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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1959
AUGUST SPECIAL TERM, 1960
AND
OCTOBER TERM, 1960

OPINIONS AND DECISIONS PER CURIAM
JUNE 27, 1960, THROUGH JANUARY 16, 1961
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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

EARL WARREN, Chief Justice.
HUGO L. BLACK, Associate Justice.
FELIX FRANKFURTER, Associate Justice.
WILLIAM O. DOUGLAS, Associate Justice.
TOM C. CLARK, Associate Justice.
JOHN M. HARLAN, Associate Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
CHARLES E. WHITTAKER, Associate Justice.
POTTER STEWART, Associate Justice.

RETIRED

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

WILLIAM P. ROGERS, Attorney General.
J. LEE RANKIN, Solicitor General.
JAMES R. BROWNING, Clerk.
WALTER WYATT, Reporter of Decisions.
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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.

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL. *v.* UNITED STATES ET AL.

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

No. 74. Argued May 19, 1960.—Decided June 27, 1960.

1. In this proceeding under § 209 (b) of the Interstate Commerce Act, the Commission exceeded its statutory authority by granting to a motor carrier subsidiary of a railroad permits to act as a contract carrier for a single shipper from points on the railroad's line in California to points on its line in certain other States, since the Commission neither (1) imposed conditions upon the permits sufficient to assure that the service to be rendered would be truly auxiliary to, and supplemental of, the rail service, nor (2) made findings sufficient to establish the existence of "special circumstances" justifying the waiver of such restrictions. Pp. 3–15.

(a) The general policy under § 5 (2)(b) and the National Transportation Policy of restricting the services of motor carrier subsidiaries of railroads to those which are auxiliary to, or supplemental of, the parent railroad's services is applicable to permits under § 209 (b). Pp. 6–7.

(b) If a trucking service can fairly be characterized as auxiliary to, or supplemental of, train service, there is compliance with the mandate of § 5 (2)(b) that the railroad should be able to "use service by motor vehicle to public advantage *in its operations*"; but, if the motor transportation is essentially unrelated to the rail service, the parent railroad is invading the field of trucking, and,

under normal circumstances, the National Transportation Policy is thereby offended. Pp. 7–9.

(c) When there are "special circumstances" sufficient to justify such action in the public interest, however, the Commission may sometimes refrain from imposing the condition that the trucking service be auxiliary to, or supplemental of, the rail service. *American Trucking Associations* v. *United States,* 355 U. S. 141. Pp. 10–11.

(d) The conditions imposed upon the permits in this case were not sufficient to restrict the motor carrier to operations truly auxiliary to, or supplemental of, the rail service. Pp. 11–13.

(e) The Commission's findings in this case were not sufficient to establish the existence of "special circumstances" justifying the waiver of such restrictions. Pp. 13–15.

2. Insofar as it pertains to the permits to serve points on the railroad's lines, the judgment of the District Court denying relief is reversed, and the case is remanded to the Commission for such further proceedings, not inconsistent with this opinion, as may be appropriate. Pp. 15–17.

3. The reversal and remand, however, do not apply to the Commission's grant of authority to provide contract carrier service to three nonrail points in Nevada. P. 17.

4. Appellants, six motor carriers and three associations of motor carriers, had standing to maintain their action to set aside the Commission's order, under the "party in interest" criterion of § 205 (g) of the Interstate Commerce Act and under the "person suffering legal wrong . . . or adversely affected or aggrieved" criterion of § 10 (a) of the Administrative Procedure Act. Pp. 17–18.

170 F. Supp. 38, reversed.

Peter T. Beardsley argued the cause for appellants. With him on the brief was *Larry A. Esckilsen.*

Richard A. Solomon argued the cause for the United States. With him on the brief were *Solicitor General Rankin* and *Acting Assistant Attorney General Bicks.*

Robert W. Ginnane argued the cause and filed a brief for the Interstate Commerce Commission, appellee.

Robert L. Pierce argued the cause for Pacific Motor Trucking Co. et al., appellees. With him on the brief were *Edward M. Reidy, Thormund A. Miller, Wm. Meinhold, Henry M. Hogan, Walter R. Frizzell* and *Beverley S. Simms.*

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

The principal question presented on this appeal is whether the appellee Interstate Commerce Commission properly declined to impose certain restrictions upon motor carrier permits it issued to a trucking company which is a subsidiary of a railroad.

The permits in question are designed to allow appellee Pacific Motor Trucking Company, a wholly owned subsidiary of Southern Pacific Company, to perform a particular type of transportation service for appellee General Motors Corporation. Prior to issuance of these permits, Pacific Motor already had been authorized to conduct certain trucking activities in a number of States into which Southern Pacific's extensive railway system penetrates. Without adverting to immaterial details, that authority may be described as follows: Pacific Motor held common carrier certificates from the Commission for the transportation of commodities, by way of service auxiliary to and supplemental of Southern Pacific rail service, over routes paralleling Southern Pacific lines in Oregon, California, Nevada, Arizona, New Mexico, and Texas. It also held contract carrier authority from the State of California for intrastate transportation of trucks and automobiles. Finally, it had been granted contract carrier permits by the Commission for the transportation of automobiles, trucks, and buses from certain points in California to three nonrail points in Nevada, to two points on the Mexican border, to certain points in Los Angeles

Harbor, and to points in Nevada located on the Southern Pacific line. These latter contract carrier permits did not contain restrictions designed to make the service auxiliary to and supplemental of Southern Pacific rail service. Pacific Motor's only contract carrier shipper has been General Motors.

By the four applications which gave rise to the present controversy, Pacific Motor sought to extend the scope of its contract carrier service for General Motors. It requested authorization from the Commission for the transportation of new automotive equipment from plants of General Motors at Oakland, Raymer, and South Gate, California, to various interstate destinations not included within its prior permits. Generally speaking, the first application, designated *Sub 34,* covered contract carrier service from the Oakland plants to points on the Southern Pacific line in Oregon; the second, *Sub 35,* covered similar service to three Nevada nonrail points; the third, *Sub 36,* covered transportation from the Raymer plant to points in Arizona which are stations on the Southern Pacific line; and the last—and broadest—application, *Sub 37,* covered transportation from the Oakland, Raymer, and South Gate plants to points in seven States, whether or not on the Southern Pacific line.[1]

The Commission proceedings resulted in the grant of some, but not all, of the requested authority. On May 8, 1957, the Commission acted favorably on the *Sub 34* application. 71 M. C. C. 561. However, the Commission thereafter consolidated the four applications and heard oral argument. On September 9, 1958, the Commission issued its final report, 77 M. C. C. 605, which may

[1] With respect to the transportation from Oakland and Raymer, the States were Washington, Oregon, Idaho, Nevada, Utah, Arizona, and New Mexico. The proposed transportation from South Gate was to be to the same States, excluding New Mexico but adding Montana.

be described specifically enough for our purposes as authorizing transportation by Pacific Motor to the three additional Nevada nonrail points and to points on the Southern Pacific line in Nevada, Utah, Arizona, Oregon, and New Mexico.[2] Otherwise, the applications were denied. There were certain other conditions imposed by the Commission, which we will detail later, but the major restriction was the limitation of points of destination to points on the Southern Pacific line.

Appellants—American Trucking Associations, Inc., its Contract Carrier Conference, the National Automobile Transporters Association, and six motor carriers—brought suit in Federal District Court to set aside the Commission's order. See 28 U. S. C. § 1336. Appellees Pacific Motor and General Motors intervened in support of the order. The United States was named a party defendant, together with the Interstate Commerce Commission, but did not either participate in or oppose the defense. See 28 U. S. C. § 2323. A three-judge court, which was convened pursuant to 28 U. S. C. §§ 2325 and 2284, denied relief. 170 F. Supp. 38. Our appellate jurisdiction was invoked under 28 U. S. C. § 1253, and we noted probable jurisdiction. 361 U. S. 806. In this Court, the Commission opposes and the United States supports the appellants.

There is a preliminary challenge by Pacific Motor and General Motors to appellants' standing, a challenge which was sustained by two members of the lower court. We disagree with this holding. Since the basis for our view on the problem of standing will be more readily appreciated after the merits of the case have been fully treated, we postpone our discussion of this matter.

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[2] One Commissioner who concurred said that he would give broader authority; three Commissioners dissented from the grant; and of the three Commissioners who did not participate, one said that he would have joined the dissenters.

The critical issue raised by appellants is whether the Commission exceeded its statutory authority by granting the permits in question to a railroad subsidiary without imposing more stringent limitations than it did. On this question, the lower court unanimously ruled against appellants. This judgment must be evaluated in the light of this Court's previous decisions, set against the background of Commission practice.

Both the Commission and this Court have recognized that Congress has expressed a strong general policy against railroad invasion of the motor carrier field. This policy is evinced in a general way in the preamble to the 1940 amendments to the Interstate Commerce Act—the National Transportation Policy, 54 Stat. 899—which articulates the congressional purpose that the Act be "so administered as to recognize and preserve the inherent advantages" of "all modes of transportation." More particularly, Congress' attitude is reflected by a proviso to § 5 (2)(b) of the Act,[3] which enjoins the Commission to withhold approval of an acquisition by a railroad of a motor carrier "unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition."

The Commission long ago concluded that the policy of the transportation legislation requires that the standards of § 5 (2)(b)—then § 213 (a) of the Motor Carrier Act of 1935, 49 Stat. 555—be followed as a general rule in other situations, notably in applications for common carrier certificates of convenience and necessity under § 207.[4] *Kansas City Southern Transport Co., Common Carrier Application,* 10 M. C. C. 221 (1938). And this

[3] 54 Stat. 906, as amended, 49 U. S. C. § 5 (2)(b).

[4] 49 Stat. 551, 49 U. S. C. § 307.

Court has confirmed the correctness of the Commission's conception of its responsibilities under both § 5 (2)(b) and § 207. See *United States* v. *Rock Island Motor Transit Co.*, 340 U. S. 419; *United States* v. *Texas & Pacific Motor Transport Co.*, 340 U. S. 450; *Interstate Commerce Comm'n* v. *Parker*, 326 U. S. 60. The Court has also taken cognizance of the congressional confirmation of the Commission's policy by the 1940 re-enactment in § 5 (2)(b) of the provisions of § 213 (a), after some of the pertinent Commission decisions had been specifically called to Congress' attention. See *United States* v. *Rock Island Motor Transit Co., supra,* at 432. And although the instant proceeding involves contract carrier applications and hence falls under § 209,[5] the Commission in its opinion recognized that, for purposes of the relevance of the § 5 (2)(b) standards, there is no distinction between this type of case and proceedings arising under § 207. 77 M. C. C. 621–622. Nor can we discern any grounds for differentiation.

Thus it is evident that the policy of opposition to railroad incursions into the field of motor carrier service has become firmly entrenched as a part of our transportation law. Moreover, this general policy fortunately has not been implemented merely by way of a more or less unguided suspicion of railroad subsidiaries, but rather has evolved through a series of Commission decisions from embryonic form into a set of reasonably firm, concrete standards.[6] The Commission's opinion in the case at bar describes these standards as follows:

> "The restrictions usually imposed in common-carrier certificates issued to rail carriers or their affiliates

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[5] 49 Stat. 552, as amended, 49 U. S. C. § 309.

[6] The first major Commission decision was rendered the year after enactment of the Motor Carrier Act of 1935. *Pennsylvania Truck Lines, Inc., Acquisition of Control of Barker Motor Freight, Inc.,*

in order to insure that the service rendered thereunder shall be no more than that which is auxiliary to or supplemental of train service are: (1) the service by motor vehicle to be performed by rail carrier or by a rail-controlled motor subsidiary should be limited to service which is auxiliary to or supplemental of rail service, (2) applicant shall not serve any point not a station on the railroad, (3) a key-point requirement or a requirement that shipments transported by motor shall be limited to those which it receives from or delivers to the railroad under a through bill of lading at rail rates covering, in addition to the movement by applicant, a prior or subsequent movement by rail, (4) all contracts between the rail carrier and the motor carrier shall be reported to the Commission and shall be subject to revision if and as the Commission finds it to be necessary in

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1 M. C. C. 101. In refusing approval of an acquisition unless certain conditions were met, a division of the Commission stated:

". . . [W]e are not convinced that the way to maintain for the future healthful competition between rail and truck service is to give the railroads free opportunity to go into the kind of truck service which is strictly competitive with, rather than auxiliary to, their rail operations. The language of section 213 . . . is evidence that Congress was not convinced that this should be done. Truck service would not, in our judgment, have developed to the extraordinary extent to which it has developed if it had been under railroad control. Improvement in the particular service now furnished by the partnership might flow from control by the railroad, but the question involved is broader than that and concerns the future of truck service generally. The financial and soliciting resources of the railroads could easily be so used in this field that the development of independent service would be greatly hampered and restricted, and with ultimate disadvantage to the public." *Id.*, at 111–112.

The development of Commission policy is traced in detail in *Rock Island Motor Transit Co.—Purchase—White Line Motor Freight Co.*, 40 M. C. C. 457. See also the similar and lengthy discussion in *United States* v. *Rock Island Co., supra, passim.*

> order that such arrangements shall be fair and equitable to the parties, and (5) such further specific conditions as the Commission, in the future, may find it necessary to impose in order to insure that the service shall be auxiliary to, or supplemental of, train service. . . ."

The key phrase in this summary is obviously "auxiliary to or supplemental of train service." If a trucking service can fairly be so characterized, it is clear enough that there is compliance with the mandate of § 5 (2)(b) that the carrier should be able "to use service by motor vehicle to public advantage *in its operations.*" But if, on the other hand, the motor transportation is essentially unrelated to rail service, the railroad parent is invading the field of trucking, and, under normal circumstances, the National Transportation Policy is thereby offended.

It is this "auxiliary to or supplemental of" verbalization of the policy of § 5 (2)(b), as applied to § 207, that has found favor in this Court. See *American Trucking Assns.* v. *United States,* 355 U. S. 141; *United States* v. *Rock Island Motor Transit Co., supra; United States* v. *Texas & Pacific Motor Transport Co., supra; Interstate Commerce Comm'n* v. *Parker, supra.* Moreover, while the Court has not specified the more particularized restrictions which it might regard as essential constituents of the "auxiliary to or supplemental of" concept, it is significant that the Court in *Rock Island* apparently accepted the Commission's view that the phrase implies a limitation of function, *i. e.,* type of trucking service, and not merely a geographical limitation, *i. e.,* place where the service is performed.[7] 340 U. S., at 436–444.

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[7] "The Commission asserts that the meaning of 'auxiliary and supplemental' . . . was not geographical. . . .

. . . . . .

"What was in the Commission's mind as to the meaning of auxiliary and supplemental at the time it issued its certificate, we cannot be

But while the judicial and administrative current has run strongly in favor of auxiliary and supplemental restrictions on motor carrier subsidiaries of railroads, the Commission has determined, and this Court has agreed,

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sure. At present a motor service is auxiliary and supplemental to rail service, in the Commission's view, when the railroad-affiliated motor carrier in a subordinate capacity aids the railroad in its rail operations by enabling the railroad to give better service or operate more cheaply rather than independently competing with other motor carriers. . . . The Commission has continually evidenced . . . its intention to have rail-owned motor carriers serve in auxiliary and supplemental capacity to the railroads.

. . . . . .

"The Commission has expressed its policy . . . by the phrase, perhaps too summary, auxiliary and supplemental. Though the phrase is difficult to define precisely, its general content is set out in *Texas & Pacific Motor Transport Co. Application,* 41 M. C. C. 721, 726 [establishing generally the same conditions set forth in the text, *supra,* pp. 7–9] . . . . While the practice of the Commission has varied in the conditions imposed, the purpose to have rail-connected motor carriers act in coordination with train service has not. . . ." 340 U. S., at 439, 442–443.

See the detailed discussion in *Rock Island Motor Transit Co.—Purchase—White Line Motor Freight Co.*, 40 M. C. C. 457. ("[T]here . . . appears to have developed a tendency in rail-motor acquisition proceedings to treat the *Barker* case restrictions as geographical or territorial only in their intent rather than as substantive limitations upon the character of the *service* which might be rendered by a railroad or its affiliate under any acquired right." *Id.*, at 470.) See also *Texas & Pacific Motor Transport Co. Common Carrier Application, supra,* at 726. ("Since petitioner's certificates limit the service to be performed to that which is auxiliary to or supplemental of the rail service of the railway, it is without authority to engage in operations unconnected with the rail service . . . . To the extent petitioner is performing or participating in all-motor movements on the bills of lading of a motor carrier and at all-motor rates, it is performing a motor service in competition with the rail service and the service of existing motor carriers; and, to the extent it is substituting rail service for motor-vehicle service, the rail service is auxiliary to or supplemental of the motor-vehicle service rather than the motor-vehicle service being auxiliary to or supplemental of rail service.")

that the public interest may sometimes be promoted by not imposing such limitations. A prime example is *American Trucking Assns.* v. *United States, supra,* where the trucking service was not being performed adequately by independent motor concerns. We there observed that the mandatory provisions of § 5 (2)(b) do not appear in § 207, and approved the Commission's policy of not attaching auxiliary and supplemental restrictions where "special circumstances" prevail. We concluded:

> "We repeat . . . that the underlying policy of § 5 (2)(b) must not be divorced from proceedings for new certificates under § 207. Indeed, the Commission must take 'cognizance' of the National Transportation Policy and apply the Act 'as a whole.' But . . . we do not believe that the Commission acts beyond its statutory authority when in the public interest it occasionally departs from the auxiliary and supplementary limitations in a § 207 proceeding." 355 U. S., at 151–152.

These, then, are the guiding principles which have been established by what has gone before and which mark the range of our inquiry in this case. Since, as we have indicated, the Commission believes, and we agree, that there is no relevant difference between a § 207 proceeding and a § 209 proceeding so far as the problem here involved is concerned, the decisive questions are: (1) Did the Commission impose conditions upon the permits issued to Pacific Motor under which the service to be rendered would be truly auxiliary to and supplemental of Southern Pacific's rail service? (2) If not, was the Commission's waiver of such restrictions justified by "special circumstances"?

The first question need not detain us long. The principal permits were qualified only by the following conditions: (1) the service was to be restricted to points which

are stations on the Southern Pacific line; (2) "there may from time to time in the future be attached to the permits . . . such reasonable terms, conditions, and limitations as the public interest and national transportation policy may require"; and (3) Pacific Motor was to request the imposition of restrictions upon its outstanding certificates with respect to the transportation of automobiles and trucks.

The last restriction was designed to obviate any dual operation problem under § 210,[8] and is not pertinent to the auxiliary and supplemental standard. See 77 M. C. C., at 624. The second condition obviously is no restriction at all on present operations, and hence can hardly be said to limit the trucking to an auxiliary or supplemental service. We so recognized in *American Trucking Associations,* where the certificates contained a similar restriction. 355 U. S., at 154. And the first limitation, upon which appellees principally rely, is but a geographical, not a functional, restriction. As we have noted, *Rock Island* gives strong support to the view there expressed by the Commission that the essence of auxiliary and supplemental limitation is functional control. While it may be true, as appellees argue, that such a geographical limitation is a necessary ingredient of an auxiliary and supplemental restriction, it does not by any means follow that this ingredient makes the whole. Moreover, we have the strongest evidence that the Commission did not believe that it did, since the Commission specifically refrained from imposing the most general, but obviously the most significant, restriction—that "the service by motor vehicle . . . should be limited to service which is auxiliary to or supplemental of rail service." 77 M. C. C., at 622–623. The conclusion seems inescapable that the conditions imposed upon the permits to Pacific Motor,

[8] 49 Stat. 554, as amended, 49 U. S. C. § 310.

though undoubtedly "restrictions" in a general sense, were not limitations sufficient to hold Pacific Motor to a truly auxiliary and supplemental service.

Appellees urge that nonetheless there were "special circumstances" within the meaning of *American Trucking Associations*. Appellees point to various findings of fact by the Commission, such as the need of General Motors for a service of the type here involved, Pacific Motor's experience and qualifications, and the unlikelihood that a significant amount of traffic would be diverted from rail to motor transportation even if the permits were granted. The difficulty with appellees' argument is that the Commission did not find that considerations of this nature constituted "special circumstances" under the *American Trucking Associations* rule, but rather viewed them simply as supporting the basic determinations which it was required to make under § 209 (b) in order to issue a contract carrier permit to *any* applicant.[9] And naturally we

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[9] Section 209 (b) provides in pertinent part:

"Subject to section 310 of this title, a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this chapter and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent authorized by the permit, will be consistent with the public interest and the national transportation policy declared in the Interstate Commerce Act; otherwise such application shall be denied. *In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in the Interstate Commerce Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper*

should not substitute our judgment for the Commission's on a matter like this, for "[t]he 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.

The Commission assigned but a single reason for not imposing the normal restrictions upon the Pacific Motor permits: to do so would compel Pacific Motor to conduct a common carrier service. Appellees support this decision upon the ground that the Commission is without authority under § 209 (b) to impose such character-destroying conditions upon a contract carrier permit.[10] We need not determine whether the Commission possesses the power to attach such limitations, or, in the alternative, to award a common carrier certificate, since we believe that, in any event, the Commission's reason is insufficient justification for its action. Assuming that the restrictions which would limit Pacific Motor's operations to an auxiliary and supplemental service would also be incompatible with a contract carrier operation, and that the Commission was consequently powerless to impose those restrictions, this alone does not, in our view, meet the "special circumstances" test. There is, for example, no finding that independent contract carriers were unable or

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and the changing character of that shipper's requirements. . . ." (Emphasis added.)

The italicized portion was added by an amendment of August 22, 1957, 71 Stat. 411, well before the Commission's decision of September 9, 1958. Consequently, the Commission was required to apply the new standards. *Ziffrin, Inc.* v. *United States*, 318 U. S. 73, 78.

[10] Section 209 (b) provides in part that the Commission "shall attach to [the permit] . . . such reasonable terms, conditions, and limitations, *consistent with the character of the holder as a contract carrier* . . . as may be necessary to assure that the business is that of a contract carrier and within the scope of the permit, and to carry out . . . the requirements established by the Commission under section 304 (a) (2) and (6) of this title . . . ."

unwilling to perform the same type of service as Pacific Motor. In such a situation we do not believe that the policy of the Act allows the Commission to authorize service by Pacific Motor, limited only to points on the Southern Pacific line, simply because General Motors wants a contract carrier operation. If that desire of General Motors, in combination with the policy of the Act, disables a railroad subsidiary from obtaining the business, that is simply the result of the National Transportation Policy.[11] This consequence, we believe, does not meet the compelling public interest standard established by *American Trucking Associations.* A contrary conclusion would open the door to approval of over-the-road contract trucking by railroad subsidiaries to most, if not virtually all, major destinations, and hence would greatly attenuate the safeguards which have been painstakingly erected to prevent railroad domination of trucking. Appellees say that these safeguards are no longer needed, because independent trucking is no longer an "infant industry." This is an immaterial argument in this forum. We do not condemn the wisdom of the Commission's action. We simply say that the transportation legislation does, and that the pardoning power in this case belongs to Congress.

Thus the decision of the District Court must be reversed, because we conclude that the Commission fell into error of law. The question then arises whether there should be a remand which permits further proceedings. Appellants argue that there should not be, because the Commission, according to appellants, found that there

[11] "Such restrictions hamper railroad companies in the use of their physical facilities—stations, terminals, warehouses—their personnel and their capital in the development of their transportation enterprises to encompass all or as much of motor transportation as the roads may desire. The announced transportation policy of Congress did not permit such development." *United States* v. *Rock Island Motor Transit Co., supra,* at 443–444.

were no special circumstances aside from the alleged impossibility of imposing the usual restrictions upon a contract carrier. It is true that the Commission based the rail-point restriction upon "the absence of any showing of unusual conditions." 77 M. C. C., at 623. But we cannot be certain that the Commission thereby intended to say that there were no special circumstances within the meaning of the *American Trucking Associations* principle. As we have pointed out, the rail-point restriction, standing alone, is different in kind from limitations which impose an auxiliary and supplemental service. Consequently, we cannot be sure that the Commission believes the same sort of circumstances determine the applicability of both types of restrictions. Moreover, the Commission's discussion of this point is open to the interpretation that it was repeating some of its conclusions with respect to the § 209 (b) standards, *e. g.*, "the effect which granting the permit would have upon the services of the protesting carriers." See note 9, *supra*.[12] Under these circumstances, we would be warranted in precluding further proceedings only if, by an independent search of the record, we were able to conclude that, as a matter of law, there are no factors present which the Commission could have regarded as special circumstances. Although the findings of the Commission which are reflected in its opinion do not seem to us to comply with the *American Trucking Associations* standard, as the silence of the Commission seems to imply, we are unwilling in a complicated proceeding of this nature to deal with this problem *ab initio* or to say that the Commission could not have made additional findings on the basis of the evidence had it been aware that the ground its decision rested upon was insuffi-

[12] The rail-point limitation appears to have been designed primarily to prevent encroachment upon the business of competing rail carriers. Various railroads opposed the grant of authority before the Commission, but did not join in the federal court action.

cient. Consequently, under the particular circumstances of this case, we believe that it should be remanded to the Commission so that it can apply what we hold to be the applicable principles in such further proceedings as it may find to be consistent with this opinion.

The reversal and remand, however, will not include one aspect of the Commission's action—the grant of authority to provide a service to three nonrail points in Nevada—which is not governed by the rationale of our opinion. This small segment of the controversy has been submerged in the dispute over the much broader permit covering transportation to rail points in various States. It is obvious, of course, that "special circumstances" would have to be present to justify this Nevada award. Appellees maintain that there was such justification, and appellants have not established that it was lacking. Nor do we perceive any other reason to upset this award. Consequently, we affirm with respect to this particular permit.

There remains only the question of standing. Although the three-judge court concluded that the Commission had not exceeded its authority in this case, two members of the court also believed that "there was no showing of actual or anticipated direct injury such as would entitle [the appellants] to institute this action." 170 F. Supp., at 48. In support of this conclusion, appellees rely principally upon *Atchison, T. & S. F. R. Co.* v. *United States,* 130 F. Supp. 76, aff'd *per curiam,* 350 U. S. 892. That decision held that certain railroads had no standing to challenge a Commission order authorizing acquisition by one motor carrier of others. Since the lower court in *Atchison* stressed the fact that the Commission there had not created any additional motor carrier service, the decision clearly is not in point. In the instant case, not only has the Commission created new operating rights, but they are rights in which appellants have a stake. And

surely the statement by General Motors that it would not in any event give the business to any appellant cannot deprive appellants of standing. The interests of these independents cannot be placed in the hands of a shipper to do with as it sees fit through predictions as to whom its business will or will not go. The decision we believe to be controlling is not *Atchison,* but rather *Alton R. Co.* v. *United States,* 315 U. S. 15, where the Court confirmed the standing of a railroad to contest the award of a certificate to a competing trucker. We conclude, then, that appellants had standing to maintain their action to set aside the Commission's order under the "party in interest" criterion of § 205 (g) of the Interstate Commerce Act, 49 Stat. 550, 49 U. S. C. § 305 (g), and under the "person suffering legal wrong . . . or adversely affected or aggrieved" criterion of § 10 (a) of the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. § 1009 (a).

Our disposition of the case makes it unnecessary to consider the other issues raised by appellants.

We have no desire to hamper the Commission in the discharge of its heavy responsibilities, and we have always recognized that the Commission has been given a wide discretion by Congress. But that discretion has limits; our decision in favor of the Commission in *American Trucking Associations* established the limits relevant to this case; and we conclude that those limits have been transgressed. Of course, in remanding the case we do not intend to circumscribe the Commission in determining whether appropriate "special circumstances" do exist in this instance which would take the case out of the otherwise conventional standards.

The judgment of the District Court is reversed and the case is remanded to that court with directions to remand to the Commission for such further proceedings, not inconsistent with this opinion, as may be appropriate.

It is so ordered.

CONTINENTAL GRAIN CO. *v.* BARGE FBL–585 ET AL.

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

No. 229. Argued April 20, 1960.—Decided June 27, 1960.

While a barge was being loaded at Memphis, it sank with resulting damage to both the barge and the cargo. The barge owner sued the cargo owner in a Tennessee State Court for damages alleged to have resulted from negligence in loading it, and that case was removed to the Federal District Court at Memphis. The cargo owner then brought this action in the Federal District Court at New Orleans against the barge and its owner, claiming damages to the cargo resulting from unseaworthiness. The barge owner then moved under 28 U. S. C. § 1404 (a) for transfer of this case to the Federal District Court at Memphis, alleging that such transfer was "necessary for the convenience of the parties and witnesses and in the interest of justice." Finding these allegations to be true, the District Court at New Orleans transferred the case to the District Court at Memphis. *Held:* It did not err in doing so. Pp. 20–27.

(a) Insofar as this is a "civil action" against the barge owner, it clearly was transferable to the District Court at Memphis, since the plaintiff could have brought this action in that court. *Hoffman* v. *Blaski,* 363 U. S. 335, distinguished. P. 22.

(b) Transfer of this action to the District Court at Memphis is not barred by the fact that fictionally it is also an *in rem* proceeding against the barge itself, which was not within the jurisdiction of the District Court at Memphis when this action was brought. Pp. 22–27.

268 F. 2d 240, affirmed.

Eberhard P. Deutsch argued the cause for petitioner. With him on the brief were *Malcolm W. Monroe* and *René H. Himel, Jr.*

George B. Matthews argued the cause for respondents. With him on the brief were *Charles Kohlmeyer, Jr.* and *Selim B. Lemle.*

MR. JUSTICE BLACK delivered the opinion of the Court.

The single issue presented for decision in this case is whether the United States District Court in New Orleans, acting under 28 U. S. C. § 1404 (a), erred in ordering that this action for damages to cargo from alleged unseaworthiness be transferred for trial, "in the interest of justice," to the United States District Court at Memphis, Tennessee, where the sinking of the barge occurred. The Court of Appeals affirmed the District Court's transfer order. 268 F. 2d 240. We granted certiorari to consider this important question. 361 U. S. 811.

The facts and circumstances on which the District Court transferred this case are these. Barge FBL–585, a respondent here under an ancient admiralty fiction, is owned by Federal Barge Lines, Inc., the other respondent. After the barge was partially loaded by petitioner, Continental Grain Co., with its soybeans at its wharf in Memphis, the barge sank, causing damage both to the barge and to the soybeans. A dispute arose over what caused it to sink. The barge owner, Federal Barge Lines, Inc., brought an action for damages in a Tennessee state court charging that the barge sank because the cargo owner, Continental Grain Co., had been negligent in loading it. The cargo owner later brought this action in the United States District Court in New Orleans against the barge and its owner, in a single complaint, charging that the vessel had sunk because of its defects and unseaworthiness, and claiming damages for injury to the cargo. In the meantime the damage case against the grain company had been removed from the Tennessee state court to the United States District Court at Memphis. While the litigation arising out of this single occurrence was in this posture in the New Orleans and Memphis courts, the barge-owner defendant, at New Orleans, filed a motion and accompanying affidavits under

§ 1404 (a) to transfer "this action" to the United States District Court at Memphis alleging that such transfer was "necessary for the convenience of the parties and witnesses and in the interest of justice. . . ." This followed the language of § 1404 (a), which provides:

> "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 New Orleans District Court found that the issue in the Memphis case

> "that is, the cause of the casualty, is precisely the issue in the case at bar. The convenience of the great majority of witnesses in this case dictates that this case be tried in Memphis. The efficient administration of justice requires that this claim for cargo damage be tried by the same court which is trying the claim for hull damage, both claims being between the same parties, and relate to the same incident."

These findings were well supported by evidence, were approved by the Court of Appeals, are not challenged here, and we accept them. The case, therefore, if tried in New Orleans, will bring about exactly the kind of mischievous consequences against "the interest of justice" that § 1404 (a) was designed to prevent, that is, unnecessary inconvenience and expense to parties, witnesses, and the public.

The grain company argues that this frustration of the basic purpose of Congress in passing § 1404 (a) is compelled by the language of the section that prevents the transfer of a "civil action" by a District Court to any District Court other than one "where it might have been brought." Two weeks ago this Court decided in *Hoff-*

man v. *Blaski* and *Sullivan* v. *Behimer,* 363 U. S. 335, that this language bars transfer of a "civil action" properly pending in one District Court to another in which that "civil action" could not have been brought because the defendant legally could not have been subjected to suit there at the time when the case was originally filed. Those cases involved transfers in which the plaintiffs filing the suits would have had no right whatever to proceed originally against the defendants on the "civil actions" in the District Courts to which transfer was sought without the defendants' consent. But in this case there was admittedly a right on the part of the grain company to subject the owner of the barge, with or without its consent, to a "civil action" in Memphis at the time the New Orleans action was brought. Under these circumstances it would plainly violate the express command of § 1404 (a), as construed in our two prior cases, to reverse the District Court's judgment ordering this single civil action to be transferred to Memphis, unless transfer is barred by the joinder of the *in rem* claim against the barge with the claim against the owner itself. The grain company takes this view of the effect of joinder, arguing that since the barge was in New Orleans when this "civil action" was brought and the admiralty *in rem* claim therefore could not have been brought in Memphis at that time, the entire civil action must remain in the inconvenient New Orleans forum. This view is reached by labeling this single civil action as two, one against the barge and one against the owner. It asserts this view despite the fact that the grain company's suit against the barge and its suit against the owner are in the same complaint for the loss of the same cargo in the same sinking of the same barge producing the same damages. The basis of this view that there are two distinct civil actions for § 1404 (a) purposes is a long-standing admiralty fiction that a vessel

may be assumed to be a person for the purpose of filing a lawsuit and enforcing a judgment.[1]

The fiction relied upon has not been without its critics even in the field it was designed to serve. It has been referred to as "archaic," "an animistic survival from remote times," "irrational" and "atavistic."[2] Perhaps this is going too far since the fiction is one that certainly had real cause for its existence in its context and in the day and generation in which it was created. A purpose of the fiction, among others, has been to allow actions against ships where a person owning the ship could not be reached, and it can be very useful for this purpose still. We are asked here, however, to transplant this ancient salt-water admiralty fiction into the dry-land context of *forum non conveniens,* where its usefulness and possibilities for good are questionable at best. In fact, the fiction appears to have no relevance whatever in a District Court's determination of where a case can most conveniently be tried. A fiction born to provide convenient forums should not be transferred into a weapon to defeat that very purpose.

This Court has not hesitated in the past to refuse to apply this same admiralty fiction in a way that would cut

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[1] "A ship is the most living of inanimate things. Servants sometimes say 'she' of a clock, but every one gives a gender to vessels. And we need not be surprised, therefore, to find a mode of dealing which has shown such extraordinary vitality in the criminal law applied with even more striking thoroughness in the Admiralty. It is only by supposing the ship to have been treated as if endowed with personality, that the arbitrary seeming peculiarities of the maritime law can be made intelligible, and on that supposition they at once become consistent and logical." Holmes, The Common Law (1881), 26–27.

[2] *The Carlotta,* 48 F. 2d 110, 112, 1931 Am. Mar. Cas. 742, 745 (C. A. 2d Cir. 1931), quoted in Gilmore and Black, The Law of Admiralty (1957), 508.

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down, as it would here, the scope of congressional enactments. In fact, Mr. Justice Bradley, speaking for the Court, said at one time, in construing a statute which had limited a shipowner's liability but had failed to refer to the "personal" liability of the vessel:

> "To say that an owner is not liable, but that his vessel is liable, seems to us like talking in riddles. A man's liability for a demand against him is measured by the amount of the property that may be taken from him to satisfy that demand. In the matter of liability, a man and his property cannot be separated . . . ." *The City of Norwich,* 118 U. S. 468, 503.

Fifty-seven years later this Court was confronted with a similar argument about another section of the same statute, and after referring to the analysis in *City of Norwich* concluded,

> "The riddle after more than half a century repeated to us in different context does not appear to us to have improved with age. . . . Congress has said that the owner shall not 'answer for' this loss in question. Claimant says this means in effect that he shall answer only with his ship. But the owner would never answer for a loss except with his property, since execution against the body was not at any time in legislative contemplation. There could be no practical exoneration of the owner that did not at the same time exempt his property." *Consumers Import Co.* v. *Kabushiki Kaisha Kawasaki Zosenjo,* 320 U. S. 249, 253–254.

We follow the common-sense approach of these two cases in interpreting § 1404 (a). Failure to do so would practically scuttle the *forum non conveniens* statute so far as admiralty actions are concerned. All a plaintiff would need to do to escape from it entirely would be to

bring his action against both the owner and the ship, as was done here. This would be all the more unfortunate since courts have long recognized "admiralty's approach to do justice with slight regard to formal matters," [3] and, as this Court has recently observed,

> "Admiralty practice, which has served as the origin of much of our modern federal procedure, should not be tied to the mast of legal technicalities it has been the forerunner in eliminating from other federal practices." *British Transport Comm'n* v. *United States,* 354 U. S. 129, 139.

It is relevant that the law of admiralty itself is unconcerned about the technical distinctions between *in rem* and *in personam* actions for purposes of transferring admiralty actions from one court to a more convenient forum. This Court's Admiralty Rule 54, which prescribes the procedures for owners' limiting their liability after vessels have been libeled, provides in language broader than § 1404 (a): "The District Court may, in its discretion, transfer the proceedings to any district for the convenience of the parties." And it may be further observed that courts have not felt themselves bound by this fiction when confronted with the argument that because *in rem* and *in personam* actions involve different parties, therefore *res judicata* does not apply from an *in personam* action against an owner to an *in rem* action against his ship.[4] It is interesting in this connection to take note of the fact that, according to the Court of

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[3] *Point Landing, Inc.,* v. *Alabama Dry Dock & Shipbuilding Co.,* 261 F. 2d 861, 866, 1959 Am. Mar. Cas. 148, 155 (C. A. 5th Cir. 1958).

[4] See *Burns Bros.* v. *Central R. Co.,* 202 F. 2d 910, 1953 Am. Mar. Cas. 718 (C. A. 2d Cir. 1953); *Sullivan* v. *Nitrate Producers' S. S. Co.,* 262 F. 371 (C. A. 2d Cir. 1919); *Bailey* v. *Sundberg,* 49 F. 583 (C. A. 2d Cir. 1892); Gilmore and Black, The Law of Admiralty (1957), 507–509.

Appeals opinion, the case at Memphis has already been tried.[5] To permit a situation in which two cases involving precisely the same issues are simultaneously pending in different District Courts leads to the wastefulness of time, energy and money that § 1404 (a) was designed to prevent. Moreover, such a situation is conducive to a race of diligence among litigants for a trial in the District Court each prefers. These are additional reasons why § 1404 (a) should not be made ambiguous by the importation of irrelevant fictions.

The idea behind § 1404 (a) is that where a "civil action" to vindicate a wrong—however brought in a court—presents issues and requires witnesses that make one District Court more convenient than another, the trial judge can, after findings, transfer the whole action to the more convenient court. That situation exists here. Although the action in New Orleans was technically brought against the barge itself as well as its owner, the obvious fact is that, whatever other advantages may result, this is an alternative way of bringing the owner into court. And although any judgment for the cargo owner will be technically enforceable against the barge as an entity as well as its owner, the practical economic fact of the matter is that the money paid in satisfaction of it will have to come out of the barge owner's pocket—including the possibility of a levy upon the barge even had the cargo owner not prayed for "personified" *in rem* relief. The crucial issues about fault and damages suffered were identical, whether considered as a claim against the ship or its owner. The witnesses were identical. Thus, while two methods were invoked to bring the owner into court and enforce any judgment against it, the substance of what had to be done to adjudicate the rights of the parties was not different at all.

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[5] 268 F. 2d 240, 242, n. 2, 1959 A. M. C. 2158, 2160, n. 2.

Treating both methods for § 1404 (a) purposes for what they are in a case like this—inseparable parts of one single "civil action"—merely permits or requires parties to try their issues in a single "civil action" in a court where it "might have been brought." To construe § 1404 (a) this way merely carries out its design to protect litigants, witnesses and the public against unnecessary inconvenience and expense, not to provide a shelter for *in rem* admiralty proceedings in costly and inconvenient forums.

For the reasons stated here the judgment is

Affirmed.

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE HARLAN joins.

Although this case also involves some nice questions of admiralty procedure, since the claimant barge owner has moved for transfer and has agreed to "pay any final decree which may be rendered against" the barge, the controlling considerations for me are those set forth in my opinion in *Sullivan* v. *Behimer,* 363 U. S. 351. Accordingly, I would affirm the judgment.

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

I think that this case, if its true facts be recognized and faced, is controlled by the Court's opinion in *Hoffman* v. *Blaski* and *Sullivan* v. *Behimer,* decided just the other day, 363 U. S. 335. I also think that the Court's opinion fails to recognize and face the crucial fact—that one of the two claims in this "civil action" was brought *in rem* against the Barge, not as an attachment or "device" to force appearance of the owner or to provide security for the payment of any *in personam* judgment which might be recovered against the owner, but as a personified "debtor or offending thing" as the settled law author-

izes [1]—which gives rise to the principal question that produces my disagreement. Indeed, I think the Court's opinion endeavors to sweep that crucial fact "under the rug." I will now undertake to make a plain and chronological statement of the simple facts.

On July 2, 1958, petitioner, Continental Grain Company,[2] brought this libel *in personam* against Federal Barge Lines, Inc.,[3] and *in rem* against Barge FBL–585 ("Barge"), in and on the admiralty side of the United States District Court for the Eastern District of Louisiana, New Orleans Division—where the Barge then was, and ever since has been, located—to recover damages in the sum of $90,000 to petitioner's cargo, caused by the alleged unseaworthiness and consequent partial sinking of the Barge while being loaded at Memphis, Tennessee, on November 6, 1957. The libel prayed a decree against both Federal Barge Lines, Inc., and Barge FBL–585, for the cargo damage; that Federal Barge Lines, Inc., be cited to appear and answer; that process issue against "Barge FBL–585 and that all persons claiming any interest in said vessel be cited to appear and answer this libel," and that "Barge FBL–585 be condemned and sold to pay the amount due libelant herein."

After Federal Barge Lines, Inc., was served with process, and after process had issued against the Barge but before actual arrest of the Barge thereunder, Federal Barge

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[1] See note 15, *infra*.

[2] Petitioner, Continental Grain Company, is a Delaware corporation maintaining its principal office in New York, New York, but is also authorized to do and is doing business in the City of Memphis in the Western District of Tennessee.

[3] Federal Barge Lines, Inc., a Delaware corporation, is a common carrier by water, operating on the Mississippi River and its principal tributaries, and has offices and does business in, among other places, Memphis, Tennessee, and New Orleans, Louisiana.

Lines, Inc., on July 23, 1958, delivered its letter addressed to petitioner, which the latter accepted and has acted on, saying, in pertinent part, that: "In consideration of your not having seized [the barge], under the *in rem* process which has been issued . . . and in further consideration of our not being required to post the usual bond for the release of that vessel, [w]e agree that we shall . . . file claim to Barge FBL 585 and [shall file] pleadings in the . . . action, and that, [whether the] vessel [be] lost or not, we shall pay any final decree which may be rendered against said vessel in said proceeding." The last paragraph of the letter said:

> "It is the intent of this undertaking that the rights of the libelant and claimant-respondent in this proceeding shall be, and for all purposes shall be taken to be, precisely the same as they would have been had the vessel, in fact, been taken into custody by the United States Marshal under said *in rem* process, and released by the filing of claim and release bond, we, as claimant, reserving in behalf of the vessel all other objections and defenses otherwise available except those which might be predicated upon the fact that the vessel was not actually so seized."

Accordingly, on July 29, 1958, Federal Barge Lines, Inc., filed its claim to "Barge FBL–585, proceeded against herein, and claim[ed] the said barge as owner and pray[ed] that it be permitted to defend according to law"; and on September 18, 1958, it filed its answer to the libel.

On October 13, 1958, Federal Barge Lines, Inc., filed its motion to transfer "this action to the United States District Court for the Western District of Tennessee, Western Division, on the ground that such transfer is

necessary for the convenience of the parties and witnesses and in the interest of justice as will appear from the affidavit attached hereto and made a part hereof." [4] After hearing, the District Court granted the motion and ordered the action transferred as requested by the movant, but the district judge, acting under the Interlocutory Appeals Act, 28 U. S. C. § 1292 (b), "certified that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order may materially advance the ultimate termination of this litigation." [5]

Petitioner then sought and was allowed an appeal by the Court of Appeals under 28 U. S. C. § 1292 (b).[6] That

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[4] The principal averments of the affidavit referred to were (1) that on June 27, 1958, Federal Barge Lines, Inc., filed an action at law against petitioner, Continental Grain Company, in the Circuit Court of Shelby County, Tennessee, for damages to its Barge FBL–585, caused by the alleged negligence of the grain company in loading it at Memphis on November 6, 1957, which action was removed by the grain company to the United States District Court for the Western District of Tennessee on July 15, 1958, and (2) that the necessary witnesses reside in or nearer to Memphis than to New Orleans.

[5] In his unpublished *per curiam* the district judge said, *inter alia*, "The libel is in rem as to the Barge FBL–585. While this libel could have been originally brought in the Western District of Tennessee against the respondent, Federal Barge Lines, the owner of the barge, the libel as to the barge itself would ordinarily be restricted to the place where the barge is located at the time the libel is filed. At that time, and now, the barge is located in this district. However, since the barge was neither seized by the Marshal nor bonded by respondent, libellant having accepted respondent's letter undertaking to respond to any decree entered herein, and since the owner thereof, Federal Barge Lines, apparently is financially able to respond to any decree rendered against it, the interest of justice would best be served by . . . transferring this case to the Western District of Tennessee."

[6] The District Court stayed its order of transfer, pending determination of the appeal.

court, relying heavily on its opinion in *Ex parte Blaski,* 245 F. 2d 737, affirmed, 268 F. 2d 240, and we granted certiorari, 361 U. S. 811.

Although the Court of Appeals found "that fair application of the letter undertaking . . . requires that we treat it as though, upon the libel being filed, the vessel had actually been seized, a Claim filed, a stipulation to abide decree with sureties executed and filed by Claimant, and the vessel formally released," it held that, inasmuch as the claimant-respondent had by its motion to transfer consented "to an unlimited submission of the cause [to the Tennessee District Court] even though it could not have been filed there initially," transfer of the *in rem* action to that court "presents no real or conceptual difficulties," because "[t]he Court does not undertake to transfer the *res,* nor does it even attempt to transfer the cause while the *res* is still in custody of the Court"; that when, as here, a "bond (stipulation)" is given and substituted for the vessel "[t]raditional notions are not affected if that security floats with the cause wherever the law navigates it." *Id.,* at 243, 244.

It is not disputed that the libel, insofar as it is *in personam,* might have been brought by petitioner against respondent, Federal Barge Lines, Inc., in the United States District Court for the Western District of Tennessee, as that court had jurisdiction to entertain such an action and Federal Barge Lines, Inc., was amenable to the service of monition there. Hence, if this libel had been brought only *in personam* against Federal Barge Lines, Inc.—*i. e.,* had omitted the claim *in rem* against the Barge—it could have been transferred to the Tennessee District, for such an action could have been brought in that forum. But, as the parties agree, petitioner had a legal right to join in one action, as it did here, a claim *in personam* against Federal Barge Lines, Inc., and one

in rem against the Barge.[7] The Court's opinion says that, because the claim *in personam* might have been brought in the Memphis forum, it is a mistake to say that "the entire civil action must remain in the inconvenient New Orleans forum." But respondent's motion did not ask transfer of only the claim *in personam,* if indeed the court could have severed the two claims and have transferred one and kept the other—a matter not at all dealt with in the Court's opinion. Instead it asked transfer of the whole action, and so we are presented with the question whether an admiralty action *in rem,* or partly *in rem,* may be transferred, upon application of the claimant of the *res,* to a district in which the *res* is not located, and in which the libellant did not have a legal right to bring it.

The Court treats this case as a "single" damage action against only the barge owner. That treatment simply ignores the crucial fact which gives rise to the question we have here. Of course, if this were simply a "single" action for damages against only the barge owner we would not have the question that confronts us, for we all agree that such an action "might have been brought" in the Memphis forum, and, hence, if brought elsewhere it could have been transferred to that forum under § 1404 (a). But those are not the facts. The facts are that there were two claims in *this* "civil action," one *in personam* against the owner, and one *in rem* against the Barge. And we cannot decide the question presented by denying its existence or by ignoring the facts that created it. One of the two claims of *this* "civil action" was *in rem* against the Barge. The Barge was in New Orleans when this suit was brought. Therefore, *this* "civil action" could not

[7] *Newell* v. *Norton,* 3 Wall. 257; *In re Fassett,* 142 U. S. 479, 484 ("The District Court has jurisdiction to determine the question, because it has jurisdiction of the vessel by attachment, and of Fassett by monition . . . ."); *The Resolute,* 168 U. S. 437, 442; *Turner* v. *United States,* 27 F. 2d 134, 136 (C. A. 2d Cir.).

have been brought in Memphis, and, hence, cannot be transferred to that forum if the limiting words of § 1404 (a), "where it might have been brought," are to have any meaning.

Petitioner, relying on the established principle that an action *in rem* may be brought only in the district where the *res* is located,[8] or possibly, under the accustomed practice in admiralty, in the district where, as alleged in the libel, the *res* (vessel) will be "during the pendency of the process [issued on the libel]," [9] contends that inasmuch as the Barge was located in the Eastern District of Louisiana when the libel was filed, *this action* could not have been brought or prosecuted in any other district and, hence, the court was without power, under 28 U. S. C. § 1404 (a),[10] to transfer it, upon respondents' motion and even with their waiver of venue and jurisdiction, to the Western District of Tennessee, where it could not have been brought by the libellant. This contention accords with our opinion in the *Blaski* and *Behimer* cases, 363 U. S. 335.

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[8] *The Ann,* 9 Cranch 289, 291; *Miller* v. *United States,* 11 Wall. 268, 294; *United States* v. *Mack,* 295 U. S. 480, 484; *Clinton Foods* v. *United States,* 188 F. 2d 289, 292 (C. A. 4th Cir.); *Fettig Canning Co.* v. *Steckler,* 188 F. 2d 715, 717–718 (C. A. 7th Cir.). Cf. *Torres* v. *Walsh,* 221 F. 2d 319, 321 (C. A. 2d Cir.); *Broussard* v. *The Jersbek,* 140 F. Supp. 851, 852–853.

[9] Notwithstanding the provision of Admiralty Rule 22 (28 U. S. C. p. 5226) that if the libel be *in rem* it shall state "that the property is within the district," we are told that in practice the common, if not universal, jurisdictional statement in libels *in rem* recites "That the vessel now is, or, during the pendency of process herein, will be, within the District and the jurisdiction of the Court." See *Internatio-Rotterdam, Inc.,* v. *Thomsen,* 218 F. 2d 514, 515–516 (C. A. 4th Cir.)—in some other aspects an anomalous opinion.

[10] "§ 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."

But respondents contend that an admiralty court is not subject to the provision of § 1404 (a) limiting the transfer of an action to a district "where it might have been brought," but is empowered by Admiralty Rule 44 to transfer an action, on the motion of the claimant-respondent and a mere showing of convenience, to any other district. This contention is wholly without merit. Admiralty Rule 44,[11] which in effect authorizes District Courts to formulate local rules of practice, is expressly limited to "cases not provided for by these rules or by statute . . . ." The matter of transferring "any civil action"—which phrase includes actions in admiralty [12]—is expressly prescribed by a statute. Section 1404 (a) expressly limits a District Court's power to transfer a civil action to a district or division "where it might have been brought." *Hoffman* v. *Blaski, supra.* The power to transfer actions cannot derive from local practice but only from substantive law. Nor is there any showing here that the District Court has ever even purported to promulgate any applicable local rule of practice.

Respondents next contend that even if § 1404 (a) applies to the transfer of admiralty actions, that section does not preclude transfer of an admiralty action *in rem* to a district where the *res* is not located if the claimant-respondent, after having prevented the arrest or procured the release of the *res* by giving bond or other acceptable security, so moves and agrees to submit to the jurisdic-

[11] 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."

[12] *Torres* v. *Walsh,* 221 F. 2d 319, 321 (C. A. 2d Cir.); *Internatio-Rotterdam, Inc.,* v. *Thomsen,* 218 F. 2d 514, 515 (C. A. 4th Cir.), and see *Ex parte Collett,* 337 U. S. 55, 58; *United States* v. *National City Lines, Inc.,* 337 U. S. 78.

tion of the transferee court. They argue that authority to proceed in admiralty against the *res* (vessel) is a mere security device and, after the claimant-respondent has prevented the arrest or procured the release of the *res* by giving bond or other acceptable security, the *in rem* action is converted into one *in personam,* and may accordingly be transferred under § 1404 (a), on motion of the claimant-respondent (but not of the libellant) [13] and a finding of convenience, to any other district in which the action if originally *in personam* "might have been brought." The Court appears to agree with that argument. It criticizes the settled doctrine of personification of the ship. It says that "perhaps [it] is going too far [to refer to the fiction of personification of the ship] as 'archaic,' 'an animistic survival from remote times,' 'irrational' and 'atavistic' " (citing *The Carlotta,* 48 F. 2d 110, 112), but it does not suggest that the numerous cases of this Court which have established and adhered to that "fiction" for more than 150 years should be overruled—something I could understand, even at this late day. Instead, it seems merely to brush them aside or to fail to recognize their application here.

But admiralty proceedings *in rem* are not a mere security device. From its earliest history to the present time,

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[13] Respondents say in their brief:

"A transfer on motion of a claimant and a transfer on motion of a libellant are two different things. We do not here contend, and it is our submission that it would be error for a Court to hold, that a coercive transfer of a claimant to a different jurisdiction than that in which the suit was filed is proper. The concept of transferee jurisdiction is that there must be two available forums, and unless the moving party is the claimant, there is no secondary or transferee forum to which the case could be transferred."

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. See *Hoffman* v. *Blaski,* 363 U. S. 335, 344.

this Court has consistently held that an admiralty proceeding *in rem* is one essentially *against the vessel itself as the debtor or offending thing;* and, in such an action, the vessel itself is impleaded as the defendant, seized, judged and sentenced.[14] In *Rounds* v. *Cloverport Foundry,* 237 U. S. 303, Mr. Justice Hughes, in distinguishing between *in rem* actions against a vessel, on the one hand, and attachments against a vessel to force appearance of the respondent or to provide security in an action *in personam,* on the other hand, said:

> "Actions *in personam* with a concurrent attachment to afford security for the payment of a personal judgment are in a different category. *The Belfast, supra; Taylor* v. *Carryl,* 20 How. 583, 598, 599; *The Robert W. Parsons, supra.* And this is so not only in the case of an attachment against the property of the defendant generally, but also where it runs specifically against the vessel under a state statute providing for a lien, if it be found that the attachment was auxiliary to the remedy *in personam. Leon* v. *Galceran,* 11 Wall. 185; see also *Johnson* v. *Chicago &c. Elevator Co.,* 119 U. S. 388, 398, 399; *Knapp, Stout & Co.* v. *McCaffrey,* 177 U. S. 638, 646, 648." *Id.,* at 307.

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[14] *The Mary,* 9 Cranch 126, 144; *The Moses Taylor,* 4 Wall. 411; *The Belfast,* 7 Wall. 624; *The Glide,* 167 U. S. 606; *The Robert W. Parsons,* 191 U. S. 17; *Rounds* v. *Cloverport Foundry,* 237 U. S. 303, 306–307.

"A ship is the most living of inanimate things. Servants sometimes say 'she' of a clock, but every one gives a gender to vessels. And we need not be surprised, therefore, to find a mode of dealing which has shown such extraordinary vitality in the criminal law applied with even more striking thoroughness in the Admiralty. It is only by supposing the ship to have been treated as if endowed with personality, that the arbitrary seeming peculiarities of the maritime law can be made intelligible, and on that supposition they at once become consistent and logical." Holmes, The Common Law (1881), 26–27.

Indeed, the absence of liability of the owner of a vessel does not necessarily exonerate the vessel itself.[15] If, for example, a vessel under bareboat charter damages another as the result of the negligence of her crew, the vessel is liable *in rem* even though an action *in personam* would not lie against her owner.[16] Likewise, the right of one damaged by the wrong of a vessel to proceed against her follows her into the hands of an innocent purchaser, although the latter is not liable *in personam*.[17] Similarly, a vessel is liable *in rem* for damages resulting from her negligent operation by an independent pilot to whose control the law required her to be confined, although her owner is not liable *in personam*.[18]

The cases cited by the Court,[19] holding that in expressly exonerating by statute shipowners from certain liabilities for casualty losses of cargo at sea, Congress similarly intended to exonerate their property, *i. e.*, their ships, from such liabilities, are wholly inapposite. They involved only interpretation of particular statutes, and did not at all deal with, and certainly were not intended to destroy, for they expressly recognized, the historic differ-

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[15] "Such personification of the vessel, treating it as a juristic person whose acts and omissions, although brought about by her personnel, are personal acts of the ship for which, as a juristic person, she is legally responsible, has long been recognized by this Court." *Canadian Aviator, Ltd.*, v. *United States*, 324 U. S. 215, 224.

[16] *The Barnstable*, 181 U. S. 464. The "settled rule is that where the ship-owner provides the vessel only, and the master and crew are selected by the charterer, the latter and not the ship-owner is responsible for their acts." *The China*, 7 Wall. 53, 70.

[17] "The maritime 'privilege' or lien . . . accompanies the property into the hands of a bona fide purchaser." *Vandewater* v. *Mills*, 19 How. 82, 89. See also *The China*, 7 Wall. 53, 68; *The John G. Stevens*, 170 U. S. 113.

[18] *The China*, 7 Wall. 53; *Homer Ramsdell Transp. Co.* v. *La Compagnie Générale Transatlantique*, 182 U. S. 406.

[19] *The City of Norwich*, 118 U. S. 468, 503; *Consumers Import Co.* v. *Kabushiki Kaisha Kawasaki Zosenjo*, 320 U. S. 249, 253–254.

ence and distinction between admiralty actions *in personam* and those *in rem*. Nor does this Court's Admiralty Rule 54, discussed by the Court, touch the question of transferability of this case. This is not a limitation of liability proceeding, specially covered by that Rule, and the parties make no such claim. Rather we have here only a simple motion to transfer a "civil action" from one District to another, and such a motion is exclusively governed by § 1404 (a).

The Barge itself being the "offending thing," and here being itself subject to suit, and having been sued, *in rem*, we think it may not be said that the giving by respondent, Federal Barge Lines, Inc., and the acceptance by petitioner, of the "letter undertaking," to prevent the physical arrest of the Barge, converted the *in rem* action into one *in personam*. That letter expressly said that the rights of the parties would for all purposes be "precisely the same as they would have been had the vessel, in fact, been taken into custody by the United States Marshal under said *in rem* process, and released by the filing of claim and release bond . . . ." That this letter was legally effective in accordance with its terms is not disputed. This Court has from an early day consistently held that a bond, given to prevent the arrest or to procure the release of a vessel, *is substituted for and stands as the vessel in the custody of the court.*[20] Inasmuch as

[20] *The Palmyra*, 12 Wheat. 1, 10; *The Webb*, 14 Wall. 406, 418; *The Wanata*, 95 U. S. 600, 611; *United States* v. *Ames*, 99 U. S. 35. In Judge Woolsey's very perceptive opinion in *J. K. Welding Co.* v. *Gotham Marine Corp.*, 47 F. 2d 332, 335 (D. C. S. D. N. Y.), the rule was summarized as follows:

"The stipulation for value is a complete substitute for the *res*, and the stipulation for value alone is sufficient to give jurisdiction to a court because its legal effect is the same as the presence of the *res* in the court's custody." See also Gilmore and Black, The Law of Admiralty, at 650–651.

the parties agreed that the letter involved here was to have precisely the same effect as a bond, it follows that the letter is, just as a bond would have been, a substitute for the vessel in the custody of the court, and that the giving and accepting of the letter did not convert the *in rem* action into one *in personam*.

Respondents finally argue that even though the Barge itself could be and was sued as the "offending thing" and, being located in the district of suit, this action *in rem* against it could not have been brought elsewhere without respondent's consent, it was as possible for the Barge voluntarily to enter appearance in and submit to the venue and jurisdiction of the transferee court as it would have been for one sued *in personam* to do so,[21] and that their motion to transfer had that effect. Whether jurisdiction over a *res* in an action *in rem* may be conferred by consent of its owner, given either before or after the action has been brought, upon a court that does not have territorial jurisdiction or custody of the *res* we need not decide, for the question here is not such, but, rather, it is simply whether a District Court is empowered by § 1404 (a) to transfer such an action to a district in which the libellant did not have the right to bring it, independently of the will or wishes of the claimant-respondent. That question was ruled in the negative by *Hoffman* v. *Blaski*, 363 U. S. 335, and I think it follows that the judgment in this case should be reversed.

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[21] See *J. K. Welding Co.* v. *Gotham Marine Corp.*, 47 F. 2d 332, 335 (D. C. S. D. N. Y.).

ARMSTRONG ET AL. *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 270. Argued March 28, 1960.—Decided June 27, 1960.

Upon default by a shipbuilder on its contract to construct certain boats for the United States, the Government, exercising an option under the contract, required the shipbuilder to transfer to the Government title to the uncompleted boats and the materials on hand for their construction. This made it impossible for petitioners to enforce their materialmen's liens which had attached under state law to the boats and materials when the materials were furnished to the shipbuilder. Petitioners sued in the Court of Claims for compensation for the taking of their liens by the Government. *Held:* Petitioners are entitled to recover whatever value their liens had when the Government took title to the boats and materials. Pp. 41–49.

(a) Under the terms of the contract here involved, title to the property was in the shipbuilder when the materials were furnished, and the mere fact that it was contemplated that title eventually would vest in the Government did not prevent the materialmen's liens from attaching. Pp. 42–44.

(b) On the record in this case, petitioners had compensable property interests within the meaning of the Fifth Amendment in their liens on the boats and materials prior to transfer of title to the Government. Pp. 44–46.

(c) Since the Government's action destroyed the value of petitioners' liens, there was, under the circumstances of this case, a "taking" of these liens by the Government, for which compensation is due under the Fifth Amendment. Pp. 46–49.

—— Ct. Cl. ——, 169 F. Supp. 259, reversed.

Burton R. Thorman argued the cause for petitioners. With him on the brief was *Solomon Dimond.*

Samuel D. Slade argued the cause for the United States. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Doub* and *Seymour Farber.*

MR. JUSTICE BLACK delivered the opinion of the Court.

In this action petitioners assert materialmen's liens under state law for materials furnished to a prime contractor building boats for the United States, and seek just compensation under the Fifth Amendment for the value of their liens on accumulated materials and uncompleted work which have been conveyed to the United States.

The United States entered into a contract with the Rice Shipbuilding Corporation for the construction of 11 navy personnel boats. The contract provided that in the event of default by Rice, the Government could terminate the contract and require Rice to transfer title and deliver to the Government all completed and uncompleted work together with all manufacturing materials acquired by Rice for building the boats. Petitioners furnished various materials to Rice for use in construction of the boats. Upon Rice's default, the Government exercised its option as to 10 of the boat hulls still under construction; Rice executed an itemized "Instrument of Transfer of Title" conveying to the United States the hulls and all manufacturing materials then on hand; and the Government removed all of these properties to out-of-state naval shipyards for use in the completion of the boats. When the transfer occurred, petitioners had not been paid for their materials and they have not been paid since. Petitioners therefore contended that they had liens under Maine law which provides that "[w]hoever furnishes labor or materials for building a vessel has a lien on it therefor, which may be enforced by attachment thereof within 4 days after it is launched . . . . He also has a lien on the materials furnished before they become part of the vessel, which may be enforced by attachment . . . ." Maine Rev. Stat., 1954, c. 178, § 13.

Claiming valid liens on the hulls and manufacturing materials at the time they were transferred by Rice to the

United States, petitioners asserted that the Government's action destroyed their liens by making them unenforceable and that this constituted a taking of their property without just compensation in violation of the Fifth Amendment.[1] The Court of Claims, relying on *United States* v. *Ansonia Brass & Copper Co.*, 218 U. S. 452, held that petitioners never acquired valid liens on the hulls or the materials transferred to the Government and that therefore there had been no taking of any property owned by them. —— Ct. Cl. ——, 169 F. Supp. 259. We granted certiorari. 361 U. S. 812.

I.

The Court of Claims reached its conclusion from the correct premise that laborers and materialmen can acquire no liens on a "public work." *Hill* v. *American Surety Co.*, 200 U. S. 197, 203; *Equitable Surety Co.* v. *McMillan*, 234 U. S. 448, 455; *United States* v. *Munsey Trust Co.*, 332 U. S. 234, 241. It reasoned that because the contract between Rice and the United States contemplated that title to the vessels would eventually vest in the Government, the Government had "inchoate title" to the materials supplied by petitioners, rendering such materials "public works" immune from the outset to petitioners' liens. We cannot agree that a mere prospect that property will later be owned by the United States renders that property immune from otherwise valid liens.

The sovereign's immunity against materialmen's liens has never been extended beyond property actually owned by it. The *Ansonia* case itself, upon which the Court of

[1] The relevant portion of the Fifth Amendment provides, ". . . nor shall private property be taken for public use, without just compensation."

Claims relied, makes this clear, where in dealing with one aspect of the issues there involved, the Court said:

> "We are not now dealing with the right of a State to provide for such liens while property to the chattel in process of construction remains in the builder, who may be constructing the same with a view to transferring title therein to the United States upon its acceptance under a contract with the Government. We are now treating of property which the United States owns. Such property, for the most obvious reasons of public policy, cannot be seized by authority of another sovereignty against the consent of the Government." 218 U. S., at 471.

The terms of the contract between Rice and the United States show conclusively that Rice, not the United States, had title to the property when petitioners furnished their materials. The agreement provided for delivery, preliminary acceptance, and final acceptance of the boats, the contractor to remain responsible for all supplies until delivery. The contractor was required to insure the property for the Government's benefit only to the extent of progress payments made and materials furnished by the Government. The very clause here invoked by the Government provided that upon default and termination of the contract the Government might "require the Contractor to *transfer* title and *deliver*" the work, supplies and materials on hand. (Emphasis added.) While the Government was obliged to make progress payments based on the percentage of the work completed, nothing in the contract provided that ownership of the portion of the work paid for should vest in the United States. On the contrary, it was stipulated that all progress payments should be secured by a paramount government lien on the property. And finally, the contractor was required to

discharge immediately any lien or right *in rem* asserted against the property. In their totality, these provisions clearly recognize that title was to remain in Rice during performance of the work, and show that private liens could attach to the property while Rice owned it.

We think, therefore, that the Court of Claims was in error in holding as it did. This, however, does not end the case in petitioners' favor since the United States urges other grounds to support its judgment.

II.

It is contended that petitioners' asserted liens gave them no compensable property interests within the meaning of the Fifth Amendment. Under Maine law, materialmen become entitled to a lien when they furnish supplies; however, the lien must subsequently be enforced by attachment of the vessel or supplies. There is no allegation that any of the petitioners had taken steps to attach the uncompleted work. Nevertheless, they were entitled to resort to the specific property for the satisfaction of their claims. That such a right is compensable by virtue of the Fifth Amendment was decided in *Louisville Bank* v. *Radford,* 295 U. S. 555. In that case, a bank acquired a mortgage which under state law constituted a lien enforceable only by suit to foreclose. Subsequently, Congress amended the Bankruptcy Act so as to deprive mortgagees of substantial incidents of their rights to resort to mortgaged property. This Court held that the bank's property had been taken without just compensation in violation of the Fifth Amendment. No reason has been suggested why the nature of the liens held by petitioners should be regarded as any different, for this purpose, from the interest of the bank held compensable in the *Radford* case.

The Government, however, suggests that because it held a paramount lien on the property to secure its progress

payments, petitioners' claimed liens were in fact worthless. Petitioners, on the other hand, argue that when the Government chose to acquire title to the property rather than to enforce its lien, the lien merged with the title, thus making petitioners' liens paramount, and that even if it did not, and their liens remained subordinate to that of the Government, the value of the hulls and materials would have been sufficient to satisfy the Government's claims and some or all of petitioners' claims as well.

We need not decide whether, as a matter of law, the Government's lien "merged" in its title. At the very least, petitioners, prior to the transfer of title, had the right to whatever proceeds the property might bring over and above the Government's claim to the amount of its progress payments.[2] By the date of default, Rice had expended some $198,000, while the Government had advanced only about $141,000 in progress payments. We have no way of knowing what the property would have brought had it been sold, but it cannot be said with certainty that it would have brought no more than the amount of the Government's claim. Moreover, petitioners themselves might have been able to purchase the property and realize some amount on their claims after the Government's claims had been satisfied. While these factors may present a difficult problem of valuation, we cannot say on this record that petitioners' interests were valueless.[3]

The Government also seems to suggest that because the contract between Rice and the United States expressly

[2] While Rice was also liable to the Government for an additional amount approximating $146,000 representing the excess cost to the Government of having the boats completed, the contract does not provide, and there is no allegation, that this amount was secured by a lien on the property.

[3] Questions of value of the liens were not determined by the Court of Claims since it entered a summary judgment for the United States for reasons stated on p. 42, *supra*.

gave the Government the option of requiring a conveyance of title upon default, petitioners' liens attached subject to that limitation. Petitioners, however, were not parties to the contract. Furthermore, their liens attached by operation of law and nothing in the record indicates that the scope of such liens is affected by contractual arrangements into which the owner of the property may have entered.

We conclude, therefore, that on this record petitioners must be considered to have had compensable property interests within the meaning of the Fifth Amendment prior to transfer of title to the Government.

III.

The final question is whether the Government's action constituted a "taking" of petitioners' property interests within the meaning of the Fifth Amendment. Before the United States compelled Rice to transfer the hulls and all materials held for future use in building the boats, petitioners had valid liens under Maine law against both the hulls and whatever unused materials which petitioners had furnished. Before transfer these liens were enforceable by attachment against both the hulls and all materials. After transfer to the United States the liens were still valid, *United States* v. *Alabama*, 313 U. S. 274, 281–282, but they could not be enforced because of the sovereign immunity of the Government and its property from suit.[4] The result of this was a destruction of all petitioners' property rights under their liens, although, as we have pointed out, the liens were valid and had compensable value. Petitioners contend that destruction of

[4] *United States* v. *Ansonia Brass & Copper Co.*, 218 U. S. 452; *Hill* v. *American Surety Co.*, 200 U. S. 197; *Equitable Surety Co.* v. *McMillan*, 234 U. S. 448; *United States* v. *Munsey Trust Co.*, 332 U. S. 234; *The Siren*, 7 Wall. 152; *Minnesota* v. *United States*, 305 U. S. 382; *United States* v. *Alabama*, 313 U. S. 274.

their liens under the circumstances here is a "taking." The United States denies this, largely on the premise that inability of petitioners to enforce their liens because of immunity of the Government and its property from suit cannot amount to a "taking."

The Government argues that the *Ansonia* case is dispositive of this Fifth Amendment issue. In that case, the contract between the shipbuilder and the United States provided, as to one of the ships contracted for, the dredge *Benyuard,* that as progress payments were made, the portion of the work paid for should become the property of the United States. Subcontractors claimed liens on the uncompleted vessel under the Virginia supply-lien law. This Court merely held that, as the property had passed to the United States by virtue of the terms of the contract, no lien could be enforced against it. No question was raised as to the rights possessed by the subcontractors prior to the acquisition of title by the United States nor as to whether that event entitled them to just compensation under the Fifth Amendment. There is, to be sure, reason to believe that the subcontractors' liens in that case, like those of petitioners here, did attach as soon as materials were furnished, which would necessarily be prior to the making of a progress payment for the portion of the work incorporating those materials and the consequent passage of title to the United States. See *Hawes & Co.* v. *Trigg Co.,* 110 Va. 165, 185–186, 199, 65 S. E. 538, 546–547, 551–552. But the Fifth Amendment question was not raised or passed upon. In these circumstances we cannot regard the court's decision as dispositive on the precise point now under consideration, and must proceed to decide that question.[5]

[5] The Government also cites *Mullen Benevolent Corp.* v. *United States,* 290 U. S. 89. The facts there, however, revealed that the Government's action could not have destroyed any liens existing at

We hold that there was a taking of these liens for which just compensation is due under the Fifth Amendment. It is true that not every destruction or injury to property by governmental action has been held to be a "taking" in the constitutional sense. *Omnia Commercial Co.* v. *United States,* 261 U. S. 502, 508–510. This case and many others reveal the difficulty of trying to draw the line between what destructions of property by lawful governmental actions are compensable "takings" and what destructions are "consequential" and therefore not compensable. See, *e. g., United States* v. *Central Eureka Mining Co.,* 357 U. S. 155; *United States* v. *Causby,* 328 U. S. 256; *United States* v. *General Motors Corp.,* 323 U. S. 373; *United States* v. *Sponenbarger,* 308 U. S. 256; *Pennsylvania Coal Co.* v. *Mahon,* 260 U. S. 393; *Louisville & Nashville R. Co.* v. *Mottley,* 219 U. S. 467; *Legal Tender Cases,* 12 Wall. 457, 551.

The total destruction by the Government of all value of these liens, which constitute compensable property, has every possible element of a Fifth Amendment "taking" and is not a mere "consequential incidence" of a valid regulatory measure. Before the liens were destroyed, the lienholders admittedly had compensable property. Immediately afterwards, they had none. This was not because their property vanished into thin air. It was because the Government for its own advantage destroyed the value of the liens, something that the Government could do because its property was not subject to suit, but which no private purchaser could have done. Since this acquisition was for a public use, however accomplished, whether with an intent and purpose of extinguishing the liens or not, the Government's action did destroy them

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the time the Government acquired the land because as the Court said, "None remained upon the land, when the purchases were consummated," 290 U. S., at 95.

and in the circumstances of this case did thereby take the property value of those liens within the meaning of the Fifth Amendment. Neither the boats' immunity, after being acquired by the Government, from enforcement of the liens nor the use of a contract to take title relieves the Government from its constitutional obligation to pay just compensation for the value of the liens the petitioners lost and of which loss the Government was the direct, positive beneficiary.

The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. A fair interpretation of this constitutional protection entitles these lienholders to just compensation here. Cf. *Thibodo* v. *United States,* 187 F. 2d 249.

The judgment is reversed and the cause is remanded to the Court of Claims for further proceedings to determine the value of the property taken.

Reversed and remanded.

MR. JUSTICE STEWART concurs in the result.

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

I agree that petitioners had valid liens on the uncompleted work and supplies at the time the property was transferred to the Government, and that such liens represented compensable property interests within the meaning of the Fifth Amendment. But the Fifth Amendment renders the Government liable only if there was a "taking" by it of such interests. I cannot conclude, as the Court so readily does, that simply because the value of those liens was "destroyed" there was a "taking" of petitioners' property.

As the Court concedes, not every governmental act which ultimately destroys property rights constitutes a compensable taking of those rights. We are not here dealing with a situation in which the United States has condemned the full fee interest in property, thus purporting to extinguish all claims therein. In such a case, it may well be that lienholders are entitled to compensation for the value of their interests. See *Thibodo* v. *United States,* 187 F. 2d 249; cf. *United States* v. *General Motors Corp.,* 323 U. S. 373, 377–378. In this instance, however, the Government has not exercised its power of eminent domain with the intent and purpose of extinguishing petitioners' liens; indeed it has not exercised its power of eminent domain at all. All it has done is to exercise its undoubted power to contract and to acquire title to the property, the consequent effect of which is to render the liens unenforceable because of the independent principle of sovereign immunity. The very nature of the doctrine of sovereign immunity precludes regarding its interposition as a Fifth Amendment "taking." It seems to me that a Court which, having established this immunity, then declares that the Government must pay for exercising it, is effectively negativing it.

I would affirm.

UNITED STATES *v.* DEGE ET VIR.

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

No. 14. Argued October 20, 1959.—Decided June 27, 1960.

A husband and wife are not legally incapable of violating 18 U. S. C. § 371 by conspiring with each other to commit an offense against the United States. Pp. 51–55.

Order dismissing indictment reversed.

Jerome M. Feit argued the cause for the United States. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg.*

Thomas Whelan argued the cause for appellees. With him on the brief was *J. Robert O'Connor.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This is an indictment charging husband and wife with conspiring to commit an offense against the United States in violation of § 371 of Title 18 of the United States Code, which was enacted by Congress on June 25, 1948, 62 Stat. 683, 701, in connection with § 545 of that Code, *id.*, 716, in that they sought illicitly to bring goods into the United States with intent to defraud it. On authority of controlling decisions of its Circuit, *Dawson* v. *United States,* 10 F. 2d 106, and *Gros* v. *United States,* 138 F. 2d 261, the District Court dismissed the indictment on the ground that it did not state an offense, to wit, a husband and wife are legally incapable of conspiring within the condemnation of § 371. The case came here on direct review of the order dismissing the indictment, 358 U. S. 944, under the Criminal Appeals Act of March 2, 1907, now 18 U. S. C.

§ 3731. The construction of § 371 by the Court of Appeals for the Ninth Circuit has been explicitly rejected by the Court of Appeals for the District of Columbia Circuit, *Johnson* v. *United States,* 81 U. S. App. D. C. 254, 157 F. 2d 209, and by the Court of Appeals for the Fifth Circuit, *Thompson* v. *United States,* 227 F. 2d 671, and *Wright* v. *United States,* 243 F. 2d 569.

The question raised by these conflicting views is clear-cut and uncomplicated. The claim that husband and wife are outside the scope of an enactment of Congress in 1948, making it an offense for two persons to conspire, must be given short shrift once we heed the admonition of this Court that "we free our minds from the notion that criminal statutes must be construed by some artificial and conventional rule," *United States* v. *Union Supply Co.,* 215 U. S. 50, 55, and therefore do not allow ourselves to be obfuscated by medieval views regarding the legal status of woman and the common law's reflection of them. Considering that legitimate business enterprises between husband and wife have long been commonplaces in our time, it would enthrone an unreality into a rule of law to suggest that man and wife are legally incapable of engaging in illicit enterprises and therefore, forsooth, do not engage in them.

None of the considerations of policy touching the law's encouragement or discouragement of domestic felicities on the basis of which this Court determined appropriate rules for testimonial compulsion as between spouses, *Hawkins* v. *United States,* 358 U. S. 74, and *Wyatt* v. *United States,* 362 U. S. 525, are relevant to yielding to the claim that an unqualified interdiction by Congress against a conspiracy between two persons precludes a husband and wife from being two persons. Such an immunity to husband and wife as a pair of conspirators would have to attribute to Congress one of two assumptions: either that responsi-

bility of husband and wife for joint participation in a criminal enterprise would make for marital disharmony, or that a wife must be presumed to act under the coercive influence of her husband and, therefore, cannot be a willing participant. The former assumption is unnourished by sense; the latter implies a view of American womanhood offensive to the ethos of our society.

The fact of the matter is that we are asked to write into law a doctrine that parrot-like has been repeated in decisions and texts from what was given its authoritative expression by Hawkins early in the eighteenth century. He wrote:

> "It plainly appears from the Words of the Statute, That one Person alone cannot be guilty of Conspiracy within the Purport of it; from whence it follows, . . . That no such Prosecution is maintainable against a Husband and Wife only, because they are esteemed but as one Person in Law, and are presumed to have but one Will." (Hawkins, Pleas of the Crown, 4th ed. 1762, Bk. I, chap. lxxii, Sect. 8, p. 192.)

The pronouncement of Hawkins apparently rests on a case in a Year Book of 38 Edward III, decided in 1365. The learning invoked for this ancient doctrine has been questioned by modern scholarship. See Williams, The Legal Unity of Husband and Wife, 10 Mod. L. Rev., 16 (1947); and cf. Winfield, The History of Conspiracy (1921), § 27, p. 64, and § 37, p. 88. But in any event the answer to Hawkins with his Year Book authority, as a basis for a decision by the Supreme Court of the United States in 1960 construing a statute enacted in 1948, was definitively made long ago by Mr. Justice Holmes:

> "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds

upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." Holmes, Collected Legal Papers, 187 (1920), reprinting The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897).

For this Court now to act on Hawkins's formulation of the medieval view that husband and wife "are esteemed but as one Person in Law, and are presumed to have but one Will" would indeed be "blind imitation of the past." It would require us to disregard the vast changes in the status of woman—the extension of her rights and correlative duties—whereby a wife's legal submission to her husband has been wholly wiped out, not only in the English-speaking world generally but emphatically so in this country.

How far removed we were even nearly a century ago when Congress passed the original statute against criminal conspiracy, the Act of March 2, 1867, 14 Stat. 484, from the legal and social climate of eighteenth century common law regarding the status of woman is pithily illustrated by recalling the self-deluding romanticism of Blackstone, whereby he could conscientiously maintain that "even the disabilities, which the wife lies under, are for the most part intended for her protection and benefit. So great a favourite is the female sex of the laws of England." Blackstone, Commentaries on the Laws of England (1765), Bk. I, ch. 15, p. 433. It would be an idle parade of learning to document the statement that these common-law disabilities were extensively swept away in our different state of society, both by legislation and adjudication, long before the originating conspiracy Act of 1867 was passed. Suffice it to say that we cannot infuse into the conspiracy statute a fictitious attribution to Congress of regard for the medieval notion of woman's submissiveness to the benevolent coercive powers of a husband in

order to relieve her of her obligation of obedience to an unqualifiedly expressed Act of Congress by regarding her as a person whose legal personality is merged in that of her husband making the two one.

Reversed.

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

If the Court's opinion reflects all that there is to this case, it is astonishing that it has taken so many years for the federal judiciary to loose itself from the medieval chains of the husband-wife conspiracy doctrine. The problem, as the Court sees it, is almost absurdly uncomplicated: The basis for the notion that husband and wife are not subject to a conspiracy charge is that man and wife are one; but we know that man and wife are two, not one; therefore, there is no basis for the notion that husband and wife are not subject to a conspiracy charge. I submit that this simplistic an approach will not do.

The Court apparently does not assert that if the husband-wife conspiracy doctrine was widely accepted when the conspiracy statute was passed in 1867, 14 Stat. 484, and therefore was presumably within Congress' understanding of the reach of that statute, nonetheless this Court should now reject the rule because it finds it nonsensical. Instead, the Court's position is that

> "It would be an idle parade of learning to document the statement that these common-law disabilities [of women] were extensively swept away in our different state of society, both by legislation and adjudication, long before the originating conspiracy Act of 1867 was passed."

But, however rapidly nineteenth century jurisprudence moved toward a recognition of the individuality of women in other areas, it is wholly inaccurate to imply that the law

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of conspiracy changed apace. In fact, the earliest case repudiating the husband-wife doctrine which the Government has been able to cite is *Dalton* v. *People*, 68 Colo. 44, 189 P. 37, which was decided, as the Government puts it, "[a]s early as 1920." And if the doctrine is an anachronism today, as the Court says, its unusual hardiness is demonstrated by the fact that the decision of the Court represents a departure from the general rule which prevails today in the English-speaking world. As recently as 1957, the Privy Council approved the husband-wife doctrine,[1] and other Commonwealth courts are in accord.[2] For American decisions, see Annot., 4 A. L. R. 266, 71 A. L. R. 1116, 46 A. L. R. 2d 1275.

Thus it seems clear that if the 1867 statute is to be construed to reflect Congress' intent as it was in 1867, the Court's decision is erroneous. And I believe that we must focus upon that intent, inasmuch as there is no indication that Congress meant to change the law by the 1948 legislation which re-enacted without material variation the old conspiracy statute.[3] Surely when a rule of law is well established in the common law and is part of the legislative purpose when a relevant statute is passed, that rule should not be rejected by this Court in the absence of an explicit subsequent repudiation of it by Congress.[4]

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[1] *Mawji* v. *Reginam*, 41 Crim. App. R. 69, 1 All Eng. Rep. [1957] 385.

[2] See *Kowbel* v. *The Queen*, 110 Can. Crim. Cas. 47 (1954); *The King* v. *McKechie* [1926] N. Z. L. R. 1.

[3] 18 U. S. C. § 371.

[4] "There are no judgments in Canada, dealing with this particular matter, but I think it is well settled that since many centuries, it has been the law of England that a husband and wife cannot alone conspire to commit an indictable offence. These views have been expressed during over six centuries, and I would be slow to believe that the hesitations of a few modern writers could justify us to brush

Consequently, I would be compelled to dissent whether or not I believed the rule to be supported by reason.

But more, I cannot agree that the rule is without justification. Inasmuch as Mr. Justice Holmes' observation that it is "revolting" to follow a doctrine only "from blind imitation of the past" is hardly novel, the tenacious adherence of the judiciary to the husband-wife conspiracy doctrine indicates to me that the rule may be predicated upon underlying policies unconnected with problems of women's suffrage or capacity to sue. The "definitive answer" to the question posed by this case is not to be found in a breezy aphorism from the collected papers of Mr. Justice Holmes, for "[g]eneral propositions do not decide concrete cases." [5]

It is not necessary to be wedded to fictions to approve the husband-wife conspiracy doctrine, for one of the dangers which that doctrine averts is the prosecution and conviction of persons for "conspiracies" which Congress never meant to be included within the statute. A wife, simply by virtue of the intimate life she shares with her husband, might easily perform acts that would technically be sufficient to involve her in a criminal conspiracy with him, but which might be far removed from the arm's-

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aside what has always been considered as the existing law. . . . It may very well be amended by legislative intervention, but as long as it is not, it must be applied." *Kowbel* v. *The Queen,* 110 Can. Crim. Cas. 47, 52 (1954). (Taschereau, J.)

"Had it been the intention of Parliament to abolish the common law defence with which we are concerned it would be expected that plain words dealing expressly with such defence would have been used . . . . I can find nothing in the general words [of the statute] to warrant imputing to Parliament the intention of taking away this ancient common law defence of a husband and wife . . . ." *Id.,* at 54–55. (Cartwright, J.)

[5] *Lochner* v. *New York,* 198 U. S. 45, 76 (dissenting opinion).

length agreement typical of that crime. It is not a medieval mental quirk or an attitude "unnourished by sense" to believe that husbands and wives should not be subjected to such a risk, or that such a possibility should not be permitted to endanger the confidentiality of the marriage relationship. While it is easy enough to ridicule Hawkins' pronouncement in Pleas of the Crown [6] from a metaphysical point of view, the concept of the "oneness" of a married couple may reflect an abiding belief that the communion between husband and wife is such that their actions are not always to be regarded by the criminal law as if there were no marriage.

By making inroads in the name of law enforcement into the protection which Congress has afforded to the marriage relationship, the Court today continues in the path charted by the recent decision in *Wyatt* v. *United States*, 362 U. S. 525, where the Court held that, under the circumstances of that case, a wife could be compelled to testify against her husband over her objection. One need not waver in his belief in virile law enforcement to insist that there are other things in American life which are also of great importance, and to which even law enforcement must accommodate itself. One of these is the solidarity and the confidential relationship of marriage. The Court's opinion dogmatically asserts that the husband-wife conspiracy doctrine does not in fact protect this relationship, and that hence the doctrine "enthrone[s] an unreality into a rule of law." I am not easily persuaded that a rule accepted by so many people for so many centuries can be so lightly dismissed. But in any event, I submit that the power to depose belongs to Congress, not to this Court. I dissent.

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[6] Hawkins, 1 Pleas of the Crown (4th ed. 1762), 192.

GONZALES *v.* UNITED STATES.

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

No. 416. Argued May 2, 1960.—Decided June 27, 1960.

Petitioner, who claims to be a conscientious objector, was convicted of violating § 12 (a) of the Universal Military Training and Service Act by refusing to be inducted into the armed forces. He claims that he was denied due process of law in violation of the Fifth Amendment, because (1) at a hearing before a hearing officer of the Department of Justice, he was not permitted to rebut statements attributed to him by the local board, and (2) at the trial, he was denied the right to have the hearing officer's report and the original report of the Federal Bureau of Investigation as to his claim. *Held:* On the record in this case, the administrative procedures prescribed by the Act were fully complied with; petitioner was not denied due process; and his conviction is sustained. Pp. 60–66.

(a) Petitioner was not denied due process in the administrative proceedings, because the statement in question was in his file, to which he had access, and he had opportunities to rebut it both before the hearing officer of the Department of Justice and before the appeal board. Pp. 62–63.

(b) Petitioner was not entitled to have the hearing officer's notes and report, especially since he failed to show any particular need for them and he did have a copy of the Department of Justice's recommendation to the appeal board. Pp. 63–64.

(c) Petitioner was not entitled, either in the administrative hearing at the Department of Justice or at his trial, to inspect the original report of the Federal Bureau of Investigation, since he was furnished a résumé of it, did not challenge its accuracy, and showed no particular need for the original report. Pp. 64–66.

269 F. 2d 613, affirmed.

Hayden C. Covington argued the cause and filed a brief for petitioner.

Daniel M. Friedman argued the cause for the United States. On the brief were *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *J. F. Bishop.*

MR. JUSTICE CLARK delivered the opinion of the Court.

This is a prosecution for refusal to be inducted into the armed services, in violation of the provisions of the Universal Military Training and Service Act, 62 Stat. 604, 622, 50 U. S. C. App. § 462 (a). Petitioner, who claims to be a conscientious objector, contends that he was denied due process, both in the proceedings before a hearing officer of the Department of Justice and at trial. He says that he was not permitted to rebut before the hearing officer statements attributed to him by the local board, and, further, that he was denied at trial the right to have the Department of Justice hearing officer's report and the original report of the Federal Bureau of Investigation as to his claim—all in violation of the Fifth Amendment. The trial judge decided that the administrative procedures of the Act were fully complied with and refused to require the production of such documents. Petitioner was found guilty and sentenced to 15 months' imprisonment. The Court of Appeals affirmed. 269 F. 2d 613. We granted certiorari in view of the importance of the questions in the administration of the Act. 361 U. S. 899. We have concluded that petitioner's claims are controlled by the rationale of *Gonzales* v. *United States,* 348 U. S. 407 (1955), and *United States* v. *Nugent,* 346 U. S. 1 (1953), and therefore affirm the judgment.

Petitioner registered with Local Board No. 9, Boulder, Colorado, on March 17, 1952. His answers to the classification questionnaire reflected that he was a minister of Jehovah's Witnesses, employed at night by a sugar producer. He claimed IV–D classification as a minister of religion, devoting a minimum of 100 hours a month to

preaching. On November 13, 1952, he was classified in Class I–A. On November 22, 1952, he wrote the Board, protesting this classification. He again stated that he was "a regular minister"; that he was "devoting an average of 100 hours a month to actual preaching publicly," in addition to 50 to 75 hours in other ministerial duties, and that he opposed war in any form. Thereafter he was classified I–O. On April 1, 1953, after some six months of full-time "pioneering," petitioner discontinued devoting 100 hours a month to preaching, but failed to so notify his local board. In a periodic review, the local board on July 30, 1953, reclassified him I–A and upheld this classification after a personal appearance by petitioner, because of his willingness to kill in defense of his church and home. Upon administrative approval of the reclassification, he was ordered to report for induction on June 11, 1956, but failed to do so. He was not prosecuted, however, and his case was subsequently reopened, in the light of *Sicurella* v. *United States,* 348 U. S. 385 (1955). He was again reclassified I–A by the local board. There followed a customary Department of Justice hearing, at which petitioner appeared. In his report to the Attorney General, the hearing officer suggested that the petitioner be exempt only from combatant training and service. On March 21, 1957, however, the Department recommended approval of the I–A classification. Its ground for this recommendation was that, while petitioner claimed before the local board on August 17, 1956 (as evidenced by its memorandum in his file of that date), that he was devoting 100 hours per month to actual preaching, the headquarters of the Jehovah's Witnesses reported that he was no longer doing so and, on the contrary, had relinquished both his Pioneer and Bible Student Servant positions. It reported that he now devoted only some 6½ hours per month to public preaching and from 20 to 25 hours per month to church activities. His claim was therefore "so

highly exaggerated," the Department concluded, that it "cast doubt upon his veracity and, consequently, upon his sincerity and good faith." The appeal board furnished petitioner a copy of the recommendation. In his answer thereto, he advised the Board that he had made no such statement in 1956, and asserted that his only claim to "pioneering" was in 1952. The appeal board, however, unanimously concurred in the Department's recommendation. Upon return of the file to the local board, petitioner was again ordered to report for induction and this prosecution followed his failure to do so.

Petitioner first contends that the Department denied him procedural due process by not giving him timely opportunity, before its final recommendation to the appeal board, to answer the statement of the local board as to his claim of devoting 100 hours to actual preaching. But the statement of the local board attributing this claim to petitioner was in his file. He admitted that he knew it was open to him at all times, and he could have rebutted it before the hearing officer. This he failed to do, asserting that he did not know it to be in his file. Apparently he never took the trouble to find out. Nevertheless he had ample opportunity to contest the statement before the appeal board. After the recommendation of the Department is forwarded to the appeal board, that is the appropriate place for a registrant to lodge his denial. This he did. We found in *Gonzales* v. *United States, supra,* that this was the controlling reason why copies of the recommendation should be furnished a registrant. We said there that it was necessary "that a registrant be given an opportunity to rebut [the Department's] recommendation when it comes to the Appeal Board, the agency with the ultimate responsibility for classification." 348 U. S., at 412. We fail to see how such procedure resulted in any prejudice to petitioner's contention, which was considered by the appeal board and denied by it. As was

said in *Gonzales,* "it is the Appeal Board which renders the selective service determination considered 'final' in the courts, not to be overturned unless there is no basis in fact. *Estep* v. *United States,* 327 U. S. 114." 348 U. S., at 412–413.

But there are other contentions which might be considered more difficult. At his trial, petitioner sought to secure through subpoena *duces tecum* the longhand notes of the Department's hearing officer, Evensen, as well as his report thereon. Petitioner also claimed at trial the right to inspect the original Federal Bureau of Investigation reports to the Department of Justice. He alleged no specific procedural errors or evidence withheld; nor did he elaborate just what favorable evidence the Federal Bureau of Investigation reports might disclose.

Section 6 (j) of the Act, as we have held, does require the Department's recommendation to be placed in a registrant's file. *Gonzales* v. *United States, supra.* But there is nothing in the Act requiring the hearing officer's report to be likewise turned over to the registrant. While the regulations formerly required that the hearing officer's report be placed in the registrant's file, this requirement was eliminated in 1952. Moreover, the hearing officer's report is but intradepartmental, is directed to the Attorney General and, of course, is not the recommendation of the Department. It is not essentially different from a memorandum of an attorney in the Department of Justice, of which the Attorney General receives many, and to which he may give his approval or rejection. It is but part of the whole process within the Department that goes into the making of the final recommendation to the appeal board.

It is also significant that neither this report nor the hearing officer's notes were furnished to the appeal board. Hence the petitioner had full opportunity to traverse the only conclusions of the Department on file with

the Board. Petitioner knew that the Department's recommendation was based not on the hearing officer's report but on the statement of the local board in his file. Having had every opportunity to rebut the finding of the local board before both the hearing officer and the appeal board, petitioner cannot now claim that he was denied due process because he did not succeed.[1]

It appears to us that the same reasoning applies to the production of the hearing officer's report and notes at the trial. In addition, petitioner has failed to show any particular need for the report and notes. While there are now allegations of the withholding of "favorable evidence developed at the hearing" and a denial of a "full and fair hearing," no such claim was made by petitioner at any stage of the administrative process. Moreover, his testimony at trial never developed any such facts. In the light of these circumstances, as well as the fact that the issue at trial in this respect centered entirely on the Department's recommendation, which petitioner repudiated but which both the appeal board and the courts below found supported by the record, we find no relevancy in the hearing officer's report and notes.

Finally petitioner says that he was entitled to inspect the FBI report during the proceedings before the hearing officer as well as at the trial. He did receive a résumé of it—the same that was furnished the appeal board—and he made no claim of its inaccuracy. Even now no such

[1] Petitioner points out that the regulations, as we have said, at one time required copies of the hearing officer's report to be placed in the registrant's file. He attributes congressional approval thereto because the selective service laws were re-enacted and amended in 1951 and 1952. The same reasoning would apply, however, to the repeal of the regulation. As we noted, it was stricken by the Attorney General in 1952 and Congress has amended the Act three times subsequently—in 1955, 1957, and 1958. Still it has failed to indicate any objection to the repeal of the regulation.

claim is asserted. He bases his present contention on the general right to explore, indicating that he hopes to find some discrepancy in the résumé. But this is fully answered by *United States* v. *Nugent, supra.* There we held "that the statutory scheme for review, within the selective service system, . . . entitles [conscientious objectors] to no guarantee that the FBI reports must be produced for their inspection." 346 U. S., at 5–6. Even if we were not bound by *Nugent,* petitioner here would not be entitled to the report. The recommendation of the Department—as well as the decision of the appeal board—was based entirely on the local board file, not on an FBI report.

As to the production of the report at the trial, it is true that, while that issue was raised in *Nugent,*[2] the Court gave it no separate treatment. However, it would be an act of folly not to require the production of such reports before the appeal boards, whose "actions are final" and to be overturned "only if there is no basis in fact for the classification," *Estep* v. *United States,* 327 U. S. 114, 122 (1946), and subsequently to require their production at the trials in the District Courts. We note that the Courts of Appeals have uniformly rejected such claims. This is not to say that there might not be circumstances in a particular case where fairness in the proceeding would require production. No such circumstances, as foundation for a claim of actual unfairness, are before us. Contrariwise, the résumé fully set out petitioner's statement before the local board as to his ministerial activity. Since this is not disputed, and since the Department's recommendation was based on a disparity between petitioner's representations before the local

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[2] Joint Brief for Respondents, p. 181, *United States* v. *Nugent,* 346 U. S. 1 (1953).

board—not on the FBI report—it follows that the reasoning of *Nugent* controls.

Petitioner raises other points, such as the fact that the prosecutor did not call the members and clerk of the local board to testify at his trial. We find no substance in any of them. Petitioner could have subpoenaed any witnesses he wished at the trial. It was he who was challenging the classification. The Government relied only on the record in the file, all of which was available to petitioner. He makes much of the identity of the language of the statement he is found to have made before the local board on August 17, 1956, as to his ministerial activity, and his earlier letter to the Board in 1952. But all of this was before the appeal board. Moreover, he could have called witnesses to bring out the circumstances surrounding the statement and the letter; the FBI files would have been to no avail. He contented himself, however, with offering only his own denial. The appeal board resolved this issue against him. It found that his claim as to ministerial activity was exaggerated and cast doubt on his sincerity. Both courts below have found "that the record is not without evidence to support these conclusions." We will not set aside their findings here.

Affirmed.

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

I cannot agree with the decision of the Court, for I believe that petitioner has been deprived of a right which is his by statute and regulation—the right to a full hearing. The facts of this case not only indicate a miscarriage of justice, but also underline the significance of the hearing rights which petitioner was never accorded.

Petitioner, a youth of 18 at the time, first claimed exemption as a minister of Jehovah's Witnesses in 1952,

describing the extent and nature of his religious activities in a detailed letter to the local selective service board. The board, however, classified him 1-A, and, after an unsuccessful appeal, he was ordered to report for induction. Although he refused to comply with the order, his case was reopened after our decision in *Sicurella* v. *United States,* 348 U. S. 385.[1] He renewed his claim for exemption, asserting that he was a minister and a conscientious objector, but again the local board ruled adversely. On appeal, the case was referred to the Department of Justice, and petitioner appeared before a hearing officer.

The hearing officer's report, as summarized by the Department of Justice, was as follows:

> "The Hearing Officer reported that registrant gave the appearance of being sincere and firm in his beliefs and that he appeared to be well versed in the scriptures. He found that registrant's objections are based upon his religious training and beliefs but concluded that he is not opposed to participation in war in any form. He further concluded that registrant was opposed to combatant training and service but not opposed to noncombatant training and service. He, therefore, recommended that registrant be exempt from combatant training and service only."

This was hardly an astonishing recommendation, inasmuch as the summaries of two F. B. I. investigative reports were entirely—and in my judgment conclusively—favorable. At the time of the first report in 1954, petitioner's grade-school teachers related that he had been "very cooperative [and] mannerly," and that he had

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[1] In *Sicurella,* which involved a member of Jehovah's Witnesses, we held that the petitioner's willingness to fight in defense of his "ministry, Kingdom Interests, and . . . his fellow brethren" was not, under the circumstances, a sufficient basis upon which to deny him exemption as a conscientious objector.

"refused to salute the flag on religious grounds." His former employers "found him an excellent worker, very serious about his religion and sincere and fair in his dealings." His neighbors stated that he was "a quiet and orderly young man whose character and reputation are good," that he was a "very active" member of Jehovah's Witnesses, and that they considered him to be "sincere in his beliefs." Petitioner's references and his fellow members in the sect said that he was "a very active, sincere member," and that they believed he was "in good faith in his conscientious-objector claim." The second report, dated 1956, incorporated the first and added the following: Petitioner's employer regarded him as "an excellent worker, completely reliable, dependable and of excellent morals, character and associates." His acquaintances, neighbors and religious associates "all spoke favorably concerning [his] character and reputation, conduct and morals," and reported that he was "very active in . . . church affairs . . . and . . . very devoted to his religious beliefs." They stated that he "lives up to the teachings of the church and is considered to be sincere in his religious beliefs and in his conscientious-objector claim." The hearing officer was understandably impressed.

However, the Chief of the Conscientious-Objector Section of the Justice Department, who reviewed the file, took a contrary view. He fastened upon a single item in the file—a matter which had neither been mentioned by the hearing officer nor, for all that appears, relied upon by the local board—and recommended to petitioner's appeal board that the claim not be sustained. The item in question was the local board's summary of petitioner's appearance before it in 1956, which the section chief interpreted to state that petitioner at that time had claimed he was still devoting 100 hours a month to preaching, as his 1952

letter to the board had stated.[2] Since the investigative reports indicated that petitioner's status as a Jehovah's Witness "Pioneer" had terminated in 1953, and that from 1954 to 1956 he had devoted only six and one-half hours

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[2] The local board memorandum reads in full as follows:

"When asked by the members of Local Board No. 9, Boulder, Colorado, if he thought he was entitled to any other classification than that of I–A, Mr. Gonzales replied, 'I am a minister and as such should be classified 4–D. Also, a minister is automatically classified as a conscientious objector.' The board replied that this statement was in error.

"Mr. Gonzales then went on to say that he had always made the claim that he was a minister even at the very beginning of his registration. He still made the statement that if I am a minister I am a conscientious objector.

"When asked if he would participate in the conscientious objector work program, he stated definitely not.

"Mr. Gonzales stated '*I am a regular minister as defined under section 16 G part II of the laws and regulations set out by Selective Service Act of 1948. At present I am devoting an average of 100 hours a month to actual preaching publicly and from house to house, and an additional 50–75 hours in preparation for ministerial duties such as; preparation for home bible studies; calling back on good-will persons; attending congregational meetings, as well as training students to become ministers. I also serve as Stock Servant for the local congregation. As you perhaps already know that the Selective Service National Headquarters has determined that Jehovah's Witnesses and the Watchtower Bible and Tract Society constitutes a recognized religious organization and that all Jehovah's Witnesses who are regularly and customarily teaching and preaching the doctrines and principles of the Bible as advocated by Jehovah's Witnesses as a vocation and not incidentally are entitled to exemption as ministers of religion. These are some of the reasons I request a 4–D classification, so I would like for you to further consider my case as a minister of the gospel or would like to appear in person before the local board members for further consideration or discussion in regard to my case.*'

"When asked by the board if he had any further information to submit, he stated he submitted no new evidence except what was

a month to preaching, the section chief concluded that petitioner's "claim as to the amount of his religious activities is so highly exaggerated . . . as to cast doubt upon his veracity and, consequently, upon his sincerity and good faith."

Petitioner was informed of this recommendation, and wrote to the appeal board as follows:

> ". . . I would like to state that I *did not* at such a time [in 1956] make such a statement or any statement implicating the same. The only time I submitted such information was when I was pioneering that was in the period of October 1, 1952 to April 16, 1953. . . . I would like to make it plain that I in no manner ever exaggerated my report concerning my activities. The reason being more than just my respect for mere man, but as a Christian and Bible Student I realize I stand before the Higher Authorities Jehovah God and Jesus Christ, I am also fully aware of the consequences to liars as stated at Proverbs 6:16, 17, 19 showing God hates a lying tongue. I also realize that for one to lie would make void his Christian conduct and worship. So please consider the information here submitted, I am sure the record stands behind it all."

This statement, set against the background of the information of record regarding petitioner's character, has the ring of truth. Moreover, it is corroborated by the inherent improbability that petitioner's oral statement in 1956 would have been a word-for-word and sentence-for-sentence carbon copy of the written statement he had sub-

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stated above, but would like to submit a certificate of marriage as the only new matter to be brought before the board."

The italicized portion repeats the statement petitioner made in his 1952 letter to the local board. The significance of this repetition is discussed *infra*.

mitted four years before, down to the request for a personal appearance which he was at that very minute receiving.[3] And it should be emphasized that the only evidence that petitioner made such a statement was the board memorandum, set forth in note 2, *supra.* The most likely explanation is that the local board merely intended to say that petitioner had repeated his basic claim to exemption, and that the board utilized petitioner's prior letter on the assumption that it described that claim. But, so far as appears, no one in the Department took the trouble to ask the local board precisely what its memorandum meant.

Although the Department's recommendation was based upon this dubious foundation, the appeal board followed that recommendation. Before the date scheduled for petitioner's induction, he informed the local board that his wife was pregnant, but the board told him that the notification came too late. Petitioner refused to be inducted, was prosecuted, and was convicted.

The striking thing about this case—aside from the dishonoring of petitioner's claim—is that he never once received a real opportunity to persuade any Department or selective service officer face to face that he had not lied to the local board, for the accusation was never made until petitioner's opportunity for oral response had passed. The hearing officer never adverted to the matter, and the Department's recommendation was made on grounds entirely different from the matters which had been explored at the hearing. It is true, as I have indicated, that petitioner was allowed to file a rebuttal before the appeal board; but that rebuttal was *written,* not oral. See 32 CFR § 1626.25 (e). Since the issue was one of credibility, it can hardly be maintained that this afforded

[3] See the italicized portion of the board's memorandum, note 2, *supra.*

petitioner a fair opportunity to meet an accusation determinative of his case.

Nor can it be said that the Department's recommendation, and the basis therefor, has no significance. On the contrary, the statute makes the Department proceeding an integral and important part of the classification process; for every appeal must be referred to the Department, and, although the appeal board is not bound to follow the Department's recommendation, it is admonished by the statute to "give consideration to" it.[4] The fact appears to be that these recommendations are followed in over 90% of the cases.[5] Moreover, the selective service classification which is given administratively cannot effectively be contested in a criminal proceeding in court, in view of the extremely restricted judicial review of that classification. See *Witmer* v. *United States*, 348 U. S. 375. These factors reveal the critical importance of the Department's recommendation, and, in turn, of the inadequate procedures under which petitioner was permitted to present his claim to the Department.

Congress fully recognized the significance of the Department of Justice stage of the proceeding, for it directed that every appeal be referred to the Department "for inquiry and hearing," and commanded the Department, "after appropriate inquiry," to "hold a hearing with respect to the character and good faith of the objections of the person concerned." An adverse recommendation is to be made only when "after such hearing the Department of Justice finds that his objections are not sustained."[6] The regulations are in accord. 32 CFR § 1626.25.

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[4] 62 Stat. 613, as amended, 50 U. S. C. App. § 456 (j).

[5] See Smith and Bell, "The Conscientious-Objector Program—A Search for Sincerity," 19 U. Pitt. L. Rev. 695, 702.

[6] Note 4, *supra*.

In requiring a hearing, Congress did not mean, in my opinion, that a guessing contest would suffice. It is true enough that, prior to the hearing, petitioner could have searched the files and discovered the local board memorandum; but this opportunity hardly measures up to the traditional concept of a hearing as involving notice of charges. And I think it not amiss, in considering this matter, to note that at the time of his appearance before the local board and the hearing officer, petitioner, a laborer with but an eighth-grade education, was a youth of 22 years of age and was unrepresented by counsel. I doubt that anyone would maintain that there would be a hearing in any true sense of the word if such a person were told by the Department that he could appear and say whatever he wished, but that the Department would not indicate to him what it considered pertinent—indeed, what it considered conclusive unless rebutted. Yet in substance this is exactly what happened here. I cannot believe that this procedure comports with Congress' intent.

Nor can I reconcile the Court's decision with precedent. In *Morgan* v. *United States,* 304 U. S. 1, the Court held a government rate order void because the stockyards commission men who were affected by it were not given the "full hearing" required by the pertinent statute. There was no question of these individuals not being allowed to argue their case. In fact, there had been a full and lengthy proceeding for the introduction of evidence, and in addition the parties had been granted an oral argument before the Acting Secretary of Agriculture. But this Court nonetheless found that there had not been a hearing within the meaning of the statute, and phrased its holding in language which is uniquely apropos here:

> "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet

> them. The right to submit argument implies that opportunity; otherwise the right might be but a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command." *Id.*, at 18–19.

I do not believe that the claim of Raymond Gonzales to a full hearing is less worthy of consideration than the rights of the stockyards commission men in *Morgan*.

In sum, I am unwilling to attribute to Congress any intent other than one which would guarantee to persons like petitioner every procedural safeguard which appears reasonably designed to insure a fair determination of their claims. We must remember that we are dealing here with a system of universal military service which touches, directly or indirectly, practically every person and every family in this country. When the people are thus brought into contact with the Government, the importance to the commonweal of insuring their confidence in the justness of the program cannot be overemphasized, for to them it is not merely the fairness of a program which is involved, but the fairness of their Government. The sensitivity of Congress to this need is nowhere better demonstrated than in the statutory provisions concerning the treatment of persons claiming exemption as conscientious objectors. As Congress has recognized, one of the most fundamental aspects of our national ethic is a recognition of the worth of the person, acting according to the dictates of his own conscience. And thus it is that, even in formulating legislation deemed to be of prime importance to the very existence of the Nation, Congress refrained from impressing into military service those who by religious conviction find war an affront to God and morality. The

desire of Congress that such beliefs be respected is further reflected by its unwillingness to entrust to a local board the final authority to pass upon the claims of conscientious objectors. Instead, Congress provided for an appeal within the selective service system, together with a hearing in the Department of Justice. In determining what Congress intended by these statutory provisions, we must not forget the nature of the program with which we are dealing, nor must we forget that most of the subjects of governmental action in these cases are inexperienced youths, many only 18 years of age, often unrepresented by attorneys. I am unwilling to give to a statute conceived in such a context a construction which results in a young man of unblemished reputation, who claims religious scruples, being sent to prison for 15 months without having received a full and fair consideration of his case. I say this with assurance that Congress did not intend that these humanitarian benefits of the Act be accorded grudgingly.

I dissent.

UNITED STATES *v.* CANNELTON SEWER PIPE CO.

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

No. 513. Argued May 19, 1960.—
Decided June 27, 1960.

The Internal Revenue Code of 1939 permitted taxpayers to deduct as a depletion allowance a percentage of "gross income from mining" and defined "mining" as including the "ordinary treatment processes normally applied by mine owners . . . to obtain the commercially marketable mineral product or products." Respondent mines fire clay and shale for which there is a market but which it utilizes to manufacture sewer pipe and other vitrified articles. It claims that it could not profitably market its raw fire clay and shale without processing them into finished products. *Held:* Respondent's depletion allowance must be based, not upon the value of the sewer pipe and other vitrified products which it manufactures, but upon the value of its raw fire clay and shale after application of ordinary treatment processes normally applied in the recovery of those materials by miners not engaged in the manufacture of finished products. Pp. 77–90.

(a) Congress intended to grant miners a depletion allowance based on the constructive income from the raw mineral product, if marketable in that form, and not on the value of finished articles. Pp. 81–86.

(b) A depletion allowance is an allowance for the exhaustion of capital assets—not a subsidy to manufacturers or to high-cost mine operators. P. 86.

(c) That respondent is both a miner and a manufacturer does not entitle it to treatment different from that accorded miners of the same raw materials who are not manufacturers. Pp. 86–88.

(d) That respondent's underground method of mining prevents it from selling its raw fire clay and shale does not entitle it to treatment different from that accorded to the other miners of the same raw materials. Pp. 88–89.

268 F. 2d 334, reversed.

Ralph S. Spritzer argued the cause for the United States. With him on the brief were *Solicitor General Rankin, Acting Assistant Attorney General Heffron, Melva M. Graney* and *James P. Turner.*

Erwin N. Griswold argued the cause for respondent. With him on the brief was *Howard P. Travis.*

Robert E. Lee Hall and *Richard L. Hirshberg* filed a brief for the National Coal Association, as *amicus curiae.*

MR. JUSTICE CLARK delivered the opinion of the Court.

This income tax refund suit involves the statutory percentage depletion allowance to which respondent, an integrated miner-manufacturer of burnt clay products from fire clay and shale, is entitled under the Internal Revenue Code of 1939.[1]

The percentage granted by the statute is on respondent's "gross income from mining." It defines "mining" to include the "ordinary treatment processes normally applied by mine owners . . . to obtain the commercially marketable mineral product or products." Respondent claimed that its first "commercially marketable mineral product" is sewer pipe and other vitrified articles. Alternatively, it contended that depletion should be based on the price of 80 tons of ground fire clay and shale actually sold during the tax year in question. The District Court agreed with respondent's first claim. The Court of Appeals affirmed, holding that respondent could not profitably sell its raw fire clay and shale without processing it into finished products, and that its statutory percentage depletion was therefore properly based on its gross sales

[1] The applicable provisions of the Code are § 23 (m) and § 114 (b) (4). In general, they provide for a depletion allowance based on a percentage of "gross income from mining," which is specifically defined. See note 8, *infra.* The percentage permitted on shale is 5%, and on fire clay, 15%.

of the latter. 268 F. 2d 334. The Government contends that the product from which "gross income from mining" is computed is an industry-wide test and cannot be reduced to a particular operation that a taxpayer might find profitable. The Government further argues that, while the statute permits ordinary treatment processes normally applied by miners to the raw product of their mines to produce a commercially marketable mineral product, it does not embrace the fabrication of the mineral product into finished articles. In view of the importance of the question to taxpayers as well as to the Government, we granted certiorari. 361 U. S. 923. We disagree with respondent's contention that the issue is not presented by this record, and we therefore reach the merits. We have concluded that, under the mandate of the statute, respondent's "gross income from mining" under the findings here is the value of its raw fire clay and shale, after the application of the ordinary treatment processes normally applied by nonintegrated miners engaged in the recovery of those minerals.[2]

I.

During the tax year ending November 30, 1951, the respondent owned and operated an underground mine from which it produced fire clay and shale in proportions of 60% fire clay and 40% shale. It transported the raw mineral product by truck to its plant at Cannelton, Indiana, about one and one-half miles distant. There it processed and fabricated the fire clay and shale into vitrified sewer pipe, flue lining and related products. In this process, the clay and shale is first ground into a pulverized form about as fine as talcum powder. The

[2] The quantity of ground and bagged fire clay and shale actually sold is too negligible to furnish an appropriate basis for computing depletion.

powder is then mixed with water in a pug mill and becomes a plastic mass, which is formed by machines into the shape of the finished ware desired. The ware is then placed in dryers where heat of less than 212° is applied to remove all of the water. This process takes from 12 hours to 3 weeks, depending on the size of the ware. Thereafter the ware is vitrified in kilns at 2,200° Fahrenheit, requiring from 60 to 210 hours. It is then cooled, graded and either shipped or stored.

Not all clays and shales are suitable for respondent's operations. They must have plasticity, special drying qualities and be able to withstand high temperatures. Respondent's clay, known as Cannelton clay, is the deepest clay mined in Indiana and, respondent says, yields the best sewer pipe. Its cost of removing and delivering the same to its plant was $2.418 per ton in 1951. Respondent used some 38,473 tons of clay and shale in its operations that year and sold approximately 80 tons of ground fire clay and shale in bags at a price of $22.88 per ton. Net sales of its finished wares amounted to approximately one and a half million dollars.

In connection with its tax assessment for the year in question, respondent filed a document in which it stated that "we used as a basis for calculating the gross income from our mining operations of shale and fire clay the point in our manufacturing operations at which we first arrive with a commercially marketable product, which is ground fire clay. This product arrives after the raw mineral is crushed and granulated to such extent that by the addition of water it can be made into a mortar for use in laying or setting fire or refractory brick. This ground fire clay has a definite market and an ascertainable market value at any particular time and is the same product from which our end product, sewer tile, is made simply by the addition of water and the necessary baking process." In this return it based the value of the ground

fire clay at $22.81 per ton, the price for which it sold some 80 tons of that material in bags during 1951. At this figure the depletion allowance would have been slightly above $2 per ton. Thereafter respondent claimed error and asserted that its mineral product, rather than being commercially marketable when it reached the stage of ground fire clay, only became commercially marketable when it became a finished product, *e. g.*, sewer pipe. On this basis, the depletion allowance on petitioner's gross income would be approximately $4 per ton, since the mineral would have a value of about $40 per ton. On the other hand, if the mineral it used in 1951 was valued at $1.60 to $1.90 per ton, the going price elsewhere in Indiana, the depletion allowance would be approximately 20¢ per ton.

The record shows and the District Court found that in 1951 there were substantial sales of raw fire clay and shale in Indiana, mostly in the vicinity of Brazil, about 140 miles from Cannelton. The average price there was $1.60 to $1.90 per ton for fire clay and $1 per ton for shale. Transportation costs from Brazil to Cannelton ran from $4.58 to $5.50 per ton. In Kentucky, across the river from respondent's plant, it appears that fire clay and shale of the same grade were mined and sold [3] before, dur-

[3] The evidence indicates that, for $50, Owensboro Sewer Pipe Company bought from L. R. Chapman five acres of ground under which the shale and clay deposits lay. Contemporaneously it made a contract with L. R. Chapman, Inc., to mine and deliver shale and fire clay from this tract to the Owensboro plant for $1.40 per ton. Chapman also testified that in addition he furnished shale and fire clay to other manufacturers in the same area in Kentucky. The arrangements varied. Some were similar to the Owensboro agreement, while others were leases on a royalty basis with a contemporaneous agreement to mine and deliver the clay at a set price. The exact year or years are not clear, but appear to have been between 1949 and 1956. Respondent began using shale and fire clay from the same source by lease arrangement in 1957. The reason for lease arrangements and

ing and subsequent to 1951. In fact, since 1957 respondent has secured all of its mineral requirements from this source on a lease basis under which the lessor mines and delivers the raw material to its plant. The exact cost is not shown, but the haul in 1957 from pit to plant, including the ferry crossing, was some seven miles.

II.

We have carefully studied the legislative history of the depletion allowance, including the voluminous materials furnished by the parties, not only in their briefs but in the exhaustive appendices and the record.[4] We shall not burden this opinion with its repetition.

In summary, mineral depletion for tax purposes is an allowance from income for the exhaustion of capital assets. *Anderson* v. *Helvering,* 310 U. S. 404 (1940). In addition, it is based on the belief that its allowance encourages extensive exploration and increasing discoveries of additional minerals to the benefit of the economy and strength of the Nation. We are not concerned with the validity of this theory or with the statutory policy. Our sole function is application of the congressional mandate. A study of the materials indicates that percentage depletion first came into the tax structure in 1926, when the Congress granted it to oil and gas producers. The percentage allowed was based on "gross income from the property," which was described as "the gross receipts from the sale of oil and gas as it is delivered from the property." Preliminary Report, Joint Committee on Internal Revenue Taxation, Vol. I, Part 2 (1927). The report continued that, as to the integrated

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paper transfer of title is not shown. However, Chapman testified that the manufacturers "didn't seem to want to do the prospecting or the sampling until they were sure they could get either a lease or a deed."

[4] The briefs cover 294 pages and the appendices an additional 685, not including 10 charts. The record is 276 pages.

operator, "the gross income from the property must be computed from the production and posted price of oil, as the gross receipts from a refined and transported product can not be used in determining the income as relating to an individual tract or lease." The Treasury Regulations confirmed this understanding. Treas. Reg. 74 (1929 ed.), Arts. 221 (i), 241.

Thereafter, in 1932, percentage depletion was extended to metal mines, coal, and sulphur. The mining engineer of the Joint Committee, Alex. R. Shepherd, urged in a report to the Congress [5] that depletion for metal mines be computed, as in the oil and gas industry, on a percentage-of-income basis, and the Revenue Act of 1932 was so drawn. The Shepherd Report pointed out that the percentage basis for oil and gas depletion had been in force for over a year and had "functioned satisfactorily both from economical and administrative viewpoints and without loss of revenue." It added that "careful study of this method as applied to metal mines indicates that the same results will be attained in practice as in the case of oil and gas," but that, because of varied practices in the mining industry, it would be necessary to determine "the point in accounting at which" gross income from the property mined could be calculated. It recommended that "it is logical to peg 'gross income from the property' f. o. b. cars at mine," *i. e.*, net smelter returns, recognizing that processing beyond this point should not be included in calculating "gross income from the property." While as to certain metals, *viz.*, gold, silver, or copper, the report suggested that gross income should be based on receipts from "the sale of the crude, partially beneficiated or refined" product, this was but to make

[5] Preliminary Report on Depletion, Staff Reports to the Joint Committee on Internal Revenue Taxation (1930), Appendix XXXI (Shepherd Report).

provision for the specific operations of miners in those metals. In this regard the report also proposed that the depletion base "in the case of all other metals, coal and oil and gas, [should be] the competitive market receipts, or its equivalent, received from the sale of the crude products, or concentrates on an f. o. b. mine, mill, or well basis."

