UNITED STATES REPORTS

VOLUME 363

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1959

OPINIONS AND DECISIONS PER CURIAM
MAY 31 THROUGH JUNE 20, 1960
ORDERS MAY 31 THROUGH JUNE 27, 1960

WALTER WYATT
REPORTER OF DECISIONS

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1960

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington 25, D.C. - Price $4 (Buckram)

ERRATUM.

296 U. S. 528, last line: "Section 33 (a)" should read "Section 33 (g)."

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.

UNITED STATES *v.* LOUISIANA ET AL.

ON MOTION FOR JUDGMENT ON THE PLEADINGS.

No. 10, Original. Argued October 12–15, 1959.—
Decided May 31, 1960.

Invoking the original jurisdiction of this Court under Art. III, § 2 of the Constitution, the United States brought suit against the States of Louisiana, Texas, Mississippi, Alabama and Florida, seeking a declaration that it is entitled to exclusive possession of, and full dominion and power over, the lands, minerals and other natural resources underlying the waters of the Gulf of Mexico more than three geographical miles seaward from the coast of each State and extending to the edge of the Continental Shelf. It also asked that the States be enjoined from interfering with the rights of the United States in that area and that they be required to account for all sums of money derived by them therefrom since June 5, 1950. *Held:*

1. The Submerged Lands Act grants to each coastal State the ownership of submerged lands within three geographical miles from its coast; but no boundary in excess of three miles was fixed *ipso facto* for any State. Pp. 13, 20–25.

2. The Act preserved the right of each Gulf State to prove boundaries extending more than three geographical miles (but not more than three marine leagues) into the Gulf; but each State must establish the existence of such a boundary in judicial proceedings. Pp. 25–26.

3. To satisfy the requirements of the Act, a State's seaward boundary beyond three geographical miles from its coast must be one which, by virtue of congressional action, would have been

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legally effective to carry, as between the State and the Nation, submerged land rights under the doctrine of *Pollard's Lessee* v. *Hagan*, 3 How. 212, as Congress conceived that rule to have been prior to this Court's decision in *United States* v. *California*, 332 U. S. 19. The mere existence of such a boundary prior to the time the State was admitted to the Union is not alone sufficient. Pp. 24–36.

4. The fact that, in the field of foreign relations, the policy of the Executive Branch of the Government may have been to refuse to assert territorial jurisdiction more than three miles from shore would not impair the effectiveness of a State's seaward boundary fixed by Congress more than three miles from shore, so far as the purely domestic purposes of the Submerged Lands Act are concerned. Pp. 30–36.

5. Texas having claimed a maritime boundary at three marine leagues from her coast when she was an independent republic prior to admission to the Union, and this boundary having been confirmed pursuant to the Annexation Resolution of 1845, Texas is entitled under the Submerged Lands Act to a grant of three marine leagues from her coast for domestic purposes. Pp. 36–65.

6. Louisiana is entitled to submerged-land rights to a distance no greater than three geographical miles from its coastlines, wherever those lines may ultimately be shown to be. Pp. 66–79.

7. Mississippi is not entitled to rights in submerged lands lying beyond three geographical miles from its coast. Pp. 79–82.

8. Alabama is not entitled to rights in submerged lands lying beyond three geographical miles from its coast. P. 82.

9. As to the States of Louisiana, Mississippi and Alabama, a decree will be entered (1) declaring that the United States is entitled, as against these States, to all the lands, minerals and other natural resources underlying the Gulf of Mexico more than three geographical miles from the coast of each such State, that is, from the line of ordinary low-water mark and outer limit of inland waters, and extending seaward to the edge of the Continental Shelf; (2) declaring that none of these States is entitled to any interest in such lands, minerals and resources; (3) enjoining these States from interfering with the rights of the United States therein; (4) directing each such State appropriately to account to the United States for all sums of money derived therefrom subsequent to June 5, 1950; and (5) dismissing Alabama's cross bill. P. 83.

1 Syllabus.

10. As to the State of Texas, a decree will be entered (1) declaring that the State is entitled, as against the United States, to the lands, minerals and other natural resources underlying the Gulf of Mexico to a distance of three marine leagues from Texas' coast, that is, from the line of ordinary low-water mark and outer limit of inland waters; (2) declaring that the United States is entitled, as against Texas, to no interest therein; (3) declaring that the United States is entitled, as against Texas, to all such lands, minerals and resources lying beyond that area and extending to the edge of the Continental Shelf; (4) enjoining the State from interfering with the rights of the United States therein; and (5) directing Texas appropriately to account to the United States for all sums of money derived since June 5, 1950, from the area to which the United States is declared to be entitled. P. 84.

11. Jurisdiction is retained for such further proceedings as may be necessary to effectuate the rights herein adjudicated. P. 84.

12. The motions of Louisiana and Mississippi to take depositions are denied, without prejudice to their renewal in such further proceedings as may be had in connection with matters left open by this opinion. Pp. 84–85.

13. The same disposition is made of the similar averment in Alabama's answer. P. 84, n. 142.

14. Texas' motion for similar relief and for a severance is rendered moot by the decision as to it. P. 84, n. 142.

15. The alternative motion of Louisiana, contained in its answer to the original complaint, to transfer the case as to it to the United States District Court in Louisiana is denied. P. 85, n. 143.

Solicitor General Rankin and *George S. Swarth* argued the cause for the United States. With them on the brief were *Oscar H. Davis* and *John F. Davis.*

Price Daniel, Governor of Texas, *Will Wilson,* Attorney General, *James P. Hart* and *J. Chrys Dougherty* argued the cause for the State of Texas, defendant. With them on the brief were *James N. Ludlum,* First Assistant Attorney General, *Houghton Brownlee, Jr., James H. Rogers, Wallace B. Clift, Jr., Neal R. Allen, John Flowers* and *Robert T. Lewis,* Assistant Attorneys General, and *Robert J. Hearon, Jr.*

Jack P. F. Gremillion, Attorney General of Louisiana, and *Victor A. Sachse,* Special Assistant Attorney General, argued the cause for the State of Louisiana, defendant. With them on the brief were *W. Scott Wilkinson, Edward M. Carmouche, John L. Madden* and *Bailey Walsh,* Special Assistant Attorneys General, and *Hugh M. Wilkinson* and *Marc Dupuy, Jr.*

Joe T. Patterson, Attorney General of Mississippi, and *John H. Price, Jr.,* Assistant Attorney General, argued the cause and filed a brief for the State of Mississippi, defendant.

Gordon Madison, Assistant Attorney General of Alabama, argued the cause for the State of Alabama, defendant. With him on the brief were *John Patterson,* Attorney General of Alabama, *William G. O'Rear,* Assistant Attorney General, *E. K. Hanby,* Special Assistant Attorney General, *E. C. Boswell* and *Neil Metcalf.*

Senator Spessard L. Holland and *Richard W. Ervin,* Attorney General of Florida, argued the cause for the State of Florida, defendant. With them on the brief were *J. Robert McClure,* First Assistant Attorney General of Florida, and *Fred M. Burns, Robert J. Kelly* and *Irving B. Levenson,* Assistant Attorneys General.

Jack P. F. Gremillion, Attorney General of Louisiana, *Will Wilson,* Attorney General of Texas, *Joe T. Patterson,* Attorney General of Mississippi, *John Patterson,* Attorney General of Alabama, and *Richard W. Ervin,* Attorney General of Florida, were also on a joint brief for the defendant States.

MR. JUSTICE HARLAN delivered the opinion of the Court.

The United States, invoking our original jurisdiction under Art. III, § 2, of the Constitution, brought this suit against the States of Louisiana, Texas, Mississippi, Ala-

bama, and Florida, seeking a declaration that it is entitled to exclusive possession of, and full dominion and power over, the lands, minerals, and other natural resources underlying the waters of the Gulf of Mexico more than *three geographical miles* seaward from the coast of each State and extending to the edge of the Continental Shelf.[1] The complaint also asks that the States be enjoined from interfering with the rights of the United States in that area, and that they be required to account for all sums of money derived by them therefrom since June 5, 1950.[2] The case is now before us on the motions of the United States for judgment on the pleadings and for dismissal of Alabama's cross bill seeking to establish its rights to such submerged lands and resources within *three marine leagues* of its coast.

The controversy is another phase of the more than 20 years' dispute between the coastal States and the Federal Government over their respective rights to exploit the oil and other natural resources of offshore submerged lands. In 1947 this Court held that, as against California, the United States possessed paramount rights in such lands underlying the Pacific Ocean seaward of the low-water mark on the coast of California and outside of inland waters. *United States* v. *California,* 332 U. S. 19, 804. And on June 5, 1950, the Court, following the principles announced in the *California* case, made like holdings with respect to submerged lands in the Gulf of Mexico similarly lying off the coasts of Louisiana and Texas, and directed both States to account to the United States for all sums derived from natural resources in those areas after that date. *United States* v. *Louisiana,* 339 U. S. 699, 340

[1] The suit was originally instituted against Louisiana alone. Pursuant to the order of this Court the suit was thereafter broadened to include the other defendant States. 354 U. S. 515.

[2] See note 140, *infra.*

U. S. 899; *United States* v. *Texas*, 339 U. S. 707, 340 U. S. 900.[3]

On May 22, 1953, Congress, following earlier repeated unsuccessful attempts at legislation dealing with state and federal rights in submerged lands,[4] passed the Submerged Lands Act, 67 Stat. 29, 43 U. S. C. §§ 1301–1315. By that Act the United States relinquished to the coastal States all of its rights in such lands within certain geographical limits, and confirmed its own rights

[3] In 1945 the United States had proclaimed, as against other nations, its jurisdiction and control over such submerged lands to the edge of the Continental Shelf. Presidential Proclamation No. 2667, Sept. 28, 1945, 10 Fed. Reg. 12303, 59 Stat. 884. The accompanying Executive Order provided that "[n]either this Order nor the aforesaid proclamation shall be deemed to affect the determination by legislation or judicial decree of any issues between the United States and the several states, relating to the ownership or control of the subsoil and sea bed of the continental shelf within or outside of the three-mile limit." Exec. Order No. 9633, 10 Fed. Reg. 12305.

The "continental shelf," in the geological sense, is the gently sloping plain which underlies the seas adjacent to most land masses, extending seaward from shore to the point at which there is a marked increase in the gradient of the decline and where the continental slope leading to the true ocean bottom begins. In the Gulf of Mexico, the edge of the Continental Shelf, as so defined, lies as much as 200 miles from shore in some places. Christopher, The Outer Continental Shelf Lands Act: Key to a New Frontier, 6 Stan. L. Rev. 23, 24; H. R. Rep. No. 215, 83d Cong., 1st Sess. 6

[4] 1937–1938, 75th Congress:

S. 2164, S. J. Res. 208. Both would have confirmed the rights in the Federal Government. S. J. Res. 208 was passed by the Senate but not by the House.

1939, 76th Congress, 1st Session:

H. J. Res. 176, H. J. Res. 181, S. J. Res. 24, S. J. Res. 83, S. J. Res. 92. All would have confirmed the rights in the Federal Government.

1945–1946, 79th Congress:

H. J. Res. 118 and 17 similar bills, H. J. Res. 225, S. J. Res. 48. All would have quitclaimed rights to the States within their bound-

therein beyond those limits. The Act was sustained in *Alabama* v. *Texas,* 347 U. S. 272, as a constitutional exercise of Congress' power to dispose of federal property, Const. Art. IV, § 3, cl. 2. Since the Act concededly did not impair the validity of the *California, Louisiana,* and *Texas* cases, which are admittedly applicable to all coastal States, this case draws in question only the geographic extent to which the statute ceded to the States the federal rights established by those decisions.

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aries. H. J. Res. 225 was passed by both Houses but vetoed by President Truman.

1948, 80th Congress, 2d Session:

H. R. 5992 and S. 1988 (quitclaim measures); S. 2222, H. R. 5890, and S. 2165 (to confirm States' rights in lands underlying inland waters and the Federal Government's rights in lands underlying the marginal sea). H. R. 5992 was passed by the House.

1949–1950, 81st Congress:

1st Sess: H. R. 5991, H. R. 5992 ("compromise" bills); S. 155, S. 1545 (quitclaim measures); S. 923, S. 2153, H. R. 354 (to confirm States' rights in lands beneath inland waters and Federal Government's rights in lands beneath marginal seas); S. 1700 (to establish a federal reserve). 2d Sess: H. R. 8137 (quitclaim measure); S. J. Res. 195 (interim management bill).

1951–1952, 82d Congress:

S. J. Res. 20, H. J. Res. 131, H. J. Res. 274 (interim management bills); H. R. 4484, S. 940 (quitclaim measures). H. R. 4484 was passed by the House in the 1st Session; S. J. Res. 20 was passed by the Senate after amending it by substituting therefor S. 940, in the 2d Session. S. J. Res. 20 as amended prevailed in conference, but was vetoed by President Truman.

1953, 83d Congress, 1st Session:

H. R. 2948 and 40 other bills, resulting in drafting of H. R. 4198 by Committee, S. J. Res. 13 (quitclaim measures); H. R. 5134, S. 1901 (to provide for administration of submerged lands seaward of those granted to States and to the edge of Continental Shelf). S. J. Res. 13 became the Submerged Lands Act, and S. 1901 became the Outer Continental Shelf Lands Act.

The purposes of the Submerged Lands Act are described in its title as follows:

> "To confirm and establish the titles of the States to lands beneath navigable waters within State boundaries and to the natural resources within such lands and waters, to provide for the use and control of said lands and resources, and to confirm the jurisdiction and control of the United States over the natural resources of the seabed of the Continental Shelf seaward of State boundaries."

To effectuate these purposes the Act, in pertinent part—

1. relinquishes to the States the entire interest of the United States in all lands beneath navigable waters within state boundaries (§ 3, 43 U. S. C. § 1311);[5]

2. defines that area in terms of state boundaries "as they existed at the time [a] State became a member of the

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[5] Section 3 provides:

"(a) It is hereby determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are hereby, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof;

"(b) (1) The United States hereby releases and relinquishes unto said States and persons aforesaid, except as otherwise reserved herein, all right, title, and interest of the United States, if any it has, in and to all said lands, improvements, and natural resources; (2) the United States hereby releases and relinquishes all claims of the United States, if any it has, for money or damages arising out of any operations of said States or persons pursuant to State authority upon or within said lands and navigable waters . . . ."

Union, or as heretofore approved by the Congress," not extending, however, seaward from the coast of any State more than three marine leagues [6] in the Gulf of Mexico or more than three geographical miles in the Atlantic and Pacific Oceans (§ 2, 43 U. S. C. § 1301); [7]

3. confirms to each State a seaward boundary of three geographical miles, without "questioning or in any manner prejudicing the existence of any State's seaward boundary beyond three geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has

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[6] Nine marine, nautical, or geographic miles, or approximately 10½ land, statute or English miles.

[7] Section 2 provides:

"(a) The term 'lands beneath navigable waters' means—

. . . . . .

"(2) all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles . . .

. . . . . .

"(b) The term 'boundaries' includes the seaward boundaries of a State or its boundaries in the Gulf of Mexico or any of the Great Lakes as they existed at the time such State became a member of the Union, or as heretofore approved by the Congress, or as extended or confirmed pursuant to section 4 hereof but in no event shall the term 'boundaries' or the term 'lands beneath navigable waters' be interpreted as extending from the coast line more than three geographical miles into the Atlantic Ocean or the Pacific Ocean, or more than three marine leagues into the Gulf of Mexico;

"(c) The term 'coast line' means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters . . . ."

been heretofore approved by Congress" (§ 4, 43 U. S. C. § 1312); [8] and

4. for purposes of commerce, navigation, national defense, and international affairs, reserves to the United States all constitutional powers of regulation and control over the areas within which the proprietary interests of the States are recognized (§ 6 (a), 43 U. S. C. § 1314); [9] and retains in the United States all rights in submerged lands lying beyond those areas to the seaward limits of the Continental Shelf (§ 9, 43 U. S. C. § 1302).[10]

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[8] Section 4 provides:

"The seaward boundary of each original coastal State is hereby approved and confirmed as a line three geographical miles distant from its coast line . . . . Any State admitted subsequent to the formation of the Union which has not already done so may extend its seaward boundaries to a line three geographical miles distant from its coast line . . . . Any claim heretofore or hereafter asserted either by constitutional provision, statute, or otherwise, indicating the intent of a State so to extend its boundaries is hereby approved and confirmed, without prejudice to its claim, if any it has, that its boundaries extend beyond that line. Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State's seaward boundary beyond three geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress."

[9] Section 6 (a) provides:

"The United States retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of the lands and natural resources which are specifically recognized, confirmed, established, and vested in and assigned to the respective States and others by section 3 of this Act."

[10] Section 9 provides:

"Nothing in this Act shall be deemed to affect in any wise the rights of the United States to the natural resources of that portion

The United States concedes that the statute grants to each of the defendant States submerged land rights in the Gulf of Mexico to the extent of three geographical miles, but contends that none of them is entitled to anything more. The States, conceding that three leagues is the limit of the statute's grant in the Gulf, contend that each of them is entitled to that much. The wide-ranging arguments of the parties, reflecting no doubt the magnitude of the economic interests at stake,[11] can be reduced to the following basic contentions:

The Government starts with the premise that the Act grants submerged land rights to a distance of more than three miles only to the extent that a Gulf State can show, in accordance with § 2 (b) of the Act, either that it had a legally established seaward boundary in excess of three miles at the time of its admission to the Union, or that such a boundary was thereafter approved for it by Congress prior to the passage of the Submerged Lands Act. It is contended that the Act did not purport to determine, fix, or change the boundary of any State, but left it to the courts to ascertain whether a particular State had a seaward boundary meeting either of these requirements. The Government then urges, as to any State relying on its original seaward boundary, that the Act contemplates as the measure of the grant a boundary which existed subsequent to a State's admission to the

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of the subsoil and seabed of the Continental Shelf lying seaward and outside of the area of lands beneath navigable waters, as defined in section 2 hereof, all of which natural resources appertain to the United States, and the jurisdiction and control of which by the United States is hereby confirmed."

Later in the same year, Congress passed the Outer Continental Shelf Lands Act, 67 Stat. 462, 43 U. S. C. §§ 1331–1343, which provides in detail for federal exploitation of the submerged lands of the Continental Shelf beyond those granted to the States by the Submerged Lands Act.

[11] See S. Rep. No. 133, 83d Cong., 1st Sess., pt. 2 (minority views), 6.

Union, and not one which existed only prior to admission—in other words, a boundary carrying the legal consequences of the event of admission. It reasons from this that since a State's seaward boundary cannot be greater than the national maritime boundary, and since the national boundary was at all relevant times never greater than three miles, no State could have had a seaward boundary in excess of three miles, regardless of what it may have claimed prior to admission. Further, the Government undertakes to show that, irrrespective of the extent of the national maritime boundary, none of these States ever had a valid seaward boundary in excess of three miles, even prior to admission, and that no such boundary was thereafter approved by Congress for any State.

The States, on the other hand, make several alternative arguments. At one extreme, they contend that the Submerged Lands Act *ipso facto* makes a three-league grant to all the Gulf States, or at least that the Act by its terms establishes the seaward boundary of some States, notably Texas and Florida, at three leagues. Alternatively, they argue that if the extent of such state boundaries "at the time" of admission was left to judicial determination, then the controlling inquiry is what seaward boundary each State had just prior to admission. If, however, the Act contemplates a boundary as fixed by the event of admission, each State contends that Congress fixed for it a three-league Gulf boundary, and that whatever may have been the extent of the national maritime boundary at the time is an irrelevant factor. Florida further contends that when it was readmitted to the Union in 1868, Congress approved for it a three-league Gulf boundary. And finally the States argue that if the national boundary is in any way relevant, it has at all material times in fact been at three leagues in the Gulf of Mexico.

Both sides have presented in support of their respective positions a massive array of historical documents, of which

we take judicial notice, and substantially agree that all the issues tendered can properly be disposed of on the basis of the pleadings and such documents.

In this opinion we consider the issues arising in common between the Government and all the defendant States, and the particular claims of Texas, Louisiana, Mississippi, and Alabama, all of which depend upon their original admission boundaries. The particular claims of Florida, which involve primarily its readmission boundary, are considered in a separate opinion. *Post,* p. 121.

I.

The Common Issues.

A. *The Statute On Its Face.*

The States' contention that the Act *ipso facto* grants them submerged land rights of three leagues in the Gulf may be shortly answered. The terms of the statute require rejection of such a construction. Rather the measure of the grant in excess of three miles is made to depend entirely upon the location of a State's original or later Congressionally approved maritime boundary, subject only to the three-league limitation of the grant.

We turn next to the question whether, as the States contend, the first of the two alternative requirements of § 2—a boundary which "existed at the time such State became a member of the Union"—is satisfied merely by showing a preadmission boundary, or whether, as the Government claims, that requirement contemplates only a boundary that carries the legal consequences of the event of admission. While it is manifest that the second requirement of § 2—a boundary which was "heretofore approved by Congress"—must take into account the effect of Congressional action, it is not clear from the face of the statute that the same is true of the first requirement—a

boundary "as it existed at the time [a] State became a member of the Union."

The Government argues that in construing the first requirement of § 2 the effect of Congressional action cannot be ignored because to do so would be to measure the boundary prior to the time a State became a member of the Union, and "at the time" cannot mean "prior to the time." However, it might be contended with equal force that to take account of the effect of Congressional action would be to measure the boundary after the time the State became a member of the Union, and "at the time" cannot mean "after the time." Indeed, if "at the time" were to be taken in a perfectly literal sense, it could refer only to the timeless instant before which the consequences of not being a State would obtain, and after which the consequences of statehood would follow, leaving unanswered the question whether the effect of Congressional action was to be considered or not. In short, if the term is to be given content it must be read as referring either to some time before or after the instant of admission, or to both times.

As an aid to construction of "at the time" in § 2, the Government points to § 4, the last sentence of which states:

> "Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State's seaward boundary beyond three geographical miles if it was so provided by its constitution or laws *prior to or at the time* such State became a member of the Union, or if it has been heretofore approved by Congress." (Emphasis supplied.)

It is urged that the disjunctive use of the terms "prior to" and "at the time" shows that the latter must have been used to refer to the time after admission, since the phraseology would otherwise be redundant, and that such meaning should also be attributed to the same term in § 2,

thereby including the effect of Congressional action. But, as has already been indicated, "at the time" inherently can also be taken as referring to the preadmission period, thereby excluding the effect of such action. And on that basis there would be no redundancy in the phrase "prior to or at the time" if "at the time" meant immediately before the instant of admission and "prior to" referred to times substantially prior to admission; yet this would nonetheless exclude the effect of Congressional action. So far as the statute itself is concerned, the Government's argument is thus inconclusive.

Nor do the States' arguments upon the face of the statute illumine the meaning of "at the time" as used in § 2. They contend that the meaning of § 2 is explained or clarified by the last sentence of § 4. According to them, a boundary "existed at the time [a] State became a member of the Union" (§ 2) if "it was so provided by its constitution or laws prior to or at the time such State became a member of the Union . . . ." (§ 4.) Under this view, whatever the meaning of "at the time," the existence of a state constitutional or statutory three-league provision prior to admission would conclusively establish the boundary contemplated by the Act, irrespective of the character of Congressional action upon admission. However, this provision appears not in the definitional or granting sections of the statute (§§ 2 or 3), but in § 4, the purpose of which is to approve and confirm the boundaries of all States at three miles, and to negative any prejudice which might thereby result to claims in excess of three miles. It thus does not define the grant, but at most describes the claims protected from prejudice by § 4 in terms of their most likely nature. A fair reading of the section does not point to the conclusion that claims of this nature were deemed to be self-proving.

Finally, there is no indication on the face of the statute whether the Executive policy of the United States on the

extent of territorial waters is a relevant circumstance in ascertaining the location of state seaward boundaries for purposes of the Act.

Because the statute on its face is inconclusive as to these issues, we turn to the legislative history.

B. *The Legislative History.*

This Court early held that the 13 original States, by virtue of the sovereignty acquired through revolution against the Crown, owned the lands beneath navigable inland waters within their territorial boundaries, and that each subsequently admitted State acquired similar rights as an inseparable attribute of the equal sovereignty guaranteed to it upon admission. *Pollard's Lessee* v. *Hagan,* 3 How. 212.[12] It was assumed by many, and not without reason,[13] that the same rule would be applied to lands beneath navigable waters of the marginal sea, that is, beyond low-water mark and the outer limit of inland waters. However, beginning in the 1930's, the Federal Government, while conceding the validity of the *Pollard* rule as to inland waters, disputed its applicability to submerged lands beyond that limit, and claimed ownership

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[12] This holding was approved in a considerable number of subsequent cases. See, *e. g., Smith* v. *Maryland,* 18 How. 71, 74; *Mumford* v. *Wardwell,* 6 Wall. 423, 436; *Weber* v. *Harbor Commissioners,* 18 Wall. 57, 65–66; *McCready* v. *Virginia,* 94 U. S. 391, 394; *Shively* v. *Bowlby,* 152 U. S. 1, 26–28; *Manchester* v. *Massachusetts,* 139 U. S. 240, 259–260; *United States* v. *Mission Rock Co.,* 189 U. S. 391, 404; *Louisiana* v. *Mississippi,* 202 U. S. 1, 52; *The Abby Dodge,* 223 U. S. 166, 174; *Borax, Ltd.,* v. *Los Angeles,* 296 U. S. 10, 15–16. See also *Martin* v. *Waddell,* 16 Pet. 367, 410.

[13] This Court in the *California* case, *supra,* at 36, stated that in following the *Pollard* case, it had previously "used language strong enough to indicate that the Court then believed that states not only owned tidelands and soil under navigable inland waters, but also owned soils under all navigable waters within their territorial jurisdiction, whether inland or not."

of those lands for the United States.[14] The controversy centered primarily on the ownership of the oil-rich submerged lands off the coast of California. The State maintained that its original constitution, adopted in 1849 before it was admitted to the Union, established a seaward boundary three English miles from the coast,[15] that this boundary was ratified by the Act of Congress admitting it to the Union, and that therefore under the *Pollard* rule, it was entitled to all submerged lands lying within three English miles of its coast. This Court refused so to apply *Pollard,* and held in the *California* case and the subsequent *Louisiana* and *Texas* cases, *supra,* that paramount rights in the marginal sea are an attribute of national rather than state sovereignty, irrespective of the location of state seaward boundaries.

Meanwhile an extended series of attempts was underway to secure Congressional legislation vesting in the States the ownership of those lands which would be theirs under an application of the *Pollard* rule to the marginal sea.[16] It was strongly urged, both before and after the

[14] See S. Rep. No. 133, 83d Cong., 1st Sess. 21.

[15] One English, statute, or land mile equals approximately .87 marine, nautical, or geographical mile. The conventional "3-mile limit" under international law refers to three marine miles, or approximately 3.45 land miles.

[16] See note 4, *ante.* The legislative history of all the bills considered prior to enactment of the Submerged Lands Act in 1953 is directly relevant to the latter Act, since the purposes and phraseology of such bills, and the objections raised against them were substantially similar. During the hearings on the final bills, all prior hearings on predecessor bills were expressly incorporated into the record, see Hearings before Subcommittee No. 1 of the House Committee on the Judiciary, 83d Cong., 1st Sess., on H. R. 2948 and similar bills 1–2 (hereinafter cited as 1953 House hearings); Hearings before the Senate Committee on Interior and Insular Affairs on S. J. Res. 13 and other bills 6–8 (hereinafter cited as 1953 Senate Hearings), and similar references to past hearings and debates were made on the floor of Congress, see 99 Cong. Rec. 2554, 2613, 4097.

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California decision that because the States had for many years relied on the applicability of the *Pollard* rule to the marginal sea, it was just and equitable that they be definitively given the rights which follow from such an application of the rule, and the *California, Louisiana,* and *Texas* cases were severely criticized for not having so applied it.[17]

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[17] H. R. Rep. No. 1778, 80th Cong., 2d Sess., to accompany H. R. 5992, at 1, 2, 3, 16 (Apr. 21, 1948): "H. R. 5992 is, in substance, the same as numerous bills introduced in the House. . . . [T]he aforementioned bills [were] introduced in the Congress to preserve the status quo as it was thought to be prior to the California decision . . . to confirm and establish the rights and claims of the 48 States, long asserted and enjoyed with the approval of the Federal Government, to the lands and resources beneath navigable waters within their boundaries . . . . The repeated assertions by our highest Court for a period of more than a century of the doctrine of State ownership of all navigable waters, whether inland or not, and the universal belief that such was the settled law, have for all practical purposes established a principle which the committee believes should as a matter of policy be recognized and confirmed by Congress as a rule of property law."

S. Rep. No. 1592, 80th Cong., 2d Sess., to accompany S. 1988, at 17–18 (June 10, 1948), after noting that the legal profession had long believed that the States owned the lands under navigable waters within their territorial jurisdiction, went on to comment:

"The evidence is conclusive that not only did our most eminent jurists so believe the law to be, but such was the belief of lower Federal court jurists and State supreme court jurists as reflected by more than 200 opinions. The pronouncements were accepted as the settled law by lawyers and authors of leading legal treatises.

"The present Court in the California decision did not expressly overrule these prior Supreme Court opinions but, in effect, said that all the eminent authorities were in error in their belief.

"For the first time in history the Court drew a distinction between the legal principles applicable to bays, harbors, sounds, and other inland waters on the one hand, and to submerged lands lying seaward of the low-water mark on the other, although it appears the Court had ample opportunity to do so in many previous cases, but failed or refused to draw such distinction. In the California decision the

Thus virtually every "quitclaim" measure introduced between 1945 and 1953, when the Submerged Lands Act was ultimately enacted, framed the grant in terms of "lands beneath navigable waters within State boundaries." This framework was employed because the sponsors understood this Court to have established, prior to the *California* decision, a rule of state ownership itself defined in

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Court refused to apply what it termed 'the old inland water rule' to the submerged coastal lands; however, historically speaking, it seems clear that the rule of State ownership of inland waters is, in fact, an offshoot of the marginal sea rule established much earlier."

H. R. Rep. No. 695, 82d Cong., 1st Sess., to accompany H. R. 4484, at 5 (July 12, 1951):

"Title II merely fixes as the law of the land that which, throughout our history prior to the Supreme Court decision in the California case in 1947, was generally believed and accepted to be the law of the land; namely, that the respective States are the sovereign owners of the land beneath navigable waters within their boundaries and of the natural resources within such lands and waters. Therefore, title II recognizes, confirms, vests, and establishes in the States the title to the submerged lands, which they have long claimed, over which they have always exercised all the rights and attributes of ownership."

S. Rep. No. 133, 83d Cong., 1st Sess., to accompany S. J. Res. 13, at 7–8 (Mar. 27, 1953):

"All of these areas of submerged lands have been treated alike in this legislation because they have been possessed, used, and claimed by the States under the same rule of law, to wit: That the States own all lands beneath navigable waters within their respective boundaries. Prior to the California decision, no distinction had been made between lands beneath inland waters and lands beneath seaward waters so long as they were within State boundaries.

"The rule was stated by the Supreme Court in the early case of *Pollard* v. *Hagan* . . . .

. . . . . .

"The purpose of this legislation is to write the law for the future as the Supreme Court believed it to be in the past—that the States shall own and have proprietary use of all lands under navigable waters within their territorial jurisdiction, whether inland or seaward, subject only to the governmental powers delegated to the United States by the Constitution."

terms of state territorial boundaries, whether located at or below low-water mark.[18] Since, however, none of the cases which had applied that rule involved lands below low-water mark, and since the *California* and subsequent *Louisiana* and *Texas* cases adopted for such lands a rule which does not depend upon state boundaries, this Court has never had occasion to consider the precise nature and method of determining state territorial boundaries in the open sea, such as would circumscribe the extent of state ownership of offshore lands under an application of the *Pollard* rule. Because Congress, in the exercise of its constitutional power to dispose of federal property, has chosen so to frame its grant, we are now called on to resolve such questions in light of the Act's history and purposes.

1. *Confirmation of All Boundaries at Three Miles.*

From the very outset, the sponsors of "quitclaim" legislation believed that all States were entitled to at least three miles of coastal submerged lands.[19] The earliest bills confirmed to the States all lands beneath navigable waters within their boundaries, and defined "lands beneath navigable waters" to include at least all lands lying within three geographical miles of the coast of each State.[20] However, they contained no definition of

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[18] For example, the very first "quitclaim" bill introduced in Congress—H. J. Res. 118, 79th Cong., 1st Sess., provided:

"*Resolved* . . . That, in consideration of the premises, the United States of America hereby releases, remises, and quitclaims all right, title, interest, claim, or demand of the United States of America in and to all lands beneath tidewaters and all lands beneath navigable waters within the boundaries of each of the respective States . . . ."

[19] See, *e. g.*, 91 Cong. Rec. 8867 (remarks of Representative Gearhart); 92 Cong. Rec. 10310 (remarks of Representative Sumners). See also 92 Cong. Rec. 9519 (remarks of Senator Overton).

[20] H. J. Res. 118, 79th Cong., 1st Sess.; H. J. Res. 225, 79th Cong., 1st Sess.; H. R. 5992, 80th Cong., 2d Sess.; S. 1988, 80th Cong., 2d

"boundaries," and it was apparently assumed that the boundaries of all States extended at least three miles.[21] Opponents of such legislation quickly pointed out that while California based its three-mile claim on an expressly defined maritime boundary, many, if not most, of the coastal States lacked such a boundary,[22] and that therefore, such States could not avail themselves of the *Pollard* rule, the applicability of which is restricted to areas within the actual territorial boundaries of the State, even assuming the rule to be capable of application beyond low-water mark.[23] Proponents of the legislation alleged it to be

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Sess. H. J. Res. 118 and H. J. Res. 225 used the term "lands beneath tidewaters" to denote the lands beneath the navigable waters of the marginal sea.

[21] See H. R. Rep. No. 927, 79th Cong., 1st Sess., to accompany H. J. Res. 225, at 2 (July 17, 1945): "The ownership by the States of these lands as above stated is coextensive with the States' boundaries, which in the case of the coastal States is in no instance less than 3 miles from the coast line." 92 Cong. Rec. 9541 (remarks of Senator Cordon): "[T]he joint resolution is limited to those submerged lands within the boundaries of the several States, with this exception, that if there should be—and there conceivably cannot be a State whose boundary did not go 3 miles at sea—then it would cover 3 miles at sea."

[22] California Constitution of 1849, Art. XII, § 1. California claimed that this boundary was ratified by the Act admitting it to the Union. 9 Stat. 452. See 92 Cong. Rec. 9614 (remarks of Senator Knowland). Attorney General Clark testified that six of the 11 original coastal States had not yet expressly claimed a three-mile boundary in the marginal sea, and that the other five had done so unilaterally long subsequent to the formation of the Union—Massachusetts in 1859 (see Stat. 1859, c. 289, as amended, Mass. Gen. Laws Ann., c. 1, § 3), Rhode Island in 1872 (R. I. Gen. Stat. 1872, c. 1, § 1), New Jersey in 1906 (see N. J. Stat. Ann., Tit. 40, § 18–5), New Hampshire in 1901 (N. H. Laws 1901, c. 115), and Georgia in 1916 (see Acts 1916, p. 29, Ga. Code Ann. § 15–101).

[23] See 92 Cong. Rec. 9524–9526 (remarks of Senator Donnell); Joint Hearings before the Committees on the Judiciary of the Congress on S. 1988 and similar House bills, 80th Cong., 2d Sess. 885–895 (hereinafter cited as 1948 Joint Hearings).

defective in that it granted only those lands beneath navigable waters which lay within state boundaries, and that this Court in the *California* case, while not expressly passing on the question, had cast doubt on whether any of the original States ever had a boundary beyond its coast.[24] As a result, a new section was added, substantially similar to the second and third sentences of § 4 of the present Act (see note 8, *ante*), which permitted each State which had not already done so to extend its boundary seaward three miles and approved all such extensions theretofore or thereafter made, without prejudice to any State's claim that its boundary extended beyond three miles.[25]

It is not entirely clear on what theory Congress thus concluded that each State owned the submerged lands within three miles of its coast, irrespective of the existence of an expressly defined seaward boundary to that distance. It was substantially agreed that the 13 original Colonies owned the lands within three miles of their coasts because of their sovereignty and the alleged international custom which permitted a nation to extend its territorial jurisdiction that far.[26] Some proponents of the legislation seem to have concluded that therefore, not only did the

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[24] *Id.*, 93–95, 884–886.

[25] Because of fears that this permission to extend boundaries would not protect grantees of the original States who had received their grants at a time when the State had not yet expressly extended its boundaries, a provision was subsequently inserted as the first sentence of § 4 of the present Act, absolutely confirming the boundary of each original State at three miles. See 1953 Senate Hearings, pt. II (Exec. Sess.), 1316; 99 Cong. Rec. 2697. The last sentence of § 4 was first inserted without explanation in H. R. 8137, 81st Cong., 2d Sess., and was carried forward as part of S. J. Res. 20, 82d Cong., 2d Sess., as it was amended and passed by Congress and vetoed by President Truman. See 98 Cong. Rec. 2886.

[26] See 91 Cong. Rec. 8858; 92 Cong. Rec. 10310. See also *Manchester* v. *Massachusetts*, 139 U. S. 240, 257, 258.

original States retain such rights after formation of the Union, but that subsequently admitted States acquired similar rights within three miles, irrespective of the location of their boundaries, by the operation of the equal-footing clause.[27] It was also suggested that state ownership within three miles came about by operation of federal law because of the Federal Government's assumed adherence to the three-mile limit of territorial waters.[28] While some speakers maintained that these factors in effect gave each State a three-mile maritime boundary,[29] others eschewed technical reliance on the matter of boundaries and thought it sufficient that the *Pollard* rule had always been thought to confer ownership on the State of lands within three miles of the coast and that the States ought to be restored to the position they believed they had formerly occupied.[30] And there is some sugges-

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[27] See, *e. g.*, 98 Cong. Rec. 2884–2885 (remarks of Senator Holland). See also H. R. Rep. No. 927, 79th Cong., 1st Sess. 2.

[28] See 98 Cong. Rec. 3351 (remarks of Senator Holland); 1953 House Hearings 222 (remarks of Attorney General Brownell); 99 Cong. Rec. 2757, 2922–2923, 4095 (remarks of Senator Holland). Solicitor General Perlman, while rejecting the idea that the existence of a seaward boundary entitled the State to ownership of the underlying lands, stated that California was entitled to a boundary for other purposes of three nautical miles, as opposed to the three English miles asserted by its constitution, because of the federal three-mile policy. Hearings before the Senate Committee on Interior and Insular Affairs, on S. J. Res. 20 and S. 940, 82d Cong., 1st Sess. 40 (hereinafter cited as 1951 Senate Hearings).

[29] See 92 Cong. Rec. 9541 (remarks of Senator Cordon); *id.*, 9619 (remarks of Senator Capehart); 99 Cong. Rec. 3265 (remarks of Senator Hill).

[30] Leander I. Shelley, counsel for the port authorities, whose proposal that all States be permitted to extend their boundaries to three miles was adopted by the Committee, said: "My position is that prior to the decision of the Supreme Court in the California case, practically everybody concerned . . . was under the impression that all the coastal States owned the land for 3 miles out. . . .

"Whether their failure to be in that position is because of a title

tion that since many States, under the Congressional view of *Pollard,* had indisputable claims to three miles of submerged lands, the remainder ought to be treated on a parity whether or not their claims were technically justified.[31] The upshot of all of these differing views was the confirmation of each coastal State's seaward boundary at three geographical miles.

2. *Boundaries Beyond Three Miles.*

Whatever may have been the uncertainty attending the relevance of state boundaries with respect to rights in submerged lands within three miles of the coast, we find a clear understanding by Congress that the question of rights beyond three miles turned on the existence of an expressly defined state boundary beyond three miles. Congress was aware that several States claimed such a boundary. Texas throughout repeatedly asserted its claim that when an independent republic its statutes established a three-league maritime boundary, and that the United States ratified that boundary when Texas was admitted to the Union and permitted Texas to retain its own public lands.[32] Florida repeatedly asserted its claim that subsequent to its secession at the time of the Civil War, it framed a constitution which established a three-league boundary along its Gulf coast, and that such boundary was ratified when Congress in 1868 approved

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question or boundary question is immaterial to us. Our position is that they should be restored to where they thought they were." 1948 Joint Hearings 894. See also 92 Cong. Rec. 9515–9516 (remarks of Senator O'Mahoney); *id.,* 9519 (remarks of Senator Overton); 99 Cong. Rec. 4095 (remarks of Senator Holland).

[31] See 98 Cong. Rec. 3351–3352 (remarks of Senator Holland).

[32] *E. g.,* 91 Cong. Rec. 8867; 92 Cong. Rec. 9518; Hearings before the Senate Committee on Interior and Insular Affairs on S. 155, S. 923, S. 1545, S. 1700, and S. 2153, 81st Cong., 1st Sess. 131 (hereinafter cited as 1949 Senate Hearings); 1953 Senate Hearings 212–234; 99 Cong. Rec. 2620, 2830, 4171–4175.

the State's constitution and readmitted it to the Union.[33] Louisiana asserted that the Act of Congress admitting it to the Union in 1812 fixed for it a three-league maritime boundary by virtue of the provision which includes within the State "all islands within three leagues of the coast." [34] And it was suggested that Mississippi and Alabama might claim boundaries six leagues in the Gulf because of similar provisions in the Acts admitting them to the Union.[35]

It was recognized that if the legal existence of such boundaries could be established, they would clearly entitle the respective States to submerged land rights to that distance under an application of the *Pollard* rule to the marginal sea. Hence, while a three-mile boundary was expressly confirmed for all coastal States, the right of the Gulf States to prove boundaries in excess of three miles was preserved. This treatment of the matter was carried into all the numerous "quitclaim" bills by language similar to that found in § 4 of the present Act, confirming all coastal state boundaries at three miles and negating any prejudice to boundary claims in excess of that.[36] Repeated expressions of the Act's sponsors make it absolutely clear that no boundary in excess of three miles was fixed for any State, but that a State would have to establish the existence of such a boundary in judicial proceedings.[37]

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[33] *E. g.*, 92 Cong. Rec. 9516; 99 Cong. Rec. 2621, 2752, 4095–4096.

[34] See 1949 Senate Hearings 187; 98 Cong. Rec. 3352; 1953 Senate Hearings 47–48, 536, 1093, 1115; 99 Cong. Rec. 2896.

[35] Hearings before the Senate Judiciary Committee on S. J. Res. 48 and H. J. Res. 225, 79th Cong., 2d Sess. 228–230 (hereinafter cited as 1946 Senate Hearings); 1951 Senate Hearings 420.

[36] The structure of § 4 was so explained by Senators Cordon, Holland, and Long. 1953 Senate Hearings, pt. II (Exec. Sess.), 1317–1318; 99 Cong. Rec. 2621, 2698, 4095–4096.

[37] 92 Cong. Rec. 9441–9442, 9516; 1953 Senate Hearings 48–49; *id.*, pt. II (Exec. Sess.), 1318, 1414–1415; 99 Cong. Rec. 2558–2559, 2620–2622, 2632–2633, 2694–2695, 2703, 2746, 2754–2755, 2757, 2896–2897, 2933, 4095–4096, 4116.

The many individual expressions of views as to the location of particular state boundaries—notably statements that the effect of the Act would be to give Texas and Florida three leagues of submerged land rights [38]—while undoubtedly representing the sincere beliefs of the speakers, cannot serve to relieve this Court from making an independent judicial inquiry and adjudication on the subject, as contemplated by Congress.

The earlier "quitclaim" bills defined the grant in terms of presently existing boundaries,[39] since such boundaries would have circumscribed the lands owned by the States under an application of *Pollard* to the marginal sea. However, the sponsors of these measures soon recognized that present boundaries could be ascertained only by reference to historic events. The claims advanced by the Gulf States during consideration of earlier bills were identical to those subsequently asserted.[40] The theory of those claims, as we have noted, depended either, as in the cases of Texas and Florida, upon a constitutional or statutory provision allegedly ratified by Congressional acquiescence, or, as in the cases of Louisiana, Mississippi, and Alabama, upon express Congressional action. Indeed, it could hardly have been contended that Congressional action surrounding the event of admission was not relevant to the

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[38] 98 Cong. Rec. 3347, 3350 (Senators Connally and Holland); 1953 House Hearings 181, 195 (Secretary of the Interior McKay); 1953 Senate Hearings 957 (Attorney General Brownell); letter from President Eisenhower to Jack Porter, Republican National Committeeman, Dec. 4, 1957, reported in Houston Post, Dec. 7, 1957, § 1, pp. 1–2; letter from President Eisenhower to Senator Anderson, Apr. 24, 1953, reprinted in 99 Cong. Rec. 3865; letter from President Eisenhower to Price Daniel, Governor of Texas, Nov. 7, 1957, printed at p. 294 of Texas' brief.

[39] H. J. Res. 118, 79th Cong., 1st Sess.; H. J. Res. 225, S. J. Res. 48, 79th Cong., 2d Sess.; S. 1988 and H. R. 5992, 80th Cong., 2d Sess.

[40] See, *e. g.*, 1946 Senate Hearings 183; 91 Cong. Rec. 8867; 92 Cong. Rec. 9515–9518.

determination of present boundaries. Some suggestions were made, however, that States might by their own action have effectively extended, or be able to extend, their boundaries subsequent to admission.[41] To exclude the possibility that States might be able to establish present boundaries based on extravagant unilateral extensions, such as those recently made by Texas and Louisiana,[42] subsequent drafts of the bill introduced the twofold test of the present Act—boundaries which existed at the time of admission and boundaries heretofore approved by Congress.[43] It is apparent that the purpose of the change was not to alter the basic theory of the grant, but to assure that the determination of boundaries would be made in

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[41] *E. g.*, 92 Cong. Rec. 9518, 9628 (remarks of Senator Connally); *id.*, 9524 (remarks of Senator Donnell).

[42] La. Act No. 55 of 1938, La. Rev. Stat. 49:1 (27 miles); Act of May 16, 1941, L. Tex., 47th Leg., p. 454 (27 miles), Act of May 23, 1947, L. Tex., 50th Leg., p. 451 (outer edge of Continental Shelf), Vernon's Tex. Civ. Stat., Art. 5415a. See also Act of May 25, 1947, L. Tex., 50th Leg., p. 490, Vernon's Tex. Civ. Stat., Art. 1592a (boundaries of counties extended to edge of Continental Shelf).

[43] An amendment was first proposed for that purpose by Senator Capehart on the floor during consideration of H. J. Res. 225, 79th Cong., 2d Sess., 92 Cong. Rec. 9541, 9619. It did not contain the "heretofore approved by Congress" provision (see note 7, *ante*), and was defeated, apparently on the ground that the boundaries of some States might have been lawfully altered since their admission. See 92 Cong. Rec. 9630 (remarks of Senator McCarran); *id.*, 9632 (amendment defeated). During the Eightieth Congress, Second Session, H. R. 5992 and S. 1988 were originally introduced with present boundaries still the measure of the grant. During the hearings on the bills, the matter of unilateral extensions was called to the Committee's attention several times. 1948 Joint Hearings 653–654 (Attorney General Clark), *id.*, 734 (Secretary of the Interior Krug), and an amendment specifically incorporating the twofold test of the present Act was proposed to the Committee by Leander I. Shelley, counsel for the port authorities, *id.*, 886. Both H. R. 5992 and S. 1988, when reported out of Committee, incorporated the proposed change. See 94 Cong. Rec. 5154, S. Rep. No. 1592, 80th Cong., 2d Sess. 2.

accordance with that theory—that the States should be "restored" to the ownership of submerged lands within their present boundaries, determined, however, by the historic action taken with respect to them jointly by Congress and the State.[44] It was such action that the framers of this legislation conceived to fix the States' boundaries

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[44] Representative Willis of Louisiana made clear the nature of the inquiry it was contemplated the courts would make to ascertain the location of "historic boundaries":

"Mr. WILLIS. Do you know of a better criteria than a historic approach?

"Secretary MCKAY. No, sir.

"Mr. WILLIS. Let us apply that criteria to Texas, for instance, and I think you and I are in thorough agreement. Texas was a republic. The Republic of Texas took certain action. Then there was a treaty between the Republic of Texas and the United States preliminary to admission. There might have been maps exhibited or maps in existence at that time. Then Congress passed an act admitting Texas into the Union, and then Texas adopted a constitution delimiting its historic boundaries. Those are the historic documents that set forth Texas' title; is that correct?

"Secretary MCKAY. That is right. If my memory is correct, the United States would not take the land. They gave it back to Texas.

"Mr. WILLIS. That is right. There is nothing unusual about that. Let me illustrate the point in this way. I know you are not a lawyer, but I think you can follow this. If a farmer should consult a lawyer to find out what the limits of his farm are, that lawyer would have to examine the papers. He would have to go first to the patent. He would have to consult all the deeds in the chain of title. There might be maps attached to those deeds which help to interpret them. After his study he would give an opinion on the limits, based upon the history of that title, and every link in the chain.

. . . . . .

". . . There has been some talk here this morning about 3 miles. The principle, though, that I think you and I agree on is that we have to go to the documents to find out what our historic boundaries are?

"Secretary MCKAY. Yes, sir." 1953 House Hearings 197–198.

And on the floor of the House, he explained "historic boundaries" as follows:

"You will hear a great deal during general debate today, first about

against subsequent change without their consent and therefore to confer upon them the long-standing equities which the measure was intended to recognize.[45]

Somewhat later, the last sentence of the present Act's § 4 was added, for the specific purpose of assuring that the boundary claims of Texas and Florida would be preserved.[46] The first part of the sentence (see note 8, *ante*), intended to refer to Texas alone, protects the State's claim to a three-league boundary as "provided by its constitution or laws prior to or at the time such State became a member of the Union." That claim, however, was asserted to rest not only on its statute but also on the

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the historic boundaries and second about the outer continental shelf of the States. Let me explain what these terms mean.

"Each State was admitted into the Union by an act of Congress, and each State adopted a constitution which was approved by the Congress. The act of Congress and the first Constitution defined the boundaries of each State in the first instance. In some cases treaties were involved. Thus the Louisiana Territory was retroceded or reconveyed by Spain to France in 1803, and then France, in turn, transferred the Louisiana Territory to the United States. Thereafter, Louisiana was admitted into the Union as a State under an act of Congress of 1812, and the first Constitution of Louisiana, of 1812, was approved by the Congress. Both Spain and France exerted influence over and claimed, owned, and controlled a marginal belt as part of the Louisiana Territory, as shown by maps then used and still in existence.

"Obviously, we must resort to all of such ancient documents in order to determine the true and actual historic boundaries of each State, and as a practical matter, that is exactly what this bill permits and accomplishes. I do not know of any better criteria for the establishment of the boundaries of the States than a historic approach." 99 Cong. Rec. 2504.

[45] See 99 Cong. Rec. 4174–4175 (remarks of Senator Daniel); *New Mexico* v. *Texas*, 275 U. S. 279, 276 U. S. 557, 558; *New Mexico* v. *Colorado*, 267 U. S. 30.

[46] 1953 Senate Hearings, pt. II (Exec. Sess.), 1317–1319; 99 Cong. Rec. 3551–3552, 4095.

action of Congress in admitting it to the Union.[47] If any doubt could remain that the event of admission is a vital circumstance in ascertaining the location of boundaries which existed "at the time" of admission within the meaning of the Submerged Lands Act, it is conclusively dispelled by repeated statements of its proponents to that effect.[48]

We conclude, therefore, that the States' contention that preadmission boundaries, standing alone, suffice to meet the requirements of the statute is not tenable.

3. *The Question of Executive Policy Respecting the "Three-Mile Limit."*

During consideration of the various "quitclaim" bills between 1945 and 1953, the suggestion that international questions might be raised by the bill constantly recurred. It was asserted that the United States might be embarrassed in its dealings with other nations, first, by permitting States to exercise rights in submerged lands beyond three miles,[49] and, second, by recognizing that the boundaries of some States might extend beyond three miles from the coast.[50] The first objection was laid to rest by the

[47] It is worth observing that at one time the claims protected from prejudice by § 4 included not only those based on state constitutional or statutory provisions, but also those based on "any treaty ratified by the Senate of the United States" or on "an act of Congress." 99 Cong. Rec. 2567. This provision was inserted specifically to preserve Texas' claim based on the Joint Resolution of Annexation (see p. 37, *post*), which was loosely referred to as a "treaty" between Texas and the United States. *Id.*, 2568. See also 1953 House Hearings 301–302.

[48] 1949 Senate Hearings 138–139; 1953 Senate Hearings 957, 1076–1078; 99 Cong. Rec. 2504, 2558–2559, 2746, 2754, 2755, 2933, 4095, 4096, 4116, 4171, 4175, 4477.

[49] *E. g.*, 99 Cong. Rec. 2916 (remarks of Senator Douglas).

[50] 1948 Joint Hearings 618 (Attorney General Clark); Hearings before Subcommittee No. 1 of the House Judiciary Committee on H. R. 5991 and H. R. 5992, 81st Cong., 1st Sess. 196 (Solicitor General Perlman); 1951 Senate Hearings 40, 393 (Solicitor General

testimony of Jack B. Tate, Deputy Legal Adviser to the State Department. Mr. Tate stated that exploitation of submerged lands involved a jurisdiction of a very special and limited character, and he assured the Committee that assertion of such a jurisdiction beyond three miles would not conflict with international law or the traditional United States position on the extent of territorial waters. He concluded that since the United States had already asserted exclusive rights in the Continental Shelf as against the world, the question to what extent those rights were to be exercised by the Federal Government and to what extent by the States was one of wholly domestic concern within the power of Congress to resolve.[51]

The second objection, however—that to recognize by the Act the possible existence of some state maritime boundaries beyond three miles would embarrass this country in its dealings with other nations—was persistently pressed by the State Department and by opponents of the bill. The bill's supporters consistently took the position that under the *Pollard* rule as they understood it, the extent of a State's submerged land rights in excess of three miles depended entirely upon the location of its maritime boundary as fixed by historical events,[52] and that to the extent a State's boundary had been so fixed beyond three miles, it constituted an exception to this country's assumed adherence to the three-mile limit. The admission of Texas and the readmission of Florida

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Perlman); 97 Cong. Rec. 9167 (letter from Solicitor General Perlman introduced by Representative Celler); 98 Cong. Rec. 5247 (Representatives Mansfield and Feighan); 1953 Senate Hearings 27 (Assistant Secretary of State Morton); *id.*, 663 (Senator Anderson); *id.*, 678–679, 680–684 (former Solicitor General Perlman); *id.*, 1053–1086 (State Department Deputy Legal Adviser Tate); 99 Cong. Rec. 2502–2503 (Representative Hays); *id.*, 2568 (Representative Yates); *id.*, 3034 (Senator Anderson).

[51] 1953 Senate Hearings 1051–1086.

[52] 1953 Senate Hearings 326; *id.*, pt. II (Exec. Sess.), 1415.

were repeatedly asserted as instances where Congress had made exceptions to the three-mile policy, purportedly based on the shallowness of waters in the Gulf and the alleged Spanish custom of claiming three leagues of territorial waters.[53]

The State Department, confronted with this argument, tenaciously maintained that it had never recognized any boundaries in excess of three miles.[54] It insisted that by virtue of federal supremacy in the field of foreign relations, the territorial claims of the States could not exceed those of the Nation, and that, therefore, if the bill recognized the effectiveness of the relied-on historical events to fix boundaries beyond three miles despite the State Department's refusal so to recognize them, the bill would violate this country's consistent foreign policy. The Government now urges in this case a closely similar contention. It says that the Submerged Lands Act did not establish any formula for the ascertainment of state boundaries but left them to be judicially determined, and that because of federal supremacy in the field of foreign relations, this Court must hold that the Executive policy of claiming no more than three miles of territorial waters—allegedly in force at all relevant times, and evidenced by the State Department's consistent refusal to recognize boundaries in excess of three miles—worked a

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[53] Hearings before the House Judiciary Committee and a Special Subcommittee of the Senate Judiciary Committee on H. J. Res. 118 and other bills, 79th Cong., 1st Sess. 23; 91 Cong. Rec. 8867; 1949 Senate Hearings 137–138; 1953 Senate Hearings 670, 1076–1078, 1082–1084; 99 Cong. Rec. 4074–4075, 4172–4173. Even Senator Anderson, who was opposed to the bill, in proposing that the grant should in any event be limited to three leagues in the Gulf of Mexico, conceived that distance to be justified as an exception to this country's three-mile policy, based on the fact that the Gulf is very largely enclosed by land. 1953 Senate Hearings, pt. II (Exec. Sess.), 1349.

[54] 1953 Senate Hearings 319–323, 1056–1057, 1060–1063, 1076–1078, 1080–1082. See also 99 Cong. Rec. 2513, 2569, 3041–3042.

decisive limitation upon the extent of all state maritime boundaries for purposes of this Act.[55]

We agree that the Submerged Lands Act does not contain any formula to be followed in the judicial ascertainment of state boundaries, and that therefore, we must determine, as an independent matter, whether boundaries, for purposes of the Act, are to be taken as fixed by historical events such as those pointed to in the Congressional hearings and debates, or whether they must be regarded as limited by Executive policy on the extent of territorial waters, as contended by the Government. However, in light of the purely domestic purposes of the Act, we see no irreconcilable conflict between the Executive policy relied on by the Government and the historical events claimed to have fixed seaward boundaries for some States in excess of three miles. We think that the Government's contentions on this score rest on an oversimplification of the problem.

A land boundary between two States is an easily understood concept. It marks the place where the full sovereignty of one State ends and that of the other begins. The concept of a boundary in the sea, however, is a more elusive one. The high seas, as distinguished from inland waters, are generally conceded by modern nations to be

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[55] Similar suggestions seem to have been made in the course of consideration of the various "quitclaim" bills, though never fully developed. See 92 Cong. Rec. 9518 (remarks of Senator Connally); 1953 Senate Hearings 316–317 (statement of John J. Real); 99 Cong. Rec. 3037 (remarks of Senators Gore and Anderson); *id.*, 3265 (remarks of Senators Morse and Hill); *id.*, 3270 (remarks of Senator Hill). See also 1953 Senate Hearings 1078 (remarks of Senator Daniel). In this Court the Government has undertaken to support its position respecting this Nation's adherence to the three-mile limit by a letter from the Secretary of State summarizing historical Executive policy in that regard. In our view of the issues in this case we do not reach the Government's contention that the Secretary's letter would be conclusive upon us as to the existence of that policy.

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subject to the exclusive sovereignty of no single nation.[56] It is recognized, however, that a nation may extend its national authority into the adjacent sea to a limited distance for various purposes. For hundreds of years, nations have asserted the right to fish, to control smuggling, and to enforce sanitary measures within varying distances from their seacoasts.[57] Early in this country's history, the modern notion had begun to develop that a country is entitled to full territorial jurisdiction over a belt of waters adjoining its coast.[58] However, even this jurisdiction is limited by the right of foreign vessels to innocent passage.[59] The extent to which a nation can extend its power into the sea for any purpose is subject to the consent of other nations, and assertions of jurisdiction to different distances may be recognized for different purposes.[60] In a manner of speaking, a nation which purports to exercise any rights to a given distance in the sea may be said to have a maritime boundary at that distance. But such a boundary, even if it delimits territorial waters, confers rights more limited than a land boundary. It is only in a very special sense, therefore, that the foreign policy of this country respecting the limit of territorial waters results in the establishment of a "national boundary."

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[56] See Mouton, The Continental Shelf 183–192 (1952 ed.).

[57] See 1951 Senate Hearings 511.

[58] See *United States* v. *California*, *supra*, at 33.

[59] See 1953 Senate Hearings 1074–1075.

[60] For example, the United States has long claimed the right to exercise jurisdiction over domestic and foreign vessels beyond the three-mile limit for purposes of customs control, 1 Stat. 145, 164, 648, 668; Anti-Smuggling Act of Aug. 5, 1935, 49 Stat. 517, 19 U. S. C. §§ 1701–1711, and for defense purposes, 62 Stat. 799, 18 U. S. C. § 2152, and this practice is recognized by international law. See 1953 Senate Hearings 1087–1088; American Law Institute, Restatement of the Foreign Relations Law of the United States (Tentative Draft No. 2, May 8, 1958), §§ 8 (c), 21.

The power to admit new States resides in Congress. The President, on the other hand, is the constitutional representative of the United States in its dealings with foreign nations. From the former springs the power to establish state boundaries; from the latter comes the power to determine how far this country will claim territorial rights in the marginal sea as against other nations. Any such determination is, of course, binding on the States. The exercise of Congress' power to admit new States, while it may have international consequences, also entails consequences as between Nation and State. We need not decide whether action by Congress fixing a State's territorial boundary more than three miles beyond its coast constitutes an overriding determination that the State, and therefore this country, are to claim that much territory against foreign nations. It is sufficient for present purposes to note that there is no question of Congress' power to fix state land and water boundaries as a domestic matter. Such a boundary, fully effective as between Nation and State, undoubtedly circumscribes the extent of navigable *inland* waters and underlying lands owned by the State under the *Pollard* rule. Were that rule applicable also to the marginal sea—the premise on which Congress proceeded in enacting the Submerged Lands Act—it is clear that such a boundary would be similarly effective to circumscribe the extent of submerged lands *beyond* low-water mark, and within the limits of the Continental Shelf, owned by the State. For, as the Government readily concedes, the right to exercise jurisdiction and control over the seabed and subsoil of the Continental Shelf is not internationally restricted by the limit of territorial waters.

We conclude that, consonant with the purpose of Congress to grant to the States, subject to the three-league limitation, the lands they would have owned had the *Pollard* rule been held applicable to the marginal sea, a

state territorial boundary beyond three miles is established for purposes of the Submerged Lands Act by Congressional action so fixing it, irrespective of the limit of territorial waters. We turn now to the task of ascertaining what boundary was so fixed for each of the defendant States.

II.

The Particular Claims of Texas.

Texas, the only one of the defendant States which had the status of an independent nation immediately prior to its admission, contends that it had a three-league maritime boundary which "existed at the time [it] became a member of the Union" in 1845. Whether that is so for the purposes of the Submerged Lands Act depends upon a proper construction of the Congressional action admitting the State to the Union.

Texas declared its independence from Mexico on March 2, 1836, 1 Laws, Republic of Texas, 3–7, and on December 19, 1836, the Texan Congress passed an Act to define its boundaries, which were described in part as

> "beginning at the mouth of the Sabine river, and running west along the Gulf of Mexico *three leagues from land,* to the mouth of the Rio Grande, thence up the principal stream of said river . . . ." *Id.,* 133. (Emphasis added.) See diagram at p. 65, *post.*[61]

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[61] The boundaries of Texas were described in full by the Act as follows:

"That from and after the passage of this act, the civil and political jurisdiction of this republic be, and is hereby declared to extend to the following boundaries, to wit: beginning at the mouth of the Sabine river, and running west along the Gulf of Mexico three leagues from land, to the mouth of the Rio Grande, thence up the principal stream of said river to its source, thence due north to the forty-second degree of north latitude, thence along the boundary line as defined in

In March 1837 this country recognized the Republic of Texas.[62] On April 25, 1838, the United States entered into a convention with the Republic to establish a boundary between the two countries and to provide for a survey of part of it.[63] On April 12, 1844, President Tyler concluded a Treaty of Annexation with the Republic, but on June 8, 1844, the Senate refused to ratify it.[64] On March 1, 1845, President Tyler signed a Joint Resolution of Congress for the annexation of Texas, which provided:

> "That Congress doth consent that the territory *properly included within, and rightfully belonging to* the Republic of Texas, may be erected into a new State, to be called the State of Texas . . . . Said State to be formed, *subject to the adjustment by this government of all questions of boundary that may arise with other governments* . . . ." [65] (Emphasis added.)

Pursuant to this Resolution, the people of Texas adopted a constitution, which was submitted to Congress, and by Joint Resolution of December 29, 1845, Texas was admitted to the Union in accordance with the terms of the previous Joint Resolution.[66] The 1836 Texas Boundary Act remained in force up to the time of admission,

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the treaty between the United States and Spain, to the beginning: and that the president be, and is hereby authorized and required to open a negotiation with the government of the United States of America, so soon as in his opinion the public interest requires it, to ascertain and define the boundary line as agreed upon in said treaty."

[62] On March 1, the Senate resolved that recognition of Texas would be expedient and proper, Cong. Globe, 24th Cong., 2d Sess. 83, 270. A Chargé d'Affaires to be sent there was appointed by the President on March 3, 4 S. Exec. J. 631, and confirmed by the Senate on March 7, 5 *id.*, 17.

[63] 8 Stat. 511.

[64] S. Doc. No. 341, 28th Cong., 1st Sess. 10; Cong. Globe, 28th Cong., 1st Sess. 652.

[65] 5 Stat. 797.

[66] 9 Stat. 108.

and the State Constitution expressly continued in force from that time forward all laws of the Republic not repugnant to the Federal or State Constitution or the Joint Resolution of Annexation.[67]

The Government, while conceding that Texas continuously asserted by statute a three-league seaward boundary, contends that at no time before, during, or after admission did the United States or any other country recognize the validity of that boundary. It follows, therefore, the Government says, that since Texas upon entering the Union became subject to the foreign policy of the United States with respect to the "three-mile limit," the State's seaward boundary became immediately and automatically fixed at three miles. Texas, on the other hand, argues that it effectively established, and that the United States repeatedly recognized, the State's three-league boundary before, during, and after admission, and that therefore such a boundary existed "at the time" of its admission within the meaning of the Submerged Lands Act. For reasons already discussed, *ante,* pp. 24–36, we consider that the only relevant inquiry is what boundary was fixed for the State of Texas by virtue of the Congressional action admitting it to the Union in accordance with the terms of the Joint Resolution of March 1, 1845. This inquiry first takes us back to some earlier history.

By the Treaty of Paris, signed April 30, 1803,[68] France ceded to the United States the Louisiana Territory. The extent of the territory thus conveyed was left uncertain, the description in the Treaty referring only to a previous treaty by which France had acquired the territory from Spain, which in turn described the area only as "the colony or province of Louisiana." [69] It was asserted by

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[67] Texas Const., 1845, Art. Thirteenth, § 2, 2 Gammel, Laws of Texas, at 1299.

[68] 8 Stat. 200.

[69] 13 Cong. Deb., 24th Cong., 2d Sess., Pt. II, at 229.

some that the territory acquired did not stop at the Sabine River—the present boundary between the States of Louisiana and Texas—but extended westward to the Rio Grande so as to include Texas.[70] However, by the Treaty of February 22, 1819, between the United States and Spain, the boundary line between the two countries was established at the Sabine.[71] Those who had believed that the Louisiana Territory extended west of the Sabine decried this Treaty as a breach of faith by the United States in violation of the covenant in the 1803 Treaty which required the inhabitants of all the Louisiana Territory to be incorporated as soon as possible into the Union.[72] Subsequently, the United States attempted unsuccessfully on several occasions to acquire the territory west of the Sabine by purchase.[73]

Meanwhile, Mexico had revolted from Spain, had been recognized by this country in 1822, and had proclaimed a federal constitution in 1824. Texas was made part of the compound province of Coahuila-Texas, with the indication that it would eventually be given a separate constitution as a sovereign state. After a series of difficulties with the central government, however, Texas in

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[70] See, *e. g.*, Cong. Globe, 28th Cong., 1st Sess., App. 540; *id.*, at 697. The Rio Grande was also sometimes called the Rio Bravo, Rio Bravo del Norte, or Rio Del Norte. We shall refer to it throughout as the Rio Grande.

[71] 8 Stat. 252.

[72] See Cong. Globe, 28th Cong., 1st Sess., App. 486, 697.

[73] In 1825 and 1827, President Adams and his Secretary of State, Henry Clay, made overtures to Mexico for the acquisition of Texas. See Justin H. Smith, The Annexation of Texas, 8; Cong. Globe, 28th Cong., 1st Sess., App. 698, 768. Again in 1829 and 1835, President Jackson made similar overtures. Smith, *op. cit., supra,* at 9; Cong. Globe, 28th Cong., 1st Sess., App. 698. It seems that the Rio Grande was not always sought as the boundary, but that on at least one occasion, Jackson was willing to stop at the center of the desert between the Nueces and the Rio Grande.

1836 proclaimed its own independence from Mexico. It immediately sent diplomatic representatives to the United States to negotiate for annexation, but nothing was consummated at that time.[74] Shortly thereafter, it promulgated the 1836 boundary statute referred to above.

It was against this background that President Tyler negotiated and sent to the Senate the 1844 Treaty for the annexation of Texas. That document provided:

> "The Republic of Texas . . . cedes to the United States all its territories, to be held by them in full property and sovereignty . . . ." [75]

One of the objections made to the Treaty on the floor of the Senate was that it purported to cede to the United States all the territory claimed by Texas under her 1836 Boundary Act, to large parts of which Texas allegedly had no title, those parts assertedly having always been under the domination and control of Spain and Mexico.[76] This objection was countered by several proponents of the Treaty who insisted that since it contained no delineation of boundaries and since the Republic of Texas was referred to by a general designation, the clause "all its

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[74] See 4 Miller, Treaties and Other International Acts of the United States of America (1934), 139; Justin H. Smith, The Annexation of Texas 1, 7, 20; Cong. Globe, 28th Cong., 1st Sess., App. 697; 1 Garrison, Diplomatic Correspondence of the Republic of Texas, 127, 132–133, H. R. Doc. No. 1282, 60th Cong., 2d Sess. 127, 132–133; letter from Messrs. Van Zandt and Henderson to Secretary of State Calhoun, Apr. 15, 1844, S. Doc. No. 341, 28th Cong., 1st Sess. 13.

[75] S. Doc. No. 341, 28th Cong., 1st Sess. 10.

[76] Speech of Senator Benton of Missouri, Cong. Globe, 28th Cong., 1st Sess., App. 474; Speech of Senator Jarnagin of Tennessee, *id.*, at 685. The contested portions of Texas' claim were the area between the Nueces and Rio Grande Rivers on the southwest, and the area bounded by the upper portion of the Rio Grande in the northwest, which is now part of New Mexico. See diagram at p. 65, *post*.

territories" ceded only that which properly and rightfully belonged to Texas, its Boundary Act notwithstanding.[77]

The proponents pointed also to a letter of instructions written by Secretary of State Calhoun to the United States Chargé d' Affaires in Mexico a week after the Treaty was signed, which enjoined the latter, in making the Treaty known to Mexico, "to assure the Mexican Government that it is his [the President's] desire to settle all questions between the two countries which may grow out of this treaty, or any other cause, on the most liberal and satisfactory terms, including that of boundary . . . . [The United States] has taken every precaution to make the terms of the treaty as little objectionable to Mexico as possible; and, among others, has left the boundary of Texas without specification, so that what the line of boundary should be might be an open question, to be fairly and fully discussed and settled according to the rights of each, and the mutual interest and security of the two countries." [78]

Despite these controversial aspects of the Treaty, it is quite apparent that its supporters desired to press Texas' boundary claims to the utmost degree possible. President Tyler, in response to the Senate's request, transmitted to it a map showing the western and southwestern boundaries of Texas, and according generally with the Texas Boundary Act.[79] Senator Walker of Mississippi, while insisting that the Treaty ceded "only . . . the country embraced within its [Texas'] lawful boundaries,"

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[77] Speech of Senator Walker of Mississippi, Cong. Globe, 28th Cong., 1st Sess., App. 548; speech of Senator McDuffie of South Carolina, *id.*, at 529; speech of Senator Breese of Illinois, *id.*, at 540; speech of Senator Buchanan of Pennsylvania, *id.*, at 726; speech of Senator Woodbury of New Hampshire, *id.*, at 768.

[78] S. Doc. No. 341, 28th Cong., 1st Sess. 53, 54.

[79] *Id.*, at 55–57.

asserted that in fact her lawful boundary extended to the Rio Grande, that it had extended that far when she was ceded away by the United States in 1819, that the United States had acquiesced in those boundaries when it recognized Texas in 1837, and that Mexico had never protested the Convention of 1838 which allegedly validated that boundary.[80] Senator Breese of Illinois, while assuring the Treaty's opponents that the boundary was left open to future determination, avowed that the United States had acknowledged the Texas boundaries as asserted in her 1836 statute, and that he was in favor of the recovery not only of the old province of Texas as it existed in 1803 and 1819, but also "for as much more as the 'republic' of Texas can lawfully claim." [81] Senators Woodbury of New Hampshire and Buchanan of Pennsylvania, while expressing doubt about the validity of the Texas Boundary Act to the extent that it claimed portions of New Mexico, thought it was valid so far as it pressed beyond the Nueces to the Rio Grande and ought to be maintained.[82]

After the failure of the Treaty, which would have annexed Texas as a territory of the United States, several proposals were introduced in the next session of Congress for the annexation of Texas by a Joint Resolution admitting it immediately as a State.[83] The doubts which

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[80] Cong. Globe, 28th Cong., 1st Sess., App. 548.

[81] *Id.*, at 540.

[82] *Id.*, at 768, 726.

[83] Opponents of the proposals objected that since the consent of a foreign nation was required, the object could be accomplished only by an exercise of the treaty-making power, which would bring Texas in as a territory. See, *e. g.*, Cong. Globe, 28th Cong., 2d Sess., App. 367. Supporters of the Resolutions insisted that the express constitutional power of Congress to admit new States on prescribed terms extended to the admission of foreign states as well as of territory already belonging to the United States. See, *e. g.*, *id.*, at 406–407. The measure as finally passed represented a compromise, the Senate having added a § 3, which authorized an alternative proce-

had been raised in 1844 as to the validity of certain Texan pretensions to territory on her western and southwestern frontiers were reiterated during consideration of the various Resolutions, and reference was made to the fact that the rejected Treaty had been assailed as purporting to embrace such territory.[84] In 1844, supporters of the Treaty had considered the general designation "all its territories" as ceding only territory which rightfully, properly, or lawfully belonged to Texas, and as leaving to the Executive the duty of settling the extent of that territory by amicable negotiation.[85] The two clauses of the 1845

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dure to be pursued by the President, at his election, under the treaty-making power. See Cong. Globe, 28th Cong., 2d Sess. 359, 360, 362–363. President Polk elected not to use that power.

[84] See, *e. g.*, speech of Senator Ashley of Arkansas, Cong. Globe, 28th Cong., 2d Sess., App. 288:

"[T]he present boundaries of Texas I learn from Judge Ellis, the president of the convention that formed the constitution of Texas, and also a member of the first legislature under that constitution, were fixed as they now are, solely and professedly *with a view of having a large margin in the negotiation with Mexico,* and not with the expectation of retaining them as they now exist in their statute book." (Emphasis in original.)

See also speech of Representative Brinkerhoff of Ohio, Cong. Globe, 28th Cong., 2d Sess. 346–347. Significantly, the House of Representatives on Jan. 16, 1845, passed a Resolution calling on the President to communicate any information he might possess on the territory within which the authority and jurisdiction of the Republic of Texas was recognized by its inhabitants. *Id.*, at 147.

[85] Speech of Senator McDuffie of South Carolina, Cong. Globe, 28th Cong., 1st Sess., App. 530: "[T]he treaty neither does convey, nor is intended to convey, one solitary square foot of land which does not *rightfully* belong to Texas." (Emphasis added.) Speech of Senator Walker of Mississippi, *id.*, at 548: "[W]hen [a nation] is ceded by name, that cession extends only to the country embraced within its *lawful* boundaries. If, then, the Del Norte . . . be the *proper* boundary, then it is and ought to be included." (Emphasis added.) See also Speech of Senator Buchanan of Pennsylvania, *id.*, at 726; speech of Senator Breese of Illinois, *id.*, at 540.

Annexation Resolution (*ante,* p. 37) appear, against this background, to be an express formulation of precisely the same thing. The first makes it clear that the grant is of initially undefined scope, governed by the truism that only "the territory properly included within, and rightfully belonging to the Republic of Texas" is ceded. The second expressly contemplates future negotiation to settle the exact extent of such territory, by making it "subject to the adjustment by this government of all questions of boundary that may arise with other governments." In short, it is clear that the "properly" and "rightfully" clause was intended neither as a legislative determination that the entire area claimed by Texas was legitimately hers, nor to serve, independently of the "adjustment" clause, as a self-operating standard for measuring Texas' boundaries. Rather, the precise fixation of the new State's boundaries was left to future negotiations with Mexico.

The circumstances surrounding the Resolution's passage make it clear that this was the understanding of Congress. Congressional attention was focused primarily on the great political questions attending annexation—primarily the extent to which slavery would be permitted in the new territory and the possibility that annexation would embroil this country with Mexico—and the matter of boundary received little consideration except as it was related to the larger issues. Public agitation over annexation had become so great that some bills had proposed annexation virtually in the abstract, with all details to be worked out later.[86] Although the Resolution as ulti-

[86] Representative Rhett of South Carolina proposed that "the sense of the . . . [House] be taken on the first number in the series of resolutions, which simply declared that Texas should be annexed to the United States." He did not "feel very scrupulous as to the particular means, provided Texas was got; and have it they would." Cong. Globe, 28th Cong., 2d Sess., App. 55. See also remarks of

mately passed did settle the details of certain matters—notably slavery, the Texan debt, and the mode of annexation—the manifest purport of it and all the many other annexation bills introduced was to postpone the fixing of boundaries for the sake of achieving immediate annexation, and no apparent importance was attached to the particular verbal formula used to achieve such postponement.[87] The general tenor of opposition to annexation

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Representative Ingersoll, Chairman of the Committee on Foreign Affairs, which had reported on the subject of annexation, objecting to this procedure, *ibid.*, and those of Senator Dayton of New Jersey, *id.*, at 387.

[87] The bills introduced included the following variations in treatment of the boundary question:

"That the republic of Texas . . . be received and admitted . . . . That the United States be authorized to adjust and settle all questions of boundary which may arise with other governments." (Offered by Senator Ashley of Arkansas, Cong. Globe, 28th Cong., 2d Sess., App., at 287–288.)

"The republic of Texas . . . cedes to the United States all the territories of Texas . . . ." (Reported by Representative Ingersoll as Chairman of the Committee on Foreign Affairs, Cong. Globe, 28th Cong., 2d Sess., at 191.)

"[T]he territory now known as the republic of Texas be, and the same is hereby, annexed to, and made a portion of, the territory of the United States. . . . That commissioners shall hereafter be appointed, who shall establish the boundaries . . . ." (Offered by Representative Weller of Ohio, *id.*, at 192.)

"That the Congress doth consent that the territory rightfully included within the limits of Texas be erected into a new State . . . . That said State be formed subject to the adjustment, by the government of the United States, of all questions of boundary that may arise with other governments." (Offered by Representative Douglass of Illinois, *id.*, at 192.)

"That the Congress doth consent that the territory known as the republic of Texas, and rightfully belonging to the same, may be erected into a new State . . . . That the President of the United States, by and with the advice and consent of the Senate, is hereby authorized to adjust and settle all questions relating to the boundaries

changed from a fear that the cession covered too much to criticisms of the indefinite treatment of boundary and concern over whether Texas really owned as much as some supporters asserted.[88] It is true that isolated statements were made which seem to indicate that the speaker thought the Resolutions would admit Texas with the boundary defined in her 1836 boundary statute, subject to possible subsequent readjustment.[89] However, read in

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of said territory, which may arise with other governments." (Offered by Representative Burke of New Hampshire, *ibid.*)

There were also several proposals to carve a State out of only part of the Texan territory, with assigned territorial boundaries, and to admit the remainder as a territory subject to later adjustment of boundaries. Cong. Globe, 28th Cong., 2d Sess. 76 (Representative Tibbatts of Kentucky); 107, 187, App. 304 (Representative Dromgoole of Virginia); 192 (Representative Robinson of New York); 359 (Senator Walker of Mississippi); 362 (Senator Miller of New Jersey).

[88] See, *e. g.*, Cong. Globe, 28th Cong., 2d Sess., App. 387, 400. The maintainable extent of Texas' territory was crucial for two reasons: first, because it had been proposed that the United States assume the Texan debt and that Texas cede all her vacant and unappropriated public lands to be applied in discharge of the debt; second, because it had been proposed that several States be carved out of the Texan territory, those lying south of latitude 36 degrees 30 minutes—the Missouri compromise line—to be slave States, and those to the north to be free States. In this context, it was repeatedly asserted by opponents of the Annexation Resolutions that by their terms, the United States would not get nearly as much public land as the Texas Boundary Act would indicate, nor any land north of the Missouri compromise line, despite the Act's claim of a boundary extending to the 42d parallel. See, *e. g.*, Cong. Globe, 28th Cong., 2d Sess. 191 (Representative McIlvaine of Pennsylvania); *id.*, App. 369–370 (Representative Severance of Maine).

[89] Representative Hudson of Massachusetts said:

"What is the Texas which we propose to take into our embrace? Not simply the old province of Texas—not the Texas which declared itself independent, and whose independence we and several other nations have recognised—not Texas proper, but a large amount of

context, these statements may have meant no more than that the United States, in its negotiations with Mexico, would attempt to sustain the full extent of Texas' declared boundaries, rather than that those boundaries were in fact proper. Be that as it may, in view of the overwhelming evidence of Congressional understanding and of the express language of the Annexation Resolution as ultimately passed, the conclusion is inescapable that Texas, at least as to its land area, was admitted with undefined boundaries subject to later settlement.

While this conclusion appears unavoidable as regards Texas' land boundaries, a question does exist as to whether it applies also to the State's seaward boundary. For we are unable to find in the Congressional debates either on the 1844 Treaty or the 1845 Annexation Resolution a single instance of significant advertence to the problem of seaward boundaries. Furthermore, a series of other events manifests a total lack of concern with the problem. Prior to Texan independence, the United States had entered into successive treaties with Spain and Mexico,[90] which provided that

> "The boundary line between the two countries, west of the Mississippi, shall begin *on the Gulph of Mexico, at the mouth of the river Sabine,* in the sea, continuing north along the western bank of that river . . . ." (Emphasis added.)

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territory which is not included in Texas—territory over which Texas never extended her conquest or jurisdiction, and which is as much a part of Mexico as the city of Mexico itself." Cong. Globe, 28th Cong., 2d Sess., App. 336.

See also remarks of Representative Rayner of North Carolina, *id.*, 411–412, see note 98, *infra;* and of Representative Haralson of Georgia. *Id.*, App. 195, see note 97, *infra.*

[90] Treaty of Amity, Settlement, and Limits, Feb. 22, 1819, 8 Stat. 252; Treaty of Limits, Jan. 12, 1828, 8 Stat. 372.

Just after Texas had proclaimed its independence from Mexico, the two countries, on May 14, 1836, concluded "Articles of Agreement and Solemn Compact," acknowledging Texan independence and setting its boundary as follows:

> "The line shall commence *at the estuary or mouth of the Rio Grande,* on the western bank thereof, and shall pursue the same bank up the said river . . . ." [91] (Emphasis added.)

Thereafter a minister was sent to the United States to seek recognition and broach the subject of annexation. With respect to the latter, he was instructed on November 18, 1836:

> "As regards the boundaries of Texas . . . [w]e claim and consider that we have possession to the Rio Bravo del Norte. Taking this as the basis, the boundary of Texas would be as follows. Beginning *at the mouth of said River on the Gulf of Mexico,* thence up the middle thereof . . . ." [92] (Emphasis added.)

Yet a month later, on December 19, 1836, the Texan Congress passed the Boundary Act which inexplicably, so far as we can find, provided that the boundary should run along the Gulf of Mexico at three leagues from land.[93]

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[91] This compact was alluded to during the debates on the unsuccessful 1844 Treaty as having probably provided the origin of the boundary claims made in the Texas 1836 boundary statute. See Cong. Globe, 28th Cong., 1st Sess., App. 700, 768.

[92] 1 Garrison, Diplomatic Correspondence of the Republic of Texas, 127, 132, reprinted as H. R. Doc. No. 1282, 60th Cong., 2d Sess. 127, 132.

[93] On Dec. 22, 1836, President Jackson sent a message to the House regarding possible recognition of Texas. One of the documents

Quite in contrast, in the subsequent Convention of 1838 to establish the boundary between the United States and Texas, Texas reaffirmed the 1819 and 1828 Treaties with Spain and Mexico regarding that boundary and agreed to the running and marking of

> "that portion of the said boundary which extends from *the mouth of the Sabine, where that river enters the Gulph of Mexico,* to the Red river." [94] (Emphasis added.)

Again, as previously mentioned (note 79, *ante*), during its consideration of the unratified Treaty of April 12, 1844, the Senate requested President Tyler to transmit any information he possessed concerning the southern, southwestern, and western boundaries of Texas. On April 26, 1844, he sent a map and a memoir by its compiler. The memoir flagrantly misquoted the 1836 Boundary Act by

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accompanying the message was a report dated Aug. 27, 1836, in which the Texan boundary was described as

"extend[ing] from *the mouth of the Rio Grande* on the east side, up to its head waters; thence on a line due north until it intersects that of the United States, and with that line to the Red river, or the northern boundary of the United States; thence to the Sabine, and along that river *to its mouth; and from that point westwardly with the Gulf of Mexico to the Rio Grande.*" H. R. Exec. Doc. No. 35, 24th Cong., 2d Sess. 11. (Emphasis added.)

While this report was written before the Texas boundary statute was passed, it again illustrates the lack of concern over a seaward boundary.

[94] Convention Between the United States of America and the Republic of Texas, for marking the boundary between them, Apr. 25, 1838, 8 Stat. 511. The Journal of the Joint Commission which conducted the survey stated:

"[W]e established the point of beginning of the boundary between the United States and the republic of Texas at a mound on the western bank of the junction of the river Sabine with the sea . . . ." S. Doc. No. 199, 27th Cong., 2d Sess. 59.

describing the Texas boundary as "'Beginning at the mouth of the Rio Grande, thence up the principal stream of said river . . . .'" [95]

The foregoing circumstances make it abundantly plain that at the time Texas was admitted to the Union, its seaward boundary, though expressly claimed at three leagues in the 1836 Texas Boundary Act, had not been the subject of any specific concern in the train of events leading to annexation.

Given this state of affairs, we must initially dispose of an argument made by Texas. The State urges, in effect, that whether or not its maritime boundary was actually considered by the Congress or the Executive during the course of the annexation proceedings, it was incumbent upon the United States to protest or reject in some manner Texas' claim in this regard, and that failure to do so constituted in law a validation or ratification of that boundary claim upon admission. Whatever the merit of this proposition may be in the abstract, the controlling factor for purposes of this case must be the terms of the Joint Resolution of Annexation. There is, indeed, a strong argument that the "properly," "rightfully," and "adjustment" clauses of that Resolution should be read as applying only to the land boundaries disputed with Mexico, which gave rise to those qualifications, and that the Resolution was meant to validate any boundary asserted by Texas without protest. However, in light of the fact that the language employed in the Resolution is of general applicability, we should hesitate to limit its effect by reading into it such an additional unexpressed test respecting the extent of Texas' boundaries. We think that its language must be taken as applying to Texas' maritime boundary as well as to its land boundary.

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[95] S. Doc. No. 341, 28th Cong., 1st Sess. 55, 56.

On this basis an argument of the Government must now be met. It is contended that since Texas was admitted to the Union with its maritime boundary not yet settled, United States foreign policy on the extent of territorial waters, to which Texas was admittedly subject from the moment of admission, automatically upon admission operated to fix its seaward boundary at three miles. This contention must be rejected. As we have noted, the boundaries contemplated by the Submerged Lands Act are those fixed by virtue of Congressional power to admit new States and to define the extent of their territory, not by virtue of the Executive power to determine this country's obligations *vis-à-vis* foreign nations. *Ante,* pp. 30–36. It may indeed be that the Executive, in the exercise of its power, can limit the enjoyment of certain incidents of a Congressionally conferred boundary, but it does not fix that boundary. If, as in the case of Texas, Congress employs an uncertain standard in fixing a State's boundaries, we must nevertheless endeavor to apply that standard to the historical events surrounding admission.

We are brought back, then, to a twofold inquiry: First, whether the three-league maritime boundary asserted by the Republic of Texas embraced an area which was "properly included within, and rightfully belonging to" the Republic. Second, whether such a boundary was ever fixed for the State of Texas pursuant to the power reserved by Congress to adjust "all questions of boundary that may arise with other governments." As we have observed, it is evident that the first clause, independently of the second, was not intended to operate as a self-executing standard for determining the disputed western and southwestern boundaries of Texas. To attempt to apply that clause as fixing the extent of Texas' maritime boundary, immediately upon admission to the Union, no less than in so fixing its land boundaries, would be illusory at best. The parties devote consider-

able discussion to the validity or invalidity of the asserted three-league maritime boundary under international law. It is true that the propriety of a nation's seaward boundary must be viewed in the context of its obligations *vis-à-vis* the family of nations. But surely the Joint Resolution of Annexation could not have been meant to import such an elusive inquiry into the determination of Texas' maritime boundary, especially when that question was never even considered and when the Resolution was expressly drawn to leave undefined the land boundaries which did receive consideration. And we are unable to say that Congress might have deemed the three-league maritime boundary "proper" or "rightful" in some other sense. It is necessary, therefore, to look to other events to ascertain where the Texan maritime boundary was fixed pursuant to the Joint Resolution of Annexation.

Congress' failure to carry into the Annexation Resolution the boundaries fixed by the 1836 Texas Boundary Act did not, of course, foreclose the possibility that the State's boundary might ultimately be fixed in accordance with that statute. It is significant in this regard to note the opinions ventured in Congress on the probable settlement of the boundary with Mexico which would occur subsequent to annexation. One group asserted that the Texan claims to the Rio Grande, particularly the portion which encompassed New Mexico, could not possibly be maintained.[96] But such remarks were made primarily by opponents of annexation and were intended as warnings against assuming that enough land would be included in the cession to pay the Texan debt or to form free States. Much more significant than opinions as to where the boundary might ultimately be *fixed* are observations made

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[96] See, *e. g.*, speech of Representative Severance of Maine, Cong. Globe, 28th Cong., 2d Sess., App. 369–370; speech of Representative McIlvain of Pennsylvania, *id.*, at 373.

regarding the basis on which the boundary question might be *pressed* against Mexico. Supporters and opponents alike acknowledged that the United States would probably negotiate on the basis of the Texan boundaries as declared in her own boundary statute, even though some parts of that boundary might not be maintainable. Some thought this was so because those boundaries were in fact her proper and rightful boundaries.[97] Others thought it was so because the United States, having acquiesced in the Boundary Act after receiving notice of it, was bound, upon admitting Texas to the Union, to maintain those claims on her behalf.[98] Whatever the reasons given, it is

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[97] Representative Haralson of Georgia, speaking to the Joint Resolution, said:

"If it should turn out that, by receiving the entire limits of Texas, as defined in her act, we acquired more territory than we could rightfully hold, having a just regard to the rights of other nations, all that is necessary to be done is to surrender the overplus. The Texian act of Congress, approved December 19, 1836, I have little doubt, defines correctly the boundary of that republic. If not, any imaginable difficulty may be adjusted if you adopt one of these resolutions, which provides for the consent of Texas to our settlement of the boundaries." Cong. Globe, 28th Cong., 2d Sess., App. 193, 195.

[98] Representative Rayner of North Carolina, speaking to the Joint Resolution, said:

"Texas claims the country on the east of the Del Norte, from its mouth to its source. She has laid down this as her boundary in her constitution. She is to transfer to this government, or retain to herself, all the unappropriated lands within the limits of her republic. She has defined these limits; and it is with Texas, claiming territory as extending to the Del Norte in its whole length, that you propose to make the contract. It may be said that this question of boundary must be left to future negotiation with Mexico. But will not this government, if Texas is now annexed, with her definition of boundary, be precluded from making any concessions to Mexico? Will not any compromise as to boundary be resisted by Texas as a breach of faith towards her? She might say that Texas had defined her own limits; that with Texas, as thus bounded, we had contracted for her admission into the Union; and that this government was bound by every

clear that Congress, although it purposely refused to settle the question, anticipated that the Texas Boundary Act should and would be insisted on to the greatest degree possible in negotiations with Mexico.

This prediction was borne out by subsequent events. After the Annexation Resolution had been passed and transmitted to Texas for its assent, the Mexican army threatened to cross the Rio Grande and invade Texas. On June 15, 1845, President Polk wrote an informal and confidential letter to the United States Chargé d'Affaires in Texas which indicated that Polk intended to repel such an invasion and to maintain the Texan claim at least to the lower portion of the Rio Grande:

> "In the contingency . . . that a Mexican army should cross—the Rio Grande . . . then in my judg-

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consideration of faith and honor to see that Texas should not be again mutilated. . . .

"Whether this reasoning be founded in justice or not, there is some plausibility in it . . . ." *Id.*, at 410, 411–412.

Similarly Senator Breese of Illinois, speaking to the 1844 Treaty, had said:

"The limits of Texas are to be adjusted hereafter. But we have acknowledged the limits as defined in the act of the Texian Congress of 1836, and as delineated on the map accompanying the documents, as extending to the Del Norte. And why do I say so? Because we did, in 1837, with a full knowledge of these declared boundaries, acknowledge the independence of Texas as a state, with that act of her Congress then, and as now, in full force; and which acknowledgment received the vote of the senator from Missouri. But this is a small matter, and can be readily adjusted with Mexico, should we encroach upon her rights. We get a title to all Texas, rightfully ours in virtue of her sovereignty. We ask no more—no less.

"The senator says that he is for the recovery of [t]he province of Texas—Spanish Texas—the Texas of La Salle. So am I, Mr. President; and for as much more as the 'republic' of Texas can lawfully claim." Cong. Globe, 28th Cong., 1st Sess., App. 537, 540.

Senator Walker of Mississippi, commenting on the 1844 Treaty, had placed his approval of the Boundary Act on both grounds. *Id.*, at 548–557.

> ment,—the public necessity for our interposition—will be such,—that we should not stand—quietly by—and permit—an invading foreign enemy—either to occupy or devastate any portion of the Texian territory. Of course I would maintain the Texan title to the extent which she claims it to be, and not permit an invading enemy—to occupy a foot of the soil East of the *Rio Grande*." Andrew Donelson Papers (Library of Congress), Vol. 10, folios 2068–2070.

Nine days before, Polk had manifested a similar intention in a letter to Sam Houston, former President of the Republic of Texas and an influential spokesman for annexation:

> "You may have no apprehensions in regard to your boundary. Texas once a part of the Union and we will maintain all your rights of territory and will not suffer them to be sacrificed." Polk Papers (Library of Congress) (1845), Vol. 84.

The attitude of the Executive at this time toward the Texan boundary is made even more explicit by an account of an interview between the United States Chargé d'Affaires in Texas and Sam Houston, written by the former to his superior, the Secretary of State:

> "I stated at large the general policy of the United States as justifying no doubt of the tenacity with which they would maintain not only the present claim of Texas, but reenforce it with the preexisting one derived from France in 1803 . . . .
>
> "I brought also to his view the fact that this latter feature of the proposals did not interfere with the right of Texas to define her limits as she claimed them, in her statutes—that the specification of the Rio Grande as the western boundary would be proper enough as shewing the extent to which the United States would maintain her claim as far as it could be

> done without manifest injustice to Mexico, and to the portion of the inhabitants of Mexico that had never yet acknowledged the jurisdiction of Texas—that practically the United States would take the place of Texas, and would be obligated to do all, in this respect, that Texas could do, were she to remain a separate nation." [99]

After Texas consented to annexation and Congress had finally admitted her to statehood, the Mexican army crossed the Rio Grande and declared war upon the United States. On May 11, 1846, President Polk called on Congress to declare war against Mexico. He said in part:

> "Texas, by the final action of our Congress, had become an integral part of our Union. The Congress of Texas, by its act of December 19, 1836, had declared the Rio del Norte to be the boundary of that republic. Its jurisdiction had been extended and exercised beyond the Nueces. The country between that river and the Del Norte had been represented in the congress and in the convention of Texas; had thus taken part in the act of annexation itself; and is now included within one of our congressional districts. Our own Congress had, moreover, with great unanimity, by the act approved December 31, 1845, recognized the country beyond the Nueces as a part of our territory, by including it within our own revenue system; and a revenue officer, to reside within that district, has been appointed, by and with the advice and consent of the Senate. It became, therefore, of urgent necessity to provide for the defence of that portion of our country." H. R. Exec. Doc. No. 60, 30th Cong., 1st Sess. 4, 7.

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[99] Letter from Andrew J. Donelson to James Buchanan, Apr. 12, 1845, 12 Manning, Diplomatic Correspondence of the United States: Inter-American Affairs, 1831–1860 (1939), 400–401.

In a later message to Congress on December 8, 1846, Polk manifested the same disposition. H. R. Exec. Doc. No. 4, 29th Cong., 2d Sess. 13–14. And on December 7, 1847, he explained that the United States had rejected a treaty proposal by Mexico because

> "It required the United States to dismember Texas, by surrendering to Mexico that part of the territory of that State lying between the Nueces and the Rio Grande, included within her limits by her laws when she was an independent republic, and when she was annexed to the United States and admitted by Congress as one of the States of our Union." H. R. Exec. Doc. No. 8, 30th Cong., 1st Sess. 9.

However, there is absolutely nothing to indicate that the Executive, any more than the Congress, was interested in, or was at all aware of any problem presented by, the seaward boundary of Texas as claimed in its 1836 Boundary Act. The Government urges, by way of explanation, that the United States had, by this time, firmly established a policy of claiming no more than three miles of territorial waters. But the Executive's responsibility for fixing the Texan boundary derived from a delegation of Congressional power to admit new States, not from the Executive's own power to fix the extent of territorial waters. As we have already pointed out, the two powers can operate independently, and only the first is determinative in this case. To the extent it may be argued that the Executive would naturally take account of its own policy toward territorial waters in fixing the Congressionally mandated boundary, the data presented to us are utterly devoid of any suggestion that such was the case. On the contrary, it is evident that the overwhelming concern of the President and his subordinates was to maintain to the greatest extent possible the land boundaries claimed by Texas and disputed with Mexico,

as anticipated by Congress. The settlement of that matter remained for future events, to which we now turn.

On April 15, 1847, Nicholas P. Trist was appointed Commissioner to Mexico to negotiate a peace treaty. Among his instructions was a projet of the proposed treaty, which provided:

> "The boundary line between the two Republics shall commence in the Gulf of Mexico *three leagues from land opposite the mouth of the Rio Grande,* from thence up the middle of that river . . . ." 5 Miller, Treaties and Other International Acts of the United States of America (1937), 265. (Emphasis added.)

This language was incorporated verbatim into Article V of the Treaty of Guadalupe Hidalgo as finally signed on February 2, 1848, 9 Stat. 922, which fixed the boundary between the United States and Mexico from the Gulf of Mexico to the Pacific coast.[100] While there was con-

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[100] The treaty provided as follows:

"The boundary line between the two republics shall commence in the Gulf of Mexico, three leagues from land, opposite the mouth of the Rio Grande, otherwise called Rio Bravo del Norte, or opposite the mouth of its deepest branch, if it should have more than one branch emptying directly into the sea; from thence up the middle of that river, following the deepest channel, where it has more than one, to the point where it strikes the southern boundary of New Mexico; thence, westwardly, along the whole southern boundary of New Mexico (which runs north of the town called *Paso*) to its western termination; thence, northward, along the western line of New Mexico, until it intersects the first branch of the river Gila; (or if it should not intersect any branch of that river, then to the point on the said line nearest to such branch, and thence in a direct line to the same;) thence down the middle of the said branch and of the said river, until it empties into the Rio Colorado; thence across the Rio Colorado, following the division line between Upper and Lower California, to the Pacific Ocean."

By this treaty, the United States thus not only maintained the Texan claim to the territory between the Nueces and the Rio Grande, but also acquired from Mexico the whole of New Mexico, part of which Texas had claimed by its boundary statute. To settle the

siderable disagreement in the negotiations over the various land boundaries, the proposals of both parties never departed from the three-league provision. See 5 Miller, *op. cit., supra,* at 270, 288, 299, 315, 317, 325.

Trist stated in his notes that one object of instructions given to his predecessor, substantially identical in relevant part to those given him, was to get Mexico to agree to a boundary which

> "would throw within the territory of the United States the country lying east of the Rio Grande. Or,

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conflict thus created between the United States and Texas to that portion of New Mexico, the United States in 1850 paid Texas $10,000,000 to relinquish its claim to the area, 9 Stat. 446, thereby consummating the final step in the establishment of Texas' disputed land boundaries. See diagram, p. 65, *post.*

The Act provided as follows:

"The State of Texas will agree that her boundary on the north shall commence at the point at which the meridian of one hundred degrees west from Greenwich is intersected by the parallel of thirty-six degrees thirty minutes north latitude, and shall run from said point due west to the meridian of one hundred and three degrees west from Greenwich; thence her boundary shall run due south to the thirty-second degree of north latitude; thence on the said parallel of thirty-two degrees of north latitude to the Rio Bravo del Norte, and thence with the channel of said river to the Gulf of Mexico."

It is suggested that the seaward boundary of Texas was thereby fixed at the edge of the Gulf. But Texas' western boundary south of New Mexico had already been definitively fixed by the Treaty of Guadalupe Hidalgo. *Post,* pp. 60–61. Since the treaty had fully supported Texas' claim to that area, there was nothing to compromise in 1850. By contrast, the portion of the 1848 boundary which encompassed not only eastern New Mexico, to which Texas had a very doubtful claim, but also western New Mexico and California, which it had never claimed, obviously was not pressed against Mexico on Texas' behalf and was not intended to validate its claim to eastern New Mexico. Thus the 1850 Compromise could be concerned only with the latter area. Nothing in *United States* v. *Texas,* 162 U. S. 1, militates to the contrary. The concluding phrase of the Act, describing the portion of Texas' boundary south of New Mexico was unnecessary to the purposes of the Act and could not, without Texas' consent, affect the seaward boundary previously fixed for it.

> as said object stands in said instructions, specifically stated & expressed, it was the object of prevailing upon Mexico 'to agree that the line shall be established along the boundary defined by the act of Congress of Texas, approved December 19, 1836, to wit: beginning at "the mouth of the Rio Grande; thence up the principal stream of said river . . . ." ' " [101]

While this misquotation of the Texas Boundary Act again demonstrates total insensitivity to any problem of a seaward boundary, the passage does indicate that the United States was attempting to follow the Texan statute in negotiating the boundary.[102] More important for the purposes of this case are the circumstances that the three-league provision was made an express part of the Treaty of Guadalupe-Hidalgo, that such boundary was reaffirmed five years later in the Gadsden Treaty of December 30, 1853 [103] and subsequently in a long line

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[101] Papers of Nicholas P. Trist (Library of Congress 1917), Vol. 33, folio 62071. The quotation is from letter of Secretary of State Buchanan to John Slidell, Nov. 10, 1845. S. Exec. Doc. No. 52, 30th Cong., 1st Sess. 78.

[102] See also 5 Miller, *op. cit., supra,* at 315, n. 1. While the United States demanded and obtained as a war indemnity a large amount of territory west of Texas' claimed boundaries extending to the Pacific coast, see note 100, *supra,* that fact never obscured this country's firm contention that as to Texas' *southwestern* boundary—lying along the Rio Grande from the Gulf to what is now New Mexico—the Texan claim based on its 1836 Boundary Act must be maintained against Mexico.

[103] 10 Stat. 1031. It is noteworthy that the boundary commissioners appointed at that time to survey the three-league boundary reported: "Lieut. Wilkinson, in command of the brig Morris, repaired at the appointed time to the mouth of the river and made soundings . . . to trace the boundary, as the treaty required, 'three leagues out to sea.' " 1 Emory, Report on the United States and Mexican Boundary Survey (1857), 58. This is in marked contrast to the notes of the surveyors of the boundary between Texas and the United States established by the 1838 Convention. See note 94, *supra.*

of international conventions,[104] and that it has never been repudiated.

The Treaty unquestionably established the Rio Grande from New Mexico to the Gulf as the land boundary not only of the United States but also of Texas, since the Executive, acting pursuant to the power given by Congress to "adjust" Texas' boundaries in dealings with other nations, pressed that boundary against Mexico on the theory that it embraced territory rightfully belonging to the State of Texas. There is nothing to indicate that the extension of that boundary three leagues into the Gulf, pursuant to the very same Boundary Act, was treated on any different basis. The portion of the boundary extending into the Gulf, like the rest of the line, was intended to separate the territory of the two countries, and to recognize that the maritime territory of Texas extended three leagues seaward.

Whether the Treaty be deemed to constitute an exercise of the power to adjust the boundaries left unsettled by the 1845 Joint Resolution of Annexation, or a *post hoc* recognition of a seaward boundary which was actually fixed for Texas upon its admission in 1845, or a fixation of boundaries which related back to the time of admission, is of no moment. Although the Submerged Lands Act requires that a State's boundary in excess of three miles must have existed "at the time" of its admission, that phrase was intended, in substance, to define a State's present boundaries by reference to the events surrounding its admission. As such, it clearly includes a boundary which was

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[104] See the following boundary conventions between the United States and Mexico: July 29, 1882, 22 Stat. 986; Nov. 12, 1884, 24 Stat. 1011; Dec. 5, 1885, 25 Stat. 1390; Feb. 18, 1889, 26 Stat. 1493; Mar. 1, 1889, 26 Stat. 1512; Aug. 24, 1894, 28 Stat. 1213; Oct. 1, 1895, 29 Stat. 841; Nov. 6, 1896, 29 Stat. 857; Oct. 29, 1897, 30 Stat. 1625; Dec. 2, 1898, 30 Stat. 1744; Nov. 21, 1900, 31 Stat. 1936; Mar. 20, 1905, 35 Stat. 1863.

fixed pursuant to a Congressional mandate establishing the terms of the State's admission, even though the final execution of that mandate occurred a short time subsequent to admission.

The Government contends that the Treaty of Guadalupe Hidalgo is of no significance in this case because the line drawn three leagues out to sea was not meant to separate territory of the two countries, but only to separate their rights to exercise certain types of "extraterritorial" jurisdiction with respect to customs and smuggling. We believe the conclusion is clear that what the line, denominated a "boundary" in the Treaty itself, separates is territory of the respective countries. No reference to "extraterritorial" jurisdiction is made in the Treaty, and no such concept can be gleaned from the context of the negotiations. Being based on the three-league provision of the 1836 Texas Boundary Act, which itself denotes a territorial boundary, the obvious and common-sense meaning of the analogous treaty provision is that it separates the maritime territory of the United States and Mexico.

The Government relies on certain diplomatic correspondence as evidencing a subsequent construction of the Treaty contrary to this conclusion. In 1848, when Great Britain protested the three-league provision of the Treaty, both the United States and Mexico replied that the Treaty defined rights only as between the two countries and was not intended to impair the rights of any other nation in the marginal sea.[105] In 1875, Secretary of State Hamilton Fish made a similar explanation to Lord Derby of Eng-

[105] Letter of Secretary of State Buchanan to Mr. Crampton, British Minister, Aug. 19, 1848, Manning, Diplomatic Correspondence of the United States, Inter-American Affairs, 1831–1860, VII, 31–32; Letter from Luis G. Cuevas, Mexican Foreign Minister, to Percy W. Doyle, British Chargé d'Affaires in Mexico, photostatic copy of translation in Public Record Office, London, Gov. Br. p. 403.

land, but added a new contention that the boundary provision was "probably" suggested by the Acts of Congress permitting revenue officials to board vessels bound for the United States within four leagues of the coast.[106] And in 1936, after Mexico had asserted a three-league belt of territorial water along its entire coast, the United States, in denying that the Treaty gave Mexico such a right, adopted both rationales relied on in 1875, and in addition contended that the boundary provision did recognize the territory of the two countries as extending three leagues from the coast, but only in the "one area" adjacent to the international boundary.[107] It seems evident from the

[106] Foreign Relations of the United States, 1875, Pt. I, 649–650. It is difficult to understand why, if jurisdiction for revenue purposes had been extended by statute to four leagues, the boundary was established only at three leagues if it was drawn solely for that purpose. It is asserted, however, that Mexico concluded a series of treaties with other countries in the latter half of the nineteenth century which established jurisdiction for revenue purposes at three leagues. Treaty between Mexico and China, Art. XI, 1 Laws and Regulations on the Regime of the High Seas (United Nations Legislative Series) 147; Treaty between Mexico and the Dominican Republic, Art. 15, *id.*, at 153, 154; Treaty between Mexico and El Salvador, Art. XXI, *id.*, at 156; Treaty between Mexico and France, Art. 15, *id.*, at 169, 170; Treaty between Mexico and Germany, Art. VIII, *id.*, at 170; Treaty between Mexico and the Netherlands, Art. 6, *id.*, at 171; Treaty between Mexico and Norway and Sweden, Art. VII, *id.*, at 171–172; Treaty between Mexico and the United Kingdom, Art. IV, *id.*, at 172. Only some of those Treaties set the limit at three leagues; others set it at twenty kilometers, which is equivalent to approximately 10.8 nautical miles, or closer to four leagues than to three. In any event, the Mexican Treaties indicate only that Mexico chose to limit the rights she would assert as against other nations, and do not relate to the rights created between it and the United States by the Treaty of Guadalupe Hidalgo.

[107] Letter from Mr. De L. Boal, American Chargé d'Affaires ad interim at Mexico City, to Senor General Hay, Mexican Minister for Foreign Affairs, June 3, 1936, 99 Cong. Rec. 3623–3624.

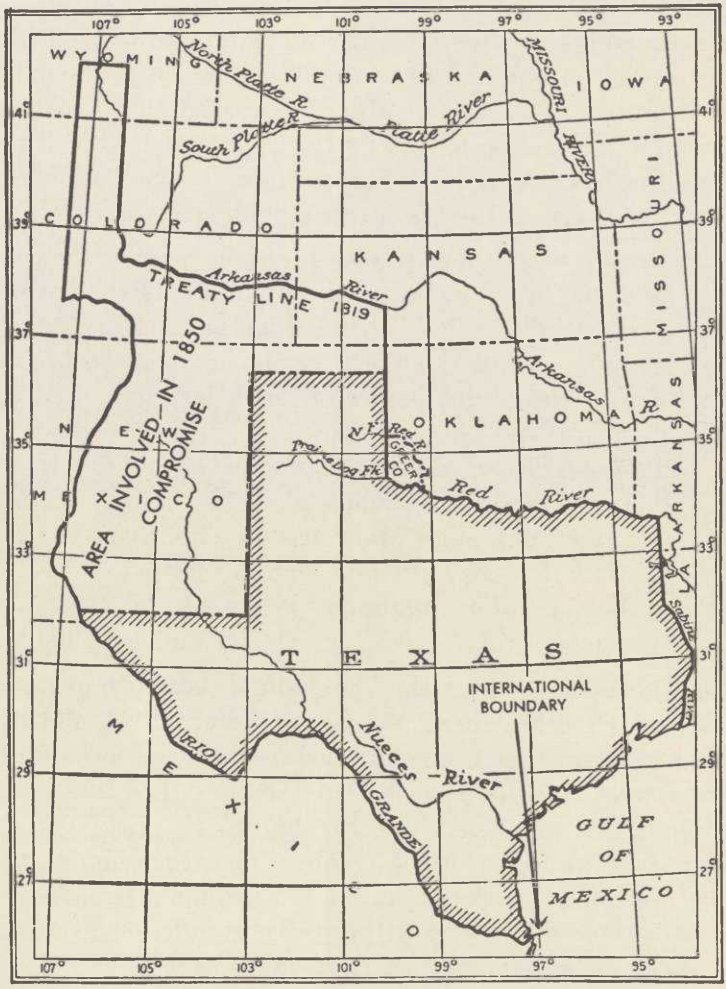
[*Footnote 107 continued on p. 64.*]

shifting and uncertain grounds upon which these pronouncements relied that they should be taken as reflecting no more than after-the-fact attempts to limit the effect of a provision which patently purported to establish a three-league territorial boundary, so as to bring it into accord with this country's international obligations. Undoubtedly the Executive has the right to limit the effect to be accorded a treaty provision in its dealings with other countries. But where, as here, that Treaty touches upon relationships between the Nation and a State created pursuant to a Congressional mandate, the original purport of the Treaty must control, and the dealings of the Executive with other nations cannot affect the State's rights in any way as a domestic matter.

We conclude, therefore, that pursuant to the Annexation Resolution of 1845, Texas' maritime boundary was established at three leagues from its coast for domestic purposes. Of course, we intimate no view on the effectiveness of this boundary as against other nations. Accordingly, Texas is entitled to a grant of three leagues from her coast under the Submerged Lands Act.

In testifying before Congress on the Submerged Lands Act, representatives of the State Department reiterated these various grounds, 1953 Senate Hearings 1056–1057, 1077–1078. See also *id.*, at 321–323, 670; 99 Cong. Rec. 2513–2514, 2569, 2893–2895, 3041–3042. Their concern was to avert a congressional determination that a three-league territorial boundary had been fixed for Texas which might be embarrassing to this country in its foreign relations. However, as we have pointed out, pp. 30–36, *ante*, there is no necessary conflict between the existence of a three-league territorial boundary for domestic purposes and the maintenance of the Executive's policy on the limit to which this country will assert rights in the marginal seas as against other nations. Despite the State Department's contentions with respect to the Treaty, Congress clearly left that question, like all other matters bearing on the determination of boundaries, an open question to be judicially resolved.

BOUNDARIES CLAIMED BY TEXAS.*



*United States Department of the Interior, Boundaries, Areas, Geographic Centers, and Altitudes of the United States and the Several States, Second Edition, 1932, Edward M. Douglas, Editor, Geological Survey Bulletin 817, p. 170.

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III.

The Particular Claims of Louisiana.

Louisiana's claims, like those of Texas, are based on the contention that it had a three-league maritime boundary which existed "at the time" it was admitted to the Union, and must be judged by the same standards. The Act of Congress admitting the State to the Union in 1812 [107a] described the new State's boundaries as follows:

> "beginning at the mouth of the river Sabine; thence, by a line to be drawn along the middle of said river, including all islands to the thirty-second degree of latitude; thence, due north, to the northernmost part of the thirty-third degree of north latitude; thence, along the said parallel of latitude, to the river Mississippi; thence, down the said river, to the river Iberville; and from thence, along the middle of the said river, and lakes Maurepas and Ponchartrain, *to the gulf of Mexico; thence, bounded by the said gulf, to the place of beginning, including all islands within three leagues of the coast . . . .*" (Emphasis added.)

Louisiana claims that the concluding clause "including all islands within three leagues of the coast" should be read to mean that Congress fixed as the State's seaward boundary a line three leagues from its coast, and that such a reading is supported both by the State's preadmission history and by subsequent events. The Government, on the other hand, insists that the phrase includes only the islands themselves lying within three leagues of the coast, and not all waters within that distance as well.[108]

[107a] 2 Stat. 701, 702. The terms of this Act were practically identical with those of the Louisiana Enabling Act, passed the year before. 2 Stat. 641.

[108] In precise modern usage, the term "shore" denotes the line of low-water mark along the mainland, while the term "coast" denotes

1. *The Act of Admission on Its Face.*

The language of the Act itself appears clearly to support the Government's position. The boundary line is drawn down the middle of the river Iberville "*to* the gulf of Mexico," not *into* it for any distance. The State is thence to be bounded "*by the said gulf*," not by a line located three leagues out in the Gulf, "to the place of beginning," which is described as "*at* the mouth of the river Sabine," not somewhere beyond the mouth in the Gulf. (Emphasis added.) And while "all islands" within

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the line of the shore plus the line where inland waters meet the open sea. It is obvious that the term "coast" was used in Louisiana's Act of Admission in a nontechnical sense to denote what is actually the shore. The Acts admitting both Mississippi and Alabama contain similar provisions for the inclusion of all islands within six leagues of the *shore*, despite the fact that Great Britain had proclaimed those areas in 1763 to include all islands within six leagues of the "sea coast." And, in *Louisiana* v. *Mississippi*, 202 U. S. 1, 47, this Court held that the "coast" referred to in Louisiana's Act of Admission was the St. Bernard marshes on the mainland and not the Chandeleur Islands, which might be thought to be the seaward limit of inland waters.

The Government concedes that all the islands which are within three leagues of Louisiana's shore and therefore belong to it under the terms of its Act of Admission, happen to be so situated that the waters between them and the mainland are sufficiently enclosed to constitute inland waters. Thus, Louisiana is entitled to the lands beneath those waters quite apart from the affirmative grant of the Submerged Lands Act, under the rule of *Pollard's Lessee* v. *Hagan*, 3 How. 212. Furthermore, since the islands enclose inland waters, a line drawn around those islands and the intervening waters would constitute the "coast" of Louisiana within the definition of the Submerged Lands Act. Since that Act confirms to all States rights in submerged lands three miles from their coasts, the Government concedes that Louisiana would be entitled not only to the inland waters enclosed by the islands, but to an additional three miles beyond those islands as well. We do not intend, however, in passing on these motions, to settle the location of the coastline of Louisiana or that of any other State.

three leagues of the coast were to be included, there is no suggestion that all waters within three leagues were to be embraced as well. In short, the language of the Act evidently contemplated no territorial sea whatever.

Similar language was employed in the Treaty of Paris of September 3, 1783, by which Great Britain recognized the independence of the United States.[109] After describing the boundary of the United States from the mouth of the St. Croix River in the Bay of Fundy to the mouth of the St. Mary's River between Georgia and Florida, the parties added: "comprehending all islands within twenty leagues of any part of the shores of the United States . . . ." In the light of Jefferson's observation, only 10 years later, that national claims to control of the sea beyond approximately 20 miles from the coast had not theretofore been generally recognized among maritime powers;[110] his accompanying proposal that a three-mile limit should be placed upon the extent of territorial waters;[111] and subsequent American and British policy in this regard, see note 54, *supra,* it is hardly conceivable that this provision of the Treaty was intended to establish United States territorial jurisdiction over all waters lying within 20 leagues (60 miles) of the shore.[112] No reason appears for reading

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[109] 8 Stat. 80, 82.

[110] Circular sent by Jefferson to United States Attorneys, ms. in National Archives, Record Group 59.

[111] *Ibid.;* see also letter from Jefferson to George Hammond, British Minister, Nov. 8, 1793, H. Exec. Doc. No. 324, 42d Cong., 2d Sess. 553; letter from Jefferson to Edmond Genet, French Minister, American State Papers, 1 Foreign Relations 183.

[112] While, as we have observed, Congress may fix state boundaries independently of Executive policy on the extent of territorial waters, subject to any limitations imposed by that policy, the Treaty of Paris does not present such a situation. It represents an exercise of purely Executive power (prior, in fact, to the establishment of the Federal Constitution) in setting a national boundary with another nation.

the Louisiana statute differently. The conclusion that language claiming all islands within a certain distance of the coast is not meant to claim all the marginal sea to that distance is further confirmed by the Act defining the boundaries of Georgia,[113] which claims three miles of marginal sea but all islands within 20 leagues of the coast. That Act provides:

> "along the middle of [the St. Mary's] river to the Atlantic Ocean, and extending therein three English miles from low-water mark; thence running in a northeasterly direction and following the direction of the Atlantic coast to a point opposite the mouth, or inlet, of said Savannah River; and from thence to the mouth or inlet of said Savannah River, to the place of beginning; including all the lands, waters, islands, and jurisdictional rights within said limits, and also all the islands within 20 marine leagues of the seacoast."

Nothing in the case of *Alaska Pacific Fisheries* v. *United States,* 248 U. S. 78, tends toward a contrary construction. The Court there held that an Act of Congress designating as an Indian reservation "the body of lands known as Annette Islands" included the intervening and surrounding waters and submerged lands, which were inland waters admittedly under the control of the United States, whether actually part of the reservation or not. The Court, construing the statute in light of the Indians' historic use of these waters as fishing grounds, merely concluded that Congress intended to include in the area reserved the waters and water bed, as well as the islands, referring to both "as a single body of lands." *Id.,* 89. The construction here contended for by Louisiana would,

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[113] Ga. Code Ann. § 15–101, derived from Act 1788, Cobb, 150; Watkins' Dig. 713–762, as amended, Acts 1916, p. 29.

in contrast, sweep within the State's jurisdiction waters and submerged lands which bear no proximate relation to any islands, and which would otherwise be part of the high seas.

Louisiana also contends, relying on *United States* v. *Texas,* 162 U. S. 1; *Louisiana* v. *Mississippi,* 202 U. S. 1, that this Court has already determined that its boundary includes three leagues of marginal sea. The *Texas* case, however, involved only the question whether Greer County, in the northwest part of the State, was properly a part of Texas. And even if that case had effectively established a three-league maritime boundary for Texas, which quite evidently it did not, that would not establish a similar boundary for Louisiana.

The *Mississippi* case involved only the issue of the boundary between Louisiana and Mississippi. Louisiana relies on the holding of the Court that because the eastern boundary of Louisiana was a water boundary along the middle of the river Iberville, extending to the Gulf, it went on to include a deep-water sailing channel in the Gulf adjacent to Mississippi. It also relies on a rough map included in the Court's opinion showing a line drawn all the way around the State's coast at some distance in the Gulf. There is, however, no indication whatever that the line so indicated bore any relation to the three-league provision in the Louisiana Act of Admission. Furthermore, if there could be any doubt that only the portion of the water boundary adjacent to Mississippi was considered by the Court, it is dispelled by the Court's statement that

> "Questions as to the breadth of the maritime belt or the extent of the sway of the riparian States require no special consideration here. The facts render such discussion unnecessary." *Id.,* 52.

See also *United States* v. *California, supra,* at 37.

2. *Preadmission History.*

Preliminarily, it should be observed that in light of what has already been said, pp. 24–30, *ante,* Louisiana's preadmission history is relevant in this case only to the extent that it aids in construing the Louisiana Act of Admission. The thrust of the State's argument on this score is that the boundaries fixed by the Act of Admission comprised the entire area acquired by the United States from France through the Louisiana Purchase, effected by the Treaty of Paris in 1803; that the extent of this area traces back, through cessions by France to Spain in 1762 and Spain to France in 1800, to what was first claimed by France in 1682; and that such area originally extended some 120 miles into the Gulf of Mexico, and in any case, by virtue of other events, at least three leagues into the Gulf.

For reasons now to be discussed we think that this historical thesis is not borne out by any of the documents or events on which Louisiana relies, but that to the contrary what has been shown us leads to the conclusion that Louisiana's preadmission territory, consistently with the Act of Admission, stopped at its coast and did not embrace any marginal sea.

1. The area which includes the present State of Louisiana was first claimed for France by La Salle in 1682, extending southward

> "as far as [the Mississippi's] . . . mouth in the sea, or gulf of Mexico, about the twenty-seventh degree of the elevation of the North Pole . . . ." [114]

It is apparent from the face of La Salle's proclamation that it was the mouth of the Mississippi which defined

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[114] ". . . jusqu'à son embouchure dans la mer ou golfe de Mexique, environ les 27 degrez d'élévation du pôle septentrional . . . ." 2 Margry, Découvertes et Établissements des Français dans L'Ouest et dans le Sud de L'Amérique Septentrionale (1877), 191–192.

the southerly limit of his claim. His expression of belief that the river mouth was at "about" the 27th parallel does not indicate an intent to claim to that parallel, which is in fact some 120 miles south of the Mississippi's mouth. In any event, the *procès-verbal* of Jacques de la Métairie, notary of the La Salle expedition,[115] shows that the proclamation was issued after the mouth of the Mississippi had been reached and the party had returned upstream only far enough to find solid ground for the erection of a monument, and that La Salle then thought, mistakenly in fact, that they were at about the 27th parallel. Other documents also indicate that the river mouth defined the extent of the claim and that the territory included no marginal sea whatever.[116]

2. By a secret Treaty executed at Fontainebleau on November 3, 1762, France ceded to Spain "all the country known under the name of Louisiana, as well as New Orleans and the island in which the place stands." [117] By the secret Treaty of San Ildefonso, signed October 1, 1800, Spain retroceded the "colony and province of Louisiana" to France.[118] Certainly there is nothing on the face of

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[115] 2 Margry, *op. cit., supra,* at 186, 190–191.

[116] Fragment of a letter of La Salle, 2 Margry, *op cit., supra,* at 199 (the Mississippi runs as far as the 27th degree, where it discharges into the sea); Letters Patent issued on Sept. 14, 1712, by Louis XIV to his Secretary, Antoine Crozat, for exclusive trading in Louisiana, in Greenhow, Memoir, Historical and Political, on the Northwest Coast of North America, S. Doc. No. 174, 26th Cong., 1st Sess. 150 (Louisiana extends along the Mississippi "from the seacoast to the Illinois country"); Definitive Treaty of Peace between Great Britain, Spain, and France, signed at Paris, Feb. 10, 1763, Art. VII, 15 Parliamentary History of England 1291, 1296 (domains of Britain and France separated by a line drawn along the middle of the river Iberville, and lakes Maurepas and Pontchartrain "to the sea").

[117] 13 Cong. Deb., 24th Cong., 2d Sess., pt. II, App. 226.

[118] *Id.,* at 229.

either of these Treaties to indicate that France or Spain claimed any territorial sea.

3. Louisiana argues, however, that certain treaties between France, Spain, and other nations evidence such an intent. Four of these treaties concern the right of the French to fish within certain distances of the coasts of the British possessions in North America, varying from three to 30 leagues. The relevant portions do not relate to French or Spanish territory at all.[119] In another, Great Britain undertook not to permit its subjects to navigate or fish within 10 leagues of coasts occupied by Spain "in the *Pacific Ocean,* or in the *South Seas,*" so as to prevent illicit trade with Spanish settlements.[120] The Treaty does not relate to the area in question, and, far from being an assertion of a territorial claim by Spain, imposed an obligation of a limited nature on Great Britain alone. The same reasoning applies to another of these treaties, the Treaty between Spain and Tripoli, signed September 10, 1794, prohibiting the capture of any vessel within 10 leagues from coasts of the dominions of Spain.[121] Reliance is also placed on an ordinance promulgated by Philip II of Spain in October 1565, asserting rights within the visual horizon of the coasts of Spain and its possessions.[122] It may be questioned whether this ordinance

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[119] Treaty of Utrecht, 1713, between Great Britain and France, 17 Journal of the House of Commons 329; Preliminary Treaty of Peace between Great Britain, Spain, and France, Nov. 3, 1762, 15 Parliamentary History of England 1241, 1243; Definitive Treaty of Peace between Great Britain, Spain, and France, Feb. 10, 1763, 15 Parliamentary History of England 1291, 1295; Definitive Treaty of Peace and Friendship between Britain and France, at Versailles, Sept. 3, 1783, 39 Journal of the House of Commons 718, 719.

[120] Convention between Great Britain and Spain, at The Escurial, Oct. 28, 1790, 46 Journal of the House of Commons 30.

[121] Estevan de Ferrater, Codigo de Derecho Internacional (Barcelona 1846), Vol. I, p. 488.

[122] Ernest Nys, Le Droit International, Vol. I, p. 499.

even constituted an assertion of territorial jurisdiction as it is known today, especially in view of the fact that the concept of the territorial sea did not arise in international law until after this country achieved its independence. See *United States* v. *California, supra,* 32–33. Even if it did, the ordinance can hardly be taken as applying to a territory not acquired by Spain until 200 years later or as affecting the construction of the Act admitting Louisiana to the Union 250 years later.[123]

4. By the Treaty of Paris, signed April 30, 1803, France ceded to the United States the Louisiana Territory with all its rights and appurtenances "as fully and in the same manner as they have been acquired by the French Republic, in virtue of the above-mentioned treaty [Treaty of San Ildefonso, Oct. 1, 1800], concluded with his Catholic Majesty," including "the adjacent islands belonging to Louisiana." [124] To show that the Act admitting Louisiana to the Union must be construed as referring directly to this Treaty, Louisiana relies on Article III of the Treaty, which required the United States to admit "the ceded territory" to statehood as soon as possible. But since the historic documents to which our attention has been called fail to show that the ceded territory included any territorial sea, taking the Treaty as defining the scope of the Act of Admission only confirms the view that Louisiana's maritime boundary was fixed at, and not somewhere in, the Gulf of Mexico.

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[123] Certain correspondence between the United States and Spain involving a dispute over the eastern and western limits of Louisiana also indicates that Spain believed the territory ended at the Gulf of Mexico. Letter from Pedro Cevallos, Spanish Foreign Minister, to Charles Pinckney and James Monroe, United States Envoys, Apr. 13, 1805, American State Papers, 2 Foreign Relations 660, 662; letter from Luis de Onis, Spanish Ambassador, to John Quincy Adams, United States Secretary of State, Dec. 29, 1817, American State Papers, 4 Foreign Relations 452, 453; letter from de Onis to Adams, Mar. 23, 1818, *id.*, at 480, 484.

[124] 8 Stat. 200, 202.

5. Louisiana also asserts that about the time of its admission, the United States was claiming three leagues of territorial waters in the Gulf, and that the Act of Admission was framed with reference to that claim. However, from the great variety of documentation presented by the parties, the most that could possibly be said is that the United States, contrary to the Government's contention, had not unequivocally asserted the applicability of the three-mile limit in the Gulf of Mexico. Assuming, as the defendants have here argued, that it would have been reasonable under international law for the United States to claim three leagues of territorial waters in the Gulf had it so chosen, we nevertheless cannot conclude that Congress meant to define Louisiana's boundaries by reference to a rule which was the subject of so much difference among nations and which had never been adopted by this country. The terms of the Act of Admission seem to point so strongly to the contrary that it would require much more convincing evidence than this to persuade us that the construction advanced by Louisiana is correct. Furthermore, it is significant that only a few years later, Congress admitted Mississippi and Alabama to the Union, describing their boundaries as including all islands within six leagues of the shore. See pp. 81, 82, *post*. If the three-league provision in Louisiana's Act of Admission was intended to reflect a policy of claiming three leagues of territorial waters, it is difficult to understand why Congress, so shortly thereafter, should have incorporated a six-league limit in an otherwise identical provision.

3. *Postadmission Events.*

To the extent that Louisiana's reliance on postadmission events is for the purpose of showing that the United States established a three-league "national boundary" in the Gulf, they cannot help her case, for reasons previously discussed. *Ante,* pp. 30–36. We need not decide whether the United States ever claimed three leagues of

territorial waters along the entire Gulf coast, which could in a sense be said to constitute a national boundary, or whether, if it did, Louisiana would have been entitled to extend its own boundary to that distance. Under the Submerged Lands Act, Louisiana's boundary must be measured at the time of her admission, unless a subsequent change was approved by Congress. If the Act of Admission fixed the boundary at the shore, neither action by Congress fixing greater boundaries for other States nor Executive policy on the extent of territorial waters could constitute Congressional approval of a maritime boundary for Louisiana. Louisiana, however, insists that certain of these events subsequent to admission must be considered in construing the Act of Admission.

1. We are urged to infer that since, as the Court today holds, three-league boundaries were fixed for Texas (*ante,* p. 64) and Florida (*post,* p. 121), and since, after Texas' admission, the Treaty of Guadalupe Hidalgo fixed the starting point of the boundary between the United States and Mexico at three leagues in the Gulf, Congress must have meant to treat Louisiana equally. The inference must be based primarily on the existence of the Texas and Florida boundaries, for the Treaty of Guadalupe Hidalgo relates only to the boundary between Texas and Mexico, and tends to prove nothing more than the existence of a three-league boundary for Texas. In view of the fact that shortly after Louisiana's admission, Congress fixed maritime boundaries for Mississippi and Alabama which, even on Louisiana's construction, would be different than three leagues, we can discern no consistent Congressional policy toward the maritime boundaries of the Gulf States at the time of Louisiana's admission, even if the much later actions with respect to Texas and Florida could be thought to have established such a policy. Cf. *Louisiana* v. *Mississippi, supra,* at 41. It would require clear evidence that such a policy was operative at the time

Congress passed the Act admitting Louisiana to overcome language in that Act which points so strongly against the construction urged by Louisiana. Nor does the concept of equal footing require such a construction. While the ownership of certain lands within state boundaries has been held to be an inseparable attribute of the political sovereignty guaranteed equally to all States, see *United States* v. *Texas,* 339 U. S., at 716, the geographic extent of those boundaries, and thus of the lands owned, clearly has nothing to do with political equality. *A fortiori* this is true in the case of maritime boundaries beyond low-water mark, since, except as granted by Congress, the States do not own the lands beneath the marginal seas. See *United States* v. *California, supra; Alabama* v. *Texas, supra.*

2. Certain treaties successively entered into from 1819 to 1838 by the United States with Spain, Mexico, and the Republic of Texas establishing the boundary between Texas and the United States are relied on as indicating that the State and Federal Governments thought that Congress had fixed a three-league maritime boundary for Louisiana.[125] Louisiana contends that the treaties fixed the beginning of the international boundary at a point three leagues from land, and that therefore the southwestern corner of Louisiana as well as the southeastern corner of Texas must have been regarded as extending seaward to that distance. Whether or not such reasoning is valid, the language of the treaties refutes the premise that the international boundary began three leagues from land. Both the 1819 and the 1828 treaties recited that "[t]he boundary line between the two countries, west of

[125] Treaty of Amity, Settlement, and Limits (between the United States and Spain), Feb. 22, 1819, 8 Stat. 252; Treaty of Limits (between the United States and Mexico), Jan. 12, 1828, 8 Stat. 372; Convention Between the United States of America and the Republic of Texas, for marking the boundary between them, Apr. 25, 1838, 8 Stat. 511.

the Mississippi, shall begin on the Gulph of Mexico, at the mouth of the river Sabine, in the sea . . . ." The Treaty of 1838 referred to the Treaty of 1828, and provided for a survey of "that portion of the said boundary which extends from the mouth of the Sabine, where that river enters the Gulph of Mexico, to the Red river." [126]

3. In its answer to the original complaint, Louisiana alleged certain acts of sovereignty over the marginal sea and seabed and the acquiescence of the Federal Government therein.[127] Although it has now abandoned its earlier contention that these acts establish its title by prescription and estoppel apart from the Submerged Lands Act, it now urges that they indicate a subsequent practical construction of Louisiana's Act of Admission. Taking these facts as proved, they do not have the effect urged by Louisiana. They indicate only that until the 1930's, the Federal Government may have believed that lands beneath the marginal sea belonged to the States. There is no allegation that the geographical extent of Louisiana's assertions, assuming that such assertions were made beyond three miles, was drawn in question, or that the question of Louisiana's boundary was considered. Some of the acts alleged constituted police power meas-

[126] See note 94, *supra*.

[127] Among the acts alleged were "the passing and enforcing of laws regulating fishing, trawling and dredging of said submerged lands, the granting of leases for the cultivation, propagation and taking of oysters, fish and shrimp, for the dredging and removal of sand, gravel and shells, and for the leasing and development of said lands for oil, gas and other minerals." The answer further alleged that prior to the discovery of oil and gas under said lands, the United States had never claimed any interest in them, and that it had recognized Louisiana's title thereto when, on numerous occasions, it "requested the Chief Executive of the State to secure the passage of laws which would permit the federal government to acquire sites therein for game and fish preserves and for light houses, jetties and other aids to navigation."

ures which a State can enforce against its citizens beyond its boundaries. *Skiriotes* v. *Florida,* 313 U. S. 69. As to acts touching the development of the submerged lands themselves, the United States would have had no reason to object to activity beyond Louisiana's boundary, since not until 1945 did the Federal Government assert any rights in the Continental Shelf for itself. If any of the other acts alleged conflicted with this Nation's policy toward territorial waters, objection would have lain regardless of the location of the State's boundary, and lack of objection is therefore, for the purposes of this case, inconclusive.

4. Finally, Louisiana relies on a 1954 statute of its own establishing the State's boundary at three leagues seaward of the line between inland and open waters. Act 33 of 1954, La. Rev. Stat. 49:1. It is said that in so legislating Louisiana followed the coastline as defined in regulations promulgated by the Commandant of the Coast Guard, pursuant to the Federal Act of February 19, 1895, 28 Stat. 672, 33 U. S. C. § 151, and that because of this, and also on considerations of convenience and certainty, this state enactment should be accepted as establishing Louisiana's coast. We think the consideration of this contention should be postponed to a later stage of this case. We decide now only that Louisiana is entitled to submerged-land rights to a distance no greater than three geographical miles from its coastlines, wherever those lines may ultimately be shown to be.

IV.

The Particular Claims of Mississippi.

Mississippi's claim to a three-league seaward boundary must fail largely for the same reasons that have led us to reject the similar claim of Louisiana.

The territory which now comprises the part of Mississippi lying south of the 31st parallel was originally ceded by France to Great Britain by the Treaty of Paris of February 10, 1763.[128] Great Britain designated this territory part of West Florida, and by proclamation of October 7, 1763, King George III described West Florida as

> "bounded to the southward by the gulf of Mexico, including all islands within six leagues of the coast, from the river Apalachicola to Lake Pontchartrain . . . ." [129]

On September 3, 1783, Great Britain and Spain signed a treaty by which Great Britain ceded this area to Spain as part of a cession embracing all of western and eastern Florida.[130]

By the Treaty of San Ildefonso, signed October 1, 1800, Spain ceded to France "the colony and province of Louisiana." See p. 72, *ante*. In the Treaty of Paris of April 30, 1803, France ceded Louisiana to the United States to the same extent as France had acquired it by virtue of the Treaty of San Ildefonso. See p. 74, *ante*. A dispute arose between the United States and Spain as to whether, by the Treaty of San Ildefonso, Spain had conveyed to France any land east of the Mississippi River (including any part of West Florida), and therefore whether France could have subsequently passed that territory to the United States in the Treaty of Paris. On October 27, 1810, President Madison claimed the right to possession of the area,[131] and on May 14, 1812, Congress

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[128] 15 Parliamentary History of England 1291, 1296.

[129] 2 White, New Collection of Laws, Charters and Local Ordinances of Great Britain, France and Spain (1839), 292, 293.

[130] 39 Journal of the House of Commons 722, 723.

[131] 1 Richardson, Messages and Papers of the Presidents 465.

made it part of the Mississippi Territory.[132] On March 1, 1817, Congress authorized the creation of the State of Mississippi, specifically setting out its boundaries, in part as follows:

> "thence due south to the Gulf of Mexico, thence westwardly, *including all the islands within six leagues of the shore,* to the most eastern junction of Pearl river with Lake Borgne . . . ." [133] (Emphasis added.)

The Mississippi Constitution, approved by the Act admitting the State to the Union on December 10, 1817,[134] contained an identical provision. Finally, by the Treaty of February 22, 1819, Spain purported to cede East and West Florida to the United States. 8 Stat. 254. It was determined, however, in *Foster* v. *Neilson,* 2 Pet. 253, that the portion of the State of Mississippi south of the 31st parallel passed to the United States as part of the Louisiana Purchase under the Treaty of Paris in 1803, and not as part of West Florida under the Spanish Treaty of 1819.

We have already held with respect to Louisiana's claim to a three-league maritime boundary that an Act of Admission which refers to all islands within a certain distance of the shore does not appear on its face to mean to establish a boundary line that distance from the shore, including all waters and submerged lands as well as all islands. There is nothing in Mississippi's history, just as there is nothing in Louisiana's, to cause us to depart from that conclusion in this instance. Indeed, Mississippi relies almost entirely on the fact that the very language which defeats its contention was repeatedly used, in the 1763 Proclamation by King George III, in the Congressional Enabling Act, and in the State Constitution, and was implicitly incorporated in mesne conveyances.

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[132] 2 Stat. 734. [133] 3 Stat. 348. [134] 3 Stat. 472.

Mississippi also urges that the draftsmen of the provision must have intended to include all waters and submerged lands within six leagues from shore because the waters are very shallow and the islands are constantly shifting. This argument, however, appears only to strengthen the conclusion that it was islands upon which the provision focused, and not waters where there were no islands.

We must hold that Mississippi is not entitled to rights in submerged lands lying beyond three geographical miles from its coast.[135]

V.

The Particular Claims of Alabama.

The preadmission history of Alabama is essentially the same as that of Mississippi, the portion of the State lying south of the 31st parallel having passed by the same mesne conveyances from France to the United States. That portion was incorporated into the Mississippi Territory by the Act of May 14, 1812,[136] and became a part of the State of Alabama formed out of that territory. Its Act of Admission [137] incorporated the Enabling Act, which described its boundary in part as follows:

> "thence, due south, to the Gulf of Mexico; thence, eastwardly, including all islands within six leagues of the shore, to the Perdido river . . . ." [138]

The same reasons applicable to the claims of Louisiana and Mississippi compel us to hold that Alabama is not entitled to rights in submerged lands lying beyond three geographical miles from its coast.[139]

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[135] We express no opinion at this time on the location of Mississippi's coastline. See note 108, *ante*.

[136] 2 Stat. 734. [137] 3 Stat. 608. [138] 3 Stat. 489, 490.

[139] We express no opinion at this time on the location of Alabama's coastline. See note 108, *ante*.

VI.

Conclusions.

On the basis of what has been said in this opinion, we reach the following conclusions:

1. As to the States of Louisiana, Mississippi, and Alabama, a decree will be entered (1) declaring that the United States is entitled, as against these States, to all the lands, minerals, and other natural resources underlying the Gulf of Mexico more than three geographical miles from the coast of each such State, that is, from the line of ordinary low-water mark and outer limit of inland waters, and extending seaward to the edge of the Continental Shelf; (2) declaring that none of these States is entitled to any interest in such lands, minerals, and resources; (3) enjoining these States from interfering with the rights of the United States therein; (4) directing each such State appropriately to account to the United States for all sums of money derived therefrom subsequent to June 5, 1950; [140] and (5) dismissing the cross bill of the State of Alabama.[141]

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[140] On June 5, 1950, the date of this Court's decision in the *Louisiana* and *Texas* cases, all coastal States were put on notice that the United States was possessed of paramount rights in submerged lands lying seaward of their respective coasts. The Submerged Lands Act, passed in 1953, by which parts of those lands were relinquished to the States, also forgave any monetary claims arising out of the States' prior use of the lands so relinquished. But the United States remains entitled to an accounting for all sums derived since June 5, 1950, from lands not so relinquished.

Mississippi contends that it is not liable for an accounting, since it was never party to a suit decreeing the United States' rights in offshore lands. However, principles announced in the 1950 *Louisiana* and *Texas* cases are plainly applicable to all coastal States, and Mississippi was put on notice by the decrees in those cases. *A fortiori,*

[*Footnote 141 is on p. 84.*]

2. As to the State of Texas, a decree will be entered (1) declaring that the State is entitled, as against the United States, to the lands, minerals, and other natural resources underlying the Gulf of Mexico to a distance of three leagues from Texas' coast, that is, from the line of ordinary low-water mark and outer limit of inland waters; (2) declaring that the United States is entitled, as against Texas, to no interest therein; (3) declaring that the United States is entitled, as against Texas, to all such lands, minerals, and resources lying beyond that area, and extending to the edge of the Continental Shelf; (4) enjoining the State from interfering with the rights of the United States therein; and (5) directing Texas appropriately to account to the United States for all sums of money derived since June 5, 1950, from the area to which the United States is declared to be entitled.

3. Jurisdiction over this case will be retained for such further proceedings as may be necessary to effectuate the rights adjudicated herein.

4. The motions of Louisiana and Mississippi to take depositions and present evidence are denied, without prejudice to their renewal in such further proceedings as may be had in connection with matters left open by this opinion.[142] In so deciding we have not been unmindful of this Court's liberality in original cases of "allowing full development of the facts." See *United States* v. *Texas*, 339 U. S. 707, 715. We think, however, that the conclusions to be drawn from the historical documents relied on

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the similar contention of Louisiana, the defendant in the 1950 *Louisiana* case, must be overruled.

[141] In light of these conclusions we do not reach the question whether Alabama's cross bill constitutes an "unconsented" suit against the United States.

[142] The same disposition is made of the similar averment in Alabama's answer. Texas' motion for similar relief and for a severance is rendered moot by our decision as to it.

by Louisiana, Mississippi, and Alabama are so clear as to leave no issue presently involved open to dispute, and that we would not be justified in postponing the granting of the relief to which we find the United States entitled as against these three States.[143] By the same token we see no need to postpone the adjudication of the issues now presented as between the United States and Texas, and we do not understand the Government indeed to contend otherwise.

The parties may submit an appropriate form of decree giving effect to the conclusions reached in this opinion.

It is so ordered.

THE CHIEF JUSTICE and MR. JUSTICE CLARK took no part in the consideration or decision of these cases.

[For opinion of MR. JUSTICE FRANKFURTER, joined by MR. JUSTICE BRENNAN, MR. JUSTICE WHITTAKER and MR. JUSTICE STEWART, see *post*, p. 129.]

MR. JUSTICE BLACK, concurring in part and dissenting in part.

I concur in the Court's judgment that Texas owns the belt of submerged lands extending three marine leagues from that State's coastline into the Gulf of Mexico (including oil and other resources), but dissent from denial of like claims by Louisiana, Mississippi and Alabama.

The claims of all these States depend on our interpretation and application of the Submerged Lands Act

[143] The alternative motion of Louisiana, contained in its answer to the original complaint herein, to transfer the case as to it to the United States District Court in Louisiana is denied for the same reasons, and on the further ground that we have already determined that the issues as to all the defendant States should be heard together in this Court. 354 U. S. 515.

passed in 1953.[1] Two bills previously passed by Congress, substantially the same as the 1953 Act, were vetoed by the President.[2] After the first veto we refused to hold that California, Texas and Louisiana owned or had ever owned legal title to the submerged lands adjacent to their coasts. We held that the United States, not the States, had paramount rights in and power over such lands and their products, including oil.[3] Congress accepted our holdings as declaring the then-existing law—that these States had never owned the offshore lands—but believed that *all* coastal States were equitably entitled to keep all the submerged lands they had long treated as their own,[4] without regard to technical legal ownership or boundaries. Accordingly, Congress exercised its power by passing the Submerged Lands Act in an attempt to restore the "rights and powers of the States and those holding under [them] . . . as they existed prior to the

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[1] 67 Stat. 29, 43 U. S. C. §§ 1301–1315.

[2] H. J. Res. 225, 79th Cong., 2d Sess., 92 Cong. Rec. 10660; S. J. Res. 20, 82d Cong., 2d Sess., 98 Cong. Rec. 6251.

[3] *United States* v. *Texas*, 339 U. S. 707; *United States* v. *Louisiana*, 339 U. S. 699; *United States* v. *California*, 332 U. S. 19.

[4] "Therefore, in full acceptance of what the Supreme Court has now found the law to be, Congress may nevertheless enact such legislation as in its wisdom it deems advisable to solve the problems arising out of the decision." S. Rep. No. 133, 83d Cong., 1st Sess. 56, from the reprint, in Appendix E, of S. Rep. No. 1592, 80th Cong., 2d Sess.

"Mr. DANIEL. . . . We can and do accept the decisions of the Court as the interpretation of the law as it exists today, but, by the same token, the Congress of the United States, in placing its interpretation on the Constitution and in deciding the equities can write the law for the future differently from that which the Court has found it to be at this time.

"That is what we propose in Senate Joint Resolution 13. We want Congress to write the law for the future exactly as it was understood and believed to be during the first 150 years of the existence of this Nation." 99 Cong. Rec. 4080–4081.

decision of the Supreme Court of the United States in the California case." [5]

To accomplish this purpose the Act first provides for an outright grant to *all* the coastal States of a boundary three geographical miles from their coastlines.[6] The Gulf States, however, were not satisfied with three *miles* but claimed that special circumstances entitled them to three *leagues* (about 10½ miles) or more. They urged, among other things, that claims of the Gulf States and their predecessors in title had always been more expansive than claims of coastal States in other parts of the country; that when admitted to the Union their constitutions contained definitions which, properly interpreted, described

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[5] "Finally, it is the intent and purpose of this bill to establish the law for the future so that the rights and powers of the States and those holding under State authority may be preserved as they existed prior to the decision of the Supreme Court of the United States in the California case." S. Rep. No. 133, 83d Cong., 1st Sess. 75. This is the closing paragraph of S. Rep. No. 1592, 80th Cong., 2d Sess., printed as an Appendix to the Report on the 1953 Act. See also S. Rep. No. 133, 83d Cong., 1st Sess. 6: "The offshore rights which are confirmed to the States and their grantees are rights growing out of the concept of ownership and proprietary use and development—rights which were first asserted by the Federal Government in recent years and which it has never exercised nor enjoyed. These rights, legally vested in the States and their grantees by Senate Joint Resolution 13, have in fact been enjoyed and exercised by them from the beginning of our history as a nation until the date of the California decision." And see Hearings before the Senate Interior and Insular Affairs Committee on S. J. Res. 13, etc., 83d Cong., 1st Sess. 32.

[6] "It is . . . declared to be in the public interest that . . . title to . . . the lands beneath navigable waters within the boundaries of the respective States . . . be . . . vested in and assigned to the respective States . . . ." 43 U. S. C. § 1311 (a). "The term 'lands beneath navigable waters' means . . . (2) all lands . . . seaward to a line three geographical miles distant from the coast line of each such State . . . ." § 1301 (a).

boundaries extending three to six leagues seaward; that the Gulf States had not only claimed these more expansive boundaries, but had always exercised possessory and ownership rights over these marginal lands and their products at will without regard to any three-mile limitations; and that historically the United States had never questioned any of their claims until disputes arose regarding oil leases during the late 1930's.[7] Moved by these

[7] "Moreover, at the time Louisiana and Texas extended their seaward boundaries to 27 marine miles, the United States was not claiming ownership or jurisdiction and control over the Continental Shelf. Actually, some years earlier the State Department had taken the position that the United States had no jurisdiction over the ocean bottom of the Gulf of Mexico beyond the territorial waters adjacent to the coast and that therefore it was not in a position to grant a lease on this area. . . .