The Congress in fashioning the 1932 Act took into account these recommendations. It incorporated a provision in the Act allowing percentage depletion for coal and metal mines and sulphur, based on the "gross income from the property." § 114 (b)(4), Revenue Act of 1932, 47 Stat. 169. On the following February 10, 1933, the Treasury issued its Regulations 77, which defined "gross income from the property" as "the amount for which the taxpayer sells (a) the crude mineral product of the property or (b) the product derived therefrom, not to exceed in the case of (a) the representative market or field price . . . or in the case of (b) the representative market or field price . . . of a product of the kind and grade from which the product sold was derived, before the application of any processes . . . with the exception of those listed . . . ." Treas. Reg. 77, Art. 221 (g). These exceptions listed processes normally in use in the mining industry for preparing the mineral as a marketable shipping product. The regulation was of unquestioned validity and, in 1943, at the instance of the industry, the Congress substantially embodied it into the statute itself, 58 Stat. 21, 44, including the basic definition of the term "gross income from the property." [6] Since that time the

[6] See, *e. g.*, Hearings before Senate Committee on Finance on H. R. 3687, 78th Cong., 1st Sess. 528; S. Rep. No. 627, 78th Cong., 1st Sess. 23–24; Hearings before House Committee on Ways and Means on Revenue Revisions, 80th Cong., 1st Sess., part 3, at 1857; Hearings before Senate Committee on Finance on H. R. 8920, 81st Cong., 2d Sess. 771; S. Rep. No. 2375, 81st Cong., 2d Sess. 53–54.

section on percentage depletion—§ 114 (b)(4)(B) of the 1939 Code—has remained basically the same.[7] Additional minerals have been added from time to time—shale and fire clay in 1951—until practically all minerals are included.

As now enacted, the section provides that "mining" includes "not merely the extraction of the ores or minerals from the ground but also the ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product or products," plus transportation from the place of extraction to the "plants or mills in which the ordinary treatment processes are applied thereto," not exceeding 50 miles.[8] It then defines "ordinary treatment processes"

[7] The present statute, § 613 of the Internal Revenue Code of 1954, is essentially unchanged.

[8] Internal Revenue Code of 1939, § 114 (b)(4)(B):

"*Definition of Gross Income from Property.*—As used in this paragraph the term 'gross income from the property' means the gross income from mining. The term 'mining' as used herein shall be considered to include not merely the extraction of the ores or minerals from the ground but also the ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product or products, and so much of the transportation of ores or minerals (whether or not by common carrier) from the point of extraction from the ground to the plants or mills in which the ordinary treatment processes are applied thereto as is not in excess of 50 miles unless the Secretary finds that the physical and other requirements are such that the ore or mineral must be transported a greater distance to such plants or mills. The term 'ordinary treatment processes,' as used herein, shall include the following: (i) In the case of coal—cleaning, breaking, sizing, and loading for shipment; (ii) in the case of sulphur—pumping to vats, cooling, breaking, and loading for shipment; (iii) in the case of iron ore, bauxite, ball and sagger clay, rock asphalt, and minerals which are customarily sold in the form of a crude mineral product—sorting, concentrating, and sintering to bring to shipping grade and form, and loading for shipment; and (iv) in the case of lead, zinc, copper, gold, silver, or fluorspar ores, potash, and ores which are not customarily

by setting out specifically in four categories those covering some 17 named minerals. Fire clay and shale are not within these specific enumerations. The Government, however, contends that they should come within clause (iii) of the section, which provides that, "in the case of iron ore, bauxite, ball and sagger clay, rock asphalt, *and minerals which are customarily sold in the form of a crude mineral product*—sorting, concentrating, and sintering to bring to shipping grade and form, and loading for shipment . . ." are included in "ordinary treatment processes." (Italics added.) Clause (iv) lists specific metals such as lead, zinc, copper, etc., "and ores which are not customarily sold in the form of crude mineral product," and specifically excludes from the permissible processes certain ones used in connection with these metals. To recapitulate, the section contains four categories of "ordinary treatment processes": the first enumerating those permissible as to the mining of coal; the second, as to sulphur; the third, as to minerals customarily sold in the form of the crude mineral product; and the fourth, as to those ores not customarily so sold. We note that the Congress even states the steps in each permissible process, and in addition specifically declares some processes not to be "ordinary treatment" ones, *viz.*, "electrolytic deposition, roasting, thermal or electric smelting, or refining." Furthermore, none of the permissible processes

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sold in the form of crude mineral product—crushing, grinding, and beneficiation by concentration (gravity, flotation, amalgamation, electrostatic, or magnetic), cyanidation, leaching, crystallization, precipitation (but not including as an ordinary treatment process electrolytic deposition, roasting, thermal or electric smelting, or refining), or by substantially equivalent processes or combination of processes used in the separation or extraction of the product or products from the ore, including the furnacing of quicksilver ores. The principles of this subparagraph shall also be applicable in determining gross income attributable to mining for the purposes of sections 450 and 453." 26 U. S. C. (1952 ed.) § 114.

destroy the physical or chemical identity of the minerals or permit them to be transformed into new products.

From this legislative history, we conclude that Congress intended to grant miners a depletion allowance based on the constructive income from the raw mineral product, if marketable in that form, and not on the value of the finished articles.

III.

The findings are that three-fifths of the fire clay produced in Indiana in 1951 was sold in its raw state. This indicates a substantial market for the raw mineral. In addition, large sales of raw fire clay and shale were made across the river in Kentucky. This indicates that fire clay and shale were "commercially marketable" in their raw state unless that phrase also implies marketability at a profit. We believe it does not. Proof of these sales is significant not because it reveals an ability to sell profitably—which the respondent could not do—but because the substantial tonnage being sold in a raw state provides conclusive proof that, when extracted from the mine, the fire clay and shale are in such a state that they are ready for industrial use or consumption—in short, they have passed the "mining" state on which the depletion principle operates. It would be strange, indeed, to ascribe to the Congress an intent to permit each miner to adopt processes peculiar to his individual operation. Depletion, as we have said, is an allowance for the exhaustion of capital assets. It is not a subsidy to manufacturers or the high-cost mine operator. The value of respondent's vitrified clay products, obtained by expensive manufacturing processes, bears little relation to the value of its minerals. The question in depletion is what allowance is necessary to permit tax-free recovery of the capital value of the minerals.

Respondent insists that its miner-manufacturer status makes some difference. We think not. It is true that the

integrated miners in Indiana outnumbered the nonintegrated ones. But in each of the three basic percentage depletion Acts the Congress indicated that integrated operators should not receive preferred treatment. Furthermore, in Regulations 77, discussed above, the Treasury specifically provided that depletion was allowable only on the crude mineral product. And, as we have said, this regulation was substantially enacted into the 1943 Act. We need not tarry to deal with any differences which are said to have existed in administrative interpretation, for here we have authoritative congressional action itself. Ever since the first percentage depletion statute, the cut-off point where "gross income from mining" stopped has been the same, *i. e.*, where the ordinary miner shipped the product of his mine. Respondent's formula would not only give it a preference over the ordinary nonintegrated miner, but also would grant it a decided competitive advantage over its nonintegrated manufacturer competitor. Congress never intended that depletion create such a discriminatory situation. As we see it, the miner-manufacturer is but selling to himself the crude mineral that he mines, insofar as the depletion allowance is concerned.

IV.

We now reach what "ordinary treatment processes" are available to respondent under the statute. As the principal industry witness put it at hearings before the Congress: "Obviously it was not the intent of Congress that those processes which would take your products and make them into different products having very different uses should be considered, as the basis of depletion." [9] But respondent says that the processes it uses

[9] Robert M. Searls, Attorney, San Francisco, Hearings before the Senate Special Committee on the Investigation of Silver, 77th Cong., 2d Sess., p. 764.

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are the ordinary ones applied in the industry. As to the miner-manufacturer, that is true. But they are not the "ordinary" normal ones applied by the nonintegrated miner. It was he whom the Congress made the object of the allowance. The fabrication processes used by respondent in manufacturing sewer pipe would not be employed by the run-of-the-mill miner—only an integrated miner-manufacturer would have occasion to use them.

Respondent further contends, however, that it must utilize these processes in order to obtain a "commercially marketable mineral product or products." It points out that its underground method of mining prevents it from selling its raw fire clay and shale. This position leads to the conclusion that respondent's mineral product has no value to it in the ground. If this be true, then there could be no depletion. One cannot deplete nothing. On the other hand, respondent alleges that its minerals yield "the best sewer pipe which is made in Indiana." If this be true, then respondent's problem is one purely of cost of recovery, an item which, as we have said, has nothing to do with value in the depletion formulae. Depletion, as we read the legislative history, was designed not to recompense for costs of recovery but for exhaustion of mineral assets alone. If it were extended as respondent asks, the miner-manufacturer would enjoy, in addition to a depletion allowance on his minerals, a similar allowance on his manufacturing costs, including depreciation on his manufacturing plant, machinery and facilities. Nor do we read the use by the Congress of the plural word "products" in the "commercially marketable" phrase as indicating that normal processing techniques might include the fabrication of different products from the same mineral. We believe that the Congress was only recognizing that in mining operations often more than one mineral product was recovered in its raw state.

In view of the finding that substantial quantities—in fact, the majority—of the tonnage production of fire clay and shale were sold in their raw state, we believe that respondent's mining activity during the year in question would come under clause (iii) of the section here involved. That clause includes "minerals which are customarily sold in the form of a crude mineral product." We believe that the Congress intended integrated mining-manufacturing operations to be treated as if the operator were selling the mineral mined to himself for fabrication. It would, of course, be permissible for such an operator to calculate his "gross income from mining" at the point where "ordinary" miners—not integrated—disposed of their product. All processes used by the nonintegrated miner before shipping the raw fire clay and shale would under such a formula be available to the integrated miner-manufacturer to the same extent but no more.

Nor do we believe that the District Court and Court of Appeals cases involving percentage depletion and cited by respondent are apposite here.[10] We do not, however, indicate any approval of their holdings. It is sufficient to say that on their facts they are all distinguishable.

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[10] Respondent's cases are based on *United States* v. *Cherokee Brick & Tile Co.*, 218 F. 2d 424 (adhered to in *United States* v. *Merry Bros. Brick & Tile Co.*, 242 F. 2d 708), which went off on factual concessions not present here. They have been pyramided into a statistically imposing number of cases, predicated upon one another. Close analysis indicates that they either go off on concessions or findings not present here, or deal with controversies over particular treatment processes claimed as "ordinary" in the industry involved. For our purposes, we need not reach the question of whether in those cases the minerals in place had any "value" to be depleted. Other than the decision here under review, only two of the Court of Appeals cases cited by respondent, both from the same Circuit (*Commissioner* v. *Iowa Limestone Co.*, 269 F. 2d 398; *Bookwalter* v. *Centropolis Crusher Co.*, 272 F. 2d 391), adopt the profitability test, which we find unacceptable.

In view of these considerations, neither of respondent's alternate claims for depletion allowance is appropriate. The judgment of the Court of Appeals is therefore reversed, and the cause remanded for further proceedings in conformity with this opinion.

It is so ordered.

MR. JUSTICE HARLAN, concurring in the result.

In joining the judgment in this case I shall refer only to one matter which, among the voluminous data presented by the parties, is for me by far the most telling in favor of the Government's position.

Treasury Regulation 77, promulgated in 1933 under the Revenue Act of 1932 (47 Stat. 169), defined the basic term "gross income from the property" contained in § 114 (b)(4) of the 1932 Act and carried forward in its successors. Art. 221 (g). It concededly supports, by its express terms (see *ante*, p. 83), the position of the Government in the present case. In my opinion the regulation was undoubtedly a valid exercise of the Commissioner's power to construe a generally worded statute. See Preliminary Report on Depletion, Staff Reports to the Joint Committee on Internal Revenue Taxation (1930), p. 68 (Shepherd Report); *Helvering* v. *Wilshire Oil Co.*, 308 U. S. 90, 102–103. The Revenue Act of 1943 (58 Stat. 21, 45), which added to the 1939 Code the provisions governing this case, represented only a limited departure from the 1933 Regulation, or from the administrative action taken under it, principally in the area of extractive processes applied to minerals not customarily sold in the form of a crude product, and did not basically affect the meaning of the term "gross income from the property." See, *e. g.*, Revenue Act of 1943, Hearings before the Senate Committee on Finance, 78th Cong., 1st Sess., on H. R. 3687, pp. 527–529; S. Rep. No. 627, 78th

Cong., 1st Sess., pp. 23–24; Revenue Revision of 1942, Hearings before the House Committee on Ways and Means, 77th Cong., 2d Sess., p. 1202; compare *id.*, at 1199; Silver, Hearings before the Senate Special Committee on the Investigation of Silver, 77th Cong., 2d Sess., pursuant to S. Res. 187 (74th Cong.), pp. 761–764. Respondent's efforts to impugn the force of that Regulation, see Shepherd Report, *supra,* at 70, 71; Revenue Revisions, 1947–1948, Hearings before the House Committee on Ways and Means, 80th Cong., 1st Sess., p. 3283; Mineral Treatment Processes for Percentage Depletion Purposes, Hearings before the House Committee on Ways and Means, 86th Cong., 1st Sess., pp. 258, 264, seem to me quite unpersuasive.

This history, in my view, provides an authoritative and controlling gloss upon the term "commercially marketable mineral product or products" in the statutory definition of "mining," which in turn constitutes the "property" with which the statute deals. See *Helvering* v. *Wilshire Oil Co., supra.* It results, on this record, in limiting respondent's basis for depletion to its constructive income from raw fire clay and shale.

MASSEY MOTORS, INC., *v.* UNITED STATES.

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

No. 141. Argued March 30, 1960.—Decided June 27, 1960.*

The Internal Revenue Code of 1939, § 23 (l), permitted the deduction for income tax purposes of a "reasonable allowance for the exhaustion, wear and tear . . . of property used in the trade or business." The applicable Treasury Regulations 111, § 29.23 (l)–1, defined such allowance to be "that amount which should be set aside for the taxable year in accordance with a reasonably consistent plan . . . whereby the aggregate of the amounts so set aside, plus the salvage value, will, at the end of the useful life of the depreciable property, equal the cost . . . of the property." *Held:* As applied to automobiles leased by the owner-taxpayers to others or (in the case of dealers) used by them or their employees in their business, and later sold as second-hand cars (not junk), the depreciation allowance is to be calculated on a base of the cost of the cars to the taxpayers less their resale value at the estimated time of sale, spread over the estimated time they actually will be employed by the taxpayers in their business. Pp. 93–107.

(a) Congress intended that, under the allowance for depreciation, the taxpayer should recover only the cost of the asset less its estimated salvage, resale or second-hand value. P. 107.

(b) For the purpose of the depreciation allowance, the useful life of the asset must be related to the period for which it may reasonably be expected to be employed in the taxpayer's business. P. 107.

264 F. 2d 552, affirmed.

264 F. 2d 502, reversed.

William R. Frazier argued the cause for petitioner in No. 141. With him on the brief was *James P. Hill.*

Howard A. Heffron argued the cause for the United States in No. 141 and for petitioner in No. 143. On the

*Together with No. 143, *Commissioner of Internal Revenue* v. *Evans et ux.*, on certiorari to the United States Court of Appeals for the Ninth Circuit, argued March 29, 1960.

briefs were *Solicitor General Rankin, Assistant Attorney General Rice, Ralph S. Spritzer, I. Henry Kutz* and *Helen A. Buckley.*

Edgar Bernhard argued the cause for respondents in No. 143. With him on the brief were *Roswell Magill, Harry N. Wyatt, Donald J. Yellon* and *John C. Klett, Jr.*

MR. JUSTICE CLARK delivered the opinion of the Court.

These consolidated cases involve the depreciation allowance for automobiles used in rental and allied service, as claimed under § 23 (l) of the Internal Revenue Code of 1939, which permits the deduction for income tax purposes of a "reasonable allowance for the exhaustion, wear and tear . . . of property used in the trade or business." The applicable Treasury Regulations 111, § 29.23 (l)–1, defines such allowance to be "that amount which should be set aside for the taxable year in accordance with a reasonably consistent plan . . . whereby the aggregate of the amounts so set aside, plus the salvage value, will, at the end of the useful life of the depreciable property, equal the cost or other basis of the property." The Courts of Appeals have divided on the method of depreciation which is permissible in relation to such assets, and we therefore granted certiorari to resolve this conflict. 361 U. S. 810, 812. We have concluded that the reasonable allowance for depreciation of the property in question used in the taxpayer's business is to be calculated over the estimated useful life of the asset while actually employed by the taxpayer, applying a depreciation base of the cost of the property to the taxpayer less its resale value at the estimated time of disposal.

In No. 143, *Commissioner* v. *R. H. and J. M. Evans,* the taxpayers are husband and wife. In 1950 and 1951, the husband, Robley Evans, was engaged in the business

of leasing new automobiles to Evans U-Drive, Inc., at the rate of $45 per car per month. U-Drive in turn leased from 30% to 40% of the cars to its customers for long terms ranging from 18 to 36 months, while the remainder were rented to the public on a call basis for shorter periods. Robley Evans normally kept in stock a supply of new cars with which to service U-Drive and which he purchased at factory price from local automobile dealers. The latest model cars were required because of the demands of the rental business for a fleet of modern automobiles.

When the U-Drive service had an oversupply of cars that were used on short-term rental, it would return them to the taxpayer and he would sell them, disposing of the oldest and least desirable ones first. Normally the ones so disposed of had been used about 15 months and had been driven an average of 15,000 to 20,000 miles. They were ordinarily in first-class condition. It was likewise customary for the taxpayer to sell the long-term rental cars at the termination of their leases, ordinarily after about 50,000 miles of use. They also were usually in good condition. The taxpayer could have used the cars for a longer period, but customer demand for the latest model cars rendered the older styles of little value to the rental business. Because of this, taxpayer found it more profitable to sell the older cars to used car dealers, jobbers or brokers at current wholesale prices. Taxpayer sold 140 such cars in 1950 and 147 in 1951. On all cars leased to U-Drive, taxpayer claimed on his tax returns depreciation calculated on the basis of an estimated useful life of four years with no residual salvage value. The return for 1950, for example, indicated that each car's cost to taxpayer was around $1,650; after some 15 months' use he sold it for $1,380; he charged depreciation of $515 based on a useful life of four years, without salvage value, which left him a net gain of $245,

on which he calculated a capital gains tax. In 1951 the net gain based on the same method of calculation was approximately $350 per car, on which capital gains were computed. The Commissioner denied the depreciation claims, however, on the theory that useful life was not the total economic life of the automobile (*i. e.,* the four years claimed), but only the period it was actually used by the taxpayer in his business; and that salvage value was not junk value but the resale value at the time of disposal. On this basis he estimated the useful life of each car at 17 months and salvage value at $1,325; depreciation was permitted only on the difference between this value and the original cost. The Tax Court accepted the Commissioner's theory but made separate findings. The Court of Appeals reversed, holding that useful life was the total physical or economic life of the automobiles—not the period while useful in the taxpayer's business. 264 F. 2d 502.

In No. 141, *Massey Motors, Inc.,* v. *United States,* the taxpayer, a franchised Chrysler dealer, withdrew from shipments to it a certain number of new cars which were assigned to company officials and employees for use in company business. Other new cars from these shipments were rented to an unaffiliated finance company at a substantial profit.

The cars assigned to company personnel were uniformly sold at the end of 8,000 to 10,000 miles' use or upon receipt of new models, whichever was earlier. The rental cars were sold after 40,000 miles or upon receipt of new models. For the most part, cars assigned to company personnel and the rental cars sold for more than they cost the taxpayer. During 1950 and 1951, the tax years involved here, the profit resulting from sale of company personnel cars was $11,272.80 and from rental cars, $525.84. The taxpayer calculated depreciation on the same theory as did taxpayer Evans, computing the gains on the sales at

capital gain rates with a basis of cost less depreciation. The Commissioner disallowed the depreciation claimed. After paying the tax and being denied a refund, the taxpayer filed this suit. The trial court decided against the Commissioner. The Court of Appeals for the Fifth Circuit, however, reversed, sustaining the Commissioner's views as to the meaning of useful life and salvage value. 264 F. 2d 552.

First, it may be well to orient ourselves. The Commissioner admits that the automobiles involved here are, for tax purposes, depreciable assets rather than ordinary stock in trade. Such assets, employed from day to day in business, generally decrease in utility and value as they are used. It was the design of the Congress to permit the taxpayer to recover, tax free, the total cost to him of such capital assets; hence it recognized that this decrease in value—depreciation—was a legitimate tax deduction as business expense. It was the purpose of § 23 (l) and the regulations to make a meaningful allocation of this cost to the tax periods benefited by the use of the asset. In practical life, however, business concerns do not usually know how long an asset will be of profitable use to them or how long it may be utilized until no longer capable of functioning. But, for the most part, such assets are used for their entire economic life, and the depreciation base in such cases has long been recognized as the number of years the asset is expected to function profitably in use. The asset being of no further use at the end of such period, its salvage value, if anything, is only as scrap.

Some assets, however, are not acquired with intent to be employed in the business for their full economic life. It is this type of asset, where the experience of the taxpayers clearly indicates a utilization of the asset for a substantially shorter period than its full eco-

nomic life, that we are concerned with in these cases. Admittedly, the automobiles are not retained by the taxpayers for their full economic life and, concededly, they do have substantial salvage, resale or second-hand value. Moreover, the application of the full-economic-life formula to taxpayers' businesses here results in the receipt of substantial "profits" from the resale or "salvage" of the automobiles, which contradicts the usual application of the full-economic-life concept. There, the salvage value, if anything, is ordinarily nominal. Furthermore, the "profits" of the taxpayers here are capital gains and incur no more than a 25% tax rate. The depreciation, however, is deducted from ordinary income. By so translating the statute and the regulations, the taxpayers are able, through the deduction of this depreciation from ordinary income, to convert the inflated amounts from income taxable at ordinary rates to that taxable at the substantially lower capital gains rates. This, we believe, was not in the design of Congress.

It appears that the governing statute has at no time defined the terms "useful life" and "salvage value." In the original Act, Congress did provide that a reasonable allowance would be permitted for "wear and tear of property *arising out of its use or employment in the business.*" (Emphasis added.) Act of Oct. 3, 1913, 38 Stat. 167. This language, particularly that emphasized above, may be fairly construed to mean that the wear and tear to the property must arise from its use *in the business* of the taxpayer—*i. e.*, useful life is measured by the use in a taxpayer's business, not by the full abstract economic life of the asset in any business. In 1918, the language of § 23 (l) was amended so that the words emphasized above would read "used in the trade or business," § 214 (a)(8), Revenue Act of 1918, 40 Stat. 1067, and the section carried those words until 1942. Meanwhile, Treas. Reg.

45, Art. 161, was promulgated in 1919 and continued in substantially the same form until 1941. It provided:

> "The proper allowance for such depreciation of any property used in the trade or business is that amount which should be set aside for the taxable year in accordance with a consistent plan by which the aggregate of such amounts for the *useful life of the property in the business* will suffice, with the *salvage value, at the end of such useful life* to provide in place of the property its cost . . . ." (Emphasis added.)

It, too, may be construed to provide that the use and employment of the property *in the business* relates to the trade or business of the taxpayer—not, as is contended, to the type or class of assets subject to depreciation. The latter contention appears to give a strained meaning to the phrase. This might be particularly true of the language in Treasury Regulations 103, promulgated January 29, 1940, under the Internal Revenue Code of 1939. Its § 19.23 (l)–1 and § 19.23 (l)–(2) [1] complement each

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[1] "SEC. 19.23 (l)–1. Depreciation.—A reasonable allowance for the exhaustion, wear and tear, and obsolescence of property used in the trade or business may be deducted from gross income. For convenience such an allowance will usually be referred to as depreciation, excluding from the term any idea of a mere reduction in market value not resulting from exhaustion, wear and tear, or obsolescence. The proper allowance for such depreciation of any property used in the trade or business is that amount which should be set aside for the taxable year in accordance with a reasonably consistent plan (not necessarily at a uniform rate), whereby the aggregate of the amounts so set aside, plus the salvage value, will, at the end of the useful life of the property in the business, equal the cost or other basis of the property determined in accordance with section 113. . . ."

"SEC. 19.23 (l)–2. Depreciable property.—The necessity for a depreciation allowance arises from the fact that certain property used in the business gradually approaches a point where its usefulness is exhausted. The allowance should be confined to property of this nature. In the case of tangible property, it applies to that which

other and seem to advise the taxpayer how to compute depreciation and what property is subject to it. The first section not only describes the proper allowance, but sets out how it is to be computed so that depreciation "plus the salvage value, will, *at the end of the useful life of the property in the business,* equal the cost . . . ." (Emphasis added.) The second section specifically defines the type of assets to which the depreciation allowance is applicable. It may be said that the taxpayers' arguments as to this regulation fail completely, since it not only specifically provides that "useful life" relates to property while used "in the business," but also details the type or class of property included within the allowance. It appears to cut from under the taxpayers the argument that the term "property used in the trade or business" relates to the type or class of assets that are included within the allowance. It would be strange to say that both of these sections of Regulations 103 defined the same thing, *viz.,* the type or class of assets subject to depreciation. On the other hand, the taxpayers point out that Regula-

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is subject to wear and tear, to decay or decline from natural causes, to exhaustion, and to obsolescence due to the normal progress of the art, as where machinery or other property must be replaced by a new invention, or due to the inadequacy of the property to the growing needs of the business. It does not apply to inventories or to stock in trade, or to land apart from the improvements or physical development added to it. It does not apply to bodies of minerals which through the process of removal suffer depletion, other provisions for this being made in the Internal Revenue Code. (See sections 23 (m) and 114.) Property kept in repair may, nevertheless, be the subject of a depreciation allowance. (See section 19.23 (a)–4.) The deduction of an allowance for depreciation is limited to property used in the taxpayer's trade or business. No such allowance may be made in respect of automobiles or other vehicles used solely for pleasure, a building used by the taxpayer solely as his residence, or in respect of furniture or furnishings therein, personal effects, or clothing; but properties and costumes used exclusively in a business, such as a theatrical business, may be the subject of a depreciation allowance."

tions 111, issued in 1942, deleted the words "property in the business" from § 19.23 (l)–1 and substituted the term "depreciable property." This might, as taxpayers claim, establish that the phrase "property used in the trade or business" merely referred to the type of property involved. Certainly when considered in isolation, this appears to be true. But the "depreciable property" phrase does refer back to the earlier identical language, still remaining in the section, of "property used in the trade or business." It does appear, however, as the Court of Appeals in No. 141, *Massey,* held, that this substitution was made because Congress expanded the depreciation allowance provision of § 23 (l) to include property held for the production of income. The change in the Regulations only conformed it to this amendment of the basic statute.

It is true, as taxpayers contend and as we have indicated, that the language of the statute and the regulations as we have heretofore traced them may not be precise and unambiguous as to the term "useful life." It may be that the administrative practice with regard thereto may not be pointed to as an example of clarity, and that in some cases the Commissioner has acquiesced in inconsistent holdings. But from the promulgation of the first regulation in 1919, he has made it clear that salvage had some value and that it was to be considered as something other than zero in the depreciation equation. In fact many of the cases cited by the parties involved controversies over the actual value of salvage, not as scrap but on resale.[2] The consistency of the Commissioner's posi-

[2] *E. g., Davidson* v. *Commissioner,* 12 CCH T. C. Mem. 1080 (1953); *W. H. Norris Lumber Co.* v. *Commissioner,* 7 CCH T. C. Mem. 728 (1948); *Bolta Co.* v. *Commissioner,* 4 CCH T. C. Mem. 1067 (1945); *Wier Long Leaf Lumber Co.* v. *Commissioner,* 9 T. C. 990 (1947), affirmed in part and reversed in part, 173 F. 2d 549 (1949).

tion in this regard is evidenced by the fact that the definition of salvage as now incorporated in the regulations is identical with that claimed at least since 1941. In the light of this, it appears that the struggle over the term "useful life" takes on less practical significance, for, if salvage is the resale value and a deduction of this amount from cost is required, the dollar-wise importance to the taxpayer of the breadth in years of "useful life" is diminished. It is only when he can successfully claim that salvage means junk and has no value that an interpretation of "useful life" as the functional, economic, physical life of the automobile brings money to his pocket. Moreover, in the consideration of the appropriate interpretation of the term, it must be admitted that there is administrative practice and judicial decision in its favor, as we shall point out. Furthermore, as we have said, Congress intended by the depreciation allowance not to make taxpayers a profit thereby, but merely to protect them from a loss. The concept is, as taxpayers say, but an accounting one and, we add, should not be exchangeable in the market place. Accuracy in accounting requires that correct tabulations, not artificial ones, be used. Certainly it is neither accurate nor correct to carry in the depreciation equation a value of nothing as salvage on the resale of the automobiles, when the taxpayers actually received substantial sums therefor. On balance, therefore, it appears clear that the weight of both fairness and argument is with the Commissioner.

Our conclusion as to this interpretation of the regulations is buttressed, we think, by a publication issued by the Commissioner in 1942, the same year as Regulations 111, and long before this controversy arose. It is known as Bulletin "F" and has been reissued as late as 1955. While it does not have the authority of a regulation, its significance is indicated clearly by the fact that both the taxpayers and the Commissioner point to it as conclusive

of their respective views of the administrative practice. Likewise it is widely cited by tax authorities, as well as by the Courts of Appeals. A careful examination of the entire bulletin, however, indicates that it clearly supports the administrative practice claimed here by the Commissioner. For example, the title page warns that "[t]he estimated useful lives and rates of depreciation . . . are based on averages and are not prescribed for use in any particular case." [3] Again on page 2, Bulletin "F," in discussing depreciation, emphasizes that it is based on "the useful life of the property in the business." What is more significant is the simple clarity with which, on page 7, it defines salvage value to be "the amount realizable from the sale . . . when property has become no longer useful in the taxpayer's business and is demolished, dismantled, or retired from service." It even goes further to say that salvage "should serve to reduce depreciation, either through a reduction in the basis on which depreciation is computed or a reduction in the rate."

Moreover, Congress was aware of this prior prevailing administrative practice as well as the concept of depreciation upon which it was based. Although the tax years involved here are 1950 and 1951, we believe that the action of Congress in adopting the 1954 Code should be noted, since it specifically recognized the existing depreciation equation. For the first time, the term "useful life" was inserted in the statutory provision. The accompanying House Report to the bill stated:

> "Depreciation allowances are the method by which the capital invested in an asset is recovered tax-free over the years it is used in a business. The annual

[3] The bulletin sets out a schedule of the useful life of automobiles, listing passenger cars at five years and those used by salesmen at three years.

deduction is computed by spreading the cost of the property over its estimated useful life." H. R. Rep. No. 1337, 83d Cong., 2d Sess. 22.

It is also noteworthy that the report states that "The changes made by your committee's bill merely affect the timing and not the ultimate amount of depreciation deductions with respect to a property." *Id.*, at 25.

Moreover, as we have said, there are numerous cases in the Tax Court in which depreciation was permitted only on the useful life of the property in the taxpayer's business.[4] The taxpayers point to others [5] which appear to be to the contrary. In most of these, however, the issue was factual, *i. e.*, the time lapse before the property would wear out from use or, as we have said, its salvage or resale value. They cannot be said to prove conclusively that the Commissioner was following a physically useful-life theory; for there is no affirmative showing or finding as to the length of the physically useful life. The most that can be said is that the element of compromise probably played a predominant role in the result in each case. Moreover, there is no indication in any of these cases that the amount of depreciation would have been changed

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[4] See note 2, *supra.*

[5] *E. g., West Virginia & Pennsylvania Coal & Coke Co.* v. *Commissioner,* 1 B. T. A. 790 (1925); *James* v. *Commissioner,* 2 B. T. A. 1071 (1925); *Merkle Broom Co.* v. *Commissioner,* 3 B. T. A. 1084 (1926); *Kurtz* v. *Commissioner,* 8 B. T. A. 679 (1927); *Whitman-Douglas Co.* v. *Commissioner,* 8 B. T. A. 694 (1927); *Sanford Cotton Mills* v. *Commissioner,* 14 B. T. A. 1210 (1929). *General Securities Co.* v. *Commissioner,* 1942 P-H BTA-TC Mem. Dec. ¶ 42,219, seems to be the only case of the group that is directly contrary to the present position of the Commissioner, and there the end result money-wise would seem to be the same under either theory. Hence it only emphasizes that isolated instances of inconsistency can be found in most areas where the volume of cases is as large as it is here.

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by computing it on the basis of its useful life in the business. The cases do not seem to reflect considered judgments as to the proper meaning of the terms used in the depreciation equation and we find them of little value as precedents.

Finally, it is the primary purpose of depreciation accounting to further the integrity of periodic income statements by making a meaningful allocation of the cost entailed in the use (excluding maintenance expense) of the asset to the periods to which it contributes. This accounting system has had the approval of this Court since *United States* v. *Ludey,* 274 U. S. 295, 301 (1927), when Mr. Justice Brandeis said, "The theory underlying this allowance for depreciation is that by using up the plant, a gradual sale is made of it." The analogy applies equally to automobiles. Likewise in *Detroit Edison Co.* v. *Commissioner,* 319 U. S. 98, 101 (1943), this Court said:

> "The end and purpose of it all [depreciation accounting] is to approximate and reflect the financial consequences to the taxpayer of the subtle effects of time and use on the value of his capital assets. For this purpose it is sound accounting practice annually to accrue . . . an amount which at the time it is retired will with its salvage value replace the original investment therein."

Obviously a meaningful annual accrual requires an accurate estimation of how much the depreciation will total. The failure to take into account a known estimate of salvage value prevents this, since it will result in an understatement of income during the years the asset is employed and an overstatement in the year of its disposition. The practice has therefore grown up of subtracting salvage value from the purchase price to determine the

depreciation base.[6] On the other hand, to calculate arbitrarily the expected total expense entailed by the asset on the false assumption that the asset will be held until it has no value is to invite an erroneous depreciation base and depreciation rate, which may result in either an over- or an under-depreciation during the period of use. If the depreciation rate and base turn out to reflect the actual cost of employing the asset, it will be by accident only. The likelihood of presenting an inaccurate picture of yearly income from operations is particularly offensive where, as here, the taxpayers stoutly maintain that they are only in the business of renting and leasing automobiles, not of selling them. The alternative is to estimate the period the asset will be held in the business and the price that will be received for it on retirement. Of course, there is a risk of error in such projections, but prediction is the very essence of depreciation accounting. Besides, the possibility of error is significantly less where probabilities rather than accidents are relied upon to produce what is hoped to be an accurate estimation of the expense involved in utilizing the asset. Moreover, under a system where the real salvage price and actual duration of use are relevant, to further insure a correct depreciation base in the years after a mistake has been discovered, adjustments may be made when it appears that a miscalculation has been made.

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[6] This industry practice is emphasized by the *amicus curiae* brief of the American Automobile Leasing Association in *Hillard* v. *Commissioner*, 31 T. C. 961, now pending in the Court of Appeals for the Fifth Circuit. Comprising "about 65 per cent of the long-term leasing industry in motor vehicles in the country" the Association takes the position that the depreciation allowance "is designed to return to the taxpayer, tax-free, the cost of his capital asset over the period during which it is useful to the taxpayer in his business." A copy of the brief is on file in this case.

Accounting for financial management and accounting for federal income tax purposes both focus on the need for an accurate determination of the net income from operations of a given business for a fiscal period. The approach taken by the Commissioner computes depreciation expense in a manner which is far more likely to reflect correctly the actual cost over the years in which the asset is employed in the business.[7]

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[7] Several writers in the accounting field have addressed themselves, without reference to the income tax laws, to the problem of giving content to the terms "useful life" and "salvage value" and their conclusions support what has been said.

Grant and Norton, Depreciation (1949), 145–146:

"[Assets such as passenger automobiles] may be expected to have substantial positive salvage values. Average salvage values must therefore be estimated before straight-line depreciation rates can be established. Salvage values will depend on average lives which may in turn depend on the owner's policy with regard to disposal of such assets. For example, if it is company policy to trade in passenger automobiles after three years, the estimation of average salvage value is simply the estimation of the average trade-in value of a 3-year-old passenger automobile."

Kohler, A Dictionary for Accountants (1952), 371, defines salvage value as:

"Actual or prospective selling price, as second-hand material, or as junk or scrap, of fixed assets retired, or of product or merchandise unsalable through usual channels, less any cost, actual or estimated, of disposition; . . ."

Useful life is defined, *id.*, at 440–441, as follows:

"Normal operating life in terms of utility to the owner; said of a fixed asset or a fixed-asset group; the period may be more or less than physical life or any commonly recognized economic life; service life."

Saliers, Depreciation Principles (1939), 72:

"Salvage is the value an article possesses for some use other than that to which it has been devoted. When it can be so used it is said to possess another cycle of life. Junk or scrap value is that which an article is worth if broken up. In making allowance for depreciation the basis to be used is cost less whatever it is estimated that the salvage or scrap will amount to."

We therefore conclude that the Congress intended that the taxpayer should, under the allowance for depreciation, recover only the cost of the asset less the estimated salvage, resale or second-hand value. This requires that the useful life of the asset be related to the period for which it may reasonably be expected to be employed in the taxpayer's business. Likewise salvage value must include estimated resale or second-hand value. It follows that No. 141, *Massey Motors, Inc.*, v. *United States*, must be affirmed, and No. 143, *Commissioner* v. *R. H. and J. M. Evans*, reversed.

It is so ordered.

MR. JUSTICE HARLAN, whom MR. JUSTICE WHITTAKER, and MR. JUSTICE STEWART join, dissenting in Nos. 141 and 143, and concurring in the judgment in No. 283.*

This is one of those situations where what may be thought to be an appealing practical position on the part of the Government has obscured the weaknesses of its legal position, at least in Nos. 141 and 143.

The position which the Commissioner takes in these cases with respect to the basic issue of "useful life" is that contained in the regulations promulgated by him in 1956 under the Internal Revenue Code of 1954, which define the useful life of a depreciable asset as the

> "period over which the asset may reasonably be expected to be useful to the taxpayer in his trade or business . . . ." [1]

In No. 283 the Commissioner seeks to apply this regulatory definition to the returns of the taxpayer with respect to the taxable years ended March 31, 1954, 1955, and 1956.

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*[This opinion applies also to No. 283, *Hertz Corporation* v. *United States*, *post*, p. 122.]

[1] Treasury Regulations on Depreciation, § 1.167 (a)–1 (b), T. D. 6182, 1956–1 Cum. Bull. 98, June 11, 1956.

In Nos. 141 and 143 he seeks in effect to apply the same definition to the taxable years 1950 and 1951, both of which were of course long before the enactment of the 1954 Code. See 264 F. 2d, at 506.

I agree that these regulations represent a reasonable method for calculating depreciation within the meaning of the 1954 Code, and that they are valid as applied prospectively. But since I believe that as to "useful life" they are wholly inconsistent with the position uniformly taken by the Commissioner in the past, I do not think they can be applied retrospectively in all instances. While I consider that the regulations may be so applied in No. 283, in my opinion that is not so in Nos. 141 and 143.

I.

It is first important to understand the precise nature of the issues before the Court. Both the method of depreciation contended for by the taxpayers and that urged by the Government purport to allocate an appropriate portion of an asset's total cost to each of the years during which the taxpayer holds it. Both methods define the total cost to be so allocated as the original cost of the asset less its salvage value at the end of its useful life. And under both methods, the total cost to be allocated is divided by the number of years in the useful life and the resulting figure is deducted from the taxpayer's income each year he holds the asset. As the Court correctly notes, the practical difference in the end results of the two methods involves the extent to which a taxpayer may be able to obtain capital-gains treatment for assets sold at or before the end of their useful life for amounts realized in excess of their remaining undepreciated cost.

The difference between the two methods from a theoretical standpoint is simply this: The taxpayers define useful life as the estimated *physical life* of the

asset, while the Government defines the term as the period during which the taxpayer anticipates *actually retaining* the asset in his business. Thus, under the taxpayers' system, the total cost to be allocated is original cost less the salvage or junk value of the asset at the end of its physical life. This figure is divided by the number of years of estimated physical life, and the quotient is subtracted from income each year the taxpayer holds the asset. Under the Government's method, the total cost to be allocated is original cost less the "salvage" value at the end of the asset's actual use in the business, that is, less the price anticipated on its resale at that time, even though the asset may not be in fact physically exhausted. This figure is divided by the number of years in the holding period, and the quotient is subtracted from income each year the taxpayer holds the asset.

If an asset is held until it is physically exhausted, both methods produce exactly the same result. Similarly, both methods can result in inaccuracies if predictions of useful life and salvage value turn out to be wrong. The Government, however, contends that where it can be predicted with reasonable certainty that an asset will be disposed of before the end of its physical life, its method of depreciation is more likely to reflect the true cost of the asset to the particular business. This is said to be so because the true cost to the business, in the end, is the asset's original cost less the amount recovered on its resale, and the Government's method starts from an estimate of that amount, which is then allocated among the years involved. The taxpayers' method on the other hand, starts from an estimate of the end cost of the asset in the general business world, and will accurately reflect such cost to the taxpayer's business only if the decline in market value at the time of resale can be expected to correspond roughly to the portion of the asset's general business end

cost which has been theretofore depreciated. In many cases that may be true, but in the present cases, there is in fact a great disparity between actual decline in market value at the time of resale and the portion of cost theretofore depreciated under taxpayers' method.

It need not be decided whether, as an abstract matter, one method or the other is deemed preferable in accounting practice. Apparently there is a split of authority on that very question.[2] It is sufficient to note that in most instances either method seems to give satisfactory results. Assuming that because of the unusual case, such as we have here, the Government's method on the whole may more accurately reflect the cost to a particular taxpayer's business, the question for me is whether the Commissioner has nevertheless established a practice to the contrary upon which taxpayers were entitled to rely until changed by him. I turn now to the examination of that question.

II.

The Court relies on the wording of certain revenue statutes and regulations to show that the period during which depreciable assets are employed in the taxpayer's business, as opposed to the period of their physical life, has always been regarded as useful life for purposes of depreciation. Concededly, the term useful life did not appear in the statute until the Internal Revenue Code of 1954, and though it had appeared in the regulations as early as 1919, Treas. Reg. 45, Art. 161, was never defined therein until 1956, *ante*, p. 107, when the Commissioner took the position he now asserts. The Court seizes on language which was not directed to the present problem and which could equally be read to support the

[2] At the trials below, taxpayers' expert witnesses testified that depreciation based on physical life was the commonly accepted accounting standard. Several textbooks, cited by the Court, *ante*, p. 106, take the contrary view.

Government's or the taxpayers' contention. The situation before 1956 was as follows:

The Act of Oct. 3, 1913, permitted a reasonable allowance for "wear and tear of property arising out of its use or employment in the business." [3] It is certainly true, as the Court says, that this means that "the wear and tear to the property must arise from its use *in the business* of the taxpayer." But it does not follow at all that the formula for calculating that wear and tear must be based on a useful life equal to the period the asset is held in the business. For, as noted above, a formula based on the physical life of the asset also results in an estimate of the portion of the asset's total cost attributable to its use in the business, and may in some circumstances yield the same tax consequences as a "holding-period" formula.

Treasury Regulations 45, Art. 161, promulgated in 1919 and continued in substantially the same form until 1942, provided that the taxpayer should set aside each year an amount such that "the aggregate of such amounts for the useful life of the property in the business will suffice, with the salvage value, at the end of such useful life to provide in place of the property its cost . . . ." In 1942, the statute was amended to permit depreciation, not only, as before, on property used in the trade or business, but also on property held for the production of income. Accordingly, the regulation was revised to delete the words "property in the business" and substitute therefor "the depreciable property." Reg. 111, § 29.23 (*l*)–1. The Court says that the deleted term could not have been meant to define the type of property subject to the depreciation allowance, since that function was already performed by another section of the regulation. That may be true, but it does not show that the language *was* meant to define the period of useful life. If it had been so meant, the Commissioner

[3] 38 Stat. 114, 167.

would hardly have simply substituted "useful life of the depreciable property" for "useful life of the property in the business," but would have inserted appropriate language, such as "useful life of the property while used in the business or held for the production of income." It is quite evident that the question of a holding period different from the physical life of the property was never adverted to, and that the term "property in the business," while not an affirmative definition of the type of property subject to depreciation, simply referred to that definition in connection with useful life because it was apparently assumed that assets were generally held in a taxpayer's business until worn out.

In light of the above, the Government's reliance on cases such as *United States* v. *Ludey,* 274 U. S. 295, 300–301, and *Detroit Edison Co.* v. *Commissioner,* 319 U. S. 98, 101, is wide of the mark. The language relied upon in *Ludey* is virtually identical to that contained in the pre-1942 regulations, and that in *Detroit Edison* merely says that the purpose of depreciation is to recover, by the time of an asset's retirement, the original investment therein. As noted above, depreciation based on either definition of useful life is dedicated to that end. The Government's reliance on Bulletin "F" is also misplaced. The Court refers to a statement on page 2 of the Bulletin which merely lifts from the regulation the phrase "useful life of the property in the business." The Court also relies on a statement appearing on page 7, defining salvage as "the amount realizable from the sale . . . when property has become no longer useful in the taxpayer's business *and is demolished, dismantled, or retired from service.*" (Emphasis added.) The italicized language again reveals the assumption that assets were generally intended for use in the business until their physical exhaustion. The present question was never adverted to.

I believe, therefore, that the statute and regulations are wholly inconclusive, and that the Commissioner's position can be gleaned only from the stand he has taken in litigated cases. I turn now to those cases. Contrary to the picture of uncertainty which the Court draws from them, I believe they leave little room for doubt but that the Commissioner's pre-1956 position on "useful life" was flatly opposed to that which he now takes.

III.

In examining the cases, it must be borne in mind that even the Commissioner does not contend that a taxpayer who *happens* to dispose of some asset before its physical exhaustion must depreciate it on a useful life equal to the time it was actually held. It is only when the asset "may reasonably be expected" to be disposed of prior to the end of its physical life that the taxpayer must base depreciation on the shorter period. Reg. § 1.167 (a)–1 (b). Therefore, the only cases relevant in this regard are those in which the taxpayer's past experience indicated that assets would be disposed of prior to becoming junk, thus presenting the issue whether the shorter or longer period should control for purposes of depreciation.[4]

In four such cases, involving tax years prior to 1942, the taxpayer had a practice of disposing of assets substantially prior to their physical exhaustion. In *Merkle Broom Co.*, 3 B. T. A. 1084, the taxpayer customarily disposed of its automobiles after two years. It attempted to depreciate them over a three-year useful life; the Com-

[4] Three cases cited by the Court, *West Virginia & Pennsylvania Coal & Coke Co.*, 1 B. T. A. 790; *James*, 2 B. T. A. 1071; and *Whitman-Douglas Co.*, 8 B. T. A. 694, involved isolated dispositions of assets prior to their physical exhaustion, and there was no evidence indicating a consistent practice by the taxpayer in this regard.

missioner asserted a five-year useful life; and the court allowed four years.

In *Kurtz,* 8 B. T. A. 679, the taxpayers customarily sold their automobiles after two or three years at substantial values. They depreciated on a four-year useful life; the Commissioner asserted a five-year life; and the court agreed.

In *Sanford Cotton Mills,* 14 B. T. A. 1210, the taxpayer customarily disposed of its motor trucks after two and one-half years. It claimed a three-year useful life; the Commissioner asserted a five-year useful life; and the court found that four years was reasonable.

In *General Securities Co.,* 1942 P-H BTA-TC Mem. Dec. ¶ 42,219, the taxpayer sold its automobiles after one or two years. The court held that a reasonable useful life was three years.

It is apparent from these cases that both the Commissioner and the courts were thinking solely in terms of the physical life of the asset, despite the fact that the taxpayer customarily held the assets for a substantially shorter period. In at least some of the cases, it would have made a very real difference had depreciation been calculated on the basis that the useful life of the asset meant its holding period. For example, in the *Sanford* case, taxpayer's trucks were sold after two and one-half years at less than one-seventh of their original cost. Given the five-year useful life proposed by the Commissioner, taxpayer would have had, at the time of resale, an undepreciated basis equal to half the original cost, while the proceeds of resale would have brought it only one-seventh of original cost, thus giving rise to a loss of the difference. If the Government's present position had been applied, the difference between original cost and resale value would have been depreciated over two and one-half years, giving rise to no gain or loss at the end of that time. Similarly, in the *General Securities* case, given a three-year useful life, the

taxpayer's automobiles, when traded in after one year, had an undepreciated basis of two-thirds of original cost, yet their resale brought only one-half to one-third of their original cost, again resulting in a substantial loss which would have been avoided under the Government's present method.

It is true that the only tax distortion present in these cases was a shift of ordinary deductions from the years in which the property was used in the business to the final year of its disposition. It is also true that had the situation been reversed, so that depreciation on a physical-life basis outran decline in market value, the resulting gain in the year of disposition would have been ordinary income, since capital-gains treatment for disposition of property used in the trade or business was not accorded by Congress until 1942.[5] However, it is significant that the Commissioner's adherence to a physical-life method did result in a distortion of income by shifting deductions among various tax years, which often entails serious revenue consequences, and that by 1942 physical life seems to have been uniformly accepted as the proper definition of useful life.

In light of these circumstances, four cases involving tax years subsequent to 1942 acquire special significance. In *Pilot Freight Carriers, Inc.,* 15 CCH T. C. Mem. 1027, the taxpayer disposed of its tractors after an average of 38 months and its trailers after an average of 32.6 months. It claimed depreciation on a four-year useful life with 10% or less salvage value. The Commissioner asserted useful lives of five and six years for the tractors and trailers, respectively, and the court found that four and five years, respectively, was reasonable. It is to be noted that upon resale, taxpayer received, because of wartime inflation, amounts substantially in excess of undepreciated

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[5] Revenue Act of 1942, § 151, 56 Stat. 846.

cost, resulting in large capital gains. Yet the Commissioner, in attempting to correct this disparity, asserted only that useful life should be increased to reflect more accurately the physical exhaustion of the assets, *not* that it should be equated with the holding period.

In *Lynch-Davidson Motors, Inc.,* v. *Tomlinson,* 58–2 U. S. T. C. ¶ 9738, an automobile dealer disposed of company cars each year when new models were brought out, yet depreciated on a three-year useful life with salvage value of $50. The Commissioner did not dispute this method of depreciation and the court held it to be proper. In the companion case of *Davidson* v. *Tomlinson,* 58–2 U. S. T. C. ¶ 9739, taxpayers were in the automobile rental business, and kept their automobiles only one year. They also were permitted to depreciate on a useful life of three years with $50 salvage value. The striking similarity between the facts of these two cases and those of the present ones need not be elaborated.

Finally, as late as 1959, in *Hillard,* 31 T. C. 961, the Commissioner took the position that the taxpayer, who operated a car rental business, and who disposed of his cars after one year, should depreciate them on the basis of a four-year useful life rather than the three years contended for by taxpayer.

Thus in all these cases, as in the cases before us, the problem of offsetting depreciation deductions by capital gains existed; nevertheless the Commissioner consistently adhered to the position, adopted long prior to 1942, that physical life controlled.

The Court, however, seems to believe that the effect of these cases is vitiated by several cases dealing with "salvage" value. In three of such cases,[6] the assets were

[6] *Wier Long Leaf Lumber Co.,* 9 T. C. 990; *W. H. Norris Lumber Co.,* 7 CCH T. C. Mem. 728; *Davidson,* 12 CCH T. C. Mem. 1080. In the *Wier* case, it is not clear whether some of the assets might have been useful for some additional period in other businesses.

apparently held by the taxpayer until at or near the end of their physical lives, and the only issue was whether the taxpayer had erroneously calculated the salvage value at the end of that time. Thus they are of no significance for present purposes.

The Court's view fares no better under any other of these cases. In *Bolta Co.*, 4 CCH T. C. Mem. 1067, involving a 1941 tax year, the taxpayer disposed of several machines after they had ceased to be useful in its business but while they were still useful in other businesses. It projected an average holding period of five years and assumed no salvage value. The Commissioner acquiesced in the five-year useful life but contended that the taxpayer could reasonably have anticipated a salvage value equal to 25% of original cost. The court agreed.

In *Koelling* v. *United States*, 57–1 U. S. T. C. ¶ 9453, taxpayers disposed of cattle after they were no longer useful for breeding, and depreciated them on a useful life equal to that period, making no allowance for salvage value. The Commissioner found that it was unreasonable thus to deduct the entire cost of the animals over their breeding life, and required the taxpayers to deduct as salvage value their predicted resale price.

In *Cohn* v. *United States*, 259 F. 2d 371, taxpayers had established flying schools during 1941 and 1942 under contract with the Army Air Corps. The arrangement was expected to last only until the end of 1944, and the useful life of property used in the business was calculated on that basis, with no allowance for salvage value. The Commissioner asserted various longer useful lives for the property, varying from five to ten years. The court permitted the taxpayers to use the shorter useful life, but required them to deduct the reasonable salvage value of the equipment which would be realized at the end of that period. The Government did not appeal from the useful-

life ruling and the only dispute was over the correct amount of salvage value.

Thus in two of the relevant salvage-value cases, *Bolta* and *Koelling,* the taxpayer himself proposed a useful life equivalent to holding period but employed a hybrid version by failing to adopt the corresponding concept of salvage value. The Commissioner merely took the position that if the holding-period method was to be used, it must be used consistently by deducting the appropriate salvage value. In the third, *Cohn,* the Commissioner actually rejected the taxpayers' attempt to employ the holding period and merely acquiesced when the court permitted the taxpayers to do so, provided the corresponding salvage value was deducted. However, in no case, until the present ones, does it appear that the Commissioner has ever sought to *require* the taxpayer to use the holding-period method where the taxpayer has attempted to use physical life. And I do not understand the Government to controvert this. To the contrary, the Commissioner has not infrequently required the taxpayer to depreciate on the basis of physical life where the taxpayer had attempted to employ a shorter period, even in instances where significant capital-gains consequences turned on the difference. Indeed, as the *Lynch-Davidson, Davidson,* and *Hillard* cases, *supra,* indicate, the Commissioner, until quite recently, has adhered to the physical-life concept in *automobile cases* virtually indistinguishable from the present ones. In the past the Commissioner, unsuccessfully, has merely sought to curb the capital-gains possibilities in such instances by contending that the automobiles involved were not depreciable assets subject to capital-gains treatment under § 117 (j) of the Internal Revenue Code of 1939. Having conceded that the property involved in the present cases is subject to the depreciation deduction, I do not think the Commissioner should now be permitted to defeat his own position as regards the

meaning of "useful life"—a position consistently maintained by him over a period of 33 years from 1926 to 1959 in every litigated case to which our attention has been called—by requiring these taxpayers, in respect of taxable years not subject to the provisions of the 1954 Code, to adopt a holding-period formula for useful life in depreciating the assets in question. Cf. *Helvering* v. *R. J. Reynolds Tobacco Co.*, 306 U. S. 110, and *Helvering* v. *Griffiths*, 318 U. S. 371. In the application of this salutary principle it should make no difference that the Commissioner's earlier different practice was not embodied in a formal regulation. Cf. *Helvering* v. *Reynolds*, 313 U. S. 428, 432; *Higgins* v. *Commissioner*, 312 U. S. 212, 216.

Accordingly, I would reverse in No. 141 and affirm in No. 143.

IV.

The situation presented in No. 283 is, however, different. The taxable years in question there are those terminating on March 31, 1954, 1955, and 1956, respectively. All the taxable years thus ended before the promulgation of the new depreciation regulations on June 11, 1956.[7] The Government concedes that Congress did not change the concept of useful life when it enacted the 1954 Code. Therefore, the question here is whether the Commissioner can, by a formal regulation, change his position retroactive only to the effective date of the statute under which it is promulgated.

Petitioner, relying on *Helvering* v. *R. J. Reynolds Tobacco Co.* and *Helvering* v. *Griffiths, supra,* asserts that where a regulation interpreting a statute has been in force for some time and has survived the re-enactment of the statute, the Commissioner cannot retroactively change

[7] T. D. 6182, 1956–1 Cum. Bull. 98. Prior to that time the regulations under the 1939 Code were continued in force. T. D. 6091, 1954–2 Cum. Bull. 47.

that interpretation by a new regulation. However, here the Commissioner's earlier adherence to the physical-life concept of useful life was expressed not in the regulations—which did not refer to the problem—but in his own administrative practice. Therefore, the present case is more like *Helvering* v. *Reynolds,* 313 U. S. 428, wherein this Court permitted the Commissioner to apply a regulation retroactive to the effective date of the statute under which it was promulgated, where his previous contrary position had been expressed only by informal administrative practice, even though the statute had been re-enacted in the interim. Application of this principle in the present case is the more called for, since Congress, in the 1954 Code, has for the first time used the term "useful life" and has made the availability of certain new accelerated methods of depreciation—among them the so-called "declining balance method," used by the taxpayer here—dependent upon its definition. It is appropriate therefore to permit the Treasury maximum discretion in integrating the concept of useful life into the new provisions and in doing so from the effective date of the statute forward.

Since the statute permits use of the declining-balance method only as to property with a useful life of three years or more, it follows that the Commissioner properly disallowed use of the declining-balance method as to Hertz' automobiles, whose useful life under the new regulation was less than three years. As to its trucks, admittedly held for more than three years, the only remaining question is whether Hertz should be allowed to depreciate them below what the Commissioner considers to be a reasonable salvage value. Given the fact that the Commissioner's definition of salvage value as resale price on disposition of the asset at the end of its holding period is validly applicable to Hertz, it becomes important that the declining-balance method not be construed to defeat

that concept. Were there no "salvage stop" in connection with declining-balance depreciation, it is clear that taxpayers who held assets for relatively short periods of time might be able to depreciate far below anticipated resale price, since the declining-balance rate is applied against the entire cost of the asset undiminished by salvage. Since the legislative history of the statute in this regard is ambiguous at best, and since there is no prior statute or administrative interpretation to becloud the issue, the Commissioner's construction should be allowed to stand. Accordingly, I concur in the Court's judgment affirming No. 283.

MR. JUSTICE DOUGLAS joins Parts I, II, and III of this opinion. He would, however, reverse in No. 283—*Hertz Corp.* v. *United States,* on the ground that the change in administrative practice involved here should not be retroactively applied under the circumstances of this case. Cf. *United States* v. *Leslie Salt Co.,* 350 U. S. 383, 396.

HERTZ CORPORATION (SUCCESSOR TO J. FRANK CONNOR, INC.) *v.* UNITED STATES.

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

No. 283. Argued March 30, 1960.—Decided June 27, 1960.

The Internal Revenue Code of 1954, § 167 (b) (2), provides an accelerated method of depreciation, known as the "declining balance method" of computing depreciation deductions for income tax purposes; but § 167 (c) limits the use of this method to property "with a useful life of 3 years or more." The applicable Treasury Regulation, § 1.167 (b), issued in 1956, defines "useful life" as the "period over which the asset may reasonably be expected to be useful to the taxpayer in his trade or business," and § 1.167 (b)–2 provides that "in no event shall an asset . . . be depreciated below a reasonable salvage value." *Held:*

1. This regulation is valid, *Massey Motors, Inc.*, v. *United States*, *ante*, p. 92, and the declining balance method may not be used in computing the depreciation on the passenger cars used by petitioner in its automobile rental business during the years 1954–1956, inclusive, since they were so used for less than three years. Pp. 123–124.

2. Since the trucks used in petitioner's truck-rental business were so used for more than three years, they were subject to depreciation under the "declining balance method"; but their salvage value at the time of disposition must be accounted for in the depreciation equation. Pp. 124–129.

(a) Having elected to compute depreciation on the "declining balance method" in connection with his returns for the years 1954–1956, inclusive, petitioner cannot abandon that method on the ground that it results in a retroactive application of a Treasury Regulation issued in 1956. Pp. 125–126.

(b) The provision of Treasury Regulation § 1.167 (b)–2 that, "in no event shall an asset . . . be depreciated below a reasonable salvage value," is valid. Pp. 126–129.

268 F. 2d 604, affirmed.

Edgar Bernhard argued the cause for petitioner. With him on the brief were *Roswell Magill, Harry N. Wyatt, Donald J. Yellon* and *John C. Klett, Jr.*

Howard A. Heffron argued the cause for the United States. On the brief were *Solicitor General Rankin, Assistant Attorney General Rice, Ralph S. Spritzer, I. Henry Kutz* and *Myron C. Baum.*

MR. JUSTICE CLARK delivered the opinion of the Court.

This case, like No. 141, *Massey Motors, Inc.*, v. *United States,* and No. 143, *Commissioner* v. *Evans,* both decided today, *ante,* p. 92, involves the depreciation allowable on cars and trucks used by petitioner's predecessor in its automobile rental business during the years 1954–1956, inclusive. The taxpayer elected to avail itself of the accelerated method of depreciation provided in § 167 (b) (2)[1] of the Internal Revenue Code of 1954—known as

[1] The statute provides:

"(b) . . . the term 'reasonable allowance' . . . shall include . . . an allowance computed in accordance with regulations prescribed by the Secretary or his delegate, under any of the following methods:

"(1) the straight line method,

"(2) the declining balance method, using a rate not exceeding twice the rate which would have been used had the annual allowance been computed under the method described in paragraph (1), ..."

The applicable regulation provides:

"§ 1.167 (b)–2. DECLINING BALANCE METHOD.—(a) *Application of method.*—Under the declining balance method a uniform rate is applied each year to the unrecovered cost or other basis of the property. The unrecovered cost or other basis is the basis provided by section 167 (f), adjusted for depreciation previously allowed or allowable, and for all other adjustments provided by section 1016 and other applicable provisions of law. The declining balance rate may be determined without resort to formula. Such rate determined under section 167 (b) (2) shall not exceed twice the appropriate straight line rate computed without adjustment for salvage. While salvage is not taken into account in determining the

"the declining balance method." Section 167 (c) of the Code limits the use of this method to property "with a useful life of 3 years or more." The applicable Treasury Regulations on Depreciation, § 1.167 (a)–1 (b), T. D. 6182, 1956–1 Cum. Bull. 98, issued in 1956, define useful life as the "period over which the asset may reasonably be expected to be useful to the taxpayer in his trade or business . . . ." Admittedly, if this regulation is valid, taxpayer's passenger cars covered by it would not meet the three-year requirement of § 167 (c). The Commissioner denied the petitioner the right to use the declining balance method as to those cars. What we have said in *Massey* and *Evans, supra,* disposes of the contention as to the meaning of "useful life" here. We therefore hold, as did the Court of Appeals, 268 F. 2d 604, that the regulation as to "useful life" involved here is valid and applicable to petitioner.

The remaining issues pose questions that relate to the depreciation on the trucks of the taxpayer which concededly had a useful life in excess of three years and were therefore subject to depreciation under the declining balance method authorized under § 167 (b)(2). Section 1.167 (a)–1 (b), issued in 1956 and subsequent to some of the tax years involved in petitioner's claim, was applied by the Commissioner. He ruled that the salvage value of the trucks at the time of disposition must be accounted for in the depreciation equation. Petitioner contended that this resulted in a retroactive application of the regulation and, in any event, it was invalid because it was not authorized under the 1954 Code. After petitioner paid the assessed tax and was

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annual allowances under this method, in no event shall an asset (or an account) be depreciated below a reasonable salvage value. See section 167 (c) and § 1.167 (c)–1 for restrictions on the use of the declining balance method."

denied a refund, this case was filed. The trial court held in favor of petitioner, but the Court of Appeals reversed. It held that the regulation applied and was not retroactive because it was only declaratory of existing law and that salvage value must be computed in the depreciation equation. We granted certiorari, 361 U. S. 811, and heard the case as a companion to *Massey* and *Evans, supra.* We agree with the result reached by the Court of Appeals.

Petitioner succeeded J. Frank Connor, Inc., by merger in July 1956; the taxes accrued against Connor during the fiscal years 1954, 1955, and 1956. Connor was engaged in the business of renting and leasing automobiles and trucks, without drivers, during the pertinent years. In the preparation of its returns for the years ending March 31, 1954, 1955, and 1956, Connor claimed depreciation on its automobiles on the basis of a four-year useful life. The taxes so computed were paid. Subsequently, and after merger, petitioner filed claims for refund on all three years. This claim was based on an election in accordance with § 1.167 (c)–1 (c) of the Treasury Regulations issued under the 1954 Code, relating to the declining balance method of depreciation.[2] We see nothing to the

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[2] "§ 1.167 (c)–1. LIMITATIONS ON METHODS OF COMPUTING DEPRECIATION UNDER SECTION 167 (b)(2), (3), AND (4)

. . . . .

"(c) *Election to use methods.*—Subject to the limitations set forth in paragraph (a) above, the methods of computing the allowance for depreciation specified in section 167 (b)(2), (3), and (4) may be adopted without permission and no formal election is required. In order for a taxpayer to elect to use these methods for any property described in paragraph (a) above, he need only compute depreciation thereon under any of these methods for any taxable year ending after December 31, 1953, in which the property may first be depreciated by him. The election with respect to any property shall not be binding with respect to acquisitions of similar property in the same year or subsequent year which are set up in separate accounts. If a taxpayer has filed his return for a

contention of retroactive application. The petitioner chose its own weapon, began the struggle under it and, at this late date, cannot be allowed to abandon it.

As to the salvage issue, the petitioner claims that, under the method it chose, the Congress built in an artificial salvage value, *i. e.*, the amount remaining after the application of the depreciation equation. The regulation, however, says that "in no event shall an asset . . . be depreciated below a reasonable salvage value." The issue is the narrow one of whether this regulation is valid under the congressional authorization providing that, as to depreciation, the term "reasonable allowance" shall include an allowance "computed in accordance with regulations prescribed by the Secretary or his delegate." Internal Revenue Code of 1954, § 167 (b). We think that it is.

As we pointed out in the companion cases, the purpose of depreciation accounting is to allocate the expense of using an asset to the various periods which are benefited by that asset. The declining balance method permits a rapid rate of depreciation in the early years of an asset's life. The Congress has permitted under this method an allowance not to exceed twice the "straight line" rate, which rate was approved in *Massey* and *Evans, supra.* In application, the taxpayer computes his straight-line percentage rate and then doubles it for the first year. This doubled rate is then applied each subsequent year to the declining balance. Because of a belief that most assets do lose more value in the earlier years, this method is justified as an attempt to level off the total costs, includ-

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taxable year ending after December 31, 1953, for which the return is required to be filed on or before September 15, 1956, an election to compute the depreciation allowance under any of the methods specified in section 167 (b) or a change in such an election may be made in an amended return or claim for refund filed on or before September 15, 1956."

ing maintenance expense, which will generally be greater in the later years. This means, even under the Commissioner's theory, that if an asset is disposed of early in what was expected to be its useful life in the business, the depreciation taken may greatly exceed the difference between the purchase price of the asset and its retirement price; this is a result of the conscious choice to permit rapid depreciation. But this, by hypothesis, is an unusual situation. There is nothing inherent in the declining balance system which requires us to assume that depreciation should be allowed beyond what reasonably appears to be the price that will be received when the asset is retired. This would permit a knowing distortion of the expense of employing the asset in the years after that point is reached. It therefore appears that the interpretation contended for by the taxpayer does not comport with the overriding statutory requirement that the depreciation deduction be a *reasonable* allowance. § 167 (a).

In challenging the regulation, the taxpayer relies upon the following excerpt from S. Rep. No. 1622, 83d Cong., 2d Sess. 201:

> "The salvage value is not deducted from the basis prior to applying the rate, since under this method at the expiration of useful life there remains an undepreciated balance which represents salvage value."

The regulation is consistent with the first part of the sentence, for salvage value is not deducted from the basis prior to the application of the rate. But petitioner contends that the regulation is contrary to the second part of the sentence which appears to equate salvage value under the declining balance method with the mathematical residue which must always exist under the system. This, it appears to us, is but recognition that under this method there is some theoretical salvage value always

left. But it only "represents salvage value" and when true salvage value exceeds this amount, the latter controls. Moreover, the regulation can only carry out the fundamental concept of depreciation—that it is allowable only in such amount, together with salvage value, as will effectuate the recovery of cost over the period of useful life. Furthermore, the House Report said that, "The changes made by your committee's bill merely affect the timing and not the ultimate amount of depreciation deductions with respect to a property." [3] Senator Humphrey stated that under the declining balance method "[t]he total deduction over the life of the property will not be increased and only the same total sum will be given as a tax deduction . . . ." Hearings before the Senate Committee on Finance, 83d Cong., 2d Sess., Pt. 1, 95. Both of these statements clearly support the regulation, since, if the taxpayer prevailed, it would be able to take a greater total amount of depreciation under the declining balance method than under the straight-line method, even if salvage value under the latter method were limited to scrap value.

Petitioner also seems to rely on administrative interpretation. It cites a footnote to what is known as Form 2106, issued by the Commissioner. This footnote to Item No. 41 reads, "Salvage value is the estimated resale or trade-in value of the vehicle, determined at the time of purchase. If declining balance method of depre-

[3] H. R. Rep. No. 1337, 83d Cong., 2d Sess. 25.

Senator Millikin made a similar statement on the floor of the Senate, but preceded it with the observation that depreciation cannot exceed the cost of the asset. The way in which the Senator presented the matter suggests that he did not mean that total depreciation taken could not be greater under the declining balance method of depreciation than under the other accepted methods. However, no such qualification limits the impact of the statement in the House Report.

ciation is used, disregard salvage value in computing depreciation." Petitioner says this is a direct instruction to "disregard salvage value" entirely since it is built into the equation. However, we are not inclined to give the footnote such weighty consideration. The form is but a worksheet and the footnote appears to refer to the fact that salvage value is disregarded at the outset of the application of the depreciation equation, as provided by the Code. We likewise place no weight in the remaining peripheral arguments of the petitioner that salvage must be ignored altogether in the application of the declining balance method.

The judgment is

Affirmed.

[For opinion of MR. JUSTICE HARLAN, joined by MR. JUSTICE WHITTAKER and MR. JUSTICE STEWART, see *ante,* p. 107.]

[For views of MR. JUSTICE DOUGLAS, see *ante,* p. 121.]

COMMISSIONER OF INTERNAL REVENUE *v.* GILLETTE MOTOR TRANSPORT, INC.

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

No. 359. Argued April 21, 1960.—Decided June 27, 1960.

Respondent trucking company ceased operations during World War II because of a strike, and the Director of the Office of Defense Transportation took possession and assumed control of its business but left title to its properties in respondent, which resumed normal operations and functioned under the control of a federal manager until termination of possession and control by the Government. The Motor Carrier Claims Commission determined that, by assuming possession and control of respondent's facilities, the Government had deprived it of the right to determine freely what use was to be made of them, and it awarded to respondent as compensation a sum representing the fair rental value of its facilities during the period of government control. *Held:* Under the Internal Revenue Code of 1939, this award constituted ordinary income and not a capital gain resulting from an "involuntary conversion" of respondent's capital assets consisting of real or depreciable personal property used in its trade or business, within the meaning of § 117 (j). Pp. 130–136.

265 F. 2d 648, reversed.

Wayne G. Barnett argued the cause for petitioner. On the brief were *Solicitor General Rankin, Assistant Attorney General Rice* and *Melvin L. Lebow.*

Joseph A. Maun argued the cause for respondent. With him on the brief was *John A. Murray.*

MR. JUSTICE HARLAN delivered the opinion of the Court.

The question in this case is whether a sum received by respondent from the United States as compensation for the temporary taking by the Government of its business facilities during World War II represented ordinary income or a capital gain. The issue involves the con-

struction and application of § 117 (j) of the Internal Revenue Code of 1939.

In 1944, respondent was a common carrier of commodities by motor vehicle. On August 4, 1944, respondent's drivers struck, and it completely ceased to operate. Shortly thereafter, because of the need for respondent's facilities in the transportation of war materiel, the President ordered the Director of the Office of Defense Transportation to "take possession and assume control of" them. The Director assumed possession and control as of August 12, and appointed a Federal Manager, who ordered respondent to resume normal operations. The Federal Manager also announced his intention to leave title to the properties in respondent and to interfere as little as possible in the management of them. Subject to certain orders given by the Federal Manager from time to time, respondent resumed normal operations and continued so to function until the termination of all possession and control by the Government on June 16, 1945.

Pursuant to an Act of Congress creating a Motor Carrier Claims Commission, 62 Stat. 1222, respondent presented its claim for just compensation. The Government contended that there had been no "taking" of respondent's property but only a regulation of it. The Commission, however, determined that by assuming actual possession and control of respondent's facilities, the United States had deprived respondent of the valuable right to determine freely what use was to be made of them. In ascertaining the fair market value of that right, the Commission found that one use to which respondent's facilities could have been put was to rent them out, and that therefore their rental value represented a fair measure of respondent's pecuniary loss. The Commission noted that in other cases of temporary takings, it has typically been held that the market value of what is taken is the sum which would be arrived at by a willing lessor

and a willing lessee. Accordingly, it awarded, and the respondent received in 1952, the sum of $122,926.21, representing the fair rental value of its facilities from August 12, 1944, until June 16, 1945, plus $34,917.78, representing interest on the former sum, or a total of $157,843.99.

The Commissioner of Internal Revenue asserted that the total compensation award represented ordinary income to respondent in 1952. Respondent contended that it constituted an amount received upon an "involuntary conversion" of property used in its trade or business and was therefore taxable as long-term capital gain pursuant to § 117 (j) of the Internal Revenue Code of 1939.*

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*Section 117 (j) provides as follows:

"Gains and losses from involuntary conversion and from the sale or exchange of certain property used in the trade or business—(1) Definition of property used in the trade or business.

"For the purposes of this subsection, the term 'property used in the trade or business' means property used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23 (*l*), held for more than 6 months, and real property used in the trade or business, held for more than 6 months, which is not (A) property of a kind which would properly be includible in the inventory of the taxpayer if on hand at the close of the taxable year, or (B) property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business . . . .

"(2) General rule.

"If, during the taxable year, the recognized gains upon sales or exchanges of property used in the trade or business, plus the recognized gains from the compulsory or involuntary conversion (as a result of destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation or the threat or imminence thereof) of property used in the trade or business and capital assets held for more than 6 months into other property or money, exceed the recognized losses from such sales, exchanges, and conversions, such gains and losses shall be considered as gains and losses from sales or exchanges of capital assets held for more than 6 months. . . ."

The Tax Court, adopting its opinion in *Midwest Motor Express, Inc.,* 27 T. C. 167, aff'd, 251 F. 2d 405 (C. A. 8th Cir.), which involved substantially identical facts, held that the award represented ordinary income. The Court of Appeals, one judge dissenting, in this instance reversed. 265 F. 2d 648. We granted certiorari because of the conflict between the decisions of the two Circuits. 361 U. S. 881.

Respondent stresses that the Motor Carrier Claims Commission, rejecting the Government's contention that only a regulation, rather than a taking, of its facilities had occurred, found that respondent had been deprived of *property,* and awarded compensation therefor. That is indeed true. But the fact that something taken by the Government is property compensable under the Fifth Amendment does not answer the entirely different question whether that thing comes within the capital-gains provisions of the Internal Revenue Code. Rather, it is necessary to determine the precise nature of the property taken. Here the Commission determined that what respondent had been deprived of, and what the Government was obligated to pay for, was the right to determine freely what use to make of its transportation facilities. The measure of compensation adopted reflected the nature of that property right. Given these facts, we turn to the statute.

Section 117 (j), under which respondent claims, is an integral part of the statute's comprehensive treatment of capital gains and losses. Long-established principles govern the application of the more favorable tax rates to long-term capital gains: (1) There must be first, a "capital asset," and second, a "sale or exchange" of that asset (§ 117 (a)); (2) "capital asset" is defined as "property held by the taxpayer," with certain exceptions not here relevant (§ 117 (a)(1)); and (3) for purposes of

calculating gain, the cost or other basis of the property (§ 113 (b)) must be subtracted from the amount realized on the sale or exchange (§ 111 (a)).

Section 117 (j), added by the Revenue Act of 1942, effects no change in the nature of a capital asset. It accomplishes only two main objectives. First, it extends capital-gains treatment to real and depreciable personal property used in the trade or business, the type of property involved in this case. Second, it accords such treatment to involuntary conversions of both capital assets, strictly defined, and property used in the trade or business. Since the net effect of the first change is merely to remove one of the exclusions made to the definition of capital assets in § 117 (a)(1), it seems evident that "property used in the trade or business," to be eligible for capital-gains treatment, must satisfy the same general criteria as govern the definition of capital assets. The second change was apparently required by the fact that this Court had given a narrow construction to the term "sale or exchange." See *Helvering* v. *Flaccus Leather Co.,* 313 U. S. 247. But that change similarly had no effect on the basic notion of what constitutes a capital asset.

While a capital asset is defined in § 117 (a)(1) as "property held by the taxpayer," it is evident that not everything which can be called property in the ordinary sense and which is outside the statutory exclusions qualifies as a capital asset. This Court has long held that the term "capital asset" is to be construed narrowly in accordance with the purpose of Congress to afford capital-gains treatment only in situations typically involving the realization of appreciation in value accrued over a substantial period of time, and thus to ameliorate the hardship of taxation of the entire gain in one year. *Burnet* v. *Harmel,* 287 U. S. 103, 106. Thus the Court has held that an unexpired lease, *Hort* v. *Commissioner,* 313 U. S. 28, corn futures, *Corn Products Co.* v. *Commissioner,* 350 U. S. 46,

and oil payment rights, *Commissioner* v. *P. G. Lake, Inc.*, 356 U. S. 260, are not capital assets even though they are concededly "property" interests in the ordinary sense. And see Surrey, Definitional Problems in Capital Gains Taxation, 69 Harv. L. Rev. 985, 987–989 and Note 7.

In the present case, respondent's right to use its transportation facilities was held to be a valuable property right compensable under the requirements of the Fifth Amendment. However, that right was not a capital asset within the meaning of §§ 117 (a)(1) and 117 (j). To be sure, respondent's facilities were themselves property embraceable as capital assets under § 117 (j). Had the Government taken a fee in those facilities, or damaged them physically beyond the ordinary wear and tear incident to normal use, the resulting compensation would no doubt have been treated as gain from the involuntary conversion of capital assets. See, *e. g., Waggoner,* 15 T. C. 496; *Henshaw,* 23 T. C. 176. But here the Government took only the right to determine the use to which those facilities were to be put.

That right is not something in which respondent had any investment, separate and apart from its investment in the physical assets themselves. Respondent suggests no method by which a cost basis could be assigned to the right; yet it is necessary, in determining the amount of gain realized for purposes of § 117, to deduct the basis of the property sold, exchanged, or involuntarily converted from the amount received. § 111 (a). Further, the right is manifestly not of the type which gives rise to the hardship of the realization in one year of an advance in value over cost built up in several years, which is what Congress sought to ameliorate by the capital-gains provisions. See cases cited, *ante,* p. 134. In short, the right to use is not a capital asset, but is simply an incident of the underlying physical property, the recompense for which is commonly regarded as rent. That is precisely the situation here,

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and the fact that the transaction was involuntary on respondent's part does not change the nature of the case.

Respondent lays stress on the use of the terms "seizure" and "requisition" in § 117 (j). More specifically, the section refers to the "involuntary conversion (as a result of destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation or the threat or imminence thereof) *of property used in the trade or business and capital assets . . . .*" (Emphasis added.) It is contended that the Government's action in the present case is perhaps the most typical example of a seizure or requisition, and that, therefore, Congress must have intended to treat it as a capital transaction. This argument, however, overlooks the fact that the seizure or requisition must be "of property used in the trade or business [or] capital assets." We have already shown that § 117 (j) does not change the long-standing meaning of those terms and that the property taken by the Government in the present case does not come within them. The words "seizure" and "requisition" are not thereby deprived of effect, since they equally cover instances in which the Government takes a fee or damages or otherwise impairs the value of physical property.

We conclude that the amount paid to respondent as the fair rental value of its facilities from August 12, 1944, to June 16, 1945, represented ordinary income to it. *A fortiori,* the interest on that sum is ordinary income. *Kieselbach* v. *Commissioner,* 317 U. S. 399.

Reversed.

MR. JUSTICE DOUGLAS dissents.

Syllabus.

SUNRAY MID-CONTINENT OIL CO. *v.* FEDERAL POWER COMMISSION.

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

No. 335. Argued April 26–27, 1960.—Decided June 27, 1960.

An independent producer of natural gas contracted to sell to an interstate pipeline company from specified reserves a specified amount of gas each year at specified prices for a term of 20 years, and it applied to the Federal Power Commission under the Natural Gas Act for a certificate of convenience and necessity authorizing it to make such sales for a term of 20 years only. Instead, the Commission tendered a certificate without any time limitation. The producer accepted it, reserving the right to object, on review, to the unlimited nature of the certificate. *Held:* The Commission did not exceed its authority in issuing a certificate unlimited as to time. Pp. 138–158.

(a) To hold that the Commission must place a time limitation upon such a certificate (1) would greatly impair its control under § 7 (b) over the abandonment by natural gas companies of their facilities and services subject to the jurisdiction of the Commission, and (2) would make unavailable the procedural safeguards under §§ 4 (d) and 4 (e) which are applicable to rate changes. Pp. 141–147.

(b) A different conclusion is not required by the language of § 7 (e) authorizing the Commission to issue a certificate "authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application." Pp. 147–151.

(c) The authority of the Commission to issue a certificate unlimited as to time should not be denied on the theory that it could accomplish the same result indirectly, either (1) by denying all applications for limited certificates, or (2) by prescribing conditions under § 7 (e) that the certificates be permanent. Pp. 151–152.

(d) The conclusion here reached is supported by the consistent administrative practice of the Commission in making a clear distinction between the underlying "service" to the public and the contractual means by which it is implemented. Pp. 152–154.

(e) The conclusion here reached is not inconsistent with that reached in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U. S. 332. Pp. 154–156.

(f) An initial application of an independent producer to sell natural gas in interstate commerce leads to a certificate of public convenience and necessity under which the Commission controls the basis on which the gas may be initially dedicated to interstate use, *Atlantic Refining Co.* v. *Public Service Commission*, 360 U. S. 378; and once so dedicated there can be no withdrawal of that supply from continued interstate movement without Commission approval. P. 156.

(g) Other objections to the Commission's order either are not properly before this Court or are without merit. Pp. 156–158.

267 F. 2d 471, affirmed.

Melvin Richter argued the cause for petitioner. With him on the brief were *M. Darwin Kirk, Homer E. McEwen, Jr.* and *Dale E. Doty.*

Howard E. Wahrenbrock argued the cause for respondent. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Doub, Alan S. Rosenthal, Willard W. Gatchell, Robert L. Russell* and *Peter H. Schiff.*

Mr. Justice Brennan delivered the opinion of the Court.

This case presents an important question under the Natural Gas Act.[1] This question, central to the case, is: When a company, proposing to make, under contract, jurisdictional sales [2] of natural gas in interstate commerce,

[1] 52 Stat. 821, as amended, 15 U. S. C. §§ 717–717w.

[2] Section 1 (b) of the Act provides that "The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or

applies for a certificate of public convenience and necessity as required by the Act, and requests that the certificate be limited in time to the duration of a contract for the sale of gas which it has entered, does the Federal Power Commission have the authority to tender it, instead, a certificate without time limitation?

Petitioner, Sunray Mid-Continent Oil Company, an independent producer of natural gas, entered into a contract with United Gas Pipeline Company, an interstate transmission company. The contract covered considerable acreage owned by, or under mineral lease to, petitioner in Vermilion and Lafayette Parishes, Louisiana, in and about what is called the Ridge field. Under it, United agreed to take an annual amount of gas from petitioner equivalent to 4.5625 per cent of petitioner's gas reserves in the area covered by the agreement; [3] and United had the right, in addition, to call for any amount up to 150 per cent of the amount it had annually agreed to take. The term of the agreement was 20 years. The initial price provided was 20.5 cents per thousand cubic feet (Mcf.); and the price was to increase one cent per Mcf. every five years.[4]

Section 7 (c) of the Natural Gas Act provides that "no natural-gas company . . . shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission . . . unless there is in force with respect to such natural-gas company a certificate of public con-

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sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas." 52 Stat. 821, 15 U. S. C. § 717 (b).

[3] The amount of the reserves was subject to redetermination during the term of the contract pursuant to its Article IV, but only prospective effect would be given the redeterminations.

[4] Article IX of the contract also provided for adjustment of these prices, by way of upward or downward escalation, in accordance with a price index of the Department of Labor.

venience and necessity issued by the Commission authorizing such acts or operations." This Court held in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672, that by virtue of § 1 (b) of the Act, sales of gas by an independent producer to a pipeline "in interstate commerce . . . for resale for ultimate public consumption" came within the scope of the Act.[5] Petitioner had no certificate of public convenience and necessity authorizing sales in interstate commerce from the field in question. Accordingly, in order to carry out its contract with United, it was necessary for petitioner to apply for a certificate from the Commission, which it did.

Petitioner's application for the certificate contained the request that the certificate sought "provide for its own expiration on the expiration of the . . . contract term so as to authorize Applicant to cease the delivery and sale of gas thereunder at that time." The Commission, upholding its examiner's recommendations, rejected the contentions of petitioner that there should be issued to cover the contract only a certificate limited to the term of the contract itself, and tendered it a certificate without time limitation.[6] 19 F. P. C. 618. Petitioner applied for a rehearing of the Commission's order. Basic to this application was the contention that "The Commission is without authority to issue a certificate to an applicant authorizing more than the whole or some part of the sale covered by the application for certificate of public convenience and necessity . . . ." The Commission denied the rehearing application. 19 F. P. C. 1107.

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[5] See note 2, *supra*.

[6] The Commission reached this conclusion without dissent. There was one dissent, by Commissioner Connole, from the issuance of the certificate, but only insofar as the Commission failed to attach a rate condition for which the Commission staff had contended. This aspect of the case was not brought before the court below for review in these proceedings.

Petitioner did not avail itself of its undoubted right to stand firm on its own application, and reject the proffered certificate. Cf. *Atlantic Refining Co.* v. *Public Service Comm'n,* 360 U. S. 378, 387–388.[7] Instead it accepted the Commission's certificate and commenced deliveries of gas under it, reserving its right to object, on review, to the certificate's unlimited nature. The Court of Appeals for the Tenth Circuit rejected petitioner's objections, and affirmed the order of the Commission, 267 F. 2d 471. In view of the importance of the central question presented, to which we have already alluded, we granted certiorari. 361 U. S. 880. We are in agreement with the Court of Appeals, and affirm its judgment.

The practical reasons behind petitioner's superficially self-abnegating desire to have a limited rather than an unlimited authorization from the Commission are obvious from a study of the Natural Gas Act's provisions. Obvious also is the damaging effect that acceptance of petitioner's central contention would have upon the policies of the Act.

I.

Section 7 (b) of the Natural Gas Act regulates the abandonment by natural-gas companies of their facilities and services subject to the jurisdiction of the Commission.[8] The section follows a common pattern in federal

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[7] Of course the economics of the industry might preclude an unyielding assumption of such a position. See 360 U. S., at 394.

[8] The text of the section provides: "No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment." 52 Stat. 824, 15 U. S. C. § 717f (b).

utility regulation[9] in forbidding such abandonment "without the permission and approval of the Commission first had and obtained." The Commission is to extend permission for an abandonment of service only on a finding "that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment." The proposal of petitioner was for a certificate that would by its own terms expire when the contract with United expired. Thus at the end of the period, petitioner would become free to cease supplying gas to the interstate market from the Ridge area without further leave of the Commission, and without there having been made the findings that Congress deemed necessary.

If petitioner's contentions, as to the want of authority in the Commission to grant a permanent certificate where one of limited duration has been sought for, were to be sustained, the way would be clear for every independent producer of natural gas to seek certification only for the limited period of its initial contract with the transmission company, and thus automatically be free at a future date, untrammeled by Commission regulation, to reassess whether it desired to continue serving the interstate market. And contracts—as did the 1947 contract in the companion case to the one at bar, *Sun Oil Co.* v. *Federal Power Comm'n, post,* p. 170—might provide for termination in the event of a rate reduction by the Commission. Petitioner's theory, by tying the term of the certificate to the contract, would mean that such a reduction of rates would under those circumstances enable the producer to cease supplying gas, without obligation to justify its cessa-

[9] See § 1 (18) of the Interstate Commerce Act, as added by the Transportation Act of 1920, 41 Stat. 477, 49 U. S. C. § 1 (18); § 214 (a) of the Communications Act of 1934, as amended by the Act of March 6, 1943, 57 Stat. 11, 47 U. S. C. § 214 (a).

tion of this service as being consistent with the public convenience and necessity.

The consequences of petitioner's argument do not stop there. The identical provisions of the Natural Gas Act regulate pipeline companies as well as independent producers. If producers can insist in their certificates on the inclusion of a provision relieving them in advance from their obligation to continue the supply of gas, as of a date certain, pipeline companies—whose dealings with local distributing companies generally also take the form of a "sale" of gas to them—could insist on a similar provision. If an individual producer were thus left free to discontinue his supply, the transmission company would be forced to find a supplier of gas elsewhere, and make connection with him, to continue its service; and the consumer ultimately would pay the bill for the rearrangement. If the pipeline company were left free to cease its service to the local distribution company, a local economy which had grown dependent on natural gas as a fuel would be at its mercy. And this, though the primary practical problem that led to the passage of the Act was the great economic power of the pipeline companies as compared with that of communities seeking natural gas service. See *Federal Power Comm'n* v. *Hope Natural Gas Co.*, 320 U. S. 591, 610.

And there are practical consequences, related to rate control, which are even more concrete. The companion case, *Sun Oil Co.* v. *Federal Power Comm'n, post,* p. 170, illustrates them. If petitioner's certificate of public convenience must expire with its first contract with United, service after then—under a new contract or otherwise—will require a new certificate. And under that certificate, petitioner may file, pursuant to § 4 (c) of the Act,[10] its

[10] "Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission . . . schedules showing all rates and charges for any transportation or sale

rates for the "new" service. The only power the Commission would have, under the Act, with respect to those rates, would be to bear the burden of proof in an investigation under § 5 of the Act,[11] that the rates are unjust or unreasonable, and thereupon order a new rate, solely for prospective application. Last Term in the so-called *Catco* case, *Atlantic Refining Co.* v. *Public Service Comm'n, supra,* at 389, we had occasion to remark that "the delay incident to determination in § 5 proceedings through which initial certificated rates are reviewable appears nigh interminable." At oral argument, counsel for the Commission confirmed that no contested major producer's § 5 case had been finally adjudicated by the Commission in the six years since this Court's decision in the *Phillips* case. In contrast to § 5 are the protections that would be available if at the conclusion of the original contract the producer's certificate remained in full force and effect. Then the rates to be charged under a new contract or otherwise would have to be filed as rate changes under § 4 (d) of the Act, with 30 days'

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subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services." 52 Stat. 822, 15 U. S. C. § 717c (c).

[11] In pertinent part, § 5 (a) of the Act provides: "Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order . . . ." 52 Stat. 823, 15 U. S. C. § 717d (a).

notice to the Commission and the public.[12] Under § 4 (e), the Commission, on complaint of any State, state commission, or municipality, or *sua sponte,* may order a hearing on the new rate, and suspend the effectiveness of the rate for five months.[13] At the hearing, the gas com-

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[12] "Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. . . ." 52 Stat. 823, 15 U. S. C. § 717c (d).

[13] "Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided,* That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep

pany would have to shoulder the burden of proving that its new rates were just and reasonable. If the hearing were not concluded by the end of the suspension period, the increased rate could be collected *ad interim;* but the Commission is empowered to require the company to collect the increment under bond and accounting, and refund it if it could not make out its case for the increase.

Clearly, the rate change provisions of §§ 4 (d) and 4 (e), rather than the "initial rate" provisions of § 4 (c), are better tailored to the situation that exists when an initial contract of sale of natural gas terminates, and the supply of gas continues, whether under a new contract or without one. When a producer commences interstate sales from a particular field, or when an interstate transmission company commences sales to a local distributing company, there are by definition no existing rates, and accordingly the protective provisions of §§ 4 (d) and (e), which are bottomed on delaying the effectiveness of, and suspending, changes, are not relevant. But of course this is not the case where one sales contract expires and service continues; in this situation, where a rate change is proposed, the protective provisions fit as well as they do in the case of a rate change made pursuant to a contract, during its term.

Thus it is apparent that petitioner's position would enable it to make what in practical effect would be rate

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accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible." 52 Stat. 823, 15 U. S. C. § 717c (e).

changes, but without compliance with the procedures of §§ 4 (d) and 4 (e), and subject to revision only in procedures which are likely to "provide a windfall for the natural gas company with a consequent squall for the consumers," as we said in *Catco*. 360 U. S., at 390. When attached to the leverage of a power to abandon service, at a contract's termination, without contemporaneous Commission approval, this power to exercise contractual control not only over rates but over the mode of their regulation, would be a substantial one indeed. And, like the power to force an advance license for the abandonment of the continued supply of gas, the power would be one enjoyed by pipeline companies and producers alike. Further, declaration today of a want of authority in the Commission to issue a certificate of longer duration than that of a sales contract attached to the application would have a retroactive effect; it would at least furnish a guide to the construction of certificates issued previously on such applications. See *Sun Oil Co.* v. *Federal Power Comm'n, post,* p. 170.

This Court declared as early as the *Hope Natural Gas* case that the primary aim of the Natural Gas Act was "to protect consumers against exploitation at the hands of natural gas companies." 320 U. S. 591, 610. We reiterated that declaration last Term in *Catco,* and observed that "The Act was so framed as to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges." 360 U. S., at 388. Against the backdrop of the practical consequences of the petitioner's claim and the purposes of the Act, we look to the details of its argument that the Commission is limited, in granting its certificate of public convenience and necessity, to a term certificate of the duration petitioner has proposed.

First. Petitioner's argument is based primarily on its construction of § 7 (e) of the Act. That section provides

that a certificate of public convenience and necessity shall be issued "to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application." [14] This, petitioner urges, makes it clear that the outside limit of what the Commission may authorize is what the applicant proposes. Further, petitioner urges that the language requiring a finding "that the applicant is able and willing properly to do the acts and to perform the service proposed" negates the Commission's authority to go beyond the time limitations the applicant inserts in its proposal; for it is claimed that it cannot be found that petitioner is willing to do more than what it has proposed. Under petitioner's theory, the abandonment provisions of § 7 (b) would have application only if it was desired to abandon service while the contract was still in effect.

The argument seems to us unpersuasive even on the face of the statutory language. It depends in the first instance upon freighting the phrase "the whole or any part," obviously intended to give the Commission power to grant less than the whole of an application, with a

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[14] "Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require." Added by the Act of February 7, 1942, 56 Stat. 84, 15 U. S. C. § 717f (e).

load of negative meaning which nothing in the legislative history indicates that it was to bear. Even without the illumination of the purpose of the Act, it could be argued with equal force that all that was meant was that the certificate to be granted be one sufficient to authorize the specific "sale" proposed; which an unlimited certificate clearly is, in any case. But apart from this, petitioner's contention depends on the assumption that the provisions relied upon speak only in terms of the specific "sale" contemplated by the parties and not in terms of a "service" in the movement of gas in interstate commerce, of which "service" the initial "sale" is the commencement. For under § 7 (e) the Commission is authorized to issue a certificate authorizing the "service" covered by the application, as well as a "sale"; and since § 7 (c),[15] which details

[15] "No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

"In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided

the acts for which a certificate is a prerequisite, sets forth no specific antecedent for the "service" to which § 7 (e) refers, it might well be thought that one who "engage[s] in the transportation or sale of natural gas," which § 7 (c) does refer to, is performing a "service" within the meaning of § 7 (e). Certainly there is no more likely antecedent in § 7 (c). The structure of § 4 (c) presents the same feature,[16] and that of the abandonment provisions of § 7 (b) themselves [17] looks the same way.

Furthermore, within § 7 (e) itself, there is found the further requirement to which petitioner itself points—that with respect to an application for a certificate of any nature, a two-part finding must be made: that the applicant is willing and able "to do the acts and to perform the service proposed." Thus, it is evident that all the matters for which a certificate is required—the construction of facilities or their extension, as well as the making of jurisdictional sales—must be justified in terms of a "service" to which they relate. Accordingly, § 7 (e)

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in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest." Added by the Act of February 7, 1942, 56 Stat. 83, 15 U. S. C. § 717f (c).

[16] Not only does § 4 (c), note 10, *supra,* contain a reference to "services" in a context where the antecedent must be "transportation or sale," but it recognizes that a "contract" may "affect or relate to" such services.

[17] It will be noted that § 7 (b) does not refer to the abandonment of the continuation of sales, but rather to the abandonment of "services." See note 8, *supra.* Accordingly, if petitioner was correct in saying that its contract did not involve a "service," it would be difficult to see the applicability of the abandonment provision even during the term of the contract, when petitioner concedes it is applicable.

itself gives positive indication that the "service" which the Commission's certificate may authorize is something quite apart from simply the specific sales which § 7 (c) forbids without a certificate sufficient to authorize them. To be sure, § 7 (e) requires that the applicant be found willing to perform the "service" in question; but surely such willingness can be inferred from its willingness to enter into a long-term sales contract. To say that the finding cannot be made in view of the applicant's declared desire to stop and have a look in 20 years as to its continued desire to be subject to regulation, and that this is a limit on its willingness to perform the service that the certificates must respect, is to make effective regulation turn on the desire of the regulated enterprise to be subject to it.[18] The willingness to make the proposed "sale" thus must imply willingness to perform the "service" which it represents. Thus even as a verbal argument, petitioner's contentions lack persuasiveness.

Second. Once we pass beyond parsing the Act to a consideration of its purpose, and of the practice under it, the construction we have given it becomes inescapable. We have outlined the serious consequences for the regulatory scheme that acceptance of the petitioner's argument would entail. These consequences cannot readily be averted by other means suggested by the Act.

It is urged that if it is in the public interest to award only an unlimited certificate, the Commission might attain this end by refusing all applications for a limited one, intimating that an unlimited application would be favorably regarded. But the action of the Commission in refusing the certificate as originally applied for would

[18] In fact, as to this contention, the examiner summarized the effect of petitioner's position by saying that it amounted to a declaration that petitioner "would prefer not to be subject to regulation." 19 F. P. C. 618, 635.

be subject to judicial review; and once it were held that the Commission had no authority to award a certificate of longer duration than that prayed for, such an indirect method of attaining the same end might well meet judicial condemnation as arbitrary. There is also some suggestion that the Commission might use its power, under § 7 (e), of attaching to the certificate "such reasonable terms and conditions as the public convenience and necessity may require," to attach the "condition" that the certificate be permanent. But again, once want of power to do this directly were established, the existence of power to achieve the same end indirectly through the conditioning power might well be doubted; and the acceptance of a certificate for a longer duration than requested might not be said properly to be a "term or condition" of a limited one at all.[19] We think the Commission's power to protect the public interest under § 7 (e) need not be restricted to these indirect and dubious methods.

The Commission's practice supports its authority here in the terms of § 7 (e). It has long drawn a distinction between the underlying service to the public a natural gas company performs and the specific manifestation—the contractual relationship—which that service takes at a given moment. For example, an independent producer may file as its rate schedule its contract of sale with a

[19] One Court of Appeals has described the granting of a permanent certificate upon an application for a limited one as a conditional certificate, but its discussion would appear to negate the inference that it meant a condition in the ordinary sense of one attached by authority of the last sentence of § 7 (e). See *Sunray Mid-Continent Oil Co.* v. *Federal Power Comm'n*, 239 F. 2d 97, 99, n. 3, reversed on other grounds, 353 U. S. 944. The Commission's order here rested alternatively on the conditioning power, and on the ground we have supported above. 19 F. P. C., at 620. Once the power to grant a permanent certificate under the general provisions of § 7 (e) is established, resort to the conditioning power is superfluous.

pipeline company. That contract may provide in explicit terms for an adjustment of rates at a future time—even one foreordained in a precise amount. Yet when the adjustment is made pursuant to the contract, the adjustment is subject, as a "change" in rates, to the procedures of §§ 4 (d) and 4 (e)—however explicit the upward adjustment was in the contract from the start. Cf. *Texas Gas Transmission Corp.* v. *Shell Oil Co.,* 363 U. S. 263. This position of the Power Commission is evidence that the service in which the producer engages is distinct from the contract which regulates his relationship with the transmission company in performing the service. And it has been upheld in every Court of Appeals case on the question. *Episcopal Theological Seminary* v. *Federal Power Comm'n,* 269 F. 2d 228; *Bel Oil Corp.* v. *Federal Power Comm'n,* 255 F. 2d 548, and companion cases; *Continental Oil Co.* v. *Federal Power Comm'n,* 236 F. 2d 839; *Cities Service Gas Producing Co.* v. *Federal Power Comm'n,* 233 F. 2d 726; *Mississippi River Fuel Corp.* v. *Federal Power Comm'n,* 121 F. 2d 159. See *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Div.,* 358 U. S. 103, 110. If the Act does not contemplate that in a seller's contract there may inhere the power, of the contract's own accord, to effect a rate change at a future date unchecked by the regulatory scheme, it is hard to believe that it contemplated that contracts would of necessity have the effect of providing for a discontinuance of service, without further leave of the Commission.

Further, the Power Commission has from an early date taken the view that there is a continuing obligation to perform "service" imposed by the Act which outlasts the term of a seller's original contract of sale. As early as 1942 it held that an abandonment of service after the expiry of such a contract had to have Commission approval under § 7 (b). *United Gas Pipe Line Co.,*

3 F. P. C. 3, 9. This ruling was made by Commissioners who had been in office during the passage of the Act.[20] It was not a fundamental ruling on a broad question of jurisdiction as to which a court might enjoy a wider latitude of review. See *Phillips Petroleum Co.* v. *Wisconsin,* 347 U. S. 672, 678. It was rather an early implementation and application of a detail of the statutory scheme by the Commission in a regulatory setting before it. The ruling has been followed, see *Panhandle Eastern Pipe Line Co.,* 11 F. P. C. 167, 172, and we think this contemporaneous and consistent construction, pointing again to a distinction between the underlying "service" to the public and the contractual means by which it is implemented, is to be afforded weight in the construction we make.

Third. But against these considerations, it is urged that *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.,* 350 U. S. 332, establishes dominant factors which impel one to the construction petitioner would put on the Act. Petitioner claims that *Mobile* establishes a principle that the Act (unlike many other regulatory schemes) [21] in general preserves the integrity of private contracts, and that the judgment below is in conflict with that principle.

The petitioner states accurately enough the principle that *Mobile* establishes. See 350 U. S., at 338, 344. But the conclusion petitioner asserts does not follow. In *Mobile,* this Court held that where a seller of gas had entered into a contract for the sale, it could not, by virtue of the provision in § 4 for rate changes, file an increase in rates that violated the terms of the contract. This was because the scheme of the Act was one which built the regulatory system on a foundation of private contracts.

[20] Commissioners Manly, Draper, Scott, and Seavey, who signed the decision, were all on the Commission at the time of the passage of the 1938 Act.

[21] See, *e. g., Armour Packing Co.* v. *United States,* 209 U. S. 56, 80–82.

It was held in the *Memphis* case, *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Div., supra,* that the corollary of *Mobile* was that where the contract left the seller free to act, he could act unilaterally under § 4.

It is apparent that the Commission's order in no way violates the integrity of petitioner's contract with United. During its term, both parties are bound by it to the same extent as any members of this regulated industry. When it expires, petitioner, to be sure, will be under an obligation to continue to deliver gas to United on the latter's request unless it can justify an abandonment before the Commission; but we do not see how this in any way disturbs the integrity of the contract during its term. The obligation that petitioner will be under after the contract term will not be one imposed by contract but by the Act. It will be free then, as it was not free during the contract term under the contract here in question, to make rate changes under § 4 without United's consent. It is said that petitioner will be in a position of inequality, because it must supply gas then to United without a corresponding obligation on United to take it. But United, subject to the Act in its sales to local distributors, has its obligations too; and if in fulfilling them it desires to have a continuing supply of gas with the stability of price protection which a contract furnishes under *Mobile,* it may be discovered that each side has its bargaining strength. In any event, we do not see how the prospect of this situation after the term of petitioner's contract in any way impairs the integrity of any contract. *Mobile* is thus simply beside the point.

The short of the matter is that *Mobile* recognized that there were two sources of price and supply stability inherent in the regulatory system established by the Natural Gas Act—the provisions of private contracts and the public regulatory power. See 350 U. S., at 344. Petitioner now urges an application of that decision that could

make private contracts the only stabilizing factor under the Act. Not only does this reading have nothing to do with the integrity of private contracts which *Mobile* underwrote, but it makes a severe incursion into the sources of that stability of natural-gas prices and supply to which that decision gave confirmation. Our consideration of this, as well as the rest of petitioner's arguments, leads us to reiterate as our holding the clear implication of what we recently said in *Catco:* An initial application of an independent producer, to make movements of natural gas in interstate commerce, leads to a certificate of public convenience and necessity under which the Commission controls the basis on which "gas may be initially dedicated to interstate use. Moreover, once so dedicated there can be no withdrawal of that supply from continued interstate movement without Commission approval. The gas operator, although to this extent a captive subject to the jurisdiction of the Commission, is not without remedy to protect himself." 360 U. S., at 389. That remedy he has, as the Court there said, in the "change" power under § 4 (d) when his contract has expired or where his contract permits its use during its term. Under a similar Act, this Court has held to the same effect as we hold today. *Pennsylvania Water & Power Co.* v. *Federal Power Comm'n,* 343 U. S. 414, 423–424.

II.

Once the power of the Commission to issue the certificate without time limitation is established, the other objections of the petitioner fall readily. It is contended that the Commission's order, by requiring the petitioner to supply gas beyond the term of its contract, may, by requiring petitioner to produce more gas than it has contemplated, offend the provision of § 1 (b) of the Act that the Act does not apply "to the production or gath-

ering of natural gas." The point was not raised before the Commission, and accordingly is not for our consideration here; [22] and we might say in any event that the point is not for evaluation in this certification proceeding, but rather on the specific facts presented in the context of an abandonment application by petitioner under § 7 (b), after the expiration of its contract, when and if it desires to make one. We intimate no view as to its merit.[23]

Other objections seem primarily directed to the point that the Commission imposed the burden of proof on the petitioner to show that the certificate should be limited, in the public interest, rather than itself taking on the burden of supporting its issuance of an unlimited certificate. There is no contention that the Commission was again indulging in the erroneous notion that it had no power to issue a limited certificate. Cf. *Sunray Mid-Continent Oil Co.* v. *Federal Power Comm'n,* 239 F. 2d 97, reversed on other grounds, 353 U. S. 944. This procedural formulation seems to us well within the Commission's discretion as an implementation of the Act's protective provisions which we have discussed. And, though much urged by petitioner, the fact that the Commission has certificated pipeline operations despite their showing of gas resources of a shorter duration than petitioner's contract term is not inconsistent with the Commission's

[22] "No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do." Section 19 (b), 52 Stat. 831, as amended, 15 U. S. C. § 717r (b). Petitioner did not comply with this provision.

[23] Petitioner makes an argument based on the limitations found in a proviso to § 7 (a) of the Act, the Commission's authority to require the extension of transportation facilities and the sale of gas to local distributors. 52 Stat. 824, 15 U. S. C. § 717f (a). But the Commission's order in no way relied on § 7 (a), and accordingly this argument of petitioner must be rejected.

approach here.[24] From the fact that the Commission has issued certificates in the presence of what may prove to be physical limitations on the service to be rendered under them,[25] it does not follow that the Commission cannot take care lest these physical problems in the continuation of supply become further complicated by the legal certificate term limitations for which the petitioner contends.

Finally it is suggested that for various reasons which petitioner claims to be related to the public interest, it would be more advantageous if gas producers were given a free hand, after the completion of each contract, to determine for themselves whether they should continue to serve the interstate market. These considerations were not urged before the Commission, and hence we are not called upon to decide whether they would compel a different approach by the Commission to the question of time limitations in certificates, or even whether, in the light of the Act's provisions—particularly the policy expressed in § 7 (b)—it would be proper for it so to rely on them. There is no contention made that petitioner demonstrated any specific circumstances in its own case indicating that, despite the Commission's general policy, the public convenience and necessity warranted a limited certificate for it.

Affirmed.

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[24] Primary reliance is put on *Transwestern Pipeline Co.*, 22 F. P. C. 391, 395–396, and *Trunkline Gas Co.*, 21 F. P. C. 704, 709, where the Commission certificated pipeline companies despite the fact that their presently established gas reserves were shown to have a deliverability life of about 13 years.

[25] It might be observed that in these cases the Commission issued certificates without time limitations. Thus if the companies, failing to find new sources of gas supply, desired to abandon service because of a depletion of supply, they would have to make proof thereof before the Commission, under § 7 (b). The Commission thus, even though there may be physical problems beyond its control, kept legal control over the continuation of service by the applicants.

MR. JUSTICE FRANKFURTER, concurring in the dissent.*

In joining MR. JUSTICE HARLAN's opinion I should like to add a word by way of emphasis.

Once analysis of the problem of these two cases, relating as they do exclusively to independent producers of natural gas, is stripped of darkening details and reduced to its statutory determinants, as spelled out in my Brother HARLAN's dissent, the answer becomes clear and uncomplicated. If a licensing agency has power to grant a particular kind of license, an applicant has the right to apply for such a license. It may be withheld without ado only if the agency has arbitrary—judicially unreviewable—power to withhold such a license. Concededly the Commission has power to grant a time-limited certificate, and its denial of such a certificate is not free from judicial review. Therefore it must give a reason for denying a proper application, with due regard, of course, to its wide discretionary power for determining what satisfies "public convenience and necessity." The Commission cannot rest denial on its *ipse dixit*. Nor can the Commission rest on the general spirit or the ultimate purposes of the Natural Gas Act, for to do so amounts to saying that the Act forbids time certificates, when in fact it does not.

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

The basic issue presented by these two cases is essentially this: When an independent producer of natural gas enters into a contract for the sale of his gas in interstate commerce for resale, and seeks a certificate from the Federal Power Commission to carry out that contract,

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*[These opinions apply also to No. 321, *Sun Oil Co.* v. *Federal Power Comm'n, post,* p. 170.]

may the Commission issue a certificate of unlimited duration not limited to the term of the contract, in the absence of a special showing that the public convenience and necessity require the certificate to be perpetual? In holding that it may, I believe the Court has strained the provisions of the Natural Gas Act beyond permissible limits in order to reach a result which it deems more appropriate to effective regulation. In my opinion, neither will the Act bear the meaning the Court attributes to it, nor will a contrary interpretation bring about the practical evils which the Court imagines.

I.

In my view the Court's conclusions are attributable at bottom to its failure to take into account the basic distinction between an interstate pipeline and an independent producer of natural gas. A pipeline performs a service akin to those traditionally performed by public utilities. The independent producer, on the other hand, is unique among the objects of public-utility regulation because it is not engaged in rendering a service to the public in the conventional sense of that concept, but rather simply in selling a commodity which it owns. The Court's basic error, it seems to me, is its notion that the petitioners are rendering a continuing service to the public in the same sense as a pipeline or other conventional utility, to which the usual modes of utility regulation are equally applicable.

I think that the Natural Gas Act, particularly as construed by the Court in *Phillips Petroleum Co.* v. *Wisconsin,* 347 U. S. 672, recognizes this important distinction. The basic jurisdictional framework of the Natural Gas Act is found in § 1 (b) which provides:

> "The provisions of this chapter shall apply to the *transportation* of natural gas in interstate commerce,

> to the *sale* in interstate commerce of natural gas for resale . . . , and to natural-gas companies engaged in such transportation *or* sale, but shall not apply to . . . the production or gathering of natural gas." (Emphasis added.)

In *Phillips* the application of this provision to independent producers, such as the petitioners in these cases, was considered. Phillips there contended that it was not subject to the Act because it did not engage in the interstate transmission of gas and was not affiliated with any interstate pipeline company, and that to regulate its prices would be to control the "production or gathering" of natural gas, which is specifically exempted by § 1 (b). The Court rejected that argument, holding that Phillips' *sales,* which were unquestionably made "in interstate commerce . . . for resale," were subject to the Commission's jurisdiction. It recognized that the Act creates two separate and distinct bases of jurisdiction—transportation and sale; that an independent producer engages solely in the latter; and that because of the production and gathering exemption, it is *only* the act of sale itself, which occurs at the very end of the production and gathering process, to which the Commission's jurisdiction attaches. It is thus evident that the Court recognized that, as to independent producers, the Act envisaged only a limited scheme of regulation, namely control over the prices and the other terms of sale of their natural gas. The blurring of this distinction respecting the scope of the regulatory scheme of the Act as between independent producers and others can only lead to confusion when, as here, the Court is faced with deciding the proper scope of the operative provisions of the statute.

The operative provisions of the Act consistently reflect their more limited reach as regards independent producers

than with respect to others. Section 7 (c) requires certification in order to

> "engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof . . . ."

Thus three distinct categories of jurisdictional acts are subject to certification: (1) transportation, (2) sale, and (3) maintenance of jurisdictional facilities. A pipeline must necessarily secure authorization for both transportation and maintenance of jurisdictional facilities, acts which by their nature are continuing services. But I do not understand the Court to contend that petitioners, as independent producers, have engaged in any jurisdictional act other than a sale.

The word "sale," in its ordinary sense, signifies a transaction limited in duration and amount. Section 7 (c) requires certification of a sale, and there is nothing in the Act which suggests that the certification is to be broader than the jurisdictional act which it authorizes. On the contrary, § 7 (e), *infra*, p. 163, directs the Commission to issue a certificate authorizing "the . . . sale . . . covered by the application." The Court suggests that a perpetual certificate does in fact authorize the specific sale proposed, and that to say that the Commission can authorize *no more* than that is to "load" the statutory language with a negative implication which was never intended. However, authorizing a producer to sell in perpetuity is certainly something different from authorizing him to make a specific sale. It could hardly be contended that a statutory direction to the Commission to authorize "the . . . sale . . . covered by the application" permits it to authorize some *different* sale.

The Court's assumption that a perpetual certificate authorizes nothing different than what the producer has in effect applied for can in the end be justified only by its view, alluded to before, that what is involved is not a "sale" at all, but a "service" consisting of the perpetual movement of gas in interstate commerce. However, as already mentioned, this flouts the industrial realities. The independent producer does not perform a service; he owns and sells a commodity. Since he need not dedicate his gas supply to the interstate market at all, surely he may propose the amount he will dedicate. The Commission of course need not accept the proposal. But neither can it in effect require acceptance of a certificate authorizing something more, on pain of denying the applicant any certificate, without satisfying the requirements of § 7 (e), *infra,* for the imposition of conditions on certificates.

The Court, however, purports to find support in the statute for its notion that a sale is really a perpetual service. It relies primarily on § 7 (e), which provides in relevant part that

> "a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the *operation, sale, service, construction, extension, or acquisition* covered by the application, if it is found that the applicant is able and willing properly to *do the acts and to perform the service* proposed, . . . and that the proposed *service, sale, operation, construction, extension, or acquisition* . . . will be required by the . . . public convenience and necessity . . . ." (Emphasis added.)

It would appear plain from the face of the very language quoted that, while the word "service" is used, it is used disjunctively with "sale" and several other words, so that a sale and a service are simply two different, and not

synonymous, things the Commission is authorized to certificate. However, the Court reasons that "service" must refer back to "transportation or sale," for which § 7 (c) requires a certificate. But § 7 (c) requires a certificate for three separate categories of jurisdictional acts—transportation, sale, and maintenance of facilities. And § 7 (e), concededly referring back to those categories, lists six items—operation, *sale,* service, construction, extension, and acquisition. Why the term "service" in § 7 (e) should be thought to refer to "sale," the least apt of the three categories in § 7 (c) which it could describe, when it is immediately preceded in § 7 (e) by the word "sale" itself, is difficult to understand.

The Court further says that the provisions of §§ 4 (c)[1] and 7 (b)[2] present the same feature. In § 4 (c), the word "service" again appears as part of an omnibus definition which refers to a number of antecedents. Even assuming, as the Court does, that the only antecedent is "transportation or sale," there is no reason to suppose that

[1] "(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services."

[2] "(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment."

"service" was meant to be taken as the equivalent of "sale" as well as of "transportation," or that it limits either. Section 7 (b) refers only to the abandonment of services "rendered by means of" jurisdictional facilities. There is not the slightest hint in the section that sales are considered to be such services.

Finally, the Court points to the requirement of § 7 (e), *ante,* p. 148, that the applicant for a certificate be willing and able "to do the acts and perform the service proposed." From this it infers that *all* the matters for which § 7 (c), *ante,* p. 149, requires a certificate "must be justified in terms of a 'service' to which they relate." I should have thought it quite plain that an applicant is required to "perform the service proposed" only *if* a service is proposed. Perhaps it would have been more apt for Congress to have said "do the acts *and/or* perform the services proposed," but I cannot understand how the clause as written can be read as meaning that whatever the applicant proposes must be both an act and a service.

I must conclude that there is nothing in the statute which makes "sale" the equivalent of "service." On the contrary, the terms are always used disjunctively. A sale, as a jurisdictional ground distinct from either transportation or the maintenance of jurisdictional facilities (§ 1 (b) *ante,* p. 160) is a limited transaction. A certificate authorizing a sale authorizes no more and, in my view, must be regarded as expiring when the underlying sale terminates, except in a situation where the Commission has properly conditioned issuance on continuance of the certificate for a longer period. See *post,* p. 167. It is suggested that the Commission has consistently held that the obligation to provide service persists even after a particular contract terminates. See *United Gas Pipe Line Co.,* 3 F. P. C. 3; *Cabot Gas Corp., id.,* 357; *Godfrey L. Cabot, Inc., id.,* 582; *Panhandle Eastern Pipe Line Co.,* 11 F. P. C. 167, 172. All those cases, however, involved pipeline com-

panies which were in fact providing a continuing service and which had facilities subject to the jurisdiction of the Commission regardless of the duration of a particular contract. They serve as no authority for the present quite different situation where an independent producer is subject to the Commission's jurisdiction only by virtue of his sales.

II.

The Court asserts that a construction of the statute contrary to the one it reaches will result in intolerable consequences, primarily in two respects. *First,* it says, producers and pipelines would be able to abandon their undertakings at the end of the contract term without a showing that the public convenience and necessity justify such abandonment, thus defeating the policy of § 7 (b) of the Act, and giving the industry a lever to avert regulation of any kind. *Second,* it concludes, producers would be able, at the expiration of their contracts, to file a higher price as an initial rate under a new certificate. This would force the Commission, it is said, to test the reasonableness of the rate under § 5 (a), *ante,* p. 144, where the Commission has the burden of proof and where experience has shown the procedure to be subject to great delays, and would avoid the rate-change procedures of § 4 (e), *ante,* p. 145, where the producer has the burden of proof and the effectiveness of the rate can be suspended pending investigation.

As to abandonment, the Court's view again rests on the erroneous notion that the Commission is charged with assuring continuity of "service" on the part of independent producers. However, § 7 (b), by its own terms, prohibits abandonment of only two things: jurisdictional facilities, and any service "rendered by means of" such facilities. The Court does not suggest that petitioners have any jurisdictional facilities. And there can be no

apprehension about the pipelines, since they clearly provide a service by means of jurisdictional facilities and are certificated for an unlimited duration.

There is a more basic reason, however, why the evils which the Court imagines do not exist. The Commission is required to issue a certificate only if the applicant's proposal is required by the public convenience and necessity. The vast majority of sales are, of economic necessity, bona fide transactions of substantial duration (see *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U. S. 332, at 344) and will, of course, be approved in ordinary course. But surely, if a proposal contains such disingenuous provisions as the Court suggests, its certification would not be in the public interest. The Court's fear that denial of the certificate under such circumstances would be overturned on review is the sheerest speculation, especially in an area where the Commission is entrusted with such wide discretion.

Furthermore, the Commission can tender a perpetual certificate under its § 7 (e) power to attach reasonable terms and conditions.[3] But in such a case, it would have to bear the burden of showing that the public convenience and necessity require such a condition. What the Court in effect permits the Commission to do here is simply to attach the condition without such a showing. If, as the Commission stoutly maintains, a limited certificate would constitute a serious threat to the public interest, then surely it is not too much to ask it to show that fact before tendering a producer a certificate different from the one he has requested. And where the Commission has fairly made such a showing, I cannot believe, with all deference

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[3] "The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."

to the Court's contrary intimation, that there is the slightest danger that its action would nonetheless be overturned on the theory it was attempting to accomplish indirectly that which it cannot do directly. Such a view assumes that a court will be blind to the conditioning power expressly given the Commission by statute, and ignores the fact that there is a very real difference between tendering an unlimited certificate when the Commission has made no affirmative showing of public need for a perpetual duration and tendering one when it has made such a showing. In the last analysis, that additional burden is the only consequence which turns on the outcome of these cases.

I would hold that where, as in No. 335, an independent producer applies for authority simply to engage in a sale transaction specifically limited in duration, the Commission has no authority to tender an unlimited certificate without bearing the burden of showing that such a departure from the proposal is required by the public convenience and necessity.

III.

The question remains whether petitioner in No. 321 proposed a sale transaction which was limited in duration and whether the Commission certificated no more than that sale. The term of the contract filed with the Commission was clearly limited to 10 years. Petitioner's application incorporated that contract by reference, and declared that "[t]his application is hereby made only for a certificate of public convenience and necessity authorizing the sale of natural gas in the circumstances above described." The Commission ordered that a certificate be "hereby issued . . . authorizing the sale by Applicant of natural gas . . . as more fully described in the application and exhibits in this proceeding. . . . The certificate . . . shall be effective only so long as Applicant

continues the acts or operations hereby authorized in accordance with the provisions of the Natural Gas Act . . . ." I think the fair interpretation of all this is that what was authorized was the sale proposed, and that the certificate should therefore be taken as limited in duration to the term of the sale contract.

The Commission, however, contends that since, at the time petitioner's certificate was issued, it had taken the position in *Sunray Oil Corp.*, 14 F. P. C. 877, that it had no power to issue a certificate specifically limited in duration, this certificate must be taken as one unlimited in duration. That position, however, was later reversed on appeal, *Sunray Mid-Continent Oil Co.* v. *Federal Power Comm'n.*, 239 F. 2d 97, and the Commission acquiesced therein. But the Commission was more fundamentally wrong in believing that a certificate authorizing a sale is unlimited unless specifically otherwise conditioned. Therefore, when it tendered to petitioner a certificate without any limiting language, its erroneous belief that it was issuing a perpetual certificate could not bind petitioner. The Commission was authorized to issue only a certificate limited to the duration of the sale unless a condition were expressly imposed to the contrary, and what it issued purported to be no more than that. Petitioner cannot be taken to have acquiesced in a certificate authorizing something other than it requested, where the certificate gave no notice of that fact, simply because the Commission may have believed its effect to be otherwise.