"Furthermore, the United States did not dispute the actions taken by the two States." H. R. Rep. No. 215, 83d Cong., 1st Sess. 25–26. And see note 18, *infra*.

See, *e. g.*, as to Louisiana, the statement of Miss Lucille May Grace, Register, State Land Office, State of Louisiana:

"[I]t strikes me as being highly incongruous that the Department of the Interior of the Federal Government, at this late date, should assert the slightest claim to such lands for it was in 1908 and again in 1915 that the General Land Office of the Department of the Interior wrote to the Federal land office of Louisiana, said records now being a part of the records of my office, explaining that certain lands beneath tidewaters belonged to Louisiana by her right of sovereignty, and that the State of Louisiana had made a mistake in applying 'to select such lands under the Swamp Lands Act.' . . .

"Let me respectfully request and urge your favorable consideration of this resolution in order that my State and all States, as well as the business interests of our country, who have in the past spent such high sums of money and who plan to invest greater sums in the future in the oil and gas development of our natural resources, will feel assured that our claims to such areas are recognized by all persons—once and for all—claims that we have considered sacred and valid in my State since Louisiana was admitted to the Union in 1812." Joint Hearings before House Committee on Judiciary, Senate Special Judiciary Subcommittee on H. J. Res. 118, etc., 79th Cong., 1st Sess. 82–83.

arguments, strongly supported by evidence and concessions, Congress did not limit its grant to the Gulf States to three miles of submerged lands, but granted a belt extending all the way to each State's "*boundaries* . . . as they existed at the time such State became a member of the Union . . . but in no event . . . more than . . . three marine leagues into the Gulf of Mexico. . . ." 43 U. S. C. § 1301 (b). We have upheld the power of Congress to convey these marginal lands to the States. *Alabama* v. *Texas,* 347 U. S. 272.

The statute neither defines the kind of "boundary" which is to measure Congress' grants to these States, nor particularizes the criteria for deciding it. We may agree with the Government that the term "boundary" was used here in its usual sense to mean the limit of territory, which, in the case of a coastal boundary, would mean the outer limit of the territorial sea. But this does not get us very far in determining the location of these States' boundaries. For a number of reasons I cannot accept the Government's contention that each State must show a "legal" or "legally accepted" boundary as of the date it became a member of the Union. I cannot see how we can be expected retroactively to reconstruct a technically defined legal boundary, extending out into the lands under the Gulf, if the States never technically owned any of these lands. In *United States* v. *California,* 332 U. S. 19, and the cases which followed it, this Court held that the States of California, Texas and Louisiana did not own or have title to the offshore lands they claimed. If we were now to hold that these States must prove technical title as of the early 1800's in order to satisfy the Submerged Lands Act and that they have succeeded in doing so, we would in effect be overruling our prior cases, cases expressly accepted by Congress as declaring the law when the 1953 Act was passed. I cannot believe that Congress intended us to try to use again the same "legal" test of ownership

we had applied in holding that the States did not own any part of their marginal lands, particularly since Congress passed the 1953 Act to allow the States' rights to be determined under established equitable, not strictly legal, principles. The opinion of MR. JUSTICE DOUGLAS forcefully points out the difficulty, if not the impossibility, of finding that any of these States ever had a technical legal boundary out in the ocean. Even if a technical determination of boundaries were intended by Congress, rather than attempt that impossible task, I would prefer to return the Act to Congress for a more precise expression of its will. Cf. *United States* v. *Alcea Band of Tillamooks,* 329 U. S. 40, 54 (concurring opinion); *Northwestern Bands of Shoshone Indians* v. *United States,* 324 U. S. 335, 354–358 (concurring opinion).

Moreover, the Submerged Lands Act prescribes no standards for determining a strictly "legal" boundary according to the conveyancer's art. There are, of course, no markers out in the Gulf of Mexico to show where the boundaries were when the States were admitted. Since some were admitted anywhere from 140 to 150 years ago there are no living witnesses to testify where their boundaries were at that time. But despite these difficulties, it is our duty to give effect to the congressional act as best we can. It is therefore my view that since we cannot look to legalistic tests of title, we must look to the claims, understandings, expectations and uses of the States throughout their history. This is because of the congressional expressions, stated time and time again that the Act's purpose was to restore to the States what Congress deemed to have been their historical rights and powers. Nor can I accept the Government's argument that these States' interests in the marginal seas must be determined in accord with the national policy of foreign relations. Everything in the very extended congressional hearings and reports refutes any such idea. Instead,

these sources indicate that Congress passed the Act to apply broad principles of equity—not as we see it but as Congress saw it.[8] In determining the boundaries of these States, we must, I think, recognize and follow the same principles if we are to effectuate the congressional purpose that produced this Act. That is what I would do. A few references to the legislative background will illustrate the guides Congress intended we should apply in interpreting its Act.

Senator Ellender of Louisiana invoked the equitable sense of Congress.[9] Senator Holland of Florida, the author of the bill, urged Congress to "look into the equi-

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[8] Under the heading, "Equity best served by establishing State ownership," the earlier Senate Report incorporated in the Report on the 1953 Act summarizes the equitable features involved:

"The repeated assertions by our highest Court for a period of more than a century of the doctrine of State ownership of all navigable waters, whether inland or not, and the universal belief that such was the settled law, have for all practical purposes established a principle which the committee believes should as a matter of policy be recognized and confirmed by Congress as a rule of property law.

"The evidence shows that the States have in good faith always treated these lands as their property in their sovereign capacities; that the States and their grantees have invested large sums of money in such lands; that the States have received, and anticipate receiving large income from the use thereof, and from taxes thereon; that the bonded indebtedness, school funds, and tax structures of several States are largely dependent upon State ownership of these lands; and that the legislative, executive, and judicial branches of the Federal Government have always considered and acted upon the belief that these lands were the properties of the sovereign States.

"If these same facts were involved in a dispute between private individuals, an equitable title to the lands would result in favor of the person in possession. . . ." S. Rep. No. 133, 83d Cong., 1st Sess. 67, reprinting S. Rep. No. 1592, 80th Cong., 2d Sess.

To the same effect is the conclusion of the 1953 Report: "By this joint resolution the Federal Government is itself doing the equity it expects of its citizens." *Id.*, at 24.

[9] 99 Cong. Rec. 4393–4394.

ties and the moral considerations that are involved. . . ." [10] The presiding officer of the Senate Committee, who conducted the hearings and reported the bill, told the Congress that "justice, equity, and the best interests of the Nation will be served by the enactment of this legislation." [11] The Senate Committee Report on an earlier bill, printed and adopted as a part of the Report on the 1953 Act, declared that "The Congress, in the exercise of its policy powers, is not and should not be confined to the same technical rules that bind the courts in their determination of legal rights of litigants. . . . The committee believes that, as a matter of policy in this instance, the same equitable principles and high standards that apply between individuals, should be applied by Congress as between the National Government and the sovereign states." [12] The very last paragraph of the report on the bill referred to it as "an act of simple justice to each of the 48 States in that it reestablishes in them as a matter of law that possession and control of the lands beneath navigable waters inside their boundaries which have existed in fact since the beginning of our Nation. It is not a gift; it is a restitution." [13]

Congress has thus repeatedly emphasized its desire to have the States' rights in these submerged lands determined not under "technical rules" but, as the Senate Committee said, in accordance with "equitable principles and high standards" of justice.[14] To point out specifically

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[10] Hearings before the Senate Committee on Interior and Insular Affairs on S. J. Res. 13, etc., 83d Cong., 1st Sess. 69.

[11] 99 Cong. Rec. 4382.

[12] S. Rep. No. 133, 83d Cong., 1st Sess. 68, 67. And see statement of Senator Daniel in the Hearings before the Senate Interior and Insular Affairs Committee on S. J. Res. 13, etc., 83d Cong., 1st Sess. 695.

[13] *Id.*, at 24.

[14] Text accompanying note 12, *supra*.

what it meant, that Committee referred to three similar cases of this Court. One, which is illustrative, was *Indiana* v. *Kentucky,* 136 U. S. 479.[15] That case involved a boundary dispute between Indiana and Kentucky. The crucial question was the determination in 1890 of the location of the Kentucky boundary when Kentucky became a State in 1792. That same kind of backward-looking determination of boundaries is involved here with reference to the Gulf States. In the *Indiana-Kentucky* case, as here, there were no satisfactory markers, and testimony of living witnesses was deemed to be of little value. There was much evidence in the *Indiana-Kentucky* case, however, that Kentucky had exercised authority over the disputed territory since it first became a State and that Indiana had never challenged the boundary or the authority of Kentucky. Emphasizing the great value of that evidence this Court said: "This long acquiescence in the exercise by Kentucky of dominion and jurisdiction over the island is more potential than the recollection of all the witnesses produced on either side. . . . It is a principle of public law universally recognized, that long acquiescence in the possession of territory and in the exercise of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority." 136 U. S., at 510. The Court went on to quote the following from *Rhode Island* v. *Massachusetts,* 4 How. 591, 639, "For the security of rights, whether of States or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be invoked with greater justice and propriety than in a case of disputed boundary." 136 U. S., at 511.

[15] The other two cases were *United States* v. *Texas,* 162 U. S. 1, and *New Mexico* v. *Texas,* 275 U. S. 279. S. Rep. No. 133, *supra,* at 67.

Accepting, as I think we should, the desire of Congress to have the ancient boundaries of these Gulf States determined on the basis of their long-unchallenged claims, rather than by the use of subtle and refined legal inferences, I am led to the conclusion that the other Gulf States, as well as Texas, are entitled to prevail over the Government here. It is admitted that prior to 1937 the United States never claimed any title to, or exercised any possession over, any part of these marginal lands, either within or without three-mile limits, except under grants from the States. On the other hand, each of the Gulf States began to exercise acts of possession, ownership, dominion and sovereignty over the marginal belt from the time of admission into the Union, without regard to any three-mile limit.[16] The hearings of Congressional Committees show and their reports assert that very large sums of money have been spent by the States and their public agencies and grantees in the development and improvement of the marginal submerged lands adjacent to the States' borders.[17] Not only have the States' posses-

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[16] See note 5, *supra*.

[17] "States and their grantees have expended millions of dollars to build piers, breakwaters, jetties, and other structures, to install sewage-disposal systems and to fill in beaches and reclaim lands. During the past two decades California, Louisiana, and Texas have been leasing substantial portions of the lands in question for oil, gas, and mineral development. California commenced such leasing in 1921 and Texas in 1926. Other States, including Washington, Florida, Mississippi, North Carolina, and Maryland, have made leases for like purposes. States have levied and collected taxes upon interests in and improvements on these lands. It appears to the committee that the States have exercised every sovereign right incident to the utilization of these submerged coastal lands." S. Rep. No. 133, 83d Cong., 1st Sess. 64, from S. Rep. No. 1592, 80th Cong., 2d Sess. Senator Holland placed the figure at "billions of dollars of invested money." Hearings before the Senate Interior and Insular Affairs Committee on S. J. Res. 13, etc., 83d Cong., 1st Sess. 74.

sion, dominion and sovereignty over these marginal belts been open and notorious, but that is coupled with the fact that for much more than a century federal departments and agencies not only acquiesced in but unequivocally recognized the States' rightful claims to these belts.[18] It is conceded that in many instances the Government itself has deemed it necessary to acquire title from these States before attempting to exercise any power of its own.[19] There is nothing to indicate that the claims or uses of the marginal lands were ever limited to three miles. Certainly there is no evidence before us, and there was none before the Congress, that up to 1937 the United States had ever attempted to limit the sovereignty of the Gulf States within boundaries three miles from their coasts. On the other hand, evidence considered by the Congressional Committees and argued to us provides ample support for holding that the Gulf States did not consider their boundaries as limited to three miles.

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[18] President Truman, in his veto message of S. J. Res. 20, 82d Cong., 2d Sess., acknowledged that, "Even so careful and zealous a guardian of the public interest as the late Secretary of the Interior, Harold Ickes, at first assumed that the undersea lands were owned by the States." H. R. Rep. No. 215, 83d Cong., 1st Sess. 104. And the Senate Report noted that "The facts are conclusive that at least prior to 1937 the policy of the executive departments of the Government has consistently been to recognize State ownership of the submerged lands, whether inland or not, within the territorial jurisdiction of the State." S. Rep. No. 133, 83d Cong., 1st Sess. 65, from S. Rep. No. 1592, 80th Cong., 2d Sess. A letter to this effect written by Secretary Ickes in 1933 was read at the Hearings before the Senate Interior and Insular Affairs Committee on S. J. Res. 13, etc., 83d Cong., 1st Sess. 68. And see note 7, *supra,* and accompanying text.

[19] Senator Holland mentioned an incomplete list prepared by California of 195 such instances involving all coastal States, and he discussed two specific grants from Florida to the Federal Government. Hearings before the Senate Interior and Insular Affairs Committee on S. J. Res. 13, etc., 83d Cong., 1st Sess. 63–64, 65, 66, and see Senator Daniel's statement at 233.

The constitutions of all these States defined their boundaries when they were admitted into the Union. The first Texas Constitution kept in force the same boundary, three leagues into the Gulf, claimed for the Republic of Texas before it became a State.[20] This definition was presented to Congress as a reason why Texas should be granted three leagues. The constitutions of all of the other States involved here defined their coastal boundaries as extending from one Gulf point to another "including all islands" three or six leagues from the shore or coastline. The legislative history of the Submerged Lands Act shows that these definitions were repeatedly called to the attention of Congress as a reason why these Gulf States should be granted three leagues or more.[21] From the standpoint of the paper boundary

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[20] Texas Const., 1845, Art. XIII, § 3, continued in effect "All laws . . . in force in the Republic of Texas," thus including the 1836 Boundary Act. Republic of Texas Boundary Act, December 19, 1836, 1 Laws of the Republic of Texas 133 (3 leagues).

[21] These provisions are found in Ala. Const., 1819, preamble (6 leagues); Miss. Const., 1817, preamble (6 leagues); La. Const., 1812, preamble (3 leagues).

From the beginning of the congressional hearings on the matter of the submerged lands, it has been clear to Congress that all the Gulf States' constitutional definitions of their boundaries have been a basis of their claims, without regard to the slight differences in language. These claims reappeared throughout the hearings. For illustration, an eight-page opinion of Dean Borchard of Yale appeared as "Appendix B" to S. Rep. No. 1260, 79th Cong., 2d Sess., as early as 1946. He stated: "Examining the conduct of the States we find a series of provisions in State constitutions and statutes in which several States, *e. g.*, Alabama, Florida, Georgia, Mississippi, Texas, and Louisiana, lay claim to a maritime boundary of 3 leagues, 6 leagues, or more." *Id.*, at 16.

During the 1953 hearings Senator Long of Louisiana was concerned by statements made by Senator Holland of Florida, the author of the bill, to the effect that only Florida and Texas would be entitled to three leagues.

"Senator LONG. May I ask the Senator a question concerning my

claims, Texas urges, on the basis of the more precise definition of its seaward boundary, that it has a stronger case than the other States. Although all these paper claims were considered by Congress, none was treated as decisive of the question of state boundaries, as is clearly shown by Congress' refusal to make Texas and Florida [22] the exclusive beneficiaries of this Act simply because their constitutions had specifically defined a three-league seaward boundary. Nevertheless, each constitutional definition provides some color of title for each State's claim of a boundary extending at least three leagues from its coastline. The paper claims of each State, therefore, merely add some weight to the overwhelming fact, as Congress saw it, that for more than 100 years all the Gulf States exercised the only possession, dominion and sovereignty over the submerged lands adjacent to their coastlines that was ever exercised at all. The admitted facts with reference to these state boundaries thus entitle all the States to three-league marginal belts, if we fairly apply the equitable principles of prescription under which Congress declared this controversy between the Federal Government and the Gulf States should be settled.[23]

State? When Louisiana came into the Union, it is my recollection that the enabling act which was passed by Congress described the boundaries of Louisiana as including all islands within 3 leagues of the coast. . . ."

To this Senator Holland replied, "The Senator from Florida has read and studied to some extent the question which the Senator from Louisiana has mentioned. The Senator from Florida thinks that the coast of Louisiana is that rim of islands, but the court might not so find when it went before the court." Hearings before the Senate Interior and Insular Affairs Committee, 83d Cong., 1st Sess. 48.

[22] By another opinion, handed down this day, we have held that Florida is entitled to a three-league marginal belt because Congress in 1868 expressly approved the Florida Constitution which precisely defined a three-league seaward boundary. *United States* v. *Florida*, *post*, p. 121.

[23] See text accompanying notes 12 and 15, *supra*.

The result of the Court's holding in this and the *Florida* case [24] is that Texas and Florida will have marginal belts that uniformly extend three leagues from their shores. The other Gulf States, however, are not so fortunate. Their boundaries will extend only three miles in some places. The Government concedes, however, that their boundaries extend three miles beyond the coastline of their islands—which may be as far as six leagues from the mainland. Thus, Louisiana, Mississippi and Alabama will have irregular saw-toothed boundaries projecting six leagues at some points and retreating to within three miles of the mainland at other points. This condition follows from the Government's concession that all lands between the States' islands and the mainland are lands beneath inland waters. The mere exercise of jurisdiction over such jagged boundaries as these raises serious problems. Moreover, there is an element of fundamental unfairness about granting Texas and Florida ownership and sovereignty over three-league marginal belts while denying it to their sister States bordering the Gulf of Mexico. This is bound to frustrate the intent of Congress to settle this whole Gulf States controversy at this time.

The unfairness of the Court's result is particularly emphasized when we consider the plight in which it leaves Louisiana. One of the grounds that Congress assigned for its desire to restore these lands to the States was its strong belief that the States rather than the Federal Government should exploit their offshore oil. This desire rested on two conclusions: (1) that the States would do it better and more effectively for the interests of the public at large,[25] and (2) that it would be unconscionable

[24] See note 22, *supra*.

[25] "The committee believes that failure to continue existing State control will result in delaying for an indefinite time the intensive development now under way on these lands and that any delay is, in the words of Secretary Forrestal, 'contrary to the best interest of the

to take this oil away from the States after they had been solely responsible for bringing it into the public use.[26] The record shows that Louisiana had leased land out more than three leagues from its coastline as early as 1920.[27] There are still oil wells out there. For many years royalties from those wells have gone into the public treasury of the State of Louisiana. This income has become a part of the very life of the State.[28] It constitutes a large part

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United States from the viewpoint of national security.' . . . Local controls and promptness of action are highly desirable. The fixed, inflexible rules and the delays and remoteness which are inseparable from a centralized national control would, in the committee's judgment, be improvident." S. Rep. No. 133, 83d Cong., 1st Sess. 70, 71, from S. Rep. No. 1592, 80th Cong., 2d Sess.

[26] "Therefore, the committee concludes that in order to avoid injustices to the sovereign States and their grantees, legislative equity can best be done by the enactment of S. 1988." *Id.*, at 68. And see notes 8–19, *supra*.

[27] See discussion in Hearings before the Senate Interior and Insular Affairs Committee on S. J. Res. 13, etc., 83d Cong., 1st Sess. 341, and Joint Hearings before House Committee on Judiciary, Senate Special Judiciary Subcommittee on H. J. Res. 118, etc., 79th Cong., 1st Sess. 82.

[28] See note 7, *supra,* for the statement of the Louisiana Registrar in 1945. She also said:

"For the fiscal year of 1944 my report shows that I have collected five and a half millions of dollars from this source. In fact the most productive area in the entire State is that in the maritime belt, or from lands beneath the tidewaters. . . .

"I would think that you gentlemen will readily understand what revenues of this size mean to the financial structure of Louisiana. . . . Terrebonne Parish, which is situated on the coast of Louisiana, received in 1944 $45,500 from the oil and gas production. Said funds are expended by the police jury for the benefit of the parish. It should certainly be obvious what this loss of revenue would mean to the taxpayers not only of this one parish but of the entire State." Joint Hearings before House Committee on Judiciary, Senate Special Judiciary Subcommittee on H. J. Res. 118, etc., 79th Cong., 1st Sess. 82.

See note 8, *supra,* for the listing by Congress of these factors as

of the support of the State's public-school system. To take these marginal lands away from the State of Louisiana and give Texas the lands it claims—when Texas apparently has no wells at all beyond the three-mile limit—seems to me completely incompatible with the kind of justice and fairness that the Congress wanted to bring about by this Act. Moreover, I am not at all sure but that this result will completely upset the congressional desire to bring about once and for all a settlement of this long-standing controversy by passage of the Submerged Lands Act.[29]

Nothing in the Act itself indicates that Texas was to be given any more consideration in this case than Louisiana, Mississippi and Alabama. Had Congress wanted to give the land to Texas and refuse to give it to the other States it easily could have done so. In fact, this was specifically suggested to Congress by the Attorney General of the United States, and the Congress rejected it.[30] Time and again Congress emphasized that its interests were focused on the problem of these lands because of the unfairness it saw in taking them from the Gulf States.

As Congress indicated, it is time that the problem be solved, the title be quieted and the controversy be stilled.[31]

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going to the equity of the States' ownership (*e. g.*, "that the bonded indebtedness, school funds, and tax structures of several States are largely dependent upon State ownership of these lands . . . ." S. Rep. No. 133, 83d Cong., 1st Sess. 67).

[29] See note 31, *infra*.

[30] "In order that there may be no misunderstanding, generally speaking what we have in mind is the 3-mile line, except for the coasts of Texas and the west coast of Florida, where 3 leagues would generally prevail." Hearings before the Senate Committee on Interior and Insular Affairs on S. J. Res. 13, etc., 83d Cong., 1st Sess. 957. And see 926, 931–933, 957–958, and Senator Jackson's comments, at 279–281.

[31] "The committee deems it imperative that Congress take action at the earliest possible date to clarify the endless confusion and multi-

In my judgment to interpret this Act in a way which grants the land to Texas and Florida and withholds it from the other Gulf States simply prolongs this costly and disquieting controversy. It will not be finally settled until it is settled the way Congress believes is right, and I do not think Congress will believe it right to award these marginal lands to Texas and Florida and deny them to the other Gulf States.

MR. JUSTICE DOUGLAS, dissenting in part.

Texas was admitted to the Union in 1845 (9 Stat. 108) pursuant to a prior Joint Resolution (5 Stat. 797) which reserved for adjustment by the United States "all questions of boundary that may arise with other governments." Texas as early as 1836 had claimed, as the opinion of the Court shows, a seaward boundary of "three leagues from land." Such a claim conflicted with our national policy in the Gulf, since the United States before then had in treaties with Spain (8 Stat. 252) and with Mexico (8 Stat. 372) described the boundaries between the two countries west of the Mississippi as commencing "on the Gulf of Mexico, at the mouth of the river Sabine, in the sea." Moreover the Convention of 1838 to establish the boundary between the United States and Texas (8 Stat. 511) agreed to the running and marking of "that portion of the said boundary which extends from

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tude of problems resulting from the California decision, and thereby bring to a speedy termination this whole controversy. Otherwise inequities, injustices, vexatious and interminable litigation, and the retardment of the much-needed development of the resources in these lands will inevitably result. . . . We are certain that until the Congress enacts a law consonant with what the States and the Supreme Court believed for more than a century was the law, confusion and uncertainty will continue to exist, titles will remain clouded, and years of vexations and complicated litigation will result." S. Rep. No. 133, 83d Cong., 1st Sess. 57, 61, from S. Rep. No. 1592, 80th Cong., 2d Sess.

the mouth of the Sabine, where that river enters the Gulph of Mexico, to the Red River." Certainly in that Convention Texas was not going so far as to claim, as she had earlier, "three leagues" into the Gulf.

I agree with the Court that there was nothing done at or subsequent to that time to approve the Texas claim to three leagues from land unless it be the Treaty of Guadalupe Hidalgo signed on February 2, 1848, 9 Stat. 922, by the United States and Mexico and which, *inter alia,* fixed the "boundary line between the two republics" in the Gulf of Mexico "three leagues from land, opposite the mouth of the Rio Grande." Can we say that the United States sat at that conference table negotiating for Texas and her boundary claim? Was the seaward boundary once claimed by Texas now claimed by the United States in recognition that Texas owned it?

There is not a word in the history of the negotiations to indicate that the United States had moral or legal claim to the three-league belt because of the earlier claim of Texas. There is no suggestion that the United States claimed derivatively from the right of Texas and thus upheld the position of Texas, approving the claim made by Texas in 1836. There is not a word indicating that the Treaty of 1848 was in form or in essence an undertaking by Congress to fix the boundaries of Texas under the 1838 Convention.

The terms of the 1838 Convention do not support any such construction for, as I have said, that Convention fixed the boundary as extending "from the mouth of the Sabine, where that river enters the Gulph of Mexico," not "three leagues" seaward of that point. To conclude, therefore, that the Treaty of Guadalupe Hidalgo was intended to fix the land and sea boundaries of Texas in accordance with the Texas Boundary Act of 1836 is to indulge in mental gymnastics beyond my capacities. The agreement by the United States to fix the bound-

aries of Texas was not contained in the unilateral act of Texas reflected in her 1836 statute but by the Convention of 1838 which required the seaward boundary to extend from "the mouth of the Sabine, where that river enters the Gulph of Mexico." The obligation in this Convention thus is at war with any inference that the seaward boundary was to be "three leagues" from shore. Cf. *United States* v. *Texas*, 162 U. S. 1, 32.

While the 1838 Convention failed to include any seaward territory, a Joint Commission appointed to make the survey pursuant to the 1838 Convention actually marked the boundary between the United States and the Republic of Texas at the mouth of the Sabine River—not three leagues into the Gulf of Mexico.[1]

It is true that the Joint Resolution of 1845 (5 Stat. 797) called for the formation of Texas "subject to the adjustment by this government of all questions of boundary that may arise with other governments." But the situation envisaged by that clause soon changed. The Mexican war broke out in 1846; and the Treaty of Guadalupe Hidalgo finally brought it to a close. By the time the treaty negotiations started the United States was thinking in new dimensions. The problem was no longer finding and establishing what the Texas boundaries had been. We then put that question to one side. The instructions to

[1] The Journal of the Joint Commission under date of May 21, 1840, states:

". . . we proceeded to the entrance of the Sabine river into the Gulf of Mexico, and then, in virtue of our respective powers, and in conformity to the provisions of the convention between the two countries concluded at Washington the 25th day of April, 1838, we established the point of beginning of the boundary between the United States and the republic of Texas at a mound on the western bank of the junction of the river Sabine with the sea. . . . The mound was made by throwing up earth in a circular form of fifty feet in diameter, and about seven feet high at its centre. . . ." S. Doc. No. 199, 27th Cong., 2d Sess. 59.

our representative, Nicholas P. Trist, which included a projet of the Treaty, read in part, "The extension of our boundaries over New Mexico and Upper California, for a sum not exceeding twenty millions of dollars, is to be considered a *sine qua non* of any treaty. You may modify, change, or omit the other terms of the projet if needful, but not so as to interfere with this ultimatum." [2] If Lower California was included, Trist was authorized to pay up to $25,000,000.[3] Trist recorded at his first conference with the Mexican Commissioners that "our claim for extension of territory" was placed "on the ground of *indemnity* for the expenses of the war." [4] The acquisition of territory from Mexico as indemnity was repeated over and again by President Polk in his message of December 7, 1847.[5] Thus he said, ". . . if no Mexican territory was acquired, no indemnity could be obtained." [6] Again, "[t]he doctrine of no territory is the doctrine of no indemnity." [7] And what he went on to say should remove any doubts about the nature of the controversy with Mexico. First, it will be apparent from what follows that "three leagues" were not a part of his thinking when it came to the seaward boundary. Second, it is obvious that

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[2] S. Exec. Doc. No. 52, 30th Cong., 1st Sess. 83.

[3] *Id.*, at 82.

[4] His first conference on January 2, 1848, was described in his own words as follows:

"President's message referred to by the Mexican Commissioners as founding our claim for extension of territory on the ground of *indemnity* for the expenses of the war. The causes of the war, & the question of *justice* in respect thereto, viewed by Mexico in a totally different light from that in which they are presented in the message. They propose *arbitration* as the first mode of settling this question and of determining the measure of indemnity justly due to the U. States. . . ." Papers of Nicholas P. Trist (Library Cong. 1917), Vol. 27, fol. 61009.

[5] H. R. Exec. Doc. No. 8, 30th Cong., 1st Sess. 3.

[6] *Id.*, at 8.

[7] *Ibid.*

the sole preoccupation was with the acquisition of land from Mexico.[8]

> "The commissioner of the United States was authorized to agree to the establishment of the Rio Grande as the boundary, *from its entrance into the Gulf* to its intersection with the southern boundary of New Mexico, in north latitude about thirty-two degrees, and to obtain a cession to the United States of the provinces of New Mexico and the Californias, and the privilege of the right of way across the isthmus of Tehuantepec. The boundary of the Rio Grande, and the cession to the United States of New Mexico and Upper California, constituted an ultimatum which our commissioner was, under no circumstances, to yield.
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> "That it might be manifest not only to Mexico, but to all other nations, that the United States were not disposed to take advantage of a feeble power, by insisting upon wresting from her all the other provinces, including many of her principal towns and cities, which we had conquered and held in our military occupation, but were willing to conclude a treaty in a spirit of liberality, our commissioner was authorized to stipulate for the restoration to Mexico of all our other conquests.
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> "As the territory to be acquired by the boundary proposed might be estimated to be of greater value than a fair equivalent for our just demands, our commissioner was authorized to stipulate for the payment of such additional pecuniary consideration as was deemed reasonable." (Italics added.)

And when the Treaty had been ratified by both countries and President Polk reported to Congress, he did not speak of settlement of any boundaries of the former State

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[8] *Id.*, at 8–9.

of Texas. He stated, "The extensive and valuable territories ceded by Mexico to the United States constitute indemnity for the past." [9] And he expounded on the valued additions of New Mexico and Upper California to our domain.[10] There is no mention of any settlement of any claim of Texas to a seaward boundary "three leagues" off shore. Nor is there any reference to any boundary settlement based on old Texas claims. This is not surprising, for the Treaty of Guadalupe Hidalgo was part of our empire building, not the determination of old boundaries.

The Treaty of Guadalupe Hidalgo has until now never been considered to have played any part in determining any Texan boundary question. As stated by the Court in *United States* v. *Texas,* 162 U. S. 1, the boundary question was resolved by the Act of September 9, 1850 (9 Stat. 446). After quoting the 1836 Act by which Texas claimed "three leagues from land" as her seaward border, the Court went on to say:

> "This boundary had not been defined when Texas was admitted as a State into the Union, with the territory 'properly included within and rightfully belonging to the Republic of Texas.' The settlement of that question, together with certain claims made by Texas against the United States, were among the subjects that engaged the attention of Congress during the consideration of the various measures constituting the Compromises of 1850. The result was the passage of the above act of September 9, 1850, c. 49, the provisions of which were promptly accepted by the State of Texas. This legislation of the two governments constituted a convention or contract in

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[9] President's Message to Congress, July 6, 1848, S. Exec. Doc. No. 60, 30th Cong., 1st Sess. 1.

[10] *Id.,* at 2.

> respect of all matters embraced by it. The settlement of 1850 fixed the boundary of Texas 'on the north' to commence at the point at which *the 100th meridian* intersects the parallel of 36° 30′ north latitude, and from that point the northern line ran due west to the 103d meridian, thence due south to the 32d degree of north latitude, thence on that parallel to the Rio Bravo del Norte, and thence with the channel of that river to the gulf of Mexico." 162 U. S., at 39.

Drawing the line "to the Gulf of Mexico" is a far cry from drawing it to a point "three leagues" from the shore. What we do today is quite inconsistent with what a unanimous Court in *United States* v. *Texas, supra,* decided in 1896. What the Court said was not decided until 1850 we now say was decided earlier.

Though the United States and Mexico by the Treaty of Guadalupe Hidalgo established land boundaries between the two countries, Congress never recognized that the Treaty established any boundaries of Texas. In her 1836 statute, Texas not only claimed the three-league belt in the Gulf of Mexico but also much of the territory lying west and north of her present boundaries, including eastern New Mexico which, like the three-league belt, was acquired under the Treaty by the United States. Congress in the 1850 compromise paid Texas $10,000,000 to relinquish its claim to this territory. Yet this payment was regarded by Congress not as purchase price but as settlement of a disputed claim.[11] Accordingly, it was early held that eastern New Mexico, though claimed by Texas, was not brought into the Union by the Joint

[11] See Message of President Fillmore to Congress, Aug. 6, 1850, Cong. Globe, 31st Cong., 1st Sess. 1525–1526; letter from Daniel Webster, Secretary of State, to P. H. Bell, Governor of Texas, Aug. 5, 1850, *id.*, at 1526–1527; remarks of Senator Pearce, sponsor of the bill, *id.*, at 1540–1542.

Resolution of 1845 and that the Treaty of Guadalupe Hidalgo did not establish what the Texas boundaries had been at the time of its annexation. *De Baca* v. *United States,* 36 Ct. Cl. 407 (1901). I cannot understand how the Treaty can be said to have established a seaward boundary when it did not fix the inland boundaries of Texas. The Court does not suggest that all the land claimed by Texas in her 1836 statute and subsequently ceded to the United States in the Treaty of Guadalupe Hidalgo was "territory properly included within, and rightfully belonging to the Republic of Texas" within the meaning of the Joint Resolution of 1845. Yet I can see no basis for deciding that the Treaty, though not recognizing the validity of the western boundary claims of Texas, did establish and fix other Texas boundaries.[12] If

[12] The Court suggests, *ante,* note 100, that while the United States pressed Texas' claim to the three-league belt, Texas' claim to eastern New Mexico "obviously was not pressed against Mexico on Texas' behalf." Yet the evidence relied upon by the Court in finding that the United States pressed the Texas claim to a three-league belt supports no such distinction. The statement of President Polk to Congress (H. R. Exec. Doc. No. 60, 30th Cong., 1st Sess. 4, 7) said, "The Congress of Texas, by its act of December 19, 1836, had declared the Rio del Norte to be the boundary of that republic." The instructions to John Slidell (S. Exec. Doc. No. 52, 30th Cong., 1st Sess. 75) read, "The Congress of Texas, by the act of December 19, 1836, have declared the Rio del Norte, from its mouth to its source, to be a boundary of that republic." The Court relies on this evidence in finding that the United States was confirming the claims in the Texas act of 1836, insofar as it related to a seaward boundary but not insofar as the act claimed ownership of all land lying east of the Rio Grande. Since these communications expressly referred to the Texas claim to the territory east of the Rio Grande, from its mouth to its source, which included eastern New Mexico, whereas they were wholly silent on any claim to a seaward territory, the Court's conclusion that the seaward claim was pressed and approved while some territorial claims were not, seems fanciful to me.

the Government was not negotiating on behalf of Texas in acquiring the eastern New Mexico territory; how can it be said to have done so with respect to the seaward boundary claim?

The southwestern boundary of Texas was confirmed in the 1850 Compromise to lie along the Rio Grande "to the Gulf of Mexico." The 1838 Convention had fixed the eastern boundary at "the mouth of the Sabine." Thus, on the two occasions when the United States and Texas negotiated and agreed upon boundaries and when they would have been most likely to have settled the question, no extension of the Texas territory into the Gulf was recognized. The conclusion for me is irresistable that the seaward boundary, *so far as Texas was concerned,* was so inconsequential as to require or receive no settlement. I conclude that in terms of § 4 of the 1953 Act the boundary of Texas reserved for later adjudication when Texas was admitted to the Union was on its seaward side never approved by Congress to be three leagues from shore.

Why then the reference in the Treaty to the "Boundary line" between the United States and Mexico as "three leagues" from land in the Gulf of Mexico?

The Court says that the United States in negotiating the Treaty attempted to follow the 1836 Texas Act. The projet of the Treaty given to Trist did provide for a boundary line commencing "three leagues from the land opposite the mouth of the Rio Grande." [13] But neither it nor the accompanying instructions made any reference to the 1836 Act of Texas. Trist was not told to take the 1836 Act as his guide when it came to seaward boundaries. I can find nothing in the instructions to Trist which relates his duties in negotiating the Treaty to what Texas had claimed in 1836, nor does the Court refer us to

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[13] S. Exec. Doc. No. 52, 30th Cong., 1st Sess. 86.

any such instruction. To be sure, Trist's predecessor, John Slidell, had been advised by the Secretary of State, Mr. Buchanan, in a letter dated November 10, 1845, that "The Congress of Texas, by the act of December 19, 1836, have declared the Rio del Norte [Rio Grande], from its mouth to its source, to be a boundary of that republic." [14] Trist knew of these earlier instructions.[15] Yet if he followed them literally he would have negotiated a boundary beginning "at the mouth" of the Rio Grande not "three leagues from land opposite the mouth." [16] And, as I have pointed out, the purpose of Trist's mission was much different from that of Slidell's. Slidell was sent to Mexico before the war to settle a boundary dispute. Trist went to obtain the fruits of our conquest of Mexico. The Court concedes that Slidell's instructions demonstrate "total insensitivity to any problem of a seaward boundary." I agree. But I cannot take the additional step that, although our State Department was wholly insensitive to the problem of a seaward boundary, it was nonetheless trying to stand in the shoes of Texas and get Mexico to validate the old boundary claims of Texas. So far as I can deduce, this is sheer speculation.

Much less speculative is the reason advanced in 1875 by Hamilton Fish, Secretary of State.

In 1874 Lord Derby had raised for Great Britain a question with regard to Spain's claim of jurisdiction of

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[14] *Id.*, at 75.

[15] Papers of Nicholas P. Trist (Library of Congress 1917), Vol. 33, fol. 62071.

[16] These instructions authorized Slidell "to pay five millions of dollars in case the Mexican government shall agree to establish the boundary between the two countries from the mouth of the Rio Grande, up the principal stream to the point where it touches the line of New Mexico; thence west of the river along the exterior line of that province, and so as to include the whole within the United States. . . ." S. Exec. Doc. No. 52, 30th Cong., 1st Sess. 78.

two leagues from the Spanish coast.[17] Hamilton Fish replied on January 22, 1875, as follows: [18]

> ". . . I have the honor to inform you that this Government has uniformly, under every administration which has had occasion to consider the subject, objected to the pretension of Spain adverted to, upon the same ground and in similar terms to those contained in the instruction of the Earl of Derby.
>
> "We have always understood and asserted that, pursuant to public law, no nation can rightfully claim jurisdiction at sea beyond a marine league from its coast.
>
> "This opinion on our part has sometimes been said to be inconsistent with the facts that, by the laws of the United States, revenue-cutters are authorized to board vessels anywhere within four leagues of their coasts, and that by the treaty of Guadalupe Hidalgo, so called, between the United States and Mexico, of the second of February, 1848, the boundary line between the dominions of the parties begins in the Gulf of Mexico, three leagues from land.
>
> "It is believed, however, that in carrying into effect the authority conferred by the act of Congress referred to, no vessel is boarded, if boarded at all, except such a one as, upon being hailed, may have answered that she was bound to a port of the United States. At all events, although the act of Congress was passed in the infancy of this Government, there is no known instance of any complaint on the part of a foreign government of the trespass by a commander of a revenue-cutter upon the rights of its flag under the law of nations.

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[17] H. R. Exec. Doc. No. 1, Pt. 1, 44th Cong., 1st Sess. 641.

[18] *Id.*, at 649–650.

> "In respect to the provision in the treaty with Mexico, it may be remarked that it was probably suggested by the passage in the act of Congress referred to, and designed for the same purpose, that of preventing smuggling. By turning to the files of your legation, you will find that Mr. Bankhead, in a note to Mr. Buchanan of the 30th of April, 1848, objected on behalf of Her Majesty's government, to the provision in question. Mr. Buchanan, however, replied in a note of the 19th of August, in that year, that the stipulation could only affect the rights of Mexico and the United States, and was never intended to trench upon the rights of Great Britain, or of any other power under the law of nations."

The Act referred to was that of March 2, 1799 (1 Stat. 627), which provided in § 54 that it shall be lawful for our collectors, naval officers, inspectors, and officers of revenue cutters to board ships bound to the United States "within four leagues of the coast" for the purpose of controlling or preventing smuggling.[19]

That this was the purpose gains collateral support from a series of treaties concluded by Mexico in the latter half

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[19] Chief Justice Marshall writing for the Court in *Church* v. *Hubbart*, 2 Cranch 187, 235, said:

"In different seas and on different coasts, a wider or more contracted range, in which to exercise the vigilance of the government, will be assented to. Thus in the channel, where a very great part of the commerce to and from all the north of Europe, passes through a very narrow sea, the seizure of vessels on suspicion of attempting an illicit trade, must necessarily be restricted to very narrow limits, but on the coast of *South America*, seldom frequented by vessels but for the purpose of illicit trade, the vigilance of the government may be extended somewhat further; and foreign nations submit to such regulations as are reasonable in themselves, and are really necessary to secure that monopoly of colonial commerce, which is claimed by all nations holding distant possessions."

of the nineteenth century with China,[20] the Dominican Republic,[21] El Salvador,[22] France,[23] Germany,[24] the Netherlands,[25] Norway and Sweden,[26] and the United Kingdom,[27] which state that the "three league" belt (or at

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[20] "*Article XI.* . . . The two contracting parties agree upon considering a distance of three marine leagues, measured from the line of low tide, as the limit of their territorial waters for everything relating to the vigilance and enforcement of the customs-house regulations and the necessary measures for the prevention of smuggling." 1 Laws and Regulations on the Regime of the High Seas (United Nations Legislative Series) 147.

[21] "*Article 15.* In all that concerns the police regulations of the ports, the loading and discharging of ships, and the custody of the merchandise and effects, the subjects of the two Powers shall be subject to the local laws and ordinances.

"With respect to Mexican ports, under this title are comprehended the laws and ordinances promulgated, or that may be promulgated in the future, by the federal Government, as also the dispositions of the local authorities within the limits of the sanitary police.

"The contracting parties agree to consider as the limit of the territorial jurisdiction on their respective coasts the distance of twenty kilometres, counted from the line of lowest tide. Nevertheless, this rule shall only be applied for the carrying out of the custom-house inspection, the observance of the custom-house regulations, and the prevention of smuggling; but on no account shall it apply to the other questions of international maritime law.

"It is equally understood that each one of the contracting parties shall not apply the said extension of the limit of jurisdiction to the ships of the other contracting party, except when this contracting Power proceeds in the same manner with the ships of the other nations with which it has treaties of commerce and navigation." *Id.*, at 153, 154.

[22] "*Article XXI.* It is agreed between the High contracting parties that the limit of sovereignty in the territorial waters adjacent to their respective coasts comprises a distance of twenty kilometres, counted from the line of lowest tide: but this rule shall apply only as regards the exercise of the right of police, for the execution of customs ordinances and the prevention of smuggling, and in respect of matters concerning the security of the country. In no case shall such limit be applicable to other questions of international maritime law." *Id.*, at 156. [*Footnotes 23–27 are on pp. 114 and 115.*]

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times a broader one) was being used for certain limited reasons of law enforcement.

These treaties reflect what Hamilton Fish as Secretary of State said about the Treaty of Guadalupe Hidalgo and

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[23] "*Article 15.* . . . The contracting parties agree to consider as the limit of territorial sovereignty on their respective coasts a distance of twenty kilometres from the line of lowest tide.

"At all times this rule shall be applicable only for exercising customs control, for executing customs ordinances, and for the regulations against contraband, and shall never be applied, on the other hand, in all other questions of international maritime law. It is likewise understood that each of the contracting parties will apply said extent of the limit of sovereignty to the vessels of the other contracting party only provided that said contracting party acts likewise toward vessels of other nations with which it has made treaties of commerce and navigation." *Id.*, at 169, 170.

[24] "*Article VIII.* . . . The two contracting parties agree to consider as the limit of maritime jurisdiction on their coasts, the distance of three sea leagues, reckoned from low-water mark. Nevertheless, this stipulation shall not have effect except as regards the coast-guard and custom-house service, and the measures for preventing contraband trade. As regards all other questions of international law it shall have no application. It is, however, to be understood that the aforesaid extension of maritime jurisdiction shall not be made applicable by one of the contracting parties as against the vessels of the other, unless that party shall treat in the same manner the vessels of all other nations with which it may have treaties of commerce and navigation." *Id.*, at 170.

[25] "*Article 6.* The high contracting parties agree to consider, as a limit of their territorial waters on their respective coasts, the distance of twenty kilometres reckoned from the line of low-water mark. Nevertheless this stipulation shall have no effect, except in what may relate to the observance and application of the custom-house regulations and the measures for preventing smuggling, and can in no way be extended to other questions of international maritime law." *Id.*, at 171.

[26] "*Article VII.* . . . The two contracting parties agree to consider as the limit of territorial seas on their respective coasts for the purpose of applying customs regulations and measures necessary for the prevention of smuggling, the distance of three marine leagues reckoned from low-water mark. It is understood, however, that with

its "three league" provision. They show a practice of exercising extraterritorial regulation beyond the usual three-mile limit with respect to customs and smuggling. It is true that the Treaty of Guadalupe Hidalgo speaks in terms of "boundary." But, if it meant "boundary" in the technical property sense, it would mark a line that separated the *territory* of the United States and Mexico and established a territorial claim good against all comers. Our State Department from the beginning insisted that was not intended. When Great Britain protested in 1848 that the Treaty of Guadalupe Hidalgo did not respect the three-mile limit which "is acknowledged by international law and practice as the extent of territorial jurisdiction over the sea that washes the coasts of states," Secretary of State Buchanan's answer (which, as we have noted, Hamilton Fish referred to in his communication of January 22, 1875) was as follows: [28]

> "In answer I have to state, that the stipulation in the treaty can only affect the rights of Mexico and the United States. If for their mutual convenience it has been deemed proper to enter into such an arrangement, third parties can have no just cause of

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respect to other questions of international maritime law, this extension of territorial seas shall not be applied by one of the contracting parties to the vessels of the other, unless that party shall apply it equally to vessels of other nations with which she has concluded treaties of commerce and navigation." *Id.*, at 171–172.

[27] "*Article IV.* . . . The two Contracting Parties agree to consider as a limit of their territorial waters on their respective coasts, the distance of three marine leagues, reckoned from the line of low-water mark. Nevertheless, this stipulation shall have no effect, excepting in what may relate to the observance and application of the custom-house regulations and the measures for preventing smuggling, and cannot be extended to other questions of civil or criminal jurisdiction, or of international maritime law." *Id.*, at 172.

[28] 1 Moore, Digest of International Law (1906), 730.

complaint. The Government of the United States never intended by this stipulation to question the rights which Great Britain or any other power may possess under the law of nations."

That has consistently been our construction. I have already referred to what Secretary Fish said in 1875. When Mexico in 1935 undertook to extend the breadth of Mexican territorial waters from three to nine miles,[29] our Ambassador Josephus Daniels on instructions from the State Department protested, reserving "all rights of whatever nature so far as concerns any effects upon American commerce from enforcement of this legislation." [30] And when Mexico in reply [31] referred to the Treaty of Guadalupe Hidalgo as justifying her claim to nine miles, the State Department reiterated among other things our consistent position that the treaty provision extending the "boundary" into the Gulf for three leagues was included to give the two nations jurisdiction to that distance at that particular point "to prevent smuggling." [32]

It seems apparent from this history that the United States in negotiating the Treaty of Guadalupe Hidalgo was far from determining that the metes and bounds of our property on the seaward side of the Gulf ran to three leagues. The three-league provision in purpose and presumed effect had quite a different aim. It had no aim to assert derivatively a title that Texas had claimed. Its aim was merely to mark a zone where, so far as the two contracting parties were concerned, our law enforcement agencies could maintain effective patrols. If this history shows nothing else, it shows that the United States had a national interest in having the three-league belt recog-

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[29] 1 Hackworth, Digest of International Law (1940), 639.

[30] 99 Cong. Rec. 3623.

[31] *Ibid.*

[32] *Id.*, at 3624.

nized for its own purposes, whereas Texas up to the time oil was discovered offshore placed no value whatsoever on a seaward boundary. For me the argument becomes too thin to say that the United States, though nominally negotiating on her own behalf, was claiming the three-league maritime belt on behalf of Texas.

If we acted today with the precision and meticulous care which is demanded in title disputes, we could not, I think, say that the United States in the Treaty of Guadalupe Hidalgo recognized or approved the Texas claim that the territory of Texas extended three leagues from shore.

Yet if we are to decide these cases by substandards (lessening the requirements of proof as we should do if Congress intended to grant whatever the parties fairly claimed), then I agree with MR. JUSTICE BLACK that the discrimination in favor of Texas and against Louisiana, Alabama, and Mississippi is quite unjustified.

If the southeast corner of Texas was three leagues offshore, it is difficult for me to see how the southwest corner of Louisiana was not at the same point. From the beginning the United States and Spain fixed their corner west of the Mississippi "on the Gulph of Mexico, at the mouth of the river Sabine, in the sea." 8 Stat. 254. If we move the Texas boundary out three leagues, it is hard to see why Louisiana's does not accompany it. It has long been recognized that a part of Louisiana's border is "a water boundary" that extends "to the open sea or Gulf of Mexico," *Louisiana* v. *Mississippi,* 202 U. S. 1, 43, and includes "the deep water sailing channel line as a boundary." *Id.,* at 44.

The enabling Act authorizing the people of the Territory of Orleans to form Louisiana described the territory as running "to the gulf of Mexico; thence bounded by the said gulf . . . including all islands within three leagues of the coast." 2 Stat. 641. The boundaries described

in the Act admitting Louisiana to the Union are similarly described as "to the gulf of Mexico . . . thence bounded by the said gulf . . . including all islands within three leagues of the coast." 2 Stat. 701, 702.

As respects Mississippi, Congress in the Enabling Act (3 Stat. 348) provided that the territory included in the new State would run from a specified point on the Gulf of Mexico, "westwardly, including all the islands within six leagues of the shore." This was the boundary description used since George III of Great Britain described West Florida as "bounded to the southward by the Gulf of Mexico, including all islands within six leagues of the coast." [33]

Alabama when a territory had two of its boundaries described as "thence due south to the Gulf of Mexico, thence eastwardly, including all the islands within six leagues of the shore, to the Perdido river." 3 Stat. 371. This language was repeated in the Enabling Act. 3 Stat. 489.

The United States concedes that, so far as Louisiana, Mississippi and Alabama are concerned, all the submerged lands between the mainland and the islands are sufficiently enclosed to constitute inland waters that passed to the State on its entry into the Union. *Pollard* v. *Hagan,* 3 How. 212. It further concedes that these States have rights to the submerged lands within three miles of the islands under the ordinary three-mile rule.

If we were to require the degree of proof of ownership which is ordinarily required in title disputes, I would agree that neither Louisiana, Alabama, nor Mississippi has met the burden of proof. But if standards and requirements

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[33] American State Papers, 5 Public Lands 756. Both East and West Florida were ceded to the United States by Spain in 1819. 8 Stat. 252, 254.

as lax as those used to grant Texas three leagues from shore are sufficient for her, they should be sufficient for these other three States.

The heart of the Texan claim is that the United States and Mexico recognized that there was a three-league maritime belt which each would respect and that this was done in recognition of the validity of the claims contained in the 1836 statute of Texas. This belt was called a "boundary"; but, as I have tried to demonstrate, it was not a territorial claim but only a demarcation of zones where the parties' respective law enforcement activities would be recognized and approved. The Gulf presents peculiar problems due to its shallow coast. The shallowness of its waters is well documented and our Government was well aware of this condition in 1848.[34] These are the persuasive facts behind the creation of the three-league belt by the Treaty of Guadalupe Hidalgo and by Mexico in the other treaties concerning the Gulf which she negotiated with other nations.

If the policy of measuring the zone of the United States as "three leagues" into the Gulf off the shore of Texas is to give Texas property rights to the submerged lands in that zone, the beneficiaries of that concern should be all our Gulf States. At best the language used to describe the seaward territories of Louisiana, Alabama, and Mississippi is ambiguous. The words "to the Gulf of Mexico . . . including all of the islands" within certain designated leagues of the shore can reasonably mean that the "boundary line" is marked by the islands. There is difficulty in that construction. Yet it is for me no more difficult than the method we use to give Texas a territorial claim in the same belt. All the States on the Gulf

[34] See 7 British and Foreign State Papers 984; 9 British and Foreign State Papers 828–829; 18 British and Foreign State Papers 1403.

should be given the same benefit of the doubts that have been resolved in favor of Texas. The claim of Florida, as shown in *United States* v. *Florida,* decided this day, *post,* p. 121, is fully established by the standard I would ask Texas to meet. If we are to relax the standard of proof for the benefit of Texas, we should do so for all these claimants. In that posture, the claims of each of the other Gulf States which have gone "long-unchallenged," as shown by MR. JUSTICE BLACK, are as clear as those of Texas.

UNITED STATES *v.* FLORIDA ET AL.

ON MOTION FOR JUDGMENT ON THE PLEADINGS.

No. 10, Original. Argued October 12–15, 1959.—
Decided May 31, 1960.

In this suit by the United States under Art. III, § 2 of the Constitution, *held:* The Submerged Lands Act grants Florida a three-marine-league belt of land under the Gulf of Mexico, seaward from its coastline, as described in Florida's 1868 Constitution, which was approved by Congress when Florida was readmitted to representation in Congress after the Civil War. Pp. 121–129.

Solicitor General Rankin and *George S. Swarth* argued the cause for the United States. With them on the brief were *Oscar H. Davis* and *John F. Davis.*

Senator Spessard L. Holland and *Richard W. Ervin,* Attorney General of Florida, argued the cause for the State of Florida, defendant. With them on the brief were *J. Robert McClure,* First Assistant Attorney General of Florida, and *Fred M. Burns, Robert J. Kelly* and *Irving B. Levenson,* Assistant Attorneys General.

MR. JUSTICE BLACK delivered the opinion of the Court.

This controversy involves the interests of all five Gulf States—Florida, Texas, Louisiana, Mississippi and Alabama—in the submerged lands off their shores. The Court heard the claims together, but treats them in two opinions. This opinion deals solely with Florida's claims. The result as to the other States is discussed in one opinion, *ante,* p. 1. All the claims arise and are decided under the Submerged Lands Act of 1953.[1]

The Act granted to all coastal States the lands and resources under navigable waters extending three geographical miles seaward from their coastlines. In addi-

[1] 67 Stat. 29, 43 U. S. C. §§ 1301–1315.

tion to the three miles, the five Gulf States were granted the submerged lands as far out as each State's boundary line either "as it existed at the time such State became a member of the Union," or as previously "approved by Congress," even though that boundary extended further than three geographical miles seaward. But in no event was any State to have "more than three marine leagues into the Gulf of Mexico."[2] This suit was first brought against Louisiana by the United States, *United States* v. *Louisiana*, 350 U. S. 990, invoking our original jurisdiction under Art. III, § 2, cl. 2, of the Constitution, to determine whether Louisiana's boundary when it became a member of the Union extended three leagues or more into the Gulf, as Louisiana claimed, so as to entitle it to the maximum three-league grant of the Submerged Lands Act. After argument on the Government's motion for judgment against Louisiana, we suggested that the interests of all the Gulf States under the Act were so related, "that the just, orderly, and effective

[2] 43 U. S. C. § 1301 (a)(2), (b). Section 1301 (b) provides: "The term 'boundaries' includes the seaward boundaries of a State or its boundaries in the Gulf of Mexico . . . as they existed at the time such State became a member of the Union, or as heretofore approved by the Congress, . . . but in no event shall the term . . . be interpreted as extending from the coast line more than . . . three marine leagues into the Gulf of Mexico." Section 1311 (a) provides: "It is . . . declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States . . . be, and they are, . . . recognized, confirmed, established, and vested in and assigned to the respective States . . . ." And § 1312 provides: "The seaward boundary of each original coastal State is approved and confirmed as a line three geographical miles distant from its coast line . . . . Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State's seaward boundary beyond three geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress."

determination" of the issues required that all those States be before the Court. *United States* v. *Louisiana,* 354 U. S. 515, 516. All are now defendants, each has claimed a three-league boundary and grant, which the United States denies, and the issues have been extensively briefed and argued by the parties. As stated, this opinion deals only with the United States-Florida controversy.

Florida contends that the record shows it to be entitled under the Act to a declaration of ownership of three marine leagues of submerged lands, because (1) its boundary extended three leagues or more seaward into the Gulf when it became a State, and (2) Congress approved such a three-league boundary for Florida after its admission into the Union and before passage of the Submerged Lands Act. Since we agree with Florida's latter contention, as to congressional approval, we find it unnecessary to decide the boundaries of Florida at the time it became a State.

Florida claims that Congress approved its three-league boundary in 1868, by approving [3] a constitution submitted to Congress as required by a Reconstruction Act passed March 2, 1867. 14 Stat. 428. That constitution carefully described Florida's boundary on the Gulf of Mexico side as running from a point in the Gulf "three leagues from the mainland" and "thence northwestwardly three leagues from the land" to the next point.[4] The

[3] The Florida Constitution of 1868, 25 Fla. Stat. Ann. 411, 413, was considered by Congress along with the constitutions of North Carolina, South Carolina, Louisiana, Georgia and Alabama in an Act of June 25, 1868, readmitting those States to "representation in Congress." 15 Stat. 73.

[4] The Florida boundary described in Article I of that State's 1868 Constitution provided in relevant part: ". . . thence southeastwardly along the [Atlantic Ocean] coast to the edge of the Gulf Stream; thence southwestwardly along the edge of the Gulf Stream and Florida Reefs to and including the Tortugas Islands; *thence northeastwardly to a point three leagues from the mainland; thence north-*

United States concedes that from 1868 to the present day Florida has claimed by its constitutions a three-league boundary into the Gulf.[5] The United States also admits that Florida submitted this constitution to Congress in 1868, but denies that the Gulf boundary it defined was "approved" by Congress within the meaning of the Submerged Lands Act.[6] This is the decisive question as between Florida and the United States.

The 1868 Florida Constitution was written and adopted by Florida pursuant to the congressional Act of March 2, 1867[7] as supplemented by a second Act of March 23, 1867.[8] These Reconstruction Acts purported "to provide for the more efficient Government of the Rebel States," including Florida. The States involved were divided into military districts and subjected to strict military authority. Detailed provisions were made for registration of voters, election of delegates to constitutional conventions, the framing of constitutions "in conformity with the provisions" of these Reconstruction Acts, and submission of the constitutions to the people of those States for their ratification and approval—all under the supervision and control of commanding generals. Constitutions so adopted were then to be "submitted to Congress for examination and approval," after which approval by Congress and after ratification of the Fourteenth Amendment by each State, each should be "declared entitled to representation in Congress." Florida's Constitution was writ-

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westwardly three leagues from the land, to a point west of the mouth of the Perdido river; thence to the place of beginning." (Emphasis supplied.)

[5] The Florida Constitution of 1885, 25 Fla. Stat. Ann. 449, is that State's current constitution. Language identical to that set forth above, note 4, *supra*, provides, in the present Article I, for the same three-league boundary described in 1868. *Id.*, 717.

[6] See note 2, *supra*.

[7] 14 Stat. 428.

[8] 15 Stat. 2.

ten, considered and voted upon in the State in accordance with these statutory directions and under the eye and control of an Army general. When submitted to Congress it was much debated, and thereafter on June 25, 1868, another Act was passed authorizing the admission of Florida and other Southern States "to Representation in Congress." [9] 15 Stat. 73. The preamble to this "Admission Act" declared that these States had adopted their constitutions "in pursuance of the provisions" of the 1867 Acts, which Acts, as has been pointed out, required "examination and approval" of the constitutions as a prerequisite to readmission of congressional representation. Thus by its own description, Congress not only approved Florida's Constitution which included three-league boundaries, but Congress in 1868 approved it within the meaning of the 1867 Acts. In turn, the approval the 1867 Acts required appears to be precisely the approval the 1953 Act contemplates.

The Government argues, however, that these readmission enactments did not contemplate and Congress did not make a general scrutiny of all the provisions of the state constitutions, but only that the constitutions had been duly adopted and were republican in form. The Government makes many references to debates which indicated that some Senators and Congressmen were satisfied with such a limited examination of the constitutions.[10] Florida, on the other hand, points out many

[9] Debates on the 1868 Act, including discussions of the constitutions of the States to be readmitted to representation in Congress, are reported at Cong. Globe, 40th Cong., 2d Sess. 2412–2413, 2445–2456, 2461–2466, 2498–2499, 2858–2860, 2861–2872, 2895–2900, 2901–2904, 2927–2935, 2963–2970, 2998–3022, 3023–3029, 3052, 3090–3097, 3466, 3484–3485, App. 314–316, 329–338, 347–354.

[10] See, *e. g.*, the remarks of Senator Sherman. "When we go beyond securing the enforcement of the guaranty of republican government, which we have the power to do, when we undertake to legislate for them upon matters on which they have passed, we transcend our

other remarks which indicated a much closer examination of the state constitutions.[11]

It is beyond doubt that the proposed constitutions were printed, then read, discussed, and amended in the Congress. For instance, the very 1868 bill that admitted Florida's congressional representatives contained a proviso rejecting certain parts of the Georgia Constitution.[12] That at least some Congressmen scrutinized the constitutions to see if amendments were necessary is persuasively shown by the remarks of Congressman Thaddeus Stevens, set out below.[13] Mr. Stevens was Chairman of the

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bounds." Cong. Globe, 40th Cong., 2d Sess. 2969. Senator Williams said: "If I understand the reconstruction laws, it is not necessarily the duty of Congress to revise the constitution of every one of these States . . . [otherwise] we might just as well have made these constitutions at the beginning and sent them down there with instructions to the people to adopt them as the constitutions of the several States." *Id.*, 2999.

[11] In opposing the inclusion of Florida in the Readmission bill, Congressman Paine, a member of the powerful Reconstruction Committee, said: "[I]t has been my duty as a member of the committee to scrutinize this constitution. I ought to explain to the House its character. After I have done that it will be for each member to decide himself whether he will or will not vote for concurrence." Cong. Globe, 40th Cong., 2d Sess. 3091. See also discussion concerning the Arkansas Constitution, note 13, *infra*.

[12] 15 Stat. 73. As to this action a Congressman said: "With a *microscopic view* the Committee on Reconstruction, or a majority of them, *have looked into the details of the constitution of Georgia*, and propose to strike out of it certain provisions." (Emphasis supplied.) Cong. Globe, 40th Cong., 2d Sess. 3094.

[13] "Now, all I have to say is this: this constitution of Arkansas has been before us for four weeks, fairly printed. . . . I think that this constitution is above all suspicion, and *I am a little scrupulous and particular about any constitution I am called upon to vote for*. Now, with a constitution with which I can find no fault, after it has been so long before us, I cannot for a moment conceive that there has not been time enough allowed for all of us to become acquainted with it. And as in equity that is presumed to be done which should be done,

all-important Joint Committee on Reconstruction, and, because of his leading role as architect of the reconstruction plan finally adopted and carried out by Congress, has appropriately been called "the Father of the Reconstruction." [14]

The voluminous references to the Reconstruction debates fail to show us precisely how closely the Southern States' Reconstruction Constitutions were examined. We cannot know, for sure, whether all or any of the Congressmen or Senators gave special attention to Florida's boundary description. We are sure, however, that this constitution was examined and approved as a whole, regardless of how thorough that examination may have been, and we think that the 1953 Submerged Lands Act requires no more than this. Moreover, the Hearings and the Reports on the Submerged Lands Act show, as the Government's brief concedes, that those who wrote into that measure a provision whereby a State was granted up to three leagues if such a boundary had been "heretofore approved by Congress," had their minds specifically focused on Florida's claim based on submission of its 1868 Constitution to Congress. When Florida's claims were mentioned in the hearings it was generally assumed that Congress had previously "approved" its three-

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which ought to be done, therefore it is to be presumed that there is not a man in this House who does not know all about this constitution." (Emphasis supplied.) Cong. Globe, 40th Cong., 2d Sess. 2399. Congressman Stevens was here referring to one State, Arkansas, 500 copies of whose constitution were printed for use of the members of the House of Representatives, Cong. Globe, 40th Cong., 2d Sess. 2333, 2372. The record shows that Florida's Constitution was referred to the Committee on Reconstruction and copies were printed for the use of the House. The congressional history indicates that all the constitutions were given equally close attention.

[14] Brodie, Thaddeus Stevens (1959), 371. See also 17 Dictionary of American Biography (1935), 620, 624, and biographies cited at 625.

league boundaries.[15] The Senate Report on a prior bill, set forth as a part of the report on the 1953 Act, pointed out that "In 1868 Congress approved the Constitution of Florida, in which its boundaries were defined as extending 3 marine leagues seaward and a like distance into the Gulf of Mexico." S. Rep. No. 133, 83d Cong., 1st Sess. 64–65.[16] The language of the Submerged Lands Act was at least in part designed to give Florida an opportunity to prove its right to adjacent submerged lands so as to remedy what the Congress evidently felt had been an injustice to Florida. Upon proof that Florida's claims met the statutory standard—"boundaries . . . heretofore approved by the Congress"—the Act was intended to "confirm" and "restore" the three-league ownership Florida had claimed as its own so long and which claim this Court had in effect rejected in *United States* v. *Texas,* 339 U. S. 707; *United States* v. *Louisiana,* 339 U. S. 699; and *United States* v. *California,* 332 U. S. 19. As previously shown, Congress in 1868 did approve Florida's claim to a boundary three leagues from its shores. And, as we have held, the 1953 Act was within the power of

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[15] "Senator LONG. When Congress approved the constitution of the State of Florida, fixing Florida's boundary on the Gulf side 3 leagues out into the sea, could there be any doubt in your mind that Congress in effect said to Florida that your boundary goes out 3 leagues and agreed to it? That certainly is not a unilateral act, is it?" Hearings before Senate Committee on Interior and Insular Affairs on S. J. Res. 13, S. 294, S. 107, S. 107 amendment, and S. J. Res. 18, 83d Cong., 1st Sess. 317. See also *id.,* 323 and 326 for remarks that in 1868 "Congress approved" Florida's boundary, and 931 for Attorney General Brownell's acknowledgment that Florida's west coast would not be limited to the general three-mile line.

[16] At pages 21–23 of this report may be found a legislative history of the submerged lands controversy. Appendix E, the Report of the Senate Judiciary Committee on the prior bill, contains further helpful background material.

Congress to enact. *Alabama* v. *Texas,* 347 U. S. 272. See also *United States* v. *California,* 332 U. S. 19, 27.

We therefore deny the United States' motion for judgment. We hold that the Submerged Lands Act grants Florida a three-marine-league belt of land under the Gulf, seaward from its coastline, as described in Florida's 1868 Constitution. The cause is retained for such further proceedings as may be necessary more specifically to determine the coastline, fix the boundary and dispose of all other relevant matters. The parties may submit an appropriate form of decree giving effect to the conclusions reached in this opinion.

It is so ordered.

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

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE BRENNAN, MR. JUSTICE WHITTAKER and MR. JUSTICE STEWART join, concurring.†

Considering the variety of views evoked by these cases, I deem it appropriate to add a few words to the two Court opinions which I have joined.

The one thing which I take to be incontestable is that Congress did not, by the Submerged Lands Act of 1953, make an outright grant to any of the Gulf States in excess of three miles. Congress only granted to each of these States the opportunity to establish at law that it possessed a boundary in excess of three miles, either by virtue of possession of such a boundary at the time of its admission to the Union or by virtue of congressional "approval" of such a boundary prior to the enactment of the Submerged

† [NOTE: This opinion applies also to *United States* v. *Louisiana et al., ante,* p. 1.]

Lands Act. A Gulf State that can successfully establish such a judicially ascertainable fact is entitled to a grant of the submerged lands beyond three miles to a distance of the lesser of three leagues or of the boundary so established. Congress, in the Submerged Lands Act itself, did not determine the existence of a boundary for any State beyond three miles, either explicitly or by implied approval of a claim presented to it in the course of the legislative process. Nor of course did Congress vest this Court with determination of a claim based on "equity" in the layman's loose sense of the term, for it could not. Congress may indulge in largess based on considerations of policy; Congress cannot ask this Court to exercise benevolence on its behalf.

There is no foundation in the Act of 1953 or its legislative history for the view that particularized, express approval of a State's boundary claim by a prior Congress is required to make a defined boundary the measure of the grant. To the contrary, in the case of Florida, authoritative legislative history makes it perfectly clear that the very question deliberately preserved by the Act of 1953 was whether congressional approval of the new Florida Constitution in the Reconstruction legislation of 1867–1868, by which Florida was restored to full participation in the Union, amounted to an approval of the three-league boundary which that constitution explicitly set forth.*

*For example, Senator Holland, the Senator from Florida, stated, in response to questioning on the precise issue:

"I have never contended in this debate, or anywhere else, for a 3-league limitation in the case of my State, except as fixed by its constitution and except as approved, I believe, by the Congress.

"If the Senator does not think we have a case which we can establish in court, why is he concerned about it? I am perfectly willing to rely upon that 3-league limit on our Gulf Coast, as stated in the Florida Constitution and as approved by the Congress, so I believe, in 1868.

"So it is very difficult for me to understand why those who oppose

I sustain Florida's claim because I find that its boundary was so approved.

The proper construction of the effect of congressional "approval" of the Florida Reconstruction constitution presents problems quite different from those stirred by the constitutional controversy and its resulting problems that are compendiously known as Reconstruction. See Lincoln's last public address, April 11, 1865. 8 Basler, The Collected Works of Abraham Lincoln, 399. The readjustment of the relationship between the States that had remained in the Union and those that had seceded presented major issues not only for the political branches of the Government, the President and the Congress, but also for this Court. Insofar as the perplexing and recalcitrant problems of Reconstruction involved legal solutions, the evolution of constitutional doctrine was an indispensable element in the process of healing the wounds of the sanguinary conflict. It was in aid of that process that this Court formulated the doctrine expressed in the

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the pending joint resolution feel that there is something to fear, if they feel we have no firm case for that boundary. We do not spell out that firm case in the pending measure. In this measure we simply claim the right . . . to show—if it be a fact—that we have a greater border than 3 miles, as we claim, in the Gulf of Mexico.

"Likewise we claim—and to come under this measure we would have to establish that claim—that that 3-league border was not only provided in our constitution, and is still there, but that it was approved when our constitution was approved by act of Congress.

"So if the Senator thinks that any link in that chain is unsafe and insecure, that should make him believe that Florida will not have the claimed 3-league boundary . . . .

"I am beginning to believe that my friends are fairly well convinced of the strength of the action taken by Congress, and are afraid that Florida does have a legal and a supportable claim to the 3-league boundary, because if the case were as weak as some Senators seem to believe it is, why would they be disturbed by the general wording of the pending joint resolution, which simply gives Florida its day in court?" 99 Cong. Rec. 2923.

famous sentence in *Texas* v. *White:* "The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." 7 Wall. 700, 725.

This theory served as a fruitful means for dealing with the problems for which it was devised. It is unrelated to the question now before us, namely, whether, when it "approved" as an entirety the Florida Constitution as a condition to the recognition of that State's full membership in the Union, Congress exercised its undoubted power to approve the seaward boundary claim contained within it. It is in essence the contention of the United States that approval could only have been manifested explicitly, that Congress must have ratified the boundary provision in so many words, either expressly in the Reconstruction Acts, or by an authoritative gloss upon them in a committee report or a speech on the floor by a responsible chairman. But in these matters we are dealing with great acts of State, not with fine writing in an insurance policy. Florida was directed to submit a new constitution for congressional approval as a prerequisite for the exercise of her full rights in the Union of States and the resumption of her responsibilities. In this context it would attribute deceptive subtlety to the Congresses of 1867–1868 to hold that it is necessary to find a formal, explicit statement by them, whether in statutory text or history, that the boundary claim, as submitted in Florida's new constitution, was duly considered and sanctioned, in order to find "approval" of that claim.

MR. JUSTICE HARLAN, dissenting.

It is with regret that I find myself unable to agree that Florida has made a case for "three-league" rights under the Submerged Lands Act. As shown in the Court's opinion relating to the other States involved in the litigation (*ante,* pp. 16–36), a state seaward boundary satisfy-

ing the requirements of the Submerged Lands Act must be one which by virtue of Congressional action would have been *legally effective* to carry, as between State and Nation, submerged land rights under the *Pollard* rule, as Congress conceived that rule to have been prior to this Court's decision in the *California* case, 332 U. S. 19. That test supplies the meaning and content not only of the phrase "boundaries . . . as they existed at the time such State became a member of the Union," but also of the phrase "boundaries . . . as heretofore approved by Congress," contained in § 2 of the Submerged Lands Act (*ante*, p. 9, note 7). Florida must satisfy that test if it is to prevail in this case.

The Court's Florida opinion conceives the issue to be whether Congress in 1868 made a "general scrutiny of all the provisions of" Florida's Constitution, and states that the Submerged Lands Act requires only that it have been "examined and approved as a whole." The concurring opinion asserts that the relevant inquiry is "whether congressional approval of the new Florida Constitution . . . amounted to an approval of the three-league boundary which that constitution explicitly set forth." In my view, neither formulation adequately characterizes the nature of the question left by the Submerged Lands Act to this Court. It may be conceded that Congress scrutinized all the provisions of Florida's Constitution and that by accepting the Constitution it, in an abstract sense, approved the boundary provision. The further and controlling inquiry that must be made is whether the *legal effect* of such action was to establish a valid three-league boundary for Florida. If not, Florida would not have owned the submerged lands to that distance under Congress' concept of the *Pollard* rule, and it would therefore be entitled to no better rights under the Submerged Lands Act. On neither branch of its claims do I believe that Florida's showing measures up to that standard.

I.

My difficulty with Florida's "readmission" claim begins with the proposition that a State relying on a readmission boundary stands on quite a different legal footing than one relying on an original admission boundary. In the latter instance the fixing of a boundary is a necessary incident of Congress' power to admit new States. A newly admitted State, in the absence of an express fixation of its boundary by the Congressional act of admission or an articulated rejection of its preadmission boundary, may, I think, rely on a presumed Congressional purpose to adopt whatever boundary the political entity had immediately prior to its admission as a State.[1] That would seem to be the effect of *New Mexico* v. *Colorado*, 267 U. S. 30, and *New Mexico* v. *Texas*, 275 U. S. 279, 276 U. S. 557.[2]

Different considerations, however, obtain in the case of a State readmitted to "representation in Congress" after the Civil War. Such a State renounced the Union with boundaries already fixed by Congress at the time of orig-

[1] More is required of Texas in this case because of the manner in which the Joint Resolution admitting Texas to the Union was drawn. See the Court's opinion relating to the other States, *ante*, pp. 44–47.

[2] In both cases, the description of the boundary fixed for the State by the event of admission was agreed upon—the 37th parallel in the *Texas* case, and the middle of the channel of the Rio Grande in the *Colorado* case. The actual physical location of those respective boundaries, however, was in dispute. In the former, the Court held that the location of the boundary was fixed by the event of admission in accordance with a survey of the 37th parallel which had been theretofore made, even though it might not have been a correct survey. In the latter case, it held that since the location of the Rio Grande's channel in 1850 had been continuously accepted as the location of New Mexico's boundary prior to statehood, and had been so specified in its constitution when admitted to the Union, that became the location of the State's boundary.

inal admission. When it was restored to full participation in the Union, there is no reason to suppose its territorial limits would not remain the same. So much indeed finds sound support in the constitutional doctrines evolved in the so-called reconstruction cases, even though they related to different problems arising out of the Civil War. See *Texas* v. *White,* 7 Wall. 700, 726; *White* v. *Hart,* 13 Wall. 646, 649–652; *Gunn* v. *Barry,* 15 Wall. 610, 623; *Keith* v. *Clark,* 97 U. S. 454, 461. Since, as will be shown later (*post,* pp. 140–141), Florida renounced the Union with a seaward boundary no greater than three miles, the issue here is whether upon readmission Congress *changed* that boundary to three leagues. Unlike the situation at original admission, where the necessity of fixing some boundary for a newly admitted State leads readily to the presumption of Congressional approval of a tendered preadmission boundary, no similar presumption arises in connection with an alleged change in a state boundary already fixed by Congress.

After a painstaking examination of the legislative materials I can find no evidence whatever that the Congress intended to change Florida's seaward boundary from one not in excess of three miles to one of three leagues when the State was readmitted to representation in 1868. Certainly the Act of readmission (Act of June 25, 1868, 15 Stat. 73), upon which Florida relies, affords no basis for a claim that Congress *expressly* approved the State's three-league boundary provision.[3] The statute refers in

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[3] In pertinent part the Act reads:

"WHEREAS the people of North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida have, in pursuance of the provisions of an act entitled 'An act for the more efficient government of the rebel States,' passed March second, eighteen hundred and sixty-seven, and the acts supplementary thereto [see note 4, *post*], framed constitutions of State government which are republican, and have adopted said constitutions by large majorities of the votes

no way to boundaries; it does not even undertake to approve Florida's Constitution, let alone the boundaries described therein; and it is entitled merely as "An Act to admit . . . Florida, to Representation in Congress," not as an act to admit it to the Union. Cf. *White* v. *Hart*, *supra*, at 652.[4]

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cast at the elections held for the ratification or rejection of the same: Therefore,

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That each of the States of North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida, shall be entitled and admitted to representation in Congress as a State of the Union when the legislature of such State shall have duly ratified the amendment to the Constitution of the United States proposed by the Thirty-ninth Congress, and known as article fourteen, upon the following fundamental conditions: That the constitutions of neither of said States shall ever be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote in said State, who are entitled to vote by the constitution thereof herein recognized, except as a punishment for such crimes as are now felonies at common law, whereof they shall have been duly convicted under laws equally applicable to all the inhabitants of said State: *Provided*, That any alteration of said constitution may be made with regard to the time and place of residence of voters; and the State of Georgia shall only be entitled and admitted to representation upon this further fundamental condition: that the first and third subdivisions of section seventeen of the fifth article of the constitution of said State, except the proviso to the first subdivision, shall be null and void, and that the general assembly of said State by solemn public act shall declare the assent of the State to the foregoing fundamental condition."

[4] Reliance is placed on the Act of March 2, 1867, 14 Stat. 428, providing for a State's readmission when, among other things, its "constitution shall have been submitted to Congress for examination and approval, and Congress shall have approved the same . . . ." I find nothing in this provision, or in those of any of the other so-called reconstruction legislation, Act of March 23, 1867, 15 Stat. 2; Act of July 19, 1867, 15 Stat. 14; Act of March 11, 1868, 15 Stat. 41, which warrants the conclusion that the constitutions of the

Nor can I find any basis in the legislative record for a conclusion that Congress *impliedly* changed Florida's boundary. The Congressional debates and reports may be searched in vain for a single reference—even a casual one—to the boundaries of any of the readmitted States. The preamble of the Act of June 25, 1868, and the Congressional debates affirmatively show that all with which Congress was concerned was whether the constitutions of the readmitted States had been validly adopted and were republican in structure, and, in a few instances, whether they contained provisions in palpable violation of the Federal Constitution.[5] No territorial questions at all appear to have figured in the debates. In these

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readmitted States were to be "approved" by Congress, except in the sense that Congress must be satisfied that they had been duly adopted and were republican in form.

[5] The following excerpts from the Congressional debates are typical of many others: "Now, sir, what is the particular question we are considering? Five or six States have had submitted to them the question of forming constitutions for their own government. They have voluntarily formed such constitutions, under the direction of the Government of the United States. They have sent those constitutions here . . . . We have looked at them; we have pronounced them republican in form; and all we propose to require is that they shall remain so forever. Subject to this requirement, we are willing to admit them into the Union." Representative Stevens of Pennsylvania, Cong. Globe, 40th Cong., 2d Sess. 2465.

"All previous fundamental conditions imposed upon a State being admitted into the Union have been upon one of two grounds, either that the clause in the State constitution objected to was in violation of the Constitution of the United States, or that it affected some great, material right, without which the government would not be republican in form. . . .

. . . . . .

"When we go beyond securing the enforcement of the guaranty of republican government, which we have the power to do, when we undertake to legislate for them upon matters on which they have passed, we transcend our bounds." Senator Sherman of Ohio, Cong. Globe, 40th Cong., 2d Sess. 2968, 2969.

circumstances the case of *Virginia* v. *Tennessee,* 148 U. S. 503, upon which Florida relies in support of its argument as to implied approval, is quite inapposite. There the two States had made a compact with respect to the boundary between them. Subsequently Congress adopted the line so established in setting up districts for judicial, revenue, election, and appointive purposes. It was held that Congress had thereby impliedly approved the interstate compact. *Id.,* 521–522. In the present instance we have no affirmative action by Congress respecting the 1868 proffered Florida boundary in any way comparable to that in this earlier case.

Nor can a purpose to change Florida's boundary be inferred from the bare context of the Congressional action. The constitutional area in which the Congress was moving in 1868 should not be forgotten. Congress was not undertaking to exercise its power to fix state boundaries incident to the admission of new States. Rather, it was engaged in "re-establishing the broken relations of the State[s] with the Union," and in satisfying itself that the constitutions of the States lately in rebellion had been validly adopted and were republican in form, all pursuant to Congress' constitutional obligation to guarantee to each State a republican form of government. See *Texas* v. *White, supra,* 727–728. This is not to say that Congress *could* not at the same time have changed any State's original admission boundary, but only to raise the question whether it in fact *did* so. While the exercise of a particular constitutional power does not of course preclude resort to others, the nature of the power exerted in 1868 does seem to me to negative the idea that Congress also purported to exercise its power to change Florida's boundary.[6]

[6] In passing the Submerged Lands Act, Congress seems to have assumed that it has always had the power so to change a State's boundary, provided the State consents. For purposes of this case,

In the last analysis I think that Florida's claim here could only be sustained on the view that Congress was under a *duty* to speak with reference to the State's boundary provision, failing which Congress' silence should as a matter of law be deemed the equivalent of acceptance of the provision. In light of factors already adverted to I cannot perceive how such a duty could be found to exist. To uphold Florida's claim on any such theory would be novel doctrine indeed, particularly where property rights of the United States are involved. Cf. *United States* v. *California, supra,* at 39–40. Moreover, to say that such a duty existed seems to me to misconceive the nature of the "approval" of the constitutions of the seceded States contemplated by the reconstruction statutes. Such approval was not of the sort involved in the case of a constitution submitted to a constitutional convention for adoption or ratification, where the failure to reject a particular provision would be equivalent to its acceptance. Instead, the whole tenor of the reconstruction debates clearly shows that all that was meant by "approval" was that before any seceded State was restored to representation, Congress must be satisfied that its constitution had been properly adopted and was republican in its general structure. That kind of a requirement of "approval" does not lend itself to the conclusion that this Court would be attributing to the 1868 Congress a "deceptive subtlety" unless it regards silence upon Florida's boundary provision as tantamount to its acceptance. Especially so, when that provision was quite outside the realm of matters upon which Congress

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we need not stop to inquire as to the source of the assumed power. It is sufficient to say that, whatever may be the power of Congress to change boundaries as a general matter, Congress clearly has the power to change boundaries, with a State's consent, to the extent that such a change affects only the exercise of property rights as between State and Nation.

had been called upon to act. "Great acts of State" these events of the reconstruction period were indeed, but I do not think they can now be taken as having encompassed acceptance of the territorial pretensions of any particular State.

In sum, I believe the conclusion inescapable that all that Congress can properly be taken to have done in readmitting Florida was to declare that nothing in the State's new constitution disqualified its Senators and Representatives from taking their seats in Congress. While such action may in some abstract sense have constituted "approval" of Florida's boundary provision, since it was included in its constitution, in my opinion it did not represent the sort of advertent, affirmative Congressional action which legally would have been necessary to effectuate an actual change in Florida's original admission boundary. It therefore did not "approve" Florida's three-league boundary within the only sense contemplated by the Submerged Lands Act.

II.

It is clear that the State fares no better on its alternative claim, based upon its original admission boundary. Since the Court does not reach this claim, it will be enough to state briefly the reasons which require its rejection.

The territory which now comprises the State of Florida was originally acquired by England from France and Spain by the Treaty of Paris of February 10, 1763.[7] By the proclamation of October 7, 1763,[8] King George III divided the acquired territory into East and West Florida. East Florida was declared to be "bounded to the west-

[7] 15 Parliamentary History of England 1291, 1296, 1301.

[8] 2 White, A New Collection of Laws, Charters and Local Ordinances of Great Britain, France and Spain (1839), 292.

ward by the Gulf of Mexico and the Apalachicola river . . . and to the east and south by the Atlantic ocean and the gulf of Florida, including all islands within six leagues of the sea coast." West Florida was declared to be "bounded to the southward by the gulf of Mexico, including all islands within six leagues of the coast, from the river Apalachicola to Lake Pontchartrain . . . ."

By the Treaty of Versailles of September 3, 1783, England ceded to Spain the territory described merely as "East Florida, as also West Florida." [9] By the Treaty of Amity, Settlement, and Limits of February 22, 1819, Spain ceded to the United States "all the territories which belong to [Spain], situated to the eastward of the Mississippi, known by the name of East and West Florida." [10] Both the Act establishing Florida as a Territory,[11] and the Act admitting it to the Union,[12] describe it in terms of the territories of East and West Florida ceded by the Treaty of 1819.

Florida contends that the provision in King George's proclamation relating to all islands within six leagues of the coast was an assertion of a territorial boundary at that distance along the entire coast, and that subsequent conveyances necessarily incorporated that description. The opinion of the Court relating to Louisiana, Mississippi, and Alabama disposes of that contention (*ante,* pp. 66–82), and what has been said there need not be repeated here.

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[9] 39 Journal of the House of Commons 722, 723.

[10] 8 Stat. 252, 254. The Treaty also provided: "The adjacent islands dependent on said provinces, all public lots and squares, vacant lands, public edifices, fortifications, barracks, and other buildings, which are not private property, archives and documents, which relate directly to the property and sovereignty of said provinces, are included in this article."

[11] 3 Stat. 654.

[12] 5 Stat. 742.

Florida also relies on many of the same treaties as does Louisiana to show that this country's predecessors in title claimed large amounts of territorial sea. Without elaborating on what has already been said (*ante,* pp. 73–74), it is sufficient to point out here that these treaties did not constitute territorial assertions, but merely established obligations between the parties of a special and limited nature, and varied so widely in the distances specified as not to be of any value whatever in showing a uniform practice.

I would grant the Government's motion for judgment as to Florida.

SENIOR *v.* ZONING COMMISSION OF NEW CANAAN.

APPEAL FROM THE SUPREME COURT OF ERRORS OF CONNECTICUT.

No. 620. Decided May 31, 1960.

Appeal dismissed for want of a substantial federal question.
Reported below: 146 Conn. 531, 153 A. 2d 415.

Raymond T. Benedict, Morgan P. Ames, Francis J. McNamara, Jr. and *John F. Spindler* for appellant.

Ira E. Hicks, Norwick R. G. Goodspeed, John C. Sturges and *Samuel A. Gilliland* for appellee.

PER CURIAM.

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

GARFINKLE *v.* GARFINKLE.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

No. 799, Misc. Decided May 31, 1960.

Appeal dismissed and certiorari denied.
Reported below: 29 N. J. 506, 150 A. 2d 291.

PER CURIAM.

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

DE VEAU *v.* BRAISTED.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 71. Argued March 1, 1960.—Decided June 6, 1960.

Section 8 of the New York Waterfront Commission Act of 1953 in effect disqualifies from holding office in any waterfront labor organization any person who has been convicted of a felony and has not subsequently been pardoned or had his disability removed by a certificate of good conduct from the Board of Parole. *Held:* This section does not violate the Supremacy Clause of the Constitution by conflicting invalidly with the National Labor Relations Act or the Labor-Management Reporting and Disclosure Act of 1959; it does not violate the Due Process Clause of the Fourteenth Amendment; and it is not an *ex post facto* law or bill of attainder forbidden by Article I, § 10 of the Constitution. Pp. 144–161.

5 N. Y. 2d 236, 157 N. E. 2d 165, affirmed.

Thomas W. Gleason argued the cause for appellant. With him on the brief was *Julius Miller.*

Thomas R. Sullivan argued the cause and filed a brief for appellee.

Nanette Dembitz filed a brief for the New York Civil Liberties Union, as *amicus curiae,* urging reversal.

William P. Sirignano, Irving Malchman and *Jerome J. Klied* filed a brief for the Waterfront Commission of New York Harbor, as *amicus curiae,* urging affirmance.

Opinion of MR. JUSTICE FRANKFURTER, in which MR. JUSTICE CLARK, MR. JUSTICE WHITTAKER and MR. JUSTICE STEWART join, and judgment of the Court, announced by MR. JUSTICE BRENNAN.

This is an action brought in the Supreme Court of Richmond County, New York, for a declaratory judgment regarding the constitutional validity of § 8 of the New York Waterfront Commission Act of 1953 (N. Y. Laws

1953, cc. 882, 883; McK. Unconsol. Laws, § 6700aa *et seq.*), and for an injunction restraining its operation. The section is claimed to be in conflict with the Supremacy Clause of the United States Constitution; it is also challenged under the Due Process Clause of the Fourteenth Amendment, and as an *ex post facto* law and bill of attainder forbidden by Art. I, § 10, of the Constitution.

The Waterfront Commission Act formulates a detailed scheme for governmental supervision of employment on the waterfront in the Port of New York. The relevant part of the specific provision, § 8, under attack follows:

> "No person shall solicit, collect or receive any dues, assessments, levies, fines or contributions within the state from employees registered or licensed pursuant to the provisions of this act [pier superintendents, hiring agents, longshoremen and port watchmen] for or on behalf of any labor organization representing any such employees, if any officer or agent of such organization has been convicted by a court of the United States, or any state or territory thereof, of a felony unless he has been subsequently pardoned therefor by the governor or other appropriate authority of the state or jurisdiction in which such conviction was had or has received a certificate of good conduct from the board of parole pursuant to the provisions of the executive law to remove the disability."

The complaint upon which this action is based makes the following allegations. Appellant was a member, and beginning in 1950 had been Secretary-Treasurer, of Local 1346, International Longshoremen's Association, a labor organization with offices in Richmond County, New York, representing "employees registered or licensed pursuant to" the Waterfront Commission Act. As Secretary-Treasurer appellant had control of the Local's funds and also served as a bargaining representative. In 1920 appellant

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had pleaded guilty to a charge of grand larceny in New York and had received a suspended sentence. It is not alleged that appellant has ever applied for or received a pardon or a "certificate of good conduct." Three years after the enactment of the Waterfront Commission Act, in 1956, the President of the International Longshoremen's Association was informed by the appellee, who was and is the District Attorney of Richmond County, New York, that because of appellant's conviction § 8 of the Act prohibited any person from collecting dues on behalf of Local 1346, so long as appellant remained its officer or agent. Appellee threatened to prosecute anyone collecting dues for the Local while appellant remained its officer. By reason of § 8 and this threat appellant was suspended as an officer of Local 1346, whereupon he brought this action.

The appellee moved to dismiss the complaint, and for judgment on the pleadings in his favor. This motion was granted. The court, holding that appellant's 1920 conviction was a conviction for a felony within the meaning of § 8, sustained the validity of that section. 11 Misc. 2d 661, 166 N. Y. S. 2d 751. This judgment was affirmed by the Appellate Division of the Supreme Court, 5 A. D. 2d 603, 174 N. Y. S. 2d 596, and by the Court of Appeals of New York, 5 N. Y. 2d 236, 157 N. E. 2d 165. See also *Hazelton* v. *Murray*, 21 N. J. 115, 121 A. 2d 1. Since a statute of a State has been upheld by the highest court of the State against a federal constitutional attack, the case is properly here on appeal. 361 U. S. 806.[1]

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[1] Appellee's claim that the cause is moot, since, after the commencement of this action, Local 1346 was disbanded and all employees under its jurisdiction came under the jurisdiction of a new local, Local 1, with offices in New York County, must fail. On the basis of what has been submitted to us, the new local is, in part, simply the old in a new dress.

Due consideration of the constitutional claims that are made requires that § 8 be placed in the context of the structure and history of the legislation of which it is a part. The New York Waterfront Commission Act was an endeavor by New York and New Jersey to cope with long-standing evils on their joint waterfront in the Port of New York. The solution which was evolved between the two States embodies not only legislation by each but also joint action by way of a constitutional compact between them, approved by Congress, including the establishment of a bi-state Waterfront Commission.

For years the New York waterfront presented a notoriously serious situation. Urgent need for drastic reform was generally recognized. Thoroughgoing investigations of the mounting abuses were begun in 1951 by the New York State Crime Commission and the Law Enforcement Council of New Jersey. After extensive hearings, the New York Crime Commission in May 1953 published a detailed report (4th Report of the New York State Crime Commission, New York State Leg. Doc. No. 70 (1953)) on the evils its investigation disclosed and the legislative remedies these were thought to require. The Commission reported that the skulduggeries on the waterfront were largely due to the domination over waterfront employment gained by the International Longshoremen's Association, as then conducted. Its employment practices easily led to corruption, and many of its officials participated in dishonesties. The presence on the waterfront of convicted felons in many influential positions was an important causative factor in this appalling situation. It was thus described to Congress in the compact submitted by New York and New Jersey for its consent:

> ". . . the conditions under which waterfront labor is employed within the Port of New York district are depressing and degrading to such labor, resulting

from the lack of any systematic method of hiring, the lack of adequate information as to the availability of employment, corrupt hiring practices and the fact that persons conducting such hiring are frequently criminals and persons notoriously lacking in moral character and integrity and neither responsive or responsible to the employers nor to the uncoerced will of the majority of the members of the labor organizations of the employees; that as a result waterfront laborers suffer from irregularity of employment, fear and insecurity, inadequate earnings, an unduly high accident rate, subjection to borrowing at usurious rates of interest, exploitation and extortion as the price of securing employment and a loss of respect for the law; that not only does there result a destruction of the dignity of an important segment of American labor, but a direct encouragement of crime which imposes a levy of greatly increased costs on food, fuel and other necessaries handled in and through the Port of New York district.

". . . many of the evils above described result not only from the causes above described but from the practices of public loaders at piers and other waterfront terminals; that such public loaders serve no valid economic purpose and operate as parasites exacting a high and unwarranted toll on the flow of commerce in and through the Port of New York district, and have used force and engaged in discriminatory and coercive practices including extortion against persons not desiring to employ them; . . .

". . . stevedores have engaged in corrupt practices to induce their hire by carriers of freight by water and to induce officers and representatives of labor organizations to betray their trust to the members of such labor organizations." 67 Stat. 541–542.

Shortly after the Crime Commission submitted its report, the Governor of New York conducted hearings based upon the Crime Commission report. As a result, a Waterfront Commission Act was introduced into and passed by the Legislatures of both States in June 1953. N. Y. Laws 1953, cc. 882, 883; N. J. Laws 1953, cc. 202, 203.

Part I of both Acts constitutes what became the compact between the two States. This is the heart of the legislation. It establishes as a bi-state agency a Waterfront Commission of New York Harbor with power to license, register and regulate the waterfront employment of pier superintendents, hiring agents, longshoremen and port watchmen, and to license and regulate stevedores. It entirely prohibits one class of waterfront employment, public loading, found to be unnecessary and particularly infested with corruption. Manifestly, one of the main aims of the compact is to keep criminals away from the waterfront. The issue of licenses to engage in waterfront occupations, or the right to be registered, depends upon findings by the Commission of good character. In particular, past convictions for certain felonies constitute specific disabilities for each occupation, with discretion in the Commission to lift the disability, except in the case of port watchmen, where it constitutes an absolute bar to waterfront employment. A new procedure for the employment of longshoremen is also provided under the supervision of the Commission, replacing the archaic, corrupt "shape-up."

Under the requirement of Art. I, § 10, of the Constitution the compact was submitted to the Congress for its consent, and it was approved. This was no perfunctory consent. Congress had independently investigated the evils that gave rise to the Waterfront Commission Acts, and the Subcommittee of the Senate Committee on Inter-

state and Foreign Commerce had in a Report endorsed the state legislative solution embodied in these Acts. See S. Rep. No. 653, 83d Cong., 1st Sess., pp. 49–50. After the compact's submission to Congress, hearings were held upon it by the Committee on the Judiciary of the House of Representatives, at which arguments were made by interested parties for and against the compact. Approval was recommended by both the House Judiciary Committee and the Senate Committee on Interstate and Foreign Commerce. The House Committee concluded that "[t]he extensive evidence of crime, corruption, and racketeering on the waterfront of the port of New York, as disclosed by the State investigations reported to this committee at its hearings and by the recent report of the Senate Committee on Interstate and Foreign Commerce [S. Rep. No. 653, *supra*], has made it clear beyond all question that the plan proposed by the States of New York and New Jersey to eradicate those public evils is urgently needed." H. R. Rep. No. 998, 83d Cong., 1st Sess., p. 1. The Senate Committee Report stated its conclusion in similar terms. S. Rep. No. 583, 83d Cong., 1st Sess., p. 1. The compact was approved by Congress in August 1953. Act of Aug. 12, 1953, 67 Stat. 541, c. 407.

In addition to the compact, New York enacted, as Parts II and III of its 1953 Waterfront Commission Act, supplementary legislation dealing, in most part, with the administration of New York's responsibility under the compact. This supplementary legislation also contains two substantive provisions in furtherance of the objectives of the compact, but not calling for bi-state enforcement, and thus not included in the compact. These are § 8, which is here challenged, and a prohibition against loitering on the waterfront. New Jersey enacted a supplementary provision essentially similar to § 8. N. J. Laws, 1953, c. 202, § 8. Although § 8 does not require enforcement by the bi-state Waterfront Commission, and was

therefore not formally submitted as part of the compact to Congress, in giving its approval to the compact Congress explicitly gave its authority to such supplementary legislation in accord with the objectives of the compact by providing in the clause granting consent "[t]hat the consent of Congress is hereby given to the compact set forth . . . and to the carrying out and effectuation of said compact, and enactments in furtherance thereof."

In giving this authorization Congress was fully mindful of the specific provisions of § 8. Not only had § 8 already been enacted by the States as part of the Waterfront Commission Acts when the compact was submitted to Congress, but, in the hearings held before the House Committee on the Judiciary, it was specifically urged by counsel for the International Longshoremen's Association, as a ground of opposition to congressional consent, that approval of the compact by Congress would carry with it sanction of § 8. See Hearing before Subcommittee No. 3 of the Committee on the Judiciary, House of Representatives, 83d Cong., 1st Sess., on H. R. 6286, H. R. 6321, H. R. 6343, and S. 2383, p. 136. The ground of objection to the section which is appellant's primary reliance here, namely, that it conflicts with existing federal labor policy, was urged as ground for rejecting the compact. It is in light of this legislative history that the compact was approved, and that congressional consent was given to "enactments in furtherance thereof."

With this background in mind, we come to consider appellant's objection that § 8 is in conflict with and therefore pre-empted by the National Labor Relations Act, specifically §§ 1 and 7 of that Act, 29 U. S. C. §§ 151, 157. The argument takes this course. Section 1 of the National Labor Relations Act declares a congressional purpose to protect "the exercise by workers of full freedom of association, self-organization, and designation of rep-

resentatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." Section 7 grants employees "the right . . . to bargain collectively through representatives of their own choosing." Under § 8 of the Waterfront Commission Act, waterfront employees do not have complete freedom of choice in the selection of their representatives, for if they choose a convicted felon the union is disabled from collecting dues. Thus, it is said, with reliance on *Hill* v. *Florida,* 325 U. S. 538, there is a conflict and the state legislation must fall.

This is not a situation where the operation of a state statute so obviously contradicts a federal enactment that it would preclude both from functioning together or, at least, would impede the effectiveness of the federal measure. Section 8 of the Waterfront Commission Act does not operate to deprive waterfront employees of opportunity to choose bargaining representatives. It does disable them from choosing as their representatives ex-felons who have neither been pardoned nor received "good conduct" certificates. The fact that there is some restriction due to the operation of state law does not settle the issue of pre-emption. The doctrine of pre-emption does not present a problem in physics but one of adjustment because of the interdependence of federal and state interests and of the interaction of federal and state powers. Obviously, the National Labor Relations Act does not exclude every state policy that may in fact restrict the complete freedom of a group of employees to designate "representatives of their own choosing." For example, by reason of the National Labor Relations Act a State surely is not forbidden to convict and imprison a defendant in a criminal case merely because he is a union official and therefore could not serve as a bargaining representative.

It would misconceive the constitutional doctrine of pre-emption—of the exclusion because of federal regulation of what otherwise is conceded state power—to decide this case mechanically on an absolute concept of free choice of representatives on the part of employees, heedless of the light that Congress has shed for our guidance. The relevant question is whether we may fairly infer a congressional purpose incompatible with the very narrow and historically explained restrictions upon the choice of a bargaining representative embodied in § 8 of the New York Waterfront Commission Act. Would Congress, with a lively regard for its own federal labor policy, find in this state enactment a true, real frustration, however dialectically plausible, of that policy?

In light of the purpose, scope and background of this New York legislation and Congress' relation to it, such an inference of incompatibility has no foundation. In this case we need not imaginatively summon the likely reaction of Congress to the state legislation, as a basis for ascertaining whether due regard for congressional purpose bars the state regulation. Here the States presented their legislative program to cope with an urgent local problem to the Congress, and the Congress unambiguously supported what is at the core of this reform. Had § 8 been written into the compact, even the most subtle casuistry could not conjure up a claim of pre-emption.

Here the challenged state legislation was not in terms approved by Congress, but was part of the legislative history and of the revealed purpose of the compact which was approved. Formal inclusion of § 8 in the compact was not called for since its enforcement was to be unilateral on the part of each State. Both New York and New Jersey enacted § 8 at the time they enacted the proposed compact. Section 8 is the same kind of regulation as is contained in the compact: it effectively disqualifies

ex-felons from waterfront union office, just as the compact makes prior conviction of certain felonies a bar to waterfront employment, unless there is a favorable exercise of executive discretion. The total state legislative program represents a drastic effort to rid the waterfront of criminal elements by generally excluding ex-felons. What sensible reason is there to suppose that Congress would approve the major part of this local effort, as it has expressly done through its approval of the compact, and disapprove its application to union officials who, as history proved, had emerged as a powerful and corrupting influence on the waterfront second to none?

This is not all. As we have seen, § 8 was brought to the attention of Congress as part of the legislation which would come into effect as an adjunct to the compact, and the objection was raised at that time and not heeded that § 8 unduly interfered with federal labor policy. Finally, it is of great significance that in approving the compact Congress did not merely remain silent regarding supplementary legislation by the States. Congress expressly gave its consent to such implementing legislation not formally part of the compact. This provision in the consent by Congress to a compact is so extraordinary as to be unique in the history of compacts. Of all the instances of congressional approval of state compacts—the process began in 1791, Act of Feb. 4, 1791, 1 Stat. 189, with more than one hundred compacts approved since—we have found no other in which Congress expressly gave its consent to implementing legislation. It is instructive that this unique provision has occurred in connection with approval of a compact dealing with the prevention of crime where, because of the peculiarly local nature of the problem, the inference is strongest that local policies are not to be thwarted.

The sum of these considerations is that it would offend reason to attribute to Congress a purpose to pre-empt the

state regulation contained in § 8. The decision in *Hill* v. *Florida,* 325 U. S. 538, in no wise obstructs this conclusion. An element most persuasive here, congressional approval of the heart of the state legislative program explicitly brought to its attention, was not present in that case. Nor was it true of *Hill* v. *Florida,* as it is here, that the challenged state legislation was part of a program, fully canvassed by Congress through its own investigations, to vindicate a legitimate and compelling state interest, namely, the interest in combatting local crime infesting a particular industry.

Appellant also asks us to find evidence of federal preemption of § 8 of the Waterfront Commission Act in the enactment by Congress of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519. Title V of the 1959 Act imposes restrictions upon union officers, and defines qualifications for such officers. Specifically, § 504 (a) provides that "[n]o person . . . who has been convicted of, or served any part of a prison term resulting from his conviction of [a group of serious felonies] . . . shall serve—(1) as an officer, director, trustee, member of any executive board or similar governing body, business agent, manager, organizer, or other employee (other than as an employee performing exclusively clerical or custodial duties) of any labor organization . . . for five years after . . . such conviction or after the end of such imprisonment, unless prior to the end of such five-year period, in the case of a person so convicted or imprisoned, (A) his citizenship rights, having been revoked as a result of such conviction, have been fully restored, or (B) the Board of Parole of the United States Department of Justice determines that such person's service in any capacity referred to in clause (1) . . . would not be contrary to the purposes of this Act."

The fact that Congress itself has thus imposed the same type of restriction upon employees' freedom to choose bargaining representatives as New York seeks to impose through § 8, namely, disqualification of ex-felons for union office, is surely evidence that Congress does not view such a restriction as incompatible with its labor policies. Appellant, however, argues that any state disablement from holding union office on account of a prior felony conviction, such as § 8, which has terms at variance with § 504 (a), is impliedly barred by it. Just the opposite conclusion is indicated by the 1959 Act, which reflects congressional awareness of the problems of pre-emption in the area of labor legislation, and which did not leave the solution of questions of pre-emption to inference. When Congress meant pre-emption to flow from the 1959 Act it expressly so provided. Sections 205 (c) and 403, set out in the margin,[2] are express provisions excluding the operation of state law, supplementing provisions for new federal regulation. No such pre-emption provision was provided in connection with § 504 (a). That alone is sufficient reason for not deciding that § 504 (a) pre-empts § 8 of the Waterfront Commission Act. In addition, two sections of the 1959 Act, both relevant to this case, affirmatively preserve the operation of state laws.

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[2] Section 205 (c) provides:

". . . No person shall be required by reason of any law of any State to furnish to any officer or agency of such State any information included in a report filed by such person with the Secretary pursuant to the provisions of this title, if a copy of such report, or of the portion thereof containing such information, is furnished to such officer or agency. . . ."

Section 403 provides:

"No labor organization shall be required by law to conduct elections of officers with greater frequency or in a different form or manner than is required by its own constitution or bylaws, except as otherwise provided by this title. . . . The remedy provided by this title for challenging an election already conducted shall be exclusive."

That § 504 (a) was not to restrict state criminal law enforcement regarding the felonies there enumerated as federal bars to union office is provided by § 604 of the 1959 Act: "Nothing in this Act shall be construed to impair or diminish the authority of any State to enact and enforce general criminal laws with respect to [the same group of serious felonies, with the exception of exclusively federal violations, which are listed in § 504 (a)]." And to make the matter conclusive, § 603 (a) is an express disclaimer of pre-emption of state laws regulating the responsibilities of union officials, except where such pre-emption is expressly provided in the 1959 Act. Section 603 (a) provides: "Except as explicitly provided to the contrary, nothing in this Act shall reduce or limit the responsibilities of any labor organization or any officer, agent, shop steward, or other representative of a labor organization . . . under the laws of any State . . . ." In view of this explicit and elaborate treatment of pre-emption in the 1959 Act, no inference can possibly arise that § 8 is impliedly pre-empted by § 504 (a).

Appellant's argument that § 8 of the Waterfront Commission Act is contrary to the Due Process Clause of the Fourteenth Amendment depends, as it must, upon the proposition that barring convicted felons from waterfront union office, unless they are pardoned, or receive a "good conduct" certificate, is not, in the context of the particular circumstances which gave rise to the legislation, a reasonable means for achieving a legitimate state aim, namely, eliminating corruption on the waterfront.

In disqualifying all convicted felons from union office unless executive discretion is exercised in their favor, § 8 may well be deemed drastic legislation. But in the view of Congress and the two States involved the situation on the New York waterfront regarding the presence and influence of ex-convicts called for drastic action. Legislative investigation had established that the presence of

ex-convicts on the waterfront was not a minor episode but constituted a principal corrupting influence. The Senate Subcommittee which investigated for Congress conditions on the New York waterfront found that "[c]riminals whose long records belie any suggestion that they can be reformed have been monopolizing controlling positions in the International Longshoremen's Association and in local unions. Under their regimes gambling, the narcotics traffic, loansharking, shortganging, payroll 'phantoms,' the 'shakedown' in all its forms—and the brutal ultimate of murder—have flourished, often virtually unchecked." S. Rep. No. 653, 83d Cong., 1st Sess. (1953), p. 7.

In light of these findings, and other evidence to the same effect,[3] the Congress approved as appropriate if indeed not necessary a compact, one of the central devices of which was to bar convicted felons from waterfront employment, and from acting as stevedores employing others, either absolutely, or in the Waterfront Commission's discretion. No positions on the waterfront were more conducive to its criminal past than those of union officials, and none, if left unregulated, were felt to be more able to impede the waterfront's reform. Duly mindful as we are of the promising record of rehabilitation by ex-felons, and of the emphasis on rehabilitation by modern penological efforts, it is not for this Court to substitute its judgment for that of Congress and the Legislatures of New York and New Jersey regarding the social surgery required by a situation as gangrenous as exposure of the New York waterfront had revealed.

Barring convicted felons from certain employments is a familiar legislative device to insure against corruption in

[3] See, *e. g.*, Hearings before Subcommittee No. 3 of the Committee on the Judiciary, House of Representatives, on H. R. 6286, H. R. 6321, H. R. 6343, and S. 2383, 83d Cong., 1st Sess. (1953), pp. 88, 97.

specified, vital areas. Federal law has frequently and of old utilized this type of disqualification. Convicted felons are not entitled to be enlisted or mustered into the United States Army, or into the Air Force, but "the Secretary . . . may authorize exceptions, in meritorious cases." 10 U. S. C. §§ 3253, 8253. This statute dates from 1833. A citizen is not competent to serve on federal grand or petit juries if he has been "convicted in a State or Federal court of record of a crime punishable by imprisonment for more than one year and and [*sic*] his civil rights have not been restored by pardon or amnesty." 28 U. S. C. § 1861. In addition, a large group of federal statutes disqualify persons "from holding any office of honor, trust, or profit under the United States" because of their conviction of certain crimes, generally involving official misconduct. 18 U. S. C. §§ 202, 205, 206, 207, 216, 281, 282, 592, 1901, 2071, 2381. For other examples in the federal statutes see 18 U. S. C. § 2387; 5 U. S. C. § 2282; 8 U. S. C. § 1481. State provisions disqualifying convicted felons from certain employments important to the public interest also have a long history. See, *e. g., Hawker* v. *New York,* 170 U. S. 189. And it is to be noted that in § 504 (a) of the 1959 Federal Labor Act, quoted earlier in this opinion, Congress adopted this same solution in its attempt to rid all unions of criminal elements. Just as New York and New Jersey have done, the 1959 Federal Act makes a prior felony conviction a bar to union office unless there is a favorable exercise of executive discretion. In the face of this wide utilization of disqualification of convicted felons for certain employments closely touching the public interest, remitting them to executive discretion to have the bar removed, we cannot say that it was not open to New York to clean up its waterfront in the way it has. New York was not guessing or indulging in airy assumptions that convicted felons constituted a deleterious influence on the waterfront. It was acting on impressive

if mortifying evidence that the presence on the waterfront of ex-convicts was an important contributing factor to the corrupt waterfront situation.

Finally, § 8 of the Waterfront Commission Act is neither a bill of attainder nor an *ex post facto* law. The distinguishing feature of a bill of attainder is the substitution of a legislative for a judicial determination of guilt. See *United States* v. *Lovett,* 328 U. S. 303. Clearly, § 8 embodies no further implications of appellant's guilt than are contained in his 1920 judicial conviction; and so it manifestly is not a bill of attainder. The mark of an *ex post facto* law is the imposition of what can fairly be designated punishment for past acts. The question in each case where unpleasant consequences are brought to bear upon an individual for prior conduct, is whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation, such as the proper qualifications for a profession. See *Hawker* v. *New York,* 170 U. S. 189. No doubt is justified regarding the legislative purpose of § 8. The proof is overwhelming that New York sought not to punish ex-felons, but to devise what was felt to be a much-needed scheme of regulation of the waterfront, and for the effectuation of that scheme it became important whether individuals had previously been convicted of a felony.

Affirmed.

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

MR. JUSTICE BRENNAN is of opinion that Congress has demonstrated its intent that § 8 of the New York Waterfront Commission Act should stand despite the provisions of the National Labor Relations Act, and that the Labor-Management Reporting and Disclosure Act of

1959 explicitly provides that it shall not displace such legislation of the States. He believes that New York's disqualification of ex-felons from waterfront union office, on all the circumstances, and as applied to this specific area, is a reasonable means for achieving a legitimate state aim, and does not deny due process or otherwise violate the Federal Constitution. Accordingly, he agrees that the judgment should be affirmed.

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

I could more nearly comprehend the thrust of the Court's ruling in this case if it overruled *Hill* v. *Florida*, 325 U. S. 538, and adopted the dissenting opinion in that case written by my Brother FRANKFURTER. But to sustain this New York law when we struck down the Florida law in the *Hill* case is to make constitutional adjudications turn on whimsical circumstances.

The New York law makes a person ineligible to solicit funds on behalf of a labor union if he has been convicted of a felony. The Florida law made it unlawful for one to be a business agent for a union if he had been convicted of a felony. 325 U. S., at 540. In each the question is whether such a state restriction is compatible with the federal guarantee contained in § 7 of the National Labor Relations Act [1] which reads as follows:

> "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 concerted activities, for the purpose of collective bargaining or other mutual aid or protection. . . ."

[1] Section 1 of the Act declared as its purpose encouraging collective bargaining and protecting "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing."

The answer we gave in *Hill* v. *Florida, supra,* at 541, was as follows:

> "It is apparent that the Florida statute has been so construed and applied that the union and its selected representative are prohibited from functioning as collective bargaining agents, or in any other capacity, except upon conditions fixed by Florida. The declared purpose of the Wagner Act, as shown in its first section, is to encourage collective bargaining, and to protect the 'full freedom' of workers in the selection of bargaining representatives of their own choice. To this end Congress made it illegal for an employer to interfere with, restrain or coerce employees in selecting their representatives. Congress attached no conditions whatsoever to their freedom of choice in this respect. Their own best judgment, not that of someone else, was to be their guide. 'Full freedom' to choose an agent means freedom to pass upon that agent's qualifications.
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> "Section 4 of the Florida Act circumscribes the 'full freedom' of choice which Congress said employees should possess. It does this by requiring a 'business agent' to prove to the satisfaction of a Florida Board that he measures up to standards set by the State of Florida as one who, among other things, performs the exact function of a collective bargaining representative. To the extent that § 4 limits a union's choice of such an 'agent' or bargaining representative, it substitutes Florida's judgment for the workers' judgment."

Nothing has been done to change, in relevant part, the language of § 7 of the National Labor Relations Act since *Hill* v. *Florida, supra.* If § 7 foreclosed Florida from prescribing standards for union officials, I fail to see why

it does not foreclose New York. Much is made of the fact that Congress, when it approved the Waterfront Commission Compact [2] between New York and New Jersey, 67 Stat. 541, knew of the restrictions contained in § 8 of the New York Waterfront Commission Act [3] now in litigation. But that is an argument that comes to naught when Art. XV, § 1 of the Compact is read:

> "*This compact is not designed and shall not be construed to limit in any way any rights* granted or

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[2] The Waterfront Commission Compact, which Congress approved, set up qualifications and licensing requirements for certain types of waterfront employment. It also called for the creation of employment information centers, to be administered by the bi-state regulatory agency, the purpose of which was to eliminate extortionate hiring practices and regularize employment by eliminating casual laborers from the registration rolls. It did not purport to regulate or set up qualifications for labor unions or labor representatives.

[3] Section 8 of Part III of the Waterfront Commission Act of the State of New York, New York Laws 1953, c. 882, provides as follows:

"No person shall solicit, collect or receive any dues, assessments, levies, fines or contributions within the state from employees registered or licensed pursuant to the provisions of this act for or on behalf of any labor organization representing any such employees, if any officer or agent of such organization has been convicted by a court of the United States, or any state or territory thereof, of a felony unless he has been subsequently pardoned therefor by the governor or other appropriate authority of the state or jurisdiction in which such conviction was had or has received a certificate of good conduct from the board of parole pursuant to the provisions of the executive law to remove the disability.

"As used in this section, the term 'labor organization' shall mean and include any organization which exists and is constituted for the purpose in whole or in part of collective bargaining, or of dealing with employers concerning grievances, terms and conditions of employment, or of other mutual aid or protection; but it shall not include a federation or congress of labor organizations organized on a national or international basis even though one of its constituent labor organizations may represent persons so registered or licensed."

> derived from any other statute or any rule of law *for employees* to organize in labor organizations, to *bargain collectively and to act in any other way individually, collectively, and through labor organizations or other representatives of their own choosing.* Without limiting the generality of the foregoing, nothing contained in this compact shall be construed to limit in any way the right of employees to strike." (Italics added.)

Yet how can employees maintain their right to act through "representatives of their own choosing" if New York can tell them whom they may not choose?

Moreover the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 29 U. S. C. (1958 ed., Supp. I) § 401, shows unmistakably that Congress has kept unto itself control over the qualifications of officers of labor unions. Section 2 (a) of that Act provides in part:

> "The Congress finds that, in the public interest, it continues to be the responsibility of the Federal Government to protect employees' rights to organize, choose their own representatives, bargain collectively, and otherwise engage in concerted activities for their mutual aid or protection . . . ."

Congress by § 504 of that Act has barred enumerated felons from holding union office "during or for five years after" the conviction or end of imprisonment. That federal, not state, qualifications for union offices now obtain is made plain by § 604 of that Act.[4] It provides as follows:

> "Nothing in this Act shall be construed to impair or diminish the authority of any State *to enact and*

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[4] Section 603 (a) of the 1959 Act provides in relevant part that "Except as explicitly provided to the contrary, nothing in this Act shall reduce or limit the responsibilities of any labor organization or

> *enforce general criminal laws* with respect to robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, murder, rape, assault with intent to kill, or assault which inflicts grievous bodily injury, or conspiracy to commit any of such crimes." (Italics added.)

I do not know how Congress could make clearer its twofold purpose: *first,* that federal standards are to determine the qualifications for holding union offices; and *second,* that enforcement of "general criminal laws" by the States remains unimpaired.

What Congress did in approving the Waterfront Commission Compact and in adopting the Labor-Management Reporting and Disclosure Act of 1959 respected the integrity of *Hill* v. *Florida, supra.* We seem now to forsake it and in effect adopt the dissent in *Hill* v. *Florida.* That I cannot do. For the federal legislative record makes plain to me beyond doubt that Congress has left the qualifications for union offices to be determined by *federal* not *state* law. The Supremacy Clause of Article VI of the Constitution calls for a reversal of the judgment of the New York Court of Appeals. Hence I do not reach the other questions presented.

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any officer, agent, shop steward, or other representative of a labor organization . . . under any other Federal law or under the laws of any State, and, except as explicitly provided to the contrary, nothing in this Act shall take away any right or bar any remedy to which members of a labor organization are entitled under such other Federal law or law of any State."

This has reference to the fiduciary responsibilities created by § 501 of the Act and makes clear that these provisions of federal law do not pre-empt state law. As stated in S. Rep. No. 187, 86th Cong., 1st Sess., p. 19, "Individual union members will therefore have a choice between suing in the State courts under the common law or invoking the provisions of the Federal statute."

There is no like provision which saves § 504 (the section that bars felons from holding union office) from pre-empting state law.

FEDERAL TRADE COMMISSION *v.* HENRY BROCH & CO.

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

No. 61. Argued January 14, 18, 1960.—Decided June 6, 1960.

In order to meet the bid of a favored buyer, a seller's broker reduced his brokerage commission from 5% to 3%, which was reflected in the seller's reduction of the price of apple concentrate from $1.30 per gallon to $1.25 per gallon; the sale was consummated at that price; and similar concessions were granted on subsequent sales to the same buyer but not to any other buyer. *Held:* The seller's broker violated § 2 (c) of the Clayton Act, as amended by the Robinson-Patman Act, which makes it unlawful for "any person" to make any allowance in lieu of "brokerage" to the "other party to such transaction." Pp. 167–177.

(a) A seller's broker is included within the term "any person" as used in § 2 (c). P. 170.

(b) Such an allowance was not made lawful by the proviso of § 2 (a) which exempts from the prohibitions of that section price differentials based on savings in selling costs resulting from differing methods of distribution. Pp. 170–174.

(c) The fact that the buyer was not aware that its favored price was based in part on a discriminatory reduction in the broker's commission is immaterial. Pp. 174–175.

(d) Section 2 (c) applies to payments or allowances by a seller's broker to a buyer, whether made directly to the buyer or indirectly through the seller. Pp. 175–176.

261 F. 2d 725, reversed.

Daniel M. Friedman argued the cause for petitioner. With him on the brief were *Solicitor General Rankin, Daniel J. McCauley, Jr.* and *Alan B. Hobbes.*

Frederick M. Rowe argued the cause for respondent. With him on the brief were *Joseph DuCoeur* and *Harold Orlinsky.*

Henry J. Bison, Jr. argued the cause and filed a brief for the National Association of Retail Grocers of the United States, as *amicus curiae,* urging reversal.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Section 2 (c) of the Clayton Act, as amended by the Robinson-Patman Act,[1] makes it unlawful for "any person" to make an allowance in lieu of "brokerage" to the "other party to such transaction." The question is whether that prohibition is applicable to the following transactions by respondent.

Respondent is a broker or sales representative for a number of principals who sell food products. One of the principals is Canada Foods Ltd., a processor of apple concentrate and other products. Respondent agreed to act for the Canada Foods for a 5% commission. Other brokers working for the same principal were promised a 4% commission. Respondent's commission was higher because it stocked merchandise in advance of sales. Canada Foods established a price for its 1954 pack of apple concentrate at $1.30 per gallon in 50-gallon drums and authorized its brokers to negotiate sales at that price.

The J. M. Smucker Co., a buyer, negotiated with another broker, Phipps, also working for Canada Foods, for apple concentrate. Smucker wanted a lower price than $1.30 but Canada Foods would not agree. Smucker finally offered $1.25 for a 500-gallon purchase. That was turned

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[1] Section 2 (c) makes it unlawful for *"any person* . . . to pay or grant . . . anything of value as a commission, brokerage, or other compensation, or *any allowance or discount in lieu thereof,* except for services rendered in connection with the sale or purchase of goods . . . either to the other party to such transaction or to an . . . intermediary therein . . . ." (Emphasis supplied.) 49 Stat. 1527.

down by Canada Foods, acting through Phipps. Canada Foods took the position that the only way the price could be lowered would be through reduction in brokerage. About the same time respondent was negotiating with Smucker. Canada Foods told respondent what it had told Phipps, that the price to the buyer could be reduced only if the brokerage were cut; and it added that it would make the sale at $1.25—the buyer's bid—if respondent would agree to reduce its brokerage from 5% to 3%. Respondent agreed and the sale was consummated at that price and for that brokerage. The reduced price of $1.25 was thereafter granted Smucker on subsequent sales. But on sales to all other customers, whether through respondent or other brokers, the price continued to be $1.30 and in each instance respondent received the full 5% commission. Only on sales through respondent to Smucker were the selling price and the brokerage reduced.

The customary brokerage fee of 5% to respondent would have been $2,036.84. The actual brokerage of 3% received by respondent was $1,222.11. The reduction of brokerage was $814.73 which is 50% of the total price reduction of $1,629.47 granted by Canada Foods to Smucker.

The Commission charged respondent with violating § 2 (c) of the Act, and after a hearing and the making of findings entered a cease-and-desist order against respondent. The Court of Appeals, while not questioning the findings of fact of the Commission, reversed. 261 F. 2d 725. The case is here on writ of certiorari, 360 U. S. 908.

The Robinson-Patman Act was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power. A lengthy investigation revealed that large chain buyers were obtaining competitive advantages in several ways other than direct price

concessions [2] and were thus avoiding the impact of the Clayton Act.[3] One of the favorite means of obtaining an indirect price concession was by setting up "dummy" brokers who were employed by the buyer and who, in many cases, rendered no services. The large buyers demanded that the seller pay "brokerage" to these fictitious brokers who then turned it over to their employer. This practice was one of the chief targets of § 2 (c) of the Act.[4] But it was not the only means by which the brokerage function was abused [5] and Congress in its wisdom phrased § 2 (c) broadly, not only to cover the other methods then in existence but all other means by which brokerage could be used to effect price discrimination.[6]

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[2] See Final Report on the Chain-Store Investigation, S. Doc. No. 4, 74th Cong., 1st Sess. (1935).

[3] Section 2 of the Clayton Act as originally enacted in 1914 (38 Stat. 730) applied only to price discriminations the effect of which was to "substantially lessen competition or tend to create a monopoly." This section was modified and retained in § 2 (a) as amended by the Robinson-Patman Act. See note 7, *infra*.

[4] See S. Rep. No. 1502, 74th Cong., 2d Sess., p. 7; H. R. Rep. No. 2287, 74th Cong., 2d Sess., pp. 14–15; *Federal Trade Comm'n* v. *Simplicity Pattern Co.*, 360 U. S. 55, 69.

[5] In the Final Report on the Chain-Store Investigation, note 2, *supra*, Congress had before it examples not only of large buyers demanding the payment of brokerage to their agents but also instances where buyers demanded discounts, allowances, or outright price reductions based on the theory that fewer brokerage services were needed in sales to these particular buyers, or that no brokerage services were necessary at all. *Id.*, at 25, 63. These transactions were described in the report as the giving of "allowances in lieu of brokerage" (*id.*, at 62) or "discount[s] in lieu of brokerage." *Id.*, at 27.

[6] The Report of the House Judiciary Committee described the brokerage provision as dealing "with the abuse of the brokerage function for purposes of oppressive discrimination." H. R. Rep. No. 2287, 74th Cong., 2d Sess., p. 14. And although not mentioned in the Committee Reports, the debates on the bill show clearly that

The particular evil at which § 2 (c) is aimed can be as easily perpetrated by a seller's broker as by the seller himself. The seller and his broker can of course agree on any brokerage fee that they wish. Yet when they agree upon one, only to reduce it when necessary to meet the demands of a favored buyer, they use the reduction in brokerage to undermine the policy of § 2 (c). The seller's broker is clearly "any person" as the words are used in § 2 (c)—as clearly such as a buyer's broker.

It is urged that the seller is free to pass on to the buyer in the form of a price reduction any differential between his ordinary brokerage expense and the brokerage commission which he pays on a particular sale because § 2 (a) [7] of the Act permits price differentials based on savings in selling costs resulting from differing methods of distribution. From this premise it is reasoned that a seller's broker should not be held to have violated § 2 (c) for having done that which is permitted under § 2 (a). We need not decide the validity of that premise, because the fact that a transaction may not violate one section of the Act does not answer the question whether another section has been violated. Section 2 (c), with which we

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§ 2 (c) was intended to proscribe other practices such as the "bribing" of a seller's broker by the buyer. See 80 Cong. Rec. 7759–7760, 8111–8112.

[7] Section 2 (a), 15 U. S. C. § 13 (a), provides, in relevant part: "It shall be unlawful for any person engaged in commerce . . . to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly . . . or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing . . . shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are . . . sold or delivered."

are here concerned, is independent of § 2 (a) and was enacted by Congress because § 2 (a) was not considered adequate to deal with abuses of the brokerage function.[8]

Before the Act was passed the large buyers, who maintained their own elaborate purchasing departments and therefore did not need the services of a seller's broker because they bought their merchandise directly from the seller, demanded and received allowances reflecting these savings in the cost of distribution. In many cases they required that "brokerage" be paid to their own purchasing agents. After the Act was passed they discarded the façade of "brokerage" and merely received a price reduction equivalent to the seller's ordinary brokerage expenses in sales to other customers. When haled before the Commission, they protested that the transaction was not covered by § 2 (c) but, since it was a price reduction, was governed by § 2 (a). They also argued that because no brokerage services were needed or used in sales to them, they were entitled to a price differential reflecting this cost saving. Congress had anticipated such a contention by the "in lieu thereof" provision.[9] Accord-

[8] The bill as reported from the Senate Committee excepted savings in brokerage from the cost proviso in § 2 (a). S. Rep. No. 1502, 74th Cong., 2d Sess., p. 5. Yet when the bill was finally passed, the reference to brokerage in § 2 (a) had been deleted. This was done, according to the Conference Report, "for the reason that the matter of brokerage is dealt with in a subsequent subsection of the bill." H. R. Conf. Rep. No. 2951, 74th Cong., 2d Sess., p. 6. By striking the words "other than brokerage" from § 2 (a) we think Congress showed both an intention that "legitimacy" of brokerage be governed entirely by § 2 (c) and an understanding that the language of § 2 (c) was sufficiently broad to cover allowances to buyers in the form of price concessions which reflect a differential in brokerage costs. The legislative history is barren of any indication that a change in substance was intended by this deletion. Indeed, the Conference Report clearly precludes any other inference.

[9] The brokerage clause in the bill was originally directed only at outright commission payments by sellers to buyers' agents. The

ingly, the Commission [10] and the courts [11] early rejected the contention that such a price reduction was lawful because the buyer's purchasing organization had saved the seller the amount of his ordinary brokerage expense.

In *Great Atlantic & Pacific Tea Co.* v. *Federal Trade Comm'n,* 106 F. 2d 667 (C. A. 3d Cir. 1939), a buyer sought to evade § 2 (c) by accepting price reductions equivalent to the seller's normal brokerage payments. The court upheld the Commission's view that the price reduction was an allowance in lieu of brokerage under § 2 (c) and was prohibited even though, in fact, the seller had "saved" his brokerage expense by dealing directly with the select buyer. The buyer also sought to justify its

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Senate added the phrases "or any allowance or discount in lieu thereof," and "either to the other party to such transaction [or his intermediary]." S. Rep. No. 1502, 74th Cong., 2d Sess., p. 7. "This phrasing of the law was obviously designed to prevent evasion of the restriction through a mere modification of the form of the sales contract. It was assumed that large buyers would seek to convert the brokerage which they had hitherto received into an outright price reduction." Zorn and Feldman, Business Under the New Price Laws (1937), 219.

[10] The Commission has held that a price reduction to favored buyers, who bought direct without the intervention of a broker, which was equivalent to brokerage currently paid by the seller to its brokers for sales to other customers was a violation of § 2 (c). It has issued cease-and-desist orders against buyers in, *e. g., The Great Atlantic & Pacific Tea Co.,* 26 F. T. C. 486 (1938), aff'd 106 F. 2d 667 (C. A. 3d Cir. 1939); *General Grocer Co.,* 33 F. T. C. 377 (1941); *Giant Tiger Corporation,* 33 F. T. C. 830 (1941); *UCO Food Corporation,* 33 F. T. C. 924 (1941); *R. C. Williams & Co.,* 33 F. T. C. 1182 (1941); *A. Krasne, Inc.,* 34 F. T. C. 121 (1941); and against sellers in *Ramsdell Packing Co.,* 32 F. T. C. 1187 (1941); *The Union Malleable Mfg. Co.,* 52 F. T. C. 408 (1955). See also several memorandum decisions reported in 32 F. T. C. 1192, 1193 (1941).

[11] *Great Atlantic & Pacific Tea Co.* v. *Federal Trade Comm'n,* 106 F. 2d 667 (C. A. 3d Cir. 1939); *Southgate Brokerage Co.* v. *Federal Trade Comm'n,* 150 F. 2d 607 (C. A. 4th Cir. 1945) (buyer's broker buying and selling on his own behalf).

price reduction on the ground that it had rendered valuable services to the seller. The court rejected this argument also. Although that court's interpretation of the "services rendered" exception in § 2 (c) has been criticized,[12] its conclusion that the price reduction was an allowance in lieu of brokerage within the meaning of § 2 (c) has been followed [13] and accepted.[14]

We are asked to distinguish these precedents on the ground that there is no claim by the present buyer that the price reduction, concededly based in part on a saving to the seller of part of his regular brokerage cost on the particular sale, was justified by the elimination of services normally performed by the seller or his broker. There is no evidence that the buyer rendered any services to the seller or to the respondent nor that anything in its method of dealing justified its getting a discriminatory price by means of a reduced brokerage charge. We would have quite a different case if there were such evidence and we need not explore the applicability of § 2 (c) to such circumstances. One thing is clear—the absence of such evidence and the absence of a claim that the rendition of

[12] See Report of the Attorney General's National Committee to Study the Antitrust Laws (1955) 192, 193; Oppenheim, Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy, 50 Mich. L. Rev. 1139, 1207, n. 178; Rowe, Price Discrimination, Competition, and Confusion: Another Look at Robinson-Patman, 60 Yale L. J. 929, 957–958.

[13] *Southgate Brokerage Co.* v. *Federal Trade Comm'n, supra,* note 11. See also cases cited, note 10, *supra.*

[14] In speaking of these interpretations of § 2 (c), a leading authority said:

"Here too the Commission and the court have applied the Congressional intent with precision. If Congress envisaged the evil as the transmission of brokerage commissions to the buyer, then to permit the buyer to get the same thing under 2 (a) in another form and name would deprive 2 (c) of all substance." Oppenheim, Administration of the Brokerage Provision of the Robinson-Patman Act, 8 Geo. Wash. L. Rev. 511, 535.

services or savings in distribution costs justified the allowance does not support the view that § 2 (c) has not been violated.

The fact that the buyer was not aware that its favored price was based in part on a discriminatory reduction in respondent's brokerage commission is immaterial. The Act is aimed at price discrimination, not conspiracy. The buyer's intent might be relevant were he charged with receiving an allowance in violation of § 2 (c). But certainly it has no bearing on whether the respondent has violated the law. The powerful buyer who demands a price concession is concerned only with getting it. He does not care whether it comes from the seller, the seller's broker, or both.

Congress enacted the Robinson-Patman Act to prevent sellers and sellers' brokers from yielding to the economic pressures of a large buying organization by granting unfair preferences in connection with the sale of goods. The form in which the buyer pressure is exerted is immaterial and proof of its existence is not required. It is rare that the motive in yielding to a buyer's demands is not the "necessity" for making the sale. An "independent" broker is not likely to be independent of the buyer's coercive bargaining power. He, like the seller, is constrained to favor the buyers with the most purchasing power. If respondent merely paid over part of his commission to the buyer, he clearly would have violated the Act. We see no distinction of substance between the two transactions. In each case the seller and his broker make a concession to the buyer as a consequence of his economic power. In both cases the result is that the buyer has received a discriminatory price. In both cases the seller's broker reduces his usual brokerage fee to get a particular contract. There is no difference in economic effect between the seller's broker splitting his brokerage

commission with the buyer [15] and his yielding part of the brokerage to the seller to be passed on to the buyer in the form of a lower price.[16]

We conclude that the statute clearly applies to payments or allowances by a seller's broker to the buyer, whether made directly to the buyer, or indirectly, through the seller. The allowances proscribed by § 2 (c) are those made by "any person" which, as we have said, clearly encompasses a seller's broker.[17] The respondent was a necessary party to the price reduction granted the buyer. His yielding of part of his brokerage to be passed on to the buyer was a *sine qua non* of the price reduction. This is not to say that every reduction in price, coupled with a reduction in brokerage, automatically compels the conclusion that an allowance "in lieu" of brokerage has been granted. As the Commission itself has made clear,

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[15] See *Oliver Bros.* v. *Federal Trade Comm'n,* 102 F. 2d 763, 770 (C. A. 4th Cir.).

[16] The Conference Report states that § 2 (c) "prohibits the *direct* or *indirect* payment of brokerage except for such services rendered." (Italics supplied.) H. R. Conf. Rep. No. 2951, 74th Cong., 2d Sess., p. 7.

[17] Several writers, including one of the coauthors of the Act, have viewed § 2 (c) as covering payments or allowances by sellers' brokers for the benefit of particular buyers. See Patman, The Robinson-Patman Act (1938), 102, 108; Austin, Price Discrimination and Related Problems Under the Robinson-Patman Act, Am. L. Inst. (rev. ed. 1953), 108. (See also 2d rev. ed., 1959, 116); Oppenheim, Administration of the Brokerage Provision of the Robinson-Patman Act, 8 Geo. Wash. L. Rev. 511, 544 (1940); Edwards, The Price Discrimination Law (1959), 104. As Patman, *op. cit., supra,* at 102, states respecting seller's brokerage, "To waive the cost of the brokerage or commission to one purchaser and assess it against another represents an unfair discrimination between the purchasers, is an attempt to divorce one item of cost from the rest when, in fact, they all make up the whole, and permits a practice to gain foothold which may increase in such proportions as to demoralize the industry of which it is a part."

whether such a reduction is tantamount to a discriminatory payment of brokerage depends on the circumstances of each case. *Main Fish Co., Inc.*, 53 F. T. C. 88. Nor does this "fuse" provisions of § 2 (a), which permits the defense of cost justification, with those of § 2 (c) which does not; it but realistically interprets the prohibitions of § 2 (c) as including an independent broker's allowance of a reduced brokerage to obtain a particular order.

It is suggested that reversal of this case would establish an irrevocable floor under commission rates. We think that view has no foundation in fact or in law. Both before and after the sales to Smucker, respondent continued to charge the usual 5% on sales to other buyers. There is nothing in the Act, nor is there anything in this case, to require him to continue to charge 5% on sales to all customers.[18] A price reduction based upon alleged savings in brokerage expenses is an "allowance in lieu of brokerage" when given only to favored customers. Had respondent, for example, agreed to accept a 3% commission on all sales to all buyers there plainly would be no room for finding that the price reductions were violations of § 2 (c). Neither the legislative history nor the purposes of the Act would require such an absurd result, and neither the Commission nor the courts have ever suggested it. Here, however, the reduction in brokerage was made to obtain this particular order and this order only and therefore was clearly discriminatory.

The applicability of § 2 (c) to sellers' brokers under circumstances not distinguishable in principle from the present case is supported by a 20-year-old administrative interpretation. Beginning in 1940, four years after the Act was passed, the Commission restrained the

[18] Cf. *Robinson* v. *Stanley Home Products, Inc.*, 272 F. 2d 601 (C. A. 1st Cir.), where it was held that § 2 (c) was not violated by a seller who eliminated the services of a broker entirely, converted to direct selling, and thereafter reduced his prices.

practice of brokers who, whether buying and selling on their own account or acting on behalf of the seller, sold goods to purchasers who bought through them direct at a reduced price reflecting the savings made by the elimination of the services of a local broker. This practice was held to be a violation of § 2 (c), not § 2 (a).[19]

If we held that § 2 (c) is not applicable here, we would disregard the history which we have delineated, overturn a settled administrative practice, and approve a construction that is hostile to the statutory scheme—one that would leave a large loophole in the Act. Any doubts as to the wisdom of the economic theory embodied in the statute are questions for Congress to resolve.

Reversed.

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

The Court holds, in effect, that the action of an independent broker, engaged by a seller, in reducing his contract rate of commission for the purpose of enabling the seller to make a sale to a buyer at a reduced price, constitutes the granting of an allowance in lieu of "brokerage" by the broker to the buyer, in violation of § 2 (c) of the

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[19] See *Albert W. Sisk & Son*, 31 F. T. C. 1543 (1940); *C. F. Unruh Brokerage Co.*, 31 F. T. C. 1557 (1940); *C. G. Reaburn & Co.*, 31 F. T. C. 1565 (1940); *William Silver & Co.*, 31 F. T. C. 1589 (1940); *H. M. Ruff & Son*, 31 F. T. C. 1573 (1940); *Thomas Roberts & Co.*, 31 F. T. C. 1551 (1940); *American Brokerage Co.*, 31 F. T. C. 1581 (1940); *W. E. Robinson & Co.*, 32 F. T. C. 370 (1941); *Custom House Packing Corp.*, 43 F. T. C. 164 (1946).

We need not view this administrative practice as laying down an absolute rule that § 2 (c) is violated by the passing on of savings in broker's commissions to direct buyers, for here, as we have emphasized, the "savings" in brokerage were passed on to a single buyer who was not shown in any way to have deserved favored treatment.

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Clayton Act, as amended by the Robinson-Patman Act, 15 U. S. C. § 13 (c).

Respondent, an independent broker of Chicago, Illinois, was engaged by Canada Foods, Ltd., of Kentville, Nova Scotia, to procure orders for its products upon a commission or "brokerage" basis of 5% of the amount of the sales made. Other independent brokers in the United States were similarly engaged by Canada Foods, but upon a commission or brokerage basis of 4%. Canada Foods had announced a price of $1.30 per gallon for its apple concentrate. Respondent and another independent broker, both acting on behalf of Canada Foods, separately solicited the J. M. Smucker Company of Orrville, Ohio, for an order for that product. Smucker was willing to purchase a quantity of the product, but would pay only $1.25 per gallon for it. Finally, respondent agreed with Canada Foods to reduce its commission or brokerage to 3% in order to permit the latter to accept the Smucker order. Thereupon, Canada Foods accepted and filled the order, and thereafter paid respondent a commission of 3% as agreed. Smucker, the buyer, was not advised that respondent had agreed to reduce its commission charge to the seller.

Thereafter, in what appears to be the first proceeding of this type, the Federal Trade Commission charged respondent with granting and allowing the buyer a portion of its brokerage fee, in violation of § 2 (c) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U. S. C. § 13 (c), and, after hearing, entered a cease-and-desist order against it. The Court of Appeals reversed, holding that respondent, an independent seller's broker, was not covered by § 2 (c), and moreover had not paid anything of value as a commission, brokerage, or other compensation to the buyer. 261 F. 2d 725. We granted certiorari, 360 U. S. 908.

In reversing the Court of Appeals, the Court now holds that § 2 (c) "clearly applies to payments or allowances by a seller's broker to the buyer, whether made directly to the buyer, or indirectly, through the seller." In my view, no such question is presented on the admitted facts of this case, and the Court's holding is not supported by the terms nor the object of § 2 (c), but is actually opposed to its declared purpose as shown by its legislative history.

Section 2 (c) makes it "unlawful for any person . . . to pay or grant . . . anything of value as a *commission, brokerage, or other compensation, or any allowance or discount in lieu thereof,* except for services rendered in connection with the sale or purchase of goods . . . either *to the other party* to such transaction *or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf . . . of any party to such transaction other than the person by whom such compensation is so granted or paid.*" [1] (Emphasis added.)

The phrase "any person" in § 2 (c) includes, of course, even a truly independent seller's broker. But that only poses the true question, which is whether an agreement by such a broker to reduce his commission charge to the seller, thus enabling the seller to reduce its price, constitutes the paying or granting by the broker of *"anything*

[1] Section 2 (c), 15 U. S. C. § 13 (c), provides in full that:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid."

of value as a commission, brokerage, or other compensation," or an *"allowance or discount in lieu thereof,"* to the buyer.

There is no contention here that the buyer made any claim for "anything of value *as a commission, brokerage, or other compensation* . . . for services rendered in connection with the . . . purchase of [the] goods," either directly or through any intermediary. Rather, it is conceded that the buyer did not even know that respondent had agreed with the seller to reduce its commission charge. Nor is there any claim that respondent was "acting in fact for or in behalf . . . of any party to such transaction other than the [seller] by whom [the concession in price was] granted." Rather, it is conceded that it was not. Nor, indeed, is there any claim that respondent actually paid "anything of value *as a commission, brokerage or other compensation*" to the buyer or to any intermediary who was "acting in fact for or in [its] behalf." What and all respondent did was to reduce its charge to the seller for its services from 5% to 3%. It must surely be clear that this did not constitute a violation by respondent of the terms of § 2 (c). For if it did, then all legitimate commission rates are frozen in destruction of competition, and in actual violation of the antitrust laws.

I turn now to the purpose of § 2 (c) as shown by its legislative history. The motivating factor behind the enactment of § 2 (c) was the elimination of the practice by large buyers of demanding and receiving price concessions in the guise of "dummy brokerage" payments and "allowances" for "services" claimed to have been rendered to sellers, but which were not actually performed.[2] It

[2] "Among the prevalent modes of discrimination at which this bill is directed, is the practice of certain large buyers to demand the allowance of brokerage direct to them upon their purchases, or its payment to an employee, agent, or corporate subsidiary whom they

was Congress' purpose to eliminate that evil. Accordingly, it designed § 2 (c) to prohibit payments or allowances of "anything of value as a commission, brokerage, or other compensation" by a seller to a buyer, directly or through an intermediary, "where such intermediary is acting in fact for or in behalf [of the buyer]." [3] Although Congress took the view that neither a party to the transaction nor his intermediary could perform legitimate services for the *other* party, § 2 (c) was not intended to and did not proscribe payments by a seller or a buyer to

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set up in the guise of a broker, and through whom they demand that sales to them be made. Whether employed by the buyer in good faith to find a source of supply, or by the seller to find a market, the broker so employed discharges a sound economic function and is entitled to appropriate compensation by the one in whose interest he so serves. But to permit its payment or allowance where no such service is rendered, where in fact, if a 'broker,' so labeled, enters the picture at all, it is one whom the buyer points out to the seller, rather than one who brings the buyer to the seller, is but to permit the corruption of this function to the purposes of competitive discrimination. The relation of the broker to his client is a fiduciary one. To collect from a client for services rendered in the interest of a party adverse to him, is a violation of that relationship; and to protect those who deal in the streams of commerce against breaches of faith in its relations of trust, is to foster confidence in its processes and promote its wholesomeness and volume." S. Rep. No. 1502, 74th Cong., 2d Sess., p. 7. See also H. R. Rep. No. 2287, 74th Cong., 2d Sess., pp. 14–15.

[3] "Section [(c)] permits the payment of compensation by a seller to his broker or agent for services actually rendered in his behalf: Likewise by a buyer to his broker or agent for services in connection with the purchase of goods actually rendered in his behalf; but it prohibits the direct or indirect payment of brokerage except for such services rendered. It prohibits its allowance by the buyer direct to the seller, or by the seller direct to the buyer; and it prohibits its payment by either to an agent or intermediary acting in fact for or in behalf, or subject to the direct or indirect control, of the other." H. R. Rep. No. 2287, 74th Cong., 2d Sess., p. 15. See also the Conference Committee Report, H. R. Conf. Rep. No. 2951, 74th Cong., 2d Sess., p. 7.

his *own* broker for services actually rendered to him, nor did Congress intend to fix or freeze brokerage rates or otherwise interfere with such legitimate brokerage operations.[4] The purpose of § 2 (c), as shown by the legislative history referred to, was not to embrace or affect legitimately negotiated rates of commission for brokers' services.

As I have pointed out, this is not a case where *the buyer* has claimed or received, either directly or through its intermediary, any "brokerage" "allowance," or discount in price, *as compensation for services.*[5] Nor has the *buyer* obtained any allowance or discount because of any "savings" claimed to have been effected for the seller through elimination by the *buyer or his broker* of services normally performed by the *seller or his broker.*[6] I am,

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[4] As stated by Senator Logan on the Senate floor:
"The bill has nothing to do with brokerage at all. The bill deals with schemes and shams used to bring about discriminations in prices. . . . A legitimate broker can charge whatever his employer may be willing to pay without the violation of any provisions of the proposed act." 80 Cong. Rec. 3118.

. . . . . .

"I shall now speak of the matter of brokerage. Let me say in the beginning that the bill does not affect legitimate brokerage either directly or indirectly. Where the broker renders service to the buyer or to the seller the bill does not prohibit the payment of brokerage. It is not aimed at the legitimate practice of brokerage, because brokerage is necessary. The broker has a field all his own and he should not be interfered with." 80 Cong. Rec. 6281.

[5] See *Biddle Purchasing Co.* v. *Federal Trade Comm'n,* 96 F. 2d 687 (C. A. 2d Cir.); *Oliver Bros., Inc.,* v. *Federal Trade Comm'n,* 102 F. 2d 763 (C. A. 4th Cir.).

[6] See *Great Atlantic & Pacific Tea Co.* v. *Federal Trade Comm'n,* 106 F. 2d 667 (C. A. 3d Cir.), and *Southgate Brokerage Co.* v. *Federal Trade Comm'n,* 150 F. 2d 607 (C. A. 4th Cir.), in which the buyer claimed to have effected a "saving" in distribution costs for the seller because of services performed by the buyer's purchasing

therefore, unable to see or understand how it may be thought that the action of respondent in reducing its charge to the seller from 5% to 3% constituted the granting, either directly or indirectly, of "*a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof*" to the buyer, within the meaning of those terms as used in § 2 (c). Since this case does not in any way involve any payment or allowance for services claimed to have been performed by the buyer or his intermediary, it is simply not the type or kind of case that is covered and governed by § 2 (c). Inasmuch as the legislative history of § 2 (c) shows that Congress did not intend that section to affect negotiated charges for legitimate brokerage services, I submit that the Court ought not so extend it by construction.

Until today, it seems always to have been generally understood that a truly independent broker, such as respondent, was free to negotiate the rate or amount of his commissions with his principal without fear of violating § 2 (c).[7] Such was the expressed congressional intention.[8] Surely if the rate or amount of respondent's commissions for services rendered to Canada Foods had been left to negotiation on each sale, no one would contend that an agreement by respondent to accept a commission of 3% for the sale in question would violate § 2 (c). Likewise, there could be no violation of § 2 (c) if, instead of dealing through a broker who charged a 5% commission, the

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organization. Such cases must be distinguished from those in which the nature of the seller's own operation, without more, enables it to effect legitimate savings in brokerage and other distribution costs.

[7] See, *e. g.*, Report of the Attorney General's National Committee to Study the Antitrust Laws (1955) 190–191; Oppenheim, Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy, 50 Mich. L. Rev. 1139, 1207, n. 178.

[8] See note 4.

seller had dealt through a broker who charged only 3%. But the Court now holds that an independent seller's broker who has once agreed with the seller on a general rate of commission may not renegotiate that rate with his principal in order to effect a sale that would otherwise be lost to him. The fact that respondent and the seller had previously entered into an agreement concerning commission rates should not, in my view, be controlling, for I can see no sound reason why the seller and his broker must regard such an agreement as establishing an irrevocable floor under commission rates or amounts in order to avoid antitrust consequences. The Court's holding appears to me to be an unwarranted interference with legitimate brokerage operations, in direct contravention of congressional intent.