I fear this is another instance where the Court has taken impermissible liberties with statutory language in order to remedy what it considers an undesirable deficiency in the way Congress has written the statute. Cf. *United States* v. *Republic Steel Corp.*, 362 U. S. 482, 493 (dissenting opinion).

I would reverse the judgments in both cases.

SUN OIL CO. *v.* FEDERAL POWER COMMISSION.

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

No. 321. Argued April 26, 1960.—Decided June 27, 1960.

In 1947, petitioner, an independent producer of natural gas, contracted to sell gas from a specified field to an interstate pipeline company at a specified price for a term of 10 years. Subsequently petitioner applied for, and obtained from, the Federal Power Commission a certificate of public convenience and necessity authorizing such sales, and its contract-rate schedule was accepted as its rate schedule under the Natural Gas Act. Upon expiration of its 10-year contract, petitioner contracted with the same pipeline company for the sale of gas from the same field for a new 20-year term but at a higher rate. Petitioner then applied for a new certificate covering the new contract and filed the new contract as an initial-rate schedule under the new certificate pursuant to § 5 of the Act. The Commission rejected the certificate application as duplicative of petitioner's existing certificate to make sales from the field in question and rejected the rate-schedule filing on the ground that the purported initial-rate schedule was actually a change in petitioner's existing rate schedule. Petitioner then filed, under protest, as rate changes pursuant to § 4 (d), the rates in its new contract, and the Commission ordered those rates suspended under § 4 (e). *Held:* The Commission's orders are sustained. Pp. 171–176.

(a) In acting upon petitioner's 1947 application, based on its 10-year contract, the Commission was authorized to issue a certificate unlimited as to time. *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission, ante,* p. 137. P. 174.

(b) The Commission properly construed the certificate issued pursuant to that application as being unlimited as to time. Pp. 174–176.

266 F. 2d 222, affirmed.

Leo J. Hoffman argued the cause for petitioner. With him on the brief were *Martin A. Row, Robert E. May* and *Omar L. Crook.*

Howard E. Wahrenbrock argued the cause for respondent. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Doub, Samuel D. Slade, Willard W. Gatchell* and *Peter H. Schiff.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This case presents many of the same issues as *Sunray Mid-Continent Oil Co.* v. *Federal Power Comm'n, ante,* p. 137. Petitioner, Sun Oil Company, is an independent producer making sales of natural gas to transmission companies in interstate commerce for ultimate resale to the public. In 1947 it entered into a contract with the Southern Natural Gas Company, a transmission company, for the sale of natural gas which petitioner controlled in the Gwinville Gas Field in Jefferson Davis and Simpson Counties, Mississippi. The term of the contract was 10 years and the sales price was roughly eight cents per Mcf.

After this Court's decisions in *Phillips Petroleum Co.* v. *Wisconsin,* 347 U. S. 672, on June 7, 1954, the Commission, in a series of orders, required independent producers engaging in jurisdictional sales on or after the date of the decision to apply for certificates of public convenience and necessity pursuant to § 7 (c) of the Natural Gas Act.[1] Under protest, petitioner applied for a certificate "authorizing the sale of natural gas in the circumstances . . . described" in its application. The described circumstances consisted simply of a reference to its contract with Southern Natural, which was at the same time submitted by petitioner as its rate schedule. In an abbreviated and consolidated proceeding disposing of over 100 separate docket certificate applications from 40-odd independent

[1] The pertinent provisions of § 7 (c) are set forth in our opinion in the *Sunray* case, *ante,* p. 149, n. 15.

producers, scattered from Colorado and New Mexico to West Virginia, the Commission on May 28, 1956, ordered issued to petitioner and each of the other applicants a certificate of public convenience and necessity, in the terms set out in the margin.[2] Petitioner's contract-rate-schedule was accepted as its FPC Gas Rate Schedule No. 55.

The 1947 contract between petitioner and Southern Natural expired on August 26, 1957. The parties however entered into a new 20-year contract for continued sale of gas from the same field, commencing on September 3, 1957. The contract called for an initial price increase

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[2] "The Commission ORDERS:

"(A) A certificate of public convenience and necessity be and is hereby issued, upon the terms and conditions of this order, authorizing the sale by Applicant of natural gas in interstate commerce for resale, together with the operation of any facilities, subject to the jurisdiction of the Commission, used for the sale of natural gas in interstate commerce, as hereinbefore described and as more fully described in the application and exhibits in this proceeding.

"(B) The certificate issued herein shall be deemed accepted and of full force and effect, unless refused in writing and under oath by Applicant within 30 days from issuance of this order.

"(C) The certificate is not transferable and shall be effective only so long as Applicant continues the acts or operations hereby authorized in accordance with the provisions of the Natural Gas Act, and the applicable rules, regulations and orders of the Commission.

"(D) The grant of the certificate herein shall not be construed as a waiver of the requirements of Section 4 of the Natural Gas Act, or of Section 154 of the Commission's Rules and Regulations thereunder requiring the filing of rate schedules for the service herein authorized, and is without prejudice to any findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against the Applicant. Further, our action in this proceeding shall not foreclose nor prejudice any future proceedings or objection relating to the operation of any price or related provision in the gas purchase contracts herein involved."

of roughly 150 per cent, to 20 cents per Mcf.[3] Petitioner took the view that the certificate it had received in 1956 was limited in term to the duration of the old contract. It accordingly filed an application for a new certificate covering the new contract, and filed the new contract as an initial rate schedule under the new certificate, pursuant to § 5 of the Act.[4] The Commission, in a letter order of September 12, 1957, rejected the certificate application as duplicative of petitioner's existing certificate to make sales from the field in question, and rejected the rate-schedule filing on the ground that the purported initial rate schedule was actually a change in its existing Schedule No. 55. A motion for reconsideration was later denied; and at the same time the Commission ordered suspended, under § 4 (e) of the Act,[5] the effectiveness of the rates in the new contract, which petitioner had, after their rejection as an initial rate schedule, filed under protest, as rate changes pursuant to § 4 (d). 18 F. P. C. 609, 611. After an application for rehearing of the suspension order was rejected, petitioner petitioned for review of all these orders of the Commission in the Court of Appeals for the Fifth Circuit.[6] That court affirmed, by a divided vote. 266 F. 2d 222. We granted certiorari. 361 U. S. 880.

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[3] There are slight discrepancies in comparison between the old and new rates, due to the fact that they are computed on somewhat different pressure bases. The Commission states that giving effect to the difference would somewhat increase the spread between the old and the new rates.

[4] For the pertinent provisions, see the *Sunray* opinion, *ante*, p. 144, n. 11.

[5] For the provisions, see the *Sunray* opinion, *ante*, p. 145, n. 13.

[6] The Commission takes the position that an order suspending a rate change under § 4 (e) is not directly reviewable in the Court of Appeals. But since the very same issues are presented in this case by the Commission's rejection of the application for a new certificate, and its rejection of the filing of the 1957 contract rate as an initial

Petitioner's contention here, as it was below, is that the initial certificate it obtained in 1956 was to remain in effect only during the life of the 1947 contract. This in its view would leave it free to discontinue interstate sales after the 1957 expiration of the contract, or to apply for a new certificate for new sales, and, not unimportantly, file the new sales contract as an initial rate schedule thereunder rather than as a rate change. We reject this contention and affirm the judgment of the Court of Appeals.

First. The major part of petitioner's argument is based on a want of authority in the Commission, over objection, to grant an independent producer a certificate for a longer duration than the term of a sales contract which its application seeks permission to fulfill. To be sure, if the Commission had no such authority, we might take pains to read the petitioner's application as seeking a certificate so limited in time, though, as compared with Sunray's in the companion case, it is highly inexplicit as to its desire that only a term certificate be issued. But we have held today in the *Sunray* case, *ante,* p. 137, that in these circumstances the Commission has authority to tender a permanent certificate under an application for a term certificate; and accordingly this keystone of petitioner's argument falls.

Second. Of course, if, despite its authority to grant a permanent certificate, the Commission had in 1956 actually granted a term certificate to petitioner, petitioner would after the term have been free to apply for a new certificate to authorize the sale under the new contract.

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rate under § 4 (c), which orders are concededly reviewable in the Court of Appeals, all the contested issues raised before the Commission were properly subject to review in the proceedings below and here, as the Commission concedes. If the Commission was in error in rejecting the application for a new certificate and the purported initial rate filing, the § 4 (e) rate change filing, which the petitioner made under protest, doubtless would be withdrawn.

But we agree with the Commission that the 1956 certificate was a permanent one. The application itself, under the construction we have given the statute in *Sunray,* did not with any explicitness ask for a limited certificate. It asked for one "authorizing the sale of natural gas" under the 1947 contract; but as we said in *Sunray,* a permanent certificate would do that. See, *ante,* p. 149. And the certificate issued makes no reference to any limitation of time. This is in contrast with explicit references to the limitation in those instances where the Commission had previously issued term certificates.[7] The Commission's order, which blanketed the many applications before it in the mass proceeding, is no more explicit about limitation than the application, and refers, in fact, to the certificate as both "authorizing the sale" of natural gas, and authorizing a "service," which accords with our construction of § 7 (e) in *Sunray.* Under these circumstances we would hardly see any basis for overturning the Commission's view that no limitation as to time was implied. Cf. *Andrew G. Nelson, Inc.,* v. *United States,* 355 U. S. 554, 560.

Moreover, if there were any doubt as to the matter, it would be removed by the fact that the batch of certificates containing petitioner's was issued at a time when the Commission was asserting that it lacked even the power to issue a term certificate. The certificate in question was issued May 28, 1956. The Commission had taken the position that it lacked such authority on July 25, 1955, in *Sunray Oil Corp.,* 14 F. P. C. 877. It was not until October 29, 1956, that judicial rejection of the Commission's position occurred.[8] *Sunray Mid-Con-*

[7] See, *e. g., Louisiana-Nevada Transit Co.,* 2 F. P. C. 546, 549 (10 years); *Ray Phebus,* 2 F. P. C. 1044, 1045 (8 years); *Southern Natural Gas Co.,* 8 F. P. C. 688, 689 (1 year).

[8] While the Court of Appeals there affirmed the Commission's order on other grounds from those on which it had proceeded—for which

tinent Oil Co. v. *Federal Power Comm'n,* 239 F. 2d 97, reversed on other grounds, 353 U. S. 944. Nothing in petitioner's application shows an attempt to take issue with that conception of the Commission, which of course would mean that every certificate granted under its influence would be intended to be permanent. It would surpass belief to say that under these circumstances the Commission tendered and the applicants received these certificates under the assumption that they were limited in time to the terms of the contracts on which the applications were based.

Affirmed.

[For opinion of MR. JUSTICE FRANKFURTER, concurring in MR. JUSTICE HARLAN'S dissenting opinion, see *ante,* p. 159.]

[For dissenting opinion of MR. JUSTICE HARLAN, joined by MR. JUSTICE FRANKFURTER, MR. JUSTICE WHITTAKER and MR. JUSTICE STEWART, see *ante,* p. 159.]

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action the Court of Appeals' judgment was reversed here—the Commission had, before the Court of Appeals, maintained its position that it was without authority to grant a limited term certificate. 239 F. 2d, at 100, n. 7. It abandoned that position when application for certiorari was made here. 353 U. S. 944.

WOLFE ET AL. *v.* NORTH CAROLINA.

APPEAL FROM THE SUPREME COURT OF NORTH CAROLINA.

No. 7. Argued October 19–20, 1959.—Decided June 27, 1960.

Appellants and other Negroes obtained from a Federal District Court an injunction against the operation on a racially discriminatory basis of a golf course owned by a North Carolina City but leased and operated by a club. Appellants had previously been charged with, and were subsequently tried in a state court for, violating a state criminal trespass statute by persisting in playing on the course after having been denied permission to do so and after having been ordered to leave. The jury was clearly instructed that appellants could not be found guilty if they were excluded because of their race; but they were convicted. At this trial, the unpublished findings and judgment of the Federal Court were offered in evidence but were excluded. Appellants omitted these facts from the record on appeal to the State Supreme Court, wherein they contended that, notwithstanding the jury's verdict, the Supremacy Clause and the Fourteenth Amendment required a holding that the findings and judgment of the Federal Court conclusively established that the criminal trespass statute was used to enforce a practice of racial discrimination by a state agency. The State Supreme Court declined to rule on that contention on the ground that, under state law, the findings and judgment of the Federal Court were not before it, and it affirmed the convictions. *Held:* An appeal to this Court is dismissed and certiorari is denied for want of a substantial federal question, since the judgment of the State Supreme Court was independently and adequately supported on state procedural grounds. Pp. 178–196.

(a) Even if the judgment and findings of the Federal Court were offered in evidence and excluded by the trial judge, these facts did not appear in the record filed by appellants in the State Supreme Court and, therefore, were not properly cognizable by that Court under state practice. Pp. 185–187.

(b) In declining to go outside the record in order to ascertain the true facts, the State Supreme Court did not discriminate against appellants; it acted in accordance with a practice which it had followed consistently for many years in considering appeals in criminal cases. Pp. 187–192.

(c) The Federal Court's findings and judgment in the civil case were not properly brought before the state courts by appellants' motion to quash at the outset of the trial, which alleged the effect of the Federal Court's proceedings and requested leave to offer the record of that Court in evidence in support of the motion, since the settled state practice does not permit consideration of extraneous evidence in passing upon such a motion. Pp. 192–193.

(d) Under established state practice, the Federal Court's findings and judgment in the civil case were not properly brought before the state courts by appellants' motion at the end of the trial to set aside the verdict. Pp. 193–194.

(e) The State Supreme Court did not arbitrarily deny appellants an opportunity to present their federal claim. Pp. 194–195.

248 N. C. 485, 103 S. E. 2d 846, appeal dismissed.

J. Alston Atkins argued the cause for appellants. With him on the brief were *Harold L. Kennedy, C. O. Pearson, Carter W. Wesley* and *James M. Nabrit, Jr.*

Ralph Moody, Assistant Attorney General of North Carolina, argued the cause for appellee. With him on the brief were *Malcolm B. Seawell,* Attorney General of North Carolina, and *Horace R. Kornegay.*

MR. JUSTICE STEWART delivered the opinion of the Court.

The appellants were convicted of violating a North Carolina criminal trespass statute,[1] and their convictions were upheld by the Supreme Court of North Carolina, 248 N. C. 485, 103 S. E. 2d 846. This appeal, grounded

[1] "If any person after being forbidden to do so, shall go or enter upon the lands of another, without a license therefor, he shall be guilty of a misdemeanor, and on conviction, shall be fined not exceeding fifty dollars, or imprisoned not more than thirty days: . . . ." N. C. Gen. Stat. § 14–134. This statute was first enacted in 1866. North Carolina Laws, Special Session, Jan., 1866, c. 60.

on 28 U. S. C. § 1257 (2),[2] attacks the constitutional validity of the statute as applied in this case. Because of doubt as to whether any substantial federal question was presented to or decided by the state courts, we postponed further consideration of the question of jurisdiction until the hearing of the case on the merits. 358 U. S. 925, 359 U. S. 951. For reasons to be stated, we have concluded that the appeal must be dismissed.[3]

There is no dispute as to the basic circumstances which led to the prosecution and ultimate conviction of the appellants. In December, 1955, Gillespie Park Golf Club, Inc., operated an 18-hole golf course on land which it leased from the City of Greensboro, North Carolina, and the Board of Trustees of the Greensboro City Administrative Unit. The bylaws of the lessee limited the use of the golf course to its "members" and persons in certain other specifically restricted categories.[4] On December 7, 1955,

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[2] "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: . . .

"(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

[3] The appellants ask that the appeal be treated as a petition for certiorari in the event it is found that the appeal was improperly taken. See 28 U. S. C. § 2103. The considerations which require dismissal of the appeal in this case also require denial of a petition for certiorari. See 28 U. S. C. § 1257 (3).

[4] The relevant provisions of the bylaws were as follows: "Section 1—Membership. Membership in this corporation shall be restricted to members who are approved by the Board of Directors for membership in this Club. There shall be two types of membership; one, the payment of a stipulated fee of $30.00 or more, plus tax, shall cover membership and greens fees. The other type of membership shall be $1.00, plus tax, but this type of member shall pay greens fees each time he uses the course. The greens fees and the

the appellants, who are Negroes, entered the club's golf shop and requested permission to play on the course. Their request was refused. Nevertheless, after placing some money on a table in the golf shop, the appellants proceeded to the course and teed off. After they had played several holes the manager of the golf course ordered them to leave. They refused. The manager then summoned a deputy sheriff, and, after the appellants were again ordered to leave the course and they had again refused, they were arrested upon warrants sworn to by the manager.

The appellants were tried and convicted of violating the state criminal trespass statute. Pending their appeal to the Supreme Court of North Carolina they and others commenced an action against the City of Greensboro, the Greensboro Board of Education, and the Gillespie Park Golf Club, Inc., in the Federal District Court for the Middle District of North Carolina, asking for a declaratory judgment and an injunction forbidding the defendants from operating the golf course on a racially discriminatory basis. The federal court granted the injunction. *Simkins* v. *City of Greensboro,* 149 F. Supp. 562. Its judgment was affirmed by the Court of Appeals for the Fourth Circuit on June 28, 1957. *City of Greensboro* v. *Simkins,* 246 F. 2d 425. On the same date the Supreme Court of North Carolina, acting on the appeal from the criminal convictions in the state court, held that there had been a fatal variance in amendments to the warrants under which the appellants had been tried, and arrested

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amount of membership fees may be changed by the Board of Directors at any time upon two-thirds vote of the members of the Board.

"Section 2—Use of Golf Facilities. The golf course and its facilities shall be used only by members, their invited guests, members in good standing of other golf clubs, members of the Carolina Golf Association, pupils of the Professional and his invited guests."

the judgments against them. *State* v. *Cooke,* 246 N. C. 518, 98 S. E. 2d 885.

The appellants were again tried *de novo* in the Superior Court of Guilford County, North Carolina, for violating the state criminal trespass statute. At the outset they made a motion to quash, which was denied. The State presented evidence as to what had happened on the golf course on December 7, 1955. At the conclusion of the evidence the trial judge instructed the jury explicitly and at length that the defendants could not be convicted if they had been excluded from the golf course because of their race. Specifically, the trial judge charged the jury that ". . . the law would not permit the City and, therefore, would not permit its lessee, the Gillespie Park Golf Club, Inc., to discriminate against any citizen of Greensboro in the maintenance and operation and use of a golf course. It could not exclude either defendant because of his race or for any other reason applicable to them alone; that is to say, they were entitled to the same rights to use the golf course as any other citizen of Greensboro would be provided they complied with the reasonable rules and regulations for the operation and maintenance and use of the golf course. They would not be required to comply with any unreasonable rules and regulations for the operation and maintenance and use of the golf course." [5] The jury returned a verdict of guilty. A motion to set aside the verdict was denied.

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[5] The trial judge's instructions in their entirety on this aspect of the case were as follows:

"Now, if the State has satisfied you from the evidence and beyond a reasonable doubt that the land in question, that is the golf course property, was the land of the corporation, that it had the actual possession of the property and that the defendants entered upon the land intentionally and that they did so after being forbidden to do so by an agent or employee of the corporation who was authorized to tell them that they could not play golf, then, nothing else appearing,

The Supreme Court of North Carolina affirmed the convictions. In doing so the court recognized that "[s]ince the operator of the golf club was charged with making a public or semipublic use of the property, it could not deny the use of the property to citizens simply because they were Negroes. . . . Since the decision in *Brown* v. *Board of Education,* 347 U. S. 483 . . . separation of the races in the use of public property cannot be required." 248 N. C., at 491, 103 S. E. 2d 850–851. The court quoted with approval the trial judge's instructions to the jury on this aspect of the case. It is from this judgment of the Supreme Court of North Carolina that the present appeal was taken.

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that would constitute a violation of the statute. However, although the State may prove beyond a reasonable doubt in a prosecution under this statute that the accused intentionally entered upon the land in the actual possession of the corporation after being forbidden to do so by an agent of the corporation and thereby establish as an ultimate fact that the accused entered the property without legal right, the accused may still escape conviction by showing as an affirmative defense that he entered under a bona fide claim of right.

"Bona fide claim of right means a claim of right in good faith or bona fide itself means in good faith. That is to say, when the defendants seek to excuse an entry without legal right as one taking place under a bona fide claim of right, then the burden is upon such defendant to show two things: not beyond a reasonable doubt or even by the greater weight of the evidence, but merely to the satisfaction of the jury, first, that he believed he had a right to enter; and, second, that he had reasonable grounds for such belief.

"Now, the defendants by their plea of not guilty deny their guilt of each and every element of the offense charged, but they further say and contend that even if it be found that the land in question was in the actual possession of the corporation and that they entered the land intentionally and that they did so and remained there after being forbidden to do so, they say that even if that be found that they did so under a bona fide claim of right and that they believed they had a right to enter and that they had reasonable grounds for such belief.

"Now, as to that question which arises upon the evidence, I instruct you then, ladies and gentlemen of the jury, that under the

The appellants contend that the Supremacy Clause and the Fourteenth Amendment required the North Carolina Court to hold that the findings of fact and judgment of the federal court in the civil case of *Simkins* v. *City of Greensboro,* 149 F. Supp. 562, conclusively established, contrary to the verdict of the jury in this case, that the state statute was used here to enforce a practice of racial discrimination by a state agency. The Supreme Court of North Carolina took cognizance of the federal court's published opinion in the *Simkins* case and commented with respect to it:

> "Examining the opinion, it appears that ten people, six of whom are defendants in this action, sought

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law as determined by the United States Court and as pronounced by them, the Gillespie Golf Club, Inc., by leasing the land from the City of Greensboro to use as a golf course was subjected to the same obligations as the City of Greensboro would have been had it operated a golf course itself. It was subjected to the same rights as the City would have had, the same obligations and same responsibilities; that is to say, the law would not permit the City and, therefore, would not permit its lessee, the Gillespie Park Golf Club, Inc., to discriminate against any citizen of Greensboro in the maintenance and operation and use of a golf course. It could not exclude either defendant because of his race or for any other reason applicable to them alone; that is to say, they were entitled to the same rights to use the golf course as any other citizen of Greensboro would be provided they complied with the reasonable rules and regulations for the operation and maintenance and use of the golf course. They would not be required to comply with any unreasonable rules and regulations for the operation and maintenance and use of the golf course.

. . . . . .

"Furthermore, I instruct you that your verdict will not be prompted in any manner whatsoever by the race of the defendants. That has absolutely nothing to do with the case in law and should not be considered by you. Under the law, all citizens have equal rights and equal responsibilities in the maintenance and use of public facilities, that is facilities maintained by the governmental unit in which they live, and therefore the fact that the defendants are Negroes certainly may not be considered to their prejudice nor to the prejudice of the State."

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injunctive relief on the assertion that Negroes were discriminated against and were not permitted to play on what is probably the property involved in this case. We do not know what evidence plaintiffs produced in that action. It is, however, apparent from the opinion that much evidence was presented to Judge Hayes [in the Federal District Court] which was not before the Superior Court when defendants were tried. It would appear from the opinion that the entry involved in this case was one incident on which plaintiffs there relied to support their assertion of unlawful discrimination, but it is manifest from the opinion that that was not all of the evidence which Judge Hayes had. We are left in the dark as to other incidents happening prior or subsequent to the conduct here complained of, which might tend to support the assertion of unlawful discrimination. On the facts presented to him, Judge Hayes issued an order enjoining racial discrimination in the use of the golf course. Presumably that order has and is being complied with. No assertion is here made to the contrary." 248 N. C., at 493, 103 S. E. 2d, at 852.

The North Carolina court did not decide, however, whether it was bound under the Constitution to give to the federal court's unpublished findings and judgment in the prior civil action the conclusive effect urged by the appellants in the present criminal case, because it held that as a matter of state law the findings and judgment were not before it.[6]

[6] Although not reaching the merits of the claim that the Constitution would compel it to hold that the federal judgment operated as a collateral estoppel in the present case, the North Carolina court discussed the question of collateral estoppel at some length in its opinion by way of *obiter dicta:*

"The mere assertion that a court of this State has not given due

It is settled that a state court may not avoid deciding federal questions and thus defeat the jurisdiction of this Court by putting forward nonfederal grounds of decision which are without any fair or substantial support.

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recognition to a judgment rendered by one of our Federal courts merits serious consideration.

. . . . . .

"When the doctrine of collateral estoppel should be applied is not always easily solved. In *Van Schuyver* v. *State,* 8 P. 2d 688, it was held that a judgment in a civil action between prosecuting witness and defendant which determined the ownership of domestic fowl could not be used by the defendant in a criminal action to estop the State from prosecuting him on a charge of larceny. Similar conclusions have been reached in other jurisdictions with respect to the ownership of property. *State* v. *Hogard,* 12 Minn. 293; *People* v. *Leland,* 25 N. Y. S.. 943; *Hill* v. *State,* 3 S. W. 764 (Tex.)

"It is said in the annotation to *Mitchell* v. *State,* 103 Am. St. Rep. 17: 'When the previous judgment arose in a case in which the state or commonwealth was the prosecutor or plaintiff and the defendant in the case at bar was also the defendant, and the judgment was with reference to a subject which is material to the case at bar, the doctrine of *res judicata* applies. (citations) But where the judgment to which it is sought to apply the doctrine of *res judicata* was rendered in a civil proceeding to which the state was not a party, or in a criminal proceeding to which the defendant in the case at bar was not a party, the doctrine of *res judicata* does not apply. (citations)'

"The Supreme Court of the United States has recognized and applied the law as there announced to differing factual situations. Compare *U. S.* v. *Baltimore & O. R. Co.,* 229 U. S. 244, 57 L. Ed. 1169, and *Williams* v. *N. C.,* 325 U. S. 226, 89 L. ed. 1577. Other illustrations may be found in: *S.* v. *Dula,* 204 N. C. 535, 168 S. E. 836; *Warren* v. *Ins. Co.,* 215 N. C. 402, 2 S. E. 2d 17; *Powers* v. *Davenport,* 101 N. C. 286; *S.* v. *Boland,* 41 N. W. 2d 727; *People* v. *McKenna,* 255 P. 2d 452; *S.* v. *Morrow,* 75 P. 2d 737; *S.* v. *Cornwell,* 91 A. 2d 456; *S.* v. *Greenberg,* 109 A. 2d 669. Extensive annotations appear as a note to *Green* v. *State,* 87 A. L. R. 1251; 30A Am. Jur. 518." 248 N. C., at 493, 495, 103 S. E. 2d, at 852, 853–854.

Compare what was said by this Court in *Hoag* v. *New Jersey,* 356 U. S. 464, 471: "Despite its wide employment, we entertain grave doubts whether collateral estoppel can be regarded as a constitutional requirement. Certainly this Court has never so held."

N. A. A. C. P. v. *Alabama,* 357 U. S. 449, 455; *Staub* v. *City of Baxley,* 355 U. S. 313, 318–320; *Ward* v. *Love County,* 253 U. S. 17, 22. Invoking this principle, the appellants urge that the independent state grounds relied upon for decision by the Supreme Court of North Carolina were untenable and inadequate, and that the question whether the Federal Constitution compelled that the findings and judgment in the federal case operated as a collateral estoppel in this case was properly before the state court for decision. It thus becomes this Court's duty to ascertain whether the procedural grounds relied upon by the state court independently and adequately support its judgment.

The Supreme Court of North Carolina stated in its opinion of affirmance that the "defendants for reasons best known to themselves elected not to offer in evidence the record in the Federal court case." 248 N. C., at 493, 103 S. E. 2d, at 852. This statement is borne out by the record before that court,[7] the so-called "case on appeal" prepared by the appellants themselves.[8] The appellants

[7] In North Carolina, "[t]he 'transcript or record on appeal' [to the Supreme Court] consists of [1] the 'record proper' (i. e., summons, pleadings, and judgment) and [2] the 'case on appeal,' which last is the exceptions taken, and such of the evidence, charge, prayers, and other matters occurring at the trial as are necessary to present the matters excepted to for review." *Cressler* v. *Asheville,* 138 N. C. 482, 485, 51 S. E. 53, 54. The "record proper" includes "only those essential proceedings which are made of record by the law itself, and as such are self-preserving," *State* v. *Gaston,* 236 N. C. 499, 501, 73 S. E. 2d 311, 313. The term "record" in this opinion refers, unless otherwise indicated, to that part of the record on appeal which is contained in the "case on appeal," *i. e.,* the transcript of the proceedings at the trial itself, containing the testimony of witnesses, proffers of evidence, exceptions and rulings thereon, etc., as selected and agreed upon by the parties.

[8] All that the record before the North Carolina court contained on this aspect of the case, here reproduced in its entirety, was "My name is Myrtle D. Cobb and I am Deputy Clerk in the Federal

now advise us that in fact the federal court's findings and judgment were offered in evidence at the trial and excluded by the trial judge. They ascribe to "some quirk of inadvertence" their failure to include in their "case on appeal" the part of the transcript which would so indicate.[9] And they assert that, since the Supreme Court

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Court in Greensboro, and I have in my possession or it is my duty to keep in my possession public records concerning Federal cases and I do have in my possession the record in the case of Simkins, et al. v. The Gillespie Park Golf Course. I have all of the original papers in that case."

Eight pages later, following the transcript of the testimony of another witness, there appears in the record before the North Carolina court the following, also reproduced here in its entirety: "Mrs. Kennedy: If your Honor please, we'd like, if possible, to have a ruling on whether or not these would be admissible. Court: I am going to sustain the objection as to those two Exhibits, that is #6 and #7." There is nothing in the record before the North Carolina Supreme Court to indicate what "these" meant, and "Exhibits 6 and 7" were not further identified nor made part of the record as an offer of evidence as required by North Carolina law, *In re Smith's Will*, 163 N. C. 464, 79 S. E. 977, nor otherwise submitted to the Supreme Court of North Carolina.

[9] The appellants have included in an appendix to their brief an excerpt from the stenographic trial transcript. The trial transcript was made available to this Court after the argument, and the excerpt in question reads as follows:

"DIRECT EXAMINATION BY MRS. KENNEDY:

"Q. Will you state your name and address, please?

"A. I am Myrtle D. Cobb. I am deputy clerk in the Federal Court in Greensboro.

"Q. As Deputy Clerk in the Federal Court here in Greensboro, is it part of your duty to keep public records?

"A. Yes, it is.

"Q. Do you have a record in the case of Simkins, et al, vs. Gillespie Park Golf Course, et al?

"A. This is the case. It is all the original papers that went up to the Court of Appeals that was filed in our office.

"Q. Were the findings of fact part of that record?

"A. Yes. [*Footnote 9 continued on p. 188.*]

of North Carolina has "wide discretion" to go outside the record in order to get at the true facts, the Court's refusal to do so here amounted to a refusal to exercise its discretion "to entertain a constitutional claim while passing upon kindred issues raised in the same manner." *Williams* v. *Georgia,* 349 U. S. 375, 383.

The difficulty with this argument, beyond the fact that the appellants apparently did not ask the North Carolina court to go outside the record for this purpose, is that that court has consistently and repeatedly held in criminal cases that it will not make independent inquiry to determine the accuracy of the record before it.[10] Illustra-

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"MRS. KENNEDY: Your Honor, at this time we'd like to offer into evidence a decree, the findings of fact, conclusions of law and opinion, as rendered by the Judge of the Federal Court, Middle District of Greensboro.

"MR. KORNEGAY: OBJECTION.

"THE COURT: Do you have anything further that you want to introduce in regard to that?

"MRS. KENNEDY: In addition to that, we have the opinion of the Circuit Court of Appeals on this case.

"MR. KORNEGAY: OBJECTION.

"THE COURT: Let the record show that is being offered in evidence. I will rule on it later.

"(The documents referred to were marked for identification DEFENDANTS' EXHIBITS 6 and 7.)

"THE COURT: Anything else?

"MRS. KENNEDY: Not with this witness, your Honor."

[10] In *civil* cases, the North Carolina Supreme Court, on motion of a party, has issued "a *certiorari* to give the [trial] Judge an opportunity to correct the 'case' already settled by him, [but] . . . such *certiorari* never issues (except to incorporate exceptions to the charge filed within ten days after adjournment: *Cameron* v. *Power Co.*, 137 N. C., 99) unless it is first made clear to the Court, usually by letter from the Judge, that he will make the correction if given the opportunity." *Slocumb* v. *Construction Co.*, 142 N. C. 349, 351, 55 S. E. 196, 197; *Sherrill* v. *Western Union Telegraph Co.*, 116 N. C. 655, 21 S. E. 429; *Broadwell* v. *Ray,* 111 N. C. 457, 16 S. E. 408; *Lowe*

tive decisions are: *State* v. *Robinson,* 229 N. C. 647, 50 S. E. 2d 740; *State* v. *Wolfe,* 227 N. C. 461, 42 S. E. 2d 515; *State* v. *Gause,* 227 N. C. 26, 40 S. E. 2d 463; *State* v. *Stiwinter,* 211 N. C. 278, 189 S. E. 868; *State* v. *Dee,* 214 N. C. 509, 199 S. E. 730; *State* v. *Weaver,* 228 N. C. 39, 44 S. E. 2d 360; *State* v. *Davis,* 231 N. C. 664, 58 S. E. 2d 355; *State* v. *Franklin,* 248 N. C. 695, 104 S. E. 2d 837.

Thus in the *Robinson* case the court reversed a criminal conviction for insufficiency of the evidence, although noting that:

> "[T]he court below, in its charge . . . referred to . . . incriminating facts and circumstances which do not appear in the testimony included in the record before us. This would seem to indicate that the record fails to include all the evidence offered by the State.
>
> "Be that as it may, the record on appeal imports verity, and this Court is bound thereby. (Citing cases.) This is true even though the case is settled by counsel (citing cases); and not by the judge (citing cases) . . . .
>
> "The Supreme Court is bound by the case on appeal, certified by the clerk of the Superior Court, even though the trial judge has had no opportunity to review it, and must decide questions presented upon the record as it comes here, without indulging in assumptions as to what might have occurred." 229 N. C., at 649–650, 50 S. E. 2d, at 741–742.

In *State* v. *Wolfe* the court reversed a criminal conviction on the ground of error in the trial court's instructions to the jury, although pointing out that:

> "The quoted excerpts from the charge do not reflect the clarity of thought and conciseness of state-

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v. *Elliott,* 107 N. C. 718, 12 S. E. 383. Here, the case on appeal was not settled by the trial judge, and no motion for certiorari was made.

ment usually found in the utterances of the eminent and experienced jurist who presided at the trial below. . . . Even so, it [the record] is certified as the case on appeal. We are bound thereby and must decide the question presented upon the record as it comes here, without indulging in assumptions as to what might have occurred." 227 N. C., at 463, 42 S. E. 2d, at 516–517.

In the *Gause* case the court also reversed a conviction upon the ground of error in the charge, although noting that:

"Doubtless the use of the words 'greater weight of evidence' instead of 'beyond reasonable doubt' was a slip of the tongue or an error in transcribing. Nevertheless, it appears in the record, and we must accept it as it comes to us." 227 N. C., at 30, 40 S. E. 2d, at 466.

In the *Stiwinter* case, involving a similar issue, the court said:

"We are constrained to believe that this instruction has been erroneously reported, but it is here in a record duly certified . . . which imports verity, and we are bound by it." 211 N. C., at 279, 189 S. E., at 869.

The *Dee* case involved similar issues. There the court noted:

"It is suggested by the Attorney-General that, in all probability, a typographical error has crept into the transcript and that the word 'disinterested' was used where the word 'interested' appears. In this he is supported by a letter from the judge who presided at the trial, and upon this letter a motion for *certiorari* to correct the record has been lodged on behalf of the State . . . . [T]he transcript is not now

> subject to change or correction. *State* v. *Moore,* 210 N. C., 686, 188 S. E., 421. It imports verity and we are bound by it. . . . 'Under C. S., 643, if the case on appeal as served by the appellant be approved by the respondent or appellee, it becomes the case and a part of the record on appeal, and in connection with the record [proper], may alone be considered in determining the rights of the parties interested in the appeal. . . . The appeal must be heard and determined on the agreed case appearing in the record.' " 214 N. C., at 512, 199 S. E., at 732.

It is thus apparent that the present case is not of a pattern with *Williams* v. *Georgia, supra.* Even if the North Carolina Supreme Court has power to make independent inquiry as to evidence proffered in the trial court but not included in the case on appeal, its decisions make clear that it has without exception refused to do so.[11]

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[11] In *Aycock* v. *Richardson,* 247 N. C. 233, 100 S. E. 2d 379, and *Mason* v. *Moore County Board,* 229 N. C. 626, 51 S. E. 2d 6, the court went beyond the record for the restricted and quite different purpose of determining whether it had jurisdiction of the appeal, *i. e.,* to determine whether an appeal had been properly taken in accordance with North Carolina General Statutes §§ 1–279 and 1–280. In other cases the North Carolina Supreme Court has remanded a cause for completion of the record on appeal because the *record proper* (as opposed to the case on appeal) lacked certain primary essentials. *State* v. *Butts,* 91 N. C. 524 (record failed to show that a court had been held by a judge or that a grand jury had been drawn, sworn, and charged); *State* v. *Farrar,* 103 N. C. 411, 9 S. E. 449 (same); *State* v. *Daniel,* 121 N. C. 574, 28 S. E. 255 (record did not show the organization of the court below or when and where the trial had been held). See also *Kearnes* v. *Gray,* 173 N. C. 717, 92 S. E. 149. In the same category must be placed those cases in which the North Carolina Supreme Court, on motion of a party, remanded the cause for correction of the *record proper.* See *State* v. *Brown,* 203 N. C. 513, 166 S. E. 396 (error in the transcription of the verdict); *State* v. *Mosley,* 212 N. C. 766, 194 S. E. 486

This is not a case, therefore, where the state court failed to exercise discretionary power on behalf of appellants' "federal rights" which it had on other occasions exercised in favor of "kindred issues."

The appellants contend additionally that they brought the federal court's findings and judgment in the *Simkins* case before the state courts in two other ways: (a) by their motion to quash at the outset of the trial, and (b) by their motion to set aside the verdict at the trial's conclusion. The motion to quash set out the existence and alleged effect of the federal court proceedings, and requested leave to offer in evidence in support of the motion "the full record and judgment roll in said case." The motion to set aside the verdict incorporated by reference the motion to quash and also contained an independent summary of the federal court proceedings, requesting the court to take judicial notice of the same. Both motions were denied by the trial court without opinion.

As to the motion to quash, the Supreme Court of North Carolina sustained the trial court's ruling on the ground that the " 'court, in ruling on the motion, is not permitted to consider extraneous evidence. Therefore, when the defect must be established by evidence *aliunde* the record, the motion must be denied.' " 248 N. C., at 489, 103 S. E. 2d, at 849. In upholding the denial of the second motion, the Supreme Court of North Carolina declined to take judicial notice of the federal court's findings and judgment, for reasons discussed at some length in its opinion, and concluded that the appellants "were not, as a matter of right, entitled to have the verdict set aside."

(omission in the transcription of the verdict). See also *State* v. *Marsh*, 134 N. C. 184, 47 S. E. 6 (case reversed because of omission of part of the indictment in the record on appeal). As to the important distinction in North Carolina between the record proper and case on appeal, see n. 7, *supra*.

248 N. C., at 495, 103 S. E. 2d, at 854. An independent examination of North Carolina law convinces us that the state court in both instances was following well-established local procedural rules; it did not make an *ad hoc* determination operating discriminatorily against these particular litigants.

At least since the decision in *State* v. *Turner,* 170 N. C. 701, 86 S. E. 1019, in 1915, it has been the settled rule in North Carolina that "[a] motion to quash . . . lies only for a defect on the face of the warrant or indictment." 170 N. C., at 702, 86 S. E., at 1020. The rule that a motion to quash cannot rest on matters *dehors* the record proper has, so far as investigation reveals, been rigidly adhered to in all subsequent North Carolina decisions.[12] See *State* v. *Brewer,* 180 N. C. 716, 717, 104 S. E. 655, 656; *State* v. *Cochran,* 230 N. C. 523, 524, 53 S. E. 2d 663, 665; *State* v. *Andrews,* 246 N. C. 561, 565, 99 S. E. 2d 745, 748. In the present case the state court simply followed this settled rule of local practice.

A similar conclusion must be reached as to the denial of the motion made at the end of the trial. That motion requested "[t]hat the verdict rendered by the jury . . . be set aside, that the Court withhold and arrest judgment and discharge the defendants notwithstanding the verdict, or grant the defendants a new trial . . . ." Whether the

[12] There is a statutory departure from the settled rule. A North Carolina statute, enacted more than 70 years ago, providing that "[a]ll exceptions to grand jurors for and on account of their disqualifications shall be taken . . . by motion to quash the indictment, and if not so taken, the same shall be deemed to be waived." N. C. Gen. Stat. § 9–26. The North Carolina courts have held that when a motion to quash is employed to attack the qualification of grand jurors, the defendant may rely on evidence outside the record proper. See *State* v. *Gardner,* 104 N. C. 739, 10 S. E. 146; *State* v. *Peoples,* 131 N. C. 784, 42 S. E. 814; *State* v. *Speller,* 229 N. C. 67, 47 S. E. 2d 537; *Miller* v. *State,* 237 N. C. 29, 74 S. E. 2d 513; *State* v. *Perry,* 248 N. C. 334, 103 S. E. 2d 404.

motion be technically considered as one to set aside the verdict and grant a new trial or as one to arrest the judgment and dismiss the defendants, the action of the North Carolina Supreme Court in upholding its denial was clearly in conformity with established state law. "A motion to set aside the verdict and grant a new trial is addressed to the discretion of the court and its refusal to grant such motion is not reviewable on appeal." *State* v. *McKinnon,* 223 N. C. 160, 166, 25 S. E. 2d 606, 610; *State* v. *Chapman,* 221 N. C. 157, 19 S. E. 2d 250; *State* v. *Johnson,* 220 N. C. 252, 17 S. E. 2d 7. See also *State* v. *Wagstaff,* 219 N. C. 15, 19, 12 S. E. 2d 657, 660; *State* v. *Brown,* 218 N. C. 415, 422, 11 S. E. 2d 321, 325; *State* v. *Caper,* 215 N. C. 670, 2 S. E. 2d 864. "A motion in arrest of judgment can be based only on matters which appear on the face of the record proper, or on matters which should, but do not, appear on the face of the record proper. . . . The record proper in any action includes only those essential proceedings which are made of record by the law itself, and as such are self-preserving. . . . The evidence in a case is no part of the record proper. . . . In consequence, defects which appear only by the aid of evidence cannot be the subject of a motion in arrest of judgment." *State* v. *Gaston,* 236 N. C. 499, 501, 73 S. E. 2d 311, 313; *State* v. *Foster,* 228 N. C. 72, 44 S. E. 2d 447; *State* v. *Brown,* 218 N. C. 415, 422, 11 S. E. 2d 321, 325; *State* v. *McKnight,* 196 N. C. 259, 145 S. E. 281; *State* v. *Shemwell,* 180 N. C. 718, 721, 104 S. E. 885.

Examination of the whole course of North Carolina decisions thus precludes the inference that the Supreme Court of North Carolina in this case arbitrarily denied the appellants an opportunity to present their federal claim. The judgment before us for review is the judgment which the Supreme Court of North Carolina made on the record before it, not the action of the state trial

court. "Without any doubt it rests with each State to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law. *Callan* v. *Bransford,* 139 U. S. 197; *Brown* v. *Massachusetts,* 144 U. S. 573; *Jacobi* v. *Alabama,* 187 U. S. 133; *Hulbert* v. *Chicago,* 202 U. S. 275, 281; *Newman* v. *Gates,* 204 U. S. 89; *Chesapeake & Ohio Railway Co.* v. *McDonald,* 214 U. S. 191, 195." *John* v. *Paullin,* 231 U. S. 583, 585. "[W]hen as here there can be no pretence that the [state] Court adopted its view in order to evade a constitutional issue, and the case has been decided upon grounds that have no relation to any federal question, this Court accepts the decision whether right or wrong." *Nickel* v. *Cole,* 256 U. S. 222, 225.[13]

A word of emphasis is appropriate, before concluding, to make entirely explicit what it is that is involved in this case, and what is not. There is no issue here as to the

[13] It has been suggested that even though the ground relied upon by the Supreme Court of North Carolina is an adequate state ground, this case should not be dismissed, but remanded because of a supervening "event." But there has been no significant "change, either in fact or law, which has supervened since the judgment was entered" by the Supreme Court of North Carolina. *Patterson* v. *Alabama,* 294 U. S. 600, 607. All that has happened is that the State Attorney General's Office, at this Court's request after argument, made available a transcript of the trial court proceedings which was stated to be accurate. But it has not been suggested that the State at any time has questioned that the transcript of the trial court's proceedings would reflect that the documents had in fact been offered in evidence in the trial court. See note 9. This case thus does not involve a situation where there has been an intervening change in fact or law. Compare *Gulf, C. & S. F. R. Co.* v. *Dennis,* 224 U. S. 503; *Pagel* v. *MacLean,* 283 U. S. 266; *State Tax Comm'n* v. *Van Cott,* 306 U. S. 511, 515–516.

constitutional right of Negroes to use a public golf course free of racial discrimination. From first to last the courts of North Carolina fully recognized that under the Constitution these appellants could not be convicted if they were excluded from the golf course because of their race. The trial judge so instructed the jury, and the Supreme Court of North Carolina so held. Cf. *Constantian* v. *Anson County,* 244 N. C. 221, 93 S. E. 2d 163. Upon the evidence in this case the jury's verdict established that no such racial discrimination had in fact occurred. "On review here of State convictions, all those matters which are usually termed issues of fact are for conclusive determination by the State courts and are not open for reconsideration by this Court. Observance of this restriction in our review of State courts calls for the utmost scruple." *Watts* v. *Indiana,* 338 U. S. 49, 50.

What is involved here is the assertion of a quite different constitutional claim—that the Supremacy Clause and the Fourteenth Amendment require a state criminal court to give conclusive effect to fact findings made in a civil action upon different evidence by a Federal District Court. While intimating no view as to the merits of this constitutional claim, we note only that it is a completely novel one. Cf. *Hoag* v. *New Jersey,* 356 U. S. 464, 470–471. The North Carolina Supreme Court did not decide this asserted federal question. We have found that it did not do so because of the requirements of rules of state procedural law within the Constitutional power of the States to define, and here clearly delineated and evenhandedly applied. We have no choice but to determine that this appeal must be dismissed because no federal question is before us. That determination is required by principles of judicial administration long settled in this Court, principles applicable alike to all litigants, irrespective of their race, color, politics, or religion.

Dismissed.

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

I do not agree that the decision below rests on adequate nonfederal grounds. And—whether it does or not—it seems to me that the case should not be dismissed in view of developments since the argument.

The crucial holding below is that the North Carolina courts could not consider the *Simkins* [1] record because appellants "for reasons best known to themselves elected not to offer [it] in evidence." 248 N. C. 485, 493, 103 S. E. 2d 846, 852. It goes without saying that the procedural rule thus invoked—that appellants must rely on evidence which was offered at the trial—is, in itself, reasonable. In fact, that rule is elementary in most types of practice. The difficulty here lies not in the rule, but in its application to this case, on this record, and in the light of the fact, acknowledged by the State,[2] that appellants offered the *Simkins* record in evidence.

The relevant facts are few. When the federal court granted its injunction in *Simkins,* it found that appellants had been excluded from Gillespie Park on the occasion in question because they are Negroes. *Simkins* v. *City of Greensboro,* 149 F. Supp. 562, 565. As was held below, such exclusion, if established as a fact in *this* case, would be a complete defense to the State's trespass charge. 248 N. C., at 491–493, 103 S. E. 2d, at 851–852. Therefore, appellants offered the *Simkins* record in evidence during their trial.[3] They claimed, under the Supremacy Clause

[1] *Simkins* v. *City of Greensboro,* 149 F. Supp. 562, affirmed, *City of Greensboro* v. *Simkins,* 246 F. 2d 425.

[2] The State has stipulated to the accuracy of a stenographic trial transcript made available to the Court, after argument, at the Court's request. See the Court's opinion, note 9. Of course, the State denies that the transcript has any relevance to the issues before the Court.

[3] See the Court's opinion, notes 8, 9.

and the Fourteenth Amendment, that the federal court determination barred the state prosecution. However, the State objected to appellants' offer of proof, and the trial court sustained the objection.[4] Thereafter, the jury convicted.

On appeal to the Supreme Court of North Carolina, appellants sought review of their contention that the federal court findings were binding on the State in the subsequent criminal proceedings. At this point they made the mistake which deprived them of the opportunity to have that federal question reviewed. They failed to include their offer of proof and the rejected exhibits in their case on appeal, although they did include the ruling on the State's objection. With the resulting defective record before it, the State Supreme Court held that it could not review appellants' federal question because, as has been indicated, appellants "for reasons best known to themselves elected not to offer [the *Simkins* record] in evidence."

The Court holds that the state ground is adequate to support the decision below because, although we know the fact to be to the contrary, the assertion that appellants failed to offer the *Simkins* record in evidence "is borne out by the record" which the state court had before it. I cannot read that record—appellants' case on appeal—as does the Court. Therefore, I do not agree that the state ground is adequate. But even if it were, it does not follow that the case must—or should—be dismissed. Rather, the State's stipulation—a supervening event which may be of critical significance under North Carolina law—requires a different disposition, in the interests of justice, under controlling precedent.

First. It cannot be said, even on the defective record which the State Supreme Court had before it, that appel-

[4] See the Court's opinion, note 8.

lants "for reasons best known to themselves elected not to offer [the *Simkins* record] in evidence." On the contrary, appellants' case on appeal indicates clearly that appellants offered the *Simkins* record in evidence. When the portions of that record set out in the Court's opinion [5] are read as a whole with the entire case on appeal, it seems reasonably clear that the *Simkins* record was offered in evidence, that the State objected to the offer, and that the objection was sustained. Therefore, whether the result below could have been based on other grounds or not, the factual premise for the ground on which it *was* based lacks fair and substantial support in the record. *That* ground, therefore, is not adequate. Cf. *Creswill* v. *Grand Lodge,* 225 U. S. 246; *Union Pacific R. Co.* v. *Public Service Comm'n,* 248 U. S. 67; *Cedar Rapids Gas Light Co.* v. *Cedar Rapids,* 223 U. S. 655; see *United Gas Co.* v. *Texas,* 303 U. S. 123, 143. "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Davis* v. *Wechsler,* 263 U. S. 22, 24. Since the *only* state ground mentioned in the opinion below is inadequate, this Court should either proceed directly to a consideration of the federal question or—if deemed desirable—should remand the case to the state court for further consideration.

Second. Even if the state ground were adequate, the case should not be dismissed. After the argument in this Court, the State furnished the Court with a copy of the actual stenographic transcript of the trial. The State stipulated to the accuracy of that transcript. The transcript shows, beyond peradventure, that the decision below was based "upon a supposed state of facts which does not exist." *Gorham* v. *Pacific Mut. Life Ins. Co.,* 215

[5] See the Court's opinion, note 8.

N. C. 195, 200, 1 S. E. 2d 569, 572. The North Carolina court apparently recognizes infirmity in its decisions in such cases. *State* v. *Marsh,* 134 N. C. 184, 47 S. E. 6. Therefore, the State's stipulation, an event "which has supervened since the judgment [below] was entered," may very well "affect the result." *Patterson* v. *Alabama,* 294 U. S. 600, 607. Accordingly, under firmly established principles, either the case should be remanded for a decision by the state court on the legal effect of the State's stipulation,[6] or we should decide this question of state law ourselves.[7] To take such action "is not to review, in any proper sense of the term, the decision of the state court upon a non-federal question, but only to deal appropriately with a matter arising since its judgment and having a bearing upon the right disposition of the case." *Patterson* v. *Alabama, supra,* at 607; *State Tax Comm'n* v. *Van Cott,* 306 U. S. 511, 515–516.

Third. It should not be assumed that *other* state grounds, not relied on below, would preclude reconsideration by the state court if the case were remanded. As has been indicated, the State's stipulation may create infirmity in the state court's decision, under North Carolina law. See *State* v. *Marsh, supra.* A remaining obstacle to appellate review of appellants' federal question, under North Carolina practice, may be the omission of the rejected exhibits from appellants' case on appeal. See *In re Smith's Will,* 163 N. C. 464, 79 S. E. 977. But records can be corrected. The Court refers us to cases which show that the North Carolina court may permit

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[6] *Gulf, C. & S. F. R. Co.* v. *Dennis,* 224 U. S. 503; *Pagel* v. *MacLean,* 283 U. S. 266; *Patterson* v. *Alabama, supra; State Tax Comm'n* v. *Van Cott,* 306 U. S. 511; *New York ex rel. Whitman* v. *Wilson,* 318 U. S. 688; *Ashcraft* v. *Tennessee,* 322 U. S. 143, 155–156; *Williams* v. *Georgia,* 349 U. S. 375.

[7] *Missouri ex rel. Wabash R. Co.* v. *Public Service Comm'n,* 273 U. S. 126; *Steamship Co.* v. *Joliffe,* 2 Wall. 450.

corrections in the record proper [8] and in the case on appeal.[9] It may authorize corrections not only when fault is attributable to the lower court,[10] but also when it is chargeable to the parties.[11] It may do so pursuant to agreement between the parties [12] and pursuant to motion of one of the parties.[13] Indeed, it appears that it may be able to do so on its own motion.[14] Its power to inquire into the accuracy of the record before it is established—

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[8] *State* v. *Mosley,* 212 N. C. 766, 194 S. E. 486; *State* v. *Brown,* 203 N. C. 513, 166 S. E. 396; *State* v. *Marsh, supra; State* v. *Daniel,* 121 N. C. 574, 28 S. E. 255; *State* v. *Farrar,* 103 N. C. 411, 9 S. E. 449, 104 N. C. 702, 10 S. E. 159; *State* v. *Butts,* 91 N. C. 524; cf. *Aycock* v. *Richardson,* 247 N. C. 233, 100 S. E. 2d 379; *Mason* v. *Moore County Board,* 229 N. C. 626, 51 S. E. 2d 6.

[9] *Cameron* v. *Power Co.,* 137 N. C. 99, 49 S. E. 76; *Arnold* v. *Dennis,* 131 N. C. 114, 42 S. E. 552; *Sherrill* v. *Western Union Tel. Co.,* 116 N. C. 654, 21 S. E. 400; *Broadwell* v. *Ray,* 111 N. C. 457, 16 S. E. 408; *Lowe* v. *Elliott,* 107 N. C. 718, 12 S. E. 383; cf. *Aycock* v. *Richardson,* 247 N. C. 233, 100 S. E. 2d 379; *Mason* v. *Moore County Board,* 229 N. C. 626, 51 S. E. 2d 6.

[10] *Cameron* v. *Power Co.,* 137 N. C. 99, 49 S. E. 76; *Sherrill* v. *Western Union Tel. Co.,* 116 N. C. 654, 21 S. E. 400; *Broadwell* v. *Ray,* 111 N. C. 457, 16 S. E. 408; *State* v. *Daniel,* 121 N. C. 574, 28 S. E. 255.

[11] *Arnold* v. *Dennis,* 131 N. C. 114, 42 S. E. 552; *State* v. *Daniel,* 121 N. C. 574, 28 S. E. 255.

[12] *Smith* v. *Capital Coca-Cola Bottling Co.,* 221 N. C. 202, 19 S. E. 2d 626; *Gorham* v. *Pacific Mut. Life Ins. Co., supra; Miller* v. *Scott,* 185 N. C. 93, 116 S. E. 86.

[13] *State* v. *Mosley,* 212 N. C. 766, 194 S. E. 486; *State* v. *Brown,* 203 N. C. 513, 166 S. E. 396; *Cameron* v. *Power Co.,* 137 N. C. 99, 49 S. E. 76; *State* v. *Marsh, supra; Sherrill* v. *Western Union Tel. Co.,* 116 N. C. 654, 21 S. E. 400; *Broadwell* v. *Ray,* 111 N. C. 457, 16 S. E. 408.

[14] See *Aycock* v. *Richardson,* 247 N. C. 233, 100 S. E. 2d 379; *Mason* v. *Moore County Board,* 229 N. C. 626, 51 S. E. 2d 6; *State* v. *Butts,* 91 N. C. 524; *State* v. *Daniel,* 121 N. C. 574, 28 S. E. 255; *State* v. *Farrar,* 103 N. C. 411, 9 S. E. 449, 104 N. C. 702, 10 S. E. 159.

to some extent at least—by recent decisions,[15] and its power to order the lower courts to send up "additional papers and parts of the record" is explicitly recognized by its rules.[16] Therefore, the state court *could* permit a correction of the record—and consequently could decide the federal question—if the case were remanded.

It is true that there is language in North Carolina cases, to which the State has called our attention, that indicates that a record settled by agreement—rather than by the trial court—may only be corrected by agreement. See *Smith* v. *Capital Coca-Cola Bottling Co.*, 221 N. C. 202, 19 S. E. 2d 626; *Gorham* v. *Pacific Mut. Life Ins. Co.*, *supra*. And language from *State* v. *Dee*, 214 N. C. 509, 512, 199 S. E. 730, 732, quoted by the Court in another connection, suggests that the state court is disinclined to permit the correction of a defective record when the case on appeal is settled by the parties. But these cases are not in point in the circumstances of the case before us.

The rule stated in *Smith* and *Gorham*—that a record settled by agreement can only be corrected by agreement—is subject to a very relevant qualification. For in *Gorham*, the North Carolina court observed, in denying a losing party's request for a certiorari to correct the record, that:

> "[T]here is no concession on the part of the [prevailing party] that the case has been decided 'upon a sham issue,' or 'upon a supposed state of facts which does not exist,' nor yet upon a misconception of the record. *Cook* v. *Mfg. Co.*, [183 N. C. 48, 110

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[15] *Aycock* v. *Richardson*, 247 N. C. 233, 100 S. E. 2d 379; *Mason* v. *Moore County Board*, 229 N. C. 626, 51 S. E. 2d 6.

[16] N. C. S. C. Rule 19 (1). Rule 19 (1) sets out the requirements as to form and content of transcripts on appeal. After setting out these requirements, it recites: "Provided, further, that this rule is subject to the power of this Court to order additional papers and parts of the record to be sent up."

> S. E. 608]; *S.* v. *Marsh,* [*supra*]. These are allegations of the [losing party], and [the prevailing party] says they rest only in allegation. She further says that the interpretation placed upon the record 'was and is absolutely correct'; . . . and that the transcript admits of no other interpretation." 215 N. C., at 200, 1 S. E. 2d, at 572.

Here, on the other hand, the State has stipulated to facts which *do* establish that the case was decided below "upon a supposed state of facts which does not exist." That is precisely what the prevailing party in *Gorham* did not concede. This case, therefore, is governed by *Cook* and *Marsh,* not by *Gorham.*

Likewise, in *Dee,* the North Carolina court denied the State's request for a certiorari to correct an alleged error in the case on appeal. But in *Dee,* as in *Gorham,* the prevailing party did not concede that there was any error in the record. In fact, the court itself expressed skepticism about the State's claim:

> "It is suggested by the Attorney-General that, in all probability, a typographical error has crept into the transcript and that the word 'disinterested' was used where the word 'interested' appears. In this he is supported by a letter from the judge who presided at the trial, and upon this letter a motion for *certiorari* to correct the record has been lodged on behalf of the State. The solicitor apparently took a different view of the matter when he agreed to the statement of case on appeal with an exception pointed directly to the expression." 214 N. C., at 512, 199 S. E., at 732.

On these facts, quite different from those before us, it is perhaps understandable that the state court refused to entertain the State's appeal to its discretion.

Therefore, it appears that if the case were remanded, appellants would very likely be permitted to correct their

case on appeal, in view of the State's stipulation. And, as has been indicated, a correction could now be allowed even if the State objected to it. But I am sure that the State would not object, for North Carolina has no interest in depriving its citizens of their liberty on assumptions that do not accord with fact. It seems clear, therefore, that under North Carolina law, appellants may yet have their federal question reviewed—unless we dismiss.[17]

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[17] Under my view of the case, it is unnecessary to decide whether the North Carolina court's broad powers with respect to the record, and the evidence of their frequent exercise in the interests of justice, see notes 8–16, *supra*, are consistent with the Court's rejection of appellants' argument, based on *Williams* v. *Georgia*, 349 U. S. 375, that the North Carolina court should have gone outside the record to get at the truth as it has in some other cases. *E. g.*, *Aycock* v. *Richardson*, 247 N. C. 233, 100 S. E. 2d 379.

However, it may be worth noting in this connection that there is no relevant distinction between criminal cases like this one and civil cases like *Aycock*. Cf. the Court's opinion, note 10. The same statute, said to limit the power of the state court to go outside the record, see *State* v. *Dee*, *supra*, at 512, 199 S. E., at 732 (quoted by the Court), is equally applicable to either type of case. Likewise, the apparently inflexible rule stated in the criminal cases cited by the Court is also stated in numerous civil cases. See, as representative, *Hagan* v. *Jenkins*, 234 N. C. 425, 67 S. E. 2d 380; *Bame* v. *Palmer Stone Works*, 232 N. C. 267, 59 S. E. 2d 812. The same precedents are applicable in both types of case. See, for example, *Bame* v. *Palmer Stone Works*, *supra*, and conversely, the *Dee* and *Weaver* cases cited by the Court. Therefore, if the rule stated in the criminal decisions relied on by the Court is as inflexible as it purports to be, it should be equally so in civil cases. Yet *Aycock* shows that the rule is less rigid in fact than in articulation.

The Court also distinguishes *Aycock* because there the state court went outside the record to verify an apparent lack of jurisdiction. See the Court's opinion, note 11. However, so far as has been called to our attention, the North Carolina court has never suggested such a distinction. It would seem more logical, therefore, to assume that if the state court can go outside the record where it apparently lacks jurisdiction, it can do so where its jurisdiction is clear.

In view of the federal court finding that the appellants were excluded from Gillespie Park because of their race, these convictions give rise to serious constitutional doubts. Unless dismissal cannot be avoided, the appellants should not be deprived of their liberty without being heard on their federal question. Our own precedents require that we either remand the case or decide the questions which it presents.

ELKINS ET AL. *v.* UNITED STATES.

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

No. 126. Argued March 28–29, 1960.—Decided June 27, 1960.

1. Evidence obtained by state officers during a search which, if conducted by federal officers, would have violated the defendant's immunity from unreasonable searches and seizures under the Fourth Amendment is inadmissible over the defendant's timely objection in a federal criminal trial, even when there was no participation by federal officers in the search and seizure. Pp. 206–224.
2. In determining whether there has been an unreasonable search and seizure by state officers, a federal court must make an independent inquiry, whether or not there has been such an inquiry by a state court, and irrespective of how any such inquiry may have turned out. Pp. 223–224.
3. The test is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed. P. 224.

266 F. 2d 588, judgment vacated and case remanded.

Frederick Bernays Wiener argued the cause for petitioners. With him on the brief was *Walter H. Evans, Jr.*

Assistant Attorney General Wilkey argued the cause for the United States. With him on the brief were *Solicitor General Rankin, Beatrice Rosenberg* and *Eugene L. Grimm.*

MR. JUSTICE STEWART delivered the opinion of the Court.

The petitioners were indicted in the United States District Court in Oregon for the offense of intercepting and divulging telephone communications and of conspiracy to do so. 47 U. S. C. §§ 501, 605; 18 U. S. C. § 371. Before trial the petitioners made a motion to suppress as evidence several tape and wire recordings and

a recording machine, which had originally been seized by state law enforcement officers in the home of petitioner Clark under circumstances which, two Oregon courts had found, had rendered the search and seizure unlawful.[1] At the hearing on the motion the district judge assumed without deciding that the articles had been obtained as the result of an unreasonable search and seizure, but denied the motion to suppress because there was no evidence that any "agent of the United States had any knowledge or information or suspicion of any kind that this search was being contemplated or was eventually made by the State officers until they read about it in the newspaper." At the trial the articles in question were admitted in evidence against the petitioners, and they were convicted.

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[1] The state officers, having received information that petitioners had in their possession obscene motion pictures, procured a search warrant to search petitioner Clark's home. The affidavit upon which the warrant was based recited that "upon information and belief" it was thought that Clark possessed obscene pictures and accompanying sound recordings. The search revealed no obscene pictures, but various paraphernalia believed to have been used in making wiretaps were found and seized.

Following an appropriate motion, the Multnomah County District Court held the search warrant invalid and ordered suppression of the evidence. This action came, however, after the return of an indictment by a state grand jury, and the local district attorney challenged the power of the district court to suppress evidence once an indictment was in. Accordingly, the question was later argued anew on a motion to suppress in the Circuit Court for Multnomah County, a court of general criminal jurisdiction. That court held the search unlawful and granted the motion to suppress. The state indictment was subsequently dismissed.

During the course of these state proceedings federal officers, acting under a federal search warrant, obtained the articles from the safe-deposit box of a local bank where the state officials had placed them. Shortly after the state case was abandoned, a federal indictment was returned, and the instant prosecution followed.

The convictions were affirmed by the Court of Appeals for the Ninth Circuit, 266 F. 2d 588. That court agreed with the district judge that it was unnecessary to determine whether or not the original state search and seizure had been lawful, because there had been no participation by federal officers. "Hence the unlawfulness of the State search and seizure, if indeed they were unlawful, did not entitle defendants to an order of the District Court suppressing the property seized." 266 F. 2d, at 594.

We granted certiorari, 361 U. S. 810, to consider a question of importance in the administration of federal justice. The question is this: May articles obtained as the result of an unreasonable search and seizure by state officers, without involvement of federal officers, be introduced in evidence against a defendant over his timely objection in a federal criminal trial? In a word, we re-examine here the validity of what has come to be called the silver platter doctrine.[2] For the reasons that follow we conclude that this doctrine can no longer be accepted.

To put the issue in historic perspective, the appropriate starting point must be *Weeks* v. *United States*, 232 U. S.

[2] The "silver platter" label stems from a phrase first turned in the prevailing opinion in *Lustig* v. *United States*, 338 U. S. 74, 79. The doctrine has been the subject of much comment in legal periodicals. See, *e. g.*, Allen, The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties, 45 Ill. L. Rev. 1, 14–25; Galler, The Exclusion of Illegal State Evidence in Federal Courts, 49 J. Crim. L., Criminology & Police Science 455; Kohn, Admissibility in Federal Court of Evidence Illegally Seized by State Officers, 1959 Wash. U. L. Q. 229; Kamisar, *Wolf* and *Lustig* Ten Years Later: Illegal State Evidence in State and Federal Courts, 43 Minn. L. Rev. 1083; Parsons, State-Federal Crossfire in Search and Seizure and Self Incrimination, 42 Cornell L. Q. 346, 347–368; Comment, The *Benanti* Case: State Wiretap Evidence and the Federal Exclusionary Rule, 57 Col. L. Rev. 1159; Comment, Judicial Control of Illegal Search and Seizure, 58 Yale L. J. 144; Notes, 51 Col. L. Rev. 128, 27 Geo. Wash. L. Rev. 392, 5 N. Y. L. F. 301, 6 U. C. L. A. Rev. 703.

383, decided in 1914. It was there that the Court established the rule which excludes in a federal criminal prosecution evidence obtained by federal agents in violation of the defendant's Fourth Amendment rights. The foundation for that decision was set out in forthright words:

> "The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.
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> ". . . If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts

of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land." 232 U. S. 383, 391–393.

To the exclusionary rule of *Weeks* v. *United States* there has been unquestioning adherence for now almost half a century. See *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385; *Gouled* v. *United States,* 255 U. S. 298; *Amos* v. *United States,* 255 U. S. 313; *Agnello* v. *United States,* 269 U. S. 20; *Go-Bart Co.* v. *United States,* 282 U. S. 344; *Grau* v. *United States,* 287 U. S. 124; *McDonald* v. *United States,* 335 U. S. 451; *United States* v. *Jeffers,* 342 U. S. 48.

But the *Weeks* case also announced, unobtrusively but nonetheless definitely, another evidentiary rule. Some of the articles used as evidence against Weeks had been unlawfully seized by local police officers acting on their own account. The Court held that the admission of this evidence was not error for the reason that "the Fourth Amendment is not directed to individual misconduct of such officials. Its limitations reach the Federal Government and its agencies." 232 U. S., at 398. Despite the limited discussion of this second ruling in the *Weeks* opinion, the right of the prosecutor in a federal criminal trial to avail himself of evidence unlawfully seized by state officers apparently went unquestioned for the next thirty-five years. See, *e. g., Byars* v. *United States,* 273 U. S. 28, 33; *Feldman* v. *United States,* 322 U. S. 487, 492.[3]

[3] See, *e. g., Rettich* v. *United States,* 84 F. 2d 118 (C. A. 1st Cir.); *Milburne* v. *United States,* 77 F. 2d 310 (C. A. 2d Cir.); *Miller* v. *United States,* 50 F. 2d 505 (C. A. 3d Cir.); *Riggs* v. *United States,* 299 Fed. 273 (C. A. 4th Cir.); *Timonen* v. *United States,* 286 Fed. 935 (C. A. 6th Cir.); *Fowler* v. *United States,* 62 F. 2d 656 (C. A. 7th Cir.) (dictum); *Elam* v. *United States,* 7 F. 2d 887 (C. A. 8th

That such a rule would engender practical difficulties in an era of expanding federal criminal jurisdiction could not, perhaps, have been foreseen. In any event the difficulties soon appeared. They arose from the entirely commendable practice of state and federal agents to cooperate with each other in the investigation and detection of criminal activity. When in a federal criminal prosecution evidence which had been illegally seized by state officers was sought to be introduced, the question inevitably arose whether there had been such participation by federal agents in the search and seizure as to make applicable the exclusionary rule of *Weeks.* See *Flagg* v. *United States,* 233 Fed. 481, 483; *United States* v. *Slusser,* 270 Fed. 818, 820; *United States* v. *Falloco,* 277 Fed. 75, 82; *Legman* v. *United States,* 295 Fed. 474, 476–478; *Marron* v. *United States,* 8 F. 2d 251, 259; *United States* v. *Brown,* 8 F. 2d 630, 631.

This Court first came to grips with the problem in *Byars* v. *United States,* 273 U. S. 28. There it was held that when the participation of the federal agent in the search was "under color of his federal office" and the search "in substance and effect was a joint operation of the local and federal officers," then the evidence must be excluded, because "the effect is the same as though [the federal agent] had engaged in the undertaking as one exclusively his own." 273 U. S., at 33. In *Gambino* v. *United States,* 275 U. S. 310, the Court went further. There state officers had seized liquor from the defendants' automobile after an unlawful search in which no federal officers had participated. The liquor was admitted in evidence against the defendants in their subsequent federal trial for violation of the National Prohibition Act. This

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Cir.)"; *Brown* v. *United States,* 12 F. 2d 926 (C. A. 9th Cir.); *Gilbert* v. *United States,* 163 F. 2d 325 (C. A. 10th Cir.); *Shelton* v. *United States,* 83 U. S. App. D. C. 257, 169 F. 2d 665, overruled by *Hanna* v. *United States,* 104 U. S. App. D. C. 205, 260 F. 2d 723.

Court reversed the judgments of conviction, holding that the illegally seized evidence should have been excluded. Pointing out that there was "no suggestion that the defendants were committing, at the time of the arrest, search and seizure, any state offense; or that they had done so in the past; or that the [state] troopers believed that they had," the Court found that "[t]he wrongful arrest, search and seizure were made solely on behalf of the United States." 275 U. S., at 314, 316.

Despite these decisions, or perhaps because of them, cases kept arising in which the federal courts were faced with determining whether there had been such participation by federal officers in a lawless state search as to make inadmissible in evidence that which had been seized. And it is fair to say that in their approach to this recurring question, no less than in their disposition of concrete cases, the federal courts did not find themselves in complete harmony, nor even internally self-consistent.[4] No less difficulty was experienced by the courts in determining whether, even in the absence of actual participation by federal agents, the state officers' illegal search and seizure had nevertheless been made "solely on behalf of the United States." [5]

But difficult and unpredictable as may have been their application to concrete cases, the controlling principles seemed clear up to 1949. Evidence which had been seized by federal officers in violation of the Fourth Amendment

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[4] Compare *Sutherland* v. *United States,* 92 F. 2d 305 (C. A. 4th Cir.); *Ward* v. *United States,* 96 F. 2d 189 (C. A. 5th Cir.); *Fowler* v. *United States,* 62 F. 2d 656 (C. A. 7th Cir.); *United States* v. *Butler,* 156 F. 2d 897 (C. A. 10th Cir.); with *Kitt* v. *United States,* 132 F. 2d 920 (C. A. 4th Cir.); *Sloane* v. *United States,* 47 F. 2d 889 (C. A. 10th Cir.).

[5] Compare *United States* v. *Jankowski,* 28 F. 2d 800 (C. A. 2d Cir.); *Marsh* v. *United States,* 29 F. 2d 172 (C. A. 2d Cir.); with *United States* v. *Butler,* 156 F. 2d 897 (C. A. 10th Cir.).

could not be used in a federal criminal prosecution. Evidence which had been obtained by state agents in an unreasonable search and seizure was admissible, because, as *Weeks* had pointed out, the Fourth Amendment was not "directed to" the "misconduct of such officials." But if federal agents had participated in an unreasonable search and seizure by state officers, or if the state officers had acted solely on behalf of the United States, the evidence was not admissible in a federal prosecution.

Then came *Wolf* v. *Colorado,* 338 U. S. 25. With the ultimate determination in *Wolf*—that the Due Process Clause of the Fourteenth Amendment does not itself require state courts to adopt the exclusionary rule with respect to evidence illegally seized by state agents—we are not here directly concerned. But nothing could be of greater relevance to the present inquiry than the underlying constitutional doctrine which *Wolf* established. For there it was unequivocally determined by a unanimous Court that the Federal Constitution, by virtue of the Fourteenth Amendment, prohibits unreasonable searches and seizures by state officers. "The security of one's privacy against arbitrary intrusion by the police . . . is . . . implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause." 338 U. S. 25, 27–28. The Court has subsequently found frequent occasion to reiterate this statement from *Wolf.* See *Stefanelli* v. *Minard,* 342 U. S. 117, 119; *Irvine* v. *California,* 347 U. S. 128, 132; *Frank* v. *Maryland,* 359 U. S. 360, 362–363.

The foundation upon which the admissibility of state-seized evidence in a federal trial originally rested—that unreasonable state searches did not violate the Federal Constitution—thus disappeared in 1949. This removal of the doctrinal underpinning for the admissibility rule has apparently escaped the attention of most of the federal courts, which have continued to approve the admission of

evidence illegally seized by state officers without so much as even discussing the impact of *Wolf*.[6] Only two of the courts of appeals which have adhered to the admissibility rule appear to have recognized that *Wolf* casts doubt upon its continuing validity. *Jones* v. *United States,* 217 F. 2d 381 (C. A. 8th Cir.); *United States* v. *Benanti,* 244 F. 2d 389 (C. A. 2d Cir.), reversed on other grounds, 355 U. S. 96. Cf. *Kendall* v. *United States,* 272 F. 2d 163, 165 (C. A. 5th Cir.). The Court of Appeals for the District of Columbia has been alone in squarely holding "that the Weeks and the Wolf decisions, considered together, make all evidence obtained by unconstitutional search and seizure unacceptable in federal courts." *Hanna* v. *United States,* 104 U. S. App. D. C. 205, 209, 260 F. 2d 723, 727.

Yet this Court's awareness that the constitutional doctrine of *Wolf* operated to undermine the logical foundation of the *Weeks* admissibility rule has been manifest from the very day that *Wolf* was decided. In *Lustig* v. *United States,* 338 U. S. 74, decided that day, the prevailing opinion carefully left open the question of the continuing validity of the admissibility rule. "Where there is participation on the part of federal officers," the opinion said, "it is not necessary to consider what would be the result if the search had been conducted entirely by State officers." 338 U. S., at 79. And in *Benanti* v. *United States,* 355 U. S. 96, the Court was at pains to point out that "[i]t has remained an open question in this Court whether evidence obtained solely by state agents in an illegal search may be admissible in federal court . . . ." 355 U. S., at 102, note 10. There the question has stood for 11 years.

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[6] See, *e. g., Burford* v. *United States,* 214 F. 2d 124, 125 (C. A. 5th Cir.); *Ford* v. *United States,* 234 F. 2d 835, 837 (C. A. 6th Cir.); *United States* v. *Moses,* 234 F. 2d 124 (C. A. 7th Cir.); *Williams* v. *United States,* 215 F. 2d 695, 696 (C. A. 9th Cir.); *Gallegos* v. *United States,* 237 F. 2d 694, 696–697 (C. A. 10th Cir.).

If resolution of the issue were to be dictated solely by principles of logic, it is clear what our decision would have to be. For surely no distinction can logically be drawn between evidence obtained in violation of the Fourth Amendment and that obtained in violation of the Fourteenth. The Constitution is flouted equally in either case. To the victim it matters not whether his constitutional right has been invaded by a federal agent or by a state officer.[7] It would be a curiously ambivalent rule that would require the courts of the United States to differentiate between unconstitutionally seized evidence upon so arbitrary a basis. Such a distinction indeed would appear to reflect an indefensibly selective evaluation of the provisions of the Constitution. Moreover, it would seem logically impossible to justify a policy that would bar from a federal trial what state officers had obtained in violation of a federal statute, yet would admit that which they had seized in violation of the Constitution itself. Cf. *Benanti* v. *United States,* 355 U. S. 96.

[7] Long before the Court established that the Fourteenth Amendment protects the security of one's privacy against arbitrary intrusion by state officers, Mr. Justice (then Judge) Cardozo perceived a basic incongruity in a rule which excludes evidence unlawfully obtained by federal officers, but admits in the same court evidence unlawfully obtained by state agents. "The Federal rule as it stands is either too strict or too lax. A Federal prosecutor may take no benefit from evidence collected through the trespass of a Federal officer. . . . He does not have to be so scrupulous about evidence brought to him by others. How finely the line is drawn is seen when we recall that marshals in the service of the nation are on one side of it, and police in the service of the States on the other. The nation may keep what the servants of the States supply. . . . We must go farther or not so far. The professed object of the trespass rather than the official character of the trespasser should test the rights of government. . . . A government would be disingenuous, if, in determining the use that should be made of evidence drawn from such a source, it drew a line between them. This would be true whether they had acted in concert or apart." *People* v. *Defore,* 242 N. Y. 13, 22–23, 150 N. E. 585, 588.

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Mere logical symmetry and abstract reasoning are perhaps not enough, however, to support a doctrine that would exclude relevant evidence from the trial of a federal criminal case. It is true that there is not involved here an absolute or qualified testimonial privilege such as that accorded a spouse, a patient, or a penitent, which irrevocably bars otherwise admissible evidence because of the *status* of the witness or his relationship to the defendant. Cf. *Hawkins* v. *United States,* 358 U. S. 74. A rule which would exclude evidence if, and only if, government officials in a particular case had chosen to engage in unlawful *conduct* is of a different order. Yet, any apparent limitation upon the process of discovering truth in a federal trial ought to be imposed only upon the basis of considerations which outweigh the general need for untrammeled disclosure of competent and relevant evidence in a court of justice.

What is here invoked is the Court's supervisory power over the administration of criminal justice in the federal courts, under which the Court has "from the very beginning of its history, formulated rules of evidence to be applied in federal criminal prosecutions." *McNabb* v. *United States,* 318 U. S. 332, 341. In devising such evidentiary rules, we are to be governed by "principles of the common law as they may be interpreted . . . in the light of reason and experience." Rule 26, Fed. Rules Crim. Proc. Determination of the issue before us must ultimately depend, therefore, upon evaluation of the exclusionary rule itself in the context here presented.

The exclusionary rule has for decades been the subject of ardent controversy. The arguments of its antagonists and of its proponents have been so many times marshalled as to require no lengthy elaboration here. Most of what has been said in opposition to the rule was distilled in a single Cardozo sentence—"The criminal is to go free because the constable has blundered." *People* v. *Defore,*

242 N. Y. 13, 21, 150 N. E. 585, 587. The same point was made at somewhat greater length in the often quoted words of Professor Wigmore: "Titus, you have been found guilty of conducting a lottery; Flavius, you have confessedly violated the constitution. Titus ought to suffer imprisonment for crime, and Flavius for contempt. But no! We shall let you *both* go free. We shall not punish Flavius directly, but shall do so by reversing Titus' conviction. This is our way of teaching people like Flavius to behave, and of teaching people like Titus to behave, and incidentally of securing respect for the Constitution. Our way of upholding the Constitution is not to strike at the man who breaks it, but to let off somebody else who broke something else." 8 Wigmore, Evidence (3d ed. 1940), § 2184.

Yet, however felicitous their phrasing, these objections hardly answer the basic postulate of the exclusionary rule itself. The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it. See *Eleuteri* v. *Richman*, 26 N. J. 506, 513, 141 A. 2d 46, 50. Mr. Justice Jackson summed it up well:

> "Only occasional and more flagrant abuses come to the attention of the courts, and then only those where the search and seizure yields incriminating evidence and the defendant is at least sufficiently compromised to be indicted. If the officers raid a home, an office, or stop and search an automobile but find nothing incriminating, this invasion of the personal liberty of the innocent too often finds no practical redress. There may be, and I am convinced that there are, many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is made, about

which courts do nothing, and about which we never hear.

"Courts can protect the innocent against such invasions only indirectly and through the medium of excluding evidence obtained against those who frequently are guilty." *Brinegar* v. *United States,* 338 U. S. 160, 181 (dissenting opinion).

Empirical statistics are not available to show that the inhabitants of states which follow the exclusionary rule suffer less from lawless searches and seizures than do those of states which admit evidence unlawfully obtained. Since as a practical matter it is never easy to prove a negative, it is hardly likely that conclusive factual data could ever be assembled. For much the same reason, it cannot positively be demonstrated that enforcement of the criminal law is either more or less effective under either rule.

But pragmatic evidence of a sort is not wanting. The federal courts themselves have operated under the exclusionary rule of *Weeks* for almost half a century; yet it has not been suggested either that the Federal Bureau of Investigation has thereby been rendered ineffective, or that the administration of criminal justice in the federal courts has thereby been disrupted.[8] Moreover, the expe-

[8] The Director of the Federal Bureau of Investigation has written as follows:

"One of the quickest ways for any law enforcement officer to bring public disrepute upon himself, his organization and the entire profession is to be found guilty of a violation of civil rights. Our people may tolerate many mistakes of both intent and performance, but, with unerring instinct, they know that when any person is intentionally deprived of his constitutional rights those responsible have committed no ordinary offense. A crime of this nature, if subtly encouraged by failure to condemn and punish, certainly leads down the road to totalitarianism.

"Civil rights violations are all the more regrettable because they are so unnecessary. Professional standards in law enforcement pro-

rience of the states is impressive. Not more than half the states continue totally to adhere to the rule that evidence is freely admissible no matter how it was obtained.[9] Most of the others have adopted the exclusionary rule in its entirety; the rest have adopted it in part.[10] The movement towards the rule of exclusion has been halting but seemingly inexorable.[11] Since the *Wolf* decision one state has switched its position in that direction by legislation,[12] and two others by judicial decision.[13] Another state, uncommitted until 1955, in that year adopted the rule

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vide for fighting crime with intelligence rather than force. . . . In matters of scientific crime detection, the services of our FBI Laboratory are available to every duly constituted law enforcement officer in the nation. Full use of these and other facilities should make it entirely unnecessary for any officer to feel the need to use dishonorable methods.

"Complete protection of civil rights should be a primary concern of every officer. These rights are basic in the law and our obligation to uphold it leaves no room for any other course of action. Although the great majority in our profession have long since adopted that policy, we cannot yet be entirely proud of our record. Incidents which give justification to charges of civil rights violations by law enforcement officers still occur. . . . This state of affairs ought to be taken as a challenge to all of us. Every progressive police administrator and officer must do everything in his power to bring about such an improvement that our conduct and our record will conclusively prove each of these charges to be false." FBI Law Enforcement Bulletin, September, 1952, pp. 1–2.

[9] See Appendix, *post,* pp. 224–225.

[10] See Appendix, *post,* pp. 224–225.

[11] For a discussion of recent developments in British Commonwealth jurisdictions, see Cowen, The Admissibility of Evidence Procured Through Illegal Searches and Seizures in British Commonwealth Jurisdictions, 5 Vanderbilt L. Rev. 523 (1952). The author concludes upon a survey of Commonwealth decisions "that there is no uniform rule on the admissibility of evidence procured through illegal searches and seizures." *Id.,* at 546.

[12] North Carolina. See Appendix, *post,* p. 230.

[13] Delaware and California. See Appendix, *post,* p. 226.

of exclusion.[14] Significantly, most of the exclusionary states which have had to consider the issue have held that evidence obtained by *federal* officers in a search and seizure unlawful under the Fourth Amendment must be suppressed in a prosecution in the *state* courts. *State* v. *Arregui,* 44 Idaho 43, 254 P. 788; *Walters* v. *Commonwealth,* 199 Ky. 182, 250 S. W. 839; *Little* v. *State,* 171 Miss. 818, 159 So. 103; *State* v. *Rebasti,* 306 Mo. 336, 267 S. W. 858; *State* v. *Hiteshew,* 42 Wyo. 147, 292 P. 2; see *Ramirez* v. *State,* 123 Tex. Cr. R. 254, 58 S. W. 2d 829. Compare *Rea* v. *United States,* 350 U. S. 214.

The experience in California has been most illuminating. In 1955 the Supreme Court of that State resolutely turned its back on many years of precedent and adopted the exclusionary rule. *People* v. *Cahan,* 44 Cal. 2d 434, 282 P. 2d 905. "We have been compelled to reach that conclusion because other remedies have completely failed to secure compliance with the constitutional provisions on the part of police officers with the attendant result that the courts under the old rule have been constantly required to participate in, and in effect condone, the lawless activities of law enforcement officers. . . . Experience has demonstrated, however, that neither administrative, criminal nor civil remedies are effective in suppressing lawless searches and seizures. The innocent suffer with the guilty, and we cannot close our eyes to the effect the rule we adopt will have on the rights of those not before the court." 44 Cal. 2d 434, at 445, 447, 282 P. 2d 905, at 911–912, 913.

The chief law enforcement officer of California was quoted as having made this practical evaluation of the *Cahan* decision less than two years later:

> "The over-all effects of the Cahan decision, particularly in view of the rules now worked out by the Supreme Court, have been excellent. A much

[14] Rhode Island. See Appendix, *post,* p. 231.

> greater education is called for on the part of all peace officers of California. As a result, I am confident they will be much better police officers. I think there is more cooperation with the District Attorneys and this will make for better administration of criminal justice." [15]

Impressive as is this experience of individual states, even more is to be said for adoption of the exclusionary rule in the particular context here presented—a context which brings into focus considerations of federalism. The very essence of a healthy federalism depends upon the avoidance of needless conflict between state and federal courts. Yet when a federal court sitting in an exclusionary state admits evidence lawlessly seized by state agents, it not only frustrates state policy, but frustrates that policy in a particularly inappropriate and ironic way. For by admitting the unlawfully seized evidence the federal court serves to defeat the state's effort to assure obedience to the Federal Constitution. In states which have not adopted the exclusionary rule, on the other hand, it would work no conflict with local policy for a federal court to decline to receive evidence unlawfully seized by state officers. The question with which we deal today affects not at all the freedom of the states to develop and apply their own sanctions in their own way. Cf. *Wolf* v. *Colorado,* 338 U. S. 25.

Free and open cooperation between state and federal law enforcement officers is to be commended and encouraged. Yet that kind of cooperation is hardly promoted by a rule that implicitly invites federal officers to withdraw from such association and at least tacitly to encour-

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[15] Excerpt from letter of Governor Edmund G. Brown, then Attorney General of the State of California, to the Stanford Law Review, quoted in Note, 9 Stan. L. Rev. 515, 538 (1957). See also Barrett, Exclusion of Evidence Obtained by Illegal Searches—A Comment on People vs. Cahan, 43 Cal. L. Rev. 565, 586–588 (1955).

age state officers in the disregard of constitutionally protected freedom. If, on the other hand, it is understood that the fruit of an unlawful search by state agents will be inadmissible in a federal trial, there can be no inducement to subterfuge and evasion with respect to federal-state cooperation in criminal investigation. Instead, forthright cooperation under constitutional standards will be promoted and fostered.

It must always be remembered that what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures. Without pausing to analyze individual decisions, it can fairly be said that in applying the Fourth Amendment this Court has seldom shown itself unaware of the practical demands of effective criminal investigation and law enforcement. Indeed, there are those who think that some of the Court's decisions have tipped the balance too heavily against the protection of that individual privacy which it was the purpose of the Fourth Amendment to guarantee. See *Harris* v. *United States,* 331 U. S. 145, 155, 183, 195 (dissenting opinions); *United States* v. *Rabinowitz,* 339 U. S. 56, 66, 68 (dissenting opinions). In any event, while individual cases have sometimes evoked "fluctuating differences of view," *Abel* v. *United States,* 362 U. S. 217, 235, it can hardly be said that in the over-all pattern of Fourth Amendment decisions this Court has been either unrealistic or visionary.

These, then, are the considerations of reason and experience which point to the rejection of a doctrine that would freely admit in a federal criminal trial evidence seized by state agents in violation of the defendant's constitutional rights. But there is another consideration—the imperative of judicial integrity. It was of this that Mr. Justice Holmes and Mr. Justice Brandeis so eloquently spoke in *Olmstead* v. *United States,* 277 U. S. 438, at 469, 471, more than 30 years ago. "For those who

agree with me," said Mr. Justice Holmes, "no distinction can be taken between the Government as prosecutor and the Government as judge." 277 U. S., at 470. (Dissenting opinion.) "In a government of laws," said Mr. Justice Brandeis, "existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face." 277 U. S., at 485. (Dissenting opinion.)

This basic principle was accepted by the Court in *McNabb* v. *United States,* 318 U. S. 332. There it was held that "a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law." 318 U. S., at 345. Even less should the federal courts be accomplices in the willful disobedience of a Constitution they are sworn to uphold.

For these reasons we hold that evidence obtained by state officers during a search which, if conducted by federal officers, would have violated the defendant's immunity from unreasonable searches and seizures under the Fourth Amendment is inadmissible over the defendant's timely objection in a federal criminal trial.[16] In deter-

[16] See Rule 41 (e), Fed. Rules Crim. Proc. The defendant, of course, must have "standing" to object. See *Jones* v. *United States,* 362 U. S. 257.

mining whether there has been an unreasonable search and seizure by state officers, a federal court must make an independent inquiry, whether or not there has been such an inquiry by a state court, and irrespective of how any such inquiry may have turned out. The test is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed.

The judgment of the Court of Appeals is set aside, and the case is remanded to the District Court for further proceedings consistent with this opinion.

Vacated and remanded.

APPENDIX TO OPINION OF THE COURT.

TABLE I.—*Admissibility, in state courts, of evidence illegally seized by state officers.*

State	*Pre-Weeks*	*Pre-Wolf*	*Post-Wolf*
Alabama	Admissible	Admissible	Partially excludable
Arizona		Admissible	Admissible
Arkansas	Admissible	Admissible	Admissible
California	Admissible	Admissible	Excludable
Colorado		Admissible	Admissible
Connecticut	Admissible	Admissible	Admissible
Delaware		Admissible	Excludable
Florida		Excludable	Excludable
Georgia	Admissible	Admissible	Admissible
Idaho	Admissible	Excludable	Excludable
Illinois	Admissible	Excludable	Excludable
Indiana		Excludable	Excludable
Iowa	Excludable	Admissible	Admissible
Kansas	Admissible	Admissible	Admissible
Kentucky		Excludable	Excludable
Louisiana		Admissible	Admissible
Maine	Admissible	Admissible	Admissible
Maryland	Admissible	Partially excludable	Partially excludable
Massachusetts	Admissible	Admissible	Admissible

TABLE I.—*Admissibility, in state courts, of evidence illegally seized by state officers*—Continued.

State	*Pre-Weeks*	*Pre-Wolf*	*Post-Wolf*
Michigan	Admissible	Excludable	Partially excludable
Minnesota	Admissible	Admissible	Admissible
Mississippi	----------	Excludable	Excludable
Missouri	Admissible	Excludable	Excludable
Montana	Admissible	Excludable	Excludable
Nebraska	Admissible	Admissible	Admissible
Nevada	----------	Admissible	Admissible
New Hampshire	Admissible	Admissible	Admissible
New Jersey	----------	Admissible	Admissible
New Mexico	----------	Admissible	Admissible
New York	Admissible	Admissible	Admissible
North Carolina	Admissible	Admissible	Excludable
North Dakota	----------	Admissible	Admissible
Ohio	----------	Admissible	Admissible
Oklahoma	Admissible	Excludable	Excludable
Oregon	Admissible	Excludable	Excludable
Pennsylvania	----------	Admissible	Admissible
Rhode Island	----------	----------	Excludable
South Carolina	Admissible	Admissible	Admissible
South Dakota	Admissible	Excludable	Partially excludable
Tennessee	Admissible	Excludable	Excludable
Texas	----------	Excludable	Excludable
Utah	----------	Admissible	Admissible
Vermont	Admissible	Admissible	Admissible
Virginia	----------	Admissible	Admissible
Washington	Admissible	Excludable	Excludable
West Virginia	Admissible	Excludable	Excludable
Wisconsin	----------	Excludable	Excludable
Wyoming	----------	Excludable	Excludable
	To admit—27	To admit—29	To admit—24
	To exclude—1	To exclude—18.	To exclude—26*
	Undecided—20.	Undecided—1.	Undecided—0.

*Alaska and Hawaii both hold illegally obtained evidence to be excludable, although it does not appear that either has passed anew on this question since attaining statehood.

TABLE II.—*Representative cases by state, considering the admissibility of evidence illegally seized by state officers.*

ALABAMA

Pre-Weeks: *Shields* v. *State*, 104 Ala. 35, 16 So. 85 (admissible).
Pre-Wolf: *Banks* v. *State*, 207 Ala. 179, 93 So. 293 (admissible).
Post-Wolf: Cf. *Oldham* v. *State*, 259 Ala. 507, 67 So. 2d 55 (admissible).
(Ala. Code, 1940 (Supp. 1955), Tit. 29, § 210, requires the exclusion of illegally obtained evidence in the trial of certain alcohol control cases.)

ARIZONA

Pre-Weeks: no holding.
Pre-Wolf: *Argetakis* v. *State*, 24 Ariz. 599, 212 P. 372 (admissible).
Post-Wolf: *State* v. *Thomas*, 78 Ariz. 52, 275 P. 2d 408 (admissible).

ARKANSAS

Pre-Weeks: *Starchman* v. *State*, 62 Ark. 538, 36 S. W. 940 (admissible).
Pre-Wolf: *Benson* v. *State*, 149 Ark. 633, 233 S. W. 758 (admissible).
Post-Wolf: *Lane, Smith & Barg* v. *State*, 217 Ark. 114, 229 S. W. 2d 43 (admissible).

CALIFORNIA

Pre-Weeks: *People* v. *Le Doux*, 155 Cal. 535, 102 P. 517 (admissible).
Pre-Wolf: *People* v. *Mayen*, 188 Cal. 237, 205 P. 435 (admissible).
Post-Wolf: *People* v. *Cahan*, 44 Cal. 2d 434, 282 P. 2d 905 (excludable).

COLORADO

Pre-Weeks: no holding.
Pre-Wolf: *Massantonio* v. *People*, 77 Colo. 392, 236 P. 1019 (admissible).
Post-Wolf: *Williams* v. *People*, 136 Colo. 164, 315 P. 2d 189 (admissible).

CONNECTICUT

Pre-Weeks: *State* v. *Griswold*, 67 Conn. 290, 34 A. 1046 (admissible).
Pre-Wolf: *State* v. *Reynolds*, 101 Conn. 224, 125 A. 636 (admissible).
Post-Wolf: no holding.

DELAWARE

Pre-Weeks: no holding.
Pre-Wolf: *State* v. *Chuchola*, 32 Del. 133, 120 A. 212 (admissible).
Post-Wolf: *Rickards* v. *State*, 45 Del. 573, 77 A. 2d 199 (excludable).

TABLE II.—*Representative cases by state, considering the admissibility of evidence illegally seized by state officers*—Continued.

FLORIDA
- Pre-Weeks: no holding.
- Pre-Wolf: *Atz* v. *Andrews*, 84 Fla. 43, 94 So. 329 (excludable).
- Post-Wolf: *Byrd* v. *State*, 80 So. 2d 694 (Sup. Ct. Florida) (excludable).

GEORGIA
- Pre-Weeks: *Williams* v. *State*, 100 Ga. 511, 28 S. E. 624 (admissible).
- Pre-Wolf: *Jackson* v. *State*, 156 Ga. 647, 119 S. E. 525 (admissible).
- Post-Wolf: *Atterberry* v. *State*, 212 Ga. 778, 95 S. E. 2d 787 (admissible).

IDAHO
- Pre-Weeks: *State* v. *Bond*, 12 Idaho 424, 86 P. 43 (admissible).
- Pre-Wolf: *State* v. *Arregui*, 44 Idaho 43, 254 P. 788 (excludable.)
- Post-Wolf: no holding.

ILLINOIS
- Pre-Weeks: *Siebert* v. *People*, 143 Ill. 571, 32 N. E. 431 (admissible).
- Pre-Wolf: *People* v. *Castree*, 311 Ill. 392, 143 N. E. 112 (excludable).
- Post-Wolf: *City of Chicago* v. *Lord*, 7 Ill. 2d 379, 130 N. E. 2d 504 (excludable).

INDIANA
- Pre-Weeks: no holding.
- Pre-Wolf: *Flum* v. *State*, 193 Ind. 585, 141 N. E. 353 (excludable).
- Post-Wolf: *Rohlfing* v. *State*, 230 Ind. 236, 102 N. E. 2d 199 (excludable).

IOWA
- Pre-Weeks: *State* v. *Sheridan*, 121 Iowa 164, 96 N. W. 730 (excludable).
- Pre-Wolf: *State* v. *Rowley*, 197 Iowa 977, 195 N. W. 881 (admissible).
- Post-Wolf: *State* v. *Smith*, 247 Iowa 500, 73 N. W. 2d 189 (admissible).

KANSAS
- Pre-Weeks: *State* v. *Miller*, 63 Kan. 62, 64 P. 1033 (admissible).
- Pre-Wolf: *State* v. *Johnson*, 116 Kan. 58, 226 P. 245 (admissible).
- Post-Wolf: *State* v. *Peasley*, 179 Kan. 314, 295 P. 2d 627 (admissible).

KENTUCKY
- Pre-Weeks: no holding.
- Pre-Wolf: *Youman* v. *Commonwealth*, 189 Ky. 152, 224 S. W. 860 (excludable).

TABLE II.—*Representative cases by state, considering the admissibility of evidence illegally seized by state officers*—Continued.

KENTUCKY—Continued

Post-Wolf: *Johnson* v. *Commonwealth*, 296 S. W. 2d 210 (Ct. App. Kentucky) (excludable).

LOUISIANA

Pre-Weeks: no holding.

Pre-Wolf: *State* v. *Fleckinger*, 152 La. 337, 93 So. 115 (admissible).

Post-Wolf: *State* v. *Mastricovo*, 221 La. 312, 59 So. 2d 403 (admissible).

MAINE

Pre-Weeks: *State* v. *Gorham*, 65 Me. 270 (admissible) (*semble*).

Pre-Wolf: *State* v. *Schoppe*, 113 Me. 10, 92 A. 867 (admissible) (*semble*).

Post-Wolf: no holding.

MARYLAND

Pre-Weeks: *Lawrence* v. *State*, 103 Md. 17, 63 A. 96 (admissible).

Pre-Wolf: *Meisinger* v. *State*, 155 Md. 195, 141 A. 536 (admissible).

Post-Wolf: *Stevens* v. *State*, 202 Md. 117, 95 A. 2d 877 (admissible). (Flack's Md. Ann. Code, 1951, Art. 35, § 5 requires the exclusion of illegally obtained evidence in the trial of most misdemeanors.)

MASSACHUSETTS

Pre-Weeks: *Commonwealth* v. *Dana*, 43 Mass. 329 (admissible).

Pre-Wolf: *Commonwealth* v. *Wilkins*, 243 Mass. 356, 138 N. E. 11 (admissible).

Post-Wolf: no holding.

MICHIGAN

Pre-Weeks: *People* v. *Aldorfer*, 164 Mich. 676, 130 N. W. 351 (admissible).

Pre-Wolf: *People* v. *Marxhausen*, 204 Mich. 559, 171 N. W. 557 (excludable).

Post-Wolf: *People* v. *Hildabridle*, 353 Mich. 562, 92 N. W. 2d 6 (excludable).

(Art. II, § 10 of the Michigan Constitution of 1908, as amended, sets forth a limited class of items which are not excludable. See *People* v. *Gonzales*, 356 Mich. 247, 97 N. W. 2d 16.)

MINNESOTA

Pre-Weeks: *State* v. *Strait*, 94 Minn. 384, 102 N. W. 913 (admissible).

Pre-Wolf: *State* v. *Pluth*, 157 Minn. 145, 195 N. W. 789 (admissible).

Post-Wolf: no holding.

TABLE II.—*Representative cases by state, considering the admissibility of evidence illegally seized by state officers*—Continued.

MISSISSIPPI
Pre-Weeks: no holding.
Pre-Wolf: *Tucker* v. *State*, 128 Miss. 211, 90 So. 845 (excludable).
Post-Wolf: *Nobles* v. *State*, 222 Miss. 827, 77 So. 2d 288 (excludable).

MISSOURI
Pre-Weeks: *State* v. *Pomeroy*, 130 Mo. 489, 32 S. W. 1002 (admissible).
Pre-Wolf: *State* v. *Owens*, 302 Mo. 348, 259 S. W. 100 (excludable).
Post-Wolf: *State* v. *Hunt*, 280 S. W. 2d 37 (Sup. Ct. Missouri) (excludable).

MONTANA
Pre-Weeks: *State* v. *Fuller*, 34 Mont. 12, 85 P. 369 (admissible).
Pre-Wolf: *State ex rel. King* v. *District Court*, 70 Mont. 191, 224 P. 862 (excludable).
Post-Wolf: no holding.

NEBRASKA
Pre-Weeks: *Geiger* v. *State*, 6 Neb. 545 (admissible).
Pre-Wolf: *Billings* v. *State*, 109 Neb. 596, 191 N. W. 721 (admissible).
Post-Wolf: *Haswell* v. *State*, 167 Neb. 169, 92 N. W. 2d 161 (admissible).

NEVADA
Pre-Weeks: no holding.
Pre-Wolf: *State* v. *Chin Gim*, 47 Nev. 431, 224 P. 798 (admissible).
Post-Wolf: no holding.

NEW HAMPSHIRE
Pre-Weeks: *State* v. *Flynn*, 36 N. H. 64 (admissible).
Pre-Wolf: *State* v. *Agalos*, 79 N. H. 241, 107 A. 314 (admissible).
Post-Wolf: *State* v. *Mara*, 96 N. H. 463, 78 A. 2d 922 (admissible).

NEW JERSEY
Pre-Weeks: no holding
Pre-Wolf: *State* v. *Black*, 5 N. J. Misc. 48, 135 A. 685 (admissible).
Post-Wolf: *Eleuteri* v. *Richman*, 26 N. J. 506, 141 A. 2d 46 (admissible).
(N. J. Rev. Stat. 33:1–62 provides for the return of items illegally seized in the investigation of certain alcohol control offenses.)

TABLE II.—*Representative cases by state, considering the admissibility of evidence illegally seized by state officers*—Continued.

NEW MEXICO
- Pre-Weeks: no holding.
- Pre-Wolf: *State* v. *Dillon*, 34 N. M. 366, 281 P. 474 (admissible).
- Post-Wolf: *Breithaupt* v. *Abram*, 58 N. M. 385, 271 P. 2d 827 (admissible).

NEW YORK
- Pre-Weeks: *People* v. *Adams*, 176 N. Y. 351, 68 N. E. 636 (admissible).
- Pre-Wolf: *People* v. *Defore*, 242 N. Y. 13, 150 N. E. 585 (admissible).
- Post-Wolf: *People* v. *Variano*, 5 N. Y. 2d 391, 157 N. E. 2d 857 (admissible).

NORTH CAROLINA
- Pre-Weeks: *State* v. *Wallace*, 162 N. C. 622, 78 S. E. 1 (admissible).
- Pre-Wolf: *State* v. *Simmons*, 183 N. C. 684, 110 S. E. 591 (admissible).
- Post-Wolf: *State* v. *Mills*, 246 N. C. 237, 98 S. E. 2d 329 (excludable).
  (N. C. Gen. Stat. § 15–27 requires the exclusion of illegally obtained evidence.)

NORTH DAKOTA
- Pre-Weeks: no holding.
- Pre-Wolf: *State* v. *Fahn*, 53 N. D. 203, 205 N. W. 67 (admissible).
- Post-Wolf: no holding.

OHIO
- Pre-Weeks: no holding.
- Pre-Wolf: *State* v. *Lindway*, 131 Ohio St. 166, 2 N. E. 2d 490 (admissible).
- Post-Wolf: *State* v. *Mapp*, 170 Ohio St. 427, 166 N. E. 2d 387 (admissible).

OKLAHOMA
- Pre-Weeks: *Silva* v. *State*, 6 Okla. Cr. 97, 116 P. 199 (admissible).
- Pre-Wolf: *Gore* v. *State*, 24 Okla. Cr. 394, 218 P. 545 (excludable).
- Post-Wolf: *Hamel* v. *State*, 317 P. 2d 285 (Okla. Crim.) (excludable).

OREGON
- Pre-Weeks: *State* v. *McDaniel*, 39 Ore. 161, 65 P. 520 (admissible).
- Pre-Wolf: See *State* v. *Laundy*, 103 Ore. 443, 204 P. 958 (excludable), although see *State* v. *Folkes*, 174 Ore. 568, 150 P. 2d 17 (not noticing *State* v. *Laundy*).
- Post-Wolf: *State* v. *Hoover*, 219 Ore. 288, 347 P. 2d 69 (questioning *Laundy*).

TABLE II.—*Representative cases by state, considering the admissibility of evidence illegally seized by state officers*—Continued.

PENNSYLVANIA
Pre-Weeks: no holding.
Pre-Wolf: *Commonwealth* v. *Dabbierio*, 290 Pa. 174, 138 A. 679 (admissible).
Post-Wolf: *Commonwealth* v. *Chaitt*, 380 Pa. 532, 112 A. 2d 379 (admissible).

RHODE ISLAND
Pre-Weeks: no holding.
Pre-Wolf: no holding.
Post-Wolf: *State* v. *Hillman*, 84 R. I. 396, 125 A. 2d 94 (applying common law rule, but noticing the enactment of the statutory rule).
(R. I. Gen. Laws, 1956, § 9–19–25 requires the exclusion of illegally obtained evidence.)

SOUTH CAROLINA
Pre-Weeks: *State* v. *Atkinson*, 40 S. C. 363, 18 S. E. 1021 (admissible).
Pre-Wolf: *State* v. *Green*, 121 S. C. 230, 114 S. E. 317 (admissible).
Post-Wolf: *State* v. *Anderson*, 230 S. C. 191, 95 S. E. 2d 164 (admissible).

SOUTH DAKOTA
Pre-Weeks: *State* v. *Madison*, 23 S. D. 584, 122 N. W. 647 (admissible).
Pre-Wolf: *State* v. *Gooder*, 57 S. D. 619, 234 N. W. 610 (excludable).
Post-Wolf: *State* v. *Poppenga*, 76 S. D. 592, 83 N. W. 2d 518 (excludable).
S. D. Code, 1939, § 34.1102 provides for a limited return to the common-law rule of admissibility. See *State* v. *Lane*, 76 S. D. 544, 82 N. W. 2d. 286.

TENNESSEE
Pre-Weeks: *Cohn* v. *State*, 120 Tenn. 61, 109 S. W. 1149 (admissible).
Pre-Wolf: *Hughes* v. *State*, 145 Tenn. 544, 238 S. W. 588 (excludable).
Post-Wolf: *Lindsey* v. *State*, 191 Tenn. 51, 231 S. W. 2d 380 (excludable).

TEXAS
Pre-Weeks: no holding.
Pre-Wolf: *Chapin* v. *State*, 107 Tex. Cr. R. 477, 296 S. W. 1095 (excludable).

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TABLE II.—*Representative cases by state, considering the admissibility of evidence illegally seized by state officers*—Continued.

TEXAS—Continued

Post-Wolf: *Williamson* v. *State*, 156 Tex. Cr. R. 520, 244 S. W. 2d 202 (excludable).
(Vernon's Tex. Stat., 1948 (Code Crim. Proc., Art. 72a) requires the exclusion of illegally obtained evidence.)

UTAH

Pre-Weeks: no holding.
Pre-Wolf: *State* v. *Aime*, 62 Utah 476, 220 P. 704 (admissible).
Post-Wolf: no holding.

VERMONT

Pre-Weeks: *State* v. *Mathers*, 64 Vt. 101, 23 A. 590 (admissible).
Pre-Wolf: *State* v. *Stacy*, 104 Vt. 379, 160 A. 257 (admissible).
Post-Wolf: *In re Raymo*, 121 Vt. 246, 154 A. 2d 487 (admissible).

VIRGINIA

Pre-Weeks: no holding.
Pre-Wolf: *Hall* v. *Commonwealth*, 138 Va. 727, 121 S. E. 154 (admissible).
Post-Wolf: no holding.

WASHINGTON

Pre-Weeks: *State* v. *Royce*, 38 Wash. 111, 80 P. 268 (admissible).
Pre-Wolf: *State* v. *Gibbons*, 118 Wash. 171, 203 P. 390 (excludable).
Post-Wolf: *State* v. *Cyr*, 40 Wash. 2d 840, 246 P. 2d 480 (excludable).

WEST VIRGINIA

Pre-Weeks: *State* v. *Edwards*, 51 W. Va. 220, 41 S. E. 429 (admissible).
Pre-Wolf: *State* v. *Wills*, 91 W. Va. 659, 114 S. E. 261 (excludable).
Post-Wolf: *State* v. *Calandros*, 140 W. Va. 720, 86 S. E. 2d 242 (excludable).

WISCONSIN

Pre-Weeks: no holding.
Pre-Wolf: *Hoyer* v. *State*, 180 Wis. 407, 193 N. W. 89 (excludable).
Post-Wolf: *State* v. *Kroening*, 274 Wis. 266, 79 N. W. 2d 810 (excludable).

WYOMING

Pre-Weeks: no holding.
Pre-Wolf: *State* v. *George*, 32 Wyo. 223, 231 P. 683 (excludable).
Post-Wolf: no holding.

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

The Court today overturns a rule of evidence always the law and formally announced in 1914 by a unanimous Court including Mr. Justice Holmes and Mr. Justice Hughes. *Weeks* v. *United States,* 232 U. S. 383, 398. The rule has since that time been applied in this Court's unanimous *per curiam* decision in 1925 in *Center* v. *United States,* 267 U. S. 575, and for nearly half a century, as a matter of course, in federal prosecutions without number throughout the United States. In 1927, a unanimous Court, on which sat Mr. Justice Holmes, Mr. Justice Brandeis and Mr. Justice Stone, thus acknowledged the rule: "[w]e do not question the right of the federal government to avail itself of evidence improperly seized by state officers operating entirely upon their own account." *Byars* v. *United States,* 273 U. S. 28, 33. It can hardly be denied that Mr. Justice Holmes and Mr. Justice Brandeis were the originators and formulators of the body of our present constitutional law pertaining to civil liberties; pronouncements since have merely been echoes and applications, when not distortions, of principles laid down by them.

Of course our law, and particularly our procedural law, does not stick fast in the past. (Speaking wholly for myself, there is indeed an appropriate basis derived from the nature of our federalism—which I shall later set forth—for modification in the circumstances of the present cases of the rule admitting state-seized evidence, regardless of the way in which it was seized.) But when a rule of law has the history and the intrinsic authority of the rule overturned today, when it has been for so long a part

*[This opinion applies also to No. 52, *Rios* v. *United States, post,* p. 253.]

of the administration of justice in the federal courts, a change, when not constitutionally compelled as the present change concededly is not, must justify itself either by the demands of new experience undermining the justification of the established rule or by new insight into the undesirable consequences of the old rule. The rule the Court newly promulgates today draws upon neither of these justifications and is not supported by any of this Court's previous decisions, while raising serious difficulties in its application, including undue conflict with state law and with state courts.

We are concerned with a rule governing the admissibility of relevant evidence in federal courts. The pertinent general principle, responding to the deepest needs of society, is that society is entitled to every man's evidence. As the underlying aim of judicial inquiry is ascertainable truth, everything rationally related to ascertaining the truth is presumptively admissible. Limitations are properly placed upon the operation of this general principle only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth. The basic consideration in these cases is whether there are present any overriding reasons for not accepting evidence concededly relevant to a federal judicial inquiry regarding a violation of federal law.

Overriding public considerations are reflected in the exclusion from evidence of the narrow classes of privileged communications, in the exclusion designed to prevent people from being compelled to convict themselves out of their own mouths developed under the shelter of the Fifth Amendment's privilege against self-incrimination, and insofar as the Due Process Clause of the Fourteenth Amendment puts curbs on the evidentiary law of the States. Respect is also due a further consideration

that courts of law are, after all, in the service of justice and that the enforcement of basic moralities by courts should at times be deemed more important than the full utilization of all relevant evidence in a particular case. See *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385. Regard for this consideration led Mr. Justice Holmes and Mr. Justice Brandeis to urge that the federal courts should not permit the Department of Justice to become the willing beneficiary of stolen goods through their use in evidence in a federal prosecution: "Respect for law will not be advanced by resort, in its enforcement, to means which shock the common man's sense of decency and fair play." It is noteworthy that while this view was expressed by Holmes and Brandeis, JJ. in 1921 in dissent in *Burdeau* v. *McDowell,* 256 U. S. 465, 477, it did not lead them in 1927, in *Byars* v. *United States, supra,* to question the right of the Federal Government to utilize the very kind of evidence involved in these two cases.

Closer to our immediate problem are the evidentiary problems arising out of the interdiction of the Fourth Amendment against "unreasonable searches and seizures." This constitutional provision addresses itself to matters that vitally relate to individual freedom. On this account another exclusion of relevant evidence has been developed in the federal courts in response to what was deemed to be a compelling public need implicit in that Amendment. Because of what was deemed to be a vital relation to the vindication of the Amendment so that its important protection would otherwise be of "no value," this Court in *Weeks* v. *United States,* 232 U. S. 383, held it appropriate to exclude from federal courts evidence seized by federal officials in disregard of the Fourth Amendment. It was thought more important to exert general legal pressures to secure obedience to the Fourth Amendment on the part of federal law-enforcing officers than to enforce the general principle of relevance in particular cases. This

exclusionary rule of *Weeks* has also been applied to violations of federal law by federal officers, closely relating to the interests protected by the Fourth Amendment, although not of the full seriousness of constitutional violations. See, *e. g., Miller* v. *United States,* 357 U. S. 301.

The Fourth Amendment, as applied in *Weeks* and cases since, operates, as do all the provisions of the Federal Bill of Rights, within the limitations imposed by our federal system. It has been held without deviation that the specific provisions of the first eight Amendments are not limitations upon the power of the States or available safeguards of the individual against state authority. Of course the same is true of procedural protections afforded by federal statutes not resting on the Constitution. It has followed from this that, until today, in applying the *Weeks* rule of exclusion a vital question has always been whether the offending search or seizure was conducted in any part by federal officials or in the interest of the Federal Government, or whether it was conducted solely by state officers acting exclusively for state purposes. Only if the Federal Government "had a hand" in the search could the Fourth Amendment or federal statutory restrictions, and thus the *Weeks* exclusionary rule, apply. See *Byars* v. *United States,* 273 U. S. 28; *Lustig* v. *United States,* 338 U. S. 74, 78. The *Weeks* case itself, as has been said, held that state misconduct was not to be the basis for application of the federal exclusionary rule. 232 U. S., at 398. Until today that has been the law of the land.

Have there been developments since *Weeks,* either intellectual or practical, which should lead the Court to overturn the authoritative rule of that case and for the first time bar relevant evidence innocently secured by federal authorities, in cases involving no federal misconduct whatever, where there has been neither violation of

the Fourth Amendment nor violation of a federal statute by federal officers or any agent for them?

The Court finds such a significant development, destroying in its view the "foundations," the "doctrinal underpinning" of the express and authoritative limitation of the *Weeks* exclusionary rule to cases of federal violations, in what was said in 1949 in *Wolf* v. *Colorado,* 338 U. S. 25, 27–28, recognizing that "[t]he security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause." The Court asserts that there is no longer any logic in restricting the application of the *Weeks* exclusionary rule to the fruits of federal seizures, for *Wolf* recognizes that state seizures may also encroach on interests protected by the Federal Constitution. The rule which the Court announces on the basis of this analysis is that there is to be excluded from federal prosecutions all evidence seized by state officers "during a search which, if conducted by federal officers, would have violated the defendant's immunity from unreasonable searches and seizures under the Fourth Amendment." As the Court's rule only purports to exclude evidence seized by state officers in violation of the Constitution, it is plain that the Court assumes for the purposes of these cases that, as a consequence of *Wolf,* precisely the same rules are applicable in determining whether the conduct of state officials violates the Constitution as are applicable in determining whether the conduct of federal officials does so, and precisely the same exclusionary remedy is deemed appropriate for one behavior as for the other.

In this use of *Wolf* the Court disregards not only what precisely was said there, namely, that only what was

characterized as the "core of the Fourth Amendment," not the Amendment itself, is enforceable against the States, but also the fact that what was said in *Wolf* was said with reference to the Due Process Clause of the Fourteenth Amendment, and not with reference to the specific guarantees of the Fourth Amendment. The scope and effect of these two constitutional provisions cannot be equated, as the Court would have it. These are constitutional provisions wholly different in history, scope and incidence, and that is crucial to our problem. It is of course true, as expressed in *Wolf,* that some of the principles underlying the specific safeguards of the first eight Amendments are implied limitations upon the States drawn out of the Due Process Clause of the Fourteenth Amendment, and to that extent, but no more, afford federal protection to individuals against state power. But it is basic to the structure and functioning of our federal system to distinguish between the specifics of the Bill of Rights of the first eight Amendments and the generalities of the Due Process Clause translated into concreteness case by case ever since *Davidson* v. *New Orleans,* 96 U. S. 97, by a process of inclusion and exclusion, as analyzed with great particularity by Mr. Justice Cardozo in *Palko* v. *Connecticut,* 302 U. S. 319.

This vital distinction, running through hundreds of cases, underlies the decision in *Wolf* v. *Colorado.* It is therefore a complete misconception of the *Wolf* case to assume, as the Court does as the basis for its innovating rule, that every finding by this Court of a technical lack of a search warrant, thereby making a search unreasonable under the Fourth Amendment, constitutes an "arbitrary intrusion" of privacy so as to make the same conduct on the part of state officials a violation of the Fourteenth Amendment. The divisions in this Court over the years regarding what is and what is not to be deemed an unreasonable search within the meaning of the Fourth Amend-

ment and the shifting views of members of the Court in this regard, prove that in evolving the meaning of the Fourth Amendment the decisions of this Court have frequently turned on dialectical niceties and have not reflected those fundamental considerations of civilized conduct on which applications of the Due Process Clause turn. See, for example, the varying views of the Court as a whole, and of individual members, regarding the "reasonableness" under the Fourth Amendment of searches without warrants incident to arrests, as illustrated by comparing *Marron* v. *United States,* 275 U. S. 192, with *Go-Bart Co.* v. *United States,* 282 U. S. 344, and *United States* v. *Lefkowitz,* 285 U. S. 452; *Go-Bart, supra,* and *Lefkowitz, supra,* with *Harris* v. *United States,* 331 U. S. 145, and *United States* v. *Rabinowitz,* 339 U. S. 56; also *Harris, supra,* with *Trupiano* v. *United States,* 334 U. S. 699, and *Trupiano* with *Rabinowitz, supra* (overruling *Trupiano*). See also the Court's differing conceptions regarding the evidence necessary to constitute "probable cause" upon which to base a warrant or a search without a warrant, as revealed by comparing *Grau* v. *United States,* 287 U. S. 124, 128, with *Draper* v. *United States,* 358 U. S. 307, 312, n. 4 (rejecting *Grau*), and *Jones* v. *United States,* 362 U. S. 257, 270.

What the Court now decides is that these variegated judgments, these fluctuating and uncertain views of what constitutes an "unreasonable search" under the Fourth Amendment in conduct by federal officials, are to determine whether what is done by state police, wholly beyond federal supervision, violates the Due Process Clause. The observation in *Wolf* v. *Colorado,* reflecting as it did the fundamental protection of the Due Process Clause against "arbitrary" police conduct, and not the specific, restrictive protection of the Fourth Amendment, hardly supports that proposition or the new rule which the Court rests upon it. The identity of the protection

of the Due Process Clause against arbitrary searches with the scope of the protection of the Fourth Amendment is something the Court assumes for the first time today. It assumes this without explication in reason or in reliance upon authority, and entirely without regard for the essential difference, which has always been recognized by this Court, between the particularities of the first eight Amendments and the fundamental nature of what constitutes due process.

Nor can I understand how *Wolf* v. *Colorado* furnishes the slightest support for the application of the *Weeks* exclusionary rule, designed as that was to enforce the Fourth Amendment and indirectly to discipline federal officers under this Court's peculiarly comprehensive supervisory power over them, to the present cases, where the infractions, if any, were by state officers and were of rights arising under the Due Process Clause of the Fourteenth Amendment. The Court finds what it calls the "ultimate holding" in *Wolf*, namely, that the exclusionary rule is not to be fastened upon state courts in enforcement of rights arising under the protection of the Fourteenth Amendment against arbitrary searches and seizures, something with which "we are not here directly concerned." I fail to understand why this holding is not of essential relevance to the holding of these cases. In the first place *Wolf* wholly rebuts the Court's assertion that there is no logic in distinguishing how the Fourteenth Amendment is to be enforced against state officials from how the Fourth is to be enforced against federal officers. The point of *Wolf* was that the logic of this was imperative and that the remedies under the two Amendments are not the same. In the second place, in light of the holding of *Wolf* that state courts may admit evidence like that involved in these cases, it cannot be said that there is any sufficient justification based upon controlling the conduct of state officers for excluding such evidence from federal

courts, as the Court would do, when gathered by state officials whose States would admit it. The underlying assumption on which the exclusionary rule of *Weeks* rests is that barring evidence illegally secured will have an inhibiting, one hopes a civilizing, influence upon law officers. With due respect, it is fanciful to assume that law-enforcing authorities of States which do not have an exclusionary rule will to any significant degree be influenced by the potential exclusion in federal prosecutions of evidence secured by them when state prosecutions, which surely are their preoccupation, remain free to use the evidence. At any rate, what warrant is there for the federal courts to assume the same supervisory control over state officials as they have assumed over federal officers, even if that control could be effective? And the exertion of controlling pressures upon the police is admittedly the only justification for any exclusionary rule.

Thus, I do not understand how *Wolf* v. *Colorado,* which is the only case relied upon by the Court as authority for its innovation, furnishes support for the Court's new rule of evidence. It seems to me to do the opposite. Nor can the Court's new rule be justified as an effective means for controlling state officers. Neither do I think the Court's adoption of an exclusionary rule in the present cases finds justification, as the Court suggests, in light of any universal recognition of the need of excluding evidence such as is involved in these cases in order to assure the wise and effective administration of criminal justice. It cannot be denied that the appropriateness of barring relevant evidence as a means for regulating police conduct has not been unquestioned even by those most zealous for honest law enforcement, and it certainly has not gone unquestioned as outweighing the interest of society in bringing criminals to justice. See, *e. g., People* v. *Defore,* 242 N. Y. 13, 21, 150 N. E. 585, 587–588; 8 Wigmore, Evidence (3d ed. 1940), § 2184. And I regret to say that I do not

find evidence that the movement towards adoption of the rule of exclusion has been, as we are told, "seemingly inexorable." On the contrary, what impresses me is the obduracy of high-minded state courts, like that of New York under the leadership of Judge Cardozo, in refusing to adopt the federal rule of exclusion. Indeed, this impressive insistence of States not to follow the *Weeks* exclusionary rule was the controlling consideration of the decision in *Wolf* not to read it into the requirement of "due process" under the Fourteenth Amendment. As the material the Court has collected shows, fully half the States have refused to adhere to our *Weeks* rule, nearly fifty years after this Court has deemed it appropriate for the federal administration of criminal justice.

Apart from any affirmative justifications for the new rule, it is suggested in support of the need for making the Court's innovation that the distinction made since *Weeks* v. *United States* for purposes of excluding evidence, turning on whether or not federal officials had any share in the search, has engendered practical difficulties and for that reason ought now to be discarded. It is also suggested that the rule which has prevailed under *Weeks* and *Byars* to this day "implicitly invites federal officers to withdraw from such association [with state law-enforcement officers] and at least tacitly to encourage state officers in the disregard of constitutionally protected freedom." I am not aware of evidence to sustain the view that the distinction between federal and state searches has been particularly difficult of application. Individual cases have merely presented the everyday issue of evaluating testimony and testimony touching an issue relatively easy of ascertainment. I know of no opinion in any federal court, and the Court points to none, which has revealed any consciousness of having been confronted with too exacting a task for adjudication when called upon to decide whether a search was or was not to be deemed a federal search.

This Court's decisions certainly do not reflect an awareness of such difficulties. And if the rule, as appears from the decisions of the judges who have had to apply it, has evidently been in general a workable one, it surely should not be discarded because of unsupported assumptions that federal officials are prone to evade it and to cooperate secretly with state police in improper activities. Disregard of the history, authority and experience that support the rule now cast into limbo ought to have a more substantiated justification than the fragile assumption that federal officers look for opportunities to engage in, to use the Court's language, "subterfuge" and "evasion" of a command sanctioned by this Court. I would not so belittle this Court's authority. I had supposed we should attribute to the law-enforcing authorities of the Government respect for this Court's weighty course of decisions and not a flouting of them.

Whatever difficulties of application there may be in the present rule—and the opinions of those who have had to apply it do not indicate that they are significant—they surely cannot lead us to exchange a tried and settled principle for the Court's new doctrine. For that doctrine, although the Court purports to be guided by the practical consequences of rules of evidence in this area and by considerations of comity between federal and state courts and policies, not only raises new and far greater difficulties than did the old rule, but is also pregnant with new disharmonies between federal and state authorities and between federal and state courts.

First. The Court's new rule introduces into the law governing the admissibility of search-and-seizure evidence in federal prosecutions a troublesome and uncertain new criterion, namely, the "unconstitutionality" of police conduct, as distinguished from its mere illegality under state or federal law. Under the rule the Court today announces, the federal trial court, whenever state-seized evidence is

challenged, must decide the wholly hypothetical question whether that evidence was "obtained by state officers during a search which, if conducted by federal officers, would have violated the defendant's immunity from unreasonable searches and seizures under the Fourth Amendment." Irrelevant are violations of state law, or hypothetical violations of federal statutes, had the search been "conducted by federal officers."

The *Weeks* rule of exclusion, as enforced by this Court, applies to all illegal seizures on the part of federal officers. If the officer's conduct is by statute or court-developed rule illegal, the evidence is excluded, and it is not necessary to say whether or not the rule of conduct flows directly from the Constitution. This has been an efficient, workable evidentiary criterion unencumbered with weighty constitutional distinctions. See, for example, *Miller* v. *United States,* 357 U. S. 301, where evidence was excluded without a mention of the Constitution. This Court or the lower federal courts have thus never, until today, needed to develop criteria distinguishing those federal regulations of the conduct of federal officers which are compelled by the Constitution from those which are entrusted to the discretion of Congress or the courts to develop. We must do so now, and so must federal trial courts concern themselves with such constitutional determinations in the midst of adjudicating motions to suppress state evidence. This is bound to be a troublesome process in light of the complete absence of such criteria. For example, are the special federal provisions regarding night search warrants of a constitutional nature? And what of the rules governing the execution of lawful warrants, applied in *Miller* v. *United States, supra?* We have never needed to pronounce upon these totally abstract and doctrinaire questions, and there surely is no need to announce a rule which forces us to do so now, when such a rule is not constitutionally required, but is concededly imposed as

a matter of this Court's discretionary power to formulate rules of evidence for federal litigation. After all, it makes not the slightest difference from the point of view of the admissibility of evidence whether what a federal officer does is simply illegal or illegal because unconstitutional. Why introduce such subtleties, in a hypothetical federal context, when passing on state evidence?

Second. The Court's new rule potentially frustrates and creates undesirable conflict with valid and praiseworthy state policies which attempt to protect individuals from unlawful police conduct. Although the Court purports to be responsive to the needs of proper law enforcement and to considerations of comity between state and federal law, when it comes to elaborate its new rule it does so as follows: "[t]he test is one of federal [constitutional] law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed." So comity plays no part at all, and the fruits of illegal law enforcement may well be admitted in federal courts directly contrary to state law. State law seeking to control improper methods of law enforcement is frustrated by the Court's new rule whenever a State which enforces an exclusionary rule places restrictions upon the conduct of its officers not directly required by the Fourth Amendment with regard to federal officers. The Court's new rule will, for example, admit evidence illegally seized under a state law which is identical to a federal statute restricting federal officers, so long as the federal statute goes beyond the minimum requirements of the Constitution. One would suppose that such a situation would be one in which this Court would plainly respect the state policy as constituting nothing but a local duplication of a federal policy. Yet the rule promulgated today flouts such a state regulation. A state officer who disobeys it needs only to turn his evidence over to the federal prosecutor, who may freely utilize it under today's

innovation in disregard of the disciplinary policy of the State's exclusionary rule. I cannot think why the federal courts should thus encourage state illegalities.

I do not merely indulge in assumptions regarding the serious frustrations of valid state regulations of state law-enforcement officers which may arise from the rule formulated today. Take a concrete example of this mischief. In *Breithaupt* v. *Abram,* 352 U. S. 432, this Court decided that it did not violate the Fourteenth Amendment for a State to take blood from a defendant without his consent and use it in evidence against him, for such police methods were found not to be "offensive" or "unreasonable." Nevertheless, States may decide, and have decided, that taking blood without consent is by state standards reprehensible, and that to discourage such conduct by its police blood-test evidence must be suppressed in use in state prosecutions. See *Lebel* v. *Swincicki,* 354 Mich. 427, 93 N. W. 2d 281; *State* v. *Kroening,* 274 Wis. 266, 271–276, 79 N. W. 2d 810, 814–817. Such a state policy is surely entitled to our respect if we are to exclude evidence on the basis of the illegal activity of state officers. Yet because of the decision in *Breithaupt,* the Court's new rule permits the admission of blood-test evidence in a federal prosecution, ignoring the State's decision that the police conduct producing it is illegal and that it therefore ought to be suppressed. And the same is to be true of evidence seized by state police in violation of a state rule regarding searches incident to lawful arrests which is more restrictive upon the police than the present version of the fluctuating federal rule, or of evidence seized pursuant to a warrant or to an arrest without a warrant which did not meet state standards of "probable cause" more restrictive than the federal standards as lately developed. State rules in these areas may be and in some States are more

restrictive than federal rules. See, for example, restricting the right of incidental search more than has this Court, *State* v. *Adams,* 103 W. Va. 77, 136 S. E. 703; *State* v. *Buckley,* 145 Wash. 87, 258 P. 1030; *Flannery* v. *Commonwealth,* 324 S. W. 2d 128 (Ky.); *Doyle* v. *State,* 320 P. 2d 412 (Okla.); and imposing more exacting standards of "probable cause" than federal law imposes, *Doyle* v. *State,* 320 P. 2d 412 (Okla.) (expressly refusing to follow *Brinegar* v. *United States,* 338 U. S. 160); *Averill* v. *State,* 52 So. 2d 791 (Fla.); *People* v. *Thymiakas,* 140 Cal. App. 2d 940, 296 P. 2d 4. Especially pertinent in this regard is the following statement in *People* v. *Cahan,* 44 Cal. 2d 434, 450–451, 282 P. 2d 905, 915, adopting an exclusionary rule for California: "In developing a rule of evidence applicable in the state courts, this court is not bound by the decisions that have applied the federal rule, and if it appears that those decisions have developed needless refinements and distinctions, this court need not follow them. Similarly, if the federal cases indicate needless limitations on the right to conduct reasonable searches and seizures or to secure warrants, this court is free to reject them."

In fact, in the very two cases now before the Court state courts have found their officers' conduct illegal and have ordered suppression of the evidence thereby gained. Yet the Court refuses to respect these findings and sends the cases back to the District Courts for independent rulings regarding the federal constitutional validity of the state officers' conduct. If these state infractions are not found to be of constitutional dimensions, and it is surely doubtful whether they were of that degree of seriousness under some of our decisions, the evidence will be admitted though wrongfully seized under the governing state law. The rule promulgated today would thus undo a State's disciplinary policy against police misconduct,

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while in the contrary situation, where the State would admit evidence now rejected by the Court, police conduct sustained by state law would not be affected.

Third. The Court's new rule creates potential conflict between federal and state courts even when the legal standards of police conduct upon which exclusion is to turn are the same in both courts. The Court says that "[i]n determining whether there has been an unreasonable search and seizure by state officers, a federal court must make an independent inquiry, whether or not there has been such an inquiry by a state court, and irrespective of how any such inquiry may have turned out." Again considerations of comity are ignored. Applying the same legal standards, a federal tribunal may hold state officers blameless after a state court has condemned their conduct, or it may hold them to have been at fault after the State has absolved them. I cannot imagine the justification for permitting a federal court to make such conflicting pronouncements, debilitating local authority in matters over which the local courts should and do have primary responsibility.

In summary, then, although the Court professes to be responsive to "[t]he very essence of a healthy federalism" and "the avoidance of needless conflict between state and federal courts," the rule it actually formulates is wholly unresponsive to valid state policies while carrying a great risk of needless conflict between state and federal policies and between state and federal courts. With regard to evidence from States which have not adopted exclusionary rules, the Court's innovation of today deprives the federal courts of relevant evidence through hazardous constitutional determinations without any significant or legitimate compensating effect upon state or federal law enforcement. In States which do apply an exclusionary rule, the Court's new formulation accords no respect to valid state policies and is a source of conflict with state

courts. The Court promulgates a rule whose only practical justification is the regulation of state officials without the slightest regard for achieving harmony with valid state laws which necessarily must be the primary concern of those officials. And although the Court recognizes considerations of "judicial integrity" in accepting illegally seized evidence, it refuses to respect state determinations that certain evidence has in fact been illegally gathered under the applicable law.

I would agree wholly with my Brothers CLARK, HARLAN and WHITTAKER, who join me in the reasons for dissenting from the Court's decision, that the judgments should be affirmed if, like them, I found the only choice to be one between the *Weeks-Byars* doctrine and today's decision. For me, however, the course of events since the promulgation of the *Weeks* doctrine suggests a modification of it consonant with the thinking of *Weeks* and therefore not essentially departing from it. I would modify the *Weeks-Byars* rule to give due heed to appropriate comity between federal and state court determinations and due respect for the discretion left to the States by *Wolf* v. *Colorado* to develop and apply exclusionary rules upon their own initiative and I therefore would exclude the evidence in these cases on the basis of state decisions to suppress it. Specifically, I would recognize that about half the States have now adopted exclusionary rules although only one State had such a rule when the *Weeks* case was decided. It respects what was decided in *Weeks* regarding state-seized evidence for the federal courts now to adjust their rules of evidence to support the States which have adopted the *Weeks* exclusionary rule for themselves, thereby exercising the same control over state officials as *Weeks* found it appropriate for the federal courts to exercise over federal officials. Thus, although I find no good reason not to admit in federal courts evidence gathered by state officials in States which would admit the evidence, I would

not admit such evidence in cases like the present, where state courts, enforcing their exclusionary rules, have found their officers guilty of infractions of the rules properly regulating their conduct and have suppressed the evidence. Just as Mr. Justice Holmes and Mr. Justice Brandeis in *Burdeau* v. *McDowell,* 256 U. S. 465, 476–477 (dissenting), deemed it not seemly for a federal court to allow the Department of Justice to be the knowing beneficiary of stolen goods, so it seems to me unseemly for a federal court not to respect the determination of a state court that its own officials were guilty of wrongdoing and not to support the State's policy to prevent those officials from making use through federal prosecution of the fruits of their wrongdoing. Dealing with the generality of cases, as rules of evidence should, to let a state determination regarding the legality of the conduct of state officials determine the admissibility in a federal court of evidence gathered by them would not only avoid a retrial of identical issues in the federal court, but would also avoid the unseemliness and disruption of state authority involved in having a federal court decide that a search was legal, as it might well do when the federal constitutional standards are narrower than state standards, after a state court has adjudged the search illegal.

I am not unmindful that this has its own difficulties, as for instance, the fact that state motions to suppress are normally determined only by a trial judge and are generally not reviewable at all if granted and followed by acquittal. And so a state court decision may not inevitably reflect the State's judicial policy as formulated by its highest court. Difficulties would also be present when there has been no state decision regarding the legality of the seizure, and when it is not clear to the federal court which must decide upon admissibility what the state decision would be. Occasionally, a state decision might

unjustifiably frustrate an important federal prosecution dependent upon state-seized evidence. These are difficulties inherent in evolving harmonious relations in the interconnected interests between the States and the Nation in our federal system. The consequences of these difficulties seem to me far less weighty and much less dubious than those of the upsetting decision of today. They seem to me outweighed by the support which should be afforded to valid state law enforcement.

If the modified rule I have outlined is not to be adopted, however, the difficulties in the Court's decision make it far more preferable in my view to continue adherence to the sharp line drawn by *Weeks* and *Byars* between state- and federally-seized evidence. I would not embark upon a hazardous jettisoning of a rule which has prevailed in the federal courts for half a century without bringing to the surface demonstrated evils, indeed without its having evoked serious criticism of weight, barring recent discussion largely of an abstract and doctrinaire nature.*

Memorandum of MR. JUSTICE HARLAN, whom MR. JUSTICE CLARK and MR. JUSTICE WHITTAKER join.†

I subscribe to all that my Brother FRANKFURTER has written in criticism of the Court's newly fashioned exclusionary rule. But, with deference, I must also say that, in my view, the arguments which he has so convincingly set forth likewise serve to block the more limited inroads

*See the authorities cited in the Court's note 2, and see *Hanna* v. *United States*, 104 U. S. App. D. C. 205, 260 F. 2d 723, the only Court of Appeals decision to concur with the views the Court today expresses. What criticisms there have been of the *Weeks* rule have largely been stimulated by *Wolf* and have in essence been reflections of dissatisfaction with the substantive decision in that case, and thus do not constitute supports for the doctrine now evolved by the Court.

†[This memorandum applies also to No. 52, *Rios* v. *United States*, *post*, p. 253.]

which he would make on the so-called "silver platter" doctrine. *Lustig* v. *United States,* 338 U. S. 74, 79. I would retain intact the nonexclusionary rule of the *Weeks* and *Byars* cases, which has behind it the strongest judicial credentials, the sanction of long usage, and the support of what, in my opinion, is sound constitutional doctrine under our federal scheme of things, doctrine which only as recently as last Term was reiterated by this Court. See *Abbate* v. *United States,* 359 U. S. 187; *Bartkus* v. *Illinois,* 359 U. S. 121. Except for this reservation, I join the dissenting opinion of my Brother FRANKFURTER.

I would affirm the judgments in both of the cases before us.

RIOS *v.* UNITED STATES.

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

No. 52. Argued March 29, 1960.—
Decided June 27, 1960.

1. Evidence seized in an unreasonable search by state officers must be excluded from a federal criminal trial upon the timely objection of a defendant who has standing to complain. *Elkins* v. *United States*, *ante*, p. 206. P. 255.

2. Without probable cause for arrest and without a warrant for search or arrest, state police officers followed a taxicab in which petitioner was riding and approached it when it stopped at a traffic light. The record is unclear as to the sequence of the events which followed; but the cab door was opened, petitioner dropped a recognizable package of narcotics to the floor of the vehicle, and one officer grabbed the petitioner as he alighted from the cab and another officer retrieved the package. In a state prosecution for unlawful possession of narcotics, the evidence was suppressed on the ground that it had been unlawfully seized, and petitioner was acquitted. Later, in a federal prosecution under 21 U. S. C. § 174 for unlawful receipt and concealment of narcotics, the Federal District Court denied a timely motion to suppress and admitted the package of narcotics in evidence, and petitioner was convicted. The Court of Appeals affirmed. *Held:* The case is remanded to the District Court for determination as to the lawfulness of the state officers' conduct, in accordance with the basic principles governing the validity of searches and seizures by federal officers under the Fourth Amendment, and for other procedings consistent with this opinion. Pp. 255–262.

   (a) On the record, it cannot be said that there existed probable cause for an arrest when the officers decided to alight from their car and approach the taxicab in which petitioner was riding. P. 261.

   (b) Therefore, if the arrest occurred when the officers took their positions at the doors of the taxicab, nothing that happened thereafter could make the arrest lawful or justify a search as its incident. Pp. 261–262.

(c) If the petitioner voluntarily revealed the package of narcotics to the officers' view, a lawful arrest could then have been supported by reasonable cause to believe that a felony was being committed in their presence. P. 262.

(d) The validity of the search turns upon the narrow question of when the arrest occurred, and the answer to that question depends upon an evaluation of the conflicting testimony of those who were present at the time. P. 262.

256 F. 2d 173, judgment vacated and cause remanded.

Harvey M. Grossman argued the cause for petitioner. With him on the brief was *Clore Warne.*

Assistant Attorney General Wilkey argued the cause for the United States. With him on the brief were *Solicitor General Rankin, Beatrice Rosenberg* and *Eugene L. Grimm.*

A. L. Wirin filed a brief for the American Civil Liberties Union et al., as *amici curiae,* urging reversal.

Mr. Justice Stewart delivered the opinion of the Court.

An indictment filed in the United States District Court for the Southern District of California charged the petitioner with unlawful receipt and concealment of narcotics in violation of 21 U. S. C. § 174. Before trial the petitioner made a motion to suppress for use as evidence a package of heroin which, so a California court had found, Los Angeles police officers had obtained from the petitioner in an unconstitutional search and seizure. After a hearing the District Court denied the motion to suppress, finding that federal agents had not participated in the search, and finding also that the California officers had obtained the evidence in a lawful manner. The package of narcotics was admitted in evidence over the petitioner's renewed objection at his subsequent trial. He was convicted and sentenced to twenty years in prison.

The Court of Appeals affirmed the conviction, accepting the District Court's finding that the seizure had been lawful, and holding that in any event illegally seized evidence "may nevertheless be received in a federal prosecution, if the seizure was made without the participation of federal officials." 256 F. 2d 173, at 176. Certiorari was granted in an order which limited the questions for consideration to two, 359 U. S. 965:

> "1. Independently of the state court's determination, was the evidence used against petitioner in the federal prosecution obtained in violation of his rights under the Constitution of the United States?
>
> "2. If the evidence was unlawfully obtained, was such evidence admissible in the federal prosecution of petitioner because it was obtained by state officers without federal participation?"

In *Elkins* v. *United States,* decided today, *ante,* p. 206, the Court has answered the second question by holding that evidence seized in an unreasonable search by state officers is to be excluded from a federal criminal trial upon the timely objection of a defendant who has standing to complain. The only question that remains in this case, therefore, is whether the Los Angeles officers obtained the package of heroin "during a search which, if conducted by federal officers, would have violated the defendant's immunity from unreasonable searches and seizures under the Fourth Amendment." *Ante,* p. 223. As in most cases involving a claimed unconstitutional search and seizure, resolution of the question requires a particularized evaluation of the conduct of the officers involved. See *Go-Bart Co.* v. *United States,* 282 U. S. 344, 357.

At about ten o'clock on the night of February 18, 1957, two Los Angeles police officers, dressed in plain clothes and riding in an unmarked car, observed a taxicab stand-

ing in a parking lot next to an apartment house at the corner of First and Flower Streets in Los Angeles. The neighborhood had a reputation for "narcotics activity." The officers saw the petitioner look up and down the street, walk across the lot, and get into the cab. Neither officer had ever before seen the petitioner, and neither of them had any idea of his identity. Except for the reputation of the neighborhood, neither officer had received information of any kind to suggest that someone might be engaged in criminal activity at that time and place. They were not searching for a participant in any previous crime. They were in possession of no arrest or search warrants.

The taxicab drove away, and the officers followed it in their car for a distance of about two miles through the city. At the intersection of First and State Streets the cab stopped for a traffic light. The two officers alighted from their car and approached on foot to opposite sides of the cab. One of the officers identified himself as a policeman. In the next minute there occurred a rapid succession of events. The cab door was opened; the petitioner dropped a recognizable package of narcotics to the floor of the vehicle; one of the officers grabbed the petitioner as he alighted from the cab; the other officer retrieved the package; and the first officer drew his revolver.[1]

The precise chronology of all that happened is not clear in the record. In their original arrest report the police stated that the petitioner dropped the package only after one of the officers had opened the cab door. In testifying later, this officer said that he saw the defendant drop the package before the door of the cab was opened. The taxi

[1] The petitioner later broke free from the policeman's grasp and ran into an alley. There the officer apprehended him after shooting him in the back.

driver gave a substantially different version of what occurred. He stated that one of the officers drew his revolver and "took hold of the defendant's arm while he was still in the cab." [2]

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[2] "Q. Will you just tell us in your own words, Mr. Smith, what happened immediately after the time you saw Officer Beckmann?

"A. Well, he appeared alongside my taxicab on the right-hand side opposite the front window on the right holding a flashlight in his right hand, I believe, and his billfold in his left. . . .

"The Court: Then what happened?

"The Witness: Then I believe he turned toward the defendant who was riding in the back of the cab and I think he motioned with his billfold toward the defendant and he opened the door. Now somewhere along in here I think Beckmann disposed of his flashlight. I didn't notice exactly what happened there.

"By Mrs. Bulgrin:

"Q. What did the defendant do? What was happening as far as the defendant was concerned?

"A. Well, he appeared to be becoming quite agitated.

"Q. While he was inside the cab?

"A. While he was inside the cab, yes.

"Q. When the door opened did he get out?

"A. Well, there are other events before he got out.

"The Court: What were they?

"The Witness: Well, I am trying to get these in the right order. It is difficult because things happened quickly. . . .

"The Witness: Officer Beckmann opened the door and I asked him who he was, that is, he opened the rear door of the taxicab and he said, 'We are police officers.' I just wanted to satisfy my own mind about that. I didn't know whether he was a policeman or a hijacker positively, but I thought that he was a policeman but I wanted to be sure. So he said, 'We are police officers.'

"I thought probably it was just a routine examination. I work the night shift, have for some time, and I have been stopped by the police and they have checked the occupants of my cab. There have been quite a few holdups of taxi drivers and I just thought it was a routine thing.

"But the defendant was getting quite agitated and I noticed at this time that Officer Beckmann had his revolver drawn, which seemed to me somewhat extraordinary just to stop and question an occupant of a cab, and said something to the effect that you are scaring him,

A state criminal prosecution was instituted against the petitioner, charging him with possession of narcotics, a felony under California law. Cal. Health and Safety Code, § 11500. At a preliminary hearing the two Los Angeles officers testified as to the circumstances surrounding the arrest and seizure. When the case came on for trial in the Superior Court of Los Angeles County, the petitioner moved to suppress as evidence the package of heroin which the police had seized. On the basis of the transcript of the preliminary hearing, and after brief argument by counsel, the court granted the motion and entered a judgment of acquittal.[3]

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what is the big idea, something like that. I don't remember my exact words.

"As I recall then Officer Beckmann took the defendant by the arm—

"By Mrs. Bulgrin:

"Q. That was after the defendant got out of the cab, is that correct?

"A. It was my impression that Officer Beckmann took hold of the defendant's arm while he was still in the cab. . . .

"The Court: How could you tell the defendant was agitated?

"The Witness: Well, it is a rough impression but I was sufficiently impressed with the fact at the time to protest to Officer Beckmann that he was frightening him, and as far as I knew there was no good cause to be frightening him with a drawn revolver. Maybe it was me who was agitated."

On cross-examination the taxi driver testified as follows:

"Well, I would say that the most prominent thing in my eyesight at the time was this revolver, which looked the size of a cannon. . . .

"At the time he opened the door, I can't say just at what point in the order of these events he drew his revolver, but at some time before or after the door was opened, while Rios was still sitting in the cab, he drew his revolver."

[3] California follows the so-called exclusionary rule. *People* v. *Cahan*, 44 Cal. 2d 434, 282 P. 2d 905. The basis for the trial court's suppression of the evidence is revealed in the following excerpt from the judge's brief oral opinion:

"As I see it, I can't possibly see how this arrest could have originally

Thereafter, one of the Los Angeles officers who had arrested the petitioner discussed the case with his superiors and suggested giving the evidence to United States authorities. He then got in touch with federal narcotics agents and told them about the petitioner's case. This led to the federal prosecution we now review.[4]

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been attempted under the information the officer very frankly tells us that he had. I don't think any reasonable man would think a felony had been committed because a man comes out of a building, looks up the street, and the other way on the street, then looks up First Street, then walks to an automobile in a parking lot, gets in a taxicab and drives away. What in the world there is in that, together with the fact it happens to be First and Hope or First and Flower—I forget which it is—and also that somebody else was arrested in a taxicab, when there are so many hundreds of taxicabs in this community, about three months before, just to state it shows the absurdity of it, insofar as I see, and your motion to suppress the evidence will be granted—. . .

"I find him not guilty as charged. They will get you sometime, Rios; they didn't get you this time but they will sometime."

[4] "Q. What occasioned the presentation of this case to the Federal grand jury after the ruling in the Superior Court across the street, Mr. Beckmann, in this particular case?

"A. After the ruling in the Superior Court, approximately a week or two weeks later, I conferred with my divisional commander, Captain Clavis, about the case, and at that time I showed him the arrest reports and discussed the case with him.

"He then called Captain Madden of the Narcotics Division of the Los Angeles Police Department. I then went over and talked to Captain Madden of the Los Angeles Police Department. Captain Madden then looked at the arrest report, and I discussed the case with him going to the Federal Narcotics to present the case.

"Q. Whose idea was that? Was that yours or Captain Madden's?

"A. Mine.

"Q. In other words, did you institute the discussion with Captain Madden?

"A. Yes. Captain Madden then called Federal Narcotics and I went over to Federal Narcotics and talked to Mr. Goven. At that time I showed him a copy of my arrest report and discussed the case with him."

In holding that the package of heroin which had been seized by the state officers was admissible as evidence in the federal trial, the District Court placed prime reliance upon the silver platter doctrine, there having been no participation by federal agents in the search and seizure. But the court also expressed the opinion, based upon the transcript of the state court proceedings and additional testimony of the two Los Angeles police officers at the hearing on the motion to suppress, that the officers had obtained the evidence lawfully. The court was of the view that the seizure was permissible as an incident to a legal arrest, or, alternatively, that the petitioner had abandoned the narcotics when he dropped them to the floor of the taxicab. At the time this opinion was expressed, however, the district judge had not yet heard the taxicab driver's version of the circumstances surrounding the arrest and seizure. The driver did not testify until the trial itself. After he had testified, the package of heroin was offered in evidence. The petitioner's counsel objected, and the court overruled the objection without comment. See *Gouled* v. *United States,* 255 U. S. 298, 312–313; *Amos* v. *United States,* 255 U. S. 313, 316–317; *Jones* v. *United States,* 362 U. S. 257, 264. For all that appears, this ruling may then have been based solely upon the silver platter doctrine. Moreover, the Court of Appeals gave no consideration to the question of the legality of the state search and seizure, relying as it did upon the silver platter doctrine and rejecting the petitioner's contention that the state court's determination of illegality precluded the federal trial court from making an independent inquiry into the matter.

With the case in such a posture, we have concluded that the interests of justice will best be served by remanding the case to the District Court. There, free from the entanglement of other issues that have now become irrel-

evant, the lawfulness of the policemen's conduct can be determined in accord with the basic principles governing the validity of searches and seizures by federal officers under the Fourth Amendment.

Under these principles the inquiry in the present case will be narrowly oriented. The seizure can survive constitutional inhibition only upon a showing that the surrounding facts brought it within one of the exceptions to the rule that a search must rest upon a search warrant. *Jones* v. *United States,* 357 U. S. 493, 499; *United States* v. *Jeffers,* 342 U. S. 48, 51. Here justification is primarily sought upon the claim that the search was an incident to a lawful arrest. Yet upon no possible view of the circumstances revealed in the testimony of the Los Angeles officers could it be said that there existed probable cause for an arrest at the time the officers decided to alight from their car and approach the taxi in which the petitioner was riding. Compare *Brinegar* v. *United States,* 338 U. S. 160; *Carroll* v. *United States,* 267 U. S. 132; *Henry* v. *United States,* 361 U. S. 98. This the Government concedes.[5]

If, therefore, the arrest occurred when the officers took their positions at the doors of the taxicab, then nothing

[5] At the time of the arrest the California statute governing arrest without warrant provided as follows:

"A peace officer may make an arrest in obedience to a warrant delivered to him, or may, without a warrant, arrest a person:

"1. For a public offense committed or attempted in his presence.

"2. When a person arrested has committed a felony, although not in his presence.

"3. When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it.

"4. On a charge made, upon a reasonable cause, of the commission of a felony by the party arrested.

"5. At night, when there is reasonable cause to believe that he has committed a felony." Cal. Penal Code (1956 ed.), § 836 (later amended, Stat. 1957, c. 2147, § 2).

that happened thereafter could make that arrest lawful, or justify a search as its incident. *United States* v. *Di Re,* 332 U. S. 581; *Johnson* v. *United States,* 333 U. S. 10; *Miller* v. *United States,* 357 U. S. 301; *Henry* v. *United States,* 361 U. S. 98. But the Government argues that the policemen approached the standing taxi only for the purpose of routine interrogation, and that they had no intent to detain the petitioner beyond the momentary requirements of such a mission. If the petitioner thereafter voluntarily revealed the package of narcotics to the officers' view, a lawful arrest could then have been supported by their reasonable cause to believe that a felony was being committed in their presence.[6] The validity of the search thus turns upon the narrow question of when the arrest occurred, and the answer to that question depends upon an evaluation of the conflicting testimony of those who were there that night.

The judgment is vacated, and the case is remanded to the District Court for further proceedings consistent with this opinion.

Vacated and remanded.

[For opinion of Mr. Justice Frankfurter, joined by Mr. Justice Clark, Mr. Justice Harlan and Mr. Justice Whittaker, see *ante,* p. 233.]

[For memorandum of Mr. Justice Harlan, joined by Mr. Justice Clark and Mr. Justice Whittaker, see *ante,* p. 251.]

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[6] A passenger who lets a package drop to the floor of the taxicab in which he is riding can hardly be said to have "abandoned" it. An occupied taxicab is not to be compared to an open field, *Hester* v. *United States,* 265 U. S. 57, or a vacated hotel room, *Abel* v. *United States,* 362 U. S. 217.

OHIO EX REL. EATON *v.* PRICE, CHIEF OF POLICE.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 30. Argued April 19, 1960.—Decided June 27, 1960.

Petitioner was arrested and held in jail awaiting trial on a criminal charge for refusing to permit building inspectors to enter and inspect his home without a search warrant, as required by § 806–30 (a) of the Dayton, Ohio, Code of General Ordinances. On review of habeas corpus proceedings in the lower state courts, the Supreme Court of Ohio sustained the constitutionality of the ordinance. *Held:* The judgment is affirmed by an equally divided Court.

Reported below: 168 Ohio St. 123, 151 N. E. 2d 523.

Greene Chandler Furman and *Elbert E. Blakely* argued the cause for appellant. With them on the briefs were *Stanley Denlinger* and *Stanley Robinson, Jr.*

Charles S. Rhyne and *Joseph P. Duffy* argued the cause for appellee. With them on the briefs was *S. White Rhyne, Jr.*

Roger Arnebergh, Alexander G. Brown, Claude V. Jones, Henry P. Kucera, John C. Melaniphy, David Stahl and *Harrison L. Winter* filed a brief for the Member Municipalities of the National Institute of Municipal Law Officers, as *amici curiae*, urging affirmance.

PER CURIAM.

The judgment is affirmed by an equally divided Court.

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

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

The judgment of the Ohio Supreme Court in this case is being affirmed *ex necessitate*, by an equally divided

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Court. Four of the Justices participating are of opinion that the judgment should be affirmed, while we four think it should be reversed. Accordingly, the judgment is without force as precedent. *The Antelope,* 10 Wheat. 66, 126; *Etting* v. *Bank of the United States,* 11 Wheat. 59, 78. In such circumstances, as those leading cases indicate, the usual practice is not to express any opinion, for such an expression is unnecessary where nothing is settled. But in this case, even before the cause was argued, four Justices made public record of their votes to affirm the judgment, and their basis therefor. 360 U. S. 246, 248–249. These four Justices stated that they were "of the view that this case is controlled by, and should be affirmed on the authority of, *Frank* v. *Maryland,* 359 U. S. 360." Their opinion further states that they deemed "the decision in the Maryland case to be completely controlling upon the Ohio decision." In a longer opinion, one of the four Justices developed his views on the merits further. 360 U. S., at 249–250. The usual practice of not expressing opinions upon an equal division has the salutary force of preventing the identification of the Justices holding the differing views as to the issue, and this may well enable the next case presenting it to be approached with less commitment. But the action we have described prevents this from being the case here; and so the reason for the usual practice is not applicable. Accordingly, since argument has been had, and votes on the merits are now in order, we express our opinion.[1]

This case involves Earl Taylor, who is in his sixties and has been working at his trade of plumber for 40 years, and

[1] Expressions of views, despite equal divisions, have been made before where there was a question whether one fact situation was to be distinguished from a related one on which a majority of the Court had rendered an opinion. *Raley* v. *Ohio,* 360 U. S. 423, 440–442, 442–445. The question whether this case is to be distinguished from *Frank* presents an analogy to this.

the home at 130 Henry Street, in Dayton, Ohio, which he and his wife bought and in which they have lived for over a decade. He describes it as a little cottage, all in one floor, with a front room, a middle room, two bedrooms, a dining room and a little utility room, and a bathroom and a little kitchen at the back. What was evidently Taylor's first involvement with the criminal law occurred in this fashion. One day three men who were housing inspectors came to his door, and said they wanted to come into the house and go through the house and inspect the inside of the house. They had no credentials, only a sheet of yellow note paper, and Taylor said to them, "You have nothing to show me you have got a right to go through my house." The response was, "We don't have to have, according to the law passed four years ago." [2]

[2] The reference is apparently to the ordinance around which this case turns. Section 806–30 (a) of the Dayton, Ohio, Code of General Ordinances provides:

"The Housing Inspector is hereby authorized and directed to make inspections to determine the condition of dwellings, dwelling units, rooming houses, rooming units and premises located within the City of Dayton in order that he may perform his duty of safeguarding the health and safety of the occupants of dwellings and of the general public. For the purpose of making such inspections and upon showing appropriate identification the Housing Inspector is hereby authorized to enter, examine and survey at any reasonable hour all dwellings, dwelling units, rooming houses, rooming units, and premises. The owner or occupant of every dwelling, dwelling unit, rooming house, and rooming unit or the person in charge thereof, shall give the Housing Inspector free access to such dwelling, dwelling unit, rooming house or rooming unit and its premises at any reasonable hour for the purpose of such inspection, examination and survey."

This command is backed by the penalty that "Any person who shall violate any provision of this ordinance shall, upon conviction, be punished by a fine of not less than twenty dollars ($20.00) nor more than two hundred dollars ($200) or by imprisonment of not less than two (2) days nor more than thirty (30) days, or both, and each day of failure to comply with any such provision shall constitute a separate violation." § 806–83.

Replied Taylor, "That don't show me that you got anything in there that you want for inspection, and, further, I don't have nothing in my house that has to be inspected." The man said, "Well, you know, according to this ordinance, that we got a right to go through your house and inspect your house." "No, I don't think you have, unless you got a search warrant," answered Taylor. This has been his position ever since, and it is the issue that divides us.

The men went away, but later there was a second attempt to gain access to Taylor's house, and a telephone call to the same end. Taylor said, "I don't see what right that you got coming into my house. Until you show me in writing, or some kind of facts, that you got a right to come into my house and inspect the house, I will not let you in." The third time the men came, there were two of them. One had some sort of credential with a photograph on it. Neither had a warrant of any kind. One said the housing inspector wanted to inspect Taylor's house. Taylor said, "What do you have in there that you want to inspect? I have nothing in my house for inspection." He was told: "We have a right to come in your house, go through your house, inspect the whole inside of your house." Taylor's reaction to this was: "You have nothing wrote down on paper. You don't have a thing to show me you are going to come in there to inspect anything, and as far as that goes you aren't coming in unless you have a search warrant to get in." The men never came back with a search warrant, but as they left, one said, "If you ain't going to let us in, we are entitled to get in, and if you don't let us in, I am going to leave it up to the Prosecutor." Whereupon Taylor said: "I don't care what you do. You aren't coming in." Taylor later testified that then the man "walked over and got in his car and that was the end of it."

But it was not. Taylor and his wife each received through the mail a registered letter from the city prosecutor, notifying them to appear at his office to answer a complaint against them. They did not appear; whereupon the police came to Taylor's home, and finally served him with a warrant—a warrant to appear in court to answer criminal charges brought against him for failing to admit the inspectors to his home. He appeared in court and was held for trial; and not being then able to make bond of $1,000, he was committed to jail, to await trial on the charges, which could have resulted in a fine of $200 and an incarceration of 30 days for each day's recalcitrance. One Eaton, an attorney, filed a petition for habeas corpus on Taylor's behalf in the State Common Pleas Court.[3] The Common Pleas Court found the ordinance unconstitutional, and discharged Taylor from custody; but the Court of Appeals reversed, 105 Ohio App. 376, 152 N. E. 2d 776, and its judgment was upheld by the Ohio Supreme Court. 168 Ohio St. 123, 151 N. E. 2d 523. We noted probable jurisdiction. 360 U. S. 246.

The municipal ordinance in question provides numerous requirements for dwellings, deemed by the city to be appropriate in the interests of the public health, safety and comfort. Several of the requirements apply to private dwelling houses, such as the Taylors'. None of these requirements is at all questioned here. What is ques-

[3] Evidently habeas corpus lies in Ohio to test the constitutionality of the ordinance under which one is being held through charges pending in a court of inferior jurisdiction, as all the state courts proceeded to pass on the merits of the claims of the relator Eaton, appellant here, that the ordinance under which the charges were brought infringed Taylor's constitutional rights. Accordingly we may now review that determination on the merits, the habeas corpus proceeding, independent of the criminal prosecution itself, having proceeded to a final judgment. *New York ex rel. Bryant* v. *Zimmerman*, 278 U. S. 63, 70.

tioned is the ordinance provision, Code of General Ordinances § 806–30, authorizing the Housing Inspector to enter at any reasonable hour any dwelling whatsoever, and commanding the owner or occupant to give him free access at any reasonable hour for the purpose of his inspection. It was armed with the naked authority of this provision, and not with any warrant (the ordinance provides for none) that the inspectors approached Taylor's door, even after he had made clear to them his intent not to admit them on this basis. Neither before a magistrate empowered to issue warrants, nor in this proceeding, have the inspectors offered any justification for their entry. They have not shown any probable cause or grounds to believe that a proscribed condition existed within the cottage, or even that they had suspicion or complaint thereof. They have not shown that they desired to make the inspection in pursuance of a regular, routinized spot check of individual homes, or in pursuance of a planned blanket check of all the homes in a particular neighborhood, or the like.[4] These might be said to be the usual reasons which would impel inspectors to seek to gain admittance to a private dwelling; but none of them is shown by the record to have been present. Most significantly, on the initial recalcitrance of Taylor, the inspectors were not required to, and did not, repair before any independent magistrate to demonstrate to him their reasons for wanting to gain access to Taylor's cottage, and to obtain his warrant for their entry—the authorization on which Taylor was insisting. The judgment below is, on this record, bottomed on the proposition that the inspectors have the

[4] Those desiring to make the inspection did not so testify; and such a planned blanket check, or its nature, is hardly inferable from Taylor's statement that "they had been going up and down there, door-to-door, looking through everybody's houses"; his statement being the only thing resembling evidence on the point.

right to enter a private dwelling, and the householder can be bound under criminal penalties to admit them, though there is demonstration neither of reason to believe there exists an improper condition within the dwelling, nor of the existence of any plan of inspection, apart from such a belief, which would include the inspection of the dwelling in question. We think that affirmance of this judgment would reduce the protection of the householder "against unreasonable searches" to the vanishing point.

In support of the judgment below, much reliance at the bar has been put on *Frank* v. *Maryland,* 359 U. S. 360. We would not be candid to say that on its own facts we have become reconciled to that judgment. To us, it remains "the dubious pronouncement of a gravely divided Court." *Cooper* v. *Aaron,* 358 U. S. 1, 24 (concurring opinion). "A single decision by a closely divided court, unsupported by the confirmation of time, cannot check" the course of constitutional adjudication here. See *Kovacs* v. *Cooper,* 336 U. S. 77, 89 (concurring opinion). We continue to agree with Judge Prettyman in *District of Columbia* v. *Little,* 85 U. S. App. D. C. 242, 246, 178 F. 2d 13, 17, aff'd on other grounds, 339 U. S. 1, that: "To say that a man suspected of crime has a right to protection against search of his home without a warrant, but that a man not suspected of crime has no such protection, is a fantastic absurdity." Nothing demonstrated in the *Frank* case indicates otherwise to us. But the present case goes much further than *Frank;* and as to the reasonableness of searches, it has been stressed that factual differences may weigh heavily. *Go-Bart Importing Co.* v. *United States,* 282 U. S. 344, 357. The search in *Frank* was for the nesting place of rats. There were ample grounds on the part of the inspecting officer to believe its existence in the house. There had been complaint of rats in the neighborhood; and an external

inspection of the house in question revealed that it was "in an 'extreme state of decay' " and that behind it there was a pile of "rodent feces mixed with straw and trash and debris to approximately half a ton." See 359 U. S., at 361. The case was decided by the narrowest of divisions; and one member of the majority found it necessary to express in a concurring opinion that the sole purpose of the search was an attempt "to locate the habitat of disease-carrying rodents known to be somewhere in the immediate area." 359 U. S., at 373 (concurring opinion). There was no case of a "systematic area-by-area search" before the Court, and although certain remarks were made as applicable to such a search, 359 U. S., at 372, their character as dicta is patent. Thus, even accepting the judgment in *Frank,* of such expressions the classic language of Justice Brandeis, dissenting in *Jaybird Mining Co.* v. *Weir,* 271 U. S. 609, 619, can be said again: "It is a peculiar virtue of our system of law that the process of inclusion and exclusion, so often employed in developing a rule, is not allowed to end with its enunciation and that an expression in an opinion yields later to the impact of facts unforeseen."

In this case we pass beyond the situation in *Frank,* where the inspector was looking for a specific violation, and where he had, and was able to demonstrate, considerable grounds to believe it existed in Frank's house. Here it would appear from Taylor's testimony that, even without a warrant, if a specific matter was cited to him by the inspector, he would have permitted the inspection in that regard. On the contrary, Frank's denial of access was described as based on "a rarely voiced denial of any official justification for seeking to enter his home." 359 U. S., at 366. There then was a specific demand for inspection, met by a refusal on the broadest of grounds. Here we have the most general of demands,

supported by no particularized justification, either directed at the conditions in Taylor's cottage, or in terms of some over-all systematic plan which would include it. This is met not by an attitude of defiance, but by a request by the householder that a specific authorization be furnished him. Not a search warrant, but a criminal complaint is the upshot. We would grossly tone down the protections afforded the householder by the Constitution were we to put an authoritative sanction on the judgment that condemns his refusal.

Much argument is made of the need of the authorities to perform inspections on a "spot check" or on an area-by-area basis. The judgment below cannot be said to present this problem, because there was no evidence that this in fact was what was being done; that the inspectors in fact were proceeding according to a reasonable plan of one sort or another. For all that appears here, the inspectors could have been acting in accordance with no particular plan of spot checks or area-by-area searches which could be justified as "reasonable," and which would give probable cause for entry; [5] their action could have been based on caprice or on personal or political spite. It hardly contradicts experience to suggest that the practical administration of local government in this country can be infected with such motives. Building inspection ordinances can lend themselves readily to such abuse. We do not at all say this to be the case here, and Taylor has made no proof of it, to be sure; but that simply points up the issue. The inspectors have not been required to make any justification for their entry. The judgment below upholds the charges as sufficient, based on a demand for entry without any such justification.

But if we were to assume that the inspectors were proceeding according to a plan, and even if evidence of the

[5] See *Frank* v. *Maryland, supra,* at 383 (dissenting opinion).

plan were put in at the trial, we think that the result should be the same. The time to make such justification is not in the criminal proceeding, after the householder has acted at his peril in denying access. The time to make it is in advance of prosecution, and the place is before a magistrate empowered to issue warrants, which will put the seal of legitimacy—the seal the Constitution specifically provides for—on the demand of the inspector, if indeed it is a reasonable one. Such a warrant need not be sought except where the householder does not consent. This is precisely the procedure followed by England in this particular area, see Public Health Act, 1936, 26 Geo. 5, & 1 Edw. 8, c. 49, § 287 (2);[6] and no complaint is heard that this stultifies enforcement there of the regulation of the public health and safety. Certainly with this procedure available—the procedure of antecedent justification before a magistrate that is central to the Fourth Amendment, see *McDonald* v. *United States,* 335 U. S. 451, 455–456—there is no need to be satisfied with lesser standards in this area. Cf. *Dean Milk Co.* v. *Madison,* 340 U. S. 349. The public interest in the cleanliness and adequacy of the dwellings of the people is great. So too is the public interest that the tools of counterfeiting and

[6] The procedure cited is that prescribed by statute in the case of health inspections under the Public Health Act. There are other statutes providing for other inspections, an English commentator points out, which do not contain this safeguard. See Waters, Rights of Entry in Administrative Officers, 27 U. of Chi. L. Rev. 79, 85. Accordingly, "the private occupier is faced with a bewildering number of persons claiming a variety of rights." *Id.,* at 83. The author is in favor of the Public Health Act procedure, and regrets that "the consistent application to good works is yet lacking." "The object should be the creation of warrant provisions in a statutory code of powers of entry, guaranteeing to the individual thereby the impartial, if rarely invoked, judgment by magistrates of the fairness and legality of any attempted entry." *Id.,* at 93.

the paraphernalia of the illicit narcotics traffic not remain active. On an adequate and appropriate showing in particular cases, the privacy of the home must bow before these interests of the public. But none of these interests provides an open sesame to those who enforce them. The Fourth Amendment's procedure establishes the way in which these general public interests are to be brought into specific focus to require the individual householder to open his door.

It has been suggested that if the Fourth Amendment's requirement of a search warrant is acknowledged to be applicable here, the result will be a general watering-down of the standards for the issuance of search warrants. For it is said that since it is agreed that a warrant for a health and safety inspection can be made on a showing quite different in kind from that which would, for example, justify a search for narcotics, magistrates will become lax generally in issuing warrants. The suggested preventive for this laxity is a drastic one: dispense with warrants for these inspections. We cannot believe that here it is necessary thus to burn down the house to roast the pig. To be sure, the showing that will justify a housing inspection to check compliance with health and safety regulations is different from that which would justify a search for narcotics. But we should not assume that magistrates will become so obtuse as not to bear this in mind. Search warrants to look for counterfeiting equipment, for example, are not issued on a showing of probable cause to believe the existence of an untaxed still. To each specific warrant, an appropriate specific showing is necessary. This can scarcely be thought to tax the capacities of the magistrate. And of course where the rule prevails that evidence obtained in violation of the constitutional guarantee is not admissible, there will be judicial review of the

magistrate's action if the fruits of a search are tendered in evidence.[7]

Apart from the very significant factual distinctions presented by this case from the *Frank* case, there is another reason why we would reverse the judgment here. It has now become clear that the *Frank* decision may have turned in substantial part on the positing of a distinction between the affirmative guaranty of privacy against official incursion raised by the Fourth Amendment against federal action, and that raised by the Due Process Clause of the Fourteenth against state action. The concurring opinion of one of the majority in that sharply divided decision indicates some concern in that respect. 359 U. S., at 373. After the greatest consideration, this Court in *Wolf* v. *Colorado,* 338 U. S. 25, 27–28, declared: "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause." It is now clear that part of the majority of the Court in the *Frank* case does not subscribe to the clear import of that statement. *Elkins* v. *United States, ante,* pp. 206, 237–240 (dissenting opinion). But the *Wolf* statement continues to be the ruling doctrine in this Court. *Elkins* v. *United States, ante,* p. 206. The guarantees are of the same dimension, matters of enforcement, such as the exclusionary rule, aside.

The classic debate on the import of the Fourteenth Amendment's Due Process Clause as to the applicability of the Bill of Rights to the States, we submit, does not even involve the theory that the matter is one for the judges to solve on an *ad hoc* basis, according to their overall reaction to particular cases. Some of us have expressed

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[7] See *Weeks* v. *United States,* 232 U. S. 383.

the conviction that the preferable view of the Fourteenth Amendment is that it makes the guarantees of the Bill of Rights generally enforceable against the States. See *Adamson* v. *California,* 332 U. S. 46, 68 (dissenting opinion). But to them, as well as to us, who have neither accepted nor rejected that view, it is clear that the celebrated passage of Justice Cardozo's opinion in *Palko* v. *Connecticut,* 302 U. S. 319, 323–325, can have no common ground with the view of the *Wolf* case that a minority of the Court now expounds. And see *Adamson* v. *California, supra,* at 85–86, 89 (dissenting opinion). For the *Palko* opinion refers to "a process of absorption," 302 U. S., at 326, of specific Bill of Rights guarantees in the Fourteenth Amendment's standard.[8] It is not a license to the judiciary to administer a watered-down, subjective version of the individual guarantees of the Bill of Rights when state cases come before us. To be sure, the contrary view has been urged, occasionally with success; the right to counsel was put on an *ad hoc* basis, *Betts* v. *Brady,* 316 U. S. 455, despite what seems the clear implication to the contrary in *Palko,* 302 U. S., at 324; and recently the surprising suggestion has even been made (never by the Court) that the freedom of speech and of the press may be secured by the Fourteenth Amendment with less vigor than it is secured by the First. See *Beauharnais* v. *Illinois,* 343 U. S. 250, 288 (dissenting opinion); *Roth* v. *United States,* 354

[8] "We reach a different plane of social and moral values when we pass to the privileges and immunities that have been taken over from the earlier articles of the federal bill of rights and brought within the Fourteenth Amendment by a process of absorption. These in their origin were effective against the federal government alone. If the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed. . . . This is true, for illustration, of freedom of thought, and speech. Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom. . . ." 302 U. S., at 326–327.

U. S. 476, 505–506 (separate opinion); *Smith* v. *California,* 361 U. S. 147, 169 (separate opinion).[9]

In *Elkins* today we have rejected such a view of the affirmative guarantees of the Fourth Amendment. The opinion of the Court in *Frank* is very likely a product of such a rejected approach. For that reason, even if it were on all fours with the present case, it should not be followed, and the judgment below should be reversed.

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[9] Contrast the statement in *Palko,* 302 U. S., at 324. For the latest of many reiterations of the settled doctrine that the First Amendment's guarantees obtain against the States, see *Smith* v. *California,* 361 U. S. 147, 149–150; *Bates* v. *Little Rock,* 361 U. S. 516, 522–523. See *Staub* v. *Baxley,* 355 U. S. 313, 321. For a collection of many of the cases to this effect, see *Speiser* v. *Randall,* 357 U. S. 513, 530 (concurring opinion).

McCRARY *v.* INDIANA.

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

No. 417, Misc. Decided June 27, 1960.

Petitioner alleges he was denied equal protection because as a pauper he was unable to furnish and pay for transcript of trial required by court rules to be filed with appeal in post-conviction proceeding in state court, and also that he was denied services of public defender. *Held:* Certiorari granted; order of dismissal vacated; and case remanded for further consideration.

239 Ind. 707, 158 N. E. 2d 292, vacated and remanded.

Petitioner *pro se.*

Edwin K. Steers, Attorney General of Indiana, and *Richard M. Givan,* Deputy Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the writ of certiorari are granted. Petitioner's attempted appeal to the Supreme Court of Indiana from a denial of relief in a post-conviction *coram nobis* proceeding was dismissed because of his failure to comply with rules of that court, requiring, *inter alia,* the filing of a transcript of the trial proceedings. He alleges that the dismissal denied him the equal protection of the laws because he was and is unable to pay for the preparation of such a transcript, see *Griffin* v. *Illinois,* 351 U. S. 12, and that although he attempted to avail himself of the services of the Indiana Public Defender, who is empowered to secure the preparation of such a transcript in paupers' cases, see Burns' Indiana Stats. (1956 Repl.), § 13–1401 *et seq.,* that officer declined to assist him. The record before us does not disclose whether these allegations were made to, and passed on by, the Indiana Supreme Court in light of *Griffin* v. *Illinois, supra.* Accordingly we vacate the order of dismissal and remand the case to it for further consideration of the appeal.

UNITED RAILROAD WORKERS DIVISION OF TRANSPORT WORKERS UNION OF AMERICA ET AL. *v.* BALTIMORE & OHIO RAILROAD CO. ET AL.

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

No. 535. Decided June 27, 1960.

Certiorari granted; judgment vacated and case remanded.
Reported below: 271 F. 2d 87.

George Halpern, Edith Lowenstein, Carl E. Newton, Yelverton Cowherd and *Alfred D. Treherne* for petitioners.

Joseph P. Allen for respondents.

PER CURIAM.

The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded for reconsideration in light of *Brotherhood of Locomotive Engineers et al.* v. *Missouri-Kansas-Texas R. Co.*, 363 U. S. 528.

McGRATH ET AL. *v.* RHAY, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON.

No. 720. Decided June 27, 1960.

Judgment vacated and case remanded for determination of specified questions of state law.

Reported below: 54 Wash. 2d 508, 342 P. 2d 607.

Petitioners *pro se.*

John J. O'Connell, Attorney General of Washington, and *Stephen C. Way,* Assistant Attorney General, for respondent.

PER CURIAM.

The respondent's motion to dismiss the writ of certiorari is denied. The judgment of the Supreme Court of Washington is vacated and the case is remanded for determination of the following questions of Washington law now involved in the case: (1) whether the case is moot as a habeas corpus proceeding; and (2) if it is, whether, to avoid mootness, it can properly be treated as an application for some other form of appropriate relief.

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LUCKENBACH STEAMSHIP CO., INC., *v.* UNITED STATES ET AL.

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

No. 848. Decided June 27, 1960.

Judgment with respect to suspension of rates vacated and case remanded; judgment affirmed with respect to antitrust question.

Reported below: 179 F. Supp. 605.

Mark P. Schlefer, John Cunningham and *Israel Convisser* for appellant.

Solicitor General Rankin, Acting Assistant Attorney General Bicks, Charles H. Weston, Robert W. Ginnane and *H. Neil Garson,* for the United States and the Interstate Commerce Commission, appellees; *Jeremiah C. Waterman, Edward M. Reidy* and *Raymond A. Negus* for other appellees.

PER CURIAM.

The judgment of the United States District Court for the District of Delaware, so far as it relates to the suspension of rates phase of the dispute, is vacated and the case is remanded to the District Court with instructions to dismiss the cause as moot. *United States* v. *Amarillo-Borger Express,* 352 U. S. 1028; *Atchison, T. & S. F. R. Co.* v. *Dixie Carriers,* 355 U. S. 179. With respect to the antitrust phase of the dispute, the judgment of the District Court is affirmed.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS dissent on the holding of *Georgia* v. *Pennsylvania R. Co.,* 324 U. S. 439.

LIVINGSTON ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA.

No. 895. Decided June 27, 1960.

179 F. Supp. 9, affirmed.

Daniel R. McLeod, Attorney General of South Carolina, and *James M. Windham* and *James S. Verner,* Assistant Attorneys General, for appellants.

Solicitor General Rankin, Assistant Attorney General Rice, Myron C. Baum, Loren K. Olson and *Lionel Kestenbaum* for the United States and the Atomic Energy Commission, appellees.

Hugh K. Clark and *W. Graham Claytor, Jr.* for E. I. du Pont de Nemours & Co., appellee.

PER CURIAM.

The motion to substitute Harold Murph and Robert C. Wasson in the place of Francis M. Pickney and James W. Crain as parties appellant is granted. The motion to affirm is granted and the judgment is affirmed.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion probable jurisdiction should be noted.

EUZIERE *v.* UNITED STATES.

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

No. 119, Misc. Decided June 27, 1960.

Certiorari granted; judgment vacated and case remanded.
Reported below: 266 F. 2d 88.

Petitioner *pro se.*

Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg and *Robert G. Maysack* for the United States.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded for consideration in light of *Elkins* v. *United States, ante,* p. 206, decided this day.

MR. JUSTICE FRANKFURTER dissents on the basis of his dissenting opinion in *Rios* v. *United States, ante,* p. 233, and *Elkins* v. *United States, ante,* p. 233, decided this day.

CAMARA *v.* UNITED STATES.

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

No. 605, Misc. Decided June 27, 1960.

Certiorari granted; judgment vacated; and case remanded.
Reported below: 271 F. 2d 787.

Albert E. Jenner, Jr. for petitioner.

Solicitor General Rankin for the United States.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded for consideration in light of *Elkins* v. *United States, ante*, p. 206, decided this day.

MR. JUSTICE FRANKFURTER would reverse on the basis of his dissenting opinion in *Rios* v. *United States, ante*, p. 233, and *Elkins* v. *United States, ante*, p. 233, decided this day.

CUTTING *v.* BANK OF ALASKA (OR NATIONAL BANK OF ALASKA) ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 925, Misc. Decided June 27, 1960.

Appeal dismissed and motions for other relief denied.

PER CURIAM.

The appeal is dismissed. The motions for other relief are denied.

DEITLE *v.* UNITED STATES.

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

No. 759, Misc. Decided June 27, 1960.

Certiorari granted; judgment vacated; and case remanded.
Reported below: 274 F. 2d 117.

Petitioner *pro se.*

Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg and *Robert G. Maysack* for the United States.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded to the District Court for a hearing at which petitioner should be present.

DE GROAT *v.* NEW YORK.

APPEAL FROM THE COUNTY COURT OF ULSTER COUNTY, NEW YORK.

No. 956, Misc. Decided June 27, 1960.

Appeal dismissed and certiorari denied.
Reported below: 8 App. Div. 2d 664, 185 N. Y. S. 2d 775.

PER CURIAM.

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

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1960.

CALIFORNIA COMPANY *v.* COLORADO ET AL.

APPEAL FROM THE SUPREME COURT OF COLORADO.

No. 86. Decided October 10, 1960.

Appeal dismissed for want of a substantial federal question.
Reported below: 141 Colo. 288, 348 P. 2d 382.

John P. Akolt, V. P. Cline and *Francis R. Kirkham* for appellant.

Duke W. Dunbar, Attorney General of Colorado, *Frank E. Hickey,* Deputy Attorney General, and *Fred M. Winner* and *Carl W. Berueffy,* Special Assistants to the Attorney General, for appellees.

PER CURIAM.

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

THOMAS ET AL. *v.* MICHIGAN.

APPEAL FROM THE RECORDER'S COURT OF THE CITY OF DETROIT.

No. 98. Decided October 10, 1960.

Appeal dismissed.

Harold Norris and *H. Franklin Brown* for appellants.

Paul L. Adams, Attorney General of Michigan, and *Samuel J. Torina,* Solicitor General, for appellee.

PER CURIAM.

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

KOPPERS COMPANY, INC., *v.* PENNSYLVANIA.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

No. 100. Decided October 10, 1960.

Appeal dismissed for want of a substantial federal question.
Reported below: 397 Pa. 523, 156 A. 2d 328.

Roy J. Keefer for appellant.

Anne X. Alpern, Attorney General of Pennsylvania, and *George W. Keitel,* Deputy Attorney General, for appellee.

PER CURIAM.

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

WEST *v.* CALIFORNIA.

APPEAL FROM THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES.

No. 117. Decided October 10, 1960.

Appeal dismissed for want of a substantial federal question.

Henry T. Moore, Sr. and *Henry T. Moore, Jr.* for appellant.

William B. McKesson and *Ralph F. Bagley* for appellee.

PER CURIAM.

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

KAHAN ET AL. *v.* CALIFORNIA.

APPEAL FROM THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES.

No. 130. Decided October 10, 1960.

Appeal dismissed for want of a substantial federal question.

A. J. Blackman for appellants.

Roger Arnebergh and *Philip E. Grey* for appellee.

PER CURIAM.

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

ANDREWS *v.* CITY OF SAN BERNARDINO ET AL.

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

No. 137. Decided October 10, 1960.

Appeal dismissed and certiorari denied.
Reported below: 175 Cal. App. 2d 454, 459; 346 P. 2d 454, 457.

Manuel Ruiz, Jr. for appellant.

Waldo Willhoft for appellees.

PER CURIAM.

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

HYAM ET AL. *v.* UPPER MONTGOMERY JOINT AUTHORITY ET AL.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

No. 150. Decided October 10, 1960.

Appeal dismissed and certiorari denied.
Reported below: 399 Pa. 446, 160 A. 2d 539.

Peyton Ford and *J. Howard McGrath* for appellants.

Aloysius B. McCabe and *Joseph DuCoeur* for appellees.

PER CURIAM.

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

DUNSCOMBE *v.* SAYLE, ADMINISTRATOR.

APPEAL FROM THE SUPREME COURT OF FLORIDA.

No. 163. Decided October 10, 1960.

Appeal dismissed and certiorari denied.

John Wattawa for appellant.

C. Robert Burns for appellee.

PER CURIAM.

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

STATE TAX COMMISSION OF ARIZONA *v.* MURRAY COMPANY OF TEXAS, INC.

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

No. 168. Decided October 10, 1960.

Certiorari granted; judgment vacated; and case remanded for clarification.

Reported below: 87 Ariz. 268, 350 P. 2d 674.

Wade Church, Attorney General of Arizona, *Leslie C. Hardy,* Chief Assistant Attorney General, and *Stanley Z. Goodfarb,* Assistant Attorney General, for petitioner.

Denison Kitchel for respondent.

PER CURIAM.

The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded for clarification. *Minnesota* v. *National Tea Co.,* 309 U. S. 551.

MR. JUSTICE DOUGLAS dissents.

TENNESSEE GAS TRANSMISSION CO. *v.* MISSISSIPPI STATE TAX COMM'N.

APPEAL FROM THE SUPREME COURT OF MISSISSIPPI.

No. 223. Decided October 10, 1960.

Appeal dismissed for want of a substantial federal question.
Reported below: 239 Miss. 191, 116 So. 2d 550.

F. Cleveland Hedrick, Jr., John G. Brendel, C. S. Tindall and *Fred S. Gilbert, Jr.* for appellant.

John E. Stone for appellee.

PER CURIAM.

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

ATLANTA NEWSPAPERS, INC., ET AL. *v.* GRIMES, SHERIFF, ET AL.

APPEAL FROM THE SUPREME COURT OF GEORGIA.

No. 237. Decided October 10, 1960.

Appeal dismissed and certiorari denied.
Reported below: 216 Ga. 74, 114 S. E. 2d 421.

B. P. Gambrell and *W. Glen Harlan* for appellants.

PER CURIAM.

The appeal is dismissed. *Rescue Army* v. *Municipal Court of Los Angeles,* 331 U. S. 549. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

FORD *v.* ATTORNEY GENERAL OF PENNSYLVANIA ET AL.

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

No. 255. Decided October 10, 1960.

184 F. Supp. 129, affirmed.

Jacob Kossman for appellant.

Anne X. Alpern, Attorney General of Pennsylvania, and *Frank P. Lawley, Jr.,* Deputy Attorney General, for appellees.

PER CURIAM.

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

VAUGHN *v.* OHIO.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 24, Misc. Decided October 10, 1960.

Appeal dismissed and certiorari denied.
Reported below: 170 Ohio St. 360, 164 N. E. 2d 739.

Appellant *pro se.*

C. Watson Hover and *Harry C. Schoettmer* for appellee.

PER CURIAM.

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

CLINTON *v.* JOSHUA HENDY CORP.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 59, Misc. Decided October 10, 1960.

Reported below: 277 F. 2d 447.

PER CURIAM.

The appeal is dismissed.

CEPERO *v.* PUERTO RICO ET AL.

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

No. 98, Misc. Decided October 10, 1960.

PER CURIAM.

The appeal is dismissed.

WACHTEL *v.* NEW YORK.

APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK, SECOND JUDICIAL DEPARTMENT.

No. 144, Misc. Decided October 10, 1960.

PER CURIAM.

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

RUMMEL ET AL. *v.* MUSGRAVE ET AL.

APPEAL FROM THE SUPREME COURT OF COLORADO.

No. 303. Decided October 17, 1960.

Appeal dismissed for want of a substantial federal question.
Reported below: 142 Colo. —, 350 P. 2d 825.

Fred M. Winner for appellants.

Duke W. Dunbar, Attorney General of Colorado, *Frank E. Hickey,* Deputy Attorney General, and *John W. Patterson,* Assistant Attorney General, for appellees.

PER CURIAM.

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

PICCOTT *v.* FLORIDA.

APPEAL FROM THE SUPREME COURT OF FLORIDA.

No. 112, Misc. Decided October 17, 1960.

Appeal dismissed and certiorari denied.
Reported below: 116 So. 2d 626.

Tobias Simon for petitioner.

Richard W. Ervin, Attorney General of Florida, and *George R. Georgieff,* Assistant Attorney General, for respondent.

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.

COOPER ET AL. *v.* PITCHESS, SHERIFF, LOS ANGELES COUNTY, ET AL.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 278. Decided October 17, 1960.

Appeal dismissed and certiorari denied.
Reported below: 53 Cal. 2d 772, 349 P. 2d 956.

Stanley Fleishman and *Sam Rosenwein* for appellants.

Harold W. Kennedy, William Lamoreaux, William B. McKesson, Ralph F. Bagley and *Victor H. Blanch* for appellees.

PER CURIAM.

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

THE CHIEF JUSTICE and MR. JUSTICE BLACK are of the opinion that probable jurisdiction should be noted.

MORALES ET AL. *v.* CITY OF GALVESTON ET AL.

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

No. 167, Misc. Decided October 17, 1960.

Certiorari granted; judgment vacated; and case remanded.
Reported below: 275 F. 2d 191.

Arthur J. Mandell for petitioners.

Preston Shirley for the City of Galveston, and *Byron F. Williams* for Cardigan Shipping Co., Ltd., respondents.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment of the Court of Appeals is vacated and the case is remanded to that court for consideration in light of *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539.

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NEW MEXICO *v.* COLORADO.

No. 1, Original.—Decided October 24, 1960.

The Report of the Commissioner heretofore designated to run, locate and mark the boundary between the States of New Mexico and Colorado, as determined by this Court's decree of April 13, 1925 (268 U. S. 108), is confirmed; and the boundary line delineated in said Report and on the accompanying maps is established and declared to be the true boundary between those States.

Opinion reported: 267 U. S. 30.

PER CURIAM.

Upon consideration of the Report filed June 27, 1960, by Joseph C. Thoma, Commissioner, heretofore designated to run, locate and mark the boundary between the States of New Mexico and Colorado as determined by the decree of this Court of April 13, 1925 (268 U. S. 108), showing that he has run, located and marked such boundary;

And no objection or exception to such Report being presented, and the time therefor having expired;

It is now adjudged, ordered and decreed as follows:

(1) The said Report is in all things confirmed.

(2) The boundary line delineated and set forth in said Report and on the accompanying maps is established and declared to be the true boundary between the States of New Mexico and Colorado.

(3) The Clerk of this Court shall transmit to the Chief Magistrates of the States of New Mexico and Colorado and to the Secretary of the Interior copies of this decree, duly authenticated under the Seal of this Court, together with copies of said Report and of the accompanying maps.

(4) As it appears that the said Commissioner has completed his work conformably to said decree, he is hereby discharged.

ALL AMERICAN AIRWAYS, INC., ET AL. *v.* UNITED AIR LINES, INC., ET AL.

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

No. 129. Decided October 24, 1960.

Certiorari granted; judgment vacated; and case remanded.
Reported below: 108 U. S. App. D. C. 1, 278 F. 2d 446.

Albert F. Beitel and *John H. Pratt* for petitioners.

Robert L. Stern, Howard C. Westwood and *William H. Allen* for respondents.

Solicitor General Rankin, Franklin M. Stone and *O. D. Ozment* for the Civil Aeronautics Board.

PER CURIAM.

The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the Court of Appeals with instructions to retain jurisdiction until such time as further legislation has been enacted or Public Law 86–661 [Act of July 14, 1960, 74 Stat. 527] has expired.

SCHOOL DISTRICT OF ABINGTON TOWNSHIP, PA., ET AL. *v.* SCHEMPP ET AL.

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

No. 297. Decided October 24, 1960.

Judgment vacated and case remanded.

Reported below: 177 F. Supp. 398.

C. Brewster Rhoads, Percival R. Rieder and *Philip H. Ward III* for appellants.

Anne X. Alpern, Attorney General of Pennsylvania, and *John D. Killian III,* Deputy Attorney General, for the Commonwealth of Pennsylvania, as *amicus curiae.*

PER CURIAM.

The judgment is vacated and the case is remanded to the District Court for such further proceedings as may be appropriate in light of Act No. 700 of the Laws of the General Assembly of the Commonwealth of Pennsylvania, passed at the Session of 1959 and approved by the Governor of the Commonwealth on December 17, 1959.

DAYTON RUBBER CO. *v.* CORDOVAN ASSOCIATES, INC.

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

No. 324. Decided October 24, 1960.

Certiorari granted; judgment vacated; and case remanded.
Reported below: 279 F. 2d 289.

Philip C. Ebeling and *James E. Corkey* for petitioner.

Richard W. Galiher for respondent.

PER CURIAM.

The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded for consideration in light of *Commissioner of Internal Revenue* v. *Duberstein,* 363 U. S. 278, 291.

MR. JUSTICE BLACK dissents.

STANDARD DREDGING CORP. *v.* ALABAMA.

APPEAL FROM THE SUPREME COURT OF ALABAMA.

No. 332. Decided October 24, 1960.

Appeal dismissed for want of a substantial federal question.
Reported below: —— Ala. ——, 122 So. 2d 280.

Eberhard P. Deutsch, René H. Himel, Jr. and *Malcolm W. Monroe* for appellant.

MacDonald Gallion, Attorney General of Alabama, *Guy Sparks,* Special Assistant Attorney General, and *William H. Burton,* 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.

UNITED STATES v. JOHN HANCOCK MUTUAL LIFE INSURANCE CO. ET AL.

APPEAL FROM THE SUPREME COURT OF KANSAS.

No. 18. Argued October 13, 1960.—Decided November 7, 1960.

The United States, as the second mortgagee of real estate judicially foreclosed and sold to satisfy the first mortgagee's lien in a proceeding in a state court to which the United States was made a party under 28 U. S. C. § 2410, can redeem the property, pursuant to § 2410 (c), within one year from the date of sale, notwithstanding a conflicting state statute giving the mortgagor the exclusive right to redeem within that period. Pp. 301–309.

185 Kan. 274, 341 P. 2d 1002, reversed.

Assistant Attorney General Doub argued the cause for the United States. With him on the briefs were *Solicitor General Rankin* and *Morton Hollander.*

Harry L. Hobson argued the cause for appellees. With him on the brief was *Emmet A. Blaes.*

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

The issue in this case is whether the United States, as the second mortagee of real estate judicially foreclosed in a proceeding to which the United States was made a party under 28 U. S. C. § 2410,[1] can redeem within one year from

[1] "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

the date of sale pursuant to 28 U. S. C. § 2410 (c), despite a conflicting state statute giving the mortgagor the exclusive right to redeem within that period.

The facts are not in dispute and, insofar as here pertinent, may be summarized as follows. Appellee John Hancock Mutual Life Insurance Co. held a note for $25,000, secured by a mortgage on certain Kansas real estate. The note was in default and the insurance company instituted proceedings in the District Court of

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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. A sale to satisfy a lien inferior to one of the United States, shall be made subject to and without disturbing the lien of the United States, unless the United States consents that the property may be sold free of its lien and the proceeds divided as the parties may be entitled. 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 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."

Edwards County, Kansas, seeking a declaration that its mortgage constituted a first lien on the property and asking foreclosure to satisfy this lien. An agency of the United States, the Farmers' Home Administration, held four notes executed by the mortgagors against whom the insurance company was proceeding and one of these notes, in the face amount of $10,565, was secured by a mortgage on the property securing appellee's note. It is undisputed that the United States' secured note was junior in priority to that held by appellee. However, under Kansas law, a senior lienor must join junior lienors in the foreclosure proceeding in order to cut off the junior liens. *Motor Equipment Co.* v. *Winters,* 146 Kan. 127, 69 P. 2d 23. And the only way in which the United States can be joined in its capacity as junior lienor is pursuant to the terms of 28 U. S. C. § 2410, since the United States has not otherwise waived sovereign immunity in this type of situation. Consequently, appellee insurance company joined the United States and the United States cross petitioned for an adjudication that it held a second lien on the property, inferior only to appellee's lien, in the amount owed on all four notes. The Kansas District Court held that appellee enjoyed a first lien entitling it to a judgment of $26,944.78 and that the United States held a second lien by virtue of its secured note, entitling it to $10,402.61.[2] The court ordered both liens foreclosed. At the foreclosure sale, the insurance company bought in the property in the amount of its own judgment. The United States did not bid and the sale was confirmed by the District Court on February 5, 1958. Four months later—on June 5, 1958—the United States instituted proceedings to

[2] Judgment for $2,642.39 was entered in favor of the United States on the three unsecured notes. While the United States sought to include these notes in its second lien on the property, the court decreed that this lien extended only to the amount of the secured note.

redeem the property pursuant to the terms of 28 U. S. C. § 2410 (c). This section specifies that, when the United States is joined in a foreclosure proceeding under § 2410—in particular § 2410 (a)—and a sale is held 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." Although the United States satisfied the procedural requirements of Kansas law, Kan. Gen. Stat., 1949, § 60–3451, its tender was refused and, consequently, it moved the court to compel the clerk to issue it a redemption certificate. The District Court denied relief and the Kansas Supreme Court affirmed,[3] holding that the United States' action was barred by the provisions of state law granting the mortgagor the exclusive right to redeem his property during a period of twelve months following the date of a foreclosure sale.

The pertinent Kansas law provides that the mortgagor shall have the exclusive right of redemption for twelve months following the date of sale; thereafter, if the mortgagor has not redeemed, the lien creditors enjoy a three-month period during which they, or the mortgagor, may redeem.[4] Kan. Gen. Stat., 1949, § 60–3440. If the mortgagor redeems at any time, all redemption rights are cut off. *Sigler* v. *Phares,* 105 Kan. 116, 181 P. 628. In this case, the mortgagors redeemed within twelve months of the date of sale but subsequent to the attempt of the United States to redeem.

The narrow question for our decision is whether that part of § 2410 (c) which grants the United States a right

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[3] *John Hancock Mutual Life Ins. Co.* v. *Hetzel,* 185 Kan. 274, 341 P. 2d 1002.

[4] From the fifteenth to and including the eighteenth month, the mortgagor resumes enjoyment of the exclusive right to redeem. Kan. Gen. Stat., 1949, § 60–3439. Upon the expiration of eighteen months without redemption, the purchaser's certificate of title becomes absolute. Kan. Gen. Stat., 1949, § 60–3438.

to redeem applies to the present situation. If it does, then the inconsistent provisions of state law must fall under the Supremacy Clause of the United States Constitution.[5] U. S. Const., Art. VI.

On analysis, the question is not only narrow but also susceptible to rapid solution, since the plain language of § 2410 (c) reveals no impediment to its applicability once resort is had to § 2410 (a). Moreover, an examination of the legislative history of § 2410 shows that Congress considered the redemption provision of § 2410 (c) an important and integral feature of § 2410. The pertinent excerpts reveal that Congress feared a situation where the United States, as junior lienor, would find its lien dissolved pursuant to § 2410 without having had a chance to protect its right to any amount the foreclosed property might be worth in excess of the senior lien.[6] As Congress

[5] Appellees argue briefly that Congress does not have the power to establish rules governing state-created property rights, citing *United States* v. *Bess,* 357 U. S. 51. This contention was raised and rejected in *United States* v. *Brosnan,* 363 U. S. 237, 240–241.

[6] Initial concern was expressed by Representative Bloom in a colloquy reported at 72 Cong. Rec. 3120–3121. Despite the apprehension expressed in this exchange, the bill that eventually became § 2410 passed the House with no provision to protect the United States' rights as junior lienor. The Senate, however, added a new section authorizing the United States to bid at the foreclosure sale and a delay of the sale until the completion of the next succeeding session of Congress so as to allow the Government time to obtain a congressional appropriation with which to make its bid. S. Rep. No. 351, 71st Cong., 2d Sess. 1–2.

This addition was stricken by the Conference Committee and the redemption provision now in § 2410 (c) was substituted. In rejecting the Senate proposal for protecting the rights of the United States as a junior lien holder, the Conference Committee concluded that a federal redemption provision was a more effective method for protecting those rights. It stated:

"The Senate amendment contains a clause allowing the court to stay proceedings on sale until the expiration of the next session of Congress. This was no doubt intended to allow Congress to appropri-

recognized, one method of protection for junior lienors is to bid competitively at the foreclosure sale, thereby preventing property worth more than the amount due on the senior lien from being sold at a discount. However, it was noted that, barring special circumstances, the United States could not pursue this procedure unless it first secured an appropriation from Congress and, thus, the one-year period of redemption was inserted to afford the United States sufficient time to secure an appropriation and protect its interests. The protective nature of the redemption proviso in § 2410 (c) was recognized in *United States* v. *Brosnan,* 363 U. S. 237, 246, where this Court stated that "the Government is guaranteed a one-year right to redeem if the plaintiff proceeds under § 2410 . . . ." This proposition is in line with the well-settled rule that Congress may impose conditions upon a waiver of the Government's immunity from suit. See *e. g., Soriano* v. *United States,* 352 U. S. 270, 276, where we added that these protective conditions "must be strictly observed and exceptions thereto are not to be implied."

Appellees concede, as they must, that § 2410 was mandatorily applicable to the present situation since Kansas law required joinder of the United States and the United States can only be joined pursuant to § 2410. However, they would have us find a superseding congressional intent to afford the United States a right of redemption only when no such right is granted under state law; when some privileges of redemption are given by the State to junior lienors, although of lesser magnitude than that provided

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ate money to enable the United States, if a junior lien holder, to bid enough at the sale to take care of prior liens and thus protect its own. In place of that the substitute bill provides that if a junior lien holder, the United States shall have a year in which to redeem. That does away with any necessity for a delay of sale." H. R. Conf. Rep. No. 2722, 71st Cong., 3d Sess. 4.

in § 2410 (c), then the federal right is no longer pertinent. The short answer to this contention is that no indication of such a limitation appears in the body of the statute—which specifies that the United States "shall" have one year to redeem—or in its legislative history. See *Soriano* v. *United States, supra.*

Appellees also press upon us the fact that the federal agency here concerned, the Farmers' Home Administration, could have protected its junior lien without insisting on a right to redeem under § 2410, since 7 U. S. C. (1952 ed.) § 1025 authorizes the Secretary of Agriculture, who supervises the Farmers' Home Administration, to bid at foreclosure sales.[7] But the significance of this section and its effect on § 2410 is not clear. Concededly, if there were some indication in § 1025 that the power of the Secretary of Agriculture is limited to bidding at the foreclosure sale, then we would be faced with a problem of resolving the two statutes. Cf. *United States* v. *Stewart,* 311 U. S. 60. However, there is no conflict, either express or implied, between § 1025 and § 2410. In effect, appellees would have us read § 2410 as authorizing redemption "except where another federal statute authorizes the particular agency concerned to bid at foreclosure sales." The only support for such an interpretation is the fact that some federal agencies are authorized to bid at foreclosure sales. We think that the logical connection is insufficient

[7] "The Secretary is authorized and empowered to bid for and purchase at any foreclosure or other sale, or otherwise to acquire property pledged or mortgaged or conveyed to secure any loan or other indebtedness owing to or acquired by the Secretary under sections 1001–1005d, 1007, and 1008–1029 of this title; to accept title to any property so purchased or acquired; to operate for a period not in excess of one year from the date of acquisition, or lease such property for such period as may be deemed necessary to protect the investment therein; and to sell or otherwise dispose of such property in a manner consistent with the provisions of section 1017 of this title."

to support such a violent graft on the language of the statute.

Appellees advance several other contentions which require only brief discussion. They argue, citing *Guaranty Trust Co.* v. *United States,* 304 U. S. 126, that the United States, by seeking affirmative relief in a state court, subjects itself to all the incidents of state law which govern other suitors. See Hart & Wechsler, The Federal Courts and the Federal System 1112. However, we need go no farther than the *Guaranty Trust* case to uncover one of the several special rules which favor the United States in preference to other plaintiffs—the rule that the United States is not subject to local statutes of limitations. See *United States* v. *Summerlin,* 310 U. S. 414. Other such rules, applicable in both federal and state courts, can be found in 28 U. S. C. §§ 2404, 2405, 2407, 2408, 2413. Furthermore, the present proceedings were not initiated by the United States but by appellee insurance company when it joined the United States pursuant to § 2410.

Appellees also point to the first sentence of § 2410 (c)—"[a] judicial sale in such action or suit shall have the same effect respecting the discharge of the property from liens . . . held by the United States as may be provided . . . by the local law of the place where the property is situated." The contention is that this sentence governs all the succeeding language in § 2410 (c). However, this construction would render the suceeding language nugatory. The more rational interpretation is that the propositions following the first sentence in § 2410 (c) were designed as qualifications on the first sentence. This thesis gains force from the fact that the sentence setting out the United States' redemption privilege in § 2410 (c) previously was preceded by the words "*And provided further.*" 46 Stat. 1529. This phrase was eliminated in the 1948 revision of the Federal Judicial Code but the

Reviser's Note indicates that no substantive changes were intended. 28 U. S. C. A. § 2410.

Therefore, the judgment of the Supreme Court of Kansas must be reversed and the case remanded with instructions to order the issuance of a certificate of redemption to the United States in accordance with its tender made in the District Court. However, in case the mortgagors wish to redeem in turn from the United States—a procedure in which the United States has acquiesced—we intimate no opinion as to the amount due the United States. The question whether the United States is entitled to payment of its claims in full upon redemption by the mortgagors or only to such debts as have been declared liens by the state courts is one to be decided according to Kansas law. Cf. *First National Bank & Trust Co.* v. *MacGarvie,* 22 N. J. 539, 547, 126 A. 2d 880, 885.

Reversed and remanded.

UNITED STATES *v.* HOUGHAM ET AL.

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

No. 24. Argued October 18, 1960.—Decided November 7, 1960.

The Government sued respondents to recover civil damages under § 26 (b)(1) of the Surplus Property Act of 1944 for obtaining surplus government property by fraud. Later it moved to file an amended complaint seeking instead to recover damages under § 26 (b)(2). That motion was withdrawn, and the Government filed a second amended complaint again seeking damages under § 26 (b)(1). After trial, the District Court awarded the Government damages under § 26 (b)(1). Both sides appealed, and the Court of Appeals affirmed. While the appeal was pending, the Government accepted from respondents promissory notes totalling the amount of the judgment, and it released only its judgment liens in two counties. *Held:*

1. By accepting payment of an amount equal to the judgment appealed from as inadequate and releasing only its judgment liens in two counties in the circumstances of this case, the Government did not lose its right to press its claim for the full amount of the damages it believed to be due. Pp. 312–313.

2. Recoveries under § 26 (b) are not penalties, and the claims asserted by the Government were not barred by the statute of limitations. P. 313.

3. In the circumstances of this case, in which the issue was preserved in a pretrial order pursuant to Rule 16 of the Federal Rules of Civil Procedure, the Government did not waive its contention that it was entitled to change its election of remedies and to recover under § 26 (b)(2), instead of § 26 (b)(1). Pp. 313–316.

4. The Government's original complaint seeking damages under § 26 (b)(1) did not constitute an irrevocable election of remedies; and, in the circumstances of this case, the Government had a right to amend its pleadings so as to seek damages under § 26 (b)(2). Pp. 316–317.

5. Section 26 (b) did not empower the District Court to determine according to the evidence which of the three subsections would

be the most appropriate and to require the Government to accept judgment under that subsection. P. 317.

6. In the circumstances of this case, respondents are not entitled to a new trial. Pp. 317–318.

270 F. 2d 290, reversed.

Wayne G. Barnett argued the cause for the United States. On the brief were *Solicitor General Rankin, Assistant Attorney General Doub, Morton Hollander* and *Anthony L. Mondello.*

Calvin H. Conron argued the cause for respondents. With him on the brief was *W. E. James.*

MR. JUSTICE BLACK delivered the opinion of the Court.

Section 16 of the Surplus Property Act of 1944 gave priority preferences to veterans in the purchase of surplus war materials. 58 Stat. 765. Section 26 authorized the United States to recover damages against any person who obtains such property from the Government by "fraudulent trick, scheme, or device . . . ." The complaint in this case charged that respondent Hougham, a nonveteran, combined with the other respondents, who are veterans, and obtained for his own business purposes hundreds of items of surplus property, including trucks, trailers and other equipment, by fraudulent use of the veteran respondents' priority certificates. After hearings, the District Court found respondents guilty of fraud as charged and awarded damages in the amount of $8,000. Both sides appealed. The Court of Appeals affirmed, rejecting both the Government's contention that the damages awarded were inadequate and the respondents' contentions that the finding of fraud was clearly erroneous and that the claims were barred by the statute of limitations. 270 F. 2d 290. Because the case raises important questions concerning the interpretation and application of

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the Surplus Property Act, we granted the Government's petition for certiorari. 361 U. S. 958.

The respondents first contend that the entire controversy here has been settled, is therefore moot, and that the Government is estopped from further pressing claims against them. This contention rests upon the fact—set out in respondents' brief and not disputed by the Government—that after the trial court judgment was entered and before it was affirmed by the Court of Appeals, the Government accepted from respondents promissory notes totalling $8,000, the amount of the trial court judgment. The contention is that this fact alone renders the case moot or at least creates some sort of estoppel against the Government. We disagree. It is a generally accepted rule of law that where a judgment is appealed on the ground that the damages awarded are inadequate, acceptance of payment of the amount of the unsatisfactory judgment does not, standing alone, amount to an accord and satisfaction of the entire claim. See, for example, *Embry* v. *Palmer,* 107 U. S. 3; *Erwin* v. *Lowry,* 7 How. 172, 183–184. This case provides a perfect example of the good sense underlying that rule. For here it was the respondents themselves who proposed payment of the $8,000, asserting expressly as their purpose in so doing the obtaining of a "Full Release of Judgment Liens" filed in the Counties of Los Angeles and Kern. The Government did nothing more in the entire transaction than accept the notes and execute the requested release. Since that release was expressly denominated only as a "Full Release of Judgment Liens" for the Counties of Los Angeles and Kern, it simply is not and cannot properly be interpreted to constitute a full release of all the Government's claims against respondents. Moreover, since the transfer of the notes occurred prior to the decision of the Court of Appeals, it is clear that neither of the parties regarded that transfer as an accord and satisfaction of the

entire controversy for *both* pursued their appeals in that court. Thus respondents' contention here is totally inconsistent with their position in the Court of Appeals where they sought to avoid *all* liability to the Government, including liability for the $8,000 they had already paid. For that position must necessarily have been predicated upon the view that the payment was without prejudice to the rights of either party as those rights might come to be established by subsequent judicial decree. Under such circumstances, the contention that the Government has lost its right to press its claim for the full amount of damages it believes due is wholly untenable.

We find it unnecessary to discuss at length respondents' second contention—that the claims asserted by the Government are barred by the statute of limitations. It is sufficient to say that the courts below were entirely correct in rejecting that contention for, resting as it does upon the assumption that recoveries under § 26 (b) are penalties, it is inconsistent with our holding in *Rex Trailer Co.* v. *United States,* 350 U. S. 148.

We therefore proceed to the principal controversy—the question of the adequacy of the damages awarded to the Government. Section 26 (b) provides in relevant part that those who obtain property by the kind of fraud established here:

> "(1) shall pay to the United States the sum of $2,000 for each such act, and double the amount of any damage which the United States may have sustained by reason thereof, together with the costs of suit; or
>
> "(2) shall, if the United States shall so elect, pay to the United States, as liquidated damages, a sum equal to twice the consideration agreed to be given by such person to the United States or any Government agency; or

> "(3) shall, if the United States shall so elect, restore to the United States the property thus secured and obtained and the United States shall retain as liquidated damages any consideration given to the United States or any Government agency for such property."

In its complaint as originally filed, the Government claimed recovery as authorized by § 26 (b)(1)—$2,000 for each fraudulent act plus double the amount of any actual damages. Subsequently, the Government attempted to file a First Amended Complaint claiming liquidated damages under § 26 (b)(2). Upon indication of the trial judge that the claim in the original complaint under § 26 (b)(1) amounted to an irrevocable election of remedies, but without any formal ruling to that effect, the Government withdrew the First Amended Complaint and filed a Second Amended Complaint in which it reverted to its original claim under § 26 (b)(1). Still later, however, following pretrial proceedings under Rule 16 of the Federal Rules of Civil Procedure, the district judge, with the approval of counsel for both parties, entered a pretrial conference order which provided, "[T]his order shall supplement the pleadings and govern the course of the trial of this cause, unless modified to prevent manifest injustice." And the order expressly enumerated the "issues of law" that remained "to be litigated upon the trial." One of the issues so reserved was the legal correctness of the Government's argument that it was entitled to recover "double the amount of the sales price of the vehicles described in the Second Amended Complaint," that it was "entitled to make its election [as between § 26 (b)(1) and § 26 (b)(2)] at any time prior to judgment" and that it did then elect "in the event of judgment in its favor, to receive as liquidated damages a sum equal to twice the consideration agreed to be given to the United

States." The District Court ultimately decided this legal issue against the Government, holding that the original complaint constituted an irrevocable election, and proceeded to award damages of $8,000 under § 26 (b)(1). The Court of Appeals affirmed this judgment on a different ground. It held that the refusal of the District Court to permit recovery under § 26 (b)(2) was within its power to determine the appropriate remedy under § 26 (b), asserting that no issue as to election of remedies was even involved in the case. 270 F. 2d, at 293.

The Government contends that denial of recovery under § 26 (b)(2) cannot be justified on either of the theories adopted below. Respondents contend that the Government waived its right to urge this contention by voluntarily proceeding to judgment on the Second Amended Complaint. This contention is predicated upon the failure of the Government to get a formal ruling on its First Amended Complaint before withdrawing it and filing the Second Amended Complaint. But, as shown above, the pretrial order and the conclusions of law of the District Court both show that the Government urged its right to change its election up to the time judgment was rendered. That pretrial order, as authorized by Rule 16, conclusively established the issues of fact and law in the case and declared that the issues so established should "supplement the pleadings and govern the course of the trial . . . ." One of these supplementary issues was the Government's contention that it was entitled to recover under § 26 (b)(2), rather than under § 26 (b)(1) as claimed in the Second Amended Complaint. Thus the pretrial order changed the claim in that complaint from § 26 (b)(1) to § 26 (b)(2) insofar as the Government had the power to change its election, and posed an issue which required adjudication by the District Court. That such was the effect of the order is clear from the language of Rule 16 which provides that the

court, after pretrial conference, "shall make an order which recites . . . the amendments allowed to the pleadings . . . and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice." Since the pretrial order here reserved the legal question as to the Government's right to change its election and since the court expressly decided that question against the Government,* the question most certainly was not waived and must here be determined.

Thus, we come to the question whether the courts below were correct in holding that the Government was not entitled to damages under § 26 (b)(2). With respect to the theory adopted by the District Court that the Government's original complaint constituted an irrevocable election of remedies, we can find nothing either in the language of § 26 (b) or in its legislative history which lends the slightest support to such a construction. This fact leads naturally to the conclusion that the ordinary liberal rules governing the amendment of pleadings are applicable. The applicable rule is Rule 15 of the Federal Rules of Civil Procedure, which was designed to facilitate the amendment of pleadings except where prejudice to the opposing party would result. Despite respondents' argument to the contrary, we see this case as one where

*The language of the trial judge on this point was unequivocal: "This Court rules that the plaintiff United States can only receive liquidated damages under the provisions of Section 26 (b)(2) if it elects to receive only such damages originally in the action; that since the United States sought damages under the provisions of Section 26 (b)(1) in the original complaint, that such is an irrevocable election; that the plaintiff United States cannot thereafter amend its complaint to seek liquidated damages under the provisions of Section 26 (b)(2), or otherwise elect to receive liquidated damages under the provisions of Section 26 (b)(2), but that the United States is thereafter limited as the measure of its recovery for liquidated damages to those liquidated damages set forth in Section 26 (b)(1)."

there plainly was no such prejudice. In such a situation, acceptance of respondents' contention on this point would subvert the basic purpose of the Rule. "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Conley* v. *Gibson,* 355 U. S. 41, 48. We therefore conclude that under the circumstances of this case the Government had a right to amend its pleadings and that the District Court erred in refusing to permit such amendment.

The alternative theory of the Court of Appeals appears, upon examination, to be equally untenable. The Court of Appeals interpreted § 26 (b) as placing power in the District Court to determine, according to the evidence presented in any particular case, which of the three subsections would be most appropriate and to require the Government to accept judgment under that subsection. That interpretation collides with the express language of § 26 (b) which provides for recovery under any one of the three subsections "if the *United States* shall so elect." (Emphasis supplied.) Since the language of the section is conclusive on this point, the theory adopted by the Court of Appeals must also be rejected.

The respondents' final contention is that in any event they are entitled to a new trial. Obviously, there need be no new trial on the fraud issue. But respondents also urge that there is no support in the record for a judgment fixing the Government's recovery under § 26 (b)(2) at "twice the consideration agreed to be given" for the vehicles. There was no consideration "agreed to be given," the argument proceeds, because all the transactions involved cash sales at a price fixed by the Government. This argument, while ingenious, is not sound. Cash sales, like others, must follow an agreement of the parties with regard to consideration "to be given."

Respondents' contention to the contrary would, if accepted, allow any purchaser from the Government to effectively avoid liability under § 26 (b)(2) simply by being careful to make all of its fraudulent dealings in cash. Plainly, however, the Government suffers just as much from a fraudulent cash sale as from a fraudulent credit sale. An interpretation of § 26 (b)(2) which allows recovery for the one but not for the other cannot be accepted. The respondents' contention for a new trial must be rejected.

The judgment is therefore reversed and the cause remanded to the District Court with directions to enter judgment for the United States under § 26 (b)(2).

It is so ordered.

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

With all deference, I cannot agree and must dissent for two reasons.

First. One may not appeal from a money judgment that he has collected and satisfied. Here, as the Court recognizes, after the judgment was entered the Government accepted promissory notes from respondents in payment of the judgment. I think, with, I respectfully submit, the support of all the relevant cases—which are legion—that the Government, having recovered a judgment for $8,000, over the serious protests of respondents that they owed it nothing, and having, with knowledge of all the facts, accepted the benefits of the judgment by collecting and satisfying it, cannot thereafter prosecute an appeal to reverse it.

The Court relies on *Embry* v. *Palmer,* 107 U. S. 3, and *Erwin* v. *Lowry,* 7 How. 172, 184, for its conclusion that the Government may prosecute this appeal from the judgment notwithstanding it has satisfied it. But, with deference, I must say those cases do not support the

Court's conclusion. The issue in the *Embry* case was whether Embry was entitled to $9,185.18, as he claimed, or to only $2,296.29, as the respondents contended and admitted to be due. The court awarded recovery of only the latter sum which Embry accepted. He afterwards appealed from the judgment, and it was held that he might do so for, as the court pointed out: "The amount awarded, paid, and accepted constitutes no part of what is in controversy." *Id.,* at 8. How different from the situation here! That case was like the later one of *Reynes* v. *Dumont,* 130 U. S. 354, where the appellants received so many of certain bonds as were not taken to satisfy the judgment from which they appealed. It was contended that their action in doing this so completely accepted the judgment that they could not appeal. In rejecting that contention, this Court said:

> "The acceptance by appellants of what was confessedly theirs cannot be construed into an admission that the decree they seek to reverse was not erroneous, nor does it take from appellees anything, on the reversal of the decree, to which they would otherwise be entitled. *Embry* v. *Palmer,* 107 U. S. 3, 8." 130 U. S., at 394.

Those cases fall within a well-recognized but very narrow exception to the general rule that is applicable here. Similarly, the *Erwin* case did not involve the collection and satisfaction of a judgment. Rather, it involved only the performance by Erwin of a minor collateral "condition imposed upon him before he [could] have the fruits of the decree" in equity. *Id.,* at 184. Like *Embry,* that case does not at all rule the question here presented.

The case in this Court that most nearly rules our question is *Gilfillan* v. *McKee,* 159 U. S. 303. There appellant claimed an interest in a special fund of $7,070 and also claimed to be entitled jointly to participate in a general

fund of $147,057.63. A portion of the special fund was awarded to him in one division of the judgment, but another division of the judgment denied to him any right to participate in the general fund. He appealed, and was met with the claim that by accepting the award of a part of the special fund, he had taken under the judgment and therefore could not appeal from it. Recognizing that one cannot appeal from a judgment that he has collected and satisfied, the Court said: ". . . the acceptance of the whole or a part of a particular amount awarded to a defendant might perhaps operate to estop him from insisting upon an appeal." But the court found that "there were practically two decrees in this case, one applicable to the special fund, which, in the bill, the subsequent pleadings, and in the decree, had been kept as a distinct and separate matter, a portion of which fund was awarded to McPherson; and the other applicable to the general fund in which McPherson had been denied any participation whatever." And the court held that "his acceptance of a share in the special fund did not operate as a waiver of his appeal from the other part of the decree disposing of the general fund." *Id.*, at 311.

The Fourth Circuit has flatly ruled this question in *Finefrock* v. *Kenova Mine Car Co.*, 37 F. 2d 310, among other cases. There the appellant accepted payment of a judgment for an amount substantially less than he claimed and afterwards appealed. In holding that he could not appeal from a judgment that he had collected and satisfied, the court said at 314:

> "We do not find it necessary to enter into a discussion of these questions in view of the acceptance by the appellant of the amount allowed him in full satisfaction and discharge of the judgment. He contends that there is no inconsistency in his acceptance of the money and the prosecution of the appeal, relying on such decisions as *Embry* v. *Palmer*, 107 U. S.

> 3, 8, 2 S. Ct. 25, 27 L. Ed. 346; *McFarland* v. *Hurley* (C. C. A.) 286 F. 365; *Carson Lumber Co.* v. *St. Louis, etc., Railroad Co.* (C. C. A.) 209 F. 191, 193; *Snow* v. *Hazlewood* (C. C. A.) 179 F. 182. But it is obvious that he falls within the general rule and not within the exceptions thereto as set out in *Carson Lumber Co.* v. *St. Louis, etc., Railroad Co., supra.*" [1]

The Third Circuit has likewise flatly ruled the question in the same way, *Smith* v. *Morris,* 69 F. 2d 3; so has the Fifth Circuit, *Kaiser* v. *Standard Oil Co.,* 89 F. 2d 58; *White & Yarborough* v. *Dailey,* 228 F. 2d 836, and the Eighth Circuit, *Carson Lumber Co.* v. *St. Louis & S. F. R. Co.,* 209 F. 191. Literally dozens of cases by the courts of last resort in almost all the States in the Union have so held.[2]

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[1] In *Carson Lumber Co.* v. *St. Louis & S. F. R. Co.,* 209 F. 191 (C. A. 8th Cir.), the Court said, at 193–194:

"It is undoubtedly the general rule that a party who obtains the benefit of an order or judgment, and accepts the benefit or receives the advantage, shall be afterwards precluded from asking that the order or judgment be reviewed. Nevertheless, this rule is not absolute where the judgment or decree is not so indivisible that it must be sustained or reversed as a whole. It has no application to cases where the appellant is shown to be so absolutely entitled to the sum collected upon the judgment that the reversal of it will not affect his right to the amount accepted (*Reynes* v. *Dumont,* 130 U. S. 354–394, 9 Sup. Ct. 486, 32 L. Ed. 934), especially where there is not present conduct which is inconsistent with the claim of a right to reverse the judgment or decree, which it is sought to bring into review (*Embry* v. *Palmer,* 107 U. S. 3–8, 2 Sup. Ct. 25, 27 L. Ed. 346; *Merriam* v. *Haas,* 3 Wall. 687, 18 L. Ed. 29; *United States* v. *Dashiel,* 3 Wall. 688, 18 L. Ed. 268)."

[2] Those interested will find many of those cases collected in the notes to 2 Am. Jur., Appeal and Error, § 214, where the authors have regarded the rule as so certain and universal as to permit them flatly to say: "The general rule . . . is that a litigant who has, voluntarily and with knowledge of all the material facts, accepted the benefits of an order, decree, or judgment of a court, cannot afterwards take or prosecute an appeal or error proceeding to reverse it."

I, therefore, respectfully submit that the settled law requires the conclusion that the Government, having collected and satisfied this judgment with knowledge of all the facts, cannot prosecute this appeal to reverse it. This appeal should, therefore, be dismissed.

Second. At all events, the Government is not entitled to a reversal of the judgment, because it went to trial, and proceeded all the way to judgment, upon a complaint that asked damages only under subdivision (1) of § 26 (b), not under subdivision (2) of that section. The procedural chronology was as follows. In its original complaint the Government sought damages "of $2,000 for each such act," under subdivision (1). It thereafter filed a motion for leave to file a First Amended Complaint asking damages in "a sum equal to twice the consideration agreed to be given," under subdivision (2). But it did not press that motion to decision. On the contrary, the record shows that the Government formally withdrew that motion and instead filed a Second Amended Complaint, again, as in its original complaint, asking damages in "the sum of $2,000 for each such act," under subdivision (1). It was upon that complaint that it went to trial and all the way to judgment.

Of course, under the express terms of § 26 (b), the Government had the right to elect which of the three allowable measures of recovery it would seek, but surely it is possible for the Government at some stage irrevocably to make that election. I agree it did not irrevocably do so by the filing of the original complaint, but I insist that it did do so by filing the Second Amended Complaint and going to trial and all the way to judgment on it. If that conduct did not effect the election, I would ask what could?

It is true that a pretrial conference was held and a pretrial order was entered, under Rule 16 of Fed. Rules Civ. Proc. One of the objects authorized by that Rule

is "[t]he simplification of the issues," and another is to consider "The necessity or desirability of amendments to the pleadings." The order recited that one of the issues of *fact* to be tried was whether the "defendants became and are liable to pay to the United States the sum of $2,000 for each act committed by them that [may be] determined by the court to be in violation of said statute"; and, under "issues of law . . . to be litigated upon the trial," the following appears:

> "It is the contention of plaintiff that it is entitled to double the amount of the sales price of the vehicles described in the Second Amended Complaint . . . . Previously the Court has indicated that an irrevocable election has been made by the United States by virtue *of the successive complaints on file.* It is the contention of plaintiff that it is entitled to make its election at any time prior to judgment. Plaintiff elects, *in the event of judgment in its favor,* to receive as liquidated damages a sum equal to twice the consideration agreed to be given to the United States or federal agency involved. Plaintiff respectfully calls this to the attention of the Court so that the point may be preserved for purposes of appeal." (Emphasis added.)

Of course, in simplifying the issues, the Court may, by the pretrial order, define the issues to be tried, *but those issues must be within the pleadings.* And amendments to the pleadings should be freely allowed as Rule 15 provides. But here the Government did not seek leave at the pretrial conference, or at any time after having voluntarily filed its Second Amended Complaint, to amend its pleading. It did not even unconditionally elect at the pretrial conference to proceed under subdivision (2) but only "in the event of judgment in its favor." Instead, it went all the way to trial, and to judgment, on the

complaint that sought damages in "the sum of $2,000 for each such act," and it obtained a judgment on that basis. Surely, that conduct constituted an irrevocable election by the Government to recover damages in the measure claimed in its final complaint, and I think the Government is bound by it.

For the first of these reasons, I would dismiss the appeal, but inasmuch as the Court does not agree, I would, at the minimum, affirm the judgment on the ground that the Government irrevocably elected to recover the measure of damages that it recovered and hence is bound by that election.

MICHALIC *v.* CLEVELAND TANKERS, INC.

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

No. 31. Argued October 20, 1960.—Decided November 7, 1960.

In this suit by a seaman, under the Jones Act and for unseaworthiness under the general maritime law, to recover from a shipowner for personal injuries sustained while a member of the crew of its ship when an allegedly defective wrench with which he was working slipped off a nut and hit his toe, *held:* The evidence was sufficient to present a jury question, under the unseaworthiness claim, as to whether the wrench was a reasonably suitable appliance, and, under the Jones Act claim, as to the shipowner's alleged failure to exercise due care in furnishing a wrench which was not a reasonably suitable appliance; and the trial judge erred in directing a verdict for the shipowner. Pp. 325–332.

271 F. 2d 194, reversed.

Harvey Goldstein argued the cause for petitioner. With him on the brief was *S. Eldridge Sampliner.*

Lucian Y. Ray argued the cause and filed a brief for respondent.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The petitioner asks damages for personal injuries he allegedly sustained in a shipboard accident while a crew member aboard the respondent's Great Lakes vessel, the tanker *Orion.* His complaint alleges respondent's liability both for negligence under the Jones Act, 46 U. S. C. § 688, and for unseaworthiness under the general maritime law; [1] a claim for maintenance and cure is also

[1] The parties tried the case in the District Court, and argued it here and in the Court of Appeals, as raising issues both of negligence under the Jones Act and unseaworthiness under the general maritime

alleged. The parties settled the claim for maintenance and cure at the trial, which was before a jury in the District Court for the Northern District of Ohio. Judgment was entered for the respondent on the unseaworthiness and Jones Act claims upon a verdict directed by the trial judge on the ground of insufficiency of the evidence. The Court of Appeals for the Sixth Circuit affirmed. 271 F. 2d 194. We granted certiorari, 362 U. S. 909.

Michalic claims that in a shipboard accident on December 28, 1955, a two-and-one-half-pound wrench dropped on his left great toe. Michalic was afflicted with Buerger's disease when he joined the *Orion* three months earlier as a fireman in the engine room. We are informed by the testimony of one of the medical witnesses that Buerger's disease "is a disease of unknown origin . . . it produces a narrowing of the blood supply going to the foot through the arteries, and it runs a very foreseeable course; it is slowly progressive in most cases and leads to progressive loss of blood supply to the extremities involving usually the legs"; for one afflicted with the disease to drop "a hammer on his toe . . . is a very serious thing and frequently leads to amputation. . . . Because the circulation is already impaired and the wound will not heal properly, and any appreciable trauma will frequently lead to gangrene."

Michalic did not report the accident at the time but continued working until January 6, 1956, a week later, when the vessel was laid up for the winter. Meanwhile he treated the toe every night after work in hot water and Epsom salts. He was at his home from January 6 to March 15 and used hot boric acid soaks "practically every day." He was called back to the *Orion* on March 15.

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law. We therefore need not be concerned with the confusing language of the complaint and whether it may be read as pleading a claim solely on the theory of negligence.

On April 1, 1956, he reported to the *Orion's* captain that "[m]y leg was so bad, so painful, I couldn't take it no more . . . I want a hospital ticket." The captain gave him the ticket after filling out a report in which he stated that Michalic told him that on December 28, 1955, "While working with pumpman in pumproom man said he dropped a wrench on his foot and his toe has been sore ever since." This was the first notice respondent had of any accident.

At the hospital in April, a diagnosis was made of "an infected left great toe nail and gangrene of the left great toe secondary to the Buerger's Disease." During the spring three amputations were performed on the left leg, first the great left toe, next the left leg below the knee and then part of the leg above the knee. Medical experts, three on behalf of the petitioner and one for the respondent, differed whether, assuming that the wrench dropped on Michalic's left great toe on December 28, there was a causal connection between that trauma and the amputations. This plainly presented a question for the jury's determination, *Sentilles* v. *Inter-Caribbean Corp.,* 361 U. S. 107, and we do not understand that the respondent contends otherwise.

The basic dispute between the parties is as to the sufficiency of the proofs to justify the jury's finding with reason that respondent furnished Michalic with a wrench which was not reasonably fit for its intended use. Here a distinction should be noticed between the unseaworthiness and Jones Act claims in this regard. The vessel's duty to furnish seamen with tools reasonably fit for their intended use is absolute, *Mahnich* v. *Southern S. S. Co.,* 321 U. S. 96; *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85; *The Osceola,* 189 U. S. 158; *Cox* v. *Esso Shipping Co.,* 247 F. 2d 629; and this duty is completely independent of the owner's duty under the Jones Act to exercise reasonable care. *Mitchell* v. *Trawler Racer, Inc.,* 362 U. S. 539.

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The differences are stated in *Cox* v. *Esso Shipping Co., supra:*

> "One is an absolute duty, the other is due care. Where . . . the ultimate issue . . . [is] seaworthiness of the gear . . . . The owner has an absolute duty to furnish reasonably suitable appliances. If he does not, then no amount of due care or prudence excuses him, whether he knew, or could have known, of its deficiency at the outset or after use. In contrast, under the negligence concept, there is only a duty to use due care, i. e., reasonable prudence, to select and keep in order reasonably suitable appliances. Defects which would not have been known to a reasonably prudent person at the outset, or arose after use and which a reasonably prudent person ought not to have discovered would impose no liability." 247 F. 2d, at 637.

Thus the question under Michalic's unseaworthiness claim is the single one as to the sufficiency of the proofs to raise a jury question whether the wrench furnished Michalic was a reasonably suitable appliance for the task he was assigned. To support the Jones Act claim, however, the evidence must also be sufficient to raise a jury question whether the respondent failed to exercise due care in furnishing a wrench which was not a reasonably suitable appliance.

The wrench dropped on Michalic's foot while he was using it to unscrew nuts from bolts on the casing of a centrifugal pump in the pumproom. He had been assigned this task by the pumpman after the first assistant engineer sent him from the engine room to the pumproom to help ready the pumps for the vessel's winter lay-up. There were about twenty-five 1⅝″ nuts tightly secured to the bolts on the casing. The pumpman gave him a 1⅝″ straight-end wrench weighing two and one-half pounds and ten to eleven inches long, and also a mallet.

The pump was located alongside and some inches below a catwalk, and Michalic had to step down from the catwalk to reach the casing. His task required the gripping of each nut in the claw of the wrench and the hammering of the side of the wrench with the mallet to apply pressure to loosen it. Michalic had removed all but a few of the nuts when he "had hold of a nut" with the wrench and "I hit it [the wrench] with the mallet and it slipped off the nut and came down the side of the pump and hit my big toe. . . . Yes, she slipped off the nut on the pump and came down the side of the pump and smashed my big toe."

Michalic contends that the proofs were sufficient to justify the jury in finding with reason that there was play in the claw of the wrench which prevented a tight grip on the nut, thus entitling him to the jury's determination of his unseaworthiness claim, and were also sufficient to justify the jury in finding with reason that the respondent negligently furnished him with a defective wrench, thus entitling him also to the jury's determination of his Jones Act claim. The evidence viewed in a light favorable to him was as follows: The wrench and other pumproom tools were kept in the pumproom toolbox and were used only when the vessel was being prepared for lay-up. The tools were four or five years old. Because of the danger of fire, the tools, including the wrench and mallet which Michalic used, were made of a special spark-proof alloy. The second mate, who had left the *Orion* on December 19,[2] testified that the tools were bronze because "Bronze tools are for non-striking." It was the practice to inspect the

[2] The trial judge ordered the second mate's testimony to be stricken from the record when it appeared that the mate left the *Orion* on December 19. The Court of Appeals nevertheless considered the testimony so far as it concerned the condition of the tools. 271 F. 2d, at 196. We think the action of the Court of Appeals was correct in light of the testimony of respondent's own witnesses, from which it is reasonable to infer that the tools used on December 28 had been in the toolbox for some time prior to December 19.

pumproom tools and replace worn ones before their use at lay-up time, but the first assistant engineer who testified to the practice did not say this inspection was made in 1955; and the pumpman testified that "It could be" that no one looked at the toolbox for nine months before December 28. The second mate testified that the tools "had been very beaten and battered, perhaps there for some time." Michalic testified that he noticed when the pumpman gave him the wrench that it was an "old beat-up wrench . . . all chewed up on the end." Michalic said that when he started work "the wrench was slipping off the nuts; it slipped off every one of them." He "had a hard time loosening them off." He protested to the pumpman that "This wrench keeps slipping off," and the pumpman answered "Never mind about that, do the job as best you can."

The trial judge found the evidence to be insufficient to present a jury question whether the wrench was a reasonably suitable appliance, because "on the theory the grip is worn . . . there is never any mention of the grip in the case . . . ." The Court of Appeals took the same view, saying "There was no evidence that the open or jaw end of the wrench was in any way deficient . . . [t]he fact that the wrench slipped is not evidence that its slipping was the consequence of some condition in the jaw or handle of the wrench." 271 F. 2d, at 199. We think that both lower courts erred. True, there was no direct evidence of play in the jaw of the wrench, as in *Jacob* v. *New York City,* 315 U. S. 752, 754. But direct evidence of a fact is not required. Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence. *Rogers* v. *Missouri Pacific R. Co.,* 352 U. S. 500, 508, n. 17.[3] The jury, on this record,

[3] The trial judge rested his action partly on a supposed variance between the complaint and the proof at the trial. The complaint alleged that the wrench was "an old defective wrench in an unsea-

with the inferences permissible from the respondent's own testimony that inspections were necessary to replace tools of this special alloy because of wear which impaired their effectiveness, could reasonably have found that the wrench repeatedly slipped from the nuts because the jaw of the wrench did not properly grip them. Plainly the jury, with reason, could infer that the colloquy between Michalic and the pumpman, and Michalic's testimony as to slipping, related to the function of the jaw of the wrench in gripping the nuts and that there was play in it which caused the wrench to slip off. Thus the proofs sufficed to raise questions for the jury's determination of both the unseaworthiness and Jones Act claims. "It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes . . . ." *Rogers* v. *Missouri Pacific R. Co., supra,* p. 506.[4]

The Jones Act claim is double-barreled. Michalic adds a charge of negligent failure to provide him with a safe place to work to the charge of negligence in furnishing him

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worthy condition in that the *teeth* and grip of the wrench were worn and defective." (Emphasis supplied.) Michalic and all the witnesses at the trial who testified about the wrench described its claw as smooth-faced and without teeth. We see no fatal variance and in any event respondent waived reliance on any by expressly disclaiming surprise at the trial.

[4] The petitioner does not invoke the District Court's jurisdiction on grounds of diversity of citizenship. Thus there is jurisdiction on the law side of the court of the unseaworthiness claim only as "pendent" to jurisdiction under the Jones Act. *Romero* v. *International Terminal Operating Co.,* 358 U. S. 354, 380–381. However, the question expressly reserved in *Romero,* p. 381—whether the District Court may submit the "pendent" claim to the jury—is not presented by the case. The *Orion* was a Great Lakes vessel and the petitioner is entitled to a jury trial of his unseaworthiness claim under 28 U. S. C. § 1873. See *Troupe* v. *Chicago, D. & G. Bay Transit Co.,* 234 F. 2d 253; *The Western States,* 159 F. 354; *Jenkins* v. *Roderick,* 156 F. Supp. 299.

with a defective wrench. However, the case was not tried, nor is it argued here, on the basis that the charge of negligence in failing to provide a safe place to work rests solely on evidence tending to show a cramped and poorly lighted working space, regardless of the suitability of the wrench. On the contrary, Michalic also makes the allegedly defective wrench the basis of this charge, arguing in effect that the described conditions under which he was required to do the work increased the hazard from the use of the defective wrench. Under that theory, the relevance of the testimony is only to the charge of furnishing a defective wrench and the causal connection between that act and his injury. Phrasing the claim as a failure to provide a safe place to work therefore adds nothing to Michalic's case, and he was not entitled to have that claim submitted to the jury as an additional ground of the respondent's alleged liability.

The judgment of the Court of Appeals is reversed and the cause remanded to the District Court for a new trial.

It is so ordered.

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

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

At the opening of a Term which finds the Court's docket crowded with more important and difficult litigation than in many years, it is not without irony that we should be witnessing among the first matters to be heard a routine negligence (and unseaworthiness) [1] case involving only

[1] See note 1 of the Court's opinion, *ante*, p. 325.

issues of fact. I continue to believe that such cases, distressing and important as they are for unsuccessful plaintiffs, do not belong in this Court. See dissenting opinions in *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500, at 524, 559.

The District Court, finding that the evidence presented no questions for the jury, directed a verdict for the respondent. The Court of Appeals, in an opinion which manifests a conscientious effort to follow the precepts of the *Rogers* case, unanimously affirmed, after a painstaking assessment of the record. 271 F. 2d 194. My own examination of the record and of the opinion of the Court of Appeals convinces me that there is no warrant for this Court overriding the views of the two lower courts.

The core of petitioner's case was the condition of the wrench, his unsafe-place-to-work theory having evaporated in thin air, as the Court recognizes. Having had to abandon his original theory that the claw of the wrench had defective teeth (since the wrench was toothless), petitioner testified (1) that the instrument was an "old beat-up wrench . . . all chewed up on the end" (whether at the claw or handle does not appear); and (2) that the wrench had slipped off nuts at various times during the operation (albeit petitioner had before the accident successfully removed some 15 out of 20 nuts without mishap).

While the Court, in stating that "there was no direct evidence of play in the jaw of the wrench," seems to recognize that this testimony did not suffice to show any actionable flaw in the wrench, it nonetheless concludes that the jury should have been permitted to infer one, in light of two other factors. These are (1) the second mate's testimony that as of some 10 days before the accident,[2] the

[2] The exact date of the accident is obscure. Petitioner did not report the alleged accident for some six months after he claimed it

tools in the pumproom toolbox "had been very beaten and battered" (whether at the claw or handle, or anywhere else, does not appear); and (2) other evidence which, as I read its opinion, the Court takes as establishing that the tools were old and infrequently inspected. (Actually the record shows that the tools had been used only four or five times and that the wrench had been inspected just before it was handed to petitioner.[3])

Judged by any reasonable standard this evidence, fragmentized or synthesized as one may please, did not in my opinion make a case for the jury. The additional factors on which the Court relies add nothing to the inherent deficiencies of petitioner's testimony which the Court seems to recognize did not of itself make out a case of either negligence or unseaworthiness. If it is permissible for a jury to rationalize "into being" a defective wrench from this sort of evidence, then wrenches have indeed become dangerous weapons for those operating vessels on the Great Lakes. If the rule of *Rogers* means that in

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occurred. The then master testified with respect to the filling out of the company accident form:

"Q. How did you arrive at the date of December 28, 1955?