Quite obviously, the Court's real concern in this case is with the price reduction which this particular buyer has received. But, while it was the aim of the Robinson-Patman Act to eliminate discriminatory price advantages which particular buyers might obtain through unfair means, it should be borne in mind that Congress did not choose to condemn *all* price differences between purchasers. Section 2 (a), designed to deal with outright price discriminations between purchasers which may lessen competition, contains, for example, a proviso to the effect that "nothing . . . shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered." [9] This proviso was

[9] Section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U. S. C. § 13 (a), provides, in pertinent part:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be

incorporated for the purpose of "preserving for the public the benefits of efficient marketing methods while at the same time subjecting to the prohibitions of the statute those 'unearned' price differentials which could not be reasonably related to some savings in the seller's costs of manufacture, sale, or delivery." Report of the Attorney General's National Committee to Study the Antitrust Laws (1955), p. 171. See also H. R. Rep. No. 2287, 74th Cong., 2d Sess., pp. 9–10.

It was the evident intention of Congress in § 2 (a) to permit sellers to pass through to buyers, in the form of reduced prices, any *true savings* in the cost of distribution of their goods. There appears to be no basis for ascribing to Congress an intention by § 2 (c) to require a seller who uses the services of a broker in some sales to do so in all sales, or to require that brokerage rates be static. Yet this would be the effect of the Commission's contention that a sale made directly by such a seller to a buyer at a price that does not include any brokerage constitutes the granting by the seller to the buyer of brokerage or an allowance in lieu of brokerage under § 2 (c).[10] Since a

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substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing contained in sections 12, 13, 14–21, and 22–27 of this title shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered . . . ."

[10] The Commission has expressed such a view in several early proceedings, see, *e. g.*, *Albert W. Sisk & Son*, 31 F. T. C. 1543 (1940); *C. F. Unruh Brokerage Co.*, 31 F. T. C. 1557 (1940); *W. E. Robinson & Co.*, 32 F. T. C. 370 (1941); *Ramsdell Packing Co.*, 32 F. T. C. 1187 (1941); *Custom House Packing Corp.*, 43 F. T. C. 164 (1946), but that view is in conflict with the terms of § 2 (c) and does not accord with the congressional intent.

reduction (or even elimination) of legitimate brokerage fees paid by the seller to an independent broker representing him might well constitute a *true saving* in the cost of one phase of the marketing process, such a reduction may, in proper circumstances, validly justify a reduction in price to a particular buyer.[11] Once this fact is recognized, and is coupled with an understanding that the real purpose of § 2 (c) was to prohibit allowances by a seller based on services claimed to have been performed,

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[11] When § 2 (a) emerged from the Senate Committee, the "cost justification" proviso contained an addition to the clause, permitting: ". . . differentials which make only due allowance for differences in the cost, *other than brokerage*, of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered. . . ." (Emphasis added.)

This addition was explained as having been deemed necessary "to harmonize this subsection with subsection [(c)] considered below, which deals directly with the question of brokerage." S. Rep. No. 1502, 74th Cong., 2d Sess., p. 5.

In discussion on the Senate floor with respect to this addition, Senator Logan commented:

"I think perhaps legitimate brokerage ought to be allowed as a part of the costs; and I think when the bill was drafted—I did not write the bill—perhaps in the amendment which was inserted by the Judiciary Committee of the Senate we had in mind dummy brokerage, sham brokerage. It may be that something should be done about that. I call it to the attention of the Senate, so that some of the other Senators may consider it." 80 Cong. Rec. 6285.

The Conference Committee then deleted the phrase "other than brokerage" from the proviso, "for the reason that the matter of brokerage is dealt with in a subsequent subsection of the bill." H. R. Conf. Rep. No. 2951, 74th Cong., 2d Sess., p. 6.

In view of the meaning of "brokerage" as used in § 2 (c) and the elimination of the phrase "other than brokerage" from the "cost justification" proviso, it seems clear to me that a reduction in price based on savings in *legitimate* brokerage costs is among the reductions which Congress intended might be validly justified under the § 2 (a) proviso.

to the benefit of the seller, *by the buyer or his broker,* I would think there is no choice but to conclude that the transaction here in question was one which Congress contemplated would be actionable only in a proceeding under § 2 (a), subject to any valid "cost justification" defense. The high standards of proof required to sustain a "cost justification" defense in a § 2 (a) proceeding eliminate any possibility of establishing as a *true cost saving* any reduction in brokerage commissions made as a subterfuge for the granting of an allowance or discount as a rebate to a buyer, whether or not as the result of coercive pressure of the buyer upon the seller or his broker.[12]

However, under the expansive reading which the Court now gives § 2 (c), in opposition, I believe, to its legislative history, this provision may now be applied to prohibit a price reduction granted by a seller to a buyer, even though such price reduction may be well based solely on true savings arising from a reduction in the cost of legitimate brokerage services performed *by the seller's own broker.* I am unable to perceive any basis for a conclusion that respondent's reduction of its brokerage charge to the seller, and the seller's consequent reduction in price to the buyer, violated the provisions of § 2 (c). That conclusion seems to me to be an obvious thwarting of the intention of Congress to allow *true cost savings* to be passed through to buyers.

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[12] I intimate no view on whether a valid "cost justification" defense would be available in a § 2 (a) proceeding on the facts of this case.

The Court of Appeals for the First Circuit has recently recognized the fundamental differences between § 2 (a) and § 2 (c), discussed here. *Robinson* v. *Stanley Home Products, Inc.*, 272 F. 2d 601. See generally, Note, 57 Mich. L. Rev. 926.

Of course, § 2 (f) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U. S. C. § 13 (f), which makes it "unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section," may be applicable in a proceeding against the buyer.

Indeed, the Court itself seems to display some concern for the potential sweep of today's decision. It declares that its interpretation of the statute includes "an independent broker's allowance of a reduced brokerage to obtain a particular order," and it is at pains to point out that "the reduction in brokerage was made to obtain this particular order and this order only and therefore was clearly discriminatory." The Court also asserts that its holding in this case should *not* be understood to mean "that every reduction in price, coupled with a reduction in brokerage, automatically compels the conclusion that an allowance 'in lieu' of brokerage has been granted," indicating that "whether such a reduction is tantamount to a discriminatory payment of brokerage depends on the circumstances of each case." Even further, the Court makes it clear that it does *not* intend to approve any absolute rule that § 2 (c) is violated in every case where savings in brokerage are passed on to buyers—justifying its holding in this case by stating that "the 'savings' in brokerage were passed on to a single buyer who was not shown in any way to have deserved favored treatment."

To me these efforts by the Court to so limit its holding represent a clear recognition of the fact that in some cases a reduction or elimination of brokerage costs might well justify a valid reduction in price by a seller to a particular buyer, and, in such cases, the Court is apparently quite prepared to hold that § 2 (c) would not be violated. But as I read § 2 (c), either its terms are not applicable to *any* case where a price reduction results from a reduction in the seller's legitimate brokerage costs, or they are applicable to *all* such cases. Section 2 (c) does *not* expressly require discrimination between purchasers as an element of its proscriptions, nor does *it* provide any defenses based on legitimate savings in brokerage costs; only § 2 (a) contains such provisions. And as we said just last Term, in

construing § 2 (e) of the Act, "[w]e cannot supply what Congress has studiously omitted." *Federal Trade Comm'n* v. *Simplicity Pattern Co.*, 360 U. S. 55, 67.

I can only conclude that, by leaving the door open for cases in which a reduction in price based on a saving in the seller's brokerage costs may, in its view, be validly justified, the Court has done one of two things. Either it has, in this § 2 (c) case, recognized and applied the true purposes and policies underlying § 2 (a), tested the validity of a "cost justification" defense in this case under *that section,* and concluded *sub silentio* that none could be made out here, or it has, despite our holding in *Simplicity Pattern, supra,* and notwithstanding its own disclaimer, fused the provisions of § 2 (a) with those of § 2 (c) and thereby weakened materially the *per se* thrust which Congress intended that § 2 (c), when applicable, would have.

In my view, § 2 (c) is not applicable to *any* case of this type, for in such a case there is no payment of "brokerage" or an "allowance or discount in lieu thereof" to the buyer, as I understand the meaning of those terms as used in the statute. For me, *every* case presenting this type of situation is actionable only under § 2 (a), for it seems clear that § 2 (a), which is expressly concerned with discrimination between purchasers, with effects on competition, and with the possible existence of true cost savings, was designed by Congress to cover this type of case. And in a § 2 (a) proceeding, the challenged party will be afforded an opportunity to establish the validity of the price reduction in question—an opportunity not afforded under the terms of § 2 (c). The Court's adroit footwork in this regard serves quite effectively to illustrate the reasons why I think the case before us is one which Congress intended should be actionable under § 2 (a), rather than § 2 (c), and I would therefore affirm the judgment of the Court of Appeals.

KRESHIK ET AL. *v.* SAINT NICHOLAS CATHEDRAL OF THE RUSSIAN ORTHODOX CHURCH OF NORTH AMERICA.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK.

No. 824. Decided June 6, 1960.

Certiorari is granted and a decision of the Court of Appeals of New York, holding that, under the common law of New York, petitioners, as the appointees of the Patriarch of Moscow, may not exercise the right conferred under canon law to use and occupy St. Nicholas Cathedral of the Russian Orthodox Church in New York City, is reversed on the authority of *Kedroff* v. *St. Nicholas Cathedral*, 344 U. S. 94, since the constitutional principles there applied forbid the judiciary, as well as the legislature, of a State to interfere with the free exercise of religion. Pp. 190–191.

7 N. Y. 2d 191, 164 N. E. 2d 687, reversed.

Philip Adler and *Eugene Gressman* for petitioners.

Ralph Montgomery Arkush and *Charles H. Tuttle* for respondent.

PER CURIAM.

The motion for leave to proceed upon the record in No. 3, October Term, 1952, and the petition for certiorari, are granted.

In a prior decision in this litigation, we held that the right conferred under canon law upon the Archbishop of the North American Archdiocese of the Russian Orthodox Greek Catholic Church, as the appointee of the Patriarch of Moscow, to the use and occupancy of the St. Nicholas Cathedral in New York City, owned by respondent corporation, was "strictly a matter of ecclesiastical government," and as such could not constitutionally be impaired by a state statute, New York Religious Corpo-

rations Law, Art. 5–C, purporting to bestow that right on another. *Kedroff* v. *St. Nicholas Cathedral,* 344 U. S. 94. We reversed a judgment of the New York Court of Appeals against the petitioners' predecessors in office, and remanded the case for "further action . . . not in contravention" of our opinion. *Id.,* at 121.

The Court of Appeals ordered a retrial of the question of petitioners' right to use and occupancy, on a common-law issue assertedly left open by our invalidation of the statutory basis for the former decision. 306 N. Y. 38, 114 N. E. 2d 197. After trial, the Court of Appeals directed the entry of judgment against petitioners, holding that, by reason of the domination—so found by that court to be the fact—of the Patriarch by the secular authority in the U. S. S. R., his appointee could not under the common law of New York validly exercise the right to occupy the Cathedral. 7 N. Y. 2d 191, 164 N. E. 2d 687.

As the opinions of the Court of Appeals make evident, compare 302 N. Y., at 29–33, 96 N. E. 2d, at 72–74, with 7 N. Y. 2d, at 209–216, 164 N. E. 2d, at 696–700, the decision now under review rests on the same premises which were found to have underlain the enactment of the statute struck down in *Kedroff.* 344 U. S., at 117–118. But it is established doctrine that "[i]t is not of moment that the State has here acted solely through its judicial branch, for whether legislative or judicial, it is still the application of state power which we are asked to scrutinize." *N. A. A. C. P.* v. *Alabama,* 357 U. S. 449, 463. See *Shelley* v. *Kraemer,* 334 U. S. 1, 14–16, and cases there cited. Accordingly, our ruling in *Kedroff* is controlling here, and requires dismissal of the complaint.

Reversed.

DOUGLAS *v.* GREEN, SUPERINTENDENT, MARION CORRECTIONAL INSTITUTION.

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

No. 438, Misc. Decided June 6, 1960.

In petitioner's application to a Federal District Court for a writ of habeas corpus, his allegation that the Supreme Court of Ohio did not provide him, as an indigent criminal defendant, with an adequate remedy for the prosecution of an appeal from his conviction without payment of docket fees, made out a case of denial of equal protection of the laws. Therefore, certiorari is granted, the judgment denying a writ of habeas corpus is reversed, and the cause is remanded to the District Court for further proceedings in the light of *Burns* v. *Ohio*, 360 U. S. 252. Pp. 192–193.

Judgment reversed and cause remanded.

Petitioner *pro se*.

Mark McElroy, Attorney General of Ohio, and *Aubrey A. Wendt*, Assistant Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is also granted. Petitioner, a prisoner in an Ohio penitentiary, filed an application for a writ of habeas corpus in the District Court for the Northern District of Ohio. Among other claims, the petitioner alleged that the Ohio Supreme Court did not provide him, as an indigent criminal defendant, an adequate remedy for the prosecution of an appeal from his conviction without payment of docket fees. This deficiency was urged, as we read this lay petitioner's informal *pro se* application for the writ, as a violation of the Federal Constitution's guarantee of the equal protection of the laws. See *Burns* v. *Ohio*, 360

U. S. 252. The writ of habeas corpus was in effect denied by the District Court, that court denying petitioner, for want of merit, leave to proceed *in forma pauperis* before it. The District Court further denied a motion for leave to appeal *in forma pauperis* and the Court of Appeals sustained this action on the renewal of the motion before it.

We hold that petitioner's allegations in the application for the writ made out a case of deprivation of his constitutional right to the equal protection of the laws by Ohio in respect to his appeal from the conviction in the criminal prosecution against him. Clearly federal habeas corpus is an appropriate remedy under these circumstances. See *Johnson* v. *Zerbst,* 304 U. S. 458, 467–468; *Burns* v. *Ohio, supra,* at 262 (dissenting opinion). In view of our decision in *Burns* as to the validity of the former Ohio practice, and Ohio's conformance, as we are advised, to the requirements of that decision, we think that the District Court should suspend a hearing on the writ for a reasonable time to allow petitioner to reapply to the Ohio Supreme Court for consideration of his appeal. Upon that court's action thereon, the District Court should proceed, upon hearing, to make such appropriate order in the premises, as under the circumstances "law and justice require." 28 U. S. C. § 2243. It may at that time consider, in the posture in which the case then stands, petitioner's other claims as to the constitutional adequacy of Ohio's appellate procedure in respect of his original conviction and his application for state collateral relief. To this end, the judgment is reversed and the cause is remanded to the District Court.

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

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UNITED STATES *v.* MANUFACTURERS NATIONAL BANK OF DETROIT, EXECUTOR.

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

No. 350. Argued March 31, 1960.—Decided June 13, 1960.

In 1936, respondent's decedent divested himself of his rights in certain insurance policies on his own life by assigning them to his wife; but he continued to pay the premiums on them until he died in 1954. The Internal Revenue Service determined that, under § 811 (g)(2)(A) of the Internal Revenue Code of 1939, the portion of the proceeds attributable to premiums paid by the insured after January 10, 1941, should be included in his estate for the purposes of the federal estate tax. *Held:* As thus applied, § 811 (g)(2)(A) is constitutional. Pp. 194–201.

(a) The tax is not a direct tax on property which Congress cannot exact without apportionment among the States. Pp. 197–200.

(b) The tax is not retroactive and does not violate the Due Process Clause of the Fifth Amendment. Pp. 200–201.

175 F. Supp. 291, reversed.

Assistant Attorney General Kramer argued the cause for the United States. With him on the briefs were *Solicitor General Rankin, Assistant Attorney General Rice, Daniel M. Friedman, Harry Baum* and *L. W. Post.*

Henry I. Armstrong, Jr. argued the cause for appellee. With him on the brief was *Louis F. Dahling.*

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

The question here is whether Section 811 (g)(2)(A) of the Internal Revenue Code of 1939 is constitutional as applied in this case. That section, the "payment of premiums" provision in the 1939 Code, requires inclusion

of insurance proceeds in the gross estate of an insured where the proceeds are receivable by beneficiaries other than the executor but are attributable to premiums paid by the insured.[1] Inclusion is required regardless of whether the insured retained any policy rights. However, if the insured possessed no "incidents of ownership" after January 10, 1941, the premiums paid by him before that date are excluded in determining the portion of the proceeds for which he paid the premiums.[2]

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[1] These provisions were enacted, through amendment of § 811 (g), by § 404 (a) of the Revenue Act of 1942, 56 Stat. 798, 944. As amended, § 811 provides in pertinent part that:

"The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

. . . . . .

"(g) PROCEEDS OF LIFE INSURANCE.—

"(1) RECEIVABLE BY THE EXECUTOR.—To the extent of the amount receivable by the executor as insurance under policies upon the life of the decedent.

"(2) RECEIVABLE BY OTHER BENEFICIARIES.—To the extent of the amount receivable by all other beneficiaries as insurance under policies upon the life of the decedent (A) purchased with premiums, or other consideration, paid directly or indirectly by the decedent, in proportion that the amount so paid by the decedent bears to the total premiums paid for the insurance, or (B) with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any other person. . . ."

[2] § 404 (c), Revenue Act of 1942, 56 Stat. 798, 945. Section 404 (c) provides that:

"The amendments made by subsection (a) [see note 1, *supra*] shall be applicable only to estates of decedents dying after the date of the enactment of this Act [October 21, 1942]; but in determining the proportion of the premiums or other consideration paid directly or indirectly by the decedent (but not the total premiums paid) the amount so paid by the decedent on or before January 10, 1941, shall

The facts in the case are stipulated. The insured died testate on July 15, 1954. The taxpayer is his executor. On the estate tax return, the taxpayer included, as part of the gross estate, the proceeds of four insurance policies payable to the wife of the insured. These policies were originally issued to the insured, but he divested himself of the policy rights by assigning them to his wife on December 18, 1936. However, he continued to pay the premiums on the policies until he died. After his death, the proceeds were retained by the insurer for the benefit of the family, pursuant to the provisions of a settlement option selected by the wife.

In auditing the return, the Revenue Service determined that only the portion of the proceeds attributable to premiums paid by the insured after January 10, 1941, should be included in his estate.[3] Accordingly, the tax was adjusted and a refund was made. The executor then filed a claim for refund of the rest of the tax attributable to the inclusion of the proceeds. The executor claimed that because the decedent had divested himself of all interest in the policies in 1936, the tax constituted an unapportioned direct tax on property, invalid under

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be excluded if at no time after such date the decedent possessed an incident of ownership in the policy."

January 10, 1941, was the effective date of a Treasury Regulation, T. D. 5032, 1941–1 Cum. Bull. 427, which provided for use of the "payment of premiums" test under § 811 (g) as it existed prior to the 1942 amendments, see note 1, *supra,* regardless of whether the decedent retained any incidents of ownership. The regulation also provided, however, that premiums paid by the decedent before its effective date were to be excluded if the decedent did not thereafter possess any incidents of ownership.

It should be noted that the "payment of premiums" test was abandoned in the 1954 Code, which reverted to the exclusive use of the "incidents of ownership" test. See 26 U. S. C. § 2042.

[3] See note 2, *supra.*

Article I, Sections 2 and 9, of the Constitution.[4] However, the Commissioner refused to allow the claim, and the present suit for refund followed. In the District Court, the executor added a claim that the tax is also invalid under the Due Process Clause of the Fifth Amendment "because it is retroactive and discriminatory in its operation."

The District Court sustained the taxpayer's contention that, as applied in this case, Section 811 (g)(2)(A) is unconstitutional. It held that because the decedent retained no incidents of ownership in the policies after 1936, "no transfer of the property herein sought to be included in the estate of this decedent occurred at the time of his death." The court concluded that the tax was therefore a direct tax on the proceeds themselves and could not be levied without apportionment.[5] 175 F. Supp. 291. The Government appealed directly to this Court under Sections 1252 and 2101 of Title 28, and we noted jurisdiction. 361 U. S. 880.

The first objection to the tax is that it is a direct tax—that is, that it is not a tax upon a transfer or other taxable

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[4] Article I, § 2, provides in pertinent part that:

"Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers . . . ."

Article I, § 9, provides in pertinent part that:

"No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken."

[5] This result is in accord with *Kohl* v. *United States*, 226 F. 2d 381 (C. A. 7th Cir.), the reasoning of which the District Court "adopted" as its own. As the District Court recognized, *Kohl* is in conflict with *Estate of Loeb* v. *Commissioner*, 261 F. 2d 232 (C. A. 2d Cir.), affirming 29 T. C. 22; *Schwarz* v. *United States*, 170 F. Supp. 2; cf. *Colonial Trust Co.* v. *Kraemer*, 63 F. Supp. 866; *Estate of Baker* v. *Commissioner*, 30 T. C. 776.

event but is, instead, a tax upon property—which Congress cannot exact without apportionment.

This argument does not do justice to the evident intent of Congress to tax events, "as distinguished from [their] tangible fruits." *Tyler* v. *United States,* 281 U. S. 497, 502. From its inception, the estate tax has been a tax on a class of events which Congress has chosen to label, in the provision which actually imposes the tax, "the *transfer* of the net estate of every decedent." [6] (Emphasis added.) See *New York Trust Co.* v. *Eisner,* 256 U. S. 345. If there is any taxable event here which can fairly be said to be a "transfer" under this language in Section 810 of the 1939 Code, the tax is clearly constitutional without apportionment. For such a tax has always "been treated as a duty or excise, because of the particular occasion which gives rise to its levy." *Knowlton* v. *Moore,* 178 U. S. 41, 81; *New York Trust Co.* v. *Eisner, supra,* at 349.

Under the statute, the occasion for the tax is the maturing of the beneficiaries' right to the proceeds upon the death of the insured. Of course, if the insured possessed no policy rights, there is no transfer of any interest *from him* at the moment of death. But that fact is not material, for the taxable "transfer," the maturing of the beneficiaries' right to the proceeds, is the crucial last step in what Congress can reasonably treat as a testamentary disposition by the insured in favor of the beneficiaries. That disposition, which began with the payment of premiums by the insured, is completed by his death. His death creates a genuine enlargement of the beneficiaries' rights. It is the "generating source" of the full value of the proceeds. See *Schwarz* v. *United States,* 170 F. Supp. 2, 6. The maturing of the right to proceeds is therefore

[6] Compare § 201 of the Revenue Act of 1916, 39 Stat. 756, 777, with § 810 of the Internal Revenue Code of 1939, 53 Stat. 120. In the 1954 Code, the word "taxable" was substituted for the word "net" in this provision. 26 U. S. C. § 2001.

an appropriate occasion for taxing the transaction to the estate of the insured. Cf. *Tyler* v. *United States,* 281 U. S. 497, 503, 504.

There is no inconsistency between such a view of the taxable event and the basic definition of the subject of the tax in Section 810. "Obviously, the word 'transfer' in the statute, or the privilege which may constitutionally be taxed, cannot be taken in such a restricted sense as to refer only to the passing of particular items of property directly from the decedent to the transferee. It must . . . at least include the transfer of property procured through expenditures by the decedent with the purpose, effected at his death, of having it pass to another." *Chase National Bank* v. *United States,* 278 U. S. 327, 337.

It makes no difference that the payment of premiums occurred during the lifetime of the insured and indirectly effected an *inter vivos* transfer of property to the owner of the policy rights. Congress can properly impose excise taxes on wholly *inter vivos* gifts. *Bromley* v. *McCaughn,* 280 U. S. 124. It may impose an estate tax on *inter vivos* transfers looking toward death. *Milliken* v. *United States,* 283 U. S. 15. Surely, then, it may impose such a tax on the final step—the maturing of the right to proceeds—in a partly *inter vivos* transaction completed by death. The question is not whether there has been, in the strict sense of the word, a "transfer" of property owned by the decedent at the time of his death, but whether "the death has brought into being or ripened for the survivor, property rights of such character as to make appropriate the imposition of a tax upon that result . . . ." *Tyler* v. *United States, supra,* at 503.

Therefore, this tax, laid on the "ripening," at death, of rights paid for by the decedent, is not a direct tax within the meaning of the Constitution. Cf. *Chase National Bank* v. *United States, supra; Fernandez* v. *Wiener,* 326

U. S. 340; *Tyler* v. *United States, supra; United States* v. *Jacobs,* 306 U. S. 363.[7]

Further objections to the statute as applied in this case are predicated on the Due Process Clause of the Fifth Amendment.

It is said that the statute operates retroactively. But the taxable event—the maturing of the policies at death—occurred long after the enactment of Section 811 (g)(2)(A) in 1942. Moreover, the payment of all but a few of the premiums in question occurred after the effective date of the statute, and those few were paid during the period after January 10, 1941, when regulations gave the insured fair notice of the likely tax consequences. See T. D. 5032, 1941–1 Cum. Bull. 427.[8] Therefore, the statute cannot be said to be retroactive in its impact. It is not material that the policies were purchased and the policy rights were assigned before the statute was enacted. The tax is not laid on the creation or transfer of the policy rights, and it "does not operate retroactively merely because some of the facts or conditions upon which its application depends came into being prior to the enactment of the tax." *United States* v. *Jacobs, supra,* at 367.

The taxpayer argues, however, that the enactment of the statute subjected the insured to a choice between unpleasant alternatives: "[H]e could stop paying the

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[7] Our view of the nature of the taxable event here involved makes it unnecessary to discuss *United States* v. *Bess,* 357 U. S. 51, and other similar cases relied on by the District Court. Nor do we find it necessary to consider at length *Lewellyn* v. *Frick,* 268 U. S. 238, or its progeny. The Court in *Frick* did not reach the constitutional issue.

[8] We do not agree with the holding in *Kohl* v. *United States,* 226 F. 2d 381, that T. D. 5032 "transcended" § 811 (g) as it existed in 1941 and that it was therefore "illegal and void." T. D. 5032, in effect, construed the controlling language in the earlier statute—"taken out by the decedent," 53 Stat. 122—as meaning paid for by the insured. Such a construction was clearly not unreasonable.

premiums—in which case the policies would be destroyed; or, he could continue paying premiums—in which case they would be included in his estate." But when he gave away the policy rights, the possibility that he would eventually be faced with that choice was an obvious risk, in view of the administrative history of the "payment of premiums" test. See 1 Paul, Federal Estate and Gift Taxation, § 10.13. The executor should not complain because his decedent gambled and lost. And, while it may be true that the insured could have avoided the tax only at the price of a loss on an investment already made, that fact alone does not prove that the lawmakers did "a wholly arbitrary thing," or that they "found equivalence where there was none," or that they "laid a burden unrelated to privilege or benefit." *Burnet* v. *Wells,* 289 U. S. 670, 679. Without such a showing, it cannot be held that the tax offends due process.

Reversed.

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

PENNSYLVANIA RAILROAD CO. *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 451. Argued May 17, 1960.—Decided June 13, 1960.

A railroad sued in the Court of Claims to recover from the United States the difference between its "domestic rates" and its "export rates" on certain shipments of iron and steel intended for export but which actually were not exported because of war conditions. The Court of Claims suspended proceedings to enable the parties to have the Interstate Commerce Commission pass on the reasonableness of the rates. After hearings, the Commission found and reported that the domestic rates were "unjust and unreasonable" as to 62 of the shipments but "just and reasonable" as to 13 of them. The railroad then invoked the jurisdiction of a Federal District Court under 28 U. S. C. §§ 1336, 1398 and 49 U. S. C. § 17 (9) to enjoin and set aside the Commission's order, and it moved that the Court of Claims stay its proceedings until the District Court could pass upon the validity of the order. *Held:* The railroad was entitled to have the Commission's order judicially reviewed; only the District Court had jurisdiction to review it; and the Court of Claims should have stayed its proceedings pending review of the Commission's order by the District Court. Pp. 202–206.

Reversed.

Hugh B. Cox argued the cause for petitioner. With him on the brief was *William F. Zearfaus.*

Assistant Attorney General Doub argued the cause for the United States. With him on the brief were *Solicitor General Rankin* and *Alan S. Rosenthal.*

MR. JUSTICE BLACK delivered the opinion of the Court.

This case involves the power of District Courts to review Interstate Commerce Commission orders determining the reasonableness of rates.

In 1941 and 1942 the United States made 75 shipments of iron and steel over the Pennsylvania Railroad intended for export from the port of New York to Great Britain. War conditions prevented exportation from New York. This caused a dispute about applicable transportation charges since the Pennsylvania had in effect tariffs for "domestic rates" that were higher than "export rates." Since the goods were not exported as planned the Railroad billed the United States for the higher domestic rates which the Government paid because required to do so by § 322 of the Transportation Act of 1940, 54 Stat. 955, 49 U. S. C. § 66. Later, under authority of the same section, the General Accounting Office deducted from other bills due the Railroad the difference between the higher and lower rates, claiming that the higher domestic rates were inapplicable, unreasonable and unlawful. The Railroad then brought this action in the Court of Claims to recover the amount deducted.

Properly relying on our holding in *United States* v. *Western Pacific R. Co.,* 352 U. S. 59, 62–70, the Court of Claims suspended proceedings to enable the parties to have the Interstate Commerce Commission pass on the reasonableness of the rates. After hearings the Commission found and reported that the domestic rates were "unjust and unreasonable" as to 62 of the shipments but "just and reasonable" as to 13. 305 I. C. C. 259, 265. The Railroad then took two steps to challenge that part of the order adverse to it: (1) it invoked the jurisdiction of a United States District Court in Pennsylvania under 28 U. S. C. §§ 1336, 1398, and 49 U. S. C. § 17 (9) to enjoin and set aside the order; and (2) it moved that the Court of Claims stay its proceedings until the District Court could pass upon the validity of the order. The United States objected to further stay in the Court of Claims and asked for dismissal of the case or judgment

in its favor. It urged in support of dismissal that the Railroad had deprived the Court of Claims of jurisdiction when it filed the District Court action to enjoin the Commission order because 28 U. S. C. § 1500 declares that "The Court of Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff . . . has pending in any other court any suit or process against the United States . . . ." The Court of Claims rejected this contention and its action in this respect is not challenged here.

The United States argued in support of its motion for judgment that the order of the Commission did not require anything to be done or not done, that it was therefore an advisory opinion only, and consequently not the kind of "order" subject to review by 28 U. S. C. § 1336, 49 U. S. C. § 17 (9), or any other provision of law. The contention of the United States was that although the Court of Claims was compelled to submit the question of the reasonableness of the rates to the Commission, neither that court nor any other court had power to review the Commission's determination. The Court of Claims agreed with this contention of the United States, accordingly refused to stay the case for the District Court to pass on the validity of the order, and entered judgment for the Railroad for only $1,663.39, which the Commission had held to be recoverable, instead of the $7,237.87 which the Railroad claimed. The result is that the Railroad has been held bound by the Commission's order although completely denied any judicial review of that order. We granted certiorari to consider this denial. 361 U. S. 922.

The Railroad contends that it was error for the Court of Claims to refuse to stay its proceedings while the District Court reviewed the Commission's order. The Solicitor General concedes here that this was error. We reach the same conclusion on the basis of our independent con-

sideration of the record. We decided some years ago that while a mere "abstract declaration" on some issue by the Commission may not be judicially reviewable, an order that determines a "right or obligation" so that "legal consequences" will flow from it is reviewable. *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 131, 132, 143. The record shows that the Commission order here meets this standard. The Commission found that the Railroad's domestic rates were "unreasonable" as to 62 shipments. This order is by no means a mere "advisory opinion," its "legal consequences" are obvious, for if valid it forecloses the "right" of the Railroad to recover its domestic rates on those shipments. We have held that judicial review is equally available whether a Commission order relates to past or future rates, or whether its proceeding follows referral by a court or originates with the Commission. *El Dorado Oil Works* v. *United States,* 328 U. S. 12.

For these reasons we conclude that the Railroad was entitled to have this Commission order judicially reviewed. We have already determined, however, that the power to review such an order cannot be exercised by the Court of Claims. *United States* v. *Jones,* 336 U. S. 641, 651–653, 670–671. That jurisdiction is vested exclusively in the District Courts. 28 U. S. C. § 1336, 49 U. S. C. § 17 (9). See *Seaboard Air Line R. Co.* v. *Daniel,* 333 U. S. 118, 122. Moreover, this order is properly reviewable by a one-judge rather than a three-judge District Court because it is essentially one "for the payment of money" within the terms of 28 U. S. C. §§ 2321 and 2325, which exempt such orders from the three-judge procedure of 28 U. S. C. § 2284. *United States* v. *Interstate Commerce Comm'n,* 337 U. S. 426, 441, 443. It necessarily follows, of course, that since the Railroad had a right to have the Commission's order reviewed, and

only the District Court had the jurisdiction to review it, the Court of Claims was under a duty to stay its proceedings pending this review.

Other questions argued by the Government are not properly presented by this record.

It was error for the Court of Claims to render judgment on the basis of the Commission's order without suspending its proceedings to await determination of the validity of that order by the Pennsylvania District Court.

Reversed.

CLAY *v.* SUN INSURANCE OFFICE LIMITED.

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

No. 349. Argued March 22–23, 1960.—Decided June 13, 1960.

While a citizen and resident of Illinois, petitioner purchased there from respondent, an insurance company licensed to do business in Illinois and Florida, an insurance policy covering "all risks" of loss or damage to certain personal property having no fixed situs. After moving to Florida, petitioner sustained losses there on which respondent denied liability. More than 12 months after discovery of the losses, petitioner sued respondent in a Federal District Court in Florida, basing jurisdiction on diversity of citizenship. That Court awarded a judgment to petitioner after ruling that, (1) under Florida law, the losses were not excluded from "all risks" coverage if they were caused by deliberate acts of petitioner's wife, and (2) the suit was not barred by a provision in the policy that suit on any claim for loss must be brought within 12 months of discovery of the loss, apparently because a Florida statute forbade enforcement of such a clause. Without passing on these issues of local law, the Court of Appeals reversed, on the ground that Florida could not, consistently with the requirements of due process, apply its statute to the "suits clause" of this contract made in Illinois, where such a clause is valid. *Held:* The Court of Appeals should not have passed on the constitutional question without first passing on the two issues of local law and not unless its decision on those issues made a decision on the constitutional question necessary. Pp. 208–212.

265 F. 2d 522, judgment vacated and cause remanded.

Paschal C. Reese argued the cause for petitioner. With him on the brief was *W. Terry Gibson.*

Bert Cotton argued the cause for respondent. With him on the brief were *Eugene A. Leiman* and *Hortense Mound.*

By leave of the Court *pro hac vice, Robert J. Kelly,* Assistant Attorney General of Florida, argued the cause

for the State of Florida, as *amicus curiae,* urging reversal. With him on the briefs were *Richard W. Ervin,* Attorney General, and *Gerald Mager,* Special Assistant Attorney General.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

In 1952, petitioner, while a citizen and resident of Illinois, purchased from respondent in Illinois the contract of insurance upon which this suit is based. The respondent is a British company licensed to do business in Illinois, Florida, and nine other States.

The policy, which petitioner bought for a lump sum, ran for three years. Designated a "Personal Property Floater Policy (World Wide)," it provides world-wide coverage against "all risks" of loss or damage to the property covered, property generally classified as personal property having no fixed situs. A provision of the policy, which has given rise to this controversy, required that suit on any claim for loss must be brought within twelve months of the discovery of the loss.

Some months after purchasing the policy the petitioner moved to Florida, where he brought this suit for losses sustained in Florida in the winter of 1954–1955. Petitioner reported the losses to the respondent on February 1, 1955, and on April 1, 1955, respondent denied liability.

The action, resting on diversity of citizenship, was instituted in the United States District Court for the Southern District of Florida on May 20, 1957, more than two years after discovery of the losses. The respondent defended on two grounds: (1) that under the time limitation for bringing suit, a restriction concededly valid under Illinois law, the suit was barred; and (2) that the "all risks" coverage of the policy does not include the losses resulting from willful injury to or appropriation of the insured property

by the insured's spouse.[1] The jury was charged that if the losses were caused by the deliberate acts of petitioner's wife, they were not therefore excluded from coverage. The jury found for petitioner, and judgment in the amount of $6,800 was entered. The District Court, without opinion, denied a motion for judgment *non obstante veredicto,* which was based, *inter alia,* upon the suit clause, apparently believing that Florida Statutes (1957) § 95.03, which is set out in the margin,[2] rendered the clause ineffective.

On appeal the Court of Appeals for the Fifth Circuit reversed (one judge dissenting), sustaining the defense based upon the suit clause on the ground that Florida could not apply its statute to this Illinois-made contract consistently with the requirements of due process. 265 F. 2d 522. The court considered the preliminary question of state law—whether the Florida statute, § 95.03, in fact applies to a contract made in these circumstances. Strangely enough, it did not decide this threshold question because it apparently found it easier to decide the constitutional question that would be presented only if the statute did apply. Such disposition of a serious constitutional issue justified bringing the case here. 361 U. S. 874.

By the settled canons of constitutional adjudication the constitutional issue should have been reached only if, after decision of two non-constitutional questions, decision was compelled. The lower court should have

[1] Certain property was taken from his home. Other property, clothing, was burned, and a painting was slashed.

[2] "All provisions and stipulations contained in any contract whatever . . . fixing the period of time in which suits may be instituted under any such contract . . . at a period of time less than that provided by the statute of limitations of this state, are hereby declared . . . to be illegal and void. No court in this state shall give effect to any provision or stipulation of the character mentioned in this section." Section 95.11 (3) provides a five-year limitation for actions on written contracts not under seal.

first considered: (1) whether, under the law of Florida, § 95.03 is applicable to this contract; and (2) whether the losses sued upon were within the "all risks" coverage of the policy if in fact caused by petitioner's wife.

It would be a temerarious man who described the constitutional question decided below as frivolous. The seriousness of the question becomes manifest from a recital of the decisions of this Court relevant to the determination of the issue on which the court below passed.

In *Home Insurance Co.* v. *Dick*, 281 U. S. 397, the Court held that Texas could not constitutionally apply its own law to invalidate a suit clause in a contract of fire insurance covering a tugboat. The plaintiff was at all pertinent times both a Texas domiciliary and a resident of Mexico. The contract, of which he was an assignee, was made in Mexico between a Mexican insurer which had no contact whatever with Texas, and a Mexican resident. The premium was paid in Mexico, and the policy covered the tug only while it was in Mexican waters. In *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.*, 292 U. S. 143, the Court held that Mississippi could not constitutionally apply its own law to invalidate a contract clause limiting the insurer's liability on a surety bond against defalcations by the insured's employees "in any position, anywhere," to losses of which notice was given within fifteen months after the termination of coverage. The contract was made in Tennessee where the insured had offices and the insurer was licensed to do business. Mississippi's action was struck down although the contract covered an ambulatory risk, the default giving rise to the claim actually occurred in Mississippi, the insurer was under license doing business there, and the insured was incorporated there.

The most recent case in the series is *Watson* v. *Employers Liability Assurance Corp., Ltd.*, 348 U. S. 66.

Without questioning either *Dick,* or *Delta & Pine,* the Court sustained Louisiana's application, in a suit by a Louisiana citizen, of its own "direct action" statute although thereby it invalidated an express provision against direct liability of the insurer in a contract negotiated and paid for within Illinois and Massachusetts, in both of which the clause was valid. The contract insured Toni, an Illinois corporation distributing its product nationally, against liabilities arising from the use of the product. The insurer was a British corporation licensed to do business in several States, including Massachusetts, Illinois and Louisiana. Toni had no contact with Louisiana and could not be served there. The Louisiana plaintiff had sustained her injury in Louisiana. The Court found Louisiana's contact with the subject justified its application of the statute to make an insurer doing business in Louisiana amenable to suit by a locally injured citizen.

The relevant factors of the present case are not identic either with *Dick,* or *Delta & Pine,* or *Watson,* and not one of them can fairly be deemed controlling here. The bearing of all three on the immediate situation would have to be considered and appropriately evaluated in adjudicating the precise constitutional issue presented by it, were that issue inescapably before us. The disposition of either of two unresolved state law questions may settle this litigation. The Court of Appeals was therefore not called upon initially to reach this constitutional question; nor is this Court. The doctrine that the Court will not "anticipate a question of constitutional law in advance of the necessity of deciding it," *Liverpool, N. Y. & P. S. S. Co.* v. *Emigration Commissioners,* 113 U. S. 33, 39, relied on by Mr. Justice Brandeis in his well-known concurring opinion in *Ashwander* v. *T. V. A.,* 297 U. S. 288, 347–348, is a well-settled doctrine of this Court which, because it carries a special weight in maintaining proper harmony

in federal-state relations, must not yield to the claim of the relatively minor inconvenience of postponement of decision. Of course we do not remotely hint at an answer to a question that is prematurely put.

While both questions not disposed of by the Court of Appeals are questions of local law, the question whether under Florida law § 95.03 is applicable to this contract is one on which the state court's determination is controlling. But, as the Court of Appeals indicated, it could not, on the available materials, make a confident guess how the Florida Supreme Court would construe the statute. See, *e. g., Hoagland* v. *Railway Express Agency,* 75 So. 2d 822; *Equitable Life Assurance Society* v. *McRee,* 75 Fla. 257. The Florida Legislature, with rare foresight, has dealt with the problem of authoritatively determining unresolved state law involved in federal litigation by a statute which permits a federal court to certify such a doubtful question of state law to the Supreme Court of Florida for its decision. Fla. Stat. Ann., 1957, § 25.031.[3] Even without such a facilitating statute we have frequently deemed it appropriate, where a federal constitutional question might be mooted thereby, to secure an authoritative state court's determination of an unresolved question of its local law. See *Allegheny County* v. *Mashuda Co.,* 360 U. S. 185, 189, and cases cited; see also *Meredith* v. *Winter Haven,* 320 U. S. 228, 236.

Vacated and remanded.

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[3] The statute provides that the Supreme Court of Florida may devise rules to govern such certifications; it appears that to date such rules have not been promulgated. See Kurland, Toward a Co-operative Judicial Federalism, 24 F. R. D. 481, 489. It is not to be assumed, however, that such rules are a jurisdictional requirement for the entertainment by the Florida Supreme Court of a certificate under § 25.031.

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

The Court today holds that this Court and the federal courts below must refrain from exercising their jurisdiction to decide this lawsuit properly brought. It remands the case to the Court of Appeals and implies that a state court should be the one to determine two questions of state law to avoid a federal constitutional question which is also presented. In so doing, I believe this Court is carrying the doctrine of avoiding constitutional questions to a wholly unjustifiable extreme. I agree that it is frequently better not to decide constitutional questions when decision of nonconstitutional questions also presented will dispose of a case. But I do not agree that this is such an occasion. The state law questions do not call for first interpretation of a broad, many-pronged, state regulatory scheme.[1] They do not involve peculiarly local questions such as the eminent domain power a State has allowed a city to exercise,[2] or the local land law of a State.[3] Nor are the state questions here difficult ones depending on ambiguous or vague state law,[4] but instead they border

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[1] See *Harrison* v. *NAACP*, 360 U. S. 167 (a declaratory judgment case); *Rescue Army* v. *Municipal Court of Los Angeles*, 331 U. S. 549; *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, and *Congress of Industrial Organizations* v. *McAdory*, 325 U. S. 472 (declaratory judgment cases); *American Federation of Labor* v. *Watson*, 327 U. S. 582 (parallel action pending in state court). And cf. *Alabama Public Service Comm'n* v. *Southern R. Co.*, 341 U. S. 341; *Burford* v. *Sun Oil Co.*, 319 U. S. 315; *Railroad Comm'n of Texas* v. *Pullman Co.*, 312 U. S. 496 (cases involving injunctions or interference with state regulations, law or administrative orders).

[2] See *Louisiana Power & Light Co.* v. *City of Thibodaux*, 360 U. S. 25.

[3] See *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478.

[4] In *Chicago* v. *Atchison, T. & S. F. R. Co.*, 357 U. S. 77, 84, *Albertson* v. *Millard*, 345 U. S. 242 (1953), and *Toomer* v. *Witsell*, 334

on the frivolous. Since I think the answer to the constitutional question also is clear, I believe we should decide all the questions in the case. The Court's refusal to do so, together with the language it uses, seems to me to be an automatic application of "canons of constitutional adjudication" so absolute that a federal court can never under any circumstances or conditions decide a constitutional question if there is any possibility of turning a case away on other grounds. I believe that there are times when a constitutional question is so important that it should be decided even though judicial ingenuity would find a way to escape it. I would decide this case here and now.

The first state question is whether, under state interpretation, the clause of this insurance policy which insures the petitioner against "all risks," protects him against destruction and loss of the property caused by his wife.[5] The policy does not intimate any exception to its coverage for such a risk although it has pages of small printed type stating its extensions, limitations, exclusions and general conditions. The United States District Judge who tried this case, experienced in Florida law, not surprisingly paid scant attention to this contention. No case in which we have ever "abstained" from passing on difficult state questions offers the faintest support for the holding that a contention so unlikely to be sustained anywhere can be used as a reason to avoid passing on a constitutional question, even one much more serious than I see the one here to be.

The second state question that the Court is sending back, with the suggestion that the Court of Appeals

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U. S. 385 (1948), it was made clear that "abstention would be improper if the statute was in fact reasonably clear . . . ." Note, Abstention: An Exercise in Federalism, 108 U. of Pa. L. Rev. 226, 233 (1959).

[5] The policy stated under "Perils Insured," "All risks of loss of or damage to property covered except as hereinafter provided."

should refer it to the Florida Supreme Court for decision, is almost equally devoid of plausibility. A Florida state statute provides that all contractual provisions fixing a period of time in which suits may be brought under such contract at a period of time less than that provided by the statute of limitations of Florida are illegal and void. The statute also forbids any court in Florida to "give effect to any provision or stipulation of the character mentioned in this section." [6] Since the contract of insurance here provided for a period of limitation shorter than the State's five-year period for unsealed, written contracts,[7] this contractual provision would be void under the Florida statute if it applies.[8] The only way to get ambiguity into this section is to import it. Statutes of a similar nature exist in 31 States and the District of Columbia.[9] They are in line with the protective safeguards that States have felt it necessary to create so as to preserve a fair opportunity for people who have bought and paid for insurance to go to court and collect it. And state courts in the main have interpreted and applied such statutes so as to carry out

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[6] Fla. Stat., 1957, § 95.03. Relevant portions of the statute are set forth in note 2 of the opinion of the Court.

[7] Fla. Stat. § 95.11 (3).

[8] The suit clause in the contract provided: "No suit, action or proceeding for the recovery of any claim under this Policy shall be sustainable in any court of law or equity unless the same be commenced within twelve (12) months next after discovery by the Assured of the occurrence which gives rise to the claim. Provided, however, that if by the laws of the state within which this Policy is issued such limitation is invalid, then any such claims shall be void unless such action, suit or proceeding be commenced within the shortest limit of time permitted by the laws of such state to be fixed herein."

[9] See statutes referred to in Carnahan, Conflict of Laws and Life Insurance Contracts (1958), §§ 26 (h), n. 83 and 137. Also four States have statutes dealing specifically with certificates of fraternal benefit societies. *Id.*, § 26 (h), n. 84.

the legislative policy adopted.[10] Florida's particular interest in this very statute is shown by the fact that the Attorney General of the State filed briefs and participated in oral argument to support both the full meaning petitioner claimed for the statute and its constitutionality when so interpreted. I see no reason to send this particular question back to the Court of Appeals, much less, ultimately, to the state court. The statute's plain language, its interpretation by the experienced trial judge who sat on the case and its interpretation by the Attorney General of the State should be sufficient to show to even the most doubtful that this state law applies to this printed provision of the contract and requires the company to try this lawsuit on its merits (unless, of course, the statute is unconstitutional when so applied). I think no cloud should be cast on the statute's clear meaning and I certainly do not think it is necessary to point out to the Florida court that it also could, if it wished, avoid the constitutional question the Court makes so much of by limiting the meaning the Florida legislature obviously intended to give this statute.[11] If "maintaining proper harmony in federal-state relations" is the objective of the Court, I would think it best to give this statute its plain meaning and to settle the constitutionality of this statute Florida passed (according to its Attorney General) to protect its people.

I now come to the constitutional question which is avoided and which I would decide. This insurance contract was made in the State of Illinois. There are Illinois cases indicating that the contractual provision shortening

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[10] See, *e. g.*, *Galliher* v. *State Mutual Life Ins. Co.*, 150 Ala. 543, 43 So. 833 (1907); Ehrenzweig, Contracts in the Conflict of Laws, 59 Col. L. Rev. 973, 1000.

[11] Cf. *Harrison* v. *NAACP*, 360 U. S. 167, 177–178.

the Illinois state statute of limitations might be treated as valid in a court of that State.[12] There are no cases, however, indicating that Illinois wanted to project its law into the State of Florida so as to nullify a Florida law invalidating such contractual provisions in Florida courts.[13] The constitutional question raised is this. Since the policy's restrictive provision would probably be upheld in Illinois courts in a suit on an Illinois contract, does either the Due Process Clause or the Full Faith and Credit Clause require Florida to pay it homage?

The Florida statute is, in my judgment, constitutional as applied by the District Court in this case. I believe it violates neither the Due Process Clause nor the Full Faith and Credit Clause of the Constitution. There was a time in the evolution of conflict of laws theories when the idea was championed that every detail and element of a contract, every action taken under it, was governed by the law of the place where the contract was made. This concept ran into many difficulties. Was the contract made at the home office of an insurance company or at the place where an agent dropped it in the mail to send it to a man in another State? Exceptions sprang up such as the rule applying the law of the place where the contract was to be performed to issues of performance. Soon it was discovered that it was almost as puzzling to tell where a contract was intended to be performed or what part of activities under a contract could be considered perform-

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[12] The Circuit Court below cited *Trichelle* v. *Sherman & Ellis, Inc.*, 259 Ill. App. 346; *Hartzell* v. *Maryland Cas. Co.*, 163 Ill. App. 221. *Sun Ins. Office Limited* v. *Clay*, 265 F. 2d 522, 524, n. 2.

[13] The Illinois cases cited by the court below as upholding limitation clauses did not deal with events so connected with foreign jurisdictions, statutes or policies as were those in the present case. They merely held that Illinois courts would honor limitation clauses in Illinois centered controversies. See note 15, *infra*.

ance as it had been to determine where a contract was made. These and other such academic problems dissipated the dream of a fixed rule or rules for deciding which law governed contract cases. As the concepts developed, there came an emphasis upon having a contract governed by the law which the parties intended to be applied. But it was not always possible to tell which law the parties had agreed upon, and there was resistance on the part of some jurisdictions having close interests in the events leading to litigation to applying foreign law, against their deeply felt policies, solely because the parties at one time preferred it.

As business boomed throughout our growing country giving more States than one an interest in what a contract meant and how it should be enforced for the benefit of the citizens who made it or for whose benefit it was made, practical men began to see that there could not be one single rule of law to govern a contract in which the citizens of many States were interested. One of the many opinions of this Court recognizing that fact was *Pacific Employers Ins. Co.* v. *Industrial Accident Comm'n,* 306 U. S. 493, in which Mr. Justice Stone, later Chief Justice, stated that:

> "[T]he conclusion is unavoidable that the full faith and credit clause does not require one state to substitute for its own statute, applicable to persons and events within it, the conflicting statute of another state, even though that statute is of controlling force in the courts of the state of its enactment with respect to the same persons and events." *Id.,* at 502.

Later, in *Klaxon Co.* v. *Stentor Electric Mfg. Co.,* 313 U. S. 487, and in *Griffin* v. *McCoach,* 313 U. S. 498, this Court recognized that the courts of a State are not compelled to enforce all provisions of all contracts, but have much freedom to exercise their own state policy in their own courts.

See also *Pink* v. *AAA Highway Express,* 314 U. S. 201; *Hoopeston Canning Co.* v. *Cullen,* 318 U. S. 313.[14]

After these and a host of other cases recognizing the constitutional power of States to apply their own laws in many ways to contracts made outside the State, we decided *Watson* v. *Employers Liability Assurance Corp.,* 348 U. S. 66. That case involved a law of Louisiana which provided that injured persons could bring direct actions against liability insurance companies that had issued policies contracting to pay judgments imposed against persons who had inflicted the injuries. The insurance contract in that case, however, contained a clause, binding and enforceable under the law of the places where the contract was made and delivered, that prohibited direct action against the insurance company until after final determination of the insured's obligation to pay damages. A person injured in Louisiana by an insured company sued the insurance company there directly. Application of the Louisiana law was challenged as an unconstitutional denial of equal protection, due process, full faith and credit, and an unconstitutional impairment of contract. We rejected all these contentions. The policy of insurance there, like the one here, was to be given nation-wide effect. We held there, MR. JUSTICE FRANKFURTER disagreeing with the grounds of the Court's opinion, that none of the provisions of the Constitution relied on requires States automatically to subordinate their own contract laws to the laws of other States in which contracts happened to have been executed. We said:

> "Where, as here, a contract affects the people of several states, each may have interests that leave it free to enforce its own contract policies." *Id.,* at 73.

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[14] But see *Order of United Commercial Travelers* v. *Wolfe,* 331 U. S. 586, in which an exception was made with regard to policies issued by a fraternal benefit society.

In the *Watson* case we also rejected a contention that the cases relied on by the Court here as throwing a cloud upon the Florida statute, *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.*, 292 U. S. 143, and *Home Ins. Co.* v. *Dick*, 281 U. S. 397, required that we hold Louisiana's law unconstitutional. The reasons we gave for rejecting the contention about those cases there apply equally to the Florida statute here. In the *Dick* case the Court's opinion carefully pointed out that the decision in that case might have been different had activities relating to the contract there held binding in Texas been carried on in that State. And in the *Delta & Pine Land Co.* case, we pointed out that the Court had considered that the Mississippi activities in connection with the policy sued on there were found to be so "slight" and so "casual" that Mississippi could not apply its own law. I, myself, have grave doubts that the *Delta & Pine Land Co.* case would be treated the same way today on its facts. But however that may be, as it stands, it does not require a holding that Florida's law is unconstitutional. If thought to suggest such a holding, it only means that we should decide this case to remove any such suggestion once and for all. The only philosophy on which the *Dick* and *Delta & Pine Land Co.* cases could be made to apply here would be on the old idea that the law of the place where the contract is made always governs every activity under it, a rule that had been repudiated by courts and commentators everywhere, especially as a constitutional rule.[15]

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[15] It has been pointed out that if a court of one State, in applying the rule that the law of the place of making the contract determines its validity, looks only to the internal law and not the conflict-of-laws rules of the foreign jurisdiction, it enforces the rights not of the parties in the case before it but of the parties in some hypothetical case. See Stumberg, Conflict of Laws, 11–12, 228. Constitutionally requiring blind and unvarying application of the internal law of the

Our later cases previously discussed express the only workable rule for this country today.[16] Insurance companies, like other contractors, do not confine their contractual activities and obligations within state boundaries. They sell to customers who are promised protection in States far away from the place where the contract is made. In this very case the policy was sold to Clay with knowledge that he could take his property anywhere in the world he saw fit without losing the protection of his insurance. In fact, his contract was described on its face as a "Personal Property Floater Policy (World Wide)." The contract did not even attempt to provide that the law of Illinois would govern when suits were filed anywhere else in the country. Shortly after the contract was made, Clay moved to Florida and there he lived for several years. His insured property was there all that time. The company knew this fact. Particularly since the company was licensed to do business in Florida, it must have known it might be sued there, and that Florida courts would feel bound by Florida law.

In addition to the reasons already given for my view that Florida law constitutionally may govern this case—that Florida, the forum State, has sufficient contacts with the parties, the property insured and the lawsuit—I would add that when a contractual provision is one dealing with limitations on actions, it is particularly inappropriate to compel the forum State, as a constitutional matter, to

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place of making is a return to outmoded territorial and vested rights theories of conflict of laws long ago outgrown by our jurisprudence.

And see generally, on application of the law of the forum, Ehrenzweig, The Lex Fori—Basic Rule in The Conflict of Laws, 58 Mich. L. Rev. 637.

[16] See also *McGee* v. *International Life Ins. Co.*, 355 U. S. 220; *Travelers Health Assn.* v. *Virginia ex rel. State Corporation Comm'n*, 339 U. S. 643; *International Shoe Co.* v. *Washington*, 326 U. S. 310.

apply the law of the place where the contract was "made." This Court has long recognized that the States where lawsuits are tried are free to apply their own statutes of limitations. This has been the constitutional rule since the decision in 1839 of *M'Elmoyle* v. *Cohen,* 13 Pet. 312. The continued vitality of this principle was recognized by the Court in *Wells* v. *Simonds Abrasive Co.,* 345 U. S. 514, 516–517. The only deviation from it appears to have been *Order of United Commercial Travelers* v. *Wolfe,* 331 U. S. 586, which applied a special rule freeing fraternal insurance companies because of their "indivisible unity," a distinction to which I registered my dissent. It is true that this case is not identical with one in which the forum seeks to apply an ordinary statute of limitations to a suit on a contract having no limitation clause. Here, Florida, seeking to be sure that its own limitation rules and no others apply to cases in its courts, has legislated that contractual limitations of too short duration are invalid. The Court of Appeals called it error to assume "that the issue presented concerned the choice of the applicable statute of limitations rather than the choice of the substantive law governing the validity of the contract itself." But the same reasons for the view that the forum may refuse to apply a foreign statute of limitations impel me to the view that the forum may refuse to apply a foreign contract of limitations. See *Order of United Commercial Travelers* v. *Wolfe,* 331 U. S. 586, 627–630 (dissenting opinion). And cf. *Metropolitan Cas. Ins. Co.* v. *Brownell,* 294 U. S. 580.

The Court, however, says that there is a serious constitutional question whether Florida can apply its own law here. Therefore, the Court refuses to decide the question (and the related state questions) on the ground, as I read the opinion, that there exists an unbending, unyielding, automatic canon of constitutional adjudication that if a constitutional question is not "frivolous," the Court must

avoid it, unless decision is "compelled" after disposition of all nonconstitutional questions. In fact, the Court indicates that when a constitutional question lurks in the case, not even the lower federal courts sitting in diversity jurisdiction should decide the nonconstitutional questions.[17] Of course, this view is not unprecedented altogether; it is in my opinion, however, wholly unprecedented in a case such as this. I agree that there is a judicial practice, wise perhaps in most instances, under which courts do not ordinarily decide constitutional questions unless essential to a decision of the case.[18] This practice extends back to the early days of the country. But even the greatest of our judges have not always followed it as a rigid rule. Perhaps had they done so the great opinion of Chief Justice Marshall in *Marbury* v. *Madison* would never have been written.[19] Only if the practice of occasionally avoiding decision of a constitutional question is first made into a rule and then elevated to a position of absoluteness denied by some even to constitutional commands themselves, are we wise in avoiding decision here. On the

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[17] Cf. *Penagaricano* v. *Allen Corp.*, 267 F. 2d 550, 556 (C. A. 1st Cir.) where Judge Woodbury, speaking for the Court, said: "Indeed this ground for declining to exercise jurisdiction [the "salutary policy of refraining from the unnecessary decision of constitutional questions"] has been invoked in so many cases decided by the United States Supreme Court as perhaps to give rise to serious doubt as to whether the lower courts in fact have 'discretion' in this matter."

[18] See, *e. g.*, *United States* v. *Raines*, 362 U. S. 17, 21 (citing *Barrows* v. *Jackson*, 346 U. S. 249).

[19] 1 Cranch 137. See 3 Beveridge, The Life of John Marshall, 132–133, 142; 1 Warren, The Supreme Court in United States History, 242–243. And see *Cohens* v. *Virginia*, 6 Wheat. 264, 404, where Chief Justice Marshall said: "It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. . . . With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us."

other hand, if the power to avoid deciding constitutional issues is discretionary, as I think it undoubtedly is, I believe that this is not a proper case for its exercise.

Such a rigid, ironclad, all-encompassing rule as I understand the Court to promulgate here is, in my judgment, bad for the litigants, bad for the courts, and bad for the country. Litigants have a right to have their lawsuits decided without unreasonable and unnecessary delay or expense.[20] There come times, in my judgment, when a constitutional question is so ripe for decision, when its resolution is so much needed, that it would be proper to decide the constitutional question even though there might be a possibility or even a probability that by sending a case back some nonconstitutional question might be decided in a way that would remove the constitutional controversy from that particular case. Cf. *Peters* v. *Hobby,* 349 U. S. 331, 349 (dissenting opinion). The fact that one case presenting the constitutional issue in some clear form has survived the jurisdictional and practical obstacles to adjudication, the fact that such an issue has been tossed up from the maelstrom of trials and private disputes to the height of our appellate courts, is one sign that the issue needs deciding. However this particular case is or may be decided, the pressing need for deciding this constitutional question will remain the same. Our expanding commerce among the States guarantees that. The constitutional question is squarely pre-

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[20] This case was begun in 1957. The damage was sustained in late 1954 and early 1955. It has taken over a year to have this Court rule on the decision of the Circuit Court below. Remand, some form of transfer of part or all of the case to the state courts, proceedings there and either appeal to this Court again or return to the federal system and eventually return here, might possibly even take 10 years or more. See, *e. g.,* the post-abstention history of the *Windsor* and *Spector* cases in Note, Consequences of Abstention by a Federal Court, 73 Harv. L. Rev. 1358 (1960).

sented and the way it is decided will have an important effect on the laws of many States in addition to Florida. It is here now. Why not decide it? Sometimes a conflict of view among the circuits and among the States on a constitutional question, like such conflicts on statutes or common-law questions, reaches such proportions that they cry out for an authoritative decision of our Court. At least in such instances I am not willing to tie myself down by a judicially created rule that would bar deciding constitutional questions when they get here.[21] Subscribing as I have to the belief that there is virtue in the policy of not unnecessarily deciding constitutional issues, I think it would be better to abandon that policy entirely than to carry it to the extremes of the Court's opinion today. In my judgment, the rule in the rigid and sweeping form announced has not been the rule heretofore. It is true that some dissents might possibly have gone so far, but I do not think it can fairly be said that the whole Court has done so. That this Court has not heretofore followed the dogmatic rule announced today is very clear from our case of *Chicago* v. *Atchison, T. & S. F. R. Co.*, 357 U. S. 77. Cf. *United States* v. *Sullivan*, 332 U. S. 689, 692–694. In the *Chicago* case, over a strong dissent, the majority of the Court refused to avoid the

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[21] There is a view, ably and clamorously urged by many, that would consider the canon of constitutional avoidance as so broad that it practically would be impossible ever to reach a constitutional question. Should this view wholly prevail, the great decision of *Marbury* v. *Madison*, 1 Cranch 137, might just as well not have been written. In that opinion Chief Justice Marshall said:

"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Id.*, at 163.

For a general discussion of judicial restraint and this Court's powers of review, see C. L. Black, The People and The Court (1960), *passim*, particularly c. IV.

constitutional question on the ground that we should first wait to have a city ordinance interpreted by Illinois courts. We said:

> "We see no ambiguity in the section which calls for interpretation by the state courts. Cf. *Toomer* v. *Witsell,* 334 U. S. 385. Remission to those courts would involve substantial delay and expense, and the chance of a result different from that reached below, on the issue of applicability, would appear to be slight." *Id.,* at 84.

This was a fair application of the constitutional avoidance practice.[22]

The Court assumes that there is in Florida a method which will enable the Court of Appeals for the Fifth Circuit to obtain a decision of the Supreme Court of Florida by certifying to them the two questions of state law here involved. Florida does have such a law on paper, but evidently does not have one in fact. The state statute, first passed in 1945 and now appearing as Fla. Stat. Ann. (1959 Supp.) § 25.031, authorizes the Supreme Court of Florida to provide rules for obtaining such certifications from federal appellate courts, but the best information obtainable is that the Supreme Court of Florida has never promulgated any such rules, and evidently has never accepted such a certificate.[23] This is not difficult to

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[22] Five cases last Term include full discussions of the policy of federal courts of waiting for state court determinations. *Martin* v. *Creasy,* 360 U. S. 219; *Allegheny County* v. *Frank Mashuda Co.,* 360 U. S. 185; *Harrison* v. *NAACP,* 360 U. S. 167; *Lassiter* v. *Northampton County Bd. of Elections,* 360 U. S. 45; *Louisiana Power & Light Co.* v. *City of Thibodaux,* 360 U. S. 25.

See generally, Wright, The Abstention Doctrine Reconsidered, 37 Tex. L. Rev. 815, Note, 59 Col. L. Rev. 749.

[23] See opinion of the Court, *ante,* p. 212, n. 3; Vestal, The Certified Question of Law, 36 Iowa L. Rev. 629, 643; Note, 73 Harv. L. Rev. 1358, 1368, n. 68; Stern, Conflict of Laws, 12 U. Miami

understand. Perhaps state courts take no more pleasure than do federal courts in deciding cases piecemeal on certificates. State courts probably prefer to determine their questions of law with complete records of cases in which they can enter final judgments before them. It seems rather unfortunate for this petitioner that he is to be made the guinea pig in the Court's effort to get the Supreme Court of Florida to put into effect a law that it has deliberately left unused for a period of 15 years.[24] This suit was filed three years ago and, borrowing an expression, it would be a "temerarious man" who would forecast that it is sure to get back to us again before three more years. That would be all right if such an exasperating delay were necessary in order to achieve fair and just consideration of this case. I do not think it is necessary or justified in this case, and I think the Court's handling of the case sets up a precedent of such an extreme nature that the rule of avoiding constitutional questions might begin to produce more evil consequences than good.

I would affirm the judgment of the District Court.

MR. JUSTICE DOUGLAS, dissenting.

While I join the dissent of my Brother BLACK, I desire to give renewed protest to our practice of making litigants travel a long, expensive road in order to obtain justice. Congress has created federal courts with power to adjudicate controversies between citizens of different States. They are manned by judges drawn from the local Bars

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L. Rev. 383, 397 (1958); Kurland, Toward A Cooperative Judicial Federalism, 24 F. R. D. 481, 489. Cf. Fla. App. Rule 4.6, 31 Fla. Stat. Ann., 1959 Cum. Pocket Part.

[24] The statutory authorization giving the State Supreme Court the power to entertain certified questions, first enacted in 1945, Fla. Laws 1945, c. 23098, § 1, was "perfected" in 1957, Fla. Laws 1957, c. 57-274, § 1. See Stern, Conflict of Laws, 12 U. Miami L. Rev. 383, 395 (1958).

and fairly conversant with the laws of their respective areas. They are equipped to decide questions of local law as well as federal questions. As we stated in *Meredith* v. *Winter Haven,* 320 U. S. 228, 236:

> "Congress having adopted the policy of opening the federal courts to suitors in all diversity cases involving the jurisdictional amount, we can discern in its action no recognition of a policy which would exclude cases from the jurisdiction merely because they involve state law or because the law is uncertain or difficult to determine."

The situations where a federal court might await decision in a state court or even remand the parties to it should be the exception not the rule. Only prejudice against diversity jurisdiction can explain the avoidance of the simple constitutional question that is presented here and the remittance of the parties to state courts to begin the litigation anew. Some litigants have long purses. Many, however, can hardly afford one lawsuit, let alone two. Shuttling the parties between state and federal tribunals is a sure way of defeating the ends of justice. The pursuit of justice is not an academic exercise. There are no foundations to finance the resolution of nice state law questions involved in federal court litigation. The parties are entitled—absent unique and rare situations—to adjudication of their rights in the tribunals which Congress has empowered to act.

Syllabus.

UNITED STATES *v.* GRAND RIVER DAM AUTHORITY.

CERTIORARI TO THE COURT OF CLAIMS.

No. 503. Argued May 17, 1960.—
Decided June 13, 1960.

Respondent is an agency of the State of Oklahoma created to develop hydroelectric power on the Grand River, a nonnavigable tributary of the navigable Arkansas River. It proposed a river development plan at Pensacola, Markham Ferry and Ft. Gibson, all sites on the Grand River, and, under license from the Federal Power Commission, completed a project at Pensacola in 1940. Subsequently, by the Flood Control Act of 1941, Congress incorporated the Grand River plan into a comprehensive plan for regulation of navigation, control of floods and production of power on the Arkansas River and its tributaries; and the United States constructed a project at Ft. Gibson, in connection with which it compensated respondent for a condemned tract of land, flowage rights over its lands and relocation of its transmission lines. Respondent sued in the Court of Claims for additional compensation for the "taking" of its water power rights at Ft. Gibson and its franchise to develop electric power and energy at that site. *Held:* Respondent is not entitled to recover. It failed to show that it had any rights in the flow of the river. The United States had the superior right under the Commerce Clause to build the Ft. Gibson project itself to protect the navigable capacity of the Arkansas River, and the frustration of respondent's plans and expectations which resulted when the United States chose to do so did not take property from respondent in the sense of the Fifth Amendment. Pp. 230–236.

— Ct. Cl. —, 175 F. Supp. 153, 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.*

Jess Larson argued the cause for respondent. With him on the brief were *Q. B. Boydstun* and *Alan Y. Cole.*

Opinion of the Court by MR. JUSTICE DOUGLAS, announced by MR. JUSTICE HARLAN.

Grand River is a nonnavigable tributary of the navigable Arkansas River and flows through Oklahoma. Respondent was created by the Oklahoma Legislature to develop hydroelectric power on the Grand River. It is, to use the statutory language of the law creating it, "a governmental agency and body politic and corporate." Session Laws of Oklahoma, 1935, c. 70, Art. 4, § 1. A report of the Army Corps of Engineers, made in 1930, indicated that federal development at Pensacola, Markham Ferry, and Ft. Gibson—all sites on the Grand River—was not then economically justified.[1] Respondent, following its creation in 1935, proposed a river development plan at these three sites. In 1939 the Army Engineers recommended a three-dam coordinated project as a federal undertaking.[2] Congress by the Flood Control Act of August 18, 1941,[3] incorporated that Grand River plan into a comprehensive plan for the Arkansas River basin.

Meanwhile respondent obtained a license under § 23 (b) of the Federal Power Act [4] to build and operate a project at Pensacola and completed it in 1940. The United States took over the operation of this project during World War II, after which it was returned to respondent. In 1946 the United States started the construction of a project at Ft. Gibson. It has been completed as an integral part of a comprehensive plan for the regulation of navigation, the control of floods, and the production of power on the Arkansas River and its tributaries. Congress, by modifying its plan for the Arkansas River basin,[5] cleared

[1] H. R. Doc. No. 308, 74th Cong., 1st Sess., Vol. 3.

[2] H. R. Doc. No. 107, 76th Cong., 1st Sess.

[3] 55 Stat. 638, 645.

[4] 49 Stat. 846, 16 U. S. C. § 817. See *Grand River Dam Authority* v. *Grand-Hydro*, 335 U. S. 359.

[5] 68 Stat. 450.

the way for respondent to obtain from the Federal Power Commission a license for a project at Markham Ferry. Thus the United States operates the Ft. Gibson project which is the farthest downstream, while the respondent has the two upstream projects. A 70-acre tract owned by the respondent was condemned when the Ft. Gibson project was built; flowage rights over its lands were acquired; and payment was made for relocation of its transmission lines. Respondent claimed more. It demanded of the United States $10,000,000 for the "taking" of its water power rights at Ft. Gibson and its franchise to develop electric power and energy at that site.[6] The Court of Claims, while reserving the question as to the amount of compensation due, held by a divided vote that the United States was liable. — Ct. Cl. —, 175 F. Supp. 153. The case is here on a writ of certiorari. 361 U. S. 922.

The Court of Claims recognized that if the Grand River were a navigable stream the United States would not be liable for depriving another entrepreneur of the opportunity to utilize the flow of the water to produce power. Our cases hold that such an interest is not compensable because when the United States asserts its superior authority under the Commerce Clause to utilize or regulate the flow of the water of a navigable stream there is no "taking" of "property" in the sense of the Fifth Amendment because the United States has a superior navigation easement which precludes private ownership of the water

[6] Severance damages, storage and headwater benefits accruing to Ft. Gibson from the Pensacola unit, the cost and value of surveys, plans, and specifications for the Ft. Gibson unit, the loss of the use and value of lands and rights-of-way acquired for the interconnection of the Ft. Gibson unit with respondent's system and for the distribution of power from Ft. Gibson were also claimed. But these claims were denied by the Court of Claims and no review of that denial has been sought here.

or its flow. See *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 69; *United States* v. *Twin City Power Co.*, 350 U. S. 222, 224–225. The Government contends that the navigational servitude of the United States extends also to nonnavigable waters, pre-empting state-created property rights in such waters, at least when asserted against the Government. In the view we take in this case, however, it is not necessary that we reach that contention. Congress by the 1941 Act, already mentioned,[7] adopted as one work of improvement "for the benefit of navigation and the control of destructive flood-waters" the reservoirs in the Grand River. That action to protect the "navigable capacity" of the Arkansas River (*United States* v. *Rio Grande Irrigation Co.*, 174 U. S. 690, 708) was within the constitutional power of Congress. We held in *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508, that the United States over the objection of Oklahoma could build the Denison Dam on the Red River, also nonnavigable, but a tributary of the Mississippi. We there stated, "There is no constitutional reason why Congress cannot, under the commerce power, treat the watersheds as a key to flood control on navigable streams and their tributaries." *Id.*, at 525. And see *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 426; *Grand River Dam Authority* v. *Grand-Hydro*, 335 U. S. 359, 373. We also said in *Oklahoma* v. *Atkinson Co.*, *supra*, that ". . . the power of flood control extends to the tributaries of navigable streams." *Id.*, at 525. We added, "It is for Congress alone to decide whether a particular project, by itself or as part of a more comprehensive scheme, will have such a beneficial effect on the arteries of interstate commerce as to warrant it. That determination is legislative in character." *Id.*, at 527. We held that the fact that the project had a multiple purpose was irrelevant to the

[7] Note 3, *supra*, at 639, 645.

constitutional issue, *id.*, at 528–534, as was the fact that power was expected to pay the way. *Id.*, at 533. "[T]he fact that ends other than flood control will also be served, or that flood control may be relatively of lesser importance, does not invalidate the exercise of the authority conferred on Congress." *Id.*, at 533–534.

We cannot say on this record that the Ft. Gibson dam is any less essential or useful or desirable from the viewpoint of flood control and navigation than was Denison Dam.[8] When the United States appropriates the flow either of a navigable or a nonnavigable stream pursuant to its superior power under the Commerce Clause, it is exercising established prerogatives and is beholden to no one. Plainly under our decisions it could license another to build the project and operate it. If respondent sued for damages for failure of the Federal Government to grant it a license to build the Ft. Gibson project, it could not claim that something of right had been withheld from it. So it is when the United States exercises its prerogative by building the project itself.[9]

Respondent, however, argues that it had a vested interest in the waters of the Grand River and points to the grant made by Oklahoma to it for the development of hydroelectric power on the Grand River. It seeks to trace the title of Oklahoma through the Cherokees who, in consideration of their agreement to remove to the territory which included the Grand River, received on December 31, 1838, a deed from the United States to the

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[8] The findings are "There is storage capacity between elevation 554 and elevation 582 that is reserved for the control of flood waters."

[9] No riparian land is involved, and it cannot be claimed as was asserted in *United States* v. *Kelly*, 243 U. S. 316, 330, that in substance there was a taking of land. And see *United States* v. *Willow River Co.*, 324 U. S. 499, 507, which narrowly confined the holding in the *Kelly* case.

territory.[10] By § 15 of the Act of March 3, 1893, 27 Stat. 612, 645, Congress agreed that this Cherokee land could be allotted to the members of the nation in severalty. The argument is that the United States had divested itself entirely of any rights in the water of the Grand River prior to Oklahoma's admission as a State in 1907. Assuming, *arguendo,* that that is true, respondent's claim is not advanced. In dealing with a grant by the United States to the Osage Indians over a nonnavigable stretch of the Arkansas River the Court in *Brewer Oil Co.* v. *United States,* 260 U. S. 77, 87–88, said:

> "The title of the Indians grows out of a federal grant when the Federal Government had complete sovereignty over the territory in question. Oklahoma when she came into the Union took sovereignty over the public lands in the condition of ownership as they were then, and, if the bed of a non-navigable stream had then become the property of the Osages, there was nothing in the admission of Oklahoma into a constitutional equality of power with other States which required or permitted a divesting of the title."

Respondent argues that if any rights in the waters of the Grand River remained in the United States after the grant to the Indians in 1838, rights over them were later given to Oklahoma. The reference is to § 25 of the Act of April 26, 1906, 34 Stat. 137, 146, which granted light and power companies the right to construct dams across nonnavigable streams in Cherokee territory for power and other purposes. The right to acquire or condemn property was granted the companies in prescribed situations "subject to approval by the Secretary of the Interior." And § 25 contained at the end a proviso critical to respondent's case and reading as follows: *"Provided,* That all rights

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[10] See Mills, Oklahoma Indian Land Laws (1924), 27.

granted hereunder shall be subject to the control of the future Territory or State within which the Indian Territory may be situated." But this Act was no more than a regulatory measure. It did not purport to grant title to waters and appurtenant lands. The 1906 Act was an assertion of power possessed by the Federal Government to regulate Indian territory. Moreover, no water rights condemned under this Act are shown to have passed to Oklahoma and from Oklahoma to respondent. Yet the Federal Government was the initial proprietor in these western lands and any claim by a State or by others must derive from this federal title. See *United States* v. *Gerlach Live Stock Co.,* 339 U. S. 725, 747; *Federal Power Comm'n* v. *Oregon,* 349 U. S. 435. Congress has made various grants or conveyances or by statute recognized certain appropriations of lands or waters in the public domain made through machinery of the States. *United States* v. *Gerlach Live Stock Co., supra,* at 747–748; *Federal Power Comm'n* v. *Oregon, supra,* at 446–448. Yet the only Federal Act on which reliance is based by respondent for the grant of these water rights to Oklahoma is § 25 of the Act of April 26, 1906. As we have seen, that was a regulatory measure through which title might be obtained; but no water rights under it were acquired by a light or power company which is now asserted to be in respondent's chain of title. If the 1906 Act be less clear than we believe, nevertheless the construction urged by respondent would be precluded by the principle that all federal grants are construed in favor of the Government lest they be enlarged to include more than what was expressly included. See *United States* v. *Union Pacific R. Co.,* 353 U. S. 112, 116.

Respondent argues that since Oklahoma gave it rights to the waters of the Grand River, it has a compensable interest in them under the decision in *Federal Power Comm'n* v. *Niagara Mohawk Power Corp.,* 347 U. S. 239.

That decision merely held that the Federal Power Act treats "usufructuary water rights like other property rights," *id.*, at 251, making it necessary for a licensee to compensate the claimant for them. Here no licensee claims under the Federal Act; the United States builds the project on its own account.

The Court of Claims erred in failing to distinguish between an appropriation of property and the frustration of an enterprise by reason of the exercise of a superior governmental power. Here respondent has done no more than prove that a prospective business opportunity was lost. More than that is necessary as *Omnia Co.* v. *United States,* 261 U. S. 502, holds. In that case the claimant stood to make large profits from a contract it had with a steel company. But the United States, pursuant to the War Power, requisitioned the company's entire steel production. Suit was brought in the Court of Claims for just compensation. The Court, after pointing out that many laws and rulings of Government reduce the value of property held by individuals, noted that there the Government did not appropriate what the claimant owned but only ended his opportunity to exploit a contract. "Frustration and appropriation are essentially different things." *Id.,* at 513. And see *Mitchell* v. *United States,* 267 U. S. 341, 345; *United States ex rel. T. V. A.* v. *Powelson,* 319 U. S. 266, 281–283. No more need be said here.

In conclusion, the United States did not appropriate any business, contract, land, or property of respondent. It had the superior right by reason of the Commerce Clause to build the Ft. Gibson project itself or to license another to do it. The frustration of respondent's plans and expectations which resulted when the United States chose to undertake the project on its own account did not take property from respondent in the sense of the Fifth Amendment.

Reversed.

UNITED STATES *v.* BROSNAN ET AL.

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

No. 137. Argued March 21, 1960.—Decided June 13, 1960.*

1. Federal tax liens on real estate which are junior to defaulted mortgages held on the same properties by other parties may be effectively extinguished by state proceedings to which the United States is not, and is not required under state law to be, a party. Pp. 238–252.

   (a) Since federal tax liens are wholly creatures of federal statute, matters directly affecting their nature or operation are federal questions, regardless of whether or not the federal statutory scheme deals with them specifically. Pp. 240–241.

   (b) Nevertheless, it is believed desirable to adopt as federal law state law governing divestiture of junior federal tax liens (except to the extent that Congress may have entered the field), since this will avoid the severe dislocation of local property relationships which would result from disregarding state procedures. Pp. 241–242.

   (c) By the enactment of 26 U. S. C. § 7424 and 28 U. S. C. § 2410, Congress did not intend to make the proceedings under those sections the only means by which a junior federal tax lien could be extinguished; it did not intend to exclude the application of all state procedures, whatever their existence or effectiveness might be. Pp. 242–250.

2. Under Pennsylvania law, mortgagees of a tract of Pennsylvania land on which the United States held a junior federal tax lien proceeded under a confession-of-judgment provision of the mortgage bond to obtain an *in personam* judgment against the mortgagor-taxpayer, pursuant to which the property was sold under a writ of *fieri facias*. Subsequently, the United States sued under 26 U. S. C. § 7403 to enforce its junior tax lien on the same land by foreclosure and sale. *Held:* Under Pennsylvania law, the sheriff's sale under a writ of *fieri facias* was a judicial sale; but the doctrine of sovereign immunity from unconsented suits has not yet been

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*Together with No. 183, *Bank of America National Trust and Savings Association* v. *United States*, on certiorari to the United States Court of Appeals for the Ninth Circuit, argued March 22, 1960.

applied to such proceedings and will not be extended to them now. Therefore, the Government's junior tax lien on the property was effectively extinguished by the Pennsylvania proceedings. Pp. 239, 250.

3. California real estate and personal properties subject to a deed of trust and two chattel mortgages were sold by the trustee-mortgagee pursuant to powers of sale contained in the respective instruments. The United States, which had junior tax liens on the properties, received no actual notice of the sale. Thereafter the mortgagee, which had bought in at the sale, brought suit against the United States under 28 U. S. C. § 2410 to quiet its title. *Held:* The doctrine of sovereign immunity from unconsented suits does not apply to such private sales without judicial proceedings. Therefore, the exercise under California law of the powers of sale conferred by the deed of trust and chattel mortgages effectively extinguished the junior federal tax liens. Pp. 239–240, 250–252.

264 F. 2d 762, affirmed.

265 F. 2d 862, reversed.

Daniel M. Friedman argued the causes for the United States. With him on the briefs were *Solicitor General Rankin, Assistant Attorney General Rice, A. F. Prescott* and *George F. Lynch.*

William L. Jacob argued the cause and filed a brief for respondents in No. 137.

Samuel B. Stewart argued the cause for petitioner in No. 183. With him on the brief were *Kenneth M. Johnson* and *Eldon C. Parr.*

MR. JUSTICE HARLAN delivered the opinion of the Court.

In these two cases, the United States purports to hold federal tax liens on Pennsylvania and California real properties which are concededly junior to defaulted mortgages held on the same properties by the other parties to the suits. The basic issue in each case is whether the federal lien was effectively extinguished by state proceed-

ings to which the United States was not, nor was required under state law to be, a party.

The course of proceedings giving rise to this issue was as follows: In No. 137, involving a tract of Pennsylvania land, the respondent mortgagees, under a confession-of-judgment provision of the mortgage bond, obtained an *in personam* judgment against the mortgagor-taxpayer, pursuant to which the property was sold under a writ of *fieri facias*.[1] Subsequently, the United States instituted this suit under 26 U. S. C. § 7403, seeking an enforcement of its tax lien by foreclosure and sale.[2] The District Court held that the Government's lien on the property in question had been effectively extinguished by the Pennsylvania proceedings, and it entered judgment for the defendants. The Court of Appeals affirmed. 264 F. 2d 762.

In No. 183, California real and personal properties, subject to a deed of trust and two chattel mortgages, were sold by the trustee-mortgagee pursuant to powers of sale contained in the respective instruments. The United States received no actual notice of the sale. Thereafter, the mortgagee, which had bought in at the sale, brought this suit against the Government under 28 U. S. C. § 2410 to quiet its title, claiming that the exercise of the powers of sale had effectively extinguished the federal tax lien. The Court of Appeals, reversing the District Court, dismissed the suit, holding that the federal lien could be

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[1] Subsequent to the entry of judgment, but prior to the sale, the mortgagees attempted to join the United States as a party under 28 U. S. C. § 2410. We agree with the District Court that that attempt did not comply with the statute.

[2] Alternatively, in the event the District Court found that the Government had been properly joined as a party to the state proceedings, the Government sought a decree that it had properly exercised its right of redemption. That issue is not pressed by the Government and is not before us.

divested "only with the consent of the United States and in the manner prescribed by Congress." 265 F. 2d 862, 869. The Court did not reach the question of the effect which California law purports to give to the exercise of the power of sale upon junior liens.

We brought the cases here, 361 U. S. 811, because of the importance of the issue in the administration of the tax laws and the conflict between the decisions of the Third and Ninth Circuits.

I.

Federal tax liens are wholly creatures of federal statute. Detailed provisions govern their creation, continuance, validity, and release.[3] Consequently, matters directly affecting the nature or operation of such liens are federal questions, regardless of whether the federal statutory scheme specifically deals with them or not. See *Clearfield Trust Co.* v. *United States,* 318 U. S. 363. Yet because federal liens intrude upon relationships traditionally governed by state law, it is inevitable that the Court, in developing the federal law defining the incidents of such liens, should often be called upon to determine whether, as a matter of federal policy, local policy should be adopted as the governing federal law, or whether a uniform nationwide federal rule should be formulated.

In determining the extent of the "property and rights to property" (§ 6321) to which a government tax lien attaches, we have looked to state law. *United States* v. *Bess,* 357 U. S. 51, 55. The mortgagees claim that the present cases are governed by the principle of *Bess.* They assert that since the taxpayer-mortgagors' interests were subject to being terminated by means of the state pro-

[3] See 26 U. S. C. § 6321 (Lien for taxes); § 6322 (Period of lien); § 6323 (Validity against mortgagees, pledgees, purchasers, and judgment creditors); and § 6325 (Release of lien or partial discharge of property).

ceedings here invoked, their "property and rights to property" were limited to that extent; that under *Bess,* the Government's lien attaches only to property rights created under state law; and that therefore, the Government's interest was subject to being similarly terminated.

The fallacy of this contention is evident. In *Bess,* we held that a deceased's property in insurance policies on his own life was limited to their cash surrender value and did not extend to their proceeds, which he could never enjoy. Here, however, the mortgagors owned the entire fee interests in the properties, subject only to the mortgages. This Court has repeatedly rejected the contention that because a fee owned by a taxpayer was already encumbered by a lien which enjoyed seniority under state law, the Government's lien necessarily attached subject to that lien.[4] *A fortiori,* the "property" to which the federal lien can attach is not diminished by the particular means of enforcement possessed by a competing lienor to whom federal law concedes priority.

II.

We nevertheless believe it desirable to adopt as federal law state law governing divestiture of federal tax liens, except to the extent that Congress may have entered the field. It is true that such liens form part of the machinery for the collection of federal taxes, the objective of which is "uniformity, as far as may be." *United States* v. *Gilbert Associates,* 345 U. S. 361, 364. However, when Con-

[4] *United States* v. *Security Trust & Savings Bank,* 340 U. S. 47; *United States* v. *City of New Britain,* 347 U. S. 81; *United States* v. *Acri,* 348 U. S. 211; *United States* v. *Liverpool & London & Globe Ins. Co., Ltd.,* 348 U. S. 215; *United States* v. *Scovil,* 348 U. S. 218; *United States* v. *Colotta,* 350 U. S. 808; *United States* v. *White Bear Brewing Co.,* 350 U. S. 1010; *United States* v. *Vorreiter,* 355 U. S. 15; *United States* v. *Ball Construction Co., Inc.,* 355 U. S. 587; *United States* v. *Hulley,* 358 U. S. 66.

gress resorted to the use of liens, it came into an area of complex property relationships long since settled and regulated by state law. We believe that, so far as this Court is concerned, the need for uniformity in this instance is outweighed by the severe disclocation to local property relationships which would result from our disregarding state procedures. Long accepted nonjudicial means of enforcing private liens would be embarrassed, if not nullified where federal liens are involved, and many titles already secured by such means would be cast in doubt. We think it more harmonious with the tenets of our federal system and more consistent with what Congress has already done in this area, not to inject ourselves into the network of competing private property interests, by displacing well-established state procedures governing their enforcement, or superimposing on them a new federal rule. Cf. *Board of Comm'rs* v. *United States*, 308 U. S. 343.

III.

This conclusion would not, of course, withstand a congressional direction to the contrary. The Government argues that by the enactment of certain statutes relating to judicial proceedings for the enforcement and extinguishment of federal liens, Congress has, at least impliedly, so spoken.

As early as 1868, Congress had authorized a suit by the United States to enforce its own tax lien.[5] A similar provision now appears as 26 U. S. C. § 7403.[6] However,

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[5] Act of July 20, 1868, c. 186, § 106, 15 Stat. 167.

[6] "§ 7403. Action to enforce lien or to subject property to payment of tax.

"(a) *Filing.* In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof, whether or not levy has been made, the Attorney General or his delegate, at the request of the Secretary or his delegate, may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States under this title with respect to such

it was already then well established that the United States was an indispensable party to any suit affecting property in which it had an interest, and that such a suit was therefore a suit against the United States which could not be maintained without its consent.[7] Furthermore, the laws of many States themselves required all persons claiming an interest in property to be joined as parties to any suit to foreclose a lien or quiet title to the property. Thus there was no way in which a party who held a lien on property senior to that of the United States could get a judicial decree extinguishing the Government's interest.

To remedy this situation, Congress in 1924 passed the predecessor of 26 U. S. C. § 7424,[8] which gives the holder

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tax or liability or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability.

"(b) *Parties.* All persons having liens upon or claiming any interest in the property involved in such action shall be made parties thereto.

"(c) *Adjudication and decree.* The court shall, after the parties have been duly notified of the action, proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property, and, in all cases where a claim or interest of the United States therein is established, may decree a sale of such property, by the proper officer of the court, and a distribution of the proceeds of such sales according to the findings of the court in respect to the interests of the parties and of the United States.

"(d) *Receivership.* In any such proceeding, at the instance of the United States, the court may appoint a receiver to enforce the lien, or, upon certification by the Secretary or his delegate during the pendency of such proceedings that it is in the public interest, may appoint a receiver with all the powers of a receiver in equity."

[7] *The Siren,* 7 Wall. 152; *Minnesota* v. *United States,* 305 U. S. 382, 386; *United States* v. *Alabama,* 313 U. S. 274, 282.

[8] 43 Stat. 253. Section 7424 now provides:

"§ 7424. Civil action to clear title to property.

"(a) *Obtaining leave to file.*

"(1) *Request for institution of proceedings by United States.* Any person having a lien upon or any interest in the property referred to in section 7403, notice of which has been duly filed of record in

of a prior-filed lien the right to enforce it by civil action against the United States, subject to the exhaustion of certain administrative remedies. The court is to proceed to "a final determination of all claims to or liens upon the property in question" in the same manner as if the action had been brought by the Government to enforce its lien under § 7403. The latter section requires the court to determine the merits of all claims to the property, and in case the United States establishes such a claim, permits, but does not require, the court to order a judicial sale. The details of the procedure to be followed in case of judicial sale are not specified, nor is the United States expressly given any right to redeem.

In 1931, Congress, for similar reasons, passed the predecessor of 28 U. S. C. § 2410, which gives a private lienor

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the jurisdiction in which the property is located, prior to the filing of notice of the lien of the United States as provided in section 6323, or any person purchasing the property at a sale to satisfy such prior lien or interest, may make written request to the Secretary or his delegate to authorize the filing of a civil action as provided in section 7403.

"(2) *Petition to court.* If the Secretary or his delegate fails to authorize the filing of such civil action within 6 months after receipt of such written request, such person or purchaser may, after giving notice to the Secretary or his delegate, file a petition in the district court of the United States for the district in which the property is located, praying leave to file a civil action for a final determination of all claims to or liens upon the property in question.

"(3) *Court order.* After a full hearing in open court, the district court may in its discretion enter an order granting leave to file such civil action, in which the United States and all persons having liens upon or claiming any interest in the property shall be made parties.

"(b) *Adjudication.* Upon the filing of such civil action, the district court shall proceed to adjudicate the matters involved therein, in the same manner as in the case of civil actions filed under section 7403. For the purpose of such adjudication, the assessment of the tax upon which the lien of the United States is based shall be conclusively presumed to be valid."

the right to name the United States a party in any action or suit to foreclose a mortgage or lien or to quiet title to property on which the United States claims any kind of mortgage or lien, whether or not a tax lien.[9] The action

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[9] 46 Stat. 1528, as amended, 56 Stat. 1026. As presently codified, 28 U. S. C. § 2410 provides:

"§ 2410. Actions affecting property on which United States has lien.

"(a) Under the conditions prescribed in this section and section 1444 of this title for the protection of the United States, the United States may be named a party in any civil action or suit in any district court, or in any State court having jurisdiction of the subject matter, to quiet title to or for the foreclosure of a mortgage or other lien upon real or personal property on which the United States has or claims a mortgage or other lien.

"(b) The complaint shall set forth with particularity the nature of the interest or lien of the United States. In actions in the State courts service upon the United States shall be made by serving the process of the court with a copy of the complaint upon the United States attorney for the district in which the action is brought or upon an assistant United States attorney or clerical employee designated by the United States attorney in writing filed with the clerk of the court in which the action is brought and by sending copies of the process and complaint, by registered mail, to the Attorney General of the United States at Washington, District of Columbia. In such actions the United States may appear and answer, plead or demur within sixty days after such service or such further time as the court may allow.

"(c) A judicial sale in such action or suit shall have the same effect respecting the discharge of the property from liens and encumbrances held by the United States as may be provided with respect to such matters by the local law of the place where the property is situated. . . . Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United States shall have one year from the date of sale within which to redeem. In any case where the debt owing the United States is due, the United States may ask, by way of affirmative relief, for the foreclosure of its own lien and where property is sold to satisfy a first lien held by the United States, the United States may bid at the sale such sum, not exceeding the amount of its claim with expenses

can be brought in a state court, but is removable to a federal court.[10] If a judicial sale is conducted in such an action or suit, it is to have the same effect as it would have under local law, but the United States is given one year to redeem.

These statutes on their face evidence no intent to exclude otherwise available state procedures. Their only apparent purpose is to lift the bar of sovereign immunity which had theretofore been considered to work a particular injustice on private lienors. Several features of the statutes make this clear:

(1) Both sections are purely permissive in tenor. A private lienor "*may* . . . file a petition in the district court" under § 7424, or "the United States *may* be named a party" under § 2410. (Emphasis added.)

(2) Under neither section is there a federally imposed requirement that there be any judicial sale at all. Nor is there any uniformity of procedure under the statutes. Under § 7424, the court "may decree a sale" of the property, but no guidance is given as to the procedure to be followed. Under § 2410, a judicial sale is to have the same effect as it would have under local law, but nothing in the section indicates when a judicial sale is to be had. While the Government is guaranteed a one-year right to redeem if the plaintiff proceeds under § 2410, it is guaranteed no such right if he proceeds under § 7424.

(3) The specific permission of § 2410 (a) to institute a quiet-title suit against the United States obviously contemplates a declaration by the federal courts of previously created legal consequences. If § 7424 or § 2410 were invoked to extinguish a federal lien, a subsequent suit to

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of sale, as may be directed by the head of the department or agency of the United States which has charge of the administration of the laws in respect of which the claim of the United States arises."

[10] 28 U. S. C. § 1444.

quiet title obviously would not be necessary. Therefore, Congress must have recognized the possibility that state procedures might affect federal liens.

The Government, however, argues that the legislative history indicates that Congress believed a suit against the United States to be the only way in which a federal lien could be extinguished. But the statements relied on [11]

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[11] The Senate Committee which reported the bill which became the predecessor of § 7424 stated (S. Rep. No. 398, 68th Cong., 1st Sess. 46):

"At the present time, in cases in which the lien prior in time to that of the United States equals or exceeds in amount the value of the property, there is no method whereby the lien for taxes may be discharged without payment. Although the lien may thus be valueless to the United States, it remains a cloud on the title which the prior lienor is powerless to remove. The subdivision gives the lienor a remedy in this case."

The House Committee which reported a bill designed to achieve the same objective as § 2410 stated (H. R. Rep. No. 95, 71st Cong., 2d Sess. 1–3):

"This legislation has been recommended for a number of years by the American Bar Association through its committee on removal of Government liens on real estate, the United States League of Local Building and Loan Associations, and by numerous land title companies, in order to relieve against the injustice with which mortgagees are confronted under the present state of the law who find, when it is necessary to foreclose their mortgages, that there has been filed against the property a junior lien by the Federal Government for some debt due the United States by the owner of the equity in the property, and for which the mortgagee owes no obligation either legal or moral. In such circumstances, the mortgagee finds himself at an impasse. It is impossible for him to bring about a judicial sale of the property owing to the cloud upon the title created by the Government's lien. He can not remove the lien as there is no method by which he may bring the United States in as one of the parties to the foreclosure proceeding. He is, therefore, in effect defeated of his own right to foreclose unless he is willing to pay off the Government lien, a debt for which he is in no way responsible and he being a person to whom the Government would in no event look for its payment. [*Footnote 11 continued on pp. 248, 249.*]

reveal simply a recognition that competing lienors were put at an unfair disadvantage because of inability to join effectively the Government as a party to judicial proceedings. As to the extent of that disadvantage, it is not

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"The purpose of this bill is to provide a simple and just method of proceeding in such cases . . . .

. . . . . .

"This bill will provide relief from a situation that has caused a great deal of injustice to innocent holders of liens against real estate. The number of liens filed under the revenue laws has been steadily growing. . . . The law provides and equity dictates that the Government's lien in such circumstances should have a junior status, yet under the present practice the inability of the plaintiff to bring the United States in as a party to the proceeding to foreclose or have execution and sale on a court judgment where a Government lien is found to have been placed upon the property subsequently to the time of the plaintiff's encumbrance ties the hands of a prior lien holder by making it impossible for him to grant a clear title to the property and thus for no just reason deprives him of the benefits of his security or court judgment as the case may be."

During the debates leading to the enactment of the predecessor of § 2410, Representative Graham, who had reported the bill from the Judiciary Committee, explained it as follows (72 Cong. Rec. 3119):

"It is simply a provision by which whenever a mortgagee, for instance, holding a mortgage upon real estate, finds that a lien to the Government has been filed . . . the owner of that mortgage may go into the State court and foreclose his mortgage, but this would do him no good unless he could get the United States made a party to the proceeding in some way so that the lien would be relieved on the part of the Government."

Subsequently, the following colloquy took place with respect to a provision of the bill which authorized administrative release of questionable or worthless federal liens (72 Cong. Rec. 3121–3122):

"Mr. BURTNESS [of North Dakota]. So that some of us may understand a little better the relief that is suggested simply as an administrative act and the cases to which it would apply. I understand, for instance, it would apply to a case of this sort: In many States foreclosure by advertisement is permitted, with the right of redemption. Assume that a prior lien is foreclosed, the Government has a junior lien, the time for redemption expires and the purchaser

clear whether Congress thought that the Government's sovereign immunity barred an attempt to affect a federal lien in any manner; that a nonjudicial procedure might be effective to divest federal liens but that state procedures

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at the foreclosure sale of the prior lien gets title through the foreclosure proceedings under State laws. Presumably in a case of that sort the enforcibility of the Federal lien as a practical proposition has been wiped out, but it is still a cloud on the title. Now, in that sort of a case, could the administrative officers give relief under the amendment that is proposed without going into court in any way?

"Mr. HAWLEY [of Oregon]. If at any time they find as a matter of fact that the Government lien is valueless they are authorized to release that lien by the pending amendment.

"Mr. BURTNESS. And it may become valueless for several reasons, for instance, depreciation in the value of the property, the amount of prior liens foreclosed in legal proceedings, or anything else.

"Mr. GRAHAM [of Pennsylvania]. The foreclosure the gentleman speaks of could not possibly discharge the Government's lien.

"Mr. BURTNESS. I understand it would not be discharged, but, of course, the holder of the property would have been subrogated to the rights acquired under the foreclosure of the prior lien, I take it."

In 1941, Attorney General Jackson sent a letter to the Chairman of the Senate Judiciary Committee urging that the predecessor of § 2410 be amended to include suits to quiet title. The letter stated (S. Rep. No. 1646, 77th Cong., 2d Sess. 2):

"It should be observed in this connection that under existing law there is no provision whereby the owner of real estate may clear his title to such real estate of the cloud of a Government mortgage or lien. *Welch* v. *Hamilton* (S. D. Calif.), 33 F. (2d) 224, and *U. S.* v. *Turner* (C. C. A. 8), 47 F. (2d) 86.

"In many instances persons acting in good faith have purchased real estate without knowledge of the Government lien or in the belief that the lien had been extinguished. In other instances, mortgagees have foreclosed on property and have failed to join the United States. It appears that justice and fair dealing would require that a method be provided to clear real-estate titles of questionable or valueless Government liens. Accordingly, I suggest that the bill be amended by inserting the phrase 'to quiet title or' between the words 'matter' and 'for the foreclosure of' in line 4 of page 2 of the bill."

by and large required junior lienors to be joined as parties to judicial proceedings; or that regardless of the existence and effectiveness of state procedures, a cloud on the title could only be removed conclusively by a judicial determination binding on the United States. In any event, the basic question is not what the existing state of the law was, or even what Congress believed it to be, but whether Congress intended to exclude the application of all state procedures, whatever their existence or effectiveness might be. No such inference can be drawn from the legislative statements referred to.

IV.

The question remains whether the state procedures followed in these cases were nonetheless ineffective to defeat the government liens because they should be regarded as being unconsented suits against the United States. Because no judicial proceeding was there involved, No. 183 presents no such problem, unless we are now to hold, beyond anything this Court has heretofore decided, that because the private sale of its own force was effective under California law to extinguish all junior liens,[12] what was done in this instance amounted to a "suit" against the United States. We do not think that the doctrine of sovereign immunity reaches so far.

No. 137, however, presents a different and more difficult question on this score. Under Pennsylvania law the Sheriff's sale of the mortgaged land under a writ of *fieri facias* was a judicial sale, having the effect of extinguishing junior liens even though their holders were not, nor required to be made, parties to the proceedings.[13] Under

[12] Cal. Civ. Code § 2932; *Bracey* v. *Gray*, 49 Cal. App. 2d 274, 121 P. 2d 770; *Sohn* v. *California Pac. Title Ins. Co.*, 124 Cal. App. 2d 757, 269 P. 2d 223; 34 Cal. Jur. 2d, Mortgages and Trust Deeds § 463.

[13] Purdon's Pa. Stat. Ann., Tit. 12, § 2447; *Liss* v. *Medary Homes, Inc.*, 388 Pa. 139, 130 A. 2d 137; *State College Borough* v. *Leathers*,

the decisions of this Court, a judicial proceeding against property in which the Government has an interest is a suit against the United States which cannot be maintained without its consent. *The Siren,* 7 Wall. 152; *Minnesota* v. *United States,* 305 U. S. 382; *United States* v. *Alabama,* 313 U. S. 274. It has been suggested that this principle applies only where the Government holds a fee interest or such other interest in the property as to render it an indispensable party under state law. See *United States* v. *Cless,* 254 F. 2d 590, 592. That, however, seems a dubious distinction, since whether or not the United States is an indispensable party to a judicial proceeding cannot depend on state law. See *Minnesota* v. *United States, supra,* at p. 386. Nevertheless, no case in this Court, so far as we can find, has yet applied the doctrine of sovereign immunity in the precise situation before us. Much can be said for the view that this Pennsylvania procedure should not be considered as being an unconsented suit against the United States,[14] any more than the wholly private proceeding in the California case. In both cases, the practical effect upon junior liens is exactly the same.

Be that as it may, we shall not so extend the principle of sovereign immunity. To do so would not only produce incongruous results as between these two cases, but would trespass upon the considerations which have led to our refusal to fashion a federal rule of uniformity respecting the extinguishment of federal junior liens under state procedures. It must be recognized that the factors supporting a federal rule of uniformity in this field, and those

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19 Pa. D. & C. 405; *Moore* v. *Schell,* 99 Pa. Super. 81; Standard Pennsylvania Practice, c. 68, § 32. See also *Commonwealth* v. *Keystone Graphite Co.,* 257 Pa. 249, 101 A. 766; Standard Pennsylvania Practice, c. 68, § 4, n. 20.

[14] If state procedures undertook to discriminate against the United States with respect to joinder, questions of a different order would be presented.

militating against the dislocation of long-standing state procedures, are full of competing considerations. They involve many imponderables which this Court is ill-equipped to assess, on which Congress has not yet spoken, and which we think are best left to that body to deal with in light of their full illumination. A wise solution of such a far-reaching problem cannot be achieved within the confines of a lawsuit. Until Congress otherwise determines, we think that state law is effective to divest government junior liens in cases such as these.

The judgment in No. 137 is affirmed, and that in No. 183 is reversed.

It is so ordered.

MR. JUSTICE CLARK, whom THE CHIEF JUSTICE, MR. JUSTICE BLACK and MR. JUSTICE FRANKFURTER join, dissenting.

I submit that the over-all purpose of Congress in the adoption of § 2410 and § 7424 was "to afford to a holder of a lien prior in time to that of the United States . . . a method of procedure for clearing the title to the property." [1] The Committee pointed out that "there is no method whereby the lien for taxes may be discharged without payment. Although the lien may . . . be valueless to the United States, it remains a cloud on the title which the prior lienor is powerless to remove." And the House Committee stated, among other things, that real estate interests had recommended the legislation for years because a prior recorded lienholder was "in effect defeated of his own right to foreclose" and that the "simple and just method of proceeding" under the bill "is fair to the holder of the prior lien on the real estate and . . . amply and fully protects the rights of the Federal Government. . . ."

[1] For the sake of brevity, see note 11, pp. 247–249, of the majority opinion for references to, and citations of authorities for, these quotations.

It declared that "equity dictates that the Government's lien in such circumstances should have a junior status, yet under *the present practice* the inability of the plaintiff to bring the United States in as a party to the proceeding to foreclose or *have execution and sale on a court judgment* . . . ties the hands of a prior lien holder by making it impossible for him to grant a clear title to the property and thus . . . *deprives him of the benefits of his security* or *court judgment* as the case may be." (Italics added.) Furthermore, the Congress understood and intended that foreclosure under state procedures—by court or private sale—without notice to the United States "could not possibly discharge the Government's lien." (Chairman Graham of the House Judiciary Committee, manager of the bill on the floor.)

The Congress first passed § 7424, which gave a mortgagee the right, after exhausting administrative remedies, to bring an action against the United States to test its lien. Thereafter in 1931 it enacted § 2410 which, without administrative remedies, permitted the United States to be named a party in a suit by a mortgagee for foreclosure of a prior mortgage lien on property or to quiet title. The Act gave consent to the filing of such actions "[u]nder the conditions prescribed," including a one-year right of redemption, all of which requirements the Congress found to be necessary "for the protection of the United States."

Nevertheless, the Court has brushed aside all of these protections and, without regard to the congressional mandate, has turned these acts into booby traps in which the Government has now been caught up by its own benevolence. Giving the California mortgagees in No. 183 a *carte blanche* to wipe out the Government's lien by summary action at a trustee's sale, without even giving the Government notice, the Court declares its extraordinary action to be in recognition "of long-standing state pro-

cedures." For the same reason, the Pennsylvania mortgagees in No. 137 are permitted to bring an action in the courts of that State and to foreclose the Government's lien without making it a party or giving it any notice whatsoever. All of this it does as "a matter of federal policy." But this is not all. The Court finds that the Pennsylvania proceeding was a judicial one culminating in a sale of property on which the United States had a lien and that "[u]nder the decisions of this Court, a judicial proceeding against property in which the Government has an interest is a suit against the United States which cannot be maintained without its consent." Yet, even though admittedly the Government has not so consented, the Court says that since "no case in this Court, so far as we can find, has yet applied the doctrine of sovereign immunity in the precise situation before us," it will not do so now. This is certainly less than a self-evident explanation for wiping out an interest of the Government without its authorized consent, but this anomalous ground for decision is followed by the bootstrap operation that "Pennsylvania procedure should not be considered as being an unconsented suit against the United States, any more than the wholly private proceeding in the California case."

The fact about it is that the Court presupposes, wholly apart from 28 U. S. C. § 2410 and 26 U. S. C. § 7424, that the "long-standing state procedures" applicable to the extinguishment of junior private liens apply equally to junior government ones. In the light of the fact that federal law with regard to the manner in which liens of the United States may be released or extinguished has been on the books in one form or another for over 90 years, this is indeed a violent assumption. Under federal law, a prior-filed lienholder has for some 30 years enjoyed three specific remedies that he may follow to secure the release or extinguishment of a junior government lien. First, he may apply to the Secretary of the Treasury or

his delegate to release the lien under § 6325 of the Internal Revenue Code.[2] Section 6325 authorizes that official (1) to execute a release when the liability is satisfied or has become legally unenforceable or upon the furnish-

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[2] "SEC. 6325. RELEASE OF LIEN OR PARTIAL DISCHARGE OF PROPERTY.

"(a) *Release of Lien.*—Subject to such rules or regulations as the Secretary or his delegate may prescribe, the Secretary or his delegate may issue a certificate of release of any lien imposed with respect to any internal revenue tax if—

"(1) *Liability satisfied or unenforceable.*—The Secretary or his delegate finds that the liability for the amount assessed, together with all interest in respect thereof, has been fully satisfied, has become legally unenforceable, or, in the case of the estate tax imposed by chapter 11 or the gift tax imposed by chapter 12, has been fully satisfied or provided for; or

"(2) *Bond accepted.*—There is furnished to the Secretary or his delegate and accepted by him a bond that is conditioned upon the payment of the amount assessed, together with all interest in respect thereof, within the time prescribed by law (including any extension of such time), and that is in accordance with such requirements relating to terms, conditions, and form of the bond and sureties thereon, as may be specified by such rules or regulations.

"(b) *Partial Discharge of Property.*—

"(1) *Property double the amount of the liability.*—Subject to such rules or regulations as the Secretary or his delegate may prescribe, the Secretary or his delegate may issue a certificate of discharge of any part of the property subject to any lien imposed under this chapter if the Secretary or his delegate finds that the fair market value of that part of such property remaining subject to the lien is at least double the amount of the unsatisfied liability secured by such lien and the amount of all other liens upon such property which have priority to such lien.

"(2) *Part payment or interest of United States valueless.*—Subject to such rules or regulations as the Secretary or his delegate may prescribe, the Secretary or his delegate may issue a certificate of discharge of any part of the property subject to the lien if—

"(A) there is paid over to the Secretary or his delegate in part satisfaction of the liability secured by the lien an amount determined by the Secretary or his delegate, which shall not be less than the

ing of a bond conditioned on the payment of the amount of the lien, or (2) to execute a partial release of the property involved where such a discharge will not jeopardize the Government's interest. This provision, in itself, seems entirely adequate to protect moneylenders from suffering any injustice, but the Congress did not stop there. It gave such a lienholder two additional remedies. These alternative and additional methods are set out in 26 U. S. C. § 7424 and 28 U. S. C. § 2410.

Section 7424 grants the mortgagee the privilege of enforcing his prior-filed lien by civil action against the United States as provided in § 7403, which was originally passed in 1868 as a remedy available only to the Government. As a protection to the United States, § 7424 first requires that the mortgagee request the Secretary of the Treasury to authorize the filing of an action under § 7403. Upon the Secretary's failure to authorize such an action within six months, the mortgagee may apply to the District Court for relief. Notice to all lienholders, including the United States, is required. The majority opinion emphasizes that no redemption right is given the Government in a proceeding under § 7424 and seems to place some reliance for its action on the absence of such relief. However, this policy of the Congress is entirely understandable

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value, as determined by the Secretary or his delegate, of the interest of the United States in the part to be so discharged, or

"(B) the Secretary or his delegate determines at any time that the interest of the United States in the part to be so discharged has no value.

In determining the value of the interest of the United States in the part to be so discharged, the Secretary or his delegate shall give consideration to the fair market value of such part and to such liens thereon as have priority to the lien of the United States.

"(c) *Effect of Certificate of Release or Partial Discharge.*—A certificate of release or of partial discharge issued under this section shall be held conclusive that the lien upon the property covered by the certificate is extinguished." 68A Stat. 781, 26 U. S. C. § 6325.

when we consider that § 7424 first requires application to the Secretary. This requirement gives that official ample time before suit is filed to pay off the prior lien if advantageous to the Government. This is, of course, tantamount to a full redemption right after sale. There would be no point in permitting such relief after suit when its equivalent was available to the Secretary for six months during the time when he was considering the mortgagee's request.

In addition to this procedure, the Congress in § 2410 gave the mortgagee an additional and separate method by which to proceed. It does not require a request to be filed with the Secretary but permits the immediate invocation of judicial remedies in state or federal courts. Its relief extends to any type of mortgage or lien claimed by the United States, whether or not for taxes. The United States, of course, must be made a party and given notice. Judicial sales may be ordered, having the same effect as they would under state law, and the United States is given one year in which to redeem. Obviously this provision was inserted to protect the Government. Unlike a § 7424 proceeding, it ordinarily has received no notice of the prior mortgage lien before the mortgagee files suit. The Congress, in fairness to the Government, gave it one year after the judgment to reimburse the lienholder and redeem the property in protection of the Government's interest.

Now let us take up *seriatim* the grounds on which the Court disregards this carefully devised scheme for protecting the Government's liens. It says that certain "features" of the acts make "clear" that the federal remedies are not exclusive. The first two features have to do with the use by the Congress of the word "may" in granting permission to file the suit and the phrase the court "may decree a sale" in dealing with the action to be taken in the same. But statutory interpretation must not be reduced

to an exercise in semantology. In stating that a mortgagee "may . . . file a petition" Congress did not—because it could not—require him to do so. He "may" file suit if he wishes or he can take his chances that his title is superior, as thousands have in such matters. Likewise, in granting the privilege that "the United States *may* be named a party" the Congress employed the word "may" in its ordinary, familiar usage and understanding. Congressional expression, after all, must not necessarily be of Addisonian diction. Reaching the Court's further objection to the word "may" in the congressional language that the court "may decree a sale," it is submitted in all logic that, since other relief is available in the suit, *i. e.*, receivership, quieting of title, *et cetera,* Congress could use no other word. Certainly the word "shall" would be inapplicable. It was left up to the court to decree the appropriate relief after a full hearing and if a sale was in order to fix the manner, time and condition of the same. These are details the Congress appropriately and traditionally leaves to courts.

The third "feature" of which the majority makes much is the fact that the federal Acts do not "on their face" exclude state procedures. But this is a commonplace in federal legislation, *Hines* v. *Davidowitz,* 312 U. S. 52, 67 (1941), and is by no means the test. See *Pennsylvania* v. *Nelson,* 350 U. S. 497 (1956). The majority says that, since § 2410 (a) grants specific permission to file a quiet-title suit, this "contemplates a declaration by the federal courts of previously created legal consequences." This provision was suggested in 1941 by the then Attorney General Jackson. Being a practical lawyer with a large general practice, he knew that many titles were then clouded by government liens and that many times in the future "persons acting in good faith . . . without knowledge of the Government lien or in the belief that the lien had been extinguished" would likewise have no remedy

under which to clear their titles. This moved him to make the suggestion. But, being the lawyer he was, I am confident he never dreamed that his suggestion would strip the Government he was so capably representing of notice in private trustee sales and deprive it of any defense in such a quiet-title suit. Such a construction of this clause in § 2410 (a) acts as a repealer of all other provisions of these federal statutes. Why would the Congress give its consent to sue the United States as a *quid pro quo* of the Government having a fair chance to test out the validity of the prior-claimed private lien, and then turn right around and let the state procedure through a trustee's sale wipe out the government lien without notice, hearing or redemption rights? In this manner, action under state law wipes out federal procedure entirely—with the exception of the quiet-title suit and even in it the Government, according to the holding today, has none of the federal statutory protections. The trustee's deed under the deed of trust sale has, the Court says, extinguished the inferior government lien under state law and that is binding on the Government. It cannot contest the *bona fides* and priority of the deed of trust, the amount due under it, the regularity, fairness or validity of the exercised power of sale, or any other infirmities in the sale, including fraud or collusion—unless allowed by state law. To be able to construe a federal statute so as to wipe out the government lien, which on the face of the statute was to be tested on specific conditions written therein "for the protection of the United States," stretches the imagination for me beyond the breaking point.

Other than these "features" of the federal Acts, the "long-standing state procedures" and the "matter of federal policy," the Court gives no reason for adopting state procedures in extinguishing government liens. Of course, if, as the Court holds, the principle of sovereign immunity were not applicable, and if the Congress had not acted in

the field, the Court could "fashion the governing rule of law." *Clearfield Trust Co.* v. *United States,* 318 U. S. 363, 367 (1943). But the adoption of local law, even in that event, would be "singularly inappropriate." The tax liabilities involved here, as well as the liens securing the same, are all federally created and the rights arising therefrom would be governed by federal law. The enforcement of these rights, however, would be controlled by state law. Would this include the validity of the tax as assessed by the collector and asserted in the lien? While § 2410 and § 7424 do not permit the validity of the tax to be tested under their procedures, what about state law? Certainly this would open up endless problems. But be that as it may, the procedures of enforcement themselves would vary in each State, resulting in 50 separate and different rules of procedure, entailing varying interpretations, practices and pitfalls peculiar to each jurisdiction. Would it not be better to have a uniform system in the tax collection machinery of the Nation? In *Clearfield* the Court concluded that:

> "The issuance of commercial paper by the United States is on a vast scale and transactions in that paper from issuance to payment will commonly occur in several states. The application of state law, even without the conflict of laws rules of the forum, would subject the rights and duties of the United States to exceptional uncertainty. It would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states. The desirability of a uniform rule is plain." 318 U. S., at 367.

I submit that these grounds for uniformity so forcefully spelled out in *Clearfield* are even more compelling here where the revenue of the United States is imperiled. The importance of uniformity in tax procedures is well illus-

trated in *United States* v. *Gilbert Associates,* 345 U. S. 361, 364 (1953), where we again emphasized its necessity in these words:

> "A cardinal principle of Congress in its tax scheme is uniformity, as far as may be. Therefore, a 'judgment creditor' [as used in 26 U. S. C. (1946 ed.) § 3672] should have the same application in all the states."

It is the more important that, if moneylenders having prior-filed liens are to be given the right to extinguish inferior government liens, it be done on a uniform basis applicable equally in all of the States.

However, there is an even more serious objection to the adoption of state procedures in these cases. As we have seen, the Government is left without even the protection of notice. The United States' lien will be wiped out before its tax officials even know of the foreclosure under the prior-filed mortgage. It will be left without any protection. With thousands of trustees' sales going on over the country each day the Government's revenue will be seriously jeopardized.

While I would hold the federal procedures exclusive, if the Court insists that state law be made applicable would not a "just method of proceeding" at least include a rule that tax liens of the United States cannot be extinguished in any state proceeding—by trustee's sale or through judicial process—without giving the United States notice thereof? With all of its millions of tax transactions, how else can the public treasury be protected? Nor would such a requirement "inject ourselves into the network of competing private property interests" or displace "well-established state procedures governing their enforcement." The State could proceed as it wishes, within Fourteenth Amendment requirements, to set up and enforce its own procedures as to private lienholders.

Only in those cases where government liens are involved would lienholders have to give notice to the United States. This would protect the public revenue and cause no more hardship on moneylenders than they agreed to and have up until today had to bear under § 2410 and § 7424.

I would therefore reverse the judgment in No. 137 and affirm that in No. 183.

Syllabus.

TEXAS GAS TRANSMISSION CORP. ET AL. *v.* SHELL OIL CO.

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

No. 167. Argued April 20–21, 1960.—Decided June 13, 1960.*

The "favored-nation" clause of a contract for the sale of natural gas by respondent to a pipeline company provided that respondent would be entitled to a price increase should the pipeline company thereafter "enter into a contract providing for the purchase by it of gas" at a higher price. Thereafter, the pipeline company agreed to a higher price under a pre-existing, long-term contract with another producer, which required that the price be redetermined every five years, either by agreement of the parties or by arbitration. In proceedings under the Natural Gas Act to determine its effective rate as of June 7, 1954, respondent filed its contract with the Federal Power Commission as a rate schedule. The Commission held that the price redetermination under the pipeline company's pre-existing contract with the other producer was not a contract for the purchase of gas within the meaning of the "favored-nation" clause in respondent's contract and that, therefore, the price payable by the pipeline company to respondent had not been increased. The Court of Appeals vacated the Commission's order. *Held:*

1. Since the Commission disposed of the case solely upon its view of the result called for by the application of ordinary rules of contract construction employed by the courts and did not rely on matters within its own special competence, the Court of Appeals was justified in making its own independent determination of the correct application of the governing principles. Pp. 268–270.

2. In the circumstances, consideration of the scope of judicial review of administrative determinations need not deter this Court from reviewing the decision of the Court of Appeals and deciding the proper construction of the "favored-nation" clause. P. 270.

3. The Commission correctly construed the "favored-nation" clause as not effecting an increase in respondent's price by reason of

*Together with No. 170, *Federal Power Commission* v. *Shell Oil Co.*, also on certiorari to the same Court.

the increased price agreed upon between the pipeline company and the other producer under their pre-existing agreement. Pp. 270–276.

4. The judgment is reversed and the cause is remanded to the Court of Appeals for further proceedings, including consideration of the question whether the enforceability of the contract between the pipeline company and the other producer is material to the decision of this case, and, if so, whether that contract was enforceable. Pp. 276–277.

263 F. 2d 223, reversed.

Mathias F. Correa argued the cause for petitioners in No. 167. With him on the brief were *Gavin H. Cochran* and *Lawrence W. Keepnews.*

Willard W. Gatchell argued the cause for petitioner in No. 170. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Doub, Daniel M. Friedman, Samuel D. Slade, Anthony L. Mondello* and *Howard E. Wahrenbrock.*

Oliver L. Stone argued the cause for respondent. With him on the brief were *William F. Kenney* and *George C. Schoenberger, Jr.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

One of the series of orders issued by the Federal Power Commission after this Court's decision in *Phillips Petroleum Co.* v. *Wisconsin,* 347 U. S. 672, required affected independent producers of natural gas to submit rate schedules in effect on June 7, 1954, the date *Phillips* was decided.[1] The respondent, Shell Oil Company, on November 18, 1954, submitted its contract dated May 1,

[1] The *Phillips* case held that the Commission had jurisdiction over the independent producers and the order in question was Order No. 174–B now incorporated in Regulations under the Natural Gas Act, 18 CFR §§ 154.92–154.93.

1951, with Texas Gas Transmission Corporation,[2] as a rate schedule on June 7, 1954, for gas from its Chalkley Field, Cameron Parish, Louisiana. The Commission, on March 13, 1957, accepted the contract as a rate schedule but ordered a hearing for the purpose of determining and fixing the price effective thereunder on June 7, 1954.[3]

At the hearing, Texas Gas contended that paragraph 1 of Article VI of the contract specifying the price of 8.997 cents per thousand cubic feet (Mcf.) for the period which included June 7, 1954, established that price for the date.[4] This was the price at which Shell was billing Texas Gas for gas at the time. However, Shell contended that when Texas Gas, prior to June 7, 1954, began paying 12.5 cents per Mcf. to Atlantic Refining Company, for gas produced in nearby Acadia Parish, Shell became entitled to receive the same price under the so-called "favored nation" clause of the Shell contract. That clause, paragraph 3 of Article VI, provides that "[i]f at

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[2] The contract was actually between Shell and Louisiana Natural Gas Corporation, a wholly owned subsidiary of the petitioner, Texas Gas Transmission Corporation. The subsidiary was merged into its parent in 1955.

[3] The hearing was ordered after Shell filed on February 11, 1957, an application for a rate increase from 12.5 cents per thousand cubic feet (Mcf.) to 16.75 cents per Mcf. plus tax reimbursement. This price increase has been suspended and is pending before the Commission in another proceeding. The Commission noted in its opinion herein that it was "necessary in connection with any rate proceeding after suspension of increased rates . . . that we know the rate previously in effect . . . ." 18 F. P. C. 617, 618. Texas Gas and its customer, the other petitioner in No. 167, Louisville Gas and Electric Company, were permitted to intervene in these proceedings.

[4] Article VI, paragraph 1, provides in pertinent part:

"1. The prices to be paid by Buyer for gas hereunder shall be as follows:

. . . . .

"For all gas purchased from January 1, 1952, through December 31, 1956..... 8.9970¢ per 1000 cu. ft."

any time after December 31, 1951, [Texas Gas] shall enter into a contract providing for the purchase by it of gas" at a higher price [than that currently being paid under this—the Shell—contract], the price currently being paid will be increased to equal the "price payable under such other contract." [5]

When Texas Gas and Shell made the contract of May 1, 1951, Atlantic Refining Company was selling gas to the former from Acadia Parish production under a contract concluded in 1943 for a 25-year term. The Atlantic contract specified a price effective for the first five years and provided that during succeeding five-year periods, "prices to be paid will be determined at the beginning of each period . . . ." "The price to be paid . . . is to be agreed upon . . . after a survey of prevailing prices for gas being sold in similar quantities in the southwestern part of Louisiana." The contract further provided that "[i]n the event that the parties are unable to agree upon the price . . . such determination shall be submitted to arbi-

[5] Paragraph 3 of Article VI is as follows:

"If at any time after December 31, 1951, Buyer shall enter into a contract providing for the purchase by it of gas produced from a field or fields located, and delivered to Buyer, within a radius of fifty (50) miles of any point of delivery provided hereunder, Buyer shall forthwith notify Seller of such fact, and if the price per one thousand (1000) cubic feet at any time payable under such other contract is higher than the price payable hereunder, each price payable hereunder which is less than the price payable at the same time under such other contract shall be immediately increased so that it will equal the price payable under such other contract. In determining whether the price payable under such other contract is 'higher' than the price payable for gas under this contract, due consideration shall be given to the provisions of this contract as compared with such other contract as to quality of gas; delivery pressures, gathering and compressing arrangements, quantity, provisions regarding measurement of gas, including deviation from Boyle's Law, taxes payable on or in respect of gas delivered and all other pertinent factors."

tration"; the arbitrators to be selected as provided in the agreement.[6] Negotiations between Atlantic and Texas Gas as to the price to be effective for the five-year period beginning September 1, 1953, terminated with a letter agreement dated February 17, 1954, which recited: "[I]t is hereby agreed that the price to be paid . . . between September 1, 1953, and August 31, 1958, both inclusive, shall be 12.2 cents net" plus .3 cent for severance tax, or 12.5 cents. It is this letter agreement which Shell contends triggered the Shell contract's "favored nation" clause.

The Commission's examiner issued his decision on August 9, 1957. He held that in making the Atlantic letter agreement Texas Gas "enter[ed] into a contract providing for the purchase by it of gas" within the meaning of the Shell "favored nation" clause and that this had escalated the Shell price to 12.5 cents per Mcf. The Com-

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[6] The pertinent provisions are in Article III of the 1943 Atlantic contract reading as follows:

"The Buyer agrees to pay for the gas received hereunder a price computed as follows:

. . . . . .

"(b) At the end of the first five-year period, Buyer and Seller are to reach an agreement as to the price for gas sold and delivered under this contract during the second five-year period. The price to be paid during such second five-year period is to be agreed upon at the beginning of such period after a survey of prevailing prices for gas being sold in similar quantities in the southwestern part of Louisiana.

"(c) During succeeding five-year periods, prices to be paid will be determined at the beginning of each period in the same manner as provided for in paragraph (b) above.

"(d) In the event that the parties are unable to agree upon the price to be paid for gas after the first five-year period, in accordance with the arrangements set forth in paragraphs (b) and (c) above, such determination shall be submitted to arbitration in accordance with Condition XII."

mission reversed the examiner's decision and determined that the effective price on June 7, 1954, was 8.997 cents per Mcf., the price fixed in paragraph 1 of Article VI. 18 F. P. C. 617. Shell's petition for rehearing was denied. 19 F. P. C. 74. The Court of Appeals for the Third Circuit, on review, vacated the Commission's order. 263 F. 2d 223. We granted the separate petitions for certiorari of Texas Gas and Louisville Gas and Electric Company in No. 167, and of the Federal Power Commission in No. 170, being particularly moved to do so by the contention made in both petitions that the Court of Appeals exceeded the appropriate scope of judicial review of the Commission's determination. 361 U. S. 811.

We may assume with the petitioners that the Court of Appeals did not treat the Commission's order as one which it was required to accept if reasonably supported in the record, and instead considered that it could examine *de novo* the question of the proper interpretation to be given the Shell "favored nation" clause. The petitioners' argument that the Court of Appeals exceeded the allowable limits of judicial review is based upon the premise that the Commission's interpretation of the "favored nation" clause reflects the application of its expert knowledge and judgment to a highly technical field, so that the Court of Appeals was required to accept the Commission's interpretation if it had "'warrant in the record' and a 'reasonable basis in law,'" citing *Unemployment Compensation Comm'n* v. *Aragon,* 329 U. S. 143, 153–154. But the record nowhere discloses that the Commission arrived at its interpretation of the "favored nation" clause on the basis of specialized knowledge gained from experience in the regulation of the natural gas business, or upon the basis of any trade practice concerning "favored nation" clauses. On the contrary the opinions of the examiner and the Commission show that both treated the question as one to be determined

simply by the application of ordinary rules of contract construction. The examiner stated that "[t]he language [of the "favored nation" clause] is clear enough to reveal the intent of the parties without resort to parole evidence or self-serving memoranda. . . . [I]ts plain meaning is . . . Shell sought to cause its selling price to rise to that called for by any other contract Buyer made for gas after an agreed date . . . . The language was evidently broad; not narrowly technical in character." The examiner concluded that "elemental principles of contract law . . . too commonly known to the legal profession to require citations in support thereof" compelled the decision he reached. The Commission, in turn, relying for authority entirely upon court decisions and texts, construed the "favored nation" clause to be applicable only when Texas Gas entered into a "new" contract after December 31, 1951, and held that the February 17, 1954, "agreement with Atlantic does not constitute a new contract as required by Shell's escalation clause, but merely represents action taken under a pre-existing contract between Texas Gas and Atlantic." 18 F. P. C., at 618–619. It is apparent that the Commission rested its determination upon a construction of the words of the contract as it supposed a court would interpret them.[7]

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[7] The Commission reached its conclusion as to the interpretation of the "favored nation" clause without dissent. There was one dissent, by Commissioner Connole, from an alternative ground of decision, namely, that the effective rate on June 7, 1954, was 8.997 cents per Mcf. because that was the charge actually being collected from Texas Gas. 18 F. P. C. 621. The Court of Appeals found no merit in this ground saying "What that rate was . . . depends upon the contract-established provisions rather than on the fortuity of rates which were being actually paid on that date." 263 F. 2d, at 224. The Commission did not present this question among the Questions Presented in its petition for certiorari and we intimate no view upon its merits.

"The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." *Securities & Exchange Comm'n* v. *Chenery Corp.*, 318 U. S. 80, 87. Therefore, since the Commission professed to dispose of the case solely upon its view of the result called for by the application of canons of contract construction employed by the courts, and did not in any wise rely on matters within its special competence, the Court of Appeals was fully justified in making its own independent determination of the correct application of the governing principles. See *Federal Communications Comm'n* v. *RCA Communications, Inc.*, 346 U. S. 86, 91. There applies here what the Court said in *Chenery:* "Since the decision of the Commission was explicitly based upon the applicability of principles [of contract interpretation] announced by courts, its validity must likewise be judged on that basis." 318 U. S., at 87.

In the circumstances, considerations of the scope of review of administrative determinations need not deter us from reviewing the decision of the Court of Appeals and deciding the proper construction of the "favored nation" clause. We proceed to do so since the question of interpretation of the clause was presented in both petitions, our grant of certiorari was not limited to exclude it, and the question has been briefed and argued.

The question to be decided is: did the parties to the Shell contract mean that an agreement of the nature of the Atlantic letter agreement of February 17, 1954, should constitute the "enter[ing] into a contract [by Texas Gas] providing for the purchase by it of gas . . ."? We first consider the nature of the letter agreement. The pricing provisions of the Atlantic contract specify a price for the first five-year period, and provide that prices for the four succeeding five-year periods should be determined by agreement of the parties, or failing such agreement, by

arbitration.[8] In either case the determination is to be made "after a survey of prevailing prices for gas being sold in similar quantities in the southwestern part of Louisiana." Pursuant to this provision a letter agreement dated October 29, 1948, and a modification agreement dated February 16, 1949, established prices for the five-year period from September 1, 1948, to August 31, 1953. The letter agreement of February 17, 1954, setting the price for the 1953–1958 period was thus the second such agreement.

Shell urges that the letter agreement is in actuality an entirely new contract which incorporates by inferential reference the terms of the 1943 contract. There is nothing in the letter agreement or otherwise in the record to substantiate this contention. On the contrary, the letter agreement affirmatively states that the action was taken "in accordance with" the 1943 contract.[9]

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[8] For purposes of its decision the Court of Appeals "assumed without deciding that the Atlantic contract of 1943 did in fact impose a binding agreement-to-agree on the price for gas in each of the contract's last four five year periods." 263 F. 2d, at 226. We proceed on the same assumption in reviewing the interpretation of the "favored nation" clause in the Shell contract.

[9] The pertinent text of the letter is as follows:

"Under date of September 1, 1943, Defense Plant Corporation, as Buyer, entered into a gas purchase contract with The Atlantic Refining Company, as Seller, for the purchase of gas produced from Seller's leases in the North Tepetate pool of Acadia Parish, Louisiana, which contract was subsequently amended February 16, 1949. Louisiana Natural Gas Corporation purchased the pipe line operated by Defense Plant Corporation and the aforesaid contract with The Atlantic Refining Company was assigned to Louisiana Natural Gas Corporation.

"In accordance with Paragraph III of said [1943] contract, it is hereby agreed that the price to be paid by Louisiana Natural Gas Corporation to The Atlantic Refining Company for gas sold and delivered under such contract between September 1, 1953, and August 31, 1958, both inclusive, shall be 12.2 cents net for each 1,000 cubic feet at a pressure base of 15.025 psia of gas received at the central point or points set forth in the original contract, regardless of whether

To be sure, the letter agreement may be said to have been a "contract" insofar as Atlantic and Texas Gas agreed therein upon a price and gave up the right to have arbitrators determine the price for them. But their act was merely in the performance of an undertaking they assumed in 1943 when they chose this binding method for periodic price adjustments instead of some method which would have foreordained the adjustments in precise amounts. The letter agreement in discharge of this obligation assumed in 1943 is thus simply "executory of the [1943] contract between the parties." *Phillips Petroleum Co.* v. *Federal Power Comm'n,* 227 F. 2d 470, 475. We therefore agree with the Commission's holding that the letter agreement "merely represents action taken under a pre-existing contract between Texas Gas and Atlantic." 18 F. P. C., at 619.

In the light of this, we do not think that in being party to the letter agreement Texas Gas "enter[ed] into a contract for the purchase . . . of gas" within the meaning of those words as employed by the parties in the "favored nation" clause. The language of that clause of the Shell contract is virtually the same as the parties used several times at the very outset of that contract. The sense in which the parties used the language there reveals its meaning in the "favored nation" clause and, so interpreted, the Atlantic letter agreement is not a "contract" within the meaning of the clause. The contract begins:

> "This Contract, made and *entered into* as of May 1, 1951 . . .
>
> "Whereas, under date of October 1, 1943, Shell Oil Company, Inc., *entered into a contract for the sale of gas* . . .

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such gas is delivered to a government plant or not; and, in addition, Buyer shall reimburse Seller for all state severance taxes, or similar taxes, which Seller is obligated to pay and has paid to the State of Louisiana on such gas."

> "Whereas, . . . Buyer and Seller now desire to rescind said contract and *enter into a new contract for the purchase of gas* . . . ." (Emphasis added.)

What follows are the nine Articles which detail the many aspects of the parties' relationship for the 20-year term of the contract. The Articles are captioned "Sale of Gas," "Quantity of Gas," "Pressure Decline," "Point of Delivery," "Warranty of Title to Gas," "Prices," "Arbitration," "Term of Contract," and "Miscellaneous." In addition an exhibit made part of the contract deals with such matters as "Quality of Gas," "Measurements," "Billing and Payment," "Regulatory Bodies" and "Force Majeure." In other words "enter[ing] into a contract providing for the purchase of gas" meant to the parties the making of a full-fledged contract containing all the terms defining the complete relationship.

This conclusion is borne out in the "Prices" Article itself. That Article divides the contract term into five periods, one from May 1, 1951, until January 1, 1952, and four others each of five years. Paragraph 1 specifies the price for each period according to a schedule of automatic step-increases. Adjustment otherwise to higher prices may result in one of two ways: (1) under paragraph 3, the "favored nation" clause, or (2) under paragraph 4—applicable only to the last two five-year periods—if Shell requests a "price redetermination." Upon such request "determination is to be made by the parties or, if they are unable to agree, by the arbitrators" upon the basis of "the three (3) highest prices to be paid during such period by operating interstate transporters of natural gas, including [Texas Gas]" for gas purchased from named Louisiana fields.

In all probability any "price redetermination" agreed upon by Shell and Texas Gas under paragraph 4 would be evidenced by a writing stating the determination. Surely the parties who used the language "enter[ing] into

a contract" as they did in the preamble to their agreement would not conceive of such a "price redetermination" as "enter[ing] into a contract providing for the purchase . . . of gas." No more does the similar periodic price adjustment under the Atlantic contract partake of the nature of "enter[ing] into a contract providing for the purchase . . . of gas," within the meaning of the language of the Shell "favored nation" clause.

The Court of Appeals, in holding that the letter agreement came within the intendment of "enter[ing] into a contract providing for the purchase . . . of gas," stressed that Shell's objective was to assure itself a "top price for its gas" and said that the facts tended to show "that the intention of the parties was for any higher price paid by [Texas Gas] to another producer to trigger a rise on the Shell contract to the same figure . . . ." 263 F. 2d, at 225. We think the contract demonstrates the contrary, and we find the record barren of any other evidence which would support this conclusion. Of course, we recognize that Shell desired to protect itself during so extended a contract period by provisions for price increases; and it did so. Indeed in this respect the contract is a one-way street. Shell is guaranteed automatic periodic step-increases and in addition, during the last 10 years of the contract term, at Shell's option, prices are to be redetermined to reflect any higher prevailing market prices. Then there is the "favored nation" clause—also part of the protection afforded Shell. Shell is entitled to the highest price which any of these methods will yield. In contrast, there is no provision allowing Texas Gas the possibility of a price decrease.

Even assuming that the parties assigned paramount importance to giving Shell the "top price," the "favored nation" clause as written is not as broad as it might have been. Shell has made other contracts with "favored nation" clauses which are triggered by *every* higher price

paid by the buyer to other producers.[10] In contrast, Shell concedes that this "favored nation" clause would not be triggered by higher prices paid by Texas Gas to other producers under pre-existing contracts by way of automatic increases or increases which are mathematically determined. The most reasonable explanation for the inclusion of the concededly more limited clause is that the parties meant to distinguish between increases which Texas Gas was contractually bound to pay under provisions of pre-1951 contracts and higher prices which Texas Gas voluntarily assumed to pay after 1951. In deciding which increases do and which do not trigger this "favored nation" clause we would be making an irrational distinction were we to focus upon the mechanics chosen in the Atlantic contract and conclude that the Shell clause was activated by a post-1951 price determination under the Atlantic contract, although it would not have been activated by price increases pursuant to a more mathematically precise formula. In its essential respects the Atlantic price adjustment was no different from the latter,

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[10] For example the Commission's opinion on the order denying rehearing, 19 F. P. C., at 77, states:

"For instance in Shell's Gas Rate Schedule No. 4 it is provided:

" 'If at any time or times the price per Mcf of gas or dry gas purchased by [the Buyer] from any gas producer whomever . . . shall be greater than the price per Mcf of gas purchased hereunder, [the Buyer] will increase the price per Mcf payable to [Shell] for gas delivered hereunder. . . .'

"In Shell's Gas Rate Schedule No. 7, it is provided:

" 'Buyer agrees that if, during the term of this agreement, it purchases or agrees to purchase natural gas at any place within a distance of twenty-five (25) miles of the delivery point under the present contract, at a price or prices higher . . . than the prices provided for by the present contract, . . . it will, upon seller's request, thereafter pay to seller a price or prices under the present agreement not less than the higher price so being paid.'

"There are numerous other examples included in the present record."

for the Atlantic adjustment was required under a pre-existing contract, and Texas Gas was powerless to prevent it.

We therefore hold that the Court of Appeals erred in its interpretation of the "favored nation" clause and that the Commission correctly construed it as not effecting an increase in price by reason of the letter agreement.

There remains for mention an argument of Shell which the Court of Appeals found unnecessary to consider because of the rationale which it adopted. This is the contention that the 1943 Atlantic agreement did not provide for a fixed and determined price beyond the first five-year period, so that under applicable state law enforceability was suspended until the contract price for a particular succeeding five-year term was supplied by agreement or arbitration. From this premise it is argued that when the second five-year period came to an end on August 31, 1953, neither Atlantic nor Texas Gas was under any enforceable obligation to continue the prior relationship and therefore when on February 17, 1954, Texas Gas signed the letter agreement it was not acting pursuant to any pre-existing obligation but was exercising its free choice to enter what was in effect a new contract. In its petition for writ of certiorari the Commission argued that not only was there no doubt about the enforceability of the Atlantic contract but that the issue is immaterial because the parties to that contract treated the contract as binding and that it is not for Shell, a stranger to the contract, to say that it was not legally enforceable. However, the Commission suggested that should we reverse the decision of the Court of Appeals, premised as it is upon the assumption that the 1943 Atlantic contract imposed a binding obligation for its entire stated term, and if we considered the question of enforceability to be material, we should remand the issue of enforceability to the Court of Appeals for its decision. Shell has main-

tained in this Court that the issue of enforceability is material but, in view of the Commission's statement, has argued neither that issue nor the issue of enforceability. We agree that it is appropriate that the Court of Appeals address itself to the enforceability issue, if it is material, but under the circumstances we think the Court of Appeals should first decide the question of materiality.[11] We therefore reverse the judgment of the Court of Appeals and remand for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE BLACK concurs in the result.

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[11] We do not read the following statement of the Court of Appeals as foreclosing the Commission's argument that the issue of enforceability is not material:

"We have assumed without deciding that the Atlantic contract of 1943 did in fact impose a binding agreement-to-agree on the price for gas in each of the contract's last four five year periods. Thus it has not been necessary to determine the several questions raised in connection with the arguments directed to that phase of the case. Of course if the Atlantic contract of 1943 was not a binding agreement-to-agree, that circumstance alone would place the February, 1954 Atlantic contract fully within the terms of the escalation clause in the Shell contract." 263 F. 2d, at 226.

COMMISSIONER OF INTERNAL REVENUE *v.* DUBERSTEIN ET UX.

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

No. 376. Argued March 23, 1960.—Decided June 13, 1960.*

1. This Court rejects the Government's suggestion that it promulgate a new "test" to serve as a standard to be applied by the lower courts and by the Tax Court in dealing with numerous cases involving the question what is a "gift" excludable from income under the Internal Revenue Code, since the governing principles are necessarily general and have already been spelled out in the opinions of this Court. Pp. 284–286.

2. The conclusion whether a transfer amounts to a "gift" is one that must be reached on consideration of all the factors. While the principles urged by the Government may, in nonabsolute form as crystallizations of experience, prove persuasive to the trier of facts in a particular case, they cannot be laid down as a matter of law. Pp. 287–289.

3. Determination in each individual case as to whether the transaction in question was a "gift" must be based ultimately on the application of the fact-finding tribunal's experience with the mainsprings of human conduct to the totality of the facts in the case; and appellate review of the conclusion reached by the fact-finding tribunal must be quite restricted. Pp. 289–291.

4. In No. 376, Duberstein, an individual taxpayer, gave to a business corporation, upon request, the names of potential customers. The information proved valuable, and the corporation reciprocated by giving Duberstein a Cadillac automobile, charging the cost thereof as a business expense on its own corporate income tax return. The Tax Court concluded that the car was not a "gift" excludable from income under § 22 (b)(3) of the Internal Revenue Code of 1939. *Held:* On the record in this case, it cannot be said

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*Together with No. 546, *Stanton et ux.* v. *United States*, on certiorari to the United States Court of Appeals for the Second Circuit, argued March 24, 1960.

that the Tax Court's conclusion was "clearly erroneous," and the Court of Appeals erred in reversing its judgment. Pp. 279–281, 291–292.

5. In No. 546, Stanton, upon resigning as comptroller of a church corporation and as president of its wholly owned subsidiary created to manage its extensive real estate holdings, was given "a gratuity" of $20,000 "in appreciation of" his past services. The Commissioner assessed an income-tax deficiency against him for failure to include this amount in his gross income. Stanton paid the deficiency and sued in a Federal District Court for a refund. The trial judge, sitting without a jury, made the simple finding that the payment was a "gift" and entered judgment for Stanton. The Court of Appeals reversed. *Held:* The finding of the District Court was inadequate; the judgment of the Court of Appeals is vacated; and the case is remanded to the District Court for further proceedings. Pp. 281–283, 292–293.

265 F. 2d 28, reversed.

268 F. 2d 727, judgment vacated and cause remanded.

Philip Elman argued the cause for petitioner in No. 376. On the brief were *Solicitor General Rankin, Assistant Attorney General Rice* and *Wayne G. Barnett.*

Clendon H. Lee argued the cause for petitioners in No. 546. With him on the brief were *John C. Farber, William F. Snyder* and *Theodore Q. Childs.*

Sidney G. Kusworm argued the cause and filed a brief for respondents in No. 376.

Wayne G. Barnett argued the cause for the United States in No. 546. With him on the brief were *Solicitor General Rankin* and *Assistant Attorney General Rice.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

These two cases concern the provision of the Internal Revenue Code which excludes from the gross income of an income taxpayer "the value of property acquired by

gift." [1] They pose the frequently recurrent question whether a specific transfer to a taxpayer in fact amounted to a "gift" to him within the meaning of the statute. The importance to decision of the facts of the cases requires that we state them in some detail.

No. 376, *Commissioner* v. *Duberstein.* The taxpayer, Duberstein,[2] was president of the Duberstein Iron & Metal Company, a corporation with headquarters in Dayton, Ohio. For some years the taxpayer's company had done business with Mohawk Metal Corporation, whose headquarters were in New York City. The president of Mohawk was one Berman. The taxpayer and Berman had generally used the telephone to transact their companies' business with each other, which consisted of buying and selling metals. The taxpayer testified, without elaboration, that he knew Berman "personally" and had known him for about seven years. From time to time in their telephone conversations, Berman would ask Duberstein whether the latter knew of potential customers for some of Mohawk's products in which Duberstein's company itself was not interested. Duberstein provided the names of potential customers for these items.

One day in 1951 Berman telephoned Duberstein and said that the information Duberstein had given him had proved so helpful that he wanted to give the latter a present. Duberstein stated that Berman owed him nothing. Berman said that he had a Cadillac as a gift for Duberstein, and that the latter should send to New York for it; Berman insisted that Duberstein accept the car, and the latter finally did so, protesting however that

[1] The operative provision in the cases at bar is § 22 (b) (3) of the 1939 Internal Revenue Code. The corresponding provision of the present Code is § 102 (a).

[2] In both cases the husband will be referred to as the taxpayer, although his wife joined with him in joint tax returns.

he had not intended to be compensated for the information. At the time Duberstein already had a Cadillac and an Oldsmobile, and felt that he did not need another car. Duberstein testified that he did not think Berman would have sent him the Cadillac if he had not furnished him with information about the customers. It appeared that Mohawk later deducted the value of the Cadillac as a business expense on its corporate income tax return.

Duberstein did not include the value of the Cadillac in gross income for 1951, deeming it a gift. The Commissioner asserted a deficiency for the car's value against him, and in proceedings to review the deficiency the Tax Court affirmed the Commissioner's determination. It said that "The record is significantly barren of evidence revealing any intention on the part of the payor to make a gift. . . . The only justifiable inference is that the automobile was intended by the payor to be remuneration for services rendered to it by Duberstein." The Court of Appeals for the Sixth Circuit reversed. 265 F. 2d 28.

No. 546, *Stanton* v. *United States*. The taxpayer, Stanton, had been for approximately 10 years in the employ of Trinity Church in New York City. He was comptroller of the Church corporation, and president of a corporation, Trinity Operating Company, the church set up as a fully owned subsidiary to manage its real estate holdings, which were more extensive than simply the church property. His salary by the end of his employment there in 1942 amounted to $22,500 a year. Effective November 30, 1942, he resigned from both positions to go into business for himself. The Operating Company's directors, who seem to have included the rector and vestrymen of the church, passed the following resolution upon his resignation: "Be it Resolved that in appreciation of the services rendered by Mr. Stanton . . . a gratuity is hereby awarded to him of Twenty Thousand Dollars, payable to him in equal instalments of Two Thousand Dollars

at the end of each and every month commencing with the month of December, 1942; provided that, with the discontinuance of his services, the Corporation of Trinity Church is released from all rights and claims to pension and retirement benefits not already accrued up to November 30, 1942."

The Operating Company's action was later explained by one of its directors as based on the fact that, "Mr. Stanton was liked by all of the Vestry personally. He had a pleasing personality. He had come in when Trinity's affairs were in a difficult situation. He did a splendid piece of work, we felt. Besides that . . . he was liked by all of the members of the Vestry personally." And by another: "[W]e were all unanimous in wishing to make Mr. Stanton a gift. Mr. Stanton had loyally and faithfully served Trinity in a very difficult time. We thought of him in the highest regard. We understood that he was going in business for himself. We felt that he was entitled to that evidence of good will."

On the other hand, there was a suggestion of some ill-feeling between Stanton and the directors, arising out of the recent termination of the services of one Watkins, the Operating Company's treasurer, whose departure was evidently attended by some acrimony. At a special board meeting on October 28, 1942, Stanton had intervened on Watkins' side and asked reconsideration of the matter. The minutes reflect that "resentment was expressed as to the 'presumptuous' suggestion that the action of the Board, taken after long deliberation, should be changed." The Board adhered to its determination that Watkins be separated from employment, giving him an opportunity to resign rather than be discharged. At another special meeting two days later it was revealed that Watkins had not resigned; the previous resolution terminating his services was then viewed as effective; and the Board voted the payment of six months' salary

to Watkins in a resolution similar to that quoted in regard to Stanton, but which did not use the term "gratuity." At the meeting, Stanton announced that in order to avoid any such embarrassment or question at any time as to his willingness to resign if the Board desired, he was tendering his resignation. It was tabled, though not without dissent. The next week, on November 5, at another special meeting, Stanton again tendered his resignation which this time was accepted.

The "gratuity" was duly paid. So was a smaller one to Stanton's (and the Operating Company's) secretary, under a similar resolution, upon her resignation at the same time. The two corporations shared the expense of the payments. There was undisputed testimony that there were in fact no enforceable rights or claims to pension and retirement benefits which had not accrued at the time of the taxpayer's resignation, and that the last proviso of the resolution was inserted simply out of an abundance of caution. The taxpayer received in cash a refund of his contributions to the retirement plans, and there is no suggestion that he was entitled to more. He was required to perform no further services for Trinity after his resignation.

The Commissioner asserted a deficiency against the taxpayer after the latter had failed to include the payments in question in gross income. After payment of the deficiency and administrative rejection of a refund claim, the taxpayer sued the United States for a refund in the District Court for the Eastern District of New York. The trial judge, sitting without a jury, made the simple finding that the payments were a "gift," [3] and judgment was entered for the taxpayer. The Court of Appeals for the Second Circuit reversed. 268 F. 2d 727.

The Government, urging that clarification of the problem typified by these two cases was necessary, and that

[3] See note 14, *infra*.

the approaches taken by the Courts of Appeals for the Second and the Sixth Circuits were in conflict, petitioned for certiorari in No. 376, and acquiesced in the taxpayer's petition in No. 546. On this basis, and because of the importance of the question in the administration of the income tax laws, we granted certiorari in both cases. 361 U. S. 923.

The exclusion of property acquired by gift from gross income under the federal income tax laws was made in the first income tax statute [4] passed under the authority of the Sixteenth Amendment, and has been a feature of the income tax statutes ever since. The meaning of the term "gift" as applied to particular transfers has always been a matter of contention.[5] Specific and illuminating legislative history on the point does not appear to exist. Analogies and inferences drawn from other revenue provisions, such as the estate and gift taxes, are dubious. See *Lockard* v. *Commissioner,* 166 F. 2d 409. The meaning of the statutory term has been shaped largely by the decisional law. With this, we turn to the contentions made by the Government in these cases.

First. The Government suggests that we promulgate a new "test" in this area to serve as a standard to be applied by the lower courts and by the Tax Court in dealing with the numerous cases that arise.[6] We reject this invitation. We are of opinion that the governing principles are necessarily general and have already been spelled out in the opinions of this Court, and that the problem is one which, under the present statutory framework, does not lend itself to any more definitive statement

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[4] § II.B., c. 16, 38 Stat. 167.

[5] The first case of the Board of Tax Appeals officially reported in fact deals with the problem. *Parrott* v. *Commissioner,* 1 B. T. A. 1.

[6] The Government's proposed test is stated: "Gifts should be defined as transfers of property made for personal as distinguished from business reasons."

that would produce a talisman for the solution of concrete cases. The cases at bar are fair examples of the settings in which the problem usually arises. They present situations in which payments have been made in a context with business overtones—an employer making a payment to a retiring employee; a businessman giving something of value to another businessman who has been of advantage to him in his business. In this context, we review the law as established by the prior cases here.

The course of decision here makes it plain that the statute does not use the term "gift" in the common-law sense, but in a more colloquial sense. This Court has indicated that a voluntary executed transfer of his property by one to another, without any consideration or compensation therefor, though a common-law gift, is not necessarily a "gift" within the meaning of the statute. For the Court has shown that the mere absence of a legal or moral obligation to make such a payment does not establish that it is a gift. *Old Colony Trust Co.* v. *Commissioner,* 279 U. S. 716, 730. And, importantly, if the payment proceeds primarily from "the constraining force of any moral or legal duty," or from "the incentive of anticipated benefit" of an economic nature, *Bogardus* v. *Commissioner,* 302 U. S. 34, 41, it is not a gift. And, conversely, "[w]here the payment is in return for services rendered, it is irrelevant that the donor derives no economic benefit from it." *Robertson* v. *United States,* 343 U. S. 711, 714.[7] A gift in the statutory sense, on the other hand, proceeds from a "detached and disinterested generosity," *Commissioner* v. *LoBue,* 351 U. S. 243, 246; "out of affection, respect, admiration, charity or like impulses." *Robertson* v. *United States, supra,* at 714. And in this regard, the most critical consideration, as the Court was agreed in the leading case here, is the transferor's "inten-

[7] The cases including "tips" in gross income are classic examples of this. See, *e. g., Roberts* v. *Commissioner,* 176 F. 2d 221.

tion." *Bogardus* v. *Commissioner,* 302 U. S. 34, 43. "What controls is the intention with which payment, however voluntary, has been made." *Id.,* at 45 (dissenting opinion).[8]

The Government says that this "intention" of the transferor cannot mean what the cases on the common-law concept of gift call "donative intent." With that we are in agreement, for our decisions fully support this. Moreover, the *Bogardus* case itself makes it plain that the donor's characterization of his action is not determinative—that there must be an objective inquiry as to whether what is called a gift amounts to it in reality. 302 U. S., at 40. It scarcely needs adding that the parties' expectations or hopes as to the tax treatment of their conduct in themselves have nothing to do with the matter.

It is suggested that the *Bogardus* criterion would be more apt if rephrased in terms of "motive" rather than "intention." We must confess to some skepticism as to whether such a verbal mutation would be of any practical consequence. We take it that the proper criterion, established by decision here, is one that inquires what the basic reason for his conduct was in fact—the dominant reason that explains his action in making the transfer. Further than that we do not think it profitable to go.

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[8] The parts of the *Bogardus* opinion which we touch on here are the ones we take to be basic to its holding, and the ones that we read as stating those governing principles which it establishes. As to them we see little distinction between the views of the Court and those taken in dissent in *Bogardus*. The fear expressed by the dissent at 302 U. S., at 44, that the prevailing opinion "seems" to hold "that every payment which in any aspect is a gift is . . . relieved of any tax" strikes us now as going beyond what the opinion of the Court held in fact. In any event, the Court's opinion in *Bogardus* does not seem to have been so interpreted afterwards. The principal difference, as we see it, between the Court's opinion and the dissent lies in the weight to be given the findings of the trier of fact.

Second. The Government's proposed "test," while apparently simple and precise in its formulation, depends frankly on a set of "principles" or "presumptions" derived from the decided cases, and concededly subject to various exceptions; and it involves various corollaries, which add to its detail. Were we to promulgate this test as a matter of law, and accept with it its various presuppositions and stated consequences, we would be passing far beyond the requirements of the cases before us, and would be painting on a large canvas with indeed a broad brush. The Government derives its test from such propositions as the following: That payments by an employer to an employee, even though voluntary, ought, by and large, to be taxable; that the concept of a gift is inconsistent with a payment's being a deductible business expense; that a gift involves "personal" elements; that a business corporation cannot properly make a gift of its assets. The Government admits that there are exceptions and qualifications to these propositions. We think, to the extent they are correct, that these propositions are not principles of law but rather maxims of experience that the tribunals which have tried the facts of cases in this area have enunciated in explaining their factual determinations. Some of them simply represent truisms: it doubtless is, statistically speaking, the exceptional payment by an employer to an employee that amounts to a gift. Others are overstatements of possible evidentiary inferences relevant to a factual determination on the totality of circumstances in the case: it is doubtless relevant to the over-all inference that the transferor treats a payment as a business deduction, or that the transferor is a corporate entity. But these inferences cannot be stated in absolute terms. Neither factor is a shibboleth. The taxing statute does not make nondeductibility by the transferor a condition on the "gift" exclusion; nor does it draw any distinction, in terms, between transfers by corporations

and individuals, as to the availability of the "gift" exclusion to the transferee. The conclusion whether a transfer amounts to a "gift" is one that must be reached on consideration of all the factors.

Specifically, the trier of fact must be careful not to allow trial of the issue whether the receipt of a specific payment is a gift to turn into a trial of the tax liability, or of the propriety, as a matter of fiduciary or corporate law, attaching to the conduct of someone else. The major corollary to the Government's suggested "test" is that, as an ordinary matter, a payment by a corporation cannot be a gift, and, more specifically, there can be no such thing as a "gift" made by a corporation which would allow it to take a deduction for an ordinary and necessary business expense. As we have said, we find no basis for such a conclusion in the statute; and if it were applied as a determinative rule of "law," it would force the tribunals trying tax cases involving the donee's liability into elaborate inquiries into the local law of corporations or into the peripheral deductibility of payments as business expenses. The former issue might make the tax tribunals the most frequent investigators of an important and difficult issue of the laws of the several States, and the latter inquiry would summon one difficult and delicate problem of federal tax law as an aid to the solution of another.[9] Or perhaps there would be required a trial of the vexed issue whether there was a "constructive" distribution of corporate property, for income tax purposes, to the corporate

[9] Justice Cardozo once described in memorable language the inquiry into whether an expense was an "ordinary and necessary" one of a business: "One struggles in vain for any verbal formula that will supply a ready touchstone. The standard set up by the statute is not a rule of law; it is rather a way of life. Life in all its fullness must supply the answer to the riddle." *Welch* v. *Helvering,* 290 U. S. 111, 115. The same comment well fits the issue in the cases at bar.

agents who had sponsored the transfer.[10] These considerations, also, reinforce us in our conclusion that while the principles urged by the Government may, in nonabsolute form as crystallizations of experience, prove persuasive to the trier of facts in a particular case, neither they, nor any more detailed statement than has been made, can be laid down as a matter of law.

Third. Decision of the issue presented in these cases must be based ultimately on the application of the fact-finding tribunal's experience with the mainsprings of human conduct to the totality of the facts of each case. The nontechnical nature of the statutory standard, the close relationship of it to the data of practical human experience, and the multiplicity of relevant factual elements, with their various combinations, creating the necessity of ascribing the proper force to each, confirm us in our conclusion that primary weight in this area must be given to the conclusions of the trier of fact. *Baker* v. *Texas & Pacific R. Co.,* 359 U. S. 227; *Commissioner* v. *Heininger,* 320 U. S. 467, 475; *United States* v. *Yellow Cab Co.,* 338 U. S. 338, 341; *Bogardus* v. *Commissioner, supra,* at 45 (dissenting opinion).[11]

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[10] Cf., *e. g., Nelson* v. *Commissioner,* 203 F. 2d 1.

[11] In *Bogardus,* the Court was divided 5 to 4 as to the scope of review to be extended the fact-finder's determination as to a specific receipt, in a context like that of the instant cases. The majority held that such a determination was "a conclusion of law or at least a determination of a mixed question of law and fact." 302 U. S., at 39. This formulation it took as justifying it in assuming a fairly broad standard of review. The dissent took a contrary view. The approach of this part of the Court's ruling in *Bogardus,* which we think was the only part on which there was real division among the Court, see note 8, *supra,* has not been afforded subsequent respect here. In *Heininger,* a question presenting at the most elements no more factual and untechnical than those here—that of the "ordinary and necessary" nature of a business expense—was treated as one of fact. Cf. note 9, *supra.* And in *Dobson* v. *Commissioner,* 320 U. S. 489, 498, n. 22, *Bogardus* was adversely criticized, insofar as it

This conclusion may not satisfy an academic desire for tidiness, symmetry and precision in this area, any more than a system based on the determinations of various fact-finders ordinarily does. But we see it as implicit in the present statutory treatment of the exclusion for gifts, and in the variety of forums in which federal income tax cases can be tried. If there is fear of undue uncertainty or overmuch litigation, Congress may make more precise its treatment of the matter by singling out certain factors and making them determinative of the matter, as it has done in one field of the "gift" exclusion's former application, that of prizes and awards.[12] Doubtless diversity of result will tend to be lessened somewhat since federal income tax decisions, even those in tribunals of first instance turning on issues of fact, tend to be reported, and since there may be a natural tendency of professional triers of fact to follow one another's determinations, even as to factual matters. But the question here remains basically one of fact, for determination on a case-by-case basis.

One consequence of this is that appellate review of determinations in this field must be quite restricted. Where a jury has tried the matter upon correct instruc-

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treated the matter as reviewable as one of law. While *Dobson* is, of course, no longer the law insofar as it ordains a greater weight to be attached to the findings of the Tax Court than to those of any other fact-finder in a tax litigation, see note 13, *infra*, we think its criticism of this point in the *Bogardus* opinion is sound in view of the dominant importance of factual inquiry to decision of these cases.

[12] I. R. C., § 74, which is a provision new with the 1954 Code. Previously, there had been holdings that such receipts as the "Pot O' Gold" radio giveaway, *Washburn* v. *Commissioner*, 5 T. C. 1333, and the Ross Essay Prize, *McDermott* v. *Commissioner*, 80 U. S. App. D. C. 176, 150 F. 2d 585, were "gifts." Congress intended to obviate such rulings. S. Rep. No. 1622, 83d Cong., 2d Sess., p. 178. We imply no approval of those holdings under the general standard of the "gift" exclusion. Cf. *Robertson* v. *United States*, *supra*.

tions, the only inquiry is whether it cannot be said that reasonable men could reach differing conclusions on the issue. *Baker* v. *Texas & Pacific R. Co., supra,* at 228. Where the trial has been by a judge without a jury, the judge's findings must stand unless "clearly erroneous." Fed. Rules Civ. Proc., 52 (a). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.,* 333 U. S. 364, 395. The rule itself applies also to factual inferences from undisputed basic facts, *id.,* at 394, as will on many occasions be presented in this area. Cf. *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.,* 339 U. S. 605, 609–610. And Congress has in the most explicit terms attached the identical weight to the findings of the Tax Court. I. R. C., § 7482 (a).[13]

Fourth. A majority of the Court is in accord with the principles just outlined. And, applying them to the *Duberstein* case, we are in agreement, on the evidence we have set forth, that it cannot be said that the conclusion of the Tax Court was "clearly erroneous." It seems to us plain that as trier of the facts it was warranted in concluding that despite the characterization of the transfer of the Cadillac by the parties and the absence of any obligation, even of a moral nature, to make it, it was

[13] "The United States Courts of Appeals shall have exclusive jurisdiction to review the decisions of the Tax Court . . . in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury. . . ." The last words first came into the statute through an amendment to § 1141 (a) of the 1939 Code in 1948 (§ 36 of the Judicial Code Act, 62 Stat. 991). The purpose of the 1948 legislation was to remove from the law the favored position (in comparison with District Court and Court of Claims rulings in tax matters) enjoyed by the Tax Court under this Court's ruling in *Dobson* v. *Commissioner,* 320 U. S. 489. Cf. note 11, *supra.* See *Grace Bros., Inc.,* v. *Commissioner,* 173 F. 2d 170, 173.

at bottom a recompense for Duberstein's past services, or an inducement for him to be of further service in the future. We cannot say with the Court of Appeals that such a conclusion was "mere suspicion" on the Tax Court's part. To us it appears based in the sort of informed experience with human affairs that fact-finding tribunals should bring to this task.

As to *Stanton,* we are in disagreement. To four of us, it is critical here that the District Court as trier of fact made only the simple and unelaborated finding that the transfer in question was a "gift." [14] To be sure, conciseness is to be strived for, and prolixity avoided, in findings; but, to the four of us, there comes a point where findings become so sparse and conclusory as to give no revelation of what the District Court's concept of the determining facts and legal standard may be. See *Matton Oil Transfer Corp.* v. *The Dynamic,* 123 F. 2d 999, 1000–1001. Such conclusory, general findings do not constitute compliance with Rule 52's direction to "find the facts specially and state separately . . . conclusions of law thereon." While the standard of law in this area is not a complex one, we four think the unelaborated finding of ultimate fact here cannot stand as a fulfillment of these requirements. It affords the reviewing court not the semblance of an indication of the legal standard with which the trier of fact has approached his task. For all that appears, the Dis-

[14] The "Findings of Fact and Conclusions of Law" were made orally, and were simply: "The resolution of the Board of Directors of the Trinity Operating Company, Incorporated, held November 19, 1942, after the resignations had been accepted of the plaintiff from his positions as controller of the corporation of the Trinity Church, and the president of the Trinity Operating Company, Incorporated, whereby a gratuity was voted to the plaintiff, Allen [*sic*] D. Stanton, in the amount of $20,000 payable to him in monthly installments of $2,000 each, commencing with the month of December, 1942, constituted a gift to the taxpayer, and therefore need not have been reported by him as income for the taxable years 1942, or 1943."

trict Court may have viewed the form of the resolution or the simple absence of legal consideration as conclusive. While the judgment of the Court of Appeals cannot stand, the four of us think there must be further proceedings in the District Court looking toward new and adequate findings of fact. In this, we are joined by MR. JUSTICE WHITTAKER, who agrees that the findings were inadequate, although he does not concur generally in this opinion.

Accordingly, in No. 376, the judgment of this Court is that the judgment of the Court of Appeals is reversed, and in No. 546, that the judgment of the Court of Appeals is vacated, and the case is remanded to the District Court for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE HARLAN concurs in the result in No. 376. In No. 546, he would affirm the judgment of the Court of Appeals for the reasons stated by MR. JUSTICE FRANKFURTER.

MR. JUSTICE WHITTAKER, agreeing with *Bogardus* that whether a particular transfer is or is not a "gift" may involve "a mixed question of law and fact," 302 U. S., at 39, concurs only in the result of this opinion.

MR. JUSTICE DOUGLAS dissents, since he is of the view that in each of these two cases there was a gift under the test which the Court fashioned nearly a quarter of a century ago in *Bogardus* v. *Commissioner,* 302 U. S. 34.

MR. JUSTICE BLACK, concurring and dissenting.

I agree with the Court that it was not clearly erroneous for the Tax Court to find as it did in No. 376 that the automobile transfer to Duberstein was not a gift, and so

I agree with the Court's opinion and judgment reversing the judgment of the Court of Appeals in that case.

I dissent in No. 546, *Stanton* v. *United States.* The District Court found that the $20,000 transferred to Mr. Stanton by his former employer at the end of ten years' service was a gift and therefore exempt from taxation under I. R. C. of 1939, § 22 (b)(3) (now I. R. C. of 1954, § 102 (a)). I think the finding was not clearly erroneous and that the Court of Appeals was therefore wrong in reversing the District Court's judgment. While conflicting inferences might have been drawn, there was evidence to show that Mr. Stanton's long services had been satisfactory, that he was well liked personally and had given splendid service, that the employer was under no obligation at all to pay any added compensation, but made the $20,000 payment because prompted by a genuine desire to make him a "gift," to award him a "gratuity." Cf. *Commissioner* v. *LoBue,* 351 U. S. 243, 246–247. The District Court's finding was that the added payment "constituted a gift to the taxpayer, and therefore need not have been reported by him as income . . . ." The trial court might have used more words, or discussed the facts set out above in more detail, but I doubt if this would have made its crucial, adequately supported finding any clearer. For this reason I would reinstate the District Court's judgment for petitioner.

MR. JUSTICE FRANKFURTER, concurring in the judgment in No. 376 and dissenting in No. 546.

As the Court's opinion indicates, we brought these two cases here partly because of a claimed difference in the approaches between two Courts of Appeals but primarily on the Government's urging that, in the interest of the better administration of the income tax laws, clarification was desirable for determining when a transfer of property constitutes a "gift" and is not to be included in

income for purposes of ascertaining the "gross income" under the Internal Revenue Code. As soon as this problem emerged after the imposition of the first income tax authorized by the Sixteenth Amendment, it became evident that its inherent difficulties and subtleties would not easily yield to the formulation of a general rule or test sufficiently definite to confine within narrow limits the area of judgment in applying it. While at its core the tax conception of a gift no doubt reflected the non-legal, non-technical notion of a benefaction unentangled with any aspect of worldly requital, the divers blends of personal and pecuniary relationships in our industrial society inevitably presented niceties for adjudication which could not be put to rest by any kind of general formulation.

Despite acute arguments at the bar and a most thorough re-examination of the problem on a full canvass of our prior decisions and an attempted fresh analysis of the nature of the problem, the Court has rejected the invitation of the Government to fashion anything like a litmus paper test for determining what is excludable as a "gift" from gross income. Nor has the Court attempted a clarification of the particular aspects of the problem presented by these two cases, namely, payment by an employer to an employee upon the termination of the employment relation and non-obligatory payment for services rendered in the course of a business relationship. While I agree that experience has shown the futility of attempting to define, by language so circumscribing as to make it easily applicable, what constitutes a gift for every situation where the problem may arise, I do think that greater explicitness is possible in isolating and emphasizing factors which militate against a gift in particular situations.

Thus, regarding the two frequently recurring situations involved in these cases—things of value given to employees by their employers upon the termination of em-

ployment and payments entangled in a business relation and occasioned by the performance of some service—the strong implication is that the payment is of a business nature. The problem in these two cases is entirely different from the problem in a case where a payment is made from one member of a family to another, where the implications are directly otherwise. No single general formulation appropriately deals with both types of cases, although both involve the question whether the payment was a "gift." While we should normally suppose that a payment from father to son was a gift, unless the contrary is shown, in the two situations now before us the business implications are so forceful that I would apply a presumptive rule placing the burden upon the beneficiary to prove the payment wholly unrelated to his services to the enterprise. The Court, however, has declined so to analyze the problem and has concluded "that the governing principles are necessarily general and have already been spelled out in the opinions of this Court, and that the problem is one which, under the present statutory framework, does not lend itself to any more definitive statement that would produce a talisman for the solution of concrete cases."

The Court has made only one authoritative addition to the previous course of our decisions. Recognizing *Bogardus* v. *Commissioner*, 302 U. S. 34, as "the leading case here" and finding essential accord between the Court's opinion and the dissent in that case, the Court has drawn from the dissent in *Bogardus* for infusion into what will now be a controlling qualification, recognition that it is "for the triers of the facts to seek among competing aims or motives the ones that dominated conduct." 302 U. S. 34, 45 (dissenting opinion). All this being so in view of the Court, it seems to me desirable not to try to improve what has "already been spelled out" in the opinions of this Court but to leave to the lower courts

the application of old phrases rather than to float new ones and thereby inevitably produce a new volume of exegesis on the new phrases.

Especially do I believe this when fact-finding tribunals are directed by the Court to rely upon their "experience with the mainsprings of human conduct" and on their "informed experience with human affairs" in appraising the totality of the facts of each case. Varying conceptions regarding the "mainsprings of human conduct" are derived from a variety of experiences or assumptions about the nature of man, and "experience with human affairs," is not only diverse but also often drastically conflicting. What the Court now does sets fact-finding bodies to sail on an illimitable ocean of individual beliefs and experiences. This can hardly fail to invite, if indeed not encourage, too individualized diversities in the administration of the income tax law. I am afraid that by these new phrasings the practicalities of tax administration, which should be as uniform as is possible in so vast a country as ours, will be embarrassed. By applying what has already been spelled out in the opinions of this Court, I agree with the Court in reversing the judgment in *Commissioner* v. *Duberstein*.

But I would affirm the decision of the Court of Appeals for the Second Circuit in *Stanton* v. *United States*. I would do so on the basis of the opinion of Judge Hand and more particularly because the very terms of the resolution by which the $20,000 was awarded to Stanton indicated that it was not a "gratuity" in the sense of sheer benevolence but in the nature of a generous lagniappe, something extra thrown in for services received though not legally nor morally required to be given. This careful resolution, doubtless drawn by a lawyer and adopted by some hardheaded businessmen, contained a proviso that Stanton should abandon all rights to "pension and retirement benefits." The fact that Stanton had no such

claims does not lessen the significance of the clause as something "to make assurance doubly sure." 268 F. 2d 728. The business nature of the payment is confirmed by the words of the resolution, explaining the "gratuity" as "in appreciation of the services rendered by Mr. Stanton as Manager of the Estate and Comptroller of the Corporation of Trinity Church throughout nearly ten years, and as President of Trinity Operating Company, Inc." The force of this document, in light of all the factors to which Judge Hand adverted in his opinion, was not in the least diminished by testimony at the trial. Thus the taxpayer has totally failed to sustain the burden I would place upon him to establish that the payment to him was wholly attributable to generosity unrelated to his performance of his secular business functions as an officer of the corporation of the Trinity Church of New York and the Trinity Operating Co. Since the record totally fails to establish taxpayer's claim, I see no need of specific findings by the trial judge.

UNITED STATES *v.* KAISER.

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

No. 55. Argued March 23, 1960.—Decided June 13, 1960.

On the record in this case, the jury, as finder of the facts, acted within its competence in concluding that the strike assistance, by way of room rent and food vouchers, rendered by a labor union to respondent, who was participating in a strike and was in need, was a "gift" within the meaning of § 102 (a) of the Internal Revenue Code of 1954 and hence was excluded from income for income-tax purposes. *Commissioner* v. *Duberstein, ante,* p. 278. Pp. 299–305.

262 F. 2d 367, affirmed.

Wayne G. Barnett argued the cause for the United States. With him on the brief were *Solicitor General Rankin* and *Assistant Attorney General Rice.*

Joseph L. Rauh, Jr. argued the cause for respondent. With him on the brief were *Max Raskin, Harold A. Cranefield, John Silard, Carolyn E. Agger* and *Julius M. Greisman.*

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

This case presents the questions whether a labor union's strike assistance, by way of room rent and food vouchers, furnished to a worker participating in a strike constitutes income to him under § 61 (a) of the Internal Revenue Code of 1954; [1] and whether the assistance furnished to

[1] "Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

"(1) Compensation for services, including fees, commissions, and similar items; [*Footnote 1 continued on p. 300.*]

this particular worker, who was in need, constituted a "gift" to him, and hence was excluded from income by § 102 (a) of the Code.[2]

The respondent was employed by the Kohler Company in Wisconsin. The bargaining representative at the Kohler plant was Local 833 of the United Automobile, Aircraft, and Agricultural Implement Workers of America, CIO (UAW). In April 1954, the Local, with the approval of the International Union of the UAW, called a strike against Kohler in support of various bargaining demands in connection with a proposed renewal of their recently expired collective bargaining contract. The respondent was not a member of the Union, but he went out on strike. He had been earning $2.16 an hour at his job. This was his sole source of income, and when he struck he soon found himself in financial need. He went to the Union headquarters and requested assistance. It was the policy of the Union to grant assistance to the many Kohler strikers simply on a need basis. It made no difference whether a striker was a union member. The

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"(2) Gross income derived from business;
"(3) Gains derived from dealings in property;
"(4) Interest;
"(5) Rents;
"(6) Royalties;
"(7) Dividends;
"(8) Alimony and separate maintenance payments;
"(9) Annuities;
"(10) Income from life insurance and endowment contracts;
"(11) Pensions;
"(12) Income from discharge of indebtedness;
"(13) Distributive share of partnership gross income;
"(14) Income in respect of a decedent; and
"(15) Income from an interest in an estate or trust."

[2] "Gross income does not include the value of property acquired by gift . . . ."

Union representatives questioned respondent as to his financial resources, and his dependents. He had no other job and needed assistance with respect to the essentials of life. He was single during the period in question, and the Union provided him with a food voucher for $6 a week, redeemable in kind at a local store; the voucher was later increased to $7.50 a week. The Union also paid his room rent, which amounted to $9 a week. If in need, married strikers and married strikers with children received respectively larger food vouchers.[3] The over-all policy of the International Union was not to render strike assistance where strikers could obtain state unemployment compensation or local public assistance benefits. But the former condition does not prevail in Wisconsin,[4] and local public assistance was available only on a showing of a destitution evidently deemed extreme by the Union.

The Union thought that strikers ought to perform picketing duty, but did not require, advise or encourage strikers who were receiving assistance to picket or perform any other activity in furtherance of the strike; but assistance ceased for strikers who obtained work. Respondent performed some picketing, though apparently no considerable amount. After receiving assistance for several months, he joined the Union. This had in no way been required of him or suggested to him in connection with the continued receipt of assistance.

The program of strike assistance was primarily financed through the strike fund of the International Union, which had been raised through crediting to it 25 cents of the

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[3] After the increase referred to, married strikers without children received a $15 weekly food voucher; those with one child, an $18 voucher.

[4] Compare N. Y. Labor Law, § 592 (compensation payable after seven weeks of striking).

$1.25 per capita monthly assessment the International required from the local unions. The Local also had a small strike fund built up through monthly credits of 5 cents of the local members' dues, and contributions were received in some degree, not contended to be substantial, from other unions and outsiders. The constitution of the International Union required that it be the authorizing agency for strikes, and imposed on it the general duty to render financial assistance to the members on strike.[5]

During 1954, the Union furnished respondent assistance in the value of $565.54. In computing his federal income tax for the year, he did not include in gross income any amount in respect of the assistance. The District Director of Internal Revenue informed respondent that the $565.54 should have been added to his gross income and the tax due increased by $108 accordingly. Respondent paid this amount, and after administrative rejection of a refund claim, sued for a refund in the District Court for the Eastern District of Wisconsin. A jury trial was had, and the court submitted to the jury the single interrogatory whether the assistance rendered to respondent was a gift. The jury answered in the affirmative; but the court entered judgment for the Government, *n. o. v.*, on the basis that as a matter of law the assistance was income to the respondent, and did not fall within the statutory exclusion for gifts. 158 F. Supp. 865.

By a divided vote, the Court of Appeals for the Seventh Circuit reversed. 262 F. 2d 367. It held alternatively

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[5] Article 12, § 1 provides that "The International Executive Board . . . shall have the power to authorize strikes." Section 15 of that article provides that upon such authorization, "it shall be the duty of the International Executive Board to render all financial assistance to the members on strike consistent with the resources and responsibilities of the International Union."

The strike funds referred to are provided for by §§ 4 and 11 of Art. 16 of the International's constitution.

that the assistance was not within the concept of income of § 61 (a) of the Code, and that in any event the jury's determination that the assistance was a gift, and hence excluded from gross income by § 102 (a), had rational support in the evidence and accordingly was within its province as trier of the facts. We granted the Government's petition for certiorari, because of the importance of the issues presented. 359 U. S. 1010. Later, when the Government petitioned for certiorari in No. 376, *Commissioner* v. *Duberstein,* and acquiesced in the taxpayer's petition in No. 546, *Stanton* v. *United States,* it suggested that those cases be set down for argument with the case at bar, because they illustrated in a more general context the "gift" exclusion issues presented by this case. We agreed, and the cases were argued together. We conclude, on the basis of our opinion in the *Duberstein* case, p. 278, *ante,* that the jury in this case, as finder of the facts, acted within its competence in concluding that the assistance rendered here was a gift within § 102 (a). Accordingly, we affirm the judgment of the Court of Appeals. Therefore, we think it unnecessary to consider or express any opinion as to whether the assistance in fact constituted income to the respondent within the meaning of § 61 (a).

At trial, counsel for the Government did not make objection to any part of the District Court's charge to the jury or the "gift" exclusion. In this Court, the charge is belatedly challenged, and only as part of the Government's position that there should be formulated a new "test" for application in this area.[6] We have rejected that contention in our opinion in *Duberstein.* In the

[6] Specific challenge to the instructions was not made by the Government until its reply brief in this Court, and then only on the basis we have noted.

absence of specific objection at trial, or of demonstration of any compelling reason for dispensing with such objection, we do not here notice any defect in the charge, in the light of the controlling legal principles as we have reviewed them in *Duberstein*.

We think, also, that the proofs were adequate to support the conclusion of the jury. Our opinion in *Duberstein* stresses the basically factual nature of the inquiry as to this issue. The factual inferences to be drawn from the basic facts were here for the jury. They had the power to conclude, on the record, taking into account such factors as the form and amount of the assistance and the conditions of personal need, of lack of other sources of income, compensation, or public assistance, and of dependency status, which surrounded the program under which it was rendered, that while the assistance was furnished only to strikers, it was not a recompense for striking. They could have concluded that the very general language of the Union's constitution, when considered with the nature of the Union as an entity and with the factors to which we have just referred, did not indicate that basically the assistance proceeded from any constraint of moral or legal obligation, of a nature that would preclude it from being a gift. And on all these circumstances, the jury could have concluded that assistance, rendered as it was to a class of persons in the community in economic need, proceeded primarily from generosity or charity, rather than from the incentive of anticipated economic benefit. We can hardly say that, as a matter of law, the fact that these transfers were made to one having a sympathetic interest with the giver prevents them from being a gift. This is present in many cases of the most unquestionable charity.

We need not stop to speculate as to what conclusion we would have drawn had we sat in the jury box rather than those who did. The question is one of the allocation

of power to decide the question; and once we say that such conclusions could with reason be reached on the evidence, and that the District Court's instructions are not overthrown, our reviewing authority is exhausted, and we must recognize that the jury was empowered to render the verdict which it did.

Affirmed.

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

In 1957 the Commissioner of Internal Revenue ruled that strike benefits paid by unions to strikers on the basis of need, without regard to union membership, were to be regarded as part of the recipient's gross income for income tax purposes. Rev. Rul. 57–1, 1957–1 Cum. Bull. 15. This ruling, if valid, governs this case. The taxpayer assails the ruling on three grounds. First, it is urged that in a series of rulings since 1920 the Commissioner has treated both public and private "subsistence relief" payments as not constituting gross income; that union strike benefits are not relevantly different from such "subsistence relief"; and that, with due regard to fair tax administration the Commissioner is constrained so to treat strike benefits in order to accord "equal treatment." Second, it is urged that both the Commissioner's rulings and court decisions have evolved an exclusion from the statutory category of "gross income," not explicitly stated in the statute, for "alleviative" receipts which do not result in any "enrichment," *i. e.*, "reparation" payments made in compensation for some loss or injury suffered by the recipient, and that strike benefits fall within this exclusion. Third, it is urged that strike benefits in general, or at least these strike benefits in particular, are to be deemed "gifts" within the meaning of the statutory exclusion from gross income of "gifts."

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The taxpayer's first ground, that of the denial by the Commissioner to strike benefits of consistent treatment accorded other public and private "subsistence relief" payments, depends wholly upon past rulings of the Commissioner. In chronological order, the substance of the Commissioner's rulings deemed relevant to this ground by the taxpayer are set out in the Appendix to this opinion, *post,* p. 317. Set out as well are the rulings deemed pertinent by both parties to the theory of "alleviative" "reparations" receipts. The two theories overlap and much of the material relevant to them is the same. For each ruling are included the relevant facts, the Commissioner's conclusion, with his reasons and supporting authority when given.

What these rulings reveal largely depends on the viewpoint from which their meaning is read. Only two of the rulings set out in the Appendix, Numbers 1 and 21, dealt expressly with strike benefits, and Number 21 is the 1957 ruling here challenged. Putting this 1957 ruling aside, the conclusion may be drawn from these rulings that the Commissioner has not taxed receipts for which no services were rendered and no direct consideration was given, which did not arise out of an employment relation, and which were relatively small in amount and designed to enable the recipient to provide for his needs so they can be said to have been in a sense "subsistence" payments. None of the rulings holding payments taxable squarely contradicts such a conclusion.

> Number 2, taxing union unemployment benefits, does not because the benefits there were paid by the union only to its members, and it can be supposed that members paid dues and lent their support in other ways, and thus there was consideration for the benefits.
>
> Numbers 5, 15, 19, 24 and 25, all holding "subsistence" payments taxable, do not contradict it. The

payments in those cases were either made from funds partly or wholly sustained by the employer (Numbers 5 and 19), or the recipient had become eligible for benefits by paying into the fund from which the payments were made (Numbers 15, 24, and 25). Thus, it can be said that there was consideration for the payments, as there is, for example, consideration for insurance. In Numbers 24 and 25 it is in fact clear that the benefits paid varied with the recipient's contribution to the fund, and in Number 15 the fact is not stated one way or the other.

Number 1, the first strike-benefit ruling, does not squarely contradict a conclusion regarding "subsistence relief" payments made without consideration, because that also only concerned payments to union members.

Only Number 20 casts doubt on the conclusion, but not enough seriously to disturb it. In that ruling, concerning payments by the German Government to persons mistreated by the Nazis, it was left open that some payments, greater than the basis in the property confiscated by the Nazis, might be taxed as income, depending on the circumstances. But it can be reasoned that such payments were windfalls, not related to "subsistence," and in any event it was not clearly decided that they were income.

So, if one starts with a feeling or assumption that "subsistence relief," paid without the voluntary giving of consideration, has not been taxed by the Commissioner, material may be adduced to justify one's starting point.

There are two reasons why such reasoning does not conclude this case in my view. First, it is far from clear that, as a matter of law, the situation before us falls within a hypothetical "subsistence relief" category. Although the taxpayer paid no union dues before or during the taxable year, he did picket, and for part of the year he was a

member of the union. The Commissioner has regularly taxed "subsistence" payments by unions to union members as well as payments made from a fund to which the recipient contributed, or to which his employer contributed. See Numbers 1, 2, 15, 19, 24 and 25. Although it may be possible to distinguish all these rulings on the ground that here taxpayer's contribution to the union was minimal and that the strike benefits were in fact paid to members and non-members alike, they hardly furnish solid basis for a claim of uniform treatment of non-taxability by the Commissioner of payments like the strike benefits in this case.

My second objection is more basic. A fair evaluation of the administrative materials in the Appendix does not lead to the conclusion that the Commissioner has uniformly treated so-called "subsistence relief" as a relevant category of payments, and one not subject to tax. The only reason urged in this case for holding the Commissioner bound to follow rulings of non-taxability which he considers inapplicable is respect for an overriding principle of "equal" tax treatment. The Commissioner cannot tax one and not tax another without some rational basis for the difference. And so, assuming the correctness of the principle of "equality," it can be an independent ground of decision that the Commissioner has been inconsistent, without much concern for whether we should hold as an original matter that the position the Commissioner now seeks to sustain is wrong.

If I am right about the justification for asking this Court in this case to bind the Commissioner to former relevant rulings, with indifference to the correctness of his present position as an independent matter, the appropriate inquiry is not, "Can such and such a principle be drawn from the administrative rulings?" The right question is, "Is there any rational basis for the prior rulings which does not apply to the present case?" For only if there

is no such rational basis can the Commissioner be said to be denying "equal" treatment. Accordingly, I think that the rulings in which the Commissioner has not imposed a tax must be analyzed to ascertain whether the only principle which can explain them is a principle that "subsistence relief" is not taxable, or whether they can be reasonably explained, individually or severally, as the result of the application of some other principle or principles which do not govern the present strike benefits. I think the Commissioner's prior rulings of non-taxability can all be explained in a way which leaves the Commissioner free to assert that the strike benefits in this case are, unless "gifts," part of gross income, without denying "equal" treatment.

There are sixteen rulings set forth in the Appendix in which no tax was imposed: Numbers 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 18, 20 and 22. Of these, reasons were clearly given in several, and in several others reasons were suggested though not spelled out. In no case was the reason given that the payment was "subsistence relief" and not taxable on that score. The nature of the payment as "subsistence" was mentioned only once, in Number 12, and it was used there as a characterization, not a reason, in a ruling which expressly accepted the nature of the payments as "gifts." The reasons which have been given suggest two other grounds upon which the Commissioner has excluded many of these payments from tax.

> In Number 13, one reason for the ruling was stated to be that the payments "are considered gratuitous and spontaneous." In light of the circumstances of that case, involving disaster relief, it is natural to suppose that this language reflects an application of the principle that "gifts" are not part of gross income. See also Number 21, explaining Number 13.

In Numbers 3, 4, 6, 7, 14, 16, 20, and with regard to part of Number 12, the reasons given or suggested were that the payment involved was to be treated as compensation for a loss or injury that had been suffered, and that it was not taxable either because not greater in amount than the loss or because the thing lost or damaged had no ascertainable market value and so it could not be said that there had been any net profit to the taxpayer through the effectual exchange of the thing lost for the payment received. Although not articulated there, such reasons may well have applied also in Number 13, whose express ground was one of "gift."

The fact that a companion question or even the principal question in some of these cases (see Numbers 12 and 20) was whether the payment should reduce the amount of the deduction permitted by the Code for a casualty loss, emphasizes the explicit treatment of the payments as in return for a loss suffered.

Even in those cases where the thing lost or injured had no basis to the taxpayer for purposes of computing gain or loss, the language of reparation or compensation for loss was used. Thus in Number 3 damages for alienation of affections or defamation were treated as "in compromise" "for an invasion of" a "personal right." See also *McDonald* v. *Commissioner,* 9 B. T. A. 1340, referred to in Number 7. In Number 4 damages for breach of promise to marry were held not taxable because "[a] promise to marry is a personal right not susceptible of any appraisal in relation to market values." Numbers 6 and 14 involved death payments, and they were called "compensation for [the] loss [of life]." In Number 16 the payment to a mistreated prisoner of war was called "reimbursement."

The principle at work here is that payment which compensates for a loss of something which would not itself have been an item of gross income is not a taxable payment. The principle is clearest when applied to compensation for the loss of what is ordinarily thought of as a capital asset, *e. g.*, insurance on a house which is destroyed. See Number 12. If a capital asset is sold for no more than its basis there is no taxable gain. The result, then, is the same if it is destroyed and there is paid in compensation no more than its basis. There are, to be sure, difficulties, not present where ordinary assets are involved, in applying this principle to compensation for the loss of something which has no basis and which is not ordinarily thought of as a capital asset, such as health or life or affection or reputation. With those difficulties we have no concern. The relevant question is whether the Commissioner has, or reasonably could have, applied a principle of reparation to deal with these cases, and the reasons given by him in Numbers 3, 4, 6, 7, 12, 14, 16, and 20 show that he has.

It is important to note that in *Commissioner* v. *Glenshaw Glass Co.*, 348 U. S. 426, 432, n. 8, we recognized just such treatment as "[t]he long history of departmental rulings holding personal injury recoveries nontaxable on the theory that they roughly correspond to a return of capital," and distinguished those rulings from the case of punitive damages, which we held not to be compensatory and therefore taxable. See also *United States* v. *Supplee-Biddle Hardware Co.*, 265 U. S. 189, 195.

The rationale of payments in compensation for a loss is not applicable to the present case. Even if we suppose that strike benefits are made to compensate in a sense for the loss of wages, the principle of payments in compensation does not apply because the thing compensated for, the wages, had they been received, would have been included in gross income. See *United States* v. *Safety*

Car Heating & Lighting Co., 297 U. S. 88. That is not so in any of the rulings set out, where the thing lost and compensated for was not an item of taxable income, but an aspect of capital or analogous to capital, which obviously would not have been included in gross income had it been retained.

Taking stock, then, ten rulings of non-taxability are clearly explainable according to the two legitimate principles of "gift" and "compensation for loss" and should not bind the Commissioner to a principle that "subsistence relief" is not to be taxed. They are Numbers 3, 4, 6, 7, 13, 14, 15, 16, 20, and part of 12. The remaining portion of Number 12 concerns Red Cross disaster relief in the form of food and clothing. A ruling regarding inclusion in gross income was not asked for in that case, which concerned the use of the casualty loss deduction with regard to payments for the loss of capital assets. The relief was referred to as a "gift" in the ruling, and it was simply asserted, without explication, that, as to the food and clothing, "nor do they represent taxable income." It is not unreasonable to attribute this conclusion to an application of the principle of "gift," in light of the nature of the Red Cross as a charitable organization.

The rulings imposing no tax which thus remain unexplained as either dealing with "gifts" or payments in compensation for loss are Numbers 8, 9, 10, 11, 17, 18, and 22.

> Numbers 8, 9 and 11 dealt with federal old age and death payments under the Social Security Act.
>
> Numbers 10 and 17 dealt with unemployment payments under the Social Security Act. In Number 10 the payments were made by the States from the Federal Unemployment Trust Fund set up under that Act, and in Number 17 the payments were under the Social Security plan to cover federal employees.

Number 18 dealt with payments by the Government of Panama under an Act "basically similar" to the United States Social Security Act.

Number 22 dealt with a state payment to the blind, under a statute authorizing disbursement of money received from the United States for such a purpose.

Except for Number 22, all these payments came out of United States Social Security funds, or in the case of Number 18, a Panamanian analogue. The Commissioner has expressly treated these Social Security payments as related to each other. Number 9 relies on ruling Number 8, Number 17 relies on Number 10, and Number 18 on Number 11. These Social Security rulings rely on no others, and no others rely on them. On the other hand, the Commissioner has uniformly treated as taxable non-governmental payments, either by employers, unions, or "private" groups which have been similar to the Social Security benefits not taxed in their character as "subsistence relief," except for their private nature. See Numbers 1, 2, 5, 15, 19, 24 and 25. In the instances urged on us, the Commissioner has never treated such a non-governmental payment as non-taxable. Having uniformly accorded different treatment to small pension, old age, and unemployment payments, depending on their source, whether they arose out of a private arrangement on the one hand, or under the Federal Social Security program on the other, the Commissioner is not disentitled to treat these strike benefits as he has the non-governmental payments in the past. Surely there is a fair basis for differentiating, for income tax purposes, payments under a comprehensive scheme of federal welfare legislation from private payments, although their ultimate social purposes may be similar. To say that the Social Security rulings control private welfare schemes is to say that the Commissioner has not been entitled to find in the policy of the Social Security legislation, in relation

to the tax statutes, a reason for excluding its benefits from taxation, while this policy does not apply to other payments.

The remaining ruling, Number 22, deals with a state assistance payment to the blind. Aside from the differences which arise from the fact that this payment involved federal funds, which was set forth in the ruling as one of the relevant facts, it may well have been treated by the Commissioner as a gift, and not unreasonably so, for the blind are a common object of charity. In any case, this payment cannot alone create an administrative practice binding the Commissioner in the present case.

In summary, the relevant instances in which the Commissioner has ruled payments not taxable can all be explained according to principles other than the general principle of "subsistence relief" urged by the taxpayer. Putting aside the question of "gift," these principles do not cover the present case. Therefore the Commissioner, in seeking to tax these strike benefits, has not denied the taxpayer "equal" treatment.

No one argues that a tax principle regarding "subsistence relief" can be drawn from the statute or the cases. The taxpayer does urge, however, that a principle concerning "alleviative," "reparations" payments can and should be derived. I have already discussed why such a principle in my view does not include the present strike benefits, which compensate no loss but the loss of wages, and these would have been included in gross income if received. It might be argued that the Court should itself formulate a principle covering "subsistence relief" payments which would cover this case. There are controlling reasons for not formulating such a principle. Such new principles in the tax law are best left to Treasury initiative and congressional adoption. Moreover, the principle of excluding "subsistence" is already reflected in the $600 personal exemption and the graduated rates.

Finding these strike benefits not otherwise outside the statutory concept of "gross income," the decisive factor for me in this case is whether the strike benefits are to be deemed a "gift." As a matter of ordinary reading of language I could not conclude that all strike benefits are, as a matter of law, "gifts." I should suppose that a strike benefit does not fit the notion of "gift." A union surely has strong self-interest in paying such benefits to strikers. The implications arising out of the relationship between a union which calls a strike and its strikers are such that, without some special circumstances, it would be unrealistic for a court to conclude that payments made by the union for which only strikers qualify, even though based upon need, derive solely from the promptings of benevolence.

In this case, however, under instructions to the jury that

> "[t]he term 'gift' as here used denotes the receipt of financial advantage gratuitously, without obligation to make the payment, either legal or moral, and without the payment being made as remuneration for something that the Union wished done or omitted by the plaintiff. To be a gift, the payments must have been made with the intent that there be nothing of value received, or that they were not made to repay what was plaintiff's due but were bestowed only because of personal regard or pity or from general motives of philanthropy or charity. If the plaintiff received this assistance simply and solely because he and his family were in actual need and not because of any obligations, as above referred to, or any expectation of anything in return, then such payments were gifts,"

the jury found in a special verdict that the strike benefit payments to taxpayer were a "gift." These instructions certainly were not unfavorable to the Government.

For me, then, the question is whether there is anything in this particular record to justify a jury in finding, as it must be deemed to have found under these instructions, that the payment to taxpayer was, unlike the ordinary strike benefit, wholly a benefaction because of need, uninfluenced by the union's self-interest in promoting the success of the strike. The trial judge held that the record precluded the jury's verdict; the Court of Appeals reinstated that verdict.

On the evidence in this case, may the jury's verdict stand? There was evidence justifying the view that in the particular circumstances existing in Sheboygan at the time these benefits were paid, the union had assumed the functions normally exercised by private charitable organizations and governmental relief programs, in view of the excessive difficulty in getting adequate relief from them, so that these benefits were dispensed pursuant to such a charitable relief program in what, because of the strike, was a distressed area. The mere fact that the payments were made by the union to men participating in a strike called by the union does not as a matter of tax law conclude the case against a "gift." When the circumstances negating the business nature of the payment were strong enough, the Commissioner has ruled that even payments by an employer to his employees were gifts. See ruling Number 13 in the Appendix, and see also Rev. Rul. 59–58, 1959–1 Cum. Bull. 17, holding that the value of turkeys, hams, etc., given by an employer to employees at Christmas or some other holiday need not be reported as income. Although it is for me a very close question, I find sufficient evidence in the record to support the theory that in making these payments the union was exercising a wholly charitable function. On this view, restricted to the particular set of circumstances under which the special verdict was rendered, I would therefore hold the payment

in this case to be a gift and would affirm the judgment below.

I am well aware that this disposition of the case does not preclude different juries reaching different conclusions on the same facts. Some individualization of result is inevitable so long as it is left to courts to determine what is or is not a "gift." The diversities that may thus result are all the more inevitable in view of the scope left to the fact-finders—whether courts or jury—by our decision today in *Commissioner* v. *Duberstein* and *Stanton* v. *United States, ante,* p. 278.

APPENDIX TO OPINION OF MR. JUSTICE FRANKFURTER.

As used in the citations to materials in this Appendix, "O. D." refers to an Office Decision, "I. T." to an Income Tax Ruling, "Sol. Op." to a Solicitor's Opinion, "S." to a Solicitor's Memorandum, "G. C. M." to a General Counsel's Memorandum, "Rev. Rul." to a Revenue Ruling, and "T. D." to a Treasury Decision.

1. O. D. 552, 2 Cum. Bull. 73 (1920).

"Benefits received from a labor union by an individual member while on strike are to be included in his gross income for the year during which received, there being no provision of law exempting such income from taxation."

2. I. T. 1293, I–1 Cum. Bull. 63 (1922).

"Amounts paid by an organized labor union as unemployed benefits to its unemployed members are required to be included in gross income of the recipients."

3. Sol. Op. 132, I–1 Cum. Bull. 92 (1922).

Damages for alienation of affections or defamation of character held not to be income. "In the light of these decisions of the Supreme Court [*Stratton's Independence* v. *Howbert,* 231 U. S. 399, and *Eisner* v. *Macomber,* 252

U. S. 189] it must be held that there is no gain, and therefore no income, derived from the receipt of damages for alienation of affections or defamation of personal character. In either case the right invaded is a personal right and is in no way transferable. While a jury endeavors roughly to compute the amount of damage inflicted, in the very nature of things there can be no correct estimate of the money value of the invaded rights. The rights on the one hand and the money on the other are incomparable things which can not be placed on opposite sides of an equation. If an individual is possessed of a personal right that is not assignable and not susceptible of any appraisal in relation to market values, and thereafter receives either damages or payment in compromise for an invasion of that right, it can not be held that he thereby derives any gain or profit." Revoking S. 1384, 2 Cum. Bull. 71, 72 (1920), which had held such damages taxable and relying on T. D. 2747 (unpublished) where "it was held that damages for personal injuries due to accident do not constitute income."

4. I. T. 1804, II–2 Cum. Bull. 61 (1923).

Damages for breach of promise to marry not gross income. "[A] promise to marry is a personal right not susceptible of any appraisal in relation to market values . . . ." Relying on Sol. Op. 132, *supra,* Number 3, and *Eisner* v. *Macomber,* 252 U. S. 189.

5. I. T. 1918, III–1 Cum. Bull. 121 (1924).

Payments to employees "involuntarily thrown out of employment because of lack of work in a certain industry." Payments made out of a fund established for that purpose under an agreement between "an association of manufacturers" and an "employees' association" and maintained by deductions from the wages of those em-

ployees who ratify the agreement and by equivalent contributions from the employers. *Held,* "Any benefits paid to the employee from the fund in excess of the amounts which he has contributed will constitute taxable income to him." Also held that employees may not deduct their contributions to the fund.

6. I. T. 2420, VII–2 Cum. Bull. 123 (1928).

Payment made to taxpayer for the death of her husband on the Lusitania. Payment made by the Government of Germany through the Mixed Claims Commission of the United States and Germany. *Held,* payment not income. "An award paid for the loss of a life is compensation for the loss, and as such is not embraced in the general concept of the term 'income.' In the instant case, the award is, in fact . . . to restore [the recipient] . . . to substantially the same financial and economic status as she possessed prior to the death of her husband."

7. G. C. M. 4363, VII–2 Cum. Bull. 185 (1928); I. T. 2422, VII–2 Cum. Bull. 186 (1928).

Damages for breach of contract to marry are not income. Commissioner acquiesces in 9 B. T. A. 1340 which so holds. O. D. 501, 2 Cum. Bull. 70 (1920), and I. T. 2170, IV–1 Cum. Bull. 28 (1925), which held otherwise, revoked.

8. I. T. 3194, 1938–1 Cum. Bull. 114.

Lump sum payments under § 204 (a) of the Social Security Act, 49 Stat. 620, to "aged individuals not qualified for benefits [under § 202 of the Act]" upon their reaching age 65. Payments amount to 3½% of the total wages paid to the individual with respect to employment after Dec. 31, 1936, and prior to reaching 65. *Held,* payments not subject to income tax.

9. I. T. 3229, 1938–2 Cum. Bull. 136.

Lump sum death payments under the "Federal old-age benefits" provisions in §§ 203 and 204 (b) of the Social Security Act to the estates of those deceased. Amount paid equals 3½% of wages earned after Dec. 31, 1936, if death occurs before 65; if death occurs after 65 amount paid is the difference between what the deceased had already been paid under the Social Security Act and 3½% of his total wages after Dec. 31, 1936, or the difference between what the deceased has already been paid under the Social Security Act and what he was entitled to be paid under that Act during his life, whichever difference is higher. *Held,* citing I. T. 3194, Number 8, *supra,* that "likewise" these payments are not subject to income tax.

10. I. T. 3230, 1938–2 Cum. Bull. 136–137.

Benefit payments made "under the Federal and State plan for unemployment compensation" by a state agency during unemployment periods. The payments are made from a fund held in the Treasury of the United States, established under the Social Security Act, called the Federal Unemployment Trust Fund. Money is deposited in the fund by the various States under the provisions of the Social Security Act. *Held,* payments not subject to income tax.

11. I. T. 3447, 1941–1 Cum. Bull. 191.

Monthly payments from the Federal Old Age and Survivors Insurance Trust Fund under § 202 of the Social Security Act, as amended, 53 Stat. 1360. *Held,* payments not subject to income tax.

12. Special Ruling, May 11, 1952, 1952–5 CCH Fed. Tax Rep. ¶ 6196.

Ruling was asked with regard to (1) whether money paid by the Red Cross as disaster relief "will affect the

deductibility of losses sustained by the taxpayer in the casualty," and (2) whether disaster relief in the form of food, clothing, medical supplies, etc., will affect "the loss deduction [for casualty losses provided by the Code]." *Held,* amounts received "from the American Red Cross by a disaster victim in the form of cash or property for the purpose of restoring or rehabilitating property of the victim which was lost or damaged in the casualty should be applied to reduce the amount of the deductible loss sustained by the taxpayer," but "[f]ood, medical supplies, and other forms of subsistence received by the taxpayer which are not replacements of lost property do not reduce the amount of any loss deduction to which he is otherwise entitled nor do they represent taxable income to him."

13. Rev. Rul. 131, 1953–2 Cum. Bull. 112.

Payments "for purposes of rehabilitation not actually compensated for by insurance or other sources" by a corporation to employees and their families who were injured or sustained damages as a result of a tornado. The size of the payments did not depend upon the length of service of the employee or the nature of his employment, and the ruling states that the payments were "not related to services rendered." *Held,* payments not taxable income. "Such contributions, measured solely by need, are considered gratuitous and spontaneous. The objective of the corporation is to try to place the employees in the same economic position, or as near to it as possible, which they had before the casualty."

14. Rev. Rul. 54–19, 1954–1 Cum. Bull. 179.

Monetary recovery by decedent's estate for death under state Wrongful Death statute. *Held,* recovery not taxable as income either to decedent's estate or to those who eventually receive the proceeds. "Proceeds of this

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nature, that is, compensation for loss of life, are not embraced in the general concept of the term 'income,' " citing I. T. 2420, Number 6, *supra*.

15. Rev. Rul. 54–190, 1954–1 Cum. Bull. 46.

Pension payments to employees from a fund administered by a union. Fund financed by compulsory employee contributions, based on earnings. It is not stated whether or how the benefits varied. Benefits payable only after age 60 to employees unable to keep their jobs and unable to get other regular employment because of age or disability. Benefits suspended when employee's wages reach a certain level. *Held,* payments subject to income tax. Since they are "directly attributable" to employment they are not without consideration and not gifts, "[a]ccordingly" they are income.

16. Rev. Rul. 55–132, 1955–1 Cum. Bull. 213.

Payments under the War Claims Act of 1948, 62 Stat. 1240, made by the United States to a former prisoner of war on account of an enemy government's violation of its obligation to furnish him humane treatment while held prisoner. *Held,* payments not subject to income tax because "in the nature of reimbursement for the loss of personal rights."

17. Rev. Rul. 55–652, 1955–2 Cum. Bull. 21.

Unemployment compensation payments made to federal employees pursuant to the Social Security Act, as amended, 68 Stat. 1130. Payments in amounts to equal payments employees would receive if covered by state unemployment compensation laws in States where employed and subject to the same conditions as such state payments would be. Payments made either by State, acting as agent of the United States, or by the Secretary of Labor. *Held,* payments not subject to income tax, relying on I. T. 3230, Number 10, *supra* (relating to state

unemployment payments out of federally administered fund under the Social Security Act). The principle applied there considered equally applicable here.

18. Rev. Rul. 56–135, 1956–1 Cum. Bull. 56.

"Social security benefits" paid by the Republic of Panama under Panama law to United States citizens living and working in Panama. *Held,* not subject to income tax. "Such benefits are deemed to be basically similar to the sundry insurance benefit payments made to individuals under the United States social security system which are described and held to be nontaxable to the recipients in I. T. 3447 [Number 11, *supra*]."

19. Rev. Rul. 56–249, 1956–1 Cum. Bull. 488.

Payments to unemployed workers at M. Co. made from fund to which only M. Co. contributes. Payments supplement state unemployment benefits, and are only paid to employees eligible for state benefits. Payments are such that in combination with state benefits they give employee a certain percentage of his salary while laid off, which percentage depends on marital status, number of dependents and wage rate when laid off. Length of payment period depends on size of fund. *Held,* subject to income tax.

20. Rev. Rul. 56–518, 1956–2 Cum. Bull. 25.

Payments made by German Government to persons persecuted by Nazi German Government who suffered damage to "life, body, health, liberty, rights of property ownership, or to professional or economic advancement." *Held,* because the payments are "in the nature of reimbursement of the deprivation of civil or personal rights," where they are on account of property taken away they are not income so long as they are less than taxpayer's basis in the property. Where payments are greater than

basis they may or may not be income depending on the circumstances of the case. No ruling made with regard to payments not on account of property taken away.

21. Rev. Rul. 57–1, 1957–1 Cum. Bull. 15.

Strike benefit payments made on the basis of need to strikers without regard to union membership. *Held,* taxable. Payments are not gratuitous because for the union's purposes. No conflict with I. T. 3230 (Number 10, *supra,* relating to state unemployment payments under Federal Fund), or I. T. 3447 (Number 11, *supra,* relating to Federal Social Security Insurance payments), because "[t]he benefits in these cases were held not to constitute taxable income because it was believed that Congress intended that such benefits be not subject to tax," and there is no evidence of such intent here. No conflict seen with Rev. Rul. 131 (Number 13, *supra*), relating to corporation's payments to rehabilitate employees after tornado, because payments there were gratuitous and donative. Rev. Rul. 54–190 (Number 15, *supra*), relating to pension payments from a union fund financed by dues, relied upon.

22. Rev. Rul. 57–102, 1957–1 Cum. Bull. 26.

Payment to a blind person under the Public Assistance Law of Pennsylvania, for the purpose of "providing for and regulating assistance to certain classes of persons requiring relief." The law authorizes the State "to cooperate with, and to accept and disburse money received from, the United States Government for assistance to such persons." *Held,* payments not taxable as income for they constitute "a disbursement from a general welfare fund in the interest of the general public."

23. T. D. 6272, § 1.61–11 (b), 1957–2 Cum. Bull. 18, 30.

"Pensions and retirement allowance paid either by the Government or by private persons constitute gross income unless excluded by law. . . ."

". . . Amounts received as pensions or annuities under the Social Security Act or the Railroad Retirement Act are excluded from gross income."

24. Rev. Rul. 57–383, 1957–2 Cum. Bull. 44.

Payments to unemployed workers from union unemployment fund financed through dues. Plan similar to insurance, employee choosing beforehand the class of benefits desired, and paying dues accordingly. *Held,* taxable.

25. Rev. Rul. 59–5, 1959–1 Cum. Bull. 12.

Benefit payments from "private" unemployment fund financed by dues from members. Dues vary with class of benefits desired. *Held,* payments are income to the extent that they exceed the contributions to the fund of the recipient. "In the absence of any provision in the Code which expressly excludes unemployment benefits derived from private sources from Federal income taxation, the rationale of the above-cited case [*Commissioner* v. *Glenshaw Glass Co.,* 348 U. S. 426] and Revenue Ruling [Rev. Rul. 57–383, Number 24, *supra,* relating to unemployment benefits from union fund financed through dues] is applicable." "[E]ach member must contribute to the fund an amount in relation to the benefits which he desires ultimately to receive. Therefore, the benefits, when received, do not constitute amounts gratuitously paid or received so as to be considered gifts." Citing Rev. Rul. 54–190 (Number 15, *supra,* relating to pension payments from union fund financed by dues).

MR. JUSTICE DOUGLAS, concurring.

While I join the opinion of my Brother BRENNAN, my view of the merits is so divergent from the rest that a word of explanation is needed. *Bogardus* v. *Commissioner,* 302 U. S. 34, 41, in holding payments by stock-

holders to employees were, on the facts there present, gifts, said:

> "There is entirely lacking the constraining force of any moral or legal duty as well as the incentive of anticipated benefit of any kind beyond the satisfaction which flows from the performance of a generous act."

Had a motion for a directed verdict been made by respondent at the close of the evidence, I think with all deference that it should have been granted, since my idea of a "gift" within the meaning of the Internal Revenue Code is a much broader concept than that of my Brethren. As the opinion of the Court points out, this striker (who became a union member without solicitation several months after he began receiving benefits) had no legal or moral duty to picket or to do any other act in furtherance of the strike. There is no evidence that the union made these payments to keep this striker in line. It is said that these strike payments serve the union's cause in promoting the strike. Yet the whole setting of the case indicates to me these payments were welfare, plain and simple. Unions, like employers, may have charitable impulses and incentives. Here only the needy got the relief.* Yet since

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*An administrative letter from the national union to the local unions dated March 6, 1952, states in part:

"The handling of the emergency health and welfare problems of our members and their families is one of the most important tasks facing our Union during strike periods. We should do everything possible to minimize the hardship of our members and their families during strike periods by using the resources of the community and our Union.

"The International Union, UAW–CIO, has established a Community Services Program in order to assist our members in making full use of community services. These health and welfare agencies have been organized in the community to render services, including financial assistance, medical, hospital and nursing care, legal aid, unemployment compensation (in New York State), family and child

(so far as the present record shows) respondent acquiesced in the submission to the jury, the United States received more favored consideration than it could claim as of right.

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

The question here is whether, in the light of the rule adopted by the Court today in *Commissioner* v. *Duber-*

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care and other such services. These services can be used by our members during strike periods as well as in lay-off periods. Our members support and pay for such services through taxes for Federal, state and local public agencies and through contributions for voluntary community agencies.

. . . . .

". . . Emergency strike assistance may be given to strikers who cannot meet their minimum needs with their own individual resources, who cannot qualify for such assistance from community agencies. Local Unions requiring strike assistance from the International Union must make their application for assistance to their Regional Director."

The parties stipulated to the following:

". . . The International Union grants strike benefits to non-members of the Union, who participate in a strike, if they do not have sufficient income to purchase food or to meet an emergency situation. The Union treats such non-members on the same basis as members of the Union, but non-members as well as members must be strikers before they may receive assistance from the Union.

"In order to obtain strike benefits from the Union, each applicant must appear before a Union Counsellor who asks him a series of questions which are contained on a printed Counselling form.

. . . . .

". . . The Union makes a distinction between applicants in granting strike benefits to them, depending on their marital status and number of dependents. At the time the Kohler strike aid program began, a single person received a food voucher for $6.00 per week; a married couple without dependents received a food voucher for $10.00 a week; a married couple with two children, a food voucher for $13.85 a week. On June 28, 1954, the Union increased the amount of aid to the people on the Kohler strike: aid for a single person was increased to $7.50 a week; for a married couple without dependents aid was increased to $15.00 a week; aid for a married couple with one child was increased to $18.00 a week."

stein, ante, p. 278, there is a reasonable basis in the evidence to support the jury's conclusion that the strike benefits paid to respondent by the union were nontaxable "gifts," within the meaning of § 102 (a) of the 1954 Internal Revenue Code.[1]

With deference, I am convinced that there was not, and that, to the contrary, the evidence compels the conclusion, as a matter of law, that those strike benefits were not "gifts" within the meaning of § 102 (a), as construed by the Court in the *Duberstein* case.[2]

The International Union is a private labor organization serving as the certified bargaining agent and representative of numerous collective bargaining units of employees. One of its principal purposes, as stated in its constitution, is to call, or approve the call by its local unions, of strikes to obtain better wages, hours and working conditions for those employees, and, of course, to win such strikes. To that end, its constitution provides for the creation of a Strike Fund, out of the dues of its members, for use in assisting its local unions in waging and winning such strikes, and it has actually created and maintains such

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[1] Section 102 (a) provides: "Gross income does not include the value of property acquired by gift, bequest, devise, or inheritance." 26 U. S. C. § 102 (a).

[2] Although the plurality opinion apparently considers it unnecessary to decide whether the strike benefits received by respondent constitute "income," and deals only with the question whether they were excludable "gifts," I think it is clear that those payments were "income." Strike benefits constitute realized *gains* to their recipients, as a partial substitute for lost wages rather than lost capital, and are materially different in nature from the various categories of realized gains which have been treated as nontaxable through administrative fiat. (See the Treasury Rulings detailed in MR. JUSTICE FRANKFURTER'S concurring opinion.) Strike benefits are, therefore, within the reach of the "gross income" provision of the Code. See *Commissioner* v. *Glenshaw Glass Co.,* 348 U. S. 426, 429–430.

a strike fund.[3] Article 12, § 15 of its constitution further provides that:

> "If and when a strike has been approved by the International Executive Board, it shall be the duty of the International Executive Board to render all financial assistance to the members on strike consistent with the resources and responsibilities of the International Union."

Thus there is a clear and specific undertaking by the International Union to furnish assistance to its striking members when, as here, it has approved the strike, and the union has created and maintains a fund for that purpose.

Although the mentioned provisions of the International's constitution relate to financial assistance to union *members,* it was stipulated at the trial that:

> "The International Union grants strike benefits to non-members of the Union, who participate in a strike, if they do not have sufficient income to purchase food or to meet an emergency situation. The Union treats such non-members on the same basis as members of the Union, but non-members as well as members *must be strikers before they may receive assistance from the Union.*" (Emphasis added.)

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[3] The evidence shows an administrative letter was written by the International to its locals describing the nature and purpose of its strike fund as follows:

"The International Union, UAW–CIO, has also established a Strike Fund to further assist Local Unions in winning current strikes and to build a fund to protect our members in any future strikes. The Strike Fund of the International Union, UAW–CIO, is not large enough to provide strike assistance on the basis of right, and is not sufficient to meet all of the needs of our members during strike periods."

It was further stipulated that respondent, who was not a member of the union during the early months of the strike, "received from the International Union" strike benefits totaling $565.54 during the taxable year 1954.[4]

It is now established that objective intention of the transferor determines whether transfers constitute "gifts," within the meaning of § 102 (a). *Bogardus* v. *Commissioner,* 302 U. S. 34; *Commissioner* v. *Duberstein, ante,* p. 278. In *Duberstein,* the Court, in attempting to shed additional light on the factors determinative of whether requisite donative intent impelled the transfer, said:

> "This Court has indicated that a voluntary executed transfer of his property by one to another, without any consideration or compensation therefor, though a common-law gift, is not necessarily a 'gift' within the meaning of the statute. . . . And, importantly, if the payment proceeds primarily from 'the constraining force of any moral or legal duty,' or from 'the incentive of anticipated benefit' of an economic nature . . . it is not a gift. . . . A gift in the statutory sense, on the other hand, proceeds from a 'detached and disinterested generosity,' . . . ; 'out of affection, respect, admiration, charity or like impulses.' . . ." *Commissioner* v. *Duberstein, ante,* at p. 285.

I find nothing in this record to indicate that the strike benefit payments by the union to respondent and other striking workers, while they were waging the strike, were made out of any "detached and disinterested generosity,"

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[4] While the Court of Appeals emphasized respondent's status as a nonmember when he began receiving strike benefits from the union, the parties' stipulation nullifies any possible basis for distinguishing between members and nonmembers in deciding the question before us, and, indeed, the Court does not purport to rest its decision on any such distinction.

or "out of affection, respect, admiration, charity or like impulses." To the contrary, it seems plain enough that those payments were made by the union to enable and encourage respondent and other striking workers to continue the strike which had been called or approved by the union, and were not motivated by benevolence. Those payments were therefore made in furtherance of one of the union's principal economic objectives—the winning of the strike—and hence proceeded primarily from " 'the incentive of anticipated benefit' of an economic nature" to the union, and from "the constraining force" of the union's promise to assist striking workers in winning the strike. *Duberstein, ante,* p. 285. Because of the economic advantages to be obtained by the union from winning the strike, the union had a manifest self-interest in financially sustaining the strikers while they carried on its strike. This shows, as a matter of law, that the payments were not made with the donative intent required to constitute "gifts" within the meaning of § 102 (a) and of the *Bogardus* and *Duberstein* cases. Wholly apart from the immediate objective which the union sought to achieve by paying these strike benefits, they could qualify as "gifts," as the Court recognizes, only if they were made, as said in *Duberstein,* with a " 'detached and disinterested generosity,' " and this record shows that it was principally private business purposes, not detached and disinterested generosity, that prompted the union to make the payments in question.

To be sure, the International's Secretary-Treasurer expressed his conclusion at the trial that, in the course of this strike, the International carried out the "same function" as would a local welfare agency in furnishing assistance to needy persons. But it is important to distinguish the very different factors that impelled the union from those that motivate a local welfare agency in furnishing such assistance. The union made payments only to

strikers to sustain them while they carried on the strike, whereas, a welfare agency assists the needy solely from humanitarian impulses, without purpose to obtain any benefit for itself, and whether the needy recipients are strikers or not. Public welfare payments represent the charitable response of the community to relieve hardships arising from conditions beyond its control; but the strike benefits shown by this record were designed, principally at least, for the purpose of sustaining the strikers while they carried on the union's strike to victorious end. The motivation of a public welfare agency in supplying basic needs to the unemployed is purely charitable in nature, but payments by a private union to striking workers to enable them to continue to successful conclusion a strike called or approved by the union, cannot reasonably be said to have proceeded primarily from any such charitable impulse.[5]

This conclusion is fortified by the consistent and long-standing rulings of the Treasury Department. It has twice ruled that strike benefits do not constitute non-taxable "gifts" to the recipient. In 1920 it held that:

> "Benefits received from a labor union by an individual member while on strike are to be included in his gross income for the year during which received,

[5] That voluntary payments by a union may be and often are made with the requisite donative intent is not to be doubted. This was illustrated by the testimony of two union officials at the trial of this case. The Secretary-Treasurer testified about expenditures from the union's strike fund to assist in emergencies caused by a tornado at Flint, Michigan, and by a flood in Connecticut. A regional officer testified that the union purchased furniture for a member whose home and its furnishings had burned, viewing that action, somewhat differently than these strike benefits, as an "outright donation" by the union. But plainly such were not the generous and charitable impulses that impelled the union to pay the strike benefits to respondent and other strikers to sustain them while they waged the union's Kohler strike.

> *there being no provision of law exempting such income from taxation.*" O. D. 552, 2 Cum. Bull. 73 (1920). (Emphasis added.)

And again in 1957, it ruled:

> "Strike benefit payments are included within the broad definition of gross income and *do not fall within any of the exclusions provided for in the Code, including the exclusions for gifts under section 102.* They are paid only upon the event of a strike which is a means employed by the union and its members for securing economic benefits, and, for this reason, they do not constitute amounts gratuitously paid or received.
>
> . . . . .
>
> "Accordingly, the strike benefit payments received under these circumstances *do not constitute gifts* but constitute income and are includible in the gross income of the recipients even though distributed on the basis of their need and regardless of whether the recipients are members or nonmembers of the union." Rev. Rul. 57–1, 1957–1 Cum. Bull. 15, 16–17. (Emphasis added.)

Nor do I find in this record any "special circumstances" which might support the jury's conclusion that the payments made to respondent were "gifts." The record shows that it was the union's policy at the time of this strike to require strikers to avail themselves of any assistance offered by local community agencies before seeking assistance from the union. However, the union decided to waive this requirement with regard to the strike involved here, for the reasons given by the International's Secretary-Treasurer:

> "In this particular case, the community assistance available in Sheboygan County was so small, and so

much red tape involved in obtaining it, we decided that Kohler workers would not have to seek assistance from the community agencies."

. . . . .

"The policy in 1954 was to use community agencies but, as I testified previously, that in the case of the Kohler workers we waived that particular policy because, after checking with the Sheboygan Welfare Agency, we found that the Kohler workers were expected to give up their license plates and not use their automobiles, and restrictions were so great that we didn't think we ought to impose those restrictions on the Kohler workers."

This determination was further evidence that the union's purpose in making the payments to respondent and other strikers was a business one, not proceeding from any " 'detached and disinterested generosity' " nor " 'out of affection, respect, admiration, charity or like impulses,' " *Duberstein, ante,* p. 285, but proceeding, rather, from the union's business purpose to obviate the supposed oppression of the local welfare restrictions upon the strikers, and thereby more effectively to preserve and continue the strike. It corroborates, I think unmistakably, the union's business purpose in paying the strike benefits, and shows that no genuine charitable or donative intent was involved.

For these reasons I would reverse the judgment of the Court of Appeals and hold that the payments in question were not "gifts" but were "income" and taxable as a matter of law.

HOFFMAN, U. S. DISTRICT JUDGE, *v.* BLASKI ET AL.

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

No. 25. Argued April 19–20, 1960.—Decided June 13, 1960.*

Under 28 U. S. C. § 1404 (a), a federal district court in which a civil action has been properly brought is not empowered to transfer the action on the motion of the defendant to a district in which the plaintiff did not have a *right* to bring it. Pp. 335–344.

(a) The phrase "where it might have been brought" in § 1404 (a) cannot be interpreted to mean "where it may now be rebrought, with defendants' consent." Pp. 342–343.

(b) Under § 1404 (a), the power of a district court to transfer an action to another district is made to depend, not upon the wish or waiver of the defendant, but upon whether the transferee district is one in which the action "might have been brought" by the plaintiff. Pp. 343–344.

260 F. 2d 317, 261 F. 2d 467, affirmed.

Charles J. Merriam argued the cause for petitioner in No. 25. With him on the brief was *Samuel B. Smith.*

John C. Butler argued the cause and filed a brief for petitioner in No. 26.

Daniel V. O'Keeffe argued the cause for respondents in No. 25. With him on the brief were *Lloyd C. Root* and *John O'C. FitzGerald.*

Warren E. King argued the cause and filed a brief for respondents in No. 26.

MR. JUSTICE WHITTAKER delivered the opinion of the Court.

To relieve against what was apparently thought to be the harshness of dismissal, under the doctrine of *forum*

*Together with No. 26, *Sullivan, Chief Judge, U. S. District Court,* v. *Behimer et al.,* argued April 20, 1960, also on certiorari to the same Court.

non conveniens, of an action brought in an inconvenient one of two or more legally available forums, *Gulf Oil Corp.* v. *Gilbert,* 330 U. S. 501, and concerned by the reach of *Baltimore & Ohio R. Co.* v. *Kepner,* 314 U. S. 44,[1] Congress, in 1948, enacted 28 U. S. C. § 1404 (a), which provides:

> "§ 1404. Change of venue.
>
> "(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

The instant cases present the question whether a District Court, in which a civil action has been properly brought, is empowered by § 1404 (a) to transfer the action, on the motion of the defendant, to a district in which the plaintiff did not have a *right* to bring it.

No. 25, *Blaski.*—Respondents, Blaski and others, residents of Illinois, brought this patent infringement action in the United States District Court for the Northern District of Texas against one Howell and a Texas corporation controlled by him, alleging that the defendants are residents of, and maintain their only place of business in, the City of Dallas, in the Northern District of Texas, where they are infringing respondents' patents. After being served with process and filing their answer, the defendants moved, under § 1404 (a), to transfer the action to the United States District Court for the Northern District of Illinois.[2] Respondents objected to the

[1] See the Reviser's Notes following 28 U. S. C. § 1404.

[2] The asserted basis of the motion was that trial of the action in the Illinois District Court would be more convenient to the parties and witnesses and in the interest of justice because several actions involving the validity of these patents were then pending in that court, and that pretrial and discovery steps taken in those actions had developed a substantial amount of evidence that would be relevant and useful in this action. [*Note 2 continued on p. 337.*]

transfer on the ground that, inasmuch as the defendants did not reside, maintain a place of business, or infringe the patents in, and could not have been served with process in, the Illinois district, the courts of that district lacked venue over the action [3] and ability to command jurisdiction over the defendants; [4] that therefore that district was not a forum in which the respondents had a right to bring the action, and, hence, the court was without power to transfer it to that district. Without mentioning that objection or the question it raised, the District Court found that "the motion should be granted for the convenience of the parties and witnesses in the interest of justice," and ordered the case transferred to the Illinois district. Thereupon, respondents moved in the Fifth Circuit for leave to file a petition for a writ of mandamus directing the vacation of that order. That court, holding that "[t]he purposes for which § 1404 (a) was enacted would be unduly circumscribed if a transfer could not be made 'in the interest of justice' to a district where the defendants not only waive venue but to which they seek the transfer," denied the motion. *Ex parte Blaski,* 245 F. 2d 737, 738.

Upon receipt of a certified copy of the pleadings and record, the Illinois District Court assigned the action to Judge Hoffman's calendar. Respondents promptly moved for an order remanding the action on the ground that the Texas District Court did not have power to make the transfer order and, hence, the Illinois District Court was not thereby vested with jurisdiction of the action.

Defendants also stated in the motion that, if and when the case be so transferred, they would waive all objections to the venue of the Illinois District Court over the action and would enter their appearance in the action in that court.

[3] See 28 U. S. C. § 1400 (b), quoted in note 10, *infra.*

[4] See Rule 4 (f) of the Fed. Rules Civ. Proc., quoted in note 11, *infra.*

After expressing his view that the "weight of reason and logic" favored "retransfer of this case to Texas," Judge Hoffman, with misgivings, denied the motion. Respondents then filed in the Seventh Circuit a petition for a writ of mandamus directing Judge Hoffman to reverse his order. After hearing and rehearing, the Seventh Circuit, holding that "[w]hen Congress provided [in § 1404 (a)] for transfer [of a civil action] to a district 'where it might have been brought,' it is hardly open to doubt but that it referred to a district where the plaintiff . . . had a right to bring the case," and that respondents did not have a *right* to bring this action in the Illinois district, granted the writ, one judge dissenting. 260 F. 2d 317.

No. 26, *Behimer*.—Diversity of citizenship then existing, respondents, Behimer and Roberts, residents of Illinois and New York, respectively, brought this stockholders' derivative action, as minority stockholders of Utah Oil Refining Corporation, a Utah corporation, on behalf of themselves and others similarly situated, in the United States District Court for the Northern District of Illinois against Standard Oil Company and Standard Oil Foundation, Inc., Indiana corporations but licensed to do and doing business in the Northern District of Illinois, for damages claimed to have been sustained through the alleged illegal acquisition by defendants of the assets of the Utah corporation at an inadequate price.

After being served with process and filing their answer, the defendants moved, under § 1404 (a), to transfer the action to the United States District Court for the District of Utah.[5] Respondents objected to the transfer on the

[5] The motion asserted, and the court found, that trial of the action in the district of Utah would be more convenient to the parties and witnesses for the reasons, among others, that all of the officers and directors, and a majority of the minority stockholders, of the Utah corporation reside in that district; that the books and records of the corporation are located in that district; that the substantive law

ground that, inasmuch as the defendants were not incorporated in or licensed to do or doing business in, and could not be served with process in. the district of Utah, the courts of that district lacked venue over the action [6] and ability to command jurisdiction over the defendants; [7] that therefore that district was not a forum in which the respondents had a right to bring the action, and, hence, the court was without power to transfer it to that district. Without mentioning the question raised by that objection, the court found that the proposed transfer would be "for the convenience of the parties and witnesses and in the interest of justice," and ordered the case transferred to the district of Utah.

Respondents then filed in the Seventh Circuit a petition for a writ of mandamus directing the District Court to reverse its order. After hearing, the Seventh Circuit, following its decision in *Blaski* v. *Hoffman, supra,* granted the writ. 261 F. 2d 467.

To settle the conflict that has arisen among the circuits respecting the proper interpretation and application of § 1404 (a),[8] we granted certiorari. 359 U. S. 904; 361 U. S. 809.

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of Utah governs the action, and that the calendar of the Utah court was less congested than the Illinois one.

As part of their motion, defendants stated that, in the event of the transfer of the action as requested, they would waive all objections to the venue of the Utah court and enter appearances in the action in that court.

[6] See 28 U. S. C. § 1391 (c), quoted in note 10, *infra.*

[7] See Rule 4 (f) of the Fed. Rules Civ. Proc., quoted in note 11, *infra.*

[8] The decisions of the circuits are in great conflict and confusion. The Second Circuit has held one way on a *plaintiff's* motion and the other on a *defendant's* motion. Compare *Foster-Milburn Co.* v. *Knight,* 181 F. 2d 949, 952–953, with *Anthony* v. *Kaufman,* 193 F. 2d 85, and *Torres* v. *Walsh,* 221 F. 2d 319. The Fifth Circuit, too, has held both ways. Compare *Blackmar* v. *Guerre,* 190 F. 2d

Without sacrifice or slight of any tenable position, the parties have in this Court commendably narrowed their contentions to the scope of the only relevant inquiry. The points of contention may be sharpened by first observing what is not in contest. Discretion of the district judges concerned is not involved. Propriety of the remedy of mandamus is not assailed. No claim is made here that the order of the Fifth Circuit denying the motion of respondents in the *Blaski* case for leave to file a petition for writ of mandamus, 245 F. 2d 737, precluded Judge Hoffman or the Seventh Circuit from remanding that case.[9] Petitioners concede that these actions were

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427, 429, with *Ex parte Blaski*, 245 F. 2d 737. The Ninth Circuit has held a District Court to be without power to transfer an action, on *plaintiff's* motion, to a district in which plaintiff did not have a legal right to bring it originally. *Shapiro* v. *Bonanza Hotel Co.*, 185 F. 2d 777, 780. The Third Circuit has held, two of the five judges dissenting, that a District Court has power to transfer an action, on *defendant's* motion, to a district in which the plaintiff did not have a legal right to bring it. *Paramount Pictures, Inc.*, v. *Rodney*, 186 F. 2d 111. The First Circuit has upheld transfer, on *defendant's* motion, to a district in which venue existed but where process could not be served on defendants (but defendants had been served in the transferor district). *In re Josephson*, 218 F. 2d 174.

[9] That order did not purport to determine the jurisdiction of the transferee court and therefore did not preclude Judge Hoffman of power to determine his own jurisdiction, nor did it preclude the power of the Seventh Circuit to review his action. *Fettig Canning Co.* v. *Steckler*, 188 F. 2d 715 (C. A. 7th Cir.); *Wilson* v. *Kansas City Southern R. Co.*, 101 F. Supp. 56 (D. C. W. D. Mo.); *United States* v. *Reid*, 104 F. Supp. 260, 266 (D. C. E. D. Ark.). Several reasons why principles of *res judicata* do not apply may be stated in a few sentences. The orders of the Texas and Illinois District Courts on the respective motions to transfer and to remand, like the orders of the Fifth and Seventh Circuits on the respective petitions for mandamus, were (1) interlocutory, (2) not upon the merits, and (3) were entered in the same case by courts of coordinate jurisdiction. Here the sole basis of the right of the Fifth Circuit to entertain the petition for a writ of mandamus was to protect its appellate jurisdiction,

properly brought in the respective transferor forums; that statutory venue did not exist over either of these actions in the respective transferee districts,[10] and that the respective defendants were not within the reach of the process of the respective transferee courts.[11] They concede, too,

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28 U. S. C. § 1651 (a); *Magnetic Engineering & Mfg. Co.* v. *Dings Mfg. Co.*, 178 F. 2d 866, 869–870 (C. A. 2d Cir.); *Foster-Milburn Co.* v. *Knight*, 181 F. 2d 949, 951 (C. A. 2d Cir.); *In re Josephson*, 218 F. 2d 174, 177 (C. A. 1st Cir.); *Torres* v. *Walsh*, 221 F. 2d 319, 321 (C. A. 2d Cir.) and, by denying leave to file the petition, it forsook such right, but it did not thereby determine that the Illinois District Court had jurisdiction of the action. The question of that court's jurisdiction still remained subject to attack as of right on appeal to the Seventh Circuit from any final judgment in the action. When, therefore, jurisdiction of the District Court was assailed in the Seventh Circuit, by the petition for mandamus, that court surely had power to determine whether it would hold, on such an appeal, that the Illinois District Court did or did not have jurisdiction of the action and, if not, to say so and thus avoid the delays and expense of a futile trial.

[10] Venue over patent infringement actions is prescribed by 28 U. S. C. § 1400 (b), which provides:

"(b) Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business."

See *Stonite Prod. Co.* v. *Melvin Lloyd Co.*, 315 U. S. 561; *Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U. S. 222.

General venue over actions against corporations is prescribed by 28 U. S. C. § 1391 (c), which provides:

"(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

[11] General provisions respecting service of the process of federal courts are prescribed by Rule 4 (f) of the Fed. Rules Civ. Proc., which provides:

"(f) Territorial limits of effective service.

"All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held and, when a statute of the United States so provides, beyond

that § 1404 (a), being "not unlimited," "may be utilized only to direct an action to any other district or division 'where it might have been brought,' " and that, like the superseded doctrine of *forum non conveniens, Gulf Oil Corp.* v. *Gilbert,* 330 U. S. 501, 507, the statute requires "an alternative forum in which plaintiff might proceed."

Petitioners' "thesis" and sole claim is that § 1404 (a), being remedial, *Ex parte Collett,* 337 U. S. 55, 71, should be broadly construed, and, when so construed, the phrase "where it might have been brought" should be held to relate not only to the time of the bringing of the action, but also to the time of the transfer; and that "if at such time the transferee forum has the power to adjudicate the issues of the action, it is a forum in which the action might *then* have been brought." [12] (Emphasis added.) They argue that in the interim between the bringing of the action and the filing of a motion to transfer it, the defendants may move their residence to, or, if corporations, may begin the transaction of business in, some other district, and, if such is done, the phrase "where it might have been brought" should be construed to empower the District Court to transfer the action, on motion of the defendants, to such other district; and that, similarly, if, as here, the defendants move to transfer the action to some other district and consent to submit to the jurisdiction of such other district, the latter district should be held one "in which the action might *then* have been brought." (Emphasis added.)

We do not agree. We do not think the § 1404 (a) phrase "where it might have been brought" can be interpreted to mean, as petitioners' theory would require,

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the territorial limits of that state. A subpoena may be served within the territorial limits provided in Rule 45."

[12] A similar view was expressed in *Paramount Pictures, Inc.,* v. *Rodney,* 186 F. 2d 111 (C. A. 3d Cir.). The court there thought that the § 1404 (a) phrase "might have been brought" means "could now be brought." *Id.,* at 114.

"where it may now be rebrought, with defendants' consent." This Court has said, in a different context, that § 1404 (a) is "unambiguous, direct [and] clear," *Ex parte Collett,* 337 U. S., at 58, and that "the unequivocal words of § 1404 (a) and the legislative history . . . [establish] that Congress indeed meant what it said." *United States* v. *National City Lines, Inc.,* 337 U. S. 78, 84. Like the Seventh Circuit, 260 F. 2d, at 322, we think the dissenting opinion of Judges Hastie and McLaughlin in *Paramount Pictures, Inc.,* v. *Rodney,* 186 F. 2d 111 (C. A. 3d Cir.), correctly answered this contention:

> "But we do not see how the conduct of a defendant after suit has been instituted can add to the forums where 'it might have been brought.' In the normal meaning of words this language of Section 1404 (a) directs the attention of the judge who is considering a transfer to the situation which existed when suit was instituted."

It is not to be doubted that the transferee courts, like every District Court, had jurisdiction to entertain actions of the character involved, but it is obvious that they did not acquire jurisdiction over these particular actions when they were brought in the transferor courts. The transferee courts could have acquired jurisdiction over these actions only if properly brought in those courts, or if validly transferred thereto under § 1404 (a). Of course, venue, like jurisdiction over the person, may be waived. A defendant, properly served with process by a court having subject matter jurisdiction, waives venue by failing seasonably to assert it, or even simply by making default. *Commercial Ins. Co.* v. *Stone Co.,* 278 U. S. 177, 179–180; *Neirbo Co.* v. *Bethlehem Shipbuilding Corp., Ltd.,* 308 U. S. 165. But the power of a District Court under § 1404 (a) to transfer an action to another district is made to depend not upon the wish or waiver of the defendant but, rather, upon whether the transferee district was one

in which the action "might have been brought" by the plaintiff.

The thesis urged by petitioners would not only do violence to the plain words of § 1404 (a), but would also inject gross discrimination. That thesis, if adopted, would empower a District Court, upon a finding of convenience, to transfer an action to any district desired by the *defendants* and in which they were willing to waive their statutory defenses as to venue and jurisdiction over their persons, regardless of the fact that such transferee district was not one in which the action "might have been brought" by the plaintiff. Conversely, that thesis would not permit the court, upon motion of the *plaintiffs* and a like showing of convenience, to transfer the action to the same district, without the consent and waiver of venue and personal jurisdiction defenses by the defendants. Nothing in § 1404 (a), or in its legislative history, suggests such a unilateral objective and we should not, under the guise of interpretation, ascribe to Congress any such discriminatory purpose.

We agree with the Seventh Circuit that:

> "If when a suit is commenced, plaintiff has a right to sue in that district, independently of the wishes of defendant, it is a district 'where [the action] might have been brought.' If he does not have that right, independently of the wishes of defendant, it is not a district 'where it might have been brought,' and it is immaterial that the defendant subsequently [makes himself subject, by consent, waiver of venue and personal jurisdiction defenses or otherwise, to the jurisdiction of some other forum]." 260 F. 2d, at 321 and 261 F. 2d, at 469.

Inasmuch as the respondents (plaintiffs) did not have a right to bring these actions in the respective transferee districts, it follows that the judgments of the Court of Appeals were correct and must be

Affirmed.

MR. JUSTICE STEWART, concurring in No. 25.

Two Courts of Appeals disagreed about the meaning of a federal law, as conscientious federal courts sometimes do. From the point of view of efficient judicial administration the resulting history of this litigation is no subject for applause. But, as the Court points out, no claim was made here that the decision of the Fifth Circuit precluded Judge Hoffman or the Seventh Circuit from remanding the case, and on the merits of that question I agree with the Court that principles of *res judicata* were inapplicable. In any event, the conflict between the Circuits is now resolved, and what happened here will not happen again.

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE HARLAN and MR. JUSTICE BRENNAN join, dissenting.*

My special disagreement with the Court in this case concerns a matter of judicial administration arising out of the fact that after the question on the merits had been considered by the Court of Appeals for the Fifth Circuit, the same question between the same parties was later independently again adjudicated by the Court of Appeals for the Seventh Circuit. I cannot join the Court's approval of the right of the Seventh Circuit to make such a re-examination. It is true that in its opinion in this case and No. 26, *Sullivan* v. *Behimer,* decided today, the Court settles the question over which the two Courts of Appeals disagreed, so that it should not recur. This is not, however, an isolated case. A general principle of judicial administration in the federal courts is at stake. In addition, while the Court today settles one problem arising in the application of § 1404 (a), other questions involving that section may readily give rise to conflicting

*[This opinion applies only to No. 25, *Hoffman* v. *Blaski.* For opinion of MR. JUSTICE FRANKFURTER, joined by MR. JUSTICE HARLAN and MR. JUSTICE BRENNAN, in No. 26, *Sullivan* v. *Behimer,* see *post,* p. 351.]

views among the eleven Courts of Appeals. Under the Court's opinion, for example, transfer always depends upon the meaning of the federal venue statutes, and upon the jurisdiction of the transferee court over the person of the defendant, which may be a problem of constitutional dimensions, and there is obviously a substantial opportunity for conflict between the Courts of Appeals over those matters. We ought to forestall in other situations of potential controversy the kind of judicial unseemliness which this case discloses.

Plaintiffs brought this action for patent infringement in the United States District Court for the Northern District of Texas. Defendants moved pursuant to 28 U. S. C. § 1404 (a) to have it transferred to the Northern District of Illinois. Finding transfer to be "for the convenience of parties and witnesses, in the interest of justice," the Texas District Court granted the motion and transferred the action to Illinois. Plaintiffs sought a writ of mandamus in the Court of Appeals for the Fifth Circuit to require the Texas District Court to set aside the transfer. In plaintiffs' view the Northern District of Illinois was not a place where the action "might have been brought," and thus the Texas District Court had no power to transfer the action there under § 1404 (a). The Fifth Circuit fully examined the merits of this claim and rejected it, holding that in the circumstances before the court the Northern District of Illinois was a jurisdiction where the action "might have been brought." Leave to file a mandamus petition was therefore denied, and the action was duly transferred. 245 F. 2d 737.

Upon the assignment of the action to the calendar of the United States District Court for the Northern District of Illinois, plaintiffs moved that court to disregard the explicit decision of another District Court in the same case, sustained by the appropriate Court of

Appeals, and to send the case back to Texas. Plaintiffs advanced precisely the claim already rejected by the Fifth Circuit, namely, that the Northern District of Illinois was not a place where the action "might have been brought" within the proper meaning of § 1404 (a). Transfer had, in their view, erroneously been ordered by the Texas District Court and the power to transfer erroneously approved by the Fifth Circuit. Plaintiffs' application was denied by the Illinois District Court. Still not accepting the decision against them, plaintiffs again sought an appellate remedy by way of mandamus, this time in the Court of Appeals for the Seventh Circuit. Initially, mandamus was denied. On rehearing, however, the Seventh Circuit held that the prior decision of the Fifth Circuit was wrong. It held that § 1404 (a) did not authorize transfer to Illinois, and it ordered the action "remanded" to the Texas District Court within the Fifth Circuit, from whence it had come, to go forward there. 260 F. 2d 317. That "remand" is the order which is here on certiorari. 359 U. S. 904.

The Court of Appeals for the Seventh Circuit has thus refused to permit an Illinois District Court to entertain an action transferred to it with the approval, after full consideration of the problem involved, of the Court of Appeals for the Fifth Circuit. The Seventh Circuit considered no evidence not before the Fifth Circuit in so deciding. It considered precisely the same issue and reached a contrary legal conclusion. This was after explicit prior adjudication of the question at the same level of the federal system in the same case and between the same parties. Because the question involved is the transferability of the action, the consequence of the Seventh Circuit's disregard of the Fifth Circuit's prior decision is not only that a question once decided has been reopened, with all the wasted motion, delay and

expense which that normally entails. Unless and until this Court acts, the litigants have no forum in which trial may go forward. Each Court of Appeals involved has refused to have the District Court in its Circuit hear the case and has sent it to a District Court in the other.

This is the judicial conduct the Court now approves. The Court does not suggest that the Court of Appeals for the Fifth Circuit was powerless, was without jurisdiction, to review, as it did, the question of the applicability of § 1404 (a) to this case. The occasion for the Fifth Circuit's review by way of mandamus may have been, as the Court suggests, "to protect its appellate jurisdiction," but there can be no question that the Fifth Circuit undertook to and did resolve on its merits the controversy between the parties regarding the meaning of § 1404 (a). Yet the Court decides that the review in the Fifth Circuit was so much wasted motion, properly ignored by the Court of Appeals for the Seventh Circuit in arriving at a contrary result. The case is treated just as if the Fifth Circuit had never considered the questions involved in it. I am at a loss to appreciate why all the considerations bearing on the good administration of justice which underlie the technical doctrine of *res judicata* did not apply here to require the Court of Appeals for the Seventh Circuit to defer to the previous decision. "Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause." *Baldwin* v. *Traveling Men's Assn.*, 283 U. S. 522, 525–526. One would suppose that these considerations would be

especially important in enforcing comity among federal courts of equal authority.

The fact that the issue involved is the propriety of a transfer of the action only makes the case for deference to the previous decision of a coordinate court in the same litigation that much stronger. The course of judicial action now approved by the Court allows transfer over a persisting objection only when concurred in by two sets of courts: those in the place where the case begins, and those in the place to which transfer is ordered. Not only does the place of trial thus remain unsettled for an unnecessarily long time to accommodate double judicial consideration, but, as this case shows, the result of a disagreement between the courts involved is that the litigation cannot go forward at all unless this Court resolves the matter. Surely a seemly system of judicial remedies, especially appellate judicial remedies, regarding controverted transfer provisions of the United States Code should encourage, not discourage, quick settlement of questions of transfer and should preclude two Courts of Appeals from creating, through their disagreement in the same case, an impasse to the litigation which only this Court can remove. Section 1404 (a) was meant to serve the ends of "convenience" and "justice" in the trial of actions. It perverts those ends to permit a question arising under § 1404 (a), as here, to be litigated, in turn, before a District Court and Court of Appeals in one Circuit, and a District Court and Court of Appeals in another Circuit, one thousand miles distant, thereby delaying trial for a year and a half, only to have the result of all that preliminary litigation be that trial may not go forward at all until this Court shall settle the question of where it shall go forward, after at least another year's delay.

We are not vouchsafed claims of reason or of the due administration of justice that require the duplication of

appellate remedies approved by the Court in this case. Why is not a single judicial appellate remedy in a Court of Appeals entirely adequate for one aggrieved by a transfer? Once the Court of Appeals for the Fifth Circuit had decided, after due consideration, that the proper meaning of § 1404 (a) included Illinois as a place where the action "might have been brought," this should have ended the matter, except of course for this Court's power of review of that decision through the writ of certiorari, a power which we declined to exercise in this case. Nor does such a view of right and wise judicial administration depend upon the nature of the procedural or even jurisdictional issue in controversy. Technically, *res judicata* controls even a decision on a matter of true jurisdiction. "We see no reason why a court, in the absence of an allegation of fraud in obtaining the judgment, should examine again the question whether the court making the earlier determination on an actual contest over jurisdiction between the parties, did have jurisdiction of the subject matter of the litigation." *Stoll* v. *Gottlieb,* 305 U. S. 165, at 172. See also *Baldwin* v. *Traveling Men's Assn., supra,* 283 U. S. 522. Surely, a prior decision of a federal court on the unfundamental issue of venue ought to receive similar respect from a coordinate federal court when the parties and the facts are the same. The question is of the appropriate scheme of judicial remedies for enforcing rights under a federal remedial statute aimed at enhancing the fair administration of justice in the federal courts. It is not consonant with reason to permit a duplicate appellate procedure for questions under this statute, thereby forestalling final decision on a pre-trial matter which ought to be decided as expeditiously as possible, causing wasteful delay and expense, and thus depriving the statutory motion to transfer of effectiveness in achieving the ends of "convenience" and "justice" for which it was created.

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE HARLAN and MR. JUSTICE BRENNAN join, dissenting.*

The problem in this case is of important concern to the effective administration of justice in the federal courts. At issue is the scope of 28 U. S. C. § 1404 (a), providing for the transfer of litigation from one Federal District Court to another. The main federal venue statutes necessarily deal with classes of cases, without regard to the occasional situation in which a normally appropriate venue may operate vexatiously. Section 1404 (a) was devised to avoid needless hardship and even miscarriage of justice by empowering district judges to recognize special circumstances calling for special relief. It provides that an action, although begun in a place falling within the normally applicable venue rubric may be sent by the District Court to go forward in another district much more appropriate when judged by the criteria of judicial justice.

The terms of § 1404 (a) are as follows:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

The part of § 1404 (a) the meaning of which is at issue here is its last phrase, "any other district or division where it [the action] might have been brought." The significance of this phrase is this: even though a place be found to be an overwhelmingly more appropriate forum from the standpoint of "convenience" and "justice," the litigation may not be sent to go forward there unless it is a

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place where the action "might have been brought." Upon the scope to be given this phrase thus depends almost entirely the effectiveness of § 1404 (a) to insure an appropriate place of trial, when the action is begun in an oppressive forum.

One would have to be singularly unmindful of the treachery and versatility of our language to deny that as a mere matter of English the words "where it might have been brought" may carry more than one meaning. For example, under Rule 3 of the Federal Rules of Civil Procedure, civil actions are "commenced" by filing a complaint with the court. As a matter of English there is no reason why "commenced" so used should not be thought to be synonymous with "brought" as used in § 1404 (a), so that an action "might have been brought" in any district where a complaint might have been filed, or perhaps only in districts with jurisdiction over the subject matter of the litigation. As a matter of English alone, the phrase might just as well be thought to refer either to those places where the defendant "might have been" served with process, or to those places where the action "might have been brought" in light of the applicable venue provision, for those provisions speak generally of where actions "may be brought." Or the phrase may be thought as a matter of English alone to refer to those places where the action "might have been brought" in light of the applicable statute of limitations, or other provisions preventing a court from reaching the merits of the litigation. On the face of its words alone, the phrase may refer to any one of these considerations, *i. e.*, venue, amenability to service, or period of limitations, to all of them or to none of them, or to others as well.[1] And to

[1] See, *e. g.*, *Felchlin* v. *American Smelting & Refining Co.*, 136 F. Supp. 577 (D. C. S. D. Calif. 1955) (transfer denied on defendant's motion because plaintiff was an executor not qualified in transferee

the extent that these are matters which may or may not be raised at the defendant's election, the English of the phrase surely does not tell whether the defendant's actual or potential waiver or failure to raise such objections is to be taken into account in determining whether a district is one in which the action "might have been brought," or whether the phrase refers only to those districts where the plaintiff "might have brought" the action even over a timely objection on the part of the defendant, that is, where he had "a right" to bring it.

The particular problem in the present case has been a relatively commonplace one in the application of § 1404 (a), and it demonstrates the failure of the words of the section, considered merely as words, to define with precision those places where an action "might have been brought." The problem here is this. Action was brought by plaintiff in district A, a proper venue under the applicable venue statute. Defendant objected and moved for transfer to district B, submitting that in the interests of "convenience" and "justice" to all concerned the action should go forward there instead of in district A. District B, however, is one in which, had the complaint been

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court); *Masterpiece Products, Inc.*, v. *United Artists Corp.*, 90 F. Supp. 750 (D. C. E. D. Pa. 1950) (transfer denied on defendant's motion because, had the action originally been brought in the transferee court, the alignment of parties would have been different, there being one involuntary party, thereby destroying complete diversity of citizenship); *Lucas* v. *New York Central R. Co.*, 88 F. Supp. 536 (D. C. S. D. N. Y. 1950) (transfer denied on defendant's motion because defendant's corporate status would have destroyed diversity of citizenship had the action been brought in the transferee court). In all of these cases transfer was denied because the transferee court was deemed not to be one where the action "might have been brought." See also *Arvidson* v. *Reynolds Metals Co.*, 107 F. Supp. 51 (D. C. W. D. Wash. 1952) (denying the defendant's motion for transfer in part because the action was a local one, and state courts in the transferee district would not have taken jurisdiction over it).

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filed there, the plaintiff would have been unable without the defendant's consent to serve him with process. In addition, the defendant in District B, had the complaint been filed there, would have had an objection to the venue, under the applicable venue statute. In moving for transfer to B, the defendant stipulates to waiving all objections to venue there and to submitting his person to the jurisdiction of District Court B, should transfer be ordered. The District Court in A agrees that B, not A, is the appropriate place for trial and is disposed to transfer the action there, for in light of the defendant's stipulation there is no way in which the plaintiff can be prejudiced by the lack of venue in B or the impossibility, as an original matter, of serving defendant there. Is B a place where the action "might have been brought" so that the transfer can be effected? The Court finds it "plain," from the words of the phrase themselves, that B is not such a place, and that, for it, is the end of the matter.

We would all agree that B would be a place where the action "might have been brought" if it were a place of statutory venue, if the defendant had always been amenable to process there, and if B had no other special characteristics whereby the defendant could prevent consideration there of the merits of the cause of action. Almost every statute has a core of indisputable application, and this statute plainly applies to permit transfer to a place where there could never have been any objection to the maintenance of the action. But is it clear, as the Court would have it, that, as a mere matter of English, because potential objections peculiar to the forum would have been present in B, it is not to be deemed a place where the action "might have been brought," although defendant not only might but is prepared to waive, as he effectively may, such objections?

I submit that it is not clear from the words themselves, and the experience in the lower courts gives compelling proof of it. At least 28 District Courts, located in all parts of the Nation, have had to give concrete meaning to the set of words in controversy. These are the judges who are, to use a familiar but appropriate phrase, on the firing line, who are in much more intimate, continuous touch with the needs for the effective functioning of the federal judicial system at the trial level than is this Court. They have not found the last phrase of § 1404 (a) unambiguous. There has been anything but the substantial uniformity of views to be expected in the application of a clear and unambiguous direction. There have been severe differences with regard to whether § 1404 (a) is ever available as a remedy to a plaintiff forced into an inconvenient forum, and if so under what conditions.[2] With regard to defendants' motions to transfer, it has been held that "brought" in § 1404 (a) is synonymous with "commenced" in Rule 3 so that transfer may be made to virtually any district dictated by "convenience" and "justice." [3] It has been held that the phrase is to be applied as if it read "where it might have been brought *now*," thus giving full effect to a waiver of objections by defendant

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[2] See, *e. g.*, *Dufek* v. *Roux Distrib. Co.*, 125 F. Supp. 716 (D. C. S. D. N. Y. 1954); *Barnhart* v. *Rogers Producing Co.*, 86 F. Supp. 595 (D. C. N. D. Ohio 1949); *Troy* v. *Poorvu*, 132 F. Supp. 864 (D. C. Mass. 1955); *United States* v. *Reid*, 104 F. Supp. 260 (D. C. E. D. Ark. 1952); *Otto* v. *Hirl*, 89 F. Supp. 72 (D. C. S. D. Iowa 1952); *McGee* v. *Southern Pacific Co.*, 151 F. Supp. 338 (D. C. S. D. N. Y. 1957); *Rogers* v. *Halford*, 107 F. Supp. 295 (D. C. E. D. Wisc. 1952); *Herzog* v. *Central Steel Tube Co.*, 98 F. Supp. 607 (D. C. S. D. Iowa 1951); *Mitchell* v. *Gundlach*, 136 F. Supp. 169 (D. C. Md. 1955); *McCarley* v. *Foster-Milburn Co.*, 89 F. Supp. 643 (D. C. W. D. N. Y. 1950).

[3] *Otto* v. *Hirl*, 89 F. Supp. 72, 74 (D. C. S. D. Iowa 1952).

in moving for transfer.[4] It has been said, on the other hand, that "[s]ection 1404 (a) . . . contemplates statutory venue and not consent venue." [5]

With regard to the particular problem in this case, which has arisen most often, a majority of the District Courts which have considered the problem have ruled against the Court's "plain" meaning of the statute. At least seven District Courts have ruled that, because of the defendant's consent to have the action go forward there, a district is one where the action "might have been brought," even though it is a place where the defendant might either have objected to the venue, or avoided process, or both had the action been brought there originally.[6] At least three District Courts have held or implied to the contrary, that the defendant's consent is not relevant, and that such a district cannot be one where the action "might have been brought." [7] Two others have simply denied motions by the defendant on the ground that the transferee court was not one where the action "might have been brought," without discussing whether

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[4] *Cain* v. *Bowater's Newfoundland Pulp & Paper Mills, Ltd.*, 127 F. Supp. 949, 950 (D. C. E. D. Pa. 1954).

[5] *Johnson* v. *Harris*, 112 F. Supp. 338, 341 (D. C. E. D. Tenn. 1953).

[6] *Hill* v. *Upper Mississippi Towing Corp.*, 141 F. Supp. 692 (D. C. Minn. 1956); *McGee* v. *Southern Pacific Co.*, 151 F. Supp. 338 (D. C. S. D. N. Y. 1957); *Welch* v. *Esso Shipping Co.*, 112 F. Supp. 611 (D. C. S. D. N. Y. 1953); *Mire* v. *Esso Shipping Co.*, 112 F. Supp. 612 (D. C. S. D. N. Y. 1953); *Cain* v. *Bowater's Newfoundland Pulp & Paper Mills, Ltd.*, 127 F. Supp. 949 (D. C. E. D. Pa. 1954); *Anthony* v. *RKO Radio Pictures*, 103 F. Supp. 56 (D. C. S. D. N. Y. 1951); *Blaski* v. *Howell* (D. C. N. D. Ill., March 14, 1958).

[7] *General Electric Co.* v. *Central Transit Warehouse Co.*, 127 F. Supp. 817 (D. C. W. D. Mo. 1955); *Tivoli Realty* v. *Paramount Pictures*, 89 F. Supp. 278 (D. C. Del. 1950); *Felchlin* v. *American Smelting & Refining Co.*, 136 F. Supp. 577 (D. C. S. D. Calif. 1955). See also *Johnson* v. *Harris*, 112 F. Supp. 338 (D. C. E. D. Tenn. 1953) (dictum).

in moving for transfer the defendant had consented to go forward in the transferee court, or what the effect of that consent would be.[8] Two District Courts have granted the defendants' motion to transfer, making the matter turn on the presence of a number of defendants and the fact that some of them were suable as of right in the transferee court.[9] Two others have found the amenability of the defendant to service of process in the place to which transfer is proposed to be wholly irrelevant to whether the action "might have been brought" there, and have ordered transfer to such a place on the plaintiff's motion even though the defendant did not consent.[10] It simply cannot be said in the face of this experience that the words of the statute are so compellingly precise, so unambiguous, that § 1404 (a) as a matter of "plain words" does not apply in the present case.

The experience in the Courts of Appeals is also revealing. Of the six cases where defendants have moved for transfer, in only two has it been held that the defendant's consent to the transfer is not relevant in determining whether the place to which transfer is proposed is a place where the action "might have been brought," and these are the two decisions of the Seventh Circuit now before us. *Blaski* v. *Hoffman,* 260 F. 2d 317 (C. A. 7th Cir. 1958); *Behimer* v. *Sullivan,* 261 F. 2d 467 (C. A. 7th Cir. 1958).

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[8] *Silbert* v. *Nu-Car Carriers,* 111 F. Supp. 357 (D. C. S. D. N. Y. 1953); *Hampton Theaters, Inc.,* v. *Paramount Film Distributing Corp.,* 90 F. Supp. 645 (D. C. D. C. 1950). See also *Arvidson* v. *Reynolds Metals Co.,* 107 F. Supp. 51 (D. C. W. D. Wash. 1952) (denying the defendants' motion to transfer in part because the plaintiff would not have been amenable to process in the transferee court).

[9] *Ferguson* v. *Ford Motor Co.,* 89 F. Supp. 45 (D. C. S. D. N. Y. 1950); *Glasfloss Corp.* v. *Owens-Corning Fiberglas Corp.,* 90 F. Supp. 967 (D. C. S. D. N. Y. 1950).

[10] *McCarley* v. *Foster-Milburn Co.,* 89 F. Supp. 643 (D. C. W. D. N. Y. 1950); *Troy* v. *Poorvu,* 132 F. Supp. 864 (D. C. Mass. 1955).

The Third Circuit has ruled in favor of transfer on the defendant's motion to a place where the defendant might have objected to the venue, *Paramount Pictures* v. *Rodney,* 186 F. 2d 111 (C. A. 3d Cir. 1951). The First and Second Circuits have ruled in favor of transfer on defendant's motion to a place where the defendant could not have been served with process, *Torres* v. *Walsh,* 221 F. 2d 319 (C. A. 2d Cir. 1955); *In re Josephson,* 218 F. 2d 174 (C. A. 1st Cir. 1954). And the Second and Fifth Circuits have ruled in favor of transfer on defendant's motion to a place where there was neither statutory venue nor a chance to serve the defendant, *Anthony* v. *Kaufman,* 193 F. 2d 85 (C. A. 2d Cir. 1951); *Ex parte Blaski,* 245 F. 2d 737 (C. A. 5th Cir. 1957). All these courts have considered the meaning of the phrase in detail and have held that the place to which transfer was proposed was a place where the action "might have been brought." Thus the Court's view of the meaning of § 1404 (a) is contrary to the rulings of every Court of Appeals but one which has considered the problem, and is contrary to the view of more than half the District Courts as well. Yet the Court maintains that the statute unambiguously means what its says it does.

Surely, the Court creates its own verbal prison in holding that "the plain words" of § 1404 (a) dictate that transfer may not be made in this case although transfer concededly was in the interest of "convenience" and "justice." Moreover, the Court, while finding the statutory words "plain," decides the case by applying, not the statutory language, but a formula of words found nowhere in the statute, namely, whether plaintiffs had "a right to bring these actions in the respective transferee districts." This is the Court's language, not that of Congress. Although it is of course a grammatically plausible interpretation of the phrase "where it might have been brought," it has been, I submit, established that it is not

by any means the only plausible interpretation. In fact, the Court's rephrasing, as distinguished from Congress' phrasing, gives the narrowest possible scope to the operation of § 1404 (a). There can be expected to be very few, if any, alternative forums in a given case where the plaintiff has a "right" to sue, considering that that means places of unobjectionable venue where the defendant is amenable to service of process and where there are no other impediments such as a statute of limitations which the defendant can rely on to defeat the action.

This case, then, cannot be decided, and is not decided, by the short way of a mechanical application of Congress' words to the situation. Indeed, it would be extraordinary if a case which could be so decided were deemed worthy of this Court's attention twelve years after the applicable statute was enacted. To conclude, as the Court does, that the transferee court is inexorably designated by the inherent force of the words "where it might have been brought" is to state a conclusion that conceals the process by which the meaning is, as a matter of choice, extracted from the words.

The problem in this case is one of resolving an ambiguity by all the considerations relevant to resolving an ambiguity concerning the conduct of litigation, and more particularly the considerations that are relevant to resolving an ambiguous direction for the fair conduct of litigation in the federal judicial system At the crux of the business, as I see it, is the realization that we are concerned here not with a question of a limitation upon the power of a federal court but with the place in which that court may exercise its power. We are dealing, that is, not with the jurisdiction of the federal courts, which is beyond the power of litigants to confer, but with the locality of a lawsuit, the rules regulating which are designed mainly for the convenience of the litigants. "[T]he locality of a law suit—the place where judicial authority may be

exercised—though defined by legislation relates to the convenience of litigants and as such is subject to their disposition. . . . [A venue statute] 'merely accords to the defendant a personal privilege respecting the venue, or place of suit, which he may assert, or may waive, at his election.' *Commercial Ins. Co.* v. *Stone Co.*, 278 U. S. 177, 179." *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165, 168. And in that case the Court was merely reiterating considerations already forcefully set out in *General Investment Co.* v. *Lake Shore R. Co.*, 260 U. S. 261, and *Lee* v. *Chesapeake & Ohio R. Co.*, 260 U. S. 653. This basic difference "between the court's power and the litigant's convenience is historic in the federal courts." 308 U. S., at 168.

Applying these considerations to a problem under a different statute but relevant to the present one, namely, whether removal from a state court to a federal court might be had upon the motion of the defendant when the federal court was one where the venue would have been subject to objection, had the action originally been brought there, this Court, speaking unanimously through Mr. Justice Van Devanter, discriminatingly reminded that "[i]t therefore cannot be affirmed broadly that this suit could not have been brought . . . [in the federal court] but only that it could not have been brought and maintained in that court over a seasonable objection by the company to being sued there." This analysis has striking application to the present problem under § 1404 (a), and it is also relevant here that the Court sanctioned removal in that case to a federal court with no statutory venue, partly because "there could be no purpose in extending to removals the personal privilege accorded to defendants by [the venue statutes] . . . since removals are had only at the instance of defendants." *General Investment Co.* v. *Lake Shore R. Co.*, 260 U. S. 261, 273, 275. See also, to the same effect, *Lee* v. *Chesapeake & Ohio R. Co.*, 260

U. S. 653, overruling *Ex parte Wisner,* 203 U. S. 449, and qualifying *In re Moore,* 209 U. S. 490. The rule that statutory venue rules governing the place of trial do not affect the power of a federal court to entertain an action, or of the plaintiff to bring it, but only afford the defendant a privilege to object to the place chosen, is now enacted as part of the Judicial Code. 28 U. S. C. § 1406 (b). And of course it needs no discussion that a defendant is always free voluntarily to submit his person to the jurisdiction of a federal court.

In light of the nature of rules governing the place of trial in the federal system, as thus expounded and codified, as distinguished from limitation upon the power of the federal courts to adjudicate, what are the competing considerations here? The transferee court in this case plainly had and has jurisdiction to adjudicate this action with the defendant's acquiescence. As the defendant, whose privilege it is to object to the place of trial, has moved for transfer, and has acquiesced to going forward with the litigation in the transferee court, it would appear presumptively, unless there are strong considerations otherwise, that there is no impediment to effecting the transfer so long as "convenience" and "justice" dictate that it be made. It does not counsel otherwise that here the plaintiff is to be sent to a venue to which he objects, whereas ordinarily, when the defendant waives his privilege to object to the place of trial, it is to acquiesce in the plaintiff's choice of forum. This would be a powerful argument if, under § 1404 (a), a transfer were to be made whenever requested by the defendant. Such is not the case, and this bears emphasis. A transfer can be made under § 1404 (a) to a place where the action "might have been brought" only when "convenience" and "justice" so dicate, not whenever the defendant so moves. A legitimate objection by the plaintiff to proceeding in the transferee forum will presumably be reflected in a decision that

the interest of justice does not require the transfer, and so it becomes irrelevant that the proposed place of transfer is deemed one where the action "might have been brought." If the plaintiff's objection to proceedings in the transferee court is not consonant with the interests of justice, a good reason is wanting why the transfer should not be made.

On the other hand, the Court's view restricts transfer, when concededly warranted in the interest of justice, to protect no legitimate interest on the part of the plaintiff. And by making transfer turn on whether the defendant could have been served with process in the transferee district on the day the action was brought, the Court's view may create difficult problems in ascertaining that fact, especially in the case of non-corporate defendants. These are problems which have no conceivable relation to the proper administration of a provision meant to assure the most convenient and just place for trial.

Nor is it necessary to reach the Court's result in order to preserve an appropriate meaning for the phrase "where it might have been brought." I fully agree that the final words of § 1404 (a) are words of limitation upon the scope of the provision. But to hold as I would that a district is one where the action "might have been brought" when the defendant consents to going forward with the litigation there, does not remove the quality of those words as a limitation. The words compel the defendant in effect to waive any objections to going forward in the transferee district which he might have had if the action had been brought there, in order to obtain a transfer. The words therefore insure that transfer will not be a device for doing the plaintiff out of any forum in which to proceed, no matter how inconvenient. The words in any case, plainly limit the plaintiff's right to seek a transfer when the defendant does not consent to the change of venue. Moreover, the words may serve to prevent transfer to

courts with a lack of federal power to adjudicate the matter of the dispute which the defendant cannot confer with his consent.[11] In light of the fact that the venue statutes in Title 28, U. S. C., are phrased in terms of where the action "may be brought," or in some cases where it "shall" or "must" be brought,[12] the most obvious limiting significance of the phrase "where it might have been brought" is that it refers to places where, under the venue provisions, the action, "may," "shall," or "must" be brought assuming the existence of federal jurisdiction.[13] In the meaning of federal venue provisions as expounded by this Court, and by Congress in § 1406 (b), these, as has been said, are not only places where, under the applicable provision, no objection to the venue is available to the defendant. They are also places where the defendant consents to be sued.

The relevant legislative history of § 1404 (a) is found in the statement in the Reviser's Notes, accompanying the 1948 Judicial Code, that § 1404 (a) "was drafted in accordance with the doctrine of forum non conveniens." [14] Under that doctrine, the remedy for an inconvenient

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[11] See cases cited in note 1, *supra*.

[12] See 28 U. S. C. §§ 1391, 1392 (a) and (b), 1393 (a) and (b), 1396–1399, 1400 (b), 1401 and 1403.

[13] See Chief Judge Magruder's opinion for the Court of Appeals for the First Circuit in *In re Josephson*, 218 F. 2d 174, 184.

[14] The whole of the statement in the Reviser's Note dealing with subsection (a) of § 1404 is as follows:

"Subsection (a) was drafted in accordance with the doctrine of forum non conveniens, permitting transfer to a more convenient forum, even though the venue is proper. As an example of the need of such a provision, see *Baltimore & Ohio R. Co.* v. *Kepner*, . . . 314 U. S. 44, . . . which was prosecuted under the Federal Employer's Liability Act in New York, although the accident occurred and the employee resided in Ohio. The new subsection requires the court to determine that the transfer is necessary for convenience of the parties and witnesses, and further, that it is in the interest of justice to do so."

forum was not to transfer the action, but to dismiss it. In *Gulf Oil Corp.* v. *Gilbert,* 330 U. S. 501, 506–507, we held that "[i]n all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them." It is entirely "in accordance" with this view of the doctrine of *forum non conveniens* to hold that transfer may be made at the instance of the defendant, regardless of the plaintiff's right as an original matter to sue him in the transferee court, so long as the defendant stipulates to going forward with the litigation there. Indeed, to hold otherwise as the Court does is to limit § 1404 (a) to a much narrower operation than the nonstatutory doctrine of *forum non conveniens.* Investigation has disclosed several *forum non conveniens* cases, one of them in this Court, where dismissal of the action on the defendant's motion was made upon the condition of the defendant's voluntary submission to the jurisdiction of another more convenient forum when that forum was not available to the plaintiff as of right over the defendant's objection. See *Canada Malting Co.* v. *Paterson Steamships, Ltd.,* 49 F. 2d 802, 804, affirmed, 285 U. S. 413, 424; *Giatilis* v. *The Darnie,* 171 F. Supp. 751, 754; *Bulkley, Dunton Paper Co.* v. *The Rio Salado,* 67 F. Supp. 115, 116; *Libby, McNeill & Libby* v. *Bristol City Line of Steamships,* 41 F. Supp. 386, 389; *The City of Agra,* 35 F. Supp. 351; *Strassburger* v. *Singer Mfg. Co.,* 263 App. Div. 518, 33 N. Y. Supp. 2d 424; *Wendel* v. *Hoffman,* 258 App. Div. 1084, 18 N. Y. Supp. 2d 96. See also *Cerro de Pasco Copper Corp.* v. *Knut Knutsen,* 187 F. 2d 990, and *Swift & Co.* v. *Compania Caribe,* 339 U. S. 684, 697–698: "it was improper under the circumstances here shown to remit a United States citizen to the courts of a foreign country without assuring the citizen that respondents would appear in those courts and that security would be given

equal to what had been obtained by attachment in the District Court. The power of the District Court to give a libellant such assurance is shown by *Canada Malting Co.* v. *Paterson Steamships, Ltd.*, 285 U. S. 413, 424 [*supra*]." In view of the familiarity of this device of dismissing for *forum non conveniens* when as of right no other forum was available to plaintiff, upon the defendant's agreement to appear in the more convenient forum, it is almost necessary to suppose, in light of the Reviser's description of § 1404 (a) as "in accordance with the doctrine of forum non conveniens," that transfer under § 1404 (a) may likewise be made where the defendant consents to going forward with the case in the transferee court.

The only consideration of the Court not resting on the "plain meaning" of § 1404 (a) is that it would constitute "gross discrimination" to permit transfer to be made with the defendant's consent and over the plaintiff's objection to a district to which the plaintiff could not similarly obtain transfer over the defendant's objection. To speak of such a situation as regards this statute as "discrimination" is a sterile use of the concept. Mutuality is not an empty or abstract doctrine; it summarizes the reality of fair dealing between litigants. Transfer cannot be made under this statute unless it is found to be in the interest of "convenience" and in the interest of "justice." Whether a party is in any sense being "discriminated" against through a transfer is certainly relevant to whether the interest of justice is being served. If the interest of justice is being served, as it must be for a transfer to be made, how can it be said that there is "discrimination" in any meaningful sense? Moreover, the transfer provision cannot be viewed in isolation in finding "discrimination." It, after all, operates to temper only to a slight degree the enormous "discrimination" inherent in our system of litigation, whereby the sole choice of forum, from among those where service is possible and venue unobjectionable,

is placed with the plaintiff. The plaintiff may choose from among these forums at will; under § 1404 (a) the defendant must satisfy a very substantial burden of demonstrating where "justice" and "convenience" lie, in order to have his objection to a forum of hardship, in the particular situation, respected.

In summary, then, the "plain meaning" of § 1404 (a) does not conclude the present case against the transfer, for the statute, as applied in this case, is not "plain" in meaning one way or another, but contains ambiguities which must be resolved by considerations relevant to the problem with which the statute deals. Moreover, the most obvious significance for the set of words here in question, considered as self-contained words, is that they have regard for the limitations contained in the regular statutory rules of venue. Those rules, it is beyond dispute, take into account the consent of the defendant to proceed in the forum, even if it is not a forum designated by statute. And the doctrine of *forum non conveniens* "in accordance with" which § 1404 (a) was drafted, also took into account the defendant's consent to proceed in another forum to which he was not obligated to submit. Nor can a decision against transfer be rested upon notions of "discrimination" or of unfairness to the plaintiff in wrenching him out of the forum of his choice to go forward in a place to which he objects. In the proper administration of § 1404 (a), such consequences cannot survive the necessity to find transfer to be in the interests of "convenience" and "justice," before it can be made. On the other hand, to restrict transfer as the Court does to those very few places where the defendant was originally amenable to process and could have had no objection to the venue is drastically to restrict the number of situations in which § 1404 (a) may serve the interests of justice by relieving the parties from a vexatious forum. And it is to restrict the operation of the section capriciously, for

such a drastic limitation is not counseled by any legitimate interest of the plaintiff, or by any interest of the federal courts in their jurisdiction. The defendant's interest of course is not involved because he is the movant for transfer.

The essence of this case is to give fair scope to the role of § 1404 (a) in our system of venue regulations, that is, a system whereby litigation may be brought in only a limited number of federal districts, which are chosen generally upon the basis of presumed convenience. Two extremes are possible in the administration of such a system, duly mindful of the fact that in our jurisprudence venue does not touch the power of the court. (1) All venue may be determined solely by rigid rules, which the defendant may invoke and which work for convenience in the generality of cases. In such an extreme situation there would be no means of responding to the special circumstances of particular cases when the rigid venue rules are inappropriate. (2) At the other extreme there may be no rigid venue provisions, but all venue may be determined, upon the defendant's objection to the plaintiff's choice of forum, by a finding of fact in each case of what is the most convenient forum from the point of view of the parties and the court. The element of undesirability in the second extreme is that it involves too much preliminary litigation; it is desirable in that it makes venue responsive to actual convenience. The first extreme is undesirable for according too little, in fact nothing, to actual convenience when the case is a special one; it is desirable in that it does away with preliminary litigation.

If anything is plain, from its history and from its words, it is that § 1404 (a) means to afford a balance, a compromise, between these two extremes. It is in this spirit that its provisions must be read. In the ordinary course the regular venue rules are to prevail, with no preliminary litigation to determine the actual convenience. But the

statute means to allow for cases where the ordinary rules are found to work a great hardship; there, actual convenience is to prevail. We should therefore not, as the Court has done, impose limitations upon the operation of § 1404 (a) which have no relation to ordinary considerations governing the place of trial in the federal system and which arbitrarily prevent actual convenience from determining the place of trial. The limitations upon the section should only be those which recognize legitimate countervailing considerations to the free reign of actual convenience, namely limitations regarding the power of the federal courts to adjudicate, and limitation recognizing the historic privilege of the defendant, should he choose to exercise it, to object to the place of trial unless it is affirmatively designated by the venue statute.

It may be urged in answer to this analysis that if transfer is available as a matter of "convenience" and "justice" in every case in which the defendant consents to going forward in the transferee court, § 1404 (a) will entail burdensome preliminary litigation and may, if improperly administered, prove vexatious to plaintiffs. Thus, even arbitrary limitations, such as the Court imposes, may be said to be warranted. In effect this argument against transfer in situations like the present implies distrust in the ability and character of district judges to hold the balance even, that is, to dispose quickly of frivolous contentions and to prevent transfer from proving unduly prejudicial to plaintiffs while according it its proper scope to deal with cases of real inconvenience. "Such apprehension implies a lack of discipline and of disinterestedness on the part of the lower courts, hardly a worthy or wise basis for fashioning rules of procedure. It reflects an attitude against which we were warned by Mr. Justice Holmes, speaking for the whole Court, likewise in regard to a question of procedure: 'Universal distrust creates universal incompe-

tence.' *Graham* v. *United States*, 231 U. S. 474, 480." *Kerotest Mfg. Co.* v. *C-O-Two Co.*, 342 U. S. 180, 185. As in that case, doubts here should be resolved in favor of the competence of the District Courts wisely to administer § 1404 (a). Whatever salutary effect that section is to have must in any event depend upon due appreciation by district judges of the relevant considerations involved in ordering a transfer. Nothing is to be gained by parceling out the areas of their discretion mechanically, making distinctions which have no relevance to the manner in which venue provisions are ordinarily administered in the federal courts. I would therefore permit considerations of "convenience" and "justice" to be operative whenever the defendant consents to going forward in the transferee court on the same terms on which he was sued in the original forum. Against a rare abuse, there will always be available the corrective supervisory power of the Courts of Appeals, and ultimately of this Court.

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PARR ET AL. *v.* UNITED STATES.

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

No. 391. Argued April 28, 1960.—Decided June 13, 1960.

Petitioners were indicted on 20 counts in a Federal District Court for using the mails to defraud, in violation of 18 U. S. C. § 1341, and conspiring to do so, in violation of 18 U. S. C. § 371. The indictment charged that together they controlled a School District and its depository bank, the assessment and collection of school taxes and the expenditure of school funds, and that they entered into and carried out a scheme to defraud the School District, the State and the taxpayers of each by misappropriating and embezzling funds and property of the School District. The specific offense charged in each of the first 19 counts was that, for the purpose of executing the scheme, petitioners caused a particular letter, check, tax statement, tax receipt or invoice to be placed in, or received from, an authorized depository for United States mail. Count 20 charged that petitioners conspired to commit the offense set out in the first count and committed specific overt acts to that end. They were convicted, and the convictions were sustained by the Court of Appeals. *Held:* Although the indictment charged, and the evidence tended to show, that petitioners devised and practiced a scheme to defraud the School District by misappropriating and embezzling its money and property, neither the indictment nor the evidence supports the judgments, because the indictment did not charge, and the evidence did not show, any use of the mails "for the purpose of executing such scheme," within the meaning of 18 U. S. C. § 1341. Pp. 371–394.

(a) The indictment did not expressly or impliedly charge, and there was no evidence tending to show, that the taxes assessed were excessive, "padded" or in any way illegal; nor did the Court submit any such issue to the jury. Pp. 385–388.

(b) In the light of the particular circumstances of this case, and especially of the facts that (1) the School Board was legally required to collect and assess taxes, (2) the indictment did not charge nor the proofs show that the taxes assessed and collected were excessive, "padded" or in any way unlawful, (3) no such issue was submitted to, or determined by, the jury, (4) the Board was compelled by state law to collect and receipt for the taxes, and

(5) it was legally compelled to use the mails in doing so, it must be concluded that the legally compelled mailings complained of in the first 16 counts of the indictment were not shown to have been made "for the purpose of executing such scheme," within the meaning of § 1341. Pp. 388–391.

(c) On the record in this case, it cannot be said that the mailings complained of in the first 16 counts of the indictment constituted false pretenses and misrepresentations to obtain money. Pp. 391–392.

(d) As to the charges in Counts 17, 18 and 19 that two of the petitioners fraudulently obtained gasoline and other filling station products and services for themselves upon the credit card and at the expense of the School District, knowing that the oil company would use the mails in billing the School District for these things, it cannot be said that the mailings in question were "for the purpose of executing" the scheme to defraud, since the scheme had reached fruition when these two petitioners received the goods and services complained of and before the mailings occurred. Pp. 392–393.

(e) Inasmuch as Count 20 charged petitioners with conspiring to commit the offense complained of in Count 1, and inasmuch as, on this record, that count cannot be sustained, it follows that petitioners' convictions upon Count 20 cannot stand. P. 393.

265 F. 2d 894, reversed.

Abe Fortas and *T. Gilbert Sharpe* argued the cause for petitioners. With them on the brief were *Paul A. Porter, Charles A. Reich* and *Luther E. Jones, Jr.*

Assistant Attorney General Wilkey argued the cause for the United States. With him on the brief were *Solicitor General Rankin, Edgar O. Bottler, Beatrice Rosenberg* and *Eugene L. Grimm.*

MR. JUSTICE WHITTAKER delivered the opinion of the Court.

Petitioners, nine individuals and two state banking corporations,[1] were indicted in 20 counts in the United

[1] The petitioners are George B. Parr, D. C. Chapa, B. F. Donald, Octavio Saenz, Jesus G. Garza, Santiago Garcia, Oscar Carrillo, Sr.,

States District Court for the Southern District of Texas, *Houston Division,* for mail fraud and conspiracy to commit mail fraud. The first 19 counts charged that petitioners devised, prior to September 1, 1949, and continued to February 20, 1954, a scheme to defraud the Benavides Independent School District ("District") of Duval County, Texas, the State of Texas, and the taxpayers of each, and that they used the mails for the purpose of executing the scheme, in violation of 18 U. S. C. § 1341.[2] The twentieth count charged that petitioners conspired to commit the substantive offense charged in the first count, in violation of 18 U. S. C. § 371.[3]

After their various motions, including one challenging venue and asking transfer of the action to the Corpus Christi Division of the court, and one for a bill of particulars, were denied, petitioners entered pleas of "not guilty" and in due course the case was put to trial before a jury. The jury returned verdicts finding petitioners

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O. P. Carrillo, Jesus Oliveira, Texas State Bank of Alice and San Diego State Bank, all of Duval County, Texas, in the *Corpus Christi Division* of the United States District Court for the Southern Division of Texas.

[2] Section 1341 provides, in pertinent part, as follows:

"Whoever, having devised . . . any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses . . . for the purpose of executing such scheme . . . places in any post office or authorized depository for mail matter, any matter . . . to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon . . . any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both." 18 U. S. C. § 1341.

[3] Section 371 provides, in pertinent part, as follows:

"If two or more persons conspire . . . to commit any offense against the United States, . . . and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both. . . ." 18 U. S. C. § 371.

guilty as charged—some of them on all counts and others on only some of the counts. After denying timely motions in arrest of judgment and for a new trial, the court entered judgments upon the verdicts, convicting petitioners and sentencing them to imprisonment.[4] On appeal, the judgments were affirmed, 265 F. 2d 894, and, to determine questions of importance relative to the scope and proper application of § 1341, we granted certiorari. 361 U. S. 912.

Petitioners' principal contentions here are: (1) that, although the indictment charged and the evidence tended to show that petitioners devised and practiced a scheme to defraud the District by the local or state crimes of misappropriating and embezzling its money and property, neither the indictment nor the proofs support the judgments, because the indictment did not charge, and the proofs did not show, any use of the mails "for the purpose

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Names	*Counts on which convicted*	*Sentences*
George B. Parr	All	Aggregate of 10 years and $20,000 fine.
D. C. Chapa	All	Aggregate of 5 years.
B. F. Donald	1–14, 17–20	Aggregate of 4 years.
Jesus G. Garza	All but 7	3 years, but suspended on probation.
Santiago Garcia	4, 5, 8, 13, 14, 15, 17–19	3 years, but suspended on probation.
Octavio Saenz	All but 7	Aggregate of 3 years.
Oscar Carrillo, Sr.	All	Aggregate of 4 years.
O. P. Carrillo	20	2 years, but suspended on probation.
Jesus Oliveira	20	2 years, but suspended on probation, and fine of $7,000.
Texas State Bank of Alice	All	Fine of $2,000.
San Diego State Bank	1–3, 7, 10–12, 16, 20	Fine of $900.

of executing such scheme" within the meaning of that phrase as used in § 1341, and (2) that the court's charge did not submit to the jury any theory or issue of fact that could constitute use of the mails "for the purpose of executing such scheme." The nature of these contentions requires a detailed examination of the indictment, the evidence adduced, and of the issues of fact actually tried and submitted to the jury, for its resolution, by the court in its charge.

We turn first to the indictment. Summarized as briefly as fair statement permits, the first count alleged that the District is a public corporation organized under the laws of Texas to acquire and hold the facilities necessary for, and to operate, the public schools within the District,[5] and, for those purposes, to assess and collect taxes; that the laws of Texas vest exclusive control of the property and management of the affairs of the District in its Board of Trustees, consisting of seven members; that prior to September 1, 1949, petitioners devised, and continued to February 20, 1954, a scheme to defraud the District, the State of Texas, and the taxpayers of each, and to obtain their money and property for themselves and their relatives.

It then alleged that, as part of the scheme, petitioners would falsely represent that district checks were issued, and its funds disbursed, only to persons and concerns for services rendered and materials furnished to the District, and that its Annual Reports to the State Commissioner of Education were correct.

It next alleged that, as a further part of the scheme, seven of the petitioners would establish and maintain

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[5] The District operates the public schools in the towns of Benavides and Freer in Duval County, Texas. The schools in each town have slightly more than 1,000 pupils.

domination and control of the District; [6] that three of them would acquire and maintain control of petitioner, the Texas State Bank of Alice, which was the authorized depository of the District's funds,[7] and that one of them would acquire and maintain control of petitioner, the San Diego State Bank.[8]

It then alleged that it was a further part of the scheme that petitioners would send or cause to be sent letters, tax statements, checks in payment of taxes, and receipted tax statements, through the United States mails; that the checks and moneys received by the District from taxpayers and others would be deposited to the credit of the District in the authorized depository bank, against which petitioners would issue district checks payable to fictitious persons, and to existing persons, without consideration (falsifying the District's records to show that such checks were issued in payment for services or materials), and would cash such checks, upon forged endorsements or without endorsements of the payees, at the depository bank and convert the proceeds; that they would open accounts and deposit checks received in payment of taxes in unauthorized banks, and that petitioner Chapa would withdraw and convert the funds; that they would convert and cash checks received by the District in payment of taxes and keep the proceeds; that they would obtain merchandise for themselves on the credit and at the expense of the District; that they would prepare, and the Board of Trustees would approve, false Annual Reports of the District and mail them to the State Commissioner of

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[6] The persons named in the allegation were petitioners Parr, Chapa, Oscar Carrillo, Sr., O. P. Carrillo, Saenz, Garza and Garcia.

[7] The persons named in the allegation were petitioners Parr, Donald and Oliveira.

[8] The allegation was that control of the San Diego State Bank would be maintained by petitioner Parr.

Education at Austin, Texas; that they would conceal their fraudulent misuse of district funds by destroying canceled checks, bank statements and other records of the District and the microfilmed records of the petitioner banks showing the fraudulent checks drawn against and paid out of the District's accounts.

The last paragraph of the count—the only paragraph purporting to charge an offense—charged that petitioners on September 29, 1952, for the purpose of executing the scheme, caused to be taken from the post office, in the Houston Division of the court, a letter addressed to Humble Oil & Refining Company, Houston, Texas.[9]

Each of Counts 2 through 19 adopted by reference all allegations of the first count, except those contained in the last paragraph of that count which charged a specific offense against petitioners, and then proceeded to allege that on a stated date the petitioners, for the purpose of executing the scheme, "caused" a particular letter, tax statement, check, tax receipt or invoice to be placed in or taken from an authorized depository for United States mail in the Houston Division of the court.[10] Doubtless

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[9] The letter referred to was one by the District of Sept. 26, 1952, to Humble Oil & Refining Co., Houston, Texas, giving notice of a modification in the assessed value of the latter's property in the District to $2,542,920 for the year 1952, and advising that the amount of tax, at the rate of $1.75 per $100, was $44,501.10.

[10] The second count described a letter by the Secretary of the Board of Equalization of the District, dated July 18, 1952, to Humble Oil & Refining Co., Houston, Texas, giving notice of a hearing to be held by that Board at Benavides on Aug. 1, 1952, to determine the taxable value of the latter's lands in the District for the year 1952.

The third count described a check of Humble Oil & Refining Co., Houston, Texas, dated Sept. 26, 1952, payable to the Tax Collector in the amount of $43,166.07, and the accompanying letter of the taxpayer, dated Sept. 29, 1952, advising that the attached check was in payment of "the correct taxes [of] $44,501.10" on the taxpayer's property in the District for 1952, less "the 3 per cent discount for

the charge in each of these counts was so limited, in the light of Rule 18 of Federal Rules of Criminal Procedure fixing venue over crimes in the District and *division* where

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September payment of $1,335.03 leaving a net of $43,166.07 as evidenced by our check."

The fourth count described a check of Humble Oil & Refining Co., Houston, Texas, dated Sept. 24, 1953, payable to the Tax Collector in the amount of $53,807.35, and the accompanying letter of the taxpayer, dated Sept. 24, 1953, advising that the attached check was in payment of taxes for the year 1953.

The fifth count described a letter by the Secretary of the Board of Equalization, dated May 20, 1953, to Humble Oil & Refining Co., Houston, Texas, giving notice of a hearing to be held by that Board at Benavides on June 2, 1953, to determine the taxable value of the latter's property in the District for the year 1953.

The sixth count described a check of Humble Oil & Refining Co., dated Sept. 25, 1951, payable to the Tax Collector in the amount of $34,285.09, and the accompanying letter of the taxpayer, dated Sept. 26, 1951, advising that the attached check was in payment of taxes for the year 1951.

The seventh count described a letter of Dec. 3, 1952, by the District to C. W. Hahl Co., Houston, Texas, complying with a request for an "auxiliary tax notice covering Surface Fee in the Rosita Townsite."

The eighth, ninth and tenth counts described checks of C. W. Hahl Co., Houston, Texas, dated Sept. 25, 1953, Sept. 21, 1951 and Sept. 26, 1952, respectively, payable to the Tax Collector in the amounts of $544.21, $555.25 and $451.70, respectively, and accompanying letters of the taxpayer advising that the attached checks were in payment of taxes on certain property in the District for the years 1953, 1951 and 1952, respectively.

The eleventh, twelfth and thirteenth counts described voucher checks of the Texas Company, Houston, Texas, dated Sept. 27, 1951, Sept. 26, 1952, and Sept. 30, 1953, respectively, payable to the Tax Assessor in the amounts of $13,532.64, $13,078.72 and $14,665.04, respectively, in payment of taxes on certain property in the District for the years 1951, 1952 and 1953, respectively.

The fourteenth count described a check of the Texas Pipe Line Co., Houston, Texas, dated Sept. 30, 1953, payable to the Tax Collector in the amount of $330.84, and the taxpayer's accompanying

committed,[11] in order to give the Houston Division venue over this action, and consequently the indictment does not count upon petitioners' full uses of the mails, for they were principally made in Duval County in the Corpus Christi Division of the court.

The twentieth count charged that throughout the relevant period petitioners feloniously conspired and agreed among themselves and with others to commit "the offenses . . . which are fully described and set out in the first count of this indictment," and that, to effect the object of the conspiracy, petitioners committed specified overt acts.[12]

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letter advising that the attached check was in payment of taxes for the year 1953.

The fifteenth and sixteenth counts described checks of J. E. Beall, Houston, Texas, dated Sept. 30, 1953 and Oct. 24, 1952, respectively, payable to "Benavides Indep. School Dist." in the amounts of $415.72 and $355.55, respectively, in payment of taxes for the years 1953 and 1952, respectively.

Count 17 described an invoice or statement of Continental Oil Co., Houston, Texas, dated May 25, 1953, to the District for merchandise in the amount of $273.85; Count 18 described a check of the District dated Mar. 31, 1953, payable to Continental Oil Co. in the amount of $353.02, and Count 19 described a statement of Continental Oil Co., dated Mar. 20, 1953, to the District for merchandise in the amount of $353.02, which was paid by the District's check described in Count 18.

[11] Rule 18 of Fed. Rules Crim. Proc. provides:

"Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed, but if the district consists of two or more divisions the trial shall be had in a division in which the offense was committed."

[12] The overt acts alleged were the sending by mail of tax receipts to Humble Oil & Refining Co. at Houston, Texas, on Oct. 4, 1951, to the Texas Co. at Houston, Texas, on Oct. 11, 1951, and Oct. 15, 1953, and to the Texas Pipe Line Co. at Houston, Texas, on Oct. 7, 1952; the deposit by the Texas Pipe Line Co. in the mails at Houston, Texas, on Sept. 30, 1952, of a letter and attached check for $325.07 addressed to the assessor-collector at Benavides, Texas; that D. C. Chapa converted and cashed at the Merchants Exchange Bank,

We now look to the evidence. Condensed to pith, the 6,000 pages of evidence disclose that the District, acting through its Board of Trustees of seven members, operated the public schools in the towns of Benavides and Freer, each having slightly more than 1,000 pupils. From time to time the Board met to appoint (a) an assessor-collector, (b) an independent firm of engineers and accountants to assist the assessor-collector in determining the ownership and valuation of property—particularly mineral lands and complex fractional interests therein—in the District, (c) a Board of Equalization, and (d) a depository of the District's funds, and also met (e) to consider and propose to the electorate the authorization and sale of bonds in 1949 ($265,000) and in 1950 ($362,500) to finance the construction of new school facilities.

In actual operations the engineering-accounting firm would annually prepare and submit to the assessor-collector a list showing the ownership and its appraisal of the value of the various properties and mineral interests in the District, from which, after the Board of Equalization had completed its work thereon (in June and July), the assessor-collector would prepare the tax rolls for the current year and therefrom prepare and send out the tax statements by mail, and on receipt of checks in payment of taxes (the great majority of which were received in the mails) would—with exceptions later noted—deposit them to the credit of the District in the depository bank, and then mail receipts to the taxpayers.

Three members of the Board resided in Freer, and the other four resided in Benavides. Aside from the meet-

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Benavides, Texas, checks payable to the District assessor-collector, (1) of J. E. Beall for $355.55 on Nov. 8, 1952, (2) of Barbara Oil Co. for $361 on Nov. 15, 1952, (3) of O. W. Greene for $298.43, (4) of Peal Properties for $230.92, (5) of Allen Martin for $300.82 on Nov. 22, 1952, and (6) of Jones-Laughlin Supply for $320.15 on Oct. 17, 1952.

ings for the purposes above stated, the Trustees rarely met as a board. Each group, rather independently, operated the schools in its town, and the actual costs of operation were about the same in each town.[13] But the Benavides members handled generally the day-to-day business of the District, including the staffing and operation of its office, the keeping of its books and records, the making of its contracts, its relations with the assessor-collector, the Annual Report to the State Commissioner of Education (to obtain from the State the amount per pupil prescribed to be paid to such school districts by the Texas law) and the routine disbursement of its funds.