"A. Well, it was merely an arbitrary date. It was kind of hard to reckon back at the time this [the form] was made up. This was made up on the 1st of April following. This may have been any time in December. It may have been the 21st, it may have been any time during that period. . . .

"The COURT: That is the date plaintiff gave. Were you on the vessel on that day, December 28?

"The WITNESS: Not to my recollection, sir, but when we typed this up Mr. Michalic, the plaintiff, gave me that as the approximate date. He didn't really know exactly when it would have been."

[3] The pumpman, whom petitioner was helping, testified that the wrench used by petitioner was one of three that had been procured four or five years before; that they were used only once a year; and that he had inspected the wrenches just before taking them out of the tool chest on the day in question.

FELA cases [4] trial courts are deprived of all significant control over jury verdicts, and juries are in effect to be allowed to roam at large, I think the lower federal courts should be so told. See *Harris* v. *Pennsylvania R. Co.*, 361 U. S. 15, 25 (dissenting opinion). At least this would be better than continuing to require the lower courts to operate in what must be an atmosphere of increasing bewilderment over what is expected of them in these federal negligence cases.

I would affirm.

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[4] The Jones Act, here involved, incorporates the standards of the Federal Employers' Liability Act.

KELLEY ET AL. *v.* RAGGIO ET AL.

APPEAL FROM THE SUPREME COURT OF NEVADA.

No. 316. Decided November 7, 1960.

Appeal dismissed for want of a substantial federal question.
Reported below: 76 Nev. 157, 350 P. 2d 724.

Clifton Young for appellants.

Roger D. Foley, Attorney General of Nevada, *John A. Porter* and *Norman H. Samuelson,* Deputy Attorneys General, and *William J. Raggio* for appellees.

PER CURIAM.

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

CENTRAL ILLINOIS PUBLIC SERVICE CO. *v.* ILLINOIS COMMERCE COMM'N ET AL.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

No. 352. Decided November 7, 1960.

Appeal dismissed and certiorari denied.
Reported below: 18 Ill. 2d 506, 165 N. E. 2d 322.

Elmer Nafziger for appellant.

William L. Guild, Attorney General of Illinois, *Harry R. Begley,* Special Assistant Attorney General, *John W. Foster, Robert Mitten, Joseph H. Wright* and *Herbert J. Deany* for appellees.

PER CURIAM.

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

OHIO EX REL. KING *v.* SHANNON, PRESIDING JUDGE, MUNICIPAL COURT OF CINCINNATI, OHIO.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 363. Decided November 7, 1960.

Appeal dismissed because the judgment below is based on a nonfederal ground adequate to support it.

Reported below: 170 Ohio St. 393, 165 N. E. 2d 642.

Allen Brown for appellant.

PER CURIAM.

The appeal herein is dismissed for the reason that the judgment of the Supreme Court of the State of Ohio, sought here to be reviewed, is based upon a nonfederal ground adequate to support it.

ARMCO STEEL CORP. *v.* MICHIGAN ET AL.

APPEAL FROM THE SUPREME COURT OF MICHIGAN.

No. 387. Decided November 7, 1960.

Appeal dismissed for want of a substantial federal question.

Reported below: 359 Mich. 430, 102 N. W. 2d 552.

Paul R. Trigg, Jr. and *Robert D. Dunwoodie* for appellant.

Paul L. Adams, Attorney General of Michigan, *Samuel J. Torina,* Solicitor General, and *William D. Dexter,* Assistant Attorney General, for appellees.

PER CURIAM.

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

RISS & CO., INC., ET AL. *v.* DALTON, ATTORNEY GENERAL.

APPEAL FROM THE SUPREME COURT OF MISSOURI.

No. 386. Decided November 7, 1960.

Appeal dismissed for want of a substantial federal question.
Reported below: 335 S. W. 2d 118.

John B. Gage, Laird P. Bowman and *A. Alvis Layne* for appellants.

John M. Dalton, Attorney General of Missouri, *Fred L. Howard,* Assistant Attorney General, and *Raymond S. Roberts,* 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.

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

MASON *v.* ECKLE, PRISON FARM SUPERINTENDENT.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 357, Misc. Decided November 7, 1960.

Appeal dismissed and certiorari denied.
Reported below: 171 Ohio St. 192, 168 N. E. 2d 409.

PER CURIAM.

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

Syllabus.

GOMILLION ET AL. *v.* LIGHTFOOT, MAYOR OF TUSKEGEE, ET AL.

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

No. 32. Argued October 18–19, 1960.—Decided November 14, 1960.

Negro citizens sued in a Federal District Court in Alabama for a declaratory judgment that an Act of the State Legislature changing the boundaries of the City of Tuskegee is unconstitutional and for an injunction against its enforcement. They alleged that the Act alters the shape of Tuskegee from a square to an irregular 28-sided figure; that it would eliminate from the City all but four or five of its 400 Negro voters without eliminating any white voter; and that its effect was to deprive Negroes of their right to vote in Tuskegee elections on account of their race. The District Court dismissed the complaint, on the ground that it had no authority to declare the Act invalid or to change any boundaries of municipal corporations fixed by the State Legislature. *Held:* It erred in doing so, since the allegations, if proven, would establish that the inevitable effect of the Act would be to deprive Negroes of their right to vote on account of their race, contrary to the Fifteenth Amendment. Pp. 340–348.

(a) Even the broad power of a State to fix the boundaries of its municipalities is limited by the Fifteenth Amendment, which forbids a State to deprive any citizen of the right to vote because of his race. *Hunter* v. *Pittsburgh*, 207 U. S. 161, and related cases distinguished. Pp. 342–345.

(b) A state statute which is alleged to have the inevitable effect of depriving Negroes of their right to vote in Tuskegee because of their race is not immune to attack simply because the mechanism employed by the Legislature is a "political" redefinition of municipal boundaries. *Colegrove* v. *Green*, 328 U. S. 549, distinguished. Pp. 346–348.

270 F. 2d 594, reversed.

Fred D. Gray and *Robert L. Carter* argued the cause for petitioners. With them on the brief was *Arthur D. Shores*.

Philip Elman argued the cause for the United States, as *amicus curiae,* urging reversal. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Tyler, Daniel M. Friedman, Harold H. Greene, D. Robert Owen* and *J. Harold Flannery, Jr.*

James J. Carter argued the cause for respondents. With him on the brief were *Thomas B. Hill, Jr.* and *Harry D. Raymon.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This litigation challenges the validity, under the United States Constitution, of Local Act No. 140, passed by the Legislature of Alabama in 1957, redefining the boundaries of the City of Tuskegee. Petitioners, Negro citizens of Alabama who were, at the time of this redistricting measure, residents of the City of Tuskegee, brought an action in the United States District Court for the Middle District of Alabama for a declaratory judgment that Act 140 is unconstitutional, and for an injunction to restrain the Mayor and officers of Tuskegee and the officials of Macon County, Alabama, from enforcing the Act against them and other Negroes similarly situated. Petitioners' claim is that enforcement of the statute, which alters the shape of Tuskegee from a square to an uncouth twenty-eight-sided figure, will constitute a discrimination against them in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution and will deny them the right to vote in defiance of the Fifteenth Amendment.

The respondents moved for dismissal of the action for failure to state a claim upon which relief could be granted and for lack of jurisdiction of the District Court. The court granted the motion, stating, "This Court has no control over, no supervision over, and no power to change any boundaries of municipal corporations fixed by a duly

convened and elected legislative body, acting for the people in the State of Alabama." 167 F. Supp. 405, 410. On appeal, the Court of Appeals for the Fifth Circuit, affirmed the judgment, one judge dissenting. 270 F. 2d 594. We brought the case here since serious questions were raised concerning the power of a State over its municipalities in relation to the Fourteenth and Fifteenth Amendments. 362 U. S. 916.

At this stage of the litigation we are not concerned with the truth of the allegations, that is, the ability of petitioners to sustain their allegations by proof. The sole question is whether the allegations entitle them to make good on their claim that they are being denied rights under the United States Constitution. The complaint, charging that Act 140 is a device to disenfranchise Negro citizens, alleges the following facts: Prior to Act 140 the City of Tuskegee was square in shape; the Act transformed it into a strangely irregular twenty-eight-sided figure as indicated in the diagram appended to this opinion. The essential inevitable effect of this redefinition of Tuskegee's boundaries is to remove from the city all save only four or five of its 400 Negro voters while not removing a single white voter or resident. The result of the Act is to deprive the Negro petitioners discriminatorily of the benefits of residence in Tuskegee, including, *inter alia,* the right to vote in municipal elections.

These allegations, if proven, would abundantly establish that Act 140 was not an ordinary geographic redistricting measure even within familiar abuses of gerrymandering. If these allegations upon a trial remained uncontradicted or unqualified, the conclusion would be irresistible, tantamount for all practical purposes to a mathematical demonstration, that the legislation is solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote.

It is difficult to appreciate what stands in the way of adjudging a statute having this inevitable effect invalid in light of the principles by which this Court must judge, and uniformly has judged, statutes that, howsoever speciously defined, obviously discriminate against colored citizens. "The [Fifteenth] Amendment nullifies sophisticated as well as simple-minded modes of discrimination." *Lane* v. *Wilson,* 307 U. S. 268, 275.

The complaint amply alleges a claim of racial discrimination. Against this claim the respondents have never suggested, either in their brief or in oral argument, any countervailing municipal function which Act 140 is designed to serve. The respondents invoke generalities expressing the State's unrestricted power—unlimited, that is, by the United States Constitution—to establish, destroy, or reorganize by contraction or expansion its political subdivisions, to wit, cities, counties, and other local units. We freely recognize the breadth and importance of this aspect of the State's political power. To exalt this power into an absolute is to misconceive the reach and rule of this Court's decisions in the leading case of *Hunter* v. *Pittsburgh,* 207 U. S. 161, and related cases relied upon by respondents.

The *Hunter* case involved a claim by citizens of Allegheny, Pennsylvania, that the General Assembly of that State could not direct a consolidation of their city and Pittsburgh over the objection of a majority of the Allegheny voters. It was alleged that while Allegheny already had made numerous civic improvements, Pittsburgh was only then planning to undertake such improvements, and that the annexation would therefore greatly increase the tax burden on Allegheny residents. All that the case held was (1) that there is no implied contract between a city and its residents that their taxes will be spent solely for the benefit of that city, and (2) that a citizen of one municipality is not de-

prived of property without due process of law by being subjected to increased tax burdens as a result of the consolidation of his city with another. Related cases, upon which the respondents also rely, such as *Trenton* v. *New Jersey,* 262 U. S. 182; *Pawhuska* v. *Pawhuska Oil Co.,* 250 U. S. 394; and *Laramie County* v. *Albany County,* 92 U. S. 307, are far off the mark. They are authority only for the principle that no constitutionally protected contractual obligation arises between a State and its subordinate governmental entities solely as a result of their relationship.

In short, the cases that have come before this Court regarding legislation by States dealing with their political subdivisions fall into two classes: (1) those in which it is claimed that the State, by virtue of the prohibition against impairment of the obligation of contract (Art. I, § 10) and of the Due Process Clause of the Fourteenth Amendment, is without power to extinguish, or alter the boundaries of, an existing municipality; and (2) in which it is claimed that the State has no power to change the identity of a municipality whereby citizens of a pre-existing municipality suffer serious economic disadvantage.

Neither of these claims is supported by such a specific limitation upon State power as confines the States under the Fifteenth Amendment. As to the first category, it is obvious that the creation of municipalities—clearly a political act—does not come within the conception of a contract under the *Dartmouth College* case. 4 Wheat. 518. As to the second, if one principle clearly emerges from the numerous decisions of this Court dealing with taxation it is that the Due Process Clause affords no immunity against mere inequalities in tax burdens, nor does it afford protection against their increase as an indirect consequence of a State's exercise of its political powers.

Particularly in dealing with claims under broad provisions of the Constitution, which derive content by an

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interpretive process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts. Thus, a correct reading of the seemingly unconfined dicta of *Hunter* and kindred cases is not that the State has plenary power to manipulate in every conceivable way, for every conceivable purpose, the affairs of its municipal corporations, but rather that the State's authority is unrestrained by the particular prohibitions of the Constitution considered in those cases.

The *Hunter* opinion itself intimates that a state legislature may not be omnipotent even as to the disposition of some types of property owned by municipal corporations, 207 U. S., at 178–181. Further, other cases in this Court have refused to allow a State to abolish a municipality, or alter its boundaries, or merge it with another city, without preserving to the creditors of the old city some effective recourse for the collection of debts owed them. *Shapleigh* v. *San Angelo,* 167 U. S. 646; *Mobile* v. *Watson,* 116 U. S. 289; *Mount Pleasant* v. *Beckwith,* 100 U. S. 514; *Broughton* v. *Pensacola,* 93 U. S. 266. For example, in *Mobile* v. *Watson* the Court said:

> "Where the resource for the payment of the bonds of a municipal corporation is the power of taxation existing when the bonds were issued, any law which withdraws or limits the taxing power and leaves no adequate means for the payment of the bonds is forbidden by the Constitution of the United States, and is null and void." *Mobile* v. *Watson, supra,* 116 U. S., at 305.

This line of authority conclusively shows that the Court has never acknowledged that the States have power to do as they will with municipal corporations regardless of consequences. Legislative control of municipalities, no less than other state power, lies within the scope of rele-

vant limitations imposed by the United States Constitution. The observation in *Graham* v. *Folsom,* 200 U. S. 248, 253, becomes relevant: "The power of the State to alter or destroy its corporations is not greater than the power of the State to repeal its legislation." In that case, which involved the attempt by state officials to evade the collection of taxes to discharge the obligations of an extinguished township, Mr. Justice McKenna, writing for the Court, went on to point out, with reference to the *Mount Pleasant* and *Mobile* cases:

> "It was argued in those cases, as it is argued in this, that such alteration or destruction of the subordinate governmental divisions was a proper exercise of legislative power, to which creditors had to submit. The argument did not prevail. It was answered, as we now answer it, that such power, extensive though it is, is met and overcome by the provision of the Constitution of the United States which forbids a State from passing any law impairing the obligation of contracts. . . ." 200 U. S., at 253–254.

If all this is so in regard to the constitutional protection of contracts, it should be equally true that, to paraphrase, such power, extensive though it is, is met and overcome by the Fifteenth Amendment to the Constitution of the United States, which forbids a State from passing any law which deprives a citizen of his vote because of his race. The opposite conclusion, urged upon us by respondents, would sanction the achievement by a State of any impairment of voting rights whatever so long as it was cloaked in the garb of the realignment of political subdivisions. "It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence." *Frost & Frost Trucking Co.* v. *Railroad Commission of California,* 271 U. S. 583, 594.

The respondents find another barrier to the trial of this case in *Colegrove* v. *Green,* 328 U. S. 549. In that case the Court passed on an Illinois law governing the arrangement of congressional districts within that State. The complaint rested upon the disparity of population between the different districts which rendered the effectiveness of each individual's vote in some districts far less than in others. This disparity came to pass solely through shifts in population between 1901, when Illinois organized its congressional districts, and 1946, when the complaint was lodged. During this entire period elections were held under the districting scheme devised in 1901. The Court affirmed the dismissal of the complaint on the ground that it presented a subject not meet for adjudication.* The decisive facts in this case, which at this stage must be taken as proved, are wholly different from the considerations found controlling in *Colegrove.*

That case involved a complaint of discriminatory apportionment of congressional districts. The appellants in *Colegrove* complained only of a dilution of the strength of their votes as a result of legislative inaction over a course of many years. The petitioners here complain that affirmative legislative action deprives them of their votes and the consequent advantages that the ballot affords. When a legislature thus singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment. In no case involving unequal weight in voting distribution that has come before the Court did the decision sanction a differentiation on racial lines whereby approval was given to unequivocal withdrawal of the vote solely from colored citizens. Apart from all else, these considerations lift this

*Soon after the decision in the *Colegrove* case, Governor Dwight H. Green of Illinois in his 1947 biennial message to the legislature recommended a reapportionment. The legislature immediately responded, Ill. Sess. Laws 1947, p. 879, and in 1951 redistricted again. Ill. Sess. Laws 1951, p. 1924.

controversy out of the so-called "political" arena and into the conventional sphere of constitutional litigation.

In sum, as Mr. Justice Holmes remarked, when dealing with a related situation, in *Nixon* v. *Herndon,* 273 U. S. 536, 540, "Of course the petition concerns political action," but "The objection that the subject matter of the suit is political is little more than a play upon words." A statute which is alleged to have worked unconstitutional deprivations of petitioners' rights is not immune to attack simply because the mechanism employed by the legislature is a redefinition of municipal boundaries. According to the allegations here made, the Alabama Legislature has not merely redrawn the Tuskegee city limits with incidental inconvenience to the petitioners; it is more accurate to say that it has deprived the petitioners of the municipal franchise and consequent rights and to that end it has incidentally changed the city's boundaries. While in form this is merely an act redefining metes and bounds, if the allegations are established, the inescapable human effect of this essay in geometry and geography is to despoil colored citizens, and only colored citizens, of their theretofore enjoyed voting rights. That was not *Colegrove* v. *Green.*

When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right. This principle has had many applications. It has long been recognized in cases which have prohibited a State from exploiting a power acknowledged to be absolute in an isolated context to justify the imposition of an "unconstitutional condition." What the Court has said in those cases is equally applicable here, *viz.,* that "Acts generally lawful may become unlawful when done to accomplish an unlawful end, *United States* v. *Reading Co.,* 226 U. S. 324, 357, and a constitutional power cannot be used by way of condition to attain an

unconstitutional result." *Western Union Telegraph Co.* v. *Foster,* 247 U. S. 105, 114. The petitioners are entitled to prove their allegations at trial.

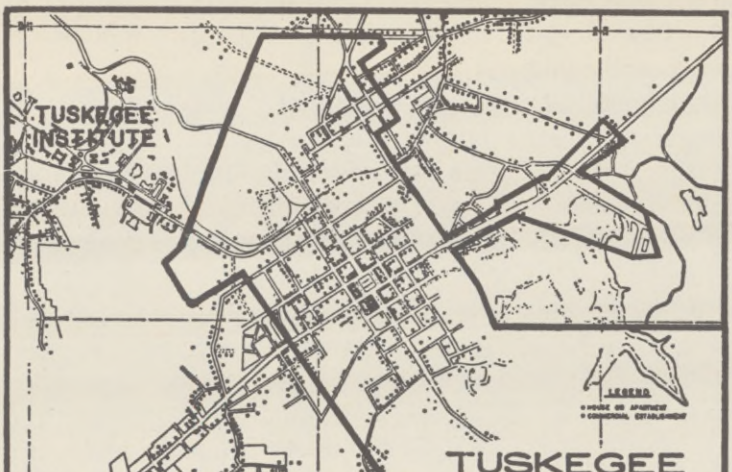
For these reasons, the principal conclusions of the District Court and the Court of Appeals are clearly erroneous and the decision below must be

Reversed.

MR. JUSTICE DOUGLAS, while joining the opinion of the Court, adheres to the dissents in *Colegrove* v. *Green,* 328 U. S. 549, and *South* v. *Peters,* 339 U. S. 276.

APPENDIX TO OPINION OF THE COURT.

CHART SHOWING TUSKEGEE, ALABAMA, BEFORE AND AFTER ACT 140



(The entire area of the square comprised the City prior to Act 140. The irregular black-bordered figure within the square represents the post-enactment city.)

MR. JUSTICE WHITTAKER, concurring.

I concur in the Court's judgment, but not in the whole of its opinion. It seems to me that the decision should be rested not on the Fifteenth Amendment, but rather on the Equal Protection Clause of the Fourteenth Amendment to the Constitution. I am doubtful that the averments of the complaint, taken for present purposes to be true, show a purpose by Act No. 140 to abridge petitioners' "right . . . to vote," in the Fifteenth Amendment sense. It seems to me that the "right . . . to vote" that is guaranteed by the Fifteenth Amendment is but the same right to vote as is enjoyed by all others within the same election precinct, ward or other political division. And, inasmuch as no one has the right to vote in a political division, or in a local election concerning only an area in which he does not reside, it would seem to follow that one's right to vote in Division A is not abridged by a redistricting that places his residence in Division B *if* he there enjoys the same voting privileges as all others in that Division, even though the redistricting was done by the State for the purpose of placing a racial group of citizens in Division B rather than A.

But it does seem clear to me that accomplishment of a State's purpose—to use the Court's phrase—of "fencing Negro citizens out of" Division A and into Division B is an unlawful segregation of races of citizens, in violation of the Equal Protection Clause of the Fourteenth Amendment, *Brown* v. *Board of Education,* 347 U. S. 483; *Cooper* v. *Aaron,* 358 U. S. 1; and, as stated, I would think the decision should be rested on that ground—which, incidentally, clearly would not involve, just as the cited cases did not involve, the *Colegrove* problem.

CHAUNT *v.* UNITED STATES.

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

No. 22. Argued October 17, 1960.—Decided November 14, 1960.

Under § 340 (a) of the Immigration and Nationality Act of 1952, as amended, the United States sued to revoke the order admitting petitioner to citizenship, on the ground that it had been procured "by concealment of a material fact or by willful misrepresentation." The complaint alleged, and the District Court found, that petitioner had concealed membership in the Communist Party, a lack of intent to renounce foreign allegiance, and a record of arrests; and it revoked his citizenship. The Court of Appeals affirmed, reaching only the question of concealment of the arrests, which occurred more than five years before petitioner's naturalization and were for distributing handbills, making a speech in a public park, and a breach of the peace. *Held:* On the record in this case concerning the arrests, the Government failed to show by clear, unequivocal, and convincing evidence either (1) that facts were suppressed which, if known, would have warranted denial of citizenship, or (2) that their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship. Pp. 350–356.

270 F. 2d 179, reversed and cause remanded.

Joseph Forer argued the cause for petitioner. With him on the brief were *David Rein* and *John W. Porter.*

Maurice A. Roberts argued the cause for the United States. On the briefs were *Solicitor General Rankin, Assistant Attorney General Wilkey, Philip R. Monahan, Beatrice Rosenberg* and *Jerome M. Feit.*

Opinion of the Court by MR. JUSTICE DOUGLAS, announced by MR. JUSTICE HARLAN.

Petitioner, a native of Hungary, was admitted to citizenship by a decree of the District Court in 1940. Respondent filed a complaint to revoke and set aside that

order as authorized by § 340 (a) of the Immigration and Nationality Act of 1952, 66 Stat. 260, as amended, 68 Stat. 1232, 8 U. S. C. § 1451 (a), on the ground that it had been procured "by concealment of a material fact or by willful misrepresentation." [1] The complaint stated that petitioner had falsely denied membership in the Communist Party and that by virtue of that membership he lacked the requisite attachment to the Constitution, etc., and the intent to renounce foreign allegiance. It also alleged that petitioner had procured his naturalization by concealing and misrepresenting a record of arrests. The District Court cancelled petitioner's naturalization, finding that he had concealed and misrepresented three matters—his arrests, his membership in the Communist Party, and his allegiance. The Court of Appeals affirmed, reaching only the question of the concealment of the arrests. 270 F. 2d 179. The case is here on a writ of certiorari. 362 U. S. 901.

One question, on a form petitioner filled out in connection with his petition for naturalization, asked if he had ever been "arrested or charged with violation of any law of the United States or State or any city ordinance or traffic regulation" and if so to give full particulars. To

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[1] The section provides in relevant part:

"It shall be the duty of the United States attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 310 of this title [§ 1421 of 8 U. S. C.] in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively . . . ."

this question petitioner answered "no." There was evidence that when he was questioned under oath by an examiner he gave the same answer. There was also evidence that if his answer had been "yes," the investigative unit of the Immigration Service would check with the authorities at the places where the arrests occurred "to ascertain . . . whether the full facts were stated."

The District Court found that from 10 to 11 years before petitioner was naturalized he had been arrested three times as follows:

(1) On July 30, 1929, he was arrested for distributing handbills in New Haven, Connecticut, in violation of an ordinance. He pleaded not guilty and was discharged.

(2) On December 21, 1929, he was arrested for violating the park regulations in New Haven, Connecticut, by making "an oration, harangue, or other public demonstration in New Haven Green, outside of the churches." Petitioner pleaded not guilty. Disposition of the charge is not clear, the notation on the court record reading "Found J. S." which respondent suggests may mean "Judgment Suspended" after a finding of guilt.

(3) On March 11, 1930, he was again arrested in New Haven and this time charged with "General Breach of the Peace." He was found guilty by the City Court and fined $25. He took an appeal and the records show "nolled April 7, 1930."

Acquisition of American citizenship is a solemn affair. Full and truthful response to all relevant questions required by the naturalization procedure is, of course, to be exacted, and temporizing with the truth must be vigorously discouraged. Failure to give frank, honest, and unequivocal answers to the court when one seeks naturalization is a serious matter. Complete replies are essential so that the qualifications of the applicant or his lack of them may be ascertained. Suppressed or concealed facts, if known, might in and of themselves justify

denial of citizenship. Or disclosure of the true facts might have led to the discovery of other facts which would justify denial of citizenship.

On the other hand, in view of the grave consequences to the citizen, naturalization decrees are not lightly to be set aside—the evidence must indeed be "clear, unequivocal, and convincing" and not leave "the issue . . . in doubt." *Schneiderman* v. *United States,* 320 U. S. 118, 125, 158; *Baumgartner* v. *United States,* 322 U. S. 665, 670. The issue in these cases is so important to the liberty of the citizen that the weight normally given concurrent findings of two lower courts does not preclude reconsideration here, for we deal with "judgments lying close to opinion regarding the whole nature of our Government and the duties and immunities of citizenship." *Baumgartner* v. *United States, supra,* 671. And see *Klapprott* v. *United States,* 335 U. S. 601, 612 and (concurring opinion) 617.

While disclosure of them was properly exacted, the arrests in these cases were not reflections on the character of the man seeking citizenship. The statute in force at the time of his naturalization required that "he has behaved as a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States" during the previous five years.[2] These arrests were made some years prior to the critical five-year period. They did not, moreover, involve moral turpitude within the meaning of the law. Cf. *Jordan* v. *De George,* 341 U. S. 223. No fraudulent conduct was charged. They involved distributing handbills, making a speech, and a breach of the peace. In one instance he was discharged, in one instance the prosecution was "nolled," and

[2] Section 4 of the Naturalization Act of June 29, 1906, 34 Stat. 598, as amended, 45 Stat. 1513–1514.

in the other (for making a speech in a park in violation of city regulations) he apparently received a suspended sentence. The totality of the circumstances surrounding the offenses charged makes them of extremely slight consequence. Had they involved moral turpitude or acts directed at the Government, had they involved conduct which even peripherally touched types of activity which might disqualify one from citizenship, a different case would be presented. On this record the nature of these arrests, the crimes charged, and the disposition of the cases do not bring them, inherently, even close to the requirement of "clear, unequivocal, and convincing" evidence that naturalization was illegally procured within the meaning of § 340 (a) of the Immigration and Nationality Act.

It is argued, however, that disclosure of the arrests made in New Haven, Connecticut, in the years 1929 and 1930 would have led to a New Haven investigation at which leads to other evidence—more relevant and material than the arrests—might have been obtained. His residence in New Haven was from February 1929 to November 1930. Since that period was more than five years before his petition for naturalization, the name of his employer at that time was not required by the form prepared by the Service. It is now said, however, that if the arrests had been disclosed and investigated, the Service might well have discovered that petitioner in 1929 was "a district organizer" of the Communist Party in Connecticut. One witness in this denaturalization proceeding testified that such was the fact. An arrest, though by no means probative of any guilt or wrongdoing, is sufficiently significant as an episode in a man's life that it may often be material at least to further enquiry. We do not minimize the importance of that disclosure. In this case, however, we are asked to base materiality on

the tenuous line of investigation that might have led from the arrests to the alleged communistic affiliations, when as a matter of fact petitioner in this same application disclosed that he was an employee and member of the International Workers' Order, which is said to be controlled by the Communist Party. In connection with petitioner's denial of such affiliations, respondent argues that since it was testified that the IWO was an organization controlled and dominated by the Communist Party, it is reasonable to infer that petitioner had those affiliations at the time of the application. But by the same token it would seem that a much less tenuous and speculative nexus with the Communist Party, if it be such, was thereby disclosed and was available for further investigation if it had been deemed appropriate at the time. Cf. *United States* v. *Anastasio,* 226 F. 2d 912. It is said that IWO did not become tainted with Communist control until 1941. We read the record differently. If the Government's case is made out, that taint extended back at least as far as 1939. Had that disclosure not been made in the application, failure to report the arrests would have had greater significance. It could then be forcefully argued that failure to disclose the arrests was part and parcel of a project to conceal a Communist Party affiliation. But on this record, the failure to report the three arrests occurring from 10 to 11 years previously is neutral. We do not speculate as to why they were not disclosed. We only conclude that, in the circumstances of this case, the Government has failed to show by "clear, unequivocal, and convincing" evidence either (1) that facts were suppressed which, if known, would have warranted denial of citizenship or (2) that their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship.

There are issues in the case which we do not reach and which were not passed upon by the Court of Appeals. Accordingly the judgment will be reversed and the cause remanded to it so that the other questions raised in the appeal may be considered.

It is so ordered.

MR. JUSTICE CLARK, with whom MR. JUSTICE WHITTAKER and MR. JUSTICE STEWART join, dissenting.

Petitioner swore in his application for naturalization that he had never been under arrest when in fact he had been arrested in New Haven, Connecticut, on three separate occasions within an eight-month period. The arrests were for distributing handbills in a public street, making "an oration, harangue, or other public demonstration" in a public park and a "general breach of the peace." Both the District Court and the Court of Appeals have found that petitioner's falsification "was an intentional concealment of a material fact and a willful misrepresentation which foreclosed the Immigration and Naturalization Service and the district court from making a further investigation as to whether he had all the qualifications for citizenship . . . ." These findings, as such, are not disputed. It is nowhere suggested, for example, that the petitioner's falsehoods were the result of inadvertence or forgetfulness—that they were anything but deliberate lies. This Court, however, brushes these findings aside on the ground [1] that the arrests "were not reflections on the char-

[1] The Court says that "[t]he totality of the circumstances surrounding the offenses charged makes them of extremely slight consequence." However, it overlooks the fact that neither the content of the handbills or of the harangue in the park nor the nature of the conduct leading to the conviction in the city court for a general breach of the peace appears in the record. Time has served petitioner well, for even the disposition of the cases is not too clear. But

acter of the man seeking citizenship." The Swiss philosopher Amiel tells us that "character is an historical fruit and is the result of a man's biography." Petitioner's past, if truthfully told in his application, would have been an odorous one. So bad that he dared not reveal it. For the Court to reward his dishonesty is nothing short of an open invitation to false swearing to all who seek the high privilege of American citizenship.

The Court first says that arrests of this nature, "the crimes charged, and the disposition of the cases do not bring them, inherently, even close to the requirement of 'clear, unequivocal, and convincing' evidence that naturalization was illegally procured." The Court, of course, knows that this is not the applicable test where one has deliberately falsified his papers and thus foreclosed further investigation. This basis for the reversal, therefore, misses the point involved and should have been of no consequence here.

The test is not whether the truthful answer in itself, or the facts discovered through an investigation prompted by that answer, would have justified a denial of citizenship. It is whether the falsification, by misleading the examining officer, forestalled an investigation which *might have resulted* in the defeat of petitioner's application for naturalization. The Courts of Appeals are without disagreement on this point [2] and it is, of course,

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to extrapolate the character of petitioner's conduct solely from these meager circumstances smacks of the psychic. Moreover, to say that the offenses "did not . . . involve moral turpitude" is gratuitous. This Court has never so held.

[2] *Corrado* v. *United States*, 227 F. 2d 780 (C. A. 6th Cir.), cert. denied, 351 U. S. 925; *United States* v. *Montalbano*, 236 F. 2d 757 (C. A. 3d Cir.), cert. denied *sub nom. Genovese* v. *United States*, 352 U. S. 952; *United States* v. *Lumantes*, 139 F. Supp. 574 (D. C. N. D. Calif.), aff'd *per curiam*, 232 F. 2d 216 (C. A. 9th Cir.); *Stacher* v. *United States*, 258 F. 2d 112 (C. A. 9th Cir.), cert. denied,

a necessary rule in order to prevent the making of misrepresentations for the very purpose of forestalling inquiry as to eligibility. The question as to arrests is highly pertinent to the issue of satisfactory moral character, the *sine qua non* of good citizenship. Petitioner's false answer to the question shut off that line of inquiry and was a fraud on the Government and the naturalization court. The majority makes much of the fact that the arrests occurred prior to the five-year statutory period of good behavior, but that is of no consequence. Concealment at the very time of naturalization is the issue here and that act of deliberate falsification before an officer of the Government clearly relates to the petitioner's general moral character. Indeed, the Congress has long made it a felony punishable by imprisonment for a maximum of five years. Certainly this does not fall within a class of peccadilloes which may be overlooked as being without "reflections on the character of the man seeking citizenship." In fact it strips an offender of all civil rights and leaves a shattered character that only a presidential pardon can mend.

The Court concludes that the false denial of prior arrests was "neutral" because the petitioner revealed in his preliminary application that he was an employee of the International Workers Order, which the Court adds, "is said to be controlled by the Communist Party." What the Court fails to point out is that the sole evidence, in this record, as to the International Workers Order was presented in 1955, 15 years after petitioner's deception of the examiner. There is no evidence that the examiner knew anything about that organization other than what

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358 U. S. 907; *United States* v. *Accardo*, 113 F. Supp. 783 (D. C. D. N. J.), aff'd *per curiam*, 208 F. 2d 632 (C. A. 3d Cir.), cert. denied, 347 U. S. 952. Cf. *United States* v. *Sweet*, 106 F. Supp. 634, 635 (D. C. E. D. Mich.), aff'd *per curiam*, 211 F. 2d 118 (C. A. 6th Cir.), cert. denied, 348 U. S. 817.

petitioner had told him. And there is nothing whatever in the record that would have even indicated that I. W. O. was communistic in 1940. What was there to prompt the examiner to investigate it at that time? The truth of the matter is that in his final naturalization application petitioner said he was employed by the "Fraternal Benefit Society of Internation [*sic*] Workers Order," a name which would lead one to believe that it was an insurance society. Surely the Court is not charging the examiner and the naturalization court with the dereliction of admitting petitioner to our citizenship knowing that he was connected with a Communist organization. In fact the testimony at the trial indicates that the Communist Party did not take over the leadership of the International Workers Order until 1941,[3] a year after petitioner was naturalized. It is also well to remember that the Attorney General did not list it as subversive until 1947, although lists of subversive organizations had been issued prior to that date.

As I read the record, it clearly supports the findings of the two courts below. Even if petitioner had told the truth, and the conduct causing the arrests was found not to relate to his present fitness for naturalization, it does not follow that citizenship would have been awarded. It might well have been that in checking on the handbills, the harangue in the public park, and the general breach of the peace the investigator would have been led to discover that petitioner was, in 1940, a leader in the Communist Party. I think it more logical than not that the Government would have discovered petitioner's Communist affiliations through such an investigation, and that the deliberate falsification in 1940 forestalled this revelation

[3] The sole witness on this point testified that "in 1941 . . . a number of us from the Communist Party were sent into that organization by the Communist Party into leadership to give more political content and strength and guidance for that organization."

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for 15 years. But whether or not that be the case, the Government was entitled to an honest answer from one who sought admission to its citizenship. We should exact the highest standards of probity and fitness from all applicants. American citizenship is a valuable right. It is prized highly by us who have it and it is sought eagerly by millions who do not. It is asking little enough of those who would be vested with its privileges to demand that they tell the truth.

I would affirm.

KNETSCH ET UX. *v.* UNITED STATES.

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

No. 23. Argued October 17–18, 1960.—Decided November 14, 1960.

In 1953, a 60-year-old taxpayer purchased single-premium 30-year maturity deferred annuity savings bonds with an aggregate face value of $4,000,000 from a life insurance company, paying only a nominal sum in cash, giving nonrecourse notes secured by the bonds for the balance and paying a substantial amount as "interest" in advance on that "indebtedness." A few days later, he borrowed from the company nearly all of the excess of the cash-surrender value which the bonds would have at the end of the first contract year over the amount of the existing "indebtedness" and again paid in advance the "interest" on such additional "indebtedness." These borrowings and "interest" payments were repeated in 1954 and 1955, and the bonds were surrendered and the indebtedness was cancelled in 1956. *Held:* The amounts paid as "interest" in 1953 and 1954 were not deductible from the gross income of the taxpayer and his wife in their joint income tax returns for those years as "interest paid . . . on indebtedness," within the meaning of § 23 (b) of the Internal Revenue Code of 1939 and § 163 (a) of the Internal Revenue Code of 1954. Pp. 362–370.

(a) On the record in this case, it is patent that the transaction between the taxpayer and the insurance company was a sham which created no "indebtedness" within the meaning of those sections of the Codes. Pp. 362–366.

(b) Congress did not authorize deduction of such payments by enacting § 264 (a) (2) of the Internal Revenue Code of 1954, which expressly denies a deduction for amounts paid on indebtedness incurred to purchase or carry a single-premium annuity contract, but only as to contracts purchased after March 1, 1954. Pp. 367–370.

272 F. 2d 200, affirmed.

W. Lee McLane, Jr. argued the cause for petitioners. With him on the brief was *Nola M. McLane.*

Grant W. Wiprud argued the cause for the United States. With him on the brief were *Solicitor General*

Rankin, Assistant Attorney General Rice and *Harry Baum.*

Richard H. Appert, Converse Murdoch and *Douglas W. McGregor* filed briefs, as *amici curiae,* urging reversal.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This case presents the question of whether deductions from gross income claimed on petitioners' 1953 and 1954 joint federal income tax returns, of $143,465 in 1953 and of $147,105 in 1954, for payments made by petitioner, Karl F. Knetsch, to Sam Houston Life Insurance Company, constituted "interest paid . . . on indebtedness" within the meaning of § 23 (b) of the Internal Revenue Code of 1939 and § 163 (a) of the Internal Revenue Code of 1954.[1] The Commissioner of Internal Revenue disallowed the deductions and determined a deficiency for each year. The petitioners paid the deficiencies and brought this action for refund in the District Court for the Southern District of California. The District Court rendered judgment for the United States, and the Court of Appeals for the Ninth Circuit affirmed, 272 F. 2d 200. Because of a suggested conflict with the decision of the Court of Appeals for the Fifth Circuit in *United States* v. *Bond,* 258 F. 2d 577, we granted certiorari, 361 U. S. 958.

On December 11, 1953, the insurance company sold Knetsch ten 30-year maturity deferred annuity savings bonds, each in the face amount of $400,000 and bearing interest at 2½% compounded annually. The purchase price was $4,004,000. Knetsch gave the Company his check for $4,000, and signed $4,000,000 of nonrecourse annuity loan notes for the balance. The notes bore

[1] The relevant words of the two sections are the same, namely that there shall be allowed as a deduction "All interest paid or accrued within the taxable year on indebtedness . . . ."

3½% interest and were secured by the annuity bonds. The interest was payable in advance, and Knetsch on the same day prepaid the first year's interest, which was $140,000. Under the Table of Cash and Loan Values made part of the bonds, their cash or loan value at December 11, 1954, the end of the first contract year, was to be $4,100,000. The contract terms, however, permitted Knetsch to borrow any excess of this value above his indebtedness without waiting until December 11, 1954. Knetsch took advantage of this provision only five days after the purchase. On December 16, 1953, he received from the company $99,000 of the $100,000 excess over his $4,000,000 indebtedness, for which he gave his notes bearing 3½% interest. This interest was also payable in advance and on the same day he prepaid the first year's interest of $3,465. In their joint return for 1953, the petitioners deducted the sum of the two interest payments, that is $143,465, as "interest paid . . . within the taxable year on indebtedness," under § 23 (b) of the 1939 Code.

The second contract year began on December 11, 1954, when interest in advance of $143,465 was payable by Knetsch on his aggregate indebtedness of $4,099,000. Knetsch paid this amount on December 27, 1954. Three days later, on December 30, he received from the company cash in the amount of $104,000, the difference less $1,000 between his then $4,099,000 indebtedness and the cash or loan value of the bonds of $4,204,000 on December 11, 1955. He gave the company appropriate notes and prepaid the interest thereon of $3,640. In their joint return for the taxable year 1954 the petitioners deducted the sum of the two interest payments, that is $147,105, as "interest paid . . . within the taxable year on indebtedness," under § 163 (a) of the 1954 Code.

The tax years 1955 and 1956 are not involved in this proceeding, but a recital of the events of those years is

necessary to complete the story of the transaction. On December 11, 1955, the start of the third contract year, Knetsch became obligated to pay $147,105 as prepaid interest on an indebtedness which now totalled $4,203,000. He paid this interest on December 28, 1955. On the same date he received $104,000 from the company. This was $1,000 less than the difference between his indebtedness and the cash or loan value of the bonds of $4,308,000 at December 11, 1956. Again he gave the company notes upon which he prepaid interest of $3,640. Petitioners claimed a deduction on their 1955 joint return for the aggregate of the payments, or $150,745.

Knetsch did not go on with the transaction for the fourth contract year beginning December 11, 1956, but terminated it on December 27, 1956. His indebtedness at that time totalled $4,307,000. The cash or loan value of the bonds was the $4,308,000 value at December 11, 1956, which had been the basis of the "loan" of December 28, 1955. He surrendered the bonds and his indebtedness was canceled. He received the difference of $1,000 in cash.

The contract called for a monthly annuity of $90,171 at maturity (when Knetsch would be 90 years of age) or for such smaller amount as would be produced by the cash or loan value after deduction of the then existing indebtedness. It was stipulated that if Knetsch had held the bonds to maturity and continued annually to borrow the net cash value less $1,000, the sum available for the annuity at maturity would be $1,000 ($8,388,000 cash or loan value less $8,387,000 of indebtedness), enough to provide an annuity of only $43 per month.

The trial judge made findings that "[t]here was no commercial economic substance to the . . . transaction," that the parties did not intend that Knetsch "become indebted to Sam Houston," that "[n]o indebtedness of [Knetsch] was created by any of the . . . transactions," and that

"[n]o economic gain could be achieved from the purchase of these bonds without regard to the tax consequences . . . ." His conclusion of law, based on this Court's decision in *Deputy* v. *du Pont,* 308 U. S. 488, was that "[w]hile in form the payments to Sam Houston were compensation for the use or forbearance of money, they were not in substance. As a payment of interest, the transaction was a sham."

We first examine the transaction between Knetsch and the insurance company to determine whether it created an "indebtedness" within the meaning of § 23 (b) of the 1939 Code and § 163 (a) of the 1954 Code, or whether, as the trial court found, it was a sham. We put aside a finding by the District Court that Knetsch's "only motive in purchasing these 10 bonds was to attempt to secure an interest deduction." [2] As was said in *Gregory* v. *Helvering,* 293 U. S. 465, 469: "The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted. . . . But the question for determination is whether what was done, apart from the tax motive, was the thing which the statute intended."

When we examine "what was done" here, we see that Knetsch paid the insurance company $294,570 during the two taxable years involved and received $203,000 back in the form of "loans." What did Knetsch get for the out-of-pocket difference of $91,570? In form he had an annuity contract with a so-called guaranteed cash value at maturity of $8,388,000, which would produce monthly annuity payments of $90,171, or substantial life insurance proceeds in the event of his death before maturity. This,

[2] We likewise put aside Knetsch's argument that, because he received ordinary income when he surrendered the annuities in 1956, he has suffered a net loss even if the contested deductions are allowed, and that therefore his motive in taking out the annuities could not have been tax avoidance.

as we have seen, was a fiction, because each year Knetsch's annual borrowings kept the net cash value, on which any annuity or insurance payments would depend, at the relative pittance of $1,000.[3] Plainly, therefore, Knetsch's transaction with the insurance company did "not appreciably affect his beneficial interest except to reduce his tax . . . ." *Gilbert* v. *Commissioner,* 248 F. 2d 399, 411 (dissenting opinion). For it is patent that there was nothing of substance to be realized by Knetsch from this transaction beyond a tax deduction. What he was ostensibly "lent" back was in reality only the rebate of a substantial part of the so-called "interest" payments. The $91,570 difference retained by the company was its fee for providing the façade of "loans" whereby the petitioners sought to reduce their 1953 and 1954 taxes in the total sum of $233,297.68. There may well be single-premium annuity arrrangements with nontax substance which create an "indebtedness" for the purposes of § 23 (b) of the 1939 Code and § 163 (a) of the 1954 Code. But this one is a sham.[4]

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[3] Petitioners argue further that in 10 years the net cash value of the bonds would have exceeded the amounts Knetsch paid as "interest." This contention, however, is predicated on the wholly unlikely assumption that Knetsch would have paid off in cash the original $4,000,000 "loan."

[4] Every court which has considered this or similar contracts has agreed with our conclusion, except the Court of Appeals for the Fifth Circuit in the *Bond* case and one District Court bound by that decision, *Roderick* v. *United States,* 59–2 U. S. T. C. ¶ 9650. See *Diggs* v. *Commissioner,* 281 F. 2d 326 (C. A. 2d Cir.), pending on petition for certiorari (later denied, *post,* p. 908); *Emmons and Weller* v. *Commissioner,* 270 F. 2d 294 (C. A. 3d Cir.), pending on petitions for certiorari (later denied, *post,* p. 908); *Haggard* v. *United States,* 59–1 U. S. T. C. ¶ 9299; *Oliver L. Williams,* 18 T. C. M. 205. See also Rev. Rul. 54–94, 1954–1 Cum. Bull. 53, and the dissenting opinion of Judge Wisdom in *Bond.*

The petitioners contend, however, that the Congress in enacting § 264 of the 1954 Code authorized the deductions. They point out that § 264 (a)(2) denies a deduction for amounts paid on indebtedness incurred to purchase or carry a single-premium annuity contract, but only as to contracts purchased after March 1, 1954.[5] The petitioners thus would attribute to Congress a purpose to allow the deduction of pre-1954 payments under transactions of the kind carried on by Knetsch with the insurance company without regard to whether the transactions created a true obligation to pay interest. Unless that meaning plainly appears we will not attribute it to Congress. "To hold otherwise would be to exalt artifice above reality and to deprive the statutory provision in question of all serious purpose." *Gregory* v. *Helvering, supra,* p. 470. We, therefore, look to the statute and materials relevant to its construction for evidence that Congress meant in § 264 (a)(2) to authorize the deduction of payments made under sham transactions entered into before 1954. We look in vain.

Provisions denying deductions for amounts paid on indebtedness incurred to purchase or carry insurance contracts are not new in the revenue acts. A provision applicable to all annuities, but not to life insurance or endowment contracts, was in the statute from 1932 to 1934, 47 Stat. 179. It was added at a time when Congress was

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[5] Section 264 (a)(2) provides:

"(a) GENERAL RULE.—No deduction shall be allowed for—

. . . . . .

"(2) Any amount paid or accrued on indebtedness incurred or continued to purchase or carry a single premium life insurance, endowment, or *annuity contract*.

"*Paragraph (2) shall apply in respect of annuity contracts only as to contracts purchased after March 1, 1954.*" (Emphasis supplied.)

The substance of the section without the italicized language was added to the 1939 Code in 1942. 56 Stat. 827.

developing a policy to deny a deduction for interest allocable to tax-exempt income; [6] the proceeds of annuities were excluded from gross income up to the amount of the consideration paid in by the annuitant. See H. R. Rep. No. 708, 72d Cong., 1st Sess., p. 11. The provision was repealed by the Revenue Act of 1934, 48 Stat. 688, when the method by which annuity payments were taken into gross income was changed in such way that more would be included. 48 Stat. 687. See S. Rep. No. 558, 73d Cong., 2d Sess., p. 24.

Congress then in 1942 denied a deduction for amounts paid on indebtedness incurred to purchase single-premium life insurance and endowment contracts. This provision was enacted by an amendment to the 1939 Code, 56 Stat. 827, "to close a loophole" in respect of interest allocable to partially exempt income. See Hearings before Senate Finance Committee on H. R. 7378, 77th Cong., 2d Sess., p. 54; § 22 (b)(1) of the 1939 Code (now § 101 (a)(1) of the 1954 Code).

The 1954 provision extending the denial to amounts paid on indebtedness incurred to purchase or carry single-premium annuities appears to us simply to expand the application of the policy in respect of interest allocable to partially exempt income. The proofs are perhaps not as strong as in the case of life insurance and endowment contracts, but in the absence of any contrary expression of the Congress, their import is clear enough. There is

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[6] See § 23 (b) of the Revenue Act of 1932, 47 Stat. 179, which provided:

"(b) INTEREST.—All interest paid or accrued within the taxable year on indebtedness, except (1) on indebtedness incurred or continued to purchase or carry obligations or securities (other than obligations of the United States issued after September 24, 1917, and originally subscribed for by the taxpayer) the interest upon which is wholly exempt from the taxes imposed by this title, or (2) on indebtedness incurred or continued in connection with the purchasing or carrying of an annuity."

first the fact that the provision was incorporated in the section covering life insurance and endowment contracts, which unquestionably was adopted to further that policy. There is *second* the fact that Congress' attention was directed to annuities in 1954; the same 1954 statute again changed the basis for taking part of the proceeds of annuities into gross income. See § 72 (b) of the 1954 Code. These are signs that Congress' long-standing concern with the problem of interest allocable to partially exempt income, and not any concern with sham transactions, explains the provision.

Moreover the provision itself negates any suggestion that sham transactions were the congressional concern, for the deduction denied is of certain interest payments on actual "indebtedness." And we see nothing in the Senate Finance and House Ways and Means Committee Reports on § 264, H. R. Rep. No. 1337, 83d Cong., 2d Sess., p. 31; S. Rep. No. 1622, 83d Cong., 2d Sess., p. 38, to suggest that Congress in exempting pre-1954 annuities intended to protect sham transactions.[7]

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[7] The Reports are as follows:

"Under existing law, no interest deduction is allowed in the case of indebtedness incurred, or continued, to purchase a single-premium life-insurance or endowment contract. . . .

"Existing law does not extend the denial of the interest deduction to indebtedness incurred to purchase single-premium annuity contracts. It has come to your committee's attention that a few insurance companies have promoted a plan for selling annuity contracts based on the tax advantage derived from omission of annuities from the treatment accorded single-premium life-insurance or endowment contracts. The annuity is sold for a nominal cash payment with a loan to cover the balance of the single-premium cost of the annuity. Interest on the loan (which may be a nonrecourse loan) is then taken as a deduction annually by the purchaser with a resulting tax saving that reduces the real interest cost below the increment in value produced by the annuity.

"Your committee's bill will deny an interest deduction in such cases but only as to annuities purchased after March 1, 1954."

Some point is made in an *amicus curiae* brief of the fact that Knetsch in entering into these annuity agreements relied on individual ruling letters issued by the Commissioner to other taxpayers. This argument has never been advanced by petitioners in this case. Accordingly, we have no reason to pass upon it.

The judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE WHITTAKER and MR. JUSTICE STEWART concur, dissenting.

I agree with the views expressed by Judge Moore in *Diggs* v. *Commissioner,* 281 F. 2d 326, 330–332, and by Judge Brown, writing for himself and Judge Hutcheson, in *United States* v. *Bond,* 258 F. 2d 577.

It is true that in this transaction the taxpayer was bound to lose if the annuity contract is taken by itself. At least the taxpayer showed by his conduct that he never intended to come out ahead on that investment apart from this income tax deduction. Yet the same may be true where a taxpayer borrows money at 5% or 6% interest to purchase securities that pay only nominal interest; or where, with money in the bank earning 3%, he borrows from the selfsame bank at a higher rate. His aim there, as here, may only be to get a tax deduction for interest paid. Yet as long as the transaction itself is not hocus-pocus, the interest charges incident to completing it would seem to be deductible under the Internal Revenue Code as respects annuity contracts made prior to March 1, 1954, the date Congress selected for terminating this class of deductions. 26 U. S. C. § 264. The insurance company existed; it operated under Texas law; it was authorized to issue these policies and to make these annuity loans. While the taxpayer was obligated to pay interest at the rate of 3½% per annum, the annuity bonds increased

in cash value at the rate of only 2½% per annum. The insurance company's profit was in that 1-point spread.

Tax avoidance is a dominating motive behind scores of transactions. It is plainly present here. Will the Service that calls this transaction a "sham" today not press for collection of taxes* arising out of the surrender of the annuity contract? I think it should, for I do not believe any part of the transaction was a "sham." To disallow the "interest" deduction because the annuity device was devoid of commercial substance is to draw a line which will affect a host of situations not now before us and which, with all deference, I do not think we can maintain when other cases reach here. The remedy is legislative. Evils or abuses can be particularized by Congress. We deal only with "interest" as commonly understood and as used across the board in myriad transactions. Since these transactions were real and legitimate in the insurance world and were consummated within the limits allowed by insurance policies, I would recognize them tax-wise.

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*Petitioners terminated this transaction in 1956 by allowing the bonds to be cancelled and receiving a check for $1,000. The termination was reflected in their tax return for 1956. It might also be noted that the insurance company reported as gross income the interest payments which it received from petitioners in 1953 and 1954.

McPHAUL *v.* UNITED STATES.

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

No. 33. Argued October 13, 1960.—Decided November 14, 1960.

Petitioner was convicted under 2 U. S. C. § 192 for willful failure to comply with a subpoena of the House of Representatives commanding him to produce before one of its Subcommittees certain records of the Civil Rights Congress. The evidence showed: Before issuance of the subpoena, the Subcommittee had reason to believe that the Civil Rights Congress was a subversive organization and that petitioner was its Executive Secretary. At the hearing, the Chairman of the Subcommittee explained that Detroit is a vital defense area and that the purpose of the hearing was to investigate Communist activities there. When asked whether he would produce the documents called for by the subpoena, petitioner stated flatly that he would not. Neither at the hearing nor at his trial did petitioner deny the existence of the records or his ability to produce them. He based his refusal upon a claim of his privilege under the Fifth Amendment. *Held:* The conviction is sustained. Pp. 373–383.

(a) The Government's proof at the trial established a *prima facie* case of willful refusal to comply with the subpoena; and, inasmuch as petitioner neither advised the Subcommittee that he was unable to produce the records nor attempted to introduce at his trial any evidence of his inability to produce them, the trial court was justified in concluding and in charging the jury that the records called for by the subpoena were in existence and under petitioner's control at the time the subpoena was served upon him. Pp. 373–380.

(b) The Fifth Amendment did not excuse petitioner from producing the records, since records held in a representative rather than in a personal capacity cannot be the subject of the personal privilege against self-incrimination. P. 380.

(c) The evidence was sufficient to show that the records called for by the subpoena were pertinent to the inquiry. Pp. 380–382.

(d) The subpoena was not so broad as to constitute an unreasonable search and seizure in violation of the Fourth Amendment. Pp. 382–383.

272 F. 2d 627, affirmed.

Ernest Goodman argued the cause and filed a brief for petitioner. *Geo. W. Crockett, Jr.* was with him on the petition.

Daniel M. Friedman argued the cause for the United States. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Yeagley, Kevin T. Maroney, George B. Searls* and *Lee B. Anderson.*

MR. JUSTICE WHITTAKER delivered the opinion of the Court.

We here review petitioner's conviction under 2 U. S. C. § 192 [1] for willful failure to comply with a subpoena of the House of Representatives commanding him to produce certain records of the Civil Rights Congress before a Subcommittee of the House Committee on Un-American Activities. The principal question presented is whether the evidence justified the trial court's rulings that the records called for by the subpoena were in existence, subject to petitioner's control, and pertinent to the Committee's inquiry.

The relevant evidence was as follows. Having knowledge that the Civil Rights Congress had been declared a subversive organization by the Attorney General—indeed, having itself earlier found that organization to be a subversive one—and having reason to believe that petitioner

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[1] "Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months."

was its Executive Secretary,[2] the House Committee on Un-American Activities caused a subpoena of the House of Representatives to be issued and served upon petitioner commanding him to appear before its Committee on Un-American Activities, or a subcommittee thereof, at a stated time and place in Detroit, Michigan, on February 26, 1952, and there to produce "all records, correspondence and memoranda pertaining to the organization of, the affiliation with other organizations and all monies received or expended by the Civil Rights Congress . . . [and] then and there to testify touching matters of inquiry committed to said Committee . . . ."

Upon the opening of the hearings before the Subcommittee at Detroit on February 26, 1952, the chairman made a public statement, saying, among other things, that earlier Committee hearings had "disclosed a concentration of Communist effort in certain defense areas of the country," consisting in part of keeping "the national organization of the Communist Party and the international Communist movement fully advised of industrial potentialities" in such areas, and that "[t]here is no area of greater importance to the Nation as a whole, both in time of peace and in time of war, than the general area of Detroit," and he concluded with the statement that: "The purpose of this investigation is to determine first, whether there has been Communist activity in this vital defense area, and if so, the nature, extent, character and objects thereof."

Accompanied by counsel, petitioner appeared before the Subcommittee at the time and place commanded by the subpoena, and the following colloquy occurred:

> "Mr. Wood [the chairman]: Mr. McPhaul, the committee has heretofore served upon you a sub-

[2] See note 4.

poena duces tecum, to produce certain records and documents. Are you prepared to respond to that subpoena?

. . . . .

"Mr. WOOD: . . . Will you answer my question, Mr. McPhaul. Are you prepared to produce the documents and papers that have been called upon for you to produce under the subpoena?

"Mr. MCPHAUL: Mr. Wood, I refuse to answer this or any question which deals with the possession or custody of the books and records called for in the subpoena. I claim my privilege under the fifth amendment of the Constitution.

. . . . .

"Mr. TAVENNER [Committee counsel]: I would like to ask the witness if he has any other reason for refusing to produce the documents called for in the subpoena?

. . . . .

"Mr. WOOD: In order to complete the record, Mr. McPhaul is it in response to this subpoena that has just been read that you now decline, for the reason you have stated, to produce the documents and books and records therein called for?

"Mr. MCPHAUL: I have stated the reasons, for the record.

"Mr. WOOD: Is it in response to this subpoena that you refuse to answer?

"Mr. MCPHAUL: That is my answer that I have just given.

"Mr. WOOD: To this subpoena?

"Mr. MCPHAUL: To that subpoena; yes."

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Petitioner was then sworn, and, after submitting a prepared statement and answering a few preliminary questions, the following occurred:

> "Mr. TAVENNER: The question is as to whether or not you are refusing to produce the records directed to be produced under the subpoena?
>
> "Mr. MCPHAUL: My answer to that is, I refuse to answer this or any questions which deal with possession or custody of the books and records called for in this subpoena. I claim my privilege under the fifth amendment of the United States Constitution.
>
> "Mr. TAVENNER: My question to you was not answered by that statement, in my judgment. My question was whether or not you are refusing to produce the records which you were directed to produce under this subpoena?
>
> "Mr. MCPHAUL: I have answered it in this statement.
>
> "Mr. TAVENNER: No sir. You have stated that you refuse to answer any questions pertaining to them. I have not asked you a question that pertains to them. I have asked you to produce the records. Now, will you produce them?
>
> "Mr. MCPHAUL: I will not."

Following receipt of the Subcommittee's report of these occurrences, the House certified the matter to the United States Attorney for the Eastern District of Michigan for initiation of contempt proceedings against petitioner, and he was indicted on July 29, 1954. After denial of his motion to dismiss the indictment,[3] petitioner entered a

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[3] Petitioner's motion to dismiss challenged the indictment on the grounds, among others, (1) that it failed to state "the relationship, if any, between the defendant and the Civil Rights Congress whose records defendant was required to produce," or that they "were subject to the control or in the custody of the defendant"; (2) that

plea of not guilty and the case was put to trial before a jury. The Government offered and there was received in evidence those portions of the transcript of the Detroit hearings which we have mentioned, various House documents authorizing the initiation of this proceeding, and a letter on the letterhead of the Civil Rights Congress, dated February 16, 1952, over petitioner's name, and what purported to be his signature, as Executive Secretary.[4]

Petitioner offered no evidence, but moved for a directed verdict of acquittal substantially on the grounds asserted in his motion to dismiss the indictment (see note 3) and on the further grounds that the Government had failed to adduce any evidence sufficient to show that the records called for by the subpoena were in existence and in petitioner's possession or control at the time he was served with the subpoena or that they were pertinent to the Subcommittee's inquiry. The motion was denied, and thereupon petitioner requested the court to charge the jury, in substance, that unless they found from the evidence and beyond a reasonable doubt that the records called for by the subpoena were in existence and in petitioner's custody or control at the time the subpoena was served upon him, they should find him not guilty. The court refused that

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it failed to state facts showing "the inquiry [to be] within the purview of the" Subcommittee, "and the relevancy and materiality to [the] inquiry of the records called for in the subpoena"; and (3) that the scope of the subpoena violated "defendant's rights under the Fourth Amendment to the United States Constitution."

[4] The letter—taken from the Subcommittee's files—was on the letterhead of the Civil Rights Congress, dated February 16, 1952—just 10 days prior to the Detroit hearing—over petitioner's name, and what purported to be his signature, as Executive Secretary. Despite the identity of names and the rule that "identity of names is *prima facie* evidence of identity of persons," *Stebbins* v. *Duncan*, 108 U. S. 32, 47, the trial court, upon petitioner's objection, excluded the exhibit from consideration by the jury but received it for his own consideration in respect to the questions of law presented.

request and, instead, charged the jury not to consider "whether the records and documents designated in the subpoena were actually in existence or under the possession or control of the defendant, because if the defendant had legitimate reasons for failing to produce the said records, he should have stated his reasons for non-compliance with the subpoena when he appeared before the said subcommittee."

The jury found petitioner guilty, and he was fined the sum of $500 and sentenced to imprisonment for a period of nine months. The Court of Appeals affirmed, 272 F. 2d 627, and we granted certiorari, 362 U. S. 917.

Petitioner's principal contentions here are that there was no evidence showing that the records called for by the subpoena were in existence or, if it may be said that there was, that those records were in petitioner's possession or subject to his control, and the trial court therefore should have sustained his motion for a directed verdict of acquittal or, at the minimum, should have submitted those matters to the jury for resolution.

It is of course true that "[a] court will not imprison a witness for failure to produce documents which he does not have, unless he is responsible for their unavailability, cf. *Jurney* v. *MacCracken,* [294 U. S. 125], or is impeding justice by not explaining what happened to them, *United States* v. *Goldstein,* 105 F. 2d 150 (1939)," *United States* v. *Bryan,* 339 U. S. 323, 330–331. But, so far as the record shows, petitioner has never claimed—either before the Subcommittee, the District Court, or the Court of Appeals, and he does not claim here—that the records called for by the subpoena did not exist or that they were not in his possession or subject to his control. Rather, his claim, first raised at his contempt trial more than two years after his appearance before the Subcommittee, is that the Government failed to show that he could have produced the records before the Subcommittee,

notwithstanding he has never claimed he could not produce them.

We think the Court's decision in *United States* v. *Bryan*, 339 U. S. 323, is highly relevant to these questions.[5] For it is as true here as it was there, that "if [petitioner] had legitimate reasons for failing to produce the records of the association, a decent respect for the House of Representatives, by whose authority the subpoenas issued, would have required that [he] state [his] reasons for noncompliance upon the return of the writ." *Id.*, at 332. Such a statement would have given the Subcommittee an opportunity to avoid the blocking of its inquiry by taking other appropriate steps to obtain the records. "To deny the Committee the opportunity to consider the objection or remedy it is in itself a contempt of its authority and an obstruction of its processes. See *Bevan* v. *Krieger*, 289 U. S. 459, 464–465 (1933)." His failure to make any such statement was "a patent evasion of the duty of one summoned to produce papers before a congressional committee [, and] cannot be condoned." *Id.*, at 333.

The Government's proof at the trial thus established a *prima facie* case of willful failure to comply with the subpoena. The evidence of the Subcommittee's reasonable basis for believing that the petitioner could produce the records in question, coupled with the evidence of his failure even to suggest to the Subcommittee his inability to produce those records, clearly supported an inference that he could have produced them. The burden then shifted to the petitioner to present some evidence to explain or justify his refusal. *Morrison* v. *California*, 291 U. S. 82, 88–89. But he elected not to present any evidence. In these circumstances, there was no factual issue, respecting the existence of the records or his ability to produce them, for resolution by the jury.

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[5] See also the companion case of *United States* v. *Fleischman*, 339 U. S. 349, which is equally relevant to these questions.

The Fifth Amendment did not excuse petitioner from producing the records of the Civil Rights Congress, for it is well settled that "[b]ooks and records kept 'in a representative rather than in a personal capacity cannot be the subject of the personal privilege against self-incrimination, even though production of the papers might tend to incriminate [their keeper] personally.' *United States* v. *White,* 322 U. S. 694, 699 (1944)." *Rogers* v. *United States,* 340 U. S. 367, 372. And see *Curcio* v. *United States,* 354 U. S. 118, 122–123. Similarly, there is no merit in petitioner's argument that he could not have advised the Subcommittee that he was unable to produce the records without thereby inviting other questions respecting the records and thus risking waiver of his privilege against self-incrimination. See *Curcio* v. *United States,* 354 U. S. 118. Nor does the rule of *Blau* v. *United States,* 340 U. S. 159, excuse one subpoenaed to produce records in a representative capacity, *United States* v. *White,* 322 U. S. 694, from asserting inability to produce the records if, at a later contempt trial for failure to produce the records, he expects to put the Government to proof on that matter.

Inasmuch as petitioner neither advised the Subcommittee that he was unable to produce the records nor attempted to introduce any evidence at his contempt trial of his inability to produce them, we hold that the trial court was justified in concluding and in charging the jury that the records called for by the subpoena were in existence and under petitioner's control at the time the subpoena was served upon him.

Petitioner next contends that the evidence was not sufficient to show that the records called for by the subpoena were pertinent to the inquiry. In the first place, petitioner made no objection to the subpoena before the Subcommittee on the ground of pertinency, see *Barenblatt* v. *United States,* 360 U. S. 109, 123, but we need not

rest decision on that score, for here "pertinency" was clearly shown. The stated purposes of the hearing were to determine "whether there has been Communist activity in this vital defense area [Detroit], and if so, the nature, extent, character and objects thereof." Earlier Subcommittee hearings had "disclosed a concentration of Communist effort in certain defense areas of the country," consisting in part of keeping "the national organization of the Communist Party and the international Communist movement fully advised of industrial potentialities" in such areas, and the Subcommittee also had reason to believe that the Civil Rights Congress was being used for subversive purposes. The subpoena called for "all records, correspondence and memoranda" of the Civil Rights Congress relating to three specified subjects: (1) The "organization of" the group, (2) its "affiliation with other organizations," and (3) "all monies received or expended by [it]." It would seem clear enough that the auspices under which the Civil Rights Congress was organized, the identity and extent of its affiliations, the source of its funds and to whom distributed would be prime considerations in determining whether the organization was being used by the Communists in the Detroit area. If the Civil Rights Congress was affiliated with known Communist organizations, or if its funds were received from such organizations or were used to support Communist activities in the Detroit area, those facts, it is reasonable to suppose, would be shown by the records called for by the subpoena, and those facts would be highly pertinent to the Subcommittee's inquiry. It thus appears that the records called for by the subpoena were not "plainly incompetent or irrelevant to any lawful purpose [of the Subcommittee] in the discharge of [its] duties," *Endicott Johnson Corp.* v. *Perkins,* 317 U. S. 501, 509, but, on the contrary, were reasonably "relevant to the

inquiry," *Oklahoma Press Publishing Co.* v. *Walling,* 327 U. S. 186, 209.

Finally, petitioner contends that the subpoena was so broad as to constitute an unreasonable search and seizure in violation of the Fourth Amendment of the Constitution. "[A]dequacy or excess in the breadth of the subpoena are matters variable in relation to the nature, purposes and scope of the inquiry," *Oklahoma Press Publishing Co.* v. *Walling, supra,* at 209. The Subcommittee's inquiry here was a relatively broad one—whether "there has been Communist activity in this vital defense area [Detroit], and if so, the nature, extent, character and objects thereof"—and the permissible scope of materials that could reasonably be sought was necessarily equally broad.

It is not reasonable to suppose that the Subcommittee knew precisely what books and records were kept by the Civil Rights Congress, and therefore the subpoena could only "specif[y] . . . with reasonable particularity, the subjects to which the documents . . . relate," *Brown* v. *United States,* 276 U. S. 134, 143. The call of the subpoena for "all records, correspondence and memoranda" of the Civil Rights Congress relating to the three specified subjects describes them "with all of the particularity the nature of the inquiry and the [Subcommittee's] situation would permit," *Oklahoma Press Publishing Co.* v. *Walling, supra,* at 210, n. 48. "[T]he description contained in the subpoena was sufficient to enable [petitioner] to know what particular documents were required and to select them accordingly," *Brown* v. *United States, supra,* at 143. If petitioner was in doubt as to what records were required by the subpoena, or found it unduly burdensome, or found it to call for records unrelated to the inquiry, he could and should have so advised the Subcommittee, where the defect, if any, "could easily have been remedied," *United States* v. *Bryan, supra,* at 333. This subpoena was

not more sweeping than those sustained against challenges of undue breadth in *Endicott Johnson Corp.* v. *Perkins,* 317 U. S. 501, and *Oklahoma Press Publishing Co.* v. *Walling,* 327 U. S. 186.

Under these circumstances, we cannot say that the breadth of the subpoena was such as to violate the Fourth Amendment.

Affirmed.

Dissenting opinion of MR. JUSTICE DOUGLAS, with whom THE CHIEF JUSTICE, MR. JUSTICE BLACK and MR. JUSTICE BRENNAN concur, announced by MR. JUSTICE BLACK.

Today's decision marks such a departure from the accepted procedure designed to protect accused people from public passion and overbearing officials that I dissent.

The Act under which petitioner goes to prison permits conviction only if he "willfully makes default" as a witness before a congressional Committee. 2 U. S. C. § 192. The subpoena commanded him to produce the records of "the Civil Rights Congress" at a given time and place. But it did not name petitioner as officer, agent, or member of "the Civil Rights Congress." The record contains no word of evidence to show (1) that petitioner was an officer, agent, or member of the Civil Rights Congress, or (2) that petitioner was in possession of, or was a custodian of, any of the records of "the Civil Rights Congress." The congressional Committee made no effort to establish these facts. Neither did the prosecutor when this criminal proceeding came to trial. The only evidence, if it can be called such, is the refusal or failure of the petitioner to deny those facts.[1] The District Court charged the jury

[1] The respondent claims that the Committee, if not the court, had a "reasonable basis for believing that petitioner could produce the records." That basis turns out to be a letter in the Committee files which the respondent made no attempt to link up with petitioner and which, for that reason, was never admitted into evidence.

that the failure of the prosecution to establish those facts was immaterial for the following reason:

> "If you find from the evidence in this case, and beyond a reasonable doubt, that the defendant appeared before the said subcommittee, and then refused or failed to make any explanation with respect to the existence of the records designated in the subpoena, or with respect to whether or not such records were under his possession or control, I charge you that you may not consider the questions of whether the records and documents designated in the subpoena were actually in existence or under the possession or control of the defendant, because if the defendant had legitimate reasons for failing to produce the said records, he should have stated his reasons for non-compliance with the subpoena when he appeared before the said subcommittee.
>
> "I also charge you that the defendant is not excused from compliance with or producing the records designated in the subpoena merely because he is not designated as an officer or agent of the Civil Rights Congress therein; and neither is the defendant excused from such compliance with the said subpoena merely because of any lack of proof of any connection between the defendant and the Civil Rights Congress."

This theory, now sustained by the Court, permits conviction without any evidence of any "willful" default.

The presumption of innocence, deep in our criminal law, has been one of our most important safeguards against oppression. So far as I can find, this is the first instance where we have dispensed with it. We do so today by shifting the burden to a witness to show that he is not an officer or agent of the organization in question and that he is not able to produce the documents, without requiring

any proof whatsoever by the prosecution that connects the defendant either with the organization or with the documents. Reliance is placed on *United States* v. *Bryan,* 339 U. S. 323. With all deference, that case is irrelevant because there the witness concededly was "the executive secretary" of the organization being investigated and had "custody of its records." *Id.,* 324. The issue in the case concerned the authority of the Committee to make the demand, authority challenged, at the trial but not before the Committee, because no quorum of the Committee was present when the witness made default. In *United States* v. *Fleischman,* 339 U. S. 349, there was also evidence that the defendant had power to cause the documents to be produced. *Id.,* 353–354. In those situations the prosecution proves enough when it establishes custody or power to control. *Id.,* 361–363. As respects the shift of the burden of going forward in a criminal prosecution to the defendant (*Morrison* v. *California,* 291 U. S. 82, 88, 90–91), Mr. Justice Cardozo said, by way of dictum, "For a transfer of the burden, experience must teach that the evidence held to be inculpatory has at least a sinister significance . . . or if this at times be lacking, there must be in any event a manifest disparity in convenience of proof and opportunity for knowledge . . . ." *Id.,* 90–91. Whatever may be the reach of that dictum, it was not adequate to sustain a conviction in that case and is inadequate here. That case involved a charge of conspiracy to violate the alien land law of California. A citizen, charged as co-conspirator, was convicted on a presumption that he knew of the disqualification of his co-conspirator alleged to be an alien. The holding of the Court was that invocation of the presumption against the citizen denied him due process. *Id.,* 93. The alien was not a conspirator, "however guilty his own state of mind," unless the citizen "shared in the guilty knowledge and design." Therefore,

said Mr. Justice Cardozo, "The joinder was something to be proved, for it was of the essence of the crime." *Id.*, 93. That ruling rests on the presumption of innocence that is never overcome unless the prosecution introduces some competent evidence implicating the accused in the criminal act that is charged.[2] Here the crime is "willful" default in the production of records of "the Civil Rights Congress." There can be no "willful" default unless this petitioner is shown to have (1) *some* connection with that organization and (2) *some* custody or control of its records. Simple questions by the Committee might have produced the necessary answers. It is hornbook law that they should have been asked.[3] Yet they were not; and without the foundation which they might have laid, the present prosecution has no starting point unless we are to throw procedural requirements to the winds.

Failure of a defendant to explain why he does not produce documents may be sufficient under the cases, where it has first been shown that he has a connection with them. See *United States* v. *Fleischman, supra,* 360–363; *Nilva* v. *United States,* 352 U. S. 385, 392. But failure to explain, where no proof of the defendant's connection with the documents is shown, is like taking his action in standing mute as a confession of guilt. Once that was the rule. See *In re Smith,* 13 F. 25, 26–27; Beale, Criminal Plead-

[2] The assaults on this presumption have been vigorous and a few lower courts have succumbed as Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure,* 69 Yale L. J. 1149, shows.

[3] Counsel for the Committee repeatedly asked petitioner to comply with the subpoena, but only once did he venture near the question of petitioner's power to comply. In the context of petitioner's invocation of his privilege against self-incrimination, Mr. Tavenner asked "if [petitioner] has any other reason for refusing to produce the documents called for." Again, the assumption is that the mere issue of the subpoena without more casts on the witness the burden of explaining non-compliance.

ing and Practice (1899), p. 52. Once it was the rule that a man who refused to take an oath and answer in criminal proceedings was held in contempt. *Trial of Lilburn,* 3 How. St. Tr. 1315. 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. 215.

Today we take a step backward. We allow a man to go to prison for doing no more, so far as this record reveals, than challenging the right of a Committee to ask him to produce documents. The Congress had the right to get these documents from someone. But, when it comes to criminal prosecutions, the Government must turn square corners. If Congress desires to have the judiciary adjudge a man guilty for failure to produce documents, the prosecution should be required to prove that the man whom we send to prison had the power to produce them.

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

APPEAL FROM THE SUPREME COURT OF NEW HAMPSHIRE.

No. 336. Decided November 14, 1960.

For refusing to comply with a state court order to produce the names of persons attending his summer camp during 1954 and 1955 for use in an investigation by the Attorney General of New Hampshire on behalf of the State Legislature to determine whether "subversive persons" were then in the State, petitioner was adjudged guilty of civil contempt and ordered committed to jail until he complied. That judgment was sustained by the State Supreme Court and by this Court. He then appealed again to the State Supreme Court, claiming that, since his former appeal, the State Legislature had terminated the Attorney General's authority to make such an investigation on its behalf; but the State Supreme Court held that such authority had not been terminated. *Held:* An appeal to this Court from that judgment is dismissed for want of jurisdiction, since that judgment is based on a nonfederal ground.

Reported below: 102 N. H. 461, 159 A. 2d 160.

Louis Lusky, Grenville Clark, Marvin H. Morse, Dudley W. Orr, Royal W. France, Hugh H. Bownes and *Leonard B. Boudin* for appellant.

Louis C. Wyman, Attorney General of New Hampshire, appellee, *pro se.*

PER CURIAM.

In view of the Court's decision in *Uphaus* v. *Wyman,* 360 U. S. 72, rehearing denied, 361 U. S. 856, the motion to dismiss is granted and the appeal herein is dismissed for want of jurisdiction, in that the judgment sought to be reviewed is based on a non-federal ground.

MR. JUSTICE BRENNAN.

The New Hampshire Supreme Court has held in this proceeding that the New Hampshire Legislature still wanted Dr. Uphaus' answers on December 14, 1959, not-

withstanding the omission from Laws 1957, c. 178, of the provision of Laws 1955, cc. 340 and 197, authorizing the Attorney General "to determine whether subversive persons . . . are presently located within this state," *Wyman* v. *Uphaus,* 102 N. H. 461, 159 A. 2d 160; on denial of motion for bail, 102 N. H. 517, 162 A. 2d 611. We are bound by the highest state court's construction of the pertinent New Hampshire statutes. We must therefore consider the substantiality of the federal constitutional questions presented on this appeal on the basis of that construction and not upon the premise urged by Dr. Uphaus that the 1957 statute shows that the legislature on December 14, 1959, no longer wanted him to produce the list of names. In consequence, while I remain of the view that the Court in *Uphaus* v. *Wyman,* 360 U. S. 72, incorrectly sustained the previous order of civil contempt made against Dr. Uphaus, see dissent at page 82, that holding, while it stands, also sustains the order challenged on this appeal. Solely under compulsion of that decision, I think that the appeal must be dismissed as not presenting a substantial federal question.

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

I concur in the dissent of MR. JUSTICE DOUGLAS and agree with him that since the New Hampshire law upheld by this Court in *Uphaus* v. *Wyman,* 360 U. S. 72, has now been changed, new federal questions are presented which cannot be dismissed as involving only the correctness of a ruling on local law, and that we consequently should not dismiss this appeal but should note jurisdiction, grant bail and hear arguments. The recent amendment withdrew the power, involved in the previous appeal, which authorized the Attorney General of New Hampshire "to determine whether subversive persons . . . are presently located within" the State, and thus took

away the very power under which the Attorney General was acting when he demanded the names of guests at the summer camp in New Hampshire managed by the appellant, Dr. Willard Uphaus. Notwithstanding that fact, the New Hampshire courts have held that the State still has an interest in those names sufficient to justify the continued imprisonment of Dr. Uphaus for his refusal to comply with the demand to produce them.[1] This appeal therefore raises federal questions as to whether this latter holding violates the Federal Constitution. I think that the Court's action today in treating those federal questions as insubstantial[2] is wrong in at least two different respects.

First, I think this action is inconsistent with the Court's own test as set forth in its opinion on the prior appeal and there used to square the imprisonment of Dr. Uphaus with the First Amendment. That test was stated in these terms: "The interest of the guests at World Fellowship in their associational privacy having been asserted, we have for decision the federal question of whether the public interests overbalance these conflicting private ones."[3] This required the Court to weigh the interest of those guests against the interest of the State, as broadly expressed by its legislature, in knowing

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[1] As indicated by my concurrence in the opinion of MR. JUSTICE DOUGLAS, I think the better interpretation of that holding is that it rests upon the theory that the imprisonment is for criminal contempt, and I think that MR. JUSTICE DOUGLAS conclusively demonstrates that if that is so, this Court cannot properly refuse review of that imprisonment. But the Court's dismissal of the appeal is an implicit holding that the New Hampshire Supreme Court's action rests upon the civil contempt theory. Even upon that view, however, I think the present appeal raises federal questions both new and substantial.

[2] Implicit, of course, in the Court's order dismissing this appeal because the judgment is based on a nonfederal ground is the holding that the federal questions actually presented are insubstantial.

[3] 360 U. S., at 78.

"whether subversive persons . . . are presently located within" the State, a balancing process[4] which there resulted in the conclusion that the state interest must prevail. Now, however, it is clear that the interest of the State so weighed no longer exists and a new balance must be made if the invasion of "associational privacy" previously sanctioned is to be permitted to continue. But this the Court refuses to do, apparently on the theory that the present appeal is controlled by the previous disposition. It seems to me that "balancing" which refuses to take note of such an important change in the interest of the State is little balancing at all—a mere illusion, in fact.

Secondly, it seems to me that the record as it now stands before this Court requires a reappraisal of the question whether the actions of the State of New Hampshire constitute a bill of attainder in violation of Art. I, § 10, of the Constitution. On the prior appeal, the majority of this Court held that the record *as it then stood* would not justify such a conclusion. The present record, however, presents new facts relevant to that issue. For here we are confronted with a situation in which the courts of New Hampshire have stated that it was the intention of the legislature of that State to permit the Attorney General to single out Dr. Uphaus and any others (if, indeed, there are any others) against whom investigative proceedings had already been commenced and to pursue those proceedings, not in furtherance of any general aim of the State—that general aim, if it ever existed, has been abandoned by the amendment—but apparently for the sole purpose of setting these people off for special treatment. What this special treatment is to be is clearly

[4] My opinion of this balancing process, when applied as here to justify direct abridgments of First Amendment freedoms, has been fully expressed in previous cases. See, *e. g., Barenblatt* v. *United States,* 360 U. S. 109, 141–146 (dissenting opinion), *Beauharnais* v. *Illinois,* 343 U. S. 250, 268–270, 274–275 (dissenting opinion).

shown by the brief filed before this Court in this appeal by the State Attorney General himself, who administers the Act. That brief states unequivocally that "[t]hose who voluntarily and knowingly appear with, consult with, confer with, attend functions with and otherwise act in concert with Communists or former Communists in America cannot possibly have any reasonable right of privacy in regard to such activities . . . ." [5] In the light of all these new facts, the decision upon the former appeal is not and cannot properly be held to be dispositive of the question whether *this* record shows that New Hampshire is unconstitutionally imposing a bill of attainder upon Dr. Uphaus.

I think the summary dismissal of this appeal without even so much as the benefit of oral argument, when the abridgment of the rights of free speech and assembly is so obvious, is a sad indication of just how far this Court has already departed from the protections of the Bill of Rights and an omen of things yet to come. Such retrogression, of course, follows naturally from the Court's recent trend toward substituting for the plain language of the commands of the Bill of Rights elastic concepts which permit the Court to uphold direct abridgments of liberty unless the Court views those abridgments as "arbitrary," "unreasonable," "offensive to decency" or "unjustified on balance," [6] for these concepts reduce the absolute commands of the Constitution to mere admonitions. I think it is time for all who cherish the liberties guaranteed by the Bill of Rights to look closely at the disastrous consequences upon those liberties which have resulted from the

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[5] Thus, the case falls squarely within the holding of this Court in *United States* v. *Lovett*, 328 U. S. 303, 315–316, in that it imposes special pains and penalties upon an easily ascertainable group.

[6] See, *e. g.*, *Beauharnais* v. *Illinois*, 343 U. S. 250; *Rochin* v. *California*, 342 U. S. 165; *American Communications Assn.* v. *Douds*, 339 U. S. 382.

Court's use of such concepts. The present case graphically illustrates those consequences when it is stripped of the ambiguous legal formulations which have been imposed upon it and considered in the context in which it actually arose—the conduct of Dr. Uphaus as an individual.

He is a citizen of this country by birth. Throughout the nearly seventy years of his life, evidently from early boyhood, he has been a deeply religious person. The record shows his active membership in and official service for various Methodist churches in the communities where he has lived. The value of that membership and those services is attested by affidavits filed by the pastors of those churches. The record further indicates, without dispute, that he is a man whose life has been dedicated to the principles of his religion. He holds a degree as a Doctor of Theology. He taught religious education at Yale University and was associated with the Religion and Labor Foundation for a number of years. Over the years, his religious faith manifested itself in an increasing opposition to war. It was this belief which led him, in 1952, to become the Director of World Fellowship, Inc., a summer camp operated, he says, in the interest of promoting the ideas of pacifism.

Almost immediately upon his arrival at World Fellowship, Dr. Uphaus came under the fire of an investigation being conducted by the Attorney General of New Hampshire, apparently on the theory that World Fellowship was frequented by "subversive" persons. Eventually, as the Director of World Fellowship, he was called before the Attorney General to testify. At the very outset of the hearing before the Attorney General, he expressed a complete willingness to answer any question concerning himself, including any views he might hold or any actions he might have taken with regard to any subject. In addition, he expressed a willingness to give the Attorney General any information which might be wanted in regard to

the subject matter of any speeches made at World Fellowship. But he absolutely refused to give the Attorney General: (1) a list of the nonprofessional employees of the camp; (2) a list of all the guests who had stayed at the camp; and (3) his personal correspondence with the speakers who had appeared at the camp. Upon being met with this refusal, the Attorney General sought a court order requiring Dr. Uphaus to produce these items. At the resulting hearing, the court, apparently viewing the request of the Attorney General for the names of the camp's dishwashers and floor sweepers as totally unreasonable and being uncertain as to the legal amenability to subpoena of the correspondence, ordered Dr. Uphaus to produce only the names of the guests. This, Dr. Uphaus persisted, he could not do, resting his refusal upon the following reasons, to which he has adhered throughout this long ordeal: (1) because "by the direct teachings of the Bible . . . it is wrong to bear false witness against my brother; and in as much as I have no reason to believe that any of these persons whose names have been called for have in any sense hurt this state or our country, I have reason to believe that they should not be in the possession of the Attorney General"; (2) because "the social teachings of the Methodist Church teach us clearly and specifically that we in the United States should stand up and uphold civil and religious rights; and in particular, it condemns guilt by association"; [7] and (3) because "I love

[7] At the hearing upon remand of these proceedings to the New Hampshire courts following this Court's affirmance of the first contempt order, Dr. Uphaus expanded this second reason to encompass the teachings of all religions. Relying upon a recent article by a Professor of Church History at Harvard University, Williams, Reluctance To Inform, 14 Theology Today 229, Dr. Uphaus argued that his position with respect to informing against his friends is required by the historic traditions of all religions. That article pointed to the indisputable truth that religious groups have time and again resorted to a refusal to inform as a shield against persecution.

this document [the Bill of Rights] and I propose to uphold it with the full strength and power of my spirit and intelligence."

Nonetheless, the order to produce was upheld and Dr. Uphaus was imprisoned for his failure to comply with it. As a result, he has been in jail since last December 14 under a judgment which sentenced him to imprisonment for one year or until such time as he would comply with the order to produce. His plight, however, is even worse than would normally be indicated by that sentence in that there can be no assurance at all that he will be released at the end of the year specified. The Attorney General of New Hampshire insists, notwithstanding the recent legislation reducing his powers, that he has a right to continue all investigations presently pending, and the Supreme Court of New Hampshire apparently agrees with him. This Court, by its action today, necessarily takes the position that this serious abridgment of the rights of free speech and peaceable assembly does not even raise a substantial federal question. As a result, it is entirely possible that Dr. Uphaus will be subjected to new questioning and forced into a new "contempt" as soon as he serves out this year's imprisonment. The brief filed by the Attorney General of New Hampshire makes it appear that he has every intention of doing just that. Thus, a distinct possibility exists that this man who, at least so far as these records show, has never committed a single crime, nor even so much as an immoral act, faces imprisonment for the rest of his life. This simply because he has refused to violate his religious principles and sacrifice his constitutional rights by disclosing the names of those with whom he has peaceably assembled to discuss public affairs in this country.

In this respect, the predicament of Dr. Uphaus may be likened to that of the defendant in the famous *Sheriff's*

Case before the House of Lords in 1767.[8] There the City of London sought to prosecute a religious dissenter for refusing to serve in the office of sheriff as required by its by-laws. The defense was that the Corporation Act[9] would have made it a crime for a dissenter to serve in that office for it required an oath from all officeholders that they had taken the sacraments of the Church of England within the year. The dilemma of the dissenter was vividly described by Lord Mansfield in stating his views on the case:

> "Make a law to render them incapable of office; make another, to punish them for not serving. . . . If they accept, punish them; if they refuse, punish them; if they say, yes, punish them; if they say, no, punish them. My Lords, this is a most exquisite dilemma, from which there is no escaping; it is a trap a man cannot get out of; it is as bad persecution as the bed of Procrustes: If they are too short, stretch them; if they are too long, lop them." [10]

This technique of putting unorthodox groups into a position where their only real choice is between various alternative punishments (a technique the prevalence of which today extends far beyond the borders of New Hampshire) is strikingly similar to that being utilized here against Dr. Uphaus. If he testifies, his friends will suffer; if he refuses to testify, he goes to jail. The dilemma is truly one "from which there is no escaping" for a man who, like Dr. Uphaus or like the religious dissenter in the *Sheriff's Case,* cannot bring himself to sacrifice either his religious principles or his legal rights.

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[8] *Harrison* v. *Evans,* 1 Eng. Rep. 1437.

[9] 13 Charles II, c. I.

[10] Lord Mansfield's statement does not appear in the report of the case cited above. It is, however, fully reproduced in The Palladium of Conscience, a collection of writings on religious liberty, at 142, 153.

That case also serves to highlight a most unfortunate aspect of the decision in this case. For there, nearly two hundred years ago and in England where there was no Bill of Rights, the House of Lords refused to countenance the use of that technique. They held it to be inconsistent with the Toleration Act [11] by which Parliament had guaranteed religious freedom even though the terms of that guarantee were far less sweeping and more limited in application than the absolute commands of our First Amendment. In my view, the majority's disposition of this case, reducing as it does those absolute commands to mere admonitions, means that our First Amendment amounts to something less as a charter of freedom than England's Toleration Act was held to be. This in the very face of the indisputable historical fact that one of the primary reasons for the establishment of this country was the desire of early settlers to escape religious persecution.

I do not suggest, of course, that this imprisonment of Dr. Uphaus is without precedent in history. Indeed, I am painfully aware that there are a multitude of such precedents extending from many centuries back in the past and continuing forward in an almost unbroken line to the present day. There is, for example, the case of the Puritan minister John Udall in 1590, a case which bears a strong similarity to that of Dr. Uphaus. Udall was called before a court in connection with the investigation of the authorship of certain religious tracts which, in the words of one of the judges, "tend[ed] to the overthrowing of the State, and the moving of Rebellion." [12] That court sought to force Udall to disclose the identity of other Puritans so that it might question them as to the authorship of the tracts. In refusing to divulge the demanded

[11] 1 William & Mary, c. XVIII.

[12] 1 Howell's State Trials 1271, 1294.

names, Udall gave his reasons in a statement not unlike that of Dr. Uphaus before the New Hampshire court. "I will take an oath of allegiance to her majesty, wherein I will acknowledge her supremacy according to statute, and promise my obedience as becometh a subject; but to swear to accuse myself or others, I think you have no law for it." [13] Udall, like Dr. Uphaus, was sentenced to jail for civil contempt under a judgment which ordered his imprisonment until such time as he would consent to testify.[14] But such coercion was as ineffective in that case as it has been to date in this. Udall's dauntless spirit was never broken even though his body was. He died in prison within a few years.

It would not be difficult to point out many other cases such as that of Udall, but I will content myself with one other. Some seventy years after John Udall's experiences, there was a dissenting preacher in England named John Bunyan. He was arrested for preaching and efforts were made to get him to agree not to preach any more. He refused to be coerced into silence. The result was that he was put through a kind of trial [15] and sentenced to prison for holding "several unlawful [religious] meetings . . . to the great disturbance and distraction of the

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[13] *Id.*, at 1275.

[14] *Id.*, at 1276. Although the term "civil contempt" was not used, the following colloquy reported between Udall and the Bishop of Rochester, one of the judges at his trial, makes it clear that such was the nature of his sentence:

"Roch. The day is past, and we must make an end: will you take the oath?

"U. I dare not take it.

"Roch. Then you must go to prison, and it will go hard with you, for you must remain there until you be glad to take it."

[15] See Bunyan's own report of the events surrounding his imprisonment, A Relation of the Imprisonment of Mr. John Bunyan, in Grace Abounding and The Pilgrim's Progress, at 103–132 (Brown ed., 1907).

good subjects of this kingdom . . . ." [16] In Bunyan's case the imprisonment lasted 12 years, and it was during those 12 years that he gave to the world The Pilgrim's Progress.[17] One of the judges who acquiesced [18] in the imprison-

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[16] *Id.*, at 114.

[17] Brown, John Bunyan, at 253–262, casts some doubt upon this traditional version of the genesis of The Pilgrim's Progress by suggesting that it was written, not during this 12 years' imprisonment, but a few years later during another shorter incarceration. See, also, Encyclopædia Britannica, Vol. IV, at 392 (1957 ed.); Dictionary of National Biography, Vol. III, at 280.

[18] It is difficult to ascertain with precision the extent of Hale's part in this matter. He was not one of the judges who conducted such trial as Bunyan was accorded, which resulted in his prison sentence. But, several months later, he, with Justice Twisden, was presented with a petition challenging the legality of Bunyan's conviction and seeking his release. The colloquy between Mrs. Bunyan, who presented that petition, and the two judges is reported in Bunyan, A Relation of the Imprisonment, *supra*, from which it appears that Hale was quite sympathetic to Bunyan's plight. Nonetheless, he refused to order his release, apparently on the belief that he was powerless to do so. Thus he is quoted as having said: "I am sorry, woman, that I can do thee no good; thou must do one of those three things aforesaid, namely; either to apply thyself to the King, or sue out his pardon, or get a writ of error . . . ." *Id.*, at 130. An accurate evaluation of the legal correctness of Hale's position is difficult but it may be pointed out that it is inconsistent with the claim made in Bunyan's report that his wife had previously petitioned the House of Lords and had been told that the question of her husband's release had been placed in the hands of the judges at the next assize (the assize at which Hale and Twisden were sitting), and also with a statement attributed to Justice Twisden by that report: "What, will your husband leave preaching? If he will do so, then send for him." *Id.*, at 128. On the other hand, Judge Hale's refusal to act without a "writ of error" was consistent with the general judicial attitude of caution attributed to him in 3 Hallam, The Constitutional History of England, at 214 (2d ed., 1829). Hallam there criticized English lawyers for "dwell[ing] on the authorities of sir Edward Coke and sir Matthew Hale" in treason cases because "these eminent men, and especially the latter, aware that our law is mainly built on adjudged

ment of Bunyan was Sir Matthew Hale, later Lord Chief Justice Hale, a man described by Lord Campbell as "one of the most pure, the most pious, the most independent, and the most learned" Chief Justices England ever had.[19] That this description is not entirely unjustified, despite the fact that his record was also marred by the part he took in the conviction and sentencing to death of two unfortunate women as witches,[20] is, I think, a tragic commentary upon the record of the judiciary, during that period, in discharging its duty to protect civil liberties. It is perhaps one of the ironies of history that the name of John Bunyan, a poor tinker and preacher, is at least as well known and respected today as that of the great Chief Justice of England who permitted him to languish in jail.

My guess is that history will look with no more favor upon the imprisonment of Willard Uphaus than it has upon that of Udall, Bunyan or the many others like them. For this is another of that ever-lengthening line of cases where people have been sent to prison and kept there for long periods of their lives because their beliefs were inconsistent with the prevailing views of the moment. I believe the First and Fourteenth Amendments were intended to prevent any such imprisonments in this country. The grounds urged by the Attorney General of New Hampshire here are, as shown by the cases of Udall and Bunyan, precisely those that have always been

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precedent, and not daring to reject that which they would not have themselves asserted, will be found to have rather timidly exercised their judgment in the construction of this statute, yielding a deference to former authority which we have transferred to their own." For a sympathetic treatment of Hale's part in the Bunyan case, see 2 Campbell, Lives of the Chief Justices of England, 219–222.

[19] 2 Campbell, Lives of the Chief Justices of England, at 171. See also Burnett, The Life and Death of Sir Matthew Hale; Foss, The Judges of England, at 105–116; Dictionary of National Biography, Vol. VIII, at 902–908.

[20] See 6 Howell's State Trials 687.

urged for throwing dissenters in jail, namely, that they are a menace to the community and it is dangerous to leave them free. It may be true, as the Attorney General of New Hampshire suspects, that Dr. Uphaus has at some time been in the company of Communists, or that the people who have been in his camp have been in the company of Communists. But even if it is true and those associates are as bad as they are suspected to be, it is my belief that our Constitution with its Bill of Rights absolutely forbids the imposition of pains and penalties upon him for peaceably assembling with them. That great charter was drafted by men who were well aware of the constant danger to individual liberty in a country where public officials are permitted to harass and punish people on nothing more than charges that they associate with others labeled by the Government as publicans and sinners.

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

I would note jurisdiction in this case for several reasons.

First. Dr. Uphaus is in prison for civil contempt for failure to deliver to a state investigating agency lists which he claims are constitutionally protected from disclosure. On June 8, 1959, we affirmed his conviction in the state courts of New Hampshire by a divided vote. *Uphaus* v. *Wyman,* 360 U. S. 72. Following the remand in that case, Uphaus was given a further hearing at which questions never before presented to us were raised. The law under which Uphaus is committed was N. H. Laws 1953, c. 307; N. H. Laws 1955, c. 197, c. 340, directing the Attorney General "to determine whether subversive persons . . . are presently located within this state." That law, however, no longer exists. For in 1957 the authority of the Attorney General of New Hampshire was limited to

making investigations of violations of law. N. H. Laws 1957, c. 178. As respects this change in legislation, the New Hampshire Supreme Court on June 27, 1960, said: [1]

> "Our opinion of March 31, 1960,[2] did not turn upon any holding that RSA 588:8a provided an extension of the legislative investigation first authorized in 1953. The plaintiff stands committed for refusal, while Laws 1955, c. 197, was still in effect, to comply with an order entered prior to enactment of RSA 588:8a."

The majority conclude that this is a ruling on local law only and therefore presents no federal question. That plainly would be right if this were a commitment for criminal contempt and if it may be constitutionally imposed. The expiration of a law normally would be no defense to violations committed while it was in force. But this is a case of civil contempt used for its coercive authority to make the defendant produce the documents which were demanded. In such a case the defendant carries the keys to freedom in his own pocket, as pointed out in *Uphaus* v. *Wyman, supra,* 81. But the requirement to produce assumes that their production is relevant to some interest of the State. As stated in *Uphaus* v. *Wyman, supra,* at 78:

> "What was the interest of the State? The Attorney General was commissioned to determine if there were any subversive persons within New Hampshire. The obvious starting point of such an inquiry was to learn what persons were within the State. It is therefore clear that the requests relate directly to the Legislature's area of interest, *i. e.*, the presence of subversives in the State, as announced in its resolution."

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[1] *Uphaus* v. *Wyman,* 102 N. H. 517, 518, 162 A. 2d 611, 612.

[2] *Wyman* v. *Uphaus,* 102 N. H. 461, 159 A. 2d 160.

That interest no longer exists, by reason of the statutory change that I have noted. The Supreme Court of New Hampshire in its opinion of June 27, 1960, quoted above, concedes that it does not rely on "an extension of the legislative investigation first authorized in 1953." 102 N. H., at 518, 162 A. 2d, at 612. In other words, the Attorney General is no longer authorized to investigate whether "subversive persons" are present in the State. That is to say, the answers are no longer relevant to any existing legislative project.

Thus a new and important question is presented in this second appeal which is now filed with us. May a person be incarcerated for civil contempt for failure to produce documents to a legislative committee when the committee is no longer authorized to investigate the matter? If, of course, the 1957 Act extended this authority respecting pending cases, the conclusion of the majority that the question is a local, nonfederal one, so far as the contempt issue is concerned, would obviously be correct. But the opinion of the Supreme Court of New Hampshire rendered June 27, 1960, rejects that construction of the New Hampshire statutes. It treats the offense as completed while the earlier Act was in force. I can read its opinion of June 27, 1960, to mean only that it considered the case as if it involved criminal rather than civil contempt. For the criteria it considered relevant have no apparent pertinency when an issue of civil contempt is tendered.

Are the principles announced in *Uphaus* v. *Wyman, supra,* applicable to criminal as well as to civil contempt? Perhaps so. But the careful delineation of the issues in that case made by my Brother CLARK, who wrote for the majority, restricts the case to civil contempt. As appellant states in his brief, the conditional nature of a civil contempt order "makes tolerable the omission, from civil contempt proceedings, of many of the procedural

safeguards with which criminal proceedings are hedged about . . . ." Are the due process problems no different when the prisoner, who invokes the First Amendment, can go to prison for 10 years or for life and when he has the keys to the prison in his own pocket? If the two cases are not different, then local law questions decide the case. But we should not decide without argument that there is no difference in due process terms between the two cases.

The Supreme Court of New Hampshire in its June 27, 1960, opinion stresses that the point now pressed was "not presented in the pending proceedings at any time, until first advanced before the Superior Court on December 14, 1959, the day on which the order of committal was entered." 102 N. H., at 518, 162 A. 2d, at 612. That seems to be true. But no waiver of the point appears to have been made. It is true that at the hearing counsel for Uphaus stated that his client had a legal duty to comply.

> "Your Honor please, it is not our purpose to deny that Willard Uphaus is under legal obligation to answer the question which has been propounded to him. We have explained to him his legal obligation, and he understands it. It is our contention that this is a real matter of conscience; that he feels bound to a higher obligation even than the direction of the court . . . . We are not contending at all that he is not obligated to answer the question."

But the transcript makes clear that the attorneys for Uphaus made two separate points. First, they argued that the 1957 amendment to the statute deprived the Attorney General of his power to investigate the presence of "subversive persons" in New Hampshire and therefore that commitment for civil contempt was no longer permissible. A motion to dismiss on that ground was argued and denied, an exception being noted. As a second and separate point, evidence was offered and argument made

concerning the duration of the sentence. It was during the presentation of this point that the statement, now claimed to be a waiver, was made. Whether imprisonment for civil contempt can constitutionally be imposed in light of the statutory changes affecting the "area of interest" of the legislature, *Uphaus* v. *Wyman, supra,* at 78, and the Attorney General's powers is a question which never has been waived. It is earnestly pressed. Moreover, if there is now no basis for civil contempt, is criminal contempt constitutionally available? These are substantial questions never resolved, as far as I know, in any of our prior decisions.

Second. Recently, when Alabama asked the National Association for the Advancement of Colored People to disclose its membership list, we held that disclosure was not required because, if compelled, it might well abridge the rights of members to engage in lawful association in support of their common beliefs. We said in *N. A. A. C. P.* v. *Alabama,* 357 U. S. 449, 462:

> "It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as the forms of governmental action in the cases above were thought likely to produce upon the particular constitutional rights there involved. This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. When referring to the varied forms of governmental action which might interfere with freedom of assembly, it said in *American Communications Assn.* v. *Douds,* [339 U. S. 382], at 402: 'A requirement that adherents of particular religious faiths or political parties wear identifying arm-bands, for example, is obviously of this nature.' Compelled disclosure of membership in an organization engaged in advocacy of particular beliefs is of the same order.

> Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs. Cf. *United States* v. *Rumely,* [345 U. S. 41], at 56–58 (concurring opinion)."

What we there said was not designed, as I understood it, as a rule for Negroes only. The Constitution favors no racial group, no political or social group. The group with which Dr. Uphaus was associated and whose membership list he refused to disclose is entitled under the First Amendment to the same protection as the N. A. A. C. P. No groundwork whatever was laid in any of the records before us that World Fellowship, Inc., was at any time engaged in any conduct that could be called unlawful.

We had *N. A. A. C. P.* v. *Alabama, supra,* before us when the *Uphaus* case was decided. It involved rights of the organization itself to defy those who wanted its membership lists. Not until later, however, did we have the case where an *individual* who possessed membership lists challenged the right of government to demand their production. In *Bates* v. *Little Rock,* 361 U. S. 516, decided after we handed down our decision in the *Uphaus* case, we reversed a state conviction of custodians of the records of local branches of N. A. A. C. P. for refusing to disclose its membership lists to city officials. We said:

> "On this record it sufficiently appears that compulsory disclosure of the membership lists of the local branches of the National Association for the Advancement of Colored People would work a significant interference with the freedom of association of their members. There was substantial uncontroverted evidence that public identification of persons in the community as members of the organizations had been followed by harassment and threats of bodily harm.

> There was also evidence that fear of community hostility and economic reprisals that would follow public disclosure of the membership lists had discouraged new members from joining the organizations and induced former members to withdraw. This repressive effect, while in part the result of private attitudes and pressures, was brought to bear only after the exercise of governmental power had threatened to force disclosure of the members' names. *N. A. A. C. P.* v. *Alabama,* 357 U. S., at 463. Thus, the threat of substantial government encroachment upon important and traditional aspects of individual freedom is neither speculative nor remote." *Id.,* 523–524.

Can there be any doubt that harassment of members of World Fellowship, Inc., in the climate prevailing among New Hampshire's law-enforcement officials will likewise be severe?[3] Can there be any doubt that its members will be as closely pursued as might be members of N. A. A. C. P. in some communities? If either N. A. A. C. P. or World Fellowship were engaged in criminal activity, we would have a different problem. But neither is shown to be. World Fellowship, so far as this record shows, is as law-abiding as N. A. A. C. P. The members of one are entitled to the same freedom of speech, of press, of assembly, and of association as the members of the other. These rights extend even to Communists, as a unanimous Court held in *De Jonge* v. *Oregon,* 299 U. S. 353.[4]

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[3] The Attorney General of New Hampshire in the motion to dismiss in this case states, "Those who voluntarily and knowingly appear with, consult with, confer with, attend functions with and otherwise act in concert with Communists or former Communists in America cannot possibly have any reasonable right of privacy in regard to such activities . . . ."

[4] Chief Justice Hughes wrote for the Court in that case:

"The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and vio-

What is an unconstitutional invasion of freedom of association in Alabama or in Arkansas should be unconstitutional in New Hampshire. All groups—white or colored—engaged in lawful conduct are entitled to the same protection against harassment as the N. A. A. C. P. enjoys. Since we allowed in the *Bates* case the protection we deny here and since *Bates* was decided after we decided Uphaus' case, we should reconsider our earlier decision in this case. The *Bates* case and the *Uphaus* case put into focus for the first time the responsibility of an *individual* to make disclosure of membership lists. We cannot administer justice with an even hand if we allow Bates to go free and Uphaus to languish in prison.

For these reasons, as well as those advanced by MR. JUSTICE BLACK, which I wholly share, I would note probable jurisdiction of this appeal. And Dr. Uphaus should, of course, be released on bail pending resolution of the questions by the Court.

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lence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.

"It follows from these considerations that, consistently with the Federal Constitution, peaceable assembly for lawful discussion cannot be made a crime. The holding of meetings for peaceable political action cannot be proscribed. Those who assist in the conduct of such meetings cannot be branded as criminals on that score. The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held but as to its purpose; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects." 299 U. S., at 365.

CLIMATE CONTROL, INC., *v.* HILL ET AL.

APPEAL FROM THE SUPREME COURT OF ARIZONA.

No. 251. Decided November 14, 1960.

Appeal dismissed for want of a substantial federal question.

Reported below: 86 Ariz. 180, 342 P. 2d 854; 87 Ariz. 201, 349 P. 2d 771.

William R. Meagher for appellant.

William W. Stevenson, Samuel H. Morris, Richard M. Fennemore, Daniel E. Cracchiolo, J. A. Riggins, Jr., Denison Kitchel, Francis J. Ryley, Ivan Robinette, Edward Jacobson, Howard Twitty, John R. Franks and *Richard G. Kleindienst* for appellees.

PER CURIAM.

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

BOBO *v.* MAYOR & COUNCILMEN OF SAVANNAH BEACH, GEORGIA.

APPEAL FROM THE SUPREME COURT OF GEORGIA.

No. 409. Decided November 14, 1960.

Appeal dismissed for want of a substantial federal question.

Reported below: 216 Ga. 12, 114 S. E. 2d 374.

Erwin A. Friedman for appellant.

PER CURIAM.

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

MEYER ET AL. *v.* UNITED STATES.

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

No. 13. Argued October 12, 1960.—Decided November 21, 1960.

The proceeds of two life insurance policies were made payable in monthly payments to the insured's wife for her lifetime, but, if she should die before the expiration of 20 years, his daughter was to receive the payments until the 20 years had elapsed. When he died, he was survived by his wife and daughter, and each insurance company determined and set up on its books a sum representing the amount necessary to fund the 240 monthly payments for the 20 years and a separate sum representing the amount necessary to fund the monthly payments to the wife so long as she might live beyond the 240 months. *Held:* The decedent's estate was not entitled to a marital deduction under § 812 (e) of the Internal Revenue Code of 1939, even with respect to that portion of the proceeds necessary to fund the monthly payments to the wife so long as she might live beyond the 240 months, since the proceeds of each policy constituted a single "property" and the interest passing to the wife might "terminate or fail" and another person might "possess or enjoy [a] part of such property after such termination or failure." Pp. 410–416.

275 F. 2d 83, affirmed.

Donald S. Day argued the cause for petitioners. On the brief was *Alfred M. Saperston.*

I. Henry Kutz argued the cause for the United States. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Rice* and *John J. Pajak.*

MR. JUSTICE WHITTAKER delivered the opinion of the Court.

Petitioners, who are executors of the estate of Albert F. Meyer, brought this suit to recover an alleged overpayment of federal estate taxes and the District Court granted

the relief asked. 166 F. Supp. 629. The Court of Appeals reversed, 275 F. 2d 83, and we granted the executors' petition for certiorari, 361 U. S. 929, because of a conflict of decisions in the circuits. Cf. *In re Reilly's Estate,* 239 F. 2d 797, decided by the Court of Appeals for the Third Circuit.

Two policies of life insurance are involved,[1] but since they are in all material respects identical, we need deal with only one of them. The policy obligated the insurer to pay a death benefit of $25,187.50, and that sum was included by the executors in the federal estate tax return and the tax thereon was paid. The decedent had selected an optional mode of settlement which provided for the payment of equal monthly installments to his wife for her life, with 240 installments guaranteed, and further provided that if the wife should die before receiving the 240 installments his daughter would receive the remainder of them, but if both the wife and the daughter died before receiving the 240 installments the commuted value of those unpaid was to be paid in one sum to the estate of the last one of them to die.

Of the total proceeds of the policy of $25,187.50, the insurer determined that $17,956.41 was necessary to fund the 240 monthly payments to the wife, the daughter, or to the estate of the last survivor of them, and that the remaining $7,231.09 was necessary to fund the monthly payments to the wife so long as she might live beyond the 240 months. Accordingly, the insurer made such entries on its books.

Thereafter petitioners, as executors, timely filed a claim for refund of the amount of the tax paid upon the

[1] One of the policies was issued by Northwestern Mutual Life Insurance Company in the amount of $25,187.50, and the other was issued by John Hancock Mutual Life Insurance Company in the amount of $5,019.60.

$7,231.09 which the insurer had shown upon its books as necessary to fund the monthly payments to the wife for her actuarial expectancy beyond the 240 months certain, on the theory that the insurer's treatment of that sum on its books created a separate "property" or fund payable to the wife alone, and hence it qualified for the marital deduction under § 812 (e)(1) of the Internal Revenue Code of 1939.[2] The claim was denied, and this suit was brought to recover the tax that had been paid on that sum.

Petitioners correctly concede that if the policy constitutes but one "property," within the meaning of the statute,[3] it would not qualify for the marital deduction

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[2] Section 812 (e) provides in relevant part:

"(1) ALLOWANCE OF MARITAL DEDUCTION.—

"(A) In General.—An amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

"(B) Life Estate or Other Terminable Interest.—Where, upon the lapse of time, upon the occurrence of an event or contingency, or upon the failure of an event or contingency to occur, such interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed with respect to such interest—

"(i) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and

"(ii) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse; . . ."

[3] "The terms 'interest' and 'property,' as used in section 812 (e) have separate and distinct meanings. The term 'property' is used in a comprehensive sense and includes all objects or rights which are susceptible of ownership. The term 'interest' refers to the extent of ownership, that is, to the estate or the quality and quantum of ownership by the surviving spouse or other person, of particular property." S. Rep. No. 1013, Part 2, 80th Cong., 2d Sess., p. 4.

because the wife's interest in it would be a "terminable" one, within the meaning of the statute, inasmuch as the wife may die before receipt of the 240 guaranteed installments, in which event the unpaid ones must go to the daughter if then living. They concede, too, that the $17,956.41, shown on the insurer's books as necessary to fund the monthly payments for the 240 months certain, does not qualify for the marital deduction for the same reasons. But they contend that, although the policy made no provision therefor, the insurer's bookkeeping entries constituted a real division of the insurance proceeds into, and created, two "properties"—one of $17,956.41 and the other of $7,231.09—and that the latter qualifies for the marital deduction under the statute because it is payable, if at all, only to the wife—during her lifetime beyond the 240 months—and no other person has any interest in it.

Whether a policy of life insurance may create several "properties" or funds, either terminable or nonterminable or both, we need not decide, for we think the policy here involved constituted only one property, and made only so much of its proceeds payable to the wife as she might live to receive in equal monthly installments, and made any guaranteed balance payable to the daughter. Hence, under the terms of the policy, the "interest passing to the surviving spouse [may] terminate or fail" and a "person other than [the] surviving spouse . . . may possess or enjoy [a] part of such property after such termination or failure of the interest so passing to the surviving spouse; . . ." Therefore the policy and its proceeds—considered apart from petitioners' claim that the insurer's bookkeeping division of the proceeds of the policy into two parts created two "properties"—are disqualified for the marital deduction by the express provisions of § 812 (e)(1)(B) of the Internal Revenue Code of 1939.

The legislative history of the section further supports and compels this conclusion. Illustrating applications of the terminable interest rule, the Senate Committee Report gave an example that is in no relevant way distinguishable from this case,[4] and makes it very clear that the marital deduction is not allowable in the case of an annuity for the surviving spouse for life if "upon the death of the surviving spouse, the payments are to continue to another person (not through her estate) or the undistributed fund is to be paid to such other person . . . ."

We think petitioners' argument—that the insurer's bookkeeping division of the proceeds of the policy into two parts created two properties—cannot withstand the provisions of the policy and the actual facts respecting the insurer's bookkeeping division of its proceeds, under the clear terms of the statute and its legislative history. The policy made no provision for the creation of two separate properties—one a property sufficient to provide payments for 240 months, to the wife while she lived and any

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[4] "*Example* (*2*). The decedent during his lifetime purchased an annuity contract under which the annuity was payable during his life and then to his spouse during her life if she survived him. The value of the interest of the decedent's surviving spouse in such contract at the death of the decedent is included in determining the value of his gross estate. A marital deduction is allowed with respect to the value of such interest so passing to the decedent's surviving spouse inasmuch as no other person has an interest in the contract. If upon the death of the surviving spouse the annuity payments were to continue for a term to her estate, or the undistributed portion thereof was to be paid to her estate, the deduction is nevertheless allowable with respect to such entire interest. *If, however, upon the death of the surviving spouse, the payments are to continue to another person (not through her estate) or the undistributed fund is to be paid to such other person, no marital deduction is allowable inasmuch as an interest passed from the decedent to such other person.*" (Emphasis added.) S. Rep. No. 1013, Part 2, 80th Cong., 2d Sess., pp. 12–13.

remainder to the daughter, and another property sufficient to provide an annuity to the wife for the period of her actuarial expectancy beyond the 240 months—and no such separate properties were in fact created. The allocations made were merely actuarial ones—mere bookkeeping entries—made by the insurer on its own books for its own convenience after the insured, the other party to the contract, had died. The wife and the daughter were, respectively, primary and contingent beneficiaries *of the policy* alone. Neither of them had any title to, nor right to receive, any special fund, and indeed none was actually created. The bookkeeping entries made by the insurer no more created or measured their rights than the insurer's erasure of those entries—which it was free to make at any time—would destroy their rights. Their rights derive solely from the policy. It, not the insurer's bookkeeping entries, created and constitutes the property involved. Any action by the beneficiaries to enforce their rights against the insurer would have to be upon the policy, not upon the entries the insurer had made on its books for its own actuarial information and convenience. Nor would exhaustion of the sum of those entries constitute any defense to the insurer against the claim of either beneficiary for amounts due her under the policy.

The proceeds of the policy were not payable to the wife (or to her estate or appointee) alone and at all events, but were payable in monthly installments to her for life, and if any obligation under the policy remained undischarged at her death it was payable to the daughter if living or, if not, to the estate of the last of them to die. It follows that the "interest passing to the surviving spouse [may] terminate or fail" and that a "person other than [the] surviving spouse . . . may possess or enjoy [a] part of such property after such termination or failure of the interest so passing to the surviving spouse; . . ."

and hence the property is disqualified for the marital deduction by the express provisions of § 812 (e)(1)(B) of the Internal Revenue Code of 1939.

Affirmed.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE CLARK and MR. JUSTICE BRENNAN concur, dissenting.

The decedent had two life insurance policies in two separate companies; and each provided for the payment of the proceeds in 20 annual instalments by monthly payments to decedent's wife, Marion E. Meyer, if living, and thereafter during her lifetime. If the wife was not living at decedent's death, the instalments were to be paid to a daughter. If the wife died after decedent and before payment in full of the instalments, any remaining instalments were to be payable to the daughter. If the wife lived beyond the 20 years, she would be entitled to like monthly payments for her life. Decedent was survived by his wife and daughter, the wife being then 42 years old.

The insurance companies calculated the sums necessary to provide the designated monthly payments for 20 years: $17,956.41 in the case of one policy and $4,012.24 in the case of the other. They then computed the amount necessary to provide a monthly income to the wife in the event she lived beyond the 20-year period: $7,231.09 for one policy; $1,007.36 for the other.

Neither of the policies provided (and decedent did not request) that there be any segregation of the proceeds between the amounts computable for the term certain and for funding of the contingent life annuity.[1] The amounts required to provide monthly payments for 20 years—$17,956.41 and $4,012.24—were not claimed as

[1] It was said, however, on oral argument the insurance companies maintained for their own records separate accounts as to the 20-year monthly income provisions and the contingent life annuity of the wife, without any segregation of funds.

marital deductions. This controversy concerns only the amount needed to fund the contingent life annuities of the wife—$7,231.09 plus $1,007.36, or $8,238.45, which the executors claim as a marital deduction.

Concededly the amount necessary to make the 20-year payments does not qualify as a marital deduction because it may "terminate or fail" within the meaning of the Code,[2] the daughter being entitled to any remaining payments during that term should the wife die before it terminates. The daughter, however, has no *interest* in the annuities payable beyond the 20-year period. And it seems to me that the wife's "interest" in that part of the insurance contracts does not "terminate or fail" within the meaning of § 812 (e)(1)(B).[3]

If the decedent had taken out *one group of policies* to pay instalments for 20 years to his wife or, if she died within that period, to his daughter, and *another group of*

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[2] Section 812 (e), I. R. C., 1939, as added by Revenue Act of 1948, § 361, 62 Stat. 110, 117, provides in relevant part:

"(1) ALLOWANCE OF MARITAL DEDUCTION.—

"(A) In General.—An amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

"(B) Life Estate or Other Terminable Interest.—Where, upon the lapse of time, upon the occurrence of an event or contingency, or upon the failure of an event or contingency to occur, such interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed with respect to such interest—

"(i) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and

"(ii) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse; . . ."

[3] See note 2, *supra*.

policies to pay instalments to his wife for life if she lived more than 20 years, the former would be nondeductible, but the latter would qualify for the marital deduction.[4] Does then the continuation of the two types of insurance in one policy change the result? The Government maintains that it does because in its view the entire insurance proceeds of each policy are a single "property" as that term is used in the statute; and the Court so holds. Yet, with all deference, that conclusion is wide of the mark.

The Senate Report states that terminable *interests* include all *interests* that are subject to contingencies and conditions.[5] Yet these contingencies and conditions are not all-inclusive. They do not include the death of the transferee. And, as I shall show, contingencies of the kind we have here are not included.

The Court, with all deference, errs in making its decision turn on whether the wife's *interest* after the 20-year term is a separate "property" within the meaning of the statute. The ruling of the Court is on a statutory provision that does not exist. Under the statute the question is not whether "property" is terminable; it is whether an "interest" is terminable. The statute indeed draws a marked distinction between "property" and "interest."[6]

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[4] The Court of Appeals in *In re Reilly's Estate*, *supra*, correctly noted that the purpose of the marital deduction under this Act was "to make more nearly uniform the tax treatment of married persons in community property and non-community property states." *Id.*, at 799. The assets not taxable in the estate of the first spouse to die may be taxed at the death of the survivor. In other words, the property in the marital community is subject to the tax only once in the estate of either.

[5] S. Rep. No. 1013, 80th Cong., 2d Sess., Pt. 2, p. 7.

[6] "The terms 'interest' and 'property,' as used in section 812 (e) have separate and distinct meanings. The term 'property' is used in a comprehensive sense and includes all objects or rights which are susceptible of ownership. The term 'interest' refers to the extent

Section 812 (e)(1)(A) speaks not of "property," but of any "interest" in property. Section 812 (e)(1)(B) speaks only of an "interest passing to the surviving spouse" that will "terminate or fail." The statute at these points is concerned with "interest" in property—not with "property." Yet the Court, disregarding the statutory scheme, looks only to "property" and finding but one insurance policy denies the deduction.