Petitioners Saenz, Garza and Garcia were three of the four Benavides members of the Board. Petitioners Oscar Carrillo, Sr., and O. P. Carrillo were, respectively, the secretary of and the attorney for the Board. Petitioner Chapa was the assessor-collector. Petitioner Parr was the president and principal stockholder of petitioner Texas State Bank—the authorized depository of the District's funds—and of petitioner San Diego State Bank, and there was evidence that, although having no official connection with the District, he practically dominated and controlled its affairs, kept its books and records in his office, outside the District, until July 1951, and countersigned all its checks after June 1950. Petitioner Donald was the cashier and administrative manager of the Texas

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[13] The actual costs of operating the schools at Freer were about $200,000 per year. They were estimated to be approximately the same amount at Benavides. Although there was evidence estimating the District's total tax assessments, not collections, at about $400,000 for 1949, at about $650,000 for 1952, and the tax rolls show a total tax assessment of $519,613.51 for 1953, the Board's records show tax collections of $310,840.59 for 1949, $295,161.25 for 1950, $370,852.42 for 1951 and $385,084.96 for 1952. The Board had other income, including payments from Duval County and the pupil per capita amount paid by the State, of about $140,000 per year.

State Bank, and petitioner Oliveira was a director of that bank.

There was evidence that throughout the relevant period the District's funds, in large amounts, were misappropriated, converted, embezzled and stolen by petitioners. It tended to show that four devices were used for such purposes:

(1) At least once each month numerous district checks were issued against both its building and maintenance accounts in the depository bank payable to fictitious persons and were presented in bundles, totaling from $3,000 to $12,000, to the depository bank and, under the supervision of petitioner Donald, were cashed by it, without endorsements, and the currency was placed and sealed in an envelope and handed to the presenting person for delivery to petitioner Parr. The evidence tended to show that no less than $120,000 of the District's funds were misappropriated in this way. However, no one of these acts is charged as an offense by the indictment.

(2) At least once each month large numbers of district checks were issued to petitioners, other than Donald and the two banks, often in assumed names or in the names of members of their families, purporting to be in payment for services rendered or materials furnished to the District but which were not rendered or furnished, which checks were presented to the depository bank and, under the supervision of petitioner Donald, were cashed by it, often without or upon forged endorsements.[14] The

[14] Petitioners Saenz, Garcia, Garza, Oliveira and Chapa regularly received district payroll checks, sometimes in their own names but usually under one or more fictitious names, for services not rendered. Saenz regularly received eight payroll checks in various names; Garcia regularly received payroll checks in the name of his daughter, so did Garza; Oliveira regularly received such checks, sometimes payable to him and at other times to his implement company. Chapa regularly received three such checks each month in various names. All

evidence tended to show that no less than $65,000 of the District's funds were misappropriated in this way. But again no one of these acts is charged as an offense by the indictment.

(3) Petitioner Chapa converted district checks received by mail in payment of taxes, cashed the same—some at a local bank and some at the depository bank—upon unauthorized endorsements, and misappropriated the proceeds.[15]

(4) Petitioners Oscar Carrillo, Sr., and Garza obtained gasoline and oil for themselves upon the credit card and at the expense of the District.[16] Use of the mails by "causing" the oil company to place its invoices for these goods in the mails and to take the District's check in payment from the mails in Houston, constitutes the basis of Counts 17, 18 and 19 of the indictment.[17]

The letters, checks and invoices which Counts 1 through 19 of the indictment charge were "caused" by petitioners to be placed in or taken from the mails in Houston, were all offered and received in evidence. Having fully stated the substance of them in notes 9 and 10, we do not repeat it here. The evidence also tended to prove the overt acts alleged in the twentieth count of the indictment.[18]

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of the checks mentioned were for from $100 to $125. A payroll check for $500 was issued monthly in the name of Parr's brother-in-law, who rendered no services for the District.

[15] Included in the checks so converted and cashed by Chapa were the checks of J. E. Beall for $415.72 and for $355.55, described in the fifteenth and sixteenth counts, but there was evidence that he similarly converted and cashed other district checks totaling about $25,000.

[16] There was evidence, too, that petitioner O. P. Carrillo procured the remodeling of his law office and new office furniture and equipment on the credit and at the expense of the District to the extent of about $2,500.

[17] See note 10 re Counts 17, 18 and 19.

[18] See note 12.

We now proceed to examine the court's charge to determine what theories and issues of fact were predicated by the court and submitted for resolution by the jury. Relative to Counts 1 through 19 of the indictment, the court, after reminding the jury that the indictment had been read to them at the beginning of the trial and that they would have it with them for study during their deliberations in the jury room, read aloud § 1341, defined numerous words and phrases, cautioned on many scores, including the weight to be given to the testimony of "accomplices," stressed the Government's burden of proof, and then proceeded to give the one verdict-directing charge covering those counts which, in pertinent part, was as follows:

> "Applying the law to the first 19 counts of the indictment, if you believe beyond a reasonable doubt that the defendant George B. Parr and the other defendants charged and triable in Count One of the indictment considering each separately, did the things that it is alleged that he did do in the first count of the indictment, and at the time that it occurred there existed a scheme to defraud, and that, as a result of such scheme, the mails were used necessarily or incidentally to the carrying out of that scheme, and, as a result thereof, . . . he did cause the defrauding or obtaining of property by false pretenses and representations in any of the particulars set forth therein . . . and that he used the United States Mails as set forth in Count One, . . . then it becomes your duty . . . to find such defendant or defendants guilty as charged in the first count of the indictment and so find by your verdict. . . . The same reasoning and instructions apply to each of the first nineteen counts of the indictment and as to each of the defendants charged and triable in each of the first nineteen counts of the indictment."

Relative to the twentieth count, the court, after reading to the jury § 371, telling them that the essence of the charge "is an agreement to use the mails to defraud," defining "conspiracy," commenting on "circumstantial evidence," and stressing the Government's burden of proof, proceeded to give the one verdict-directing charge covering that count which, in pertinent part, was as follows:

> "Therefore, with reference to the 20th count, if you believe as to any of the alleged conspirators that that person, together with at least one other, did the things charged against him in such count . . . to effect the objects of the alleged conspiracy, and thereafter there was done one or more of the overt acts set forth in such count . . . then it becomes your duty under the law as to such defendant or defendants that you so believe as to such 20th count were guilty, to so say by your verdict . . . ." [19]

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[19] Before the giving of the charge, petitioners' counsel, among numerous requests for charge, had requested the court to charge the jury as follows:

"You are further instructed that if the use of the mails involved in each of the first 19 counts of the indictment was solely for the purpose of collection of taxes by the Benavides Independent School District, or for the purpose of payment of same by taxpayers, or if you have a reasonable doubt in regard thereto, you will find the Defendants and each of them, 'Not Guilty,' as to each of the first 19 counts of the indictment."

A similar charge was requested with respect to the twentieth count. Both requests were denied.

After the court's charge, counsel for petitioners excepted to the charge on the grounds, among others, that it did "not apply the law given to the facts in any way," was "an abstract instruction which nowhere applies the complete law . . . to the facts in this case," and, with particular reference to the twentieth count, did not instruct the jury "as to the exact essential elements of the offense involved in the first count of the indictment."

In the light of this review of the indictment, the evidence adduced and the court's charge to the jury, we return to the questions presented by petitioners. There can be no doubt that the indictment charged and the evidence tended strongly to show that petitioners devised and practiced a brazen scheme to defraud by misappropriating, converting and embezzling the District's moneys and property. Counsel for petitioners concede that this is so. But, as they correctly say, these were essentially state crimes and could become federal ones, under the mail fraud statute, only if the mails were used "for the purpose of executing such scheme." [20] Hence, the question is whether the uses of the mails that were charged in the indictment and shown by the evidence properly may be said to have been "for the purpose of executing such scheme," in violation of § 1341. Petitioners say "no." The Government says "yes."

Specifically, petitioners' position is that the School Board was required by law to assess and collect taxes for the acquisition of facilities for, and to maintain and operate, the District's schools; that the taxes, assessed in obedience to that duty and for those purposes, were not charged in the indictment or shown by the evidence to have been in any way illegal, and must therefore be assumed to have been entirely lawful; that to perform its duty to assess and collect such taxes, the Board was both legally authorized and compelled to cause the mailing of the letters and their enclosures (tax statements, checks and receipts) complained of in the indictment, and hence those mailings may not be said to have been "for the purpose of executing such scheme," in violation of § 1341.

The Government, on the other hand, contends, first, that it was not necessary to charge or prove that the taxes were unlawful, for it is its view that once the scheme to

[20] 18 U. S. C. § 1341, quoted in note 2.

defraud was shown to exist, the subsequent mailings of the letters and their enclosures, even though legally compelled to be made, constituted essential steps in the scheme and, in contemplation of § 1341, were made "for the purpose of executing such scheme"; but it asserts that, in fact, it was *impliedly* charged in the indictment and shown by the evidence that the taxes were illegal in that they were assessed, collected and accumulated in excess of the District's needs in order to provide a fund for misappropriation, and, second, that the indictment charged and the evidence showed that the mailings *impliedly* pretended and falsely represented that the tax moneys would be used only for lawful purposes, and, hence, those mailings were caused for the purpose of obtaining money by false pretenses and misrepresentations, in violation of § 1341.

After asserting complete novelty of the Government's position and that no reported case supports it, counsel for petitioners point to what they think would be the "explosively expanded" and incongruous results from adoption of the Government's theory, *e. g.,* making federal mail fraud cases out of the conduct of a doctor's secretary or a business concern's billing clerk or cashier in mailing out, in the course of duty, the employer's lawful statements with the design, eventually executed, of misappropriating part of the receipts—the aptness of which supposed analogies, happily, we are not called on to determine. But petitioners' counsel concede that if such secretary, clerk or cashier—and similarly a member of a School Board—improperly "pads" or increases the amounts of the statements and causes them to be mailed to bring in a fund to be looted, such mailings, not being those of the employer (or School Board), would not be duty bound or legally compelled and would constitute an essential step "for the purpose of executing [a] scheme" to defraud, in violation of § 1341. They then repeat and stress their

claim that here the indictment did not allege, and there was no evidence tending to show, that the taxes assessed and collected were excessive, "padded" or in any way illegal, that the court did not submit any such issue to the jury and that such was not the Government's theory.

It is clear and undisputed that the School Board was under an express constitutional mandate to levy and collect taxes for the acquisition of facilities for, and to maintain and operate, the schools of the District, Constitution of Texas, Art. 7, § 3,[21] and was required by statute to issue statements for such taxes and to deliver receipts upon payment.[22]

The Texas laws leave to the discretion of such school boards the valuation of properties and the fixing of the tax rate, within a prescribed limit, in the making of their assessments,[23] and their determinations, made within the prescribed limit as here, are not judicially reviewable, *Madeley* v. *Trustees of Conroe Ind. School Dist.,* 130 S. W. 2d 929, 934 (Tex. Civ. App.), except enforcement may be enjoined for fraud.[24] But the question whether the amount of such an assessment might be collaterally attacked, even for fraud, in a federal mail fraud case is not presented here, for after a most careful examination we are compelled to say that the indictment did not expressly or impliedly charge, and there was no evidence tending to show, that the taxes assessed were excessive, "padded" or in any way illegal. Nor did the court submit any such issue to the jury. Indeed, the court refused a charge proffered by counsel for petitioners

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[21] *Madeley* v. *Trustees of Conroe Ind. School Dist.,* 130 S. W. 2d 929, 934 (Tex. Civ. App.).

[22] Vernon's Tex. Rev. Civ. Stat. Art. 2784e.

[23] Vernon's Tex. Rev. Civ. Stat. Arts. 2784e, 2827.

[24] *Madeley* v. *Trustees, supra,* 130 S. W. 2d, at 932; *Kluckman* v. *Trustees,* 113 S. W. 2d 301, 303 (Tex. Civ. App.).

that would have submitted that issue to the jury.[25] Such was not the Government's theory. In fact, the Government took the position at the trial, and argued to the jury, that the taxes assessed and collected were needed by the District for a new "science hall," "office building," "plumbing facilities [and] all sorts of things," and that petitioners' misappropriations not only deprived the District of those needed things but left it "two and one-half years in debt"—a sum several times greater than that said to have been misappropriated by petitioners.

The theory that it was *impliedly* charged and shown that the taxes were illegal in that they were assessed, collected and accumulated in excess of the District's needs in order to provide a fund for misappropriation, was first injected into the case by the Court of Appeals. That court rested its judgment largely upon its conclusion that the assessments were designed to bring in not only "enough money . . . to provide for the legitimate operation of the schools [but also] enough additional . . . to provide the funds to be looted." 265 F. 2d, at 897. We think that theory and conclusion is not supported by the record. As stated, no such fact or theory was charged in the indictment, shown by the evidence or submitted to the jury, and moreover the Government negatived any such possible implication by taking the position at the trial that the assessed taxes were needed for new school facilities and improvements and that the misappropriations deprived the District of those needed things and left it "two and one-half years in debt."

Nor does the Government question that the Board, to collect the District's taxes (largely from nonresident property owners), was required by the state law to use the mails. Indeed, it took the position at the trial, and argued to the jury, that the Board could not "collect these taxes

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[25] See note 19.

from Houston, from the Humble, from The Texas Oil Company, and from the taxpayers all over the State of Texas without the use of the United States mails." The Court of Appeals thought that such legal compulsion placed petitioners "on the horns of a dilemma" because they could not at once contend that the law compelled them to cause the mailings and deny that they did cause them. 265 F. 2d, at 898.

The crucial question, respecting Counts 1 through 16 of the indictment, then comes down to whether the legally compelled mailings of the lawful—or, more properly, what are not charged or shown to have been unlawful—letters, tax statements, checks and receipts, complained of in those counts, properly may be said to have been for the purpose of executing a scheme to defraud because those legally compelled to cause and causing those mailings planned to steal an indefinite part of the receipts.

The fact that a scheme may violate state laws does not exclude it from the proscriptions of the federal mail fraud statute, for Congress "may forbid any . . . [mailings] . . . in furtherance of a scheme that it regards as contrary to public policy, whether it can forbid the scheme or not." *Badders* v. *United States,* 240 U. S. 391, 393. In exercise of that power, Congress enacted § 1341 forbidding and making criminal any use of the mails "for the purpose of executing [a] scheme" to defraud or to obtain money by false representations—leaving generally the matter of what conduct may constitute such a scheme for determination under other laws. Its purpose was "to prevent the post office from being used to carry [such schemes] into effect . . . ." *Durland* v. *United States,* 161 U. S. 306, 314. Thus, as its terms and purpose make clear, "[t]he federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appro-

priate state law." *Kann* v. *United States,* 323 U. S. 88, 95. Therefore, only if the mailings were "a part of the execution of the fraud," or, as we said in *Pereira* v. *United States,* 347 U. S. 1, 8, were "incident to an essential part of the scheme," do they fall within the ban of the federal mail fraud statute.

The Government, with the support of the cases, soundly argues that immunization from the ban of the statute is not effected by the fact that those causing the mailings were public officials [26] or by the fact that the things they caused to be mailed were "innocent in themselves," if their mailing was "a step in a plot." *Badders* v. *United States, supra,* at 394.[27] It then argues that the jury properly could find that the mailings, complained of in the first 16 counts—namely, the letter notice of a modification in assessed valuation, two letters giving notice of hearings before the Board of Equalization to determine taxable value of property, one letter complying with a property owner's request for an "auxiliary tax notice," and 12 checks of taxpayers and their letters of transmittal [28]—were, even if innocent in themselves, each "a step in a plot" or scheme to defraud, and that they were caused to be made "for the purpose of executing such scheme" in violation of § 1341. But it cites no case holding that the mailing of a thing which the law required to be mailed may be regarded as mailed for the purpose of executing a plot or scheme to defraud. Instead, it frankly concedes

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[26] *Bradford* v. *United States,* 129 F. 2d 274, 276 (C. A. 5th Cir.); *Shushan* v. *United States,* 117 F. 2d 110, 115 (C. A. 5th Cir.). See also *Steiner* v. *United States,* 134 F. 2d 931, 933 (C. A. 5th Cir.).

[27] *United States* v. *Earnhardt,* 153 F. 2d 472 (C. A. 7th Cir.); *Holmes* v. *United States,* 134 F. 2d 125, 133 (C. A. 8th Cir.); *Mitchell* v. *United States,* 126 F. 2d 550 (C. A. 10th Cir.); *Stephens* v. *United States,* 41 F. 2d 440 (C. A. 9th Cir.). See also *Ahrens* v. *United States,* 265 F. 2d 514 (C. A. 5th Cir.).

[28] See notes 9 and 10.

that there is no such case. It says that "there is no reported case exactly like this," but expresses its view that this case rests on a factually "unique situation."

We agree that the factual situation is unique, and, of course, agree, too, that the fact there is no reported decision involving similar factual circumstances or legal theories is not determinative. But in the light of the particular circumstances of this case, and especially of the facts (1) that the School Board was legally required to assess and collect taxes, (2) that the indictment did not charge nor the proofs show that the taxes assessed and collected were in excess of the District's needs or that they were "padded" or in any way unlawful, (3) that no such issue was submitted to, nor, hence, determined by, the jury, (4) that the Board was compelled to collect and receipt for the taxes by state law, which, in the circumstances here, compelled it to use and *cause* (here, principally by permitting) the use of the mails for those purposes, we must conclude that the legally compelled mailings, complained of in the first 16 counts of the indictment, were not shown to have been unlawful "step[s] in a plot," *Badders* v. *United States, supra,* 240 U. S., at 394, "part[s] of the execution of the fraud," *Kann* v. *United States, supra,* 323 U. S., at 95, "incident to an essential part of the scheme," *Pereira* v. *United States, supra,* 347 U. S., at 8, or to have been made "for the purpose of executing such scheme," within the meaning of § 1341, for we think it cannot be said that mailings made or caused to be made under the imperative command of duty imposed by state law are criminal under the federal mail fraud statute, even though some of those who are so required to do the mailing for the District plan to steal, when or after received, some indefinite part of its moneys.

Nor, in the light of the facts in this record, can it be said that the mailings complained of in the first 16 counts of the indictment constituted false pretenses and

misrepresentations to obtain money. Surely the letters giving notice of the modification of an assessed valuation and of valuation hearings to be conducted by the Board of Equalization, constituting the basis of Counts 1, 2 and 5, contained no false pretense or misrepresentation. We fail to see how the letter complying with a property owner's request for an "auxiliary tax notice," constituting the basis of Count 7, could be said to be a misrepresentation. And the mailings complained of in the remaining counts, even though "caused" by petitioners, certainly carried no misrepresentations by petitioners for they were checks (and covering letters) of taxpayers in payment of taxes which, so far as this record shows, were in all respects lawful obligations. On this phase of the case, the Government has principally relied on the fact that the Annual Reports of the Board and the depository bank to the State Commissioner of Education, apparently necessary to obtain the amount per pupil allowed by the State to such districts, contained false entries. But the fact is those mailings were not charged as offenses in the indictment, doubtless because they were, as shown, between Benavides and Austin, Texas, and therefore not within the Division, nor hence the venue, of the court.[29]

Counts 17, 18 and 19 of the indictment relate to a different subject. They charged, and there was evidence tending to show, that petitioners Oscar Carrillo, Sr., and Garza fraudulently obtained gasoline and other filling station products and services for themselves upon the credit card and at the expense of the District knowing, or charged with knowledge, that the oil company would use the mails in billing the District for those things. The mailings complained of in those counts were two invoices, said to contain amounts for items so procured by Carrillo and Garza, mailed by the oil company, at Houston, to

[29] Rule 18 of Fed. Rules Crim. Proc., quoted in note 11.

the District, at Benavides, and the District's check mailed to the oil company, at Houston, in payment of the latter invoice. We think these counts are ruled by *Kann* v. *United States, supra.* Here, as in *Kann,* "[t]he scheme in each case had reached fruition" when Carrillo and Garza received the goods and services complained of. "The persons intended to receive the [goods and services] had received [them] irrevocably. It was immaterial to them, or to any consummation of the scheme, how the [oil company] . . . would collect from the [District]. It cannot be said that the mailings in question were for the purpose of executing the scheme, as the statute requires." 323 U. S., at 94.

Inasmuch as the twentieth count charged petitioners with conspiring to commit the offense complained of in Count 1, and inasmuch as, on the facts of this record, that count cannot be sustained, it follows that petitioners' convictions upon the twentieth count cannot stand.

In view of our stated conclusions, it is unnecessary to discuss other contentions made by petitioners.

The strongest element in the Government's case is that petitioners' behavior was shown to have been so bad and brazen, which, coupled with the inability or at least the failure of the state authorities to bring them to justice,[30] doubtless persuaded the Government to undertake this prosecution. But the showing, however convincing, that state crimes of misappropriation, conversion, embezzle-

[30] Petitioners Parr, Chapa and Donald were several times tried in the state court on charges growing out of matters involved in this case. Parr and Donald were ultimately found guilty but their convictions were reversed. *Donald* v. *State,* 165 Tex. Cr. R. 252, 306 S. W. 2d 360 (1957); *Parr* v. *State,* 307 S. W. 2d 94 (Tex. Crim. App. 1957). Chapa was tried on two other indictments returned in the state court, both charging fraudulent conversion of the District's funds. He was acquitted on the first indictment and convicted on the second but his conviction was reversed. *Chapa* v. *State,* 164 Tex. Cr. R. 554, 301 S. W. 2d 127 (1957).

ment and theft were committed does not establish the federal crime of using the mails to defraud, and, under our vaunted legal system, no man, however bad his behavior, may be convicted of a crime of which he was not charged, proven and found guilty in accordance with due process.

Reversed.

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

The petitioners, nine individuals and two banks, were indicted for violations of, and conspiracy to violate, the Mail Fraud Act, 18 U. S. C. § 1341. All were convicted on the conspiracy count, and all but two, who were exonerated on all of the substantive counts, were convicted of eight or more of the nineteen specific mailings charged.

Together these petitioners controlled a public body created under Texas law, the Benavides Independent School District (hereinafter called the District), which administered the public schools within its geographical confines, and dominated the bank serving as depository of the District, designated as such pursuant to statute. Vernon's Tex. Rev. Civ. Stat. Arts. 2763, 2763a. Through their control of the District's fiscal affairs they looted it of at least $200,000 between 1949 and 1953.

The District was vested by Texas law with a limited taxing power, Vernon's Tex. Rev. Civ. Stat. Art. 2784e, and the annual collection of taxes was the primary source of revenue for maintaining its public schools. The District, and therefore these petitioners exercising the powers of the District, assessed and collected an ad valorem property tax which was by law to be devoted exclusively to the maintenance of the public schools. They were empowered to fix the rate of taxation according to projected needs, whether for expenditures or reserves. Vernon's Tex. Rev. Civ. Stat. Arts. 2784e, 2827. Apart from their

duty to confine the tax to school purposes, petitioners' discretionary power to fix the rate was unlimited, except that a maximum rate was fixed by statute. Vernon's Tex. Rev. Civ. Stat. Art. 2784e. In 1951, petitioners raised the tax rate to the statutory maximum, and thereafter taxed at that rate. Pursuant to a scheme devised in 1949, they regularly spent less than the amount collected on the schools, created no reserves, and appropriated a portion of the proceeds to their own uses. When their domination of the District ceased in 1954, school expenditures sharply rose, while tax collections remained substantially unchanged.

Conduct or transactions fall under the Mail Fraud Act if it be established that there existed "any scheme or artifice to defraud" and that the mails were used "for the purpose of executing such scheme or artifice or attempting so to do." Of the nineteen substantive violations charged in this indictment, sixteen were mailings in connection with the tax collection process carried out by petitioners. As to those counts this case presents the question whether the Act is violated by a public officer vested by law with a discretionary power to levy taxes for the purpose of providing funds estimated to meet projected expenditures for a statutorily defined public need for the satisfaction of which the power is entrusted to him, who exercises that power over several years to collect through the mails sums which could as a matter of law be so expended, but a portion of which he at all times, throughout successive years of fixing the tax rate and utilizing the proceeds, actually intends to and does appropriate to his own uses.

Petitioners urge that because the amounts they collected each year were credited to the taxpayers on the District's books, and were not in excess of what they might, had they lawfully applied the proceeds, have expended for school maintenance, the collections were in effect lawful and did not constitute a fraudulent scheme

in the collection of the taxes, so that there was no wrongdoing, nothing illicit, till they misapplied the innocently collected funds. Their case is that it must therefore be concluded that the mailings, which occurred in the course of the exercise of the District's lawful taxing power, were not for the purpose of "executing" their scheme within the meaning of the Act, regardless of the fact that it was established beyond peradventure that their abuse of the District's powers was a seamless fraudulent scheme, conceived and executed as such with every element of the enterprise interdependent with every other.

Insofar as the defense rests on the lawfulness of the isolated act of mailing as a claim of immunity from the Mail Fraud statute, it is without substance. It has long been established that under this Act "[i]ntent may make an otherwise innocent act criminal, if it is a step in a plot." *Badders* v. *United States,* 240 U. S. 391, 394. In fact the heart of petitioners' effort to escape their conviction is the claim that the skulduggeries of which the jury found them guilty do not fall within the scope of the Mail Fraud statute because in sending out the tax bills they were the neutral vehicles of legal compulsion, although at the time that they sent them out, and having full governmental control of the process of controlling revenue and expending it, they had predetermined that the proceeds were not to be fully applied to school purposes but were in part to be diverted into their private pockets. It bespeaks an audacious lack of humor to suggest that the law anywhere under any circumstances requires tax collectors who send out tax bills, and who also have complete control over the returns, to send out bills to an amount which they predeterminedly design to put in part to personal uses. That is certainly not the law of Texas in any event. While it may be assumed that, since the maintenance of the schools was the duty of the District, petitioners were obligated to collect some amount of ad valorem tax for

that purpose, it is undisputed that how much was to be expended, and therefore how much was to be collected, was determined not by Texas law but by the discretion, the voluntary act, of petitioners themselves. No Texas statute required them to collect what they intended to spend to keep the schools running, plus an amount which they intended to misappropriate,[1] and that is precisely what the proof established and the jury found that they did.

Petitioners' claim raises the further question whether, even if the mailings were not immune in themselves, they were too remote from the purpose of the fraudulently designed scheme to be deemed in "execution" of it. Whether a mailing which occurs in discernible relation to a scheme to defraud is an execution of it is a question of the degree of proximity of the mailing to the scheme. The statute was enacted "with the purpose of protecting the public against all such intentional efforts to despoil, and to prevent the post office from being used to carry them into effect . . . ." *Durland* v. *United States,* 161 U. S. 306, 314. Whether the post office was so used must be the Court's central inquiry. If the use of the mails occurred not as a step in but only after the consummation of the scheme, the fraud is the exclusive concern of the States. *Kann* v. *United States,* 323 U. S. 88. The adequate degree of relationship between a mailing which occurs during the life of a scheme and the scheme is of course not a matter susceptible of geometric determination. In *United States* v. *Young,* 232 U. S. 155, we said that it is not neces-

[1] See *Madeley* v. *Trustees,* 130 S. W. 2d 929, 932 (Tex. Civ. App.), and *Kluckman* v. *Trustees,* 113 S. W. 2d 301, 303 (Tex. Civ. App.), both stating that an action will lie to enjoin the collection of taxes on the ground of the Trustees' fraud; and *Stephens* v. *Dodds,* 243 S. W. 710 (Tex. Civ. App.), suggesting that a referendum conferring on the Trustees the power to tax may be void if the tax is not for the statutory purpose.

sary that the scheme contemplate the use of the mails as an essential element, and in *Pereira* v. *United States,* 347 U. S. 1, 8, we found a mailing to be in execution of a scheme because it was "incident to an essential part" of it. The determining question is whether the mailing was designed materially to aid the consummation of the scheme, as, for example, in *Pereira* v. *United States, supra,* by the obtaining of its proceeds through the innocent collection of defendant's fraudulently obtained check by his bank.

For the purposes of the statute, the significance of the relationship between scheme and mailing depends on the interconnection of the parts in a particular scheme. Ordinarily, once the fraud is proved its scope is not a matter of dispute. But when, as here, the fraud involves the abuse of a position of public trust, closer analysis is required. Petitioners seek to denude their scheme of its range and pervasiveness. They construct an artifact whereby their fraudulent scheme was, as it were, intramural, unrelated to taxpayers to whom they sent the tax bills, and so the mails, the ingenuous argument runs, were not used in the fraud because the wrongdoing only arose after the mails had fulfilled their function by bringing the returns. The wrong is thus nicely pigeonholed as embezzlement, without any prior scheme.

The fraudulent, episodic, petty-cash peculations of a clerk at a regulatory agency are frauds upon that agency, and although taxpayers generally are injured by the fraud and in that sense are the ultimate objects of it, the mailings by which the tax proceeds are collected which constitute the vast government funds out of which the agency's funds are taken, are, as a matter of practical good sense by which law determines such issues of causation, see *Gully* v. *First National Bank,* 299 U. S. 109, 117–118, too remote from the scheme to be deemed in execution of it. But to analogize petitioners' scheme to a conven-

tional case of peculation by an employee, whether public or private, is to disregard the facts of this case.

The petitioners themselves controlled the entire conduct of the District's fiscal affairs, and their own decision, limited only by a statutory ceiling, determined the amount of the tax that would be collected. Petitioners' exercise of their power to fix the amount of the tax, an exercise which ultimately assured to themselves an excess of funds over their intended expenditures or reserves for school purposes, was necessarily central to their scheme. Such control obliterates the line they seek to draw between themselves and the entity it was their duty to serve. By demanding and collecting what they intended to misappropriate they made the process of collection an inseparable element of their scheme.

The petitioners' control of the District and therefore of its tax rate, similarly disposes of their contentions that one or another element of a technical fraud upon the taxpayers of the District is absent. The suggestion that in the collection of taxes there was no representation by petitioners to the taxpayers of the District might be pertinent were the system a self-executing tax structure under which the time for, and amount of, the payment due and the payee to whom it is to be made are designated by statute, so that the tax collector, serving as an automatic conduit, does nothing to cause collection of the tax. These collectors, however, were the prime actors in the structure. They not only billed the taxpayers but also fixed the rate of the tax itself. For that reason it cannot be said that the taxpayers paid their taxes solely under compulsion of Texas law, and not at all in reliance upon the implied false representation of petitioners that the amounts assessed were collected to meet projected expenditures. The taxpayers necessarily depended upon petitioners' setting of the rate for knowledge of what amount was to be paid. Each taxpayer who testified revealed

that he awaited his bill before making payment. The fact, much relied on by petitioners, that an available Texas procedure for challenging the tax was not invoked, establishes not, as is argued, the legality of the tax, but the reliance of taxpayers on petitioners' implied representations in the collection of it.

The intention of petitioners to have their bills paid is beyond dispute. But they urge an absence of detriment to the taxpayers who did rely since their payments were ordinarily credited to them on the District's books. The claim is frivolous. Whether they are viewed as having overpaid for school services, or having been deprived of services for which they paid, the detriment to the taxpayers is self-evident. It is in part for this reason that petitioners' attempted analogy between this case and the case of a doctor's secretary who sends out just bills but intends to steal from the proceeds is to urge that a mountain is a molehill. Even if the secretary, rather than her principal, is regarded as making the representation to patients that they may pay her, they are not injured by so doing, and they are not defrauded. The result would be very different, as petitioners concede, if the bills so sent out were padded by her. Here inescapably the bills were padded by the predetermined increase, which, though within technical legal limits, was for fraudulent ends.

Although this analysis appropriately disposes of this case it goes beyond the requirements of the statute. While the Mail Fraud Act is directed against the utilization of the mails in carrying out a fraudulent scheme, the penal prohibition of the use of the mails for a fraud does not turn on the niceties of the common-law offense of obtaining money or goods under false pretenses, see *Durland* v. *United States*, 161 U. S. 306, 312–313. The statute sought to forbid the use of the mails as a vehicle for a fraudulent

enterprise in the ordinary sense of a fraud—a dishonest and cheating enterprise. It is significant that the Act was amended in 1909 by adding to the outlawry of a "scheme or artifice to defraud" the expanding condemnation, "obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 35 Stat. 1130. While of course penal criminal statutes must not be extended beyond the fair meaning of English words, they must not be artificially and unreasonably contracted to avoid bringing a new situation within their scope which plainly falls within it in light of "the evil sought to be remedied." *Durland* v. *United States, supra,* at 313. The lay, commonsensical way of interpreting condemnation of aspects of fraud in federal penal legislation is illustrated by the settled doctrine that the prohibition against defrauding the United States in 18 U. S. C. § 371 extends far beyond the common-law conception of fraud in that financial or property loss is not an ingredient of the offense. *Haas* v. *Henkel,* 216 U. S. 462, 480; see also *United States* v. *Plyler,* 222 U. S. 15. If the fraudulent enterprise of which this record reeks is not a scheme essentially to defraud the taxpayers who constitute the District rather than a disembodied, abstract entity called the District, English words have lost their meaning.

Petitioners finally urge as to these counts that their convictions cannot be sustained because, even if the facts were sufficient to sustain a conviction, the indictment did not allege, the proof did not show, the conduct of the trial and the summations to the jury did not reveal, and the charge to the jury did not present, such a case either as to fact or law. It is apparent however that every aspect of this prosecution was focused on the Government's basic assertion that because petitioners controlled the District's affairs, continuously schemed to and did misappropriate funds while continuing to collect falsely

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represented revenues from taxpayers by mail, the use of the mails to collect taxes was in execution of a scheme to defraud the District and its taxpayers.

The indictment in every substantive count expressly alleged "a scheme and artifice to defraud the BISD, persons obligated by the laws of the State of Texas to pay taxes to the BISD (hereinafter called taxpayers), the State of Texas, and . . . to obtain the money and property of the BISD and the taxpayers for themselves . . . ." The primary devices allegedly undertaken to effectuate the scheme were the obtaining and maintaining of control of the District and its depository bank, and the collection of taxes by mail from District taxpayers during the period of the scheme.

The Government's proof established a design of petitioners to obtain control of the political and fiscal mechanism of the District, and that, having obtained control and being the *dominus* of the District, they sent out tax bills of the returns from which, year after year, they took a portion for themselves. The proof thus established a continuing course of conduct constituting, by the very nature of the systematic continuity of the practice, a conscious scheme to utilize their powers of government, of which setting the tax rate was one, for fraudulent purposes, in the execution of which the mails of the United States were a necessary instrument. Objections to government evidence offered on the substantive counts as to events before 1951 were overruled on the well-settled ground that the offers were admissible to show the continuing scheme to acquire, maintain and abuse control of the District.

In its summation the Government repeatedly characterized the scheme which it had sought to prove as one to employ petitioners' comprehensive control to max-

imize District revenues with a view to stealing funds,[2] and the charge adequately placed the issues of the indictment and trial before the jury.

The remaining three substantive counts of the indictment charged that as part of the same scheme to control and defraud the District the petitioners used the District's charge account to obtain gasoline for their personal use, which acts resulted in the use of the mails by the vendor to present the appropriate bills to the District. The mailings of two such bills and of one payment by the District were charged as separate offenses. Two matters are to be noted. First, it is suggested that there was no misrepresentation by the petitioners, because only the correct bill of the vendor was sent to the District. No reason appears however why a bill which the jury could have found petitioners knowingly caused to be sent to the District constitutes less of a representation by them that the gasoline consumed was used for the District's purposes than a voucher directly submitted by them for reimbursement for cash purchases.

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[2] "A continuing scheme year after year, send out the tax notice, rake in the harvest through the mails, and then milk it by several methods as outlined." "[T]his was a continuing scheme to defraud. This was not a scheme which these defendants thought up 'I will take one check and convert it to my own use,' but it went on, '48, '49, '50, '51, '52, '53, in order to draw out more fraudulent checks, more money from the depository banks they had to replenish the supply." "It is the Government's theory of this case that these defendants took over a mail-order business. . . . The defendants knew that; they had to know it." "What is the function of the School District? The function of the School District is to provide for the public education, the free education of the students, all the children who live in their district. . . . The trustees are someone in whom confidence . . . trust and reliance are placed by the taxpayers . . . . What was the school district used for in this instance? . . . it was used as a personal vehicle for the fraudulent designs and purposes of these defendants."

Second, it is urged that, under the rationale of *Kann* v. *United States*, 323 U. S. 88, the mailings, even if caused by petitioners, were not in execution of a scheme to defraud because the scheme was consummated once they received the gasoline. *Kann* v. *United States* found an appropriate instance of such a limitation; but it also expressly excepted from the force of the rule situations in which the subsequent mailing has the function of affording "concealment so that further frauds which are part of the scheme may be perpetrated," *supra*, at 94–95. Here the jury might properly have found that consumption of gasoline for private purposes was but one device of petitioners for turning their control of the District to their personal advantage, and that the continuing presentation and payment of the bills, and not merely the receipt of the gasoline, was the purpose of the scheme.

Petitioners raise no substantial objections to the conspiracy convictions that are not disposed of by what has already been said. The petitioners' other attacks against the verdict require no more discussion than given below. 265 F. 2d 894.

I would affirm the judgments.

Per Curiam.

KIMM *v.* ROSENBERG, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE.

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

No. 139. Argued May 16–17, 1960.—Decided June 13, 1960.

Petitioner, an alien whose deportation had been ordered, applied under § 19 (c) of the Immigration Act of 1917, as amended, for an order suspending his deportation or permitting his voluntary departure. In an administrative hearing on his application, he was asked whether he was a member of the Communist Party. He refused to answer, claiming the Fifth Amendment privilege against self-incrimination. His application was denied on the ground that he had failed to prove his eligibility under § 19 and the Internal Security Act of 1950. *Held:* Denial of his application is sustained, since § 19 (d) and the Internal Security Act of 1950 make Communists ineligible for suspension of deportation, and the burden was on petitioner to show that he was eligible for such suspension. Pp. 405–408.

263 F. 2d 773, affirmed.

Joseph Forer argued the cause for petitioner. With him on the brief was *David Rein.*

John F. Davis argued the cause for respondent. On the brief were *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Philip R. Monahan.*

PER CURIAM.

Petitioner applied for suspension of an order directing his deportation to Korea or permitting his voluntary departure. He does not question the validity of the deportation order, but contends that he is within the eligible statutory class whose deportation may be suspended at the discretion of the Attorney General. § 19 (c) of the Immigration Act of 1917, as amended. Relief on this score was denied on the basis that the Attorney General has no power to exercise his discretion in

that regard since petitioner failed to prove his eligibility under that section and the Internal Security Act of 1950.

Before the hearing officer, petitioner was asked if he was a member of the Communist Party. He refused to answer, claiming the Fifth Amendment privilege against self-incrimination. The officer refused the suspension on the grounds that petitioner had failed to prove that he was a person of good moral character and that he had not met the statutory requirement of showing that he was not a member of or affiliated with the Communist Party. The Board of Immigration Appeals affirmed on the latter ground, as did the Court of Appeals. 263 F. 2d 773.

Petitioner contends that he presented "clear affirmative evidence" as to eligibility which stands uncontradicted and that the burden was on the Government to show his affiliations, if any, with the Party. He contends that the disqualifying factor of Communist Party membership is an exception to § 19 (c) which the Government must prove. We think not. Rather than a proviso, it is an absolute disqualification, since that class of aliens is carved out of the section at its very beginning by the words "other than one to whom subsection (d) of this section is applicable." [1] Subsection (d) [2] referred to aliens

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[1] Section 19 (c) provided, in relevant part:

"In the case of any alien (other than one to whom subsection (d) of this section is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may . . . (2) suspend deportation of such alien if he is not ineligible for naturalization . . . if he finds . . . (b) that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon the effective date of this Act. . . ." 8 U. S. C. (1946 ed., Supp. II) § 155 (c).

[2] Section 19 (d), as amended:

"The provisions of subsection (c) shall not be applicable in the case of any alien who is deportable under (1) the Act of October 16,

deportable under the Act of October 16, 1918. Section 22 of the Internal Security Act of 1950 amended the 1918 Act to include Communists,[3] and thus terminated the discretionary authority under § 19 (c) as to any alien who was deportable because of membership in the Communist Party. Petitioner offered no evidence on this point, although the regulations place on him the burden of proof as to "the statutory requirements precedent to the exercise of discretionary relief." 8 CFR, 1949 ed., § 151.3 (e), as amended, 15 Fed. Reg. 7638. This regulation is com-

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1918 (40 Stat. 1008; U. S. C., title 8, sec. 137), entitled 'An Act to exclude and expel from the United States aliens who are members of the anarchist and similar classes,' as amended . . . ." 54 Stat. 672, 8 U. S. C. (1946 ed.) § 155 (d).

[3] The Act of October 16, 1918, c. 186, 40 Stat. 1012, as amended by the Internal Security Act of 1950, c. 1024, § 22, 64 Stat. 1006–1008, provided in pertinent part:

"Any alien who is a member of any one of the following classes shall be excluded from admission into the United States:

. . . . . .

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

. . . . . .

"(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States, (ii) any other totalitarian party of the United States, (iii) the Communist Political Association, (iv) the Communist or other totalitarian party of any State of the United States, of any foreign state, or of any political or geographical subdivision of any foreign state; (v) any section, subsidiary, branch, affiliate, or subdivision of any such association or party; or (vi) the direct predecessors or successors of any such association or party, regardless of what name such group or organization may have used, may now bear, or may hereafter adopt;

. . . . . .

"SEC. 4. (a) Any alien who was at the time of entering the United States, or has been at any time thereafter, . . . a member of any one of the classes of aliens enumerated in section 1 (2) of this Act, shall, upon the warrant of the Attorney General, be taken into custody and deported . . . ."

pletely consistent with § 19 (c). The language of that section, in contrast with the statutory provisions governing deportation, imposes the general burden of proof upon the applicant.

It follows that an applicant for suspension, "a matter of discretion and of administrative grace," *Hintopoulos* v. *Shaughnessy,* 353 U. S. 72, 77 (1957), must, upon the request of the Attorney General, supply such information that is within his knowledge and has a direct bearing on his eligibility under the statute. The Attorney General may, of course, exercise his authority of grace through duly delegated agents. *Jay* v. *Boyd,* 351 U. S. 345 (1956). Perhaps the petitioner was justified in his personal refusal to answer—a question we do not pass upon—but this did not relieve him under the statute of the burden of establishing the authority of the Attorney General to exercise his discretion in the first place.

Affirmed.

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

It has become much the fashion to impute wrongdoing to or to impose punishment on a person for invoking his constitutional rights.[1] Lloyd Barenblatt has served a jail sentence for invoking his First Amendment rights. See *Barenblatt* v. *United States,* 360 U. S. 109. As this is written, Dr. Willard Uphaus, as a consequence of our

[1] Meiklejohn, Political Freedom (1960) pp. 154–155, after referring to the efforts of legislative committees to compel Americans to give testimony "about their political beliefs and affiliations," goes on to say: ". . . in that field, the Fifth and the First Amendments are joined together, as their motives have been joined for centuries, in requiring of free citizens and of free institutions that they resist with all their might the irresponsible usurpations of a legislature which would attempt to tell men what they may believe and what they may not believe, with whom they may associate and with whom they may not associate."

decision in *Uphaus* v. *Wyman,* 360 U. S. 72, is in jail in New Hampshire for invoking rights guaranteed to him by the First and Fourteenth Amendments. So is the mathematician, Horace Chandler Davis, who invoked the First Amendment against the House Un-American Activities Committee. *Davis* v. *United States,* 269 F. 2d 357 (C. A. 6th Cir.). Today we allow invocation of the Fifth Amendment to serve, in effect though not in terms, as proof that an alien lacks the "good moral character" which he must have under § 19 (c) of the Immigration Act in order to become eligible for the dispensing powers entrusted to the Attorney General.

The import of what we do is underlined by the fact that there is not a shred of evidence of bad character in the record against this alien. The alien has fully satisfied the requirements of § 19 (c) as shown by the record. He entered as a student in 1928 and pursued his studies until 1938. He planned to return to Korea but the outbreak of hostilities between China and Japan in 1937 changed his mind. Since 1938 he has been continuously employed in gainful occupations. That is the sole basis of his deportability.[2] The record shows no criminal convictions, nothing that could bring stigma to the man.. His employment since 1938 has been as manager of a produce company, as chemist, as foundry worker, and as a member of O. S. S. during the latter part of World War II. He also was self-employed in the printing business, publishing a paper "Korean Independence." No one came forward to testify that he was a Communist. There is not a word of evidence that he had been a member of the Communist Party at any time. The only thing that stands in his way of being eligible for suspension of depor-

[2] Petitioner was admitted as a student pursuant to § 4 (e) of the Immigration Act of 1924. 43 Stat. 155, 8 U. S. C. (1946 ed.) § 204 (e).

tation by the Attorney General is his invocation of the Fifth Amendment.

The statute says nothing about the need of an alien to prove he never was a Communist. If the question of Communist Party membership had never been asked and petitioner had never invoked the Fifth Amendment, can it be that he would still be ineligible for suspension? It is for me unthinkable. Presumption of innocence is too deeply ingrained in our system for me to believe that an alien would have the burden of establishing a negative. What the case comes down to is simply this: invocation of the Fifth Amendment creates suspicions and doubts that cloud the alien's claim of good moral character.

Imputation of guilt for invoking the protection of the Fifth Amendment carries us back some centuries to the hated oath *ex officio* used both by the Star Chamber and the High Commission. Refusal to answer was contempt.[3] Thus was started in the English-speaking world the great rebellion against oaths that either violated the conscience of the witness or were used to obtain evidence against

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[3] See Maguire, Attack of the Common Lawyers on the Oath *Ex Officio* As Administered in the Ecclesiastical Courts in England, Essays in History and Political Theory (1936), c. VII, p. 199, at 215, where the procedure of the High Commission is described:

"Thus the defendant swore to answer fully and truly all questions which might be put to him before he knew the charges in detail, and in cases *ex officio* without knowing the accuser. Either party could produce witnesses who gave their depositions on oath, but in the most important cases *ex officio mero* the whole trial was based on the answers of the defendant. As in the Star Chamber the judges delivered their opinions *seriatim* and the decree accorded with the decision of the majority.

"Thus the crux of the procedure was the oath *ex officio*. Until the defendant had been sworn, the articles for his examination could not be produced; until he had been examined, the case could not proceed to trial. Refusal or partial answers constituted contempt, followed by imprisonment; perjury was a cardinal sin."

him. See *Ullmann* v. *United States,* 350 U. S. 422, 445–449 (dissenting opinion).

I had assumed that invocation of the privilege is a neutral act, as consistent with innocence as with guilt. We pointed out in *Slochower* v. *Board of Education,* 350 U. S. 551, 557–558: "The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances." We re-emphasized that view in *Grunewald* v. *United States,* 353 U. S. 391, 421: "Recent re-examination of the history and meaning of the Fifth Amendment has emphasized anew that one of the basic functions of the privilege is to protect *innocent* men."

We went further in *Konigsberg* v. *State Bar,* 353 U. S. 252, 267, and in *Schware* v. *Board of Bar Examiners,* 353 U. S. 232, 246, and held that even past membership in the Communist Party was not by itself evidence that the person was of bad moral character.

We therefore today make a marked departure from precedent when we attach a penalty for reliance on the Fifth Amendment. The Court in terms does not, and cannot, rest its decision on the ground that by invoking the Fifth Amendment the petitioner gave evidence of bad moral character. Yet the effect of its decision is precisely the same. In so holding we disregard history and, in the manner of the despised oath *ex officio,* attribute wrongdoing to the refusal to answer. It seems to me indefensible for courts which act under the Constitution to draw an inference of bad moral character from the invocation of a privilege which was deemed so important to this free society that it was embedded in the Bill of Rights.

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

Suspension of deportation may be "a matter of discretion and of administrative grace," *United States ex rel. Hintopoulos* v. *Shaughnessy,* 353 U. S. 72, 77, but eligi-

bility for suspension, for the exercise of that discretion, is very much a matter of law. *McGrath* v. *Kristensen*, 340 U. S. 162, 169. The decision of the Board of Immigration Appeals was that petitioner was not, under the governing statute, eligible for suspension; and on that basis its order must stand or fall in court. *Securities & Exchange Comm'n* v. *Chenery Corp.*, 318 U. S. 80, 87.

The only basis of the Appeals Board's determination of ineligibility that the Government seriously defends here is the Board's finding that the petitioner had not shown he was not deportable under §§ 1 and 4 of the Act of October 16, 1918, 40 Stat. 1012, as amended by § 22 of the Internal Security Act of 1950, 64 Stat. 1006, 1008. Those provisions retroactively made deportable an alien who had been a Communist Party member at any time since his entry into the United States; and § 19 of the 1917 Immigration Act, 39 Stat. 889, as later amended,[1] under which petitioner's eligibility for suspension was determined, made those aliens who were deportable on that basis ineligible for suspension of deportation.

It has not been, and scarcely could be, controverted that the Government must in general bear the burden of demonstrating, in administrative proceedings, the deportability of an alien; whatever the exceptions to this rule may be,[2] it was established by the time relevant here that

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[1] The suspension provisions, with their reference to deportability under the 1918 Act as a disqualification, were added to the old § 19 through the amendments of 1940 and 1948, 54 Stat. 672, 62 Stat. 1206.

The validity of the proceedings here is to be tested under the law as it stood as of the time of the administrative hearing and review in 1951 and early 1952, before the passage of the Immigration and Nationality Act of 1952, 66 Stat. 163, 8 U. S. C. § 1101 *et seq.*, on June 27, 1952. See § 405 (a) of the later Act, 66 Stat. 280.

[2] Section 23 of the 1924 Immigration Act, 43 Stat. 165, placed the burden on the alien in a deportation proceeding to show that he had been lawfully admitted to the country. The current Act is to the same effect. § 291, 66 Stat. 234, 8 U. S. C. § 1361. The courts in

where post-entry misconduct is charged as the basis for deportability, the burden is the Government's. *Hughes* v. *Tropello,* 296 F. 306, 309; *Werrmann* v. *Perkins,* 79 F. 2d 467, 469. Here the Government never bore any burden of showing that petitioner was deportable as having been, since his entry, a Communist. The determination of his deportability was made on entirely different grounds; that (as was conceded) he had failed to maintain the student status on the basis of which he had been admitted to the United States. At the hearing on suspension of deportation the Government introduced literally no evidence even remotely suggesting that petitioner had ever been a Communist; and much evidence as to petitioner's good character was introduced. But, apparently at random, and out of the blue, petitioner was asked about membership in the Communist Party; and he declined to answer, citing his constitutional privilege against self-incrimination. On this basis the administrative officials found that he was ineligible for suspension of deportation.

If the basis on which it was sought to deport petitioner in the first place was that he was deportable as a Communist or ex-Communist under §§ 1 and 4 of the 1918 Act, as amended, it could hardly be contended that this would be evidence, let alone sufficient evidence, that he was or had been a Communist, on which to base a finding of deportability. Cf. *Slochower* v. *Board of Higher Education,* 350 U. S. 551. The provision in § 19 of the 1917 Immigration Act, as amended, which is relied on, disqualifies from suspension an alien who is "deportable" under the other Act; and one would think the burden of

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the cases cited in text drew a sharp distinction between this issue and the matter of deportability owing to post-admission conduct. The failure of Congress to specify other issues on which the alien has the burden is confirmation of the correctness of these decisions. See *United States ex rel. Bilokumsky* v. *Tod,* 263 U. S. 149, 153.

proof of deportability in both circumstances should be the same. The most obvious case, of course, for the application of § 19's disqualification from suspension is the one in which the Government, in the deportation proceedings, has already borne the burden of proving the alien deportable under the amended 1918 Act. It is an anomaly that the burden of proof shifts, there ceases to be a requirement of evidence of deportability as a Communist or ex-Communist, and the alien must prove a negative in order to qualify for suspension, when the Government has chosen to base deportation on some other ground. In support of this the Court cites only a regulation which stated in general terms that it was up to the alien to show his eligibility for suspension. 8 CFR, 1949 ed., § 151.3 (e), as added, 15 Fed. Reg. 7638.

I would think it perfectly plain that such a regulation, as applied in this case, would be contrary to the statutory scheme, properly and responsibly construed.[3] In the first place, as I have noted, it turns around the ordinary rules as to the burden of proof as to which party shall show "deportability." It requires the alien to prove a negative—that he never was a Communist since he entered the country—when no one has said or intimated that he was. Such proof would necessarily lead to petitioner's bearing the laboring oar in showing that all his political or economic expressions in this country were independent of any covert connection with the Communist Party. The effect of imposing such a burden of exculpation on the exercise, for example, of non-Communist political action on behalf of causes which Communists might also happen to favor

[3] Section 19 (c) in terms imposes a burden of proof on the alien as to his good moral character, but is silent as to the burden of proof otherwise. And it is in § 19 (d) that the noneligibility of those deportable under the amended 1918 Act is provided for; and § 19 (d) is inexplicit as to the burden of proof. Accordingly, no support for this application of the regulation can be found in § 19 (c).

is obvious. In fact, on this very basis, we not so long ago struck down a state statute which placed on an individual desiring a tax exemption the burden of proof to show that his political activities were not of a proscribed nature—of a nature, moreover, which we assumed the State had the power directly to proscribe. *Speiser* v. *Randall,* 357 U. S. 513, 520. We have this Term reaffirmed the central principle of that case, its inhibition on procedural devices which, though designed to reach legitimate ends, impose burdens on the exercise of the freedom of speech, in a subsequent decision, by striking down another state enactment. *Smith* v. *California,* 361 U. S. 147. On such a basis we declared the enactments of sovereign States unconstitutional; I think we should hardly be less willing to apply the same doctrine to set aside, as not statutorily warranted, a federal administrative regulation which anomalously turns about the ordinary state of the burden of proof as to "deportability," and in fact so far dispenses with the ordinary requirement of evidence of "deportability" that the alien must shoulder the burden of negating it even where the Government has introduced no evidence at all on the issue.

We are, apart from construction of the Constitution, responsible for the proper construction of Acts of Congress, and for determining the validity of challenged administrative regulations and procedures under them. Here we are called upon only to put a rational construction upon a federal statute and the allocation of the burden of proof under it, that will promote the statute's internal consistency and minimize its frictions with the First Amendment. One of the relevant enactments, § 22 of the 1950 Internal Security Act, is a harsh one whose constitutionality was upheld here only on historical grounds. See *Galvan* v. *Press,* 347 U. S. 522, 530–532. By subscribing to the anomalous allocation of the burden of proof here, we increase the statute's harshness, promote the pro-

cedural restriction on the freedom of speech which we condemned in *Speiser* and *Smith,* and in practical effect, because of the allocation, let this petitioner's invocation of his constitutional privilege be equated with a demonstration of his deportability as to the matters on which he invoked the privilege. I cannot subscribe to a construction that has this effect, and accordingly dissent.

DEFOE *v.* SUCHMAN ET AL.

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 896. Decided June 13, 1960.

Appeal dismissed for want of a substantial federal question.

PER CURIAM.

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

SECURITIES AND EXCHANGE COMMISSION *v.* LEA FABRICS, INC., ET AL.

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

No. 905. Decided June 13, 1960.

Certiorari granted; judgment vacated and case remanded to the District Court with instructions to dismiss the petition as moot.

Reported below: 272 F. 2d 769.

Solicitor General Rankin, Thomas G. Meeker and *David Ferber* for petitioner.

Samuel M. Coombs, Jr., Nathan Ravin and *George Furst* for respondents.

PER CURIAM.

The petition for writ of certiorari is granted. The judgment of the Court of Appeals is vacated and the case is remanded to the District Court with instructions to dismiss the petition as moot.

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LEVITT & SONS, INC., *v.* DIVISION AGAINST DISCRIMINATION IN STATE DEPARTMENT OF EDUCATION ET AL.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

No. 865. Decided June 13, 1960.

Appeal dismissed for want of a substantial federal question.
Reported below: 31 N. J. 514, 158 A. 2d 177.

William P. Reiss for appellant.

David D. Furman, Attorney General of New Jersey, and *Lee A. Holley,* Deputy Attorney General, for appellee Division Against Discrimination.

Emerson L. Darnell and *Sidney Reitman* for appellee Willie R. James; *Jerome C. Eisenberg* and *Herbert H. Tate* for appellee Franklin D. Todd; and *Julius Wildstein* of counsel, and *Joseph B. Robinson* on the brief, for both individual appellees.

PER CURIAM.

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

MR. JUSTICE BLACK would note probable jurisdiction.

BERNSTEIN ET AL. *v.* REAL ESTATE COMMISSION OF MARYLAND ET AL.

APPEAL FROM THE COURT OF APPEALS OF MARYLAND.

No. 852. Decided June 13, 1960.

Appeal dismissed for want of a substantial federal question.
Reported below: 221 Md. 221, 156 A. 2d 657.

J. Calvin Carney and *William H. Murphy* for appellants.

C. Ferdinand Sybert, Attorney General of Maryland, and *Joseph S. Kaufman,* Assistant Attorney General, for appellee Commission.

Melvin J. Sykes for appellees Allendale-Lyndhurst Improvement Assn., Inc., Allen Kleiman et ux. and Bernard Cherry et ux.; and *David Kimmelman* of counsel for appellees Kleiman and Cherry.

PER CURIAM.

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

HANNAH ET AL. *v.* LARCHE ET AL.

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

No. 549. Argued January 18–19, 1960.—Decided June 20, 1960.*

The Civil Rights Act of 1957 created in the Executive Branch of the Government a Commission on Civil Rights to investigate written, sworn allegations that persons have been discriminatorily deprived of their right to vote on account of their color, race, religion or national origin, to study and collect information "concerning legal developments constituting a denial of equal protection of the laws," and to report to the President and Congress. The Commission is authorized to subpoena witnesses and documents and to conduct hearings. The Act prescribes certain rules of procedure; but nothing in the Act requires the Commission to afford persons accused of discrimination the right to be apprised as to the specific charges against them or as to the identity of their accusers, or the right to confront and cross-examine witnesses appearing at Commission hearings; and the Commission prescribed supplementary rules of procedure which deny such rights in hearings conducted by it. *Held:*

1. In the light of the legislative history of the Act, the Commission was authorized by Congress to adopt such rules of procedure. Pp. 430–439.

2. Since the Commission makes no adjudications but acts solely as an investigative and fact-finding agency, these rules of procedure do not violate the Due Process Clause of the Fifth Amendment. *Morgan* v. *United States*, 304 U. S. 1; *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123; *Greene* v. *McElroy*, 360 U. S. 474, distinguished. Pp. 440–452.

3. Such rules of procedure do not violate the Sixth Amendment, since that Amendment is specifically limited to "criminal prosecutions," and the proceedings of the Commission do not fall in that category. P. 440, n. 16.

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*Together with No. 550, *Hannah et al.* v. *Slawson et al.*, on petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

4. The Civil Rights Act of 1957 is appropriate legislation under the Fifteenth Amendment. P. 452.

5. Section 7 of the Administrative Procedure Act is not applicable to hearings conducted by this Commission. Pp. 452–453.

177 F. Supp. 816, reversed.

Deputy Attorney General Walsh argued the causes for appellants in No. 549 and petitioners in No. 550. On the brief were *Solicitor General Rankin, Acting Assistant Attorney General Ryan, Philip Elman, Harold H. Greene* and *David Rubin.*

Jack P. F. Gremillion, Attorney General of Louisiana, argued the cause for appellees in No. 549. With him on the brief were *George M. Ponder,* First Assistant Attorney General, and *Albin P. Lassiter.*

W. M. Shaw argued the cause and filed a brief for respondents in No. 550.

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

These cases involve the validity of certain Rules of Procedure adopted by the Commission on Civil Rights, which was established by Congress in 1957.[1] Civil Rights Act of 1957, 71 Stat. 634, 42 U. S. C. §§ 1975–1975e. They arise out of the Commission's investigation of alleged Negro voting deprivations in the State of Louisiana. The appellees in No. 549 are registrars of voters in the State of Louisiana, and the respondents in No. 550 are private citizens of Louisiana.[2] After having been summoned to

[1] Although the Civil Rights Act of 1957 provided that the Commission should cease to exist within two years after its creation, 71 Stat. 635, 42 U. S. C. § 1975c, in 1959 Congress extended the Commission's life for an additional two years. 73 Stat. 724.

[2] The appellants in No. 549 and the petitioners in No. 550 are the individual members of the Civil Rights Commission. Hereinafter,

appear before a hearing which the Commission proposed to conduct in Shreveport, Louisiana, these registrars and private citizens requested the United States District Court for the Western District of Louisiana to enjoin the Commission from holding its anticipated hearing. It was alleged, among other things, that the Commission's Rules of Procedure governing the conduct of its investigations were unconstitutional. The specific rules challenged are those which provide that the identity of persons submitting complaints to the Commission need not be disclosed, and that those summoned to testify before the Commission, including persons against whom complaints have been filed, may not cross-examine other witnesses called by the Commission. The District Court held that the Commission was not authorized to adopt the Rules of Procedure here in question, and therefore issued an injunction which prohibits the Commission from holding any hearings in the Western District of Louisiana as long as the challenged procedures remain in force. The Commission requested this Court to review the District Court's decision.[3] We granted the Commission's motion to advance the cases, and oral argument was accordingly scheduled on the jurisdiction on appeal in No. 549, on the petition for certiorari in No. 550, and on the merits of both cases.

Having heard oral argument as scheduled, we now take jurisdiction in No. 549 and grant certiorari in No.

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they will be referred to as "the Commission." The appellees in No. 549 and the respondents in No. 550 will both hereinafter be referred to as "respondents."

[3] Because No. 549 was heard and decided by a three-judge District Court, a direct appeal to this Court was sought by the Commission pursuant to 28 U. S. C. § 1253. The Commission also filed an appeal in No. 550 with the United States Court of Appeals for the Fifth Circuit. However, before the Court of Appeals could render a decision in No. 550, the Commission filed a petition for certiorari pursuant to Rule 20 of this Court.

550. The specific questions which we must decide are (1) whether the Commission was authorized by Congress to adopt the Rules of Procedure challenged by the respondents, and (2) if so, whether those procedures violate the Due Process Clause of the Fifth Amendment.

A description of the events leading up to this litigation is necessary not only to place the legal questions in their proper factual context, but also to indicate the significance of the Commission's proposed Shreveport hearing. During the months prior to its decision to convene the hearing, the Commission had received some sixty-seven complaints from individual Negroes who alleged that they had been discriminatorily deprived of their right to vote. Based upon these complaints, and pursuant to its statutory mandate to "investigate allegations in writing under oath or affirmation that certain citizens of the United States are being deprived of their right to vote and have that vote counted by reason of their color, race, religion, or national origin," [4] the Commission began its investigation into the Louisiana voting situation by making several *ex parte* attempts to acquire information. Thus, in March 1959, a member of the Commission's staff interviewed the Voting Registrars of Claiborne, Caddo, and Webster Parishes, but obtained little relevant information. During one of these interviews the staff member is alleged to have informed Mrs. Lannie Linton, the Registrar of Claiborne Parish, that the Commission had on file four sworn statements charging her with depriving Negroes of their voting rights solely because of their race. Subsequent to this interview, Mr. W. M. Shaw, Mrs. Linton's personal attorney, wrote a letter to Mr. Gordon M. Tiffany, the Staff Director of the Commission, in which it was asserted that Mrs. Linton knew the sworn complaints lodged against

[4] Section 104 of the Civil Rights Act of 1957, 71 Stat. 635, 42 U. S. C. § 1975c (a) (1).

her to be false. The letter also indicated that Mrs. Linton wished to prefer perjury charges against the affiants, and Mr. Shaw therefore demanded that the Commission forward to him copies of the affidavits so that a proper presentment could be made to the grand jury. On April 14, 1959, Mr. Tiffany replied to Mr. Shaw's letter and indicated that the Commission had denied the request for copies of the sworn affidavits. Mr. Shaw was also informed of the following official statement adopted by the Commission:

> "The Commission from its first meeting forward, having considered all complaints submitted to it as confidential because such confidentiality is essential in carrying out the statutory duties of the Commission, the Staff Director is hereby instructed not to disclose the names of complainants or other information contained in complaints to anyone except members of the Commission and members of the staff assigned to process, study, or investigate such complaints."

A copy of Mr. Tiffany's letter was sent to Mr. Jack P. F. Gremillion, the Attorney General of Louisiana, who had previously informed the Commission that under Louisiana law the Attorney General is the legal adviser for all voting registrars in any hearing or investigation before a federal commission.

Another attempt to obtain information occurred on May 13, 1959, when Mr. Tiffany, upon Commission authorization, sent a list of 315 written interrogatories to Mr. Gremillion. These interrogatories requested very detailed and specific information, and were to be answered by the voting registrars of nineteen Louisiana parishes. Although Mr. Gremillion and the Governor of Louisiana had previously assented to the idea of written interrogatories, on May 28, 1959, Mr. Gremillion sent a letter to

Mr. Tiffany indicating that the voting registrars refused to answer the interrogatories. The reasons given for the refusal were that many of the questions seemed unrelated to the functions of voting registrars, that the questions were neither accompanied by specific complaints nor related to specific complaints, and that the time and research required to answer the questions placed an unreasonable burden upon the voting registrars.

In response to this refusal, on May 29, 1959, Mr. Tiffany sent a telegram to Mr. Gremillion, informing the latter that the interrogatories were based upon specific allegations received by the Commission, and reaffirming the Commission's position that the identity of specific complainants would not be disclosed. Mr. Tiffany's letter contained a further request that the interrogatories be answered and sent to the Commission by June 5, 1959. On June 2, 1959, Mr. Gremillion wrote a letter to Mr. Tiffany reiterating the registrars' refusal, and again requesting that the names of complainants be disclosed.

Finally, as a result of this exchange of correspondence, and because the Commission's attempts to obtain information *ex parte* had been frustrated, the Commission, acting pursuant to Section 105 (f) of the Civil Rights Act of 1957,[5] decided to hold the Shreveport hearing commencing on July 13, 1959.

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[5] Section 105 (f) of the Civil Rights Act authorizes the Commission to hold hearings and to subpoena witnesses. That section provides:

"(f) *Hearings; issuance of subpenas.*

"The Commission, or on the authorization of the Commission any subcommittee of two or more members, at least one of whom shall be of each major political party, may, for the purpose of carrying out the provisions of this Act, hold such hearings and act at such times and places as the Commission or such authorized subcommittee may deem advisable. Subpenas for the attendance and testimony of witnesses or the production of written or other matter may be issued in accordance with the rules of the Commission as contained in sec-

Notice of the scheduled hearing was sent to Mr. Gremillion, and between June 29 and July 6, subpoenas *duces tecum* were served on the respondents in No. 549, ordering them to appear at the hearing and to bring with them various voting and registration records within their custody and control. Subpoenas were also served upon the respondents in No. 550. These private citizens were apparently summoned to explain their activities with regard to alleged deprivations of Negro voting rights.[6]

On July 8, 1959, Mr. Tiffany wrote to Mr. Gremillion, enclosing copies of the Civil Rights Act and of the Commission's Rules of Procedure.[7] Mr. Gremillion's attention was also drawn to Section 102 (h) of the Civil Rights Act, which permits witnesses to submit, subject to the discretion of the Commission, brief and pertinent sworn statements for inclusion in the record.[8]

Two days later, on July 10, 1959, the respondents in No. 549 and No. 550 filed two separate complaints in the Dis-

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tion 1975a (j) and (k) of this title, over the signature of the Chairman of the Commission or of such subcommittee, and may be served by any person designated by such Chairman." 71 Stat. 636, 42 U. S. C. § 1975d (f).

[6] The role of private citizens in depriving Negroes of their right to vote was one of the questions involved in *United States* v. *McElveen*, 180 F. Supp. 10 (E. D. La.), aff'd as to defendant Thomas, 362 U. S. 58.

[7] Rule 3 (i) of the Commission's Rules of Procedure, adopted on July 1, 1958, prohibits witnesses or their counsel from cross-examining other witnesses. That Rule reads:

"Interrogation of witnesses at hearings shall be conducted only by members of the Commission or by authorized staff personnel."

[8] The full text of Section 102 (h) of the Civil Rights Act reads as follows:

"(h) *Submission of written statements.*

"In the discretion of the Commission, witnesses may submit brief and pertinent sworn statements in writing for inclusion in the record. The Commission is the sole judge of the pertinency of testimony and evidence adduced at its hearings." 71 Stat. 634, 42 U. S. C. § 1975a (h).

trict Court for the Western District of Louisiana. Both complaints alleged that the respondents would suffer irreparable harm by virtue of the Commission's refusal to furnish the names of persons who had filed allegations of voting deprivations, as well as the contents of the allegations, and by its further refusal to permit the respondents to confront and cross-examine the persons making such allegations. In addition, both complaints alleged that the Commission's refusals not only violated numerous provisions of the Federal Constitution, but also constituted "ultra vires" acts not authorized either by Congress or the Chief Executive. The respondents in No. 549 also alleged that they could not comply with the subpoenas *duces tecum* because Louisiana law prohibited voting registrars from removing their voting records except "upon an order of a competent court," and because the Commission was not such a "court." Finally, the complaint in No. 549 alleged that the Civil Rights Act was unconstitutional because it did not constitute "appropriate legislation within the meaning of Section (2) of the XV Amendment."

Both complaints sought a temporary restraining order and a permanent injunction prohibiting the members of the Commission (a) from compelling the "testimony from or the production of any records" by the respondents until copies of the sworn charges, together with the names and addresses of the persons filing such charges were given to the respondents; [9] (b) from "conducting any hearing pursuant to the rules and regulations adopted by" the Commission; and (c) from "conspiring together . . . or with any other person . . . to deny complainants their rights and privileges as citizens" of Louisiana or the

[9] Under the Civil Rights Act, the Commission not only has the power to issue subpoenas under Section 105 (f), but, as is customary when Congress confers the subpoena power on an investigative agency, the Commission is also authorized to enforce its subpoenas by enlisting the aid of the federal courts. 71 Stat. 636, 42 U. S. C. § 1975d (g).

United States "or to deny to complainants their right to be confronted by their accusers, to know the nature and character of the charges made against them," and to be represented by counsel. The complaint in No. 549 also sought a declaratory judgment that the Civil Rights Act of 1957 was unconstitutional.

On the day that the complaints were filed, the district judge held a combined hearing on the prayers for temporary restraining orders. On July 12, 1959, he found that the respondents would suffer irreparable harm if the hearings were held as scheduled, and he therefore issued the requested temporary restraining orders and rules to show cause why a preliminary injunction should not be granted. *Larche* v. *Hannah*, 176 F. Supp. 791. The order prohibited the Commission from holding any hearings which concerned the respondents or others similarly situated until a determination was made on the motion for a preliminary injunction.

Inasmuch as the complaint in No. 549 attacked the constitutionality of the Civil Rights Act, a three-judge court was convened pursuant to 28 U. S. C. § 2282. Since the complaint in No. 550 did not challenge the constitutionality of the Civil Rights Act of 1957, that case was scheduled to be heard by a single district judge. That district judge was also a member of the three-judge panel in No. 549, and a combined hearing was therefore held on both cases on August 7, 1959.

On October 7, 1959, a divided three-judge District Court filed an opinion in No. 549. *Larche* v. *Hannah,* 177 F. Supp. 816. The court held that the Civil Rights Act of 1957 was constitutional since it "very definitely constitutes appropriate legislation" authorized by the Fourteenth and Fifteenth Amendments and Article I, Section 2, of the Federal Constitution. *Id.,* at 821. The court then held that since the respondents' allegations with regard to apprisal, confrontation, and cross-examination

raised a "serious constitutional issue," this Court's decision in *Greene* v. *McElroy,* 360 U. S. 474, required a preliminary determination as to whether Congress specifically authorized the Commission "to adopt rules for investigations . . . which would deprive parties investigated of their rights of confrontation and cross-examination and their right to be apprised of the charges against them." 177 F. Supp., at 822. The court found that Congress had not so authorized the Commission, and an injunction was therefore issued. In deciding the case on the issue of authorization, the court never reached the "serious constitutional issue" raised by the respondents' allegations.[10] The injunction prohibits the Commission from holding any hearing in the Western District of Louisiana wherein the registrars, "accused of depriving others of the right to vote, would be denied the right of apprisal, confrontation, and cross examination." [11] The single dis-

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[10] Judge Wisdom, who dissented, was of the opinion that the procedures adopted by the Commission were authorized by Congress, and that those procedures were also constitutional. 177 F. Supp., at 828.

[11] The court's injunction reads as follows:

"For reasons assigned in the Court's written opinion of October 6, 1959,

"It is ordered, adjudged and decreed that defendants and their agents, servants, employees and attorneys are enjoined and restrained from conducting the proposed hearing in Shreveport, Louisiana, wherein plaintiff registrars, accused of depriving others of the right to vote, would be denied the right of apprisal, confrontation and cross examination.

"This injunction does not prohibit all hearings pursuant to Public Law 85–315, 85th Congress, 42 U. S. C. A. 1975, et seq., but only those hearings proposed to be held in the Western District of Louisiana wherein the accused are denied the right of apprisal, confrontation and cross examination.

"Thus done and signed in Chambers on this the 9 day of November, 1959."

The breadth of this injunction is indicated by the fact that the Commission is not only prohibited from compelling respondents'

trict judge rendered a decision in No. 550 incorporating by reference the opinion of the three-judge District Court, and an injunction, identical in substance to that entered in No. 549, was issued.

I.

We held last Term in *Greene* v. *McElroy, supra,* that when action taken by an inferior governmental agency was accomplished by procedures which raise serious constitutional questions, an initial inquiry will be made to determine whether or not "the President or Congress, within their respective constitutional powers, specifically has decided that the imposed procedures are necessary and warranted and has authorized their use." *Id.,* at 507. The considerations which prompted us in *Greene* to analyze the question of authorization before reaching the constitutional issues presented are no less pertinent in this case. Obviously, if the Civil Rights Commission was not authorized to adopt the procedures complained of by the respondents, the case could be disposed of without a premature determination of serious constitutional questions. See *Vitarelli* v. *Seaton,* 359 U. S. 535; *Kent* v. *Dulles,* 357 U. S. 116; *Watkins* v. *United States,* 354 U. S. 178; *Peters* v. *Hobby,* 349 U. S. 331.

We therefore consider first the question of authorization. As indicated above, the Commission specifically refused to disclose to the respondents the identity of persons who had submitted sworn complaints to the Commission and the specific charges contained in those complaints. Moreover, the respondents were informed by the Commission that they would not be permitted to cross-examine

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appearance at the hearing, but it is also enjoined from conducting *any* hearing in the Western District of Louisiana under existing rules of procedure, whether or not the respondents are called as witnesses.

any witnesses at the hearing. The respondents contend, and the court below held, that Congress did not authorize the adoption of procedural rules which would deprive those being investigated by the Commission of the rights to apprisal, confrontation, and cross-examination. The court's holding is best summarized by the following language from its opinion:

> "[W]e find nothing in the Act which expressly authorizes or permits the Commission's refusal to inform persons, under investigation for criminal conduct, of the nature, cause and source of the accusations against them, and there is nothing in the Act authorizing the Commission to deprive these persons of the right of confrontation and cross-examination." 177 F. Supp., at 822.

After thoroughly analyzing the Rules of Procedure contained in the Civil Rights Act of 1957 and the legislative history which led to the adoption of that Act, we are of the opinion that the court below erred in its conclusion and that Congress did authorize the Commission to adopt the procedures here in question.

It could not be said that Congress ignored the procedures which the Commission was to follow in conducting its hearings. Section 102 of the Civil Rights Act of 1957 lists a number of procedural rights intended to safeguard witnesses from potential abuses. Briefly summarized, the relevant subdivisions of Section 102 provide that the Chairman shall make an opening statement as to the subject of the hearing; that a copy of the Commission's rules shall be made available to witnesses; that witnesses "may be accompanied by their own counsel for the purpose of advising them concerning their constitutional rights"; that potentially defamatory, degrading, or incriminating testimony shall be received in executive session, and

that any person defamed, degraded, or incriminated by such testimony shall have an opportunity to appear voluntarily as a witness and to request the Commission to subpoena additional witnesses; that testimony taken in executive session shall be released only upon the consent of the Commission; and that witnesses may submit brief and pertinent sworn statements in writing for inclusion in the record.[12]

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[12] The complete text of Section 102 reads as follows:

"§ 1975a. *Rules of procedure.*

"(a) *Opening statement.*

"The Chairman or one designated by him to act as Chairman at a hearing of the Commission shall announce in an opening statement the subject of the hearing.

"(b) *Copy of rules.*

"A copy of the Commission's rules shall be made available to the witness before the Commission.

"(c) *Attendance of counsel.*

"Witnesses at the hearings may be accompanied by their own counsel for the purpose of advising them concerning their constitutional rights.

"(d) *Censure and exclusion of counsel.*

"The Chairman or Acting Chairman may punish breaches of order and decorum and unprofessional ethics on the part of counsel, by censure and exclusion from the hearings.

"(e) *Defamatory, degrading or incriminating evidence.*

"If the Commission determines that evidence or testimony at any hearing may tend to defame, degrade, or incriminate any person, it shall (1) receive such evidence or testimony in executive session; (2) afford such person an opportunity voluntarily to appear as a witness; and (3) receive and dispose of requests from such person to subpena additional witnesses.

"(f) *Requests for additional witnesses.*

"Except as provided in this section and section 1975d (f) of this title, the Chairman shall receive and the Commission shall dispose of requests to subpena additional witnesses.

[*Footnote 12 continued on pp. 433–434.*]

The absence of any reference to apprisal, confrontation, and cross-examination, in addition to the fact that counsel's role is specifically limited to advising witnesses of their constitutional rights, creates a presumption that Congress did not intend witnesses appearing before the Commission to have the rights claimed by respondents. This initial presumption is strengthened beyond any

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"(g) *Release of evidence taken in executive session.*

"No evidence or testimony taken in executive session may be released or used in public sessions without the consent of the Commission. Whoever releases or uses in public without the consent of the Commission evidence or testimony taken in executive session shall be fined not more than $1,000, or imprisoned for not more than one year.

"(h) *Submission of written statements.*

"In the discretion of the Commission, witnesses may submit brief and pertinent sworn statements in writing for inclusion in the record. The Commission is the sole judge of the pertinency of testimony and evidence adduced at its hearings.

"(i) *Transcripts.*

"Upon payment of the cost thereof, a witness may obtain a transcript copy of his testimony given at a public session or, if given at an executive session, when authorized by the Commission.

"(j) *Witness fees.*

"A witness attending any session of the Commission shall receive $4 for each day's attendance and for the time necessarily occupied in going to and returning from the same, and 8 cents per mile for going from and returning to his place of residence. Witnesses who attend at points so far removed from their respective residences as to prohibit return thereto from day to day shall be entitled to an additional allowance of $12 per day for expenses of subsistence, including the time necessarily occupied in going to and returning from the place of attendance. Mileage payments shall be tendered to the witness upon service of a subpena issued on behalf of the Commission or any subcommittee thereof.

"(k) *Restriction on issuance of subpena.*

"The Commission shall not issue any subpena for the attendance and testimony of witnesses or for the production of written or other

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reasonable doubt by an investigation of the legislative history of the Act.

The complete story of the 1957 Act begins with the 1956 House Civil Rights Bill, H. R. 627. That bill was reported out of the House Judiciary Committee without any reference to the procedures to be used by the Commission in conducting its hearings. H. R. Rep. No. 2187, 84th Cong., 2d Sess. During the floor debate, Representative Dies of Texas introduced extensive amendments designed to regulate the procedure of Commission hearings. 102 Cong. Rec. 13542. Those amendments would have guaranteed to witnesses appearing before the Commission all of the rights claimed by the respondents in these cases. The amendments provided, in pertinent part, that a person who might be adversely affected by the testimony of another "shall be fully advised by the

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matter which would require the presence of the party subpenaed at a hearing to be held outside of the State, wherein the witness is found or resides or transacts business." 71 Stat. 634, 42 U. S. C. § 1975a.

In addition to the procedural safeguards provided by Section 102 of the Act, the Commission's Rules of Procedure grant additional protection. Thus, Rule 3 (f) of the Commission's Rules of Procedure provides:

"(f) An accurate transcript shall be made of the testimony of all witnesses in all hearings, either public or executive sessions, of the Commission or of any subcommittee thereof. Each witness shall have the right to inspect the record of his own testimony. A transcript copy of his testimony may be purchased by a witness pursuant to Rule 2 (i) above. Transcript copies of public sessions may be obtained by the public upon payment of the cost thereof."

And Rule 3 (j) provides:

"(j) If the Commission pursuant to Rule 2 (e), or any subcommittee thereof, determines that evidence or testimony at any hearing may tend to defame, degrade, or incriminate any person, it shall advise such person that such evidence has been given and it shall afford such person an opportunity to read the pertinent testimony and to appear as a voluntary witness or to file a sworn statement in his behalf."

Commission as to the matters into which the Commission proposes to inquire and the adverse material which is proposed to be presented"; that a person adversely affected by evidence or testimony given at a public hearing could "appear and testify or file a sworn statement in his own behalf"; that such a person could also "have the adverse witness recalled" within a stated time; and that he or his counsel could cross-examine adverse witnesses.[13]

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[13] The amendments introduced by Representative Dies read, in pertinent part, as follows:

"'(q) A person shall be considered to be adversely affected by evidence or testimony of a witness if the Commission determines that: (i) the evidence or testimony would constitute libel or slander if not presented before the Commission or (ii) the evidence or testimony alleges crime or misconduct or tends to disgrace or otherwise to expose the person to public contempt, hatred, or scorn.

"'(r) Insofar as practicable, any person whose activities are the subject of investigation by the Commission, or about whom adverse information is proposed to be presented at a public hearing of the Commission, shall be fully advised by the Commission as to the matters into which the Commission proposes to inquire and the adverse material which is proposed to be presented. Insofar as practicable, all material reflecting adversely on the character or reputation of any individual which is proposed to be presented at a public hearing of the Commission shall be first reviewed in executive session to determine its reliability and probative value and shall not be presented at a public hearing except pursuant to majority vote of the Commission.

"'(s) If a person is adversely affected by evidence or testimony given in a public hearing, that person shall have the right: (i) to appear and testify or file a sworn statement in his own behalf, (ii) to have the adverse witness recalled upon application made within thirty days after introduction of such evidence or determination of the adverse witness' testimony, (iii) to be represented by counsel as heretofore provided, (iv) to cross-examine (in person or by counsel) such adverse witness, and (v) subject to the discretion of the Commission, to obtain the issuance by the Commission of subpenas for witnesses, documents, and other evidence in his defense. Such opportunity for rebuttal shall be afforded promptly and, so

The bill, as finally passed by the House, contained all of the amendments proposed by Representative Dies. 102 Cong. Rec. 13998–13999. However, before further action could be taken, the bill died in the Senate. Although many proposals relating to civil rights were introduced in the 1957 Session of Congress, two bills became the prominent contenders for support. One was S. 83, a bill introduced by Senator Dirksen containing the same procedural provisions that the amended House bill in 1956 had contained. The other bill, H. R. 6127, was introduced by Representative Celler, Chairman of the House Judiciary Committee, and this bill incorporated the so-called House "fair play" rules as the procedures which should govern the conduct of Commission hearings.[14] After extensive debate and hearings, H. R. 6127

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far as practicable, such hearing shall be conducted at the same place and under the same circumstances as the hearing at which adverse testimony was presented.

" 'Cross-examination shall be limited to one hour for each witness, unless the Commission by majority vote extends the time for each witness or group of witnesses.

" '(t) If a person is adversely affected by evidence or testimony given in executive session or by material in the Commission files or records, and if public release of such evidence, testimony, or material is contemplated such person shall have, prior to the public release of such evidence or testimony or material or any disclosure of or comment upon it by members of the Commission or Commission staff or taking of similar evidence or testimony in a public hearing, the rights heretofore conferred and the right to inspect at least as much of the evidence or testimony of the adverse witness or material as will be made public or the subject of a public hearing.

" '(u) Any witness (except a member of the press who testifies in his professional capacity) who gives testimony before the Commission in an open hearing which reflects adversely on the character or reputation of another person may be required by the Commission to disclose his sources of information, unless to do so would endanger the national security.' " 102 Cong. Rec. 13542–13543.

[14] The complete text of the House "fair play" rules may be found in H. Res. 151, 84th Cong., 1st Sess.

was finally passed by both Houses of Congress, and the House "fair play" rules, which make no provision for advance notice, confrontation, or cross-examination, were adopted in preference to the more protective rules suggested in S. 83.[15]

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[15] That Congress focused upon the issues here involved and recognized the distinctions between H. R. 6127 and S. 83 is attested to by the following extracts from the floor debate and committee hearings:

In testifying before both the House and Senate Subcommittees considering the various proposed civil rights bills, Attorney General Brownell supported the adoption of the House "fair play" rules instead of the more restrictive procedures outlined in S. 83. Thus, at the Senate hearings, the Attorney General made the following statement:

"Now there is one other addition to S. 83 that I would like to make special reference to and that is the provision for rules of procedure contained in section 102 on pages 2 to 10 of S. 83.

"These rules of procedure are considerably more restrictive than those imposed on regular committees of the House and Senate. There is much in them which clearly would be desirable. We have not as yet had any experience with the use of rules such as those proposed here and we cannot predict the extent to which they might be used to obstruct the work of the Commission.

. . . . . .

"Yet I feel that the task to be given to this Commission is of such great public importance that it would be a mistake to make it the vehicle for experimenting with new rules which may have to be tested out under the courts and this is only a 2-year Commission and you might have to spend those 2 years studying the rules instead of getting at the facts." Hearings before Subcommittee on Constitutional Rights of the Senate Judiciary Committee, 85th Cong., 1st Sess. 14–15.

See also Hearings before Subcommittee No. 5 of the House Judiciary Committee, 85th Cong., 1st Sess. 593.

The lack of any right to cross-examine witnesses was commented upon by members of both the House and the Senate:

Statement of Senator Talmadge during the Senate floor debate, 103 Cong. Rec. 11504:

"No provision is made for notification of persons against whom charges are to be made. [*Footnote 15 continued on pp. 438–439.*]

The legislative background of the Civil Rights Act not only provides evidence of congressional authorization, but it also distinguishes these cases from *Greene* v. *McElroy, supra,* upon which the court below relied so heavily. In *Greene* there was no express authorization by Congress or the President for the Department of Defense to adopt the type of security clearance program there involved. Nor was there any legislative history or executive directive indicating that the Secretary of Defense was authorized to establish a security clearance program which could deprive a person of his government employment on the basis of secret and undisclosed information. Therefore, we concluded in *Greene* that because of the serious constitutional problems presented, mere acquiescence by the President or the Congress would not be sufficient to constitute authoriza-

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"No provision is made for persons adversely affected by testimony taken by the Commission to be present when they are accused or later to confront and cross-examine their accusers."

Statement of Senator Stennis during Senate floor debate, 103 Cong. Rec. 13835:

"Defamatory testimony tending to defame, degrade, or incriminate any person cannot be heard by the person slandered, since the testimony must be taken in executive session. There is no requirement in the proposed statute that the person injured by defamatory testimony shall have an opportunity to examine the nature of the adverse testimony. He has no right of confrontation nor cross-examination, and his request to subpena witnesses on his behalf falls within the arbitrary discretion of the Commission. There is no right to subpena witnesses."

Statement of Representative Kilday during House floor debate, 103 Cong. Rec. 8673:

"The bill provides that witnesses may be accompanied by counsel, for what purpose? 'For the purpose of advising them concerning their constitutional rights.' That is all. Even though the Commission or its own counsel develops only a portion of a transaction, and that adverse to the witness, his lawyer cannot ask a single question to develop the remainder of the transaction or the portion favorable to him."

tion for the security clearance procedures adopted by the Secretary of Defense. The facts of this case present a sharp contrast to those before the Court in *Greene*. Here, we have substantially more than the mere acquiescence upon which the Government relied in *Greene*. There was a conscious, intentional selection by Congress of one bill, providing for none of the procedures demanded by respondents, over another bill, which provided for all of those procedures. We have no doubt that Congress' consideration and rejection of the procedures here at issue constituted an authorization to the Commission to conduct its hearings according to the Rules of Procedure it has adopted, and to deny to witnesses the rights of apprisal, confrontation, and cross-examination.

Statement of Representative Frazier during Hearings before the House Rules Committee, 85th Cong., 1st Sess. 176:

"The authors of this proposal contemplate that it will yield thousands of complaints and even more thousands of subpenas will be issued. The various allegations will, in the first instance, be incontrovertible and wholly ex parte and the principal concerned, against whom the charges are made, when summoned as a witness is given no opportunity to cross-examine. True, the person summoned as a witness may have counsel (sec. 102), but only for the purpose of advising him of his constitutional rights."

That the bill contained the House "fair play" rules is demonstrated by the following statement of Representative Celler, the author of the bill:

"*The rules of procedure of the Commission are the same as those which govern the committees of the House.* For example, the chairman is required to make an opening statement as to the subject of the hearing. Witnesses are furnished with a copy of the Commission's rules and may be accompanied by counsel. The chairman is authorized to punish breaches of order by censure and exclusion. Protection is furnished to witnesses when it appears that a person may be the subject of derogatory information by requiring such evidence to be received in executive session, and affording the person affected the right to appear and testify, and further to submit a request for subpena of additional witnesses." 103 Cong. Rec. 8491. (Emphasis supplied.)

II.

The existence of authorization inevitably requires us to determine whether the Commission's Rules of Procedure are consistent with the Due Process Clause of the Fifth Amendment.[16]

Since the requirements of due process frequently vary with the type of proceeding involved, *e. g.*, compare *Opp Cotton Mills, Inc.* v. *Administrator,* 312 U. S. 126, 152, with *Interstate Commerce Comm'n* v. *Louisville & N. R. Co.,* 227 U. S. 88, 91, we think it is necessary at the outset to ascertain both the nature and function of this Commission. Section 104 of the Civil Rights Act of 1957 specifies the duties to be performed by the Commission. Those duties consist of (1) investigating written, sworn allegations that anyone has been discriminatorily deprived of his right to vote; (2) studying and collecting information "concerning legal developments constituting a denial of equal protection of the laws under the Constitution"; and (3) reporting to the President and Congress on its activities, findings, and recommendations.[17] As is appar-

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[16] Although the respondents contend that the procedures adopted by the Commission also violate their rights under the Sixth Amendment, their claim does not merit extensive discussion. That Amendment is specifically limited to "criminal prosecutions," and the proceedings of the Commission clearly do not fall within that category. See *United States* v. *Zucker,* 161 U. S. 475, 481.

[17] The full text of Section 104 of the Act reads as follows:

"§ 1975c. *Duties; reports; termination.*

"(a) The Commission shall—

"(1) investigate allegations in writing under oath or affirmation that certain citizens of the United States are being deprived of their right to vote and have that vote counted by reason of their color, race, religion, or national origin; which writing, under oath or affirmation, shall set forth the facts upon which such belief or beliefs are based;

"(2) study and collect information concerning legal developments

ent from this brief sketch of the statutory duties imposed upon the Commission, its function is purely investigative and fact-finding. It does not adjudicate. It does not hold trials or determine anyone's civil or criminal liability. It does not issue orders. Nor does it indict, punish, or impose any legal sanctions. It does not make determinations depriving anyone of his life, liberty, or property. In short, the Commission does not and cannot take any affirmative action which will affect an individual's legal rights. The only purpose of its existence is to find facts which may subsequently be used as the basis for legislative or executive action.

The specific constitutional question, therefore, is whether persons whose conduct is under investigation by a governmental agency of this nature are entitled, by virtue of the Due Process Clause, to know the specific charges that are being investigated, as well as the identity of the complainants,[18] and to have the right to cross-

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constituting a denial of equal protection of the laws under the Constitution; and

"(3) appraise the laws and policies of the Federal Government with respect to equal protection of the laws under the Constitution.

"(b) The Commission shall submit interim reports to the President and to the Congress at such times as either the Commission or the President shall deem desirable, and shall submit to the President and to the Congress a final and comprehensive report of its activities, findings, and recommendations not later than two years from September 9, 1957.

"(c) Sixty days after the submission of its final report and recommendations the Commission shall cease to exist." 71 Stat. 635, 42 U. S. C. § 1975c.

[18] It should be noted that the respondents in these cases did have notice of the general nature of the inquiry. The only information withheld from them was the identity of specific complainants and the exact charges made by those complainants. Because most of the charges related to the denial of individual voting rights, it is apparent that the Commission could not have disclosed the exact charges without also revealing the names of the complainants.

examine those complainants and other witnesses. Although these procedures are very desirable in some situations, for the reasons which we shall now indicate, we are of the opinion that they are not constitutionally required in the proceedings of this Commission.

"Due process" is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. On the other hand, when governmental action does not partake of an adjudication, as for example, when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used. Therefore, as a generalization, it can be said that due process embodies the differing rules of fair play, which through the years, have become associated with differing types of proceedings. Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account. An analysis of these factors demonstrates why it is that the particular rights claimed by the respondents need not be conferred upon those appearing before purely investigative agencies, of which the Commission on Civil Rights is one.

It is probably sufficient merely to indicate that the rights claimed by respondents are normally associated only with adjudicatory proceedings, and that since the Commission does not adjudicate, it need not be bound by adjudicatory procedures. Yet, the respondents contend, and the court below implied, that such procedures

are required since the Commission's proceedings might irreparably harm those being investigated by subjecting them to public opprobrium and scorn, the distinct likelihood of losing their jobs, and the possibility of criminal prosecutions. That any of these consequences will result is purely conjectural. There is nothing in the record to indicate that such will be the case or that past Commission hearings have had any harmful effects upon witnesses appearing before the Commission. However, even if such collateral consequences were to flow from the Commission's investigations, they would not be the result of any affirmative determinations made by the Commission, and they would not affect the legitimacy of the Commission's investigative function.[19]

On the other hand, the investigative process could be completely disrupted if investigative hearings were transformed into trial-like proceedings, and if persons who might be indirectly affected by an investigation were given an absolute right to cross-examine every witness called to testify. Fact-finding agencies without any power to adjudicate would be diverted from their legitimate duties and would be plagued by the injection of collateral issues that would make the investigation interminable. Even a person not called as a witness could demand the right to appear at the hearing, cross-examine any witness whose testimony or sworn affidavit allegedly defamed or incriminated him, and call an unlimited number of witnesses of

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[19] Cf. *Sinclair* v. *United States,* 279 U. S. 263, 295, holding that Congress' legitimate right to investigate is not affected by the fact that information disclosed at the investigation may also be used in a subsequent criminal prosecution. Cf. also *McGrain* v. *Daugherty,* 273 U. S. 135, 179–180, holding that a regular congressional investigation is not rendered invalid merely because "it might possibly disclose crime or wrongdoing" on the part of witnesses summoned to appear at the investigation. *Id.,* at 180.

his own selection.[20] This type of proceeding would make a shambles of the investigation and stifle the agency in its gathering of facts.

In addition to these persuasive considerations, we think it is highly significant that the Commission's procedures are not historically foreign to other forms of investigation under our system. Far from being unique, the Rules of Procedure adopted by the Commission are similar to those which, as shown by the Appendix to this opinion,[21] have traditionally governed the proceedings of the vast majority of governmental investigating agencies.

A frequently used type of investigative agency is the legislative committee. The investigative function of such committees is as old as the Republic.[22] The volumes written about legislative investigations have proliferated almost as rapidly as the legislative committees themselves, and the courts have on more than one occasion been confronted with the legal problems presented by such committees.[23] The procedures adopted by legislative inves-

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[20] The injunction issued by the court below would certainly lead to this result since it prohibits the Commission from conducting *any* hearing under existing procedure, even though those being investigated are not summoned to testify.

[21] A compilation of the rules of procedure governing the investigative proceedings of a representative group of administrative and executive agencies, presidential commissions, and congressional committees is set out in the Appendix to this opinion, *post*, p. 454.

[22] The first full-fledged congressional investigating committee was established in 1792 to "inquire into the causes of the failure of the late expedition under Major General St. Clair." 3 Annals of Cong. 493 (1792). The development and use of legislative investigation by the colonial governments is discussed in Eberling, Congressional Investigations, 13–30. The English origin of legislative investigation in this country is discussed in Dimock, Congressional Investigating Committees, 46–56.

[23] See, *e. g.*, *Kilbourn* v. *Thompson*, 103 U. S. 168; *McGrain* v. *Daugherty*, 273 U. S. 135; *Sinclair* v. *United States*, 279 U. S. 263; *Christoffel* v. *United States*, 338 U. S. 84; *United States* v. *Bryan*,

tigating committees have varied over the course of years. Yet, the history of these committees clearly demonstrates that only infrequently have witnesses appearing before congressional committees been afforded the procedural rights normally associated with an adjudicative proceeding. In the vast majority of instances, congressional committees have not given witnesses detailed notice or an opportunity to confront, cross-examine and call other witnesses.[24]

The history of investigations conducted by the executive branch of the Government is also marked by a decided absence of those procedures here in issue.[25] The best example is provided by the administrative regulatory agencies. Although these agencies normally make determinations of a quasi-judicial nature, they also frequently conduct purely fact-finding investigations. When doing the former, they are governed by the Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. §§ 1001–1011, and the parties to the adjudication are accorded the traditional safeguards of a trial. However, when

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339 U. S. 323; *United States* v. *Fleischman*, 339 U. S. 349; *Watkins* v. *United States*, 354 U. S. 178; *Barenblatt* v. *United States*, 360 U. S. 109.

[24] See Appendix, *post*, pp. 478–485. See also Dimock, Congressional Investigating Committees, 153; Eberling, Congressional Investigations, 283, 390; McGeary, The Developments of Congressional Investigative Power, 80; Liacos, Rights of Witnesses Before Congressional Committees, 33 B. U. L. Rev. 337, 359–361; American Bar Association, Special Committee on Individual Rights as Affected by National Security, Appendix to Report on Congressional Investigations, 67–68.

The English practice is described in Clokie and Robinson, Royal Commissions of Inquiry; Finer, Congressional Investigations: The British System, 18 U. of Chi. L. Rev. 521; Keeton, Parliamentary Tribunals of Inquiry, in Vol. 12, Current Legal Problems 1959, 12.

[25] See Appendix, *post*, pp. 454–471. See also Gellhorn, Federal Administrative Proceedings, 108; Report of the Attorney General's Committee on Administrative Procedure and the various Monographs written by that Committee.

these agencies are conducting nonadjudicative, fact-finding investigations, rights such as apprisal, confrontation, and cross-examination generally do not obtain.

A typical agency is the Federal Trade Commission. Its rules draw a clear distinction between adjudicative proceedings and investigative proceedings. 16 CFR, 1958 Supp., § 1.34. Although the latter are frequently initiated by complaints from undisclosed informants, *id.*, §§ 1.11, 1.15, and although the Commission may use the information obtained during investigations to initiate adjudicative proceedings, *id.*, § 1.42, nevertheless, persons summoned to appear before investigative proceedings are entitled only to a general notice of "the purpose and scope of the investigation," *id.*, § 1.33, and while they may have the advice of counsel, "counsel may not, as a matter of right, otherwise participate in the investigation." *Id.*, § 1.40. The reason for these rules is obvious. The Federal Trade Commission could not conduct an efficient investigation if persons being investigated were permitted to convert the investigation into a trial. We have found no authorities suggesting that the rules governing Federal Trade Commission investigations violate the Constitution, and this is understandable since any person investigated by the Federal Trade Commission will be accorded all the traditional judicial safeguards at a subsequent adjudicative proceeding, just as any person investigated by the Civil Rights Commission will have all of these safeguards, should some type of adjudicative proceeding subsequently be instituted.

Another regulatory agency which distinguishes between adjudicative and investigative proceedings is the Securities and Exchange Commission. This Commission conducts numerous investigations, many of which are initiated by complaints from private parties. 17 CFR § 202.4. Although the Commission's Rules provide that parties to adjudicative proceedings shall be given detailed

notice of the matters to be determined, *id.*, 1959 Supp., § 201.3, and a right to cross-examine witnesses appearing at the hearing, *id.*, § 201.5, those provisions of the Rules are made specifically inapplicable to investigations, *id.*, § 201.20,[26] even though the Commission is required to

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[26] The Commission's practice with regard to investigations was described by the Attorney General's Committee on Administrative Procedure, Monograph, Securities Exchange Commission, 34–41. The following extract is pertinent here:

"*Where formal investigations are utilized as preliminaries to decisive proceedings, the person being investigated is normally not sent a notice, which, in any event, is not public.* The order for investigation, which includes the notice, is, however, exhibited to any person examined in the course of such investigation who so requests; since ordinarily the investigation will include the examination of the person suspected of violation, he will, thus, have actual notice of the investigation. Since a person may, on the other hand, be wholly unaware of the fact that he is being investigated until his friends who are interviewed so inform him, and since this may sometimes give rise to antagonism and a feeling that the Commission is besmirching him behind his back, no reason is apparent why, simply as a matter of good will, the Commission should not in ordinary cases send a copy of its order for investigation to the person under investigation.

. . . . . .

"The Commission's Rules of Practice expressly provide that all such rules (governing notice, amendments, objections to evidence, briefs, and the like) are inapplicable to formal investigatory hearings in the absence of express provision to the contrary in the order and with the exception of rule II, which relates to appearance and practice by representatives before the Commission. The testimony given in such investigations is recorded . . . . *In the usual case, witnesses are granted the right to be accompanied by counsel, but the latter's role is limited simply to advising the witnesses in respect of their right against self-incrimination without claiming the benefits of the immunity clause of the pertinent statute* (a right of which the presiding officer is, in any event, instructed to apprise the witnesses) *and to making objections to questions which assertedly exceed the scope of the order of investigation.*" *Id.*, 37–38. (Emphasis supplied.) See also Loss, Securities Regulation (1951), 1152.

initiate civil or criminal proceedings if an investigation discloses violations of law.[27] Undoubtedly, the reason for this distinction is to prevent the sterilization of investigations by burdening them with trial-like procedures.

Another type of executive agency which frequently conducts investigations is the presidential commission. Although a survey of these commissions presents no definite pattern of practice, each commission has generally been permitted to adopt whatever rules of procedure seem appropriate to it,[28] and it is clear that many of the most famous presidential commissions have adopted rules similar to those governing the proceedings of the Civil Rights Commission.[29] For example, the Roberts Commission established in 1941 to ascertain the facts relating to the Japanese attack upon Pearl Harbor, and to determine whether the success of the attack resulted from any derelictions of duty on the part of American military personnel, did not permit any of the parties involved in the investigation to cross-examine other witnesses. In fact, many of the persons whose conduct was being investigated were not represented by counsel and were not present during the interrogation of other witnesses. Hearings before the Joint Committee on the Investigation of the Pearl Harbor Attack, 79th Cong., 1st Sess., pts. 22–25.

Having considered the procedures traditionally followed by executive and legislative investigating agencies, we think it would be profitable at this point to discuss the oldest and, perhaps, the best known of all investigative bodies, the grand jury. It has never been considered necessary to grant a witness summoned before the grand

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[27] Loss, Securities Regulation (1951), 1153. See also the statutes cited in the Appendix, *post*, p. 463.

[28] Marcy, Presidential Commissions, 97–101.

[29] See Appendix, *post*, pp. 472–479.

jury the right to refuse to testify merely because he did not have access to the identity and testimony of prior witnesses. Nor has it ever been considered essential that a person being investigated by the grand jury be permitted to come before that body and cross-examine witnesses who may have accused him of wrongdoing. Undoubtedly, the procedural rights claimed by the respondents have not been extended to grand jury hearings because of the disruptive influence their injection would have on the proceedings, and also because the grand jury merely investigates and reports. It does not try.

We think it is fairly clear from this survey of various phases of governmental investigation that witnesses appearing before investigating agencies, whether legislative, executive, or judicial, have generally not been accorded the rights of apprisal, confrontation, or cross-examination. Although we do not suggest that the grand jury and the congressional investigating committee are identical in all respects to the Civil Rights Commission,[30] we mention them, in addition to the executive agencies and commissions created by Congress, to show that the rules of this Commission are not alien to those which have historically governed the procedure of investigations conducted by agencies in the three major branches of our Government. The logic behind this historical practice was recognized and described by Mr. Justice Cardozo's landmark opinion in *Norwegian Nitrogen Products Co.* v. *United States,* 288 U. S. 294. In that

[30] However, the courts have on more than one occasion likened investigative agencies of the executive branch of Government to a grand jury. See, *e. g., United States* v. *Morton Salt Co.,* 338 U. S. 632, 642; *Oklahoma Press Pub. Co.* v. *Walling,* 327 U. S. 186, 216; *Consolidated Mines of Calif.* v. *Securities & Exchange Comm'n,* 97 F. 2d 704, 708 (C. A. 9th Cir.); *Woolley* v. *United States,* 97 F. 2d 258, 262 (C. A. 9th Cir.).

case, the Court was concerned with the type of hearing that the Tariff Commission was required to hold when conducting its investigations. Specifically, the Court was asked to decide whether the Tariff Act of 1922, 42 Stat. 858, gave witnesses appearing before the Commission the right to examine confidential information in the Commission files and to cross-examine other witnesses testifying at Commission hearings. Although the Court did not phrase its holding in terms of due process, we think that the following language from Mr. Justice Cardozo's opinion is significant:

> "The Tariff Commission advises; these others ordain. There is indeed this common bond that all alike are instruments in a governmental process which according to the accepted classification is legislative, not judicial. . . . Whatever the appropriate label, the kind of order that emerges from a hearing before a body with power to ordain is one that impinges upon legal rights in a very different way from the report of a commission which merely investigates and advises. The traditionary forms of hearing appropriate to the one body are unknown to the other. What issues from the Tariff Commission as a report and recommendation to the President, may be accepted, modified, or rejected. If it happens to be accepted, it does not bear fruit in anything that trenches upon legal rights." 288 U. S., at 318.

And in referring to the traditional practice of investigating bodies, Mr. Justice Cardozo had this to say:

> "[W]ithin the meaning of this act the 'hearing' assured to one affected by a change of duty does not include a privilege to ransack the records of the Commission, and to subject its confidential agents to an examination as to all that they have learned. *There*

> *was no thought to revolutionize the practice of investigating bodies generally and of this one in particular." Id.*, at 319. (Emphasis supplied.)

Thus, the purely investigative nature of the Commission's proceedings, the burden that the claimed rights would place upon those proceedings, and the traditional procedure of investigating agencies in general, leads us to conclude that the Commission's Rules of Procedure comport with the requirements of due process.[31]

Nor do the authorities cited by respondents support their position. They rely primarily upon *Morgan* v. *United States*, 304 U. S. 1; *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U. S. 123; and *Greene* v. *McElroy, supra.* Those cases are all distinguishable in that the government agency involved in each was found by the Court to have made determinations in the nature of adjudications affecting legal rights. Thus, in *Morgan,* the action of the Secretary of Agriculture in fixing the maximum rates to be charged by market agencies at stockyards was challenged. In voiding the order of the Secretary for his failure to conduct a trial-like hearing, the Court referred to the adjudicatory nature of the proceeding:

> "Congress, in requiring a 'full hearing,' had regard to judicial standards,—not in any technical sense but with respect to those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature." 304 U. S., at 19.

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[31] The Commission cites *In re Groban*, 352 U. S. 330, and *Anonymous* v. *Baker*, 360 U. S. 287, in support of its position. Each of us who participated in those cases adheres to the view to which he subscribed therein. However, because there are significant differences between the *Groban* and *Anonymous* cases and the instant litigation, and because the result we reach today is supported by the other considerations analyzed herein, the Court does not find it necessary to discuss either of those cases.

Likewise, in *Joint Anti-Fascist Refugee Comm.* v. *McGrath,* 341 U. S. 123, 140–141, this Court held that the Attorney General's action constituted an adjudication. Finally, our decision last year in *Greene* v. *McElroy* lends little support to the respondents' position. The governmental action there reviewed was certainly of a judicial nature. The various Security Clearance Boards involved in *Greene* were not conducting an investigation; they were determining whether Greene could have a security clearance—a license in a real sense, and one that had a significant impact upon his employment. By contrast, the Civil Rights Commission does not make any binding orders or issue "clearances" or licenses having legal effect. Rather, it investigates and reports leaving affirmative action, if there is to be any, to other governmental agencies where there must be action *de novo.*

The respondents have also contended that the Civil Rights Act of 1957 is inappropriate legislation under the Fifteenth Amendment. We have considered this argument, and we find it to be without merit. It would unduly lengthen this opinion to add anything to the District Court's disposition of this claim. See 177 F. Supp., at 819–821.

Respondents' final argument is that the Commission's hearings should be governed by Section 7 of the Administrative Procedure Act, 60 Stat. 241, 5 U. S. C. § 1006, which specifies the hearing procedures to be used by agencies falling within the coverage of the Act. One of those procedures is the right of every party to conduct "such cross-examination as may be required for a full and true disclosure of the facts." However, what the respondents fail to recognize is that Section 7, by its terms, applies only to proceedings under Section 4, 60 Stat. 238, 5 U. S. C. § 1003 (rule making), and Section 5, 60 Stat.

239, 5-U. S. C. § 1004 (adjudications), of the Act. As we have already indicated, the Civil Rights Commission performs none of the functions specified in those sections.

From what we have said, it is obvious that the District Court erred in both cases in enjoining the Commission from holding its Shreveport hearing. The court's judgments are accordingly reversed, and the cases are remanded with direction to vacate the injunctions.

Reversed and remanded.

[For opinion of MR. JUSTICE FRANKFURTER, concurring in the result, see *post*, p. 486.]

[For concurring opinion of MR. JUSTICE HARLAN, joined by MR. JUSTICE CLARK, see *post*, p. 493.]

[For dissenting opinion of MR. JUSTICE DOUGLAS, joined by MR. JUSTICE BLACK, see *post*, p. 493.]

APPENDIX TO OPINION

[Footnotes at end of table]

Agency	Scope of agency's investigative authority	Extent of agency's subpoena power in investigative proceedings
Executive and Administrative Agencies [2] Atomic Energy Commission.	The Commission is authorized to "make such studies and investigations, . . . and hold such meetings or hearings as . . . [it] may deem necessary or proper to assist it in exercising" any of its statutory functions. 68 Stat. 948, 42 U.S.C. § 2201 (c).	The Commission may subpoena any person to appear and testify or produce documents "at any designated place." 68 Stat. 948, 42 U. S. C. § 2201 (c).

OF THE COURT [1]

[Footnotes at end of table]

The type of notice required to be given in investigative proceedings [3]	The right, if any, of persons affected by an investigation to cross-examine others testifying at investigative proceedings [4]	Miscellaneous comments
This is not specified by statute. The Commission's Rules of Practice provide that "[t]he procedure to be followed in informal hearings shall be such as will best serve the purpose of the hearing." 10 CFR § 2.720. The Rules of Practice do not require any specific type of notice to be given in informal hearings. *Ibid.*	This is not specified by statute. The Commission's Rules of Practice do not require that those summoned to appear before informal hearings be given the right to cross-examine other witnesses. Rather, the Commission is given the discretion to adopt those procedures which "will best serve the purpose of the hearing." 10 CFR § 2.720.	The Commission's Rules of Practice draw a sharp distinction between informal and formal hearings. Formal hearings are used only in "cases of adjudication," 10 CFR § 2.708, and parties to the hearings are given detailed notice of the subject of the hearing, *id.*, § 2.735, as well as the right to cross-examine witnesses, *id.*, § 2.747. Informal hearings are used in investigations "for the purposes of obtaining necessary or useful information, and affording participation by interested persons, in the formulation, amendment, or rescission of rules and regulations." *Id.*, § 2.708. The safeguards which are accorded in the formal, adjudicative hearings are not mentioned in the Commission's Rule relating to informal hearings. *Id.*, § 2.720.

Agency	Scope of agency's investigative authority	Extent of agency's subpoena power in investigative proceedings
Federal Communications Commission.	(1) The Commission is authorized to investigate any matters contained in a complaint "in such manner and by such means as it shall deem proper." 48 Stat. 1073, 47 U. S. C. § 208. (2) The Federal Communications Commission was also authorized to conduct a special investigation of the American Telephone and Telegraph Company, and to obtain information concerning the company's history and structure, the services rendered by it, its failure to reduce rates, the effect of monopolistic control on the company, the methods of competition engaged in by the company, and the company's attempts to influence public opinion by the use of propaganda. 49 Stat. 43.	(1) The Commission may "subpena the attendance and testimony of witnesses and the production of all books, papers, schedules of charges, contracts, agreements, and documents relating to any matter under investigation." 48 Stat. 1096, 47 U. S. C. § 409 (e). (2) The Commission was also given the subpoena power by the statute authorizing the investigation of the American Telephone and Telegraph Company. 49 Stat. 45.
Federal Trade Commission.	(1) The Commission is authorized to investigate "the organization, business, conduct, practices, and management of any corporation engaged in commerce"; to make an investigation of the manner in which antitrust decrees are being carried out; to investigate and report the facts relating to any alleged violations of the anti-	(1) The Commission may "subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation." 38

The type of notice required to be given in investigative proceedings [3]	The right, if any, of persons affected by an investigation to cross-examine others testifying at investigative proceedings [4]	Miscellaneous comments
This is not specified by statute. The Commission's Rules of Practice do not specify the type of notice to be given in investigative proceedings. However, the Rules do provide that the "[p]rocedures to be followed by the Commission shall, unless specifically prescribed . . . [in the Rules], be such as in the opinion of the Commission will best serve the purposes of . . . [any investigative] proceeding." 47 CFR § 1.10.	This is not specified by statute. Nor do the Commission's Rules of Practice refer to cross-examination in investigative proceedings. Therefore, whether persons appearing at an investigation have the privilege of cross-examining witnesses apparently depends upon whether the Commission is of the opinion that cross-examination "will best serve the purposes of such proceeding." 47 CFR § 1.10. It should also be noted that even in that portion of the Commission's Rules relating to adjudicative proceedings, there is no specific provision relating to cross-examination. *Id.*, §§ 1.101–1.193.	It should be noted that the Commission's Report on the Telephone Investigation made no mention of the type of notice, if any, given to those summoned to appear at the investigation. Nor was there any reference to cross-examination. The Commission did permit the Company "to submit statements in writing pointing out any inaccuracies in factual data or statistics in the reports introduced in the hearings or in any testimony in connection therewith, provided that such statements were confined to the presentation of facts and that no attempt would be made therein to draw conclusions therefrom." H. R. Doc. No. 340, 76th Cong., 1st Sess. xviii.
(1) This is not specified by statute. The Commission's Rules of Practice provide that "[a]ny party under investigation compelled to furnish information or documentary evidence shall be advised with respect to	(1) This is not specified by statute. The Commission's Rules of Practice provide that a person required to testify in an investigative proceeding "may be accompanied and advised by counsel, but	(1) It is interesting to note that the Commission's Rules of Practice draw an express and sharp distinction between investigative and adjudicative proceedings, and that the Commission's Rules relating to notice and

Agency	Scope of agency's investigative authority	Extent of agency's subpoena power in investigative proceedings
Federal Trade Commission—Continued.	trust Acts by any corporation; and "to investigate . . . trade conditions in and with foreign countries where associations, combinations, or practices of manufacturers, merchants, or traders, or other conditions, may affect the foreign trade of the United States." 38 Stat. 721–722, 15 U.S.C. § 46. (2) The Commission was also authorized to conduct a special investigation of the motor vehicle industry to determine (a) "the extent of concentration of control and of monopoly in the manufacturing, warehousing, distribution, and sale of automobiles, accessories, and parts, including methods and devices used by manufacturers for obtaining and maintaining their control or monopoly . . . and the extent, if any, to which fraudulent, dishonest, unfair, and injurious methods . . . [were] employed, including combinations, monopolies, price fixing, or unfair trade practices"; and (b) "the extent to which any of the antitrust laws of the United States . . . [were] being violated." 52 Stat. 218.	Stat. 722, 15 U.S.C. § 49. (2) The Commission was also given the subpoena power under the statute authorizing the investigation of the motor vehicle industry. 52 Stat. 218.

The type of notice required to be given in investigative proceedings [3]	The right, if any, of persons affected by an investigation to cross-examine others testifying at investigative proceedings [4]	Miscellaneous comments
the purpose and scope of the investigation." 16 CFR, 1959 Supp., § 1.33. (2) The Commission's Report on the Motor Vehicle Industry did not indicate what type of notice, if any, was given to those summoned to testify at the investigation. H.R. Doc. No. 468, 76th Cong., 1st Sess. Presumably, the Commission's regular Rules of Practice obtained.	counsel may not, as a matter of right, otherwise participate in the investigation." 16 CFR, 1959 Supp., § 1.40. Moreover, while the Rules of Practice make no mention of the right to cross-examine witnesses in investigative proceedings, see *id.*, § 1.31–1.42, such a right is specifically given to parties in an adjudicative proceeding. *Id.*, § 3.16. (2) The Commission's Report on the Motor Vehicle Industry did not refer to cross-examination. H.R. Doc. No. 468, 76th Cong., 1st Sess. Presumably, the Commission's regular Rules of Practice obtained.	cross-examination in investigative proceedings are very similar to those adopted by the Civil Rights Commission. (2) It should also be observed that FTC investigations may be initiated "upon complaint by members of the consuming public, businessmen, or the concerns aggrieved by unfair practices," 16 CFR, 1959 Supp., § 1.11, and that complaints received by the Commission may charge "any violation of law over which the Commission has jurisdiction." *Id.*, § 1.12. (3) Also relevant to our inquiry is the fact that the Commission does not "publish or divulge the name of an applicant or complaining party." *Id.*, § 1.15. (4) Finally, it is important to observe that the FTC, unlike the Civil Rights Commission, has the authority to commence adjudicative proceedings based upon the material obtained by means of investigative proceedings. *Id.*, § 1.42.

Agency	Scope of agency's investigative authority	Extent of agency's subpoena power in investigative proceedings
National Labor Relations Board.	Under the National Labor Relations Act, the Board is given the power to investigate petitions and charges submitted to it relating to union representation and unfair labor practices. 61 Stat. 144, 149, 29 U.S.C. §§ 159 (c), 160 (l).	"For the purpose of all hearings and investigations . . . the Board [may] . . . copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation," and it may also issue subpoenas requiring the attendance and testimony of witnesses in any proceeding or investigation. 61 Stat. 150, 29 U. S. C. § 161.
Securities and Exchange Commission.	(1) Under the Securities Act of 1933, as amended, the Commission is authorized to conduct "all investigations which . . . are necessary and proper for the enforcement of" the Act. 48 Stat. 85, 15 U. S. C. § 77s (b). (2) The Securities Exchange Act of 1934 authorizes the Commission to "make such investigations as it deems necessary to determine whether any person has violated or is about to violate any provisions of . . . [the Act] or any rule or regulation thereunder." 48 Stat. 899, 15 U. S. C. § 78u (a). (3) The Public Utility Holding Company Act of 1935 empowers the Commission to "investigate any facts, condi-	All of the Acts which authorize the Commission to conduct investigations also bestow upon it the power to subpoena witnesses, compel their attendance, and require the production of any books, correspondence, memoranda, contracts, agreements, and other records which are relevant to the investigation. Securities Act of 1933, 48 Stat. 85, 15 U. S. C. § 77s (b); Securi-

The type of notice required to be given in investigative proceedings [3]	The right, if any, of persons affected by an investigation to cross-examine others testifying at investigative proceedings [4]	Miscellaneous comments
This is not specified by statute. The Board's Statements of Procedure and Rules and Regulations provide for the preliminary investigation of all petitions and charges received by the Board. Although a copy of the initial charge may be served upon an alleged violator, there is no specific rule requiring the Board to give notice of the preliminary investigation. See 29 CFR, 1960 Supp., §§101.4, 101.18, 101.22, 101.27, 101.32, 102.63, 102.77, 102.85.	This is not specified by statute. The Board's Statements of Procedure and Rules and Regulations provide for the right to cross-examine witnesses at formal, adjudicative hearings, 29 CFR, 1960 Supp., §§101.10, 102.38, 102.66, 102.86, 102.90, but there is no such provision with regard to preliminary investigations. *Id.*, §§101.4, 101.18, 101.22, 101.27, 101.32, 102.63, 102.77, 102.85.	It should be noted that the National Labor Relations Board may use the information collected during preliminary investigations to initiate adjudicative proceedings. 61 Stat. 149, 29 U. S. C. § 160 (l). The Commission on Civil Rights has no such power. Moreover, the Board, unlike the Civil Rights Commission, may use the information obtained by it through investigations to petition the federal courts for appropriate injunctive relief, 61 Stat. 149, 29 U. S. C. § 160 (l).
This is not specified by statute. Nor do the Commission's Rules of Practice relating to formal investigations make any mention of the type of notice which must be given in such proceedings. 17 CFR § 202.4. The Commission's Rules do provide for the giving of notice in adjudicative proceedings, *id.*, 1959 Supp., § 201.3, but this provision is made specifically inapplicable to investigative proceedings. *Id.*, § 201.20.	This is not specified by statute. The Commission's Rules of Practice make no mention of the right to cross-examine witnesses in investigative proceedings. 17 CFR § 202.4. Parties are given the right to cross-examine witnesses in adjudicative proceedings, *id.*, § 201.5, but this provision is made specifically inapplicable to investigative proceedings. *Id.*, § 201.20.	The Securities and Exchange Commission's procedures for investigative proceedings are very similar to those of the Civil Rights Commission. Investigations may be initiated upon complaints received from members of the public, and these complaints may contain specific charges of illegal conduct. 17 CFR § 202.4. It should be noted, however, that the Securities and Exchange Commission, unlike the Civil

Agency	Scope of agency's investigative authority	Extent of agency's subpoena power in investigative proceedings
Securities and Exchange Commission—Con.	tions, practices, or matters which it may deem necessary or appropriate to determine whether any person has violated or is about to violate any provision of . . . [the Act] or any rule or regulation thereunder, or to aid in the enforcement of the provisions of . . . [the Act], in the prescribing of rules and regulations thereunder, or in obtaining information to serve as a basis for recommending further legislation concerning the matters to which . . . [the Act] relates." 49 Stat. 831, 15 U. S. C. § 79r (a). (4) The Trust Indenture Act of 1939 authorizes the Commission to conduct "any investigation . . . which . . . is necessary and proper for the enforcement of" the Act. 53 Stat. 1174, 15 U. S. C. § 77uuu (a). (5) The Investment Company Act of 1940 gives the Commission the power to "make such investigations as it deems necessary to determine whether any person has violated or is about to violate any provision of . . . [the Act] or of any rule, regulation, or order thereunder, or to determine whether any action in any court or any proceeding before the Commission shall be instituted under . . . [the Act] against a particular person or persons, or with respect to a particular person or persons, or with respect to a particular transaction or transactions." 54 Stat. 842, 15 U. S. C. § 80a–41 (a). (6) Finally, under the Investment Advisers Act of 1940, the Commission is authorized to determine by investigation	ties Exchange Act of 1934, 48 Stat. 900, 15 U. S. C. § 78u (b); Public Utility Holding Company Act of 1935, 49 Stat. 831, 15 U. S. C. § 79r (c); Trust Indenture Act of 1939, 53 Stat. 1174, 15 U. S. C. § 77uuu (a); Investment Company Act of 1940, 54 Stat. 842, 15 U. S. C. § 80a–41 (b); Investment Advisers Act of 1940, 54 Stat. 853, 15 U. S. C. § 80b–9 (b).

The type of notice required to be given in investigative proceedings [3]	The right, if any, of persons affected by an investigation to cross-examine others testifying at investigative proceedings [4]	Miscellaneous comments
		Rights Commission, is an adjudicatory body, and it may use the information gathered through investigative proceedings to initiate "administrative proceedings looking to the imposition of remedial sanctions, . . . (or) injunction proceedings in the courts, and, in the case of a willful violation," it may refer the "matter to the Department of Justice for criminal prosecution." *Ibid.* See also Securities Act of 1933, 48 Stat. 86, 15 U. S. C. § 77t (b); Securities Exchange Act of 1934, 48 Stat. 900, 15 U. S. C. § 78u (e); Public Utility Holding Company Act of 1935, 49 Stat. 832, 15 U. S. C. § 79r (f); Investment Company Act of 1940, 54 Stat. 843, 15 U. S. C. § 80a–41 (e); Investment Advisers Act of 1940, 54 Stat. 854, 15 U. S. C. § 80b–9 (e).

Agency	Scope of agency's investigative authority	Extent of agency's subpoena power in investigative proceedings
Securities and Exchange Commission—Con.	whether "the provisions of . . . [the Act] or of any rule or regulation prescribed under the authority thereof, have been or are about to be violated by any person." 54 Stat. 853, 15 U. S. C. § 80b–9 (a).	
Office of Price Stabilization.[5]	The Defense Production Act of 1950 authorized the President "to issue regulations and orders establishing a ceiling or ceilings on the price, rental, commission, margin, rate, fee, charge, or allowance paid or received on the sale or delivery, or the purchase or receipt, by or to any person, of any material or service, and at the same time . . . issue regulations and orders stabilizing wages, salaries, and other compensation in accordance with provisions of" the Act. 64 Stat. 803. This authority was delegated to the Economic Stabilization Administrator by Exec. Order No. 10161, 15 Fed. Reg. 6105. The Administrator in turn delegated the duty of issuing price regulations to the Office of Price Stabilization. Gen. Order No. 2 of the Economic Stabilization Agency, 16 Fed. Reg. 738. Pursuant to this authority, the Office of Price Stabilization promulgated Rules of Procedure, Section 2 of which provided that investigations would be held before the issuance of a ceiling price regulation. Price Procedural Regulation 1, Revision 2—General Price Procedures, § 2, 17 Fed. Reg. 3788.	The Defense Production Act of 1950 conferred upon the President the power, "by subpena or otherwise, to obtain such information from, require such reports and the keeping of such records by, make such inspection of the books, records, and other writings, premises or property of, and take the sworn testimony of, any person as may be necessary or appropriate, in his discretion, to the enforcement or the administration of . . . [the] Act and the regulations or orders issued thereunder." 64 Stat. 816. This power was delegated to the Office of Price Stabilization by Exec. Order No. 10161, 15 Fed. Reg. 6105; Gen. Order No. 2 of the Economic Stabilization Agency, 16 Fed. Reg. 738.

The type of notice required to be given in investigative proceedings [3]	The right, if any, of persons affected by an investigation to cross-examine others testifying at investigative proceedings [4]	Miscellaneous comments
This was not specified by statute or Executive Order. The Office's Rules of Procedure provided that a general public notice was to be given in the Federal Register of all pre-issuance hearings. Price Procedural Regulation 1—General Price Procedures, § 4, 17 Fed. Reg. 3788.	This was not specified by statute or Executive Order. Nor did the Office's Rules of Procedure make any mention of the right to cross-examine witnesses appearing at pre-issuance hearings. The Rules merely said that the hearing was to "be conducted in such manner, consistent with the need for expeditious action, as will permit the fullest possible presentation of the evidence by such persons as are, in the judgment of the Director, best qualified to provide information with respect to matters considered at the hearing or most likely to be seriously affected by action which may be taken as a result of the hearing." Price Procedural Regulation 1—General Price Procedures, § 5, 17 Fed. Reg. 3788.	It should be noticed that the Office's pre-issuance hearings usually led to determinations which had severe effects upon certain individuals; yet, there was no provision for personalized, detailed notice or cross-examination.

Agency	Scope of agency's investigative authority	Extent of agency's subpoena power in investigative proceedings
Office of Price Administration.[6]	The Administrator was "authorized to make such studies and investigations and to obtain such information as he . . . [deemed] necessary or proper to assist him in prescribing any regulation or order under . . . [the] Act, or in the administration and enforcement of . . . [the] Act and regulations, orders, and price schedules thereunder." 56 Stat. 30.	"For the purpose of obtaining any information [in an investigation] . . . the Administrator . . . [could] by subpena require any . . . person to appear and testify or to appear and produce documents, or both, at any designated place." 56 Stat. 30.
The Department of Agriculture.	(1) Under the Perishable Agricultural Commodities Act of 1930, the Department is authorized to investigate any complaint filed with the Secretary alleging that someone has violated the Act. 46 Stat. 534, 7 U. S. C. § 499f(c). (2) The Department also enforces the Packers and Stock-	(1) The Perishable Agricultural Commodities Act of 1930 authorizes the Secretary to "require by subpoena the attendance and testimony of witnesses and the produc-

The type of notice required to be given in investigative proceedings [3]	The right, if any, of persons affected by an investigation to cross-examine others testifying at investigative proceedings [4]	Miscellaneous comments
This was not specified by statute. The Administrator's Rules of Procedure did not specify the type of notice, if any, to be given during the investigative stage of price regulation proceedings. 32 CFR, 1944 Supp., § 1300.2. After the investigation, the Administrator could hold a price hearing prior to issuance of the regulation, and general notice of the hearing was to be published in the Federal Register. *Id.*, § 1300.4.	This was not specified by statute. The Administrator's Rules of Procedure made no mention of the right to cross-examine witnesses during either investigations or pre-issuance hearings. 32 CFR, 1944 Supp., §§ 1300.2, 1300.5. The Rules merely provided that hearings were to be conducted "in such manner, consistent with the need for expeditious action, as will permit the fullest possible presentation of evidence by such persons as are, in the judgment of the Administrator, best qualified to provide information with respect to matters considered at the hearing or most likely to be seriously affected by action which may be taken as a result of the hearing." *Id.*, § 1300.5.	It should be noted that even though the Administrator's proceedings smacked of an adjudication, there was no express requirement that either detailed notice or the right to cross-examine witnesses be given to parties affected by the Administrator's actions.
This is not specified by statute. The Department's Rules of Practice adopted pursuant to the Perishable Agricultural Commodities Act and the Packers and Stockyards Act do not refer to the type	This is not specified by statute. The Department's Rules of Practice adopted pursuant to the Perishable Agricultural Commodities Act and the Packers and Stockyards Act contain no reference to	(1) The Department of Agriculture, unlike the Civil Rights Commission, may use the information obtained through investigations in its subsequent adjudicative proceedings under the Perishable Agricultural

Agency	Scope of agency's investigative authority	Extent of agency's subpoena power in investigative proceedings
The Department of Agriculture—Con.	yards Act of 1921, which, for the purposes of that Act, gives the Secretary the investigative and other enforcement powers possessed by the Federal Trade Commission, 42 Stat 168, 7 U. S. C. § 222. The Department's Rules of Practice also provide that investigations shall be conducted when informal complaints charging a violation of the Act are received by the Secretary. 9 CFR § 202.23.	tion of such accounts, records, and memoranda as may be material for the determination of any complaint under" the Act. 46 Stat. 536, 7 U. S. C. § 499m (b). (2) The Packers and Stockyards Act of 1921 gives to the Secretary those powers conferred upon the Federal Trade Commission by "sections 46 and 48–50 of Title 15." Among those powers is the authority to subpoena witnesses. 42 Stat. 168, 7 U. S. C. § 222.

The type of notice required to be given in investigative proceedings [3]	The right, if any, of persons affected by an investigation to cross-examine others testifying at investigative proceedings [4]	Miscellaneous comments
of notice, if any, which must be given in investigative proceedings, 7 CFR § 47.3; 9 CFR § 202.3, although a specific right to notice is given in adjudicative proceedings. 7 CFR §§ 47.6, 47.27; 9 CFR §§ 202.6, 202.23, 202.39.	cross-examination during investigative proceedings, 7 CFR § 47.3; 9 CFR § 202.3, although such a right is given in the formal, adjudicative stage of the proceedings. 7 CFR §§ 47.15, 47.32; 9 CFR §§ 202.11, 202.29, 202.48.	Commodities Act. 7 CFR § 47.7. (2) It is also of interest that investigative proceedings under both the Perishable Agricultural Commodities Act and the Packers and Stockyards Act are commenced by the filing of complaints from private individuals. 7 CFR § 47.3; 9 CFR § 202.3. (3) Finally, it should be noted that the Department of Agriculture administers the Federal Seed Act, 53 Stat. 1275, 7 U. S. C. §§ 1551–1610, which makes it unlawful to engage in certain practices relating to the labeling and importation of seeds, and a statute regulating export standards for apples and pears, 48 Stat. 123, 7 U. S. C. §§ 581–589. The Rules of Practice adopted by the Secretary pursuant to statutory authorization provide that proceedings under these statutes shall be initiated by an investigation of the charges contained in any complaint received by the Secretary. These Rules make no mention of the type of notice, if any, given to those being investigated;

Agency	Scope of agency's investigative authority	Extent of agency's subpoena power in investigative proceedings
The Department of Agriculture—Con.		
Commodity Exchange Commission (Department of Agriculture).	The Commodity Exchange Act empowers the Secretary of Agriculture (acting through the Commission) to "make such investigations as he may deem necessary to ascertain the facts regarding the operations of boards of trade, whether prior or subsequent to the enactment of" the Act. The Secretary is also empowered to "investigate marketing conditions of commodity and commodity products and byproducts, including supply and demand for these commodities, cost to the consumer, and handling and transportation charges." 42 Stat. 1003, as amended, 49 Stat. 1491, 7 U.S.C. § 12.	The Secretary of Agriculture (acting through the Commission) is given the same subpoena powers as are vested in the Interstate Commerce Commission by the Interstate Commerce Act, 24 Stat. 383, 27 Stat. 443, 32 Stat. 904, 34 Stat. 798, 49 U.S.C. §§ 12, 46–48. 42 Stat. 1002, as amended, 49 Stat. 1499, 69 Stat. 160, 7 U.S.C. § 15.
Food and Drug Administration (Department of Health, Education and Welfare).	The Regulations adopted pursuant to the Federal Caustic Poison Act, 44 Stat. 1406, 15 U.S.C. §§ 401–411, authorize the Administration to conduct investigations, 21 CFR § 285.15, and to hold preliminary hearings "whenever it appears . . . that the provisions of section 3 or 6 of the Caustic Poison Act . . . have been violated and criminal proceedings are contemplated." *Id.*, § 285.17.	The Act makes no provision for compelling testimony.

The type of notice required to be given in investigative proceedings [3]	The right, if any, of persons affected by an investigation to cross-examine others testifying at investigative proceedings [4]	Miscellaneous comments
		nor is there any reference to cross-examination during the investigative stage of the proceedings. 7 CFR §§ 201.151, 33.17.
This is not specified by statute. The Commission has no special rules for investigations; however, its Rules of Practice provide that a private party may initiate a disciplinary proceeding by filing a complaint, and that an investigation of the complaint will be made. No mention is made of the type of notice, if any, which must be given in investigative proceedings. 17 CFR § 0.53.	This is not specified by statute. The Commission has no special rules for investigations; however, its Rules of Practice provide that a private party may initiate a disciplinary proceeding by filing a complaint, and that an investigation of the complaint will be made. No mention is made of the right to cross-examine witnesses during investigative proceedings. 17 CFR § 0.53.	It is of interest to note that investigations may be initiated by complaints from private parties, and that the information obtained during investigations may be used in a subsequent adjudicative proceeding. 17 CFR § 0.53.
This is not specified by statute. The Administration's Regulations make no reference to notice of investigative proceedings, but they do require that general notice be given to those against whom prosecution is contemplated. 21 CFR § 285.17.	This is not specified by statute. The Administration's regulations make no mention of the right to cross-examine witnesses appearing at investigative proceedings or preliminary hearings. 21 CFR § 285.17.	It should be noted that the Administration investigates specific instances of possible unlawful activity, and that, unlike the Civil Rights Commission, the Secretary (acting through the Administration) is required to refer possible violations to the proper United States Attorney. 44 Stat. 1409, 15 U. S. C. § 409 (b).

Agency	Scope of agency's investigative authority	Extent of agency's subpoena power in investigative proceedings
Presidential Commissions United States Tariff Commission.	(1) The Commission is authorized "to investigate the administration and fiscal and industrial effects of the customs laws of this country now in force or which may be hereafter enacted, the relations between the rates of duty on raw materials and finished products, the effects of ad valorem and specific duties and of compound specific and ad valorem duties, all questions relative to the arrangement of schedules and classification of articles in the several schedules of the customs law, and, in general, . . . the operation of customs laws, including their relation to the Federal revenues, [and] their effect upon the industries and labor of the country." 46 Stat. 698, 19 U. S. C. § 1332 (a). (2) The Commission is also authorized "to investigate the tariff relations between the United States and foreign countries, commercial treaties, preferential provisions, economic alliances, the effect of export bounties and preferential transportation rates, the volume of importations compared with domestic production and consumption, and conditions, causes and effects relating to competition of foreign industries with those of the United States, including dumping and cost of production." 46 Stat. 698, 19 U. S. C. § 1332 (b). (3) The Commission may investigate "the Paris Economy Pact and similar organizations and arrangements in Europe." 46 Stat. 698, 19 U. S. C. § 1332 (c). (4) The Commission is empowered to "investigate the difference in the costs of pro-	The Commission may, "for the purposes of carrying out its functions and duties in connection with any investigation authorized by law, . . . (1) . . . have access to and the right to copy any document, paper, or record, pertinent to the subject matter under investigation, in the possession of any person, firm, copartnership, corporation, or association engaged in the production, importation, or distribution of any article under investigation, (2) . . . summon witnesses, take testimony, and administer oaths, (3) . . . require any firm, person, copartnership, corporation, or association to produce books or papers relating to any matter pertaining to such investigation, and (4) . . . require any person, firm, copartnership, corporation, or association, to furnish in writing, in such detail and in such form as the commission may prescribe, information in their possession pertain-

The type of notice required to be given in investigative proceedings [3]	The right, if any, of persons affected by an investigation to cross-examine others testifying at investigative proceedings [4]	Miscellaneous comments
Many of the statutory provisions authorizing the Commission to hold hearings pursuant to its investigatory power require that reasonable notice of prospective hearings be given. 46 Stat. 701, 19 U. S. C. § 1336 (a); 65 Stat. 72, 19 U. S. C. § 1360 (b) (1); 65 Stat. 74, 19 U. S. C. § 1364 (a); 49 Stat. 774, 7 U. S. C. § 624 (a). The Commission's Rules of Practice also provide that public notice of any pending investigation shall be given. 19 CFR, 1960 Supp., § 201.10.	This is not specified by statute. The Commission's Rules permit a party who has entered an appearance to question a witness "for the purpose of assisting the Commission in obtaining the material facts with respect to the subject matter of the investigation." 19 CFR § 201.14. However, all questioning is done under the direction of and subject to the limitations imposed by the Commission, and a person who has not entered a formal appearance may not, as a matter of right, question witnesses. *Ibid.* See also *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294.	(1) Since the Commission's investigative powers are generally exercised to aid the President in the execution of his duties under the Tariff Act, it is readily apparent that the Commission's investigations may have far reaching effects upon those persons affected by specific tariff regulations. (2) It should also be noted that business data given to the Commission may be classified as confidential, 19 CFR § 201.6, and that confidential material contained in applications for investigation and complaints will not be made available for public inspection. *Id.*, § 201.8.

Agency	Scope of agency's investigative authority	Extent of agency's subpoena power in investigative proceedings
United States Tariff Commission—Con.	duction of any domestic article and of any like or similar foreign article." 46 Stat. 701, 19 U. S. C. § 1336 (a). (5) The Commission is authorized to investigate any complaint alleging that a person has engaged in unfair methods of competition or unfair acts in the importation of articles into the United States. 46 Stat. 703, 19 U. S. C. § 1337 (a), (b). (6) Before the President enters into negotiations concerning any proposed foreign trade agreement, the Commission is required to conduct an investigation and make a report to the President, indicating the type of agreement which will best carry out the purpose of the Tariff Act. 65 Stat. 72, 19 U. S. C. § 1360 (a). (7) The Commission is authorized to "make an investigation and make a report thereon . . . to determine whether any product upon which a concession has been granted under a trade agreement is, as a result, in whole or in part, of the duty or other customs treatment reflecting such concession, being imported into the United States in such increased quantities, either actual or relative, as to cause or threaten serious injury to the domestic industry producing like or directly competitive products." 65 Stat. 74, 19 U. S. C. § 1364(a). (8) The Commission is authorized to investigate the effects of dumping, and to determine whether because of such dumping, "an industry in the United States is being or is likely to be injured, or is prevented from being established." 42 Stat. 11, 19 U. S. C. § 160(a).	ing to such investigation." 46 Stat. 699, as amended, 72 Stat. 679, 19 U. S. C. § 1333 (a).

The type of notice required to be given in investigative proceedings [3]	The right, if any, of persons affected by an investigation to cross-examine others testifying at investigative proceedings [4]	Miscellaneous comments

Agency	Scope of agency's investigative authority	Extent of agency's subpoena power in investigative proceedings
United States Tariff Commission—Con.	(9) Finally, the Commission is authorized to conduct investigations for the purpose of determining whether "any article or articles are being or are practically certain to be imported into the United States under such conditions and in such quantities as to render or tend to render ineffective, or materially interfere with, any program or operation undertaken under" the Agricultural Adjustment Act or the Soil Conservation and Domestic Allotment Act. 49 Stat. 773, as amended, 62 Stat. 1248, 7 U. S. C. § 624 (a).	
Commission To Investigate the Japanese Attack on Hawaii.	The Commission was authorized to investigate the attack upon Pearl Harbor in order "to provide bases for sound decisions whether any derelictions of duty or errors of judgment on the part of the United States Army or Navy personnel contributed to such successes as were achieved by the enemy on the occasion mentioned, and if so, what these derelictions or errors were, and who were responsible therefor." Exec. Order No. 8983, 6 Fed. Reg. 6569.	The Commission was authorized "to issue subpenas requiring the attendance and testimony of witnesses and the production of any evidence that relates to any matter under investigation by the Commission." 55 Stat. 854.

The type of notice required to be given in investigative proceedings [3]	The right, if any, of persons affected by an investigation to cross-examine others testifying at investigative proceedings [4]	Miscellaneous comments
Neither the Executive Order creating the Commission, Exec. Order No. 8983, 6 Fed. Reg. 6569, nor the joint resolution conferring the subpoena power upon the Commission, 55 Stat. 853, required the Commission to inform prospective witnesses of complaints lodged against them.	Neither the Executive Order creating the Commission, Exec. Order No. 8983, 6 Fed. Reg. 6569, nor the joint resolution conferring the subpoena power upon the Commission, 55 Stat. 853, made any mention of the right to cross-examine witnesses. An examination of the Commission's proceedings does not disclose instances wherein any witness or party to the investigation was given the right to cross-examine other witnesses. In fact, such interested parties as Admiral Kimmel and General Short, the Navy and Army commanders at Pearl Harbor, were not even present at the hearings when other	It is of special interest that the Commission was charged with the responsibility of determining whether the successful attack upon Pearl Harbor resulted from any individual derelictions of duty. Yet, even though the Commission's investigation had all the earmarks of an adjudication, none of the procedural safeguards demanded by the respondents in these cases were provided.

Agency	Scope of agency's investigative authority	Extent of agency's subpoena power in investigative proceedings
Commission To Investigate the Japanese Attack on Hawaii—Continued.		
Temporary National Economic Committee.	The Committee was authorized to investigate "monopoly and the concentration of economic power in and financial control over production and distribution of goods and services . . . with a view to determining . . . (1) the causes of such concentration and control and their effect upon competition; (2) the effect of the existing price system and the price policies of industry upon the general level of trade, upon employment, upon long-term profits, and upon consumption, and (3) the effect of existing tax, patent, and other Government policies upon competition, price levels, unemployment, profits, and consumption." 52 Stat. 705.	The Committee was given the same subpoena powers as were conferred upon the Securities and Exchange Commission by the Public Utility Holding Company Act, 49 Stat. 831, 15 U. S. C. § 79r(c). 52 Stat. 706.
Congressional Investigating Committees [7] Senate Committee of Privileges (1800).	The Committee was authorized to conduct an investigation into charges that William Duane, a newspaper editor, had published articles defaming the Senate. 10 Annals of Cong. 117 (1800).	The Committee was authorized "to send for persons, papers, and records, and compel the attendance of witnesses which may become requisite for the execution of their commission." 10 Annals of Cong. 121 (1800).

The type of notice required to be given in investigative proceedings [3]	The right, if any, of persons affected by an investigation to cross-examine others testifying at investigative proceedings [4]	Miscellaneous comments
	witnesses were testifying. Hearings of the Joint Congressional Committee on the Investigation of the Pearl Harbor Attack, 79th Cong., 1st Sess., pts. 22–25.	
This was not specified by statute. The Rules of Procedure adopted by the Committee for the conduct of its hearings made no mention of the type of notice, if any, which was to be given to prospective witnesses. Hearings of the Temporary National Economic Committee, pt. 1. 193.	This was not specified by statute. The Rules of Procedure adopted by the Committee for the conduct of its hearings did not refer to cross-examination. There was merely a general statement that "[i]n all examination of witnesses, the rules of evidence shall be observed but liberally construed." Hearings of the Temporary National Economic Committee, pt. 1, 193.	
This was not specified by the authorizing resolution. However, a subsequent resolution provided that Duane was to be informed of the charges against him when he presented himself at the bar of the Senate. 10 Annals of Cong. 117 (1800).	This was not specified by the authorizing resolution. The Senate later rejected a motion to permit Duane "to have assistance of counsel for his defense," but allowed him to be heard through counsel "in denial of any facts charged against [him] or in excuse and extenuation of his offence." 10 Annals of Cong. 118, 119 (1800).	It should be noted that this Committee was investigating the allegedly unlawful conduct of a specific individual; yet, it does not appear that he was given the right to cross-examine adverse witnesses.

Agency	Scope of agency's investigative authority	Extent of agency's subpoena power in investigative proceedings
Committee of the Senate to Investigate Whether Senator John Smith of Ohio Should Retain His Seat in the Senate (1807).	Senator Smith had been accused of conspiring with Aaron Burr to commit treason, and the Committee was established to investigate the charges and to inquire whether Senator Smith "should be permitted any longer to have a seat" in the Senate. 17 Annals of Cong. 40 (1807).	The authorizing resolution did not indicate whether the Committee had the subpoena power. 17 Annals of Cong. 40 (1807).
Joint Committee on the Conduct of the Civil War (1861).	(1) The Committee was established "to inquire into the conduct of the present [Civil] war." Cong. Globe, 37th Cong., 2d Sess. 32, 40 (1861). (2) The Committee was also authorized "to inquire into the truth of the rumored slaughter of the Union troops, after their surrender, at the recent attack of the rebel forces upon Fort Pillow, Tennessee; as, [*sic*] also, whether Fort Pillow could have been sufficiently reenforced or evacuated, and, if so, why it was not done." 13 Stat. 405.	The Committee had "the power to send for persons and papers." Cong. Globe, 37th Cong., 2d Sess. 32, 40 (1861).

The type of notice required to be given in investigative proceedings [3]	The right, if any, of persons affected by an investigation to cross-examine others testifying at investigative proceedings [4]	Miscellaneous comments
This was not specified by the authorizing resolution. The Committee furnished Senator Smith with a description of the charges and evidence against him. Report of the Committee, 17 Annals of Cong. 56 (1807).	This was not specified by the authorizing resolution. Before the Committee, Senator Smith "claimed, as a right, to be heard in his defense by counsel, to have compulsory process for witnesses, and to be confronted with his accusers, as if the Committee had been a circuit court of the United States." Report of the Committee, 17 Annals of Cong. 56 (1807). However, the Committee rejected these claims on the ground that it was not a court, but rather a body whose function it was to investigate and report the facts relating to Senator Smith's conduct. *Ibid.*	Here again, it should be observed that the Committee was investigating the conduct of a particular individual, and that the Committee's findings could have had severe consequences on that individual.
This was not specified by the authorizing resolution. Many of the generals whose conduct was being investigated were given no notice of the charges that had been leveled against them. Botterud, The Joint Committee on the Conduct of the Civil War (M.A. Thesis, Georgetown University, 1949), 42.	This was not specified by the authorizing resolution. Many of the generals whose conduct was being investigated were not given the right to be assisted by counsel or to cross-examine other witnesses. Botterud, The Joint Committee on the Conduct of the Civil War (M.A. Thesis, Georgetown University, 1949), 42.	It should be noted that the Committee's investigation frequently centered on the allegedly derelict conduct of specific individuals. Botterud, The Joint Committee on the Conduct of the Civil War (M.A. Thesis, Georgetown University, 1949), 42.

Agency	Scope of agency's investigative authority	Extent of agency's subpoena power in investigative proceedings
House Committee to Investigate the Electric Boat Company of New Jersey (1908).	The Committee was established to investigate charges that the Electric Boat Company of New Jersey had "been engaged in efforts to exert corrupting influence on certain Members of Congress in their legislative capacities, and . . . [had], in fact, exerted such corrupting influence." H. R. Res. 288, 60th Cong., 1st Sess., 42 Cong. Rec. 2972.	The Committee had authority "to send for persons and papers." H. R. Res. 288, 60th Cong., 1st Sess., 42 Cong. Rec. 2972.
House Committee to Investigate Violations of the Antitrust Laws by the American Sugar Refining Co. (1911).	(1) The Committee was authorized to conduct an investigation "for the purpose of ascertaining whether or not there have been violations of the antitrust act of July 2, 1890, and the various acts supplementary thereto, by the American Sugar Refining Co.," and further, to "investigate the organization and operations of said American Sugar Refining Co., and its relations with other persons or corporations engaged in the business of manufacturing or refining sugar, and all other persons or corporations engaged in manufacturing or refining sugar and their relations with each other." H. R. Res., 157, 62d Cong., 1st Sess., 47 Cong. Rec. 1143.	The Committee was authorized "to compel the attendance of witnesses, [and] to send for persons and papers." H. R. Res. 157, 62d Cong., 1st Sess., 47 Cong. Rec. 1143.
Senate Committee to Investigate Lobbying (1935–1936).	The Committee was authorized "to make a full and complete investigation of all lobbying activities and all efforts to influence, encourage, promote, or retard legislation, directly or indirectly, in connection with the so-called 'holding-company bill',	The Committee was authorized "to require by subpena or otherwise the attendance of such witnesses and the production of such

The type of notice required to be given in investigative proceedings [3]	The right, if any, of persons affected by an investigation to cross-examine others testifying at investigative proceedings [4]	Miscellaneous comments
This was not specified by the authorizing resolution. However, most of the charges which led to the investigation were made in public hearings before the Rules Committee of the House. H.R. Rep. No. 1168, 60th Cong., 1st Sess.	The questioning of all witnesses was conducted by the Committee, although the parties being investigated were permitted to submit written interrogatories for the Committee to propound to certain witnesses. H. R. Rep. No. 1727, 60th Cong., 1st Sess. 11.	It is of interest that the Committee was investigating specific charges of corruption leveled against named individuals.
This was not specified by the authorizing resolution. Nor was this specified by the Committee's Rules of Procedure.	This was not specified by the authorizing statute. The Committee's Rules of Procedure provided that "counsel may attend witnesses summoned before this committee, but may not participate in the proceedings, either by way of examination or argument, except upon permission given by the committee, from time to time, as the occasion arises." Hearings before the Special Committee on the Investigation of the American Sugar Refining Co., 62d Cong., 1st Sess., Vol. 1, 3.	Once again, it should be noted that the Committee was established to investigate, among other things, possible violations of the law.
This was not specified by the authorizing resolution.	This was not specified by the authorizing resolution. The Committee adopted a rule that witnesses and their attorneys could not examine other wit-	

Agency	Scope of agency's investigative authority	Extent of agency's subpoena power in investigative proceedings
Senate Committee to Investigate Lobbying (1935–1936)—Con.	or any other matter or proposal affecting legislation." S. Res. 165, 74th Cong., 1st Sess., 79 Cong. Rec. 11003.	correspondence, books, papers, and documents . . . as it . . . [deemed] advisable." S. Res. 165, 74th Cong., 1st Sess., 79 Cong. Rec. 11003.

[1] This Appendix describes the Rules of Procedure governing the authorized investigative proceedings of a representative group of administrative agencies, executive departments, presidential commissions, and congressional committees. The Appendix does not purport to be a complete enumeration of the hundreds of agencies which have conducted investigations during the course of this country's history. Rather, it is designed to demonstrate that the procedures adopted by the Civil Rights Commission are similar to those which have traditionally been used by investigating agencies in both the executive and legislative branches of our Government.

[2] We have found many other administrative agencies and presidential commissions empowered to conduct investigations and to subpoena witnesses. Those agencies are not listed in the body of this Appendix because we were unable to find an adequate description of the rules of procedure governing their investigative proceedings. However, it is significant that the statutes creating these agencies made no reference to apprisal or cross-examination in investigative proceedings. Among the agencies in this category are: (1) Bureau of Corporations in the Department of Commerce and Labor, 32 Stat. 827; (2) Commission on Industrial Relations, 37 Stat. 415; (3) the Railroad Labor Board, 41 Stat. 469; (4) the United States Coal Commission, 42 Stat. 1023; (5) the Investigation Commission established by the Railroad Retirement Act of 1935, 49 Stat. 972; (6) National Bituminous Coal Commission, 49 Stat. 992; (7) Wage and Hour Division of the Department of Labor, 52 Stat. 1061; (8) Board of Investigation to Investigate Various Modes of Transportation, 54 Stat. 952; (9) Commission on Organization of the Executive Branch of the Government, 67 Stat. 143; (10) Commission on Intergovernmental Relations, 67 Stat. 145.

[3] If the relevant statute makes no reference to notice, this fact will be mentioned. The negative inference which may be drawn from the absence of any statutory requirement that notice be given is supported by the fact that, in a few instances, Congress has made specific provision for the giving of notice in investigative proceedings. See, *e.g.*, the statutes cited on p. 473, *supra*, requiring the United States Tariff Commission to give reasonable notice of any investigative hearing.

[4] If the relevant statute makes no reference to cross-examination, that fact will be mentioned because of the inference which may be drawn therefrom that Congress did not intend persons appearing at investigative hearings to cross-examine other witnesses. This inference

The type of notice required to be given in investigative proceedings [3]	The right, if any, of persons affected by an investigation to cross-examine others testifying at investigative proceedings [4]	Miscellaneous comments
	nesses; however, they could submit written questions, which the Committee would consider propounding to other witnesses. Hearings before Special Senate Committee to Investigate Lobbying Activities, 74th Cong., 2d Sess. 1469.	

is strengthened by the fact that in a relatively few instances Congress has, for one reason or another, required that persons being investigated by a commission or agency be given the right to cross-examine other witnesses. See, *e.g.*, 49 Stat. 1381, which authorized the Secretary of Commerce to appoint special boards to investigate the causes of marine casualties.

[5] The Office of Price Stabilization is now defunct, having been terminated by Exec. Order No. 10434, 18 Fed. Reg. 809.

[6] The Office of Price Administration is now defunct, its functions having been transferred to the Office of Temporary Controls by Exec. Order No. 9809, 11 Fed. Reg. 14281, which in turn was terminated by Exec. Order No. 9841, 12 Fed. Reg. 2645.

[7] In addition to the investigating committees listed in the body of the Appendix, we think mention should also be made of the contemporary standing committees of Congress. Most of these committees have rules very similar to those adopted by the Civil Rights Commission. The Rules of Procedure of the Subcommittee on Privileges and Elections of the Senate Committee on Rules and Administration are typical. Rule 17 of the Rules reads as follows:

"There shall be no direct or cross examination by counsel appearing for a witness. However, the counsel may submit in writing any question or questions he wishes propounded to his client or to any other witness. With the consent of the majority of the Members of the Subcommittee present and voting, such question or questions shall be put to the witness by the Chairman, by a Member of the Subcommittee or by the Counsel of the Subcommittee either in the original form or in modified language. The decision of the Subcommittee as to the admissibility of questions submitted by counsel for a witness, as well as to their form, shall be final."

See also S. Rep. No. 2, 84th Cong., 1st Sess. 20; Hearings before the Subcommittee on Rules of the Senate Committee on Rules and Administration, on S. Res. 65, 146, 223, 249, 253, 256, S. Con. Res. 11, and 86, 83d Cong., 2d Sess., Part 3, 141–142, 344, 345, 374; Rules of Procedure of the Select Committee on Improper Activities in the Labor or Management Field, Rules 10 and 11. Reference has been made in the text, *supra*, pp. 436–439, to the House "fair play" rules, which govern the hearings of most House Committees, and which make no provision for cross-examination.

MR. JUSTICE FRANKFURTER, concurring in the result.

The United States Commission on Civil Rights, in exercising powers granted to it by the Civil Rights Act of 1957 (71 Stat. 635, 42 U. S. C. § 1975c), scheduled a hearing to be held by it in Shreveport, Louisiana, on July 13, 1959. By these two actions judgments were sought to declare the proposed hearing illegal and to restrain the members of the Commission from holding it.

The rules of procedure formulated by the Commission amply rest on leave of Congress. I need add nothing on this phase of the case to the Court's opinion. While it is a most salutary doctrine of constitutional adjudication to give a statute even a strained construction to avoid facing a serious doubt of constitutionality, "avoidance of a difficulty will not be pressed to the point of disingenuous evasion. Here the intention of the Congress is revealed too distinctly to permit us to ignore it because of mere misgivings as to power. The problem must be faced and answered." *Moore Ice Cream Co.* v. *Rose,* 289 U. S. 373, 379. I have no such misgivings in the situation before us. I also agree with the Court's conclusion in rejecting the constitutional claims of the plaintiffs. In view, however, of divergencies between the Court's analysis and mine of the specific issues before us, including the authoritative relevance of *In re Groban,* 352 U. S. 330, and *Anonymous No. 6* v. *Baker,* 360 U. S. 287, I state my reasons for agreement.

To conduct the Shreveport hearing on the basis of sworn allegations of wrongdoing by the plaintiffs, without submitting to them these allegations and disclosing the identities of the affiants, would, it is claimed, violate the Constitution. The issue thus raised turns exclusively on the application of the Due Process Clause of the Fifth Amendment. The Commission's hearings are not proceedings requiring a person to answer for an "infamous crime," which must be based on an indictment of a grand

jury (Amendment V), nor are they "criminal prosecutions" giving an accused the rights defined by Amendment VI. Since due process is the constitutional axis on which decision must turn, our concern is not with absolutes, either of governmental power or of safeguards protecting individuals. Inquiry must be directed to the validity of the adjustment between these clashing interests—that of Government and of the individual, respectively—in the procedural scheme devised by the Congress and the Commission. Whether the scheme satisfies those strivings for justice which due process guarantees, must be judged in the light of reason drawn from the considerations of fairness that reflect our traditions of legal and political thought, duly related to the public interest Congress sought to meet by this legislation as against the hazards or hardship to the individual that the Commission procedure would entail.

Barring rare lapses, this Court has not unduly confined those who have the responsibility of governing within a doctrinaire conception of "due process." The Court has been mindful of the manifold variety and perplexity of the tasks which the Constitution has vested in the legislative and executive branches of the Government by recognizing that what is unfair in one situation may be fair in another. Compare, for instance, *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, with *Ng Fung Ho* v. *White*, 259 U. S. 276, and see *Communications Comm'n* v. *WJR*, 337 U. S. 265, 275. Whether the procedure now questioned offends "the rudiments of fair play," *Chicago, M. & St. P. R. Co.* v. *Polt*, 232 U. S. 165, 168, is not to be tested by loose generalities or sentiments abstractly appealing. The precise nature of the interest alleged to be adversely affected or of the freedom of action claimed to be curtailed, the manner in which this is to be done and the reasons for doing it, the balance of individual hurt and the justifying public good—these and such like are the

considerations, avowed or implicit, that determine the judicial judgment when appeal is made to "due process."

The proposed Shreveport hearing creates risks of harm to the plaintiffs. It is likewise true that, were the plaintiffs afforded the procedural rights they seek, they would have a greater opportunity to reduce these risks than will be theirs under the questioned rules of the Commission. Some charges touching the plaintiffs might be withdrawn or modified, if those making them knew that their identities and the content of their charges were to be revealed. By the safeguards they seek the plaintiffs might use the hearing as a forum for subjecting the charges against them to a scrutiny that might disprove them or, at least, establish that they are not incompatible with innocent conduct.

Were the Commission exercising an accusatory function, were its duty to find that named individuals were responsible for wrongful deprivation of voting rights and to advertise such finding or to serve as part of the process of criminal prosecution, the rigorous protections relevant to criminal prosecutions might well be the controlling starting point for assessing the protection which the Commission's procedure provides. The objectives of the Commission on Civil Rights, the purpose of its creation, and its true functioning are quite otherwise. It is not charged with official judgment on individuals nor are its inquiries so directed. The purpose of its investigations is to develop facts upon which legislation may be based. As such, its investigations are directed to those concerns that are the normal impulse to legislation and the basis for it. To impose upon the Commission's investigations the safeguards appropriate to inquiries into individual blameworthiness would be to divert and frustrate its purpose. Its investigation would be turned into a forum for the litigation of individual culpability—matters which are not within the keeping

of the Commission, with which it is not effectively equipped to deal, and which would deflect it from the purpose for which it was within its limited life established.

We would be shutting our eyes to actualities to be unmindful of the fact that it would dissuade sources of vitally relevant information from making that information known to the Commission, if the Commission were required to reveal its sources and subject them to cross-examination. This would not be a valid consideration for secrecy were the Commission charged with passing official incriminatory or even defamatory judgment on individuals. Since the Commission is merely an investigatorial arm of Congress, the narrow risk of unintended harm to the individual is outweighed by the legislative justification for permitting the Commission to be the critic and protector of the information given it. It would be wrong not to assume that the Commission will responsibly scrutinize the reliability of sworn allegations that are to serve as the basis for further investigation and that it will be rigorously vigilant to protect the fair name of those brought into question.

In appraising the constitutionally permissive investigative procedure claimed to subject individuals to incrimination or defamation without adequate opportunity for defense, a relevant distinction is between those proceedings which are preliminaries to official judgments on individuals and those, like the investigation of this Commission, charged with responsibility to gather information as a solid foundation for legislative action. Judgments by the Commission condemning or stigmatizing individuals are not called for. When official pronouncements on individuals purport to rest on evidence and investigation, it is right to demand that those so accused be given a full opportunity for their defense in such investigation, excepting, of course, grand jury investigations. The functions of that institution and its constitutional prerog-

atives are rooted in long centuries of Anglo-American history. On the other hand, to require the introduction of adversary contests relevant to determination of individual guilt into what is in effect a legislative investigation is bound to thwart it by turning it into a serious digression from its purpose.

The cases in which this Court has recently considered claims to procedural rights in investigative inquiries alleged to deal unfairly with the reputation of individuals or to incriminate them, have made clear that the fairness of their procedures is to be judged in light of the purpose of the inquiry, and, more particularly, whether its essential objective is official judgment on individuals under scrutiny. Such a case was *Greene* v. *McElroy,* 360 U. S. 474. There the inquiry was for the purpose of determining whether the security clearance of a particular person was to be revoked. A denial of clearance would shut him off from the opportunity of access to a wide field of employment. The Court concluded that serious constitutional questions were raised by denial of the rights to confront accusatory witnesses and to have access to unfavorable reports on the basis of which the very livelihood of an individual would be gravely jeopardized. Again, *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123, presented a contrasting situation to the one before us. The Government there sought through the Attorney General to designate organizations as "Communist," thus furnishing grounds on which to discharge their members from government employment. No notice was given of the charges against the organizations nor were they given an opportunity to establish the innocence of their aims and acts. It was well within the realities to say of what was under scrutiny in *Joint Anti-Fascist Refugee Committee* v. *McGrath* that "It would be blindness . . . not to recognize that in the conditions of our time such designation drastically restricts

the organizations, if it does not proscribe them." 341 U. S., at 161 (concurring opinion). And the procedure which was found constitutionally wanting in that case could be fairly characterized as action "to maim or decapitate, on the mere say-so of the Attorney General, an organization to all outward-seeming engaged in lawful objectives . . . ." *Ibid.* Nothing like such characterization can remotely be made regarding the procedure for the proposed inquiry of the Commission on Civil Rights.

Contrariwise, decisions arising under the Due Process Clause of the Fourteenth Amendment strongly support the constitutionality of what is here challenged, where the purposes were as here truly investigatorial. Thus, *In re Groban,* 352 U. S. 330, sustained inquiry by the Ohio State Fire Marshal into the causes of a fire while excluding counsel of subpoenaed witnesses on whose premises the fire occurred. The Court so held even though the Fire Marshal had authority, after questioning a witness, to arrest him if he believed there was sufficient evidence to charge him with arson. The guiding consideration was that, although suspects might be discovered, the essential purpose of the Fire Marshal's inquiry was not to adjudicate individual responsibility for the fire but to pursue a legislative policy of fire prevention through the discovery of the origins of fires. This decision was applied in *Anonymous No. 6* v. *Baker,* 360 U. S. 287, which concerned "a state judicial Inquiry into alleged improper practices at the local bar" (at p. 288). Rejecting the claim based on the consideration that the inquiry might serve as a groundwork for the prosecution of witnesses called before it, the Court applied *Groban* because the inquiry was a general one and appellants were before it not as potential accused but "solely as witnesses." The proposed investigation of the Commission on Civil Rights is much less likely to result in prosecution of witnesses before it than were the investigations in *Groban* and

Baker. Just as surely, there is not present in the cases now before us a drastic official judgment, as in *Greene* and *Joint Anti-Fascist Refugee Committee,* where the Court deemed it necessary to insure that full opportunity for defense be accorded to individuals who were the specific, adverse targets of the secret process.

Moreover, the limited, investigatorial scope of the challenged hearing is carefully hedged in with protections for the plaintiffs. They will have the right to be accompanied by counsel. The rules insure that they will be made aware of the subject of the hearings. They will have the right to appeal to the Commission's power to subpoena additional witnesses. The rules significantly direct the Commission to abstain from public exposure by taking in executive session any evidence or testimony tending "to defame, degrade, or incriminate any person." A person so affected is given the right to read such evidence and to reply to it. These detailed provisions are obviously designed as safeguards against injury to persons who appear in public hearings before the Commission. The provision for screening defamatory and incriminatory testimony in order to keep it from the public may well be contrasted with the procedure in the *Joint Anti-Fascist* case, where the very purpose of the inquiry was to make an official judgment that certain organizations were "Communist." Such condemnation of an organization would of course taint its members. The rules of the Commission manifest a sense of its responsibility in carrying out the limited investigatorial task confided to it. It is not a constitutional requirement that the Commission be argumentatively turned into a forum for trial of the truth of particular allegations of denial of voting rights in order thereby to invalidate its functioning. Such an inadmissible transformation of the Commission's function is in essence what is involved in the claims of the plaintiffs. Congress has entrusted the Commission with a very dif-

ferent role—that of investigating and appraising general conditions and reporting them to Congress so as to inform the legislative judgment. Resort to a legislative commission as a vehicle for proposing well-founded legislation and recommending its passage to Congress has ample precedent.

Finally it should be noted that arguments directed either at the assumed novelty of employing the Commission in the area of legislative interest which led Congress to its establishment, or at the fact that the source of the Commission's procedures were those long used by Committees of Congress, are not particularly relevant. History may satisfy constitutionality, but constitutionality need not produce the title deeds of history. Mere age may establish due process, but due process does not preclude new ends of government or new means for achieving them. Since the Commission has, within its legislative framework, provided procedural safeguards appropriate to its proper function, claims of unfairness offending due process fall. The proposed Shreveport hearing fully comports with the Constitution and the law. Accordingly I join the judgment of the Court in reversing the District Court.

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

In joining the Court's opinion, as I do, I desire to add that in my view the principles established by *In re Groban,* 352 U. S. 330, and *Anonymous* v. *Baker,* 360 U. S. 287, are dispositive of the issues herein in the Commission's favor.

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

With great deference to my Brethren I dissent from a reversal of these judgments.

The cause which the majority opinion serves is, on the surface, one which a person dedicated to constitutional

principles could not question. At the bottom of this controversy is the right to vote protected by the Fifteenth Amendment. That Amendment withholds power from either the States or the United States to deny or abridge the right to vote "on account of race, color, or previous condition of servitude." This right stands beyond the reach of government. Only voting qualifications that conform to the standards proscribed by the Fifteenth Amendment may be prescribed. See *Lassiter* v. *Northampton Election Board,* 360 U. S. 45. As stated in *Terry* v. *Adams,* 345 U. S. 461, 468, "The Amendment, the congressional enactment and the cases make explicit the rule against racial discrimination in the conduct of elections." By democratic values this right is fundamental, for the very existence of government dedicated to the concept "of the people, by the people, for the people," to use Lincoln's words, depends on the franchise.

Yet important as these civil rights are, it will not do to sacrifice other civil rights in order to protect them. We live and work under a Constitution. The temptation of many men of goodwill is to cut corners, take short cuts, and reach the desired end regardless of the means. Worthy as I think the ends are which the Civil Rights Commission advances in these cases, I think the particular means used are unconstitutional.

The Commission, created by Congress, is a part of "the executive branch" of the Government, 71 Stat. 634, 42 U. S. C. § 1975 (a), whose members are appointed by the President and confirmed by the Senate. § 1975 (a). It is given broad powers of investigation with the view of making a report with "findings and recommendations" to the Congress. § 1975c. It is empowered, among other things, to

> "investigate allegations in writing under oath or affirmation that certain citizens of the United States

> are being deprived of their right to vote and have that vote counted by reason of their color, race, religion, or national origin; which writing, under oath or affirmation, shall set forth the facts upon which such belief or beliefs are based." § 1975c (a)(1).

Complaints have been filed with the Commission charging respondents, who are registrars of voters in Louisiana, with depriving persons of their voting rights by reason of their color. If these charges are true and if the registrars acted willfully (see *Screws* v. *United States,* 325 U. S. 91), the registrars are criminally responsible under a federal statute which subjects to fine and imprisonment [1] anyone who willfully deprives a citizen of any right under the Constitution "by reason of his color, or race." [2] 18 U. S. C. § 242.

The investigation and hearing by the Commission are therefore necessarily aimed at determining if this criminal law has been violated. The serious and incriminating nature of the charge and the disclosure of facts concerning it are recognized by the Congress, for the Act requires certain protective procedures to be adopted where defamatory, degrading, or incriminating evidence may be adduced.

> "If the Commission determines that evidence or testimony at any hearing may tend to defame, degrade, or incriminate any person, it shall (1) receive such evidence or testimony in executive session; (2) afford

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[1] Civil suits for damages are also authorized. See 42 U. S. C. § 1983; *Lane* v. *Wilson,* 307 U. S. 268.

[2] The section reads in relevant part as follows:

"Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . by reason of his color, or race . . . shall be fined not more than $1,000 or imprisoned not more than one year, or both."

such person an opportunity voluntarily to appear as a witness; and (3) receive and dispose of requests from such person to subpena additional witnesses." 42 U. S. C. § 1975a (e).

Yet these safeguards, given as a matter of grace, do not in my judgment dispose of the constitutional difficulty. First, it is the Commission's judgment, not the suspect's, that determines whether the hearing shall be secret or public. Thus this procedure has one of the evils protested against in *In re Groban,* 352 U. S. 330, 337, 348–353 (dissenting opinion). The secrecy of the inquisition only underlines its inherent vices: "Secret inquisitions are dangerous things justly feared by free men everywhere. They are the breeding place for arbitrary misuse of official power. They are often the beginning of tyranny as well as indispensable instruments for its survival. Modern as well as ancient history bears witness that both innocent and guilty have been seized by officers of the state and whisked away for secret interrogation or worse until the groundwork has been securely laid for their inevitable conviction." *Id.,* at 352–353. As said in dissent in *Anonymous* v. *Baker,* 360 U. S. 287, 299, "secretly compelled testimony does not lose its highly dangerous potentialities merely because" it is taken in preliminary proceedings. Second, the procedure seems to me patently unconstitutional whether the hearing is public or secret. Under the Commission's rules the accused is deprived of the right to notice of the charges against him and the opportunity of cross-examination. This statutory provision, fashioned to protect witnesses as such rather than a prospective defendant, permits the Commission to exclude the accused entirely from the hearing and deny him the opportunity even to observe the testimony of his accusers. And even if the Commission were inclined in a particular case to protect the accused from the opprobrium likely to flow from the testimony of

individual witnesses against him by holding secret sessions, this would be little comfort after the Commission's findings, based on such untested evidence, were publicized across the Nation.

I assume that no court would be justified in enjoining a Congressional Committee composed of Senators or Congressmen that engaged in this kind of conduct. This is not that kind of a committee. Moreover, even if it were and if private rights were infringed by reason of the Committee's violations of the Constitution, there are circumstances when redress can be had in the courts. *Kilbourn* v. *Thompson,* 103 U. S. 168. Cf. *Greenfield* v. *Russel,* 292 Ill. 392, 127 N. E. 102; *Opinion of the Justices,* 96 N. H. 530, 73 A. 2d 433. The judiciary also becomes implicated when the Congress asks the courts to back up what its Committees have done; or when a victim of an investigation asks relief from punishment imposed on him. Then the procedural safeguards of the Bill of Rights come into full play. See *Watkins* v. *United States,* 354 U. S. 178.

The Civil Rights Commission, however, is not a Congressional Committee of Senators or Congressmen; nor is it an arm of Congress. It is an arm of the Executive. There is, in my view, only one way the Chief Executive may move against a person accused of a crime and deny him the right of confrontation and cross-examination and that is by the grand jury.

The grand jury is the accusatory body in federal law as provided by the Fifth Amendment. The essence of the institution of the grand jury was stated by 1 Stephen, History of Criminal Law of England, 252: "The body of the country are the accusers." Thomas Erskine stated the matter accurately and eloquently in *Jones* v. *Shipley,* 21 How. St. Tr. 847, 977.

> "[I]t is unnecessary to remind your lordships, that, in a civil case, the party who conceives himself

> aggrieved, states his complaint to the court,—avails himself at his own pleasure of its process,—compels an answer from the defendant by its authority,—or taking the charge *pro confesso* against him on his default, is entitled to final judgment and execution for his debt, without any interposition of a jury. But in criminal cases it is otherwise; the court has no cognizance of them, without leave from the people forming a grand inquest. If a man were to commit a capital offence in the face of all the judges of England, their united authority could not put him upon his trial:—they could file no complaint against him, even upon the records of the supreme criminal court, but could only commit him for safe custody, which is equally competent to every common justice of the peace:—the grand jury alone could arraign him, and in their discretion might likewise finally discharge him, by throwing out the bill, with the names of all your lordships as witnesses on the back of it. If it shall be said, that this exclusive power of the grand jury does not extend to lesser misdemeanors, which may be prosecuted by information; I answer, that for that very reason it becomes doubly necessary to preserve the power of the other jury which is left."

This idea, though uttered in 1783, is modern and relevant here. The grand jury brings suspects before neighbors, not strangers. Just recently in *Stirone* v. *United States,* 361 U. S. 212, 218, we said, "The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge."

This Commission has no such guarantee of fairness. Its members are not drawn from the neighborhood. The

members cannot be as independent as grand juries because they meet not for one occasion only; they do a continuing job for the executive and, if history is a guide, tend to acquire a vested interest in that role.

The grand jury, adopted as a safeguard against "hasty, malicious, and oppressive" action by the Federal Government, *Ex parte Bain,* 121 U. S. 1, 12, stands as an important safeguard to the citizen against open and public accusations of crime. Today the grand jury may act on its own volition, though originally specific charges by private prosecutors were the basis of its action. *Hale* v. *Henkel,* 201 U. S. 43, 59–60. It has broad investigational powers to look into what may be offensive against federal criminal law. *United States* v. *Johnson,* 319 U. S. 503, 510. An indictment returned by a grand jury may not be challenged because it rests wholly on hearsay. *Costello* v. *United States,* 350 U. S. 359, 361–362. An accused is not entitled to a hearing before a grand jury, nor to present evidence, nor to be represented by counsel; and a grand jury may act secretly—a procedure normally abhorrent to due process. In this country as in England of old, the grand jury is convened as a body of laymen, free from technical rules, acting in secret, pledged to indict no one because of prejudice and to free no one because of special favor. *Costello* v. *United States, supra,* at 362.

Grand juries have their defects. They do not always return a true bill, for while the prejudices of the community may radiate through them, they also have the saving quality of being familiar with the people involved. They are the only accusatory body in the Federal Government that is recognized by the Constitution. I would allow no other engine of government, either executive or legislative, to take their place—at least when the right of confrontation and cross-examination are denied the accused as is done in these cases.

The might and power of the Federal Government have no equal. When its guns are leveled at a citizen on charges that he committed a federal crime, it is for me no answer to say that the only purpose is to report his activities to the President and Congress, not to turn him over to the District Attorney for prosecution. Our Constitution was drawn on the theory that there are certain things government may not do to the citizen and that there are other things that may be done only in a specific manner. The relationship of the Federal Government to a man charged with crime is carefully defined. Its power may be marshalled against him, but only in a defined way. When we allow this substitute method, we make an innovation that does not comport with that due process which the Fifth Amendment requires of the Federal Government. When the Federal Government prepares to inquire into charges that a person has violated federal law, the Fifth Amendment tells us how it can proceed.

The Civil Rights Commission, it is true, returns no indictment. Yet in a real sense the hearings on charges that a registrar has committed a federal offense are a trial. Moreover, these hearings before the Commission may be televised or broadcast on the radio.[3] In our day we have seen Congressional Committees probing into alleged criminal conduct of witnesses appearing on the television screen. This is in reality a trial in which the

[3] The Rules of the Commission by Subdivision (k) provide:

"Subject to the physical limitations of the hearing room and consideration of the physical comfort of Commission members, staff, and witnesses, equal and reasonable access for coverage of the hearings shall be provided to the various means of communications, including newspapers, magazines, radio, news reels, and television. However, no witness shall be televised, filmed or photographed during the hearings if he objects on the ground of distraction, harassment, or physical handicap."

whole Nation sits as a jury. Their verdict does not send men to prison. But it often condemns men or produces evidence to convict and even saturates the Nation with prejudice against an accused so that a fair trial may be impossible. As stated in 37 A. B. A. J. 392 (1951), "If several million television viewers see and hear a politician, a businessman or a movie actor subjected to searching interrogation, without ever having an opportunity to cross-examine his accusers or offer evidence in his own support, that man will stand convicted, or at least seriously compromised, in the public mind, whatever the later formal findings may be." The use of this procedure puts in jeopardy our traditional concept of the way men should be tried and replaces it with "a new concept of guilt based on inquisitorial devices." Note, 26 Temp. L. Q. 70, 73.

Yet whether the hearing is televised or not it will have all the evils of a legislative trial. "The legislative trial," wrote Alan Barth in Government by Investigation (1955) p. 81, "is a device for condemning men without the formalities of due process." And he went on to say:

> "The legislative trial serves three distinct though related purposes: (1) it can be used to punish conduct which is not criminal; (2) it can be used to punish supposedly criminal conduct in the absence of evidence requisite to conviction in a court of law; and (3) it can be used to drive or trap persons suspected of 'disloyalty' into committing some collateral crime such as perjury or contempt of Congress, which can then be subjected to punishment through a judicial proceeding. 'It is hard to get them for their criminal activities in connection with espionage, but a way has been found,' Senator McCarthy once remarked. 'We are getting them for perjury and putting some of the worst of them away. For that

> reason I hope every witness who comes here is put under oath and his testimony is gone over with a fine-tooth comb, and if we cannot convict some of them for their disloyal activities, perhaps we can convict some of them for perjury.' That they may have been guilty of no violation of law in the first place seems of no concern to the Senator." *Id.*, at 83. And see Telford Taylor, Grand Inquest (1955).

Barth wrote of hearings in the so-called loyalty cases. But the reasons apply to any hearing where a person's job or liberty or reputation is at stake. Barth wrote of hearings held by Congressional Committees. Yet the evil is compounded where the "legislative trial" has become a "Commission trial." And while I assume that a court would not enjoin the typical Congressional Committee, it is duty bound to keep commissions within limits, when its jurisdiction is properly invoked.

The right to know the claims asserted against one and to contest them—to be heard—to conduct a cross-examination—these are all implicit in our concept of "a full and fair hearing" before any administrative agency, as the Court in *Morgan* v. *United States,* 304 U. S. 1, 18, emphasized. We spoke there in the context of civil litigation where property was at stake. Here the need for all the protective devices of a fair hearing is greater. For one's job and perhaps his liberty are hinged on these hearings.

We spoke in the tradition of the *Morgan* case only recently in *Greene* v. *McElroy,* 360 U. S. 474, 496–497.

> "Certain principles have remained relatively immutable in our jurisprudence. *One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so*

> *that he has an opportunity to show that it is untrue.* While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right 'to be confronted with the witnesses against him.' This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, . . . but also in all types of cases where administrative and regulatory actions were under scrutiny." (Italics added.)

We spoke there in a context where men were being deprived of their jobs as a result of investigations into their loyalty. Certainly no less is required if hearings are to be held on charges that a person has violated a federal law.

Respondents ask no more than the right to know the charges, to be confronted with the accuser, and to cross-examine him. Absent these rights, they ask for an injunction. In the *Greene* case we said these rights were available "where governmental action seriously injures an individual." 360 U. S., at 496. Injury is plain and obvious here—injury of a nature far more serious than merely losing one's job, as was the situation in the *Greene* case. If the hearings are to be without the safeguards which due process requires of all trials—civil and criminal—there is only one way I know by which the Federal Government may proceed and that is by grand jury. If these trials before the Commission are to be held on

charges that these respondents are criminals, the least we can do is to allow them to know what they are being tried for, and to confront their accusers and to cross-examine them.[4] This protection would be extended to them in any preliminary hearing, even in one before a United States Commissioner.[5] Confrontation and cross-examination are so basic to our concept of due process (*Peters* v. *Hobby*, 349 U. S. 331, 351–352 (concurring opinion)) that no proceeding by an administrative agency is a fair one that denies these rights.

References are made to federal statutes governing numerous administrative agencies such as the Federal Trade Commission and the Securities and Exchange Commission; and the inference is that what is done in this case can be done there. This comes as a surprise to one who for some years was engaged in those administrative investigations. No effort was ever made, so far as I am aware, to compel a person, charged with violating a federal law, to run the gantlet of a hearing over his objection.

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[4] Cf. Frankfurter, Hands Off the Investigations, New Republic, May 21, 1924, p. 329, at 331: "It must be remembered that our rules of evidence are but tools for ascertaining the truth, and that these tools vary with the nature of the issues and the nature of the tribunal seeking facts. Specifically, the system of rules of evidence used in trials before juries 'are mainly aimed at guarding the jury from the over-weening effect of certain kinds of evidence.' That system, as pointed out by Wigmore, 'is not applicable by historical precedent, or by sound practical policy' to 'inquiries of fact determinable by administrative tribunals.' Still less is it applicable to inquiries by congressional committees. Of course the essential decencies must be observed, namely opportunity for cross-examination must be afforded to those who are investigated or to those representing issues under investigation."

[5] Rule 5 (b), Rules of Criminal Procedure, provides that the defendant shall be informed of the complaint against him and of his right to retain counsel. Rule 5 (c) expressly states, "The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf."

No objection based either on the ground now advanced nor on the Fifth Amendment was, so far as I know, ever overruled. Investigations were made; and they were searching. Such evidence of law violations as was obtained was turned over to the Department of Justice. But never before, I believe, has a federal executive agency attempted, over the objections of an accused, to force him through a hearing to determine whether he has violated a federal law. If it did, the action was lawless and courts should have granted relief.

What we do today is to allow under the head of due process a fragmentation of proceedings against accused people that seems to me to be foreign to our system. No indictment is returned, no commitment to jail is made, no formal criminal charges are made. Hence the procedure is condoned as violating no constitutional guarantee. Yet what is done is another short cut used more and more these days to "try" men in ways not envisaged by the Constitution. The result is as damaging as summoning before committees men who it is known will invoke the Fifth Amendment and pillorying them for asserting their constitutional rights. This case—like the others—is a device to expose people as suspects or criminals. The concept of due process which permits the invention and use of prosecutorial devices not included in the Constitution makes due process reflect the subjective or even whimsical notions of a majority of this Court as from time to time constituted. Due process under the prevailing doctrine is what the judges say it is; and it differs from judge to judge, from court to court. This notion of due process makes it a tool of the activists who respond to their own visceral reactions in deciding what is fair, decent, or reasonable. This elastic concept of due process is described in the concurring opinion as follows:

> "Whether the scheme satisfies those strivings for justice which due process guarantees, must be judged in

> the light of reason drawn from the considerations of fairness that reflect our traditions of legal and political thought, duly related to the public interest Congress sought to meet by this legislation as against the hazards or hardship to the individual that the Commission procedure would entail."

When we turn to the cases, personal preference, not reason, seems, however, to be controlling.

Illustrative are the First Amendment protection given to the activities of a classroom teacher by the Due Process Clause of the Fourteenth Amendment in *Sweezy* v. *New Hampshire,* 354 U. S. 234, 255, 261–263 (concurring opinion), but denied to the leader of an organization holding discussion groups at a summer camp in *Uphaus* v. *Wyman,* 360 U. S. 72; the decisions that due process was violated by the use of evidence obtained by the forceful use of a stomach pump in *Rochin* v. *California,* 342 U. S. 165, but not when evidence was used which was obtained by taking the blood of an unconscious prisoner. *Breithaupt* v. *Abram,* 352 U. S. 432.

It is said in defense of this chameleon-like due process that it is not "an exercise of whim or will," that it is "founded on something much deeper and more justifiable than personal preference. As far as it lies within human limitations, it must be an impersonal judgment. It must rest on fundamental presuppositions rooted in history to which widespread acceptance may fairly be attributed." *Sweezy* v. *New Hampshire, supra,* at 267 (concurring opinion). Yet one who tries to rationalize the cases on cold logic or reason fails. The answer turns on the personal predilections of the judge; and the louder the denial the more evident it is that emotion rather than reason dictates the answer. This is a serious price to pay for adopting a free-wheeling concept of due process, rather than confining it to the procedures and devices enu-

merated in the Constitution itself. As said in *Adamson* v. *California,* 332 U. S. 46, 68, 89 (dissenting opinion):

> "In my judgment the people of no nation can lose their liberty so long as a Bill of Rights like ours survives and its basic purposes are conscientiously interpreted, enforced and respected so as to afford continuous protection against old, as well as new, devices and practices which might thwart those purposes. I fear to see the consequences of the Court's practice of substituting its own concepts of decency and fundamental justice for the language of the Bill of Rights as its point of departure in interpreting and enforcing that Bill of Rights."

That was written concerning the meaning of the Due Process Clause of the Fourteenth Amendment. But it has equal vitality when applied to the Due Process Clause of the Fifth Amendment with which we are now concerned.

I think due process is described in the Constitution and limited and circumscribed by it. The Constitution is explicit as respects the permissible accusatory process that the Executive can employ against the citizen. Men of goodwill, not evil ones only, invent, under feelings of urgency, new and different procedures that have an awful effect on the citizen. The new accusatory procedure survives if a transient majority of the Court are persuaded that the device is fair or decent. My view of the Constitution confines judges—as well as the lawmakers and the Executive—to the procedures expressed in the Constitution. We look to the Constitution—not to the personal predilections of the judges—to see what is permissible. Since summoning an accused by the Government to explain or justify his conduct, that is charged as a crime, may be done only in one way, I would require a constitutional amendment before it can be done in a different way.

The alternate path which we take today leads to trial of separate essential parts of criminal prosecutions by commissions, by executive agencies, by legislative committees. Farming out pieces of trials to investigative agencies is fragmentizing the kind of trial the Constitution authorizes. It prejudices the ultimate trial itself; and it puts in the hands of officials the awesome power which the Framers entrusted only to judges, grand jurors and petit jurors drawn from the community where the accused lives. It leads to government by inquisition.

The Civil Rights Commission can hold all the hearings it desires; it can adduce testimony from as many people as it likes; it can search the records and archives for such information it needs to make an informed report to Congress. See *United States* v. *Morton Salt Co.,* 338 U. S. 632; *Oklahoma Press Pub. Co.* v. *Walling,* 327 U. S. 186. But when it summons a person, accused under affidavit of having violated the federal election law, to see if the charge is true, it acts in lieu either of a grand jury or of a committing magistrate. The sifting of criminal charges against people is for the grand jury or for judges or magistrates and for them alone under our Constitution. In my view no other accusatory body can be used that withholds the rights of confrontation and cross-examination from those accused of federal crimes.

I would affirm these judgments.

Syllabus.

AQUILINO ET AL., DOING BUSINESS AS HOME MAINTENANCE CO., ET AL. *v.* UNITED STATES ET AL.

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK.

No. 1. Argued October 15, 1959.—Decided June 20, 1960.

A general contractor having defaulted both on the payment of federal taxes and on the payment of amounts due to subcontractors who had supplied labor and materials on a construction job in New York State, and the subcontractors having sued to foreclose their mechanics' liens, the owner of the real estate paid into court the amount remaining due under the construction contract. Under §§ 3670 and 3671 of the Internal Revenue Code of 1939, the United States claimed priority for its tax lien on the "property and rights to property" of the defaulting general contractor. The subcontractors claimed that, under § 36–a of the New York Lien Law, the amounts due to the general contractor from the owner constituted "trust funds" in the hands of the general contractor for the benefit of subcontractors, laborers and materialmen, to the extent of their unpaid claims, and that, therefore, the general contractor had no "property" or "rights to property" in the fund to which the Government's tax lien could attach. Without clearly determining what property rights, if any, the general contractor had in the fund under state law, the Court of Appeals of New York decided in favor of the United States. *Held:* The judgment is vacated and the case is remanded to the Court of Appeals of New York, so that it may ascertain the property interests of the taxpayer under state law and then dispose of the case in accordance with established federal law. Pp. 510–516.

3 N. Y. 2d 511, 146 N. E. 2d 774, judgment vacated and cause remanded.

Charles S. Friedman argued the cause for petitioners. With him on the brief was *Harold M. Edwards.*

Howard A. Heffron argued the cause for the United States. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Rice, A. F. Prescott* and *Myron C. Baum.*

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

In this case we are asked to determine which of two competing claimants—the Federal Government by virtue of its tax lien, or certain petitioning subcontractors by virtue of their rights under Section 36–a of the New York Lien Law—is entitled to a sum of money owed under a general construction contract which was performed by the taxpayer.

The taxpayer, Fleetwood Paving Corporation, is a general contractor, which in July or August 1952, agreed to remodel a restaurant belonging to one Ada Bottone, herein referred to as the owner. The petitioners in August and September of that year entered into a subcontract with the taxpayer to supply labor and materials for the remodeling job. Shortly thereafter, the petitioners performed their obligations under the subcontract, but were not fully compensated by the contractor-taxpayer. Therefore, on November 3, 1952, and on November 10, 1952, they filed notices of their mechanic's liens on the owner's realty in the office of the Clerk of Westchester County. In June 1953, they instituted actions in the New York Supreme Court to foreclose those liens.

By order of court, the owner was permitted to deposit with the Clerk of the court the $2,200 which she still owed under the original construction contract, and she was thereafter dismissed as a defendant in the action. The Government, having previously levied upon the owner's alleged indebtedness to the taxpayer, was permitted by the court to enter the case as a party defendant.

The Government asserted precedence over the claims of petitioners because of the following facts: The Director of Internal Revenue in December 1951 and March 1952 received assessment lists containing assessments against the taxpayer for unpaid federal withholding and social security taxes. On October 31, 1952, the Director filed a

notice of federal tax liens in the office of the Clerk of the City of Mount Vernon, New York, which is the city wherein the taxpayer maintained its principal place of business. The Government claimed priority for its tax lien under Sections 3670 and 3671 of the Internal Revenue Code of 1939.[1] The petitioners contended that since the contractor-taxpayer owed them more than $2,200 for labor and materials supplied to the job, under the New York Lien Law, Section 36–a,[2] he had no property interest in

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[1] Section 3670:

"If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person."

Section 3671:

"Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time."

These provisions also appear in the 1954 Code. Int. Rev. Code of 1954, §§ 6321, 6322.

[2] McKinney's N. Y. Laws, Lien Law (1958 Supp.), § 36–a, provides as follows:

"The funds received by a contractor from an owner for the improvement of real property are hereby declared to constitute trust funds in the hands of such contractor to be applied first to the payment of claims of subcontractors, architects, engineers, surveyors, laborers and materialmen arising out of the improvement, and to the payment of premiums on surety bond or bonds filed and premiums on insurance accruing during the making of the improvement and any contractor and any officer, director or agent of any contractor who applies or consents to the application of such funds for any other purpose and fails to pay the claims hereinbefore mentioned is guilty of larceny and punishable as provided in section thirteen hundred and two of the penal law. Such trust may be enforced by civil action maintained as provided in article three-a of this chapter by any person entitled to share in the fund, whether or not he shall have filed, or had the right to file, a notice of lien or shall have recovered

the $2,200 which the owner still owed under the original remodeling contract.

The New York Supreme Court, Special Term, 140 N. Y. S. 2d 355, granted petitioners' motion for summary judgment. The ground for the decision was that the Government's tax lien was ineffective since it had not been filed in the office designated by New York law for the filing of liens against realty. On appeal, the Appellate Division affirmed, but on the ground that there was no debt due from the owner to the taxpayer to which the Government's lien could attach, 2 App. Div. 2d 747, 153 N. Y. S. 2d 268. The court reasoned that the fund deposited by the owner was a substitute for her realty to which the mechanic's liens had attached; and that since the Government had no lien on the owner's property, it could have no lien on the fund substituted for that property. On appeal, the New York Court of Appeals held that the tax lien had taken effect prior to the petitioners' claims. It therefore reversed the lower New York courts, and ruled that the motion of the United States for summary judgment, rather than that of petitioners, should have been granted by the Supreme Court, Special Term. 3 N. Y. 2d 511, 146 N. E. 2d 774. We granted certiorari, 359 U. S. 904.

The threshold question in this case, as in all cases where the Federal Government asserts its tax lien, is whether and to what extent the taxpayer had "property" or "rights to property" to which the tax lien could attach. In answering that question, both federal and state courts

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a judgment for a claim arising out of the improvement. For the purpose of a civil action only, the trust funds shall include the right of action upon an obligation for moneys due or to become due to a contractor, as well as moneys actually received by him."

Section 36–a was repealed on September 1, 1959. N. Y. Laws 1959, c. 696, § 14. The subject matter covered by § 36–a is now included in McKinney's N. Y. Laws, Lien Law (1959 Supp.), §§ 70, 71.

must look to state law, for it has long been the rule that "in the application of a federal revenue act, state law controls in determining the nature of the legal interest which the taxpayer had in the property . . . sought to be reached by the statute." [3] *Morgan* v. *Commissioner,* 309 U. S. 78, 82. Thus, as we held only two Terms ago, Section 3670 "creates no property rights but merely attaches consequences, federally defined, to rights created under state law . . . ." *United States* v. *Bess,* 357 U. S. 51, 55.[4] However, once the tax lien has attached to the

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[3] It is suggested that the definition of the taxpayer's property interests should be governed by federal law, although supplying the content of this nebulous body of federal law would apparently be left for future decisions. We think that this approach is unsound because it ignores the long-established role that the States have played in creating property interests and places upon the courts the task of attempting to ascertain a taxpayer's property rights under an undefined rule of federal law. It would indeed be anomalous to say that the taxpayer's "property and rights to property" included property in which, under the relevant state law, he had no property interest at all.

[4] It is said that because of the unique circumstances which existed in *Bess*, that case does not control here. However, aside from the fact that *Bess* involved proceeds payable under an insurance policy, whereas this case involves proceeds payable under a construction contract, it is apparent that the relevant circumstances of the two cases are essentially identical. In both cases the Government was attempting to assert its tax lien against what it thought to be the "property and rights to property" of the taxpayer. In both cases an adverse party claimed the right to the property in question on the theory that the taxpayer had never acquired a state-created property interest to which the Government's tax lien could attach. Finally, in both cases, the Government attempted to characterize the problem as one involving a conflict between competing claimants to be settled solely by the application of federal law.

Bess held that state law determines the property interests of a taxpayer in the cash surrender value of an insurance policy, as well as in the proceeds payable upon death. The same considerations which led to our conclusion in *Bess* require that we look to state law in determining the general contractor's property interests in this case.

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taxpayer's state-created interests, we enter the province of federal law, which we have consistently held determines the priority of competing liens asserted against the taxpayer's "property" or "rights to property." [5] *United States* v. *Vorreiter,* 355 U. S. 15, reversing 134 Colo. 543, 307 P. 2d 475; *United States* v. *White Bear Brewing Co.,* 350 U. S. 1010, reversing 227 F. 2d 359; *United States* v. *Colotta,* 350 U. S. 808, reversing 224 Miss. 33, 79 So. 2d 474; *United States* v. *Scovil,* 348 U. S. 218; *United States* v. *Liverpool & London & Globe Ins. Co.,* 348 U. S. 215; *United States* v. *Acri,* 348 U. S. 211; *United States* v. *City of New Britain,* 347 U. S. 81; *United States* v. *Gilbert Associates,* 345 U. S. 361; *United States* v. *Security Trust & Sav. Bank,* 340 U. S. 47; *Illinois* v. *Campbell,* 329 U. S. 362; *United States* v. *Waddill, Holland & Flinn, Inc.,* 323 U. S. 353. The application of state law in ascertaining the taxpayer's property rights and of federal law in reconciling the claims of competing lienors is based both upon logic and sound legal principles. This approach strikes a proper balance between the legitimate and traditional interest which the State has in creating and defining the property interest of its citizens, and the necessity for a uniform administration of the federal revenue statutes.

Petitioners contend that the New York Court of Appeals did not make its determination in the light of these settled principles. Relying upon the express lan-

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[5] It is suggested that the rule announced by *Bess* and applied in this case is inconsistent with the mandate that federal law governs the relative priority of federal tax liens and state-created liens. However, we fail to perceive wherein lies the inconsistency. It is one thing to say that a taxpayer's property rights have been and should be created by state law. It is quite another thing to declare that in the interest of efficient tax administration one must look to federal law to resolve the conflict between competing claimants of the taxpayer's state-created property interests.

guage of Section 36–a of the Lien Law and upon a number of lower New York court decisions interpreting that statute, petitioners conclude that the money actually received by the contractor-taxpayer and his right to collect amounts still due under the construction contract constitute a direct trust for the benefit of subcontractors, and that the only property rights which the contractor-taxpayer has in the trust are bare legal title to any money actually received and a beneficial interest in so much of the trust proceeds as remain after the claims of subcontractors have been settled. The Government, on the other hand, claims that Section 36–a merely gives the subcontractors an ordinary lien, and that the contractor-taxpayer's property rights encompass the entire indebtedness of the owner under the construction contract.

This conflict should not be resolved by this Court, but by the highest court of the State of New York. We cannot say from the opinion of the Court of Appeals that it has been satisfactorily resolved.[6] We find no discussion in the court's opinion to indicate the nature of the property rights possessed by the taxpayer under state law. Nor is the application to be made of federal law clearly defined. We believe that it is in the interests of all concerned to have these questions decided by the state courts of New York. We therefore vacate the judgment

[6] Subsequent to the Court of Appeals' decision in the instant case, and after this Court's decision in *United States* v. *Bess*, 357 U. S. 51, the New York Court of Appeals decided the case of *In re City of New York*, 5 N. Y. 2d 300, 157 N. E. 2d 587, pending on petition for a writ of certiorari *sub nom. United States* v. *Coblentz*, No. 259, this Term [*post*, p. 841]. The *Coblentz* case is not authority for the disposition of the instant case. The latter involves a determination of property rights under § 36–a of the New York Lien Law, whereas the *Coblentz* case was concerned with the taxpayer's property interests under an assignment contract, § 475 of the New York Judiciary Law, and § B15–37.0 of the New York City Administrative Code.

of the Court of Appeals, and remand the case to that court so that it may ascertain the property interests of the taxpayer under state law and then dispose of the case according to established principles of law.

Vacated and remanded.

MR. JUSTICE HARLAN, dissenting in Nos. 1 and 23.*

I am unable to subscribe to the reasoning which underlies the Court's disposition of these cases. By holding that they both turn on whether the taxpayer had "property" under state law to which the Government's lien could attach, the Court has sanctioned a result consistently prohibited by us in a line of cases dealing with the priority of federal tax liens.[1]

In both cases, the delinquent taxpayer is a defaulting general contractor whose subcontractors remain unpaid. The Government's lien is asserted against the chose in action which the general contractor allegedly holds against the owner of the real estate on which the improvements were made, in respect of amounts due from the owner under the construction contract. If the subcontractors had sought to enforce their claims by imposing a lien on that chose in action, there is no question that the Government's lien would prevail. Under the decisions of this Court cited in note 1, *supra,* a federal tax lien asserted

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*[No. 23 is *United States* v. *Durham Lumber Co. et al., post,* p. 522.]

[1] *United States* v. *Security Trust & Savings Bank,* 340 U. S. 47 (1950); *United States* v. *City of New Britain,* 347 U. S. 81 (1954); *United States* v. *Acri,* 348 U. S. 211 (1955); *United States* v. *Liverpool & London Globe Ins. Co., Ltd.,* 348 U. S. 215 (1955); *United States* v. *Scovil,* 348 U. S. 218 (1955); *United States* v. *Colotta,* 350 U. S. 808 (1955); *United States* v. *White Bear Brewing Co.,* 350 U. S. 1010 (1956); *United States* v. *Vorreiter,* 355 U. S. 15 (1957); *United States* v. *Ball Construction Co., Inc.,* 355 U. S. 587 (1958); *United States* v. *Hulley,* 358 U. S. 66 (1958).

against a taxpayer's property under §§ 3670 and 3671 of the Internal Revenue Code of 1939 [2] prevails over all other claims against such property except (1) those which attach and become "choate" before the federal lien attaches, and (2) those specifically protected by § 3672 (a).[3] It is conceded that the interests of the subcontractors in the present cases are not protected by § 3672 (a) and would not be considered choate under the applicable decisions. See *United States* v. *Kings County Iron Works,* 224 F. 2d 232 (C. A. 2d Cir. 1955).

The Court believes, however, that the present cases are different, because under state law, the general contractor in *Aquilino* held his claim against the owner in trust for the subcontractors to the extent of their claims, and because the subcontractors in *Durham Lumber* were given, to the extent of their claims, a direct right of action against the owner in respect of his debt to the general contractor, and that in these circumstances the rights of the subcontractors in the owner's debt are superior to those of the general contractor. It is said that, to the extent of the subcontractors' claims, the general contractor, under state law, thus had no "property" interest in the amounts due him from the owner, and that under the principles enunciated in *United States* v. *Bess,* 357 U. S. 51, a federal tax lien can attach only to a property interest which exists under state law.

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[2] The text of these sections, applicable in the *Aquilino* case, are set forth in note 1 of the Court's opinion in No. 1, *ante,* p. 511. The comparable provisions of the Internal Revenue Code of 1954, §§ 6321 and 6322, applicable in the *Durham Lumber* case, are printed in notes 1 and 2 of the Court's opinion in No. 23, *post,* p. 524.

[3] That section, as amended, provides: "Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector . . . ." 53 Stat. 882. The comparable provision of the Internal Revenue Code of 1954 is § 6323 (a).

I cannot see how it makes any difference, for purposes of the federal tax-lien statute, whether state law purports to prefer subcontractors over the general contractor and parties claiming through him by giving the subcontractors a lien on the general contractor's right of action against the owner or by giving them a prior right to collect the debt itself. In both instances, the owner is under a contractual duty to pay the general contractor and the latter is under a contractual duty to pay the subcontractors. In both instances, the subcontractors are attempting to satisfy their claims against the general contractor. And in both instances, they are seeking to satisfy themselves by claiming precisely the same thing—a prior right in the proceeds of the debt which arises by virtue of the contractual relationship between the owner and the general contractor.[4] In neither instance can the subcontractors collect more than that to which the subcontract entitles them, and in neither can the owner be required to pay more than that to which the main contract obligates him. If federal law requires that subordination of the general contractor's interest be ignored in the one instance, it does so equally in the other.

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[4] It is noteworthy that the North Carolina law involved in the *Durham Lumber* case requires the general contractor to furnish the owner with a statement of subcontractors' claims "before receiving any part of the *contract price, as it may become due,*" and that it is thereafter the duty of the owner to retain an appropriate amount "from the money *then due the contractor.*" N. C. Gen. Stat., 1950, § 44–8. (Emphasis added.) Although this section indicates that the general contractor has no right to collect the proceeds of the main contract until the statutory conditions are satisfied, it obviously recognizes the owner's contractual obligation as the real basis of the transaction and the source of the subcontractors' rights. The subcontractors' claims are thus not akin to liens on the owner's real estate, as this Court suggests, but are asserted solely in respect of the monetary claim held by the general contractor against the owner.

The *Bess* case does not require a contrary conclusion. That case held only that while a federal tax lien attached to the cash surrender value of a life insurance policy owned by the taxpayer, it did not attach to the proceeds paid on his death, because under state law he had no right to such proceeds during his life. There was no reason under those circumstances why state property concepts should not control. To read that case as standing for the proposition that such concepts must also be controlling in cases such as these defeats the rule that "[t]he relative priority of the lien of the United States for unpaid taxes is . . . always a federal question to be determined finally by the federal courts." *United States* v. *Acri,* 348 U. S. 211, 213. It is one thing to say, as the Court did in *Bess,* that the federal interest in uniform application of federal tax liens does not require, as a general rule, that state property concepts be disregarded. It is quite another to permit such concepts to control the extent of a federal lien's application in situations indistinguishable from those where the Court has in fact, rightly or wrongly, enforced a uniform federal rule. Given federal supremacy in this field, it surely cannot be that the federal courts may not appraise for themselves the true impact of state-created rights upon the priority of federal tax liens within the criteria established by this Court. Cf. *Carpenter* v. *Shaw,* 280 U. S. 363, 367; *City of Detroit* v. *Murray Corporation,* 355 U. S. 489, 492. To recognize the substantial equivalence of the situations is not to create a new rule of federal property law but to require an evenhanded application of an already established one. It seems to me that Judge Fuld of the New York Court of Appeals was quite right in holding in the *Aquilino* case that New York could not, consistently with the past decisions of our Court, defeat the otherwise superior federal lien upon the owner's debt to the general

contractor by converting the debt into a trust for the benefit of the subcontractor.[5]

To read *Bess* as the Court does can only lead to confusion in the administration of the federal tax-lien statute. A taxpayer's property in a debt is surely diminished by the imposition of a lien on his interest, for he has no right to collect the liened portion nor to alienate it. Yet in precisely this situation, we have held that the federal tax lien is not affected by such diminution. *United States* v. *Liverpool & London Globe Ins. Co.*, 348 U. S. 215. If this holding is to be preserved after today's decision, subsequent cases must turn on the elusive distinction between diminishing a greater property interest and initially conferring a lesser one.[6] The very difficulty

[5] "It is, by now, exceedingly well settled that no state-created rule may defeat the paramount right of the United States to levy and collect taxes uniformly throughout the land. (See *United States* v. *Vorreiter*, 355 U. S. 15, revg. 134 Col. 543; *United States* v. *White Bear Brewing Co.*, 350 U. S. 1010, revg. 227 F. 2d 359; *United States* v. *Colotta, supra*, 350 U. S. 808, revg. 224 Miss. 33; *United States* v. *Scovil, supra*, 348 U. S. 218, 220–221; *United States* v. *New Britain, supra*, 347 U. S. 81, 84–87; *United States* v. *Kings County Iron Works, supra*, 224 F. 2d 232, 237). That being so, it follows that the provision in this state's Lien Law, to which respondents point—that funds received by a contractor from the owner for the improvement of real property shall be deemed 'trust funds' for the payment of subcontractors (§ 36–a; § 13, subd. [7])—may not be construed to affect the rights of the government or the priority of its tax lien." 3 N. Y. 2d, at 516, 146 N. E. 2d, at 777–778.

[6] It will not do to distinguish the present type of case from the lien-priority cases on the ground that in the latter cases the taxpayer remains the owner in a very real sense and can continue to enjoy the property if he discharges the debt it secures. In both instances, the taxpayer is temporarily deprived of certain incidents of ownership as a device for securing the payment of a debt, and is restored to the full enjoyment of the property only when the debt is discharged. And it is illusory to say that ownership of a debt which can be neither collected nor alienated is any more "real" than the ownership of no debt at all. Whether the diminution of the tax-

which this Court experiences in trying to determine whether under New York law the general contractor really holds only a bare legal title in trust for the subcontractors or has full ownership of the debt subject to a lien in favor of the subcontractors demonstrates the futility of attempting to draw such distinctions for federal purposes. I venture to suggest that on remand, the Court of Appeals can with equal facility label the subcontractors' interests "property" or a "lien," the relevant incidents of the relationship being the same in either case. Why should not that court and the legislatures of other States readily respond in choosing the former alternative?

I would affirm the judgment in No. 1, and would reverse in No. 23 on the ground that North Carolina can under no circumstances accord subcontractors a right in the proceeds of the debt arising from the construction contract superior to the Government's lien without satisfying one of the two requirements laid down by federal law. If the federal standard of choateness is thought to be an undesirable restriction on the States' freedom to regulate property relationships, the cases establishing that standard should be expressly overruled and not emasculated by dubious distinctions.

MR. JUSTICE BLACK, while adhering to the dissenting views expressed by him in *Commissioner* v. *Stern,* 357 U. S. 39, 47, and *United States* v. *Bess,* 357 U. S. 51, 59, concurs in this opinion.

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payer's interest is sufficiently definite and complete to conclude the federal lien is precisely the question on which this Court has held federal law must control. It is admitted that, if the federal standard of "choateness" developed by this Court in the lien-priority cases is applied, the incidents of ownership retained by the taxpayers here must in fact be deemed greater than those retained by taxpayers in cases where state-created liens imposed on their interests have prevailed over the Government's lien.

UNITED STATES *v.* DURHAM LUMBER CO. ET AL.

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

No. 23. Argued October 19, 1959.—Decided June 20, 1960.

Certain general contractors were adjudicated bankrupts after having defaulted both on the payment of federal taxes and on the payment of amounts due to certain subcontractors on the construction of buildings in North Carolina. The owners of the buildings paid to the trustee in bankruptcy the amount remaining due under the contract, and it was agreed that the subcontractors could assert the same rights against the trustee as they could have asserted against the owners. Under §§ 6321 and 6322 of the Internal Revenue Code of 1954, the United States claimed priority for its tax lien on the "property and rights to property" belonging to the general contractors. The Federal Court of Appeals held that, under North Carolina law, the general contractors had no property interest in the amount due under the general construction contract, except to the extent that such amount exceeded the aggregate of all amounts due to subcontractors, and that, therefore, the Government could recover only so much of the construction price as would remain unpaid after deduction of a sum sufficient to pay the subcontractors. *Held:* Since the Court of Appeals is much closer to North Carolina law than is this Court, and since this Court cannot say that the Court of Appeals' characterization of the taxpayers' property interests under that law is clearly erroneous or unreasonable, the judgment is affirmed. Pp. 523–527.

257 F. 2d 570, affirmed.

Howard A. Heffron argued the cause for the United States. On the brief were *Solicitor General Rankin, Assistant Attorney General Rice, Daniel M. Friedman, A. F. Prescott* and *Myron C. Baum.*

Arthur Vann argued the cause for respondents. With him on the brief were *C. V. Jones, Daniel M. Williams, Jr.* and *J. L. Zimmerman.*

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

This case involves the competing claims of the Federal Government and certain subcontractors to a sum of money owed to the taxpayers under a general construction contract.

The taxpayers, Michael & Embree, were general contractors doing business at Durham, North Carolina. Early in 1954, they agreed to construct certain buildings for persons herein referred to as the "owners." This work was completed on July 15, 1954, but because the owners disputed the amount due under the contract, payment to the taxpayers was delayed.

In completing the construction work, the taxpayers had utilized the services and materials of numerous subcontractors, most of whom had not been compensated. The respondents are two such subcontractors, who in January and February 1955, gave the owners notice of their respective claims against the taxpayers.

On January 18, 1955, the taxpayers were adjudicated bankrupts. At that time, there was an unpaid balance of $5,250 due from the owners under the construction contract. After extensive negotiations between the owners, the trustee in bankruptcy, and the subcontractors, it was agreed that the owners would absolve themselves from further liability by paying the $5,250 to the trustee, and that the subcontractors could thereafter assert the same rights against the trustee as they could have asserted against the owners. This arrangement was approved by both the Superior Court for Durham County, North Carolina, and the federal bankruptcy court.

Another claimant of the money deposited with the trustee was the Federal Government, which on August 13, 1954, and November 22, 1954, had assessed the taxpayers for uncollected withholding and unemployment insurance

taxes. By virtue of Sections 6321[1] and 6322[2] of the Internal Revenue Code of 1954, a federal tax lien attached to all "property and rights to property" belonging to the taxpayers at the time the assessments were made. The Government contended that the money owing under the construction contract was property of the taxpayers to which the tax lien attached.

The referee in bankruptcy, attempting to resolve the competing claims against the fund as if the parties were before a state court, decided that the rights of the Federal Government under its tax lien were superior to those of the respondents. The District Court for the Middle District of North Carolina disagreed, and held that the respondents were entitled to payment of their claims before the Government could satisfy its tax lien. On appeal, the Court of Appeals for the Fourth Circuit affirmed, 257 F. 2d 570. We granted certiorari. 359 U. S. 905.

In affirming the judgment of the District Court, the Court of Appeals stated that the nature and extent of the general contractors' property rights, to which the tax lien attached, must be ascertained under state law. The court then undertook an extensive analysis of the relevant North Carolina statutes[3] and cases. It found that the North Carolina law provides as follows: Subcontractors

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[1] Section 6321. Lien for taxes:

"If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person."

[2] Section 6322. Period of lien:

"Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time."

[3] N. C. Gen. Stat., 1950, §§ 44–6 to 44–12.

who have not been paid by the general contractor have a direct, independent cause of action against the owner to the extent of any amount due under the general construction contract, and any money owed by the owner under the construction contract must first be used to satisfy subcontractors' claims of which the owner has notice. Moreover, to insure that the owner will receive notice of outstanding subcontractors' claims, the North Carolina statute, N. C. Gen. Stat., 1950, § 44–8, requires the general contractor, before receiving any payment, to furnish the owner with a statement of all sums due subcontractors, and if the general contractor fails to supply the required statement, he is guilty of a misdemeanor. N. C Gen. Stat., 1950, § 44–12. Finally, the court found further evidence of the direct and independent nature of the subcontractors' claims against the owner in N. C. Gen. Stat., 1950, § 44–9, which provides that should the owner pay the general contractor after receiving notice of a subcontractor's claim, he will nevertheless be liable to the subcontractor to the extent of the amount which was due under the construction contract at the time notice was received.

Based upon these considerations, the Court of Appeals held that, under North Carolina law, the general contractor did not have a property interest in the face amount, as such, of the general construction contract. Specifically, the court said that "except to the extent the claim of the general contractor exceeds the aggregate of the claims of the subcontractors, the general contractor has no right which is subject to seizure under the tax lien." *Id.*, at 574. Therefore, concluded the court, since under North Carolina law the taxpayers possessed merely a right to the residue of the fund, and since the Government's tax lien attached to the property interests of the taxpayers as defined by state law, the Government can recover only "so much of the construction price as will

remain unpaid after the owners have deducted a sum sufficient to pay the subcontractors." *Id.*, at 575.

The Court of Appeals was correct in asserting that the Government's tax lien attached to the taxpayers' property interests in the fund as defined by North Carolina law. *Aquilino* v. *United States, ante,* pp. 509, 513; [4] *United States* v. *Bess,* 357 U. S. 51, 55; cf. *Morgan* v. *Commissioner,* 309 U. S. 78, 82. It is suggested that the courts of North Carolina have never specifically described the nature of the property rights created by the North Carolina statutes involved in this case, and that the Court of Appeals' interpretation of those statutes is probably incorrect. However, where "[t]he precise issue of state law involved . . . is one which has not been decided by the . . . [state] courts," this Court has said that, "[i]n

[4] This case points up the distinction we drew in *Aquilino*. The facts here show how it simply begs the question to suggest that the principle of the lien-priority cases is somehow subverted or evaded by recognizing that what constitutes the taxpayer's property in the first place is a question of state law. The facts show, too, that it does not promote clarity to substitute, for the property interests created by state law, a rule of federal property law, the main feature of which seems to be an inquiry into what the consequences would be if state law were different from what it in fact is. It is said that we should regard the subcontractor's interest as equivalent to a lien on the general contractor's claim against the owner, overlooking the fact that the law of North Carolina, as interpreted by the Court of Appeals, indicates that there is no such claim. If we are to equate the subcontractor's interest with something it is not, it would be much more appropriate, in terms of similarity, to equate it with the usual mechanic's lien of a subcontractor on the owner's property being improved—which of course is not the general contractor's property, and which could not be taken by the United States under a lien against the general contractor. This only points up the lack of precision and content in the proposed federal definition of property. See also *Fidelity & Deposit Co. of Md.* v. *New York City Housing Auth.*, 241 F. 2d 142 (C. A. 2d Cir.), cited with approval in *United States* v. *Bess,* 357 U. S. 51, 55.

dealing with issues of state law that enter into judgments of federal courts, we are hesitant to overrule decisions by federal courts skilled in the law of particular states unless their conclusions are shown to be unreasonable." *Propper* v. *Clark,* 337 U. S. 472, 486–487. Since the Court of Appeals is much closer to North Carolina law than we are, and since we cannot say that the court's characterization of the taxpayers' property interests under that law is clearly erroneous or unreasonable,[5] the judgment is

Affirmed.

[For dissenting opinion of MR. JUSTICE HARLAN, concurred in by MR. JUSTICE BLACK, see *ante,* p. 516.]

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[5] See *Sims* v. *United States,* 359 U. S. 108, 114; *Ragan* v. *Merchants Transfer & Warehouse Co.,* 337 U. S. 530, 534; *Estate of Spiegel* v. *Commissioner,* 335 U. S. 701, 707–708.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS ET AL. *v.* MISSOURI-KANSAS-TEXAS RAILROAD CO. ET AL.

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

No. 165. Argued April 20, 1960.—Decided June 20, 1960.

After changing from short-range steam locomotives to longer-range diesel locomotives, respondent railroads issued general orders doubling the length of their way-freight runs, thereby eliminating the jobs of two of their five-man way-freight crews and changing the home or away-from-home terminals of the remaining crews. After unsuccessfully invoking the services of the National Mediation Board, the unions representing the members of these crews called a strike. The railroads submitted the dispute to the National Railroad Adjustment Board and sued for injunctive relief. The District Court enjoined the strike pending decision by the Adjustment Board, but only on condition that the railroads either (1) restore the pre-existing situation, or (2) pay the employees adversely affected the wages they would have received had the orders not been issued. *Held:* In granting an injunction to protect the jurisdiction of the Adjustment Board, the District Court had the equitable power to impose these conditions to protect the employees against a harmful change in working conditions during pendency of the dispute before the Adjustment Board. Pp. 529–535.

266 F. 2d 335, reversed.

Harold C. Heiss argued the cause for petitioners. With him on the brief were *J. Hart Willis, Clarence E. Weisell, Wayland K. Sullivan* and *V. C. Shuttleworth.*

M. E. Clinton argued the cause for respondents. With him on the brief was *O. O. Touchstone.*

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.

Walter J. Cummings, Jr. filed a brief for the Bureau of Information of the Eastern Railways et al., as *amici curiae,* urging affirmance.

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

This case presents a question concerning the jurisdiction of a Federal District Court to impose certain conditions upon a strike injunction issued in a railway labor dispute.

The essential facts are not complicated. The respondent Railroads operate a 302-mile branch between Wichita Falls, Texas, and Forgan, Oklahoma. The line was originally operated with steam locomotives capable of only short runs, and this necessitated the stationing of five way-freight crews along the route. After longer-range diesel locomotives were purchased to replace the steam equipment, the Railroads issued general orders which doubled the length of the way-freight runs, thereby eliminating the jobs of two of the five way-freight crews and changing the home or away-from-home terminals of the remaining crews.

The petitioner Brotherhoods, representing the engineers, firemen, conductors and brakemen affected, protested the issuance of the orders and invoked the services of the National Mediation Board. Nonetheless, the Railroads put the change into effect. After the Board advised the parties that it did not consider the dispute one subject to mediation, the unions called a strike. On the same day the Railroads filed a complaint for injunctive relief in the Federal District Court and obtained a temporary restraining order. The Railroads then submitted the dispute to the National Railroad Adjustment Board, to National Committees and Disputes Committees established by the collective bargaining agreements, and to the National

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Mediation Board. They amended their complaint in the District Court to allege the various submissions.

After a hearing, the District Court granted the injunction pending decision by the Adjustment Board, but it did so upon certain conditions which are the subject of the controversy before us. These conditions required that the Railroads either (1) restore the situation which existed prior to the General Orders, or (2) pay the employees adversely affected by the orders, the wages they would have received had the orders not been issued.

Both sides appealed, the unions from the injunction against the strike, and the Railroads from the conditions requiring preservation of the *status quo*. The Court of Appeals sustained the injunction but vacated the conditions, holding that the District Court had no power to attach them. 266 F. 2d 335. In so holding, the Court of Appeals reasoned that imposition of conditions of this character involved a preliminary judgment on the merits of a "minor dispute," the resolution of which is committed by the Railway Labor Act, § 3 (i), 48 Stat. 1189, 45 U. S. C. § 153, to the exclusive jurisdiction of the Adjustment Board. The question of a district judge's jurisdiction to impose this type of condition upon an injunction issued to preserve the Adjustment Board's jurisdiction is both recurring and important in the field of labor-management relations. Consequently, we granted certiorari, but limited the grant to this issue.[1]

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[1] The order granting certiorari limits our review to the following question:

"Whether a district court under circumstances where a dispute arising under the Railway Labor Act has been submitted by a railroad to the National Railroad Adjustment Board and an injunction against a strike by employees is sought on authority of *Brotherhood of Railroad Trainmen* v. *Chicago River and Ind. RR Co.*, 353 U. S. 30, may on the granting of an injunction impose reasonable conditions designed to protect the employees against a harmful change in work-

This Court held in *Brotherhood of Railroad Trainmen* v. *Chicago River & Ind. R. Co.*, 353 U. S. 30, that a Federal District Court may enjoin strikes arising out of "minor disputes"—generally speaking, disputes relating to construction of a contract[2]—when they have been properly submitted to the National Railroad Adjustment Board. We concluded that such an injunction does not fall within the prohibitions of the Norris-LaGuardia Act, 29 U. S. C. § 101 *et seq.*, because of the superseding purpose of the Railway Labor Act to establish a system of compulsory arbitration for this type of dispute, a purpose which might be frustrated if strikes could not be enjoined during the consideration of such a dispute by the Board. This case presents a further question as to nature of the relief which may be granted under the *Chicago River* rule—specifically, whether the injunction granted the Railroad may be qualified by conditions imposed by the District Court under traditional equitable considerations.[3]

If the District Court is free to exercise the typical powers of a court of equity, it has the power to impose conditions requiring maintenance of the *status quo*. Conditions of this nature traditionally may be made the price

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ing conditions during pendency of the dispute before the Adjustment Board by ordering that the railroad restore the status quo, or, in the alternative, pay the employees the amount they would have been paid had changes in working conditions giving rise to the dispute not been made." 361 U. S. 810.

[2] See *Elgin, J. & E. R. Co.* v. *Burley*, 325 U. S. 711, 723; *Brotherhood of Railroad Trainmen* v. *Chicago River & Ind. R. Co.*, 353 U. S. 30, 33–34.

[3] We did not decide in *Chicago River*, and we do not decide here, whether a federal court can, during the pendency of a dispute before the Board, enjoin a carrier from effectuating the changes which gave rise to and constitute the subject matter of the dispute, independently of any suit by the railroad for equitable relief. As we read the order of the District Court, this case does not involve independent relief for the union.

of relief when the injunctive powers of the court are invoked and the conditions are necessary to do justice between the parties.[4] "The award of an interlocutory injunction by courts of equity has never been regarded as strictly a matter of right, even though irreparable injury may otherwise result to the plaintiff. . . . [The court] will avoid . . . injury so far as may be, by attaching conditions to the award. . . ." *Yakus* v. *United States,* 321 U. S. 414, 440. "[I]t is the duty of a court of equity granting injunctive relief to do so upon conditions that will protect all . . . whose interests the injunction may affect." *Inland Steel Co.* v. *United States,* 306 U. S. 153, 157. Since the power to condition relief is essential to ensure that extraordinary equitable remedies will not become the engines of injustice, it would require the clearest legislative direction to justify the truncation of that power.

Such direction, if it exists, presumably must be derived from the Railway Labor Act itself, and since that Act contains no express provisions circumscribing the equitable powers of the court, such limitations, if any, must be created by clear implication.

The Court of Appeals found the limiting legislative direction in the provision of the Railway Labor Act granting exclusive primary jurisdiction over "minor disputes" to the National Railroad Adjustment Board. Its theory was that the conditions imposed by the District Court constituted a preliminary decision on the merits of the parties' dispute and therefore encroached upon the jurisdiction of the Board.

It is true that the federal courts ought not act in such a way as to infringe upon the jurisdiction of the Board,

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[4] See 2 Pomeroy, Equity Jurisprudence, 51, 57–59 (5th ed. 1941); 1 Story, Equity Jurisprudence, §§ 69–76 (14th ed. 1918); *Central Kentucky Natural Gas Co.* v. *Railroad Comm'n,* 290 U. S. 264, 271.

Order of Conductors v. *Pitney*, 326 U. S. 561. But neither this principle nor the *Pitney* case itself leads us to the Court of Appeals' conclusion.

In *Pitney*, we held that the District Court in exercise of its equity powers ancillary to its jurisdiction as a railroad reorganization court under 11 U. S. C. § 205, should not have granted a permanent injunction finally determining the merits of a dispute which was within the jurisdiction of the Board, but that, instead, it should have withheld such relief pending a determination by the Board.

In the case at bar, however, there was no determination of the merits of the dispute by the District Court. Nothing in the record of the proceedings in the District Court suggests that any view on the merits was considered. Instead, the record affirmatively discloses that the district judge was quite aware that it was not his function to construe the contractual provisions upon which the parties relied for their respective positions on the merits. In sum, the judge was scrupulous to avoid encroaching upon the jurisdiction of the Board.[5]

The Court of Appeals apparently concluded that a decision on the merits was inherent in the very conditioning of the injunction. It is true that a District Court must make some examination of the nature of the dispute before conditioning relief since not all disputes coming before the Adjustment Board threaten irreparable injury

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[5] The judge said at one stage of the proceeding,

"Now, let us see where we are. There is a contract. We have not analyzed the contract because it is useless for us to analyze it because regardless of what conclusion we reach about the provisions of that contract we have no right to enforce its provisions or deny its provisions. Those conditions can be determined first only by the Railroad Adjustment Act, ...

"This Court is without power to construe that contract, which the defendants claim has been broken by the company." R. 316–317.

and justify the attachment of a condition. To fulfill its function the District Court must also consider the hardships, if any, that would arise if the employees were required to await the Board's sometimes long-delayed decisions without recourse to a strike. But this examination of the nature of the dispute is so unlike that which the Adjustment Board will make of the merits of the same dispute, and is for such a dissimilar purpose, that it could not interfere with the later consideration of the grievance by the Adjustment Board.

Moreover, such an examination is inherent in the grant of the injunction itself. Yet it is settled, since *Chicago River,* that an injunction may issue to preserve the Board's jurisdiction. We think that, in logic, we must hold that the conditions are proper also, at least where they are designed not only to promote the interests of justice, but also to preserve the jurisdiction of the Board.

It is not difficult to perceive how the conditions imposed in this case could be deemed to serve to protect the jurisdiction of the Board. The dispute out of which the judicial controversy arose does not merely concern rates of pay or job assignments, but rather involves the discharge of employees from positions long held and the dislocation of others from their homes. From the point of view of these employees, the critical point in the dispute may be when the change is made, for, by the time of the frequently long-delayed Board decision, it might well be impossible to make them whole in any realistic sense. If this be so, the action of the district judge, rather than defeating the Board's jurisdiction, would operate to preserve that jurisdiction by preventing injury so irreparable that a decision of the Board in the unions' favor would be but an empty victory.

It is true that preventing the Railroad from instituting the change imposed upon it the burden of maintaining what may be a less efficient and more costly operation.

The balancing of these competing claims of irreparable hardship is, however, the traditional function of the equity court, the exercise of which is reviewable only for abuse of discretion. And although respondents maintain that there has been such an abuse in this case, scrutiny of the record does not persuade us that the evidence was insufficient to support the judge's action.

The judgment of the Court of Appeals is

Reversed.

MR. JUSTICE HARLAN and MR. JUSTICE STEWART, while agreeing with the Court that the District Court had power to condition the issuance of the injunction, would vacate the judgment of the Court of Appeals and remand the case to that court for consideration of respondents' contention that the District Court's action involved an abuse of discretion.

FEDERAL TRADE COMMISSION *v.* ANHEUSER-BUSCH, INC.

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

No. 389. Argued March 2, 1960.—Decided June 20, 1960.

The Federal Trade Commission found that respondent, a leading national brewer which sells a so-called premium beer at higher prices than the beers of regional and local breweries in the great majority of markets, had reduced its prices only to those customers in the St. Louis area while maintaining higher prices to all purchasers outside the St. Louis area, and thereby had "discriminated in price" as between purchasers differently located, and that this had diverted substantial business from respondent's St. Louis competitors, had substantially lessened competition and tended to create a monopoly, in violation of § 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act; and it ordered respondent to cease and desist. The Court of Appeals concluded that the statutory element of price discrimination had not been established, and it set aside the Commission's order on this ground alone. *Held:* The Court of Appeals erred in its construction of § 2 (a); the evidence warranted the Commission's finding of price discrimination; and the judgment is reversed and the case is remanded for further proceedings. Pp. 537–554.

(a) Section 2 (a) is violated when there is a price discrimination which deals the requisite injury to sellers' or "primary-line" competition, even though buyers' or "secondary-line" and "tertiary-line" competition are unaffected. Pp. 542–545.

(b) The Court of Appeals erred in concluding that, since all *competing* purchasers paid respondent the same price, so far as the record disclosed, respondent's price cuts were not *discriminatory*. Pp. 545–546.

(c) A price discrimination within the meaning of the portion of § 2 (a) here involved is merely a price difference; and, in order to establish such a price discrimination, it is not necessary to show that the lower price is below cost or unreasonably low for the purpose or design to eliminate competition and thereby obtain a monopoly. Pp. 546–553.

265 F. 2d 677, reversed.

Philip Elman argued the cause for petitioner. With him on the briefs were *Solicitor General Rankin, Acting Assistant Attorney General Bicks, Ralph S. Spritzer, Richard A. Solomon, Irwin A. Seibel, Daniel J. McCauley, Jr.* and *Alan B. Hobbes.*

Edgar Barton argued the cause for respondent. With him on the brief were *Charles M. Price, Robert C. Keck* and *Thomas J. Carroll.*

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

The question presented is whether certain pricing activities of respondent, Anheuser-Busch, Inc., constituted price discrimination within the meaning of § 2 (a) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. § 13 (a).

Section 2 (a) provides in pertinent part:

> "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . . ."

This controversy had its genesis in a complaint issued by the Federal Trade Commission in 1955, which charged respondent, a beer producer, with a violation of § 2 (a). The complaint alleged that respondent had "discriminated in price between different purchasers of its beer of like grade and quality by selling it to some of its customers at higher prices than to other[s]"; that, more specifically, respondent had lowered prices in the St. Louis, Missouri, market, without making similar price reductions in other markets; that this discrimination had already diverted substantial business from respondent's St. Louis competitors; that it was "sufficient" to have the same impact in the future; that there was a "reasonable probability" it would substantially lessen competition in respondent's line of commerce; and that it might also tend to create a monopoly or to injure, destroy, or prevent competition with respondent. Thus the complaint described a pricing pattern which had adverse effects only upon sellers' competition, commonly termed primary-line competition, and not upon buyers' competition, commonly termed secondary-line competition.

Both the hearing examiner and, on appeal, the Commission held that the evidence introduced at the hearing established a violation of § 2 (a). The Commission found the facts to be as follows:

Respondent, a leading national brewer,[1] sells a so-called premium beer, which is priced higher than the beers of regional and local breweries in the great majority of markets, although both the price of respondent's beer and the premium differential vary from market to market and from time to time. During the period relevant to this case, respondent had three principal competitors in the St. Louis area, all regional breweries: Falstaff Brewing

[1] Anheuser-Busch ranked second nationally in gross sales in 1952 and 1955, and first in 1953 and 1954.

Corporation, Griesedieck Western Brewing Company, and Griesedieck Brothers Brewery Company.[2] In accord with the generally prevailing price structure, these breweries normally sold their products at a price substantially lower than respondent's.

In 1953, most of the national breweries, including respondent, granted their employees a wage increase, and on October 1, 1953, they put into effect a general price increase.[3] Although many regional and local breweries throughout the country followed suit by raising their prices, Falstaff, Griesedieck Western, and Griesedieck Brothers maintained their pre-October price of $2.35 per standard case. Although respondent's sales in the St. Louis area did not decline, its national sales fell, along with industry sales in general.

On January 4, 1954, respondent lowered its price in the St. Louis market from $2.93 to $2.68 per case, thereby reducing the previous 58¢ differential to 33¢. A second price cut occurred on June 21, 1954, this time to $2.35, the same price charged by respondent's three competitors. On January 3, 1954, the day before the first price cut, respondent's price in the St. Louis market had been lower

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[2] It appears that Griesedieck Western sold out to Carling Brewing Company in October, 1954.

[3] Respondent maintains—and petitioner agrees—that the evidence establishes that it did not raise its prices in Missouri or Wisconsin. In view of our disposition of the case, this is immaterial to the issue presented on this review.

Possibly we should note that most of the facts in this particular paragraph are taken from the initial decision. Although the Commission adopted "the findings, conclusions, and order, as modified, contained in the initial decision," there is some disagreement as to how encompassing this incorporation order was. See note 10, *infra*. Since that dispute concerns matters not relevant to our decision, and since the facts set forth above are merely background and appear to be unquestioned, we find it unnecessary to resolve the disagreement.

than its price in other markets,[4] and during the period of the price reductions in the St. Louis area, respondent made no similar price reductions in any other market. In March, 1955, respondent increased its St. Louis price 45¢ per case, and Falstaff, Griesedieck Western, and Griesedieck Brothers almost immediately raised their prices 15¢, which re-established a substantial differential. This ended the period of alleged price discrimination.

The Commission concluded:

> "As a result of maintaining higher prices to all purchasers outside of the St. Louis area and charging the lower prices, as reduced in 1954, to only those customers in the St. Louis area, respondent discriminated in price as between purchasers differently located."

Since, as will appear, it is this aspect of the decision which concerns us, it is necessary only to sketch summarily the remaining elements in the Commission's decision. The Commission's finding of competitive injury was predicated to a substantial degree upon what it regarded as a demonstrated diversion of business to respondent from its St. Louis competitors during the period of price discrimination. For example, by comparing that period with a similar period during the previous year, the Commission determined that respondent's sales had risen 201.5%, Falstaff's sales had dropped

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[4] The following table discloses the degree of this price spread:

St. Louis, Mo.	$2.93	Washington, D. C.	$3.65
Chicago, Ill.	3.44	Detroit, Mich.	3.55
Cincinnati, Ohio	3.75	Boston, Mass.	3.69
Houston, Tex.	3.70	Kansas City, Mo.	3.15
Bronx, N. Y.	3.68	St. Paul, Minn.	3.53
Kearney, Nebr.	3.68	Sioux Falls, S. Dak.	3.50
St. Joseph, Mo.	3.17	Denver, Colo.	...
Buffalo, N. Y.	3.60	San Francisco, Calif.	3.79
Baltimore, Md.	3.62	Los Angeles, Calif.	3.80

slightly, Griesedieck Western's sales had fallen about 33%, and Griesedieck Brothers' sales had plummeted about 41%. In tabular form, the relative market positions of the St. Louis sellers were as follows:

	Dec. 31 1953	*June 30 1954*	*Mar. 1 1955*	*July 31 1955*
Respondent	12.5	16.55	39.3	21.03
Griesedieck Brothers	14.4	12.58	4.8	7.36
Falstaff	29.4	32.05	29.1	36.62
Griesedieck Western	38.9	33.	23.1	27.78
All others	4.8	5.82	3.94	7.21

The Commission rejected respondent's contention that its price reductions had been made in good faith to meet the equally low price of a competitor within the meaning of the proviso to § 2 (b) of the Act, 49 Stat. 1526, 15 U. S. C. § 13 (b), and also found respondent's attack upon the examiner's cease-and-desist order to be meritless. The Commission thereupon adopted and issued that order, with only slight modification.[5]

On review, the Court of Appeals set aside the order. 265 F. 2d 677. We granted certiorari, 361 U. S. 880, because a conflict had developed among the Courts of Appeals on a question of importance in the administration of the statute. See *Atlas Building Products Co.* v. *Diamond Block & Gravel Co.*, 269 F. 2d 950 (C. A. 10th Cir.).

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[5] "It Is Ordered that the respondent, Anheuser-Busch, Inc., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in the sale of beer of like grade and quality, do forthwith cease and desist from discriminating, directly or indirectly, in price, between different purchasers engaged in the same line of commerce, where either, or any, of the purchases involved in such discrimination are in commerce, as 'commerce' is defined in the Clayton Act, by a price reduction in any market where respondent is in competition with any other seller, unless it proportionally reduces its prices everywhere for the same quantity of beer."

The limited nature of our inquiry can be fully appreciated only in the light of the correspondingly narrow decision of the Court of Appeals, which rested entirely upon the holding that the threshold statutory element of price discrimination had not been established. Thus the Court of Appeals did not consider whether the record supported a finding of the requisite competitive injury, whether respondent's good faith defense was valid, or whether the Commission's order was unduly broad. We have concluded that the Court of Appeals erred in its construction of § 2 (a) and that the evidence fully warranted the Commission's finding of price discrimination. Respondent would have us affirm nonetheless on any of the alternative grounds it strongly urged below. While this is, to be sure, an appropriate course of action under proper circumstances, we believe that it would be unwise for us to grapple with these intricate problems, the solution to which requires a careful examination of a voluminous record, before they have been dealt with by the Court of Appeals. Therefore, the case will be remanded, and of course nothing in this opinion should be interpreted as intimating a view upon the remaining aspects of the controversy.

A discussion of the import of the § 2 (a) phrase "discriminate in price," in the context of this case, must begin with a consideration of the purpose of the statute with respect to primary-line competition. The Court of Appeals expressed some doubt that § 2 (a) was designed to protect this competition at all, but respondent has not undertaken to defend that position here. This is entirely understandable. While "precision of expression is not an outstanding characteristic of the Robinson-Patman Act," *Automatic Canteen Co.* v. *Federal Trade Comm'n,* 346 U. S. 61, 65, it is certain at least that § 2 (a) is violated where there is a price discrimination which deals the requisite injury to primary-line competition, even

though secondary-line and tertiary-line competition are unaffected. The statute could hardly be read any other way, for it forbids price discriminations "where the effect . . . may be substantially to lessen competition or tend to create a monopoly *in any line of commerce,* or to injure, destroy, or prevent competition with any person *who either grants* or knowingly receives the benefit of such discrimination, or with customers of either of them." (Emphasis added.)

The legislative history of § 2 (a) is equally plain. The section, when originally enacted as part of the Clayton Act in 1914, was born of a desire by Congress to curb the use by financially powerful corporations of localized price-cutting tactics which had gravely impaired the competitive position of other sellers.[6] It is, of course, quite true—and too well known to require extensive exposition—that the 1936 Robinson-Patman amendments to the Clayton Act were motivated principally by congres-

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[6] "Section 2 of the bill . . . is expressly designed with the view of correcting and forbidding a common and widespread unfair trade practice whereby certain great corporations and also certain smaller concerns which seek to secure a monopoly in trade and commerce by aping the methods of the great corporations, have heretofore endeavored to destroy competition and render unprofitable the business of competitors by selling their goods, wares, and merchandise at a less price in the particular communities where their rivals are engaged in business than at other places throughout the country. . . . In the past it has been a most common practice of great and powerful combinations engaged in commerce—notably the Standard Oil Co., and the American Tobacco Co., and others of less notoriety, but of great influence—to lower prices of their commodities, oftentimes below the cost of production in certain communities and sections where they had competition, with the intent to destroy and make unprofitable the business of their competitors, and with the ultimate purpose in view of thereby acquiring a monopoly in the particular locality or section in which the discriminating price is made. . . ." H. R. Rep. No. 627, 63d Cong., 2d Sess. 8. See also S. Rep. No. 698, 63d Cong., 2d Sess. 2–4.

sional concern over the impact upon secondary-line competition of the burgeoning of mammoth purchasers, notably chain stores.[7] However, the legislative history of these amendments leaves no doubt that Congress was intent upon strengthening the Clayton Act provisions, not weakening them, and that it was no part of Congress' purpose to curtail the pre-existing applicability of § 2 (a) to price discriminations affecting primary-line competition.[8]

The federal courts, both before and after the amendment of § 2 (a), have taken this view of the scope of the statute in cases involving impairment of primary-line competition. See *Porto Rican American Tobacco Co.* v. *American Tobacco Co.*, 30 F. 2d 234 (C. A. 2d Cir. 1929); *E. B. Muller & Co.* v. *Federal Trade Comm'n*, 142 F. 2d 511 (C. A. 6th Cir. 1944); *Maryland Baking Co.* v. *Federal Trade Comm'n*, 243 F. 2d 716 (C. A. 4th Cir. 1957); *Atlas Building Products Co.* v. *Diamond Block & Gravel Co.*, *supra* (1959). In fact, the original focus of § 2 (a) on sellers' competition was so evident that this Court was compelled to hold explicitly, contrary to lower court decisions,[9] that the statute was not *restricted* to price discriminations impeding primary-line competition, but protected secondary-line competition as well. *Van Camp &*

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[7] See H. R. Rep. No. 2287, 74th Cong., 2d Sess.; S. Rep. No. 1502, 74th Cong., 2d Sess.; F. T. C., Final Report on the Chain-Store Investigation, S. Doc. No. 4, 74th Cong., 1st Sess.; *Federal Trade Comm'n* v. *Morton Salt Co.*, 334 U. S. 37, 43; Report of the Attorney General's National Committee to Study the Antitrust Laws, 155–156; Austin, Price Discrimination and Related Problems under the Robinson-Patman Act (2d rev. ed., 1959), 8–11; Palamountain, The Politics of Distribution, 188–234; Rowe, The Evolution of the Robinson-Patman Act: A Twenty-Year Perspective, 57 Col. L. Rev. 1059.

[8] See sources cited in note 7, *supra*.

[9] See *Mennen Co.* v. *Federal Trade Comm'n*, 288 F. 774; *National Biscuit Co.* v. *Federal Trade Comm'n*, 299 F. 733.

Sons v. *American Can Co.*, 278 U. S. 245 (1929). And more recently, in *Moore* v. *Mead's Fine Bread Co.*, 348 U. S. 115 (1954), the Court sustained a treble damage judgment in favor of a competing seller which was based partly upon a violation of § 2 (a).

Thus neither the language of § 2 (a), its legislative history, nor its judicial application countenances a construction of the statute which draws strength from even a lingering doubt as to its purpose of protecting primary-line competition. But the rationale of the Court of Appeals appears to have been shaped by precisely this type of doubt. The view of the Court of Appeals was that, before there can be a price discrimination within the meaning of § 2 (a), "[t]here must be some relationship between the different purchasers which entitles them to comparable treatment." 265 F. 2d, at 681. Such a relationship would exist, the court reasoned, if different prices were being charged to *competing* purchasers. But the court observed that in this case all *competing* purchasers paid respondent the same price, so far as the record disclosed. Consequently, the court concluded that, even assuming the price cuts "were directed at [Anheuser-Busch's] local competitors, they were not *discriminatory*." [10] *Ibid.*

This qualification upon the applicability of § 2 (a) to primary-line-competition cases is in no way adumbrated by the prevailing line of relevant decisions. In *Mead's Fine Bread Co., supra,* in *Maryland Baking Co., supra,* and in *Porto Rican American Tobacco Co., supra,* violations of § 2 (a) were predicated upon injury to primary-line competition without reliance upon the presence or

[10] There is a dispute as to whether the Commission adopted a finding by the examiner which related to the purpose of the price reductions. Since we conclude that the issue of predatory intent is irrelevant to the question before us, it is unnecessary for us to resolve this dispute.

absence of competition among purchasers as a relevant factor. And in *Muller & Co., supra,* while there was evidence that the purchasers in question were competing, the court explicitly rejected the notion that this was a necessary element of a violation in a primary-line case. 142 F. 2d, at 518. But cf. *Balian Ice Cream Co.* v. *Arden Farms Co.,* 231 F. 2d 356.

More important, however, is the incompatibility of the Circuit Court's rule with the purpose of § 2 (a). The existence of competition among buyers who are charged different prices by a seller is obviously important in terms of adverse effect upon secondary-line competition, but it would be merely a fortuitous circumstance so far as injury to primary-line competition is concerned. Since, as we have indicated, an independent and important goal of § 2 (a) is to extend protection to competitors of the discriminating seller, the limitation of that protection by the alien factor of competition among purchasers would constitute a debilitating graft upon the statute.

Although respondent's starting point is the same as that of the Court of Appeals—that a price discrimination is not synonymous with a price difference—its test of price discrimination is somewhat broader.[11] Respondent concedes that a competitive relationship among purchasers is not a prerequisite of price discrimination, but maintains that at least there must be "proof that the lower price is below cost or unreasonably low for the purpose or design to eliminate competition and thereby obtain a monopoly." Since such a finding is lacking here, respondent argues that it cannot be said that there was price discrimination.

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[11] Respondent maintains that the opinion of the Court of Appeals may and should be read to encompass respondent's views. It is true that there are certain passages in the opinion which lend some support to respondent's interpretation. In view of our disposition of the case, it is unnecessary for us either to accept or reject that construction.

Respondent asserts that its view is supported by legislative history, court decisions, and reason. Respondent relies heavily, as did the Court of Appeals, upon a statement made during Congress' consideration of the Robinson-Patman legislation by Representative Utterback, a manager of the conference bill which became § 2 (a). In this rather widely quoted exegesis of the section, Representative Utterback declared that "a discrimination is more than a mere difference," and exists only when there is "some relationship . . . between the parties to the discrimination which entitles them to equal treatment." Such a relationship would prevail among competing purchasers, according to the Congressman, and also "where . . . the price to one is so low as to involve a sacrifice of some part of the seller's necessary costs and profit," so that "it leaves that deficit inevitably to be made up in higher prices to his other customers." 80 Cong. Rec. 9416.[12] Respondent also cites expressions in the legislative history of the Clayton Act which reflect Congress' concern over classic examples of predatory business practices. See H. R. Rep. No. 627, 63d Cong., 2d

[12] The statement in full is as follows:

"In its meaning as simple English, a discrimination is more than a mere difference. Underlying the meaning of the word is the idea that some relationship exists between the parties to the discrimination which entitles them to equal treatment, whereby the difference granted to one casts some burden or disadvantage upon the other. If the two are competing in the resale of the goods concerned, that relationship exists. Where, also, the price to one is so low as to involve a sacrifice of some part of the seller's necessary costs and profit as applied to that business, it leaves that deficit inevitably to be made up in higher prices to his other customers; and there, too, a relationship may exist upon which to base the charge of discrimination. But where no such relationship exists, where the goods are sold in different markets and the conditions affecting those markets set different price levels for them, the sale to different customers at those different prices would not constitute a discrimination within the meaning of this bill."

Sess. 8; S. Rep. No. 698, 63d Cong., 2d Sess. 2–4. Moreover, respondent maintains that the principle it advances has found expression in the decisions of the federal courts in primary-line-competition cases, which consistently emphasize the unreasonably low prices and the predatory intent of the defendants.[13] Respondent also urges that its view is grounded upon the statutory scheme of § 2 (a), which penalizes sellers only if an anticompetitive effect stems from a *discriminatory* pricing pattern, not if it results merely from a low price. Thus, the argument goes, unless there is proof that high prices in one area have subsidized low prices in another, the price differential does not fall within the compass of the section. In such a case, it is contended, § 3 of the Robinson-Patman Act, 49 Stat. 1528, 15 U. S. C. § 13a, may be applicable, but not § 2 (a).[14] Finally, respondent argues that, unless its position is accepted, the law will impose rigid price uniformity upon the business world, contrary to sound economics and the policy of the antitrust laws.

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[13] See, *e. g., Porto Rican American Tobacco Co.* v. *American Tobacco Co., supra; Atlas Building Products Co.* v. *Diamond Block & Gravel Co., supra; Maryland Baking Co.* v. *Federal Trade Comm'n, supra.*

[14] Section 3 provides:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor."

The trouble with respondent's arguments is not that they are necessarily irrelevant in a § 2 (a) proceeding, but that they are misdirected when the issue under consideration is solely whether there has been a price discrimination. We are convinced that, whatever may be said with respect to the rest of §§ 2 (a) and 2 (b)—and we say nothing here—there are no overtones of business buccaneering in the § 2 (a) phrase "discriminate in price." Rather, a price discrimination within the meaning of that provision is merely a price difference.

When this Court has spoken of price discrimination in § 2 (a) cases, it has generally assumed that the term was synonymous with price differentiation. In *Federal Trade Comm'n* v. *Cement Institute,* 333 U. S. 683, 721, the Court referred to "discrimination in price" as "selling the same kind of goods cheaper to one purchaser than to another." And in *Federal Trade Comm'n* v. *Morton Salt Co.,* 334 U. S. 37, 45, the Court said, "Congress meant by using the words 'discrimination in price' in § 2 that in a case involving competitive injury between a seller's customers the Commission need only prove that a seller had charged one purchaser a higher price for like goods than he had charged one or more of the purchaser's competitors." [15] The commentators have generally shared this view.[16]

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[15] See also *Federal Trade Comm'n* v. *Staley Co.,* 324 U. S. 746, 757; *Samuel H. Moss, Inc.,* v. *Federal Trade Comm'n,* 148 F. 2d 378, 379, 155 F. 2d 1016. Compare *Automatic Canteen Co.* v. *Federal Trade Comm'n, supra,* at 70 n. 10, 71.

[16] See Att'y Gen. Nat'l Comm. Antitrust Rep. 156; Austin, Price Discrimination and Related Problems Under the Robinson-Patman Act (2d rev. ed. 1959), 18–20; McAllister, Price Control by Law in the United States: A Survey, 4 Law and Contemp. Prob. 273, 291–293; Rowe, Price Differentials and Product Differentiation: The Issues Under the Robinson-Patman Act, 66 Yale L. J. 1, 36–38; Comment, 12 Stan. L. Rev. 460, 461. But see Zorn and Feldman, Business Under The New Price Laws, 75.

These assumptions, we now conclude, were firmly rooted in the structure of the statute, for it is only by equating price discrimination with price differentiation that § 2 (a) can be administered as Congress intended. As we read that provision, it proscribes price differences, subject to certain defined defenses,[17] where the effect of the differences "may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit" of the price differential, "or with customers of either of them." See *Federal Trade Comm'n* v. *Morton Salt Co.*, 334 U. S. 37, 45–47. In other words, the statute itself spells out the conditions which make a price difference illegal or legal, and we would derange this integrated statutory scheme were we to read other conditions into the law by means of the nondirective phrase, "discriminate in price." Not only would such action be contrary to what we conceive to be the meaning of the statute, but, perhaps because of this, it would be thoroughly undesir-

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[17] In addition to the statutory provisions regarding injury to competition, set out at p. 537, *supra*, there are other relevant portions of the statute, such as the seller's § 2 (b) defense of "showing that his lower price . . . was made in good faith to meet an equally low price of a competitor . . . ." And a proviso to § 2 (a) states:
"That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered . . . ."
And still another proviso to § 2 (a) states:
"That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned."

able. As one commentator has succinctly put it, "Inevitably every legal controversy over any price difference would shift from the detailed governing provisions—'injury,' cost justification, 'meeting competition,' etc.—over into the 'discrimination' concept for *ad hoc* resolution divorced from specifically pertinent statutory text." Rowe, Price Differentials and Product Differentiation: The Issues Under the Robinson-Patman Act, 66 Yale L. J. 1, 38.[18]

In the face of these considerations, we do not find respondent's arguments persuasive. The fact that activity which falls within the civil proscription of § 2 (a) may also be criminal under § 3 is entirely irrelevant. The partial overlap between these sections, which was to a significant extent the by-product of the tortuous path of the Robinson-Patman bills through Congress,[19] has been widely recognized. "[T]his section [§ 3] does not restrict the operation of the prohibitions, with civil sanctions, of the Robinson-Patman amendments to § 2 (a) of the Clayton Act." *Corn Products Co.* v. *Federal Trade Comm'n*, 324 U. S. 726, 734.[20]

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[18] See also Austin, Price Discrimination and Related Problems Under the Robinson-Patman Act (2d rev. ed. 1959), 18–20; McAllister, Price Control by Law in the United States: A Survey, 4 Law and Contemp. Prob. 273, 291–293.

[19] See Palamountain, The Politics of Distribution, 188–234; Rowe, The Evolution of the Robinson-Patman Act: A Twenty-Year Perspective, 57 Col. L. Rev. 1059.

[20] "Subsection (h) of the Senate amendment . . . appears in the conference report as section 3 of the bill itself. It contains the operative and penal provisions of what was originally the Borah-Van Nuys bill (S. 4171). While they overlap in some respects, they are in no way inconsistent with the provisions of the Clayton Act amendment provided for in section 1. Section 3 authorizes nothing which that amendment prohibits, and takes nothing from it. On the contrary, where only civil remedies and liabilities attach to violations of the amendment provided in section 1, section 3 sets up special prohibi-

The other materials adduced by respondent do no more than indicate that the factors in question—predatory intent and unreasonably low local price cuts—may possibly be relevant to other matters which may be put in issue in a § 2 (a) proceeding. For example, it might be argued that the existence of predatory intent bears upon the likelihood of injury to competition,[21] and that a price reduction below cost tends to establish such an intent.[22] Practically all of the legislative materials and court decisions relied upon by respondent are explicable on this basis, since hardly any of them are concerned specifically with the meaning of price discrimination.[23] Moreover, many of the legislative expressions cited by respondent may merely be descriptive of the prototype of the evil

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tions as to the particular offenses therein described and attaches to them also the criminal penalties therein provided." H. R. Rep. No. 2951, 74th Cong., 2d Sess. 8. See also *Nashville Milk Co.* v. *Carnation Co.*, 355 U. S. 373, 378; Austin, Price Discrimination and Related Problems Under the Robinson-Patman Act (2d rev. ed. 1959), 3–4; 108 U. of Pa. L. Rev. 116, 121; 45 Va. L. Rev. 1397, 1400; sources cited in note 19, *supra*.

[21] Of course we do not depart from our holding in *Federal Trade Comm'n* v. *Morton Salt*, *supra*, at pp. 50–51, as to adequacy of proof of tendency to injure competition in cases involving discrimination between purchasers. The instant case, as we have pointed out, involves differences in prices among competing sellers.

[22] See *Balian Ice Cream Co.* v. *Arden Farms Co.*, *supra*, at 369; Report of the Attorney General's National Committee to Study the Antitrust Laws, 165; Rowe, Price Discrimination, Competition, and Confusion: Another Look at Robinson-Patman, 60 Yale L. J. 929, 956; The "New" Federal Trade Commission and the Enforcement of the Antitrust Laws, 65 Yale L. J. 34, 74–75; A Symposium on the Robinson-Patman Act, 49 N. W. U. L. Rev. 197, 215, 224. But cf. *Nashville Milk Co.* v. *Carnation Co.*, 355 U. S. 373, 378; *Federal Trade Comm'n* v. *Ruberoid Co.*, 343 U. S. 470, 484 (dissenting opinion).

[23] Perhaps it is worth noting in this connection that the Senate and House committee reports appear to use the words "discrimination" and "differential" interchangeably. See H. R. Rep. No. 2287, 74th Cong., 2d Sess. 10; S. Rep. No. 1502, 74th Cong., 2d Sess. 5.

with which Congress dealt in § 2 (a), rather than delineative of the outer reach of that section. A possible exception is the statement of Representative Utterback. But the primary function of statutory construction is to effectuate the intent of Congress, and that function cannot properly be discharged by reliance upon a statement of a single Congressman, in the face of the weighty countervailing considerations which are present in this case.[24]

Nothing that we have said, of course, should be construed to be the expression of any view concerning the relevance of the factors stressed by respondent to statutory standards other than price discrimination. We wish merely to point out, on the one hand, why respondent's arguments in our view are not pertinent to the issue at bar, and, on the other, that we are not foreclosing respondent from urging in the Court of Appeals that such arguments are material to issues not now before us.

What we have said makes it quite evident, we believe, that our decision does not raise the specter of a flat prohibition of price differentials, inasmuch as price differences constitute but one element of a § 2 (a) violation. In fact, as we have indicated, respondent has vigorously contested this very case on the entirely separate grounds of insufficient injury to competition and good faith lowering of price to meet competition. Nor is it relevant that the Commission did not proceed upon the basis of the respondent's price differentials which existed prior to the period in question in this case. This choice is committed to the

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[24] Representative Utterback's comment has been criticized as "ambiguous and misleading and . . . too often accepted without analysis." Austin, Price Discrimination and Related Problems Under the Robinson-Patman Act (2d rev. ed. 1959), 18. It is, of course, possible that the Congressman was so intent upon the immediate problem—protection of secondary-line competition—that he did not reflect upon the significance of his statement when applied to primary-line cases.

discretion of the Commission; and it may well be that the Commission did not believe the remaining statutory elements could be established with respect to other differentials. Our interest is solely with this case, and at this stage of the litigation that interest is confined exclusively to identifying and keeping distinct the various statutory standards which are part of the § 2 (a) complex.

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

Reversed.

Syllabus.

METLAKATLA INDIAN COMMUNITY, ANNETTE ISLAND RESERVE, *v.* EGAN, GOVERNOR OF ALASKA, ET AL.

APPEAL FROM THE DISTRICT COURT FOR ALASKA.

No. 326. Argued May 18, 1960.—Decided June 20, 1960.*

After Alaska achieved statehood, these suits to enjoin enforcement of a statute of the State on the ground that it conflicted with applicable federal law were instituted in the District Court for Alaska, which, by the Constitution of the new State, and by state and federal statutes, was designated the successor of the former Territorial District Court in the interim until the organization of the new state courts and the Federal District Court for the District of Alaska. The District Court for Alaska held the statute constitutional and entered orders denying the injunctions and dismissing the complaints. Notices of direct appeals to this Court were filed after the Justices of the new Alaska Supreme Court had been designated but before that Court was in actual operation. *Held:*

1. The District Court for Alaska was the "highest court of a State in which a decision could be had," and the appeals are within the jurisdiction of this Court under 28 U. S. C. § 1257 (2). Pp. 557–560.

2. Since the question of the constitutionality of the Alaska statute raises the issue of its justification under the so-called police power and is entangled with questions of state law which the Supreme Court of Alaska might construe so as to avoid conflict with federal law, this Court refrains at this stage from deciding the issues presented on the merits of these appeals so as to afford the Supreme Court of Alaska an opportunity to rule on the questions presented. Pp. 561–562.

3. The cases are retained on the docket of this Court pending further proceedings or a further appeal after the decision of the Supreme Court of Alaska, and the stays granted are continued until final disposition of the cases. Pp. 562–563.

18 Alaska —, 174 F. Supp. 500, decision reserved and appeals held on docket pending consideration by the Supreme Court of Alaska.

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*Together with No. 327, *Organized Village of Kake et al.* v. *Egan, Governor of Alaska,* also on appeal from the same Court.

Richard Schifter argued the cause for appellant in No. 326. With him on the brief were *Theodore H. Little* and *Daniel M. Singer.*

John W. Cragun argued the cause and filed a brief for appellants in No. 327.

John L. Rader argued the cause for appellees. With him on the brief were *Ralph E. Moody,* Attorney General of Alaska, *Douglas L. Gregg,* Assistant Attorney General, and *Charles S. Rhyne.*

John D. Calhoun argued the cause for the United States, as *amicus curiae,* urging reversal. On the brief were *Solicitor General Rankin, Assistant Attorney General Morton* and *Roger P. Marquis.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

These consolidated cases were commenced on June 22 and 24, 1959, in the interim District Court for Alaska, by complaints seeking permanent injunctions against threatened enforcement by the new State of Alaska, its Governor, and other agents, of an Alaska statute (Alaska Laws 1959, c. 17, as amended, Alaska Laws 1959, c. 95) making it a criminal offense to fish with traps. The statute was assailed on the ground that it was in conflict with applicable federal law. On July 2, 1959, orders were entered denying the injunctions, dismissing the complaints with prejudice, and denying an injunction pending appeal to this Court. 18 Alaska ——, 174 F. Supp. 500. On July 11, 1959, MR. JUSTICE BRENNAN, acting in his capacity as a circuit justice, granted appellants' application for an injunction pending final disposition of their future appeals to this Court. His opinion noted the existence of substantial questions, both as to our jurisdiction and the merits. 80 S. Ct. 33. The notices of appeal were filed

on August 6, 1959; on December 7, 1959, we postponed further consideration of the question of jurisdiction to the hearing of the cases on the merits. 361 U. S. 911.

If the orders rendered on July 2, 1959, were those of the "highest court of a State in which a decision could be had," the appeals are within our jurisdiction under 28 U. S. C. § 1257 (2), since the court below sustained a statute of the State of Alaska against a claim of unconstitutionality under the United States Constitution. The jurisdictional problem arises out of the enactments governing Alaska's accession to statehood, specifically, in relation to the Constitution of the new State and to the state and federal laws governing the termination of the former territorial courts and their displacement by a new state judicial system and a Federal District Court for the District of Alaska. The State Constitution, which took effect "immediately upon the admission of Alaska into the Union as a state" (Art. XV, § 25) on January 3, 1959, provided for a Supreme Court, to "be the highest court of the State, with final appellate jurisdiction," a superior court, and such other courts as the legislature may provide. Art. IV, §§ 1, 2. Article XV, § 17, provides that in the transitional period until the new courts are organized, "the judicial system shall remain as constituted on the date of admission . . ." and that "[w]hen the state courts are organized, new actions shall be commenced and filed therein, and all causes, other than those under the jurisdiction of the United States, pending in the courts existing on the date of admission, shall be transferred to the proper state court as though commenced, filed, or lodged in those courts in the first instance, except as otherwise provided by law."

The Alaska Statehood Act, 72 Stat. 339, which also became fully effective on January 3, 1959, in §§ 13–17, makes similar provision for the eventual disposition of business pending in the territorial district court upon the

organization of the new District Court for the District of Alaska. However, it too provides, in § 18, that "the United States District Court for the Territory of Alaska shall continue to function as heretofore" for three years, or until the President proclaims that the new District Court "is prepared to assume the functions imposed upon it." In June, 1959, when these actions were commenced, and on July 2, 1959, when decision below was rendered, neither new federal nor state courts were in operation.

The first question presented is whether the interim Alaskan District Court was the "court of a State" in deciding these cases. Sections 12 to 18 of the Statehood Act, 72 Stat. 339, make it plain that the interim court was not intended to be the newly created United States District Court for the District of Alaska, 28 U. S. C. § 81A; otherwise the nature of the court, whether state or federal, is not explicitly set forth. It is apparent, however, that the court is to a significant degree the creature of two sovereigns acting cooperatively to accomplish the joint purpose of avoiding an interregnum in judicial administration in the transitional period. The termination of the existence of the interim court is governed by federal law, Statehood Act § 18; but the termination of its general jurisdiction over state law matters, insofar as it is dependent on state consent, is governed by state law, Alaska Laws 1959, c. 50, § 31 (2), which also provides for the accelerated organization of separate Alaska courts should the interim court be terminated before they are ready. Alaska Laws 1959, c. 50, § 32 (4), amended by Alaska Laws 1959, c. 151, § 1.

To determine our jurisdiction we need not engage in abstract speculation as to the function of the interim court in cases not before us. Whether the court can serve as a federal court, and the permissible scope of its powers if it may so serve, cf. *National Mutual Ins. Co.* v. *Tidewater Transfer Co.*, 337 U. S. 582; *Benner* v. *Porter*,

9 How. 235, are perplexing questions, decision of which should not be avoidably made. It is apparent that the legislature of Alaska vested the judicial power of the State in the interim District Court for the time being, that the district judge in this case explicitly deemed himself to be exercising such power, and that, in light of the express consent of the United States, he properly did so. *Benner* v. *Porter, supra.* It follows that the District Court sat as a "court of a State" to decide these cases.

The question remains whether the interim court was also the "highest court" of Alaska within the meaning of 28 U. S. C. § 1257. At the time of the filing of the notice of this appeal on August 6, 1959, the latest time at which jurisdiction could properly be determined, no new Alaska state court was in actual operation, although on July 29 the Justices of the Court were designated by the Governor. The contention that the interim court was not the highest court of Alaska at that time rests upon this latter fact, and the terms of Alaska Laws 1959, c. 151, § 1, amending Alaska Laws 1959, c. 50, § 32, which amendment provides that in the event that "a court of competent jurisdiction, by final judgment, declares that the United States Court of Appeals for the Ninth Circuit lacks jurisdiction to hear appeals from the District Court of the District of Alaska, the Judicial Council shall forthwith meet and submit to the Governor the names of the persons nominated as justices of the supreme court and appeals from the District Court of the District of Alaska may be made to the State Supreme Court."

Because the Ninth Circuit had ruled against its appellate jurisdiction over the interim court on June 16, 1959, six days before this action was commenced, *Parker* v. *McCarrey,* 268 F. 2d 907, it is urged that this provision, preserving appeals from the District Court to the Supreme Court of the State until the creation of that court, requires the conclusion that at least after July 29, when the Jus-

tices were appointed, appellate review was sufficiently guaranteed to make the Supreme Court, and not the District Court, the highest court of Alaska in which a decision in the instant case could be rendered.

The question thus raised is not free from doubt. Viewing the cases as of August 6, when the notices of appeal were filed, it is fairly arguable that the preservation effected by Alaska Laws 1959, c. 151, § 1, of the right to appeal to the Supreme Court of Alaska constituted the interim court as a lower court of Alaska within the intent of 28 U. S. C. § 1257 to await the completion of the State's adjudicatory process as a prerequisite to adjudication here. Yet, were the promise of an appeal, however indefinitely postponed, to be taken as sufficient to bar our jurisdiction under § 1257, its equally obvious purpose to allow substantial constitutional questions to be timely brought here as of right would be frustrated. Although these cases were decided below on July 2, 1959, the date set by Alaska statute for full organization of the state courts was not until January 3, 1962, Alaska Laws 1959, c. 50, §§ 31 and 32 (4). If no other fact were present, a potential delay of two and one-half years before the organization of a court to hear the preserved appeal would in itself counsel a construction against denial of our jurisdiction. Here, however, two additional facts must be weighed: (1) the Justices of the Supreme Court were actually appointed on July 29, in pursuance of a direction to accelerate the organization of the court; and (2) the effective promulgation of the rules of the court (accomplished on October 5, 1959) and appointment of a clerk were in their hands. Alaska Laws 1959, c. 50, § 32 (3). While in light of these facts the question is exceedingly nice, we do not think that the assurance of a timely appeal to a court not yet functioning was sufficiently definite when the appeals were here filed to constitute a bar to our jurisdiction under § 1257 (2).

The interim court sustained the validity of the Alaska statute banning fishing with traps, Alaska Laws 1959, c. 17, as amended by Alaska Laws 1959, c. 95, against the claim of overriding federal law under the Supremacy Clause. The claim was based on an asserted conflict between the statute and regulations of the Secretary of the Interior, 24 Fed. Reg. 2053–71, prohibiting trap fishing in Alaskan waters generally, but excepting the appellants, thereby granting them in effect a license to fish with traps. The authority under which the Secretary purported to act is the Act of 1924, 43 Stat. 464, as amended, 48 U. S. C. §§ 221, 222.

A question not free from doubt, to put it at its lowest, thus raised under the Supremacy Clause, is however entangled with questions of construction of Alaskan state statutes as well as of the Alaska Statehood Act, *supra*. Also in issue is the effect of provisions of a compact between Alaska and the United States which, it is urged, reserved exclusive regulatory powers over Indian fishing rights to the United States, 72 Stat. 339, and which, so construed, is assertedly unconstitutional because of its failure to accord to Alaska participation in the Union on an "equal footing" with the other States. The latter contention raises related questions of federal power under the Commerce Clause, Art. 1, § 8. While we have before us questions of federal law that are the concern of this Court, their consideration implicates antecedent questions of local law turning in part on appreciation of local economic and social considerations pertinent to the scope of the so-called police power reserved to the State, upon which it would be patently desirable to have the enlightenment which the now fully formed Alaska Supreme Court presumably could furnish.

The original Act prohibiting traps was amended by Alaska Laws 1959, c. 95, § 1, so as to provide that it should not be construed inconsistently with the compact, and if

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the Alaska court determines as a matter of statutory construction that the compact was designed to leave with the United States, as to Indian fishing, the power it exercises under the White Act, a constitutional question now appearing on the horizon might disappear. Moreover, since questions are raised regarding the status of these two Indian communities in relation to the authority of the Secretary of the Interior, enlightenment drawn on the spot by the Alaska Supreme Court may be material to any ultimate determination of federal questions by this Court. Finally, since the ultimate challenge to this legislation is that it must yield to superior federal authority, an authoritative pronouncement by the Supreme Court of Alaska with regard to the justifications of this legislation under the so-called police power would have important bearing on the question of the scope of the powers reserved to the State.

Accordingly, consistently with the policies embodied in § 1257, and in view of the peculiar facts of these cases, we refrain at this stage from deciding the issues presented on the merits of these appeals so as to afford the Alaska Supreme Court the opportunity to rule on questions open to it for decision. We assume that that court has jurisdiction in these cases. However, since it alone can authoritatively decide such a question, we shall hold the cases on our docket. After the Alaska Supreme Court's decision, there may be further proceedings on these appeals; and if it assumes jurisdiction, further appeals may be taken from its judgments. Cf. *Lassiter* v. *Northampton County Board of Elections*, 360 U. S. 45.

Because of the nature of the asserted claim of federal right and the irreparable nature of the injury which may flow from the enforcement of these Alaska criminal statutes prior to a final determination of the merits, we continue the stays granted by MR. JUSTICE BRENNAN on July 11, 1959, until the final disposition of the cases.

Having been advised that appeals in these cases are pending in the Alaska Supreme Court, we direct appellants to pursue those appeals for disposition not inconsistent with this opinion.

It is so ordered.

THE CHIEF JUSTICE, MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS dissent from remitting the parties to the Alaska Supreme Court, as they are of the view that the controlling questions are federal ones whose resolution is for this Court.

UNITED STEELWORKERS OF AMERICA *v.* AMERICAN MANUFACTURING CO.

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

No. 360. Argued April 27, 1960.—Decided June 20, 1960.

In a suit under § 301 (a) of the Labor Management Relations Act, 1947, to compel arbitration of a dispute pursuant to a collective bargaining agreement providing for arbitration of all disputes between the parties "as to the meaning, interpretation and application of the provisions of this agreement," the function of the court is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract, and the court has no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. Pp. 564–569.

264 F. 2d 624, reversed.

David E. Feller argued the cause for petitioner. With him on the brief were *Arthur J. Goldberg, Elliot Bredhoff, James P. Clowes* and *Carney M. Layne.*

John S. Carriger argued the cause for respondent. With him on the brief were *John S. Fletcher* and *Harold M. Humphreys.*

Opinion of the Court by MR. JUSTICE DOUGLAS, announced by MR. JUSTICE BRENNAN.

This suit was brought by petitioner union in the District Court to compel arbitration of a "grievance" that petitioner, acting for one Sparks, a union member, had filed with the respondent, Sparks' employer. The employer defended on the ground (1) that Sparks is estopped from making his claim because he had a few days previously settled a workmen's compensation claim against the company on the basis that he was permanently partially disabled, (2) that Sparks is not physically able to

do the work, and (3) that this type of dispute is not arbitrable under the collective bargaining agreement in question.

The agreement provided that during its term there would be "no strike," unless the employer refused to abide by a decision of the arbitrator. The agreement sets out a detailed grievance procedure with a provision for arbitration (regarded as the standard form) of all disputes between the parties "as to the meaning, interpretation and application of the provisions of this agreement." [1]

The agreement reserves to the management power to suspend or discharge any employee "for cause." [2] It also contains a provision that the employer will employ and promote employees on the principle of seniority

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[1] The relevant arbitration provisions read as follows:

"Any disputes, misunderstandings, differences or grievances arising between the parties as to the meaning, interpretation and application of the provisions of this agreement, which are not adjusted as herein provided, may be submitted to the Board of Arbitration for decision. . . .

"The arbitrator may interpret this agreement and apply it to the particular case under consideration but shall, however, have no authority to add to, subtract from, or modify the terms of the agreement. Disputes relating to discharges or such matters as might involve a loss of pay for employees may carry an award of back pay in whole or in part as may be determined by the Board of Arbitration.

"The decision of the Board of Arbitration shall be final and conclusively binding upon both parties, and the parties agree to observe and abide by same. . . ."

[2] "The Management of the works, the direction of the working force, plant layout and routine of work, including the right to hire, suspend, transfer, discharge or otherwise discipline any employee for cause, such cause being: infraction of company rules, inefficiency, insubordination, contagious disease harmful to others, and any other ground or reason that would tend to reduce or impair the efficiency of plant operation; and to lay off employees because of lack of work, is reserved to the Company, provided it does not conflict with this agreement. . . ."

"where ability and efficiency are equal." [3] Sparks left his work due to an injury and while off work brought an action for compensation benefits. The case was settled, Sparks' physician expressing the opinion that the injury had made him 25% "permanently partially disabled." That was on September 9. Two weeks later the union filed a grievance which charged that Sparks was entitled to return to his job by virtue of the seniority provision of the collective bargaining agreement. Respondent refused to arbitrate and this action was brought. The District Court held that Sparks, having accepted the settlement on the basis of permanent partial disability, was estopped to claim any seniority or employment rights and granted the motion for summary judgment. The Court of Appeals affirmed, 264 F. 2d 624, for different reasons. After reviewing the evidence it held that the grievance is "a frivolous, patently baseless one, not subject to arbitration under the collective bargaining agreement." *Id.*, at 628. The case is here on a writ of certiorari, 361 U. S. 881.

Section 203 (d) of the Labor Management Relations Act, 1947, 61 Stat. 154, 29 U. S. C. § 173 (d), states, "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. . . ." That policy can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play.

A state decision that held to the contrary announced a principle that could only have a crippling effect on griev-

[3] This provision provides in relevant part:

"The Company and the Union fully recognize the principle of seniority as a factor in the selection of employees for promotion, transfer, lay-off, re-employment, and filling of vacancies, where ability and efficiency are equal. It is the policy of the Company to promote employees on that basis."

ance arbitration. The case was *International Assn. of Machinists* v. *Cutler-Hammer, Inc.*, 271 App. Div. 917, 67 N. Y. S. 2d 317, aff'd 297 N. Y. 519, 74 N. E. 2d 464. It held that "If the meaning of the provision of the contract sought to be arbitrated is beyond dispute, there cannot be anything to arbitrate and the contract cannot be said to provide for arbitration." 271 App. Div., at 918, 67 N. Y. S. 2d, at 318. The lower courts in the instant case had a like preoccupation with ordinary contract law. The collective agreement requires arbitration of claims that courts might be unwilling to entertain. In the context of the plant or industry the grievance may assume proportions of which judges are ignorant. Yet, the agreement is to submit all grievances to arbitration, not merely those that a court may deem to be meritorious. There is no exception in the "no strike" clause and none therefore should be read into the grievance clause, since one is the *quid pro quo* for the other.[4] The question is not whether in the mind of the court there is equity in the claim. Arbitration is a stabilizing influence only as it serves as a vehicle for handling any and all disputes that arise under the agreement.

The collective agreement calls for the submission of grievances in the categories which it describes, irrespective of whether a court may deem them to be meritorious. In our role of developing a meaningful body of law to govern the interpretation and enforcement of collective bargaining agreements, we think special heed should be given to the context in which collective bargaining agreements are negotiated and the purpose which they are intended to serve. See *Lewis* v. *Benedict Coal Corp.*, 361 U. S. 459, 468. The function of the court is very limited when the parties have agreed to submit all

[4] Cf. *Structural Steel & Ornamental Iron Assn.* v. *Shopmens Local Union*, 172 F. Supp. 354, where the employer sued for breach of the "no strike" agreement.

questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for.

The courts, therefore, have no business weighing the merits of the grievance,[5] considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious. The processing of even frivolous claims may have therapeutic values of which those who are not a part of the plant environment may be quite unaware.[6]

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[5] See *New Bedford Defense Products Division* v. *Local No. 1113*, 258 F. 2d 522, 526 (C. A. 1st Cir.).

[6] Cox, Current Problems in the Law of Grievance Arbitration, 30 Rocky Mt. L. Rev. 247, 261 (1958), writes:

"The typical arbitration clause is written in words which cover, without limitation, all disputes concerning the interpretation or application of a collective bargaining agreement. Its words do not restrict its scope to meritorious disputes or two-sided disputes, still less are they limited to disputes which a judge will consider two-sided. Frivolous cases are often taken, and are expected to be taken, to arbitration. What one man considers frivolous another may find meritorious, and it is common knowledge in industrial relations circles that grievance arbitration often serves as a safety valve for troublesome complaints. Under these circumstances it seems proper to read the typical arbitration clause as a promise to arbitrate every claim, meritorious or frivolous, which the complainant bases upon the contract. The objection that equity will not order a party to do a useless act is outweighed by the cathartic value of arbitrating even a frivolous grievance and by the dangers of excessive judicial intervention."

The union claimed in this case that the company had violated a specific provision of the contract. The company took the position that it had not violated that clause. There was, therefore, a dispute between the parties as to "the meaning, interpretation and application" of the collective bargaining agreement. Arbitration should have been ordered. When the judiciary undertakes to determine the merits of a grievance under the guise of interpreting the grievance procedure of collective bargaining agreements, it usurps a function which under that regime is entrusted to the arbitration tribunal.

Reversed.

MR. JUSTICE FRANKFURTER concurs in the result.

MR. JUSTICE WHITTAKER, believing that the District Court lacked jurisdiction to determine the merits of the claim which the parties had validly agreed to submit to the exclusive jurisdiction of a Board of Arbitrators (*Textile Workers* v. *Lincoln Mills*, 353 U. S. 448), concurs in the result of this opinion.

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

MR. JUSTICE BRENNAN, with whom MR. JUSTICE HARLAN joins, concurring.*

While I join the Court's opinions in Nos. 443, 360 and 538, I add a word in Nos. 443 and 360.

In each of these two cases the issue concerns the enforcement of but one promise—the promise to arbitrate in the context of an agreement dealing with a particular subject

*[This opinion applies also to No. 443, *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, *post*, p. 574, and No. 538, *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, *post*, p. 593.]

matter, the industrial relations between employers and employees. Other promises contained in the collective bargaining agreements are beside the point unless, by the very terms of the arbitration promise, they are made relevant to its interpretation. And I emphasize this, for the arbitration promise is itself a contract. The parties are free to make that promise as broad or as narrow as they wish, for there is no compulsion in law requiring them to include any such promises in their agreement. The meaning of the arbitration promise is not to be found simply by reference to the dictionary definitions of the words the parties use, or by reference to the interpretation of commercial arbitration clauses. Words in a collective bargaining agreement, rightly viewed by the Court to be the charter instrument of a system of industrial self-government, like words in a statute, are to be understood only by reference to the background which gave rise to their inclusion. The Court therefore avoids the prescription of inflexible rules for the enforcement of arbitration promises. Guidance is given by identifying the various considerations which a court should take into account when construing a particular clause—considerations of the milieu in which the clause is negotiated and of the national labor policy. It is particularly underscored that the arbitral process in collective bargaining presupposes that the parties wanted the informed judgment of an arbitrator, precisely for the reason that judges cannot provide it. Therefore, a court asked to enforce a promise to arbitrate should ordinarily refrain from involving itself in the interpretation of the substantive provisions of the contract.

To be sure, since arbitration is a creature of contract, a court must always inquire, when a party seeks to invoke its aid to force a reluctant party to the arbitration table, whether the parties have agreed to arbitrate the particu-

lar dispute. In this sense, the question of whether a dispute is "arbitrable" is inescapably for the court.

On examining the arbitration clause, the court may conclude that it commits to arbitration any "dispute, difference, disagreement, or controversy of any nature or character." With that finding the court will have exhausted its function, except to order the reluctant party to arbitration. Similarly, although the arbitrator may be empowered only to interpret and apply the contract, the parties may have provided that any dispute as to whether a particular claim is within the arbitration clause is itself for the arbitrator. Again the court, without more, must send any dispute to the arbitrator, for the parties have agreed that the construction of the arbitration promise itself is for the arbitrator, and the reluctant party has breached his promise by refusing to submit the dispute to arbitration.

In *American,* the Court deals with a request to enforce the "standard" form of arbitration clause, one that provides for the arbitration of "[a]ny disputes, misunderstandings, differences or grievances arising between the parties as to the meaning, interpretation and application of this agreement . . . ." Since the arbitration clause itself is part of the agreement, it might be argued that a dispute as to the meaning of that clause is for the arbitrator. But the Court rejects this position, saying that the threshold question, the meaning of the arbitration clause itself, is for the judge unless the parties clearly state to the contrary. However, the Court finds that the meaning of that "standard" clause is simply that the parties have agreed to arbitrate any dispute which the moving party asserts to involve construction of the substantive provisions of the contract, because such a dispute necessarily does involve such a construction.

The issue in the *Warrior* case is essentially no different from that in *American,* that is, it is whether the company

agreed to arbitrate a particular grievance. In contrast to *American,* however, the arbitration promise here excludes a particular area from arbitration—"matters which are strictly a function of management." Because the arbitration promise is different, the scope of the court's inquiry may be broader. Here, a court may be required to examine the substantive provisions of the contract to ascertain whether the parties have provided that contracting out shall be a "function of management." If a court may delve into the merits to the extent of inquiring whether the parties have expressly agreed whether or not contracting out was a "function of management," why was it error for the lower court here to evaluate the evidence of bargaining history for the same purpose? Neat logical distinctions do not provide the answer. The Court rightly concludes that appropriate regard for the national labor policy and the special factors relevant to the labor arbitral process, admonish that judicial inquiry into the merits of this grievance should be limited to the search for an explicit provision which brings the grievance under the cover of the exclusion clause since "the exclusion clause is vague and arbitration clause quite broad." The hazard of going further into the merits is amply demonstrated by what the courts below did. On the basis of inconclusive evidence, those courts found that *Warrior* was in no way limited by any implied covenants of good faith and fair dealing from contracting out as it pleased—which would necessarily mean that *Warrior* was free completely to destroy the collective bargaining agreement by contracting out all the work.

The very ambiguity of the *Warrior* exclusion clause suggests that the parties were generally more concerned with having an arbitrator render decisions as to the meaning of the contract than they were in restricting the arbitrator's jurisdiction. The case might of course be otherwise were the arbitration clause very narrow, or the

exclusion clause quite specific, for the inference might then be permissible that the parties had manifested a greater interest in confining the arbitrator; the presumption of arbitrability would then not have the same force and the Court would be somewhat freer to examine into the merits.

The Court makes reference to an arbitration clause being the *quid pro quo* for a no-strike clause. I do not understand the Court to mean that the application of the principles announced today depends upon the presence of a no-strike clause in the agreement.

MR. JUSTICE FRANKFURTER joins these observations.

UNITED STEELWORKERS OF AMERICA *v.* WARRIOR & GULF NAVIGATION CO.

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

No. 443. Argued April 27, 1960.—Decided June 20, 1960.

This suit under § 301 (a) of the Labor Management Relations Act, 1947, was brought by a labor union to compel arbitration of a grievance based upon the employer's practice of contracting out work while laying off employees who could have performed such work. The collective bargaining agreement between the parties contained "no strike" and "no lock-out" provisions and set up a grievance procedure culminating in arbitration. It provided that "matters which are strictly a function of management shall not be subject to arbitration"; but it also provided that "Should differences arise . . . as to the meaning and application of the provisions of this Agreement, or should any local trouble of any kind arise," the grievance procedure should be followed. The Court of Appeals ruled that deciding whether to contract out work was "strictly a function of management" within the meaning of the agreement, and it sustained a judgment of the District Court dismissing the complaint. *Held:* It erred in doing so, and the judgment is reversed. Pp. 575–585.

(a) In a suit under § 301 (a), judicial inquiry must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or to give the arbitrator power to make the award he made; an order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute; and doubts should be resolved in favor of coverage. Pp. 582–583.

(b) In the absence of any express provision excluding a particular grievance from arbitration, only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad. Pp. 583–585.

(c) Since, in this case, the parties had agreed that any dispute "as to the meaning of this Agreement" would be determined by

arbitration, it was for the arbitrator, not the courts, to decide whether the contracting out here involved violated the agreement. P. 585.

269 F. 2d 633, reversed.

David E. Feller argued the cause for petitioner. With him on the brief were *Arthur J. Goldberg, Elliot Bredhoff, James P. Clowes* and *Carney M. Layne.*

Samuel Lang argued the cause for respondent. With him on the brief were *Richard C. Keenan* and *T. K. Jackson, Jr.*

Opinion of the Court by MR. JUSTICE DOUGLAS, announced by MR. JUSTICE BRENNAN.

Respondent transports steel and steel products by barge and maintains a terminal at Chickasaw, Alabama, where it performs maintenance and repair work on its barges. The employees at that terminal constitute a bargaining unit covered by a collective bargaining agreement negotiated by petitioner union. Respondent between 1956 and 1958 laid off some employees, reducing the bargaining unit from 42 to 23 men. This reduction was due in part to respondent contracting maintenance work, previously done by its employees, to other companies. The latter used respondent's supervisors to lay out the work and hired some of the laid-off employees of respondent (at reduced wages). Some were in fact assigned to work on respondent's barges. A number of employees signed a grievance which petitioner presented to respondent, the grievance reading:

> "We are hereby protesting the Company's actions, of arbitrarily and unreasonably contracting out work to other concerns, that could and previously has been performed by Company employees.
>
> "This practice becomes unreasonable, unjust and discriminatory in lieu [*sic*] of the fact that at present

there are a number of employees that have been laid off for about 1 and ½ years or more for allegedly lack of work.

"Confronted with these facts we charge that the Company is in violation of the contract by inducing a partial lock-out, of a number of the employees who would otherwise be working were it not for this unfair practice."

The collective agreement had both a "no strike" and a "no lockout" provision. It also had a grievance procedure which provided in relevant part as follows:

"Issues which conflict with any Federal statute in its application as established by Court procedure or matters which are strictly a function of management shall not be subject to arbitration under this section.

"Should differences arise between the Company and the Union or its members employed by the Company as to the meaning and application of the provisions of this Agreement, or should any local trouble of any kind arise, there shall be no suspension of work on account of such differences but an earnest effort shall be made to settle such differences immediately in the following manner:

"A. For Maintenance Employees:

"First, between the aggrieved employees, and the Foreman involved;

"Second, between a member or members of the Grievance Committee designated by the Union, and the Foreman and Master Mechanic.

. . . . . .

"Fifth, if agreement has not been reached the matter shall be referred to an impartial umpire for decision. The parties shall meet to decide on an umpire acceptable to both. If no agreement on selection of an umpire is reached, the parties shall jointly peti-

> tion the United States Conciliation Service for suggestion of a list of umpires from which selection will be made. The decision of the umpire shall be final."

Settlement of this grievance was not had and respondent refused arbitration. This suit was then commenced by the union to compel it.[1]

The District Court granted respondent's motion to dismiss the complaint. 168 F. Supp. 702. It held after hearing evidence, much of which went to the merits of the grievance, that the agreement did not "confide in an arbitrator the right to review the defendant's business judgment in contracting out work." *Id.*, at 705. It further held that "the contracting out of repair and maintenance work, as well as construction work, is strictly a function of management not limited in any respect by the labor agreement involved here." *Ibid.* The Court of Appeals affirmed by a divided vote, 269 F. 2d 633, the majority holding that the collective agreement had withdrawn from the grievance procedure "matters which are strictly a function of management" and that contracting out fell in that exception. The case is here on a writ of certiorari. 361 U. S. 912.

We held in *Textile Workers* v. *Lincoln Mills,* 353 U. S. 448, that a grievance arbitration provision in a collective agreement could be enforced by reason of § 301 (a) of the Labor Management Relations Act[2] and that the policy to be applied in enforcing this type of arbitration

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[1] Section 301 (a) of the Labor Management Relations Act, 1947, 61 Stat. 156, 29 U. S. C. § 185 (a), provides:

"Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." See *Textile Workers* v. *Lincoln Mills,* 353 U. S. 448.

[2] Note 1, *supra.*

was that reflected in our national labor laws. *Id.*, at 456–457. The present federal policy is to promote industrial stabilization through the collective bargaining agreement.[3] *Id.*, at 453–454. A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement.[4]

Thus the run of arbitration cases, illustrated by *Wilko* v. *Swan*, 346 U. S. 427, becomes irrelevant to our problem. There the choice is between the adjudication of cases or controversies in courts with established procedures or even special statutory safeguards on the one hand and the settlement of them in the more informal arbitration tribunal on the other. In the commercial case, arbitration is the substitute for litigation. Here arbitration is the substitute for industrial strife. Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by courts toward arbitration of commercial agreements has no place here. For arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself.

The collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. See Shulman, Reason, Contract, and Law in Labor Relations, 68 Harv. L.

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[3] In § 8 (d) of the National Labor Relations Act, as amended by the 1947 Act, 29 U. S. C. § 158 (d), Congress indeed provided that where there was a collective agreement for a fixed term the duty to bargain did not require either party "to discuss or agree to any modification of the terms and conditions contained in" the contract. And see *Labor Board* v. *Sands Mfg. Co.*, 306 U. S. 332.

[4] Complete effectuation of the federal policy is achieved when the agreement contains both an arbitration provision for all unresolved grievances and an absolute prohibition of strikes, the arbitration agreement being the *"quid pro quo"* for the agreement not to strike. *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448, 455.

Rev. 999, 1004–1005. The collective agreement covers the whole employment relationship.[5] It calls into being a new common law—the common law of a particular industry or of a particular plant. As one observer has put it: [6]

> ". . . [I]t is not unqualifiedly true that a collective-bargaining agreement is simply a document by which the union and employees have imposed upon management limited, express restrictions of its otherwise absolute right to manage the enterprise, so that an employee's claim must fail unless he can point to a specific contract provision upon which the claim is founded. There are too many people, too many problems, too many unforeseeable contingencies to make the words of the contract the exclusive source of rights and duties. One cannot reduce all the rules governing a community like an industrial plant to fifteen or even fifty pages. Within the sphere of collective bargaining, the institutional characteristics

[5] "Contracts which ban strikes often provide for lifting the ban under certain conditions. Unconditional pledges against strikes are, however, somewhat more frequent than conditional ones. Where conditions are attached to no-strike pledges, one or both of two approaches may be used: certain *subjects* may be exempted from the scope of the pledge, or the pledge may be lifted after certain *procedures* are followed by the union. (Similar qualifications may be made in pledges against lockouts.)

"Most frequent conditions for lifting no-strike pledges are: (1) The occurrence of a deadlock in wage reopening negotiations; and (2) violation of the contract, especially non-compliance with the grievance procedure and failure to abide by an arbitration award.

"No-strike pledges may also be lifted after compliance with specified procedures. Some contracts permit the union to strike after the grievance procedure has been exhausted without a settlement, and where arbitration is not prescribed as the final recourse. Other contracts permit a strike if mediation efforts fail, or after a specified cooling-off period." Collective Bargaining, Negotiations and Contracts, Bureau of National Affairs, Inc., 77:101.

[6] Cox, Reflections Upon Labor Arbitration, 72 Harv. L. Rev. 1482, 1498–1499 (1959).

and the governmental nature of the collective-bargaining process demand a common law of the shop which implements and furnishes the context of the agreement. We must assume that intelligent negotiators acknowledged so plain a need unless they stated a contrary rule in plain words."

A collective bargaining agreement is an effort to erect a system of industrial self-government. When most parties enter into contractual relationship they do so voluntarily, in the sense that there is no real compulsion to deal with one another, as opposed to dealing with other parties. This is not true of the labor agreement. The choice is generally not between entering or refusing to enter into a relationship, for that in all probability preexists the negotiations. Rather it is between having that relationship governed by an agreed-upon rule of law or leaving each and every matter subject to a temporary resolution dependent solely upon the relative strength, at any given moment, of the contending forces. The mature labor agreement may attempt to regulate all aspects of the complicated relationship, from the most crucial to the most minute over an extended period of time. Because of the compulsion to reach agreement and the breadth of the matters covered, as well as the need for a fairly concise and readable instrument, the product of negotiations (the written document) is, in the words of the late Dean Shulman, "a compilation of diverse provisions: some provide objective criteria almost automatically applicable; some provide more or less specific standards which require reason and judgment in their application; and some do little more than leave problems to future consideration with an expression of hope and good faith." Shulman, *supra,* at 1005. Gaps may be left to be filled in by reference to the practices of the particular industry and of the various shops covered by the agreement. Many of the specific prac-

tices which underlie the agreement may be unknown, except in hazy form, even to the negotiators. Courts and arbitration in the context of most commercial contracts are resorted to because there has been a breakdown in the working relationship of the parties; such resort is the unwanted exception. But the grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement.

Apart from matters that the parties specifically exclude, all of the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions of the collective agreement. The grievance procedure is, in other words, a part of the continuous collective bargaining process. It, rather than a strike, is the terminal point of a disagreement.

The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts.

> "A proper conception of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends the parties. He is rather part of a system of self-government created by and confined to the parties. . . ." Shulman, *supra,* at 1016.

The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial

common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it. The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished. For the parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs. The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.

The Congress, however, has by § 301 of the Labor Management Relations Act, assigned the courts the duty of determining whether the reluctant party has breached his promise to arbitrate. For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. Yet, to be consistent with congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration, the judicial inquiry under § 301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made. An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpreta-

tion that covers the asserted dispute. Doubts should be resolved in favor of coverage.[7]

We do not agree with the lower courts that contracting-out grievances were necessarily excepted from the grievance procedure of this agreement. To be sure, the agreement provides that "matters which are strictly a function of management shall not be subject to arbitration." But it goes on to say that if "differences" arise or if "any local trouble of any kind" arises, the grievance procedure shall be applicable.

Collective bargaining agreements regulate or restrict the exercise of management functions; they do not oust management from the performance of them. Management hires and fires, pays and promotes, supervises and plans. All these are part of its function, and absent a collective bargaining agreement, it may be exercised freely except as limited by public law and by the willingness of employees to work under the particular, unilaterally imposed conditions. A collective bargaining agreement may treat only with certain specific practices, leaving the rest to management but subject to the possibility of work stoppages. When, however, an absolute no-strike clause is included in the agreement, then in a very real sense everything that management does is subject to the agreement, for either management is prohibited or limited in the action it takes, or if not, it is protected from interference by strikes. This comprehensive reach of the collective bargaining agreement does not mean,

[7] It is clear that under both the agreement in this case and that involved in *American Manufacturing Co., ante,* p. 564, the question of arbitrability is for the courts to decide. Cf. Cox, Reflections Upon Labor Arbitration, 72 Harv. L. Rev. 1482, 1508–1509. Where the assertion by the claimant is that the parties excluded from court determination not merely the decision of the merits of the grievance but also the question of its arbitrability, vesting power to make both decisions in the arbitrator, the claimant must bear the burden of a clear demonstration of that purpose.

however, that the language, "strictly a function of management," has no meaning.

"Strictly a function of management" might be thought to refer to any practice of management in which, under particular circumstances prescribed by the agreement, it is permitted to indulge. But if courts, in order to determine arbitrability, were allowed to determine what is permitted and what is not, the arbitration clause would be swallowed up by the exception. Every grievance in a sense involves a claim that management has violated some provision of the agreement.

Accordingly, "strictly a function of management" must be interpreted as referring only to that over which the contract gives management complete control and unfettered discretion. Respondent claims that the contracting out of work falls within this category. Contracting out work is the basis of many grievances; and that type of claim is grist in the mills of the arbitrators.[8] A specific collective bargaining agreement may exclude contracting out from the grievance procedure. Or a written collateral agreement may make clear that contracting out was not a matter for arbitration. In such a case a grievance based solely on contracting out would not be arbitrable. Here, however, there is no such provision. Nor is there any showing that the parties designed the phrase "strictly a function of management" to encompass any and all forms of contracting out. In the absence of any

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[8] See *Celanese Corp. of America*, 33 Lab. Arb. Rep. 925, 941 (1959), where the arbiter in a grievance growing out of contracting out work said:

"In my research I have located 64 published decisions which have been concerned with this issue covering a wide range of factual situations but all of them with the common characteristic—i. e., the contracting-out of work involved occurred under an Agreement that contained no provision that specifically mentioned contracting-out of work."

express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad. Since any attempt by a court to infer such a purpose necessarily comprehends the merits, the court should view with suspicion an attempt to persuade it to become entangled in the construction of the substantive provisions of a labor agreement, even through the back door of interpreting the arbitration clause, when the alternative is to utilize the services of an arbitrator.

The grievance alleged that the contracting out was a violation of the collective bargaining agreement. There was, therefore, a dispute "as to the meaning and application of the provisions of this Agreement" which the parties had agreed would be determined by arbitration.

The judiciary sits in these cases to bring into operation an arbitral process which substitutes a regime of peaceful settlement for the older regime of industrial conflict. Whether contracting out in the present case violated the agreement is the question. It is a question for the arbiter, not for the courts.

Reversed.

MR. JUSTICE FRANKFURTER concurs in the result.

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

[For opinion of MR. JUSTICE BRENNAN, joined by MR. JUSTICE FRANKFURTER and MR. JUSTICE HARLAN, see *ante*, p. 569.]

MR. JUSTICE WHITTAKER, dissenting.

Until today, I have understood it to be the unquestioned law, as this Court has consistently held, that arbitrators are private judges chosen by the parties to decide

particular matters specifically submitted; [1] that the contract under which matters are submitted to arbitrators is at once the source and limit of their authority and power; [2] and that their power to decide issues with finality, thus ousting the normal functions of the courts, must rest upon a clear, definitive agreement of the parties, as such powers can never be implied. *United States* v. *Moorman,* 338 U. S. 457, 462; [3] *Mercantile Trust Co.* v. *Hensey,* 205 U. S. 298, 309.[4] See also *Fernandez & Hnos.* v. *Rickert Rice Mills,* 119 F. 2d 809, 815 (C. A. 1st Cir.); [5] *Marchant* v. *Mead-Morrison Mfg. Co.,* 252 N. Y. 284, 299, 169 N. E. 386, 391; [6] *Continental Milling & Feed Co.*

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[1] "Arbitrators are judges chosen by the parties to decide the matters submitted to them." *Burchell* v. *Marsh,* 17 How. 344, 349.