Plainly there may be more than one "interest" in a single "property." A deduction is not denied merely because the surviving spouse and someone else each have an "interest" in the same "property." S. Rep. No. 1013, 80th Cong., 2d Sess., Pt. 2, p. 8. The Senate Committee gave several examples: ". . . if the decedent by his will devises Blackacre to his wife and son as tenants in common, the marital deduction is allowed, since the surviving spouse's interest is not a terminable interest." [7]

There seems to me to be a like separation of *interests* in the present case. These insurance policies created, of course, no fund or *res*. The sum of $21,968.65 representing the wife's terminable *interest* and the $8,238.45 representing her other *interest* were, of course, no more segregated in the insurance companies' assets than a customer's checking account is segregated in a commercial bank. Yet that seems immaterial. Each represented a chose in action. The wife or daughter, as the case might be, could sue for the one during the 20-year period. Only the wife could enforce the claim here in question.

That the proceeds of one life insurance policy may create two or more "interests" for purposes of the estate tax is implicit in the Senate Report. Thus one example of a marital deduction that is given is an annuity pay-

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of ownership, that is, to the estate or the quality and quantum of ownership by the surviving spouse or other person, of particular property." S. Rep., *supra*, Pt. 2, p. 4.

[7] *Id.*, at 8.

able to the decedent during his life and to his spouse during her life if she survived him.

> "The decedent during his lifetime purchased an annuity contract under which the annuity was payable during his life and then to his spouse during her life if she survived him. The value of the interest of the decedent's surviving spouse in such contract at the death of the decedent is included in determining the value of his gross estate. A marital deduction is allowed with respect to the value of such interest so passing to the decedent's surviving spouse inasmuch as no other person has an interest in the contract. If upon the death of the surviving spouse the annuity payments were to continue for a term to her estate, or the undistributed portion thereof was to be paid to her estate, the deduction is nevertheless allowable with respect to such entire interest. If, however, upon the death of the surviving spouse, the payments are to continue to another person (not through her estate) or the undistributed fund is to be paid to such other person, no marital deduction is allowable inasmuch as an interest passed from the decedent to such other person." *Id.*, pp. 12–13.

The last sentence of the foregoing quotation, on which the Court relies, describes with accuracy the terminable "interest" of the wife in that part of the annuity payable during the 20-year period after the death of the decedent. It has no relevancy to the "interest" with which we are here concerned, *viz.*, the instalments payable after that 20-year period.

My conclusion is that where the "interest" that accrues to the surviving spouse is, as here, shared with no one else and is subject to no termination except her own death, it qualifies for a marital deduction under this statute, even though another "interest" of hers in the same annuity contract would not qualify.

WATERMAN STEAMSHIP CORP. *v.* DUGAN & McNAMARA, INC.

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

No. 35. Argued October 20, 1960.—Decided November 21, 1960.

A longshoreman employed by respondent, a stevedoring contractor engaged by a consignee, sued a shipowner for personal injuries sustained aboard a ship while helping to unload its cargo. The shipowner settled the claim and sought to recover from respondent on the ground that the longshoreman's injuries resulted from respondent's failure to perform its work in a workmanlike manner. *Held:* Respondent was liable to the shipowner, even though there was no privity of contract between respondent and the shipowner and regardless of whether the longshoreman's original claim was asserted in an *in rem* or an *in personam* proceeding, since respondent's warranty of workmanlike service aboard the ship was for the benefit of the ship and its owner as well as of respondent's employer. *Crumady* v. *The J. H. Fisser,* 358 U. S. 423. Pp. 421–425.

272 F. 2d 823, reversed.

Thomas F. Mount argued the cause for petitioner. With him on the brief were *George M. Brodhead* and *J. Welles Henderson.*

George E. Beechwood argued the cause for respondent. With him on the brief were *J. Paul Erwin, Jr.* and *John V. Lovitt.*

Solicitor General Rankin, Assistant Attorney General Doub and *Alan S. Rosenthal* filed a brief for the United States, as *amicus curiae,* urging reversal.

MR. JUSTICE STEWART delivered the opinion of the Court.

The petitioner is the owner of the vessel S. S. *Afoundria.* The respondent is a stevedoring company. A longshoreman employed by the respondent was injured aboard the

Afoundria while engaged with other employees of the respondent in unloading the ship at the port of Philadelphia. The cargo consisted of bagged sugar. The longshoreman was working in the hold, and his injuries resulted from the collapse of a vertical column of hundred-pound bags which the unloading operations had left without lateral support.

He sued the petitioner in the District Court for the Eastern District of Pennsylvania to recover for his injuries. The petitioner settled the claim and, by way of a third-party complaint, sought to recover from the respondent the amount paid in satisfaction of the longshoreman's claim. The third-party complaint alleged that improper stowage of the cargo [1] had created an unseaworthy condition in the ship's hold which had imposed absolute liability upon the petitioner as shipowner for the longshoreman's injuries, but that "the direct, proximate, active and substantial cause of the accident" had been the negligence of the respondent, who, by "failing to perform the contracted stevedoring services in a safe, proper, customary, careful and workmanlike manner," had brought the existing unseaworthy condition into play.

As an affirmative defense the respondent stevedore alleged that there had been no direct contractual relationship between it and the petitioner covering the stevedoring services rendered the *Afoundria* in Philadelphia. At the trial the parties stipulated that this allegation was correct, it appearing that the consignee of the cargo, not the petitioner, had actually engaged the respondent to unload the ship. The District Court directed a verdict for the respondent, holding that a shipowner has no right of indemnity against a stevedore under the circumstances alleged in the absence of a direct contractual relationship

[1] The cargo had been loaded in the Philippines several weeks earlier by a stevedore unrelated to the parties to the present proceeding.

between them. The Court of Appeals for the Third Circuit affirmed in an *en banc* decision, three judges dissenting.[2] Certiorari was granted to consider whether in a situation such as this the absence of a contractual relationship between the parties is fatal to the indemnity claim. 362 U. S. 926.

In *Ryan Co.* v. *Pan-Atlantic Corp.,* 350 U. S. 124, it was established that a stevedoring contractor who enters into a service agreement with a shipowner is liable to indemnify the owner for damages sustained as a result of the stevedore's breach of his warranty to perform the obligations of the contract with reasonable safety. This warranty of workmanlike service extends to the handling of cargo, as in *Ryan,* as well as to the use of equipment incidental to cargo handling, as in *Weyerhaeuser S. S. Co.* v. *Nacirema Co.,* 355 U. S. 563. The warranty may be breached when the stevedore's negligence does no more than call into play the vessel's unseaworthiness. *Crumady* v. *The J. H. Fisser,* 358 U. S. 423, 429. The factual allegations of the third-party complaint in the present case comprehend the latter situation.

In the *Ryan* and *Weyerhaeuser* cases considerable emphasis was placed upon the direct contractual relationship between the shipowner and the stevedore. If those decisions stood alone, it might well be thought an open question whether such contractual privity is essential to support the stevedore's duty to indemnify. But the fact is that this bridge was crossed in the *Crumady* case. There we explicitly held that the stevedore's assumption of responsibility for the shipowner's damages resulting from unsafe and improper performance of the stevedoring services was unaffected by the fact that the shipowner was not the party who had hired the stevedore. That case was decided upon the factual premises that the stevedore

[2] 272 F. 2d 823 (on rehearing).

had been engaged not by the shipowner, but by the party operating the ship under a charter. The Court's language was unambiguous:

> "We think this case is governed by the principle announced in the *Ryan* case. The warranty which a stevedore owes when he goes aboard a vessel to perform services is plainly for the benefit of the vessel whether the vessel's owners are parties to the contract or not. That is enough to bring the vessel into the zone of modern law that recognizes rights in third-party beneficiaries. Restatement, Law of Contracts, § 133. Moreover, as we said in the *Ryan* case, 'competency and safety of stowage are inescapable elements of the service undertaken.' 350 U. S., at 133. They are part of the stevedore's 'warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product.' *Id.*, at 133–134. See *MacPherson* v. *Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050.
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> "We conclude that since the negligence of the stevedores, which brought the unseaworthiness of the vessel into play, amounted to a breach of the warranty of workmanlike service, the vessel may recover over." 358 U. S. 428–429.

This reasoning is applicable here. We can perceive no difference in principle, so far as the stevedore's duty to indemnify the shipowner is concerned, whether the stevedore is engaged by an operator to whom the owner has chartered the vessel or by the consignee of the cargo. Nor can there be any significant distinction in this respect whether the longshoreman's original claim was asserted in an *in rem* or an *in personam* proceeding. In the *Ryan* and *Weyerhaeuser* cases *in personam* liability was asserted. In the *Crumady* case the injured stevedore had brought an *in rem* proceeding. The ship and its owner

are equally liable for a breach by the contractor of the owner's nondelegable duty to provide a seaworthy vessel. *The Osceola,* 189 U. S. 158, 175; cf. *Continental Grain Co.* v. *Barge FBL–585,* 364 U. S. 19. The owner, no less than the ship, is the beneficiary of the stevedore's warranty of workmanlike service.

Accordingly the judgment of the Court of Appeals is reversed, and the case is remanded to the District Court for further proceedings consistent with this opinion.

Reversed and remanded.

POLITES *v.* UNITED STATES.

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

No. 25. Argued October 18, 1960.—Decided November 21, 1960.

Petitioner's citizenship was revoked in a proceeding under § 338 (a) of the Nationality Act of 1940. The District Court found that, within ten years preceding his petition for naturalization, he had been a member of the Communist Party, that the Party was an organization which was then advocating the forcible overthrow of the Government, and that, therefore, petitioner was ineligible for citizenship under § 305. Pursuant to a stipulation of petitioner's counsel, his appeal was dismissed with prejudice. Four years later petitioner moved under Rule 60 (b) of the Federal Rules of Civil Procedure to vacate the judgment, on the ground that it was voidable under this Court's subsequent decisions in *Nowak* v. *United States*, 356 U. S. 660, and *Maisenberg* v. *United States*, 356 U. S. 670. *Held:* Regardless of whether relief under Rule 60 (b) is available to petitioner in the circumstances, those decisions were not effective to alter the law controlling petitioner's case. Pp. 426–437.

272 F. 2d 709, affirmed.

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

Charles Gordon argued the cause for the United States. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Jerome M. Feit.*

MR. JUSTICE STEWART delivered the opinion of the Court.

Petitioner is a native of Greece who came to this country in 1916. In 1942 he became a naturalized citizen by decree of the United States District Court at Detroit, under the provisions of the Nationality Act of 1940.[1] In

[1] 54 Stat. 1137.

1952 the United States brought proceedings under § 338 (a) of the 1940 Act to revoke his citizenship.[2] These proceedings culminated in a judgment of denaturalization, 127 F. Supp. 768. An appeal from that judgment was docketed in the Court of Appeals for the Sixth Circuit. Subsequently, under circumstances to be related, counsel for the petitioner stipulated to dismissal of the appeal with prejudice, and the appeal was dismissed in accordance with the stipulation. Four years later the petitioner moved to vacate the judgment of denaturalization, relying upon Rule 60 (b), Fed. Rules Civ. Proc.[3] The District Court denied the motion, 24 F. R. D. 401, and the Court of Appeals affirmed, 272 F. 2d 709. Certiorari was granted to consider the availability of Rule 60 (b) relief in the circumstances here presented, 361 U. S. 958.

Section 305 of the Nationality Act of 1940 provided that no person should be eligible for naturalization who at any time within ten years preceding his application had been a member of any organization that advocated the overthrow by force or violence of the Government of the

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[2] Section 338 (a) of the Nationality Act of 1940, 54 Stat. 1158–1159, provided: "It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings . . . for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground of fraud or on the ground that such order and certificate of naturalization were illegally procured."

[3] The provisions of Rule 60 (b) upon which the petitioner relied are as follows: "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . . (5) . . . it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment."

United States.[4] The Government's complaint in the 1952 denaturalization proceedings charged that the petitioner's citizenship had been illegally procured because within ten years immediately preceding his application for naturalization he had been a member of the Communist Party of the United States, an organization which, it was alleged, advised, advocated, or taught the overthrow by force and violence of the Government of the United States.[5]

At the denaturalization hearing the petitioner, who was represented by counsel, testified that he had been a member of the Communist Party of the United States from "around" 1931 until 1938. He stated that he had attended closed Party meetings about once a month, that he had been secretary of the "Greek Fraction" of the Party in Detroit, and that he had left the Party in 1938 only because of a directive that all aliens resign from the Party at that time. Other witnesses described the petitioner as a "high functionary" of the Party, who at closed

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[4] "No person shall hereafter be naturalized as a citizen of the United States—

. . . . . .

"(b) Who believes in, advises, advocates, or teaches, or who is a member of or affiliated with any organization, association, society, or group that believes in, advises, advocates, or teaches—

"(1) the overthrow by force or violence of the Government of the United States or of all forms of law; . . .

. . . . . .

"The provisions of this section shall be applicable to any applicant for naturalization who at any time within a period of ten years immediately preceding the filing of the petition for naturalization is, or has been, found to be within any of the clauses enumerated in this section, notwithstanding that at the time petition is filed he may not be included in such classes." 54 Stat. 1141.

[5] The complaint also alleged that the petitioner had obtained his naturalized citizenship fraudulently.

meetings had advocated the overthrow of existing government by force and violence.[6]

Based upon this and other testimony, the District Court found that the Government had proved by clear, unequivocal, and convincing evidence that the petitioner had been a member of the Communist Party of the United States within the statutory period, and that the Party was an

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[6] The following are illustrative examples of such testimony:

"Q. What was his statement? What did he say?

"A. He say the way to organize, agitate—agitate the workers, organize them, in order to follow up when the time comes to overthrow the government by force and violence.

. . . . . .

"Q. Did he ever say in your presence the methods that he was going to use?

"A. Well, the only method he said was by force. He said that we, the workers, would never be able to get in the Government by vote.

. . . . . .

"Q. This was April and May, 1935. What did he say?

"A. We had this campaign for the bi-weekly paper, and he spoke very ardently to the members that we had to go ahead and subscribe and get the money that we supposed to collect in order to reach them workers and wait in our movement until the time comes when we would be able to overthrow the present government by force and violence.

"Q. And you heard him say that at a Greek Fraction meeting?

"A. Yes.

. . . . . .

"Q. Do you know of your own knowledge what positions the defendant, Guss Polites, held in the Communist Party during that period of time?

"A. Not all of the positions. I do know that he was a member of the Fraction Bureau of the Greek Fraction, and my recollection is that he was Secretary of that Fraction for a time. At least, he was a high functionary and attended functionary meetings.

. . . . . .

"A. He has, in speeches, advocated the overthrow of the government by force and violence, during my presence."

organization which "was then advising, advocating or teaching forcible or violent overthrow of this government." 127 F. Supp., at 770. Accordingly, the court held that the petitioner had illegally procured his citizenship, because he had not been eligible to become a citizen at the time his certificate of naturalization was issued.[7] A judgment cancelling the petitioner's citizenship was entered, 127 F. Supp. 768, 770–772.[8]

From this judgment the petitioner promptly appealed to the United States Court of Appeals for the Sixth Circuit. At the time there were pending in that court appeals from three other denaturalization judgments by the same District Court. *United States* v. *Sweet,* 106 F. Supp. 634; *United States* v. *Chomiak,* 108 F. Supp. 527; and *United States* v. *Charnowola,* 109 F. Supp. 810. Petitioner's counsel appeared and argued for the appellants in each of those three cases. Before the petitioner's brief was due, the Court of Appeals affirmed the judgments in all three of them, 211 F. 2d 118. The petitioner thereafter obtained an extension of time for filing briefs on the appeal of his case until thirty days after disposition by this Court of petitions for certiorari filed in the other three cases. When those petitions for certiorari were denied, 348 U. S. 817, the petitioner by his counsel

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[7] In connection with the issue of fraudulent procurement, the court also found that the Government had proved by clear, unequivocal, and convincing evidence that the petitioner had personally known that the Communist Party of the United States was an organization advocating overthrow of this Government by force and violence. 127 F. Supp. 768, 772–773.

[8] The court also found that the petitioner had procured his citizenship fraudulently. The respondent now states that it does "not now rely upon the fraud finding as an alternative basis for the judgment of denaturalization." In the light of its concession that, "in view of the state of this particular record," the finding of fraud was not supported by sufficient evidence, we proceed upon that premise.

stipulated in the Court of Appeals that his appeal should be dismissed with prejudice, and the appeal was dismissed on November 10, 1954.

On August 6, 1958, the petitioner filed his motion under Rule 60 (b)(5) and (6) to set aside the 1953 denaturalization decree. The ground for the motion, supported by an affidavit of counsel, was that in the light of this Court's opinions in two cases which had recently been decided, *Nowak* v. *United States,* 356 U. S. 660, and *Maisenberg* v. *United States,* 356 U. S. 670, "it now appears that the . . . judgment of cancellation is voidable" and "that it is no longer equitable that said judgment should have prospective application." In denying the motion the District Court held that the *Nowak* and *Maisenberg* decisions "do not as contended by Polites clearly control the instant case warranting relief from judgment," and that, in any event, the doctrine of *Ackermann* v. *United States,* 340 U. S. 193, precludes reopening a judgment under Rule 60 (b) where the movant has voluntarily abandoned his appeal, and the only ground for the motion to reopen is an asserted later change in the judicial view of applicable law. 24 F. R. D. 401. The Court of Appeals affirmed "for the reasons set forth" by the District Court, 272 F. 2d 709.

It is the contention of the Government that the "instant case is squarely controlled by the decision of this Court in *Ackermann* v. *United States,* 340 U. S. 193, that a freely made decision not to appeal a denaturalization judgment may not be excused by permitting recourse to Rule 60 (b)(6) as a substitute for appeal." In that case Mr. and Mrs. Ackermann and a relative, Keilbar, had been denaturalized after a joint hearing. Keilbar appealed. The Ackermanns did not. On appeal the judgment of denaturalization against Keilbar was reversed upon a stipulation by the Government that the evidence was insufficient to support it. *Keilbar* v. *United States,* 144 F. 2d

866. The Ackermanns thereafter filed a motion under Rule 60 (b) to vacate the denaturalization judgments against them. They alleged that they had failed to appeal from the judgments because of financial inability and in reliance upon the advice of a government official whom they trusted, the official who was in charge of the detention camp in which they had been placed following their denaturalization. After reviewing these allegations the Court held that the District Court had been correct in denying the motion to reopen the judgments, holding that "[s]ubsection 6 of Rule 60 (b) has no application to the situation of petitioner." 340 U. S., at 202.

What the Court said in *Ackermann* is of obvious relevance here:

> "Petitioner made a considered choice not to appeal, apparently because he did not feel that an appeal would prove to be worth what he thought was a required sacrifice of his home. His choice was a risk, but calculated and deliberate and such as follows a free choice. Petitioner cannot be relieved of such a choice because hindsight seems to indicate to him that his decision not to appeal was probably wrong, considering the outcome of the *Keilbar* case. There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from." 340 U. S., at 198.

In the present case it is not claimed that the decision not to appeal was anything but "free, calculated, and deliberate." Indeed, there is not even an indication in this case, as there was in *Ackermann,* that the choice was influenced by reliance upon the advice of a government officer. The only claim is that upon the advice of the petitioner's own counsel the appeal was abandoned because there seemed at the time small likelihood of its

success, and that some four years later the applicable law was "clarified" in the petitioner's favor.

Despite the relevant and persuasive force of *Ackermann,* however, we need not go so far here as to decide that when an appeal has been abandoned or not taken because of a clearly applicable adverse rule of law, relief under Rule 60 (b) is inflexibly to be withheld when there has later been a clear and authoritative change in governing law. The fact of the matter is that that situation is not presented by this case. Without assaying by hindsight how hopeless the prospects of the petitioner's appeal may have appeared at the time it was abandoned,[9] it is clear that the later decisions of this Court upon which his motion to vacate relied did not in fact work the controlling change in the governing law which he asserted. The decisions in question are *Nowak* v. *United States,* 356 U. S. 660, and *Maisenberg* v. *United States,* 356 U. S. 670.

Petitioner contends that the *Nowak* and *Maisenberg* decisions reject the grounds relied upon by the District Court in revoking petitioner's citizenship in 1953. In the petitioner's denaturalization proceeding, the court held that a charge of illegal procurement of citizenship under the Nationality Act of 1940 could be sustained by clear, unequivocal and convincing evidence that (a) petitioner had been a member of the Communist Party within ten years immediately preceding the day he filed his citizen-

[9] It is worth pointing out, with respect to the three other denaturalization judgments whose affirmance by the Sixth Circuit assertedly led to the petitioner's decision not to pursue his appeal, that each was decided upon the facts of its own individual record. 211 F. 2d 118. And it need hardly be repeated at this late date that the refusal by this Court to review those cases imported "no expression of opinion on the merits." *Sunal* v. *Large,* 332 U. S. 174, 181; see *Maryland* v. *Baltimore Radio Show,* 338 U. S. 912.

ship application, and (b) the Communist Party had advised, advocated, or taught overthrow of the Government by force or violence during that period. Petitioner claims that this interpretation of the statute is erroneous because it fails to take into account the question of the petitioner's knowledge of the Party's activities. It was the claim of the petitioner's motion that *Nowak* and *Maisenberg* establish that "[a] charge of illegal procurement of citizenship based upon alleged membership in the Communist Party, cannot be sustained where the evidence fails to show . . . that the defendant was aware that the organization was engaged in the kind of illegal advocacy proscribed by law during the period of his membership therein." But the *Nowak* and *Maisenberg* decisions neither support nor oppose this intepretation of the 1940 Act. Those cases simply do not deal with the question.

In *Nowak* the petitioner had acquired his citizenship under the Nationality Act of 1906. That statute did not specifically prohibit citizenship to a member of an organization which advocated overthrow of the Government by force and violence. It did require an alien to have been "attached to the principles of the Constitution of the United States" for at least five years preceding his application for citizenship.[10] In order to show that Nowak had illegally procured his citizenship because during the five years preceding his naturalization he had not been "attached" to constitutional principles, the Government

[10] Paragraph Fourth of § 4 of the Act, 34 Stat. 596, 598, as amended, 8 U. S. C. (1934 ed.) § 382, provided that no alien should be admitted to citizenship unless immediately preceding his application he had resided continuously within the United States for at least five years and that during this period "he has behaved as a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States."

undertook to prove that he had been a member of the Communist Party with knowledge that the Party advocated the overthrow of the Government by force and violence. This Court found that the record contained adequate proof that Nowak had been a member of the Party during the pertinent five-year period, and it proceeded on the assumption that the evidence of the Party's illegal advocacy was sufficient. The Court held, however, that the Government had not established, under the standard required in denaturalization cases, that Nowak had known of the Party's advocacy of forcible governmental overthrow. Accordingly, the Court concluded that the Government had failed to prove Nowak's "state of mind," 356 U. S., at 666, his lack of "attachment" to constitutional principles, by the clear, unequivocal, and convincing evidence which is required. Cf. *Schneiderman* v. *United States,* 320 U. S. 118. *Maisenberg* was different in that the ultimate issue involved was whether the petitioner's citizenship had been obtained "by concealment of a material fact [and] willful misrepresentation." [11] 356 U. S., at 671. But there, too, the Court held that the Government had failed to prove the petitioner's state of mind, her lack of "attachment" to the constitutional principles required by the 1906 Act, by its proof of her Communist Party membership and of the Party's advocacy.[12]

In the present case, by contrast, the District Court held that determination of the issue of illegal procurement did

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[11] The Government was seeking to denaturalize Maisenberg under the provisions of § 340 (a) of the Immigration and Nationality Act of 1952, 66 Stat. 260, 8 U. S. C. § 1451 (a). Under that statute illegal procurement as such is not a specific basis for cancellation of a certificate of naturalization.

[12] In view of this conclusion the Court did not reach the further question under the 1952 Act whether the Government had adequately proved that petitioner had misrepresented her attachment or concealed a lack of attachment. See 356 U. S., at 672, note 3.

not involve an inquiry into the petitioner's state of mind. Unlike Nowak and Maisenberg, the petitioner was naturalized under the Nationality Act of 1940, which withheld the right of citizenship to any alien who had been a member of a particular kind of organization during the statutory period.[13] The evidence that the petitioner was a "member of the Party" in every meaningful sense was abundantly shown. Cf. *Galvan* v. *Press,* 347 U. S. 522; *Rowoldt* v. *Perfetto,* 355 U. S. 115; *Niukkanen* v. *McAlexander,* 362 U. S. 390. The District Court found that the proof was also clear, unequivocal, and convincing that the organization to which the petitioner had belonged was in the category proscribed by the 1940 Act.[14] Those findings remain completely unaffected by anything that was decided or said in either *Nowak* or *Maisenberg.*

As the District Court viewed the issue of illegal procurement in this case, there was no occasion, as in *Nowak* and *Maisenberg,* to establish by inference or imputation the petitioner's personal beliefs, his "attachment" or lack of it. The court was concerned only with objective facts—the petitioner's membership and the Party's purpose. Upon the basis of its findings as to these factual issues, the Court held that the "government must prevail on the jurisdictional question that defendant was not eligible to become a citizen either when he filed his naturalization petition or when he took the oath . . . ." 127 F. Supp., at 772. As the issue was determined, therefore, the case was consistent with many decisions in which this Court has ruled that a certificate of citizenship is cancellable on the basis of illegal procurement if there has not

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[13] See note 4, *supra.*

[14] It is to be emphasized that neither in his motion to set aside the denaturalization judgment nor in the supporting affidavit did the petitioner allege the existence of any new or mitigating evidence upon these factual issues. Cf. *Klapprott* v. *United States,* 335 U. S. 601.

been strict compliance with the conditions imposed by Congress as prerequisites to acquisition of citizenship. See *Maney* v. *United States,* 278 U. S. 17; *United States* v. *Ness,* 245 U. S. 319; *United States* v. *Ginsberg,* 243 U. S. 472; cf. *Schneiderman* v. *United States,* 320 U. S. 118, 163 (concurring opinion).

The validity of the District Court's interpretation of § 305 is not before us; we are not here directly reviewing the 1953 decision. We hold only that the decisions in *Maisenberg* and *Nowak* were not effective to alter the law controlling the petitioner's case.

Affirmed.

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

In my view, the District Court should have exercised its discretion under Fed. Rules Civ. Proc., 60 (b) to determine whether it is any longer equitable that this judgment of denaturalization should have prospective application. The Court's opinion, although it refers to *Ackermann* v. *United States,* 340 U. S. 193, as "relevant and persuasive," expresses no definite view on the availability of Rule 60 (b) in this situation, but instead decides on the merits that the state of the law is substantially unchanged since the entry of the denaturalization decree. I would confirm the power of the District Court to act under Rule 60 (b), but remand the cause to that court so that it may, in the first instance, decide what effect the *Nowak* and *Maisenberg* decisions have on petitioner's case.

First, it is necessary to point out that *Ackermann* is not in point. For one thing, relief there was sought only under subdivisions (1) and (6) of Rule 60 (b), not, as here, under subdivision (5) as well. But more fundamentally, *Ackermann* was a case in which petitioners

could have secured a reversal of their denaturalization simply by appealing. Since they deliberately chose not to appeal, this Court held Rule 60 (b) unavailable. Here also petitioner chose not to appeal, but only because of the hopelessness of any chance of success. The Court of Appeals had affirmed judgments in three companion cases, and this Court had denied certiorari. True, denial of certiorari has no legal significance, and petitioner might have doggedly pursued his appellate remedies to the end. But as a practical matter such a course of action would have been futile. So petitioner's case must be considered not as one in which he could have appealed successfully, but as one in which he in fact did appeal unsuccessfully.

In that situation, it was the law long before the promulgation of Rule 60 (b) that a change in the law after the rendition of a decree was grounds for modification or dissolution of that decree insofar as it might affect future conduct. *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 18 How. 421, 431–432. This principle is rooted in the practice of courts of equity and is well settled in the vast majority of the States. See 7 Moore, Federal Practice (2d ed. 1955), ¶ 60.26 [4]; *Ladner* v. *Siegel,* 298 Pa. 487, 148 A. 699. Perhaps before the merger of law and equity in 1938 a denaturalization proceeding was an "action at law." But a decree of denaturalization is a determination of status which has prospective effect, and there is no reason why in modern times it should not be governed by equitable principles.

The decisions under Rule 60 (b)(5) (adopted by the 1948 amendments to the Federal Rules of Civil Procedure) continue this history of equitable adjustment to changing conditions of fact and law. *McGrath* v. *Potash,* 199 F. 2d 166, a case decided under subdivision (6), but to which subdivision (5), by the respondent's admission, was equally applicable, is directly in point. There several aliens obtained a decree from a District Court enjoining

the Attorney General from proceeding to deport them without complying with the hearing requirements of the Administrative Procedure Act. Pending appeal by the Government, this Court held in *Wong Yang Sung* v. *McGrath,* 339 U. S. 33, that the Administrative Procedure Act did indeed apply to deportation proceedings. Seeing that further resistance would be futile, the Attorney General dismissed his own appeal by agreement. Shortly thereafter Congress overruled the *Wong Yang Sung* decision and expressly declared that proceedings relative to the exclusion or expulsion of aliens should not be subject to the Administrative Procedure Act. 64 Stat. 1048. The Government then moved under Rule 60 (b) for a dissolution of the injunction against it, relying on this change in law, and the motion was granted. The United States in this case seeks to distinguish that decision by asserting that here "the continuing force of the decree derives from facts fully accrued and litigated in the original judgment." True enough; but here, as in *McGrath,* although the facts were fully accrued at the time of the decree and have not changed, the law has (so petitioner asserts) radically changed, and in that situation it is unjust to give the judgment prospective effect.

The cases under Rule 60 (b)(5) relied on by the United States are readily distinguishable. In *Title* v. *United States,* 263 F. 2d 28, cert. denied, 359 U. S. 989, *Elgin Nat'l Watch Co.* v. *Barrett,* 213 F. 2d 776, and *Berryhill* v. *United States,* 199 F. 2d 217, it was entirely possible that the remedy by appeal would have been successfully invoked. And in *Collins* v. *City of Wichita,* 254 F. 2d 837, a modification of the judgment would have retroactively disturbed existing rights and financial reliance on the judgment. In *Scotten* v. *Littlefield,* 235 U. S. 407, relief was denied in a situation virtually identical to this case. But the point actually decided there was that a bill of review would not lie, and it is universally conceded that

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Rule 60 (b) is not limited to those situations where the old confusing collateral remedies would have been available.

In sum, the District Court need "not abdicate its power to revoke or modify its mandate if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong." *United States* v. *Swift & Co.*, 286 U. S. 106, 114–115. It is revolting that petitioner should be subject to deportation because of a decree which he could not successfully have attacked on appeal and which subsequent events may have rendered erroneous. The principle of finality is not offended by modification which disturbs no accrued rights and concerns only future conduct.

Accordingly, I would reverse the judgment of the Court of Appeals and remand this case to the District Court with directions to exercise its discretion under Rule 60 (b)(5).

NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO. *v.* HENAGAN.

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

No. 38. Argued November 8, 1960.—Decided November 21, 1960.

In this suit against a railroad under the Federal Employers' Liability Act by a waitress in the grill car of one of the railroad's trains to recover damages for injuries allegedly sustained when an emergency application of the brakes brought the train to a sudden stop, *held:* The proofs were insufficient to submit to the jury the question whether employer negligence played a part in the emergency application of the brakes which allegedly produced the injury.

272 F. 2d 153, reversed.

Noel W. Deering argued the cause and filed a brief for petitioner.

James W. Kelleher argued the cause for respondent. With him on the brief was *Daniel J. Hanlon.*

PER CURIAM.

The respondent was a waitress in the grill car of one of petitioner's trains. She brought this action under the Federal Employers' Liability Act, 45 U. S. C. § 51 *et seq.*, for damages for injuries allegedly sustained when an emergency application of the brakes brought the train to a sudden stop. A jury which heard the case in the District Court for the District of Massachusetts returned a verdict for respondent. The trial judge denied the petitioner's motions for judgment notwithstanding the verdict and for a new trial. The Court of Appeals for the First Circuit affirmed, 272 F. 2d 153. We granted certiorari, 362 U. S. 967.

The train was pulling into petitioner's station at Providence, Rhode Island, for a scheduled stop. One Montell,

apparently to commit suicide, stepped on the track from the station platform as the train approached alongside the platform. The engineer made the emergency application of the brakes in an unsuccessful effort to stop the train before it reached Montell. We have examined the trial record and hold that the proofs were insufficient to submit to the jury the question whether employer negligence played a part in the emergency application of the brakes which allegedly produced the respondent's injury. See *Herdman* v. *Pennsylvania R. Co.*, 352 U. S. 518.

The judgment of the Court of Appeals is reversed and the cause remanded to the District Court with direction to enter judgment for the petitioner notwithstanding the verdict.

It is so ordered.

Mr. Justice Black and Mr. Justice Douglas dissent. They believe there was evidence of negligence sufficient for the jury, as summarized by Judge Woodbury, speaking for a unanimous Court of Appeals. 272 F. 2d 153. They also dissent from the direction to enter judgment for the petitioner, since they are of the view that if there is a reversal, there should be a new trial. See *Galloway* v. *United States,* 319 U. S. 372, 396 (dissenting opinion).

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

THOMAS *v.* VIRGINIA.

CERTIORARI TO THE CIRCUIT COURT OF ARLINGTON COUNTY, VIRGINIA.

No. 43. Argued November 10, 1960.—Decided November 21, 1960.

Judgment reversed and cause remanded.

Cornelius H. Doherty argued the cause and filed a brief for petitioner.

R. D. McIlwaine III, Assistant Attorney General of Virginia, argued the cause for respondent. With him on the briefs were *A. S. Harrison, Jr.,* Attorney General, and *John W. Knowles,* Assistant Attorney General.

PER CURIAM.

The judgment of the Circuit Court of Arlington County of the Commonwealth of Virginia is reversed and the case is remanded to that court. *Blodgett* v. *Silberman,* 277 U. S. 1, 18.

MR. JUSTICE BLACK dissents for the same reason expressed by Mr. Justice Holmes in *Union Transit Co.* v. *Kentucky,* 199 U. S. 194, 211:

> "It seems to me that the result reached by the Court probably is a desirable one, but I hardly understand how it can be deduced from the Fourteenth Amendment . . . ."

FORD MOTOR CO. *v.* PACE ET AL.

APPEAL FROM THE SUPREME COURT OF TENNESSEE.

No. 431. Decided November 21, 1960.

Appeal dismissed for want of a properly presented federal question. Reported below: 206 Tenn. 559, 335 S. W. 2d 360.

William T. Gossett, L. Homer Surbeck and *Cecil Sims* for appellant.

K. Harland Dodson, Jr. for appellees.

PER CURIAM.

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

DART DRUG CORP. OF MARYLAND ET AL. *v.* GADOL ET AL., DOING BUSINESS AS FOUR CORNERS PHARMACY.

APPEAL FROM THE COURT OF APPEALS OF MARYLAND.

No. 435. Decided November 21, 1960.

Appeal dismissed for want of a substantial federal question. Reported below: 222 Md. 372, 161 A. 2d 122.

Milton M. Gottesman for appellants.

Joseph S. Kaufman and *Stedman Prescott, Jr.* for appellees.

PER CURIAM.

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

KING *v.* ELLIS, CORRECTIONS DIRECTOR.

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

No. 4, Misc. Decided November 21, 1960.

Certiorari granted; judgment vacated; and case remanded.

Petitioner *pro se.*

Will Wilson, Attorney General of Texas, and *Leon F. Pesek* and *Linward Shivers,* Assistant Attorneys General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded to the District Court for a full hearing. *Ellis* v. *United States,* 356 U. S. 674.

STATHAM *v.* CALIFORNIA.

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

No. 239, Misc. Decided November 21, 1960.

Appeal dismissed for want of a substantial federal question.
Reported below: 176 Cal. App. 2d 806, 1 Cal. Rptr. 767.

Carl Q. Christol for petitioner.

PER CURIAM.

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

SMALL BUSINESS ADMINISTRATION *v.* McCLELLAN, TRUSTEE.

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

No. 42. Argued November 9–10, 1960.—Decided December 5, 1960.

When the Small Business Administration created by the Small Business Act of 1953, with authority *inter alia* to lend government funds to small businesses, has joined a private bank in making a loan and the borrower becomes a bankrupt, the Administration's interest in the unpaid balance of the loan is entitled to the priority provided for "debts due to the United States" under R. S. § 3466 and § 64 of the Bankruptcy Act—even though the Administration has agreed to share with the bank any money collected on the loan. Pp. 447–453.

(a) The Small Business Administration is an integral part of the governmental mechanism—not a separate legal entity—and it is entitled to the priority of the United States in collecting loans made by it out of government funds. *Sloan Shipyards Corp.* v. *United States Fleet Corp.*, 258 U. S. 549, and *Reconstruction Finance Corp.* v. *Menihan Corp.*, 312 U. S. 81, distinguished. *United States* v. *Remund*, 330 U. S. 539, followed. Pp. 448–450.

(b) Since the Administration participated in making the loan and acquired a beneficial interest in it prior to the petition in bankruptcy, it is immaterial that formal assignment to the Administration of the note evidencing the debt was not made by the bank until after the filing of the petition. P. 450.

(c) The Administration did not forfeit its right to priority by agreeing to turn over to the bank part of any distribution obtained because of its priority. Pp. 451–453.

(d) Governmental priority in bankruptcy proceedings is not inconsistent with the basic purposes and provisions of the Small Business Act. P. 453.

272 F. 2d 143, reversed.

Morton Hollander argued the cause for petitioner. With him on the brief were *Solicitor General Rankin* and *Assistant Attorney General Doub.*

John Q. Royce argued the cause and filed a brief for respondent.

MR. JUSTICE BLACK delivered the opinion of the Court.

The Small Business Act of 1953 [1] created the Small Business Administration to "aid, counsel, assist, and protect insofar as is possible the interests of small-business concerns in order to preserve free competitive enterprise . . . and to maintain and strengthen the overall economy of the Nation." [2] The Administration was given extraordinarily broad powers to accomplish these important objectives, including that of lending money to small businesses whenever they could not get necessary loans on reasonable terms from private lenders.[3] When a part, but not all, of a necessary loan can be obtained from a bank or other private lender, the Administration is empowered to join that private lender in making the loan.[4] The basic question this case presents is whether, when the Administration has joined a private bank in a loan and the borrower becomes a bankrupt, the Administration's interest in the unpaid balance of the loan is entitled to the priority provided for "debts due to the United States" in R. S. § 3466 and § 64 of the Bankruptcy Act,[5] even though the Administration has agreed to share any money collected on the loan with the private bank.

That question arises out of a joint bank-Administration loan of $20,000 to a small business, $5,000 of the loan having come from the funds of the bank and $15,000 from the Government Treasury. Nine months later, an involuntary petition in bankruptcy was filed against the borrower

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[1] 67 Stat. 232, as amended, 15 U. S. C. §§ 631–651.

[2] 67 Stat. 232.

[3] 67 Stat. 235–236.

[4] *Ibid.*

[5] R. S. § 3466, 31 U. S. C. § 191, establishes a general priority for debts due to the United States. Section 64 of the Bankruptcy Act, as amended, 11 U. S. C. § 104, provides that in bankruptcy cases the priority so established should come fifth in the order of preferred creditors.

by other creditors. The Administration appeared in the proceedings upon that petition, filed a claim for $16,355.69, the amount then due on the loan, including interest, and asserted priority for its claim to the extent of $12,266.75, its 75 per cent interest in the debt. After a hearing, the referee in bankruptcy denied priority on the ground that the Administration is a "legal entity" and therefore not entitled to the "privileges and immunities of the United States." The District Court, on review, rejected the ground upon which the referee had relied but concluded that since the bankrupt's note evidencing the loan was not assigned by the bank to the Administration until after the commencement of bankruptcy proceedings, the debt is not entitled to priority.[6] The Court of Appeals affirmed on a third ground—that the Administration, having contracted to pay the participating private bank one-fourth of any distribution received, could not assert its priority and thus permit a private party to benefit from a priority which, under R. S. § 3466 and the Bankruptcy Act, belongs to the Government alone.[7] We granted certiorari to consider the Government's contention that the denial of priority to the Small Business Administration handicaps that agency in the effective performance of the duties imposed upon it by Congress.[8]

First. It is contended that the referee was correct in holding that the Small Business Administration is a separate legal entity and therefore not entitled to governmental priority in a bankruptcy proceeding. The contention rests upon a supposed analogy between this case and *Sloan Shipyards Corp.* v. *United States Fleet Corporation*[9] and *Reconstruction Finance Corp.* v. *Menihan*

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[6] 168 F. Supp. 483.

[7] 272 F. 2d 143.

[8] 362 U. S. 947.

[9] 258 U. S. 549.

Corp.,[10] in which cases this Court refused to treat the corporate governmental agencies involved as the United States. Neither of those cases, however, is controlling here. The agency involved in *Sloan Shipyards,* the Fleet Corporation, was organized under the laws of the District of Columbia pursuant to authority of an Act of Congress which "contemplated a corporation in which private persons might be stockholders." [11] This fact alone is enough to distinguish the Fleet Corporation from the Small Business Administration, which, as was contemplated from the beginning, gets all of its money from the Government Treasury. Our decision in the *Reconstruction Finance Corp.* case is equally inapplicable for that case involved only the question of whether the Reconstruction Finance Corporation, having been endowed by Congress with the capacity to sue and be sued, could be assessed costs in connection with a suit it brought. The holding that such costs could be assessed would not support a holding that the Small Business Administration is not the United States for the purpose of bankruptcy priority.[12]

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[10] 312 U. S. 81.

[11] 258 U. S., at 565.

[12] The proper scope of that holding was recognized by Congress itself when, several years later, the Reconstruction Finance Corporation Act was amended expressly to deny the Corporation a right of priority except with respect to debts arising out of its wartime activities. Act of May 25, 1948, 62 Stat. 261. That the assumption underlying this amendment was that the Corporation would otherwise have had priority for all debts due to it is clear from the discussion of the purpose of the amendment in the Senate. Senator Buck stated that purpose as follows: "The committee believes that RFC should not have such priority with respect to debts arising from its normal lending activities. A provision has been included in this section *which will eliminate that priority* except with respect to debts arising under the specific war powers which are designated therein." (Emphasis supplied.) Cong. Rec., 80th Cong., 2d Sess., Vol. 94, Part 3, p. 4108. See also *In re Temple,* 174 F. 2d 145.

Thus neither of these cases requires us to hold that the Small Business Administration, an agency created to lend the money of the United States, is not entitled to all the priority that must be accorded to the United States when the time comes to collect that money. Under like circumstances we refused to deny priority for debts due to the Farm Credit Administration in *United States* v. *Remund*.[13] As was said there of the Farm Credit Administration, the Small Business Administration is "an integral part of the governmental mechanism" [14] created to accomplish what Congress deemed to be of national importance. And it, like the Farm Credit Administration, is entitled to the priority of the United States in collecting loans made by it out of government funds.

Second. Respondent contends, as the District Court held, that the Small Business Administration's assertion of priority is precluded by our holding in *United States* v. *Marxen* [15] that priority attaches only to those debts owing to the United States on the date of the commencement of bankruptcy proceedings and not to debts that come into existence after that date. But this requirement of the *Marxen* case is fully met here by virtue of the fact that the debt due the Administration arises out of the loan made jointly by the bank and the United States nine months prior to the petition in bankruptcy. Since beneficial ownership of the three-fourths of the debt for which priority is asserted belonged to the Administration from the date of the loan, it is immaterial that formal assignment of the note evidencing the debt was not made by the bank until after the filing of the petition.

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[13] 330 U. S. 539.

[14] *Id.*, at 542.

[15] 307 U. S. 200.

Third. The Court of Appeals held, and the contention is reiterated here, that the Administration forfeited any right it might otherwise have had to priority by agreeing to turn over to the bank one-fourth of any distribution obtained because of its priority. By this arrangement, it is urged, the Administration is attempting "to give priority to a claim which the United States is collecting for the benefit of a private party," contrary to the principles announced by this Court in *Nathanson* v. *Labor Board.*[16] But the *Nathanson* case involved a significantly different situation. There the National Labor Relations Board sought to obtain governmental priority for back-pay claims belonging to employees based upon their loss of pay as a result of allegedly discriminatory discharges by the bankrupt. This Court's denial of priority in that case, involving claims in which the United States had no financial interest, would not justify a denial here where the money was loaned by, and the debt sought to be collected is due to, the United States. The fact that the Administration has contracted to pay the participating private bank one-fourth of any money it later collects on its loan does not mean the Government must lose its priority. Respondent's argument to the contrary seems to rest upon the assumption that the Government is deprived of its priority by making a contract to pay a part of its funds to another creditor of the bankrupt who has no priority. This argument finds no support whatever in § 3466, in § 64 of the Bankruptcy Act, or in the Small Business Act. Section 3466 declares in unequivocal language that the United States is entitled to priority "[w]henever any person indebted to the United States is insolvent," and § 64 recognizes that priority in bankruptcy proceedings. The purpose of these sections is simply to protect the

[16] 344 U. S. 25, at 28.

interest of the Government in collecting money due to it.[17] Once that money is collected and placed in the Government Treasury, the end sought to be achieved by § 3466 and § 64 of the Bankruptcy Act is completely satisfied. At that point, there is no difference between the money so received and money received from any other source and, like other money, it may be disbursed in any way the Government sees fit, including the satisfaction of obligations already incurred, so long as the purpose is lawful. The Small Business Administration is authorized to enter into contracts calculated to induce private banks to make loans to small businesses.[18] The contract involved in this case, by providing additional security to the private bank at the Government's expense, is well adapted to that end. Indeed, in many cases such a contract may be the only way the Administration could induce private bank participation in a necessary loan. In those cases, acceptance of respondent's argument would make it more difficult for the Administration to perform its statutory duties. Clearly Congress did not intend, by the very act of imposing duties upon the Administration, to take away a privilege necessary to the effective performance of those duties.

Respondent's argument from the policy of equality of distribution for similar creditors expressed in the Bankruptcy Act [19] is no more convincing. It is true that the allowance of the priority asserted here will place the bank, a private unsecured creditor, in a better position than other private unsecured creditors. But this position is a result, not of any inequality of distribution on the part

[17] For a discussion of the history and purposes of R. S. § 3466, see *United States* v. *State Bank*, 6 Pet. 29, 35–37. Compare *Nathanson* v. *Labor Board, supra,* at 27–28.

[18] 67 Stat. 236.

[19] 11 U. S. C. § 1 *et seq.*

of the bankruptcy court, but of the bank's valid contract with the Small Business Administration.

Fourth. Respondent's last contention, urged throughout these proceedings, is that governmental priority is inconsistent with the basic purposes and provisions of the Small Business Act. The contention rests upon the fact that having a creditor with governmental priority tends to make it more difficult for a small businessman to borrow money from other persons, and, in this respect, handicaps rather than aids borrowers, thus conflicting with the Act's basic policy. In *United States* v. *Emory,* we rejected this same argument, with reference to priority for Federal Housing Administration debts, stating that "[o]nly the plainest inconsistency would warrant our finding an implied exception to . . . so clear a command as that of § 3466." [20] The same conclusion must be reached here.

It was error for the courts below to refuse the Government's claim for priority.

Reversed and remanded.

MR. JUSTICE DOUGLAS dissents.

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[20] 314 U. S. 423, 433. See also *United States* v. *Remund, supra,* at 544–545; *Illinois ex rel. Gordon* v. *United States,* 328 U. S. 8, 11–12.

BOYNTON *v.* VIRGINIA.

CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 7. Argued October 12, 1960.—Decided December 5, 1960.

For refusing to leave the section reserved for white people in a restaurant in a bus terminal, petitioner, a Negro interstate bus passenger, was convicted in Virginia courts of violating a state statute making it a misdemeanor for any person "without authority of law" to remain upon the premises of another after having been forbidden to do so. On appeal, he contended that his conviction violated the Interstate Commerce Act and the Equal Protection, Due Process and Commerce Clauses of the Federal Constitution; but his conviction was sustained by the State Supreme Court. On petition for certiorari to this Court, he raised only the constitutional questions. *Held:*

1. Notwithstanding the fact that the petition for certiorari presented only the constitutional questions, this Court will consider the statutory issue, which involves essentially the same problem—racial discrimination in interstate commerce. P. 457.

2. Under § 216 (d) of the Interstate Commerce Act, which forbids any interstate common carrier by motor vehicle to subject any person to unjust discrimination, petitioner had a federal right to remain in the white portion of the restaurant, he was there "under authority of law," and it was error to affirm his conviction. Pp. 457–463.

(a) When a bus carrier has volunteered to make terminal and restaurant facilities and services available to its interstate passengers as a regular part of their transportation, and the terminal and restaurant have acquiesced and cooperated in this undertaking, the terminal and restaurant must perform these services without discriminations prohibited by the Act. Pp. 457–461.

(b) Although the courts below made no findings of fact, the evidence in this case shows such a situation here. Pp. 461–463.

Reversed.

Thurgood Marshall argued the cause for petitioner. With him on the brief were *Martin A. Martin, Clarence W. Newsome, Jack Greenberg, Louis H. Pollak* and *Constance Baker Motley.*

Walter E. Rogers, Special Assistant to the Attorney General of Virginia, argued the cause for respondent. With him on the brief were *A. S. Harrison, Jr.,* Attorney General of Virginia, and *R. D. McIlwaine III,* Assistant Attorney General.

Solicitor General Rankin, Assistant Attorney General Tyler, Philip Elman, Harold H. Greene and *David Rubin* filed a brief for the United States, as *amicus curiae,* urging reversal.

MR. JUSTICE BLACK delivered the opinion of the Court.

The basic question presented in this case is whether an interstate bus passenger is denied a federal statutory or constitutional right when a restaurant in a bus terminal used by the carrier along its route discriminates in serving food to the passenger solely because of his color.

Petitioner, a Negro law student, bought a Trailways bus ticket from Washington, D. C., to Montgomery, Alabama. He boarded a bus at 8 p. m. which arrived at Richmond, Virginia, about 10:40 p. m. When the bus pulled up at the Richmond "Trailways Bus Terminal" the bus driver announced a forty-minute stopover there. Petitioner got off the bus and went into the bus terminal to get something to eat. In the station he found a restaurant in which one part was used to serve white people and one to serve Negroes. Disregarding this division, petitioner sat down on a stool in the white section. A waitress asked him to move over to the other section where there were "facilities" to serve colored people. Petitioner told her he was an interstate bus passenger, refused to move and ordered a sandwich and tea. The waitress then brought the Assistant Manager, who "instructed" petitioner to "leave the white portion of the restaurant and advised him he could be served in the colored portion." Upon petitioner's refusal to leave an officer was called and petitioner was arrested and later tried, convicted and

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fined ten dollars in the Police Justice's Court of Richmond on a charge that he *"Unlawfully* did remain on the premises of the Bus Terminal Restaurant of Richmond, Inc. after having been forbidden to do so" by the Assistant Manager. (Emphasis supplied.) The charge was based on § 18–225 of the Code of Virginia of 1950, as amended (1958), which provides in part:

> "If any person shall *without authority of law* go upon or remain upon the lands or premises of another, after having been forbidden to do so by the owner, lessee, custodian or other person lawfully in charge of such land, . . . he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than one hundred dollars or by confinement in jail not exceeding thirty days, or by both such fine and imprisonment." (Emphasis supplied.)

Petitioner appealed his conviction to the Hustings Court of Richmond, where, as in the Police Court, he admitted that he had remained in the white portion of the Terminal Restaurant although ordered not to do so. His defense in both courts was that he had a federal right as an interstate passenger of Trailways to be served without discrimination by this restaurant used by the bus carrier for the accommodation of its interstate passengers. On this basis petitioner claimed he was on the restaurant premises lawfully, not "unlawfully" as charged, and that he remained there with, not "without authority of law." His federal claim to this effect was spelled out in a motion to dismiss the warrant in Hustings Court, which was overruled both before and after the evidence was heard. Pointing out that the restaurant was an integral part of the bus service for interstate passengers such as petitioner, and asserting that refusal to serve him was a discrimination based on color, the motion to dismiss charged

that application of the Virginia law to petitioner violated the Interstate Commerce Act and the Equal Protection, Due Process and Commerce Clauses of the Federal Constitution. On appeal the Virginia Supreme Court held that the conviction was "plainly right" and affirmed without opinion, thereby rejecting petitioner's assignments of error based on the same grounds of discrimination set out in his motion to dismiss in Hustings Court but not specifically charging that the discrimination violated the Interstate Commerce Act. We think, however, that the claims of discrimination previously made under the Act are sufficiently closely related to the assignments that were made to be considered within the scope of the issues presented to the State Supreme Court. We granted certiorari because of the serious federal questions raised concerning discrimination based on color. 361 U. S. 958.

The petition for certiorari we granted presented only two questions: first, whether the conviction of petitioner is invalid as a burden on commerce in violation of Art. I, § 8, cl. 3 of the Constitution; and second, whether the conviction violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Ordinarily we limit our review to the questions presented in an application for certiorari. We think there are persuasive reasons, however, why this case should be decided, if it can, on the Interstate Commerce Act contention raised in the Virginia courts. Discrimination because of color is the core of the two broad constitutional questions presented to us by petitioner, just as it is the core of the Interstate Commerce Act question presented to the Virginia courts. Under these circumstances we think it appropriate not to reach the constitutional questions but to proceed at once to the statutory issue.

The Interstate Commerce Act, as we have said, uses language of the broadest type to bar discriminations of all kinds. *United States* v. *Baltimore & Ohio R. Co.*, 333

U. S. 169, 175, and cases cited. We have held that the Act forbids railroad dining cars to discriminate in service to passengers on account of their color. *Henderson* v. *United States,* 339 U. S. 816; see also *Mitchell* v. *United States,* 313 U. S. 80, 97.

Section 216 (d) of Part II of the Interstate Commerce Act, 49 U. S. C. § 316 (d), which applies to motor carriers, provides in part:

> "It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person . . . in any respect whatsoever; or to subject any particular person . . . to any unjust discrimination or any unjust or unreasonable prejudice or disadvantage in any respect whatsoever . . . ."

So far as relevant to our problem, the provisions of § 216 (d) quoted are the same as those in § 3 (1) of the Act, 49 U. S. C. § 3 (1), except that the latter refers to railroads as defined in Part I of the Act instead of motor carriers as defined in Part II. Section 3 (1) was the basis for this Court's holding in *Henderson* v. *United States, supra,* that it was an "undue or unreasonable prejudice" under that section for a railroad to divide its dining car by curtains, partitions and signs in order to separate passengers according to race. The Court said that under § 3 (1) "[w]here a dining car is available to passengers holding tickets entitling them to use it, each such passenger is equally entitled to its facilities in accordance with reasonable regulations." *Id.,* 339 U. S., at 824. The *Henderson* case largely rested on *Mitchell* v. *United States, supra,* which pointed out that while the railroads might not be required by law to furnish dining car facilities, yet if they did, substantial equality of treatment of persons traveling

under like conditions could not be refused consistently with § 3 (1). It is also of relevance that both cases upset Interstate Commerce Commission holdings, the Court stating in *Mitchell* that since the "discrimination shown was palpably unjust and forbidden by the Act" no room was left for administrative or expert judgment with reference to practical difficulties. *Id.*, 313 U. S., at 97.

It follows from the *Mitchell* and *Henderson* cases as a matter of course that should buses in transit decide to supply dining service, discrimination of the kind shown here would violate § 216 (d). Cf. *Williams* v. *Carolina Coach Co.*, 111 F. Supp. 329, aff'd, 207 F. 2d 408, and *Keys* v. *Carolina Coach Co.*, 64 M. C. C. 769. Although this Court has not decided whether the same result would follow from a similar discrimination in service by a restaurant in a railroad or bus terminal, we have no doubt that the reasoning underlying the *Mitchell* and *Henderson* cases would compel the same decision as to the unlawfulness of discrimination in transportation services against interstate passengers in terminals and terminal restaurants owned or operated or controlled by interstate carriers. This is true as to railroad terminals because they are expressly made carriers by § 1 (3)(a) of the Act,[1] 49 U. S. C. § 1 (3)(a), and as to bus terminals because § 203 (a)(19) of the Act, 49 U. S. C. § 303 (a)(19), specifically includes interstate transportation facilities and property operated or controlled by a

[1] See *National Association for the Advancement of Colored People* v. *St. Louis-S. F. R. Co.*, 297 I. C. C. 335, 347–348, in which the Interstate Commerce Commission held that a railroad terminal discriminates in violation of § 3 (1) if it maintains waiting rooms for the exclusive use of Negroes. The Commission regarded assignment to accommodations or facilities in a railroad terminal solely on the basis of race as an implication of inherent inferiority and found it to be unreasonable.

motor carrier within the definition of the "services" and "transportation" to which the motor carrier provisions of the Act apply.[2]

Respondent correctly points out, however, that, whatever may be the facts, the evidence in this record does not show that the bus company owns or actively operates or directly controls the bus terminal or the restaurant in it. But the fact that § 203 (a)(19) says that the protections of the motor carrier provisions of the Act extend to "include" facilities so operated or controlled by no means should be interpreted to exempt motor carriers from their statutory duty under § 216 (d) not to discriminate should they choose to provide their interstate passengers with services that are an integral part of transportation through the use of facilities they neither own, control nor operate. The protections afforded by the Act against discriminatory transportation services are not so narrowly limited. We have held that a railroad cannot escape its statutory duty to treat its shippers alike either by use of facilities it does not own or by contractual arrangement with the owner of those facilities. *United States* v. *Baltimore & Ohio R. Co., supra.* And so here, without regard to contracts, if the bus carrier has volunteered to make terminal and restaurant facilities and services available to its interstate passengers as a regular part of their transportation, and the terminal and restaurant have acquiesced and cooperated in this undertaking, the terminal and restaurant must perform these services without discriminations prohibited by the Act. In the performance of these services

[2] "The 'services' and 'transportation' to which this chapter applies include all vehicles operated by, for, or in the interest of any motor carrier irrespective of ownership or of contract, express or implied, together with all facilities and property operated or controlled by any such carrier or carriers, and used in the transportation of passengers or property in interstate or foreign commerce or in the performance of any service in connection therewith."

under such conditions the terminal and restaurant stand in the place of the bus company in the performance of its transportation obligations. Cf. *Derrington* v. *Plummer,* 240 F. 2d 922, 925–926, cert. denied, 353 U. S. 924. Although the courts below made no findings of fact, we think the evidence in this case shows such a relationship and situation here.

The manager of the restaurant testified that it was not affiliated in any way with the Trailways Bus Company and that the bus company had no control over the operation of the restaurant, but that while the restaurant had "quite a bit of business" from local people, it was primarily or partly for the service of the passengers on the Trailways bus. This last statement was perhaps much of an understatement, as shown by the lease agreement executed in writing and signed both by the "Trailways Bus Terminal, Inc.," as lessor, and the "Bus Terminal Restaurant of Richmond, Inc.," as lessee. The first part of the document showed that Trailways Terminal was then constructing a "bus station" with built-in facilities "for the operation of a restaurant, soda fountain, and news stand.". Terminal covenanted to lease this space to Restaurant for its use; to grant Restaurant the exclusive right to sell foods and other things usually sold in restaurants, newsstands, soda fountains and lunch counters; to keep the terminal building in good repair and to furnish certain utilities. Restaurant on its part agreed to use its space for the sale of commodities agreed on at prices that are "just and reasonable"; to sell no commodities not usually sold or installed in a bus terminal concession without Terminal's permission; to discontinue the sale of any commodity objectionable to Terminal; to buy, maintain, and replace equipment subject to Terminal's approval in writing as to its quality; to make alterations and additions only after Terminal's written consent and approval; to make no "sales on buses

operating in and out said bus station" but only "through the windows of said buses"; to keep its employees neat and clean; to perform no terminal service other than that pertaining to the operation of its restaurant as agreed on; and that neither Restaurant nor its employees were to "sell transportation of any kind or give information pertaining to schedules, rates or transportation matters, but shall refer all such inquiries to the proper agents of" Terminal. In short, as Terminal and Restaurant agreed, "the operation of the restaurant and the said stands shall be in keeping with the character of service maintained in an up-to-date, modern bus terminal."

All of these things show that this terminal building, with its grounds, constituted one project for a single purpose, and that was to serve passengers of one or more bus companies—certainly Trailways' passengers. The restaurant area was specifically designed and built into the structure from the beginning to fill the needs of bus passengers in this "up-to-date, modern bus terminal." Whoever may have had technical title or immediate control of the details of the various activities in the terminal, such as waiting-room seating, furnishing of schedule information, ticket sales, and restaurant service, they were all geared to the service of bus companies and their passengers, even though local people who might happen to come into the terminal or its restaurant might also be accommodated. Thus we have a well-coordinated and smoothly functioning plan for continuous cooperative transportation services between the terminal, the restaurant and buses like Trailways that made stopovers there. All of this evidence plus Trailways' use on this occasion shows that Trailways was not utilizing the terminal and restaurant services merely on a sporadic or occasional basis. This bus terminal plainly was just as essential and necessary, and as available for that matter, to passengers and carriers like Trailways that used it, as though such carriers

had legal title and complete control over all of its activities.[3] Interstate passengers have to eat, and the very terms of the lease of the built-in restaurant space in this terminal constitute a recognition of the essential need of interstate passengers to be able to get food conveniently on their journey and an undertaking by the restaurant to fulfill that need. Such passengers in transit on a paid interstate Trailways journey had a right to expect that this essential[4] transportation food service voluntarily provided for them under such circumstances would be rendered without discrimination prohibited by the Interstate Commerce Act. Under the circumstances of this case, therefore, petitioner had a federal right to remain in the white portion of the restaurant. He was there under "authority of law"—the Interstate Commerce Act—and it was error for the Supreme Court of Virginia to affirm his conviction.

Because of some of the arguments made here it is necessary to say a word about what we are not deciding. We are not holding that every time a bus stops at a wholly independent roadside restaurant the Interstate Commerce Act requires that restaurant service be supplied in harmony with the provisions of that Act. We decide only this case, on its facts, where circumstances show that the terminal and restaurant operate as an integral part of the

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[3] Cf. *Atchison, Topeka & S. F. R. Co.*, 135 I. C. C. 633, 634–635, in which the Commission held that railroad-owned hotels and restaurants used for railroad passengers and employees, and as an incident to the operation and management of the railroad, should be accorded a common-carrier classification.

[4] Because the evidence shows that this terminal restaurant was utilized as an integral part of the transportation of interstate passengers, we need not decide whether discrimination on the basis of color by a bus terminal lessee restaurant would violate § 216 (d) in the absence of such circumstances. Cf. *National Association for the Advancement of Colored People* v. *St. Louis-S. F. R. Co.*, *supra*, at 343–344.

bus carrier's transportation service for interstate passengers. Under such circumstances, an interstate passenger need not inquire into documents of title or contractual arrangements in order to determine whether he has a right to be served without discrimination.

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

Reversed and remanded.

MR. JUSTICE WHITTAKER, with whom MR. JUSTICE CLARK joins, dissenting.

Neither in the Supreme Court of Appeals of Virginia nor in his petition for certiorari or in his brief on the merits in this Court did petitioner challenge the judgment on the ground that it was obtained in violation of the Interstate Commerce Act. I therefore respectfully submit that, under our rules and decisions, no such question is presented or open for consideration here.[1] But even if the Court properly may proceed, as it has proceeded, to decide the case under that Act, and not at all on the constitutional grounds solely relied on by petitioner,[2] I must say, with all deference, that the facts in this record do not show that petitioner was convicted of trespass in violation of that Act.

For me, the decisive question in this case is whether petitioner had a legal right to remain in the restaurant

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[1] See our Rules 23 (1)(c) and 40 (1)(d)(1); *Lawn* v. *United States,* 355 U. S. 339, 362, n. 16, and cases cited.

[2] The only grounds relied on by petitioner in the Supreme Court of Appeals of Virginia and in his petition for certiorari and brief on the merits in this Court were that his conviction is invalid as an undue burden on interstate commerce in violation of Art. I, § 8, cl. 3, and also violated the Due Process and Equal Protection Clauses of the Fourteenth Amendent of the United States Constitution.

involved after being ordered to leave it by the proprietor. If he did not have that legal right, however arising, he was guilty of trespass and, unless proscribed by some federal law, his conviction therefor was legally adjudged under § 18–225 of the Code of Virginia.[3]

If the facts in this record could fairly be said to show that the restaurant was a facility "operated or controlled by any [motor] carrier or carriers, and used in the transportation of passengers or property in interstate or foreign commerce," § 203 (a)(19) of Part II of the Interstate Commerce Act, 49 U. S. C. § 303 (a)(19), I would agree that petitioner had a legal right to remain in and to insist on service by that restaurant and, hence, was not guilty of trespass in so remaining and insisting though in defiance of the manager's order to leave, for § 216 (d) of the Act, 49 U. S. C. § 316 (d), makes it unlawful for a motor carrier while engaged in interstate commerce "to subject any particular person . . . to any unjust discrimination," and this Court has held that any discrimination by a carrier against its interstate passenger on account of his color in the use of its dining facilities is an unjust discrimination. *Henderson* v. *United States,* 339 U. S. 816. Cf. *Mitchell* v. *United States,* 313 U. S. 80.

But I respectfully submit that those are not the facts shown by this record. As I read it, there is no evidence in this record even tending to show that the restaurant was "operated or controlled by any such carrier," directly or indirectly. Instead, all of the relevant evidence, none

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[3] Section 18–225 of the Code of Virginia, in relevant part, provides:

"If any person shall without authority of law go upon or remain upon the lands or premises of another, after having been forbidden to do so by the owner, lessee, custodian or other person lawfully in charge of such land, . . . he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than one hundred dollars or by confinement in jail not exceeding thirty days, or by both such fine and imprisonment."

of which was contradicted, shows that the restaurant was owned and controlled by a noncarrier who alone operated it as a local and private enterprise. The evidence was very brief, consisting only of an exhibit (a lease) and the testimony of the assistant manager of the restaurant, of a police officer and of petitioner—all, except the exhibit, being contained on 10 pages of the printed record. The lease is in the usual and common form and terms. By it, the owner of the building, Trailways Bus Terminal, Inc., a Virginia corporation, as lessor, demised to the restaurant company, Bus Terminal Restaurant of Richmond, Inc., a Virginia corporation, as lessee, certain described "space" in the lessor's bus station building in Richmond, Virginia, "for use by Lessee as a restaurant, lunchroom, soda fountain and news stand," for a term of five years from December 2, 1953 (with an option in the lessee to renew, on the same terms, for an additional five-year term), at an annual rental of $30,000 (payable in equal monthly installments) plus 12% of lessee's gross receipts from the demised premises in excess of $275,000 (payable at the end of each year).[4]

[4] Under other provisions of the lease, the lessee covenanted, in substance, that it would acquire and install in the leased space, at its own expense, all things, including plumbing and wiring, which may be reasonably necessary to the equipment and operation of the restaurant; to provide and pay for all gas and electric current, except for overhead lights; to keep the premises and employees neat and clean and to operate the restaurant "in keeping with the character of service maintained in an up-to-date, modern bus terminal"; that it would not keep any coin-controlled machines or sell intoxicants on the demised premises nor make "any sales on buses operating in and out [of] said bus station"; that it would "comply with all the ordinances of the City of Richmond, and the laws of the United States and the State of Virginia in respect to the conduct of business of Lessee on the demised premises"; to take good care of the premises, and to surrender them at the end of the term in the same condition as when received "ordinary wear and tear excepted."

There is not a word of evidence that any carrier had any interest in or control over the lessee or its restaurant. Nor is there any suggestion in the record that the lease or the lessee's restaurant operations under it were anything other than bona fide and for a legitimate and private business purpose. Indeed, there is not a word of evidence in the record tending to show that any carrier even had any interest in or control over the lessor corporation that owned the building. In truth, the record does not even show the name of the carrier on which petitioner was traveling or identify it other than as "Trailways." [5] On

[5] Obviously recognizing these glaring deficiencies in the evidence, counsel for petitioner and for the Government, as *amicus curiae*, have submitted with their briefs in this Court copies of certain Annual Reports of Virginia Stage Lines, Inc. (which probably was the carrier on which petitioner was traveling), Carolina Coach Company, and of Trailways Bus Terminal, Inc. (the owner of the building and lessor of the space occupied by the lessee's restaurant), to the State Corporation Commission of Virginia, purporting to show that those companies were doing business in Virginia in 1958 and 1959, and a copy of certain pages of the Annual Report filed by Virginia Stage Lines, Inc., with the Interstate Commerce Commission for the year 1959, purporting to show that the capital stock of Trailways Bus Terminal, Inc., was owned in equal parts by Virginia Stage Lines, Inc., and Carolina Coach Company. But none of those documents was put in evidence nor brought to the attention of the Supreme Court of Appeals of Virginia, and it appears, as contended by Virginia, that the Virginia court could not take judicial notice of those documents. See §§ 8–264 and 8–266 of the Code of Virginia; *Commonwealth* v. *Castner*, 138 Va. 81, 121 S. E. 894; *Sisk* v. *Town of Shenandoah*, 200 Va. 277, 105 S. E. 2d 169; *Bell* v. *Hagmann*, 200 Va. 626, 107 S. E. 2d 426. In the light of these facts the proffered documents cannot be considered here. *Lawn* v. *United States*, 355 U. S. 339, 354; *Wolfe* v. *North Carolina*, 364 U. S. 177. But even if those documents could be considered here, they would not aid petitioner, for they do not purport to show that any carrier had any interest in or control over the restaurant involved or in or over Bus Terminal Restaurant of Richmond, the company that owned and operated the restaurant.

the other hand, the assistant manager of the restaurant testified, without suggestion of contradiction, that "[t]he company that operates the restaurant is not affiliated in any way with the bus company," and that "[t]he bus company has no control over the operation of the restaurant." There was simply no evidence to the contrary.

The Court seems to agree that "[r]espondent correctly points out [that] . . . the evidence in this record does not show that the bus company owns or actively operates or directly controls the bus terminal or the restaurant in it." But it seems to hold, as I read its opinion, that a motor carrier's regular "use" of a restaurant, though it be "neither own[ed], control[led] nor operate[d]" by the motor carrier, makes the restaurant a facility "operated or controlled by [the motor] carrier or carriers" within the meaning of § 203 (a)(19) of the Interstate Commerce Act. I must respectfully disagree. To me, it seems rather plain that when Congress, in § 203 (a)(19), said that the " 'services' and 'transportation' " to which Part II of the Act applies shall include "all vehicles . . . together with all facilities and property operated or controlled by any such carrier or carriers, and used in the transportation of passengers or property in interstate or foreign commerce or in the performance of any service in connection therewith," it hardly meant to include a private restaurant, "neither owned, operated nor controlled" by a carrier. Surely such "use" of a private restaurant by a motor carrier as results from stopping and opening its buses in front of or near a restaurant does not make the restaurant a facility "operated or controlled by" the carrier, within the meaning of § 203 (a)(19) or in any true sense. This simple, and I think obvious, principle was recognized and correctly applied by the Commission as recently as November 1955 in *N. A. A. C. P.* v. *St. Louis, S. F. R. Co.*, 297 I. C. C. 335. There, the railroad terminal or station building in

Richmond, Virginia, was owned by Richmond Terminal Railway Company [6]—itself a carrier under § 3 (1) of Part I of the Act—which had leased space in that building to Union News Company for a term of 10 years, but subject to termination at the option of either party on 90 days' notice, for use as a restaurant.[7] In rejecting the contention that the Union News Company's operation of the restaurant on a racially segregated basis violated § 3 (1) of Part I of the Act, the Commission said:

> "*Unless the operation of the lunchrooms can be found to be that of a common carrier* subject to part I of the act, it cannot be regulated under section 3 (1), and we are unable so to find on the facts before us." (Emphasis added.) *Id.*, at 344.

and the Commission concluded:

> "We further find that the operation *by a lessee* (*noncarrier*) of separate lunchroom facilities for white and colored persons in the railway station at Richmond, constitutes a function or service which is not within the jurisdiction of this Commission." (Emphasis added.) *Id.*, at 348.

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[6] The Richmond Terminal Railway Company was controlled jointly by two railroads—the Richmond, Fredericksburg & Potomac Railway Co. and the Atlantic Coast Line.

[7] The lease involved in that case was evidently similar to the one here. Speaking of that lease, the Commission said:

"The lease is silent as to racial segregation. The terminal has certain powers of supervision for a purpose which may be described as policing. The lessee is obligated to 'comply with the requirements of the Department of Public Health, City of Richmond, and with all other lawful governmental rules and regulations.' The context, however, indicates that this requirement is for the purpose of keeping the premises in a neat, clean, and orderly condition, and does not render the lessee liable for violations of the Interstate Commerce Act." 297 I. C. C., at 343.

I would agree with the Court that "if the bus carrier [had] volunteered to make . . . restaurant facilities and services available to its interstate passengers as a regular part of their transportation, and the . . . restaurant [had] acquiesced . . . in this undertaking," the restaurant would then have been bound to serve the carrier's interstate passengers without discrimination. For, in that case, the restaurant would have been made a facility of the carrier, within the meaning of § 203 (a)(19), and § 216 (d) would inhibit both the carrier and the restaurant from discriminating against the carrier's interstate passengers on account of their color, or on any other account, in the use of the restaurant facilities thus provided. *Henderson* v. *United States, supra.* But that is not this case. As we have shown, there is no evidence in this record that the carrier on which petitioner was traveling, whatever may have been its name, had "volunteered to make . . . restaurant facilities and services available to its interstate passengers" *at this restaurant* "as a regular part of their transportation," or that the proprietor of this restaurant ever "acquiesced" in any such "undertaking." There is no evidence of any agreement, express or implied, between the proprietor of this restaurant and any bus carrier. Instead, the undisputed evidence is that the restaurant was not in any way affiliated with or controlled by any bus carrier. On this evidence, I am unable to find any basis to support a conclusion that this restaurant was in some way made a facility of the bus carrier, or subject to Part II of the Interstate Commerce Act.

For these reasons, I cannot agree on this record that petitioner's conviction of trespass under § 18–225 of the Code of Virginia was had in violation of the Interstate Commerce Act. Since the Court's opinion does not explore the constitutional grounds relied on by petitioner, I refrain from intimating any views on those subjects.

SCOTT *v.* CALIFORNIA.

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

No. 241, Misc. Decided December 5, 1960.

Appellant was convicted in a state court of murdering his wife. The evidence against him was entirely circumstantial. Proof of the *corpus delicti,* as well as proof of appellant's criminal agency, was to be inferred only from his wife's inexplicable disappearance coupled with appellant's unnatural behavior thereafter. He did not take the stand in his own defense, and the trial judge instructed the jury that his failure to do so could be made the basis of inferences unfavorable to him. On appeal to this Court, appellant contended that his conviction violated the Due Process Clause of the Fourteenth Amendment. *Held:* Appeal dismissed and certiorari denied.

Reported below: 176 Cal. App. 2d 458, 1 Cal. Rptr. 600.

Morris Lavine for appellant.

Stanley Mosk, Attorney General of California, *William E. James,* Assistant Attorney General, *William B. McKesson* and *Lewis Watnick* for appellee.

PER CURIAM.

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

MR. JUSTICE DOUGLAS, dissenting.

The salient facts in this case are related in 176 Cal. App. 2d 458, 1 Cal. Rptr. 600. A reading of the report shows that the entire evidence against the defendant was circumstantial. It was not even shown directly that his wife, whom he is now convicted of murdering, is dead. Proof of the *corpus delicti,* as well as proof of petitioner's criminal

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agency, was to be inferred from his wife's inexplicable disappearance coupled with his unnatural behavior thereafter. A prominent aspect of this unnatural behavior was his silence. At the trial, the petitioner did not take the stand. The trial judge in accord with California law charged the jury as follows:

> "It is a constitutional right of a defendant in a criminal trial that he may not be compelled to testify. Thus, whether or not he does testify rests entirely in his own decision. As to any evidence or facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge, *if he does not testify, the jury may take that fact into consideration* as tending to indicate the truth of such evidence and *as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable.* The failure of a defendant to deny or explain evidence against him does not, however, create a presumption of guilt or by itself warrant an inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt." (Italics added.)

Using a defendant's silence as evidence against him is one way of having him testify against himself. This would not be permitted, we have assumed, in a federal trial by reason of the Fifth Amendment. *Adamson* v. *California,* 332 U. S. 46, 50. That rule, embodied in a federal statute, has much history behind it. See *Wilson* v. *United States,* 149 U. S. 60. Its value in protecting the interests of an accused was well stated in *Bruno* v. *United States,* 308 U. S. 287, 294, where we said:

> "To the suggestion that it benefits a defendant who fails to take the stand not to have the attention of

> the jury directed to that fact, it suffices to say that, however difficult it may be to exercise enlightened self-interest, the accused should be allowed to make his own choice when an Act of Congress authorizes him to choose. And when it is urged that it is a psychological impossibility not to have a presumption arise in the minds of jurors against an accused who fails to testify, the short answer is that Congress legislated on a contrary assumption and not without support in experience. It was for Congress to decide whether what it deemed legally significant was psychologically futile. Certainly, despite the vast accumulation of psychological data, we have not yet attained that certitude about the human mind which would justify us in disregarding the will of Congress by a dogmatic assumption that jurors, if properly admonished, neither could nor would heed the instructions of the trial court that the failure of an accused to be a witness in his own cause 'shall not create any presumption against him.' "

And see *Johnson* v. *United States,* 318 U. S. 189, 199.

The Court in 1947 held that the Fourteenth Amendment by its Due Process Clause did not incorporate the Fifth Amendment (*Adamson* v. *California, supra*), with the result that the failure of a defendant to testify could be taken as evidence against him. I dissented in that case and continue to believe it was wrong. The present case shows how utterly devastating the state rule which it sanctions can be. I would accordingly note probable jurisdiction.

KIRSCHKE ET AL. *v.* CITY OF HOUSTON.

APPEAL FROM THE SUPREME COURT OF TEXAS.

No. 426. Decided December 5, 1960.

Appeal dismissed since the judgment below is based on a nonfederal ground adequate to support it.

Bennett B. Patterson for appellants.

R. H. Burks and *Homer T. Bouldin* for appellee.

PER CURIAM.

The appeal herein is dismissed for the reason that the judgment of the Supreme Court of Texas, sought here to be reviewed, is based upon a nonfederal ground adequate to support it.

RIELA *v.* NEW YORK.

APPEAL FROM THE COUNTY COURT OF TIOGA COUNTY, NEW YORK.

No. 445. Decided December 5, 1960.

Appeal dismissed and certiorari denied.

Reported below: 7 N. Y. 2d 571, 166 N. E. 2d 840.

Louis Mansdorf for appellant.

George Boldman and *Eliot H. Lumbard* for appellee.

PER CURIAM.

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

THE CHIEF JUSTICE, MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that probable jurisdiction should be noted.

BECK ET AL. *v.* BINKS, DIRECTOR OF DEPARTMENT OF REGISTRATION AND EDUCATION OF ILLINOIS.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

No. 461. Decided December 5, 1960.

Appeal dismissed and certiorari denied.
Reported below: 19 Ill. 2d 72, 165 N. E. 2d 292.

Edwin S. D. Butterfield for appellants.

William L. Guild, Attorney General of Illinois, and *William C. Wines* and *Raymond S. Sarnow,* Assistant Attorneys General, for appellee.

PER CURIAM.

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

KOTRICH ET AL. *v.* COUNTY OF DUPAGE, ILLINOIS, ET AL.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

No. 473. Decided December 5, 1960.

Appeal dismissed for want of a substantial federal question.
Reported below: 19 Ill. 2d 181, 166 N. E. 2d 601.

Arthur Frankel, Nathan Glick and *Lawrence E. Glick* for appellants.

PER CURIAM.

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

GRIFFITH *v.* CALIFORNIA ET AL.

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

No. 457. Decided December 5, 1960.

Appeal dismissed for want of a substantial federal question.
Reported below: 179 Cal. App. 2d 558, 4 Cal. Rptr. 531.

J. B. Tietz for appellant.

Robert E. Reed and *R. B. Pegram* for the State of California, and *Roger Arneberg* and *Bourke Jones* for the City of Los Angeles, appellees.

PER CURIAM.

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

RAY *v.* OHIO.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 237, Misc. Decided December 5, 1960.

Appeal dismissed for want of a substantial federal question.
Reported below: 170 Ohio St. 201, 163 N. E. 2d 176.

Ralph Atkinson for appellant.

PER CURIAM.

The motion for leave to supplement the jurisdictional statement is granted. The appeal is dismissed for want of a substantial federal question.

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

BANDY *v.* UNITED STATES.

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

No. 171, Misc. Decided December 5, 1960.

Certiorari granted; judgment vacated; and cause remanded to Court of Appeals for a hearing of the appeal.

Reported below: 278 F. 2d 214.

Petitioner *pro se*.

Solicitor General Rankin, Assistant Attorney General Rice and *Meyer Rothwacks* for the United States.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. In light of the circumstances pointed out by the Government surrounding the alleged inability of the petitioner to secure the services of his own handwriting expert, the error which occurred in the "Agreed Statement of the Case" and which was repeated by the Government in its brief and the Court of Appeals in its opinion, the failure to subpoena witnesses with respect to petitioner's alibi, and the dispute which arose with respect to representation of petitioner by his appointed counsel on appeal, the judgment is vacated and the cause is remanded to the Court of Appeals for a hearing of the appeal.

PEKAO TRADING CORP. *v.* BRAGALINI ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 483. Decided December 5, 1960.

Appeal dismissed for want of a substantial federal question.
Reported below: 8 N. Y. 2d 903, 168 N. E. 2d 823.

Arthur C. Fink for appellant.

PER CURIAM.

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

MR. JUSTICE FRANKFURTER would note probable jurisdiction and hear the case, the more so inasmuch as the transactions which New York has taxed concerned foreign commerce, unlike those which were involved in *Northwestern States Portland Cement Co.* v. *Minnesota,* 358 U. S. 450.

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

SHELTON ET AL. *v.* TUCKER ET AL.

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

No. 14. Argued November 7, 1960.—Decided December 12, 1960.*

An Arkansas statute requires every teacher, as a condition of employment in a state-supported school or college, to file annually an affidavit listing without limitation every organization to which he has belonged or regularly contributed within the preceding five years. Teachers in state-supported schools and colleges are not covered by a civil service system, they are hired on a year-to-year basis, and they have no job security beyond the end of each school year. The contracts of the teachers here involved were not renewed, because they refused to file the required affidavits. *Held:* The statute is invalid, because it deprives teachers of their right of associational freedom protected by the Due Process Clause of the Fourteenth Amendment from invasion by state action. Pp. 480–490.

(a) There can be no doubt of the right of a State to investigate the competence and fitness of those whom it hires to teach in its schools. P. 485.

(b) To compel a teacher to disclose his every associational tie is to impair his right of free association, a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society. Pp. 485–487.

(c) The unlimited and indiscriminate sweep of the statute here involved and its comprehensive interference with associational freedom go far beyond what might be justified in the exercise of the State's legitimate inquiry into the fitness and competence of its teachers. Pp. 487–490.

174 F. Supp. 351 and 231 Ark. 641, 331 S. W. 2d 701, reversed.

Robert L. Carter argued the cause for appellants in No. 14. With him on the brief were *Thad D. Williams, Harold B. Anderson* and *George Howard, Jr.*

*Together with No. 83, *Carr et al.* v. *Young et al.*, on certiorari to the Supreme Court of Arkansas.

Herschel H. Friday, Jr. and *Louis L. Ramsay, Jr.* argued the cause for appellees in No. 14. With them on the brief were *E. Harley Cox* and *Robert V. Light.*

Edwin E. Dunaway argued the cause and filed a brief for petitioners in No. 83.

Robert V. Light and *Herschel H. Friday, Jr.* argued the cause for respondents in No. 83. With them on the briefs were *Bruce Bennett,* Attorney General of Arkansas, and *Thorp Thomas,* Assistant Attorney General.

Mr. Justice Stewart delivered the opinion of the Court.

An Arkansas statute compels every teacher, as a condition of employment in a state-supported school or college, to file annually an affidavit listing without limitation every organization to which he has belonged or regularly contributed within the preceding five years. At issue in these two cases is the validity of that statute under the Fourteenth Amendment to the Constitution. No. 14 is an appeal from the judgment of a three-judge Federal District Court upholding the statute's validity, 174 F. Supp. 351. No. 83 is here on writ of certiorari to the Supreme Court of Arkansas, which also held the statute constitutionally valid. 231 Ark. 641, 331 S. W. 2d 701.

The statute in question is Act 10 of the Second Extraordinary Session of the Arkansas General Assembly of 1958. The provisions of the Act are summarized in the opinion of the District Court as follows:

> "Act 10 provides in substance that no person shall be employed or elected to employment as a superintendent, principal or teacher in any public school in Arkansas, or as an instructor, professor or teacher in any public institution of higher learning in that State until such person shall have submitted to the appro-

priate hiring authority an affidavit listing all organizations to which he at the time belongs and to which he has belonged during the past five years, and also listing all organizations to which he at the time is paying regular dues or is making regular contributions, or to which within the past five years he has paid such dues or made such contributions. The Act further provides, among other things, that any contract entered into with any person who has not filed the prescribed affidavit shall be void; that no public moneys shall be paid to such person as compensation for his services; and that any such funds so paid may be recovered back either from the person receiving such funds or from the board of trustees or other governing body making the payment. The filing of a false affidavit is denounced as perjury, punishable by a fine of not less than five hundred nor more than one thousand dollars, and, in addition, the person filing the false affidavit is to lose his teaching license." 174 F. Supp. 353–354.[1]

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[1] The statute is in seven sections. Section 1 provides: "It is hereby declared that the purpose of this act is to provide assistance in the administration and financing of the public schools of Arkansas, and institutions of higher learning supported wholly or in part by public funds, and it is hereby determined that it will be beneficial to the public schools and institutions of higher learning and the State of Arkansas, if certain affidavits of membership are required as hereinafter provided."

Section 2 provides: "No superintendent, principal, or teacher shall be employed or elected in any elementary or secondary school by the district operating such school, and no instructor, professor, or other teacher shall be employed or elected in any institution of higher learning, or other educational institution supported wholly or in part by public funds, by the trustees or governing authority thereof, until, as a condition precedent to such employment, such superintendent, principal, teacher, instructor or professor shall have filed with such board

These provisions must be considered against the existing system of teacher employment required by Arkansas law. Teachers there are hired on a year-to-year basis. They are not covered by a civil service system, and they have no job security beyond the end of each school year. The closest approach to tenure is a statutory provision for the automatic renewal of a teacher's contract if he is not notified within ten days after the end of a school year that the contract has not been renewed. Ark. 1947 Stat. Ann. § 80–1304 (b) (1960); *Wabbaseka School District No. 7* v. *Johnson*, 225 Ark. 982, 286 S. W. 2d 841.

The plaintiffs in the Federal District Court (appellants here) were B. T. Shelton, a teacher employed in the Little Rock Public School System, suing for himself and others similarly situated, together with the Arkansas Teachers Association and its Executive Secretary, suing for the benefit of members of the Association. Shelton had been

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of trustees or governing authority an affidavit as to the names and addresses of all incorporated and/or unincorporated associations and organizations that such superintendent, principal, teacher, instructor or professor is or within the past five years has been a member of, or to which organization or association such superintendent, principal, teacher, instructor, professor, or other teacher is presently paying, or within the past five years has paid regular dues, or to which the same is making or within the past five years has made regular contributions."

Section 3 sets out the form of affidavit to be used.

Section 4 provides: "Any contract entered into by any board of any school district, board of trustees of any institution of higher learning, or other educational institution supported wholly or in part by public funds, or by any governing authority thereof, with any superintendent, principal, teacher, instructor, professor, or other instructional personnel, who shall not have filed the affidavit required in Section 2 hereof prior to the employment or election of such person and prior to the making of such contracts, shall be null and void and no funds shall be paid under said contract to such superintendent, principal, teacher, instructor, professor, or other instructional per-

employed in the Little Rock Special School District for twenty-five years. In the spring of 1959 he was notified that, before he could be employed for the 1959–1960 school year, he must file the affidavit required by Act 10, listing all his organizational connections over the previous five years. He declined to file the affidavit, and his contract for the ensuing school year was not renewed. At the trial the evidence showed that he was not a member of the Communist Party or of any organization advocating the overthrow of the Government by force, and that he was a member of the National Association for the Advancement of Colored People. The court upheld Act 10, finding the information it required was "relevant," and relying on several decisions of this Court, particularly *Garner* v. *Board of Public Works of Los Angeles,* 341 U. S. 716; *Adler* v. *Board of Education,* 342 U. S. 485; *Beilan* v.

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sonnel; any funds so paid under said contract to such superintendent, principal, teacher, instructor, professor, or other instructional personnel, may be recovered from the person receiving the same and/or from the board of trustees or other governing authority by suit filed in the circuit court of the county in which such contract was made, and any judgment entered by such court in such cause of action shall be a personal judgment against the defendant therein and upon the official bonds made by such defendants, if any such bonds be in existence."

Section 5 provides that a teacher filing a false affidavit shall be guilty of perjury, punishable by a fine, and shall forfeit his license to teach in any school or other institution of learning supported wholly or in part by public funds.

Section 6 is a separability provision.

Section 7 is an emergency clause, reading in part as follows:

"It is hereby determined that the decisions of the United States Supreme Court in the school segregation cases require solution of a great variety of local public school problems of considerable complexity immediately and which involve the health, safety and general welfare of the people of the State of Arkansas, and that the purpose of this act is to assist in the solution of these problems and to provide for the more efficient administration of public education."

Board of Education, 357 U. S. 399; and *Lerner* v. *Casey,* 357 U. S. 468.[2]

The plaintiffs in the state court proceedings (petitioners here) were Max Carr, an associate professor at the University of Arkansas, and Ernest T. Gephardt, a teacher at Central High School in Little Rock, each suing for himself and others similarly situated. Each refused to execute and file the affidavit required by Act 10. Carr executed an affirmation [3] in which he listed his membership in professional organizations, denied ever having been a member of any subversive organization, and offered to answer any questions which the University authorities might constitutionally ask touching upon his qualifications as a teacher. Gephardt filed an affidavit stating that he had never belonged to a subversive organization, disclosing his membership in the Arkansas Education Association and the American Legion, and also offering to answer any questions which the school authorities might constitutionally ask touching upon his qualifications as a teacher. Both were advised that their failure to comply with the requirements of Act 10 would make impossible their re-employment as teachers for the following school year. The Supreme Court of Arkansas upheld the constitutionality of Act 10, on its face and as applied to the petitioners. 231 Ark. 641, 331 S. W. 2d 701.

I.

It is urged here, as it was unsuccessfully urged throughout the proceedings in both the federal and state courts, that Act 10 deprives teachers in Arkansas of their

[2] In the same proceeding the court held constitutionally invalid an Arkansas statute making it unlawful for any member of the National Association for the Advancement of Colored People to be employed by the State of Arkansas or any of its subdivisions. 174 F. Supp. 351.

[3] The affirmation recited that Carr was "conscientiously opposed to taking an oath or swearing in any form . . . ."

rights to personal, associational, and academic liberty, protected by the Due Process Clause of the Fourteenth Amendment from invasion by state action. In considering this contention, we deal with two basic postulates.

First. There can be no doubt of the right of a State to investigate the competence and fitness of those whom it hires to teach in its schools, as this Court before now has had occasion to recognize. "A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern." *Adler* v. *Board of Education,* 342 U. S. 485, 493. There is "no requirement in the Federal Constitution that a teacher's classroom conduct be the sole basis for determining his fitness. Fitness for teaching depends on a broad range of factors." *Beilan* v. *Board of Education,* 357 U. S. 399, 406.[4]

This controversy is thus not of a pattern with such cases as *N. A. A. C. P.* v. *Alabama,* 357 U. S. 449, and *Bates* v. *Little Rock,* 361 U. S. 516. In those cases the Court held that there was no substantially relevant correlation between the governmental interest asserted and the State's effort to compel disclosure of the membership lists involved. Here, by contrast, there can be no question of the relevance of a State's inquiry into the fitness and competence of its teachers.[5]

Second. It is not disputed that to compel a teacher to disclose his every associational tie is to impair

[4] The actual holdings in *Adler* and *Beilan,* involving the validity of teachers' discharges, are not relevant to the present case.

[5] The declared purpose of Act 10 is "to provide assistance in the administration and financing of the public schools . . . ." The declared justification for the emergency clause is "to assist in the solution" of problems raised by "the decisions of the United States Supreme Court in the school segregation cases." See note 1. But neither the breadth and generality of the declared purpose nor the possible irrelevance of the emergency provision detracts from the existence of an actual relevant state interest in the inquiry.

that teacher's right of free association, a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society. *De Jonge* v. *Oregon,* 299 U. S. 353, 364; *Bates* v. *Little Rock, supra,* at 522–523. Such interference with personal freedom is conspicuously accented when the teacher serves at the absolute will of those to whom the disclosure must be made—those who any year can terminate the teacher's employment without bringing charges, without notice, without a hearing, without affording an opportunity to explain.

The statute does not provide that the information it requires be kept confidential. Each school board is left free to deal with the information as it wishes.[6] The record contains evidence to indicate that fear of public disclosure is neither theoretical nor groundless.[7] Even if there were no disclosure to the general public, the pressure upon a teacher to avoid any ties which might displease those who control his professional destiny would be constant and heavy. Public exposure, bringing with it the possibility of public pressures upon school boards to discharge teachers who belong to unpopular or minority

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[6] The record contains an opinion of the State Attorney General that "it is an administrative determination, to be made by the respective Boards, as to the disclosure of information contained in the affidavits." The Supreme Court of Arkansas has held only that "the affidavits *need* not be opened to public inspection . . . ." 231 Ark. 641, 646, 331 S. W. 2d 701, 704. (Emphasis added.)

[7] In the state court proceedings a witness who was a member of the Capital Citizens Council testified that his group intended to gain access to some of the Act 10 affidavits with a view to eliminating from the school system persons who supported organizations unpopular with the group. Among such organizations he named the American Civil Liberties Union, the Urban League, the American Association of University Professors, and the Women's Emergency Committee to Open Our Schools.

organizations, would simply operate to widen and aggravate the impairment of constitutional liberty.

The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. "By limiting the power of the States to interfere with freedom of speech and freedom of inquiry and freedom of association, the Fourteenth Amendment protects all persons, no matter what their calling. But, in view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of those amendments vividly into operation. Such unwarranted inhibition upon the free spirit of teachers . . . has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers." *Wieman* v. *Updegraff*, 344 U. S. 183, 195 (concurring opinion). "Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate . . . ." *Sweezy* v. *New Hampshire*, 354 U. S. 234, 250.

II.

The question to be decided here is not whether the State of Arkansas can ask certain of its teachers about all their organizational relationships. It is not whether the State can ask all of its teachers about certain of their associational ties. It is not whether teachers can be asked how many organizations they belong to, or how much time they spend in organizational activity. The question is whether the State can ask every one of its teachers to disclose every single organization with which he has

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been associated over a five-year period. The scope of the inquiry required by Act 10 is completely unlimited. The statute requires a teacher to reveal the church to which he belongs, or to which he has given financial support. It requires him to disclose his political party, and every political organization to which he may have contributed over a five-year period. It requires him to list, without number, every conceivable kind of associational tie—social, professional, political, avocational, or religious. Many such relationships could have no possible bearing upon the teacher's occupational competence or fitness.

In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.[8] The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.[9]

In *Lovell* v. *Griffin,* 303 U. S. 444, the Court invalidated an ordinance prohibiting all distribution of literature at any time or place in Griffin, Georgia, without a license, pointing out that so broad an interference was unnecessary to accomplish legitimate municipal aims. In

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[8] In other areas, involving different constitutional issues, more administrative leeway has been thought allowable in the interest of increased efficiency in accomplishing a clearly constitutional central purpose. See *Purity Extract Co.* v. *Lynch,* 226 U. S. 192; *Jacob Ruppert* v. *Caffey,* 251 U. S. 264; *Schlesinger* v. *Wisconsin,* 270 U. S. 230, 241 (dissenting opinion); *Queenside Hills Co.* v. *Saxl,* 328 U. S. 80, 83. But cf. *Dean Milk Co.* v. *Madison,* 340 U. S. 349.

[9] See Freund, Competing Freedoms in American Constitutional Law, 13 U. of Chicago Conference Series 26, 32–33; Richardson, Freedom of Expression and the Function of Courts, 65 Harv. L. Rev. 1, 6, 23–24; Comment, Legislative Inquiry into Political Activity: First Amendment Immunity From Committee Interrogation, 65 Yale L. J. 1159, 1173–1175.

Schneider v. *State,* 308 U. S. 147, the Court dealt with ordinances of four different municipalities which either banned or imposed prior restraints upon the distribution of handbills. In holding the ordinances invalid, the Court noted that where legislative abridgment of "fundamental personal rights and liberties" is asserted, "the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions." 308 U. S., at 161. In *Cantwell* v. *Connecticut,* 310 U. S. 296, the Court said that "[c]onduct remains subject to regulation for the protection of society," but pointed out that in each case "the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." 310 U. S., at 304. Illustrations of the same constitutional principle are to be found in many other decisions of the Court, among them, *Martin* v. *Struthers,* 319 U. S. 141; *Saia* v. *New York,* 334 U. S. 558; and *Kunz* v. *New York,* 340 U. S. 290.

As recently as last Term we held invalid an ordinance prohibiting the distribution of handbills because the breadth of its application went far beyond what was necessary to achieve a legitimate governmental purpose. *Talley* v. *California,* 362 U. S. 60. In that case the Court noted that it had been "urged that this ordinance is aimed at providing a way to identify those responsible for fraud, false advertising and libel. Yet the ordinance is in no manner so limited . . . . Therefore we do not pass on the validity of an ordinance limited to prevent these or any other supposed evils. This ordinance simply bars all handbills under all circumstances anywhere that do not have the names and addresses printed on them in the place the ordinance requires." 362 U. S., at 64.

The unlimited and indiscriminate sweep of the statute now before us brings it within the ban of our prior cases. The statute's comprehensive interference with associational freedom goes far beyond what might be justified in the exercise of the State's legitimate inquiry into the fitness and competency of its teachers. The judgments in both cases must be reversed.

It is so ordered.

MR. JUSTICE FRANKFURTER, dissenting.

As one who has strong views against crude intrusions by the state into the atmosphere of creative freedom in which alone the spirit and mind of a teacher can fruitfully function, I may find displeasure with the Arkansas legislation now under review. But in maintaining the distinction between private views and constitutional restrictions, I am constrained to find that it does not exceed the permissible range of state action limited by the Fourteenth Amendment. By way of emphasis I therefore add a few words to the dissent of MR. JUSTICE HARLAN, in which I concur.

It is essential, at the outset, to establish what is not involved in this litigation:

(1) As the Court recognizes, this is not a case where, as in *N. A. A. C. P.* v. *Alabama,* 357 U. S. 449, and *Bates* v. *Little Rock,* 361 U. S. 516, a State, asserting the power to compel disclosure of organizational affiliations, can show no rational relation between disclosure and a governmental interest justifying it. Those cases are relevant here only because of their recognition that an interest in privacy, in non-disclosure, may under appropriate circumstances claim constitutional protection. The question here is whether that interest is overborne by a countervailing public interest. To this concrete, limited question—whether the State's interest in knowing the nature

of the organizational activities of teachers employed by it or by institutions which it supports, as a basis for appraising the fitness of those teachers for the positions which they hold, outweighs the interest recognized in *N. A. A. C. P.* and *Bates*—those earlier decisions themselves give no answer.

(2) The Court's holding that the Arkansas statute is unconstitutional does not, apparently, rest upon the threat that the information which it requires of teachers will be revealed to the public. In view of the opinion of the Supreme Court of Arkansas, decision here could not, I believe, turn on a claim that the teachers' affidavits will not remain confidential. That court has expressly said that "Inasmuch as the validity of the act depends upon its being construed as a *bona fide* legislative effort to provide school boards with needed information, it necessarily follows that the affidavits need not be opened to public inspection, for the permissible purpose of the statute is to enlighten the school board alone." 231 Ark. 641, 646, 331 S. W. 2d 701, 704. If the validity of the statute depended on this matter, the pronouncement of the State's highest judicial organ would have to be read as establishing—the earlier view of the State Attorney General notwithstanding—that the statute does not authorize the making public of the affidavits. Even were the Arkansas court's language far more ambiguous than it is, it would be our duty so to understand its opinion, in accordance with the principle that "So far as statutes fairly may be construed in such a way as to avoid doubtful constitutional questions they should be so construed." *Fox* v. *Washington,* 236 U. S. 273, 277.

(3) This is not a case in which *Lovell* v. *Griffin,* 303 U. S. 444; *Cantwell* v. *Connecticut,* 310 U. S. 296; *Saia* v. *New York,* 334 U. S. 558; and *Kunz* v. *New York,* 340 U. S. 290, call for condemnation of the "breadth" of the statute. Those decisions struck down licensing laws

which vested in administrative officials a power of censorship over communications not confined within standards designed to curb the dangers of arbitrary or discriminatory official action. The "breadth" with which the cases were concerned was the breadth of unrestricted discretion left to a censor, which permitted him to make his own subjective opinions the practically unreviewable measure of permissible speech.[1] Nor is this a case of the nature of *Thornhill* v. *Alabama,* 310 U. S. 88, and *Herndon* v. *Lowry,* 301 U. S. 242,[2] involving penal statutes which the Court found impermissibly "broad" in quite another sense. Prohibiting, indiscriminately, activity within and without the sphere of the Fourteenth Amendment's protection of free expression, those statutes had the double vice of deterring the exercise of constitutional freedoms by making the uncertain line of the Amendment's application determinative of criminality and of prescribing indefinite standards of guilt, thereby allowing the potential vagaries and prejudices of juries, effectively insulated against control by reviewing courts, the power to intrude upon the protected sphere. The statute challenged in the present cases involves neither administrative discretion to censor nor vague, overreaching tests of criminal responsibility.

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[1] See also *Hague* v. *C. I. O.,* 307 U. S. 496; *Schneider* v. *State,* 308 U. S. 147 (the Irvington ordinance); *Largent* v. *Texas,* 318 U. S. 418; *Jones* v. *Opelika,* 319 U. S. 103, vacating 316 U. S. 584 (the Opelika ordinance); *Niemotko* v. *Maryland,* 340 U. S. 268; *Joseph Burstyn, Inc.,* v. *Wilson,* 343 U. S. 495; *Gelling* v. *Texas,* 343 U. S. 960; *Superior Films, Inc.,* v. *Department of Education,* 346 U. S. 587; *Staub* v. *Baxley,* 355 U. S. 313; cf. *Marsh* v. *Alabama,* 326 U. S. 501; *Tucker* v. *Texas,* 326 U. S. 517. The common-law count in the *Cantwell* case involved considerations similar to those which were determinative of the decisions cited in text and note, at note 2, *infra.*

[2] See also *Stromberg* v. *California,* 283 U. S. 359; *Winters* v. *New York,* 333 U. S. 507.

Where state assertions of authority are attacked as impermissibly restrictive upon thought, expression, or association, the existence *vel non* of other possible less restrictive means of achieving the object which the State seeks is, of course, a constitutionally relevant consideration. This is not because some novel, particular rule of law obtains in cases of this kind. Whenever the reasonableness and fairness of a measure are at issue—as they are in every case in which this Court must apply the standards of reason and fairness, with the appropriate scope to be given those concepts, in enforcing the Due Process Clause of the Fourteenth Amendment as a limitation upon state action—the availability or unavailability of alternative methods of proceeding is germane. Thus, a State may not prohibit the distribution of literature on its cities' streets as a means of preventing littering, when the same end might be achieved with only slightly greater inconvenience by applying the sanctions of the penal law not to the pamphleteer who distributes the paper but to the recipient who crumples it and throws it away. *Hague* v. *C. I. O.,* 307 U. S. 496; *Schneider* v. *State,* 308 U. S. 147; *Jamison* v. *Texas,* 318 U. S. 413. Nor may a State protect its population from the dangers and incitements of salacious books by restricting the reading matter of adults to that which would be harmless to the susceptible mind of a child. *Butler* v. *Michigan,* 352 U. S. 380. And see *De Jonge* v. *Oregon,* 299 U. S. 353; *Talley* v. *California,* 362 U. S. 60.[3] But the consideration

[3] Language characterizing state statutes as overly broad has sometimes been found in opinions where it was unnecessary to the result, and merely meant to express the idea that whatever state interest was there asserted as underlying a regulation was insufficient to justify the regulation's application to particular circumstances fairly within the Fourteenth Amendment's protection. Compare *Thomas* v. *Collins,* 323 U. S. 516, with *Fiske* v. *Kansas,* 274 U. S. 380. Compare *Martin* v. *Struthers,* 319 U. S. 141, with *Breard* v. *Alexandria,* 341 U. S. 622.

of feasible alternative modes of regulation in these cases did not imply that the Court might substitute its own choice among alternatives for that of a state legislature, or that the States were to be restricted to the "narrowest" workable means of accomplishing an end. See *Prince* v. *Massachusetts,* 321 U. S. 158, 169–170. Consideration of alternatives may focus the precise exercise of state legislative authority which is tested in this Court by the standard of reasonableness, but it does not alter or displace that standard. The issue remains whether, in light of the particular kind of restriction upon individual liberty which a regulation entails, it is reasonable for a legislature to choose that form of regulation rather than others less restrictive. To that determination, the range of judgment easily open to a legislature in considering the relative degrees of efficiency of alternative means in achieving the end it seeks is pertinent.

In the present case the Court strikes down an Arkansas statute requiring that teachers disclose to school officials all of their organizational relationships, on the ground that "Many such relationships could have no possible bearing upon the teacher's occupational competence or fitness." Granted that a given teacher's membership in the First Street Congregation is, standing alone, of little relevance to what may rightly be expected of a teacher, is that membership equally irrelevant when it is discovered that the teacher is in fact a member of the First Street Congregation *and* the Second Street Congregation *and* the Third Street Congregation *and* the 4–H Club *and* the 3–H Club *and* half a dozen other groups? Presumably, a teacher may have so many divers associations, so many divers commitments, that they consume his time and energy and interest at the expense of his work or even of his professional dedication. Unlike wholly individual interests, organizational connections—because they involve obligations undertaken with relation to other per-

sons—may become inescapably demanding and distracting. Surely, a school board is entitled to inquire whether any of its teachers has placed himself, or is placing himself, in a condition where his work may suffer. Of course, the State might ask: "To how many organizations do you belong?" or "How much time do you expend at organizational activity?" But the answer to such questions could reasonably be regarded by a state legislature as insufficient, both because the veracity of the answer is more difficult to test, in cases where doubts as to veracity may arise, than in the case of the answers required by the Arkansas statute, and because an estimate of time presently spent in organizational activity reveals nothing as to the quality and nature of that activity, upon the basis of which, necessarily, judgment or prophesy of the extent of future involvement must be based. A teacher's answers to the questions which Arkansas asks, moreover, may serve the purpose of making known to school authorities persons who come into contact with the teacher in all of the phases of his activity in the community, and who can be questioned, if need be, concerning the teacher's conduct in matters which this Court can certainly not now say are lacking in any pertinence to professional fitness. It is difficult to understand how these particular ends could be achieved by asking "certain of [the State's] teachers about all their organizational relationships," or "all of its teachers about certain of their associational ties," or all of its teachers how many associations currently involve them, or during how many hours; and difficult, therefore, to appreciate why the Court deems unreasonable and forbids what Arkansas does ask.

If I dissent from the Court's disposition in these cases, it is not that I put a low value on academic freedom. See *Wieman* v. *Updegraff,* 344 U. S. 183, 194 (concurring opinion); *Sweezy* v. *New Hampshire,* 354 U. S. 234, 255 (concurring opinion). It is because that very freedom,

in its most creative reaches, is dependent in no small part upon the careful and discriminating selection of teachers. This process of selection is an intricate affair, a matter of fine judgment, and if it is to be informed, it must be based upon a comprehensive range of information. I am unable to say, on the face of this statute, that Arkansas could not reasonably find that the information which the statute requires—and which may not be otherwise acquired than by asking the question which it asks—is germane to that selection. Nor, on this record, can I attribute to the State a purpose to employ the enactment as a device for the accomplishment of what is constitutionally forbidden. Of course, if the information gathered by the required affidavits is used to further a scheme of terminating the employment of teachers solely because of their membership in unpopular organizations, that use will run afoul of the Fourteenth Amendment. It will be time enough, if such use is made, to hold the application of the statute unconstitutional. See *Yick Wo* v. *Hopkins,* 118 U. S. 356. Because I do not find that the disclosure of teachers' associations to their school boards is, without more, such a restriction upon their liberty, or upon that of the community, as to overbalance the State's interest in asking the question, I would affirm the judgments below.

I am authorized to say that MR. JUSTICE CLARK, MR. JUSTICE HARLAN and MR. JUSTICE WHITTAKER agree with this opinion.

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

Of course this decision has a natural tendency to enlist support, involving as it does an unusual statute that touches constitutional rights whose protection in the context of the racial situation in various parts of the country

demands the unremitting vigilance of the courts. Yet that very circumstance also serves to remind of the restraints that attend constitutional adjudication. It must be emphasized that neither of these cases actually presents an issue of racial discrimination. The statute on its face applies to *all* Arkansas teachers irrespective of race, and there is no showing that it has been discriminatorily administered.

The issue is whether, consistently with the Fourteenth Amendment, a State may require teachers in its public schools or colleges to disclose, as a condition precedent to their initial or continued employment, all organizations to which they have belonged, paid dues, or contributed within the past five years. Since I believe that such a requirement cannot be said to transgress the constitutional limits of a State's conceded authority to determine the qualifications of those serving it as teachers, I am bound to consider that Arkansas had the right to pass the statute in question, and therefore conceive it my duty to dissent.

The legal framework in which the issue must be judged is clear. The rights of free speech and association embodied in the "liberty" assured against state action by the Fourteenth Amendment (see *De Jonge* v. *Oregon,* 299 U. S. 353, 364; *Gitlow* v. *New York,* 268 U. S. 652, 672, dissenting opinion of Holmes, J.) are not absolute. *Near* v. *Minnesota,* 283 U. S. 697, 708; *Whitney* v. *California,* 274 U. S. 357, 373 (concurring opinion of Brandeis, J.). Where official action is claimed to invade these rights, the controlling inquiry is whether such action is justifiable on the basis of a superior governmental interest to which such individual rights must yield. When the action complained of pertains to the realm of investigation, our inquiry has a double aspect: first, whether the investigation relates to a legitimate governmental purpose; second, whether, judged in the light of that purpose, the ques-

tioned action has substantial relevance thereto. See *Barenblatt* v. *United States,* 360 U. S. 109; *Uphaus* v. *Wyman,* 360 U. S. 72.

In the two cases at hand, I think both factors are satisfied. It is surely indisputable that a State has the right to choose its teachers on the basis of fitness. And I think it equally clear, as the Court appears to recognize, that information about a teacher's associations may be useful to school authorities in determining the moral, professional, and social qualifications of the teacher, as well as in determining the type of service for which he will be best suited in the educational system. See *Adler* v. *Board of Education,* 342 U. S. 485; *Beilan* v. *Board of Public Education,* 357 U. S. 399; see also *Slochower* v. *Board of Education,* 350 U. S. 551. Furthermore, I take the Court to acknowledge that, agreeably to our previous decisions, the State may enquire into associations to the extent that the resulting information may be in aid of that legitimate purpose. These cases therefore do not present a situation such as we had in *N. A. A. C. P.* v. *Alabama,* 357 U. S. 449, and *Bates* v. *Little Rock,* 361 U. S. 516, where the required disclosure bears no substantial relevance to a legitimate state interest.

Despite these considerations this statute is stricken down because, in the Court's view, it is too broad, because it asks more than may be necessary to effectuate the State's legitimate interest. Such a statute, it is said, cannot justify the inhibition on freedom of association which so blanket an inquiry may entail. Cf. *N. A. A. C. P.* v. *Alabama, supra; Bates* v. *Little Rock, supra.*

I am unable to subscribe to this view because I believe it impossible to determine *a priori* the place where the line should be drawn between what would be permissible inquiry and overbroad inquiry in a situation like this. Certainly the Court does not point that place out. There can be little doubt that much of the associational informa-

tion called for by the statute will be of little or no use whatever to the school authorities, but I do not understand how those authorities can be expected to fix in advance the terms of their enquiry so that it will yield only relevant information.

I do not mean to say that alternatives such as an enquiry limited to the names of organizations of whose character the State is presently aware, or to a class of organizations defined by their purposes, would not be more consonant with a decent respect for the privacy of the teacher, nor that such alternatives would be utterly unworkable. I do see, however, that these alternatives suffer from deficiencies so obvious where a State is bent upon discovering everything which would be relevant to its proper purposes, that I cannot say that it must, as a matter of constitutional compulsion, adopt some such means instead of those which have been chosen here.

Finally, I need hardly say that if it turns out that this statute is abused, either by an unwarranted publicizing of the required associational disclosures or otherwise, we would have a different kind of case than those presently before us. See *Lassiter* v. *Northampton Elections Board,* 360 U. S. 45, 53–54. All that is now here is the validity of the statute on its face, and I am unable to agree that in this posture of things the enactment can be said to be unconstitutional.

I would affirm in both cases.

BUSH ET AL. *v.* ORLEANS PARISH SCHOOL BOARD ET AL.

ON MOTION FOR STAY.

Decided December 12, 1960.*

A three-judge Federal District Court declared unconstitutional, and temporarily enjoined enforcement of, a series of enactments of the Louisiana Legislature designed to prevent partial desegregation of the races in certain public schools in New Orleans pursuant to an earlier federal court order. It was contended, *inter alia*, that the State of Louisiana had "interposed itself in the field of public education over which it has exclusive control," and motions were made for a stay of the injunction pending direct appeal to this Court. *Held:* This contention and others made in the motions are without substance, and the motions for stay are denied.

Jack P. F. Gremillion, Attorney General of Louisiana, for the State of Louisiana et al.

W. Scott Wilkinson and *Thompson Clarke* for the Legislature of Louisiana et al.

Solicitor General Rankin for the United States.

Robert G. Polack, Peter H. Beer, William M. Campbell, Jr. and *Ralph N. Jackson* for the Orleans Parish School Board et al., in opposition.

Thurgood Marshall, Constance Baker Motley and *A. P. Tureaud* for Bush et al., in opposition.

PER CURIAM.

These are motions for stay of an injunction by a three-judge District Court which nullified a series of enactments of the State of Louisiana. The scope of these enactments and the basis on which they were found in conflict with

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*Together with *United States* v. *Louisiana et al.* and *Williams et al.* v. *Davis et al.*, also on motions for stay.

the Constitution of the United States are not matters of doubt. The nub of the decision of the three-judge court is this:

> "The conclusion is clear that interposition is not a *constitutional* doctrine. If taken seriously, it is illegal defiance of constitutional authority." *United States* v. *Louisiana,* 188 F. Supp. 916, 926.

The main basis for challenging this ruling is that the State of Louisiana "has interposed itself in the field of public education over which it has exclusive control." This objection is without substance, as we held, upon full consideration, in *Cooper* v. *Aaron,* 358 U. S. 1. The others are likewise without merit.

Accordingly, the motions for stay are denied.

UNITED STATES *v.* LOUISIANA ET AL.

No. 10, Original. Decided May 31, 1960.—Final Decree Entered December 12, 1960.

This Court having stated its conclusions in its opinions announced on May 31, 1960, as to the respective rights of the United States and the States of Louisiana, Texas, Mississippi, Alabama and Florida, under the Submerged Lands Act, in the lands, minerals and other natural resources underlying the waters of the Gulf of Mexico off the coasts of such States, and having considered the positions of the respective parties as to the terms of a decree, now enters its final decree in the case.

Opinions reported: 363 U. S. 1, 121.

FINAL DECREE.

This cause having come on to be heard on the motion of the plaintiff for judgment and to dismiss the cross-bill of the State of Alabama, and having been argued by counsel, and this Court having stated its conclusions in its opinions announced on May 31, 1960, 363 U. S. 1, 121, and having considered the positions of the respective parties as to the terms of this decree, it is ordered, adjudged and decreed as follows:

1. As against the respective defendant States, the United States is entitled to all the lands, minerals and other natural resources underlying the Gulf of Mexico more than three geographic miles seaward from the coast lines of Louisiana, Mississippi and Alabama, and more than three leagues seaward from the coast lines of Texas and Florida, and extending seaward to the edge of the Continental Shelf. None of the States of Louisiana, Texas, Mississippi, Alabama or Florida is entitled to any interest in such lands, minerals or resources, and each of said States, their privies, assigns, lessees and other persons claiming under any of them are hereby enjoined from

interfering with the rights of the United States in such lands, minerals and resources. As used in this decree, 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.

2. As against the United States, the defendant States are respectively entitled to all the lands, minerals and other natural resources underlying the Gulf of Mexico, extending seaward from their coast lines for a distance of three leagues in the case of Texas and Florida and three geographic miles in the case of Louisiana, Mississippi and Alabama, and the United States is not entitled, as against any of such States, to any interest in such lands, minerals or resources, with the exceptions provided by § 5 of the Submerged Lands Act, 43 U. S. C. § 1313.

3. Whenever the location of the coast line of any of the defendant States shall be agreed upon or determined, such State shall thereupon promptly render to the United States a true, full, accurate and appropriate account of any and all sums of money derived by such State since June 5, 1950, either by sale, leasing, licensing, exploitation or otherwise from or on account of any of the lands or resources described in paragraph 1 hereof which lie opposite to such coast line so agreed upon or determined, and, after said account has been rendered and filed with and approved by the Court, shall promptly pay to the United States a sum equal to such amounts shown by said account as so derived by said State; provided, however, that as to the State of Louisiana the allocation, withdrawal and payment of any funds now impounded under the Interim Agreement between the United States and the State of Louisiana, dated October 12, 1956, shall, subject to the terms hereof, be made in accordance with the appropriate provisions of said Agreement.

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4. The cross-bill of the State of Alabama is dismissed.

5. All motions 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 decree.

6. The motion of the State of Texas for severance is dismissed.

7. The motion of the State of Louisiana to transfer the case to a district court is denied.

8. Jurisdiction is reserved by this Court to entertain such further proceedings, enter such orders and issue such writs as may from time to time be deemed necessary or advisable to give proper force and effect to this decree.

THE CHIEF JUSTICE and MR. JUSTICE CLARK took no part in the formulation of this decree.

DAVIS *v.* UNITED STATES.

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

No. 456. Decided December 12, 1960.

Certiorari granted and judgment reversed as to Counts I, II and III of the indictment, and case remanded for new trial on said counts.

Reported below: 281 F. 2d 93.

George F. Callaghan and *Julius Lucius Echeles* for petitioner.

Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg and *Robert G. Maysack* for the United States.

PER CURIAM.

Upon consideration of the entire record and the suggestion of the Solicitor General, the petition for writ of certiorari is granted limited to that part of the judgment concerned with Counts I, II, and III of the indictment, and that part of the judgment is reversed and the case is remanded to the District Court for a new trial on Counts I, II, and III. In all other respects the petition for writ of certiorari is denied.

KRUPA ET AL. *v.* FARMINGTON RIVER POWER CO.

APPEAL FROM THE SUPREME COURT OF ERRORS OF CONNECTICUT.

No. 403, Misc. Decided December 12, 1960.

Appeal dismissed and certiorari denied.

Reported below: 147 Conn. 153, 157 A. 2d 914.

Thaddeus Maliszewski for appellants.

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.

REINA *v.* UNITED STATES.

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

No. 29. Argued November 7–8, 1960.—
Decided December 19, 1960.

While serving a sentence for a federal narcotics offense, petitioner was summoned before a federal grand jury and asked questions concerning his crime, particularly as to the persons involved with him and their activities in smuggling narcotics into this country from Europe. He invoked his privilege against self-incrimination under the Fifth Amendment and refused to answer. Acting pursuant to 18 U. S. C. § 1406, which grants immunity from prosecution to a witness compelled to testify before a grand jury, the United States Attorney, with the approval of the Attorney General, obtained a court order directing petitioner to testify. He again refused to do so and was adjudged guilty of criminal contempt. *Held:* The conviction is sustained. Pp. 508–515.

1. The immunity provided by § 1406 covers state, as well as federal, prosecutions. P. 510.

2. As so construed, § 1406 is constitutional, since the grant of immunity from state prosecution is necessary and proper to the more effective execution of the undoubted power of Congress to enact the narcotics laws. Pp. 510–512.

3. The grant of immunity from future state and federal prosecution was at least coextensive with petitioner's constitutional privilege against self-incrimination, and it was not necessary that he be pardoned or granted amnesty covering the unserved portion of his sentence and his fine for the offense of which he had previously been convicted. Pp. 512–514.

4. Since the District Court provided that petitioner's sentence to two years' imprisonment for criminal contempt should be vacated if petitioner should purge himself of his contempt by appearing before the grand jury and answering the questions within 60 days from the date of the judgment, and this Court construes the 60-day period as running from the effective date of this Court's

mandate, it is not necessary to pass on the questions whether the sentence was excessive or whether the conviction was invalid because the District Court did not advise petitioner of the extent of the immunity conferred by § 1406. Pp. 514–515.

273 F. 2d 234, affirmed.

Allen S. Stim argued the cause for petitioner. With him on the brief was *Menahem Stim.*

Oscar H. Davis argued the cause for the United States. On the briefs were *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg, J. F. Bishop* and *Robert S. Erdahl.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The Narcotic Control Act of 1956,[1] 18 U. S. C. § 1406, legislates immunity from prosecution for a witness compelled under the section by court order to testify before a federal grand jury investigating alleged violations of the federal narcotics laws. The questions presented are, primarily, whether the section grants immunity from

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[1] Act of July 18, 1956, 70 Stat. 572 *et seq.;* 18 U. S. C. § 1401 *et seq.* The relevant portions of § 1406 are as follows:

"§ 1406. Immunity of witnesses.

"Whenever in the judgment of a United States attorney the testimony of any witness . . . in any case or proceeding before any grand jury or court of the United States involving any violation of [certain federal narcotics statutes] . . . is necessary to the public interest, he, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify . . . . But no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify . . . nor shall testimony so compelled be used as evidence in any criminal proceeding . . . against him in any court. . . ."

state, as well as federal, prosecution, and, if state immunity, whether the section is constitutional.