[2] "The agreement under which [the arbitrators] were selected *was at once the source and limit of their authority,* and the award, to be binding, must, in substance and form, conform to the submission." (Emphasis added.) *Continental Ins. Co.* v. *Garrett,* 125 F. 589, 590 (C. A. 6th Cir.)—Opinion by Judge, later Mr. Justice, Lurton.

[3] "It is true that *the intention of parties to submit their contractual disputes to final determination outside the courts should be made manifest by plain language.*" (Emphasis added.) *United States* v. *Moorman,* 338 U. S. 457, 462.

[4] "To make such [an arbitrator's] certificate conclusive *requires plain language in the contract.* It is not to be implied." (Emphasis added.) *Mercantile Trust Co.* v. *Hensey,* 205 U. S. 298, 309.

[5] "A party is never required to submit to arbitration any question which he has not agreed so to submit, and contracts providing for arbitration *will be carefully construed in order not to force a party to submit to arbitration a question which he did not intend to be submitted.*" (Emphasis added.) *Fernandez & Hnos.* v. *Rickert Rice Mills,* 119 F. 2d 809, 815 (C. A. 1st Cir.).

[6] In this leading case, Judge, later Mr. Justice, Cardozo said:

"The question is one of intention, to be ascertained by the same tests that are applied to contracts generally. . . . No one is under a duty to resort to these conventional tribunals, however helpful their processes, *except to the extent that he has signified his willingness.* Our own favor or disfavor of the cause of arbitration is not

v. *Doughnut Corp.*, 186 Md. 669, 676, 48 A. 2d 447, 450; [7] *Jacob* v. *Weisser*, 207 Pa. 484, 489, 56 A. 1065, 1067.[8] I believe that the Court today departs from the established principles announced in these decisions.

Here, the employer operates a shop for the normal maintenance of its barges, but it is not equipped to make major repairs, and accordingly the employer has, from the beginning of its operations more than 19 years ago, contracted out its major repair work. During most, if not all, of this time the union has represented the employees in that unit. The District Court found that "[t]hroughout the successive labor agreements between these parties, including the present one, . . . [the union] has unsuccessfully sought to negotiate changes in the labor contracts, and particularly during the negotiation of the present labor agreement, . . . which would have limited

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to count as a factor in the appraisal of the thought of others." (Emphasis added.) *Marchant* v. *Mead-Morrison Mfg. Co.*, 252 N. Y. 284, 299, 169 N. E. 386, 391.

[7] In this case, the Court, after quoting Judge Cardozo's language in *Marchant*, *supra*, saying that "the question is one of intention," said:

"Sound policy demands that the terms of an arbitration agreement *must not be strained to discover power to pass upon matters in dispute, but the terms must be clear and unmistakable to oust the jurisdiction of the Court, for trial by jury cannot be taken away in any case merely by implication.*" (Emphasis added.) *Continental Milling & Feed Co.* v. *Doughnut Corp.*, 186 Md. 669, 676, 48 A. 447, 450.

[8] "But, under any circumstances, before the decision of an arbitrator can be held final and conclusive, it must appear, as was said in *Chandley Bros.* v. *Cambridge Springs*, 200 Pa. 230, 49 Atl. 772, *that power to pass upon the subject-matter, is clearly given to him. 'The terms of the agreement are not to be strained to discover it. They must be clear and unmistakable to oust the jurisdiction of the courts; for trial by jury cannot be taken away by implication merely in any case.'*" (Emphasis added.) *Jacob* v. *Weisser*, 207 Pa. 484, 489, 56 A. 1065, 1067.

the right of the [employer] to continue the practice of contracting out such work." 168 F. Supp. 702, 704–705.

The labor agreement involved here provides for arbitration of disputes respecting the interpretation and application of the agreement and, arguably, also some other things. But the first paragraph of the arbitration section says: "[M]atters which are strictly a function of management shall not be subject to arbitration under this section." Although acquiescing for 19 years in the employer's interpretation that contracting out work was "strictly a function of management," and having repeatedly tried—particularly in the negotiation of the agreement involved here—but unsuccessfully, to induce the employer to agree to a covenant that would prohibit it from contracting out work, the union, after having agreed to and signed the contract involved, presented a "grievance" on the ground that the employer's contracting out work, at a time when some employees in the unit were laid off for lack of work, constituted a partial "lockout" of employees in violation of the antilockout provision of the agreement.

Being unable to persuade the employer to agree to cease contracting out work or to agree to arbitrate the "grievance," the union brought this action in the District Court, under § 301 of the Labor Management Relations Act, 29 U. S. C. § 185, for a decree compelling the employer to submit the "grievance" to arbitration. The District Court, holding that the contracting out of work was, and over a long course of dealings had been interpreted and understood by the parties to be, "strictly a function of management," and was therefore specifically excluded from arbitration by the terms of the contract, denied the relief prayed, 168 F. Supp. 702. The Court of Appeals affirmed, 269 F. 2d 633, and we granted certiorari. 361 U. S. 912.

The Court now reverses the judgment of the Court of Appeals. It holds that the arbitrator's source of law is "not confined to the express provisions of the contract," that arbitration should be ordered "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute," that "[d]oubts [of arbitrability] should be resolved in favor of coverage," and that when, as here, "an absolute no-strike clause is included in the agreement, then . . . everything that management does is subject to [arbitration]." I understand the Court thus to hold that the arbitrators are not confined to the express provisions of the contract, that arbitration is to be ordered unless it may be said with positive assurance that arbitration of a particular dispute is excluded by the contract, that doubts of arbitrability are to be resolved in favor of arbitration, and that when, as here, the contract contains a no-strike clause, everything that management does is subject to arbitration.

This is an entirely new and strange doctrine to me. I suggest, with deference, that it departs from both the contract of the parties and the controlling decisions of this Court. I find nothing in the contract that purports to confer upon arbitrators any such general breadth of private judicial power. The Court cites no legislative or judicial authority that creates for or gives to arbitrators such broad general powers. And I respectfully submit that today's decision cannot be squared with the statement of Judge, later Mr. Justice, Cardozo in *Marchant* that "No one is under a duty to resort to these conventional tribunals, however helpful their processes, *except to the extent that he has signified his willingness.* Our own favor or disfavor of the cause of arbitration is not to count as a factor in the appraisal of the thought of others" (emphasis added), 252 N. Y., at 299, 169 N. E., at 391; nor with his state-

ment in that case that "[t]he question is one of intention, to be ascertained by the same tests that are applied to contracts generally," *id.;* nor with this Court's statement in *Moorman,* "that the intention of the parties to submit their contractual disputes to final determination outside the courts *should be made manifest by plain language*" (emphasis added), 338 U. S., at 462; nor with this Court's statement in *Hensey* that: "To make such [an arbitrator's] certificate conclusive *requires plain language in the contract.* It is not to be implied." (Emphasis added.) 205 U. S., at 309. "A party is never required to submit to arbitration any question which he has not agreed so to submit, and *contracts providing for arbitration will be carefully construed in order not to force a party to submit to arbitration a question which he did not intend to be submitted.*" (Emphasis added.) *Fernandez & Hnos.* v. *Rickert Rice Mills, supra,* 119 F. 2d, at 815 (C. A. 1st Cir.).

With respect, I submit that there is nothing in the contract here to indicate that the employer "signified [its] willingness" (*Marchant, supra,* at 299) to submit to arbitrators whether it must cease contracting out work. Certainly no such intention is "made manifest by plain language" (*Moorman, supra,* at 462), as the law "requires," because such consent "is not to be implied." *Hensey, supra,* at 309.) To the contrary, the parties by their conduct over many years interpreted the contracting out of major repair work to be "strictly a function of management," and if, as the concurring opinion suggests, the words of the contract can "be understood only by reference to the background which gave rise to their inclusion," then the interpretation given by the parties over 19 years to the phrase "matters which are strictly a function of management" should logically have some significance here. By their contract, the parties agreed that "matters

which are strictly a function of management shall not be subject to arbitration." The union over the course of many years repeatedly tried to induce the employer to agree to a covenant prohibiting the contracting out of work, but was never successful. The union again made such an effort in negotiating the very contract involved here, and, failing of success, signed the contract, knowing, of course, that it did not contain any such covenant, but that, to the contrary, it contained, just as had the former contracts, a covenant that "matters which are strictly a function of management shall not be subject to arbitration." Does not this show that, instead of signifying a willingness to submit to arbitration the matter of whether the employer might continue to contract out work, the parties fairly agreed to exclude at least that matter from arbitration? Surely it cannot be said that the parties agreed to such a submission by any "plain language." *Moorman, supra,* at 462, and *Hensey, supra,* at 309. Does not then the Court's opinion compel the employer "to submit to arbitration [a] question which [it] has not agreed so to submit"? (*Fernandez & Hnos., supra,* at 815.)

Surely the question whether a particular subject or class of subjects is or is not made arbitrable by a contract is a judicial question, and if, as the concurring opinion suggests, "the court may conclude that [the contract] commits to arbitration any [subject or class of subjects]," it may likewise conclude that the contract does not commit such subject or class of subjects to arbitration, and "[w]ith that finding the court will have exhausted its function" no more nor less by denying arbitration than by ordering it. Here the District Court found, and the Court of Appeals approved its finding, that by the terms of the contract, as interpreted by the parties over 19 years, the contracting out of work was "strictly a function

of management" and "not subject to arbitration." That finding, I think, should be accepted here. Acceptance of it requires affirmance of the judgment.

I agree with the Court that courts have no proper concern with the "merits" of claims which by contract the parties have agreed to submit to the exclusive jurisdiction of arbitrators. But the question is one of jurisdiction. Neither may entrench upon the jurisdiction of the other. The test is: Did the parties in their contract "manifest by plain language" (*Moorman, supra,* at 462) their willingness to submit the issue in controversy to arbitrators? If they did, then the arbitrators have exclusive jurisdiction of it, and the courts, absent fraud or the like, must respect that exclusive jurisdiction and cannot interfere. But if they did not, then the courts must exercise their jurisdiction, when properly invoked, to protect the citizen against the attempted use by arbitrators of pretended powers actually never conferred. That question always is, and from its very nature must be, a judicial one. Such was the question presented to the District Court and the Court of Appeals here. They found the jurisdictional facts, properly applied the settled law to those facts, and correctly decided the case. I would therefore affirm the judgment.

UNITED STEELWORKERS OF AMERICA *v.* ENTERPRISE WHEEL & CAR CORP.

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

No. 538. Argued April 28, 1960.—Decided June 20, 1960.

Employees were discharged during the term of a collective bargaining agreement containing a provision for arbitration of disputes, including differences "as to the meaning and application" of the agreement, and a provision for reinstatement with back pay of employees discharged in violation of the agreement. The discharges were arbitrated after the agreement had expired, and the arbitrator found that they were in violation of the agreement and that the agreement required reinstatement with back pay, minus pay for a ten-day suspension and such sums as the employees had received from other employment. Respondent refused to comply with the award, and the District Court directed it to do so. The Court of Appeals held that (a) failure of the award to specify the amounts to be deducted from the back pay rendered the award unenforceable, though that defect could be remedied by requiring the parties to complete the arbitration, (b) an award for back pay subsequent to the date of expiration of the collective bargaining agreement could not be enforced, and (c) the requirement for reinstatement of the discharged employees was unenforceable because the collective bargaining agreement had expired. *Held:* The judgment of the District Court should have been affirmed with a modification requiring the specific amounts due the employees to be definitely determined by arbitration. Pp. 594–599.

(a) Federal courts should decline to review the merits of arbitration awards under collective bargaining agreements. *Steelworkers* v. *Warrior & Gulf Navigation Co.*, *ante*, p. 574. P. 596.

(b) The opinion of the arbitrator in this case, as it bears upon the award of back pay beyond the date of the agreement's expiration and reinstatement, is ambiguous; but mere ambiguity in the opinion accompanying an award is not a reason for refusing to enforce the award, even when it permits the inference that the arbitrator may have exceeded his authority. Pp. 597–598.

(c) The question of interpretation of the collective bargaining agreement is a question for the arbitrator, and the courts have no

business overruling his construction of the contract merely because their interpretation of it is different from his. Pp. 598–599.

(d) The Court of Appeals erred in holding that an award for back pay subsequent to the date of expiration of the collective bargaining agreement could not be enforced and that the requirement for reinstatement of the discharged employees was unenforceable because the collective bargaining agreement had expired. Pp. 596, 599.

(e) The judgment of the District Court ordering respondent to comply with the arbitrator's award should be modified so that the amount due the employees may be definitely determined by arbitration. P. 599.

269 F. 2d 327, reversed in part.

Elliot Bredhoff and *David E. Feller* argued the cause for petitioner. With them on the brief were *Arthur J. Goldberg, James P. Clowes* and *Carney M. Layne.*

William C. Beatty argued the cause for respondent. With him on the brief was *Jackson N. Huddleston.*

Opinion of the Court by MR. JUSTICE DOUGLAS, announced by MR. JUSTICE BRENNAN.

Petitioner union and respondent during the period relevant here had a collective bargaining agreement which provided that any differences "as to the meaning and application" of the agreement should be submitted to arbitration and that the arbitrator's decision "shall be final and binding on the parties." Special provisions were included concerning the suspension and discharge of employees. The agreement stated:

> "Should it be determined by the Company or by an arbitrator in accordance with the grievance procedure that the employee has been suspended unjustly or discharged in violation of the provisions of this Agreement, the Company shall reinstate the employee and pay full compensation at the employee's regular rate of pay for the time lost."

The agreement also provided:

> ". . . It is understood and agreed that neither party will institute *civil suits or legal proceedings* against the other for alleged violation of any of the provisions of this labor contract; instead all disputes will be settled in the manner outlined in this Article III—Adjustment of Grievances."

A group of employees left their jobs in protest against the discharge of one employee. A union official advised them at once to return to work. An official of respondent at their request gave them permission and then rescinded it. The next day they were told they did not have a job any more "until this thing was settled one way or the other."

A grievance was filed; and when respondent finally refused to arbitrate, this suit was brought for specific enforcement of the arbitration provisions of the agreement. The District Court ordered arbitration. The arbitrator found that the discharge of the men was not justified, though their conduct, he said, was improper. In his view the facts warranted at most a suspension of the men for 10 days each. After their discharge and before the arbitration award the collective bargaining agreement had expired. The union, however, continued to represent the workers at the plant. The arbitrator rejected the contention that expiration of the agreement barred reinstatement of the employees. He held that the provision of the agreement above quoted imposed an unconditional obligation on the employer. He awarded reinstatement with back pay, minus pay for a 10-day suspension and such sums as these employees received from other employment.

Respondent refused to comply with the award. Petitioner moved the District Court for enforcement. The District Court directed respondent to comply. 168 F. Supp. 308. The Court of Appeals, while agreeing that

the District Court had jurisdiction to enforce an arbitration award under a collective bargaining agreement,[1] held that the failure of the award to specify the amounts to be deducted from the back pay rendered the award unenforceable. That defect, it agreed, could be remedied by requiring the parties to complete the arbitration. It went on to hold, however, that an award for back pay subsequent to the date of termination of the collective bargaining agreement could not be enforced. It also held that the requirement for reinstatement of the discharged employees was likewise unenforceable because the collective bargaining agreement had expired. 269 F. 2d 327. We granted certiorari. 361 U. S. 929.

The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards. As we stated in *United Steelworkers of America* v. *Warrior & Gulf Navigation Co., ante,* p. 574, decided this day, the arbitrators under these collective agreements are indispensable agencies in a continuous collective bargaining process. They sit to settle disputes at the plant level—disputes that require for their solution knowledge of the custom and practices of a particular factory or of a particular industry as reflected in particular agreements.[2]

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[1] See *Textile Workers* v. *Cone Mills Corp.*, 268 F. 2d 920 (C. A. 4th Cir.).

[2] "Persons unfamiliar with mills and factories—farmers or professors, for example—often remark upon visiting them that they seem like another world. This is particularly true if, as in the steel industry, both tradition and technology have strongly and uniquely molded the ways men think and act when at work. The newly hired employee, the 'green hand,' is gradually initiated into what amounts to a miniature society. There he finds himself in a strange environment that assaults his senses with unusual sounds and smells and often with

When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency. Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

The opinion of the arbitrator in this case, as it bears upon the award of back pay beyond the date of the agreement's expiration and reinstatement, is ambiguous. It may be read as based solely upon the arbitrator's view of the requirements of enacted legislation, which would mean that he exceeded the scope of the submission. Or it may

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different 'weather conditions' such as sudden drafts of heat, cold, or humidity. He discovers that the society of which he only gradually becomes a part has of course a formal government of its own—the rules which management and the union have laid down—but that it also differs from or parallels the world outside in social classes, folklore, ritual, and traditions.

"Under the process in the old mills a very real 'miniature society' had grown up, and in important ways the technological revolution described in this case history shattered it. But a new society or work community was born immediately, though for a long time it developed slowly. As the old society was strongly molded by the *discontinuous* process of making pipe, so was the new one molded by the *continuous* process and strongly influenced by the characteristics of new high-speed automatic equipment." Walker, Life in the Automatic Factory, 36 Harv. Bus. Rev. 111, 117.

be read as embodying a construction of the agreement itself, perhaps with the arbitrator looking to "the law" for help in determining the sense of the agreement. A mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award. Arbitrators have no obligation to the court to give their reasons for an award. To require opinions [3] free of ambiguity may lead arbitrators to play it safe by writing no supporting opinions. This would be undesirable for a well-reasoned opinion tends to engender confidence in the integrity of the process and aids in clarifying the underlying agreement. Moreover, we see no reason to assume that this arbitrator has abused the trust the parties confided in him and has not stayed within the areas marked out for his consideration. It is not apparent that he went beyond the submission. The Court of Appeals' opinion refusing to enforce the reinstatement and partial back pay portions of the award was not based upon any finding that the arbitrator did not premise his award on his construction of the contract. It merely disagreed with the arbitrator's construction of it.

The collective bargaining agreement could have provided that if any of the employees were wrongfully discharged, the remedy would be reinstatement and back pay up to the date they were returned to work. Respondent's major argument seems to be that by applying correct principles of law to the interpretation of the collective bargaining agreement it can be determined that the agreement did not so provide, and that therefore the arbitrator's decision was not based upon the contract. The acceptance of this view would require courts, even under the standard arbitration clause, to review the merits of every

[3] See Jalet, Judicial Review of Arbitration: The Judicial Attitude, 45 Cornell L. Q. 519, 522.

construction of the contract. This plenary review by a court of the merits would make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final. This underlines the fundamental error which we have alluded to in *United Steelworkers of America* v. *American Manufacturing Co., ante,* p. 564, decided this day. As we there emphasized, the question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.

We agree with the Court of Appeals that the judgment of the District Court should be modified so that the amounts due the employees may be definitely determined by arbitration. In all other respects we think the judgment of the District Court should be affirmed. Accordingly, we reverse the judgment of the Court of Appeals, except for that modification, and remand the case to the District Court for proceedings in conformity with this opinion.

It is so ordered.

MR. JUSTICE FRANKFURTER concurs in the result.

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

[For opinion of MR. JUSTICE BRENNAN, joined by MR. JUSTICE FRANKFURTER and MR. JUSTICE HARLAN, see *ante,* p. 569.]

MR. JUSTICE WHITTAKER, dissenting.

Claiming that the employer's discharge on January 18, 1957, of 11 employees violated the provisions of its collective bargaining contract with the employer—covering the period beginning April 5, 1956, and ending April 4,

1957—the union sought and obtained arbitration, under the provisions of the contract, of the issues whether these employees had been discharged in violation of the agreement and, if so, should be ordered reinstated and awarded wages from the time of their wrongful discharge. In August 1957, more than four months after the collective agreement had expired, these issues, by agreement of the parties, were submitted to a single arbitrator, and a hearing was held before him on January 3, 1958. On April 10, 1958, the arbitrator made his award, finding that the 11 employees had been discharged in violation of the agreement and ordering their reinstatement with back pay at their regular rates from a time 10 days after their discharge to the time of reinstatement. Over the employer's objection that the collective agreement and the submission under it did not authorize nor empower the arbitrator to award reinstatement or wages for any period after the date of expiration of the contract (April 4, 1957), the District Court ordered enforcement of the award. The Court of Appeals modified the judgment by eliminating the requirement that the employer reinstate the employees and pay them wages for the period *after* expiration of the collective agreement, and affirmed it in all other respects, 269 F. 2d 327, and we granted certiorari, 361 U. S. 929.

That the propriety of the discharges, under the collective agreement, was arbitrable under the provisions of that agreement, even after its expiration, is not in issue. Nor is there any issue here as to the power of the arbitrator to award reinstatement status and back pay to the discharged employees to the date of expiration of the collective agreement. It is conceded, too, that the collective agreement expired by its terms on April 4, 1957, and was never extended or renewed.

The sole question here is whether the arbitrator exceeded the submission and his powers in awarding

reinstatement and back pay for any period after expiration of the collective agreements. Like the Court of Appeals, I think he did. I find nothing in the collective agreement that purports to so authorize. Nor does the Court point to anything in the agreement that purports to do so. Indeed, the union does not contend that there is any such covenant in the contract. Doubtless all rights that accrued to the employees under the collective agreement during its term, and that were made arbitrable by its provisions, could be awarded to them by the arbitrator, even though the period of the agreement had ended. But surely no rights *accrued* to the employees under the agreement after it had expired. Save for the provisions of the collective agreement, and in the absence, as here, of any applicable rule of law or contrary covenant between the employer and the employees, the employer had the legal right to discharge the employees at will. The collective agreement, however, protected them against discharge, for specified reasons, during its continuation. But when that agreement expired, it did not continue to afford rights *in futuro* to the employees—as though still effective and governing. After the agreement expired, the employment status of these 11 employees was terminable at the will of the employer, as the Court of Appeals quite properly held, 269 F. 2d, at 331, and see *Meadows* v. *Radio Industries,* 222 F. 2d 347, 349 (C. A. 7th Cir.); *Atchison, T. & S. F. R. Co.* v. *Andrews,* 211 F. 2d 264, 265 (C. A. 10th Cir.); *Warden* v. *Hinds,* 163 F. 201 (C. A. 4th Cir.), and the announced discharge of these 11 employees then became lawfully effective.

Once the contract expired, no rights continued to accrue under it to the employees. Thereafter they had no contractual right to demand that the employer continue to employ them, and *a fortiori* the arbitrator did not have power to order the employer to do so; nor did the arbitrator have power to order the employer to pay wages to

them after the date of termination of the contract, which was also the effective date of their discharges.

The judgment of the Court of Appeals, affirming so much of the award as required reinstatement of the 11 employees to employment status and payment of their wages until expiration of the contract, but not thereafter, seems to me to be indubitably correct, and I would affirm it.

Syllabus.

FLEMMING, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, *v.* NESTOR.

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

No. 54. Argued February 24, 1960.—Decided June 20, 1960.

Section 202 (n) of the Social Security Act, as amended, provides for the termination of old-age benefits payable to an alien who, after the date of its enactment (September 1, 1954), is deported under § 241 (a) of the Immigration and Nationality Act on any one of certain grounds specified in § 202 (n). Appellee, an alien who had become eligible for old-age benefits in 1955, was deported in 1956, pursuant to § 241 (a) of the Immigration and Nationality Act, for having been a member of the Communist Party from 1933 to 1939. Since this was one of the grounds specified in § 202 (n), his old-age benefits were terminated shortly thereafter. He commenced this action in a single-judge District Court, under § 205 (g) of the Social Security Act, to secure judicial review of that administrative decision. The District Court held that § 202 (n) deprived appellee of an accrued property right and, therefore, violated the Due Process Clause of the Fifth Amendment. *Held:*

1. Although this action drew into question the constitutionality of § 202 (n), it did not involve an injunction or otherwise interdict the operation of the statutory scheme; 28 U. S. C. § 2282, forbidding the issuance of an injunction restraining the enforcement, operation or execution of an Act of Congress for repugnance to the Constitution, except by a three-judge District Court, was not applicable; and jurisdiction over the action was properly exercised by the single-judge District Court. Pp. 606–608.

2. A person covered by the Social Security Act has not such a right in old-age benefit payments as would make every defeasance of "accrued" interests violative of the Due Process Clause of the Fifth Amendment. Pp. 608–611.

(a) The noncontractual interest of an employee covered by the Act cannot be soundly analogized to that of the holder of an annuity, whose right to benefits are based on his contractual premium payments. Pp. 608–610.

(b) To engraft upon the Social Security System a concept of "accrued property rights" would deprive it of the flexibility and

boldness in adjustment to ever-changing conditions which it demands and which Congress probably had in mind when it expressly reserved the right to alter, amend or repeal any provision of the Act. Pp. 610–611.

3. Section 202 (n) of the Act cannot be condemned as so lacking in rational justification as to offend due process. Pp. 611–612.

4. Termination of appellee's benefits under § 202 (n) does not amount to punishing him without a trial, in violation of Art. III, § 2, cl. 3, of the Constitution or the Sixth Amendment; nor is § 202 (n) a bill of attainder or *ex post facto* law, since its purpose is not punitive. Pp. 612–621.

169 F. Supp. 922, reversed.

John F. Davis argued the cause for appellant. On the brief were *Solicitor General Rankin, Assistant Attorney General Yeagley* and *Kevin T. Maroney.*

David Rein argued the cause for appellee. With him on the brief was *Joseph Forer.*

MR. JUSTICE HARLAN delivered the opinion of the Court.

From a decision of the District Court for the District of Columbia holding § 202 (n) of the Social Security Act (68 Stat. 1083, as amended, 42 U. S. C. § 402 (n)) unconstitutional, the Secretary of Health, Education, and Welfare takes this direct appeal pursuant to 28 U. S. C. § 1252. The challenged section, set forth in full in the margin,[1] provides for the termination of old-age, survivor,

[1] Section 202 (n) provides as follows:

"(n)(1) If any individual is (after the date of enactment of this subsection) deported under paragraph (1), (2), (4), (5), (6), (7), (10), (11), (12), (14), (15), (16), (17), or (18) of section 241 (a) of the Immigration and Nationality Act, then, notwithstanding any other provisions of this title—

"(A) no monthly benefit under this section or section 223 [42 U. S. C. § 423, relating to "disability insurance benefits"] shall be paid to such individual, on the basis of his wages and self-employment income, for any month occurring (i) after the month in which

and disability insurance benefits payable to, or in certain cases in respect of, an alien individual who, after September 1, 1954 (the date of enactment of the section), is deported under § 241 (a) of the Immigration and Nationality Act (8 U. S. C. § 1251 (a)) on any one of certain grounds specified in § 202 (n).

Appellee, an alien, immigrated to this country from Bulgaria in 1913, and became eligible for old-age benefits in November 1955. In July 1956 he was deported pursuant to § 241 (a)(6)(C)(i) of the Immigration and Nationality Act for having been a member of the Communist Party from 1933 to 1939. This being one of the benefit-termination deportation grounds specified in § 202 (n), appellee's benefits were terminated soon thereafter, and notice of the termination was given to his wife,

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the Secretary is notified by the Attorney General that such individual has been so deported, and (ii) before the month in which such individual is thereafter lawfully admitted to the United States for permanent residence,

"(B) if no benefit could be paid to such individual (or if no benefit could be paid to him if he were alive) for any month by reason of subparagraph (A), no monthly benefit under this section shall be paid, on the basis of his wages and self-employment income, for such month to any other person who is not a citizen of the United States and is outside the United States for any part of such month, and

"(C) no lump-sum death payment shall be made on the basis of such individual's wages and self-employment income if he dies (i) in or after the month in which such notice is received, and (ii) before the month in which he is thereafter lawfully admitted to the United States for permanent residence.

"Section 203 (b) and (c) of this Act shall not apply with respect to any such individual for any month for which no monthly benefit may be paid to him by reason of this paragraph.

"(2) As soon as practicable after the deportation of any individual under any of the paragraphs of section 241 (a) of the Immigration and Nationality Act enumerated in paragraph (1) in this subsection, the Attorney General shall notify the Secretary of such deportation."

The provisions of § 241 (a) of the Immigration and Nationality Act are summarized in notes 10, 13, *post*, pp. 618, 620.

who had remained in this country.[2] Upon his failure to obtain administrative reversal of the decision, appellee commenced this action in the District Court, pursuant to § 205 (g) of the Social Security Act (53 Stat. 1370, as amended, 42 U. S. C. § 405 (g)), to secure judicial review.[3] On cross-motions for summary judgment, the District Court ruled for appellee, holding § 202 (n) unconstitutional under the Due Process Clause of the Fifth Amendment in that it deprived appellee of an accrued property right. 169 F. Supp. 922. The Secretary prosecuted an appeal to this Court, and, subject to a jurisdictional question hereinafter discussed, we set the case down for plenary hearing. 360 U. S. 915.

The preliminary jurisdictional question is whether 28 U. S. C. § 2282 is applicable, and therefore required that the case be heard below before three judges, rather than by a single judge, as it was. Section 2282 forbids the issuance, except by a three-judge District Court, of

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[2] Under paragraph (1)(B) of § 202 (n) (see note 1, *ante*), appellee's wife, because of her residence here, has remained eligible for benefits payable to her as the wife of an insured individual. See § 202 (b), 53 Stat. 1364, as amended, 42 U. S. C. § 402 (b).

[3] Section 205 (g) provides as follows:

"(g) Any individual, after any final decision of the Board made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Board may allow. . . . As part of its answer the Board shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Board, with or without remanding the cause for a rehearing. The findings of the Board as to any fact, if supported by substantial evidence, shall be conclusive . . . . The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions."

any "interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution . . . ." Neither party requested a three-judge court below, and in this Court both parties argue the inapplicability of § 2282. If the provision applies, we cannot reach the merits, but must vacate the judgment below and remand the case for consideration by a three-judge District Court. See *Federal Housing Administration* v. *The Darlington, Inc.*, 352 U. S. 977.

Under the decisions of this Court, this § 205 (g) action could, and did, draw in question the constitutionality of § 202 (n). See, *e. g., Anniston Mfg. Co.* v. *Davis,* 301 U. S. 337, 345–346. However, the action did no more. It did not seek affirmatively to interdict the operation of a statutory scheme. A judgment for appellee would not put the operation of a federal statute under the restraint of an equity decree; indeed, apart from its effect under the doctrine of *stare decisis,* it would have no other result than to require the payment of appellee's benefits. In these circumstances we think that what was said in *Garment Workers* v. *Donnelly Co.,* 304 U. S. 243, where this Court dealt with an analogous situation, is controlling here:

> "[The predecessor of § 2282] does not provide for a case where the validity of an Act of Congress is merely drawn in question, albeit that question be decided, but only for a case where there is an application for an interlocutory or permanent injunction to restrain the enforcement of an Act of Congress. . . . Had Congress intended the provision . . . , for three judges and direct appeal, to apply whenever a question of the validity of an Act of Congress became involved, Congress would naturally have used the familiar phrase 'drawn in question' . . . ." *Id.*, at 250.

We hold that jurisdiction over the action was properly exercised by the District Court, and therefore reach the merits.

I.

We think that the District Court erred in holding that § 202 (n) deprived appellee of an "accrued property right." 169 F. Supp., at 934. Appellee's right to Social Security benefits cannot properly be considered to have been of that order.

The general purposes underlying the Social Security Act were expounded by Mr. Justice Cardozo in *Helvering* v. *Davis,* 301 U. S. 619, 640–645. The issue here, however, requires some inquiry into the statutory scheme by which those purposes are sought to be achieved. Payments under the Act are based upon the wage earner's record of earnings in employment or self-employment covered by the Act, and take the form of old-age insurance and disability insurance benefits inuring to the wage earner (known as the "primary beneficiary"), and of benefits, including survivor benefits, payable to named dependents ("secondary beneficiaries") of a wage earner. Broadly speaking, eligibility for benefits depends on satisfying statutory conditions as to (1) employment in covered employment or self-employment (see § 210 (a), 42 U. S. C. § 410 (a)); (2) the requisite number of "quarters of coverage"—*i. e.,* three-month periods during which not less than a stated sum was earned—the number depending generally on age (see §§ 213–215, 42 U. S. C. §§ 413–415); and (3) attainment of the retirement age (see § 216 (a), 42 U. S. C. § 416 (a)). § 202 (a), 42 U. S. C. § 402 (a).[4] Entitlement to benefits once gained,

[4] In addition, eligibility for disability insurance benefits is of course subject to the further condition of the incurring of a disability as defined in the Act. § 223, 42 U. S. C. § 423. Secondary beneficiaries must meet the tests of family relationship to the wage earner set forth in the Act. § 202 (b)–(h), 42 U. S. C. § 402 (b)–(h).

is partially or totally lost if the beneficiary earns more than a stated annual sum, unless he or she is at least 72 years old. § 203 (b), (e), 42 U. S. C. § 403 (b), (e). Of special importance in this case is the fact that eligibility for benefits, and the amount of such benefits, do not in any true sense depend on contribution to the program through the payment of taxes, but rather on the earnings record of the primary beneficiary.

The program is financed through a payroll tax levied on employees in covered employment, and on their employers. The tax rate, which is a fixed percentage of the first $4,800 of employee annual income, is set at a scale which will increase from year to year, presumably to keep pace with rising benefit costs. I. R. C. of 1954, §§ 3101, 3111, 3121 (a). The tax proceeds are paid into the Treasury "as internal-revenue collections," I. R. C., § 3501, and each year an amount equal to the proceeds is appropriated to a Trust Fund, from which benefits and the expenses of the program are paid. § 201, 42 U. S. C. § 401. It was evidently contemplated that receipts would greatly exceed disbursements in the early years of operation of the system, and surplus funds are invested in government obligations, and the income returned to the Trust Fund. Thus, provision is made for expected increasing costs of the program.

The Social Security system may be accurately described as a form of social insurance, enacted pursuant to Congress' power to "spend money in aid of the 'general welfare,' " *Helvering* v. *Davis, supra,* at 640, whereby persons gainfully employed, and those who employ them, are taxed to permit the payment of benefits to the retired and disabled, and their dependents. Plainly the expectation is that many members of the present productive work force will in turn become beneficiaries rather than supporters of the program. But each worker's benefits, though flowing from the contributions he made to the

national economy while actively employed, are not dependent on the degree to which he was called upon to support the system by taxation. It is apparent that the noncontractual interest of an employee covered by the Act cannot be soundly analogized to that of the holder of an annuity, whose right to benefits is bottomed on his contractual premium payments.

It is hardly profitable to engage in conceptualizations regarding "earned rights" and "gratuities." Cf. *Lynch* v. *United States,* 292 U. S. 571, 576–577. The "right" to Social Security benefits is in one sense "earned," for the entire scheme rests on the legislative judgment that those who in their productive years were functioning members of the economy may justly call upon that economy, in their later years, for protection from "the rigors of the poor house as well as from the haunting fear that such a lot awaits them when journey's end is near." *Helvering* v. *Davis, supra,* at 641. But the practical effectuation of that judgment has of necessity called forth a highly complex and interrelated statutory structure. Integrated treatment of the manifold specific problems presented by the Social Security program demands more than a generalization. That program was designed to function into the indefinite future, and its specific provisions rest on predictions as to expected economic conditions which must inevitably prove less than wholly accurate, and on judgments and preferences as to the proper allocation of the Nation's resources which evolving economic and social conditions will of necessity in some degree modify.

To engraft upon the Social Security system a concept of "accrued property rights" would deprive it of the flexibility and boldness in adjustment to ever-changing conditions which it demands. See Wollenberg, Vested Rights in Social-Security Benefits, 37 Ore. L. Rev. 299, 359. It was doubtless out of an awareness of the need for such flexibility that Congress included in the original Act, and

has since retained, a clause expressly reserving to it "[t]he right to alter, amend, or repeal any provision" of the Act. § 1104, 49 Stat. 648, 42 U. S. C. § 1304. That provision makes express what is implicit in the institutional needs of the program. See Analysis of the Social Security System, Hearings before a Subcommittee of the Committee on Ways and Means, House of Representatives, 83d Cong., 1st Sess., pp. 920–921. It was pursuant to that provision that § 202 (n) was enacted.

We must conclude that a person covered by the Act has not such a right in benefit payments as would make every defeasance of "accrued" interests violative of the Due Process Clause of the Fifth Amendment.

II.

This is not to say, however, that Congress may exercise its power to modify the statutory scheme free of all constitutional restraint. The interest of a covered employee under the Act is of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause. In judging the permissibility of the cut-off provisions of § 202 (n) from this standpoint, it is not within our authority to determine whether the Congressional judgment expressed in that section is sound or equitable, or whether it comports well or ill with the purposes of the Act. "Whether wisdom or unwisdom resides in the scheme of benefits set forth in Title II, it is not for us to say. The answer to such inquiries must come from Congress, not the courts. Our concern here, as often, is with power, not with wisdom." *Helvering* v. *Davis, supra,* at 644. Particularly when we deal with a withholding of a noncontractual benefit under a social welfare program such as this, we must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification.

Such is not the case here. The fact of a beneficiary's residence abroad—in the case of a deportee, a presumably permanent residence—can be of obvious relevance to the question of eligibility. One benefit which may be thought to accrue to the economy from the Social Security system is the increased over-all national purchasing power resulting from taxation of productive elements of the economy to provide payments to the retired and disabled, who might otherwise be destitute or nearly so, and who would generally spend a comparatively large percentage of their benefit payments. This advantage would be lost as to payments made to one residing abroad. For these purposes, it is, of course, constitutionally irrelevant whether this reasoning in fact underlay the legislative decision, as it is irrelevant that the section does not extend to all to whom the postulated rationale might in logic apply.[5] See *United States* v. *Petrillo,* 332 U. S. 1, 8–9; *Steward Machine Co.* v. *Davis,* 301 U. S. 548, 584–585; cf. *Carmichael* v. *Southern Coal Co.,* 301 U. S. 495, 510–513. Nor, apart from this, can it be deemed irrational for Congress to have concluded that the public purse should not be utilized to contribute to the support of those deported on the grounds specified in the statute.

We need go no further to find support for our conclusion that this provision of the Act cannot be condemned as so lacking in rational justification as to offend due process.

III.

The remaining, and most insistently pressed, constitutional objections rest upon Art. I, § 9, cl. 3, and Art. III,

[5] The Act does not provide for the termination of benefits of nonresident citizens, or of some aliens who leave the country voluntarily—although many nonresident aliens do lose their eligibility by virtue of the provisions of § 202 (t), 70 Stat. 835, as amended, 42 U. S. C. § 402 (t)—or of aliens deported pursuant to paragraphs 3, 8, 9, or 13 of the 18 paragraphs of § 241 (a) of the Immigration and Nationality Act. See note 13, *post.*

§ 2, cl. 3, of the Constitution, and the Sixth Amendment.[6] It is said that the termination of appellee's benefits amounts to punishing him without a judicial trial, see *Wong Wing* v. *United States,* 163 U. S. 228; that the termination of benefits constitutes the imposition of punishment by legislative act, rendering § 202 (n) a bill of attainder, see *United States* v. *Lovett,* 328 U. S. 303; *Cummings* v. *Missouri,* 4 Wall. 277; and that the punishment exacted is imposed for past conduct not unlawful when engaged in, thereby violating the constitutional prohibition on *ex post facto* laws, see *Ex parte Garland,* 4 Wall. 333.[7] Essential to the success of each of these contentions is the validity of characterizing as "punishment" in the constitutional sense the termination of benefits under § 202 (n).

In determining whether legislation which bases a disqualification on the happening of a certain past event imposes a punishment, the Court has sought to discern the objects on which the enactment in question was

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[6] Art. I, § 9, cl. 3:

"No bill of attainder or *ex post facto* law shall be passed."

Art. III, § 2, cl. 3:

"The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed . . . ."

Amend. VI:

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour; and to have the assistance of counsel for his defence."

[7] Appellee also adds, but hardly argues, the contention that he has been deprived of his rights under the First Amendment, since the adverse consequences stemmed from "mere past membership" in the Communist Party. This contention, which is no more than a collateral attack on appellee's deportation, is not open to him.

focused. Where the source of legislative concern can be thought to be the activity or status from which the individual is barred, the disqualification is not punishment even though it may bear harshly upon one affected. The contrary is the case where the statute in question is evidently aimed at the person or class of persons disqualified. In the earliest case on which appellee relies, a clergyman successfully challenged a state constitutional provision barring from that profession—and from many other professions and offices—all who would not swear that they had never manifested any sympathy or support for the cause of the Confederacy. *Cummings* v. *Missouri, supra.* The Court thus described the aims of the challenged enactment:

> "The oath could not . . . have been required as a means of ascertaining whether parties were qualified or not for their respective callings or the trusts with which they were charged. *It was required in order to reach the person, not the calling.* It was exacted, not from any notion that the several acts designated indicated unfitness for the callings, but because it was thought that the several acts deserved punishment . . . ." *Id.,* at 320. (Emphasis supplied.)

Only the other day the governing inquiry was stated, in an opinion joined by four members of the Court, in these terms:

> "The question in each case where unpleasant consequences are brought to bear upon an individual for prior conduct, is whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation, such as the proper qualifications for a profession." *De Veau* v. *Braisted,* 363 U. S. 144, 160 (plurality opinion).

In *Ex parte Garland, supra,* where the Court struck down an oath—similar in content to that involved in *Cummings*—required of attorneys seeking to practice before any federal court, as also in *Cummings,* the finding of punitive intent drew heavily on the Court's first-hand acquaintance with the events and the mood of the then recent Civil War, and "the fierce passions which that struggle aroused." *Cummings* v. *Missouri, supra,* at 322.[8] Similarly, in *United States* v. *Lovett, supra,* where the Court invalidated, as a bill of attainder, a statute forbidding—subject to certain conditions—the further payment of the salaries of three named government employees, the determination that a punishment had been imposed rested in large measure on the specific Congressional history which the Court was at pains to spell out in detail. See 328 U. S., at 308–312. Most recently, in *Trop* v. *Dulles,* 356 U. S. 86, which held unconstitutional a statute providing for the expatriation of one who had been sentenced by a court-martial to dismissal or dishonorable discharge for wartime desertion, the majority of the Court characterized the statute as punitive. However, no single opinion commanded the support of a majority. The plurality opinion rested its determination, at least in part, on its inability to discern any alternative purpose which the statute could be thought to serve. *Id.,* at 97. The concurring opinion found in the specific historical evolution of the provision in question compelling evidence of punitive intent. *Id.,* at 107–109.

[8] See also *Pierce* v. *Carskadon,* 16 Wall. 234. A West Virginia statute providing that a nonresident who had suffered a judgment in an action commenced by attachment, but in which he had not been personally served and did not appear, could within one year petition the court for a reopening of the judgment and a trial on the merits, was amended in 1865 so as to condition that right on the taking of an exculpatory oath that the defendant had never supported the Confederacy. On the authority of *Cummings* and *Garland,* the amendment was invalidated.

It is thus apparent that, though the governing criterion may be readily stated, each case has turned on its own highly particularized context. Where no persuasive showing of a purpose "to reach the person, not the calling," *Cummings* v. *Missouri, supra,* at 320, has been made, the Court has not hampered legislative regulation of activities within its sphere of concern, despite the often-severe effects such regulation has had on the persons subject to it.[9] Thus, deportation has been held to be not punishment, but an exercise of the plenary power of Congress to fix the conditions under which aliens are to be permitted to enter and remain in this country. *Fong Yue Ting* v. *United States,* 149 U. S. 698, 730; see *Galvan* v. *Press,* 347 U. S. 522, 530–531. Similarly, the setting by a State of qualifications for the practice of medicine, and their modification from time to time, is an incident of the State's power to protect the health and safety of its citizens, and its decision to bar from practice persons who commit or have committed a felony is taken as evidencing an intent to exercise that regulatory power, and not a purpose to add to the punishment of ex-felons. *Hawker* v. *New York,* 170 U. S. 189. See *De Veau* v. *Braisted, supra* (regulation of crime on the waterfront through disqualification of ex-felons from holding union office). Cf. *Helvering* v. *Mitchell,* 303 U. S. 391, 397–401, holding that, with respect to deficiencies due to fraud, a 50 percent addition to the tax imposed was not punishment so as to prevent, upon principles of double jeopardy, its assessment against one acquitted of tax evasion.

Turning, then, to the particular statutory provision before us, appellee cannot successfully contend that the language and structure of § 202 (n), or the nature of

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[9] As prior decisions make clear, compare *Ex parte Garland, supra,* with *Hawker* v. *New York, supra,* the severity of a sanction is not determinative of its character as "punishment."

the deprivation, requires us to recognize a punitive design. Cf. *Wong Wing* v. *United States, supra* (imprisonment, at hard labor up to one year, of person found to be unlawfully in the country). Here the sanction is the mere denial of a noncontractual governmental benefit. No affirmative disability or restraint is imposed, and certainly nothing approaching the "infamous punishment" of imprisonment, as in *Wong Wing,* on which great reliance is mistakenly placed. Moreover, for reasons already given (*ante,* pp. 611–612), it cannot be said, as was said of the statute in *Cummings* v. *Missouri, supra,* at 319; see *Dent* v. *West Virginia,* 129 U. S. 114, 126, that the disqualification of certain deportees from receipt of Social Security benefits while they are not lawfully in this country bears no rational connection to the purposes of the legislation of which it is a part, and must without more therefore be taken as evidencing a Congressional desire to punish. Appellee argues, however, that the history and scope of § 202 (n) prove that no such postulated purpose can be thought to have motivated the legislature, and that they persuasively show that a punitive purpose in fact lay behind the statute. We do not agree.

We observe initially that only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground. Judicial inquiries into Congressional motives are at best a hazardous matter, and when that inquiry seeks to go behind objective manifestations it becomes a dubious affair indeed. Moreover, the presumption of constitutionality with which this enactment, like any other, comes to us forbids us lightly to choose that reading of the statute's setting which will invalidate it over that which will save it. "[I]t is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void." *Fletcher* v. *Peck,* 6 Cranch 87, 128.

Section 202 (n) was enacted as a small part of an extensive revision of the Social Security program. The provision originated in the House of Representatives. H. R. 9366, 83d Cong., 2d Sess., § 108. The discussion in the House Committee Report, H. R. Rep. No. 1698, 83d Cong., 2d Sess., pp. 5, 25, 77, does not express the purpose of the statute. However, it does say that the termination of benefits would apply to those persons who were "deported from the United States because of illegal entry, conviction of a crime, or subversive activity . . . ." *Id.*, at 25. It was evidently the thought that such was the scope of the statute resulting from its application to deportation under the 14 named paragraphs of § 241 (a) of the Immigration and Nationality Act. *Id.*, at 77.[10]

The Senate Committee rejected the proposal, for the stated reason that it had "not had an opportunity to give sufficient study to all the possible implications of this provision, which involves termination of benefit rights under the contributory program of old-age and survivors insurance . . . ." S. Rep. No. 1987, 83d Cong., 2d Sess., p. 23; see also *id.*, at 76. However, in Conference, the proposal was restored in modified form,[11] and as modified was enacted as § 202 (n). See H. R. Conf. Rep. No. 2679, 83d Cong., 2d Sess., p. 18.

Appellee argues that this history demonstrates that Congress was not concerned with the *fact* of a benefi-

[10] Paragraphs (1), (2), and (10) of § 241 (a) relate to unlawful entry, or entry not complying with certain conditions; paragraphs (6) and (7) apply to "subversive" and related activities; the remainder of the included paragraphs are concerned with convictions of designated crimes, or the commission of acts related to them, such as narcotics addiction or prostitution.

[11] For example, under the House version termination of benefits of a deportee would also have terminated benefits paid to secondary beneficiaries based on the earning records of the deportee. The Conference proposal limited this effect to secondary beneficiaries who were nonresident aliens. See note 2, *ante*.

ciary's deportation—which it is claimed alone would justify this legislation as being pursuant to a policy relevant to regulation of the Social Security system—but that it sought to reach certain *grounds* for deportation, thus evidencing a punitive intent.[12] It is impossible to find in this meagre history the unmistakable evidence of punitive intent which, under principles already discussed, is required before a Congressional enactment of this kind may be struck down. Even were that history to be taken as evidencing Congress' concern with the grounds, rather than the fact, of deportation, we do not think that this, standing alone, would suffice to establish a punitive purpose. This would still be a far cry from the situations involved in such cases as *Cummings, Wong Wing,* and *Garland* (see *ante,* p. 617), and from that in *Lovett, supra,* where the legislation was on its face aimed at particular individuals. The legislative record, however, falls short of any persuasive showing that Congress was in fact concerned alone with the grounds of deportation. To be sure Congress did not apply the termination

[12] Appellee also relies on the juxtaposition of the proposed § 108 and certain other provisions, some of which were enacted and some of which were not. This argument is too conjectural to warrant discussion. In addition, reliance is placed on a letter written to the Senate Finance Committee by appellant's predecessor in office, opposing the enactment of what is now § 202 (u) of the Act, 70 Stat. 838, 42 U. S. C. § 402 (u), on the ground that the section was "in the nature of a penalty and based on considerations foreign to the objectives" of the program. Social Security Amendments of 1955, Hearings before the Senate Committee on Finance, 84th Cong., 2d Sess., p. 1319. The Secretary went on to say that "present law recognizes only three narrowly limited exceptions [of which § 202 (n) is one] to the basic principle that benefits are paid without regard to the attitudes, opinions, behavior, or personal characteristics of the individual . . . ." It should be observed, however, that the Secretary did not speak of § 202 (n) as a penalty, as he did of the proposed § 202 (u). The latter provision is concededly penal, and applies only pursuant to a judgment of a court in a criminal case.

provision to all deportees. However, it is evident that neither did it rest the operation of the statute on the occurrence of the underlying act. The fact of deportation itself remained an essential condition for loss of benefits, and even if a beneficiary were saved from deportation only through discretionary suspension by the Attorney General under § 244 of the Immigration and Nationality Act (66 Stat. 214, 8 U. S. C. § 1254), § 202 (n) would not reach him.

Moreover, the grounds for deportation referred to in the Committee Report embrace the great majority of those deported, as is evident from an examination of the four omitted grounds, summarized in the margin.[13] Inferences drawn from the omission of those grounds cannot establish, to the degree of certainty required, that Congressional concern was wholly with the acts leading to deportation, and not with the fact of deportation.[14] To hold otherwise would be to rest on the "slight implication and vague conjecture" against which Chief Justice Marshall warned. *Fletcher* v. *Peck, supra,* at 128.

The same answer must be made to arguments drawn from the failure of Congress to apply § 202 (n) to bene-

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[13] They are: (1) persons institutionalized at public expense within five years after entry because of "mental disease, defect, or deficiency" not shown to have arisen subsequent to admission (§ 241 (a)(3)); (2) persons becoming a public charge within five years after entry from causes not shown to have arisen subsequent to admission § 241 (a)(8)); (3) persons admitted as nonimmigrants (see § 101 (a)(15), 66 Stat. 167, 8 U. S. C. § 1101 (a)(15)) who fail to maintain, or comply with the conditions of, such status (§ 241 (a)(9)); (4) persons knowingly and for gain inducing or aiding, prior to or within five years after entry, any other alien to enter or attempt to enter unlawfully (§ 241 (a)(13)).

[14] Were we to engage in speculation, it would not be difficult to conjecture that Congress may have been led to exclude these four grounds of deportation out of compassionate or *de minimis* considerations.

ficiaries voluntarily residing abroad. But cf. § 202 (t), *ante,* note 5. Congress may have failed to consider such persons; or it may have thought their number too slight, or the permanence of their voluntary residence abroad too uncertain, to warrant application of the statute to them, with its attendant administrative problems of supervision and enforcement. Again, we cannot with confidence reject all those alternatives which imaginativeness can bring to mind, save that one which might require the invalidation of the statute.

Reversed.

MR. JUSTICE BLACK, dissenting.

For the reasons stated here and in the dissents of MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN I agree with the District Court that the United States is depriving appellee, Ephram Nestor, of his statutory right to old-age benefits in violation of the United States Constitution.

Nestor came to this country from Bulgaria in 1913 and lived here continuously for 43 years, until July 1956. He was then deported from this country for having been a Communist from 1933 to 1939. At that time membership in the Communist Party as such was not illegal and was not even a statutory ground for deportation. From December 1936 to January 1955 Nestor and his employers made regular payments to the Government under the Federal Insurance Contributions Act, 26 U. S. C. §§ 3101–3125. These funds went to a special federal old-age and survivors insurance trust fund under 49 Stat. 622, 53 Stat. 1362, as amended, 42 U. S. C. § 401, in return for which Nestor, like millions of others, expected to receive payments when he reached the statutory age. In 1954, 15 years after Nestor had last been a Communist, and 18 years after he began to make payments into the old-age security fund, Congress passed a law providing, among other things, that any person who had been deported from

this country because of past Communist membership under 66 Stat. 205, 8 U. S. C. § 1251 (a)(6)(C) should be wholly cut off from any benefits of the fund to which he had contributed under the law. 68 Stat. 1083, 42 U. S. C. § 402 (n). After the Government deported Nestor in 1956 it notified his wife, who had remained in this country, that he was cut off and no further payments would be made to him. This action, it seems to me, takes Nestor's insurance without just compensation and in violation of the Due Process Clause of the Fifth Amendment. Moreover, it imposes an *ex post facto* law and bill of attainder by stamping him, without a court trial, as unworthy to receive that for which he has paid and which the Government promised to pay him. The fact that the Court is sustaining this action indicates the extent to which people are willing to go these days to overlook violations of the Constitution perpetrated against anyone who has ever even innocently belonged to the Communist Party.

I.

In *Lynch* v. *United States,* 292 U. S. 571, this Court unanimously held that Congress was without power to repudiate and abrogate in whole or in part its promises to pay amounts claimed by soldiers under the War Risk Insurance Act of 1917, §§ 400–405, 40 Stat. 409. This Court held that such a repudiation was inconsistent with the provision of the Fifth Amendment that "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." The Court today puts the *Lynch* case aside on the ground that "It is hardly profitable to engage in conceptualizations regarding 'earned rights' and 'gratuities.'" From this sound premise the Court goes on to say that while "The 'right' to Social Security benefits is in one sense 'earned,'"

yet the Government's insurance scheme now before us rests not on the idea of the contributors to the fund earning something, but simply provides that they may "justly call" upon the Government "in their later years, for protection from 'the rigors of the poor house as well as from the haunting fear that such a lot awaits them when journey's end is near.'" These are nice words but they cannot conceal the fact that they simply tell the contributors to this insurance fund that despite their own and their employers' payments the Government, in paying the beneficiaries out of the fund, is merely giving them something for nothing and can stop doing so when it pleases. This, in my judgment, reveals a complete misunderstanding of the purpose Congress and the country had in passing that law. It was then generally agreed, as it is today, that it is not desirable that aged people think of the Government as giving them something for nothing. An excellent statement of this view, quoted by MR. JUSTICE DOUGLAS in another connection, was made by Senator George, the Chairman of the Finance Committee when the Social Security Act was passed, and one very familiar with the philosophy that brought it about:

> "It comports better than any substitute we have discovered with the American concept that free men want to earn their security and not ask for doles—that what is due as a matter of earned right is far better than a gratuity. . . .
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> . . . . . .
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> "Social Security is not a handout; it is not charity; it is not relief. It is an earned right based upon the contributions and earnings of the individual. As an earned right, the individual is eligible to receive his benefit in dignity and self-respect." 102 Cong. Rec. 15110.

The people covered by this Act are now able to rely with complete assurance on the fact that they will be compelled to contribute regularly to this fund whenever each contribution falls due. I believe they are entitled to rely with the same assurance on getting the benefits they have paid for and have been promised, when their disability or age makes their insurance payable under the terms of the law. The Court did not permit the Government to break its plighted faith with the soldiers in the *Lynch* case; it said the Constitution forbade such governmental conduct. I would say precisely the same thing here.

The Court consoles those whose insurance is taken away today, and others who may suffer the same fate in the future, by saying that a decision requiring the Social Security system to keep faith "would deprive it of the flexibility and boldness in adjustment to ever-changing conditions which it demands." People who pay premiums for insurance usually think they are paying for insurance, not for "flexibility and boldness." I cannot believe that any private insurance company in America would be permitted to repudiate its matured contracts with its policyholders who have regularly paid all their premiums in reliance upon the good faith of the company. It is true, as the Court says, that the original Act contained a clause, still in force, that expressly reserves to Congress "[t]he right to alter, amend, or repeal any provision" of the Act. § 1104, 49 Stat. 648, 42 U. S. C. § 1304. Congress, of course, properly retained that power. It could repeal the Act so as to cease to operate its old-age insurance activities for the future. This means that it could stop covering new people, and even stop increasing its obligations to its old contributors. But that is quite different from disappointing the just expectations of the contributors to the fund which the Government has com-

pelled them and their employers to pay its Treasury. There is nothing "conceptualistic" about saying, as this Court did in *Lynch,* that such a taking as this the Constitution forbids.

II.

In part II of its opinion, the Court throws out a line of hope by its suggestion that if Congress in the future cuts off some other group from the benefits they have bought from the Government, this Court might possibly hold that the future hypothetical act violates the Due Process Clause. In doing so it reads due process as affording only minimal protection, and under this reading it will protect all future groups from destruction of their rights only if Congress "manifests a patently arbitrary classification, utterly lacking in rational justification." The Due Process Clause so defined provides little protection indeed compared with the specific safeguards of the Constitution such as its prohibitions against taking private property for a public use without just compensation, passing *ex post facto* laws, and imposing bills of attainder. I cannot agree, however, that the Due Process Clause is properly interpreted when it is used to subordinate and dilute the specific safeguards of the Bill of Rights, and when "due process" itself becomes so wholly dependent upon this Court's idea of what is "arbitrary" and "rational." See *Levine* v. *United States,* 362 U. S. 610, 620 (dissenting opinion); *Adamson* v. *California,* 332 U. S. 46, 89–92 (dissenting opinion); *Rochin* v. *California,* 342 U. S. 165, 174 (concurring opinion). One reason for my belief in this respect is that I agree with what is said in the Court's quotation from *Helvering* v. *Davis,* 301 U. S. 619, 644:

> "Whether wisdom or unwisdom resides in the scheme of benefits set forth in Title II, it is not for

> us to say. The answer to such inquiries must come from Congress, not the courts. Our concern here, as often, is with power, not with wisdom."

And yet the Court's assumption of its power to hold Acts unconstitutional because the Court thinks they are arbitrary and irrational can be neither more nor less than a judicial foray into the field of governmental policy. By the use of this due process formula the Court does not, as its proponents frequently proclaim, abstain from interfering with the congressional policy. It actively enters that field with no standards except its own conclusion as to what is "arbitrary" and what is "rational." And this elastic formula gives the Court a further power, that of holding legislative Acts constitutional on the ground that they are neither arbitrary nor irrational, even though the Acts violate specific Bill of Rights safeguards. See my dissent in *Adamson* v. *California, supra.* Whether this Act had "rational justification" was, in my judgment, for Congress; whether it violates the Federal Constitution is for us to determine, unless we are by circumlocution to abdicate the power that this Court has been held to have ever since *Marbury* v. *Madison*, 1 Cranch 137.

III.

The Court in part III of its opinion holds that the 1954 Act is not an *ex post facto* law or bill of attainder even though it creates a class of deportees who cannot collect their insurance benefits because they were once Communists at a time when simply being a Communist was not illegal. The Court also puts great emphasis on its belief that the Act here is not punishment. Although not believing that the particular label "punishment" is of decisive importance, I think the Act does impose punishment even in a classic sense. The basic reason for

Nestor's loss of his insurance payments is that he was once a Communist. This man, now 69 years old, has been driven out of the country where he has lived for 43 years to a land where he is practically a stranger, under an Act authorizing his deportation many years after his Communist membership. Cf. *Galvan* v. *Press,* 347 U. S. 522, 532, 533 (dissenting opinions). Now a similar *ex post facto* law deprives him of his insurance, which, while petty and insignificant in amount to this great Government, may well be this exile's daily bread, for the same reason and in accord with the general fashion of the day—that is, to punish in every way possible anyone who ever made the mistake of being a Communist in this country or who is supposed ever to have been associated with anyone who made that mistake. See, *e. g., Barenblatt* v. *United States,* 360 U. S. 109, and *Uphaus* v. *Wyman,* 360 U. S. 72. In *United States* v. *Lovett,* 328 U. S. 303, 315–316, we said:

> ". . . legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution."

Faithful observance of our holdings in that case, in *Ex parte Garland,* 4 Wall. 333, and in *Cummings* v. *Missouri,* 4 Wall. 277, would, in my judgment, require us to hold that the 1954 Act is a bill of attainder. It is a congressional enactment aimed at an easily ascertainable group; it is certainly punishment in any normal sense of the word to take away from any person the benefits of an insurance system into which he and his employer have paid their moneys for almost two decades; and it does all this without a trial according to due process of law. It is true that the *Lovett, Cummings* and *Garland* Court opinions were

not unanimous, but they nonetheless represent positive precedents on highly important questions of individual liberty which should not be explained away with cobwebbery refinements. If the Court is going to overrule these cases in whole or in part, and adopt the views of previous dissenters, I believe it should be done clearly and forthrightly.

A basic constitutional infirmity of this Act, in my judgment, is that it is a part of a pattern of laws all of which violate the First Amendment out of fear that this country is in grave danger if it lets a handful of Communist fanatics or some other extremist group make their arguments and discuss their ideas. This fear, I think, is baseless. It reflects a lack of faith in the sturdy patriotism of our people and does not give to the world a true picture of our abiding strength. It is an unworthy fear in a country that has a Bill of Rights containing provisions for fair trials, freedom of speech, press and religion, and other specific safeguards designed to keep men free. I repeat once more that I think this Nation's greatest security lies, not in trusting to a momentary majority of this Court's view at any particular time of what is "patently arbitrary," but in wholehearted devotion to and observance of our constitutional freedoms. See *Wieman* v. *Updegraff*, 344 U. S. 183, 192 (concurring opinion).

I would affirm the judgment of the District Court which held that Nestor is constitutionally entitled to collect his insurance.

MR. JUSTICE DOUGLAS, dissenting.

Appellee came to this country from Bulgaria in 1913 and was employed, so as to be covered by the Social Security Act, from December 1936 to January 1955—a period of 19 years. He became eligible for retirement

and for Social Security benefits in November 1955 and was awarded $55.60 per month. In July 1956 he was deported for having been a member of the Communist Party from 1933 to 1939. Pursuant to a law, enacted September 1, 1954, he was thereupon denied payment of further Social Security benefits.

This 1954 law seems to me to be a classic example of a bill of attainder, which Art. I, § 9 of the Constitution prohibits Congress from enacting. A bill of attainder is a legislative act which inflicts punishment without a judicial trial. *Cummings* v. *Missouri*, 4 Wall. 277, 323.

In the old days punishment was meted out to a creditor or rival or enemy by sending him to the gallows. But as recently stated by Irving Brant,[1]

> ". . . By smiting a man day after day with slanderous words, by taking away his opportunity to earn a living, you can drain the blood from his veins without even scratching his skin.
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> "Today's bill of attainder is broader than the classic form, and not so tall and sharp. There is mental in place of physical torture, and confiscation of tomorrow's bread and butter instead of yesterday's land and gold. What is perfectly clear is that hate, fear and prejudice play the same role today, in the destruction of human rights in America that they did in England when a frenzied mob of lords, judges, bishops and shoemakers turned the Titus Oates blacklist into a hangman's record. Hate, jealousy and spite continue to fill the legislative attainder lists just as they did in the Irish Parliament of ex-King James."

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[1] Address entitled Bills of Attainder in 1787 and Today. Columbia Law Review dinner 1954, published in 1959 by the Emergency Civil Liberties Committee, under the title Congressional Investigations and Bills of Attainder.

Bills of attainder, when they imposed punishment less than death, were bills of pains and penalties and equally beyond the constitutional power of Congress. *Cummings* v. *Missouri, supra,* at 323.

Punishment in the sense of a bill of attainder includes the "deprivation or suspension of political or civil rights." *Cummings* v. *Missouri, supra,* at 322. In that case it was barring a priest from practicing his profession. In *Ex parte Garland,* 4 Wall. 333, it was excluding a man from practicing law in the federal courts. In *United States* v. *Lovett,* 328 U. S. 303, it was cutting off employees' compensation and barring them permanently from government service. Cutting off a person's livelihood by denying him accrued social benefits—part of his property interests—is no less a punishment. Here, as in the other cases cited, the penalty exacted has one of the classic purposes of punishment [2]—"to reprimand the wrongdoer, to deter others." *Trop* v. *Dulles,* 356 U. S. 86, 96.

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[2] The broad sweep of the idea of punishment behind the concept of the bill of attainder was stated as follows by Irving Brant, *op. cit., supra,* note 1, 9–10:

"In 1794 the American people were in a state of excitement comparable to that which exists today. Supporters of the French Revolution had organized the Democratic Societies—blatantly adopting that subversive title. Then the Whisky Rebellion exploded in western Pennsylvania. The Democratic Societies were blamed. A motion censuring the Societies was introduced in the House of Representatives.

"There, in 1794, you had the basic division in American thought—on one side the doctrine of political liberty for everybody, with collective security resting on the capacity of the people for self-government; on the other side the doctrine that the people could not be trusted and political liberty must be restrained.

"James Madison challenged this latter doctrine. The investigative power of Congress over persons, he contended, was limited to inquiry into the conduct of individuals in the public service. 'Opinions,' he said, 'are not the subjects of legislation.' Start criticizing people for abuse of their reserved rights, and the censure might extend to free-

Social Security payments are not gratuities. They are products of a contributory system, the funds being raised by payment from employees and employers alike, or in case of self-employed persons, by the individual alone. See *Social Security Board* v. *Nierotko,* 327 U. S. 358, 364. The funds are placed in the Federal Old-Age and Survivors Insurance Trust Fund, 42 U. S. C. § 401 (a); and only those who contribute to the fund are entitled to its benefits, the amount of benefits being related to the amount of contributions made. See Stark, Social Security: Its Importance to Lawyers, 43 A. B. A. J. 319, 321 (1957). As the late Senator George, long Chairman of the Senate Finance Committee and one of the authors of the Social Security system, said:

> "There has developed through the years a feeling both in and out of Congress that the contributory social insurance principle fits our times—that it serves a vital need that cannot be as well served otherwise. It comports better than any substitute we have discovered with the American concept that free men want to earn their security and not ask for doles—that what is due as a matter of earned right is far better than a gratuity. . . .
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> . . . . . .
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> "Social security is not a handout; it is not charity; it is not relief. It is an earned right based upon the

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dom of speech and press. What would be the effect on the people thus condemned? Said Madison:

" 'It is in vain to say that this indiscriminate censure is no punishment. . . . Is not this proposition, if voted, a bill of attainder?'

"Madison won his fight, not because he called the resolution a bill of attainder, but because it attainted too many men who were going to vote in the next election. The definition, however, was there—a bill of attainder—and the definition was given by the foremost American authority on the principles of liberty and order underlying our system of government."

> contributions and earnings of the individual. As an earned right, the individual is eligible to receive his benefit in dignity and self-respect." 102 Cong. Rec. 15110.

Social Security benefits have rightly come to be regarded as basic financial protection against the hazards of old age and disability. As stated in a recent House Report:

> "The old-age and survivors insurance system is the basic program which provides protection for America's families against the loss of earned income upon the retirement or death of the family provider. The program provides benefits related to earned income and such benefits are paid for by the contributions made with respect to persons working in covered occupations." H. R. Rep. No. 1189, 84th Cong., 1st Sess. 2.

Congress could provide that only people resident here could get Social Security benefits. Yet both the House and the Senate rejected any residence requirements. See H. R. Rep. No. 1698, 83d Cong., 2d Sess. 24–25; S. Rep. No. 1987, 83d Cong., 2d Sess. 23. Congress concededly might amend the program to meet new conditions. But may it take away Social Security benefits from one person or from a group of persons for vindictive reasons? Could Congress on deporting an alien for having been a Communist confiscate his home, appropriate his savings accounts, and thus send him out of the country penniless? I think not. Any such Act would be a bill of attainder. The difference, as I see it, between that case and this is one merely of degree. Social Security benefits, made up in part of this alien's own earnings, are taken from him because he once was a Communist.

The view that § 202 (n), with which we now deal, imposes a penalty was taken by Secretary Folsom, appel-

lant's predecessor, when opposing enlargement of the category of people to be denied benefits of Social Security, *e. g.*, those convicted of treason and sedition. He said:

> "Because the deprivation of benefits as provided in the amendment is in the nature of a penalty and based on considerations foreign to the objectives and provisions of the old-age and survivors insurance program, the amendment may well serve as a precedent for extension of similar provisions to other public programs and to other crimes which, while perhaps different in degree, are difficult to distinguish in principle.
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> "The present law recognizes only three narrowly limited exceptions [3] to the basic principle that benefits are paid without regard to the attitudes, opinions, behavior, or personal characteristics of the individual . . . ." Hearings, Senate Finance Committee on Social Security Amendments of 1955, 84th Cong., 2d Sess. 1319.

The Committee Reports, though meagre, support Secretary Folsom in that characterization of § 202 (n). The House Report tersely stated that termination of the benefits would apply to those persons who were deported "because of illegal entry, conviction of a crime, or subversive activity." H. R. Rep. No. 1698, 83d Cong., 2d Sess. 25. The aim and purpose are clear—to take away from a person by legislative *fiat* property which he has accumulated because he has acted in a certain way or embraced a certain ideology. That is a modern version

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[3] The three exceptions referred to were (1) § 202 (n); (2) Act of September 1, 1954, 68 Stat. 1142, 5 U. S. C. §§ 2281–2288; (3) Regulation of the Social Security Administration, 20 CFR § 403.409—denying dependent's benefits to a person found guilty of felonious homicide of the insured worker.

of the bill of attainder—as plain, as direct, as effective as those which religious passions once loosed in England and which later were employed against the Tories here.[4] I would affirm this judgment.

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

When Nestor quit the Communist Party in 1939 his past membership was not a ground for his deportation. *Kessler* v. *Strecker,* 307 U. S. 22. It was not until a year later that past membership was made a specific ground for deportation.[1] This past membership has cost Nestor

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[4] Brant, *op. cit., supra,* note 1, states at p. 9:

"What were the framers aiming at when they forbade bills of attainder? They were, of course, guarding against the religious passions that disgraced Christianity in Europe. But American bills of attainder, just before 1787, were typically used by Revolutionary assemblies to rid the states of British Loyalists. By a curious coincidence, it was usually the Tory with a good farm who was sent into exile, and all too often it was somebody who wanted that farm who induced the legislature to attaint him. Patriotism could serve as a cloak for greed as easily as religion did in that Irish Parliament of James the Second.

"But consider a case in which nothing could be said against the motive. During the Revolution, Governor Patrick Henry induced the Virginia legislature to pass a bill of attainder condemning Josiah Phillips to death. He was a traitor, a murderer, a pirate and an outlaw. When ratification of the new Constitution came before the Virginia Convention, Henry inveighed against it because it contained no Bill of Rights. Edmund Randolph taunted him with his sponsorship of the Phillips bill of attainder. Henry then made the blunder of defending it. The bill was warranted, he said, because Phillips was no Socrates. That shocking defense of arbitrary condemnation may have produced the small margin by which the Constitution was ratified."

[1] The Alien Registration Act, 1940, 54 Stat. 673, made membership in an organization which advocates the overthrow of the Government of the United States by force or violence a ground for deportation even though the membership was terminated prior to

dear. It brought him expulsion from the country after 43 years' residence—most of his life. Now more is exacted from him, for after he had begun to receive benefits in 1955—having worked in covered employment the required time and reached age 65—and might anticipate receiving them the rest of his life, the benefits were stopped pursuant to § 202 (n) of the Amended Social Security Act.[2] His predicament is very real—an aging man deprived of the means with which to live after being separated from his family and exiled to live among strangers in a land he quit 47 years ago. The common sense of it is that he has been punished severely for his past conduct.

Even the 1950 statute deporting aliens for past membership raised serious questions in this Court whether the prohibition against *ex post facto* laws was violated. In *Galvan* v. *Press,* 347 U. S. 522, 531, we said "since the intrinsic consequences of deportation are so close to punishment for crime, it might fairly be said also that the *ex post facto* Clause, even though applicable only to punitive legislation, should be applied to deportation." However, precedents which treat deportation not as punishment, but as a permissible exercise of congressional power to enact the conditions under which aliens may

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the passage of that statute. See *Harisiades* v. *Shaughnessy,* 342 U. S. 580. Until the passage of the Internal Security Act of 1950, 64 Stat. 1006, 1008, it was necessary for the Government to prove in each case in which it sought to deport an alien because of membership in the Communist Party that that organization in fact advocated the violent overthrow of the Government. The 1950 Act expressly made deportable aliens who at the time of entry, or at any time thereafter were "members of or affiliated with . . . the Communist Party of the United States." See *Galvan* v. *Press,* 347 U. S. 522, 529.

[2] A comparable annuity was worth, at the time appellee's benefits were canceled, approximately $6,000. To date he has lost nearly $2,500 in benefits.

come to and remain in this country, governed the decision in favor of the constitutionality of the statute.

However, the Court cannot rest a decision that § 202 (n) does not impose punishment on Congress' power to regulate immigration. It escapes the common-sense conclusion that Congress has imposed punishment by finding the requisite rational nexus to a granted power in the supposed furtherance of the Social Security program "enacted pursuant to Congress' power to 'spend money in aid of the "general welfare." ' " I do not understand the Court to deny that but for that connection, § 202 (n) would impose punishment and not only offend the constitutional prohibition on *ex post facto* laws but also violate the constitutional guarantees against imposition of punishment without a judicial trial.

The Court's test of the constitutionality of § 202 (n) is whether the legislative concern underlying the statute was to regulate "the activity or status from which the individual is barred" or whether the statute "is evidently aimed at the person or class of persons disqualified." It rejects the inference that the statute is "aimed at the person or class of persons disqualified" by relying upon the presumption of constitutionality. This presumption might be a basis for sustaining the statute if in fact there were two opposing inferences which could reasonably be drawn from the legislation, one that it imposes punishment and the other that it is purposed to further the administration of the Social Security program. The Court, however, does not limit the presumption to that use. Rather the presumption becomes a complete substitute for any supportable finding of a rational connection of § 202 (n) with the Social Security program. For me it is not enough to state the test and hold that the presumption alone satisfies it. I find it necessary to examine the Act and its consequences to ascertain whether there

is ground for the inference of a congressional concern with the administration of the Social Security program. Only after this inquiry would I consider the application of the presumption.

The Court seems to acknowledge that the statute bears harshly upon the individual disqualified, but states that this is permissible when a statute is enacted as a regulation of the activity. But surely the harshness of the consequences is itself a relevant consideration to the inquiry into the congressional purpose.[3] Cf. *Trop* v. *Dulles,* 356 U. S. 86, 110 (concurring opinion).

It seems to me that the statute itself shows that the sole legislative concern was with "the person or class of persons disqualified." Congress did not disqualify for benefits all beneficiaries residing abroad or even all dependents residing abroad who are aliens. If that had been the case I might agree that Congress' concern would have been with "the activity or status" and not with the "person or class of persons disqualified." The scales would then be tipped toward the conclusion that Congress desired to limit benefit payments to beneficiaries residing in the United States so that the American economy would be aided by expenditure of benefits here. Indeed a proposal along those lines was submitted to Congress in

[3] The Court, recognizing that *Cummings* v. *Missouri,* 4 Wall. 277, and *Ex parte Garland,* 4 Wall. 333, strongly favor the conclusion that § 202 (n) was enacted with punitive intent, rejects the force of those precedents as drawing "heavily on the Court's first-hand acquaintance with the events and the mood of the then recent Civil War, and 'the fierce passions which that struggle aroused.' " This seems to me to say that the provision of § 202 (n) which cuts off benefits from aliens deported for past Communist Party membership was not enacted in a similar atmosphere. Our judicial detachment from the realities of the national scene should not carry us so far. Our memory of the emotional climate stirred by the question of communism in the early 1950's cannot be so short.

1954, at the same time § 202 (n) was proposed,[4] and it was rejected.[5]

Perhaps, the Court's conclusion that regulation of "the activity or status" was the congressional concern would be a fair appraisal of the statute if Congress had terminated the benefits of all alien beneficiaries who are deported. But that is not what Congress did. Section 202 (n) applies only to aliens deported on one or more of 14 of the 18 grounds for which aliens may be deported.[6]

H. R. Rep. No. 1698, 83d Cong., 2d Sess. 25, 77, cited by the Court, describes § 202 (n) as including persons who were deported "because of unlawful entry, conviction of a crime, or subversive activity." The section, in addition, covers those deported for such socially condemned acts as narcotic addiction or prostitution. The common element of the 14 grounds is that the alien has been guilty of some blameworthy conduct. In other words Congress worked its will only on aliens deported for conduct displeasing to the lawmakers.

This is plainly demonstrated by the remaining four grounds of deportation, those which do not result in the cancellation of benefits.[7] Two of those four grounds cover persons who become public charges within five years after entry for reasons which predated the entry. A third ground covers the alien who fails to maintain his nonimmigrant status. The fourth ground reaches the alien who, prior to or within five years after entry, aids other aliens to enter the country illegally.

Those who are deported for becoming public charges clearly have not, by modern standards, engaged in conduct worthy of censure. The Government's suggestion

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[4] See H. R. Rep. No. 1698, 83d Cong., 2d Sess. 24–25.

[5] See S. Rep. No. 1987, 83d Cong., 2d Sess. 23; H. R. Conf. Rep. No. 2679, 83d Cong., 2d Sess. 4.

[6] See Court's opinion, *ante*, note 1.

[7] See the Court's opinion, *ante*, note 13.

that the reason for their exclusion from § 202 (n) was an unarticulated feeling of Congress that it would be unfair to the "other country to deport such destitute persons without letting them retain their modicum of social security benefits" appears at best fanciful, especially since, by hypothesis, they are deportable because the conditions which led to their becoming public charges existed prior to entry.

The exclusion from the operation of § 202 (n) of aliens deported for failure to maintain nonimmigrant status rationally can be explained, in the context of the whole statute, only as evidencing that Congress considered that conduct less blameworthy. Certainly the Government's suggestion that Congress may have thought it unlikely that such persons would work sufficient time in covered employment to become eligible for Social Security benefits cannot be the reason for this exclusion. For frequently the very act which eventually results in the deportation of persons on that ground is the securing of private employment. Finally, it is impossible to reconcile the continuation of benefits to aliens who are deported for aiding other aliens to enter the country illegally, except upon the ground that Congress felt that their conduct was less reprehensible. Again the Government's suggestion that the reason might be Congress' belief that these aliens would not have worked in covered employment must be rejected. Five years after entry would be ample time within which to secure employment and qualify. Moreover the same five-year limitation applies to several of the 14 grounds of deportation for which aliens are cut off from benefits and the Government's argument would apply equally to them if that in fact was the congressional reason.

This appraisal of the distinctions drawn by Congress between various kinds of conduct impels the conclusion, beyond peradventure that the distinctions can be

understood only if the purpose of Congress was to strike at "the person or class of persons disqualified." The Court inveighs against invalidating a statute on "implication and vague conjecture." Rather I think the Court has strained to sustain the statute on "implication and vague conjecture," in holding that the congressional concern was "the activity or status from which the individual is barred." Today's decision sanctions the use of the spending power not to further the legitimate objectives of the Social Security program but to inflict hurt upon those who by their conduct have incurred the displeasure of Congress. The Framers ordained that even the worst of men should not be punished for their past acts or for any conduct without adherence to the procedural safeguards written into the Constitution. Today's decision is to me a regretful retreat from *Lovett, Cummings* and *Garland.*

Section 202 (n) imposes punishment in violation of the prohibition against *ex post facto* laws and without a judicial trial.[8] I therefore dissent.

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[8] It is unnecessary for me to reach the question whether the statute also constitutes a bill of attainder.

MINER ET AL., JUDGES, U. S. DISTRICT COURT, *v.* ATLASS.

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

No. 156. Argued March 3, 1960.—Decided June 20, 1960.

A Federal District Court sitting in admiralty has no power to order the taking of oral depositions for the purpose of discovery only; and Rule 32 of the Admiralty Rules of the District Court for the Northern District of Illinois, purporting to authorize the taking of such depositions, is invalid for want of authority in the District Court to promulgate it. Pp. 641–652.

(a) A court of admiralty has no inherent power, independent of any statute or rule, to order the taking of depositions for the purpose of discovery. Pp. 643–644.

(b) Rule 32C of this Court's General Admiralty Rules does not impliedly empower a district judge to order the taking of such depositions. Pp. 644–646.

(c) Rule 32 of the District Court's Admiralty Rules is not a valid exercise of its power to regulate local practice, conferred by Rule 44 of the General Admiralty Rules. Pp. 646–652.

265 F. 2d 312, affirmed.

Harold A. Liebenson argued the cause for petitioners. With him on the brief were *Edward G. Raszus* and *John E. Harris.*

Edward B. Hayes argued the cause and filed a brief for respondent.

MR. JUSTICE HARLAN delivered the opinion of the Court.

Certiorari was granted in this case, 361 U. S. 807, to review the decision of the Court of Appeals holding that a District Court sitting in admiralty lacked power to order the taking of oral depositions for the purpose of discovery only, and that Rule 32 of the Admiralty Rules of the Dis-

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trict Court for the Northern District of Illinois, purporting to authorize the taking of such depositions,[1] was invalid for want of authority in the District Court to promulgate it.

The issue arose in the following manner: The respondent filed a petition in admiralty seeking exoneration from or limitation of liability for the death by drowning of two seamen employed on a yacht owned by him. The representatives of the deceased seamen, having appeared as claimants, applied to the District Court for an order granting leave to take the depositions of several named persons, including respondent, for the purpose of discovery only. Respondent opposed the motion on the ground that the court had no power to order the taking of depositions in any case not meeting the conditions of R. S. §§ 863–865, the *de bene esse* statute.[2] After argument, petitioner

[1] Local Rule 32 provides that the "taking and use of depositions of parties and witnesses shall be governed by the Federal Rules of Civil Procedure except as otherwise provided by statute and except that their use" is limited as set forth in the rule. Rule 26 (a) of the Civil Rules permits the taking of "the testimony of any person, including a party, by deposition upon oral examination . . . for the purpose of discovery or for use as evidence in the action or for both purposes," subject to limitations as to use of such depositions set forth in Rule 26 (d).

[2] This statute, as amended, 31 Stat. 182, is now applicable only to proceedings in admiralty. See note preceding 28 U. S. C. § 1781. Section 863 permits the taking of the deposition *de bene esse* of a witness in a pending action, in the following circumstances only: ". . . when the witness lives at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of the district in which the case is to be tried, and to a greater distance than one hundred miles from the place of trial, before the time of trial, or when he is ancient and infirm. . . ."
The deposition is admissible at trial only in the event of the deponent's death, absence from the country, presence at a distance greater than 100 miles from the place of trial, or inability to travel and appear by reason of age, ill health, or imprisonment. R. S. § 865.

Miner, D. J., granted the claimants' motion, pursuant to local Admiralty Rule 32. Respondent then sought a writ of mandamus or prohibition requiring the vacation of the order of the District Court, and prohibiting Judge Miner, or any other district judge to whom the case might be assigned, from further proceeding under it. A rule to show cause was issued by the Court of Appeals and, after a hearing, the application for extraordinary relief, whose availability in the particular circumstances involved is not challenged before us, was granted. 265 F. 2d 312. For reasons presently to be stated, we have concluded that the Court of Appeals' conclusion was correct, and we affirm its judgment.

Counsel for the claimants, representing the petitioners here, undertake to support the discovery-deposition order on the grounds that: (1) a court of admiralty has inherent power, not dependent on any statute or rule, to order the taking of depositions for the purpose of discovery; (2) Rule 32C of this Court's General Admiralty Rules impliedly empowers a district judge to order the taking of such depositions; (3) Rule 32 of the District Court's Admiralty Rules is a valid exercise of its power to regulate local practice, conferred by Rule 44 of the General Admiralty Rules. We consider each contention in turn.

The reliance on an asserted inherent power is based almost exclusively on the decision of the Court of Appeals for the Third Circuit in *Dowling* v. *Isthmian S. S. Corp.*, 184 F. 2d 758. In an exhaustive discussion, Judge Fee, for that court, expressed the view that the traditionally flexible and adaptable admiralty practice empowers a court to order a party to submit to pretrial oral examination. Whether or not the decision was intended to embrace examinations solely for discovery purposes is not entirely clear. Compare *Standard Steamship Co.* v. *United States,* 126 F. Supp. 583, with *Darling's Estate* v. *Atlantic Contracting Corp.*, 150 F. Supp. 578, 579; 1950

Annual Survey of American Law 523. None of the historical data adduced in the *Dowling* case seems to go beyond the area of testimony for use at the trial. The opinion states no more than that history discloses no overt rejection of the power to order depositions taken for discovery purposes. 184 F. 2d, at 771, n. 36. There is no affirmative indication of the exercise of such a power, if any was thought to exist, and the 1940 edition of Benedict on Admiralty unequivocally asserts that "[a]n admiralty deposition may only be taken for the purpose of securing evidence; it may not be taken for the purpose of discovery." 3 Benedict, Admiralty (Knauth ed.), 34. This statement by a leading work in the field hardly bespeaks the existence of traditional inherent power, and we find none. Cf. *Cary* v. *Curtis,* 3 How. 236, 245.

Neither can we find in this Court's Admiralty Rules warrant for the entry by a district judge of an order of the character granted below. The deposition practice authorized by the Civil Rules does not of its own force provide the authority sought, since those rules are expressly declared inapplicable to proceedings in admiralty. Civil Rule 81 (a)(1). Certain of the Civil Rules were adopted by this Court as part of the Admiralty Rules in the 1939 amendments, 307 U. S. 653. Thus, Civil Rules 33 through 37 were made part of the Admiralty Rules as Rules 31, 32, 32A, 32B, and 32C, respectively.[3] However, the remainder of the Civil Rules in Part V, dealing with "Depositions and Discovery," including Rule 26, the basic authority

[3] Civil Rule 33, adopted as Admiralty Rule 31, is entitled, "Interrogatories to Parties"; Civil Rule 34 (Admiralty Rule 32) relates to "Discovery and Production of Documents and Things for Inspection, Copying, or Photographing"; Civil Rule 35 (Admiralty Rule 32A) authorizes "Physical and Mental Examination of Persons"; Civil Rule 36 (Admiralty Rule 32B) governs "Admission of Facts and of Genuineness of Documents"; Civil Rule 37 (Admiralty Rule 32C) deals with "Refusal to Make Discovery: Consequences."

for discovery-deposition practice (see note 1, *ante*), was not adopted. We cannot of course regard this significant omission as inadvertent, cf. 76 A. B. A. Ann. Rep. 565–566; rather, it goes far to establish the lack of any provision for discovery by deposition in the General Admiralty Rules.

However, petitioners contend, and some courts have agreed, that the existence of such a power is to be inferred from Rule 32C, the counterpart of Civil Rule 37, entitled, "Refusal to Make Discovery: Consequences." That rule details the procedures which are to be followed if "a party or other deponent refuses to answer any question propounded upon oral examination . . . ." It has been held that the inclusion of this rule must be taken as the expression of an assumption by the Court that the discovery-deposition practice existed or was to be followed in admiralty, for the reason that "[i]t is inconceivable that the Supreme Court, by means of the elaborate and detailed terms of Rule 32C would have given a suitor in admiralty a method of enforcing a right that did not exist." *Brown* v. *Isthmian S. S. Corp.*, 79 F. Supp. 701, 702 (D. C. E. D. Pa.). In accord with the *Brown* decision are *Bunge Corp.* v. *The Ourania Gournaris*, 1949 A. M. C. 744 (D. C. S. D. N. Y.); *Galperin* v. *United States*, 1949 A. M. C. 1907 (D. C. E. D. N. Y.); *The Ballantrae*, 1949 A. M. C. 1999 (D. C. N. J.).

The dilemma thus suggested—either that we must regard Civil Rule 26 as inadvertently omitted from the Admiralty Rules [4] or that we should consider that part of Civil Rule 37 which refers to oral examinations as inadvertently included—is more seeming than real. The ref-

[4] For reasons stated, *ante*, pp. 643–644, we cannot regard the omission as the result of a so well-settled practice of using depositions for discovery in admiralty that codification was thought unnecessary. See *Mulligan* v. *United States*, 87 F. Supp. 79, 80.

erence to "discovery" in the title to Rule 32C can well have been simply to the modes of discovery authorized by those of the Civil Rules which were carried into the Admiralty Rules in the 1939 amendments, see note 3, *ante*, and we think it should so be taken. As to the reference to "oral examination," we are in agreement with the explanation offered by Judge Rifkind in *Mulligan* v. *United States*, 87 F. Supp. 79, 81, that it comprehends only those forms of oral examinations traditionally recognized in admiralty, primarily the deposition *de bene esse* (see note 2, *ante*).[5] By this construction, both actions of this Court—the adoption of Civil Rule 37 and the omission of Civil Rule 26—are given harmonious effect.

Petitioners' third contention is that, although admiralty courts were not given authority by the General Admiralty Rules to order the taking of depositions for discovery purposes, the District Court in the present case acted pursuant to its own local Admiralty Rule 32 (see note 1, *ante*) granting such authority, and that such rule was a valid exercise of power conferred on the District Court by Rule 44 of the General Rules. See *Ludena* v. *The Santa Luisa*, 95 F. Supp. 790 (D. C. S. D. N. Y.); *Application of A. Pellegrino & Son*, 11 F. R. D. 209 (D. C. S. D. N. Y.); cf. *Republic of France* v. *Belships Co., Ltd.*, 91 F. Supp.

[5] Apart from the *de bene esse* procedure, admiralty practice traditionally utilized the Commission *Dedimus Potestatum*, the Deposition *In Perpetuam Rei Memoriae*, and Letters Rogatory. The statutory authority for these procedures, R. S. §§ 866–870, 875, was not repealed until the 1948 codification of the Judicial Code, some years after the 1939 amendments to the Admiralty Rules. For a discussion of them, see 3 Benedict, Admiralty, §§ 397–401.

Judge Rifkind's rejection of the *Brown* decision has been followed by several district judges. See *Kelleher* v. *United States*, 88 F. Supp. 139 (D. C. S. D. N. Y.); cf. *Standard Steamship Co.* v. *United States*, *supra* (D. C. Del.); *Gulf Oil Corp.* v. *Alcoa S. S. Co.*, 1949 A. M. C. 1965 (D. C. S. D. N. Y.).

912; *Prudential Steamship Corp.* v. *Curtis Bay Towing Co.*, 20 F. R. D. 356 (D. C. Md.). Rule 44, entitled "Right of trial courts to make rules of practice," provides:

> "In suits in admiralty in all cases not provided for by these rules or by statute, the district courts are to regulate their practice in such a manner as they deem most expedient for the due administration of justice, *provided the same are not inconsistent with these rules.*" (Emphasis added.)

We may assume, without deciding, that, the proviso apart, the affirmative grant of authority contained in Rule 44 is sufficiently broad and unqualified, in light of the traditional liberality and flexibility of admiralty practice, to embrace the "practice" of taking depositions for discovery purposes. Cf. *Galveston Dry Dock & Constr. Co.* v. *Standard Dredging Co.*, 40 F. 2d 442. However, we feel constrained to hold that this particular practice is not consistent with the present General Admiralty Rules and therefore that in this respect local Rule 32 falls within the proviso.[6]

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[6] We do not find such inconsistency in Admiralty Rule 46, requiring that "the testimony of witnesses . . . be taken orally in open court, except as otherwise provided by statute, or agreement of parties." We regard that provision as having been promulgated with reference to the trial and not the discovery stage of the lawsuit. See *Republic of France* v. *Belships Co., Ltd., supra.*

For much the same reason, we do not deem the challenged rule inconsistent with the *de bene esse* statute, note 2, *ante*. That statute is concerned with the taking of depositions for use at trial, and not for discovery. The limitations on the taking of a deposition are evidently the product of the limitations on use. A discovery-deposition not meeting the conditions of the statute may not be admitted into evidence at the trial, *Mercado* v. *United States*, 184 F. 2d 24 (C. A. 2d Cir.), but where a deposition is not sought to be taken for use at trial, we see no reason to regard the statute as a bar. See *Republic of France* v. *Belships Co., Ltd., supra.*

As we have noted, the determination of this Court in 1939 to promulgate some but not all of the Civil Rules relating to discovery must be taken as an advertent declination of the opportunity to institute the discovery-deposition procedure of Civil Rule 26 (a) throughout courts of admiralty. It may be, see 76 A. B. A. Ann. Rep. 565–566,[7] that one reason for this failure was the belief that this Court could not take over into Admiralty in its entirety Civil Rule 26. The Enabling Act did not then, R. S. § 913, although it does now, 28 U. S. C. § 2073, authorize the Court to supersede statutes, and the limitations of the *de bene esse* statute would therefore have overridden Civil Rule 26 (d) to the extent the statute was more restrictive. Nevertheless it does seem clear that the part of Civil Rule 26 with which we are now concerned could have been promulgated in admiralty, cf. note 6, *ante*. But for whatever reason, no action was taken.

It is of course true that the failure to adopt Civil Rule 26 implies no more than that this Court did not wish to *impose* the practice on the District Courts, and does not necessarily bespeak an intention to foreclose each District Court from exercising a "local option" under Rule 44. We do not deny the logic of this contention; neither do we hold that whenever the General Admiralty Rules deal with part, but not all, of a subject, those practices left unprovided for by the General Rules may not in any circumstances be dealt with by the District Courts under General Rule 44. Unlike many state practice statutes, this Court's rules of admiralty practice for the District Courts are not comprehensive codes regulating every detail of practice, and we would be slow to hold that the interstices may not be the subject of appropriate local regulation. For example, rules fixing the time for doing

[7] The Bar Association Report, in referring to "Chief Justice Stone," is in error. The Chief Justice in 1939 was Charles Evans Hughes.

certain acts are of the essence of orderly procedure. So long as the time set be not unreasonable, it is less important what the limit be than that there be a rule whereby some timetable may be known to the profession. Thus, the failure of the General Admiralty Rules to prescribe a time within which motions for rehearing may be filed should not bar a District Court from fixing such a time limit. See *Papanikolaou* v. *Atlantic Freighters,* 232 F. 2d 663, 665. Similarly, the General Admiralty Rules provide no answer to the question whether one sued for a certain sum, who contests his liability for but a portion of that sum, may be required to suffer a judgment for the remainder prior to trial on the contested portion, and there is no compelling reason why that lack should be held to prevent a District Court from supplying an answer by local rule. See *Galveston Dry Dock & Constr. Co.* v. *Standard Dredging Co., supra.*

We deal here only with the procedure before us, and our decision is based on its particular nature and history. Discovery by deposition is at once more weighty and more complex a matter than either of the examples just discussed or others that might come to mind. Its introduction into federal procedure was one of the major achievements of the Civil Rules, and has been described by this Court as "one of the most significant innovations" of the rules. *Hickman* v. *Taylor,* 329 U. S. 495, 500. Moreover, the choice of procedures adopted to govern various specific problems arising under the system was in some instances hardly less significant than the initial decision to have such a system. It should be obvious that we are not here dealing either with a bare choice between an affirmative or a negative answer to a narrow question, or even less with the necessary choice of a rule to deal with a problem which must have an answer, but need not have any particular one. Rather, the matter is one which,

though concededly "procedural," may be of as great importance to litigants as many a "substantive" doctrine, and which arises in a field of federal jurisdiction where nationwide uniformity has traditionally always been highly esteemed.

The problem then is one which peculiarly calls for exacting observance of the statutory procedures surrounding the rule-making powers of the Court, see 28 U. S. C. § 331 (advisory function of Judicial Conference), 28 U. S. C. § 2073 (prior report of proposed rule to Congress), designed to insure that basic procedural innovations shall be introduced only after mature consideration of informed opinion from all relevant quarters, with all the opportunities for comprehensive and integrated treatment which such consideration affords. Having already concluded that the discovery-deposition procedure is not authorized by the General Admiralty Rules themselves, we should hesitate to construe General Rule 44 as permitting a change so basic as this to be effectuated through the local rule-making power, especially when that course was never reported to Congress [8] as would now be required under 28 U. S. C. § 2073.

We are strongly reinforced in our conclusion by the post-1939 history of the question of adoption of discovery-deposition rules in the General Admiralty Rules. In the 1948 revision of the Judicial Code this Court was given the power to supersede statutes, which it lacked in 1939. In 1951 a joint committee representing several leading bar associations proposed the adoption of a rule permitting the taking of the deposition of a *party* for discovery purposes. See 76 A. B. A. Ann. Rep. 181; Maritime Law Assn., Doc. No. 348 (Sept. 1951). No action was taken.

[8] R. S. § 913, the predecessor source of this Court's authority to promulgate admiralty rules, in effect when Rule 44 was adopted, did not, as does 28 U. S. C. § 2073, require the prior reporting of such rules to Congress.

In 1953 it was recommended that Rule 26 (a) be made applicable to proceedings in admiralty, with two minor modifications; this would of course have permitted discovery by deposition of witnesses as well as parties. Maritime Law Assn., Doc. No. 369 (Apr. 1953). Again no action was taken. We do not think this failure to enact the proposed amendments can be explained away by suggesting that the widespread local adoption of rules similar to the local rule now before us [9] was thought to render amendment of the General Rules unnecessary, for local rules, by virtue of the inability of the District Courts to supersede statutes, cannot deal with the matter of the taking and use of depositions as an integrated whole. See *Mercado* v. *United States,* 184 F. 2d 24 (C. A. 2d Cir.).

It hardly need be added that our decision here in no way implies any view as to the desirability or undesirability of having a discovery-deposition procedure in admiralty cases. Those who advise the Court with respect to the exercise of its rule-making powers—more particularly of course the Judicial Conference of the United States (28 U. S. C. § 331) and the newly created Advisory Committee on the General Admiralty Rules, which it is to be hoped will give the matter their early attention—are left wholly free to approach the question of amendment of the discovery provisions of the rules in the light of whatever considerations seem relevant to them, including of course the experience gained by the District Courts which have had rules similar to the Local Rule here challenged. Nor would anything we have said prevent those bodies from recommending that the matter of discovery-depositions be left to local rule making. All we decide in the exist-

[9] See, *e. g.,* Southern District of New York, Admiralty Rule 32; Southern and Northern Districts of Florida, Admiralty Rule 24; Northern District of California, Admiralty Rule 13. See also *Darling's Estate* v. *Atlantic Contracting Corp., supra* (D. C. E. D. Va.); *Brown* v. *Isthmian S. S. Corp., supra* (D. C. E. D. Pa.).

ing posture of affairs is that the matter of discovery-depositions is not presently provided for in the General Admiralty Rules or encompassed within the local rule-making power under General Rule 44.

Affirmed.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE STEWART join, dissenting.

The Court today strikes down a local admiralty rule which has counterparts in District Courts throughout the country. In fact, the statistics of the most recent fiscal year in the experience of the federal courts indicate that over half the admiralty litigation in the federal courts is conducted in courts having discovery-deposition rules like the one today nullified.[1] I cannot agree to a judgment

[1] In the fiscal year ending June 30, 1959, over half the private admiralty actions filed in the District Courts were brought in districts having rules similar to the one in question here. Local admiralty rules expressly providing for the taking of depositions of witnesses (including nonparty witnesses) in accord with the Civil Rules have been adopted in the Southern District of New York (Admiralty Rule 32); the Northern District of New York (Admiralty Rule 32); the Southern and Northern Districts of Florida (joint Admiralty Rule 24); the Northern District of California (Admiralty Rule 13); and the Western District of Washington (Admiralty Rules 25 and 25A), besides the Northern District of Illinois. In the fiscal year referred to, these districts were responsible for 1,743 of the 3,424 private admiralty actions filed in the District Courts, or 50.9%.

In addition, there are two districts where there is a catchall local admiralty rule making the Federal Rules of Civil Procedure applicable to situations not otherwise provided for. In one of these districts, the local rule is interpreted as allowing discovery depositions. Eastern District of Virginia, Admiralty Rule 24; *Darling's Estate* v. *Atlantic Contracting Corp.*, 150 F. Supp. 578, 580. In the other, the rule was apparently promulgated in response to a suggestion by the chief district judge that a local rule on depositions be proposed by a committee for promulgation by the court. *Prudential S. S. Corp.* v. *Curtis Bay Towing Co.*, 20 F. R. D. 356, 357

which lightly brings about so widespread a turning back of the clock in the admiralty practice throughout the Nation.

I agree with the Court that the first and second contentions of the petitioners, on which reliance is put that the judgment should be reversed, are not well taken; [2] but I must dissent from the Court's rejection of the third, and truly substantial, contention of petitioners. This is that the order for discovery depositions made here was sanctioned by the District Court's local Admiralty Rule 32 and that that rule is a valid exercise of the District Court's rulemaking power. There is no doubt that the order in

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(decided May 9, 1957); District of Maryland, Admiralty Rule 46, promulgated May 9, 1958. These two districts accounted for 170 or 5% of the private admiralty cases filed during the year in question. This with the category of districts just discussed indicates that 55.9% of the private admiralty cases were prosecuted in districts where there existed a local rule making the Civil Rules procedure for discovery deposition available.

In addition, several districts have admiralty rules providing for broadened deposition practice in regard to adverse parties. Eastern District of New York, Admiralty Rule 32; Eastern District of North Carolina, Admiralty Rule 30; Western District of Louisiana, Admiralty Rule 30; Northern District of Ohio, Admiralty Rule 38. In the year in question, these districts accounted for 116 cases filed, or 3.4%.

In other districts, the need for a local rule may have been thought to be obviated by a ruling that General Admiralty Rule 32C implicitly made broadened discovery available, see *The Ballantrae,* 1949 A. M. C. 1999 (D. C. N. J.); *Brown* v. *Isthmian S. S. Corp.,* 79 F. Supp. 701 (D. C. E. D. Pa.), or by a decision indicating that the practice was available without rule of court, see *Dowling* v. *Isthmian S. S. Corp.,* 184 F. 2d 758 (C. A. 3d Cir.).

For the statistics as to private admiralty cases filed, see Annual Report of the Director of the Administrative Office of the United States Courts for the Fiscal Year ending June 30, 1959, Table C3. Government admiralty cases are not separately listed as such.

[2] These contentions are first, that admiralty courts have inherent power to order such depositions, and second, that this power is conferred by General Admiralty Rule 32C.

question was authorized by the local rule; and so the only question is of the rule's validity. The question is one of power; and to me the Court's opinion fails completely to demonstrate a lack of power to promulgate the rule in question in this District Court and the many District Courts having a very substantial admiralty business which have adopted similar rules. The local rule was promulgated under authority of this Court's General Admiralty Rule 44, which provides:

> "Rule 44. Right of trial courts to make rules of practice.
>
> "In suits in admiralty in all cases not provided for by these rules or by statute, the district courts are to regulate their practice in such a manner as they deem most expedient for the due administration of justice, provided the same are not inconsistent with these rules."

The authority established by General Admiralty Rule 44, under this Court's statutory powers, is separate in form and different in expression from the general statutory authority of the District Courts, with the other federal courts, to make "rules for the conduct of their business." 28 U. S. C. § 2071.[3] Whatever the precise content of § 2071, I think as a separate authority General Admiralty Rule 44 must be read separately as a grant

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[3] Before the codification of 1948, the statutory predecessors of 28 U. S. C. § 2071 themselves were more clear in providing for some practice rulemaking power in the trial courts. See R. S. § 918, and its somewhat differently worded predecessor, § 7 of the Act of March 2, 1793, 1 Stat. 335. See also R. S. § 913, derived from the early Process Acts. But as early as the First General Admiralty Rules of 1844, this Court had provided for subsidiary rulemaking power by the District Courts, in terms fairly similar to those of the present General Admiralty Rule 44. See General Admiralty Rule 46 of 1844, 3 How. XIII.

of power to the District Courts to make admiralty rules of procedure effective as to actions within them, subject only to the limitations specified in the rule or otherwise implicit in law. This seems to be the obvious meaning of the rule, and it should be taken at its face value. See *Papanikolaou* v. *Atlantic Freighters, Ltd.*, 232 F. 2d 663, 665; *Galveston Dry Dock & Construction Co.* v. *Standard Dredging Co.*, 40 F. 2d 442, 444.[4] Cf. *British Transport Commission* v. *United States*, 354 U. S. 129, 138. Civil Rule 83 is quite similar in concept, and appears to be given a comparable interpretation. *Russell* v. *Cunningham*, 233 F. 2d 806, 811; 7 Moore, Federal Practice (2d ed.), ¶ 83.03. Cf. *United States* v. *Hvass*, 355 U. S. 570, 575.

Clearly a rule providing for discovery by way of deposition practice is one regulating procedure. See *Sibbach* v. *Wilson & Co.*, 312 U. S. 1. The Court does not venture to deny this. Of course this procedural rule may be as important as many a "substantive" doctrine, but there is nothing in General Rule 44 confining the local rulemaking power to exercises in the trivial. Hence the District Court rule is prima facie valid (as the Court apparently admits), and we must examine whether it is invalidated by reason of conflict with some rule promulgated by this Court, or some statute. No statute precludes the local

[4] In the last-cited case, Judge Learned Hand went so far as to say of a District Court rule promulgated under the authority of R. S. § 918 and General Admiralty Rule 44, that it was "the result of the exercise of a power to legislate, delegated by Congress, though circumscribed by the statute which gives it, and by anything contained in the general laws, or the Supreme Court rules, as the statute itself declares. Within these limits the District Court may disregard existing practice as freely as Congress itself; its action has the force of law . . . and we are as much bound to observe it as a statute." 40 F. 2d, at 444.

rule; [5] but the court holds that it is precluded by some of this Court's General Admiralty Rules. The Court gingerly draws some support from the circumstance that the amendatory Admiralty Rules promulgated by this Court in 1939—General Admiralty Rules 31 through 32C—incorporated some of the Civil Rules' discovery devices but not others. On this basis it is concluded that the District Courts are precluded from adopting local rules that estab-

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[5] The Court rightly rejects the contention that the *de bene esse* act itself, R. S. §§ 863–865, operates through negative implication to prevent the promulgation by a District Court of any other deposition rule, and hence makes this local rule fall as violative of a statute. General Admiralty Rule 44 does not purport to invest District Courts with this Court's current power to supersede statutes under the Admiralty Rules Enabling Act, 28 U. S. C. § 2073. But there is no inconsistency between the *de bene esse* act and the local rule. The act provides a method for the introduction of depositions into evidence; the local rule regulates their taking for discovery. The local rule contains a provision designed to subject the admissibility into evidence of depositions taken under it to the provisions of the act. It is said that the *Fisk* and *Tooth Crown* cases, *Ex parte Fisk*, 113 U. S. 713; *Hanks Dental Assn.* v. *International Tooth Crown Co.*, 194 U. S. 303, implied that the *de bene esse* act, and the other statutes regulating the taking of depositions for use as testimony, then on the books (see note 6, *infra*), amounted to an implicit exclusion of all other means of examination, for discovery purposes, or otherwise. These cases were based primarily on the provisions of R. S. § 861 for the taking of testimony in open court (see note 12, *infra*); but even if they were based in part on negative inferences from the deposition acts, they have not been honored as authorities in admiralty. For this Court's 1939 amendatory General Admiralty Rules, dealing extensively with discovery, were promulgated at a time when all these statutes were on the books, and when this Court's rulemaking powers in admiralty did not extend to the power to supersede statutes. It has been recognized in the admiralty jurisprudence here, accordingly, that the various statutory provisions referred to in *Fisk* and *Tooth Crown* are to be taken as relating only to the introduction of proof at trial, and not to discovery practice. Accordingly there is no barrier in those cases, or in the *de bene esse* act, to the local rule here involved.

lish in admiralty the Civil Rules discovery devices not adopted in the General Admiralty Rules—such as Civil Rule 26.[6] But certainly this negative inference does not follow. This Court's promulgation of General Admiralty Rules 31 through 32C made the observance of those rules, counterparts of Civil Rules as they were, mandatory on the District Courts. As to those Civil Rules dealing with discovery and pretrial practice that were not adopted by General Admiralty Rules, the inference is obvious that they were not made mandatory upon the District Courts; but it does not follow that the District Courts' power under General Admiralty Rule 44 in regard to local rules was lessened. This Court decided that the rules it pro-

[6] Of course, in 1939 this Court had no authority to promulgate in admiralty that part of Civil Rule 26 which provides for the reception of depositions in evidence, to the extent that it was inconsistent with the *de bene esse* act and such other statutes as R. S. §§ 866–870, 875, providing for various means of taking evidence other than in open court. See 3 Benedict, Admiralty (6th ed. 1940), §§ 397–401. All these statutes except the *de bene esse* act were repealed in the 1948 codification of the Judicial Code. 62 Stat. 993. This inability was due to the fact that until the 1948 revision of the Judicial Code, 28 U. S. C. § 2073, this Court's Admiralty Rules Enabling Act did not contain a power to supersede statutes. R. S. § 917. See also R. S. §§ 862 and 913. Civil Rule 26 contains provisions for the reception of depositions as evidence different from those of the *de bene esse* act. Hence it could not have been promulgated in terms in admiralty then, only in a form like the local rule here which avoids conflict with the statute. See note 5, *supra;* cf. *Mercado* v. *United States,* 184 F. 2d 24.

There is some evidence that it was the inability of this Court under the then-existing Admiralty Rules Enabling Act to promulgate Civil Rule 26 *in toto* in admiralty which resulted in no action at all being taken on the subject. See Report of the Standing Committee on Admiralty and Maritime Law, American Bar Association, in 76 Ann. Rep. A. B. A. (1951), pp. 565–566. The 1939 General Admiralty Rules amendments were made without report from an advisory committee, and no rule was promulgated which was not a copy of one of the new Civil Rules.

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mulgated in the discovery area were enough for the time being *as General Admiralty Rules;* but there is not a word in the rules that inhibits the District Courts from going further if they desire. The test of General Rule 44 is simply whether the local rules are "not inconsistent" with the general. There is not a word in the General Rules indicating that their discovery devices shall constitute the only ones permissible.[7] How then does the Court come to a contrary conclusion?

The Court's basic reason, it appears, why this local rule is to be held void under the negative implications of the 1939 amendments to the General Admiralty Rules, is that it was not promulgated with the safeguards provided for in the current General Admiralty Rules Enabling Act. 28 U. S. C. § 2073; see also 28 U. S. C. § 331 (advisory function of Judicial Conference). There are many answers to this contention. Perhaps the most basic is that these safeguards are relevant only to General Admiralty Rules—rules which are promulgated by this Court, and whose observance is mandatory in admiralty throughout the country. The statutes that ordain those safeguards do not require them of local rules; and this reflects the difference in Congress' approach between rulemaking carried on on a local basis, and General Rule-making, which ends all forms of local innovations and prescribes a rule for the whole country.[8] If the District Court for

[7] Not only might a local rule on discovery depositions serve as a supplement to the General Rules on discovery, but to the pretrial conference practice. See General Admiralty Rule 44½, added 316 U. S. 716. Cf. *Dowling* v. *Isthmian S. S. Corp.*, 184 F. 2d 758, 773.

[8] It should be noted that a similar authority to that of General Admiralty Rule 44 is vested in the District Courts by Civil Rule 83, empowering the District Courts to make local rules of civil procedure. No submission of these local rules to Congress is contemplated by this Court's Rules. No power to supersede statutes is delegated by either the General Admiralty Rule or the Civil Rule. It might be noted that generally (but cf. 28 U. S. C. § 2074) only where this

the Northern District of Illinois had attempted to promulgate a rule for the whole country, the Court's observations would have some point.

Furthermore, one of the protective provisions—the provision for Judicial Conference advice (which is not mandatory even on this Court, incidentally)—was not even in effect as to General Rules at the time this local rule was adopted.[9] And the General Admiralty Rules additions of 1939, which introduced sweeping liberalizations of

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power is given, has Congress provided for a procedure whereby new rules are reported to it and laid on the table before it. See the original Civil Rules Enabling Act, the Act of June 19, 1934, c. 651, 48 Stat. 1064, and its present form, 28 U. S. C. § 2072, and the current Admiralty Rules Enabling Act, 28 U. S. C. § 2073. Contrast the old civil rulemaking authority in the lower courts, R. S. § 918, and the old Admiralty Rules Enabling Act, R. S. § 917, together with R. S. §§ 862 and 913. These provisions did not empower the courts to supersede pre-existing statutes (although § 917's predecessor may have been itself an implicit repealer of certain statutes, see note 12, *infra*); and they provided for no procedure whereby the rules would be laid before Congress.

Of course, under the modern Acts, all new General Admiralty and Civil Rules promulgated here must be laid before Congress, not simply those which supersede statutes; but the point is that the limited rulemaking power delegated here to the District Court, since it does not contemplate the supercession of statutes, is foreign to the procedural safeguards which the Court today finds indispensable to its exercise. The point is that a narrow power, particularly in lower courts, to make procedural rules of a nature (like this one) not inconsistent with statutory law, has not generally been deemed by Congress to require the safeguards the Court today requires, and which the local rulemaking power cannot provide.

[9] This provision was added to § 331 of the Judicial Code by the Act of July 11, 1958, 72 Stat. 356. The local rule in question was in effect in 1955. See 5A Benedict, Admiralty (7th ed. 1959), p. 833. Of course this is not relevant to the efficacy of a local admiralty rule, since even today local rules are not covered by § 331; but it is interesting to note that the provisions of § 331 that the Court treats as relevant here would not even have been applicable to a General Rule promulgated at the time this local rule was.

discovery practice, and which the Court finds preclusive of this supplementary local rule, were promulgated with none of these safeguards—with no advisory report at all, and with no submission to Congress. Yet there is no doubt as to their validity. The reason of course is that there was no statutory requirement for the use of these procedures; the Court had the power to promulgate these rules without them. And unquestionably in 1939 this Court could have promulgated a General Rule in the terms of the local rule here.[10] By the same token, so did the District Court, under General Admiralty Rule 44, which stood side-by-side with the 1939 amendments, have the power to make this local rule without reference to Congress; there was no statute requiring it to make such a reference and in fact no procedure by which the reference could have been made. The local rule may be one providing for a "basic" change in procedure, but it is still a local rule; it was validly authorized by General Admiralty Rule 44 to be promulgated, as local rules may be promulgated, without reference to Congress; and I think we break faith with the District Courts when we give them a power which we later declare to be a mirage.

The court finds support for its position from the fact that this Court has never promulgated a General Rule for deposition-discovery since 1948, when it received the power to supersede statutes in the exercise of its General Admiralty Rule-making power. To be sure, Civil Rule 26 then could have been promulgated in admiralty by this Court (as it could not have been before, *in toto*). But the

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[10] There is some suggestion in the Court's opinion that General Admiralty Rule 44 itself should be narrowly construed because it was not reported to Congress. But that procedure was not required at the time it was promulgated; and in promulgating it, there is no evidence to show that this Court did not exercise the plenitude of its rulemaking powers under the then-existing statutes. See note 6, *supra*.

local rule, which does not contain any provision contrary to existing statutes,[11] was not dependent on any such power. It did not require the exercise of a power reserved exclusively to this Court. And the failure of this Court to promulgate a General Rule in the post-1948 era hardly reflects on the validity of the local rules. Perhaps this Court thought that the time was not ripe for a General Rule; that the problem for a while was best approached through local experimentation. Certainly there does not have to be evidence that the Court thought the local rules made the promulgation of a General Rule "unnecessary," as the Court today intimates. For the local rule to be valid, it is enough that it have been promulgated within the scope of the District Court's authority. It is not a prerequisite on the validity of a local rule that it make General Rules unnecessary. Obviously this is one of the intrinsic differences between a local rule and a General Rule.[12]

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[11] See note 5, *supra.*

[12] The Court rightly rejects the argument that the local rule is in conflict with General Admiralty Rule 46, which requires that "the testimony of witnesses shall be taken orally in open court, except as otherwise provided by statute, or agreement of parties." Old cases here have held discovery-deposition practice at law inconsistent with comparable provisions, *Ex parte Fisk,* 113 U. S. 713; *Hanks Dental Assn.* v. *International Tooth Crown Co.,* 194 U. S. 303; but these cases hardly offer guides to our decision under the present General Admiralty Rules. The primary basis of these decisions, rendered in 1885 and 1904, was that discovery depositions were thought to be inconsistent with the then-existing statute, applicable at law, providing that all testimony be given orally in open court except as otherwise statutorily provided. R. S. § 861. See *Hanks Dental Assn.* v. *International Tooth Crown Co., supra,* at 308. Modern practice has come to see the making of testimonial proof and the taking of discovery depositions as quite separate matters. There would seem no reason why a limitation on the former should affect the latter. See *Republic of France* v. *Belships Co.,* 91 F. Supp. 912, 913. And the provisions for the taking of testimony in open court found in General Admiralty

The Court's holding stops up one of the most plentiful sources of reform and revision of the General Admiralty Rules; a source very relevant to revision of the discovery rules. In developing the Civil Discovery Rules, there was a great body of state court experience with dis-

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Rule 46 comes with an entirely different history from that of the statutory provision applicable at law. The first statutory provision on the subject, § 30 of the First Judiciary Act of 1789, c. 20, 1 Stat. 88, applied to all actions, admiralty, law and equity alike; but in the revision of 1874, the provision was restricted to actions at law, R. S. § 861, and admiralty and equity proofs were left to this Court's rules. R. S. § 862. This may, in fact, have been the state of the law even before the 1874 revision. The note to R. S. § 862 derives the provision entirely from § 6 of the Act of August 23, 1842, c. 188, 5 Stat. 518, which was the first Admiralty Rules Enabling Act. The 1842 Act contained no explicit repealer of the application in admiralty of § 30 of the First Judiciary Act, but evidently at the time of the revision the view was taken that the rulemaking authority (which in its 1842 form, as opposed to its form in the revision, R. S. §§ 862, 917, was not made expressly subject to pre-existing statutes) had superseded in admiralty the requirement of § 30 of the First Judiciary Act.

This Court's General Admiralty Rules of 1844, which subject to individual amendments remained in effect till the revision of 1921, never contained any provision comparable to R. S. § 861, or to the present General Admiralty Rule 46. (See Hughes, Admiralty (2d ed. 1920), p. 511 *et seq.*, for the form of the 1844 Rules as they stood immediately before the 1921 revision.) General Rule 46 was introduced in the 1921 General Admiralty Rules revision; but side-by-side with it were promulgated two rules, General Admiralty Rules 31 and 32, 254 U. S., at 692–693, which touched on the subject of discovery; and when the extensive 1939 discovery supplements to the rules were promulgated, it was not thought necessary to make any alteration in General Admiralty Rule 46. Accordingly, since discovery rules have stood side-by-side with Rule 46, without explicit exception or cross-reference in it, it should not be treated as carrying the same gloss as R. S. § 861 was held to have, particularly since the interpretation of such a provision as inhibiting discovery rather than simply regulating the introduction of proof at trial is a very strained one.

covery depositions on which to draw, and Civil Rule 26's formulators drew upon it. See 4 Moore, Federal Practice (2d ed.), ¶ 26.01. If there is consideration whether Civil Rule 26, or a comparable provision, should be promulgated as a General Admiralty Rule, the question will occur whether the discovery deposition procedure is suitable to the particular problems of the admiralty court. State court and Federal Civil Rules experience may arguably not be of great value here. For example, there has been opposition to a general rule making the Civil Rules applicable in admiralty to cases unprovided for in the other Admiralty Rules by those who argue that the problems of admiralty are so unique that the Civil Rules will fit badly. See Report of the Standing Committee on Admiralty and Maritime Law, American Bar Association, in 76 Ann. Rep. A. B. A. (1951), pp. 182–183. It would appear difficult either to evaluate the correctness of this attitude, or to investigate which civil rules would work well in admiralty, without some District Court experience in applying them. If it is being held that, every time this Court's General Admiralty Rules deal with a general subject, all parts of the subject, though untouched by the General Rules, become insulated from further rulemaking by the District Courts, the most fruitful source, and perhaps the only valid source, of experience as to further revision of the General Admiralty Rules would be choked off—the experience of the various District Courts under their local admiralty rules. We should be loath to draw any negative inference from our rules that would produce such a result.

We are not apprised how broad the principle of implicit preclusion the Court today establishes may be. It would be pure speculation to attempt to enumerate the local rules which might be struck down on the basis of it because they deal with an important subject matter and there are General Rules which move in the same area as they

do. The result is a cloud of uncertain proportions on the local rules.

Obviously the Court is greatly influenced by the fact that any local admiralty oral deposition rule must to some extent be a piecemeal effort, because even if discovery can be provided for by local deposition rule, the local rule cannot change the provisions of the *de bene esse* act regulating admissibility into evidence. So *Mercado* v. *United States*, 184 F. 2d 24, holds, and there is no gainsaying its correctness.[13] Thus the District Courts themselves cannot give the whole subject of depositions the integrated treatment that the Civil Rules give it, or that an admiralty deposition rule from this Court, with its post-1948 power to supersede statutes, could give it. There is force to this point, but its force is not against the validity of the local rule. I do not see how it affects the power of the District Courts, under General Admiralty Rule 44, to deal with the matter as far as they can. It may have considerable force in indicating that this Court, and those who advise it in this regard,[14] should be more careful to examine whether a general rule should be promulgated. But the question here is one of the District Court's power, and to me that seems unimpaired, so long as it is confined to the use of the deposition for discovery.[15]

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[13] Cf. notes 5 and 6, *supra*.

[14] The Judicial Conference has responsibilities in this area, as has been developed, see 28 U. S. C. § 331; *United States* v. *Isthmian S. S. Co.*, 359 U. S. 314, 323–324; and an Advisory Committee to this Court on the General Admiralty Rules has recently been formed.

[15] The local rule in question here, with an exception for use as impeachment or contradiction of the deponent when he has testified, makes admissibility in evidence depend generally upon the fulfillment of the conditions specified in R. S. § 865. It does not provide for admissibility in the circumstances set forth in Civil Rule 26 (d)(3), items 4 and 5, which present occasions for admission not having counterparts in the *de bene esse* act.

However well-motivated may be the basis on which the Court today strikes down this rule and the many, many local rules like it, I cannot conclude that its action has any basis in law. It may well be desirable that this Court promulgate a General Rule in the premises, and certainly, informed with this Court's power to supersede statutes, such a rule might provide a better approach to the problem than the local rules can provide. And the area may be one that particularly lends itself to uniform regulation. But if that is so, the answer is for this Court to promulgate such a rule, not to strike down local rules which, within their territorial and statutory limitations, provide some sort of solution for the problem in the interim. This Court has granted local rulemaking power to the District Courts through General Admiralty Rule 44 and Civil Rule 83; and I submit we should not seek to escape the plain consequences of such a grant of power whenever we believe that it has been exercised in an area where we think we could do better. When we do act on admiralty discovery depositions through a General Rule, the local rules will be superseded; and that will be time enough.

The Court's action nullifies these many local admiralty discovery-deposition rules, and casts an uncertain cloud over other local admiralty and civil rules. It creates an unfortunate hiatus in the development of discovery in admiralty by postponing the further collection of practical experience on the matter until a General Rule can be produced. I can see no legal reason why the exercise of the District Court's rulemaking powers should not be permitted to go forward, and accordingly I dissent from the judgment affirming the Court of Appeals' issuance of the extraordinary writs.

SCHILLING *v.* ROGERS, ATTORNEY GENERAL.

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

No. 319. Argued February 29–March 1, 1960.—
Decided June 20, 1960.

Petitioner, an alien, brought this action in a Federal District Court to obtain judicial review of an administrative determination by the Director, Office of Alien Property, sanctioned by the Attorney General, that petitioner was not eligible under § 32 (a) (2) (D) of the Trading with the Enemy Act, as amended, for the return of property vested by the Alien Property Custodian in which petitioner claimed to have an interest. *Held:* Judicial review of that administrative determination was precluded by § 7 (c) of the Trading with the Enemy Act, which provides that, "The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter . . . transferred . . . to the Alien Property Custodian . . . shall be that provided by the terms of this Act," since that Act cannot be construed to provide a judicial remedy for a person such as petitioner. Pp. 667–677.

(a) Section 10 of the Administrative Procedure Act does not entitle petitioner to judicial review of this administrative determination, both because the matter involved is "committed to agency discretion" by § 32 (a) of the Trading with the Enemy Act and because judicial review is precluded by § 7 (c) of that Act. Pp. 670–676.

(b) A different conclusion is not required on the theory that, by moving to dismiss petitioner's action, respondent admitted petitioner's allegation that the administrative action was arbitrary and capricious. Pp. 676–677.

(c) The Declaratory Judgment Act does not entitle petitioner to judicial review, because relief thereunder is precluded by § 7 (c) of the Trading with the Enemy Act. P. 677.

106 U. S. App. D. C. 8, 268 F. 2d 584, affirmed.

Henry I. Fillman argued the cause for petitioner. With him on the brief were *Otto C. Sommerich* and *Isadore G. Alk.*

Assistant Attorney General Kramer argued the cause for respondent. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Townsend, Irving Jaffe, George B. Searls* and *Victor R. Taylor.*

MR. JUSTICE HARLAN delivered the opinion of the Court.

Section 32 (a) of the Trading with the Enemy Act (added by 60 Stat. 50, as amended, 50 U. S. C. App. § 32 (a)) authorizes the return in certain circumstances of property vested by the United States during World War II. Under that provision:

> "The President, or such officer or agency as he may designate, may return any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the net proceeds thereof, whenever the President or such officer or agency shall determine . . ."

that the following conditions are met: (1) the claimant was the owner of the property in question prior to its vesting, or is the legal representative or successor in interest of the owner;[1] (2) he was not a member of any of several excluded classes, summarized in the margin;[2] (3) the

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[1] § 32 (a) (1): "That the person who has filed a notice of claim for return, in such form as the President or such officer or agency may prescribe, was the owner of such property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian, or is the legal representative (whether or not appointed by a court in the United States), or successor in interest by inheritance, devise, bequest, or operation of law, of such owner . . . ."

[2] § 32 (a) (2) disqualifies: (A) the Governments of Germany, Japan, Bulgaria, Hungary, and Rumania; (B) corporations or associations organized under the laws of such nations; (C) persons voluntarily resident since Dec. 7, 1941, in any such nation, other than American citizens, certain diplomatic officers, or certain persecuted persons; (D) citizens of such nations, other than certain persecuted

property was not used pursuant to a "cloaking" arrangement, whereby the interest of an ineligible person in the property was concealed; [3] (4) there is no danger of liability in respect of the property attaching to the Custodian under the renegotiation statutes; [4] and (5) "such return is in the interest of the United States." [5]

The particular provision involved in this case is paragraph 2 (D) of § 32 (a), which makes ineligible citizens of certain enemy countries who were present in those countries after the onset of hostilities, and its first proviso (added by 60 Stat. 930), which exempts from that ineligibility certain persons who were the victims of persecution.[6]

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persons, who were present or engaged in business there between Dec. 7, 1941, and Mar. 8, 1946; and (E) certain foreign corporations or associations which, after Dec. 7, 1941, were controlled by persons falling within the above categories.

[3] § 32 (a)(3): "that the property or interest claimed, or the net proceeds of which are claimed, was not at any time after September 1, 1939, held or used, by or with the assent of the person who was the owner thereof immediately prior to vesting in or transfer to the Alien Property Custodian, pursuant to any arrangement to conceal any property or interest within the United States of any person ineligible to receive a return under subsection (a)(2) of this section . . . ."

[4] § 32 (a)(4): "that the Alien Property Custodian has no actual or potential liability under the Renegotiation Act or the Act of October 31, 1942 (56 Stat. 1013; 35 U. S. C. §§ 89–96), in respect of the property or interest or proceeds to be returned and that the claimant and his predecessor in interest, if any, have no actual or potential liability of any kind under the Renegotiation Act or the said Act of October 31, 1942; or in the alternative that the claimant has provided security or undertakings adequate to assure satisfaction of all such liabilities or that property or interest or proceeds to be retained by the Alien Property Custodian are adequate therefor . . . ."

[5] § 32 (a)(5).

[6] § 32 (a)(2)(D) disqualifies: "an individual who was at any time after December 7, 1941, a citizen or subject of Germany, Japan, Bulgaria, Hungary, or Rumania, and who on or after December 7, 1941, and prior to the date of the enactment of this section, was pres-

The question for decision is whether the District Court had jurisdiction to review a determination of the Director, Office of Alien Property, sanctioned by the respondent Attorney General, holding this proviso inapplicable to the facts presented by the petitioner's claim.[7]

Petitioner, a national and resident of Germany at all material times, duly filed with the Attorney General a claim under the § 32 (a)(2)(D) proviso for the return of the proceeds of certain property vested by the respondent's predecessors in 1942, 1947, and 1948, asserting an interest therein of some $68,500. He alleged that throughout the relevant period he, as an "anti-Nazi," claimed to have been a discriminated-against political group, had been deprived of full rights of German citizenship, in that he had been denied admission to the practice of law. A Hearing Examiner recommended allowance of the claim, but his recommendation was rejected by the Director on the ground that petitioner was ineligible for relief under the § 32 (a)(2)(D) proviso.[8] The Attorney General

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ent (other than in the service of the United States) in the territory of such nation or in any territory occupied by the military or naval forces thereof or engaged in any business in any such territory: *Provided*, That notwithstanding the provisions of this subdivision return may be made to an individual who, as a consequence of any law, decree, or regulation of the nation of which he was then a citizen or subject, discriminating against political, racial, or religious groups, has at no time between December 7, 1941, and the time when such law, decree, or regulation was abrogated, enjoyed full rights of citizenship under the law of such nation . . . ."

[7] On May 16, 1946, the President delegated his functions under § 32 (a) to the Alien Property Custodian. Exec. Order No. 9725, 11 Fed. Reg. 5381. On Oct. 15, 1946, the functions of the Custodian were transferred to the Attorney General. Exec. Order No. 9788, 11 Fed. Reg. 11981.

[8] The Director stated the essence of his decision as follows: "Even if it were to be assumed that denial of a license to practice law deprived claimant of full rights of citizenship, his claim must be disallowed for the reason that he was not a member of a political,

refused review. Petitioner then sued in the District Court to review the administrative determination, claiming it to have been arbitrary and illegal. The court denied the Government's motion to dismiss the complaint for want of jurisdiction. The Court of Appeals reversed, holding, in line with its own prior course of decisions, that judicial review of the administrative disposition was precluded by § 7 (c) of the Trading with the Enemy Act. 106 U. S. App. D. C. 8, 268 F. 2d 584. Because of the importance of the question in the proper administration of the Trading with the Enemy Act we brought the case here. 361 U. S. 874. For reasons given hereafter we affirm the judgment below.

Petitioner's principal reliance is upon § 10 of the Administrative Procedure Act which provides for judicial review of agency action "[e]xcept so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion." 60 Stat. 243, 5 U. S. C. § 1009. We find that both such limitations are applicable here.

Section 7 (c) of the Act provides:

> "The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter . . . transferred . . . to the Alien Property Custodian . . . shall be that provided by the terms of this Act . . . ." 40 Stat. 1021.

We perceive no basis for petitioner's contention that § 7 (c) limits only the remedies available to nonenemies under § 9 (a), or for construing § 7 (c), passed in 1918, as not being applicable to § 32, passed in 1946. The language of the section is "all-inclusive," *Becker Steel Co.* v. *Cummings,* 296 U. S. 74, 79, and it speaks to the future

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racial or religious group that was discriminated against. Anti-Nazis and non-Nazis do not constitute a political group." (Citing past administrative decisions.)

as well as the past. See also *Central Union Trust Co.* v. *Garvan,* 254 U. S. 554, 568.

The only express provision in the Trading with the Enemy Act for recourse to the courts by those claiming the return of property vested during World War II is that contained in § 9 (a). That section, however, is applicable only to persons not enemies or allies of enemies as defined in the relevant statutes, and hence is not available to this petitioner, an enemy national.[9] While § 9 (c) also entitles certain classes of "enemies" enumerated in § 9 (b) similarly to sue in the courts to recover vested property whose return is authorized under § 9 (b), those sections apply only to World War I vestings. See *Feyerabend* v. *McGrath,* 89 U. S. App. D. C. 33, 189 F. 2d 694; cf. *Markham* v. *Cabell,* 326 U. S. 404. Although § 32 (a) broadened the categories of those having an enemy status who were eligible for the return of property vested during World War II, unlike § 9 (c) it contains no express provision for judicial relief in respect of such claims.

The question then is whether a right to such relief can fairly be implied, for we shall assume that if such be the case the requirements of § 7 (c) would be satisfied. The terms of § 32 and its legislative history speak strongly against any such implication. The absence in § 32 of any provision for judicial relief respecting "enemy" claims for the return of property vested during World War II stands in sharp contrast to the presence of such a provision in

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[9] Section 9 (a) authorizes "[a]ny person not an enemy or ally of enemy" (defined in § 2 of the Act, as supplemented by the First War Powers Act, 1941, 55 Stat. 838) to sue in equity for the return of vested property in which he claims an interest, either in the District Court for the District of Columbia or in the District Court of the district in which the claimant resides. 40 Stat. 419, as amended, 50 U. S. C. App. § 9 (a). As a German national and resident, petitioner is concededly an "enemy" under the statute.

§ 9 (c) with respect to certain enemy claims arising out of World War I vestings. The original version of what ultimately became § 32 did contain a provision for judicial relief comparable to that in § 9 (c), not applicable, however, to property of enemy national-residents, as well as a "sole relief and remedy" provision comparable to that in § 7 (c)—H. R. 4840, § 32 (b), (c), in Hearings before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives on H. R. 4840, 78th Cong., 2d Sess., pp. 1–2—but the subsequent draft of the bill, substantially in the form as finally enacted in March 1946 (60 Stat. 50), omitted both provisions. See H. R. 3750, in Hearings before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, on H. R. 3750, 79th Cong., 1st Sess., pp. 1–2. While the legislative record contains no explanation of these omissions, the committee hearings on H. R. 3750 and those on subsequent amendments to the Act preclude the view that it was contemplated that persons having an enemy status, still less those who were nationals and residents of enemy countries, should have the right of recourse to the courts with respect to administrative denials of return claims.

Speaking to H. R. 3750 at the initial committee hearing, Mr. Markham, then Alien Property Custodian, stated:

> "I want to be sure I make this clear. Supposing a person applies to the Custodian for the return of a property, and for reasons that I deem appropriate under the bill I refuse to return the property. Now, we will say this person would have to be a technical enemy, a Frenchman. He has no right to compel me to return it under this bill." Hearings before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, on H. R. 3750, 79th Cong., 1st Sess., p. 14; see also pp. 11, 15.

And when a few months later, in August 1946, various amendments to the statute were considered and the § 32 (a)(2)(D) proviso was added (60 Stat. 930), § 32 came under severe criticism because of the absence of provisions for judicial relief in respect of return claims by technical enemies. See Hearings before a Subcommittee of the Senate Committee on the Judiciary, on S. 2378 and S. 2039, 79th Cong., 2d Sess., pp. 57–59, 61, 62–63. The affording of such relief to enemy nationals was, however, at no time suggested. Congress, nevertheless, permitted § 32 to stand without enacting provisions for such judicial relief,[10] and later proposed legislation of that character also failed of enactment. See S. 2544, 82d Cong., 2d Sess.; S. 34, 83d Cong., 1st Sess.[11]

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[10] At the same time, however, Congress enacted other provisions relating to judicial remedies, § 33 providing a statute of limitations on the commencement of suits under § 9, and § 34 providing for judicial review of administrative determinations on debt claims allowable out of vested property (60 Stat. 925). In connection with the former section there was spread in the Congressional Record, with the approval of the Chairman and Ranking Member of the House Judiciary Committee, a letter from the Custodian stating his understanding that "this amendment is not to be regarded as implying that there is judicial review under section 32." 92 Cong. Rec. 10486. Similarly, in connection with the enactment of § 32, a few months before, Congress had added to the Act § 20 providing for judicial review of administrative allowances of counsel fees in return proceedings before the Custodian, 60 Stat. 54. See also S. Rep. No. 920, 79th Cong., 2d Sess., p. 7.

[11] More particularly with reference to the § 32 (a)(2)(D) proviso, neither the Committee hearings preceding its enactment, see Hearings before a Subcommittee of the Senate Committee on the Judiciary, on S. 2378 and S. 2039, 79th Cong., 2d Sess.; cf. Hearings before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, on H. R. 5089, 79th Cong., 2d Sess., nor later Senate or House Reports referring to the proviso—see S. Rep. No. 784, 81st Cong., 1st Sess.; H. R. Rep. No. 2338, 81st Cong., 2d Sess.; S. Rep. No. 600, 82d Cong., 1st Sess.; Final Report of the Subcommittee on

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The conclusion which the history of § 32 impels is confirmed by the text of the section and other provisions of the Act. The absence of any provision for recourse to the courts in connection with § 32 (a) return claims contrasts strongly with the care that Congress took to provide for and limit judicial remedies with respect to other aspects of the section and other provisions of the Act. See, *e. g.*, §§ 32 (d), 32 (e), 32 (f),[12] 33, 34 (e), 34 (f), 34 (i). It is not of moment that these provisions concerned direct judicial relief, and not court review of denials of administrative relief. The point is that in this Act Congress was advertent to the role of courts, and an absence in any specific area of any kind of provision for judicial participation strongly indicates a legislative purpose that there be no such participation. Beyond this, the permissive terms in which the § 32 return provisions are drawn (*ante*, p. 667) persuasively indicate that their administration was committed entirely to the discretionary judgment of the Executive branch "without the intervention of the courts." See *Work* v. *Rives*, 267 U. S. 175, 182.

Petitioner, however, relying on *McGrath* v. *Kristensen*, 340 U. S. 162, contends that even though he might not be entitled to judicial review of an adverse administrative determination on the *merits* of his claim, he is none-

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Administration of the Trading with the Enemy Act, Senate Committee on the Judiciary, pursuant to S. Res. 245, 82d Cong., 2d Sess., as amended by S. Res. 47, and S. Res. 120, 83d Cong., 1st Sess.— contain any suggestion that judicial review was contemplated in connection with such claims.

[12] This section, which requires the Custodian to publish in the Federal Register a 30-day notice of his intention to return vested property to claimants other than residents of the United States or domestic corporations, provides that publication of such notice "shall confer no right of action upon any person to compel the return of any such property," and further that any such notice may be revoked by the Custodian by appropriate publication in the Federal Register.

theless entitled to such review on the issue of his *eligibility* under the § 32 (a)(2)(D) proviso, the only issue here involved. The *Kristensen* case, involving eligibility for suspension of deportation under § 244 of the Immigration and Nationality Act (66 Stat. 214, 8 U. S. C. § 1254), bears little resemblance to the situation involved here. See *Heikkila* v. *Barber,* 345 U. S. 229, 233; *Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297, 301. The structure of § 32 (a) does not permit of any such distinction in this case. Compare H. R. 4840, 78th Cong., 2d Sess., § 32 (a). Indeed, it is not certain whether petitioner's theory of partial reviewability would apply only to the proviso with which he is concerned; to all of paragraph (2), but only to that paragraph; or to paragraphs (1), (3), and (4) as well (see pp. 667–668, and notes 1–4, *ante*). None of these alternatives is acceptable. As to the first and second, no reason appears why either of these categories should be singled out for special treatment, while the third would make reviewable determinations which involve factors with which only the Executive Branch can satisfactorily deal. See, *e. g.,* Hearings before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, on H. R. 3750, 79th Cong., 1st Sess., p. 4 (proof of pre-vesting ownership); Hearings before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, on H. R. 5089, 79th Cong., 2d Sess., p. 37 (proof of "cloaking" arrangements). Beyond that, we think the congressional decision to spell out in some detail certain limitations on the power it was conferring on the Executive was not designed to bestow rights on claimants, arising out of an assertedly too-narrow reading by the Executive of the discretionary power given him. Rather we consider the specifications of paragraphs (1) through (4) as designed to provide guides for the Executive, thereby lessening the administrative burden of decision. See Hearings before a

Subcommittee of the Senate Committee on the Judiciary, on S. 2378 and S. 2039, 79th Cong., 2d Sess., p. 19.

We conclude that the Trading with the Enemy Act excludes a judicial remedy in this instance, and that because of this, as well as because of the discretionary character of the administrative action involved, the Administrative Procedure Act, by its own terms (*ante,* p. 670), is unavailing to the petitioner.[13]

Petitioner's other contentions may be dealt with shortly. It is urged that judicial review is in any event available because the complaint, whose allegations as the case comes here must be taken as true, alleges that the administrative action was arbitrary and capricious. However, such conclusory allegations may not be read in isolation from the complaint's factual allegations and the considerations set forth in the administrative decision upon which denial of this claim was based. See *Reagan* v. *Farmers' Loan & Trust Co.,* 154 U. S. 362, 401. So read, it appears that the complaint should properly be taken as charging no more than that the administrative action was erroneous. This is not a case in which it is charged either that an administrative official has refused or failed to exercise a statutory discretion, or that he has

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[13] The fact that in a third-party suit affecting returned property, the courts must, in accordance with § 32 (e), determine, if relevant, the claimant's eligibility under the § 32 (a) (2) (D) proviso, does not militate against this conclusion. First, it is far from clear that in such circumstances the doctrine of primary jurisdiction would not call for a referral of that issue to the Attorney General. Cf. *United States Navigation Co.* v. *Cunard S. S. Co.,* 284 U. S. 474; *Far East Conference* v. *United States,* 342 U. S. 570; *Maritime Board* v. *Isbrandtsen,* 356 U. S. 481, 496–498. Moreover, even if necessity compelled judicial determination in suits between private parties of the issue ordinarily disposed of under § 32 (a), we would not be justified, in the context of the other provisions of this statute, in inferring from that a congressional willingness to have Executive determinations reviewed in court.

acted beyond the scope of his powers, where the availability of judicial review would be attended by quite different considerations than those controlling here. Cf., *e. g., Accardi* v. *Shaughnessy,* 347 U. S. 260; *Leedom* v. *Kyne,* 358 U. S. 184.

Finally, petitioner's reliance on the Declaratory Judgment Act carries him no further. Section 7 (c) of the Trading with the Enemy Act embraces that form of judicial relief as well as others. Additionally, the Declaratory Judgment Act is not an independent source of federal jurisdiction, *Skelly Oil Co.* v. *Phillips Petroleum Co.,* 339 U. S. 667, 671; the availability of such relief presupposes the existence of a judicially remediable right. No such right exists here.

We conclude that the Court of Appeals correctly held that the District Court lacked jurisdiction over this action, and that its judgment must be

Affirmed.

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

This Court has gone far towards establishing the proposition that preclusion of judicial review of administrative action adjudicating private rights is not lightly to be inferred. See *Leedom* v. *Kyne,* 358 U. S. 184; *Harmon* v. *Brucker,* 355 U. S. 579; *Stark* v. *Wickard,* 321 U. S. 288; *American School of Magnetic Healing* v. *McAnnulty,* 187 U. S. 94. Generalizations are dangerous, but with some safety one can say that judicial review of such administrative action is the rule, and nonreviewability an exception which must be demonstrated.[1] To be sure, a clear command of the statute will preclude review; and such a command of the statute may be inferred from its pur-

[1] See Jaffe, The Right to Judicial Review, 71 Harv. L. Rev. 401, 432.

pose, though *Leedom* v. *Kyne, supra,* where I thought nonreviewability proved from the congressional purpose, shows that the Court is far from quick to draw such a conclusion. I cannot agree that the statute here gives any clear direction that this administrative determination that as a matter of law petitioner was ineligible for the exercise of discretionary relief under § 32 (a) should not be reviewable by the courts. Questions as to the scope of that review, of course, are not now before us; simply whether the power exists at all.

Section 7 (c) of the Act states that the Act's remedies shall be "[t]he sole relief and remedy" of claimants of vested property, and, to be sure, this language is "all-inclusive," *Becker Steel Co.* v. *Cummings,* 296 U. S. 74, 79. Let us, then, take a close and fully-focused look at what those remedies include, and compare them with what petitioner seeks.

Section 9 (a) of the Act, under which petitioner of course makes no claim, provides a judicial remedy for those who are not enemies and not allies of enemies; they may sue in equity for the return of their property.[2] Sec-

[2] In pertinent part, § 9 (a) provides:

"(a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall deter-

tion 9 (c) gives the same remedy to certain classes of enemies.[3] But it is apparent from both these provisions that they contemplate an independent judicial remedy—a suit to return property; not an action to review certain determinations of administrative officers. There is not even a provision that application must be made for admin-

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mine said claimant is entitled: *Provided,* That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the United States District Court for the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. . . ." 40 Stat. 419, as amended, 50 U. S. C. App. § 9 (a).

[3] Section 9 (c) provides:

"(c) Any person whose money or other property the President is authorized to return under the provisions of subsection (b) hereof may file notice of claim for the return of such money or other property, as provided in subsection (a) hereof, and thereafter may make application to the President for allowance of such claim and/or may institute suit in equity to recover such money or other property, as provided in said subsection, and with like effect. The President or the court, as the case may be, may make the same determinations with respect to citizenship and other relevant facts that the President is authorized to make under the provisions of subsection (b) hereof." As added, 41 Stat. 980, as amended, 50 U. S. C. App. § 9 (c).

The relevant classes of enemies are set forth in § 9 (b). Petitioner makes no claim under § 9 (c).

istrative relief before suit is brought. There simply is a requirement for the filing of a notice of claim, which the statute clearly distinguishes from making an application for an administrative return, the latter being optional. *Draeger Shipping Co.* v. *Crowley,* 49 F. Supp. 215; *Duisberg* v. *Crowley,* 54 F. Supp. 365. See *Stoehr* v. *Wallace,* 255 U. S. 239, 246. Even where the applicant chooses to seek an administrative return, suit may be instituted before the administrative action is completed. The administrative remedy and the judicial remedy are each completely independent of the other; Congress has made this clear even to the extent of putting an "and/or" on the statute books. In no sense, then, can the independent judicial remedy of § 9 be said to be a judicial review of administrative action. It is independent of any administrative action's being taken. It requires the courts to make a plenary, *de novo* adjudication of all the controverted issues as they would in any lawsuit between citizens.

Section 32 (a), under which petitioner has applied for relief, on the other hand provides simply for an administrative remedy. That it does, of course, under § 7 (c) precludes the inference of any independent judicial remedy such as § 9 provides. But there is no reason why it should preclude the inference that administrative action taken under it should be subject to judicial review. The courts have developed many principles defining and limiting the quantum of judicial review that may be afforded administrative adjudication. This generally narrow character of judicial review, in contrast to an independent lawsuit directed at the same end as an administrative adjudication, points up the distinction between the independent action under § 9 and what is contended for here. In the latter, the courts cannot order the return of the property. They simply may say that the administrator cannot stand on the ground he gave for not returning it.

See *Greene* v. *McElroy*, 360 U. S. 474, 510 (concurring opinion). The former is clearly precluded, but the latter hardly is. The approach to interpretation that cases like *Kyne, Harmon* and *Stark* symbolize should indicate that judicial review of the administrative action under § 32 (a) is available. Section 7 (c) is by no means offended by this since this construction recognizes that the sole remedy under § 32 (a) is administrative in nature, but attaches to that administrative remedy the general attribute of administrative remedies in our system—judicial review.

The Court points to the legislative history of § 32 (a) as indicating a contrary conclusion. It says that a judicial remedy was originally provided for in early versions of the bill which added § 32 (a) to the statute, but that the final enactment omitted it. This would be very relevant if what had been originally contained in the bill had been a provision for judicial review of action taken under § 32 (a), such as what petitioner now contends is implicit. But it was not; it was rather a provision for an independent judicial remedy, patterned entirely in the style of § 9.[4]

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[4] In fact, the independent judicial remedy was not even put *in pari materia* with the administrative remedy under § 32 (a). It simply provided:

"After filing a claim with the Alien Property Custodian pursuant to subsection (a) hereof, a claimant may institute a suit in equity in the United States District Court for the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Custodian shall be made a party defendant), to establish that he is not a foreign country or national thereof as defined pursuant to subsection (b) of section 5 hereof, and to establish the interest, right, or title claimed. The claimant shall obtain a judgment or decree ordering the return to him of the interest, right, or title to which the court shall determine he is entitled, but only if the court shall adjudicate that he is not a foreign country or national thereof . . . ." § 32 (b), H. R. 4840, in Hearing before Subcommittee No. 1, Committee on the Judiciary, House of Representatives, on H. R. 4840, 78th Cong., 2d Sess., pp. 1–2.

That it was omitted of course adds another proof that there can be no independent judicial action to get a return under § 32 (a); but it does not tell us that normal judicial review into administrative action under § 32 (a) is to be foreclosed. Mr. Markham's remarks, quoted by the Court, are of course explicable on the ground that there was no counterpart of § 9's provision for an independent lawsuit in § 32 (a). In fact, they were spoken in response to a question whether "the individual whose property has been taken or affected can appeal to the courts of the land to have his equity determined." Hearing before Subcommittee No. 1, Committee on the Judiciary, House of Representatives, on H. R. 3750, 79th Cong., 1st Sess., p. 13. The question is a good description of the functions of courts under § 9. It does not describe the functions of courts exercising a review function of administrative action under § 32 (a). The subsequent legislation which the Court mentions as having failed of passage, S. 2544, 82d Cong., 2d Sess.; S. 34, 83d Cong., 1st Sess., was not legislation to provide judicial review, but to afford an independent judicial remedy similar to § 9.[5] Thus it is apparent that the alternative that was presented to Congress and rejected clearly enough was not ordinary judicial review of determinations under § 32 (a), but independent judicial action of a sort comparable to § 9's.

The Court does not demonstrate any policy on which Congress may have been acting and from which it might be inferred that judicial review was impliedly precluded under § 32. Congress clearly precluded independent law-

[5] This legislation seems to have contemplated a judicial remedy much broader than that of the early provisions before the addition of § 32, see note 4, *supra*. The bills covered "[a]ny person eligible for a return under this section" (§ 32) and provided that such a person, after filing a notice of claim, might "institute a suit in equity to recover such money or other property in the manner provided by subsection 9 (a) hereof and with like effect."

suits, but there is no demonstration that it acted in pursuance of any purpose which would be broad enough impliedly to negate judicial review of administrative action as well. So there is no reason why the general principle should not apply: "Generally, judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers." *Harmon* v. *Brucker, supra,* at 581–582.

There is then clearly established jurisdiction to review under the general principles which find expression in § 10 of the Administrative Procedure Act; the statute does not "preclude judicial review." 60 Stat. 243, 5 U. S. C. § 1009. But the Court also holds that, within the meaning of § 10, "agency action is by law committed to agency discretion." Since want of jurisdiction in the District Court is found, I take it the Court holds that the question, review of which is now sought, which is an issue of statutory construction, is totally and exclusively for the administrative officers to determine—not simply that the courts are to give their determination of this question of law considerable weight. Cf. *Labor Board* v. *Hearst Publications, Inc.,* 322 U. S. 111, 130; *Gray* v. *Powell,* 314 U. S. 402, 411. Once it is established that the statute does not preclude judicial review, this conclusion seems to me untenable. The issue is a question of law; the construction of a detailed and moderately specified standard. It is not like the ultimate determination that the return be "in the interest of the United States," § 32 (a)(5), which is clearly where the ultimate reservoir of discretion lies under § 32 (a). This determination was never reached. We need not speculate about the breadth of judicial inquiry in judicial review where the administrative decision not to return the property is based on that ground, or is based on one of the other grounds under the statute. The quantum of review can be adjusted to the problem before the courts. Here the determination not

to return was based on a holding that petitioner did not come within the first proviso to § 32 (a)(2)(D). The proviso's terms were viewed administratively not as guides to an administrative discretion but as legal standards. Under commonplace principles, the determination must stand or fall on that basis. It may be that the novelty of the standards of that proviso (see Subcommittee Hearings, Senate Committee on the Judiciary, on S. 2378 and S. 2039, 79th Cong., 2d Sess., p. 19) should teach the courts to give considerable weight to the administrative construction of the law. But that is not to say, as the Court does, that it is so much a matter of administrative discretion as to preclude judicial review.[6] To my mind, *McGrath* v. *Kristensen,* 340 U. S. 162, is squarely in point. There there was a statute which bristled with discretion as much as this one. But where the administrative decision under it was not rendered on the basis for the exercise of discretion the statute provided, but as a matter of law, judicial review was available. We retreat from established principles of administrative law when we say it is unavailable here. The judgment of the Court of Appeals should be reversed, and the order of the District Court declining to dismiss the complaint for want of jurisdiction should be affirmed.

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[6] One of the grounds on which the administrative officials may decline return under § 32 (a) is that the claimant was not the owner of the property at the time it was vested, or the successor thereof. § 32 (a)(1). Is this simply to be deemed a guide to the administrative discretion in granting returns, or a legal standard?

UNITED STATES *v.* AMERICAN-FOREIGN STEAMSHIP CORP. ET AL.

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

No. 138. Argued April 25, 1960.—Decided June 20, 1960.

A circuit judge who has retired under 28 U. S. C. § 371 (b) is not eligible to participate in the decision of a case on rehearing *en banc* under 28 U. S. C. § 46 (c), which provides that such a proceeding shall be "heard and determined" by a court consisting of all "active circuit judges" of the circuit. Pp. 685–691.

265 F. 2d 136, judgment vacated and cause remanded.

Philip Elman argued the cause for the United States. With him on the briefs were *Solicitor General Rankin, Assistant Attorney General Doub, Alan S. Rosenthal* and *Herbert E. Morris.*

Arthur M. Becker and *J. Franklin Fort* argued the cause for respondents. With them on the briefs were *Gerald B. Greenwald, William S. Stern, John Cunningham* and *Israel Convisser.*

MR. JUSTICE STEWART delivered the opinion of the Court.

The question to be decided here is a narrow one. The Judicial Code provides that in the United States Courts of Appeals "[c]ases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service." It further provides that "[a] court in banc shall consist of all active circuit judges of the circuit." 28 U. S. C. § 46 (c). The sole issue presented is whether a circuit judge who has retired is eligible under this statute to participate in the decision

of a case on rehearing *en banc*. We have concluded that he is not.

This litigation arose when the respondents, who had chartered ships from the Government under the Merchant Ship Sales Act, 50 U. S. C. App. §§ 1735 *et seq.*, sued the Government in the District Court for the Southern District of New York to recover amounts of allegedly excessive charter hire which had been assessed by the Maritime Commission. The Government moved to dismiss the libels on the ground that the claims were barred by the two-year limitation period prescribed by the Suits in Admiralty Act, 46 U. S. C. § 745. The libels were dismissed in the District Court on the authority of the Second Circuit decisions in *Sword Line, Inc.*, v. *United States*, 228 F. 2d 344, 230 F. 2d 75, aff'd as to admiralty jurisdiction, 351 U. S. 976, and *American Eastern Corp.* v. *United States*, 231 F. 2d 664.[1]

The District Court's decisions were thereafter affirmed by the United States Court of Appeals for the Second Circuit. That court, consisting of Circuit Judges Medina and Hincks and retired District Judge Leibell, held that the issues were controlled by the earlier *Sword Line* and *American Eastern* decisions. The court's opinion stated, however, that "[i]f the subject-matter of these appeals were *res nova*, we are by no means sure that our dispositions would coincide with those made by the majority opinion in Sword Line and by American Eastern. However, we will not overrule these recent decisions of other panels of the court." 265 F. 2d 136, 142.

Thereafter, on December 19, 1957, the Court of Appeals granted the libellants' petition for rehearing *en banc* and ordered that argument thereon be confined to written briefs to be submitted within twenty days. On March 1, 1958, Judge Medina retired pursuant to the provisions of

[1] 141 F. Supp. 58. Two of the libels were dismissed upon the same ground by another district judge in an opinion which is unreported.

28 U. S. C. § 371 (b).[2] Almost five months later, on July 28, 1958, the court issued its *en banc* decision. Circuit Judges Hincks and Moore and retired Circuit Judge Medina joined an opinion ordering the earlier three-judge decision withdrawn and remanding the causes to the District Court, 265 F. 2d 136, 144. Judges Clark and Waterman dissented.[3] In his dissenting opinion Judge Clark expressed doubt as to a retired judge's eligibility to participate in an *en banc* decision. 265 F. 2d 136, 153.

The Government then filed a petition for further rehearing *en banc,* directed primarily to the question which had been raised by Judge Clark. The petition was denied in an opinion by Judge Hincks joined by Judges Moore and Medina, stating the view that "[s]ince Judge Medina was a member of the court *in banc* which was duly constituted to hear and determine the issues raised by the petition for rehearing, we think his subsequent retirement did not affect his competence to participate in the decision thereafter reached." 265 F. 2d 136, 154. Judges Clark and Waterman filed a separate statement in which they expressed the opinion that Judge Medina's participation in the *en banc* determination was precluded by the plain language of the controlling statute. 265 F. 2d 136, 155. Certiorari was granted to consider a question of importance to the Courts of Appeals in the administration of their judicial business. 361 U. S. 861.

As a preliminary to decision of the precise question before us it is important to make clear that this case in no way involves the eligibility of a retired judge to par-

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[2] "Any justice or judge of the United States appointed to hold office during good behavior may retain his office but retire from regular active service after attaining the age of seventy years and after serving at least ten years continuously or otherwise, or after attaining the age of sixty-five years and after serving at least fifteen years continuously or otherwise."

[3] Judge Lumbard did not participate because of a prior connection with the litigation as United States Attorney.

ticipate in the hearing, rehearing or determination of a case as a member of a conventional three-judge Court of Appeals. Such participation is governed by different statutory provisions. The Judicial Code explicitly provides that "judges designated or assigned" shall be "competent to sit as judges" of such a court. 28 U. S. C. § 43 (b). Other provisions of the Code spell out in detail the system under which designations and assignments of retired judges are to be made. 28 U. S. C. §§ 294, 295, 296.[4]

Moreover, there is not involved here any issue as to the procedure to be followed by a Court of Appeals in determining whether a hearing or rehearing *en banc* is to be ordered. In the *Western Pacific Railroad Case,* 345 U. S. 247, it was held that this question is largely to be left to intramural determination by each of the Courts of Appeals. "The court is left free to devise its own administrative machinery to provide the means whereby a majority may order such a hearing." 345 U. S., at 250.[5]

Here we are concerned only with the specific provision of the Judicial Code which ordains that *en banc* proceedings shall be "heard and *determined*" by a court consisting of all the "*active* circuit judges" of the circuit involved. The literal meaning of the words seems plain enough. An "active" judge is a judge who has not retired "from regular active service." 28 U. S. C. § 371 (b). A case or controversy is "determined" when it is decided.

There is nothing in the history of the legislation to indicate that these words should be understood to mean

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[4] In accord with this flexible statutory scheme, retired federal judges the country over have rendered devoted service in the trial and appellate courts of the United States, voluntarily and without economic incentive of any kind.

[5] An enlightening discussion by Judge Maris of the thorough administrative machinery worked out by the Court of Appeals for the Third Circuit appears in 14 F. R. D. 91.

anything else than what they say. As the Reviser's Note indicates, and as this Court pointed out in the *Western Pacific Railroad Case,* 345 U. S., at 250, 251, where the legislative history was fully reviewed, the statutory provision was added to the Judicial Code in 1948 simply as a "legislative ratification of *Textile Mills Securities Corp.* v. *Commissioner,* 314 U. S. 326 (1941)—a decision which went no further than to sustain the power of a Court of Appeals to order a hearing *en banc.*" [6]

The view that a retired circuit judge is eligible to participate in an *en banc* decision thus finds support neither in the language of the controlling statute nor in the circumstances of its enactment. Indeed, Congress may well have thought that it would frustrate a basic purpose of the legislation not to confine the power of *en banc* decision to the permanent active membership of a Court of Appeals. *En banc* courts are the exception, not the rule. They are convened only when extraordinary circumstances exist that call for authoritative consideration and decision by those charged with the administration and development of the law of the circuit.

When such circumstances appear, *en banc* determinations make "for more effective judicial administration. Conflicts within a circuit will be avoided. Finality of decision in the circuit courts of appeal will be promoted. Those considerations are especially important in view of the fact that in our federal judicial system these courts are the courts of last resort in the run of ordinary cases." *Textile Mills Corp.* v. *Commissioner,* 314 U. S., at 334–335. "The principal utility of determinations by the courts of appeals in banc is to enable the court to maintain its integrity as an institution by making it possible for a

[6] It is worth noting that the *Textile Mills* opinion itself carefully distinguished between circuit judges in active service and those who have retired. 314 U. S., at 327.

majority of its judges always to control and thereby to secure uniformity and continuity in its decisions, while enabling the court at the same time to follow the efficient and time-saving procedure of having panels of three judges hear and decide the vast majority of cases as to which no division exists within the court." Maris, Hearing and Rehearing Cases in Banc, 14 F. R. D. 91, at 96 (1954). As Judge Clark put it in the present case, the evident policy of the statute was to provide "that the active circuit judges shall determine the major doctrinal trends of the future for their court . . . ." 265 F. 2d, at 155.

Persuasive arguments could be advanced that an exception should be made to permit a retired circuit judge to participate in *en banc* determination of cases where, as here, he took part in the original three-judge hearing, or where, as here, he had not yet retired when the *en banc* hearing was originally ordered. Indeed, the Judicial Conference of the United States has approved suggested legislative changes that would provide such an exception, and a bill to amend the statute has been introduced in the Congress.[7] But this only serves to emphasize that if the

[7] At its Annual Meeting in September, 1959, the Judicial Conference of the United States received a joint report of its Committees on Court Administration and Revision of the Laws, stating their view that under the present law retired judges are not eligible to participate in *en banc* proceedings. "However, the Committees thought it proper to permit a retired circuit judge to be a member of the court of appeals sitting in banc in the rehearing of a case in which he has sat, by assignment, in the panel of the court which heard the case originally." The Conference agreed and approved a draft of a bill, presented by the Committees, which would add the following sentence to 28 U. S. C. § 46 (c): "A circuit judge of the circuit who has retired from regular active service shall also be competent to sit as a judge of the court in banc in the rehearing of a case or controversy if he sat in the court or division at the original hearing thereof." Annual Report of the Proceedings of the Judicial Conference of the United States (1959), pp. 9–10. A bill to effect this

statute is to be changed, it is for Congress, not for us, to change it.

We conclude for these reasons that under existing legislation a retired circuit judge is without power to participate in an *en banc* Court of Appeals determination, and accordingly that the judgment must be set aside. *American Construction Co.* v. *Jacksonville, T. & K. W. R. Co.*, 148 U. S. 372, 387; *Frad* v. *Kelly*, 302 U. S. 312, 316–319. In reaching this conclusion we intimate no view as to the merits of the underlying litigation. The judgment is vacated, and the case remanded for further proceedings consistent with this opinion.

Vacated and remanded.

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

I can find nothing in 28 U. S. C. § 46 (c) which requires the decision the Court has made, and nothing in the decision which commends itself to considerations of sound judicial administration. For convenience I again quote § 46 (c):

> "Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active circuit judges of the circuit."

The statute need hardly be read, as the Court now holds it should be, as saying that a case in an *en banc* court shall be "heard and determined" by the active circuit judges; still less does it say that a case is not "determined"

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change was introduced in the House of Representatives by Representative Celler on April 5, 1960, as H. R. 11567, 86th Cong., 2d Sess. 106 Cong. Rec. 6865.

until the decision of it is announced. The statute says no more than that ordinarily lawsuits before the Courts of Appeals are to be "heard and determined" before a panel of not more than three judges, but that a majority of the judges in active service may order that a case be set for "hearing or rehearing" before a court consisting of all the active circuit judges of the circuit sitting *en banc*.

The "heard and determined" clause on which the Court relies appears in a sentence whose purposes were simply to codify the doctrine that a Court of Appeals had power to sit *en banc, Textile Mills Corp.* v. *Commissioner,* 314 U. S. 326, while making clear that the usual procedure was to be decision by a three-judge panel.[1] It is not an unknown phenomenon in federal adjudication that a case, though heard by less than the entire tribunal, may be decided according to the majority vote of all. Cf. I. R. C., § 7460; see 2 Casey, Federal Tax Practice, 274–280. The traditional term, "heard and determined," in my view was designed to do no more than reflect the obvious inappropriateness of such a procedure to the deliberations of the Court of Appeals. There is no necessity for finding in that term, in light of the context in which it appears, any Congressional direction regarding the constitution of an *en banc* court.

The requirements governing the composition of an *en banc* court are found in the last sentence of § 46 (c). All it provides is that such a court shall not include retired

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[1] The Reviser's Note to § 46 shows this to be true. "This section preserves the interpretation established by the Textile Mills case but provides in subsection (c) that cases shall be heard by a court of not more than three judges unless the court has provided for hearing in banc. This provision continues the tradition of a three-judge appellate court and makes the decision of a division, the decision of the court, unless rehearing in banc is ordered. It makes judges available for other assignments, and permits a rotation of judges in such manner as to give to each a maximum of time for the preparation of opinions."

circuit judges. The reason for such a provision is not hard to discern. Congress would hardly have required a retired circuit judge to return to the bench to attend at an *en banc* hearing and, as between leaving the matter to the discretion of the individual judge and limiting the court to active judges, it is not surprising—in view of the varying degrees of judicial activity of the retired judges, and the administrative undesirability of having, for these purposes, a court of unpredictable size and complement—that Congress should have chosen the latter course.

The language and context, then, of § 46 (c) are given full effect by holding, as I would, that the statute requires no more than that the members of an *en banc* court be in active status at the time the case is argued or submitted. Such a construction, for a court which decided the *Textile Mills* case, *supra,* should not be difficult to reach. The issue there was whether the predecessor of § 46 (c), conferring appellate jurisdiction on circuit courts consisting of three judges, prevented adjudication by a circuit court composed of five judges, constituting all the active circuit judges of the particular circuit there involved. In holding that it did not, the Court, making a wise "sacrifice of literalness for common sense," 314 U. S., at 334, found no difficulty in rising above the arithmetic of the predecessor of § 46 (c) so as to achieve a sensible result. Still less should there be difficulty here in accommodating § 46 (c) to the needs of sound judicial administration. So construed, the statute was complied with here.[2]

[2] The order granting the respondents' petition for rehearing *en banc* required that the case be submitted on written briefs, to be filed by Jan. 8, 1958. Judge Medina retired on Mar. 1, 1958. The action of the Judicial Conference in 1959, to which the Court refers (*ante,* p. 690, note 7), does not of course bear upon the narrow issue before us. That action was broadly directed to permitting retired circuit judges to sit on *en banc* courts in instances where they had sat on the panel originally deciding the case. Indeed, the recommendation of the Judicial Conference goes far to dilute the force of the Court's

But even were I to accept the Court's premises—a reading into the *en banc* procedure of a requirement that only active judges may participate in the "determination" of such cases, and a view of § 46 (c) as expressing a Congressional policy against participation by retired judges in decisions setting the "major doctrinal trends" of a court—I could not agree that they justify this decision. Choice of the date of announcement of a decision as the date of "determination" of the cause may provide a touchstone which a disappointed litigant searching for grounds for reversal can easily apply. However, it seems a singularly infelicitous construction of this particular legislative language.[3] "[L]aws are not abstract propositions. They are expressions of policy arising out of specific situations and addressed to the attainment of particular ends." Frankfurter, Some Reflections on the Reading of Statutes, 47 Col. L. Rev. 527, 533. The exact point of time when a case is "determined" is, as all informed lawyers know, a question whose answer varies from case to case, and which is known in a particular instance only to the judges themselves. Certainly, if an opinion—all argument, reflection, deliberation, and explication having been completed by a court composed of active judges only—is filed with the clerk of the court on the morning following the retirement of one of its members, no policy remotely discernible in § 46 (c) can justify a requirement that his vote in the case should not be counted. If any such policy can be thought to be reflected in the *en banc* statute, it should not be taken as requiring more than that a judge, whose retirement comes at a time when meaningful things in the

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attribution to Congress of a design to leave in the hands of active circuit judges alone the setting of the "major doctrinal trends" of their courts.

[3] In construing a statute far more amenable to a technical approach, we recently rejected an analogous construction of the word "determined." *United States* v. *Price*, 361 U. S. 304, 307.

process of adjudication still remain to be done, must withdraw from further participation. But where such is not the case, the statute should not be thought to require a precipitous termination of judicial affairs and the undoing of adjudications properly made. In the nature of things the effectuation of such a policy should be left with the various Courts of Appeals, if indeed not to the conscience and good taste of the particular circuit judge concerned, as in most instances of individual disqualification for other reasons. Cf. 28 U. S. C. § 455.

It is not a ground for objection that such a construction would provide no test which an outsider, whether litigant or reviewing court, could apply.[4] As this Court has observed: "In our view, § 46 (c) is not addressed to litigants. It is addressed to the Court of Appeals." *Western Pacific Railroad Case,* 345 U. S. 247, 250. On its view of the statute the Court should not have hesitated to adopt that construction of the "heard and determined" clause which most faithfully reflects its purpose merely because those with whom the statute is not concerned are thereby hampered in voicing their own objections.

Indeed, while I need express no definite view on the question, since I regard the claim of noncompliance with § 46 (c) as untenable, I must say that the Court's opinion presents no substantial reason for permitting a litigant to overturn a judgment of the Court of Appeals through this sort of collateral attack on the competence of one of its members to sit. Had Judge Medina found in § 46 (c), as the Court holds he should have found, a statutory direction to withdraw from further participation in this

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[4] In this case, one cannot say that such a standard was not followed. Although the decision was not announced until nearly five months after his retirement (265 F. 2d 136, 144), Judge Medina had sat on the panel which originally heard the case, and the briefs on reargument were submitted almost three months prior to his retirement. He did not write an opinion in the case.

lawsuit, petitioner and not respondents would have prevailed on the appeal, since that would have resulted in the affirmance, by an equally divided Court of Appeals, of the District Court's judgment in favor of the Government. Of course, to a litigant, there is no greater injury than to lose a case, but I have difficulty understanding just what legal error has been committed against petitioner, such as to warrant vacation by this Court of the judgment below, thus giving the Government an opportunity to retrieve its original loss in the *en banc* Court of Appeals. Clearly, Judge Medina was not a mere interloper, or a usurper. He was, and is, a circuit judge of the United States, bearing a commission signed by the President. Abstractions about "competence" only becloud the matter. All that has happened is that Judge Medina has exercised the right conferred by Congress (28 U. S. C. § 371 (b)) to retire from active service. Nothing in that action, or in what the Court has said concerning the scope of § 46 (c), renders the judgment of the court below vulnerable to attack. The cases cited by the Court dealt with disqualifications based on policy grounds the effectuation of which called for a vacation of the judgments rendered there.[5] No reason has been given why that is so here.

I would affirm.

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[5] In *Frad* v. *Kelly*, 302 U. S. 312, a motion for discharge from probation was entertained and granted by a judge not of the district where sentence had been imposed. The evident purpose of the statute limiting consideration of such matters to judges of the sentencing court was to permit those judges to develop an integrated policy governing probation. *Id.*, at 318. To give effect to that policy, the order of discharge was vacated. The dictum in *American Construction Co.* v. *Jacksonville, T. & K. W. R. Co.*, 148 U. S. 372, 387, concerned a violation by a judge of the requirement that he not sit on an appeal from a judgment or order which he had entered. It hardly needs elucidation to recognize that disregard of such a policy infects the judgment rendered.

HUDSON *v.* NORTH CAROLINA.

CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA.

No. 466. Argued May 16, 1960.—Decided June 20, 1960.

Petitioner and two others were tried before a jury in a North Carolina state court on an indictment jointly charging them with robbery. Petitioner, who was 18 years old, asked the judge to appoint a lawyer to help him in his defense, stating that he was without funds to employ counsel and was incapable of defending himself; but this request was denied. Counsel for one of petitioner's codefendants volunteered to help petitioner and the third defendant; but, in the midst of the trial and in the presence of the jury, his client pleaded guilty to petit larceny, that plea was accepted, and the lawyer withdrew from the proceedings. No steps were taken to protect petitioner from the potential prejudice resulting from the guilty plea of his codefendant in the presence of the jury, and petitioner and his other codefendant were convicted of larceny from the person, a felony under North Carolina law. *Held:* The prejudicial position in which petitioner found himself when his codefendant pleaded guilty before the jury raised problems requiring professional knowledge and experience beyond a layman's ken, and petitioner's conviction in these circumstances without the benefit of counsel deprived him of the due process of law guaranteed by the Fourteenth Amendment. Pp. 697–704.

Reversed.

William Joslin argued the cause and filed a brief for petitioner.

Ralph Moody, Assistant Attorney General of North Carolina, argued the cause for respondent. With him on the brief was *T. W. Bruton,* Attorney General.

MR. JUSTICE STEWART delivered the opinion of the Court.

The petitioner and two others were brought to trial before a jury in the Superior Court of Cumberland County, North Carolina, upon an indictment jointly charging them with robbery. When their case was called

one of the defendants, David Cain, was represented by a lawyer of his own selection. The petitioner and the other defendant did not have counsel. Before pleading to the indictment, the petitioner, who was eighteen years old, asked the presiding judge to appoint a lawyer to help him with his defense, stating that he was without funds to employ counsel and was incapable of defending himself.[1] The prosecutor conceded that the petitioner was unable to employ an attorney.[2] The trial judge denied the motion, telling the petitioner that "The Court will try to see that your rights are protected throughout the case."

All three of the defendants thereupon pleaded not guilty, and the case proceeded immediately to trial. The first witness for the State was the alleged victim of the robbery. Midway through this witness's testimony Cain's lawyer offered to represent all three codefendants "as long as their interests don't conflict." At the conclusion of the witness's direct testimony the trial judge advised the lawyer that he should cross-examine only on behalf of Cain, because "I think you probably have a conflicting interest there." Thereafter the witness was cross-examined intensely by Cain's lawyer, who brought out the witness's criminal record and previous commitment to a state mental institution. The petitioner and the other codefendant also briefly cross-examined the witness. The only other witnesses for the prosecution were two deputy sheriffs, who testified as to statements made to them by the defendants. They were cross-examined by the lawyer, but not by the two defendants without counsel.

At the conclusion of the State's evidence, Cain's lawyer moved that the case be dismissed. When this motion was

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[1] "I don't have funds to employ an attorney and am not capable of defending myself. If the Court please, I would like to ask the Court to employ me an attorney."

[2] "I will say that he is not able to employ an attorney, but as to whether he is able to represent himself I cannot say."

denied he stated that Cain had no evidence to offer. Thereupon, in the presence of the jury, he tendered on behalf of Cain a plea of guilty to petit larceny. This plea was agreed to by the prosecutor and accepted by the court. The lawyer then withdrew from the proceedings.

The trial proceeded. The petitioner and his remaining codefendant each took the stand. Each made a statement denying the robbery. The petitioner was cross-examined at some length, with emphasis upon his previous criminal record. Neither the petitioner nor his codefendant produced any other witnesses or offered any further evidence. They were given an opportunity to argue their case to the jury, but did not do so.

The jury found both defendants guilty of larceny from the person, a felony under North Carolina law, and the following day the trial judge pronounced sentence. The petitioner was committed to the penitentiary for a term of three to five years. The codefendant convicted with him was sentenced to a jail term of eighteen months to two years. Cain was given a six months' suspended sentence.

The petitioner's subsequent appeal to the Supreme Court of North Carolina was dismissed for want of prosecution. Thereafter he filed in the trial court a "petition for writ of certiorari," which urged that the failure of the trial court to provide him with counsel had deprived him of his constitutional rights. This petition was treated as an application for relief under the North Carolina Post-Conviction Hearing Act.[3] In the subsequent proceedings the court appointed a lawyer to represent the petitioner,[4] and held a hearing at which the petitioner

[3] N. C. Gen. Stat., § 15–217 *et seq.*

[4] The North Carolina Post-Conviction Hearing Act provides: "If the petition alleges that the petitioner is without funds to pay the costs of the proceeding, and is unable to give a costs bond with sureties for the payment of the costs for the proceeding and is unable to

and his counsel were present. After considering the evidence presented, including a transcript of the trial proceedings,[5] the court concluded that no special circumstances were shown which required the appointment of trial counsel, that the petitioner had been convicted only after a fair and impartial trial, and that there had consequently been no denial of due process of law. The petition was accordingly dismissed.[6] The Supreme Court of North Carolina declined to review the order of dismissal. We granted certiorari to consider the substantial constitutional claim asserted. 361 U. S. 812.

The judge who presided at the post-conviction proceedings made detailed findings of fact. He found that the trial judge had "advised the petitioner of his right to challenge when the jury was selected and advised the petitioner of his right to cross examine witnesses and to

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furnish security for costs by means of a mortgage or lien upon property to secure the costs, the court may order that the petitioner be permitted to proceed to prosecute such proceeding without providing for the payment of costs. If the petitioner is without counsel and alleges in the petition that he is without means of any nature sufficient to procure counsel, he shall state whether or not he wishes counsel to be appointed to represent him. If appointment of counsel is so requested, the court shall appoint counsel if satisfied that the petitioner has no means sufficient to procure counsel. The court shall fix the compensation to be paid such counsel which, when so determined, shall be paid by the county in which the conviction occurred." N. C. Gen. Stat., § 15–219.

[5] The judge who conducted the post-conviction proceedings was not the judge who had presided at the trial.

[6] The dismissal was clearly based upon the court's view of the merits of the petitioner's constitutional claim. The court nowhere suggested that the petitioner had chosen an inappropriate remedy under the State law. Indeed the Supreme Court of North Carolina has made clear that claims of unconstitutional denial of the right to counsel are to be considered on their merits in Post-Conviction Hearing Act proceedings. *State* v. *Hackney,* 240 N. C. 230, 81 S. E. 2d 778; *State* v. *Cruse,* 238 N. C. 53, 76 S. E. 2d 320.

argue the case to the jury." He also found that "during the trial the Court properly excluded evidence which was inadmissible, and the petitioner cross examined the witnesses against him and at his request testified in his own behalf."

In this Court counsel for the petitioner does not take issue with these findings. Counsel's primary emphasis rather is upon the petitioner's comparative youth, relying upon *Wade* v. *Mayo,* 334 U. S. 672. In that case it was held that the denial of a lawyer's help had resulted in the deprivation of due process where the Federal District Court after a habeas corpus hearing had found that the eighteen-year-old defendant was "an inexperienced youth unfamiliar with Court procedure, and not capable of adequately representing himself." 334 U. S., at 683. Here, by contrast, the post-conviction court found that "although the petitioner was only eighteen years of age and had been only to the sixth grade in school at the time of his trial, he is intelligent, well informed, and was familiar with and experienced in Court procedure and criminal trials . . . ." Evaluations of this nature are peculiarly within the province of the trier of the facts based upon personal observation. As the Court pointed out in *Wade* v. *Mayo,* "[t]here are some individuals who, by reason of age, ignorance or mental capacity, are incapable of representing themselves adequately in a prosecution of a relatively simple nature. This incapacity is purely personal and can be determined only by an examination and observation of the individual." 334 U. S., at 684.

In view of the findings of the post-conviction court, supported by the record of the trial proceedings, this, in short, is not a case where it can be said that the failure to appoint counsel for the defendant resulted in a constitutionally unfair trial either because of deliberate overreaching by court or prosecutor or simply because of

the defendant's chronological age. Moreover, the record shows that up to the time that Cain's lawyer withdrew from the proceedings the petitioner was receiving the effective benefit of the lawyer's activity, and had the trial of all three defendants proceeded to a jury verdict, it is possible that the lawyer could have continued to represent the interests of the petitioner as well as those of the client who had retained him.

But that did not happen. Instead, on the advice of his counsel Cain entered a plea of guilt in the presence of the jury midway through the trial. The potential prejudice of such an occurrence is obvious and has long been recognized by the courts of North Carolina. *State* v. *Hunter,* 94 N. C. 829, 835; *State* v. *Bryant,* 236 N. C. 745, 747, 73 S. E. 2d 791, 792; *State* v. *Kerley,* 246 N. C. 157, 97 S. E. 2d 876. Yet it was precisely at this moment of great potential prejudice that the petitioner and his codefendant were left entirely to their own devices, for it was then that Cain's lawyer withdrew from the case. At that very point the petitioner and his codefendant were left to go it alone.

The precise course to be followed by a North Carolina trial court in order to cure the prejudice that may result from a codefendant's guilty plea does not appear to have been made entirely clear by the North Carolina decisions. In the *Hunter* case the Supreme Court of North Carolina pointed out that while not infrequently a defendant on trial with another is allowed to enter a plea of guilt during the course of the trial, the court should exercise care "to see that such practice works no undue prejudice to another party on trial." 94 N. C., at 835. Later cases have been somewhat more explicit. In the *Bryant* case curative instructions to the jury given immediately after a codefendant's guilty plea were held sufficient to avoid error prejudicial to the remaining defend-

ant. 236 N. C., at 747–748, 73 S. E. 2d, at 792. More recently, in the *Kerley* case, the court said that "[w]hen request therefor is made, it is the duty of the trial judge to instruct the jury that a codefendant's plea of guilty is not to be considered as evidence bearing upon the guilt of the defendant then on trial and that the latter's guilt must be determined solely on the basis of the evidence *against him* and without reference to the codefendant's plea." 246 N. C., at 161; 97 S. E. 2d, at 879. Indeed, the court expressed the view that even "a positive instruction probably would not have removed entirely the subtle prejudice that unavoidably resulted from [a codefendant's] plea . . . ." 246 N. C., at 162; 97 S. E. 2d, at 880.

In the present case the petitioner did not make any request that the jury be instructed to disregard Cain's guilty plea, and the court gave none, either at the time the plea was entered or in finally instructing the jury. A layman would hardly be aware of the fact that he was entitled to any protection from the prejudicial effect of a codefendant's plea of guilt. Even less could he be expected to know the proper course to follow in order to invoke such protection. The very uncertainty of the North Carolina law in this respect serves to underline the petitioner's need for counsel to advise him.

The post-conviction court made no finding specifically evaluating the prejudicial effect of Cain's plea of guilt and the trial judge's subsequent failure to give cautionary instructions to the jury. In any event, we cannot escape the responsibility of making our own examination of the record. *Spano* v. *New York,* 360 U. S. 315, 316. We hold that the circumstances which thus arose during the course of the petitioner's trial made this a case where the denial of counsel's assistance operated to deprive the defendant of the due process of law guaranteed by the Fourteenth Amendment. The prejudicial position in which the peti-

tioner found himself when his codefendant pleaded guilty before the jury raised problems requiring professional knowledge and experience beyond a layman's ken. *Gibbs* v. *Burke,* 337 U. S. 773; *Cash* v. *Culver,* 358 U. S. 633.

Reversed.

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

The opinion of the Court bids fair to "furnish opportunities hitherto uncontemplated for opening wide the prison doors of the land." *Foster* v. *Illinois,* 332 U. S. 134, 139 (1947). Without so much as mentioning *Betts* v. *Brady,* 316 U. S. 455 (1942), it cuts serious inroads into that holding and releases petitioner, now a fourth offender though only 18 years old, from his 3-to-5-year sentence for larceny from the person. The Court does so on the ground of a single circumstance occurring at the trial, *i. e.,* the fact that a codefendant, David Cain, was permitted at the close of the State's case to plead guilty to "larceny, in such amount that it is a misdemeanor." The Court says that this circumstance "made this a case where the denial of counsel's assistance operated to deprive the defendant of the due process of law guaranteed by the Fourteenth Amendment." Strangely enough, the Court digs up this ground *sua sponte,* for neither the petitioner, the State, nor any court of North Carolina thought such circumstance produced sufficient "unfairness" in the trial even to discuss it, though its existence was mentioned in the recital of facts in petitioner's brief. The truth is that the courts of North Carolina have held affirmatively that petitioner received a fair trial, and that no special circumstances were shown to indicate that lack of counsel resulted in prejudice to petitioner.

The Court, however, speculates that Cain's change in plea "raised problems requiring professional knowledge

and experience beyond a layman's ken." The Court says that "The prejudicial position in which the petitioner found himself" resulted. But this is purely speculative and, I submit, does not at all follow. In fact, the jury—despite language in the court's charge which indicated the presence of "violence, intimidation and putting [the victim] in fear"—refused to find petitioner guilty of the common-law offense of robbery but only found him guilty of the lesser offense, larceny from the person. The record here would clearly support a verdict of guilty on the robbery charge. As I appraise the jury's verdict, it would be much more realistic to say that David Cain's plea of guilty influenced the jury not to find petitioner guilty of the greater offense. After all, Cain was only the driver of the car and participated no further in the criminal enterprise. In fact, the victim could not even identify him at the trial. Cain, unlike petitioner, had "wholeheartedly admitted" his guilt to the officers. This apparently brought on his plea. Petitioner on the other hand was the chief actor in the criminal enterprise. In addition, he had a criminal record, had served a term in prison, was twice an escapee therefrom, and from the record here gives every appearance of being a hardened criminal. Still the jury found him guilty only of the lesser offense, larceny from the person. It is reasonable to assume that it did this because Cain was permitted to plead to the lesser offense of larceny.

The Court cites three North Carolina cases* in support of the "potential prejudice" which it finds petitioner may have suffered from Cain's change of plea. None of these cases were cited by the parties. As I have said, the point was not raised in the briefs. But even the North Caro-

State v. *Hunter*, 94 N. C. 829, 835; *State* v. *Bryant*, 236 N. C. 745, 747, 73 S. E. 2d 791, 792; *State* v. *Kerley*, 246 N. C. 157, 97 S. E. 2d 876.

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lina cases cited by the Court do not support its new theory for reversal. All they indicate, as the Court frankly points out, is that care must be exercised to avoid "undue prejudice." In this regard the trial court fully protected petitioner all during the presentation of the case and gave a full, fair, and intelligent charge to which no objection is even now being made by petitioner. It is intimated by the Court that North Carolina law required a charge that Cain's plea not be considered as any evidence bearing on petitioner's guilt. But the short answer is that three North Carolina courts have considered this case and not one has even mentioned the point. The Court says this underlines the petitioner's need for counsel. I submit that he has had counsel since his Post Conviction Hearing Act case was filed some two years ago, and not once has the handling of the Cain plea been urged as error necessitating reversal.

While I do not wish to labor the issue, I must say that careful study of the case convinces me that it was a simple one and the trial was without complexity or technicality. The petitioner and three others induced their victim, an elderly man, to enter their car on the ruse that they would take him home for a dollar. It was in the nighttime and on the way to his home they drove into some woods. Petitioner ordered the victim out of the car, directed him to hold up his hands, and then went through his pockets, taking his billfold, containing some $24. The sole question for the jury was one of fact, namely, did petitioner take the old man's money? The State offered three witnesses in support of its position. The petitioner and his codefendant took the stand and gave their version of the affair, each admitting his presence on the scene but denying any robbery. There is not and never has been any claim that the State withheld any evidence or used perjured testimony or that incompetent evidence was admitted against the petitioner; or that he was denied

compulsory process for witnesses; or that he was ignorant or feeble-minded; or that the instructions of the court were not full and sufficient. As the Court itself finds, this "is not a case" where the age of the defendant or the deliberate "overreaching by court or prosecutor" resulted in an "unfair trial." Moreover, the Court finds that the case upon which the petitioner primarily depends, *Wade* v. *Mayo,* 334 U. S. 672 (1948), is in nowise controlling. It therefore follows that the lone special circumstances upon which petitioner depends, namely, his "youthfulness . . . his lack of formal education, his timely request for the appointment of counsel, his inability to hire a lawyer, and his own fumbling defense," do not show a lack of due process based on the trial judge's refusal to appoint counsel for him.

The record clearly shows, as the trial court found, that the petitioner "is intelligent, well informed, and was familiar with and experienced in Court procedure and criminal trials, having been previously tried on different occasions for careless and reckless driving, for breaking and entering, for driving while under the influence of intoxicating liquor, and for assault and robbery." Only at the previous term of the same court, petitioner had defended himself on the assault and robbery charge and was found not guilty by the jury. But what more could emphasize the petitioner's ingenuity in defending himself than his defense here? It was simple and direct. Both he and his codefendant had this story: The victim, before entering the car, had been drinking beer and on the way home gave petitioner the money to buy a pint of vodka. After they all partook of the vodka the victim became ill and nauseated while sitting in the back of the car. The petitioner then got in the back seat, and when the car was stopped he helped the victim out and the latter fell down on the ground. Petitioner then got back in the car and his group drove away. After leaving the victim,

petitioner's codefendant found the billfold in the car. It "almost went behind the [back] seat." It had no money in it but petitioner proposed that they take it back to the victim. They then returned to where the victim got out of the car but he was gone, and although they "got out and hollered for him," he could not be found. After the defendants left the scene, the billfold was thrown from the car by petitioner's codefendant and was not produced at the trial. This was indeed a shrewd defense. The only trouble was that the jury did not believe it.

On the facts of this record, I can see no basis for saying that petitioner was denied due process, *Betts* v. *Brady, supra,* and accordingly would affirm the judgment.

Per Curiam.

CORY CORPORATION ET AL. *v.* SAUBER.

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

No. 436. Argued May 16, 1960.—Decided June 20, 1960.

The Internal Revenue Codes of 1939, § 3405 (c), and 1954, § 4111, placed a 10% excise tax on sales of "self-contained air-conditioning units" and gave the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, power to prescribe needful rules and regulations for the enforcement of the provisions relating to such taxes. The Commissioner published revenue rulings in 1948 and 1954 holding that the statute taxed air-conditioning units which had certain physical features, were designed for installation in a window or other opening and had "a total motor horsepower of less than 1 horsepower." *Held:*

1. These rulings were valid. Pp. 711–712.

2. The case is remanded to the Court of Appeals for consideration of the question what is meant by "horsepower" and any other questions which may remain. P. 712.

3. This disposition of the case is without prejudice to such action as the lower courts may deem appropriate to prevent taxpayers, should they ultimately prevail, from obtaining a windfall by reason of taxes collected by them but not paid to the Government. P. 712.

266 F. 2d 58, 267 F. 2d 802, reversed.

Edwin A. Rothschild argued the cause for petitioners. With him on the brief was *Stanford Clinton.*

Howard A. Heffron argued the cause for respondent. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Rice* and *Grant W. Wiprud.*

PER CURIAM.

This suit was instituted by petitioners in the District Court for a refund of excise taxes collected on the sales of two air-conditioning units sold in 1954 and 1955. Section 3405 (c) of the Internal Revenue Code of 1939, 26

U. S. C. (1952 ed.) § 3405 (c), placed a 10% tax on "[s]elf-contained air-conditioning units." [1] Section 3450 gave the Commissioner, with the approval of the Secretary, power to prescribe needful rules and regulations for the enforcement of the provisions relating to such taxes. Pursuant to this power, the Commissioner published revenue rulings in 1948 [2] and in 1954 [3] holding that the statute taxed air-conditioning units which had certain physical features, were designed for installation in a window or other opening and had "a total motor horsepower of less than 1 horsepower." These rulings represented the Commissioner's construction of the Act until a different construction, applied prospectively only, was expressed in regulations issued in 1959.[4]

The parties stipulated that the statute applied only to "self-contained air conditioning units of the household type" and that each of the two units in question had an actual motor horsepower of one horsepower. The taxpayers contended that the words "motor horsepower" in the revenue rulings meant actual horsepower; the Government contended that they meant the nominal horsepower given by the manufacturer or "rated" horsepower assigned on the basis of standards established by trade associations. The District Court construed the revenue rulings as referring to actual, not nominal or rated, horsepower and found, in accordance with the stipulation, that each of the two units had an actual horsepower in excess of one horsepower. It found additionally that even the "rated" horsepower of the two units in question was greater than one horsepower. On appeal the Court of Appeals re-

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[1] This was re-enacted in § 4111 of the 1954 Code, 26 U. S. C. § 4111.

[2] S. T. 934, 1948–2 Cum. Bull. 180.

[3] Rev. Rul. 54–462, 1954–2 Cum. Bull. 410.

[4] This test of horsepower was excluded from the Treasury Regulations promulgated in 1959 under the 1954 Code by T. D. 6423, 1959–2 Cum. Bull. 282.

versed. 266 F. 2d 58, 267 F. 2d 802. It did not reach the question as to the meaning of the revenue rulings, for it held that "household type" was the controlling statutory criterion, that the horsepower of the units is irrelevant to that issue, that the units in question were clearly of the household type because they were "made to meet the needs of a household," and that the revenue rulings, insofar as they referred to horsepower, were therefore void. The case is here on petition for a writ of certiorari, 361 U. S. 899.

There is much said in the briefs and in oral argument about this case as a test case. It is said that taxes on the sale of about 50,000 units turn on this decision. We intimate no opinion as to the taxes on any sales except the two involved here. The only issues before the Court are the construction and validity of the revenue rulings. Hence we do not reach the question as to what other defenses might have been made. Respondent urges in this Court, contrary to the stipulation below, that the statute taxes all self-contained air-conditioning units, not merely those of the household type. We need not consider which view of the statute is correct for under either view we think the horsepower test is a permissible one. We hold that the revenue rulings which were in force from 1948 to 1959 [5] were not void. The factor of horsepower in our opinion may have had some relation to size in the then stage of engineering development and size might well have been relevant to what was then a "self-contained air-conditioning unit." There is indeed evidence that the less-than-one-horsepower test was designed to draw the line between household and commercial types of air-conditioning equipment. Moreover, it appears that the rulings in question were issued after consultation with industry representatives, who asserted that horsepower was a

[5] See notes 2 and 3, *supra*.

factor relevant to the definition of the statutory term as they understood it. The Commissioner consistently adhered to the horsepower test for more than 10 years, and Congress did not change the statute though it was specifically advised in 1956 that that was the test which was being applied.[6] We cannot say that such a construction was not a permissible one, cf. *Universal Battery Co.* v. *United States*, 281 U. S. 580, especially where it continued without deviation for over a decade. Cf. *United States* v. *Leslie Salt Co.*, 350 U. S. 383. The District Court found that "Among engineers, the horsepower of a motor does not mean its nominal horsepower rating but means the actual horsepower which the motor will deliver continuously under its full normal load."

The Court of Appeals did not reach that question nor review that finding in view of its conclusion that the horsepower test was not valid. Accordingly we remand the case to the Court of Appeals for consideration of that and any other questions which may remain. And we add that our disposition is without prejudice to such action as the lower courts may deem appropriate to prevent taxpayers, should they ultimately prevail, from obtaining a windfall by reason of taxes collected by them but not paid to the Government.

Reversed.

MR. JUSTICE FRANKFURTER, dissenting.

I would dismiss the writ of certiorari as improvidently granted.

The petition urged the substantial question of retroactivity in the Commissioner's exercise of his lawmaking power, in that he attacked in court a prior interpretation by him of the taxing statutes whereby the tax now claimed

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[6] Hearings, Subcommittee, House Ways and Means Committee on Excise Taxes, 84th Cong., 2d Sess. 163–165.

was not due. As the case finally was presented here no substantial question of retroactivity was presented. Insofar as the retroactivity initially asserted depended upon the reliance of the petitioners, that is apparently governed by § 1108 (b) of the Revenue Act of 1926, 44 Stat. 114, controlling excise taxation, and is in any event not now in issue, for the petitioners stipulated in the trial court and reiterated here that the Commissioner was in no way "estopped" to attack the invalidity of the ruling as petitioners and the District Court construed it. Insofar as the retroactivity asserted was the more general unfairness of a change in the Commissioner's interpretation, it cannot be presented in this case because from the start it has been manifest that the ruling is, to say the least, ambiguous (the Commissioner tried to clarify it in 1957) and reasonably susceptible of both interpretations urged for it, so that any judicial determination of its meaning was bound to affect some taxpayers retroactively. Nor was or is there any basis in the record for saying that the Court of Appeals' rejection of the horsepower test *in toto* was more severely retroactive in its effect than either construction of the ruling might have been.

The only other contention presented for review is the substantive statutory determination of the Court of Appeals, as to which that court apparently failed to give due weight to the interpretative function of the Commissioner. In light of the confused and cloudy record in this case, this failure cannot be said to be clearly presented since the Commissioner's approach has resulted in a rule which the Court of Appeals found to be "inconclusive and uncertain." Had all this been clear from the start, it would have been apparent, to me at least, that, assuming the Court of Appeals to be wrong, there was not such a departure "from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this court's power of supervision." Rule 19, par. 1 (b).

Moreover, this litigation bears many of the earmarks of a feigned suit. Despite the desire of the parties to "test" a question of law, we ought to avoid adjudication in a case with so checkered a course of positions taken by the parties where the particular controversy may well be less than real. The consent required by § 6416 (a)(3) of the Internal Revenue Code of 1954, a precondition for this action, was obtained from the attorney and auditor of the petitioners. It is not too broad an inference to say that the petitioners were, in effect, writing their own consent for bringing this suit. Without further proof, such sales and consent hardly establish the immediate interest of the petitioners in the outcome of this lawsuit, *i. e.*, money loss due to an illegal exaction, not some other suit sought to be made to turn upon it, which is a requisite to adjudication. Cf. *Atherton Mills* v. *Johnston,* 259 U. S. 13, 15. Responsibility for the confusing shifts of position during litigation which characterize this record may not unfairly be attributed to the extent to which this action was contrived, and to the stipulations affecting the really substantial interests which were apparently the chief concern for using this action as a pilot litigation. Whether or not a case is feigned must ultimately turn on inferences from the record and history of a litigation. The appearance that it may be, even if not demonstrably calling for dismissal of the proceeding, ought to make the Court doubly unwilling to give its judgment on the substantive questions to be dug out of so dubious a litigation on such a record.

I would dismiss.

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

The Congress, in 1941, levied an excise tax on "[s]elf-contained air-conditioning units." § 3405 (c), Internal Revenue Code of 1939. The legislative history shows that

the Congress intended the tax to "apply to all mechanical refrigerators and refrigerating units [including self-contained air-conditioning units] whether of household or other type." H. R. Rep. No. 1040, 77th Cong., 1st Sess., p. 32. In 1948, the Commissioner issued a ruling, reissued in 1954, which defined self-contained air-conditioning units as those with "a total motor horsepower of less than 1 horsepower."

This suit involves only two self-contained air-conditioning units, but by stipulation of the parties it is a "prototype or test" case to determine the extent of the coverage of the excise tax under § 3405 (c) as to self-contained air-conditioning units. Petitioners contend that "total motor horsepower" as used in the rulings meant actual horsepower rather than that for which the motor is rated by the manufacturer. It was stipulated that each unit had over one actual horsepower, but a manufacturer's rating of three-fourths horsepower. The Government contended that an interpretation that actual horsepower applied would make the rulings "fly in the face of the statute." It argued that the ruling should be interpreted "in [consonance] with the statute so as not to require the Court to strike down the ruling as a nullity and as something that is unreasonable, void, and of no effect." [1] This, the Government asserted, required that "total motor horsepower" be interpreted as manufacturer's rated horsepower. The trial court, however, enforced the rulings as requiring the application of the actual horsepower test. The Court of Appeals reversed, holding that the horsepower test was not permissible under the statute, and that the rulings were void.

The Government's contention that the statute covers all self-contained air-conditioning units is brushed aside by this Court with a finding that such a position is

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[1] See R. pp. 130–132.

"contrary to the stipulation" which declares the statute restricted to units of the "household type." The Court finds that it "need not consider which view of the statute is correct for under either view we think the horsepower test is a permissible one." It holds that the rulings "were not void." Thus, despite the fact that § 3405 (c) refers solely to "[s]elf-contained air-conditioning units" and fails to mention "household type," the Court refuses to resolve this question of statutory construction raised by the Government. It simply remands the case to the Court of Appeals for a determination of whether the ruling meant by its language to refer to actual horsepower, as the District Court found, or to the manufacturer's rated horsepower as posted on the motor itself. I cannot see how any horsepower test under the rulings would be permissible, since it is not mentioned in the statute and is entirely inconsistent with the statute's full coverage. This test was formulated by the industry in meetings that culminated in a letter from the York Corporation to the Commissioner. This letter revealed that York considered the language "[s]elf-contained air-conditioning units" as used in § 3405 (c) to mean "exactly what the common everyday accepted usage of the term implies—the unit must be complete within itself." The suggested definition which York made was later promulgated in almost identical language by the Commissioner. York represented it to be "sufficiently broad in its scope to include without exception all self-contained air conditioning units which are now being manufactured." Petitioners admit that they were "at all times material hereto engaged in the manufacture and sale of self-contained air conditioning units." It is further admitted that the units involved here were self-contained ones, "in the sense that all the works are in the same box." They certainly came within the terms of § 3405 (c) as reflected in the York representations. If these representations brought about an

erroneous ruling inconsistent with § 3405 (c), then it is void and we should so declare it, as did the Court of Appeals.

Finally, these rulings do not have the force of regulations, and, as petitioners admit, they cannot "overrule a statute." However, if the manufacturer does not collect the tax on a sale because of his reliance on a ruling of the Commissioner holding the sale nontaxable, then "[n]o tax shall be levied, assessed, or collected" on that sale. § 1108 (b), Revenue Act of 1926.[2] It follows that if the petitioners did not collect the tax imposed by § 3405 (c) because of the Commissioner's rulings, no tax can now be levied or collected on the same. The Government specifically concedes that if respondents "had relied *to their detriment*—by treating as nontaxable the sale of units with an actual horsepower output of one or more [which is the interpretation placed on the ruling by petitioners and the trial court]—they would be protected [under § 1108 (b)] against any retroactive change in administrative position." Conversely, if the manufacturer did not rely on the rulings of the Commissioner and collected the tax under § 3405 (c), then he could not now interpose invalid rulings to bar the Government's recovery from him of the tax he has already collected.

In this connection, no one seems to know to what extent the tax has been collected by the industry. Petitioners now seem to admit that they made substantial collections, and the record discloses that other major manufacturers determined "taxability . . . by reference to rated

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[2] § 1108 (b) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 114:

"No tax shall be levied, assessed, or collected . . . on any article sold or leased by the manufacturer, . . . if at the time of the sale or lease there was an existing ruling, regulation, or Treasury decision holding that the sale or lease of such article was not taxable, and the manufacturer, . . . parted with possession or ownership of such article, relying upon the ruling, regulation, or Treasury decision."

horsepower, whether or not the actual horsepower was different therefrom." It therefore appears that large sums of money have been collected and are now being retained by the manufacturers. This case is based on only two units, purchased by persons connected with the petitioners. Under the stipulation, nevertheless, the result of this case will control the tax on some 50,000 other units not involved here. While the customers who paid the tax might sue the manufacturer therefor, the likelihood of such actions would be highly remote under the circumstances here.

Thus far the Government has received the tax only on the two units involved here. There are no "consents" save on these same two units—and these consents were obtained from a lawyer and an accountant of the taxpayers. The entire record and course of this litigation are cloudy, and the parties cannot even agree as to what they "agreed" upon in their stipulations. In light of these circumstances, I think it highly unfortunate that today the Court should enter an order which may permit the manufacturers to keep as a windfall considerable amounts they have charged their customers for "excise taxes."

GREENWALD *v.* MARYLAND.

APPEAL FROM THE COURT OF APPEALS OF MARYLAND.

No. 859. Decided June 20, 1960.

Appeal dismissed for want of a substantial federal question.
Reported below: 221 Md. 235, 155 A. 2d 894.

Harry Silbert, A. Jerome Diener and *Sidney Schlachman* for appellant.

C. Ferdinand Sybert, Attorney General of Maryland, *Stedman Prescott, Jr.,* Deputy Attorney General, and *James H. Norris, Jr.,* Special 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.

ANDERSON *v.* THORINGTON CONSTRUCTION CO., INC.

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 878. Decided June 20, 1960.

Appeal dismissed for want of a properly presented substantial federal question.
Reported below: 201 Va. 266, 110 S. E. 2d 396.

George E. Allen and *Seymour I. Toll* for appellant.

PER CURIAM.

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

AMERICAN LEGION POST NO. 51 *v.* PENNSYLVANIA.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

No. 881. Decided June 20, 1960.

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

Reported below: 397 Pa. 430, 156 A. 2d 107.

Anthony Cavalcante for appellant.

Anne X. Alpern, Attorney General of Pennsylvania, and *Frank P. Lawley, Jr.,* Deputy Attorney General, for appellee.

PER CURIAM.

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

GREENWALD *v.* MARYLAND.

APPEAL FROM THE COURT OF APPEALS OF MARYLAND.

No. 920. Decided June 20, 1960.

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

Reported below: 221 Md. 245, 157 A. 2d 119.

Harry Silbert, A. Jerome Diener and *Sidney Schlachman* for appellant.

C. Ferdinand Sybert, Attorney General of Maryland, *Stedman Prescott, Jr.,* Deputy Attorney General, and *James H. Norris, Jr.,* Special Assistant Attorney General, for appellee.

PER CURIAM.

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

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REPORTER'S NOTE.

The next page is purposely numbered 801. The numbers between 721 and 801 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 MAY 31 THROUGH JUNE 27, 1960.

MAY 31, 1960.

Miscellaneous Orders.

No. 837, Misc. BIGGS *v.* HASTINGS, CHIEF JUDGE, U. S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT, ET AL. Motion for leave to file petition for writ of mandamus denied.

No. 843, Misc. STREIT *v.* BUCHHEIT. Motion for leave to file petition for writ of certiorari denied.

No. 384, Misc. REYNOLDS *v.* COCHRAN, DIRECTOR OF DIVISION OF CORRECTIONS. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for writ of certiorari, certiorari to the Supreme Court of Florida granted. Petitioner is permitted to proceed *in forma pauperis* and case transferred to appellate docket. Petitioner *pro se*. *Richard W. Ervin,* Attorney General of Florida, and *Reeves Bowen,* Assistant Attorney General, for respondent.

Certiorari Granted. (*See also No. 384, Misc., supra.*)

No. 837. SILVERMAN ET AL. *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Edward Bennett Williams* and *Agnes A. Neill* for petitioners. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 107 U. S. App. D. C. 144, 275 F. 2d 173.

Nos. 75, 479 and 872. TRAVIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari granted. *Telford Taylor* and *Nathan Witt* for petitioner. *Solicitor General Rankin, Assistant*

Attorney General Yeagley, Philip R. Monahan and *Kevin T. Maroney* for the United States. Reported below: No. 75, 268 F. 2d 218; No. 479, 269 F. 2d 928; No. 872, 280 F. 2d 430.

No. 866. NATIONAL LABOR RELATIONS BOARD *v.* RADIO & TELEVISION BROADCAST ENGINEERS UNION, LOCAL 1212, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL–CIO. C. A. 2d Cir. Certiorari granted. *Solicitor General Rankin, Stuart Rothman* and *Dominick L. Manoli* for petitioner. *Robert Silagi* for respondent. Reported below: 272 F. 2d 713.

No. 875. CARBO *v.* UNITED STATES. C. A. 9th Cir. Certiorari granted. *A. L. Wirin* and *Fred Okrand* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 277 F. 2d 433.

No. 453, Misc. NEWSOM *v.* SMYTH, SUPERINTENDENT, VIRGINIA STATE PENITENTIARY. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the Supreme Court of Appeals of Virginia granted. Case transferred to appellate docket. Petitioner *pro se.* *A. S. Harrison, Jr.,* Attorney General of Virginia, and *Thomas M. Miller,* Assistant Attorney General, for respondent.

Certiorari Denied. (*See also No. 799, Misc., ante, p. 143.*)

No. 790. ALUMINUM COMPANY OF AMERICA *v.* LOVEDAY ET AL. C. A. 6th Cir. Certiorari denied. *Frank L. Seamans, William H. Eckert* and *R. R. Kramer* for petitioner. *John P. Davis, Jr., Richard L. Carson* and *J. H. Doughty* for respondents. Reported below: 273 F. 2d 499.

No. 791. BLOOM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *James W. Harvey* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, A. F. Prescott* and *Joseph Kovner* for the United States. Reported below: 272 F. 2d 215.

No. 797. WOOD-MOSAIC CO. ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Bernard H. Barnett* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice, I. Henry Kutz* and *Joseph Kovner* for the United States. Reported below: 272 F. 2d 944.

No. 798. LEE WAN NAM, ALIAS HONG LEE, *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Gilbert S. Rosenthal* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 274 F. 2d 863.

No. 804. DAVENPORT, ADMINISTRATOR, ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *G. W. Horsley* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice, Robert N. Anderson* and *Morton K. Rothschild* for the United States. Reported below: 273 F. 2d 231.

No. 854. STRECH *v.* BLISSFIELD COMMUNITY SCHOOLS DISTRICT. Supreme Court of Michigan. Certiorari denied. *Robert E. Childs* for petitioner. Reported below: 357 Mich. 620, 99 N. W. 2d 545.

No. 861. METROPOLITAN STEVEDORE CO. *v.* DAMPSKIBSAKTIESELSKABET INTERNATIONAL. C. A. 9th Cir. Certiorari denied. *George A. Helmer* for petitioner. Reported below: 274 F. 2d 875.

No. 858. FUNKHOUSER ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. *John W. Cable III* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice, Melva M. Graney* and *Carolyn R. Just* for respondent. Reported below: 275 F. 2d 245.

No. 863. MARTIN *v.* TOYE BROS. AIRPORT SERVICE, INC. C. A. 5th Cir. Certiorari denied. *Felicien Y. Lozes* for petitioner. Reported below: 273 F. 2d 457.

No. 864. KWIEK *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. *Charles A. Bellows* for petitioner. Reported below: 18 Ill. 2d 121, 163 N. E. 2d 474.

No. 867. PACIFIC CEMENT AND AGGREGATES, INC., *v.* CALIFORNIA BANK ET AL. C. A. 9th Cir. Certiorari denied. *George A. Blackstone* for petitioner. Reported below: 273 F. 2d 628.

No. 882. WINZELBERG *v.* R. K. BAKING CORP. ET AL. C. A. 2d Cir. Certiorari denied. *Morris D. Forkosch* for petitioner. *Solicitor General Rankin, Stuart Rothman, Dominick L. Manoli, Norton J. Come* and *Standau E. Weinbrecht* for the National Labor Relations Board, *William B. Rothschild* for R. K. Baking Corp., and *Samuel J. Cohen* for Bakery and Pastry Drivers and Helpers Union, Local No. 802, respondents. Reported below: 273 F. 2d 407.

No. 484, Misc. ISOM *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. Petitioner *pro se*. *Stanley Mosk,* Attorney General of California, *Doris H. Maier* and *Edsel W. Haws,* Deputy Attorneys General, for respondent.

No. 876. FLOOD ET AL., TRUSTEES, *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted. *Frederick M. Fisk, Walter C. Fox, Jr.* and *Vincent I. Compagno* for petitioners. *Solicitor General Rankin, Assistant Attorney General Morton, Roger P. Marquis* and *S. Billingsley Hill* for the United States. Reported below: 274 F. 2d 483.

No. 52, Misc. KAPLAN *v.* NEW YORK. Appellate Division of the Supreme Court of New York, First Judicial Department. Certiorari denied. Petitioner *pro se*. *Frank S. Hogan* and *Charles W. Manning* for respondent.

No. 460, Misc. PORTER *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *John Silard* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 106 U. S. App. D. C. 150, 270 F. 2d 453.

No. 618, Misc. WALKER *v.* UNITED STATES GYPSUM CO. ET AL. C. A. 4th Cir. Certiorari denied. *Sidney H. Kelsey* for petitioner. *L. S. Parsons* and *Charles L. Kaufman* for respondents. Reported below: 270 F. 2d 857.

No. 659, Misc. COAKLEY *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 672, Misc. BUTTS *v.* NEW YORK. Appellate Division of the Supreme Court of New York, First Judicial Department. Certiorari denied. Petitioner *pro se*. *Frank S. Hogan* and *Charles W. Manning* for respondent.

No. 753, Misc. HUNTER *v.* RANDOLPH, WARDEN, ET AL. Supreme Court of Illinois. Certiorari denied.

No. 862. INSURANCE WORKERS INTERNATIONAL UNION, AFL–CIO, *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. *Irving Abramson* for petitioner. *Solicitor General Rankin, Stuart Rothman, Dominick L. Manoli, Norton J. Come* and *Frederick U. Reel* for respondent. Reported below: —— F. 2d ——.

No. 733, Misc. ELLIS *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Henry Lincoln Johnson, Jr.* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 107 U. S. App. D. C. 76, 274 F. 2d 585.

No. 766, Misc. SCOTT ET AL. *v.* CENTRAL COMMERCIAL CO. C. A. 2d Cir. Certiorari denied. Petitioners *pro se. John C. Blair* for respondent. Reported below: 272 F. 2d 781.

No. 789, Misc. RAGAVAGE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 272 F. 2d 196.

No. 798, Misc. BRILLIANT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se. Solicitor General Rankin, Assistant Attorney General Rice* and *Meyer Rothwacks* for the United States. Reported below: 274 F. 2d 618.

No. 816, Misc. TILLERY *v.* WARDEN, MARYLAND PENITENTIARY. Court of Appeals of Maryland. Certiorari denied. Reported below: 221 Md. 627, 157 A. 2d 455.

No. 811, Misc. CLARK *v.* ADAMS, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied. Reported below: 144 W. Va. —, 111 S. E. 2d 336.

No. 826, Misc. BULLOCK *v.* UNITED STATES. Court of Claims. Certiorari denied. *Francis P. Keiper, Helen F. Keiper* and *James H. Littlepage* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Alan S. Rosenthal* for the United States. Reported below: — Ct. Cl. —, 176 F. Supp. 279.

No. 830, Misc. TAFARELLA *v.* HAND, WARDEN. Supreme Court of Kansas. Certiorari denied. Reported below: 185 Kan. 613, 347 P. 2d 356.

No. 839, Misc. WILLIAMS *v.* CALIFORNIA. District Court of Appeal of California, Second Appellate District. 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. Reported below: 174 Cal. App. 2d 364, 345 P. 2d 47.

No. 844, Misc. HAINES *v.* BANMILLER, WARDEN. Supreme Court of Pennsylvania. Certiorari denied. Reported below: 398 Pa. 7, 157 A. 2d 167.

No. 969, Misc. STICKNEY *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. *O. John Rogge* for petitioner. *Will Wilson,* Attorney General of Texas, *Riley Eugene Fletcher,* Assistant Attorney General, and *James N. Ludlum,* First Assistant Attorney General, for respondent. Reported below: — Tex. Cr. R. —, 336 S. W. 2d 133.

No. 815, Misc. SMITH *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 825, Misc. WATSON *v.* LAVALLEE, WARDEN. Court of Appeals of New York. Certiorari denied. Petitioner *pro se.* *Louis J. Lefkowitz,* Attorney General of New York, and *Paxton Blair,* Solicitor General, for respondent.

No. 827, Misc. KURTH *v.* BENNETT, WARDEN. C. A. 8th Cir. Certiorari denied. Petitioner *pro se.* *Norman A. Erbe,* Attorney General of Iowa, for respondent. Reported below: 274 F. 2d 409.

No. 828, Misc. DUNCAN *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.

No. 834, Misc. JACOBSEN *v.* TRUSTEES OF COLUMBIA UNIVERSITY. Supreme Court of New Jersey. Certiorari denied. Petitioner *pro se.* *Edward D. Burns* and *John A. Kiser* for respondent. Reported below: 31 N. J. 221, 156 A. 2d 251.

No. 836, Misc. ANDERTEN *v.* UNITED STATES. Court of Claims. Certiorari denied. Petitioner *pro se.* *Solicitor General Rankin* for the United States.

No. 845, Misc. SCOTT *v.* BUCHKOE, WARDEN. Supreme Court of Michigan. Certiorari denied.

No. 935, Misc. QUINTERO *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Second Judicial Department. Certiorari denied.

Rehearing Denied.

No. 403. MARINE COOKS & STEWARDS, AFL, ET AL. *v.* PANAMA STEAMSHIP CO., LTD., ET AL., 362 U. S. 365;

No. 726. BURLINGTON-CHICAGO CARTAGE, INC., *v.* UNITED STATES ET AL., 362 U. S. 401;

No. 734. WOLFE ET AL. *v.* NATIONAL LEAD CO., 362 U. S. 950;

No. 746. HELMIG *v.* JONES ET AL., 362 U. S. 950; and

No. 793. SINCLAIR OIL & GAS CO. *v.* MASTERSON ET AL., 362 U. S. 952. Petitions for rehearing denied.

JUNE 6, 1960.

Miscellaneous Orders.

No. 326. METLAKATLA INDIAN COMMUNITY, ANNETTE ISLAND RESERVE, *v.* EGAN, GOVERNOR OF ALASKA, ET AL. Appeal from the District Court for Alaska. The motion of *Edward G. Dobrin* for leave to withdraw his appearance as counsel for appellant is granted.

No. 890, Misc. CATO *v.* SACKS, WARDEN. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for writ of certiorari to the Supreme Court of Ohio, certiorari is denied.

Certiorari Granted. (*See also No. 824, ante, p. 190, and No. 438, Misc., ante, p. 192.*)

No. 884. RADIANT BURNERS, INC., *v.* PEOPLES GAS LIGHT & COKE CO. ET AL. C. A. 7th Cir. Certiorari granted. *John O'C. FitzGerald* and *Joseph Keig, Sr.* for petitioner. *Clarence H. Ross, Justin A. Stanley, Robert W. Murphy, Burton Y. Weitzenfeld, Harold A. Smith, Arthur D. Welton, Jr., Horace R. Lamb* and *Adrian C. Leiby* for respondents. Reported below: 273 F. 2d 196.

No. 816. LEAHY *v.* UNITED STATES. C. A. 9th Cir. Certiorari granted. *Arthur D. Klang* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 272 F. 2d 487.

No. 921. COHEN *v.* HURLEY. Court of Appeals of New York. Certiorari granted. *Theodore Kiendl* for petitioner. *Denis M. Hurley* and *Michael Caputo* for respondent. Reported below: 7 N. Y. 2d 488, 166 N. E. 2d 672.

No. 680, Misc. KIMBROUGH *v.* UNITED STATES. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit granted. Case transferred to the appellate docket. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 272 F. 2d 944.

Certiorari Denied. (*See also No. 890, Misc., supra.*)

No. 805. ROBINSON ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. *Charles W. Merritt* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice* and *Harry Baum* for respondent. Reported below: 273 F. 2d 503.

No. 822. PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK ET AL. *v.* WAGNER, MAYOR, ET AL. Court of Appeals of New York. Certiorari denied. *Louis Nizer* and *Hazel B. Mack* for petitioners. *Seymour B. Quel* for respondents. Reported below: 7 N. Y. 2d 813, 164 N. E. 2d 715.

No. 819. COMMERCIAL CREDIT CORP. *v.* ALLEN, TRUSTEE IN BANKRUPTCY. C. A. 7th Cir. Certiorari denied. *Berthold Muecke, Jr.* and *J. Francis Ireton* for petitioner. *William S. Collen* for respondent. Reported below: 272 F. 2d 224.

No. 840. FAUCI *v.* UNITED STATES ET AL.; and

No. 841. DENEHY *v.* HANNON, RECEIVER, ET AL. C. A. 1st Cir. Certiorari denied. *Llewellyn A. Luce* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice, A. F. Prescott* and *Frederick E. Youngman* for the United States, and *Arthur L. Brown* for Hannon, respondents. Reported below: 275 F. 2d 234.

No. 853. GRACE, TRUSTEE, *v.* DEEPDALE, INC., ET AL. Court of Appeals of New York. Certiorari denied. *George J. Schaefer* and *John W. Cragun* for petitioner. *John P. Boland, Robert E. Lawther* and *Lawrence J. McKay* for respondents.

No. 869. HERMAN SCHWABE, INC., *v.* UNITED SHOE MACHINERY CORP. C. A. 2d Cir. Certiorari denied. *Richard S. Sullivan, James M. Malloy* and *Ralph Warren Sullivan* for petitioner. *Ralph M. Carson, Robert D. Salinger* and *Louis L. Stanton, Jr.* for respondent. Reported below: 274 F. 2d 608.

No. 873. GAINEY ET AL. *v.* BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES ET AL. C. A. 3d Cir. Certiorari denied. *Lawrence J. Richette* for petitioners. *Robert M. Landis, Owen B. Rhoades, Richard N. Clattenburg, Allen S. Olmsted 2nd, Walter Biddle Saul, Robert S. Marx* and *Ivar H. Peterson* for respondents. Reported below: 275 F. 2d 342.

No. 874. INSURANCE COMPANY OF NORTH AMERICA *v.* LEO, DOING BUSINESS AS OVERSEAS ASSOCIATED CORP. C. A. 2d Cir. Certiorari denied. *Martin P. Detels* and *Vincent L. Leibell, Jr.* for petitioner. *Francis A. Brick, Jr.* for respondent. Reported below: 275 F. 2d 766.

No. 877. DOWELL, INC., ET AL. *v.* TYLER ET AL., DOING BUSINESS AS KING DRILLING CO., ET AL. C. A. 10th Cir. Certiorari denied. *Royal H. Brin, Jr.* for petitioners. *William A. Sloan* for respondents. Reported below: 274 F. 2d 890.

No. 880. LEV ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Charles Spar* and *Murray E. Gottesman* for petitioners. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 276 F. 2d 605.

No. 888. BINION *v.* O'BRIEN, U. S. MARSHAL. C. A. 3d Cir. Certiorari denied. *Jacob Kossman* and *Leon H. Kline* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General Ryan, Harold H. Greene* and *David Rubin* for respondent. Reported below: 273 F. 2d 495.

No. 890. BOWERS MANUFACTURING CO., INC., *v.* ALL-STEEL EQUIPMENT INC. C. A. 9th Cir. Certiorari denied. *Herbert A. Huebner* for petitioner. *Thomas F. McWilliams* for respondent. Reported below: 275 F. 2d 809.

No. 893. MANHATTAN FRUIT EXPORT CORP. *v.* ROYAL NETHERLANDS STEAMSHIP CO. C. A. 2d Cir. Certiorari denied. *Thomas Turner Cooke* for petitioner. *Norman M. Barron* for respondent. Reported below: 271 F. 2d 607.

No. 899. KANSAS TURNPIKE AUTHORITY *v.* ABRAMSON ET AL., EXECUTORS. C. A. 10th Cir. Certiorari denied. *Edward F. Arn* and *Gale Moss* for petitioner. *Clarence V. Beck* for respondents. Reported below: 275 F. 2d 711.

No. 809. KERN ET AL. *v.* COLUMBIA GAS SYSTEM, INC., ET AL.; and

No. 883. VANSTON BONDHOLDERS PROTECTIVE COMMITTEE *v.* COLUMBIA GAS SYSTEM, INC., ET AL. C. A. 6th Cir. Certiorari denied. MR. JUSTICE CLARK took no part in the consideration or decision of these applications. *George Zolotar, Leo T. Wolford* and *Edwin R. Denney* for petitioners in No. 809. *George W. Jaques* for petitioner in No. 883. *Edward S. Pinney, Hugh R. H. Smith, Seldon S. McNeer* and *Robert K. Emerson* for respondents. *Solicitor General Rankin, Wayne G. Barnett, Thomas G. Meeker, David Ferber, Arthur Blasberg, Jr.* and *Richard B. Pearl* for the Securities and Exchange Commission. Reported below: 275 F. 2d 509.

No. 541, Misc. SARDO *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Fourth Judicial Department. Certiorari denied.

No. 732, Misc. MOORE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States.

No. 748, Misc. FRAZIER ET AL. *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Timothy V. A. Dillon* for petitioners. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Theodore G. Gilinsky* for the United States. Reported below: 106 U. S. App. D. C. 400, 273 F. 2d 525.

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No. 868. BARRON *v.* OHIO. Supreme Court of Ohio. Certiorari denied. *Richard B. McQuade* and *James D. Nestroff* for petitioner. Reported below: 170 Ohio St. 267, 164 N. E. 2d 409.

No. 879. WOLD ET AL. *v.* SHORELINE SCHOOL DISTRICT No. 412 ET AL. Supreme Court of Washington. Certiorari denied. THE CHIEF JUSTICE, MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN are of the opinion certiorari should be granted. *Charles S. Burdell* for petitioners. Reported below: 55 Wash. 2d 177, 346 P. 2d 999.

No. 756, Misc. WRIGHT *v.* WILKINS, WARDEN, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 272 F. 2d 881.

No. 781, Misc. MINNESOTA EX REL. WILLIAMS *v.* RIGG, WARDEN. Supreme Court of Minnesota. Certiorari denied. Reported below: 256 Minn. 568, 99 N. W. 2d 450.

No. 802, Misc. FARRELL *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: 106 U. S. App. D. C. 343, 273 F. 2d 78.

No. 808, Misc. STANTON *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 832, Misc. MACLAREN *v.* DENNO, WARDEN. C. A. 2d Cir. Certiorari denied. *John J. Seffern* for petitioner. Reported below: 272 F. 2d 191.

No. 835, Misc. RICHARDS *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Joseph Forer* and *David Rein* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 107 U. S. App. D. C. 197, 275 F. 2d 655.

No. 847, Misc. STEWART *v.* TEXAS ET AL. Court of Criminal Appeals of Texas. Certiorari denied.

No. 852, Misc. ABEL ET AL. *v.* COLORADO. Supreme Court of Colorado. Certiorari denied. Petitioners *pro se*. *Duke W. Dunbar,* Attorney General of Colorado, *Frank E. Hickey,* Deputy Attorney General, and *J. F. Brauer,* Assistant Attorney General, for respondent.

No. 854, Misc. NESMITH *v.* SOUTH CAROLINA. Supreme Court of South Carolina. Certiorari denied.

No. 865, Misc. SMITH *v.* GLADDEN, WARDEN. Supreme Court of Oregon. Certiorari denied. Reported below: 219 Ore. 369, 345 P. 2d 398.

No. 899, Misc. ASHLEY *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 18 Ill. 2d 272, 164 N. E. 2d 70.

No. 900, Misc. DOUGLAS *v.* ARIZONA. Supreme Court of Arizona. Certiorari denied. *W. Edward Morgan* for petitioner. *Wade Church,* Attorney General of Arizona, *Leslie C. Hardy,* Chief Assistant Attorney General, and *Stirley Newell,* Assistant Attorney General, for respondent. Reported below: 87 Ariz. 182, 349 P. 2d 622.

No. 856, Misc. McKINNEY *v.* WARDEN, UNITED STATES PENITENTIARY. C. A. 10th Cir. Certiorari denied. *Roy Cook* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General Ryan* and *Harold H. Greene* for respondent. Reported below: 273 F. 2d 643.

No. 857, Misc. JOHNSON *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 221 Md. 177, 156 A. 2d 441.

No. 859, Misc. STEVENS *v.* MYERS, SUPERINTENDENT OF STATE PENITENTIARY. Supreme Court of Pennsylvania. Certiorari denied. Reported below: 398 Pa. 23, 156 A. 2d 527.

No. 873, Misc. WARD *v.* WARDEN, MARYLAND HOUSE OF CORRECTION. Court of Appeals of Maryland. Certiorari denied.

No. 878, Misc. McKINNEY *v.* PAROLE BOARD OF MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 895, Misc. ESTELLE *v.* MARONEY, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION. Supreme Court of Pennsylvania. Certiorari denied.

No. 862, Misc. HICKS *v.* SPRINGER ET AL. C. A. 6th Cir. Certiorari denied. MR. JUSTICE STEWART took no part in the consideration or decision of this application. Reported below: 275 F. 2d 303.

Rehearing Denied.

No. 627. MONDAY *v.* UNITED STATES, 361 U. S. 965. Motion for leave to file second petition for rehearing denied.

No. 317, Misc. KREMER *v.* CLARKE, TRUSTEE, 362 U. S. 963;

No. 547, Misc. WILLIS *v.* UNITED STATES, 362 U. S. 964;

No. 654, Misc. CERMINARO *v.* URBAN REDEVELOPMENT AUTHORITY OF PITTSBURGH ET AL., 362 U. S. 457; and

No. 778, Misc. SPARKS, ALIAS HOWLERY, *v.* CLERK OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, 362 U. S. 967. Petitions for rehearing denied.

No. 130. NIUKKANEN, ALIAS MACKIE, *v.* MCALEXANDER, ACTING DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, 362 U. S. 390. Motion for leave to file petition for rehearing denied.

JUNE 13, 1960.

Miscellaneous Orders.

No. 663. GINSBURG *v.* GOURLEY, CHIEF JUDGE, U. S. DISTRICT COURT. The motion to vacate order denying petition for certiorari, 362 U. S. 917, and for leave to amend petition is denied. The motion for production of records is denied. *Paul Ginsburg*, petitioner, *pro se*.

No. 23, Misc. IN RE DISBARMENT OF ALKER. In view of the pendency of disbarment proceedings in the United States Court of Appeals and the United States District Court, the motion to vacate the order of disbarment (362 U. S. 985) and to reinstate the order of suspension (360 U. S. 908) is held until those matters are determined. *Francis E. Walter* and *William J. Woolston* on the motion.

No. 850, Misc. ANDERSON *v.* CALIFORNIA ET AL. Motion for leave to file petition for writ of habeas corpus and other relief denied.

No. 747, Misc. McDONALD *v.* BANNAN, WARDEN; and No. 907, Misc. WYERS *v.* BUCHKOE, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

Certiorari Granted. (*See also No. 905, ante, p. 417.*)

No. 914. PAN AMERICAN PETROLEUM CORP. *v.* SUPERIOR COURT OF DELAWARE IN AND FOR NEW CASTLE COUNTY ET AL.;

No. 915. TEXACO, INC., *v.* SUPERIOR COURT OF DELAWARE IN AND FOR NEW CASTLE COUNTY ET AL.; and

No. 916. COLUMBIAN FUEL CORP. *v.* SUPERIOR COURT OF DELAWARE IN AND FOR NEW CASTLE COUNTY ET AL. Supreme Court of Delaware. Certiorari granted. *Hugh M. Morris, James M. Tunnell, Jr., Byron M. Gray, William J. Grove, L. A. Thompson* and *W. W. Heard* for petitioner in No. 914. *John J. Wilson, Frank H. Strickler, Paul F. Schlicher, James M. Tunnell, Jr.* and *Andrew B. Kirkpatrick, Jr.* for petitioner in No. 915. *James M. Tunnell, Jr.* and *Andrew B. Kirkpatrick, Jr.* for petitioner in No. 916. *Conrad C. Mount, Jack Werner, Harry S. Littman* and *Howard L. Williams* for Cities Service Gas Co., respondent. Reported below: 52 Del. —, 158 A. 2d 478.

No. 974, Misc. STEWART *v.* UNITED STATES. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit granted. Case transferred to the appellate docket. *Edward L. Carey, Robert L. Ackerly* and *Walter E. Gillchrist* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 107 U. S. App. D. C. 159, 275 F. 2d 617.

Certiorari Denied.

No. 821. R. C. Owen Co. *v.* United States. Court of Claims. Certiorari denied. *William Waller* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Robert N. Anderson* and *Carolyn R. Just* for the United States. Reported below: —— Ct. Cl. ——, 180 F. Supp. 369.

No. 885. Graves *v.* Texas. Court of Criminal Appeals of Texas. Certiorari denied. *Adolph D. Pavlicek* for petitioner. Reported below: —— Tex. Cr. R. ——, 336 S. W. 2d 156.

No. 900. Guiness *v.* United States. Court of Claims. Certiorari denied. *Carl L. Shipley, Thomas A. Ziebarth* and *Samuel Resnicoff* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub, Alan S. Rosenthal* and *Herbert E. Morris* for the United States. Reported below: —— Ct. Cl. ——, —— F. Supp. ——.

No. 901. Seckler, Trustee, *v.* J. I. Case Co. Supreme Court of Colorado. Certiorari denied. *Winston S. Howard* for petitioner. *Clark M. Robertson* for respondent. Reported below: 141 Colo. 395, 348 P. 2d 368.

No. 889. Williams *v.* Raines, Warden. C. A. 10th Cir. Certiorari denied. Reported below: 277 F. 2d 150.

No. 935. Caruso *v.* California. District Court of Appeal of California, Second Appellate District. Certiorari denied. *Robert Maslow* and *John E. Nolan, Jr.* for petitioner. Reported below: 174 Cal. App. 2d 624, 345 P. 2d 282.

No. 903. SEIDEMAN *v.* HAMILTON. C. A. 3d Cir. Certiorari denied. *B. Nathaniel Richter* and *Lois G. Forer* for petitioner. *Albert E. Brault* and *Denver H. Graham* for respondent. Reported below: 275 F. 2d 224.

No. 928. MARSHALL & HUSCHART MACHINERY CO. *v.* DEPARTMENT OF REVENUE, STATE OF ILLINOIS. Supreme Court of Illinois. Certiorari denied. *Fred W. Potter* and *Edward P. Morse* for petitioner. *Grenville Beardsley,* Attorney General of Illinois, *William C. Wines, Raymond S. Sarnow* and *A. Zola Graves,* Assistant Attorneys General, for respondent. Reported below: 18 Ill. 2d 496, 165 N. E. 2d 305.

No. 744. OLSHAUSEN *v.* COMMISSIONER OF INTERNAL REVENUE. Motion for leave to file supplement to petition for certiorari granted. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied. *George Olshausen,* petitioner, *pro se. Solicitor General Rankin, Assistant Attorney General Rice* and *I. Henry Kutz* for respondent. Reported below: 273 F. 2d 23.

No. 940. CRANE PACKING CO. ET AL. *v.* SPITFIRE TOOL & MACHINE CO., INC. The motion of the American Patent Law Association for leave to file brief, as *amicus curiae,* is granted. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied. *Warren C. Horton, John R. Nicholson* and *Charles M. Nisen* for petitioners. *Clarence E. Threedy* for respondent. *James P. Hume, Robert C. Brown, Jr.* and *George E. Frost* for the American Patent Law Association.

No. 702, Misc. KING *v.* BANNAN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 806. RICHMAN *v.* CALIFORNIA. Appellate Department, Superior Court of California, County of San Bernardino. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted.

No. 841, Misc. MISTRETTA *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 851, Misc. RICHARDSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States.

No. 872, Misc. BISCHELL *v.* WARDEN, MARYLAND HOUSE OF CORRECTION, ET AL. Court of Appeals of Maryland. Certiorari denied.

No. 874, Misc. SOSTRE *v.* MAILLER, CHAIRMAN OF THE NEW YORK STATE BOARD OF PAROLE, ET AL. Appellate Division, Supreme Court of New York, Third Judicial Department. Certiorari denied. Petitioner *pro se. Paxton Blair,* Solicitor General of New York, for respondents.

No. 879, Misc. MOORE *v.* MARTIN, 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: 273 F. 2d 344.

No. 880, Misc. IN RE POPE. Supreme Court of California. Certiorari denied.

No. 883, Misc. MANGIA *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 846, Misc. WEST *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: —— F. 2d ——.

No. 885, Misc. TINES *v.* BOMAR, WARDEN. Supreme Court of Tennessee. Certiorari denied. *Jas. P. Brown* and *Earl E. Leming* for petitioner. *George F. McCanless,* Attorney General of Tennessee, and *James M. Glasgow,* Assistant Attorney General, for respondent. Reported below: 205 Tenn. ——, 329 S. W. 2d 813.

No. 901, Misc. SHACKLEFORD *v.* ARIZONA. Supreme Court of Arizona. Certiorari denied. *W. Edward Morgan* for petitioner. *Wade Church,* Attorney General of Arizona, *Leslie C. Hardy,* Chief Assistant Attorney General, and *Stirley Newell,* Assistant Attorney General, for respondent. Reported below: 87 Ariz. 189, 349 P. 2d 626.

No. 918, Misc. RANKINS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 18 Ill. 2d 260, 163 N. E. 2d 814.

No. 919, Misc. COX *v.* HAND, WARDEN. Supreme Court of Kansas. Certiorari denied. Reported below: 185 Kan. 780, 347 P. 2d 265.

No. 905, Misc. THOMAS *v.* BURFORD, WARDEN. The motion to substitute M. J. Wiman as the party respondent in place of C. P. Burford is granted. Petition for writ of certiorari to the Supreme Court of Alabama denied. Reported below: 270 Ala. 411, 118 So. 2d 738.

No. 887, Misc. SCOTT *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. 891, Misc. HOUSE *v.* MAYO, STATE PRISON CUSTODIAN. C. A. 5th Cir. Certiorari denied. Reported below: 276 F. 2d 42.

No. 897, Misc. KAMROWSKI *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 908, Misc. PHILLIPS *v.* KANSAS ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 274 F. 2d 832.

No. 909, Misc. OPPENHEIMER *v.* SOUTHERN PACIFIC CO. ET AL. Appellate Department, Superior Court of California, County of Los Angeles. Certiorari denied.

No. 913, Misc. BUNDY *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 916, Misc. DE STEFANO *v.* NEW YORK. Appellate Division, Supreme Court of New York, First Judicial Department. Certiorari denied.

No. 922, Misc. GRAY, BY JOHNSON, ADMINISTRATRIX, ET AL. *v.* ST. MARYS KRAFT CORP. ET AL. Supreme Court of Florida. Certiorari denied. *J. B. Hodges* and *Alex Akerman, Jr.* for petitioners. *W. Brantley Brannon* for respondents. Reported below: 117 So. 2d 496.

No. 936, Misc. HILL *v.* NEW MEXICO. Supreme Court of New Mexico. Certiorari denied.

No. 917, Misc. GIBBS *v.* ELLIS, DIRECTOR OF TEXAS DEPARTMENT OF CORRECTIONS, ET AL. Court of Criminal Appeals of Texas. Certiorari denied.

No. 951, Misc. BOGISH *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 959, Misc. HARRIS *v.* NEW YORK. Appellate Division, Supreme Court of New York, First Judicial Department. Certiorari denied.

No. 960, Misc. DAVIS *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Reported below: 7 N. Y. 2d 923, 165 N. E. 2d 571.

No. 995, Misc. ODELL *v.* BURKE. C. A. 7th Cir. Certiorari denied.

No. 450, Misc. KIERNAN *v.* NEW YORK. Petition for writ of certiorari to the Court of Appeals of New York denied without prejudice to an application for writ of habeas corpus in the appropriate United States District Court. Petitioner *pro se*. *Joseph F. Gagliardi* for respondent. Reported below: 6 N. Y. 2d 274, 160 N. E. 2d 503.

JUNE 20, 1960.

Miscellaneous Orders.

No. 973. REYNOLDS *v.* COCHRAN, DIRECTOR OF DIVISION OF CORRECTIONS. Certiorari, *ante*, p. 801, to the Supreme Court of Florida. The motion of the petitioner for the appointment of counsel is granted and it is ordered that *Claude Pepper, Esquire*, of Miami, Florida, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel in this case. Reported below: —— So. 2d ——.

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.) Argued April 21, 1960. Reported below: 215 Ga. 27, 108 S. E. 2d 796.

There having been no certification to the Attorney General of the United States that the constitutionality of § 2 Eleventh of the Railway Labor Act, 45 U. S. C. § 152 Eleventh, an Act of Congress affecting the public interest, is drawn in question, it is ordered that this case be set for reargument in the 1960 Term; and the Court hereby certifies to the Attorney General, pursuant to 28 U. S. C. § 2403, that the constitutionality of said statute is drawn in question in the cause.

Lester P. Schoene and *Milton Kramer* argued the cause and filed a brief for appellants.

E. Smythe Gambrell argued the cause for appellees. With him on the briefs were *W. Glen Harlan, Charles J. Bloch* and *Ellsworth Hall, Jr.*

Briefs of *amici curiae,* urging reversal, were filed by *Clarence M. Mulholland, Edward J. Hickey, Jr.* and *James L. Highsaw, Jr.* for the Railway Labor Executives' Association, and by *J. Albert Woll, Theodore J. St. Antoine* and *Thomas E. Harris* for the American Federation of Labor and Congress of Industrial Organizations.

Probable Jurisdiction Noted.

No. 829. BROWN SHOE CO., INC., *v.* UNITED STATES. Appeal from the United States District Court for the Eastern District of Missouri. Probable jurisdiction noted. *Arthur H. Dean* and *Robert H. McRoberts* for appellant. *Solicitor General Rankin, Acting Assistant Attorney General Bicks, Richard A. Solomon* and *Henry Geller* for the United States. Reported below: 179 F. Supp. 721.

Certiorari Granted. (*See also No. 550, ante, p. 420.*)

No. 886. NATIONAL LABOR RELATIONS BOARD *v.* MATTISON MACHINE WORKS. C. A. 7th Cir. Certiorari granted. *Solicitor General Rankin, Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* for petitioner. *Charles B. Cannon* for respondent. Reported below: 274 F. 2d 347.

No. 910. MILANOVICH ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari granted. *Russell T. Bradford* for petitioners. *Solicitor General Rankin* and *Assistant Attorney General Wilkey* for the United States. Reported below: 275 F. 2d 716.

No. 917. CARR ET AL. *v.* YOUNG ET AL. Supreme Court of Arkansas. Certiorari granted. *Edwin E. Dunaway* for petitioners. Reported below: —— Ark. ——, 331 S. W. 2d 701.

No. 1005, Misc. CULOMBE *v.* CONNECTICUT. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the Supreme Court of Errors of Connecticut granted. Case transferred to the appellate docket. *Alexander A. Goldfarb* for petitioner. *John D. LaBelle* for respondent. Reported below: 147 Conn. 194, 158 A. 2d 239.

Certiorari Denied.

No. 795. IN RE ESTATE OF CHOJNACKI. Supreme Court of Pennsylvania. Certiorari denied. *Anne X. Alpern,* Attorney General of Pennsylvania, and *John D. Killian III,* Deputy Attorney General, for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Alan S. Rosenthal* for the United States in opposition. Reported below: 397 Pa. 596, 156 A. 2d 812.

No. 842. UNITED STATES RUBBER CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *D. Nelson Adams* and *John A. Reed* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Lee A. Jackson* and *Harry Marselli* for respondent. Reported below: 274 F. 2d 307.

No. 894. WILLEY *v.* REVIEW COMMITTEE, VENUE VII, COMMODITY STABILIZATION SERVICE, U. S. DEPARTMENT OF AGRICULTURE. C. A. 8th Cir. Certiorari denied. *Lyle B. Gill* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for respondent. Reported below: 275 F. 2d 264.

No. 897. BROOKSHIRE ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. *Frank Thomas Miller, Jr.* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice, Harry Baum* and *Carolyn R. Just* for respondent. Reported below: 273 F. 2d 638.

No. 906. MATSON NAVIGATION CO. *v.* PACIFIC FAR EAST LINE, INC., ET AL.; and

No. 907. FEDERAL MARITIME BOARD ET AL. *v.* PACIFIC FAR EAST LINE, INC., ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Alvin J. Rockwell* and *Willis R. Deming* for petitioner in No. 906. *E. Robert Seaver, Robert E. Mitchell, Edward Aptaker* and *Edward Schmeltzer* for the Federal Maritime Board et al., petitioners in No. 907. *Solicitor General Rankin, Acting Assistant Attorney General Bicks, Richard A. Solomon* and *Henry Geller* for the United States in opposition. *Donald E. Van Koughnet* for Pacific Far East Line, Inc., respondent. Reported below: 107 U. S. App. D. C. 155, 275 F. 2d 184.

No. 902. WHEELER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Robert M. Taylor* and *Alexander Cooper* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *Meyer Rothwacks* for the United States. Reported below: 275 F. 2d 94.

No. 908. MCCAFFREY ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. *Robert G. McAlister* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice, Melva M. Graney* and *Frederick E. Youngman* for respondent. Reported below: 275 F. 2d 27.

No. 911. JONES & LAUGHLIN STEEL CORP. *v.* HARDINGE COMPANY, INC. C. A. 3d Cir. Certiorari denied. *Davidson C. Miller* for petitioner. *John Gibson Semmes* for respondent. Reported below: 275 F. 2d 37.

No. 912. MANFREDI *v.* UNITED STATES; and

No. 913. DE LUCA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Vincent J. Velella* for petitioners. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Julia P. Cooper* for the United States. Reported below: 275 F. 2d 588.

No. 918. OHIO STATE LIFE INSURANCE CO. ET AL. *v.* CLARK ET AL.; and

No. 919. BROWN, SECRETARY OF STATE, ET AL. *v.* KELLER ET AL. C. A. 6th Cir. Certiorari denied. *William S. Evatt, Robert L. Barton* and *Donald J. Hoskins* for petitioners in No. 918 and for petitioners (other than Ted W. Brown, Secretary of State) in No. 919. *Edward B. Raub, Jr., William A. Wick, William E. Knepper* and *Richard L. Miller* for respondents in No. 918. *J. Bruce Donaldson* and *John D. Holschuh* for respondents in No. 919. Reported below: 274 F. 2d 771.

No. 923. WILKINSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Calvin L. Rampton* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *Meyer Rothwacks* for the United States. Reported below: 278 F. 2d 604.

No. 924. DISTRICT COURT OF MONTEZUMA COUNTY, COLORADO, ET AL. *v.* WHYTE. Supreme Court of Colorado. Certiorari denied. *Duke W. Dunbar,* Attorney General of Colorado, and *John B. Barnard, Jr.,* Assistant Attorney General, for petitioners. *Dan Milenski, Fred M. Winner* and *William A. Brophy* for respondent. Reported below: 140 Colo. 334, 346 P. 2d 1012.

No. 925. WILSON *v.* BEVILLE ET AL. District Court of Appeal of California, Second Appellate District. Certiorari denied. *Robert J. McGowan* for petitioner. *Roger Arnebergh* and *Bourke Jones* for respondents. Reported below: 175 Cal. App. 2d 498, 346 P. 2d 226.

No. 933. NISBET *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. *Luther E. Jones, Jr.* for petitioner. *Will Wilson,* Attorney General of Texas, *Riley Eugene Fletcher* and *Leon F. Pesek,* Assistant Attorneys General, for respondent. Reported below: —— Tex. Cr. R. ——, 336 S. W. 2d 142.

No. 927. UNITED STATES *v.* SAULNIER. Court of Claims. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted. *Solicitor General Rankin, Assistant Attorney General Doub* and *Morton Hollander* for the United States. *Michael Gould* and *Max C. Louis* for respondent. Reported below: —— Ct. Cl. ——, 180 F. Supp. 412.

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No. 922. BYRAM *v.* EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES. C. A. 5th Cir. Certiorari denied. *Grove Stafford* for petitioner. *Al. C. Kammer* for respondent. Reported below: 274 F. 2d 822.

No. 926. HARTLEY PEN CO. *v.* FORMULABS, INC., ET AL. C. A. 9th Cir. Certiorari denied. *Owen A. Bartlett* and *A. V. Falcone* for petitioner. *William Douglas Sellers* for Formulabs, Inc., respondent. Reported below: 275 F. 2d 52.

No. 936. RASER TANNING CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. *M. Reese Dill* for petitioner. *Solicitor General Rankin, Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 276 F. 2d 80.

No. 943. LAMB *v.* SUTTON ET AL. C. A. 6th Cir. Certiorari denied. *Lewis S. Pope* and *Kenneth Harwell* for petitioner. *Edwin F. Hunt, W. F. Barry, Jr.* and *Charles C. Trabue, Jr.* for respondents. Reported below: 274 F. 2d 705.

No. 951. GRAZIANI ET AL. *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. *Joseph A. Pennica* for petitioners. Reported below: 31 N. J. 538, 158 A. 2d 330.

No. 834. CLARKE, TRUSTEE, *v.* UNITED STATES. The motion of Fehr Kremer for leave to dispense with printing brief, as *amicus curiae*, is granted. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied. *Oldham Clarke* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *I. Henry Kutz* for the United States. *Louis Lusky* and *Marvin H. Morse* for Kremer. Reported below: 274 F. 2d 824.

No. 983. GROSS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Donald N. Murtha* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *Meyer Rothwacks* for the United States. Reported below: 276 F. 2d 816.

No. 909. GIRTEN INVESTMENT CO. ET AL. *v.* KANSAS EX REL. ANDERSON, ATTORNEY GENERAL, ET AL. The motion of George Docking, Governor of Kansas, for leave to file brief, as *amicus curiae,* is granted. Petition for writ of certiorari to the Supreme Court of Kansas denied. *Hugh B. Cox, J. E. Schroeder, T. M. Lillard* and *O. B. Eidson* for petitioners. *John Anderson, Jr.,* Attorney General of Kansas, *Charles S. Rhyne* and *Herzel H. E. Plaine* for respondents. *John B. Cullen* for George Docking, Governor of Kansas. Reported below: 186 Kan. 190, 350 P. 2d 37.

No. 466, Misc. LEATHER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Eugene L. Grimm* for the United States. Reported below: 271 F. 2d 80.

No. 646, Misc. FORSYTHE *v.* OHIO. Supreme Court of Ohio. Certiorari denied. *Wilmer D. Rekeweg* and *J. Gareth Hitchcock* for petitioner. *Anthony J. Bowers* for respondent. Reported below: 170 Ohio St. 38, 161 N. E. 2d 778.

No. 708, Misc. ALLEN *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *David I. Shapiro* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 106 U. S. App. D. C. 350, 273 F. 2d 85.

No. 717, Misc. MANFREDONIA *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se. Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Julia P. Cooper* for the United States.

No. 904, Misc. HOWARD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Rankin, Acting Assistant Attorney General Ryan* and *Harold H. Greene* for the United States. Reported below: 274 F. 2d 100.

No. 932, Misc. ROWAN *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 1040, Misc. COSBY *v.* OHIO. Supreme Court of Ohio. Certiorari denied. *Robert B. Krupansky* for petitioner. Reported below: 170 Ohio St. 440, 165 N. E. 2d 792.

No. 598, Misc. BRAMBLE *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application.

Rehearing Denied.

No. 108. MILL RIDGE COAL CO. *v.* PATTERSON, DISTRICT DIRECTOR OF INTERNAL REVENUE, 361 U. S. 816;

No. 839. SMOOT SAND & GRAVEL CORP. *v.* COMMISSIONER OF INTERNAL REVENUE, 362 U. S. 976;

No. 647, Misc. CEPERO *v.* RINCON DE GAUTIER, MANAGER, CITY GOVERNMENT, 362 U. S. 976;

No. 791, Misc. BAKER *v.* UNITED STATES, 362 U. S. 983; and

No. 833, Misc. WILLIAMS *v.* LAVALLEE, WARDEN, 362 U. S. 637. Petitions for rehearing denied.

JUNE 27, 1960.

Miscellaneous Orders.

No. 1, Original. NEW MEXICO *v.* COLORADO. The report of the Boundary Commissioner is received and ordered filed. Exceptions, if any, to the report of the Boundary Commissioner may be filed by the parties within 90 days.

No. —. IN RE BURKE. The motion to amend the attorneys' roll to show the change of name of *Mary Elizabeth Burke* to *Mary Burke Flax* is granted.

No. —. IN RE BORKOWSKI. The motion to amend the attorneys' roll to show the change of name of *Nathan A. Borkowski* to *Nathan Alfred Bork* is granted.

No. 764. BAILEY *v.* ALVIS, WARDEN. The order of March 7, 1960, granting certiorari to the Supreme Court of Ohio, 362 U. S. 909, is amended so as to limit review to the question decided in *Burns* v. *Ohio,* 360 U. S. 252. The motion of petitioner for the appointment of counsel is granted and it is ordered that *Milton H. Schmidt, Esquire,* of Cincinnati, Ohio, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel in this case.

No. 974. NEWSOM *v.* SMYTH, SUPERINTENDENT, VIRGINIA STATE PENITENTIARY. Certiorari, 363 U. S. 802, to the Supreme Court of Appeals of Virginia. The motion of the petitioner for the appointment of counsel is granted and it is ordered that *Armistead L. Boothe, Esquire,* of Alexandria, Virginia, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel in this case.

No. 987. KIMBROUGH *v.* UNITED STATES. Certiorari, 363 U. S. 810, to the United States Court of Appeals for the Sixth Circuit. The motion of petitioner for the appointment of counsel is granted and it is ordered that *Edward L. Barrett, Esquire,* of Berkeley, California, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel in this case. Reported below: 272 F. 2d 944.

No. 785, Misc. SMITH *v.* BENNETT, WARDEN. Appeal from the Supreme Court of Iowa. Motion for leave to proceed *in forma pauperis* granted. The motion to dismiss is granted and the appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is granted limited to the question decided in *Burns* v. *Ohio,* 360 U. S. 252. Case transferred to the appellate docket. It is ordered that *Luther L. Hill, Jr., Esquire,* of Des Moines, Iowa, be, and he is hereby, appointed to serve as counsel for appellant in this case. Appellant *pro se. Norman A. Erbe,* Attorney General of Iowa, for respondent.

No. 765, Misc. STEHLIN *v.* NASH, WARDEN;

No. 888, Misc. BYRD *v.* PEPERSACK, WARDEN;

No. 1031, Misc. MANGLE *v.* WINSOR, COMMISSIONER OF THE DEPARTMENT OF HEALTH AND WELFARE; and

No. 1050, Misc. RICHARDSON *v.* RHAY, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. 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. John M. Dalton,* Attorney General of Missouri, and *Calvin K. Hamilton,* Assistant Attorney General, for respondent in No. 765, Misc. *James H. Norris, Jr.,* Special Assistant Attorney General of Maryland, for respondent in No. 888, Misc.

No. 755, Misc. WOOTEN *v.* BOMAR, WARDEN;

No. 933, Misc. WILLIAMS *v.* RAGEN, WARDEN;

No. 944, Misc. MOORE *v.* BANNAN, WARDEN;

No. 980, Misc. SAM *v.* RHAY, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY;

No. 1006, Misc. HICKS *v.* PEPERSACK, WARDEN, ET AL.;

No. 1020, Misc. MILLER *v.* TAYLOR, WARDEN; and

No. 1042, Misc. WAY *v.* SETTLE, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied. Petitioners *pro se*. *George F. McCanless*, Attorney General of Tennessee, and *Henry C. Foutch*, Assistant Attorney General, for respondent in No. 755, Misc.

No. 970, Misc. FAUBERT *v.* MICHIGAN 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.

No. 1023, Misc. SULLIVAN *v.* DICKSON, WARDEN, ET AL. Motion for leave to file petition for writ of habeas corpus and for other relief denied.

No. 497, Misc. MCDANIEL *v.* CAMPBELL, COMPTROLLER GENERAL OF THE UNITED STATES, ET AL.;

No. 876, Misc. BAXTER *v.* JOHNSON, CLERK, U. S. DISTRICT COURT, ET AL.; and

No. 1000, Misc. CHAUFFEURS, TEAMSTERS AND HELPERS "GENERAL" LOCAL NO. 200 *v.* UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT ET AL. Motions for leave to file petitions for writs of mandamus denied. *David Previant* for petitioner in No. 1000, Misc. *Solicitor General Rankin, Stuart Rothman, Dominick L. Manoli, Norton J. Come* and *Duane B. Beeson* filed a memorandum for the National Labor Relations Board in No. 1000, Misc.

Certiorari Granted. (*See also No. 785, Misc., supra, No. 535, and Misc. Nos. 119, 417, 605, and 759, 364 U. S., at pp. 277, 278, 282, 283, 284.*)

No. 931. TAMPA ELECTRIC CO. *v.* NASHVILLE COAL CO. ET AL. C. A. 6th Cir. Certiorari granted. *William C. Chanler* for petitioner. *Abe Fortas* and *Norman Diamond* for respondents. Reported below: 276 F. 2d 766.

No. 932. CLANCY ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari granted. *Paul P. Waller, Jr.* and *John F. O'Connell* for petitioners. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 276 F. 2d 617.

No. 963. NOLAN, ADMINISTRATOR, ET AL. *v.* TRANSOCEAN AIR LINES. C. A. 2d Cir. Certiorari granted. *Harry S. Wender* for petitioners. *William J. Junkerman* for respondent. Reported below: 276 F. 2d 280.

No. 968. PUGACH *v.* DOLLINGER, DISTRICT ATTORNEY OF BRONX COUNTY, ET AL. C. A. 2d Cir. Certiorari granted. *George J. Todaro* for petitioner. *Isidore Dollinger, Walter E. Dillon* and *Irving Anolik* for respondents. Reported below: 277 F. 2d 739.

No. 730, Misc. CHAPMAN *v.* UNITED STATES. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit granted. Case transferred to the appellate docket. *J. Sewell Elliott* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 272 F. 2d 70.

No. 825. LOCAL 357, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA *v.* NATIONAL LABOR RELATIONS BOARD; and

No. 929. NATIONAL LABOR RELATIONS BOARD *v.* LOCAL 357, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Herbert S. Thatcher* and *David Previant* for Local 357. *Solicitor General Rankin, Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* for respondent in No. 825. *Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* for petitioner in No. 929. Reported below: 107 U. S. App. D. C. 188, 275 F. 2d 646.

No. 846. LOCAL 60, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL–CIO, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari granted. *Francis X. Ward* and *Bernard Dunau* for petitioners. *Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 273 F. 2d 699.

No. 942. BELL ET AL. *v.* UNITED STATES. Court of Claims. Certiorari granted. *Robert E. Hannon* for petitioners. Reported below: — Ct. Cl. —, 181 F. Supp. 668.

No. 949. LEWIS, TRUSTEE, *v.* MANUFACTURERS NATIONAL BANK OF DETROIT. C. A. 6th Cir. Certiorari granted. *Stuart E. Hertzberg* and *Herbert N. Weingarten* for petitioner. *Henry I. Armstrong, Jr.* and *Louis F. Dahling* for respondent. Reported below: 275 F. 2d 454.

No. 952. KOSSICK *v.* UNITED FRUIT CO. C. A. 2d Cir. Certiorari granted. *Jacob Rassner* for petitioner. *Eugene Underwood* for respondent. Reported below: 275 F. 2d 500.

No. 941, Misc. SALDANA *v.* UNITED STATES. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit granted. Case transferred to the appellate docket. *Stephen R. Reinhardt* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. *John T. McTernan, A. L. Wirin* and *Fred Okrand* filed a brief for the American Civil Liberties Union of Southern California, as *amicus curiae,* in support of the petition. Reported below: 274 F. 2d 352.

No. 446, Misc. MARSHALL *v.* BENNETT, WARDEN; and No. 515, Misc. HOOPER *v.* BENNETT, WARDEN. Motions for leave to proceed *in forma pauperis* and petitions for writs of certiorari to the Supreme Court of Iowa granted limited to the question decided in *Burns* v. *Ohio,* 360 U. S. 252. Cases transferred to the appellate docket. It is ordered that *Luther L. Hill, Jr., Esquire,* of Des Moines, Iowa, be, and he is hereby, appointed to serve as counsel for the petitioners. Petitioners *pro se. Norman A. Erbe,* Attorney General of Iowa, for respondent.

No. 920, Misc. RECK *v.* RAGEN, WARDEN. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit granted. Case transferred to the appellate docket. *Anthony Bradley Eben* for petitioner. Reported below: 274 F. 2d 250.

No. 712, Misc. GREEN *v.* UNITED STATES. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the United States Court of Appeals for the First Circuit granted. Case transferred to the appellate docket. 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 the petitioner. Petitioner *pro se. Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 274 F. 2d 59.

No. 729, Misc. PAYNE *v.* MADIGAN, WARDEN. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit granted. Case transferred to the appellate docket. Petitioner *pro se. Solicitor General Rankin, Acting Assistant Attorney General Ryan, Harold H. Greene* and *David Rubin* for respondent. Reported below: 274 F. 2d 702.

No. 966, Misc. MAYNARD *v.* DURHAM & SOUTHERN RAILWAY CO. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the Supreme Court of North Carolina granted. Case transferred to the appellate docket. *William Joslin* for petitioner. Reported below: 251 N. C. 783, 112 S. E. 2d 249.

No. 814, Misc. YOUNG *v.* UNITED STATES. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit granted. Case transferred to the appellate docket. Petitioner *pro se. Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 274 F. 2d 698.

No. 1071, Misc. BALDONADO *v.* CALIFORNIA;

No. 1074, Misc. MOYA *v.* CALIFORNIA; and

No. 1075, Misc. DUNCAN *v.* CALIFORNIA. Motions for leave to proceed *in forma pauperis* and petitions for writs of certiorari to the Supreme Court of California granted limited to the following questions:

1. Was petitioner's right to the trial guaranteed by the Due Process Clause of the XIV Amendment violated in view of the conduct of the District Attorney, the resulting publicity, and the other circumstances under which the trial was held?

2. Was there a violation of petitioner's right to a fair trial, as guaranteed by the Due Process Clause of the XIV Amendment of the Constitution of the United States of America, where in a trial of a capital offense by jury, the trial court permitted to remain in the jury box and sit in judgment, three jurors who had entered the jury box with fixed opinion as to petitioner's guilt, and retained such opinions while being examined on *voir dire?*

Cases transferred to the appellate docket. The orders of MR. JUSTICE DOUGLAS of June 10, 1960, staying the execution of the death sentences are continued pending the issuance of the mandates of this Court. *A. L. Wirin* for petitioners. *Stanley Mosk,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Roy A. Gustafson* for respondent. Reported below: No. 1071, Misc., 53 Cal. 2d 824, 350 P. 2d 115; No. 1074, Misc., 53 Cal. 2d 819, 350 P. 2d 112; No. 1075, Misc., 53 Cal. 2d 803, 350 P. 2d 103.

No. 921, Misc. WILSON *v.* SCHNETTLER ET AL. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit granted. Case transferred to the appellate docket. *Gerald W. Getty* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey,*

Beatrice Rosenberg and *Kirby W. Patterson* for the United States in opposition. Reported below: 275 F. 2d 932.

Certiorari Denied. (See also Misc. Nos. 765, 888, 1031 and 1050, ante, p. 834, and No. 956, Misc., 364 U. S. 284.)

No. 208. CONNALLY ET AL., EXECUTORS, *v.* FEDERAL POWER COMMISSION. C. A. 5th Cir. Certiorari denied. *Gene M. Woodfin* for petitioners. *Solicitor General Rankin, Assistant Attorney General Doub, Samuel D. Slade, Willard W. Gatchell, Howard E. Wahrenbrock* and *C. Louis Knight* for respondent. Reported below: 266 F. 2d 233.

No. 259. UNITED STATES *v.* COBLENTZ ET AL. Court of Appeals of New York. Certiorari denied. *Solicitor General Rankin, Acting Assistant Attorney General Heffron, A. F. Prescott* and *James P. Turner* for the United States. *Alfred D. Jahr* for Coblentz, and *W. Randolph Montgomery* and *Lester Nelson* for New York University, respondents. Reported below: 5 N. Y. 2d 300, 157 N. E. 2d 587.

No. 322. AMERICAN-FOREIGN STEAMSHIP CORP. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Arthur M. Becker* and *Gerald B. Greenwald* for petitioner. *Solicitor General Rankin* for the United States. Reported below: 265 F. 2d 136.

No. 323. HUNT OIL CO. *v.* FEDERAL POWER COMMISSION. C. A. 5th Cir. Certiorari denied. *Robert E. May* and *Omar L. Crook* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub, Samuel D. Slade, Willard W. Gatchell, Howard E. Wahrenbrock* and *Peter H. Schiff* for respondent. Reported below: 266 F. 2d 232.

No. 334. STOCKARD STEAMSHIP CORP. ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *J. Franklin Fort, John Cunningham* and *Israel Convisser* for petitioners. *Solicitor General Rankin* for the United States. Reported below: 265 F. 2d 136.

No. 340. SCOTT ET AL. *v.* UNION PRODUCING CO. ET AL. C. A. 5th Cir. Certiorari denied. *John C. White* and *John H. Dittmar* for petitioners. *Thomas Fletcher* and *James C. Abbott* for respondents. Reported below: 267 F. 2d 469.

No. 352. SOCONY MOBIL OIL CO., INC., *v.* FEDERAL POWER COMMISSION. C. A. 5th Cir. Certiorari denied. *Frank C. Bolton, Jr., William S. Richardson* and *John E. McClure* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub, Samuel D. Slade, Willard W. Gatchell, Howard E. Wahrenbrock* and *Peter H. Schiff* for respondent. Reported below: 266 F. 2d 234.

No. 368. HUMBLE OIL & REFINING CO. *v.* FEDERAL POWER COMMISSION. C. A. 5th Cir. Certiorari denied. *Carl Illig, William J. Merrill* and *Bernard A. Foster, Jr.* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub, Samuel D. Slade, Willard W. Gatchell, Howard E. Wahrenbrock* and *Peter H. Schiff* for respondent. Reported below: 266 F. 2d 235.

No. 396. GOLDFINE ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *Thurman Arnold, Abe Krash* and *Harold Rosenwald* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice* and *Meyer Rothwacks* for the United States. Reported below: 268 F. 2d 941.

No. 468. Atlas Building Products Co. *v.* Diamond Block & Gravel Co. C. A. 10th Cir. Certiorari denied. *J. F. Hulse* and *William A. Sloan* for petitioner. *Dee C. Blythe* and *R. C. Garland* for respondent. Reported below: 269 F. 2d 950.

No. 533. General Grievance Committee of the Brotherhood of Railroad Trainmen et al. *v.* Stichman, Trustee. C. A. 2d Cir. Certiorari denied. *Arnold B. Elkind* and *Herbert Zelenko* for petitioners. *William W. Golub* for respondent. Reported below: 267 F. 2d 941.

No. 934. Glass *v.* United States. C. A. 7th Cir. Certiorari denied. *Charles B. Evins* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 277 F. 2d 566.

No. 938. Chilean Nitrate and Iodine Sales Corp. *v.* Amicizia Societa Navegazione. C. A. 2d Cir. Certiorari denied. *C. Dickerman Williams* for petitioner. *Anthony N. Zock, John R. Sheneman* and *Francis J. O'Brien* for respondent. Reported below: 274 F. 2d 805.

No. 945. Elmer, doing business as Mississippi Testing Laboratories, *v.* United States Fidelity & Guaranty Co. C. A. 5th Cir. Certiorari denied. *Charles Clark* for petitioner. *Joseph A. Covington* for respondent. Reported below: 275 F. 2d 89.

No. 947. Maas, Guardian ad Litem, *v.* Board of Education of Mountain Lakes et al. Supreme Court of New Jersey. Certiorari denied. *Esther Strum Frankel* for petitioner. Reported below: 31 N. J. 537, 158 A. 2d 330.

No. 944. SALOMONS *v.* CALIFORNIA. Appellate Department, Superior Court of California, County of Los Angeles. Certiorari denied. *Harry M. Umann* for petitioner. *Roger Arnebergh* and *Philip E. Grey* for respondent.

No. 948. BEARDEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *M. Neil Andrews* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 277 F. 2d 802.

No. 966. G. & K. INVESTMENT CO. *v.* HARRISON ET AL. Supreme Court of Mississippi. Certiorari denied. *Elizabeth Watkins Hulen* for petitioner. *Frederick Bernays Wiener* for respondents. Reported below: 238 Miss. 760, 115 So. 2d 918.

No. 972. SOCONY-VACUUM OIL CO., INC., ET AL. *v.* LAWLOR. C. A. 2d Cir. Certiorari denied. *Herbert C. Smyth* and *Frank A. Bull* for petitioners. *Nathan Baker, Bernard Chazen* and *Milton Garber* for respondent. Reported below: 275 F. 2d 599.

No. 517, Misc. IN RE NELSON. Supreme Court of Montana. Certiorari denied. Petitioner *pro se*. *Forrest H. Anderson,* Attorney General of Montana, *William F. Crowley,* First Assistant Attorney General, and *Alfred B. Coate,* Assistant Attorney General, for respondent. Reported below: 135 Mont. 603, 343 P. 2d 564.

No. 223, Misc. GRAFF *v.* OHIO. Supreme Court of Ohio. Certiorari denied. Petitioner *pro se*. *Mark McElroy,* Attorney General of Ohio, and *Aubrey A. Wendt,* Assistant Attorney General, for respondent.

No. 554. UNITED STATES POTASH CO. *v.* LOCAL 1912, INTERNATIONAL ASSOCIATION OF MACHINISTS. C. A. 10th Cir. Certiorari denied. MR. JUSTICE BLACK took no part in the consideration or decision of this application. *Rufus G. Poole* for petitioner. *Plato E. Papps, George W. Christensen* and *Bernard Dunau* for respondent. Reported below: 270 F. 2d 496.

No. 706. BRASS & COPPER WORKERS FEDERAL LABOR UNION No. 19,322, AFL–CIO, *v.* AMERICAN BRASS CO., KENOSHA DIVISION. C. A. 7th Cir. Certiorari denied. MR. JUSTICE BLACK took no part in the consideration or decision of this application. *David Previant* and *David Leo Uelmen* for petitioner. *John F. Zimmermann* for respondent. Reported below: 272 F. 2d 849.

No. 991. QUIRKE *v.* ST. LOUIS-SAN FRANCISCO RAILWAY CO. ET AL. The motion for leave to amend the petition for writ of certiorari is granted. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied. *Aaron Kravitch* and *Phyllis Kravitch* for petitioner. *Ralph L. McAfee, James L. Homire* and *John H. Pickering* for respondents. Reported below: 277 F. 2d 705.

No. 553, Misc. WILLIAMS *v.* HEINZE, WARDEN. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Stanley Mosk,* Attorney General of California, *Doris H. Maier* and *G. A. Strader,* Deputy Attorneys General, for respondent. Reported below: 271 F. 2d 308.

No. 562, Misc. LEON *v.* KLINGER, SUPERINTENDENT, CALIFORNIA MEN'S COLONY. Supreme Court of California. Certiorari denied. Petitioner *pro se*. *Stanley Mosk,* Attorney General of California, and *Arlo E. Smith,* Deputy Attorney General, for respondent.

No. 410, Misc. MAYFIELD *v.* SOUTH CAROLINA. Supreme Court of South Carolina. Certiorari denied. Petitioner *pro se*. *Daniel R. McLeod,* Attorney General of South Carolina, *James S. Verner,* Assistant Attorney General, and *James R. Mann* for respondent. Reported below: 235 S. C. 11, 109 S. E. 2d 716.

No. 577, Misc. MILLER *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. *George K. Meuth* for petitioner. *William L. Guild,* Attorney General of Illinois, for respondent.

No. 625, Misc. SMITH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Duke Duvall* and *Ben T. Head* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 273 F. 2d 462.

No. 667, Misc. BEVINS *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 677, Misc. RICKERSON *v.* NEW YORK. Appellate Division, Supreme Court of New York, Fourth Judicial Department. Certiorari denied.

No. 687, Misc. PHILLIPS *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 690, Misc. IN RE BUTLER. Court of Criminal Appeals of Oklahoma. Certiorari denied. Reported below: 346 P. 2d 348.

No. 703, Misc. MITTS *v.* OKLAHOMA. Court of Criminal Appeals of Oklahoma. Certiorari denied. Reported below: 345 P. 2d 913.

No. 707, Misc. COOPER ET AL. *v.* DISTRICT OF COLUMBIA. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *James C. Newton* for petitioner. *Chester H. Gray, Milton D. Korman* and *Hubert B. Pair* for respondent.

No. 714, Misc. DAVIS *v.* RHAY, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Supreme Court of Washington. Certiorari denied.

No. 724, Misc. DUCHON *v.* MISSOURI ET AL. 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. 738, Misc. NEWMAN *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. 763, Misc. KIRKWOOD *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. *Warren J. Carey* for petitioner. *Grenville Beardsley,* Attorney General of Illinois, for respondent. Reported below: 17 Ill. 2d 23, 160 N. E. 2d 766.

No. 764, Misc. MARTINEZ *v.* SOUTHERN UTE TRIBE. C. A. 10th Cir. Certiorari denied. *Bentley M. McMullin* for petitioner. *LaVerne H. McKelvey* and *R. Franklin McKelvey* for respondent. Reported below: 273 F. 2d 731.

No. 773, Misc. SCHENCK *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied. Petitioner *pro se.* *Victor H. Blanc* for respondent.

No. 768, Misc. McGrady *v.* Smyth, Superintendent, Virginia State Penitentiary. Supreme Court of Appeals of Virginia. Certiorari denied. Petitioner *pro se*. *A. S. Harrison, Jr.*, Attorney General of Virginia, for respondent.

No. 769, Misc. Davis *v.* Smyth, Superintendent, Virginia State Penitentiary. Supreme Court of Appeals of Virginia. Certiorari denied. Petitioner *pro se*. *A. S. Harrison, Jr.*, Attorney General of Virginia, for respondent.

No. 782, Misc. Eastman *v.* Smyth, Superintendent, Virginia State Penitentiary. Supreme Court of Appeals of Virginia. Certiorari denied. Petitioner *pro se*. *A. S. Harrison, Jr.*, Attorney General of Virginia, for respondent.

No. 794, Misc. Koczwara *v.* Pennsylvania. Supreme Court of Pennsylvania. Certiorari denied. *Irving L. Epstein* for petitioner. *Carlon M. O'Malley* for respondent.

No. 858, Misc. Beard *v.* Ohio. Supreme Court of Ohio. Certiorari denied.

No. 860, Misc. Dunn et al. *v.* United States. C. A. 5th 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: 273 F. 2d 470.

No. 864, Misc. Smith *v.* New York. Appellate Division, Supreme Court of New York, Fourth Judicial Department. Certiorari denied.

No. 870, Misc. DRANOW *v.* COMMITTEE ON CHARACTER AND FITNESS IN THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK, FIRST DEPARTMENT, ET AL. Court of Appeals of New York. Certiorari denied.

No. 875, Misc. WALKER ET AL. *v.* WALKER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 274 F. 2d 425.

No. 877, Misc. WILLIAMS *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. 882, Misc. LARSON *v.* UNITED STATES. C. A. 5th 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: 275 F. 2d 673.

No. 892, Misc. FOWLER *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied.

No. 896, Misc. OSTROFSKY ET AL. *v.* UNITED STEELWORKERS OF AMERICA, AFL–CIO, ET AL. C. A. 4th Cir. Certiorari denied. *Bernard W. Rubenstein* for petitioners. *Arthur J. Goldberg* and *David E. Feller* for the United Steelworkers of America, and *John H. Morse, Ralph L. McAfee* and *H. Vernon Eney* for Bethlehem Steel Co., respondents. Reported below: 273 F. 2d 614.

No. 898, Misc. MARTEL *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 221 Md. 294, 157 A. 2d 437.

No. 910, Misc. FULWOOD *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. 911, Misc. SOLOMON *v.* BANNAN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 915, Misc. ADAMIETZ *v.* SMITH, POSTMASTER, PITTSBURGH. C. A. 3d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Doub, Samuel D. Slade* and *Seymour Farber* for the United States. Reported below: 273 F. 2d 385.

No. 924, Misc. RHYCE *v.* RICHMOND, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 273 F. 2d 29.

No. 926, Misc. GRANT *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. 931, Misc. EDELSON *v.* MURPHY, WARDEN. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Louis J. Lefkowitz,* Attorney General of New York, *Paxton Blair,* Solicitor General, and *Irving Galt* for respondent.

No. 934, Misc. ALEXANDER *v.* WYOMING ET AL. Supreme Court of Wyoming. Certiorari denied. Petitioner *pro se*. *Norman B. Gray,* Attorney General of Wyoming, and *W. M. Haight,* Deputy Attorney General, for respondents.

No. 937, Misc. LOCKE *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 18 Ill. 2d 471, 165 N. E. 2d 316.

No. 938, Misc. WESSON *v.* ELLIS, GENERAL MANAGER, TEXAS DEPARTMENT OF CORRECTIONS, ET AL. Court of Criminal Appeals of Texas. Certiorari denied.

No. 939, Misc. BAILEY *v.* OHIO. Supreme Court of Ohio. Certiorari denied.

No. 940, Misc. HANOVICH *v.* SACKS, WARDEN. Supreme Court of Ohio. Certiorari denied.

No. 943, Misc. FUGATE *v.* NEBRASKA. Supreme Court of Nebraska. Certiorari denied. *Frederick H. Wagener* for petitioner. Reported below: 169 Neb. 420, 99 N. W. 2d 868.

No. 945, Misc. YOUNGQUIST *v.* BRUCKER, SECRETARY OF THE ARMY. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for respondent.

No. 946, Misc. EX PARTE SHERWOOD. C. A. 9th Cir. Certiorari denied.

No. 947, Misc. SMITH *v.* INDUSTRIAL ACCIDENT COMMISSION ET AL. Supreme Court of California. Certiorari denied.

No. 964, Misc. MORRISON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Theodore George Gilinsky* for the United States.

No. 948, Misc. IN RE WINCHESTER. Supreme Court of California. Certiorari denied. Petitioner *pro se*. *Stanley Mosk*, Attorney General of California, *Doris H. Maier* and *Raymond M. Momboisse*, Deputy Attorneys General, for respondent. Reported below: 53 Cal. 2d 528, 348 P. 2d 904.

No. 950, Misc. CROXTON *v.* NEW YORK. Court of General Sessions of New York County, N. Y. Certiorari denied.

No. 952, Misc. MCKINNEY *v.* BANNAN, WARDEN. Supreme Court of Michigan. Certiorari denied.

No. 953, Misc. STUBBS *v.* KANSAS. Supreme Court of Kansas. Certiorari denied. Reported below: 186 Kan. 266, 349 P. 2d 936.

No. 1026, Misc. HAMILTON *v.* ALABAMA. Supreme Court of Alabama. Certiorari denied. *Orzell Billingsley, Jr.*, *Arthur D. Shores*, *Peter A. Hall*, *Oscar W. Adams, Jr.*, *Thurgood Marshall*, *Jack Greenberg* and *James M. Nabrit III* for petitioner. *MacDonald Gallion*, Attorney General of Alabama, and *James W. Webb*, Assistant Attorney General, for respondent. Reported below: 270 Ala. 184, 116 So. 2d 906.

No. 1052, Misc. SCOTT *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. *Morris Lavine* for petitioner. *Stanley Mosk*, Attorney General of California, *William E. James*, Assistant Attorney General, and *Ernest E. Sanchez*, Deputy Attorney General, for respondent. Reported below: 53 Cal. 2d 558, 348 P. 2d 882.

No. 971, Misc. SHEPPARD *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari denied.

No. 954, Misc. CABALLERO *v.* WILKINS, WARDEN. Appellate Division of the Supreme Court of New York, Fourth Judicial Department. Certiorari denied.

No. 955, Misc. O'NEAL *v.* CALIFORNIA. District Court of Appeal of California, Third Appellate District. Certiorari denied.

No. 957, Misc. DIGGS *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, Harold H. Greene* and *David Rubin* for the United States.

No. 962, Misc. RIGG *v.* CORRECTION DEPARTMENT, PAROLE BOARD DIVISION, OHIO. Supreme Court of Ohio. Certiorari denied.

No. 965, Misc. SHEFFIELD *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. 967, Misc. YOUNG *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Petitioner *pro se. John Martin Jones, Jr.*, Assistant Attorney General of Maryland, for respondent.

No. 968, Misc. GORDON *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *Nathan Kestnbaum* for petitioner. *Edward S. Silver* for respondent.

No. 973, Misc. SISK *v.* TEXAS ET AL. Court of Criminal Appeals of Texas. Certiorari denied.

No. 975, Misc. IN RE MERCER. Supreme Court of California. Certiorari denied.

No. 977, Misc. TIBBETT *v.* HAND, WARDEN. Supreme Court of Kansas. Certiorari denied. Reported below: 185 Kan. 770, 347 P. 2d 353.

No. 978, Misc. MCNUTT *v.* TEXAS ET AL. Court of Criminal Appeals of Texas. Certiorari denied.

No. 981, Misc. TWINING *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 276 F. 2d 925.

No. 983, Misc. MCCAFFREY *v.* UNITED AIRCRAFT CORP. Supreme Court of Errors of Connecticut. Certiorari denied. Reported below: 147 Conn. 139, 157 A. 2d 920.

No. 987, Misc. BEENE *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 991, Misc. WILSON *v.* SAMPSON BROTHERS & COOPER, INC., ET AL. C. A. 5th Cir. Certiorari denied. *Weldon A. Cousins* for petitioner. *Robert G. Hughes* and *Stanley E. Loeb* for respondents. Reported below: 273 F. 2d 611.

No. 992, Misc. ANDREWS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Kirby W. Patterson* for the United States.

No. 1014, Misc. BATSON *v.* LAVALLEE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1011, Misc. ELSTEN *v.* UNITED STATES ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin* for the United States.

No. 1058, Misc. SMITH *v.* LOUISIANA. Supreme Court of Louisiana. Certiorari denied. *Raymond H. Kierr* for petitioner.

No. 7, Misc. JACKSON *v.* PENNSYLVANIA;
No. 186, Misc. SMITH *v.* PENNSYLVANIA;
No. 376, Misc. GODFREY *v.* BANMILLER, WARDEN;
No. 487, Misc. PENNSYLVANIA EX REL. HARRIS *v.* MARONEY, WARDEN;
No. 519, Misc. PENNSYLVANIA EX REL. SMITH *v.* MARONEY, WARDEN;
No. 522, Misc. PENNSYLVANIA EX REL. MOYER *v.* MARONEY, WARDEN;
No. 535, Misc. ADAMS *v.* BANMILLER, WARDEN;
No. 572, Misc. PENNSYLVANIA EX REL. HAUN *v.* MARONEY, WARDEN, ET AL.;
No. 615, Misc. BROWN *v.* MARONEY, WARDEN;
No. 804, Misc. LUZZI *v.* BANMILLER, WARDEN; and
No. 869, Misc. SLAUGHENHAUPT *v.* MARONEY, WARDEN. On petitions for writs of certiorari to the Supreme Court of Pennsylvania. In view of the representations by the Attorney General of Pennsylvania that the Supreme Court of Pennsylvania has agreed to allow the filing of appeals by indigent litigants without the payment of the required statutory filing fees, the petitions for writs of certiorari are denied. *Anne X. Alpern*, Attorney General of Pennsylvania, and *Frank P. Lawley, Jr.*, Deputy Attorney General, for respondents. *Victor H. Blanc* also for respondent in No. 7, Misc., and No. 186, Misc.

No. 231, Misc. PENNSYLVANIA EX REL. BRUNO *v.* CAVELL, WARDEN. The motion to substitute James F. Maroney in the place of Angelo C. Cavell as the party respondent is granted. In view of the representations by the Attorney General of Pennsylvania that the Supreme Court of Pennsylvania has agreed to allow the filing of appeals by indigent litigants without the payment of the required statutory filing fees, petition for writ of certiorari to the Supreme Court of Pennsylvania denied. *Anne X. Alpern,* Attorney General of Pennsylvania, and *Frank P. Lawley, Jr.,* Deputy Attorney General, for respondent.

No. 744, Misc. LEBEAU *v.* ILLINOIS DEPARTMENT OF PUBLIC SAFETY, BIBB, DIRECTOR. The motions of Talbot Jennings, Allan Foster, Douglas McMiller, and Frank Johnson for leave to file briefs, as *amicus curiae,* are denied. Petition for writ of certiorari to the Supreme Court of Illinois denied.

No. 797, Misc. CARTER ET AL. *v.* MCELROY, SECRETARY OF DEFENSE, ET AL. The motion to substitute Thomas S. Gates, Jr., in the place of Neil H. McElroy as a party respondent is granted. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit denied. *Alfred Avins* for petitioners. *Solicitor General Rankin, Acting Assistant Attorney General Ryan, Harold H. Greene* and *David Rubin* for respondents.

No. 881, Misc. SMITH *v.* WILKINSON, WARDEN. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit and for other relief denied. Petitioner *pro se. Solicitor General Rankin, Acting Assistant Attorney General Ryan* and *Harold H. Greene* for respondent. Reported below: 273 F. 2d 416.

No. 861, Misc. THOMAS *v.* RAGEN, WARDEN. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted. *Gerald W. Getty* and *James J. Doherty* for petitioner.

No. 893, Misc. LADD *v.* CALIFORNIA ET AL. Petition for writ of certiorari to the Supreme Court of California and for other relief denied.

No. 963, Misc. ARMSTRONG *v.* CALIFORNIA ET AL. Petition for writ of certiorari to the Supreme Court of California and for other relief denied.

No. 993, Misc. LOFTON *v.* DOUGLAS, SECRETARY OF THE AIR FORCE, ET AL. The motion to substitute Dudley C. Sharp in the place of James H. Douglas as a party respondent is granted. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit denied. Petitioner *pro se. Solicitor General Rankin, Assistant Attorney General Yeagley, Kevin T. Maroney* and *Samuel L. Strother* for respondents.

Rehearing Denied.

No. 221. PHILCO CORPORATION *v.* UNITED STATES, 361 U. S. 825. Motion for leave to file petition for rehearing denied.

No. 398. UNITED STATES *v.* ALABAMA ET AL., 362 U. S. 602. Petition for rehearing and motion to retax costs denied.

No. 435. KINNEAR-WEED CORPORATION *v.* HUMBLE OIL & REFINING CO., 361 U. S. 903. Motion for leave to file petition for rehearing and for other relief denied.

No. 56. UNITED STATES *v.* REPUBLIC STEEL CORP. ET AL., 362 U. S. 482;

No. 111. SCHAFFER ET AL. *v.* UNITED STATES, 362 U. S. 511;

No. 164. LEVINE *v.* UNITED STATES, 362 U. S. 610;

No. 278. NEEDELMAN *v.* UNITED STATES, 362 U. S. 600;

No. 817. GENOVESE *v.* UNITED STATES, 362 U. S. 974;

No. 694, Misc. LAWYER *v.* UNITED STATES, 362 U. S. 977;

No. 732, Misc. MOORE *v.* UNITED STATES, *ante*, p. 813; and

No. 836, Misc. ANDERTEN *v.* UNITED STATES, *ante*, p. 808. Petitions for rehearing denied.

No. 813. LOCAL 24 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, AFL–CIO, ET AL. *v.* OLIVER ET AL., 362 U. S. 605. Petition for rehearing denied. MR. JUSTICE FRANKFURTER and MR. JUSTICE STEWART took no part in the consideration or decision of this application.

No. 593, Misc. CROSS *v.* STATE BAR OF CALIFORNIA, 362 U. S. 991. Petition for rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of this application.

AMENDMENT OF RULES OF THIS COURT.

ORDER.

IT IS ORDERED that paragraph 2 of Rule 33 of the Rules of this Court be amended by designating said paragraph "2 (a)" and by adding paragraph "(b)" as follows:

(b) In any proceeding in whatever court arising wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question and the United States or any agency, officer or employee thereof is not a party, all initial pleadings, motions or papers in this Court shall recite that 28 U. S. C. § 2403 may be applicable and shall be served upon the Solicitor General, Department of Justice, Washington, D. C. In proceedings from any court of the United States as defined by 28 U. S. C. § 451, such initial pleading, motion or paper shall state whether or not any such court has, pursuant to 28 U. S. C. § 2403, certified to the Attorney General the fact that the constitutionality of such Act of Congress was drawn in question.

JUNE 20, 1960.

STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF, AND REMAINING ON DOCKETS, AT CONCLUSION OF OCTOBER TERMS—1957, 1958, AND 1959

	ORIGINAL			APPELLATE			MISCELLANEOUS			TOTALS		
Terms	1957	1958	1959	1957	1958	1959	1957	1958	1959	1957	1958	1959
Number of cases on dockets	13	15	12	1,104	1,041	1,047	891	1,006	1,119	2,008	2,062	2,178
Number disposed of during terms	1	3	0	967	886	860	815	892	962	1,783	1,781	1,822
Number remaining on dockets	12	12	12	137	155	187	76	114	157	225	281	356

	TERMS		
	1957	1958	1959
Distribution of cases disposed of during terms:			
Original cases	1	3	0
Appellate cases on merits	297	245	215
Petitions for certiorari	670	641	645
Miscellaneous docket applications	815	892	962

	TERMS		
	1957	1958	1959
Distribution of cases remaining on dockets:			
Original cases	12	12	12
Appellate cases on merits	68	84	116
Petitions for certiorari	69	71	71
Miscellaneous docket applications	76	114	157

JUNE 29, 1960

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CRIMINAL LAW. See also **Constitutional Law**, II, 3; III.

Using mails to defraud—"For the purpose of executing such scheme."—Though indictment charged, and evidence tended to show, that defendants devised and practiced a scheme to defraud a school district, they did not support conviction under 18 U. S. C. § 1341, when indictment did not charge, and evidence did not show, any use of mails "for the purpose of executing such scheme," within meaning of that section. Parr v. United States, p. 370.

CROSS-EXAMINATION. See **Civil Rights Act.**

DAMS. See **Eminent Domain.**

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EMINENT DOMAIN.

Water-power rights—"Taking"—Government dam on nonnavigable tributary to protect capacity of navigable river.—When state agency had been authorized by state law and license from Federal Power Commission to build hydroelectric plants on nonnavigable tributary of navigable stream, and Federal Government prevented consummation by building its own dam to protect navigable capacity of the navigable stream, the state agency was not entitled to compensation for "taking" of its water-power rights. United States v. Grand River Dam Authority, p. 229.

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INTERNAL REVENUE CODE. See **Taxation**, 1–7.

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JURISDICTION. See also **Admiralty; Labor**, 1–3; **Procedure; Trading with the Enemy Act; Transportation.**

1. *Supreme Court—Appeal from state court holding state statute constitutional — Alaska.* — During interim between attainment of Alaska statehood and organization of new state courts and Federal District Court for Alaska, the old District Court for Alaska was "highest court" of the State, within meaning of 28 U. S. C. § 1257 (2), and this Court had jurisdiction of direct appeal from decision sustaining constitutionality of state statute. Metlakatla Indian Community v. Egan, p. 555.

2. *District Courts—Action to review administrative decision—Constitutionality of federal statute—One-judge or three-judge court.*— When action under § 205 (g) of Social Security Act to review administrative decision challenged constitutionality of Act but did not seek injunction or otherwise interdict operation of statutory scheme, 28 U. S. C. § 2282 did not require three-judge court and jurisdiction was properly exercised by single-judge court. Flemming v. Nestor, p. 603.

LABOR. See also **Constitutional Law**, II, 4; **Taxation**, 2.

1. *Labor Management Relations Act, 1947—Suit to compel arbitration—Function of court.*—In suit under § 301 (a) of Labor Management Relations Act, 1947, to compel arbitration of dispute under

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provision for arbitration of all disputes arising under collective bargaining agreement, function of court limited to ascertaining whether party seeking arbitration is making a claim which on its face is governed by agreement to arbitrate. Steelworkers v. American Manufacturing Co., p. 564; Steelworkers v. Warrior & Gulf Navigation Co., p. 574; Steelworkers v. Enterprise Wheel & Car Corp., p. 593.

2. *Arbitration agreement—Wrongful discharge—Reinstatement and back pay after expiration of agreement.*—When collective bargaining agreement provided for arbitration of disputes and for reinstatement with back pay of employees wrongfully discharged, arbitrator finding that employees had been wrongfully discharged during life of agreement could order reinstatement and back pay after its expiration. Steelworkers v. Enterprise Wheel & Car Corp., p. 593.

3. *Railway Labor Act—Adjustment Board—Injunction to protect jurisdiction—Conditions.*—In granting injunction against strike to protect jurisdiction of National Railroad Adjustment Board, District Court had equitable power to impose condition to protect employees against harmful change in working conditions during pendency of dispute before Board. Locomotive Engineers v. Missouri-Kansas-Texas R. Co., p. 528.

LIENS. See **Taxation**, 5–7.

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Rates—Favored nation clause—Effect of pipeline paying a higher price to another producer.—Effective rate for sale of gas by producer to pipeline company not increased automatically under "favored nation" clause of contract when pipeline company agreed to pay another producer higher price under pre-existing long-term contract which required price to be redetermined periodically. Texas Gas Transmission Corp. v. Shell Oil Co., p. 263.

NAVIGABLE WATERS. See **Eminent Domain.**

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OLD-AGE BENEFITS. See **Constitutional Law,** II, 2; **Jurisdiction,** 2.

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PRICE DISCRIMINATIONS. See **Antitrust Acts,** 1–2.

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PROCEDURE. See also **Admiralty; Civil Rights Act; Constitutional Law,** II, 1–4; III; **Labor,** 1–3; **Taxation,** 5; **Trading with the Enemy Act; Transportation.**

1. *Supreme Court—Appeal from decision of interim court sustaining constitutionality of state statute—Alaska.*—When decision of interim court of Alaska sustaining constitutionality of state statute was entangled with questions of state law, this Court refrained from passing on appeal pending opportunity for Supreme Court of Alaska to rule on questions of state law. Metlakatla Indian Community v. Egan, p. 555.

2. *Supreme Court—Case challenging constitutionality of federal statute—Failure to notify Attorney General.*—Appeal in case involving challenge to constitutionality of federal statute affecting public interest having been argued without notification to Attorney General, case set for reargument; Court certified to Attorney General, pursuant to 28 U. S. C. § 2403, that constitutionality of statute was drawn in question. Machinists v. Street, p. 825.

3. *Supreme Court—Amendment of Rules—Litigation challenging constitutionality of federal statute—Notice to Solicitor General.*—Rule 33 amended so as to require notice to Solicitor General regarding litigation challenging constitutionality of Act of Congress when United States or any agency, officer or employee thereof is not a party. P. 859.

4. *Courts of Appeals—Constitutional questions—Issues of local law.*—When District Court had awarded judgment to policyholder

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against foreign insurance company on ground that, under local law, losses were not excluded from coverage of policy and suit was not barred by time provision in policy, Court of Appeals should have passed on these issues of local law before ruling on constitutionality of application of local law to contract made in another State. Clay v. Sun Insurance Office, p. 207.

5. *Courts of Appeals—Rehearing en banc—Participation by retired judge.*—Circuit judge who has retired under 28 U. S. C. § 371 (b) not eligible to participate in decision of case on rehearing *en banc* under 28 U. S. C. § 46 (c). United States v. American-Foreign SS. Corp., p. 685.

6. *District Courts—Admiralty—Depositions for purpose of discovery.*—A federal district court sitting in admiralty has no power to order the taking of oral depositions for the purpose of discovery only. Miner v. Atlass, p. 641.

7. *District Courts—Transfer of civil action to another District—"Where it might have been brought."*—Under 28 U. S. C. § 1404 (a), a federal district court in which a civil action has been properly brought is not empowered to transfer it on motion of defendant to a district in which the plaintiff did not have a right to bring it. Hoffman v. Blaski, p. 335.

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Extent of grants to Gulf Coast States.—Texas and Florida entitled under Act to land under Gulf of Mexico within three marine leagues of their coasts; but Louisiana, Mississippi and Alabama entitled only to three geographical miles from their coastlines. United States v. Louisiana, p. 1; United States v. Florida, p. 121.

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1. *Amendment of Rules—Litigation challenging constitutionality of federal statute—Notice to Solicitor General.*—Rule 33 amended so as to require notice to Solicitor General regarding litigation challenging constitutionality of Act of Congress when United States or any agency, officer or employee thereof is not a party. P. 859.

2. *Statistics.*—Statement showing the number of cases filed, disposed of, and remaining on dockets, at conclusion of October Terms, 1957, 1958 and 1959. P. 860.

TAXATION.

1. *Income tax—"Gifts" — Business associates — Retiring employees.*—Whether transaction amounts to "gift" excludable from income depends upon facts of each case; presentation of automobile to business associate in appreciation of services rendered held not "gift"; in concluding that payment of cash to retiring employee in appreciation of past services was "gift," District Court made insufficient findings. Commissioner v. Duberstein, p. 278.

2. *Income tax—"Gifts"—Strike assistance by labor union.*—On record, jury was justified in finding that strike assistance, by way of room rent and food vouchers, rendered by labor union to striker who was in need, was "gift" excludable from income. United States v. Kaiser, p. 299.

3. *Estate tax — Life insurance — Policies assigned to wife but premiums paid by decedent.*—Internal Revenue Code of 1939, § 811 (g) (2) (A), construed and applied as requiring that, where a husband had assigned insurance policies on his own life to his wife but continued to pay premiums on them until he died in 1954, proceeds attributable to premiums so paid after January 10, 1941, must be included in husband's estate for purposes of federal estate tax, held constitutional. United States v. Manufacturers National Bank, p. 194.

4. *Excise tax—"Self-contained air-conditioning units"—Revenue Rulings.*—Revenue Rulings holding that excise tax on "self-contained air-conditioning units" applied to those having certain physical

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features, designed for installation in window or other opening and having "a total motor horsepower of less than 1 horsepower," held valid. Cory Corporation v. Sauber, p. 709.

5. *Federal tax liens—Junior—Extinguish by enforcement of senior liens under state law.*—Federal tax liens on real estate which are junior to defaulted mortgages held on same properties by other parties may be effectively extinguished by state proceedings to which the United States is not a party. United States v. Brosnan, p. 237.

6. *Federal tax liens—Mechanics' liens—Priority.*—When contractor defaulted both on federal taxes and on payments to subcontractors, extent of federal tax lien on his "property and rights to property" depended upon what rights, if any, he had under New York State law to funds paid into court by owners of real estate as amounts remaining due under construction contract. Aquilino v. United States, p. 509.

7. *Federal tax liens—Mechanics' liens—Priorities.*—Under North Carolina law, bankrupt contractor who had defaulted both on federal taxes and on payments to subcontractors had no property interest in amount due under general contract except to extent it exceeded aggregate of amounts due subcontractors; therefore, federal tax lien could attach only to such excess. United States v. Durham Lumber Co., p. 522.

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Return of vested property—Administrative determination—Judicial review.—Section 7 (c) of Trading with the Enemy Act precludes judicial review of administrative determination that alien is not eligible for return of property vested by Alien Property Custodian; Administrative Procedure Act and Declaratory Judgment Act not applicable. Schilling v. Rogers, p. 666.

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Railroads—Rate determinations—Interstate Commerce Commission—Review by District Court.—When railroad sued in Court of Claims to recover from Government difference between domestic rates and export rates on certain shipments, Court of Claims suspended proceedings until Interstate Commerce Commission passed on reasonableness of rates, and railroad then sued in Federal District Court for review of Commission's determination, Court of Claims

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should have continued to stay its proceedings until District Court had passed upon validity of Commission's order. Pennsylvania R. Co. v. United States, p. 202.

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2. *"Committed to agency discretion."*—Administrative Procedure Act. Schilling v. Rogers, p. 666.

3. *"Criminal prosecutions."* — Sixth Amendment. Hannah v. Larche, p. 420.

4. *"Discriminate in price."*—Clayton Act, § 2 (a). Federal Trade Comm'n v. Anheuser-Busch, p. 536.

5. *"For the purpose of executing such scheme."*—18 U. S. C. § 1341. Parr v. United States, p. 370.

6. *"Gift."*—Internal Revenue Code. Commissioner v. Duberstein, p. 278; United States v. Kaiser, p. 299.

7. *"Heard and determined."*—28 U. S. C. § 46 (c). United States v. American-Foreign SS. Corp., p. 685.

8. *"Highest court of a State in which a decision could be had."*—28 U. S. C. § 1257 (2). Metlakatla Indians v. Egan, p. 555.

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10. *"Property and rights to property."*—Internal Revenue Code. Aquilino v. United States, p. 509; United States v. Durham Lumber Co., p. 522.

11. *"Self-contained air-conditioning units."*—Internal Revenue Code. Cory Corporation v. Sauber, p. 709.

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13. *"Take."*—Fifth Amendment. United States v. Grand River Dam Authority, p. 229.

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