The petitioner was serving a five-year sentence for a federal narcotics offense [2] when, on December 5, 1958, he was subpoenaed before a federal grand jury sitting in the Southern District of New York. A number of questions were asked him concerning his crime, particularly as to the persons involved with him and their activities in the smuggling of narcotics into this country from Europe. The petitioner invoked the provision of the Fifth Amendment against being compelled to be a witness against himself [3] and refused to answer any of the questions. The United States Attorney with the approval of the Attorney General obtained a court order pursuant to § 1406 directing him to answer. When he returned before the grand jury he again refused to testify. Proceedings against him in criminal contempt resulted in the judgment under review adjudging him guilty as charged. 170 F. Supp. 592. The Court of Appeals for the Second Circuit affirmed. 273 F. 2d 234. Because of the importance of the questions of the construction and constitutionality of § 1406 raised by the case, we granted certiorari, 362 U. S. 939.

Petitioner's main argument in both courts below and here challenges § 1406 as granting him only federal immunity, and not state immunity, either because Congress meant the statute to be thus limited, or because the statute, if construed also to grant state immunity, would be unconstitutional. Both courts below passed the question whether the statute grants state immunity because,

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[2] *United States* v. *Reina,* 242 F. 2d 302. When petitioner appeared before the grand jury on December 5, 1958, he had served about two years and eight months of his five-year term. He completed the sentence on November 21, 1959.

[3] "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

assuming only federal immunity is granted, they held that *United States* v. *Murdock,* 284 U. S. 141, settled that the Fifth Amendment does not protect a federal witness from answering questions which might incriminate him under state law. 170 F. Supp., at 595; 273 F. 2d, at 235. Petitioner contends that *Murdock* should be re-examined and overruled. We have no occasion to consider this contention, since in our view § 1406 constitutionally grants immunity from both federal and state prosecutions.

We consider first whether the immunity provided by § 1406 covers state, as well as federal, prosecutions. We have no doubt the section legislates immunity from both. The relevant words of the section have appeared in other immunity statutes and have been construed by this Court to cover both state and federal immunity. In *Adams* v. *Maryland,* 347 U. S. 179, a like provision in 18 U. S. C. § 3486 that the compelled testimony shall not "be used as evidence in *any* criminal proceeding . . . against him in *any* court" was held to cover both federal and state courts. (Emphasis supplied.) The "Language could be no plainer," p. 181. In *Ullmann* v. *United States,* 350 U. S. 422, 434–435, 18 U. S. C. § 3486 (c), added by the Immunity Act of 1954, of which § 1406 is virtually a carbon copy, was given the same construction. Moreover, the adoption of § 1406 followed close upon the *Ullmann* decision. That decision came down on March 26, 1956. Section 1406 was reported out of the House Ways and Means Committee only three months later on June 19, 1956, H. R. Rep. No. 2388, 84th Cong., 2d Sess. It became law on July 18, 1956. 70 Stat. 574. We cannot believe that Congress would have used in § 1406 the very words construed in *Ullmann* to cover both state and federal prosecutions without giving the words the same meaning.

We turn then to the petitioner's argument that, so construed, § 1406 encroaches on the police powers reserved

to the States under the Tenth Amendment. The petitioner recognizes that in *Ullmann* the Court upheld the authority of Congress to grant state immunity as "necessary and proper" to carry out the power to provide for the national defense; and in *Adams* v. *Maryland* upheld the power of Congress to preclude the States from using testimony that was compelled under former § 3486 before a congressional investigating committee. He insists, however, that the congressional authority to enact narcotics laws—rested on the Commerce Clause, *Brolan* v. *United States,* 236 U. S. 216, 218; *Yee Hem* v. *United States,* 268 U. S. 178; or the taxing power, *United States* v. *Doremus,* 249 U. S. 86; *Alston* v. *United States,* 274 U. S. 289; *Nigro* v. *United States,* 276 U. S. 332, 351–354; *United States* v. *Sanchez,* 340 U. S. 42—is not broad enough to encompass the legislation of immunity against state prosecution under state narcotics laws, "a subject that has traditionally been within the police power of the state." But the petitioner misconceives the reach of the principle applied in *Ullmann* and *Adams* v. *Maryland.* Congress may legislate immunity restricting the exercise of state power to the extent necessary and proper for the more effective exercise of a granted power, and distinctions based upon the particular granted power concerned have no support in the Constitution. See *Brown* v. *Walker,* 161 U. S. 591, in which the Court upheld a federal immunity statute passed in the name of the Commerce Clause and construed that statute to apply to state prosecutions. The relevant inquiry here is thus simply whether the legislated state immunity is necessary and proper to the more effective enforcement of the undoubted power to enact the narcotics laws.

It can hardly be questioned that Congress had a rational basis for supposing that the grant of state as well as federal immunity would aid in the detection of violations and hence the more effective enforcement of the narcotics

laws. The Congress has evinced serious and continuing concern over the alarming proportions to which the illicit narcotics traffic has grown. The traffic has far-reaching national and international roots. See S. Rep. No. 1997, 84th Cong., 2d Sess., pp. 3–6. The discovery and apprehension of those engaged in it present particularly difficult problems of law enforcement. The whole array of aids adopted in 1956, of which immunity is but one, was especially designed to "permit enforcement officers to operate more effectively." H. R. Rep. No. 2388, 84th Cong., 2d Sess., p. 10. The grant of both federal and state immunity is appropriate and conducive to that end, and that is enough. Even if the grant of immunity were viewed as not absolutely necessary to the execution of the congressional design, "[T]o undertake here to inquire into the degree of . . . necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground." *McCulloch* v. *Maryland,* 4 Wheat. 316, 423. And the supersession of state prosecution is not the less valid because the States have traditionally regulated the traffic in narcotics, although that fact has troubled one court. See *Tedesco* v. *United States,* 255 F. 2d 35. Madison said, "Interference with the power of the States was no constitutional criterion of the power of Congress. If the power was not given, Congress could not exercise it; if given, they might exercise it, although it should interfere with the laws, or even the Constitution of the States." II Annals of Cong. 1897 (1791). Or as the Court has said concerning federal immunity statutes, ". . . since Congress in the legitimate exercise of its powers enacts 'the supreme Law of the Land,' state courts are bound by [§ 1406], even though it affects their rules of practice." *Adams* v. *Maryland, supra,* p. 183.

The petitioner urges that in any event he should not have been ordered to answer the grand jury's questions

unless he first received a "general pardon or amnesty" covering the unserved portion of his sentence and his fine. This is a surprising contention, in light of the traditional purpose of immunity statutes to protect witnesses only as to the future. It suggests that the witness who has been convicted is entitled to ask more of the Government than the witness who has not but who may be compelled under § 1406 to reveal criminal conduct which, but for the immunity, would subject him to future federal or state prosecution. Yet the petitioner in his brief says that "the ordinary rule is that once a person is convicted of a crime, he no longer has the privilege against self-incrimination as he can no longer be incriminated by his testimony about said crime . . . ." There is indeed weighty authority for that proposition. *United States* v. *Romero,* 249 F. 2d 371; 8 Wigmore, Evidence (3d ed. 1940), § 2279; cf. *Brown* v. *Walker, supra,* 597–600. Under it, immunity, at least from federal prosecution, need not have been offered the petitioner at all.

The petitioner does not argue that remission of his penalty was his due as a *quid pro quo* for further exposing himself to personal disgrace or opprobrium. That reason would not be tenable under *Brown* v. *Walker, supra,* in which the Court rejected the argument that the validity of an immunity statute should depend upon whether it shields "the witness from the personal disgrace or opprobrium attaching to the exposure of his crime." 161 U. S., at 605. Nor does he support his contention with the argument that the prison sentence imposed for disobedience of the order directing him to testify is actually an additional punishment for his crime. His argument is the single one that the "said order was not a proper basis upon which to bottom a contempt proceeding in the face of a claim of privilege against self incrimination *as it did not grant this petitioner immunity coextensive with the*

constitutional privilege it sought to replace . . . ." (Emphasis supplied.) The complete answer to this is that in safeguarding him against future federal and state prosecution "for or on account of any transaction, matter or thing concerning which he is compelled" to testify, the statute grants him immunity fully coextensive with the constitutional privilege. Some language in *Brown* v. *Walker,* 161 U. S., at 601, to which petitioner refers, compares immunity statutes to the traditional declarations of amnesty or pardon. But neither in that opinion nor elsewhere is it suggested that immunity statutes, to escape invalidity under the Fifth Amendment, need do more than protect a witness from future prosecutions. This § 1406 does.

The petitioner complains finally that his sentence is excessive. The District Court sentenced him to two years' imprisonment to commence at the expiration of the sentence he was then serving. However, the court also allowed the petitioner 60 days from the date of the judgment to purge himself of his contempt by appearing within that period before the grand jury and answering the questions. It was further provided that if he did so, "the sentence imposed herein shall be vacated." The District Court took this action because it found in effect that the petitioner asserted his legal position in good faith and was not contumaciously disrespectful of the court's order or obstinately flouting it. 170 F. Supp., at 596. There is no occasion for us to consider the claim of excessiveness of the sentence, or the petitioner's companion claim that the conviction was invalid because the District Court did not advise him of the extent of the immunity conferred by § 1406. We construe the 60-day purge period as running from the effective date of this Court's mandate and the petitioner may avoid imprisonment by answering. Now that this Court has held that his fears of future state

or federal prosecution are groundless, he knows that the only reason he gave for claiming his privilege has no substance. No question of an admixture of civil and criminal contempt having been raised below or here, we do not reach the issues it might present.

Affirmed.

MR. JUSTICE BLACK, with whom THE CHIEF JUSTICE concurs, dissenting.

The Court affirms a conviction for contempt of court upon which petitioner has been sentenced to imprisonment for two years with the provision that he can purge himself of the contempt if he answers the questions propounded to him within 60 days. This is a strange kind of sentence, apparently combining in one judgment the elements of both civil and criminal contempt. This fact alone is sufficient to arouse grave doubts in my mind as to the validity of the judgment, since civil and criminal contempt procedures are quite different and call for the exercise of quite different judicial powers. Moreover, analysis of this judgment makes it clear that it rests upon the notion that petitioner has as yet committed no crime and is being sentenced for civil contempt for the sole purpose of coercing his compliance with the demand for his testimony, but that if he fails to comply with this demand within the specified period, he *will have* committed a criminal contempt. Thus the judgment seems to represent a present adjudication of guilt for a crime to be committed in the future. The fact that the judgment has not been challenged on this specific ground by petitioner does not, in my view, bar our consideration of it. Ordinarily, a judgment invalid on its face can be challenged at any time. I find it unnecessary, however, to reach a definite conclusion on this question

because, even assuming that the judgment is not invalid as a result of its hybrid nature, I still think it should be reversed.

Petitioner contends that the decision of the Court of Appeals should be reversed because the two-year sentence is excessive. That contention is sufficient to bring into issue any ground upon which the length of the sentence may open the decision to attack. Cf. *Boynton* v. *Virginia,* 364 U. S. 454, 457. I think the imposition of a two-year sentence was beyond the District Court's power in the summary proceedings it conducted in this case. In my dissenting opinion in *Green* v. *United States,* 356 U. S. 165, 193, I stated in full the reasons which led me to conclude that where the object of a proceeding is to impose punishment rather than merely to coerce compliance, "there is no justification in history, in necessity, or most important in the Constitution for trying those charged with violating a court's decree in a manner wholly different from those accused of disobeying any other mandate of the state." *Id.,* at 218. I adhere to that view and reiterate my belief that the Court's position rests solely upon the fact that "judges and lawyers have told each other the contrary so often that they have come to accept it as the gospel truth." *Id.,* at 219. Thus, I cannot join a decision upholding a two-year sentence for contempt upon a trial in which the accused has been denied the constitutional protections of indictment by a grand jury and determination of guilt by a petit jury. I regard this case as another ominous step in the incredible transformation and growth of the contempt power and in the consequent erosion of constitutional safeguards to the protection of liberty. I see no reason why petitioner should not have been tried in accordance with the law of the land—including the Bill of Rights—and conclude, therefore, that the case should be reversed for such a trial.

ALLRED ET AL. *v.* HEATON ET AL.

APPEAL FROM THE COURT OF CIVIL APPEALS OF TEXAS, TENTH SUPREME JUDICIAL DISTRICT.

No. 518. Decided December 19, 1960.

Appeal dismissed and certiorari denied.
Reported below: 336 S. W. 2d 251.

John M. Barron for appellants.

Will Wilson, Attorney General of Texas, *Leonard Passmore,* First Assistant Attorney General, and *John Reeves,* Assistant Attorney General, for appellees.

PER CURIAM.

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

MR. JUSTICE DOUGLAS is of the opinion that further consideration of the question of jurisdiction should be postponed to the hearing of the case on the merits.

WESTINGHOUSE BROADCASTING CO. *v.* UNITED STATES ET AL.

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

No. 484. Decided December 19, 1960.

Appeal dismissed.

Reported below: 186 F. Supp. 776.

George B. Turner and *Philip H. Strubing* for appellant.

Solicitor General Rankin, Assistant Attorney General Bicks, Richard A. Solomon and *Bernard M. Hollander* for the United States, and *Bernard G. Segal, Samuel D. Slade, Robert L. Werner* and *Thomas E. Ervin* for Radio Corporation of America and National Broadcasting Co., Inc., appellees.

PER CURIAM.

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

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that probable jurisdiction should be noted.

MR. JUSTICE FRANKFURTER is of the opinion that the motion to affirm should be granted.

ROBERTOY *v.* MICHIGAN.

APPEAL FROM THE SUPREME COURT OF MICHIGAN.

No. 308, Misc. Decided December 19, 1960.

Appeal dismissed since the judgment below is based on a nonfederal ground adequate to support it.

Petitioner *pro se.*

Paul L. Adams, Attorney General of Michigan, and *Samuel J. Torina,* Solicitor General, for respondent.

PER CURIAM.

The appeal is dismissed for the reason that the judgment of the Supreme Court of Michigan, sought here to be reviewed, is based upon a nonfederal ground adequate to support it.

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UNITED STATES *v.* MISSISSIPPI VALLEY GENERATING CO.

CERTIORARI TO THE COURT OF CLAIMS.

No. 26. Argued October 19, 1960.—Decided January 9, 1961.

Respondent sued the United States in the Court of Claims to recover costs and damages incurred under a government-terminated contract to construct and operate a power plant to provide electric power for the Atomic Energy Commission. The Government contended that the contract was unenforceable because it grew out of a proposal resulting from negotiations in which the Government had been represented by an unpaid part-time consultant to the Budget Bureau, who was at the same time an active officer of an investment banking company which was expected to profit from the transaction by becoming financial agent for the project. It was shown that, while acting for the Government, he had also acted for the sponsors of the project by obtaining from his own company estimates of the cost of the financing and that he had stopped acting for the Government (without resigning) shortly before his company was retained by the sponsors as financial agent. *Held:* The consultant violated 18 U. S. C. § 434, and public policy forbids enforcement of the contract. Pp. 523–566.

1. By acting for the Government in a business transaction from which he and his company could be expected eventually to derive a profit, the consultant violated 18 U. S. C. § 434. Pp. 548–562.

(a) The obvious purpose of § 434 is to insure honesty in the Government's business dealings by preventing federal agents who have interests adverse to those of the Government from advancing their own interests at the expense of the public welfare. P. 548.

(b) It is not limited in its application to those in the highest echelons of government service, to those government agents who have only a direct financial interest in the business entities with which they negotiate on behalf of the Government, or to a narrow class of business transactions. P. 549.

(c) It establishes an objective standard of conduct, and whenever a government agent fails to act in accordance with that standard he is guilty of violating the statute, regardless of whether there is actual corruption or any actual loss suffered by the Government. P. 549.

(d) It attempts to prevent honest government agents from succumbing to temptation by making it illegal for them to enter into relationships which are fraught with temptation. Pp. 549–550.

(e) In view of the statute's evident purpose and its comprehensive language, it is clear that Congress intended to establish a rigid rule of conduct to which there are no exceptions. Pp. 549–551.

(f) Since the consultant acted as the Government's key representative in the crucial preliminary negotiations which eventually resulted in this contract, it would be unrealistic to say that he was not the type of "agent" of the United States to whom § 434 was intended to apply. Pp. 551–552.

(g) A different conclusion is not required by the facts that he took no oath of office, had no tenure, served without salary, performed duties which were merely consultative and were not prescribed by statute, and was knowingly permitted to continue in his position and to draw his salary as vice president of his company. Pp. 552–553.

(h) On the record, it cannot be said that his activities did not constitute "the transaction of business" for the Government within the meaning of § 434. Pp. 553–555.

(i) Since there was a reasonable expectation that the consultant's company would be selected as financial agent for the project, he was "indirectly interested in the pecuniary profits or contracts" of the sponsors, within the meaning of § 434. Pp. 555–557.

(j) The statute lays down an absolute standard of conduct which the consultant violated by entering into a relationship which made it difficult for him to represent the Government with the singleness of purpose required by the statute. Pp. 557–559.

(k) The consultant's expectation while acting for the Government that he and his company would benefit from profits to be realized from financing the transaction infected the transaction, and the taint was not removed by the subsequent decision of his company to forego its usual fee. P. 559, n. 17.

(l) Since the consultant had reason to believe that his company would be selected as financial agent if the negotiations resulted in a contract, the absence of a formal agreement to that effect did not prevent his activities from violating § 434. P. 560.

(m) He was not exempted from the coverage of the statute by the fact that his goal of advancing the cause of private power coincided with the Administration's general objective. P. 560.

(n) Even if the consultant did not think that his activities involved any conflict of interest, that is irrelevant. Pp. 560–561.

(o) The knowledge of his superiors in the Budget Bureau and their approval of his activities did not exempt him from the coverage of § 434. P. 561.

(p) The statute is directed at an evil which endangers the very fabric of democratic society, and it is neither unjust nor inequitable to apply it to one who acted as the consultant did in this case. Pp. 561–562.

2. Nonenforcement of this contract is required in order to extend to the public the full protection which Congress decreed by enacting § 434. Pp. 563–566.

(a) The purpose of the statute to protect the public can be fully achieved only if contracts which are tainted by a conflict of interest on the part of a government agent may be disaffirmed by the Government. P. 563.

(b) Nonenforcement of contracts made in violation of § 434 and its predecessor statutes is not a novel remedy but one which has been recognized by the Court of Claims on at least two occasions. P. 564.

(c) The inherent difficulty in detecting corruption lying beneath the surface of a contract conceived in a tainted transaction requires that contracts made in violation of § 434 be held unenforceable, even when the party seeking enforcement may appear to be entirely innocent. Pp. 564–565.

(d) That the conflict of interest here involved was directly caused by high officials of the Budget Bureau does not require enforcement of this illegal contract. Pp. 565–566.

3. Since the Government has received no tangible benefits from respondent, no recovery *quantum valebat* is in order. P. 566, n. 22.

175 F. Supp. 505, reversed.

Solicitor General Rankin argued the cause for the United States. With him on the briefs were *Oscar H. Davis, Howard E. Shapiro* and *Samuel D. Slade.*

John T. Cahill and *William C. Chanler* argued the cause for respondent. With them on the brief was *Robert G. Zeller*.

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

We granted certiorari to review the decision of the Court of Claims because the conflict-of-interest problem presented by this case has a far-reaching significance in the area of public employment and involves fundamental questions relating to the standards of conduct which should govern those who represent the Government in its business dealings.

The person with whose activities we are primarily concerned is one Adolphe H. Wenzell, Vice President and Director of First Boston Corporation,[1] which is one of the major financial institutions in the country. At the suggestion of First Boston's Chairman, and subsequently at the request of the Bureau of the Budget, Wenzell undertook to advise the Government and act on its behalf in negotiations which culminated in a contract between the Government and the Mississippi Valley Generating Company (MVG), the respondent herein. The contract called for the construction and operation by the respondent of a $100,000,000 steam power plant in the Memphis, Tennessee, area. Ultimately, the plant was to supply 600,000 kw. of electrical energy for the use of the Atomic Energy Commission (AEC). Before the plant was constructed, but after the respondent had taken some steps toward performing the contract, the AEC, which was the governmental contracting agency, canceled the contract because the power to be generated by the proposed plant

[1] The positions held by the various individuals named in this opinion are those which were held at the time the transaction in question occurred.

was no longer needed. The respondent then sued the Government in the Court of Claims for the sums it had expended in connection with the contract.

The Government defended on several grounds, but primarily on the ground that the contract was unenforceable due to an illegal conflict of interest on the part of Wenzell. Specifically, the Government contended that at the time of Wenzell's employment by the Government, it was apparent that First Boston was likely to benefit, and as subsequently developed, in fact, did benefit, from the contract here in question; that Wenzell, as an officer of First Boston, was therefore "directly or indirectly" interested in the contract which he, as an agent of the Government, had helped to negotiate; that he consequently had violated the federal conflict-of-interest statute, 18 U. S. C. § 434; [2] and that his illegal conduct tainted the whole transaction and rendered the contract unenforceable.

A sharply divided Court of Claims rejected all of the Government's defenses and awarded damages to the respondent in the sum of $1,867,545.56.[3] 175 F. Supp. 505.

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[2] The statute reads as follows:

"Whoever, being an officer, agent or member of, or directly or indirectly interested in the pecuniary profits or contracts of any corporation, joint-stock company, or association, or of any firm or partnership, or other business entity, is employed or acts as an officer or agent of the United States for the transaction of business with such business entity, shall be fined not more than $2,000 or imprisoned not more than two years, or both."

[3] There were four opinions in the lower court. The principal one was written by Judge Madden of the Court of Claims, and it was joined by Judges Laramore of the Court of Claims and Bryan, United States District Judge sitting by assignment. Judge Bryan also wrote a concurring opinion. MR. JUSTICE REED (retired), sitting by assignment, wrote a dissenting opinion which was joined by Judge Jones, Chief Judge of the Court of Claims. Judge Jones also wrote a separate dissent.

Because of the view which we take of the conflict-of-interest question, it will not be necessary for us to determine the validity of the other defenses raised by the Government in the court below, important though they may be.[4] With regard to the conflict-of-interest defense, there appear to be but two legal principles involved: (1) Did the activities of Wenzell constitute a violation of 18 U. S. C. § 434; and (2) if so, does that fact alone preclude the respondent from enforcing the contract? For reasons which we shall set forth in detail below, we think that the Court of Claims was in error and that both of these questions must be answered in the affirmative.

I.

Because the outcome of this case depends largely upon an evaluation of Wenzell's activities on behalf of the Government, a rather detailed statement of the facts is necessary in order to understand fully the nature of those activities and to place them in their proper context. The voluminous evidence in the case was heard by a trial commissioner. Based upon the commissioner's report and the briefs and arguments of counsel, the Court of Claims made very extensive findings of fact which cover approximately 200 pages in the transcript of record. Fortunately, it will

[4] The other defenses raised by the Government were:

(1) That the AEC had not been authorized by the Atomic Energy Act of 1954 to make the contract;

(2) That the contract had not been placed before the Joint Committee on Atomic Energy in the manner required by the Atomic Energy Act;

(3) That the financing agreements required by the contract violated the Public Utility Act of 1935;

(4) That the respondent had not obtained all of the regulatory approvals required for it to arrange the financing necessary for performance of the contract; and

(5) That the power contract was void for lack of mutuality.

not be necessary for us to consider the original evidence, since both parties have agreed to rely upon the Court of Claims' findings, and since we also conclude that those findings are sufficient to dispose of the issues presented. However, it should be noted that our reliance upon the findings of fact does not preclude us from making an independent determination as to the legal conclusions and inferences which should be drawn from them. See *United States* v. *Du Pont de Nemours & Co.*, 353 U. S. 586, 598; *Great Atl. & Pac. Tea Co.* v. *Supermarket Equip. Corp.*, 340 U. S. 147, 153–154.

First. At the outset, we think it is appropriate to discuss, in a general way, the origin of the contract here in question and the negotiations which led to the ultimate agreement. The story of this contract begins in the early days of 1953. Almost immediately after assuming office, President Eisenhower announced his intention to revise the Government's approach to the public power question. In his first State of the Union Message, delivered on February 2, 1953, the President indicated that it was his intention to encourage either private enterprise or local communities to provide power-generating sources in partnership with the Federal Government. Consonant with this policy, Joseph M. Dodge, Director of the Bureau of the Budget, decided in the fall of 1953 to eliminate from the Tennessee Valley Authority's (TVA) budget for the fiscal year 1955 a request for funds to be used for the construction of a steam-generating plant at Fulton, Tennessee. The proposed TVA plant was to have served the commercial, industrial, and domestic power needs of the City of Memphis and its environs. When Gordon Clapp, the General Manager of TVA, learned of Dodge's decision, he immediately informed persons working in the Bureau of the Budget that if provision for the Fulton plant were eliminated from TVA's budget, TVA would take the

position that the amount of power then being supplied by TVA to the AEC should be reduced so that sufficient power would be available to meet the growing demands of TVA's other customers. As a result of this statement by Clapp, the Bureau of the Budget began drafting a statement for the President's budget message to the effect that steps would be taken to relieve TVA of some of its commitments to the AEC, and that if efforts in that direction proved unsuccessful, the possibility of the construction of a plant by TVA at Fulton would be reconsidered.

On December 2, 1953, Dodge met in his office with Lewis I. Strauss, Chairman of the AEC, and Walter J. Williams, General Manager of the AEC. Dodge said that he hoped to avoid further expenditures by TVA for the construction of power-generating plants, and that he thought the AEC should investigate the possibility of reducing its consumption of TVA-generated power by contracting with private industry for the construction of a plant that would supply 450,000 kw. of additional power for the AEC at its Paducah, Kentucky, installation by 1957. Dodge inquired whether the plan outlined by him would be feasible, and Williams replied that he could not answer the question until he had consulted with J. W. McAfee, the President of Electric Energy, Inc., a private utility company which had previously entered into long-term power contracts with the AEC similar to the one described by Dodge.

After the meeting, Williams arranged to meet with McAfee, and this meeting occurred on December 8, 1953. Williams asked McAfee whether he knew of a private power company that might be interested in building a plant to supply the AEC with as much as 450,000 kw. of generating capacity by the middle of 1957. McAfee stated that it might be difficult for his company to do the

job, but he agreed to make some inquiries about the matter. Later, on December 14, 1953, McAfee wrote a letter to the AEC indicating that he thought a group of private investors could be formed to supply the AEC the amount of power requested. Because of the Budget Bureau's continuing interest in the progress of the plan, a copy of McAfee's letter was requested by and sent to William F. McCandless, Assistant Director for Budget Review in the Bureau.

Sometime prior to December 14, 1953, Edgar H. Dixon, President of Middle South Utilities, learned from McAfee that the AEC might be seeking an additional source of power in the Paducah area. On December 23, 1953, Dixon came to Strauss' office for a meeting with Williams, Strauss, and Kenneth D. Nichols, who had been selected to succeed Williams as General Manager of the AEC. The purpose of the meeting was to discuss the possibility of having private utility companies build additional generating capacity near Paducah for the purpose of relieving TVA of its commitments to the AEC there. Shortly after the meeting had concluded, Williams called McCandless at the Bureau of the Budget to inform him of what had transpired at the meeting. On the next day, December 24, 1953, Rowland Hughes, Assistant Director of the Bureau of the Budget, wrote to Strauss, stating that it would be helpful if the AEC would continue negotiations with private power interests with a view toward reaching a firm agreement for the supply of power to the AEC at Paducah.

On January 4, 1954, McAfee wrote a letter to Williams in which he expressed some doubts about the plan suggested by the Government. He thought that it might be wiser for TVA to reduce its commitments to the numerous municipalities which it supplied with power, or for TVA to arrange with neighboring power companies to buy power from them. Shortly after Williams received this

letter, a meeting was held in Strauss' office, and those present were Strauss, Williams, Nichols, Hughes, and McCandless. Nichols, speaking for the AEC, expressed a certain reluctance to continue the negotiations. He pointed out that if the AEC purchased more power from private utilities in lieu of the power already being supplied by TVA, the cost to the AEC would be greater and the supply less certain because of possible delays in the construction of the plant and the location of reserve power. He also noted that McAfee was apparently no longer eager to enter into the contract; that from an engineering point of view, Paducah was a poor location for the site of the new plant; and that if more power was needed in the Memphis area, it would be better for the City of Memphis or for TVA to enter into a contract with private companies for the construction of a plant at that location. McCandless requested that the AEC pursue the matter at greater length with McAfee.

Pursuant to this request, a meeting was arranged for January 20, 1954, between McAfee and Dixon and representatives of the Budget Bureau and the AEC. At the meeting it was made clear to Dixon and McAfee that the purpose of the power plant was to relieve the pressure on TVA in the Memphis area by reducing its commitments to the AEC. The discussion therefore turned to the possibility of constructing the plant at Memphis rather than at Paducah. Dixon suggested that since the power would be supplied directly to TVA, it might be better for TVA, rather than for the AEC, to act as the contracting agency. However, the government representatives preferred that the AEC contract and pay for the power, even though the actual delivery of power would be made to TVA. It was finally agreed that Dixon would prepare a study of the cost factors pertaining to the construction by his company of a power plant that could supply 450,000 to 600,000 kw. of power in the Memphis area.

When it became apparent that the new plant was to be located at Memphis, McAfee lost interest in the project because the location was far removed from the pool area of the companies in which he was interested. Dixon therefore proceeded on his own to draft an initial proposal. During the period in which Dixon was preparing his proposal, he kept in close contact with several government officials, especially Wenzell. The nature and scope of these associations will be discussed below.

On February 19, 1954, Dixon met with Eugene A. Yates, Chairman of the Board of the Southern Company, a public utility holding company. Dixon's purpose in calling this meeting was to persuade Yates that Southern should join Middle South in building the proposed power plant. The next day Yates notified Hughes at the Bureau of the Budget and Nichols at the AEC that Southern had decided to join in the venture.

On February 25, 1954, Dixon and Yates (hereinafter referred to as the sponsors) submitted their proposal to the AEC. They offered to form a new corporation (MVG) which would finance and construct generating facilities from which 600,000 kw. of electrical power would be delivered to TVA in the Memphis area for the account of the AEC. We do not think it is necessary to relate the details of the proposal. Suffice it to say that after a comprehensive joint analysis by TVA and the AEC, the Government decided that the cost estimates contained in the proposal were too high. In fact, the analysis showed that the proposal would cost over seven million dollars more per year than the proposed TVA plant at Fulton would have cost. At the sponsors' request, another analysis was made by Francis L. Adams, Chief of the Bureau of Power, Federal Power Commission. Adams confirmed the conclusions of the AEC and TVA, and said that the figures in the proposal were much higher than a reasonable estimate of costs to the sponsors should require.

By March 24, 1954, it became apparent to the sponsors that their initial proposal was unacceptable to the Government. Therefore, they worked from March 26 to April 1, 1954, to draft a proposal which would be more agreeable to the Government. This second proposal was ultimately submitted to the AEC on April 12, 1954. An intensive joint analysis was again made by the AEC and TVA. Although the findings of fact do not specifically indicate wherein the second proposal differed from the first, the second proposal was more to the Government's liking, and the analysts suggested that it could be a basis for the negotiation of a final contract. On April 24, 1954, Hughes sent President Eisenhower a memorandum reporting the results of the analysis and recommending that the Budget Bureau be authorized to instruct the AEC to conclude a final agreement. On June 16, 1954, the President authorized AEC to continue negotiations with the sponsors and to attempt to consummate an agreement based generally upon the terms of the second proposal.

The negotiation of the final contract began on July 7, 1954, and concluded with the signing of the contract on November 11, 1954. The Government was represented by a "competent and aggressive staff of negotiators." [5] Although the final contract was slightly different from the second proposal, in a general way, it was within the terms of that proposal. The contract became effective on December 17, 1954.

In June 1955, after the respondent had taken some preliminary steps toward performance of the contract,[6] the

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[5] Any quoted material in the statement of facts is taken from the Court of Claims' findings of fact.

[6] Those steps consisted of undertaking initial action toward financing the project, attempting to obtain the regulatory approvals required under the terms of the contract, taking options on land which was to be the site of the plant, and letting some of the basic construction contracts.

sponsors learned that President Eisenhower had requested the Bureau of the Budget, the AEC and TVA to consider whether the contract should be terminated because in the interim the City of Memphis had decided to construct a municipal power plant, thereby obviating the need in that area for TVA-generated power. On July 11, 1955, the sponsors were informed by the Chairman of the AEC that the President of the United States had decided to terminate the contract. During the months that followed, representatives of the sponsors and of the AEC attempted to agree upon a mutually acceptable basis for terminating the contract. On November 23, 1955, after protracted congressional debate concerning the propriety of Wenzell's activities on behalf of the Budget Bureau, the AEC advised the sponsors that, upon the advice of its counsel, it had reached the conclusion that the contract was not an obligation which could be recognized by the Government. This suit for damages was then initiated.

Second. Having sketched the general background of this litigation, we think it is now appropriate to set forth in some detail a description of Wenzell's connection with the Government and of the role he played in the negotiations, for it is these activities on behalf of the Government, as well as his affiliation with First Boston, which constitute the basis for the Government's assertion of a conflict of interest.

Wenzell's first contact with the Government actually antedates any of the negotiations relating to the contract here in question. However, his earlier association with the Government does have a bearing on the issues with which we are primarily concerned, and we shall therefore advert briefly to that phase of Wenzell's activities. In May 1953, George D. Woods, Chairman of First Boston, met with Dodge at the latter's office in the Bureau of the Budget. Woods expressed his agreement with the Administration's newly announced policy of reducing the

Government's participation in business activities, and he offered the services of himself and his firm in any way that might help to achieve the Administration's objective. Dodge replied that he was interested in having some studies made on the amount of subsidy that TVA was receiving from the Federal Government. Dodge indicated that he had not been able to find the right person to conduct these studies, and he asked Woods if he could suggest someone. Woods replied that First Boston did have a man who had worked on many utility financing transactions and who would be qualified to do the work described by Dodge. The man referred to was Wenzell. Woods promised that he would endeavor to make Wenzell's services available for the special project described by Dodge. At the time, Wenzell was a vice president of First Boston and one of its directors. He had been with the firm since its inception in 1934 and before that with its predecessor since 1923. He owned stock in First Boston, although the stock was in his wife's name.

Upon returning to New York, Woods conferred with Wenzell and with other executives of First Boston. Wenzell indicated his willingness to take the job, and none of the other men consulted had any objection. A meeting between Dodge and Wenzell was therefore arranged for May 15, 1953. At the meeting, it was agreed that Wenzell would serve as a part-time consultant to the Bureau, spending one or two days a week in Washington until the project was completed. Wenzell was to receive no compensation from the Government, but he was to be given $10 per day in lieu of subsistence plus transportation expenses. It was understood that he would neither resign his position with First Boston nor relinquish any part of his regular salary or yearly bonus based on the business which he brought to the firm.

Wenzell's task was to make a financial analysis of TVA for the purpose of estimating the amount and source of the

subsidy given to TVA by the Government. Wenzell began his work for the Bureau on May 20, 1953, and his final report was submitted on September 20, 1953. During his four months with the Government, Wenzell was made privy to a vast quantity of data, much of it confidential, contained in the TVA files. Wenzell's final report was generally favorable toward TVA's technical operations, although it suggested that some of TVA's internal accounting systems should be revised and that its service area should not be expanded. The report also contained many unsolicited recommendations to the effect that future demands for power in areas supplied by TVA should be met by private or municipal power plants rather than by an expansion of TVA's facilities. When the report was delivered to Dodge, he read it briefly and was surprised to see that Wenzell had included in the report these recommendations, which had not been requested. Subsequently, after Wenzell had severed his connection with the Bureau, he showed a copy of his report to Woods, although Dodge had expressly admonished Wenzell that the report was a confidential document and should be shown to no one.

Wenzell's next contact with the Government came in January 1954, shortly after the Bureau had commenced the above-described preliminary negotiations with McAfee and Dixon. At the request of Hughes, Wenzell came to Washington on January 18, 1954, to confer on the possibility of his returning to the Bureau on a part-time basis to assist in the negotiations with Dixon. The decision to call upon Wenzell's talents was made by Dodge and Hughes, for it was thought that Wenzell's knowledge of TVA, based upon the analysis theretofore made by him, and of commercial transactions generally would be of great value during the negotiations. At the meeting, Hughes informed Wenzell of the Government's intention to arrange for the construction of a privately owned

power plant near Memphis. Wenzell was also told about the exploratory negotiations which had taken place in December 1953 between the AEC and McAfee and Dixon. Wenzell's chief responsibility was to act as a consultant in the technical area of interest costs for any financing that would have to be undertaken in connection with the contract. Again, as in 1953, Wenzell was not asked to sever his connection with First Boston, and he did not do so. At the close of the meeting, Wenzell informed Hughes that he knew both Dixon and McAfee and that in 1948, or 1949, he had talked to Dixon in connection with services that First Boston proposed to render to one of Dixon's companies. Hughes asked Wenzell to attend a forthcoming meeting between the AEC and Dixon and McAfee. "Hughes emphasized the need for great speed on the project," and he asked Wenzell "to use such influence as he had with the private utility people to impress upon them the need for prompt action on the matter."

At the request of Hughes, Wenzell went to the AEC on the afternoon of January 18, 1954, to confer with Strauss. Strauss acquainted Wenzell with the purpose of the meeting scheduled for January 20, and impressed upon Wenzell the necessity for prompt action. On the following day, Wenzell called Dixon and told him that he would be present at the January 20 meeting as a representative of the Budget Bureau and that Dixon should not be surprised when he saw Wenzell at the meeting.

As prearranged, Wenzell attended the January 20 meeting, and he was the only representative of the Budget Bureau there. However, he did not come to the meeting unescorted. "On his own volition and without consulting any representative of the . . . [Government] or of First Boston, Wenzell took with him Paul Miller, an assistant in First Boston's buying department." The meeting lasted for several hours and the drift of the discussion has been

described above. At the close of the meeting, Dixon said that he would begin investigating the feasibility of the type of contract desired by the Government, and it was agreed that Wenzell would talk to Tony Seal of Ebasco, an engineering firm which serviced Dixon's projects.

Wenzell returned to New York after the meeting, but, before he left, Hughes "requested Wenzell to stay in touch with Dixon and his associates on the development of a proposal and particularly to help point up the real cost of money to be used in financing the project." On January 21, 1954, Wenzell conferred with Seal. He informed Seal of what had happened in Washington and instructed him to begin a study of the proposed project. Seal met with Wenzell again on January 27, 1954, and the former described his progress on the study he was making. "Wenzell stated that he was at . . . [Seal's] service as a representative of the Bureau of the Budget on the all-important matter of the cost of interest on money that would be borrowed to finance the construction of the plant."

Wenzell went to Washington on February 4, 1954, to inform Hughes of what had transpired at his meetings with Seal. He met Dixon in Washington, and the two men flew to New York together that evening. During the flight, Dixon "asked Wenzell to do him a personal favor and ascertain the opinion of First Boston on what the interest rates in the then current money market would be for financing a project similar to the OVEC project." [7]

[7] OVEC stands for the Ohio Valley Electric Corporation, which is a generating company composed of several private utility companies. In 1952, OVEC had contracted with the AEC to supply it with power at its Portsmouth, Ohio, installation. The Portsmouth project required a large amount of financing, and First Boston had been retained to handle the arrangements. First Boston was still engaged in its Portsmouth undertaking when Wenzell first came to the Bureau of the Budget in 1953.

On February 5, 1954, Wenzell met with other executives of First Boston in an attempt to obtain the information requested by Dixon. After Wenzell thought he had found the answer to Dixon's question, he called Dixon and advised him of the information he had acquired from his colleagues at First Boston. During the week that followed, Wenzell made further studies and engrafted certain refinements onto his calculations. Then, on February 14, 1954, he attended a meeting in Dixon's office and gave Dixon the new figures which he had computed.

After McAfee dropped out of the negotiations because of the proposed site of the new plant, Dixon began to search out support from other quarters. One of those from whom he sought assistance was Yates. Dixon arranged a meeting with Yates on February 19, and he requested Wenzell, who had known Yates for several years, to be present. The meeting occurred as scheduled, and Wenzell was the only representative of the Government present. As indicated, Yates agreed to join the project on February 20, 1954.

During his next trip to Washington on February 23, 1954, Wenzell drafted a letter to Dixon giving his opinion as to the cost of money. The information in this letter conformed to the oral opinion which Wenzell had rendered on February 14, 1954. The letter was on First Boston stationery and was signed by Wenzell as an officer of First Boston. Two days later, on February 25, 1954, the sponsors submitted their first proposal. The proposal contained only one reference to the cost of money, and that paragraph read as follows:

> "We have received assurances from responsible financial specialists expressing the belief that financial arrangements can be consummated on the basis which we have used in making this proposal and under existing market conditions, and our offer is conditioned upon such consummation."

The "responsible financial specialists" upon which the sponsors relied were Wenzell and his colleagues at First Boston, and the cost data upon which they conditioned their proposal was that which was contained in the opinion letter drafted by Wenzell.

Wenzell did not participate in the initial study of the sponsors' proposal, but on March 1, 1954, he attended a Budget Bureau staff meeting which had been called for the purpose of completing the review of the proposal. Wenzell brought with him to this meeting Powell Robinson, an assistant vice president of First Boston's sales department. Wenzell, who by March 1 had completed his function as a consultant on the cost of money, now assumed the role of a consultant on the total cost of the project. His initial reaction was that the cost estimates contained in the first proposal were too high. When it became apparent that Wenzell could not answer all of the technical questions relating to engineering costs, Wenzell decided to call Seal down from New York. Seal arrived on the following day and the meeting was continued. As it turned out, Seal was also unable to answer all the questions asked by staff members, and Hughes was advised that, despite Wenzell's insight into the problem, there still remained areas of uncertainty. It was then suggested by a staff member that a joint AEC–TVA analysis be made. Immediately after Hughes made his decision, Wenzell informed Seal that such an analysis was to be made.

On March 9, 1954, a meeting took place at the Bureau of the Budget. The joint AEC–TVA analysis was discussed, and it was the view of all present that the cost estimates were too high. Wenzell was therefore instructed to inform Seal that the sponsors should try to submit a more acceptable proposal. Wenzell conveyed the information to Seal as requested. On the next day, Wenzell arranged a meeting between Duncan Linsley, the Chairman of First Boston's Executive Committee, and

the sponsors. Dixon had requested the meeting so that he could confirm with a reliable source the cost-of-money information previously given him by Wenzell.

On March 15, Wenzell participated in another Budget Bureau meeting which had been called to discuss the final AEC–TVA analysis. In addition to Wenzell, those present at the meeting were the sponsors and Dodge. The sponsors requested that an independent analysis of the proposal be made, and Wenzell suggested that Francis L. Adams, Chief of the Bureau of Power, Federal Power Commission, be requested to make the analysis. As indicated above, this suggestion was subsequently adopted.

On March 16, 1954, several representatives of the sponsors met in Dixon's hotel room to draft a letter replying to the unfavorable conclusions contained in the AEC–TVA analysis. The evidence does not clearly demonstrate whether or not Wenzell was present at this meeting, but the Court of Claims found that Wenzell saw the letter and made several changes on it for the sponsors in his own handwriting. The letter was never sent to the AEC.

On March 23, 1954, Wenzell met with Adams and conferred with him on the proposal and the analysis which Adams was making. While Adams was preparing his analysis, the sponsors were working on some revised estimates. A meeting was called at the Budget Bureau for April 3, 1954, to discuss both Adams' analysis and the sponsors' new estimates. At the meeting, Wenzell once again confirmed the information he had previously given the sponsors on the cost of money. At the conclusion of the meeting, it was decided that the sponsors should undertake to prepare a new proposal in line with their revised estimates. On the afternoon of April 3, Wenzell saw Nichols of the AEC, who said that the sponsors' most recent estimates might prove acceptable. "He suggested that Wenzell encourage the sponsors to refine their figures."

April 3 was the last time that Wenzell came to Washington in his capacity as a consultant to the Bureau. However, the sponsors consulted him from time to time in the preparation of their second proposal, which was dated April 10, 1954, and was submitted to the AEC on April 12, 1954. Wenzell reconfirmed the information which he had previously given the sponsors on the cost of money, and "[t]his information was relied upon by the sponsors in the drafting of the second proposal." The second proposal, like the first, contained a paragraph indicating that the sponsors relied upon Wenzell's advice and conditioned their offer on that advice.

Wenzell took no part in the final negotiations which led to a formal contract based upon the second proposal. The Court of Claims found that Wenzell terminated his association with the Bureau on April 3, 1954; however, Wenzell felt that his relationship with the Bureau ended on the date of the sponsors' second proposal, April 10, 1954. The findings show that Wenzell received a telephone call from Dixon regarding the second proposal as late as April 10, 1954, and that McCandless and Wenzell also had a telephone conversation on that date. Wenzell never tendered either an oral or written resignation; he merely stopped working on behalf of the Bureau.[8]

Third. The findings of the Court of Claims make it perfectly clear that the conflict-of-interest question in the case arose many months prior to the time at which the

[8] In our rehearsal of the facts, we have necessarily omitted mention of numerous inconsequential meetings and telephone conversations between Wenzell and representatives of the Government and of the sponsors. We make this fact known only to complete the picture and to indicate that Wenzell was continuously involved in the negotiations during his tenure with the Bureau of the Budget. It should also be noted that Hughes was aware of most of Wenzell's activities, both those which we have described and those which we have not mentioned in detail.

Government concluded that the contract was unenforceable. Those who first showed concern about the duality of Wenzell's interests were the sponsors themselves. Around February 20, 1954, Dixon's counsel, Daniel James, expressed apprehension about the fact that Wenzell was an officer of First Boston and was also an employee of the Budget Bureau. "James felt that if it became necessary to finance the project, First Boston would receive first consideration as financial agent because of its experience on the OVEC project. Therefore, James told Dixon that since Wenzell was an officer of First Boston and was also employed by the Budget Bureau, a difficult situation might be created if Dixon should subsequently ask First Boston to handle the financing of the project." James thought that the public power advocates would "make it appear that there was a taint of illegality" attached to the project. As a result of his discussion with James, Dixon later spoke to Wenzell about the "embarrassment" that might result if First Boston were to be retained as financial agent. Dixon suggested that Wenzell talk to his superiors at the Budget Bureau about the situation.

On February 23, 1954, Wenzell followed Dixon's advice and spoke to Hughes about the matter of duality. He alluded to the fact that he had given the sponsors an opinion letter on the probable cost of money for financing the project, and that First Boston was the source of the information given to the sponsors. "He then pointed out to Hughes that if it later developed that First Boston should be asked to handle the financing for the sponsors and should give them a letter similar to Wenzell's draft, the facts that he had been the instrumentality for obtaining the interest figure from First Boston, had given the figure to the sponsors, and had used the same figure in his draft could cause criticism against and embarrassment to the Administration, in that it could be charged

that he, as a First Boston officer and while employed as a special consultant to the Bureau of the Budget, had improperly used his position in the Bureau to obtain business for First Boston." Hughes replied that he thought Wenzell was exaggerating the problem, but he nevertheless advised Wenzell to discuss the matter with his associates at First Boston, with his counsel, and ultimately with Dodge.

Wenzell returned to New York on February 23, 1954, and spoke to James Coggeshall, President of First Boston. Coggeshall thought that the matter was important and suggested that First Boston's counsel, Sullivan and Cromwell, be consulted. Arthur Dean, the partner in the firm who generally handled First Boston's business, was leaving town, and he suggested that Wenzell see John Raben, another member of the law firm. On February 26, 1954, Wenzell met with Raben and described the activities in which he had engaged on behalf of the Budget Bureau. "Raben advised Wenzell that he should terminate his relationship as consultant with the Budget Bureau forthwith and in writing. He also advised that if the proposal was later accepted and First Boston was requested to handle the financing, the board of directors of First Boston should consider whether they wanted to accept the business and, if so, whether they should charge a fee. Finally, he told Wenzell that he should keep Dodge and Hughes informed about any developments in the matter, including any decision which First Boston might later make as to handling the financing of the project." On the same day Raben telephoned Dean, who confirmed the advice which Raben had given Wenzell.

During the days that followed, Wenzell, in conversation, recognized the danger of his dual position, but he did not resign, as he had been advised to do. On one occasion, he was describing his uneasiness to one of his coworkers at the Budget Bureau, and his colleague said

that he thought Wenzell "was 'working both sides of the street' and was likely to get in serious trouble. He suggested that Wenzell's actions were attributable to his lack of familiarity with the restrictions applicable to Government employees as compared with practices in private business." On another occasion in early March 1954, Wenzell told other associates at the Bureau that "he felt that he was in an awkward position in connection with his work on the sponsors' proposal." Then, on March 9, 1954, Wenzell spoke to Dodge about his problem. "Dodge told Wenzell that if there was any likelihood that First Boston might participate in any financing which developed in the future, Wenzell should finish his work with the Bureau as quickly as possible."

In the meantime, both James and Dixon learned that Wenzell had been advised by his counsel to resign immediately. When in early March 1954, James learned that Wenzell had not yet resigned, he asked Hughes why Wenzell had been permitted to continue as a consultant to the Bureau. James expressed the same fears to Hughes that he had earlier expressed to Dixon.

On March 3, 1954, Raben called Wenzell to find out whether the latter had resigned. Wenzell said that he had not resigned, but he assured Raben that he was in the process of doing so. Dean then telephoned Wenzell and told him "to resign promptly and in writing." Dean's concern continued, and on March 10, 1954, he told Raben to call Wenzell again to find out whether he had resigned. Wenzell indicated that he had not as yet resigned, but that he would do so immediately. Consequently, Raben took no further action on the matter. However, as indicated, Wenzell never resigned and did not cease to act for the Bureau until approximately the date on which the second proposal was submitted.

Fourth. The final set of facts with which we are concerned relates to the retention of First Boston as the

financing agent for the project. On April 12, 1954, the day on which the second proposal was submitted to the Government, the sponsors met with numerous executives of First Boston, among whom was Wenzell. The sponsors requested a letter confirming Wenzell's information on interest costs. First Boston was also asked to prepare a memorandum on what it thought would be a proper financial plan for the project. At this meeting, Wenzell had discarded his Budget Bureau hat, and had resumed his role as a First Boston vice president. By the time of the meeting, Wenzell "expected that First Boston would handle the financial arrangements for the sponsors if a contract resulted from" the second proposal.

About the middle of April 1954, an executive at Lehman Brothers, another major investment banking firm, learned of the possibility of a contract between the sponsors and the Government. Lehman Brothers thereupon notified the sponsors that it wished to be considered in connection with the financing of the project. Subsequently, in May 1954, Dixon told Woods that if First Boston was to arrange for the financing, it would probably be a good idea for Lehman Brothers also to be associated with the project. Woods was very cool to the idea of Lehman Brothers' participation, and he indicated that he would have to consult his colleagues about it.

On May 11, 1954, Woods told Dixon that First Boston did not wish to share the financing arrangements with Lehman Brothers, and that it might be better for First Boston to withdraw from the project. However, said Woods, if Dixon did not want Lehman Brothers to handle the financing alone, First Boston would be willing to associate with Lehman Brothers "on the conditions that First Boston would have the dominant position so far as authority was concerned and would also have the senior position with respect to advertising and the division of fees." Woods pointed out that in the financial business senior

position as to advertising was a matter of great importance. He felt that First Boston would achieve great prestige were it to arrange for the financing of the project, and that as a result of its activities, First Boston would probably receive other business of the same kind.

Thereafter, First Boston, having already given Dixon a letter confirming Wenzell's information on interest costs, began to prepare a plan for the debt financing. Although Wenzell was not directly responsible for the preparation of the plan, he did assist those who were drafting it. At a meeting on May 18, 1954, the final draft plan for the financing of the project was discussed by the sponsors, First Boston, and Lehman Brothers. The plan called for the direct placement of up to $93,000,000 worth of bonds and up to $27,000,000 worth of unsecured notes. The plan was approved, and it was also decided "that the fee for the financial agents would be divided on the basis of 60 percent to First Boston and 40 percent to Lehman Brothers and that First Boston would have the preferred position on any advertising."

Since no formal agreement of retainer was ever signed, it is difficult to pinpoint the date on which First Boston was actually retained. However, Dixon believed that First Boston had been retained on April 12, when it had been asked to prepare an opinion letter and a memorandum on procedures to be used in financing the project.

Some time in late May 1954, Woods decided that it would be better for First Boston not to charge a fee for its services. The executive committee of First Boston tentatively decided not to accept a fee on July 1, 1954, and that position was formally adopted on October 21, 1954. "The decision not to charge a fee was based on Woods' conclusions that the financing, which First Boston had been retained to handle, had flowed directly from the conversation which Woods had had with Dodge in May 1953, when Woods had offered Wenzell's services to the Budget

Bureau to assist the Administration in connection with its power policy, and that First Boston should not charge a fee for assistance in obtaining funds that were designed to obviate the necessity of Federal expenditures for the expansion of TVA."

As of February 18, 1955, First Boston had made no formal announcement of its decision not to charge a fee; nor had it notified the Government concerning the decision. On that date, Senator Lister Hill of Alabama made a speech criticizing the activities of Wenzell and First Boston and emphasizing Wenzell's conflict of interest.[9] On the next day, Woods released a statement to the press indicating that neither Wenzell nor First Boston had received or would receive any fee for the services rendered in connection with the project. Lehman Brothers had previously indicated that it thought some fee should be charged, and when Woods released the press statement, representatives of Lehman Brothers were upset because they had not been consulted first. Although Dixon had heard that First Boston was contemplating not charging a fee, he did not understand that a final decision on that subject had been made. Even as late as May 5, 1955, Dixon told First Boston that he anticipated questions from the SEC regarding First Boston's fee, and he requested that First Boston give him a clear statement on the matter. In response to this request, First Boston gave Dixon a letter indicating that it would take no fee for the financing services to be rendered in connection with the project. "Dixon was surprised by First Boston's decision not to accept a fee for its services as financial agent. The decision was unusual and without precedent in the history of First Boston." Finally, on May 11, 1955, Lehman Brothers decided that, in view of First Boston's decision, it would also agree not to charge a fee.

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[9] 101 Cong. Rec. 1714.

Despite the fact that Wenzell had earlier promised to inform Dodge of any agreements between First Boston and the sponsors and to submit those agreements to the Budget Bureau for approval, and despite the fact that First Boston's counsel had advised Wenzell to inform the Budget Bureau of any such agreements, neither Wenzell nor anyone connected with First Boston informed the Budget Bureau of First Boston's retention by the sponsors. The Bureau of the Budget did not learn of First Boston's retention until February 18, 1955. The AEC was informed on July 7, 1954, that First Boston and Lehman Brothers were acting as financial agents for the sponsors. However, "there is no evidence that any representative of AEC had knowledge up to . . . [December 1954] that Wenzell, while serving as a consultant to the Budget Bureau, had been meeting with and supplying information to the sponsors regarding the project."

II.

As is apparent from a recitation of the facts, this case touches upon numerous matters with which we are not concerned. Therefore, at the outset, we think it is important not only to delineate the issues upon which our decision turns, but also to specify those collateral issues which are not pertinent to our decision. As already indicated, we are interested only in whether Wenzell's executive position with First Boston and his simultaneous activities on behalf of the Government constituted an illegal conflict of interest; and if so, whether the conflict of interest rendered the contract unenforceable. In reaching our decision on these questions, we do not consider and have no interest in the following matters:

(1) The policy of the Administration concerning the relative merits of public versus private power development;

(2) The desire of the respondent and Wenzell and his corporate associates to advance the policies of the Administration;

(3) The employment of so-called "dollar-a-year" men, such as Wenzell, to advise the Government in matters of business, industry, labor, and the sciences; and

(4) The reasonableness or unreasonableness of the contract ultimately negotiated, that not being an issue in the case, and there being no burden on the Government to establish financial loss.

First. In determining whether Wenzell's activities fall within the proscription of Section 434, we think it is appropriate to focus our attention initially on the origin, purpose, and scope of the statute. Section 434 is one of several penal conflict-of-interest statutes which were designed to prohibit government officials from engaging in conduct that might be inimical to the best interests of the general public.[10] It is a restatement of a statute adopted in 1863 following the disclosure by a House Committee of scandalous corruption on the part of government agents whose job it was to procure war materials for the Union armies during the Civil War.[11] The statute has since been re-enacted on several occasions,[12] and the broad prohibition contained in the original statute has been retained throughout the years.

The obvious purpose of the statute is to insure honesty in the Government's business dealings by preventing federal agents who have interests adverse to those of the Government from advancing their own interests at the expense of the public welfare. *United States* v. *Chemical*

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[10] The other statutes are 18 U. S. C. §§ 216, 281, 283, 284, 1914.

[11] Act of March 2, 1863, c. 67, § 8, 12 Stat. 696, 698. See H. R. Rep. No. 2, 37th Cong., 2d Sess., Government Contracts and Appendix.

[12] R. S. § 1783; Act of March 4, 1909, c. 321, § 41, 35 Stat. 1097; Act of June 25, 1948, 62 Stat. 703.

Foundation, 272 U. S. 1, 18. The moral principle upon which the statute is based has its foundation in the Biblical admonition that no man may serve two masters, Matt. 6:24, a maxim which is especially pertinent if one of the masters happens to be economic self-interest. Consonant with this salutary moral purpose, Congress has drafted a statute which speaks in very comprehensive terms. Section 434 is not limited in its application to those in the highest echelons of government service, or to those government agents who have only a direct financial interest in the business entities with which they negotiate on behalf of the Government, or to a narrow class of business transactions. Nor is the statute's scope restricted by numerous provisos and exceptions, as is true of many penal statutes.[13] Rather, it applies, without exception, to "whoever" is "directly or indirectly interested in the pecuniary profits or contracts" of a business entity with which he transacts any business "as an officer or agent of the United States."

It is also significant, we think, that the statute does not specify as elements of the crime that there be actual corruption or that there be any actual loss suffered by the Government as a result of the defendant's conflict of interest. This omission indicates that the statute establishes an objective standard of conduct, and that whenever a government agent fails to act in accordance with that standard, he is guilty of violating the statute, regardless of whether there is positive corruption. The statute is thus directed not only at dishonor, but also at conduct that tempts dishonor. This broad proscription embodies a recognition of the fact that an impairment of impartial judgment can occur in even the most well-meaning men when their personal economic interests are affected by the business they transact on behalf of the Government. To

[13] See, *e. g.*, 18 U. S. C. §§ 431–433; 15 U. S. C. §§ 1, 13, 13c.

this extent, therefore, the statute is more concerned with what might have happened in a given situation than with what actually happened. It attempts to prevent honest government agents from succumbing to temptation by making it illegal for them to enter into relationships which are fraught with temptation.[14] *Rankin* v. *United States,* 98 Ct. Cl. 357.

While recognizing that the statute speaks in broad, absolute terms, the respondent argues that to interpret the statute as laying down a prophylactic rule which ignores the actual consequences of proscribed action would be a violation of the time-honored canon that penal statutes are to be narrowly construed. But even penal statutes must be "given their fair meaning in accord with the evident intent of Congress." *United States* v. *Raynor,* 302 U. S. 540, 552; *Rainwater* v. *United States,* 356 U. S. 590, 593; *United States* v. *Corbett,* 215 U. S. 233, 242. In view of the statute's evident purpose and its com-

[14] The preventive nature of conflict-of-interest statutes was ably described by the Court of Claims in *Michigan Steel Box Co.* v. *United States,* 49 Ct. Cl. 421, 439:

"The reason of the rule inhibiting a party who occupies confidential and fiduciary relations toward another from assuming antagonistic positions to his principal in matters involving the subject matter of the trust is sometimes said to rest in a sound public policy, but it also is justified in a recognition of the authoritative declaration that no man can serve two masters; and considering that human nature must be dealt with, the rule does not stop with actual violations of such trust relations, but includes within its purpose the removal of any temptation to violate them. . . ."

We have taken a similar view of the evils which flow from contingent fee arrangements for obtaining government contracts. In *Hazelton* v. *Sheckells,* 202 U. S. 71, 79, we said: "The objection to them rests in their tendency, not in what was done in the particular case. . . . The court will not inquire what was done. If that should be improper it probably would be hidden and would not appear." See also *Oscanyan* v. *Arms Co.,* 103 U. S. 261, 275; *Tool Co.* v. *Norris,* 2 Wall. 45, 55.

prehensive language, we are convinced that Congress intended to establish a rigid rule of conduct which, as we shall now demonstrate by analyzing each of the elements of the statutory prohibition, was violated by Wenzell.

The first question is whether Wenzell acted as an "officer or agent of the United States for the transaction of business." Judged by any reasonable test, the facts which we have recited above demonstrate that he was the Government's key representative in the crucial preliminary negotiations between the Government and the sponsors. Because Wenzell was a business acquaintance of both Dixon and Yates, Hughes very early in the negotiations assigned Wenzell the task of using "such influence as he had with the private utility people to impress upon them the need for prompt action." In the weeks that followed, Wenzell kept in constant touch with the sponsors, and frequently was the only representative of the Government at important meetings concerning the project. He participated in intragovernmental analyses; he supplied the sponsors with vital information on the cost of money, and that information was subsequently made the basis for the sponsors' proposals; he urged the sponsors to refine their figures after the initial proposal was rejected; and he was used by the Budget Bureau not only as a consultant on the cost of money, but also as an advisor on the total cost of the project. In fact, Wenzell's activities were so extensive that the Court of Claims was led to the conclusion that "Hughes really used Wenzell as an expediter. . . . He [Wenzell], no doubt, was able to give to Hughes a better overall view of events than any other person, and did, we should suppose, expedite the formulation of the proposal which formed the basis for the later negotiation of details and exact figures." 175 F. Supp., at 514. Considering that Wenzell was the Government's major representative in the formative negotiations of this multimillion dollar contract, we think it

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would be unrealistic to say that he was not the type of "agent" to whom Section 434 was intended to apply.

The respondent suggests that Wenzell was not an "agent of the United States" because "[h]e took no oath of office; he had no tenure; he served without salary, except for $10 per day in lieu of subsistence; his duties were merely consultative, were occasional and temporary and were not prescribed by statute; and he was permitted to continue in his position as one of the vice presidents and directors of First Boston and to draw his salary from that company." But surely, these factors cannot be determinative of the question. A key representative of the Government who has taken no oath of office, who has no tenure, and who receives no salary is just as likely to subordinate the Government's interest to his own as is a regular, full-time, compensated civil servant. This is undoubtedly why the statute applies not only to those who are "employed" by the Government, but also to "[w]hoever . . . acts" as an agent for the Government.[15] In addition, we think that the respondent ignores the relevant facts when it characterizes Wenzell's activities as merely "occasional and temporary." During his association with the Budget Bureau, Wenzell, as we have indicated, was as active a participant in the negotiations as anyone connected with the project. We do not think it would be erroneous to characterize him as the real architect of the final contract. Finally, respondent's reliance upon the fact that Wenzell retained his position with First Boston is misplaced. The key role which Wenzell played in representing the Government was in no way diminished by the fact that he retained his association with First Boston during his period of consultancy. It was Wenzell's position with

[15] Irregular employees of the Government, whether compensated or not, have always been considered by the Executive Branch to be subject to the conflict-of-interest statutes. See, *e. g.*, 40 Op. Atty. Gen. 168, 289, 294; 41 Op. Atty. Gen. No. 64.

First Boston which constituted the basis for his conflict of interest, and it would truly be anomalous if we were to adopt the respondent's suggestion that the very fact which creates the conflict of interest also operates to remove Wenzell from the coverage of the statute. This would ignore the purpose of the statute.

The respondent also contends that even if Wenzell qualified as an "agent" of the Government, his activities did not constitute "the transaction of business." We disagree. Although it is true that Wenzell had no authority to sign a binding contract, and that he did not participate in the terminal negotiations which led to the final agreement, nevertheless, those facts do not support the respondent's conclusion that the negotiations in which Wenzell participated were too remote and tenuous to be considered "the transaction of business." Far from being tenuous, the negotiations in which he participated were the very foundation upon which the final contract was based. As the findings of the Court of Claims demonstrate, the preliminary negotiations with which Wenzell was concerned dealt primarily with the cost of the project, and particularly with the "all-important matter of the cost of interest on money that would be borrowed to finance the construction of the plant." If the sponsors and the Government had not agreed on the cost of construction and on the cost of money, no contract would have been made, because the cost of power supplied to the AEC was to have been based upon both of those factors. As the Court of Claims found: "It was well known that the cost of money played an important part in the cost of the entire project and in the price at which the energy could be produced and sold. . . . It was always contemplated that the cost of money would be reflected in the capacity charge to the Government, and . . . the cost of money is the largest component of cost included in the capacity charge." The importance of the negotiations between Wenzell and the

sponsors is emphasized by the fact that both the first and second proposals were conditioned upon the sponsors' being able to borrow money at the interest rate specified by Wenzell and First Boston. Although Wenzell did not participate in the ultimate negotiations, those negotiations cannot be divorced from the events which led up to the submission of the second proposal. The final contract was not negotiated in a vacuum. The second proposal, upon which Wenzell had expended so much time and energy, constituted both the framework and the guidelines of the final contract. And although "there were numerous changes in and additions to the terms set forth in the proposal," the Court of Claims specifically found that "[i]n a general way, the contract was within the terms of the proposal."

We therefore think that the respondent unrealistically assesses the facts when it characterizes the negotiations which led to the contract as a series of disconnected transactions. On the contrary, they were a continuous course of dealings which were closely interrelated and interconnected. Wenzell played a key role in the early stages of the negotiations, and it was quite likely that the contract would never have come into fruition had he not participated on behalf of the Government. The Court of Claims recognized the importance of the preliminary negotiations and of Wenzell's activities during those negotiations. It said that "[w]hile the contract itself contained nothing of Wenzell's work, the fact that it was made at all may have been a result of his work." 175 F. Supp., at 514. If the activities of a government agent have as decisive an effect upon the outcome of a transaction as Wenzell's activities were said by the Court of Claims to have had in this case, then a refusal to characterize those activities as part of a business transaction merely because they occurred at an early stage of the negotiations is at war with the obvious purpose of the statute. To limit the application of the

statute to government agents who participate only in the final formation of a contract would permit those who have a conflict of interest to engage in the preliminary, but often crucial stages of the transaction, and then to insulate themselves from prosecution under Section 434 by withdrawing from the negotiations at the final, and often perfunctory stage of the proceedings. Congress could not possibly have intended such an obvious evasion of the statute.

The second question which we must consider in determining whether Wenzell's activities fell within the scope of the statute is whether he was "directly or indirectly interested in the pecuniary profits or contracts" of the sponsors. We think that the findings of the lower court demonstrate that, at the very least, Wenzell had an indirect interest in the contract which the sponsors were attempting to obtain. That interest may be described as follows: Wenzell was an officer and executive of First Boston; he not only shared in the profits which First Boston made during the year, but he also received a bonus for any business which he brought to the firm; if a contract between the Government and the sponsors was ultimately agreed upon, there was a substantial probability that, because of its prior experience in the area of private power financing, First Boston would be hired to secure the financing for the proposed Memphis project; if First Boston did receive the contract, it might not only profit directly from that contract, but it would also achieve great prestige and would thereby be likely to receive other business of the same kind in the future; therefore, Wenzell, as an officer and profit-sharer of First Boston, could expect to benefit from any agreement that might be made between the Government and the sponsors.

The respondent urges that Wenzell had no interest because First Boston had no more than a mere hope that it might receive the financing work were the negotiations

in which Wenzell participated to culminate in a contract. However, the findings of fact and the conclusions of the Court of Claims belie the respondent's assertion. First Boston had arranged the financing on the OVEC project and had acquired a reputation in the area of private power financing. Wenzell had also acquired a certain expertise in this area by virtue of his previous work for the Budget Bureau in preparing the TVA analysis. It was therefore probable that First Boston's services would again be utilized should the sponsors obtain a contract to construct a project similar to OVEC. That this expectation was not baseless is demonstrated by the fact that as early as February 20, 1954, Dixon's counsel expressed apprehension about Wenzell's duality since it seemed likely that First Boston would receive the financing contract. Even Wenzell must have thought very early in the negotiations that First Boston would probably be retained to do the financing, for on February 23, 1954, he told Hughes that should First Boston be retained, he might be criticized for having "improperly used his position in the Bureau to obtain business for First Boston." Wenzell's apprehension was confirmed by First Boston's counsel, who advised Wenzell to resign from the Bureau of the Budget "forthwith and in writing." This advice was undoubtedly premised on the realization that First Boston stood a good chance of receiving the financing contract. The Court of Claims recognized that from the outset there was a "substantial possibility" that First Boston would be retained. It said:

> "There was, of course, a substantial possibility that if the Administration's hope that private capital would build the necessary plant should be realized, First Boston, as one of the largest and most experienced firms engaged in arranging the financing of such

> enterprises, might be employed by the company which got the contract." 175 F. Supp., at 514.
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> . . . . .
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> "He [Wenzell] had an interest in First Boston which company, *by the logic of circumstances,* might be offered the work of arranging the financing of the project when and if a contract for the project should be made." 175 F. Supp., at 515. (Emphasis added.)

It was the "logic of circumstances" referred to by the Court of Claims that placed Wenzell in the ambivalent position at which the statute is aimed. Wenzell, as an agent of the Government, was entrusted with the responsibility of representing the Government's interest in the preliminary stages of a very important contract negotiation. However, because the sponsors were in a position to affect the fortunes of himself and his firm, he was, to say the least, subconsciously tempted to ingratiate himself with the sponsors and to accede to their demands, even though such concessions might have been adverse to the best interests of the Government. By thus placing himself in this ambiguous situation, Wenzell failed to honor the objective standard of conduct which the statute prescribes.

The respondent suggests that Wenzell was never really subject to any temptations because he was not in a position whereby he could have sacrificed any of the Government's interests. Once again, however, the respondent takes an unrealistic view of the facts. We have already described how important a role Wenzell played in this transaction. In fulfilling that role, Wenzell, on numerous occasions, could have taken action that would have favored the sponsors to the detriment of the Government. For example, he could have concurred too easily with the sponsors as to specific items of the proposals or of the cost estimates; or

he could have failed to press the Government's position on items of cost vigorously enough; or he could have suggested acceptance by the Government of a proposal which, for one reason or another, should not have been approved. However, we need not deal exclusively in the realm of conjecture. The findings of the Court of Claims disclose numerous instances in which Wenzell seemed to be more preoccupied with advancing the position of First Boston or the sponsors than with representing the best interests of the Government. For example, after the joint TVA–AEC analysis was made available, Wenzell helped draft a letter which the sponsors planned to submit to the Government as a rebuttal to the unfavorable conclusions contained in the analysis. We should think that one who represented the Government would be more interested in defending the Government's position than in helping the sponsors to attack it. On another occasion, Wenzell performed a "personal favor" for Dixon by obtaining some information on the cost of money from his associates at First Boston. As it later turned out, this information was to constitute the framework around which the sponsors constructed their proposal. By submitting the information to Dixon on the stationery of First Boston, and by subsequently arranging a meeting between the sponsors and some officers of First Boston so that the information could be confirmed, Wenzell was able constantly to keep First Boston in the forefront of the picture.[16] It is therefore not surprising either that the sponsors did choose First Boston to conduct the major part of the financing, or that Woods, the Chairman of First Boston, subsequently thought that "the financing, which First Boston had been retained to handle, had flowed directly from the conversa-

[16] That Wenzell, on at least two occasions, brought senior officers from First Boston with him to negotiating sessions is further evidence of the fact that Wenzell frequently attempted to place First Boston in a position of predominance.

tion which Woods had had with Dodge in May 1953, when Woods had offered Wenzell's services to the Budget Bureau to assist the Administration in connection with its power policy." That Wenzell's primary allegiance was to First Boston and that his loyalty to the Government was a fleeting one is shown by the fact that after he had finished his report on TVA in 1953, he showed a copy of that confidential document to Woods, even though he had been expressly told by Dodge to show the report to no one; and by the further fact that when First Boston agreed to do the financing, Wenzell did not keep his promise to Dodge to inform the Budget Bureau of any arrangement between First Boston and the sponsors and to submit that arrangement to the Bureau for approval. It may be true, as the respondent asserts, that none of Wenzell's activities to which we have alluded adversely affected the Government in any way. However, that question is irrelevant to a consideration of whether or not Wenzell violated the statute. As we have indicated, the statute is preventive in nature; it lays down an absolute standard of conduct which Wenzell violated by entering into a relationship which made it difficult for him to represent the Government with the singleness of purpose required by the statute.[17]

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[17] The fact that First Boston subsequently decided not to accept a fee is irrelevant to a determination of whether Wenzell violated the statute. First Boston's decision was not reached until many months after Wenzell had terminated his connection with the Bureau of the Budget. At the time Wenzell represented the Government, which is the period crucial to our determination, First Boston fully expected to accept a fee for services which it might render, and Wenzell had every reason to expect that he would benefit from any profits that First Boston might make. It was this expectation that infected the transaction, and the taint cannot be removed by a subsequent, unilateral decision on the part of First Boston to forego its fee.

Finally, some mention must be made of certain factors which the Court of Claims cited in reaching the conclusion that Wenzell had not violated the statute. First, both the court below and the respondent intimate that Wenzell could not have expected to benefit from the contract because there was no formal contract or understanding between First Boston and the sponsors to the effect that First Boston would be retained should the sponsors enter into an agreement with the Government. However, we do not think that the absence of such a formal agreement or understanding is determinative. The question is not whether Wenzell was certain to benefit from the contract, but whether the likelihood that he might benefit was so great that he would be subject to those temptations which the statute seeks to avoid. That there was more than a mere likelihood in this case has already been shown. Second, the Court of Claims stressed the fact that Wenzell's goal of advancing the cause of private power coincided with the Administration's general objective. However, that fact cannot serve to exempt Wenzell from the coverage of the statute. In fact, the more evidence an agent gives of agreement with the policies of the Administration, the more responsibility he is likely to be given, and in case of a conflict of interest, the greater is the possible injury to the Government. Third, the Court of Claims relied strongly on the fact that Wenzell did not think that he was involved in a conflict-of-interest situation. How Wenzell could have thought otherwise following the admonitions of both Dixon's counsel and First Boston's counsel and his own statements in that regard is difficult to understand. However, even assuming that Wenzell did not think there was a conflict, that fact is irrelevant. As we have shown, the statute establishes an objective, not a subjective, standard, and it is therefore of little moment whether the agent thought he was

violating the statute, if the objective facts show that there was a conflict of interest. Finally, both the Court of Claims and the respondent make much of the fact that Wenzell's immediate superiors in the Bureau of the Budget knew of his activities and of his interest in First Boston. True as this fact is, it is significant, we think, that no one in the AEC, which was the governmental contracting agency, and which had expressed reluctance about the contract throughout the negotiations, had knowledge until December 1954 that "Wenzell, while serving as a consultant to the Budget Bureau, had been meeting with and supplying information to the sponsors regarding the project." In any event, the knowledge of Wenzell's superiors and their approval of his activities do not suffice to exempt Wenzell from the coverage of the statute. Neither Section 434 nor any other statute empowered his superiors to exempt him from the statute, and we are convinced that it would be contrary to the purpose of the statute for this Court to bestow such a power upon those whom Congress has not seen fit to so authorize. Congress undoubtedly had a very specific reason for not conferring such a power upon high-level administrators. It recognized that an agent's superiors may not appreciate the nature of the agent's conflict, or that the superiors might, in fact, share the agent's conflict of interest. The prohibition was therefore designed to protect the United States, as a Government, from the mistakes, as well as the connivance, of its own officers and agents. It is not surprising therefore that we have consistently held that no government agent can properly claim exemption from a conflict-of-interest statute simply because his superiors did not discern the conflict. *Ewert* v. *Bluejacket,* 259 U. S. 129; *Prosser* v. *Finn,* 208 U. S. 67.

The thrust of the arguments made by the respondent and adopted by the Court of Claims is that it would be

unjust to apply the statute to one who acted as Wenzell did in this case. We cannot agree. The statute is directed at an evil which endangers the very fabric of a democratic society, for a democracy is effective only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption. The seriousness of this evil quite naturally led Congress to adopt a statute whose breadth would be sufficient to cope with the evil. Against this background, it seems clear to us that Wenzell's duality, which aroused the fears of his own counsel and the suspicions of many observers, was the very type of conflict at which the statute is aimed. That Wenzell was aware of his dual position early in the negotiations; that he was advised by his own counsel to resign "forthwith and in writing"; that he did not terminate his association with the Budget Bureau until the final proposal had been submitted; that he never formally resigned his position with the Bureau, as he had been advised to do; and that his activities fall within the literal meaning of the statute have all been demonstrated. In the light of these circumstances, we think that the respondent's reliance upon the so-called equitable considerations in Wenzell's favor is misplaced.

Because of the respondent's assertion that an application of the statute to Wenzell will make it impossible in the future for the Government to obtain the services of private consultants on a part-time basis, we emphasize that our specific holding, on the facts before us, is that Section 434 forbids a government agent from engaging in business transactions on behalf of the Government if, by virtue of his private interests, he may benefit financially from the outcome of those transactions.

Second. Having determined that Wenzell's activities constituted a violation of Section 434, we must next consider whether Wenzell's illegal conduct renders the contract unenforceable. It is true that Section 434 does not specifically provide for the invalidation of contracts which are made in violation of the statutory prohibition. However, that fact is not determinative of the question, for a statute frequently implies that a contract is not to be enforced when it arises out of circumstances that would lead enforcement to offend the essential purpose of the enactment. *E. g., Miller* v. *Ammon,* 145 U. S. 421; *Bank of the United States* v. *Owens,* 2 Pet. 527; 6 Williston, Contracts (rev. ed. 1938), § 1763. Therefore, the inquiry must be whether the sanction of nonenforcement is consistent with and essential to effectuating the public policy embodied in Section 434.

As we have indicated, the primary purpose of the statute is to protect the public from the corrupting influences that might be brought to bear upon government agents who are financially interested in the business transactions which they are conducting on behalf of the Government. This protection can be fully accorded only if contracts which are tainted by a conflict of interest on the part of a government agent may be disaffirmed by the Government. If the Government's sole remedy in a case such as that now before us is merely a criminal prosecution against its agent, as the respondent suggests, then the public will be forced to bear the burden of complying with the very sort of contract which the statute sought to prevent. Were we to decree the enforcement of such a contract, we would be affirmatively sanctioning the type of infected bargain which the statute outlaws and we would be depriving the public of the protection which Congress has conferred.

Nonenforcement of contracts made in violation of Section 434 and its predecessor statutes is not a novel remedy. On at least two occasions the Court of Claims has held that the Government could disaffirm contractual obligations arising from transactions which were prohibited by the statutory antecedent to Section 434. *Rankin* v. *United States, supra; Curved Electrotype Plate Co.* v. *United States,* 50 Ct. Cl. 258. See also *Michigan Steel Box Co.* v. *United States,* 49 Ct. Cl. 421. In reaching its decision in this case, the Court of Claims appears to have abandoned these precedents, and instead placed great reliance upon our decision in *Muschany* v. *United States,* 324 U. S. 49. However, we find no difficulty in distinguishing that case from the instant situation. The *Muschany* case involved a government land agent whose activities not only were authorized by the National Defense Act of 1940, 54 Stat. 712, but also were found by the Court to be outside the purview of the conflict-of-interest statutes. Therefore, unlike this case, *Muschany* did not involve a contract which resulted from an illegal transaction, and it is consequently understandable that the contract there in question was enforced.[18]

The Court of Claims was of the opinion that it would be overly harsh not to enforce this contract, since the sponsors could not have controlled Wenzell's activities and were guilty of no wrongdoing. However, we think that the court emphasized the wrong considerations. Although nonenforcement frequently has the effect of

[18] The other cases relied upon by the respondent, *United States* v. *Chemical Foundation,* 272 U. S. 1; *Architects Building Corp.* v. *United States,* 98 Ct. Cl. 368, are also distinguishable on the ground that the activities of the government agents there involved were found by the courts not to constitute a violation of any conflict-of-interest statute. Therefore, since the contracts in those cases had not emanated from an illegal transaction, they were enforced.

punishing one who has broken the law, its primary purpose is to guarantee the integrity of the federal contracting process and to protect the public from the corruption which might lie undetectable beneath the surface of a contract conceived in a tainted transaction. Cf. *Crocker* v. *United States,* 240 U. S. 74, 80–81. It is this inherent difficulty in detecting corruption which requires that contracts made in violation of Section 434 be held unenforceable, even though the party seeking enforcement ostensibly appears entirely innocent. Cf. *Hazelton* v. *Sheckells,* 202 U. S. 71, 79. Therefore, even if the result in a given case may seem harsh, and we do not think that such is the case here,[19] that result is dictated by the public policy manifested by the statute. We agree with Judge Jones' statement that "the policy so clearly expressed in 18 U. S. C. 434 leaves no room for equitable considerations. . . . If that policy is to be narrowed or limited by exceptions, it is the function of Congress and not of this court to spell out such limitations and exceptions." 175 F. Supp., at 533 (dissenting opinion).

In concluding that the sponsors were entitled to enforce their contract, the court below expressed the opinion that the Government may not avoid a bad bargain by relying upon a conflict of interest which was directly caused by high officials in the Bureau of the Budget. Of course, the

[19] We do not think that the result in this case is harsh because the sponsors were not as naive regarding the conflict-of-interest question as the Court of Claims implied. They recognized Wenzell's conflict of interest almost from the outset of the negotiations. However, instead of refusing to negotiate with Wenzell or of making it clear both to Wenzell and to all the other interested parties that if Wenzell participated in the negotiations, First Boston would under no circumstances be considered as the financing agent for the project, the sponsors dealt almost exclusively with Wenzell and continually fortified his belief that First Boston would be selected as the financing agent should a contract result from the negotiations.

Government could not avoid the contract merely because it turned out to be a bad bargain.[20] See *Muschany* v. *United States, supra,* at 66–67. However, that is not the issue before us. The question is whether the Government may disaffirm a contract which is infected by an illegal conflict of interest. As we have indicated, the public policy embodied in Section 434 requires nonenforcement, and this is true even though the conflict of interest was caused or condoned by high government officials. The same strong policy which prevents an administrative official from exempting his subordinates from the coverage of the statute also dictates that the actions of such an official not be construed as requiring enforcement of an illegal contract.[21]

Although nonenforcement may seem harsh in a given case, we think that it is required in order to extend to the public the full protection which Congress decreed by enacting Section 434.[22]

The judgment of the Court of Claims is reversed and the case is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

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[20] There is nothing in the findings to show whether the contract here involved was favorable or unfavorable to the Government.

[21] It should be remembered that the contracting agency, the AEC, had virtually no knowledge of the activities which Wenzell was conducting on behalf of the sponsors during his tenure with the Bureau of the Budget. It may well be that had the AEC known of these facts, it would have insisted that Wenzell be precluded from representing the Government, or, at least, would have scrutinized his recommendations more closely.

[22] The respondent also contends that even if the contract is not enforceable, a recovery *quantum valebat* should be decreed. However, such a remedy is appropriate only where one party to a transaction has received and retained tangible benefits from the other party. See *Crocker* v. *United States,* 240 U. S. 74, 81–82. Since the Government has received nothing from the respondent, no recovery *quantum valebat* is in order.

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

In a case like this controlling legal issues are apt to become blurred under the urge of vindicating a public policy whose importance no one will dispute. However, we sit here not as a committee on general business ethics, but as a court enforcing a specific piece of legislation.

While I am bound to say that the Government's defense to this claim for out-of-pocket expenses incurred in a matter that the Government was once anxious to explore, is far from ingratiating,[1] I must agree with the Court that Wenzell's government role in connection with the Mississippi Valley contract, though in the view of the Court of Claims it was quite peripheral, was sufficient to constitute him one who "acts as an officer or agent of the United States" within the meaning of 18 U. S. C. § 434,[2] and that if he was personally "indirectly interested" in that contract via First Boston the case must go for the

[1] Wenzell's superiors in the Government were fully aware of his connection with First Boston and of the possibility that First Boston might later figure in the financing of the contemplated private power project; and with such knowledge they affirmatively acquiesced, and indeed encouraged, his continuing in his consultative role. The power contract, which the Government recognizes was the product of hard bargaining and implicitly concedes was fair, was eventually terminated only because the Government had lost interest in it. The defense of illegality was raised for the first time in this suit, and only after a political storm had arisen over the public versus private power issue. Nevertheless I think the Court is right in considering that all these factors are rendered immaterial by the statute in question.

[2] "§ 434. *Interested persons acting as Government agents.*

"Whoever, being an officer, agent or member of, or directly or indirectly interested in the pecuniary profits or contracts of any corporation, joint-stock company, or association, or of any firm or partnership, or other business entity, is employed or acts as an officer or agent of the United States for the transaction of business with such business entity, shall be fined not more than $2,000 or imprisoned not more than two years, or both."

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Government. But in light of the findings of the Court of Claims I cannot agree that Wenzell was so interested, within the contemplation of § 434. In my opinion this Court's contrary conclusion rests upon too loose a view of the controlling statutory phrase.

Referring to the period of Wenzell's governmental service, the Court of Claims concluded:

> "There is not a shadow of evidence that it [First Boston] had any agreement or commitment, written or oral, formal or informal, contingent or otherwise that, in the event that the proposal [of the Dixon-Yates group] which was in preparation when Wenzell's Government employment ended should result in negotiations which should, in the course of events, result in a contract, First Boston would be given the opportunity to earn a commission by selling the bonds of the corporation [Mississippi Valley] which would be formed to sign and perform the contract. The evidence is perfectly plain that there was no such agreement or understanding." 175 F. Supp., at 518.

I do not understand the Court to take issue with this conclusion or with any of the findings of the Hearing Examiner on which it was based. It could not well do so, cf. *Commissioner* v. *Duberstein,* 363 U. S. 278; nor does the Government ask this. Rather, the Court finds the prohibited "indirect interest" to consist of Wenzell's expectation in the probability that First Boston, by virtue of its reputation in the field of private power financing and its having previously arranged the financing for a similar project, would eventually share in the financing of this venture.

I do not believe that such a probability alone gives rise to a contaminating interest under § 434. The fact that the probability eventuated into actuality after Wenzell's

government service terminated can hardly be relevant, for what the Court, under its view of the statute, correctly says as to the immateriality of First Boston's later waiver of commissions must surely also work in reverse. Whether or not a prohibited interest exists must be determined as of the period during which an individual is acting for the Government. And when the asserted interest arises "indirectly" by way of a subcontract, its existence can, in my opinion, only be found in some commitment, arrangement, or understanding obtaining at that time between the prime contractor and subcontractor.[3] I believe this latter proposition is supported by persuasive considerations.

First. It fits the language of § 434, whereas the Court's view does not. The statute does not speak of the disqualifying factors in terms of expectations or probabilities, but imports a precise standard, that is, a present status or pecuniary interest arising from some existing relationship with the business entity contracting with the Government. Certainly this is true as to an "officer," "agent," or "member" of the contracting enterprise. It is equally true of one disqualified by reason of "being . . . directly . . . interested in the pecuniary profits or contracts" of such an entity. I can see no reason why it should not also be true as to one "indirectly" so interested, requiring in this instance proof of some then-existing arrangement between Mississippi Valley and First Boston. I do not mean to suggest that such an arrangement must be evidenced by a formal agreement, for of course any sort of tacit understanding or "gentlemen's agreement" will suffice. But here the Court of Claims has expressly found against the existence of any such thing.

[3] Whether absence of knowledge of such an arrangement on the part of the individual concerned would be a defense is a matter not presented by this case.

Second. The view which I take of the matter also fits the purposes of § 434. The policy and rationale of the statute are clear: an individual who negotiates business for the Government should not be exposed to the temptation which might be created by a loyalty divided between the interest of the Government and his own self-interest; the risk that the Government will not be left with the best possible transaction is too great. In terms of these factors, a finding of some commitment, arrangement or understanding between the prime contractor and the subcontractor should be required when the contracting officer's adverse interest arises by way of a subcontract, since only where some such arrangement exists can the officer be taken to have known that any undue benefit he confers on the prime contractor will not eventually redound to the profit of some other competing subcontractor.

Here, for instance, it was found below that Mississippi Valley "a month after Wenzell's Government employment had terminated . . . felt perfectly free to give the bond-selling business to whomever it pleased." 175 F. Supp., at 518. Hence if Wenzell did in fact confer some undue benefit on Mississippi during the term of his government service (although none is suggested), he must have known that he was conferring that benefit at large, and that if First Boston later were to share in it this would only be the consequence of its having successfully competed against other investment bankers with similar qualifications. Furthermore, where the government officer's eventual indirect participation in the contract which he has negotiated (by hypothesis improperly) depends on the chance of competition after he has lost the leverage which his position gave, then it would be subject to the additional hazard that although the contractor has received a boon at his hands, all the subcontractor receives is such a normal subcontract as he might have had in any case.

Third. The Court's interpretation of § 434 introduces unnecessary and undesirable uncertainties into the statute. Instead of presenting the individual concerned or the trier of fact with a definite standard for determining whether a disqualifying interest of this kind is present—the existence *vel non* of a commitment or undertaking between the primary and secondary contractors—the question is left at large. The opinion in this case indeed highlights the matter. For after apparently agreeing that a "mere hope" that First Boston might share in the financing of the power contract would not be enough, the Court goes on to describe that eventuality in a variety of ways—that there was "a substantial probability" of it; that it was "probable"; that "it seemed likely"; that it "stood a good chance" of coming to pass; and that it might simply follow from the " 'logic of circumstances' " as a " 'substantial possibility.' "

Such uncertainty, inherent in the Court's view of the statute, is bound to cause future confusion in an area where the line of demarcation should be clear cut. As time goes on it will face many conscientious persons with the kind of close and subtle niceties which, as every judge and lawyer knows, often attend a matter of possible disqualification. Such illusive factors should not be imported into a statute governing the conduct primarily of laymen serving the Government.

Fourth. I think there is affirmative ground in the pattern of conflict-of-interest legislation for not attributing to Congress the purpose which the Court here does. The statute in question is the most general conflict-of-interest enactment, but there are other provisions of law, as well as federal regulations, which also deal with the subject. Particularly 5 U. S. C. § 99 and 18 U. S. C. § 284 indicate a different approach to the problem. The two statutes disqualify former officers and employees of governmental agencies or departments for a period of two years from

prosecuting or aiding in any way in the prosecution of a claim which had been pending at the time of their employment. A similar approach is suggested by this Court's Rule 7 which prohibits clerks and secretaries from practicing before this Court for a period of two years after leaving the Court, and from participating in any way in a case which was before the Court during the term of their employment. Cf. Canon 36 of the Canons of Professional Ethics of the American Bar Association.

The interpretation which the Court today gives 18 U. S. C. § 434, if it is to be taken as more than a disposition of this particular controversy, will go a long way to assimilating that statute in practical effect to the absolute disqualification type of provision, for certainly where criminal sanctions are involved no prudent man will risk later acquiring an interest in a contract which he helped to negotiate during a previous term of government employment. Whether such a rigid rule, of a kind traditional in the legal profession, should also be regarded as one of general morality in the public service may, of course, well be debated. However, Congress did not, in my view, enact this precept into law in the present statute, and where it has enacted this policy it has done so with a clarity and precision which I feel the present reading of § 434 lacks.

I would affirm.

NATIONAL LABOR RELATIONS BOARD *v.* RADIO AND TELEVISION BROADCAST ENGINEERS UNION, LOCAL 1212, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL–CIO.

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

No. 69. Argued November 10, 14, 1960.—Decided January 9, 1961.

Two labor unions were engaged in a jurisdictional dispute over a certain type of work for a certain employer. Both had collective bargaining agreements with the employer, and one was the certified bargaining agent for its members; but neither the certification nor the agreements clearly apportioned the disputed type of work between their respective members. The respondent union caused a work stoppage on a particular job, because work of this type was assigned to members of the other union. The employer filed an unfair labor practice charge, claiming a violation of § 8 (b) (4) (D) of the National Labor Relations Act. After a hearing under § 10 (k), the Board held that the respondent union was not entitled to have the work assigned to its members; but the Board refused to make an affirmative award of the work between the employees represented by the two unions. Respondent refused to comply with the decision, and the Board issued a cease-and-desist order to compel it to do so. *Held:* The Board's order is not entitled to enforcement, because the Board had not discharged its duty under § 10 (k) to "determine the dispute." It should have made an affirmative award of the work between the employees of the competing unions. Pp. 574–586.

272 F. 2d 713, affirmed.

Dominick L. Manoli argued the cause for petitioner. With him on the brief were *Solicitor General Rankin, Stuart Rothman, Norton J. Come* and *Melvin J. Welles.*

Robert Silagi and *Louis Sherman* argued the cause for respondent. With them on the brief were *Joseph B. Robison* and *Joseph M. Stone.*

MR. JUSTICE BLACK delivered the opinion of the Court.

This case, in which the Court of Appeals refused to enforce a cease-and-desist order of the National Labor Relations Board, grew out of a "jurisdictional dispute" over work assignments between the respondent union, composed of television "technicians," [1] and another union, composed of "stage employees." [2] Both of these unions had collective bargaining agreements in force with the Columbia Broadcasting System and the respondent union was the certified bargaining agent for its members, but neither the certification nor the agreements clearly apportioned between the employees represented by the two unions the work of providing electric lighting for television shows. This led to constant disputes, extending over a number of years, as to the proper assignment of this work, disputes that were particularly acrimonious with reference to "remote lighting," that is, lighting for telecasts away from the home studio. Each union repeatedly urged Columbia to amend its bargaining agreement so as specifically to allocate remote lighting to its members rather than to members of the other union. But, as the Board found, Columbia refused to make such an agreement with either union because "the rival locals had failed to agree on the resolution of this jurisdictional dispute over remote lighting." [3] Thus feeling

[1] Radio & Television Broadcast Engineers Union, Local 1212, International Brotherhood of Electrical Workers, AFL–CIO.

[2] Theatrical Protective Union No. 1, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL–CIO.

[3] The other major television broadcasting companies have also been forced to contend with this same problem. The record shows that there has been joint bargaining on this point between Columbia, National and American Broadcasting Systems on the one hand and the unions on the other. All the companies refused to allocate the work to either union because the unions did not agree among them-

itself caught "between the devil and the deep blue," [4] Columbia chose to divide the disputed work between the two unions according to criteria improvised apparently for the sole purpose of maintaining peace between the two. But, in trying to satisfy both of the unions, Columbia has apparently not succeeded in satisfying either. During recent years, it has been forced to contend with work stoppages by each of the two unions when a particular assignment was made in favor of the other.[5]

The precise occasion for the present controversy was the decision of Columbia to assign the lighting work for a major telecast from the Waldorf-Astoria Hotel in New York City to the stage employees. When the technicians' protest of this assignment proved unavailing, they refused to operate the cameras for the program and thus forced its cancellation.[6] This caused Columbia to file the unfair labor practice charge which started these proceedings, claiming a violation of § 8 (b) (4) (D) of the National Labor Relations Act.[7] That section clearly makes it an unfair labor practice for a labor union to induce a strike or

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selves. Columbia's vice president in charge of labor relations explained the situation in these terms: "All three companies negotiating jointly here took the position that they could not do this. They could not give exclusive jurisdiction because each of them had a conflicting claim from another union." See also *National Association of Broadcast Engineers,* 105 N. L. R. B. 355.

[4] This phrase was used by the Hearing Examiner to describe the position of Columbia as explained by its vice president in charge of labor relations.

[5] See *Theatrical Protective Union No. 1, International Alliance of Theatrical Stage Employees,* 124 N. L. R. B. 249, for a report of a recent jurisdictional strike against Columbia by the same stage employees' union involved here which resulted from an assignment of remote lighting work favorable to the technicians.

[6] Respondent, for the purposes of this proceeding only, concedes the correctness of a Board finding to this effect.

[7] 29 U. S. C. § 158 (b) (4) (D).

a concerted refusal to work in order to compel an employer to assign particular work to employees represented by it rather than to employees represented by another union, unless the employer's assignment is in violation of "an order or certification of the Board determining the bargaining representative for employees performing such work . . . ." [8] Obviously, if § 8 (b)(4)(D) stood alone, what this union did in the absence of a Board order or certification entitling its members to be assigned to these particular jobs would be enough to support a finding of an unfair labor practice in a normal proceeding under § 10 (c) of the Act.[9] But when Congress created this new type of unfair labor practice by enacting § 8 (b)(4)(D) as part of the Taft-Hartley Act in 1947, it also added § 10 (k) to the Act.[10] Section 10 (k), set out below,[11] quite plainly emphasizes the belief of Congress

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[8] Section 8 (b). "It shall be an unfair labor practice for a labor organization or its agents—

. . . . . .

"(4) . . . to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal . . . to perform any services, where an object thereof is: . . . (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: . . ."

[9] 29 U. S. C. § 160 (c).

[10] 29 U. S. C. § 160 (k).

[11] "Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 8 (b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless . . . the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed."

that it is more important to industrial peace that jurisdictional disputes be settled permanently than it is that unfair labor practice sanctions for jurisdictional strikes be imposed upon unions. Accordingly, § 10 (k) offers strong inducements to quarrelling unions to settle their differences by directing dismissal of unfair labor practice charges upon voluntary adjustment of jurisdictional disputes. And even where no voluntary adjustment is made, "the Board is empowered and directed," by § 10 (k), "to hear and determine the dispute out of which such unfair labor practice shall have arisen," and upon compliance by the disputants with the Board's decision the unfair labor practice charges must be dismissed.

In this case respondent failed to reach a voluntary agreement with the stage employees union so the Board held the § 10 (k) hearing as required to "determine the dispute." The result of this hearing was a decision that the respondent union was not entitled to have the work assigned to its members because it had no right to it under either an outstanding Board order or certification, as provided in § 8 (b)(4)(D), or a collective bargaining agreement.[12] The Board refused to consider other criteria, such as the employer's prior practices and the custom of the industry, and also refused to make an affirmative award of the work between the employees

[12] This latter consideration was made necessary because the Board has adopted the position that jurisdictional strikes in support of contract rights do not constitute violations of § 8 (b)(4)(D) despite the fact that the language of that section contains no provision for special treatment of such strikes. See *Local 26, International Fur Workers*, 90 N. L. R. B. 1379. The Board has explained this position as resting upon the principle that "to fail to hold as controlling . . . the contractual preemption of the work in dispute would be to encourage disregard for observance of binding obligations under collective-bargaining agreements and invite the very jurisdictional disputes Section 8 (b)(4)(D) is intended to prevent." *National Association of Broadcast Engineers, supra*, n. 3, at 364.

represented by the two competing unions. The respondent union refused to comply with this decision, contending that the Board's conception of its duty to "determine the dispute" was too narrow in that this duty is not at all limited, as the Board would have it, to strictly legal considerations growing out of prior Board orders, certifications or collective bargaining agreements. It urged, instead, that the Board's duty was to make a final determination, binding on both unions, as to which of the two unions' members were entitled to do the remote lighting work, basing its determination on factors deemed important in arbitration proceedings, such as the nature of the work, the practices and customs of this and other companies and of these and other unions, and upon other factors deemed relevant by the Board in the light of its experience in the field of labor relations. On the basis of its decision in the § 10 (k) proceeding and the union's challenge to the validity of that decision, the Board issued an order under § 10 (c) directing the union to cease and desist from striking to compel Columbia to assign remote lighting work to its members. The Court of Appeals for the Second Circuit refused to enforce the cease-and-desist order, accepting the respondent's contention that the Board had failed to make the kind of determination that § 10 (k) requires.[13] The Third [14] and Seventh [15] Circuits have construed § 10 (k) the same way, while the Fifth Circuit [16] has agreed with the Board's narrower conception of its duties. Because of this conflict and the importance of this problem, we granted certiorari.[17]

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[13] 272 F. 2d 713.

[14] *N. L. R. B.* v. *United Association of Journeymen,* 242 F. 2d 722.

[15] *N. L. R. B.* v. *United Brotherhood of Carpenters,* 261 F. 2d 166.

[16] *N. L. R. B.* v. *Local 450, International Union of Operating Engineers,* 275 F. 2d 413.

[17] 363 U. S. 802.

We agree with the Second, Third and Seventh Circuits that § 10 (k) requires the Board to decide jurisdictional disputes on their merits and conclude that in this case that requirement means that the Board should affirmatively have decided whether the technicians or the stage employees were entitled to the disputed work. The language of § 10 (k), supplementing § 8 (b)(4)(D) as it does, sets up a method adopted by Congress to try to get jurisdictional disputes settled. The words "hear and determine the dispute" convey not only the idea of hearing but also the idea of deciding a controversy. And the clause "the dispute out of which such unfair labor practice shall have arisen" can have no other meaning except a jurisdictional dispute under § 8 (b)(4)(D) which is a dispute between two or more groups of employees over which is entitled to do certain work for an employer. To determine or settle the dispute as between them would normally require a decision that one or the other is entitled to do the work in dispute. Any decision short of that would obviously not be conducive to quieting a quarrel between two groups which, here as in most instances, is of so little interest to the employer that he seems perfectly willing to assign work to either if the other will just let him alone. This language also indicates a congressional purpose to have the Board do something more than merely look at prior Board orders and certifications or a collective bargaining contract to determine whether one or the other union has a clearly defined statutory or contractual right to have the employees it represents perform certain work tasks. For, in the vast majority of cases, such a narrow determination would leave the broader problem of work assignments in the hands of the employer, exactly where it was before the enactment of § 10 (k)—with the same old basic jurisdictional dispute likely continuing to vex him, and the rival unions, short of striking, would still be free to adopt other forms of pressure upon the employer. The

§ 10 (k) hearing would therefore accomplish little but a restoration of the pre-existing situation, a situation already found intolerable by Congress and by all parties concerned. If this newly granted Board power to hear and determine jurisdictional disputes had meant no more than that, Congress certainly would have achieved very little to solve the knotty problem of wasteful work stoppages due to such disputes.

This conclusion reached on the basis of the language of § 10 (k) and § 8 (b)(4)(D) is reinforced by reference to the history of those provisions. Prior to the enactment of the Taft-Hartley Act, labor, business and the public in general had for a long time joined in hopeful efforts to escape the disruptive consequences of jurisdictional disputes and resulting work stoppages. To this end unions had established union tribunals, employers had established employer tribunals, and both had set up joint tribunals to arbitrate such disputes.[18] Each of these efforts had helped some but none had achieved complete success. The result was a continuing and widely expressed dissatisfaction with jurisdictional strikes. As one of the forerunners to these very provisions of the Act, President Truman told the Congress in 1947 that disputes "involving the question of which labor union is entitled to perform a particular task" should be settled, and that if the "rival unions are unable to settle such disputes themselves, provision must be made for peaceful and binding determination of the issues." [19] And the House Committee report on one of the proposals out of which these sections came recognized the necessity of enacting legisla-

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[18] For a review and criticism of some of these efforts, see Dunlop, Jurisdictional Disputes, N. Y. U. 2d Ann. Conference on Labor 477, at 494–504.

[19] 93 Cong. Rec. 136.

tion to protect employers from being "the helpless victims of quarrels that do not concern them at all." [20]

The Taft-Hartley Act as originally offered contained only a section making jurisdictional strikes an unfair labor practice. Section 10 (k) came into the measure as the result of an amendment offered by Senator Morse which, in its original form, proposed to supplement this blanket proscription by empowering and directing the Board either "to hear and determine the dispute out of which such unfair labor practice shall have arisen or to appoint an arbitrator to hear and determine such dispute . . . ." [21] That the purpose of this amendment was to set up machinery by which the underlying jurisdictional dispute would be settled is clear and, indeed, even the Board concedes this much. The authority to appoint an arbitrator passed the Senate [22] but was eliminated in conference,[23] leaving it to the Board alone "to hear and determine" the underlying jurisdictional dispute. The Board's position is that this change can be interpreted as an indication that Congress decided against providing for the compulsory determination of jurisdictional disputes. We find this argument unpersuasive, to say the very least. The obvious effect of this change was simply to place the responsibility for compulsory determination of the dis-

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[20] H. R. Rep. No. 245, 80th Cong., 1st Sess., p. 23, I Legislative History of the Labor Management Relations Act, 1947, at 314 (hereinafter cited as Leg. Hist.).

[21] The amendment was contained in a bill (S. 858) offered by Senator Morse, which also contained a number of other proposals. 93 Cong. Rec. 1913, II Leg. Hist. 987.

[22] I Leg. Hist. 241, 258–259. See also the Senate Committee Report on the bill, S. Rep. No. 105, 80th Cong., 1st Sess., p. 8, I Leg. Hist. 414.

[23] H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 57, I Leg. Hist. 561.

pute entirely on the Board, not to eliminate the requirement that there be such a compulsory determination. The Board's view of its powers thus has no more support in the history of § 10 (k) than it has in the language of that section. Both show that the section was designed to provide precisely what the Board has disclaimed the power to provide—an effective compulsory method of getting rid of what were deemed to be the bad consequences of jurisdictional disputes.

The Board contends, however, that this interpretation of § 10 (k) should be rejected, despite the language and history of that section. In support of this contention, it first points out that § 10 (k) sets forth no standards to guide it in determining jurisdictional disputes on their merits. From this fact, the Board argues that § 8 (b)(4)(D) makes the employer's assignment decisive unless he is at the time acting in violation of a Board order or certification and that the proper interpretation of § 10 (k) must take account of this right of the employer. It is true, of course, that employers normally select and assign their own individual employees according to their best judgment. But here, as in most situations where jurisdictional strikes occur, the employer has contracted with two unions, both of which represent employees capable of doing the particular tasks involved. The result is that the employer has been placed in a situation where he finds it impossible to secure the benefits of stability from either of these contracts, not because he refuses to satisfy the unions, but because the situation is such that he cannot satisfy them. Thus, it is the employer here, probably more than anyone else, who has been and will be damaged by a failure of the Board to make the binding decision that the employer has not been able to make. We therefore are not impressed by the Board's solicitude for the employer's right to do that which he has not been, and most likely will not be,

able to do. It is true that this forces the Board to exercise under § 10 (k) powers which are broad and lacking in rigid standards to govern their application. But administrative agencies are frequently given rather loosely defined powers to cope with problems as difficult as those posed by jurisdictional disputes and strikes. It might have been better, as some persuasively argued in Congress, to intrust this matter to arbitrators. But Congress, after discussion and consideration, decided to intrust this decision to the Board. It has had long experience in hearing and disposing of similar labor problems. With this experience and a knowledge of the standards generally used by arbitrators, unions, employers, joint boards and others in wrestling with this problem, we are confident that the Board need not disclaim the power given it for lack of standards. Experience and common sense will supply the grounds for the performance of this job which Congress has assigned the Board.

The Board also contends that respondent's interpretation of § 10 (k) should be avoided because that interpretation completely vitiates the purpose of Congress to encourage the private settlement of jurisdictional disputes. This contention proceeds on the assumption that the parties to a dispute will have no incentive to reach a private settlement if they are permitted to adhere to their respective views until the matter is brought before the Board and then given the same opportunity to prevail which they would have had in a private settlement. Respondent disagrees with this contention and attacks the Board's assumption. We find it unnecessary to resolve this controversy for it turns upon the sort of policy determination that must be regarded as implicitly settled by Congress when it chose to enact § 10 (k). Even if Congress has chosen the wrong way to accomplish its aim, that choice is binding both upon the Board and upon this Court.

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The Board's next contention is that respondent's interpretation of § 10 (k) should be rejected because it is inconsistent with other provisions of the Taft-Hartley Act. The first such inconsistency urged is with §§ 8 (a)(3) and 8 (b)(2) [24] of the Act on the ground that the determination of jurisdictional disputes on their merits by the Board might somehow enable unions to compel employers to discriminate in regard to employment in order to encourage union membership. The argument here, which is based upon the fact that § 10 (k), like § 8 (b)(4)(D), extends to jurisdictional disputes between unions and unorganized groups as well as to disputes between two or more unions, appears to be that groups represented by unions would almost always prevail over nonunion groups in such a determination because their claim to the work would probably have more basis in custom and tradition than that of unorganized groups. No such danger is present here, however, for both groups of employees are represented by unions. Moreover, we feel entirely confident that the Board, with its many years of experience in guarding against and redressing violations of §§ 8 (a)(3) and 8 (b)(2), will devise means of discharging its duties under § 10 (k) in a manner entirely harmonious with those sections. A second inconsistency is urged with § 303 (a)(4) of the Taft-Hartley Act,[25] which authorizes suits for damages suffered because of jurisdictional strikes. The argument here is that since § 303 (a)(4) does not permit a union to establish, as a defense to an action for damages under that section, that it is entitled to the work struck for on the basis of such factors as practice or custom, a similar result is required here in order to preserve "the substantive symmetry" between § 303 (a)(4) on the one hand and §§ 8 (b)(4)(D) and

[24] 29 U. S. C. §§ 158 (a)(3) and 158 (b)(2).

[25] 29 U. S. C. § 187 (a)(4).

10 (k) on the other. This argument ignores the fact that this Court has recognized the separate and distinct nature of these two approaches to the problem of handling jurisdictional strikes.[26] Since we do not require a "substantive symmetry" between the two, we need not and do not decide what effect a decision of the Board under § 10 (k) might have on actions under § 303 (a)(4).

The Board's final contention is that since its construction of § 10 (k) was adopted shortly after the section was added to the Act and has been consistently adhered to since, that construction has itself become a part of the statute by reason of congressional acquiescence. In support of this contention, the Board points out that Congress has long been aware of its construction and yet has not seen fit to adopt proposed amendments which would have changed it. In the ordinary case, this argument might have some weight. But an administrative construction adhered to in the face of consistent rejection by Courts of Appeals is not such an ordinary case. Moreover, the Board had a regulation on this subject from 1947 to 1958 which the Court of Appeals for the Seventh Circuit thought, with some reason, was wholly inconsistent with the Board's present interpretation.[27] With all this uncertainty surrounding the eventual authoritative interpretation of the existing law, the failure of Congress to enact a new law simply will not support the inference which the Board asks us to make.

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[26] *International Longshoremen's Union* v. *Juneau Spruce Corp.*, 342 U. S. 237.

[27] See *N. L. R. B.* v. *United Brotherhood of Carpenters, supra,* at 170–172. The Rules and Regulations adopted in 1947 by the Board provided that in § 10 (k) proceedings the Board was "to certify the labor organization or the particular trade, craft, or class of employees, as the case may be, *which shall perform the particular work tasks in issue,* or to make other disposition of the matter." (Emphasis supplied.) 29 CFR, 1957 Supp., § 102.73. This rule remained in effect until 1958.

We conclude therefore that the Board's interpretation of its duty under § 10 (k) is wrong and that under that section it is the Board's responsibility and duty to decide which of two or more employee groups claiming the right to perform certain work tasks is right and then specifically to award such tasks in accordance with its decision. Having failed to meet that responsibility in this case, the Board could not properly proceed under § 10 (c) to adjudicate the unfair labor practice charge. The Court of Appeals was therefore correct in refusing to enforce the order which resulted from that proceeding.

Affirmed.

CALLANAN *v.* UNITED STATES.

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

No. 47. Argued November 15–16, 1960.—Decided January 9, 1961.

Petitioner was convicted under the Hobbs Anti-Racketeering Act, 18 U. S. C. § 1951, on two counts, for obstructing interstate commerce by extortion and for conspiring to do so. He was sentenced to consecutive terms of 12 years on each count, though the sentence on one count was suspended and replaced with a five-year probation to commence at the expiration of the sentence on the other count. He sought a correction of the sentence under Rule 35 of the Federal Rules of Criminal Procedure, claiming that the maximum penalty under the Act for obstructing interstate commerce by any means is 20 years and that Congress did not intend to subject individuals to two penalties. *Held:* Under the Act, obstructing interstate commerce by extortion and conspiring to do so are separate offenses; separate consecutive sentences may be imposed for each offense. Pp. 587–597.

274 F. 2d 601, affirmed.

Morris A. Shenker and *Sidney M. Glazer* argued the cause and filed a brief for petitioner.

Theodore George Gilinsky argued the cause for the United States. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

Petitioner was convicted by a jury in the United States District Court for the Eastern District of Missouri on two counts. Count I charged a conspiracy to obstruct commerce by extorting money, and Count II charged the substantive offense of obstructing commerce by extortion, both crimes made punishable by the Hobbs Anti-Rack-

eteering Act, 18 U. S. C. § 1951.[1] Petitioner was sentenced to consecutive terms of twelve years on each count, but the sentence on Count II was suspended and replaced with a five-year probation to commence at the expiration of his sentence under Count I.[2] On appeal, the conviction was affirmed, 223 F. 2d 171.

Petitioner thereafter sought a correction of his sentence, invoking Rule 35 of the Federal Rules of Criminal

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[1] Section 1951 (a) is as follows:

"Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both."

The pertinent parts of the Hobbs Act Amendments of 1946, 60 Stat. 420, from which the 1948 codification was compiled, were as follows:

"SEC. 2. Whoever in any way or degree obstructs, delays, or affects commerce, or the movement of any article or commodity in commerce, by robbery or extortion, shall be guilty of a felony.

"SEC. 3. Whoever conspires with another or with others, or acts in concert with another or with others to do anything in violation of section 2 shall be guilty of a felony.

"SEC. 4. Whoever attempts or participates in an attempt to do anything in violation of section 2 shall be guilty of a felony.

"SEC. 5. Whoever commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of section 2 shall be guilty of a felony.

"SEC. 6. Whoever violates any section of this title shall, upon conviction thereof, be punished by imprisonment for not more than twenty years or by a fine of not more than $10,000, or both."

The Reviser's Note to the 1948 Code states that "The words 'attempts or conspires so to do' were substituted for sections 3 and 4 of the 1946 act, . . ."

[2] Petitioner was released from imprisonment in April 1960 and currently is on parole. Both parties and the courts below apparently have interpreted the probationary period for Count II to commence at the expiration of petitioner's parole for Count I.

Procedure as well as 28 U. S. C. § 2255.[3] He claimed that the maximum penalty for obstructing interstate commerce under the Act by any means is twenty years and that Congress did not intend to subject individuals to two penalties. The District Court denied relief, holding that the Hobbs Act gave no indication of a departure from the usual rule that a conspiracy and the substantive crime which was its object may be cumulatively punished. 173 F. Supp. 98. The Court of Appeals for the Eighth Circuit affirmed this judgment, 274 F. 2d 601. Deeming the question raised by petitioner of sufficient importance, we brought the case here. 362 U. S. 939.

Under the early common law, a conspiracy—which constituted a misdemeanor—was said to merge with the completed felony which was its object. See *Commonwealth* v. *Kingsbury,* 5 Mass. 106. This rule, however, was based upon significant procedural distinctions between misdemeanors and felonies. The defendant in a misdemeanor trial was entitled to counsel and a copy of the indictment; these advantages were unavailable on trial for a felony. *King* v. *Westbeer,* 1 Leach 12, 15, 168 Eng. Rep. 108, 110 (1739); see Clark and Marshall, Crimes, § 2.03, n. 96 (6th ed.). Therefore no conviction was permitted of a constituent misdemeanor upon an indictment for the felony. When the substantive crime was also a misdemeanor, *People* v. *Mather,* 4 Wend. 229, 265 (N. Y.), or when the conspiracy was defined by statute as a felony, *State* v. *Mayberry,* 48 Me. 218, 238, merger did not obtain. As these common-law procedural niceties disappeared, the

[3] Both courts below ruled that 28 U. S. C. § 2255 was not available since it would be premature to claim the "right to be released" from a sentence not yet served. Since, as the Government concedes, Rule 35 is available to correct an illegal sentence when the claim is based on the face of the indictment even if such claim had not been raised on direct appeal, *Heflin* v. *United States,* 358 U. S. 415, 418, 422, the applicability of § 2255 need not be considered.

merger concept lost significance, and today it has been abandoned. *Queen* v. *Button,* 11 Q. B. 929, 116 Eng. Rep. 720; *Pinkerton* v. *United States,* 328 U. S. 640.

Petitioner does not draw on this archaic law of merger. He argues that Congress by combining the conspiracy and the substantive offense in one provision, § 1951, manifested an intent not to punish commission of two offenses cumulatively. Unlike the merger doctrine, petitioner's position does not question that the Government could charge a conspiracy even when the substantive crime that was its object had been completed. His concern is with the punitive consequences of the choice thus open to the Government; it can indict for both or either offense, but, petitioner contends, it can punish only for one.

The present Hobbs Act had as its antecedent the Anti-Racketeering Act of 1934.[4] In view of this Court's restric-

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[4] The original bill, S. 2248, 73d Cong., 2d Sess., did not contain any provision concerning conspiracy. (Of course, the general conspiracy statute, R. S. § 5440, now 18 U. S. C. § 371, which then provided for a maximum two-year sentence, was available.) The bill made punishable by imprisonment from one to ninety-nine years acts of violence, extortion, and coercion which interfered with interstate commerce. 78 Cong. Rec. 11403. The purpose of the legislation was to provide for direct prosecution of large-scale racketeering, which formerly had been ineffectively attempted through the Sherman Act, which had a maximum penalty of one-year imprisonment or $5,000 fine. S. Rep. No. 532, 73d Cong., 2d Sess. p. 1. After the bill had passed the Senate, 78 Cong. Rec. 5735, some question was raised as to whether legitimate labor activity was not threatened by the statutory phraseology, 78 Cong. Rec. 5859, 10867, and provisos were suggested by the House Judiciary Committee in reporting the measure to the full body. H. R. Rep. No. 1833, 73d Cong., 2d Sess. The Committee, upon the suggestion of the Attorney General, further added a section making conspiracy to commit any of the designated substantive violations punishable. *Ibid.* The amended bill was passed by the House substantially as reported except that the penalty was decreased to ten years or $10,000. 78 Cong. Rec. 11403. The House bill was summarily approved by the Senate. 78 Cong. Rec. 11482.

tive decision in *United States* v. *Local 807,* 315 U. S. 521 (1942), Congress, under the leadership of Representative Hobbs, sought to stiffen the 1934 legislation. After several unsuccessful attempts over a period of four years, a bill was passed in 1946 which deleted any reference to wages paid by an employer to an employee, on which the decision in *Local 807* had relied.[5] The 1934 Act was further invigorated by increasing the maximum penalty from ten to twenty years.

Petitioner relies on numerous statements by members of Congress concerning the severity of the twenty-year penalty to illustrate that cumulative sentences were not

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[5] A little over two months after the decision, H. R. 7067 was introduced by Representative Hobbs in the House of Representatives, 88 Cong. Rec. 4080, following Hearings before a Subcommittee of the Committee on the Judiciary, 77th Cong., 2d Sess. The bill was reported favorably out of committee, the only major change being the reduction of the proposed twenty-year maximum sentence to ten years. In discussing the various provisions, the report stated: "The objective of Title I is to prevent anyone from obstructing, delaying, or affecting commerce, or the movement of any article or commodity in commerce by robbery or extortion as defined in the bill. A conspiracy or attempt to do anything in violation of section 2 is likewise made punishable . . . ." H. R. Rep. No. 2176, 77th Cong., 2d Sess., p. 9. No further congressional action was taken on the bill.

The following year, Representative Hobbs introduced H. R. 653 which was identical with his prior bill. This time the Committee did not amend the twenty-year penalty. H. R. Rep. No. 66, 78th Cong., 1st Sess. The measure passed the House, 89 Cong. Rec. 3230, but no action was taken in the Senate.

In 1945 Representative Hobbs again introduced his amendment. H. R. 32, 79th Cong., 1st Sess. The measure was passed by both bodies, 91 Cong. Rec. 11922, 92 Cong. Rec. 7308. Both Committee reports again stated that "A conspiracy or attempt to do anything in violation of section 2 is likewise made punishable." S. Rep. No. 1516, 79th Cong., 2d Sess.; H. R. Rep. No. 238, 79th Cong., 1st Sess., p. 9.

The pertinent parts of the amendment, 60 Stat. 420, are set out in n. 1, *supra.*

contemplated.[6] But the legislative history sheds no light whatever on whether the Congressmen were discussing the question of potential sentences under the whole bill or merely defending the maximum punishment under its

[6] Typical excerpts on which petitioner relies are:

"Mr. DELANEY. The fact of the matter is that this committee report was not unanimous. Also, in the committee it was indicated by those who favor this legislation that the legislation is too drastic, that the $10,000 fine and 20 years in jail is too drastic. They think a modified bill might be more in consonance with present-day thinking." (89 Cong. Rec. 3162.)

. . . . . .

"Mr. FISH. . . . I want to refer likewise to some of the excessive penalties. The penalties in this bill in my opinion are too severe—20 years and $10,000 fine. When we reach this section of the bill there should be very careful consideration given to reducing both the extent of the imprisonment and fines." (89 Cong. Rec. 3194.)

. . . . . .

"Mr. SPRINGER. May I ask my distinguished colleague on the Committee on the Judiciary if it is not a fact that under the provisions of this bill the question of penalty is left entirely discretionary with the court trying the case? Under the provisions of this bill a person could be penalized to the extent of 1 year or less than 1 year or up to 20 years, all in the discretion of the court.

"Mr. CELLER. Or his sentence might be suspended. I agree with the gentleman. But why do we single out labor and impose even a possible penalty of 20 years?" (89 Cong. Rec. 3201.)

. . . . . .

"Mr. ROBSION. . . . There is some objection to the penalties prescribed in this bill for robbery and extortion. It has gone forth to the country that the penalty is 20 years. That is not a correct statement. The penalties range from 1 hour up to 20 years, according to the offense, and fines of $1 to $10,000. In other words, the 20 years and the $10,000 fine are the maximum." (89 Cong. Rec. 3226.)

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"Mr. FISH. . . . When the bill was before the Rules Committee it seemed to me at that time that these penalties were excessive. Twenty years is just about as bad as a life sentence, and I want to give the House the opportunity to reduce it by cutting it in half. This applies to threats. A man may be sent to jail for 20 years merely for threatening extortion." (89 Cong. Rec. 3229.)

specific sections. All the legislative talk only reiterates what the statute itself says—that the maximum penalty is twenty years.

The distinctiveness between a substantive offense and a conspiracy to commit is a postulate of our law. "It has been long and consistently recognized by the Court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses." *Pinkerton* v. *United States,* 328 U. S. 640, 643. See also *Pereira* v. *United States,* 347 U. S. 1, 11. Over the years, this distinction has been applied in various situations. For example, in *Clune* v. *United States,* 159 U. S. 590, the Court upheld a two-year sentence for conspiracy over the objection that the crime which was the object of the unlawful agreement could only be punished by a $100 fine. The same result was reached when, as in the present case, both offenses were described within the same statute. In *Carter* v. *McClaughry,* 183 U. S. 365, cumulative sentences for conspiracy to defraud and fraud were upheld. "Cumulative sentences," the Court pronounced, "are not cumulative punishments, and a single sentence for several offences, in excess of that prescribed for one offence, may be authorized by statute." 183 U. S., at 394.

This settled principle derives from the reason of things in dealing with socially reprehensible conduct: collective criminal agreement—partnership in crime—presents a greater potential threat to the public than individual delicts. Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality. Group association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish. Nor is the danger of a conspiratorial group limited to the particular end toward which it has embarked. Combination in crime

makes more likely the commission of crimes unrelated to the original purpose for which the group was formed. In sum, the danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise.[7]

These considerations are the presuppositions of the separately defined crimes in § 1951. The punitive consequences that presumably flow from them must be placed in such context. Congress is, after all, not a body of laymen unfamiliar with the commonplaces of our law. This legislation was the formulation of the two Judiciary Committees, all of whom are lawyers, and the Congress is predominately a lawyers' body. We attribute "to Congress a tacit purpose—in the absence of any inconsistent expression—to maintain a long-established distinction between offenses essentially different; a distinction whose practical importance in the criminal law is not easily overestimated." *United States* v. *Rabinowich,* 238 U. S. 78, 88.

These considerations are reinforced by a prior interpretation of the Sherman Act whose minor penalties influenced the enactment of the 1934 anti-racketeering legislation.[8] In *American Tobacco Co.* v. *United States,* 328

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[7] For a discussion of these problems of the law of conspiracy see Developments in the Law—Criminal Conspiracy, 72 Harv. L. Rev. 920, 922–925, 968–971.

[8] The Senate Report which accompanied the original 1934 legislation described the purpose of the Act by setting forth a memorandum received from the Justice Department:

". . . The nearest approach to prosecution of racketeers as such has been under the Sherman Antitrust Act. This act, however, was designed primarily to prevent and punish capitalistic combinations and monopolies, and because of the many limitations engrafted upon the act by interpretations of the courts, the act is not well suited for prosecution of persons who commit acts of violence, intimidation, and extortion. . . . Moreover, a violation of the Sherman Act is merely a misdemeanor, punishable by 1 year in jail plus $5,000 fine, which is

U. S. 781, individual and corporate defendants were convicted, *inter alia,* of conspiracy to monopolize and monopolization, both made criminal by § 2. They were sentenced to a fine of $5,000, the maximum statutory penalty, on each of the counts. We affirmed these convictions on the basis of our past decisions in this field of law. 328 U. S., at 788–789. To dislodge such conventional consequences in the outlawing of two disparate offenses, conspiracy and substantive conduct, and effectuate a reversal of the settled interpretation we pronounced in *American Tobacco* would require specific language to the contrary. See also *Albrecht* v. *United States,* 273 U. S. 1, 11; *Burton* v. *United States,* 202 U. S. 344, 377.

Petitioner argues that some of the other provisions of § 1951 seem to overlap and would not justify cumulative punishment for separate crimes. From this he deduces a congressional intent that the statute allows punishment for only one crime no matter how many separately outlawed offenses have been committed. These contentions raise problems of statutory interpretation not now here. That some of the substantive sections may be repetitive as being variants in phrasing of the same delict, or that petitioner could not be cumulatively punished for both an attempt to extort and a completed act of extortion, has no relevance to the legal consequences of two incontestably distinctive offenses, conspiracy and the completed crime

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not a sufficient penalty for the usual acts of violence and intimidation affecting interstate commerce." S. Rep. No. 532, 73d Cong., 2d Sess., p. 1.

Representative Celler, in arguing for a less severe penalty during the 1945 debates, said:

"If you look at the antitrust penalties against employers you find that they are only $5,000 or 1 year in jail. This bill has direct relation to the antitrust laws, the Clayton Act." 91 Cong. Rec. 11902.

See also Representative Celler's remarks during the 1943 debates, 89 Cong. Rec. 3201.

that is its object. In the *American Tobacco* litigation it was decided that the attempt to monopolize, described in § 2 of the Sherman Act, merged with the completed monopolization, but this result did not qualify the holding that cumulative sentences for the conspiracy and the substantive crime, also contained within § 2, were demanded by the governing precepts of our law.

Petitioner invokes "the rule of lenity" for decision in this case. But that "rule," as is true of any guide to statutory construction, only serves as an aid for resolving an ambiguity; it is not to be used to beget one.[9] "To rest upon a formula is a slumber that, prolonged, means death." Mr. Justice Holmes in Collected Legal Papers, p. 306. The rule comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers. That is not the function of the judiciary. In *United States* v. *Universal C. I. T. Credit Corp.*, 344 U. S. 218; *Bell* v. *United States, supra,* and *Ladner* v. *United States,* 358 U. S. 169, the applicable statutory provisions were found to be unclear as to the appropriate unit of prosecution; accordingly, the rule of lenity was utilized, *in favorem libertatis,* to resolve the ambiguity. In *Prince* v. *United States,* 352 U. S. 322, and *Heflin* v. *United States,* 358 U. S. 415, the Court had to meet the problem whether various subsidiary provisions of the Federal Bank Robbery Act, 18 U. S. C. § 2113, which punished entering with intent to commit robbery and possessing stolen property, merged when applied to a defendant who was also being prosecuted for the robbery itself. Again the rule of lenity served to resolve the doubt with which Congress faced the Court.

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[9] "When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity." *Bell* v. *United States,* 349 U. S. 81, 83.

Here we have no such dubieties within the statute itself. Unlike all of these cases, the problem before us does not involve the appropriate unit of prosecution—whether conduct constitutes one or several violations of a single statutory provision—nor is it an open question whether conspiracy and its substantive aim merge into a single offense. This is an ordinary case of a defendant convicted of violating two separate provisions of a statute, whereby Congress defined two historically distinctive crimes composed of differing components. If petitioner had committed two separate acts of extortion, no one would question that the crimes could be punished by consecutive sentences; the result seems no less clear in the present case. It was therefore within the discretion of the trial judge to fix separate sentences, even though Congress has seen fit to authorize for each of these two offenses what may seem to some to be harsh punishment.

Affirmed.

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

To be sure, it is now a commonplace of our law that the commission of a substantive crime and a conspiracy to commit it may be treated by Congress as separate offenses, cumulatively punishable. *Pinkerton* v. *United States,* 328 U. S. 640, 643. It is also true that Congress has often chosen to exercise its power to make separate offenses of the two.[1] But neither of these generalities provides an answer to the question now before us. The question here is the meaning of *this* law, the Hobbs Anti-Racketeering Act. I do not agree that under this statute a man can be separately convicted and cumulatively pun-

[1] The most notable illustration of this is the General Conspiracy Statute, 18 U. S. C. § 371.

ished for obstructing commerce by extorting money, and for conspiring to obstruct commerce by the same extortion. My view is based both upon the language of the statute and upon its history, considered in the light of principles that have consistently guided this Court's decisions in related areas of federal criminal law.

The relevant section of the Act, repeated for convenience in the margin,[2] is not a model of precise verbal structure. Purely as a matter of syntax, the section could be read as creating separate offenses for obstructing commerce, for delaying commerce, and for affecting commerce by any one of the proscribed means. It could be read, again merely as a matter of grammar, as creating distinct offenses for obstructing commerce by robbery, for threatening physical violence to property in connection with the same robbery, for committing the physical violence which had been threatened, for attempting to do so, and for conspiring to do so. Read in such a way the Act could be made to justify the imposition upon one man of separate sentences totalling more than a hundred years for one basic criminal transaction. To construe this statute that way would obviously be absurd, and I do not understand that the Court today even remotely suggests any such construction.

The Act, then, must mean something else. I think its language can fairly be read as imposing a maximum twenty-year sentence for each actual or threatened interference with interstate commerce accomplished by any one or more of the proscribed means. Such a reading of

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[2] "Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both." 18 U. S. C. § 1951 (a).

the Act does violence neither to semantics nor to common sense. It is fully justified by the legislative history, and it is consistent with settled principles governing the construction of ambiguous criminal statutes. If this is what the Act means, then the indictment in the present case charged but a single offense, and it was wrong to impose two separate sentences upon the petitioner.

The antecedent of the present Act was the Anti-Racketeering Act of 1934. That legislation was originally introduced after extensive hearings before a subcommittee of the Senate Committee on Commerce, popularly known as the Committee on Racketeering. The original bill did not contain any reference to conspiracy. S. 2248, 73d Cong., 2d Sess. The Committee Report consisted of a memorandum from the Department of Justice, stating that the purpose of the bill was to permit prosecution of so-called "racketeers" for acts constituting racketeering. Significantly, the memorandum stated "The accompanying proposed statute is designed to avoid many of the embarrassing limitations in the wording and interpretation of the Sherman Act, and to extend Federal jurisdiction over all restraints of any commerce within the scope of the Federal Government's constitutional powers. Such restraints if accompanied by extortion, violence, coercion, or intimidation, are made felonies, *whether the restraints are in form of conspiracies or not.*" (Emphasis added.) S. Rep. No. 532, 73d Cong., 2d Sess., p. 1.

After the bill had passed the Senate fear was expressed that some of the provisions of the proposed legislation might endanger legitimate activities of organized labor. In response to these fears the bill was revised by the House Judiciary Committee along lines suggested by the Attorney General, and it was then that the statutory reference to conspiracy was added, without explanation. H. R. Rep. No. 1833, 73d Cong., 2d Sess. The bill was passed by the House after adoption of an amendment

reducing the maximum punishment provision to "10 years or by a fine of $10,000 or both." 78 Cong. Rec. 11403. Thereafter, the Senate approved the House bill without debate. 78 Cong. Rec. 11482.

In 1942 this Court considered the 1934 Act in *United States* v. *Local 807,* 315 U. S. 521, holding that under the statute's labor exemption the petitioners there had been wrongly convicted. Within a few weeks after that decision, Representative Hobbs introduced a bill in the House designed to eliminate the labor exemption from the statute. Similar amendatory bills were introduced in succeeding sessions of Congress, and in 1946 the Act was finally amended by deletion of the provision exempting wages paid by an employer to an employee, the exemption upon which the decision in the *Local 807* case had been based.

With that aspect of the 1946 amendment we are not here concerned. But the amendment made one other significant change in the Act: it increased the maximum penalty from ten to twenty years' imprisonment. The congressional debates over that provision throw considerable light upon the problem now before us. For two conclusions can be drawn from a review of the discussions in Congress of the proposed increase in the penalty provision. First, it is clear that many Members of Congress were seriously concerned by the severity of a penalty of twenty years in prison for violation of this statute. Expressions such as "too drastic," "too severe," and "excessive" were used in describing what was referred to by one Member as "even a possible penalty of 20 years." 89 Cong. Rec. 3162, 3194, 3201, 3229. Secondly, it is clear that there was general agreement among both the proponents and the opponents of the legislation that twenty years was to be the maximum penalty that could be imposed upon a defendant convicted of violating the

statute. 89 Cong. Rec. 3226. No one ever suggested that cumulative penalties could be inflicted.

In sum, then, we have here a statute which, as a matter of English language, can fairly be read as imposing a single penalty for each interference or threatened interference with interstate commerce by any or all of the prohibited means. We have evidence stemming from the very origin of the legislation that the unit of prosecution under the statute was to be each restraint of commerce, not each means by which the restraint was accomplished. As the original Senate Committee Report stated, "restraints if accompanied by extortion, violence, coercion, or intimidation, are made felonies, whether the restraints are in form of conspiracies or not." Finally, we have every indication that when the Act was amended in 1946 Congress was agreed that but a single maximum sentence of twenty years could be imposed upon conviction, and that many Members of Congress considered even that penalty far too severe.

It is said, however, that despite all this we must attribute to Congress a "tacit purpose" to provide cumulative punishments for conspiracy and substantive conduct under this statute. We are told that this presumption of a tacit purpose must prevail because there is no "specific language to the contrary" in the Act.[3] But to indulge in such a presumption seems to me wholly at odds with principles firmly established by our previous decisions.

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[3] The Court's reliance upon *American Tobacco Co.* v. *United States,* 328 U. S. 781, seems to me misplaced. The discussion of multiple punishment in that opinion was in response to the contention that Congress could not, because of the double jeopardy provision of the Fifth Amendment, impose multiple punishment for substantive conduct and conspiracy. Moreover, to decide the meaning of this Act upon the basis of what Congress may have provided in another statute, would seem to me a dubious way to resolve the issue. Cf. *Bell* v. *United States,* 349 U. S. 81, 83.

In *Bell* v. *United States,* 349 U. S. 81, we described the approach to be taken in a case such as this. "When Congress has the will it has no difficulty in expressing it . . . . When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity." 349 U. S., at 83. In *Ladner* v. *United States,* 358 U. S. 169, we said: "This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." 358 U. S., at 178. In *Prince* v. *United States,* 352 U. S. 322, we spoke of the doctrine as one "of not attributing to Congress, in the enactment of criminal statutes, an intention to punish more severely than the language of its laws clearly imports in the light of pertinent legislative history." 352 U. S., at 329. These recent expressions are but restatements in a specific context of the ancient rule that a criminal statute is to be strictly construed. I would not depart from that rule in the present case.

LEWIS, TRUSTEE IN BANKRUPTCY, *v.* MANUFACTURERS NATIONAL BANK OF DETROIT.

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

No. 94. Argued December 15, 1960.—Decided January 9, 1961.

Petitioner's bankrupt borrowed money from respondent on November 4, 1957, giving as security a chattel mortgage on an automobile, which was not recorded until November 8, 1957. Under the law of the State where the transaction occurred, such a mortgage was void against one who became a creditor of the mortgagor between the time of execution and the time of recordation. Over five months after recordation of the chattel mortgage, the borrower filed a voluntary petition in bankruptcy. He was adjudicated a bankrupt and petitioner was named trustee. *Held:* Under § 70c of the Bankruptcy Act, the chattel mortgage was not void as against the trustee, since the trustee acquired the status of a creditor as of the time when the petition in bankruptcy was filed. Pp. 603–610.

275 F. 2d 454, affirmed.

Stuart E. Hertzberg argued the cause for petitioner. With him on the brief was *Herbert N. Weingarten.*

Richard D. Rohr argued the cause for respondent. With him on the brief was *Henry I. Armstrong, Jr.* *Louis F. Dahling* entered an appearance for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The bankrupt borrowed money from respondent on November 4, 1957, giving as security a chattel mortgage on an automobile. In Michigan, where the transaction took place, mortgages were void as against creditors of the mortgagor unless filed with the Register of Deeds [1] with

[1] Mich. Comp. Laws, 1948, § 566.140, as amended by Pub. Acts 1957, No. 233. In 1959, by Pub. Acts 1959, No. 110, a 10-day grace period was given to all mortgagees *vis-à-vis* creditors.

a special dispensation to purchase-money mortgages if filed within 14 days of the execution of the mortgage. This mortgage, however, was not a purchase-money mortgage; and though executed on November 4, 1957, it was not recorded until November 8, 1957.

Over five months later—on April 18, 1958—the borrower filed a voluntary petition in bankruptcy and an adjudication of bankruptcy followed, petitioner being named trustee.

There was no evidence that any creditor had extended credit between November 4, the date of the execution of the mortgage, and November 8, the date of its recordation. But since the mortgage had not been recorded immediately, the referee held that it was void as against the trustee. The referee relied upon § 70c of the Bankruptcy Act, 11 U. S. C. § 110 (c), which, so far as material here, reads:

> "The trustee, as to all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists."

He ruled that § 70c "clothes the Trustee with the rights of a creditor who could have obtained a lien at the date of bankruptcy whether or not such a creditor exists." He concluded that under Michigan law a creditor could have taken prior to the mortgage had he extended credit during the four-day period when the mortgage was "off record" and that therefore the trustee can claim the same rights, even though there was no such creditor. The District Court overruled the referee and the Court of

Appeals affirmed the District Court. 275 F. 2d 454. The case is here on a petition for a writ of certiorari which we granted because of a conflict between that decision and *Constance* v. *Harvey,* 215 F. 2d 571, decided by the Court of Appeals for the Second Circuit and subsequently followed by the same court in *Conti* v. *Volper,* 229 F. 2d 317. 363 U. S. 837.

Petitioner's case turns on the words, "upon which a creditor of the bankrupt could have obtained a lien . . . whether or not such a creditor actually exists," contained in § 70c.

Prior to 1910 the trustee had no better title to the property than the bankrupt had. See *York Mfg. Co.* v. *Cassell,* 201 U. S. 344, 352; *Zartman* v. *First National Bank,* 216 U. S. 134, 138. The provision with which we are here concerned was written into the law in 1910 to give the trustee all the rights of an ideal judicial lien creditor.[2]

The predecessor of the present § 70c was § 47a (2) of the Bankruptcy Act, as amended by the 1910 Act which provided in relevant part:

> ". . . such trustees, as to all property in the custody or coming into the custody of the bankruptcy

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[2] See MacLachlan, Bankruptcy (1956), p. 187. The Committee Report concerning the 1910 Amendment said:

"It is evident that in the proposed amendment attempt is made to give effect to two ideas quite distinct: First, that as to the property in the custody of the bankruptcy court the bankruptcy trustee shall be considered to have the same title that a creditor holding an execution or other lien by legal or equitable proceedings levied upon that property would have under state law: and, second, that as to property not in the custody of the bankruptcy court the trustee should stand in the position of a judgment creditor holding an execution returned unsatisfied, thus entitling him to proceed precisely as an individual creditor might have done to subject assets. In this way, in effect, proceedings in bankruptcy will give to creditors all the rights that creditors under the state law might have had had there been

> court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied." 36 Stat. 840.

That language was held to give the trustee the status of a creditor "as of the time when the petition in bankruptcy is filed." *Bailey* v. *Baker Ice Machine Co.*, 239 U. S. 268, 276.

In 1938 the relevant provisions of § 47a (2) were transferred to § 70c with no material change.[3]

In 1950 § 70c was recast to read as follows:

> ". . . The trustee, as to all property of the bankrupt at the date of bankruptcy whether or not coming into possession or control of the court, shall be deemed vested as of the date of bankruptcy with all the rights, remedies, and powers of a creditor then holding a lien thereon by legal or equitable proceedings, whether or not such a creditor actually exists." 64 Stat. 26.

Thus the distinction between property in the possession of the bankrupt as of the date of bankruptcy and other property was abolished; and the trustee was given the status of a creditor holding a lien through legal or equitable proceedings as to both types of property. This 1950 Amendment, however, created an anomaly. The

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no bankruptcy and from which they are debarred by the bankruptcy—certainly a very desirable and eminently fair position to be granted to the trustee." H. R. Rep. No. 511, 61st Cong., 2d Sess., p. 7.

[3] See MacLachlan, Bankruptcy (1956), p. 187; H. R. Rep. No. 1409, 75th Cong., 1st Sess., pp. 4, 34–35.

House Report [4] accompanying a 1952 amendment that cast § 70c in its present form states:

> ". . . it is now recognized that the amendment did not accurately express what was intended. Since the trustee already has title to all of the bankrupt's property, it is not proper to say that he has the rights of a lien creditor upon his own property. What should be said is that he has the rights of a lien creditor upon property in which the bankrupt has an interest or as to which the bankrupt may be the ostensible owner. Accordingly, the language of section 70c has been revised so as to clarify its meaning and state more accurately what is intended."

We think that one consistent theory underlies the several versions of § 70c which we have set forth, *viz.*, that the rights of creditors—whether they are existing or hypothetical—to which the trustee succeeds are to be ascertained as of "the date of bankruptcy," [5] not at an anterior point of time. That is to say, the trustee acquires the status of a creditor as of the time when the petition in bankruptcy is filed. We read the statutory words "the rights . . . of a creditor [existing or hypothetical] then holding a lien" to refer to that date.[6]

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[4] H. R. Rep. No. 2320, 82d Cong., 2d Sess., p. 16.

[5] While § 70c speaks of "the date of bankruptcy," that term is defined as "the date when the petition was filed." Section 1 (13), 11 U. S. C. § 1 (13).

[6] After the decision in *Constance* v. *Harvey*, 215 F. 2d 571, 575, Congress passed a bill to change its holding. The President vetoed the bill, stating:

"I have withheld my approval of H. R. 7242, to amend sections 1, 57j, 64a (5), 67b, 67c, and 70c of the Bankruptcy Act, and for other further purposes.

"I recognize the need for legislation to solve certain problems regarding the priority of liens in bankruptcy, but this bill is not a satisfactory solution. It would unduly and unnecessarily prejudice

This construction seems to us to fit the scheme of the Act.[7] Section 70e enables the trustee to set aside fraudulent transfers which creditors having provable claims could void. The construction of § 70c which petitioner urges would give the trustee power to set aside transactions which no creditor could void and which injured no creditor. That construction would enrich

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the sound administration of Federal tax laws. In some cases, for example, mortgages would be given an unwarranted priority over Federal tax liens even though the mortgage is recorded after the filing of the tax lien.

"This and other defects of the bill can, I believe, be corrected without compromising its primary and commendable purpose." Cong. Rec., September 16, 1960, p. A7013.

The Committee Report, urging that amendment, made clear the inequity that might often result if § 70c is construed as *Constance* v. *Harvey, supra,* construed it:

"The holding in *Constance* v. *Harvey,* by injecting into section 70c the substance of 70e, created the statutorily unwarranted status of a hypothetical creditor with rights relating back to a date prior to bankruptcy. While bankruptcy is in effect a general levy on the property of the bankrupt for the benefit of his creditors, it is not a license for the trustee, irrespective of prejudice to creditors, to avoid at will any security given by the bankrupt which remained imperfected for any period of time prior to bankruptcy. Yet this is the effect of *Constance* v. *Harvey*. Under this decision the only limit to the power of the trustee is his ability to conceive of some right of a creditor that can be used as a basis for striking down imperfect transfers. The doctrine of *Constance* v. *Harvey* presents a very real threat to security transactions, the validity of which have hitherto not been subject to challenge under the act. Moreover, this is a threat which is not required by the policy of the act, since the creditors who have been prejudiced by the imperfections of a transfer are normally protected under section 70e." H. R. Rep. No. 745, 86th Cong., 1st Sess., pp. 8–9.

[7] See Seligson, Creditors' Rights, Jour. Nat. Assoc. Referees in Bankruptcy, Oct. 1957, 113, 118; Marsh, *Constance* v. *Harvey*—The "Strong-Arm Clause" Re-Evaluated, 43 Cal. L. Rev. 65; Note, 57 Mich. L. Rev. 1227.

unsecured creditors at the expense of secured creditors, creating a windfall merely by reason of the happenstance of bankruptcy.

It is true that in some instances the trustee has rights which existing creditors may not have. Section 11, 11 U. S. C. § 29, gives him two years to institute legal proceedings regardless of what limitations creditors might have been under. Section 60, 11 U. S. C. § 96, gives him the right to recover preferential transfers made by the bankrupt within four months whether or not creditors had that right by local law. A like power exists under § 67a, 11 U. S. C. § 107 (a), as respects the invalidation of judicial liens obtained within four months of bankruptcy when the bankrupt was insolvent. Section 67d, 11 U. S. C. § 107 (d), carefully defines transactions which may be voided if made "within one year prior to the filing" of the petition.

Congress in striking a balance between secured and unsecured creditors has provided for specific periods of repose beyond which transactions of the bankrupt prior to bankruptcy may no longer be upset—except and unless existing creditors can set them aside.[8] Yet if we construe § 70c as petitioner does, there would be no period of repose. Security transactions entered into in good faith years before the bankruptcy could be upset if the trustee were ingenious enough to conjure up a hypothetical situation in which a hypothetical creditor might have had such a right. The rule pressed upon us would deprive a mortgagee of his rights in States like Michigan, if the mortgage had been executed months or even years pre-

[8] See, *e. g.*, § 70e, concerning which H. R. Rep. No. 1409, 75th Cong., 1st Sess., p. 32, stated, ". . . under section 70e the trustee may avoid any transfer which any creditor might have avoided under applicable State law, and there is no time limitation in such case."

viously and there had been a delay of a day or two in recording without any creditor having been injured during the period when the mortgage was unrecorded.

That is too great a wrench for us to give the bankruptcy system, absent a plain indication from Congress which is lacking here.

Affirmed.

MR. JUSTICE HARLAN: As the judge who wrote for the Court of Appeals in *Constance* v. *Harvey*, 215 F. 2d 571, I think it appropriate to say that I have long since come to the view that the second opinion in *Constance*, 215 F. 2d 575, was ill-considered. I welcome this opportunity to join in setting the matter right.

CARBO *v.* UNITED STATES.

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

No. 72. Argued November 16, 1960.—Decided January 9, 1961.

Under 28 U. S. C. § 2241, the United States District Court for the Southern District of California had jurisdiction in the circumstances of this case to issue a writ of *habeas corpus ad prosequendum* directing a New York City prison official to deliver petitioner, a prisoner of that City, to California for trial on an indictment pending there in the District Court. Pp. 611–622.

(a) At common law, the term *habeas corpus* was a generic term, including many species of that writ and including the writ of *habeas corpus ad prosequendum*. Pp. 614–615.

(b) The territorial limitation in § 2241, "within their respective jurisdictions," refers to issuance of the Great Writ, *habeas corpus ad subjiciendum*, for an inquiry into the cause of restraint, with which the bulk of the Act is concerned, and not to writs of *habeas corpus ad prosequendum*. P. 619.

(c) To the extent that lower court decisions have relied upon a contrary construction of § 2241, this Court disapproves of their conclusions. P. 621.

277 F. 2d 433, affirmed.

A. L. Wirin and *William B. Beirne* argued the cause for petitioner. With them on the brief was *Fred Okrand*.

Beatrice Rosenberg argued the cause for the United States. With her on the brief were *Solicitor General Rankin* and *Assistant Attorney General Wilkey*.

MR. JUSTICE CLARK delivered the opinion of the Court.

The sole question in this case is whether the United States District Court for the Southern District of California has jurisdiction to issue a writ of *habeas corpus ad prosequendum* directing a New York City prison official to deliver petitioner, a prisoner of that City, to California

for trial on an indictment pending in the California court.[1] Both the District Court and the Court of Appeals have held that such jurisdiction does exist. 277 F. 2d 433. Recognizing that the effective administration of criminal justice required our decision on the point, we granted certiorari, 363 U. S. 802. We affirm the judgment.

Petitioner, one of five defendants indicted on September 22, 1959, in the District Court for the Southern District of California on charges of extortion and conspiracy,[2] was arrested in Baltimore, Maryland, where he posted bond returnable to the California court. Before appearing in California pursuant to his obligation under the bond, petitioner pleaded guilty to three misdemeanor charges in New York City and was sentenced to serve a two-year term in the New York City Prison, in addition to payment of a fine. Pursuant to a writ of *habeas corpus ad prosequendum* issuing from the California court to the New York City prison authorities, the petitioner appeared in custody before that court, was arraigned and pleaded not guilty to the indictment. Upon petitioner's request the court ordered that he be returned to the New York City Prison in custody in order to obtain counsel and that he thereafter be returned [3] to California in time for trial on

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[1] The Government has raised the question of petitioner's standing to challenge the writ (cf. *Ponzi* v. *Fessenden*, 258 U. S. 254), which point it waived by stipulation in the Court of Appeals. In light of the circumstances under which the case reaches us we do not believe that the point is well taken.

[2] 18 U. S. C. §§ 875, 1951.

[3] The order was as follows:

"Defendant appears without counsel and requests permission to enter his plea and be permitted to return to New York and obtain counsel there and return here for trial.

"Defendant Carbo pleads not guilty . . . .

"Court Orders cause as to Defendant Carbo set for trial with co-defendants on March 29, 1960, 9:30 AM, and directs that Defendant Carbo be returned to New York for the purpose of obtaining counsel and be returned here in time for trial."

the indictment set for March 29, 1960. In order that petitioner might meet the obligation of his bond, as well as that of the latter order, the court, on March 16, 1960, again issued a writ of *habeas corpus ad prosequendum* to the New York City prison official directing the return of the petitioner for trial on March 29, 1960. On the same date and before it could be served, the petitioner moved to quash the writ. His sole ground of objection was that the United States District Court for the Southern District of California had no power to issue the writ to an officer located outside of its territorial limits. The contention is bottomed on the language of 28 U. S. C. § 2241 as codified in 1948.[4] We have concluded that the issuance of the writ of *habeas corpus ad prosequendum* was within the jurisdiction of the court as authorized by the Congress in § 2241.

This is the first time this Court has undertaken a construction of the statutory authority for the issuance of writs of *habeas corpus ad prosequendum* since Chief Jus-

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[4] 28 U. S. C. § 2241 provides:

"(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

. . . . . .

"(c) The writ of habeas corpus shall not extend to a prisoner unless—

"(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

"(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

"(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

"(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right . . . ; or

"(5) It is necessary to bring him into court to testify or for trial."

tice Marshall, in *Ex parte Bollman,* 4 Cranch 75 (1807), interpreted the language of the First Judiciary Act, 1 Stat. 81–82 (1789). It seems, therefore, both appropriate and in our view necessary to first trace the course followed by congressional action granting judicial power to issue writs of *habeas corpus* generally.

Section 14 of the First Judiciary Act gave authority to

> "all the . . . courts of the United States . . . to issue writs of *scire facias, habeas corpus,* and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And . . . either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment.—*Provided,* That writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify." 1 Stat. 81–82 (1789).

We are indeed fortunate to have the benefit of the close scrutiny to which Chief Justice John Marshall subjected § 14 in *Ex parte Bollman, supra.* Initially, the Chief Justice observed that "for the meaning of the term *habeas corpus,* resort may unquestionably be had to the common law; but the power to award the writ by any of the courts of the United States, must be given by written law." 4 Cranch, at 93–94. Mindful perhaps of his own observation the preceding year that "There is some obscurity in the act of congress," *Ex parte Burford,* 3 Cranch 448, at 449, he then proceeded to analyze the meaning of the writ as described in § 14. He recognized that the term *habeas*

corpus "is a generic term" including many species of that writ. It encompassed, he concluded, in addition to the Great Writ (*habeas corpus ad subjiciendum,* for an inquiry into the cause of restraint) the writ *habeas corpus ad prosequendum.* The "Great Chief Justice" noted, however, that when used in the Constitution,[5] that is, "when used singly—when we say *the writ of habeas corpus,* without addition, we most generally mean that great writ" traditionally used to test restraint of liberty. *Ex parte Bollman, supra,* at 95.

The Chief Justice, following the English practice, particularly 3 Blackstone, Commentaries *129, noted that the writ *ad prosequendum* was necessary to remove a prisoner in order to prosecute him in the *proper jurisdiction* wherein the offense was committed. In his discussion of the common usage of the various writs, he recognized in *Ex parte Bollman, supra,* that the Congress had without qualification authorized the customary issuance of the writ *ad prosequendum* by a jurisdiction not the same as that wherein the prisoner was confined.

Following the Judiciary Act of 1789, there came a series of legislative amendments dealing with habeas corpus, but, significantly, all related solely to the usages of the Great Writ.[6] Simultaneously with the expansion of the Great Writ, there developed from the common source, § 14 of the first Judiciary Act, a second line of statutes—the "All writs" portion of § 14, in large measure the first sentence of that section, devolved by a process of addition along a course parallel to but separate from the habeas corpus provisions. Upon revision of the federal statutes in 1874, the general power of courts to issue writs of habeas

[5] Art. I, § 9, cl. 2.

[6] The habeas corpus provisions of § 14 of the original Judiciary Act, 1 Stat. 81 (1789), were amended by 4 Stat. 634 (1833), 5 Stat. 539 (1842), 14 Stat. 385 (1867), R. S. §§ 752–753 (1875), and 43 Stat. 940 (1925).

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corpus, which was a part of the express grant in the first sentence of § 14, disappeared from the language of the statutes derivative from the all writs portion of the first sentence, R. S. § 716 (1875), which, after further amendment, is known today as 28 U. S. C. § 1651.[7] This general power was, however, retained in the first of the three reorganized sections of the Revised Statutes dealing with habeas corpus, R. S. § 751 (1875),[8] and served as the modern version of the authority for writs *ad prosequendum* upon which Marshall had relied in *Ex parte Bollman.*

The second section in the 1875 Revision of the laws on habeas corpus, R. S. § 752, authorizing issuance of the Great Writ by justices and judges, included the jurisdictional limitation [9] which had been imposed for the first time [10] in 1867, 14 Stat. 385. The motive for that limitation can be traced to the position reportedly taken by Chief Justice Chase in rejecting an application for the Great Writ from a prisoner on the ground that he was incarcerated outside his circuit.[11] Mindful of the position taken

[7] R. S. § 716 (1875): "The Supreme Court and the circuit and district courts shall have power to issue writs of scire facias. They shall also have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

[8] R. S. § 751 (1875): "The Supreme Court and the circuit and district courts shall have power to issue writs of habeas corpus."

[9] R. S. § 752 (1875): "The several justices and judges of the said courts, within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty."

[10] Actually, the 1842 extension of the Great Writ's availability to imprisoned applicants, 5 Stat. 539, had imposed a jurisdictional limitation upon its issuance—power to grant applications by foreign citizens was given only to Justices of the Supreme Court, and to judges of the District Court *in the district of confinement.*

[11] This decision, unreported, would appear consonant with a legitimate inference drawn from the jurisdictional limitation expressed in

by the Chief Justice, the Senate amended the first draft of the bill expanding once again the usage of the Great Writ and inserted the phrase "within their respective jurisdictions"—an obvious limitation upon the action of individual judges and justices in exercising their power to issue the Great Writ. The debates in Congress indicate that it was thought inconvenient, potentially embarrassing, certainly expensive and on the whole quite unnecessary to provide every judge anywhere with authority to issue the Great Writ on behalf of applicants far distantly removed from the courts whereon they sat.[12]

The third section in the revised arrangement, R. S. § 753, collected all the instances in which the Great Writ might issue on behalf of imprisoned applicants.

From this history it becomes obvious that the Congress had continual concern for the Great Writ—*habeas corpus ad subjiciendum*. Exclusively to it did it give attention, and only upon its issuance did it impose a limitation. The other species of the writ, including that involved here—*habeas corpus ad prosequendum*—continued to derive authority for their issuance from what had been the first sentence of § 14 of the First Judiciary Act, which was not repealed until the 1875 Revision of the Statutes at Large, when it was re-enacted as two separate and distinct sections, R. S. § 716 (all-writs) and R. S. § 751 (general habeas corpus).

The Congress had obviously made an attempt to completely separate the habeas corpus provisions from those concerning other writs. However, just as in 1789 Marshall had found authority for the writ *ad prosequendum* in the reference to habeas corpus in the first sentence of § 14, so

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1842, cf. note 10, *supra*, that Justices of the Supreme Court should limit their considerations to applications from within their assigned circuits, just as district judges were limited to their district.

[12] Cong. Globe, Part 1, p. 730; Part 2, pp. 790, 899, 39th Cong., 2d Sess.

too in 1875 its authority was constituted in the lineal derivative of that sentence, R. S. § 751, which gave courts without jurisdictional limitation, as distinguished from individual judges, R. S. § 752, the power to issue writs of habeas corpus generally. *State* v. *Sullivan,* 50 F. 593, 598. Clearly, the use of the phrase in § 751 was generic, whereas the grant of authority to judges "within their respective jurisdictions" in R. S. § 752 was specific, meaning only the Great Writ.[13]

Thus, the *ad prosequendum* writ, necessary as a tool for jurisdictional potency as well as administrative efficiency, extended to the entire country. The Great Writ, however, designed to relieve an individual from oppressive confinement, could well have been and properly was, at least as early as 1842,[14] issuable only in the district of confinement. This was in consonance with convenience, necessity and avoidance of inordinate expense—considerations remarkably unpersuasive when viewed in light of the role of the writ *ad prosequendum.*

This same trichotomy of sections in the revised statutes, setting out the statutory authority for habeas corpus, was continued through the 1911 revision of the Judicial Code which did not affect by repeal or significant amendment the existing law on the writs.[15] In 1925, when the Judicial Code was amended, 43 Stat. 940, some attention was again paid to habeas corpus, but only to assign to individual judges of the Courts of Appeals the same power within their circuits as District Court judges had within their districts—an obvious adherence to the tradition embodied in R. S. § 752 which dealt only with the Great Writ and imposed the jurisdictional limitations on its issuance. In

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[13] We do not decide whether the writ *habeas corpus ad testificandum* was intended by Congress to be subject to the 1867 jurisdictional limitation. Cf. *Edgerly* v. *Kennelly,* 215 F. 2d 420.

[14] See note 10, *supra.*

[15] 36 Stat. 1167.

1948, when further clarification of the United States Code [16] was thought desirable, the statute took its present form, and for the first time in the legislative history of the writ of habeas corpus there was made explicit reference to the writ *ad prosequendum* in a statute.[17] Although the three sections were merged into one, it was done only "with changes in phraseology necessary to effect the consolidation." Specifically disclaimed was any intent to change the existing law on habeas corpus. That the Revisor considered the new section to deal almost exclusively with the Great Writ, in spite of its authorization of writs *ad testificandum* and *ad prosequendum,* is obvious from his own note: "Words 'for the purpose of an inquiry into the cause of restraint of liberty' . . . were omitted as merely descriptive of the writ." [18] However, as reconstructed in § 2241, the authority of courts, as well as of individual justices and judges, was now provided in a single sentence which ostensibly imposed upon all the same jurisdictional limitation previously imposed only as to the Great Writ's issuance by individual judges.

Since from its first usage the limiting phrase had always been a qualification of the authority of individual judges to issue the Great Writ, we see no reason to read into the new codification a change of meaning specifically disclaimed by the Revisor. It is our conclusion, therefore, that the territorial limitation refers solely to issuance of the Great Writ with which the bulk of the section is concerned.

We feel that there is no indication that there is required today a more restricted view of the writ *habeas corpus ad*

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[16] R. S. §§ 751–753 (1875) were at that time included as §§ 451–453 of 28 U. S. C. (1946 ed.).

[17] See note 4, *supra.*

[18] H. R. Rep. No. 2646, 79th Cong., 2d Sess., p. A169; H. R. Rep. No. 308, 80th Cong., 1st Sess., pp. A177–A178.

prosequendum than was necessary in 1807 when Chief Justice Marshall considered it. Cases reported from at least three Circuit Courts of Appeals, involving extraterritorial writs *ad prosequendum* issued both before and after the 1948 revision, *Taylor* v. *United States,* 238 F. 2d 259 (C. A. D. C. Cir.); *United States ex rel. Moses* v. *Kipp,* 232 F. 2d 147 (C. A. 7th Cir.); *Hill* v. *United States,* 186 F. 2d 669 (C. A. 10th Cir.); and perhaps four, cf. *Vanover* v. *Cox,* 136 F. 2d 442 (C. A. 8th Cir.), indicate as an accepted, or at least there unchallenged,[19] interpretation of the statutes, that the writ suffers no geographical limitations in its use.

Moreover, this construction appears neither strained nor anomalous. Much was borrowed from our English brethren. Although our own practice has limited the jurisdiction of courts and justices to issue the Great Writ, we have never abandoned the English system as to the *ad prosequendum* writ. Cf. 1 Chitty's Criminal Law 132 (1847), and 4 Bacon's Abridgment 566 (1856) for discussion of similar process. After almost two hundred years, we cannot now say it has been abandoned by a Congress which expressly said it intended to make no substantive changes. The more strongly are we led to this construction by recognition of the continually increasing importance assigned to authorizing extraterritorial process where patently desirable. Cf. Fed. Rules Crim. Proc., 4 (c)(2) and 17 (e)(1). And it is the more so here where an accommodation is so important between the federal and state authorities. *Hebert* v. *Louisiana,*

[19] We are not unmindful of the terse Third Circuit dictum to the contrary in *Yodock* v. *United States,* 196 F. 2d 1018, and the divergent view of at least two District Courts. However, *Phillips* v. *Hiatt,* 83 F. Supp. 935, considered § 2241 as derived solely from R. S. § 752 (1875); and *In the Matter of Karol Van Collins,* 160 F. Supp. 165, relied, without distinction, upon *Ahrens* v. *Clark,* 335 U. S. 188, which dealt only with the Great Writ.

272 U. S. 312, 315–316 (1926). That comity is necessary between sovereignties in the administration of criminal justice in our federal-state system is given full recognition by affording through the use of the writ both respect and courtesy to the laws of the respective jurisdictions.[20]

Viewed in light of this history, petitioner's reliance upon cases dealing solely with territorial limitations upon issuance of the Great Writ and the criminal process authorized by 28 U. S. C. § 1651(a), unrelated to habeas corpus, is misplaced. *Ahrens* v. *Clark,* 335 U. S. 188 (1948), is clearly inapposite as is also *United States* v. *Hayman,* 342 U. S. 205 (1952), in which habeas corpus was not even involved.[21] To the extent that lower court decisions have relied upon a contrary construction of § 2241, we disapprove of their conclusions.[22]

Even were we to have agreed with petitioner's argument, we would nonetheless be constrained to recognize that, within the modern attitude adopted in *Ex parte Endo,* 323 U. S. 283 (1944), rigid formulae, even as to the issuance of the Great Writ, may be tempered by factual considerations requiring the decision that its "objective may be in no way impaired or defeated by the removal of the prisoner from the territorial jurisdiction of the District Court" after the suit is begun. At 307. Such facts are present here. Petitioner Carbo filed an appearance bond, and submitted himself to the jurisdiction of the District Court by his personal appearance and plea of not guilty upon arraignment. Permission for his return to New York before trial was granted only upon his promise to return

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[20] In view of the cooperation extended by the New York authorities in honoring the writ, it is unnecessary to decide what would be the effect of a similar writ absent such cooperation.

[21] That case, as well as *Price* v. *Johnston,* 334 U. S. 266, dealt with process *in the nature of habeas corpus,* the authority for which was not derived from the *habeas corpus* statutes.

[22] See note 19, *supra.*

and the condition that he do so. Implicit in his request for the order of return to New York was his consent to the obligation imposed upon his custodians to return him to California promptly. The second writ of *habeas corpus ad prosequendum,* the only writ here involved, served only as assurance to petitioner and to the court that he would not suffer default in the obligation of his bail. Just as the mere subsequent removal of the prisoner in *Endo* failed to render that application beyond the court's power to consider, so too here, in a similar vein, we cannot say that these factors have fastened onto petitioner so unsecure a leash as to suffer his escape from the jurisdiction of the California court. We must, therefore, in any event, affirm on these facts.

Affirmed.

MR. JUSTICE WHITTAKER, believing that, on the peculiar facts here involved, the writ, though denominated "Habeas Corpus Ad Prosequendum," had the effect of and properly should be regarded as a subpoena issued under Paragraph (a) and properly served under Paragraph (e)(1) of Rule 17 of Federal Rules of Criminal Procedure, concurs in the result of the Court's opinion.

MR. CHIEF JUSTICE WARREN, with whom MR. JUSTICE BLACK joins, dissenting.

I cannot agree with the decision of the Court. We have said that "apart from specific exceptions created by Congress the jurisdiction of the district courts is territorial," *Ahrens* v. *Clark,* 335 U. S. 188, 190, and that as a general rule "a United States district court cannot issue process beyond the limits of the district." *Georgia* v. *Pennsylvania R. Co.,* 324 U. S. 439, 467–468. These principles were applied to writs of *habeas corpus ad subjiciendum* in *Ahrens* v. *Clark, supra,* where we held that the words "within their respective jurisdictions" as

used in 28 U. S. C. § 2241 created a territorial limitation upon the *habeas corpus* jurisdiction of federal judges and courts. Today we are departing from *Ahrens* and the principles on which our decision in that case rested, for the Court holds that the restrictive language of § 2241 is inapplicable to writs of *habeas corpus ad prosequendum*. I can see no justification for these variant interpretations of the same language in the same statute.

We are not helped by the tortured history of § 2241 and its antecedents, since the legislative material relied on by the Court is, to say the least, ambiguous,[1] and could be used to support inferences diametrically opposed to those drawn by the Court. For example, the fact that the first statutory reference to the writ of *habeas corpus ad prosequendum* does not appear until the enactment of § 2241 reasonably implies that none of the prior statutory history is relevant insofar as that writ is concerned, and that in codifying a unified *habeas corpus* statute in 1948, Congress intended the restrictive language of the first paragraph of § 2241 to apply to all of the writs thereafter enumerated, among which are both the writ *ad subjiciendum* and the writ *ad prosequendum*.

Although the specific question presented by this case is a matter of first impression for us, the Court concludes that, since three, and perhaps four, Circuit Courts of Appeals have upheld the issuance of extraterritorial writs *ad prosequendum*, its interpretation of the statute has

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[1] Chief Justice Taft, speaking for the Court in *Ponzi* v. *Fessenden*, 258 U. S. 254, construed § 753 of the Revised Statutes, one of the enactments relied upon by the Court, as imposing a territorial limitation upon the District Court's power to issue a writ of *habeas corpus ad prosequendum*. He said:

"Under statutes permitting it, he [the prisoner] might have been taken under the writ of habeas corpus to give evidence in a federal court, or to be tried there *if in the same district*, § 753, Rev. Stats. . . ." *Id.*, at 261. (Emphasis added.)

become an "accepted" one. But at the same time, the Court recognizes that there are other cases in which lower courts have "relied upon a contrary construction of § 2241." In each of these cases, the District Court overruled a defendant's request for a speedy trial by holding that since its orders could not "run beyond its territorial jurisdiction," it had no power to issue a writ *ad prosequendum* to bring to trial a defendant who was incarcerated outside of its district. *In the Matter of Van Collins,* 160 F. Supp. 165, 167 (D. C. Me.); *Phillips* v. *Hiatt,* 83 F. Supp. 935, 938 (D. C. Del.). Cf. *Edgerly* v. *Kennelly,* 215 F. 2d 420 (C. A. 7th Cir.); *Yodock* v. *United States,* 196 F. 2d 1018 (C. A. 3d Cir.). In view of these cases, it can hardly be said that the Court's interpretation has become a generally "accepted" one.

The court below justified the District Court's action not upon § 2241, but rather upon the all writs statute, 28 U. S. C. § 1651. This Court refrains from relying on that section, as, indeed, it should, since the general provisions of § 1651 should not be read as expanding the jurisdictional limitations created by Congress with regard to a specific writ.[2] See *Price* v. *Johnston,* 334 U. S. 266, 279; *Adams* v. *McCann,* 317 U. S. 269, 272–273.

I do not say that the federal courts should not have the power to issue extraterritorial writs *ad prosequendum.* There are persuasive reasons for conferring such authority upon the courts, and Congress is perfectly free to do so. However, if the jurisdiction of the federal courts is to be expanded, and if the traditional territorial limitation

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[2] The lower court's reliance upon *United States* v. *Hayman,* 342 U. S. 205, is misplaced. There the Court upheld the issuance of an extraterritorial writ in the nature of *habeas corpus,* saying that the authority to issue the writ under § 1651 was necessarily inferred from the provisions of 28 U. S. C. § 2255. This case does not involve § 2255; nor does it involve any other statute which could be read as conferring extraterritorial authority upon the federal courts.

is to be abandoned, then Congress should specifically so indicate.[3] But Congress has not done so, and until it does, we should not tamper with the present statutory scheme, except by following the customary procedure of adopting a special rule and submitting it to Congress for approval. Cf. Rules 4 (c)(2), 17 (e)(1), Fed. Rules Crim. Proc.

Finally, I must add a few words concerning the Court's dictum that, regardless of the interpretation placed upon § 2241, the California District Court had jurisdiction to issue the writ because the petitioner had previously appeared in that court, had entered a plea of not guilty, and had been permitted to return to New York to obtain counsel on condition that he would come back to California for trial. It is said that by virtue of this appearance, the District Court had "fastened . . . a leash" on the petitioner, and that this "leash" supported the issuance of the writ *ad prosequendum*. However, the Court ignores the fact that petitioner's initial appearance in California was also obtained by means of a writ of *habeas*

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[3] In those few instances when Congress intended to extend the territorial jurisdiction of the federal courts, it has specifically and unambiguously indicated that intent. See Rules 4 (c)(2) and 17 (e)(1), Fed. Rules Crim. Proc., which read:

"Rule 4. Warrant or Summons Upon Complaint.

. . . . . .

"(c) Execution or Service; and Return.

. . . . . .

"(2) Territorial Limits. The warrant may be executed or the summons may be served at any place within the jurisdiction of the United States."

"Rule 17. Subpoena.

. . . . . .

"(e) Place of Service.

"(1) In United States. A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the United States."

corpus ad prosequendum addressed to the authorities of the New York City Prison. It ill behooves the Court to attempt to justify the issuance of an unauthorized writ of *habeas corpus* by relying upon jurisdiction that was acquired by an equally unauthorized writ.[4] This theory introduces an unwise and judicially engrafted bootstrap exception to § 2241. In my opinion, the "leash" relied upon by the Court is in reality no more than a rope of sand.

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[4] The Court's reliance upon *Ex parte Endo*, 323 U. S. 283, is misplaced, because the District Court's initial jurisdiction in that case was unquestionably proper in all respects.

DENVER CHICAGO TRANSPORT CO., INC., *v.* UNITED STATES ET AL.

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

No. 503. Decided January 9, 1961.

183 F. Supp. 785, affirmed.

Thomas F. Kilroy for appellant.

Solicitor General Rankin, Assistant Attorney General Bicks, Richard A. Solomon, Robert W. Ginnane and *Francis A. Silver* for the United States and the Interstate Commerce Commission.

PER CURIAM.

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

OREGON-NEVADA-CALIFORNIA FAST FREIGHT, INC., *v.* STEWART ET AL.

APPEAL FROM THE SUPREME COURT OF OREGON.

No. 521. Decided January 9, 1961.

Appeal dismissed for want of a substantial federal question.
Reported below: 223 Ore. 314, 353 P. 2d 541.

Ferris F. Boothe for appellant.

Robert Y. Thornton, Attorney General of Oregon, and *Alfred B. Thomas* and *Theodore W. deLooze,* Assistant Attorneys General, for appellees.

PER CURIAM.

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

WORTHINGTON CORP. *v.* MLODOZENIEC ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 515. Decided January 9, 1961.

Appeal dismissed and certiorari denied.

Reported below: See 9 App. Div. 2d 21, 189 N. Y. S. 2d 468.

Benedict T. Mangano for appellant.

Louis J. Lefkowitz, Attorney General of New York, *Paxton Blair,* Solicitor General, and *Roy Wiedersum* and *Gilbert M. Landy,* Assistant Attorneys General, for appellees.

PER CURIAM.

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

COUNTY OF LAWRENCE ET AL. *v.* UNITED STATES.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 528. Decided January 9, 1961.

280 F. 2d 462, affirmed.

Robert C. Lea, Jr. for appellants.

Solicitor General Rankin, Assistant Attorney General Morton and *Roger P. Marquis* for the United States.

PER CURIAM.

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

SYLVANDER ET AL. *v.* FARMERS & TRADERS LIFE INSURANCE CO. ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 529. Decided January 9, 1961.

Appeal dismissed for want of a substantial federal question.
Reported below: See 9 App. Div. 2d 1019, 196 N. Y. S. 2d 592.

Joseph W. Burns and *Laurence Sovik* for appellants.

Louis J. Lefkowitz, Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Benjamin E. Shove* for appellees.

PER CURIAM.

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

BELTOWSKI *v.* RIGG, WARDEN.

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

No. 405, Misc. Decided January 9, 1961.

PER CURIAM.

The appeal is dismissed.

RIDGWAY NATIONAL BANK ET AL. *v.* PENNSYLVANIA.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

No. 516. Decided January 9, 1961.

Appeal dismissed and certiorari denied.
Reported below: 400 Pa. 261, 161 A. 2d 390.

William I. Crosby and *B. R. Coppolo* for appellants.

Anne X. Alpern, Attorney General of Pennsylvania, *John Sullivan,* Deputy Attorney General, and *Robert C. Derrick,* Assistant Attorney General, for appellee.

PER CURIAM.

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

TRAVIS *v.* UNITED STATES.

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

No. 10. Argued December 13, 1960.—Decided January 16, 1961.

Petitioner was indicted in the United States District Court for the District of Colorado under 18 U. S. C. § 1001 for making and executing in Colorado and filing with the National Labor Relations Board in Washington, D. C., under § 9 (h) of the National Labor Relations Act, as it then stood, false affidavits that he was not a member of the Communist Party and was not affiliated with it. The affidavits were executed by petitioner as a union officer in Colorado and mailed there to the Board in Washington, D. C., where they were received and filed. Notwithstanding a timely objection to the venue, petitioner was tried and convicted in Colorado. *Held:* Venue lay only in the District of Columbia, where § 9 (h) and the Board's regulations required the affidavits to be "on file with the Board," and the judgment is reversed. Pp. 632–637.

(a) The words of § 9 (h), "unless there is on file with the Board," suggest that the filing must be completed before there is a "matter within the jurisdiction" of the Board, within the meaning of 18 U. S. C. § 1001, and § 9 (h) makes the criminal penalty applicable only to affidavits "on file with the Board." Pp. 635–636.

(b) When 18 U. S. C. § 3237 is read in the light of the constitutional requirements and the explicit provision of § 9 (h), the *locus* of the offense has been carefully specified, and only the single act of having a false statement "on file with the Board" is penalized. Pp. 636–637.

269 F. 2d 928, reversed.

268 F. 2d 218 and 280 F. 2d 430, judgments vacated.

Telford Taylor argued the cause for petitioner. With him on the briefs were *Nathan Witt* and *Kenneth Simon.*

George B. Searls argued the cause for the United States. With him on the briefs were *Solicitor General Rankin, Assistant Attorney General Yeagley, Philip R. Monahan* and *Kevin T. Maroney.*

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MR. JUSTICE DOUGLAS delivered the opinion of the Court.

In this case [1] petitioner was charged on four counts of an indictment with the making and filing of false non-Communist affidavits [2] required by § 9 (h) of the National Labor Relations Act, as amended by the Taft-

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[1] There are two companion cases, No. 3, *Travis* v. *United States*, and No. 71, *Travis* v. *United States*, in which we also granted certiorari and which present phases of the main case. We discuss them near the close of the opinion.

[2] This section, which was repealed by § 201 (d) of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 525, provided:

"No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, *unless there is on file with the Board an affidavit* executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits." (Italics added.)

Section 35 (A) of the Criminal Code was repealed by § 21 of the Act of June 25, 1948, 62 Stat. 683, 862, and is now covered, so far as we are now concerned, by 18 U. S. C. § 1001, which provides:

"Whoever, *in any matter within the jurisdiction of any department or agency of the United States* knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both." (Italics added.)

Hartley Act, 61 Stat. 136, 146, and further amended by the Act of Oct. 22, 1951, § 1 (d), 65 Stat. 601, 602. The indictment charged that the affidavits were false writings or documents made and executed in Colorado and filed in Washington, D. C., with the National Labor Relations Board.

Petitioner was convicted and on appeal the judgment of conviction was reversed for a new trial. 247 F. 2d 130. Petitioner was tried a second time and again convicted. This time the judgment was affirmed on appeal, one judge dissenting. 269 F. 2d 928. The case is here on a writ of certiorari. 363 U. S. 801.

Before the first trial, petitioner moved to dismiss the indictment on the ground that venue was improperly laid in Colorado. The District Court denied the motion. Although the Court of Appeals reversed on another ground on petitioner's first appeal, it specifically approved the laying of venue in Colorado (247 F. 2d 130, 133–134) recognizing that its ruling was in conflict with that in *United States* v. *Valenti,* 207 F. 2d 242 (C. A. 3d Cir.). It is solely to this issue that we address ourselves.

It is agreed that the affidavits were executed by petitioner as a union officer in Colorado and mailed there to the Board in Washington, D. C., where they were received and filed.[3] The prosecution contends—and it was held below—that the offense was begun in Colorado and completed in the District of Columbia. In that view venue was properly laid in Colorado by virtue of 18 U. S. C. § 3237 (a) which provides:

> "Except as otherwise expressly provided by enactment of Congress, any offense against the United

[3] Under the regulations in force at the time of filing, petitioner's affidavit was required to be on file with the General Counsel of the National Labor Relations Board in Washington, D. C. 29 CFR § 101.3 (b) (since deleted, see 24 Fed. Reg. 7501 (Sept. 17, 1959)).

> States begun in one district and completed in another . . . may be inquired of and prosecuted in any district in which such offense was begun . . . or completed."

We start with the provision of Art. III, § 2 of the Constitution that criminal trials "shall be held in the State where the said crimes shall have been committed," a safeguard reinforced by the command of the Sixth Amendment that the criminal trial shall be before an impartial jury of "the State and district wherein the crime shall have been committed." We start also with the assumption that Colorado, the residence of petitioner, might offer conveniences and advantages to him which a trial in the District of Columbia might lack. We are also aware that venue provisions in Acts of Congress should not be so freely construed as to give the Government the choice of "a tribunal favorable" to it. *United States* v. *Johnson,* 323 U. S. 273, 275. We therefore begin our inquiry from the premise that questions of venue are more than matters of mere procedure. "They raise deep issues of public policy in the light of which legislation must be construed." *United States* v. *Johnson, supra,* 276.

Where various duties are imposed, some to be performed at a distant place, others at home, the Court has allowed the prosecution to fix the former as the venue of trial. *Johnston* v. *United States,* 351 U. S. 215, 222. The use of agencies of interstate commerce enables Congress to place venue in any district where the particular agency was used. *Armour Packing Co.* v. *United States,* 209 U. S. 56. "The constitutional requirement is as to the locality of the offense and not the personal presence of the offender." *Id.,* at 76. Where the language of the Act defining venue has been construed to mean that Congress created a continuing offense, it is held, for venue purposes, to have been committed wherever the wrongdoer roamed.

United States v. *Cores,* 356 U. S. 405. And see *Brown* v. *Elliott,* 225 U. S. 392. The decisions are discrete, each looking to the nature of the crime charged. Thus, while the use of the mails might be thought to allow venue to be laid either at the sending or receiving end, the trial was recently restricted to the district of the sender, in light of the constitutional provisions already mentioned and the phrasing of a particular criminal statute. *United States* v. *Johnson, supra,* 277–278. Where Congress is not explicit, "the *locus delicti* must be determined from the nature of the crime alleged and the location of the act or acts constituting it." *United States* v. *Anderson,* 328 U. S. 699, 703.

Section 9 (h) of the National Labor Relations Act,[4] with which we are concerned, did not require union officers to file non-Communist affidavits. If it had, the whole process of filing, including the use of the mails, might logically be construed to constitute the offense. But this statutory design is different. It requires that the Board shall make no investigation nor issue any complaint in the matters described in § 9 (h) "unless there is on file with the Board" a non-Communist affidavit of each union officer. The filings are conditions precedent to a union's use of the Board's procedures. *Leedom* v. *International Union,* 352 U. S. 145, 148. The false statement statute,[5] under which the prosecution is brought, penalizes him who knowingly makes any "false" statement "in any matter within the jurisdiction of any department or agency of the United States." There would seem to be no offense, unless petitioner completed the filing in the District of Columbia. The statute demanded that the affidavits be on file with the Board before it could extend help to the union; the forms prescribed by the Board required the filing in the

[4] See note 2, *supra.*

[5] See 18 U. S. C. § 1001, note 2, *supra.*

District of Columbia; the indictment charged that petitioner filed the affidavits there. The words of the Act—"unless there is on file with the Board"—suggest to us that the filing must be completed before there is a "matter within the jurisdiction" of the Board within the meaning of the false statement statute.[6] When § 9 (h) provides the criminal penalty,[7] it makes the penal provisions applicable "to such affidavits," *viz.*, to those "on file with the Board."

The Government admits that the filing is necessary to the "occurrence" of the offense, but it argues that the offense has its "beginning" in Colorado, because it was there that "the defendant had irrevocably set in motion and placed beyond his control the train of events which would normally result (and here did result) in the consummation of the offense." We do not agree with this analysis. Venue should not be made to depend on the chance use of the mails, when Congress has so carefully indicated the *locus* of the crime. After mailing, the affidavit might have been lost; petitioner himself might have recalled it.[8] Multiple venue in general requires crimes consisting of "distinct parts" or involving "a continuously moving act." *United States* v. *Lombardo*, 241 U. S. 73, 77. When a place is explicitly designated where a paper must be filed, a prosecution for failure to file lies only at that place. *Id.*, at 76–78. The theory of that case was followed in *United States* v. *Valenti*, *supra*, where Judge Maris stated that no false statement has been made within the jurisdiction of the Board "until the affidavit through its filing has become the basis for action by the Board." *Id.*, at 244.

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[6] See 18 U. S. C. § 1001, note 2, *supra*.

[7] See note 2, *supra*.

[8] 39 CFR § 43.6 (a) provides: "Mail deposited in a post office may be recalled by the sender, by the parent or guardian of a minor child, or by the guardian of a person of unsound mind."

We think that is the correct view when 18 U. S. C. § 3237 is read in light of the constitutional requirements and the explicit provision of § 9 (h). The *locus* of the offense has been carefully specified; and only the single act of having a false statement at a specified place is penalized. The rationale of *United States* v. *Lombardo, supra,* a case involving a failure to file, is therefore equally applicable here. We conclude that venue lay only in the District of Columbia.

Petitioner also brought here two companion cases arising out of the same trial. In No. 3 he asked for a new trial on the ground of newly discovered evidence. In No. 71 he moved a second time for a new trial on the ground of newly discovered evidence. We granted the petitions in these cases as they were protective of petitioner's rights in the main litigation. 363 U. S. 801. But since our holding in the main case is that venue was improperly laid in Colorado, the judgment of conviction must be set aside. Accordingly the orders in Nos. 3 and 71 denying new trials have become moot and are vacated in the customary manner. In No. 10 the judgment is

Reversed.

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

Title 18 U. S. C. § 3237 (a) provides in pertinent part:

> "Except as otherwise expressly provided by enactment of Congress, any offense against the United States *begun* in one district and *completed* in another . . . may be inquired of and prosecuted in any district in which such offense was begun . . . or completed." (Emphasis added.)

On my view of the offense with which Travis is charged, I think that under this section the Government was entitled to proceed either in Colorado, where this affidavit

was made, or in the District of Columbia, where the affidavit was filed, and therefore dissent from the Court's holding that venue was improperly laid in Colorado.

Section 9 (h) of the National Labor Relations Act, as amended by the Taft-Hartley Act,[1] 61 Stat. 136, 146, provided that the National Labor Relations Board shall neither make an investigation nor issue any complaint on behalf of a labor union unless there is on file with it a non-Communist affidavit of the kind here in question. 18 U. S. C. § 1001 [2] is specifically made applicable to such affidavits. That section of the criminal code makes it an offense, in any matter within the jurisdiction of any department or agency of the United States, to falsify a

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[1] "No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 160 of this title, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of [18 U. S. C. § 1001] shall be applicable in respect to such affidavits." 29 U. S. C. § 159 (h), repealed by the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, § 201 (d).

[2] "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

material fact, make a false statement, or make or use any false writing or document. The elements of the crime here involved, therefore, are set out in 18 U. S. C. § 1001, and what § 9 (h) does is simply to supply the "jurisdiction of . . . [an] agency of the United States" required by § 1001.

If this crime may properly be viewed as having been begun in the district of Colorado and completed in the district of the District of Columbia, then venue may be laid in either district under 18 U. S. C. § 3237 (a). Whether that is the proper view of this offense is an issue on which the authorities in this Court are at best inconclusive. In *In re Palliser,* 136 U. S. 257, the Court held that where the defendant had mailed in New York to a postmaster in Connecticut a letter which constituted a prohibited tender of a contract with intent to induce the postmaster to violate his lawful duty, venue could properly be laid in the district of Connecticut. The Court expressly left open the question of whether venue might also have been laid in New York, 136 U. S., at 267–268. To the same effect is *Burton* v. *United States,* 202 U. S. 344. *United States* v. *Lombardo,* 241 U. S. 73, which the Court considers particularly significant, is not controlling, since in that case the offense charged was the *failure* to file with the Commissioner General of Immigration certain information concerning an alien woman whom the defendant was harboring for purposes of prostitution. In such a charge it is difficult to see how the defendant does anything at all except at the place where he fails to file. But cf. *United States* v. *Cores,* 356 U. S. 405. In contrast, the false affidavit in the present case first came into existence in Colorado, having been made and sworn to there.

Nor do the opinions in the lower courts establish anything like a clear line of authority from which it would be unwise now to depart. If anything, I think, they indi-

cate a contrary conclusion to that now reached by the Court. Compare *Henslee* v. *United States,* 262 F. 2d 750; *United States* v. *Miller,* 246 F. 2d 486; *De Rosier* v. *United States,* 218 F. 2d 420; *United States* v. *Downey,* 257 F. 366, and *Bridgeman* v. *United States,* 140 F. 577, with *United States* v. *Valenti,* 207 F. 2d 242.

In these circumstances, the proper course to follow appears to me to be to determine the appropriate venue "from the nature of the crime alleged and the location of the act or acts constituting it," *United States* v. *Anderson,* 328 U. S. 699, 703, and that determination should take into account that

> ". . . The provision for trial in the vicinity of the crime is a safeguard against the unfairness and hardship involved when an accused is prosecuted in a remote place. Provided its language permits, the Act in question should be given that construction which will respect such considerations." *United States* v. *Cores,* 356 U. S. 405, 407.

In this kind of case, prosecution in the district in which the affidavit was executed, most often I would suppose the place where the union offices are located, is more likely to respect the basic policy of the Sixth Amendment than would a prosecution in the district where the affidavit was filed. The witnesses and relevant circumstances surrounding the contested issues in such cases more probably will be found in the district of the execution of the affidavit than at the place of filing which, as in this instance, will often be for the defendant "a remote place," *United States* v. *Cores, supra*—that is the District of Columbia where the headquarters of the National Labor Relations Board are located in the case of officers of international unions, or elsewhere throughout the country where the Board has branch offices in the case of local union officers, 29 CFR § 101.3.

This is not to say that venue *must* be limited to the place of execution of the affidavit, but only that there is no lack of consonance with the underlying policy of the Sixth Amendment in permitting venue to be laid there if the elements of the crime allow. *United States* v. *Anderson, supra.* In holding that the crime for which this petitioner was prosecuted does not allow venue to be laid in the district of the making of the affidavit, the Court considers the essence of the crime to be the filing of the affidavit, and until that is accomplished it holds that the crime is not even begun. But since it is 18 U. S. C. § 1001 which defines the offense, § 9 (h) only supplying the requisite jurisdiction of the agency of the United States, and since by § 1001 the offense consists of *falsifying* a material fact, *making* a false statement, or *making* or using any false writing or document, it seems eminently reasonable to consider that the offense is at least definitively begun at the place where the false affidavit is actually made, sworn and subscribed. Cf. the *Henslee, Miller, De Rosier, Downey* and *Bridgeman* cases, *supra.*

It is of course true that the offense is not completed until the affidavit is filed with the Board, but I do not think it adds anything to say, as the Court does, that until such time as the affidavit is filed with the Board there is no matter "within the jurisdiction of any department or agency of the United States." The fact that the filing completes the offense by giving the Board jurisdiction over the matter does not, in my view, detract from the conclusion that the offense was begun when and where the affidavit was executed. Indeed this would seem to be the very type of situation contemplated by 18 U. S. C. § 3237 (a).

Since I consider it would be inappropriate for me, in dissent, to discuss issues which the Court does not reach, I refrain from considering the other grounds for reversal urged by the petitioner.

SYSTEM FEDERATION NO. 91, RAILWAY EMPLOYES' DEPARTMENT, AFL–CIO, ET AL. *v.* WRIGHT ET AL.

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

No. 48. Argued December 5, 1960.—Decided January 16, 1961.

In 1945, when the Railway Labor Act prohibited union-shop agreements between railroads and labor unions, nonunion employees of a railroad brought a suit against the railroad and certain unions of its employees which resulted in a consent decree forbidding the defendants to discriminate against nonunion employees because of their refusal to join unions. After the Act was amended in 1951 so as to permit union-shop agreements between railroads and labor unions, the petitioner unions moved that the decree be modified so as not to prohibit the defendants from entering into such agreements. The District Court, which had retained jurisdiction of the suit, denied the motion. *Held:* It erred in doing so. Pp. 643–653.

(a) It would have been an abuse of discretion to deny modification of the injunction had it not resulted from a consent decree, since a change in the law had expressly made lawful what had theretofore been forbidden. *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 18 How. 421. Pp. 646–650.

(b) A different conclusion is not required by the fact that the injunction was incorporated in a consent decree, since the decree was a judicial act and not a mere contract between the parties. Pp. 650–651.

(c) It was the Railway Labor Act, and only incidentally the parties, that the District Court served in entering the consent decree; and that Court must be free to continue to further the objectives of the Act after its provisions have been amended. Pp. 651–653.

272 F. 2d 56, reversed.

Richard R. Lyman argued the cause for petitioners. With him on the brief was *Robert E. Hogan.*

Marshall P. Eldred argued the cause for respondents and filed a brief for respondents other than Louisville &

Nashville Railroad Co. *John P. Sandidge, H. G. Breetz, W. L. Grubbs, M. D. Jones* and *Joseph L. Lenihan* filed a brief for Louisville & Nashville Railroad Co., respondent.

MR. JUSTICE HARLAN delivered the opinion of the Court.

By a complaint filed on July 16, 1945, in the United States District Court for the Western District of Kentucky, 28 nonunion employees of the Louisville and Nashville Railroad began an action for declaratory relief, an injunction, and damages against the railroad and a number of unions representing its employees. Particularly relevant to the complaint were those provisions of the fourth and fifth paragraphs of § 2 of the Railway Labor Act [1] which make it

> "unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization . . . ."

and which forbid any carrier from requiring "any person seeking employment to sign any contract or agreement promising to join . . . a labor organization . . . ." Also relied upon was the duty of the exclusive bargaining agent to represent fairly and without discrimination all members of the class represented. See *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192. The factual allegations set forth a pattern of discriminations effected by the railroad and the defendant unions against nonunion employees.

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[1] 45 U. S. C. § 152.

By a settlement agreement dated December 1, 1945, the 28 plaintiffs released the railroad and union defendants from all claims [2] or actions then accrued "in consideration of the sum of $5000.00 this day paid to the undersigned . . . and the consent of said defendants to the entry of a decree in said action, a copy of which is attached hereto . . . ." The attached decree was adopted by the District Court on December 7, 1945. After detailing and then enjoining a number of specific discriminations on the basis of union status, the decree provided that the defendants

> "are further enjoined, in the application of the provisions of the regularly adopted bargaining agreements in effect between the defendant Railroad and the defendant Unions, or that may be hereafter in effect between the defendant Railroad and the defendant Unions in accordance with the provisions of the Railway Labor Act, from discriminating against the plaintiffs and the classes represented by them in this action by reason of or on account of the refusal of said employes to join or retain their membership in any of defendant labor organizations, or any labor organization . . . ."

The District Court retained jurisdiction over the matter "for the purpose of entering such further orders as may be deemed necessary or proper."

In 1951 the Railway Labor Act was amended to permit, under certain circumstances, a contract requiring a union shop.[3] In order to avail themselves of the newly granted statutory privilege, in 1957 the petitioners filed in the District Court a motion under Rule 60 (b) of the Federal

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[2] Each of the 28 plaintiffs had claimed $5,000 in damages.

[3] 45 U. S. C. § 152 Eleventh. See *Railway Employes' Department* v. *Hanson*, 351 U. S. 225.

Rules of Civil Procedure [4] asking for a sufficient modification of the consent decree to make clear that it

> "shall have no prospective application to prohibit defendants, or any of them, from negotiating, entering into, or applying and enforcing, any agreement or agreements authorized by Section 2, Eleventh, of the Railway Labor Act, as amended January 10, 1951."

The motion, which was opposed by the railroad and its suing employees (respondents here), was denied after a hearing at which was presented unrebutted evidence of assaults, destruction of property, and various other malicious acts directed by members of the union at any employee (union or nonunion) who had worked during a 58-day strike in 1955. The District Court acknowledged its authority to modify the consent decree but declined to do so, primarily out of regard for the fact that the unions (petitioners here) had consented by the decree not to have a union shop then or in the future, an undertaking which the District Court considered was not unlawful either before or after the 1951 amendments.[5] The court stated:

> "It is to be remembered that the provisions of the Railway Labor Act made illegal a union shop in 1945, when the injunction was agreed upon. Hence, it was then unnecessary for the railroad and the unions

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[4] The relevant provisions of Rule 60 (b) are as follows: "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . . (5) . . . it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment."

[5] In the view we take of the case we need not consider whether such a commitment of indefinite duration is valid.

> to agree, as they did, that the non-union members should not then be required to join or maintain membership in any of their craft unions as a condition precedent to employment. The law so prohibited, Section 152, Fourth and Fifth, Title 45, United States Code Annotated, Railway Labor Act. The railroad and unions went further to provide by their agreement that no such requirement of union membership should thereafter be in effect in any bargaining agreement in accordance with the provisions of the Railway Labor Act. The 1951 amendment to the Act did no more than make negotiations for a union shop permissive, Railway Employees' Dept. v. Hanson, supra. The amendment did not nullify the agreement or the injunction. It did not prohibit an agreement between the railroad and the unions that a union shop should not exist. Hence, the Court leaves the parties as they agreed to be and to remain." 165 F. Supp. 443, 449.

Though making it clear that evidence of continued union hostility against nonunion employees was not decisive, the District Court gave some weight to the administrative difficulty of preventing unlawful discriminations against nonunion employees that might be facilitated if there were a union shop. The Sixth Circuit affirmed "for the reasons set forth in the opinion of Chief Judge Shelbourne" in the District Court. 272 F. 2d 56, 58. We granted certiorari because of the importance of the issues involved. 362 U. S. 948.

At the outset it should be noted that the *power* of the District Court to modify this decree is not drawn in question. That proposition indeed could not well be disputed. See *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 18 How. 421; *United States* v. *Swift & Co.*, 286 U. S. 106;

Chrysler Corp. v. *United States,* 316 U. S. 556. In the *Swift* case, Mr. Justice Cardozo put the matter thus, at 114:

> "We are not doubtful of the power of a court of equity to modify an injunction in adaptation to changed conditions though it was entered by consent. . . . Power to modify the decree was reserved by its very terms, and so from the beginning went hand in hand with its restraints. If the reservation had been omitted, power there still would be by force of principles inherent in the jurisdiction of the chancery. A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need. *Ladner* v. *Siegel,* 298 Pa. St. 487, 494, 495."

There is also no dispute but that a sound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen. The source of the power to modify is of course the fact that an injunction often requires continuing supervision by the issuing court and always a continuing willingness to apply its powers and processes on behalf of the party who obtained that equitable relief. Firmness and stability must no doubt be attributed to continuing injunctive relief based on adjudicated facts and law, and neither the plaintiff nor the court should be subjected to the unnecessary burden of re-establishing what has once been decided. Nevertheless the court cannot be required to disregard significant changes in law or facts if it is "satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong." *United States* v. *Swift & Co., supra,* at 114–115. A balance must thus be struck between the policies of *res judicata* and the right

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of the court to apply modified measures to changed circumstances.

Where there is such a balance of imponderables there must be wide discretion in the District Court. But discretion is never without limits and these limits are often far clearer to the reviewing court when the new circumstances involve a change in law rather than facts. When the decree in this case was originally made, union shop agreements were prohibited by the Railway Labor Act and thus constituted in themselves a form of statutorily forbidden discrimination. Congress has since, in the clearest terms, legislated that bargaining for and the existence of a union shop contract, satisfying the conditions provided in § 2 Eleventh of the Railway Labor Act, are not forbidden discriminations by union or employer. Congress has therefore determined that whatever ways such a union shop arrangement facilitates other, unauthorized discriminations must be borne as inescapable incidents of a legislatively approved contract term.

Had the 1945 decree simply represented relief awarded by the District Court after a trial of the action instituted by petitioners, there could be little doubt but that, faced with the 1951 amendment to the Railway Labor Act, it would have been improvident for the court to continue in effect this provision of the injunction prohibiting a union shop agreement as being unlawful *per se,* or its use as an instrument to effectuate other statutorily forbidden discriminations. That provision was well enough under the earlier Railway Labor Act, but to continue it after the 1951 amendment would be to render protection in no way authorized by the needs of safeguarding statutory rights at the expense of a privilege denied and deniable to no other union. This conclusion would not be affected by the circumstance, which the District Court here found, that the unions' hostility to nonunion employees still continued, for any discriminations that might be facilitated

by the union shop clause have been legislatively determined to be an expense more than offset by the benefits of such a provision.

What seems plain to us in reason, as to a litigated decree, is amply supported by precedent. In *Pennsylvania* v. *Wheeling & Belmont Bridge Co., supra,* this Court was also required to deal with the effect upon an outstanding injunction of subsequent congressional action. The Court had earlier held that a bridge across the Ohio River obstructed navigation in such a way as to be in conflict with certain Acts of Congress regulating navigation on the river. The decree "directed that the obstruction be removed, either by elevating the bridge to a height designated, or by abatement." 18 How., at 429. A later Act of Congress declared the bridge to be a lawful structure in its existing position and elevation. The injunction was dissolved, the Court saying, 18 How., at 430–432:

> "So far, therefore, as this bridge created an obstruction to the free navigation of the river, in view of the previous acts of congress, they are to be regarded as modified by this subsequent legislation; and, although it still may be an obstruction in fact, is not so in the contemplation of law. . . . But that part of the decree, directing the abatement of the obstruction, is executory, a continuing decree, which requires not only the removal of the bridge, but enjoins the defendants against any reconstruction or continuance. Now, whether it is a future existing or continuing obstruction depends upon the question whether or not it interferes with the right of navigation. If, in the mean time, since the decree, this right has been modified by the competent authority, so that the bridge is no longer an unlawful obstruction, it is quite plain the decree of the court cannot

> be enforced. There is no longer any interference with the enjoyment of the public right inconsistent with law, no more than there would be where the plaintiff himself had consented to it, after the rendition of the decree. Suppose the decree had been executed, and after that the passage of the law in question, can it be doubted but that the defendants would have had a right to reconstruct it? And is it not equally clear that the right to maintain it, if not abated, existed from the moment of the enactment?"

The principles of the *Wheeling Bridge* case have repeatedly been followed by lower federal and state courts.[6] We find no reason to recede from them.

That it would be an abuse of discretion to deny a modification of the present injunction if it had not resulted from a consent decree we regard as established. Is this result affected by the fact that we are dealing with a consent decree? Again we start with the *Swift* case, *supra,* where the Court held, at pp. 114–115:

> "The result is all one whether the decree has been entered after litigation or by consent. . . . In either

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[6] In *McGrath* v. *Potash,* 91 U. S. App. D. C. 94, 199 F. 2d 166, after Congress passed a statute excluding from the requirements of the Administrative Procedure Act deportation proceedings, the District of Columbia Circuit vacated an injunction against the Government requiring compliance with that Act. There are many cases where a mere change in decisional law has been held to justify modification of an outstanding injunction. *E. g., Ladner* v. *Siegel,* 298 Pa. 487, 148 A. 699 (whether a garage in a residential district is a nuisance); *Santa Rita Oil Co.* v. *State Board of Equalization,* 112 Mont. 359, 116 P. 2d 1012 (what federal instrumentalities are exempt from state taxation); *Coca-Cola Co.* v. *Standard Bottling Co.,* 138 F. 2d 788 (whether the use of the word "cola" infringed Coca-Cola's trademark); and see *Western Union Tel. Co.* v. *International Brotherhood,* 133 F. 2d 955 (whether ordinary strikes are forbidden by the Sherman Act and what picketing can constitutionally be enjoined).

> event, a court does not abdicate its power to revoke or modify its mandate if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong. We reject the argument for the interveners that a decree entered upon consent is to be treated as a contract and not as a judicial act. . . . But in truth what was then adjudged was not a contract as to any one. The consent is to be read as directed toward events as they then were. It was not an abandonment of the right to exact revision in the future, if revision should become necessary in adaptation to events to be."

This Court has never departed from that general rule.[7] We continue to adhere to it because of the policy it expresses. The parties cannot, by giving each other consideration, purchase from a court of equity a continuing injunction. In a case like this the District Court's authority to adopt a consent decree comes only from the statute which the decree is intended to enforce. Frequently of course the terms arrived at by the parties are accepted without change by the adopting court. But just as the adopting court is free to reject agreed-upon terms as not in furtherance of statutory objectives, so must it be free to modify the terms of a consent decree when a change in law brings those terms in conflict with statutory objectives. In short, it was the Railway Labor Act, and only incidentally the parties, that the District Court served in entering the consent decree now before us. The court must be free to continue to further the objectives of that Act when its provisions are amended.

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[7] In *Coca-Cola Co.* v. *Standard Bottling Co.*, 138 F. 2d 788, 790, a Circuit Court could say with some certainty: "We know of no case which holds that a consent decree imposing a continuing injunction deprives the court of its supervisory jurisdiction in the matter."

The parties have no power to require of the court continuing enforcement of rights the statute no longer gives.

The record leaves no room for doubt that the parties in fact attempted to conform the consent decree to the dictates of the Railway Labor Act as it then read. We can attach no weight to either of the two factors that led the lower courts to find that the parties had bargained, free of the requirements of the Act, for an injunction serving only their own interests. The first factor—that an independently arrived at contract rather than a decree effectuating rights accorded by the Act must have been contemplated because the unions agreed to equitable relief when their acts were already declared unlawful by statute—ignores completely the fact that this was precisely the relief sought in the complaint filed by the 28 plaintiffs and the relief that had been granted after litigation in *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192, and in *Graham* v. *Brotherhood of Firemen*, 338 U. S. 232. The second factor—that the unions agreed to be bound as to bargaining agreements that might later be in effect as well as the contract then in effect—ignores the fact that the parties, in all likelihood, meant only to cover any later bargaining agreements under the Act *as it read at the time of the consent decree.*[8]

The type of decree the parties bargained for is the same as the only type of decree a court can properly grant—one with all those strengths and infirmities of any litigated decree which arise out of the fact that the court will not continue to exercise its powers thereunder when a change in law or facts has made inequitable what was once equitable. The parties could not become the conscience

[8] We consider unpersuasive the argument of the railroad that in 1945 there was already on foot a movement to amend the Railway Labor Act so as to permit union shop agreements.

of the equity court and decide for it once and for all what was equitable and what was not, because the court was not acting to enforce a promise but to enforce a statute.

The judgment of the Court of Appeals must be reversed, and the case remanded to it for further proceedings consistent with this opinion.

It is so ordered.

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

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE FRANKFURTER and MR. JUSTICE WHITTAKER concur, dissenting in part.

This controversy commenced in 1945 prior to the time when so-called union shop agreements were authorized by Congress. Act of Jan. 10, 1951, 64 Stat. 1238, 45 U. S. C. § 152 Eleventh. Since the date of that law, which we upheld in *Railway Employes' Dept.* v. *Hanson,* 351 U. S. 225, employees and carriers *may* negotiate that type of agreement, though they are not required to do so. *Id.,* p. 231. Prior to that date, however, a union shop was barred by law in this industry; and a union that discriminated against nonunion members was accountable to them. See *Steele* v. *Louisville & N. R. Co.,* 323 U. S. 192, 207.

Twenty-eight nonunion members sued petitioners, in 1945, claiming damages in the amount of $140,000. The complaint purported to state a class action. But the case never came to trial. A settlement was reached which provided for (a) the payment of $5,000 in cash; (b) the waiver and release by the 28 plaintiffs of all their claims; and (c) a consent decree which would protect "the undersigned" against future acts of discrimination by petitioners.

The consent decree did not purport to protect *future* employees. By its terms it protected only "the plaintiffs in this action and all other employes of the defendant Railroad employed in" designated crafts or classes and not members of the union. The petitioners agreed to refrain from discriminating "against the plaintiffs and the classes represented by them."

I do not think the consent decree, read in light of the settlement, did more than settle claims of *then-existing employees.* Employees hired in the future were, by its terms, not included. Yet apparently a host of them have intervened, seeking the protection of the *status quo* created by that decree. I use the word "apparently" because the record does not show which intervenors were on the payroll of the carrier in 1945. Those who became employed after that date plainly are not entitled to the protection of the decree. Of those who were employed at that time, we know that some are still employed. Of the latter group, at least seven of the original 28 employees are still on the payroll. These seven released valuable claims for settling their disputes. It is harsh and unjust to deprive them of those fruits of the settlement. Whether there are others employed in 1945 who have a like claim to fair dealing is impossible to tell from the record.

We are all agreed that there is power in the District Court to modify the consent decree, whether or not the power to modify was reserved. *United States* v. *Swift & Co.,* 286 U. S. 106, 114. I agree with the Court that the union should not be disabled by that decree from carrying out the new union shop policy which Congress has made permissive. Cf. *Pennsylvania* v. *Wheeling & Belmont Bridge Co.,* 18 How. 421, 435–436. Certainly all employees who have joined the ranks since 1945 have no claim to its protection, as they are not included in its

terms and gave nothing up in exchange for it. To construe it to include them would as a result of changing circumstances turn the consent decree "into an instrument of wrong." *United States* v. *Swift & Co., supra,* 115. But when we set aside the decree as respects those who gave up something of value to get it, we do an injustice. I think the applicable principle is stated in *United States* v. *Swift & Co., supra,* 119: "The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making."

RADIANT BURNERS, INC., *v.* PEOPLES GAS LIGHT & COKE CO. ET AL.

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

No. 73. Argued December 7, 1960.—Decided January 16, 1961.

Under § 4 of the Clayton Act, a manufacturer of gas heaters brought a suit for treble damages against a trade association and ten of its members which are pipeline companies, gas distributors and manufacturers of gas burners, claiming that the defendants had combined and conspired to restrain interstate commerce in the manufacture and sale of gas burners in violation of § 1 of the Sherman Act. It alleged that: The association tests burners and issues a seal of approval for those which pass its tests; such tests are not objective but are influenced by some of the defendants which are in competition with plaintiff; the association has improperly refused to approve plaintiff's gas burners; two of the defendants which are gas distributors refuse to provide gas for use in plaintiff's burners; and plaintiff's gas burners have thus been effectively excluded from the market. *Held:* It was error for the District Court to dismiss the complaint for failure to state a claim upon which relief could be granted. *Klor's, Inc.*, v. *Broadway-Hale Stores*, 359 U. S. 207. Pp. 657–660.

273 F. 2d 196, reversed.

Richard F. Levy argued the cause for petitioner. With him on the brief were *Joseph Keig, Sr.* and *John O'C. FitzGerald.*

Horace R. Lamb argued the cause and filed a brief for the American Gas Association, Inc., respondent. With him on the brief in opposition to the petition for writ of certiorari was *Adrian C. Leiby*. *Clarence H. Ross* argued the cause for Peoples Gas Light & Coke Co. et al., respondents. With him on the brief were *Harold A. Smith, Arthur D. Welton, Jr., Justin A. Stanley, Robert W. Murphy* and *Burton Y. Weitzenfeld.*

Charles H. Weston argued the cause for the United States, as *amicus curiae,* urging reversal. On the brief were *Solicitor General Rankin, Assistant Attorney General Bicks* and *Richard A. Solomon.*

Thomas C. McConnell and *Lee A. Freeman* filed a brief for the Parmelee Transportation Co., as *amicus curiae,* urging reversal.

PER CURIAM.

The question here is whether petitioner's complaint stated a claim upon which relief could be granted. Petitioner is engaged at Lombard, Illinois, in the manufacture and sale in interstate commerce of a ceramic gas burner, known as the "Radiant Burner," for the heating of houses and other buildings. Claiming that American Gas Association, Inc. (AGA), a membership corporation doing business in the Northern District of Illinois and in other States, and 10 of its numerous members [1] who also are doing business in the Northern District of Illinois, combined and conspired to restrain interstate commerce in the manufacture, sale and use of gas burners in violation of § 1 of the Sherman Act, petitioner brought this action against those parties for treble damages and an injunction in the United States District Court for the Northern District of Illinois.[2]

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[1] Of the 10 members of AGA who were joined with it as defendants, two are public utilities engaged in the distribution of gas in the Northern District of Illinois, namely, The Peoples Gas Light & Coke Company and Northern Illinois Gas Company; two are pipeline companies engaged in transporting natural gas in interstate commerce into the Northern District of Illinois, namely, Natural Gas Pipeline of America and Texas-Illinois Natural Gas Co.; the other six are manufacturers of gas burners, namely, Autogas Company, Crown Stove Works, Florence Stove Company, Gas Appliance Service, Inc., Norge Sales Corporation, and Sellers Engineering Company.

[2] Section 1 of the Sherman Act provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint

The complaint included the following allegations: American Gas Association operates testing laboratories wherein it purports to determine the safety, utility and durability of gas burners. It has adopted a "seal of approval" which it affixes on such gas burners as it determines have passed its tests. Its tests are not based on "objective standards," but are influenced by respondents, some of whom are in competition with petitioner, and thus its determinations can be made "arbitrarily and capriciously." Petitioner has twice submitted its Radiant Burner to AGA for approval but it has not been approved, although it is safer and more efficient than, and just as durable as, gas burners which AGA has approved. "[B]ecause AGA and its Utility members, including Peoples and Northern, effectuate the plan and purpose of the unlawful combination and conspiracy alleged herein by . . . refusing to provide gas for use in the plaintiff's Radiant Burner[s] . . . which are not approved by AGA," petitioner's gas burners have been effectively excluded from the market, as its potential customers will not buy gas burners for which they cannot obtain gas, and in consequence petitioner has suffered and is suffering the loss of substantial profits.

Respondents moved to dismiss for failure of the complaint to state a claim upon which relief could be granted. The District Court granted the motions, dismissed the

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of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal . . . ."

Section 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 15, states, "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained . . . ."

Section 16 of the Clayton Act, 38 Stat. 737, 15 U. S. C. § 26, states, "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws . . . ."

complaint and entered judgment for respondents. The Court of Appeals for the Seventh Circuit affirmed. 273 F. 2d 196. It stated that "No boycott, conspiracy to boycott or other form of *per se* violation is established by the facts alleged" (*id.*, at 199), and that "[i]n the absence of a *per se* violation the Sherman Act protects the individual injured competitor and affords him relief, but only under circumstances where there is such general injury to the competitive process that the public at large suffers economic harm." *Id.*, at 200. It held that public injury was not alleged since "[t]he allegations of the plaintiff's complaint fail to establish that there has been any appreciable lessening in the sale of conversion gas burners or gas furnaces or that the public has been deprived of a product of over-all superiority." *Id.*, at 200. Because of petitioner's claim that this holding is contrary to controlling decisions of this Court, we granted certiorari. 363 U. S. 809.

We think the decision of the Court of Appeals does not accord with our recent decision in *Klor's, Inc.*, v. *Broadway-Hale Stores,* 359 U. S. 207. The allegation in the complaint that "AGA and its Utility members, including Peoples and Northern, effectuate the plan and purpose of the unlawful combination and conspiracy . . . by . . . refusing to provide gas for use in the plaintiff's Radiant Burner[s]" because they "are not approved by AGA" clearly shows "one type of trade restraint and public harm the Sherman Act forbids . . . ." *Id.*, at 210. It is obvious that petitioner cannot sell its gas burners, whatever may be their virtues, if, because of the alleged conspiracy, the purchasers cannot buy gas for use in those burners. The conspiratorial refusal "to provide gas for use in the plaintiff's Radiant Burner[s] [because they] are not approved by AGA" therefore falls within one of the "classes of restraints which from their 'nature or character' [are] unduly restrictive, and hence forbidden by

both the common law and the statute. . . . As to these classes of restraints . . . Congress [has] determined its own criteria of public harm and it [is] not for the courts to decide whether in an individual case injury [has] actually occurred." *Id.*, at 211. The alleged conspiratorial refusal to provide gas for use in plaintiff's Radiant Burners "interferes with the natural flow of interstate commerce [and] clearly has, by its 'nature' and 'character,' a 'monopolistic tendency.' As such it is not to be tolerated merely because the victim is just one [manufacturer] whose business is so small that his destruction makes little difference to the economy." *Id.*, at 213.

By § 1, Congress has made illegal: "Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States . . . ." *Standard Oil Co.* v. *United States,* 221 U. S. 1. Congress having thus prescribed the criteria of the prohibitions, the courts may not expand them. Therefore, to state a claim upon which relief can be granted under that section, allegations adequate to show a violation and, in a private treble damage action, that plaintiff was damaged thereby are all the law requires.

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

Reversed.

KIMBROUGH *v.* UNITED STATES.

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

No. 128. Argued January 11–12, 1961.—Decided January 16, 1961.

Writ of certiorari dismissed because the record does not present with sufficient clarity the question whether cumulative sentences can validly be imposed upon conviction under the National Motor Vehicle Theft Act for transporting a stolen automobile in interstate commerce and for receiving, concealing and storing the same automobile, in a continuing criminal transaction.

Reported below: 272 F. 2d 944.

Edward L. Barrett, Jr. argued the cause and filed a brief for petitioner.

Bruce J. Terris argued the cause for the United States. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Robert G. Maysack.*

PER CURIAM.

We brought this case here to consider whether cumulative sentences can validly be imposed upon conviction under the National Motor Vehicle Theft Act for transporting a stolen automobile in interstate commerce and for receiving, concealing, and storing the same automobile, in a continuing criminal transaction. After oral argument and a more thorough consideration of the record than was afforded when the petition for certiorari was granted, we have concluded that this question is not presented with sufficient clarity in this case. Accordingly, the writ is dismissed.

PECK ET AL. *v.* NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 437. Decided January 16, 1961.

Appeal dismissed and certiorari denied.
Reported below: 7 N. Y. 2d 76, 163 N. E. 2d 866.

Kenneth W. Greenawalt and *Harrop Freeman* for appellants.

Frank S. Hogan and *Harold Roland Shapiro* for appellee.

PER CURIAM.

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

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

REPORTER'S NOTE.

The next page is purposely numbered 801. The numbers between 662 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.

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ORDERS FROM JULY 7, 1960, THROUGH JANUARY 19, 1961.

Parties and Cases Dismissed in Vacation.

No. 56. Sam Fox Publishing Co., Inc., et al. *v.* United States et al. Appeal from the United States District Court for the Southern District of New York. July 7, 1960. The Movietone Music Corporation is dismissed as a party appellant pursuant to stipulation of counsel under Rule 60 of the Rules of this Court. *Charles A. Horsky* for appellants. *Solicitor General Rankin* for the United States, and *Howard T. Milman* for the American Society of Composers, Authors and Publishers, appellees.

No. 27. Robert Lawrence Co., Inc., *v.* Devonshire Fabrics, Inc. Certiorari, 362 U. S. 909, to the United States Court of Appeals for the Second Circuit. August 23, 1960. Writ of certiorari dismissed pursuant to stipulation of counsel under Rule 60 of the Rules of this Court. *Sigmund Timberg* for petitioner. *David L. Shivitz* for respondent. Reported below: 271 F. 2d 402.

No. 109, Misc. Fulford *v.* Cochran, Corrections Director. On petition for writ of certiorari to the Supreme Court of Florida. August 25, 1960. Petition dismissed pursuant to Rule 60 of the Rules of this Court.

No. 226, Misc. Green *v.* Clemmer et al. On petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. September 19, 1960. Petition dismissed pursuant to stipulation of counsel under Rule 60 of the Rules of this Court. Petitioner *pro se*. *Solicitor General Rankin* for respondents.

No. 35, Misc. BOLDEN *v.* CLEMMER ET AL. On petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. September 21, 1960. Petition dismissed pursuant to stipulation of counsel under Rule 60 of the Rules of this Court. Petitioner *pro se*. *Solicitor General Rankin* for respondents.

No. 258, Misc. JONES *v.* MARKWAY, SHERIFF. On petition for writ of certiorari to the Supreme Court of Missouri. September 30, 1960. Petition dismissed pursuant to Rule 60 of the Rules of this Court.

SEPTEMBER 1, 1960.*

No. 336, October Term, 1960. UPHAUS *v.* WYMAN, ATTORNEY GENERAL OF NEW HAMPSHIRE. Appeal from the Supreme Court of New Hampshire. The application for bail presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, is denied. THE CHIEF JUSTICE, MR. JUSTICE BLACK, and MR. JUSTICE DOUGLAS are of the opinion the application should be granted. *Louis Lusky, Marvin H. Morse, Grenville Clark, Dudley W. Orr, Royal W. France, Hugh H. Bownes* and *Leonard B. Boudin* for appellant. *Louis C. Wyman,* Attorney General of New Hampshire, for appellee. Reported below: 102 N. H. 461, 159 A. 2d 160.

No. ——. ENNIS ET AL. *v.* EVANS ET AL. The application for a stay of the execution and enforcement of the judgments of the United States Court of Appeals for the Third Circuit presented to MR. JUSTICE BRENNAN, and by

* [REPORTER'S NOTE: These orders were entered during the August Special Term, 1960, which was called to enable the Court to admit to practice a large number of lawyers attending the meeting of the American Bar Association in Washington, D. C. The Special Term commenced August 30 and ended September 1, 1960.]

him referred to the Court, is denied. *Januar D. Bove, Jr.*, Attorney General of Delaware, and *James M. Tunnell, Jr.* for applicants. Reported below: 281 F. 2d 385.

No. —. HOUSTON INDEPENDENT SCHOOL DISTRICT *v.* ROSS ET AL. The application for a stay of the judgment of the United States District Court for the Southern District of Texas presented to MR. JUSTICE BLACK, and by him referred to the Court, is denied. *Joe H. Reynolds* and *Fentress Bracewell* for applicant. Reported below: 282 F. 2d 95.

No. —. ORLEANS PARISH SCHOOL BOARD ET AL. *v.* BUSH ET AL.; and

No. —. DAVIS, GOVERNOR OF LOUISIANA, ET AL. *v.* WILLIAMS ET AL. The application for a stay of the temporary injunction of the United States District Court for the Eastern District of Louisiana is denied. *Jack P. F. Gremillion,* Attorney General, for the State of Louisiana. *Thurgood Marshall, Constance Baker Motley* and *A. P. Tureaud* for Bush et al. Reported below: 187 F. Supp. 42.

No. —. BUSH ET AL. *v.* ORLEANS PARISH SCHOOL BOARD. The motion to vacate the order of the United States District Court for the Eastern District of Louisiana of August 31, 1960, is denied. *Thurgood Marshall, A. P. Tureaud* and *Constance B. Motley* for movants. *Lloyd J. Rittiner* and *James F. Redmond* for respondent.

OCTOBER 3, 1960.

Assignment Orders.

An order of THE CHIEF JUSTICE designating and assigning MR. JUSTICE REED (retired) to perform judicial duties in the United States Court of Appeals for the District of Columbia Circuit beginning October 3, 1960, and ending

June 30, 1961, and for such further time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

An order of THE CHIEF JUSTICE designating and assigning MR. JUSTICE BURTON (retired) to perform judicial duties in the United States Court of Appeals for the District of Columbia Circuit beginning October 3, 1960, and ending June 30, 1961, and for such further time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

Dismissal Under Rule 60.

No. 51. BAILEY *v.* ALVIS, WARDEN. Certiorari, 362 U. S. 909, 363 U. S. 833, to the Supreme Court of Ohio. Writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. *Milton H. Schmidt* for petitioner.

OCTOBER 10, 1960.

Miscellaneous Orders.

No. 60. POE ET AL. *v.* ULLMAN, STATE'S ATTORNEY; and

No. 61. BUXTON *v.* ULLMAN, STATE'S ATTORNEY. Appeals from the Supreme Court of Errors of Connecticut. (Probable jurisdiction noted, 362 U. S. 987.) The motion to postpone the oral argument is granted. The motion of Planned Parenthood Federation of America, Inc., for leave to file brief, as *amicus curiae,* is granted. MR. JUSTICE FRANKFURTER took no part in the consideration or decision of these motions. *Albert L. Coles,* Attorney General of Connecticut, for appellee. *Morris L. Ernst, Harriet F. Pilpel* and *Nancy F. Wechsler* for Planned Parenthood Federation of America, Inc.

No. 342, October Term, 1959. NOSTRAND ET AL. *v.* LITTLE ET AL., 362 U. S. 474. The motion to strike the motion to retax costs is denied. The motion to retax costs is also denied. *John J. O'Connell,* Attorney General of Washington, and *Herbert H. Fuller,* Chief Assistant Attorney General, for appellees, were on the motion to retax costs. *Francis Hoague* and *Solie Ringold,* for appellants, were on the motion to strike.

No. 4. 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. Set for reargument, 363 U. S. 825.) The motion of the United States for leave to intervene is granted. The motion of AFL–CIO for leave to participate in the oral argument, as *amicus curiae,* is denied. *Solicitor General Rankin* for the United States.

No. 34. TIMES FILM CORP. *v.* CITY OF CHICAGO ET AL. Certiorari, 362 U. S. 917, to the United States Court of Appeals for the Seventh Circuit. The motions of Motion Picture Association of America, Inc., American Civil Liberties Union, and Independent Film Importers and Distributors of America, Inc., for leave to file briefs, as *amici curiae,* are granted. *Sidney A. Schreiber* for Motion Picture Association of America, Inc. *Edgar Bernhard* and *Alex Elson* for American Civil Liberties Union.

No. 28. KONIGSBERG *v.* STATE BAR OF CALIFORNIA ET AL. Certiorari, 362 U. S. 910, to the Supreme Court of California. The motion of *Robert L. Brock et al.* for leave to file brief, as *amici curiae,* is granted. *Robert L. Brock, Pauline Epstein, Robert W. Kenny, Hugh R. Manes, Ben Margolis, Daniel G. Marshall, William B. Murrish, John McTernan, Maynard Omerberg, Alexander Shullman* and *David Sokol* for movants.

No. 28. KONIGSBERG *v.* STATE BAR OF CALIFORNIA ET AL. Certiorari, 362 U. S. 910, to the Supreme Court of California; and

No. 58. IN RE ANASTAPLO. Certiorari, 362 U. S. 968, to the Supreme Court of Illinois. The motion of National Lawyers Guild for leave to file brief, as *amicus curiae,* is granted. *David Scribner, Leonard B. Boudin, Ben Margolis, William B. Murrish* and *Charles Stewart* for movant.

No. 32. GOMILLION ET AL. *v.* LIGHTFOOT, MAYOR OF THE CITY OF TUSKEGEE, ET AL. Certiorari, 362 U. S. 916, to the United States Court of Appeals for the Fifth Circuit. The motion of the United States for leave to participate in oral argument, as *amicus curiae,* is granted. The motion of American Civil Liberties Union for leave to file brief, as *amicus curiae,* is granted. *Solicitor General Rankin* for the United States. *Lawrence Speiser* for American Civil Liberties Union.

No. 73. RADIANT BURNERS, INC., *v.* PEOPLES GAS LIGHT & COKE CO. ET AL. Certiorari, 363 U. S. 809, to the United States Court of Appeals for the Seventh Circuit. The motion of Parmelee Transportation Company for leave to file brief, as *amicus curiae,* is granted. *Thomas C. McConnell* and *Lee A. Freeman* for movant. *Horace R. Lamb* for American Gas Association, Inc., respondent, in opposition.

No. 21. ARO MANUFACTURING CO., INC., ET AL. *v.* CONVERTIBLE TOP REPLACEMENT CO., INC. Certiorari, 362 U. S. 902, to the United States Court of Appeals for the First Circuit. The motion of the American Patent Law Association for leave to file brief, as *amicus curiae,* is denied.

No. 61. BUXTON *v.* ULLMAN, STATE'S ATTORNEY. Appeal from the Supreme Court of Errors of Connecticut. (Probable jurisdiction noted, 362 U. S. 987.) The motion of Willard Allen et al. for leave to file brief, as *amici curiae,* is granted. MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this motion. *Whitney North Seymour* for movants.

No. 176. SALDANA *v.* UNITED STATES. Certiorari, 363 U. S. 838, to the United States Court of Appeals for the Ninth Circuit. The motion for the appointment of counsel is granted and it is ordered that *Stephen R. Reinhardt, Esquire,* of Los Angeles, California, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for petitioner in this case.

No. 178. HOOPER *v.* BENNETT, WARDEN. Certiorari, 363 U. S. 838, to the Supreme Court of Iowa. The writ of certiorari to the Supreme Court of Iowa is dismissed as improvidently granted.

No. 180. PAYNE *v.* MADIGAN, WARDEN. Certiorari, 363 U. S. 839, to the United States Court of Appeals for the Ninth Circuit; and

No. 184. YOUNG *v.* UNITED STATES. Certiorari, 363 U. S. 839, to the United States Court of Appeals for the Eighth Circuit. The motions for the appointment of counsel are granted and it is ordered that *Frederick M. Rowe, Esquire,* of Washington, D. C., a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for petitioners in these cases.

No. 194, Misc. HECTOR *v.* DICKSON, WARDEN, ET AL. Motion for leave to file petition for writ of habeas corpus and other relief denied.

No. 86, Misc. JOHNSON *v.* UNITED STATES. Motion for leave to file petition for writ of certiorari denied. Petitioner *pro se*. *Solicitor General Rankin* for the United States.

No. 75, Misc. PARKER *v.* UNITED STATES;

No. 130, Misc. HARTFORD *v.* SETTLE, WARDEN;

No. 131, Misc. PROCTOR *v.* UNITED STATES;

No. 173, Misc. GUZZI *v.* WILLINGHAM, WARDEN;

No. 174, Misc. WHITTINGTON *v.* OVERHOLSER, HOSPITAL SUPERINTENDENT;

No. 209, Misc. WILLIAMS *v.* REID, JAIL SUPERINTENDENT;

No. 244, Misc. IN RE DONALDSON;

No. 255, Misc. PADGETT *v.* COCHRAN, CORRECTIONS DIRECTOR;

No. 257, Misc. IN RE MORRISON; and

No. 288, Misc. DANDY *v.* BANMILLER, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied. Petitioners *pro se*. *Solicitor General Rankin* for the United States in No. 75, Misc.

No. 22, Misc. CONNOR *v.* COCHRAN, CORRECTIONS DIRECTOR;

No. 38, Misc. WHITLEY *v.* WARDEN, MARYLAND HOUSE OF CORRECTION;

No. 120, Misc. COULTON *v.* SACKS, WARDEN; and

No. 228, Misc. SHAW *v.* NEW JERSEY. Motions for leave to file petitions for writs of habeas corpus denied. Treating the papers submitted as petitions for writs of certiorari, certiorari is denied. Petitioners *pro se*. *Richard W. Ervin,* Attorney General of Florida, and *Reeves Bowen,* Assistant Attorney General, for respondent in No. 22, Misc. *C. Ferdinand Sybert,* Attorney General of Maryland, and *James O'C. Gentry,* Assistant Attorney General, for respondent in No. 38, Misc.

No. 127, Misc. CLAYTON *v.* HALBERT, U. S. DISTRICT JUDGE; and

No. 264, Misc. WILLIAMS *v.* WILKINS, WARDEN. Motions for leave to file petitions for writs of mandamus and other relief denied.

No. 107, Misc. GILBRECH *v.* UNITED STATES;

No. 279, Misc. GAGLIASSO *v.* UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT ET AL.; and

No. 282, Misc. LAWYER *v.* UNITED STATES CIVIL SERVICE COMMISSION ET AL. Motions for leave to file petitions for writs of mandamus denied. Petitioners *pro se*. *Solicitor General Rankin* for the United States in No. 107, Misc.

No. 21, Misc. RODENBERGER *v.* MARTIN, WARDEN. Petition for writ of certiorari to the Court of Appeals of New York dismissed as moot. Petitioner *pro se*. *Louis J. Lefkowitz,* Attorney General of New York, and *Paxton Blair,* Solicitor General, for respondent.

No. 87, Misc. THE ROMANIAN ORTHODOX MISSIONARY EPISCOPATE OF AMERICA, THROUGH HIS GRACE BISHOP ANDREI MOLDOVAN, *v.* TRUTZA ET AL. The motion to use record in No. 422, October Term, 1953, is granted. Motion for leave to file petition for writ of certiorari denied. *John R. Vintilla* for petitioner. *Percy H. Russell* for respondents.

No. 108, Misc. GROSS *v.* SUPREME COURT OF IOWA; and

No. 210, Misc. RAY *v.* HALBERT, JUDGE OF THE DISTRICT COURT, ET AL. Motions for leave to file petitions for writs of prohibition denied.

Probable Jurisdiction Noted or Question Postponed.

No. 155. MICHIGAN NATIONAL BANK ET AL. *v.* MICHIGAN ET AL. Appeal from the Supreme Court of Michigan. Probable jurisdiction noted. *Thomas G. Long* and *Victor W. Klein* for Michigan National Bank, appellant. *Paul L. Adams,* Attorney General of Michigan, *Samuel J. Torina,* Solicitor General, and *William D. Dexter,* Assistant Attorney General, for appellees. Reported below: 358 Mich. 611, 101 N. W. 2d 245.

No. 91. UNITED STATES *v.* FRUEHAUF ET AL. Appeal from the United States District Court for the Southern District of New York. Probable jurisdiction noted. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Eugene L. Grimm* for the United States. *Louis Nizer, Cyrus R. Vance, Mortimer A. Sullivan, Albert C. Bickford, Charles Seligson, Albert I. Schmalholz, Melvin Lloyd Robbins, Charles S. Burdell* and *Donald McL. Davidson* for appellees.

No. 200. LATHROP *v.* DONOHUE. Appeal from the Supreme Court of Wisconsin. Further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits. Appellant *pro se. John W. Reynolds,* Attorney General of Wisconsin, and *Warren H. Resh,* Assistant Attorney General, for appellee. Reported below: 10 Wis. 2d 230, 102 N. W. 2d 404.

No. 164. BURTON *v.* WILMINGTON PARKING AUTHORITY ET AL. Appeal from the Supreme Court of Delaware. Further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits. *Louis L. Redding* for appellant. *Clair John Killoran* for the Wilmington Parking Authority, appellee. Reported below: —— Del. ——, 157 A. 2d 894.

No. 105. SLAGLE ET AL. *v.* OHIO. Appeal from the Supreme Court of Ohio. Further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits. *Thelma C. Furry* for appellants. Reported below: 170 Ohio St. 216, 163 N. E. 2d 177.

No. 225. MARCUS ET AL. *v.* SEARCH WARRANT OF PROPERTY AT 104 EAST TENTH STREET, KANSAS CITY, MISSOURI, ET AL. Appeal from the Supreme Court of Missouri. Further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits. *Morris A. Shenker, Bernard J. Mellman* and *Sidney M. Glazer* for appellants. Reported below: 334 S. W. 2d 119.

Certiorari Granted. (*See also No. 168, ante, p. 289.*)

No. 284. INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL–CIO, *v.* NATIONAL LABOR RELATIONS BOARD ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Morris P. Glushien, L. N. D. Wells, Jr.* and *Ruth Weyand* for petitioner. *Solicitor General Rankin, Stuart Rothman, Dominick L. Manoli, Norton J. Come* and *Herman M. Levy* for the National Labor Relations Board, respondent. Reported below: 108 U. S. App. D. C. 68, 280 F. 2d 616.

No. 106. ALASKA *v.* ARCTIC MAID ET AL. C. A. 9th Cir. Certiorari granted. *Ralph E. Moody,* Attorney General of Alaska, and *Gary Thurlow,* Deputy Attorney General, for petitioner. Reported below: 277 F. 2d 120.

No. 122. PIEMONTE *v.* UNITED STATES. C. A. 7th Cir. Certiorari granted. *Melvin B. Lewis* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 276 F. 2d 148.

No. 151. JARECKI, FORMER COLLECTOR OF INTERNAL REVENUE, ET AL. *v.* G. D. SEARLE & Co. C. A. 7th Cir. Certiorari granted. *Solicitor General Rankin, Assistant Attorney General Rice* and *Harry Marselli* for petitioners. *Walter J. Cummings, Jr.* for respondent. Reported below: 274 F. 2d 129.

No. 233. DEUTCH *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Henry W. Sawyer III* and *George Herbert Goodrich* for petitioner. *Solicitor General Rankin, Assistant Attorney General Yeagley* and *Kevin T. Maroney* for the United States. Reported below: 108 U. S. App. D. C. 143, 280 F. 2d 691.

No. 126. LAURENS FEDERAL SAVINGS & LOAN ASSN. *v.* SOUTH CAROLINA TAX COMMISSION ET AL. Supreme Court of South Carolina. Certiorari granted. *Frank K. Sloan* and *Ernest L. Folk III* for petitioner. *Daniel R. McLeod,* Attorney General of South Carolina, *James M. Windham* and *Wm. H. Smith, Jr.,* Assistant Attorneys General, for respondents. *Solicitor General Rankin, Assistant Attorney General Rice, Myron C. Baum* and *William Massar* for the United States, as *amicus curiae,* in support of the petition. Reported below: 236 S. C. 2, 112 S. E. 2d 716.

No. 102. KOLOVRAT ET AL. *v.* OREGON. Supreme Court of Oregon. Certiorari granted. *Lawrence S. Lesser* and *Peter A. Schwabe* for petitioners. *Robert Y. Thornton,* Attorney General of Oregon, *Arthur Garfield Higgs* and *Catherine Zorn,* Assistant Attorneys General, for respondent. *Solicitor General Rankin, Assistant Attorney General Doub* and *Alan S. Rosenthal* for the United States, as *amicus curiae,* in support of the petition. Reported below: 220 Ore. 448, 349 P. 2d 255.

No. 97. Cafeteria & Restaurant Workers Union, Local 473, AFL–CIO, et al. *v.* McElroy et al. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Bernard Dunau* for petitioners. *Solicitor General Rankin, Assistant Attorney General Yeagley* and *Kevin T. Maroney* for respondents. Reported below: —— U. S. App. D. C. ——, 284 F. 2d 173.

No. 153. Coppola *v.* United States. C. A. 2d Cir. Certiorari granted. *William B. Mahoney* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Philip R. Monahan* for the United States. Reported below: 281 F. 2d 340, 354.

No. 219. Schnell et al. *v.* Peter Eckrich & Sons, Inc., et al. C. A. 7th Cir. Certiorari granted. *Charles J. Merriam* for petitioners. *M. Hudson Rathburn* for respondents. Reported below: 279 F. 2d 594.

No. 238. Lott et al. *v.* United States. C. A. 5th Cir. Certiorari granted. *John H. Crooker, Joe S. Moss* and *C. W. Wellen* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice, Meyer Rothwacks* and *Lawrence K. Bailey* for the United States. Reported below: 280 F. 2d 24.

No. 288. American Automobile Association *v.* United States. Court of Claims. Certiorari granted. *Fleming Bomar* and *Joseph E. McAndrews* for petitioner. *Solicitor General Rankin* for the United States. Reported below: —— Ct. Cl. ——, 181 F. Supp. 255.

No. 169. Polaroid Corporation *v.* Commissioner of Internal Revenue. C. A. 1st Cir. Certiorari granted. *David Saperstein* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General Heffron* and *Harry Marselli* for respondent. Reported below: 278 F. 2d 148.

No. 212. Moses Lake Homes, Inc., et al. *v.* Grant County. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit granted limited to Question No. 3 presented by the petition which reads as follows:

"3. May a state tax which discriminates against persons holding leaseholds from the United States be enforced in a United States court against a deposit of estimated compensation in a condemnation of such leasehold?"

The Solicitor General is invited to file a brief in this case setting forth the views of the United States. *Lyle L. Iverson* for petitioners. Reported below: 276 F. 2d 836.

No. 70, Misc. Horton *v.* Liberty Mutual Insurance Co. 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. *Joe H. Tonahill* for petitioner. *Major T. Bell* for respondent. Reported below: 275 F. 2d 148.

Certiorari Denied. (*See also No. 137, ante, p. 288; No. 150, ante, p. 288; No. 163, ante, p. 289; No. 237, ante, p. 290; No. 24, Misc., ante, p. 291; and Misc. Nos. 22, 38, 120 and 228, ante, p. 808.*)

No. 30. Hayes *v.* Seaton, Secretary of the Interior. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Leon BenEzra* for petitioner. *Solicitor General Rankin, Assistant Attorney General Morton* and *Roger P. Marquis* for respondent. Reported below: 106 U. S. App. D. C. 126, 270 F. 2d 319.

No. 101. Pedersen *v.* Tanker Bulklube et al. C. A. 2d Cir. Certiorari denied. *Arthur K. Ash* for petitioner. *Victor S. Cichanowicz* and *Patrick E. Gibbons* for respondents. Reported below: 274 F. 2d 824.

No. 99. RONCEVICH ET AL. *v.* ESPERDY, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 2d Cir. Certiorari denied. *Abraham Lebenkoff* for petitioners. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Jerome M. Feit* for respondent. Reported below: —— F. 2d ——.

No. 90. ARSENAULT ET AL. *v.* GENERAL ELECTRIC CO. Supreme Court of Errors of Connecticut. Certiorari denied. *Leonard B. Boudin* for petitioners. *Norman K. Parsells* for respondent. Reported below: 147 Conn. 130, 157 A. 2d 918.

No. 108. INTERNATIONAL ASSOCIATION OF TOOL CRAFTSMEN ET AL. *v.* LEEDOM ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Robert Sheriffs Moss* for petitioners. *Solicitor General Rankin, Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* for the National Labor Relations Board, respondent. Reported below: 107 U. S. App. D. C. 268, 276 F. 2d 514.

No. 109. HENRY DU BOIS' SONS CO., INC., *v.* DUNBAR, ADMINISTRATRIX. C. A. 2d Cir. Certiorari denied. *Edmund F. Lamb* for petitioner. *Paul C. Matthews* for respondent. Reported below: 275 F. 2d 304.

No. 112. FISHER *v.* CHESAPEAKE & OHIO RAILWAY CO. C. A. 7th Cir. Certiorari denied. *Owen Rall* and *Henry T. Synek* for petitioner. *James A. Velde* for respondent. Reported below: 276 F. 2d 297.

No. 113. NICHOLS *v.* UNITED STATES. C. A. 6th 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: 276 F. 2d 147.

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No. 114. FLOERSCH ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *J. R. Modrall* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice, Meyer Rothwacks* and *Fred E. Youngman* for the United States. Reported below: 276 F. 2d 714.

No. 119. RICHISON ET UX. *v.* NUNN ET UX. Supreme Court of Washington. Certiorari denied. *John J. Kennett* for petitioners. *Robert T. Mautz* for respondents. Reported below: 57 Wash. 2d 1, 340 P. 2d 793.

No. 124. ZACHARY ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Frank E. Hook* for petitioners. *Solicitor General Rankin* for the United States. Reported below: 275 F. 2d 793.

No. 125. SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL–CIO, *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 5th Cir. Certiorari denied. *Seymour W. Miller, Ray R. Murdock* and *Bernard Dunau* for petitioner. *Solicitor General Rankin, Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* for the National Labor Relations Board. Reported below: 273 F. 2d 891.

No. 132. INTERNATIONAL LATEX CORP. *v.* WARNER BROTHERS CO. C. A. 2d Cir. Certiorari denied. *William H. Davis* for petitioner. *Stephen H. Philbin* for respondent. Reported below: 276 F. 2d 557.

No. 131. REISSNER *v.* ROGERS, ATTORNEY GENERAL, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *George Halpern* for petitioner. *Solicitor General Rankin, Assistant Attorney General Townsend, Daniel G. McGrath* and *Armand B. DuBois* for respondents. Reported below: 107 U. S. App. D. C. 260, 276 F. 2d 506.

No. 127. WILEY ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Clyde A. Douglass* for petitioners. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 277 F. 2d 820.

No. 136. CONSOLIDATED TITLE CORP. *v.* DISTRICT OF COLUMBIA. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *John J. Wilson, Philip S. Peyser* and *Thomas S. Jackson* for petitioner. *Chester H. Gray, Milton D. Korman* and *Henry E. Wixon* for respondent. Reported below: 107 U. S. App. D. C. 221, 275 F. 2d 885.

No. 139. WILSON *v.* SOUTHERN FARM BUREAU CASUALTY CO. C. A. 5th Cir. Certiorari denied. *H. Alva Brumfield* for petitioner. Reported below: 275 F. 2d 819.

No. 142. DAYAN *v.* CALIFORNIA. Appellate Department, Superior Court of California, County of Los Angeles. Certiorari denied. *Nathan Newby, Jr.* for petitioner. *Roger Arnebergh* and *Philip E. Grey* for respondent.

No. 144. SGARLAT ESTATE *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied. *James Lenahan Brown* for petitioner. Reported below: 398 Pa. 406, 158 A. 2d 541.

No. 158. KING COLONY RANCH ET AL. *v.* MONTANA. Supreme Court of Montana. Certiorari denied. *Ralph J. Anderson* for petitioners. *Forrest H. Anderson,* Attorney General of Montana, *William F. Crowley,* Assistant Attorney General, and *George T. Bennett,* Special Assistant Attorney General, for respondent. Reported below: —— Mont. ——, 350 P. 2d 841.

No. 145. Foote Mineral Co. *v.* Maryland Casualty Co. C. A. 6th Cir. Certiorari denied. *M. W. Egerton* and *W. W. Davis* for petitioner. *Charles E. McNabb* for respondent. Reported below: 277 F. 2d 452.

No. 146. Byrd *v.* Sexton et al. C. A. 8th Cir. Certiorari denied. *Victor B. Harris, Harold C. Hanke* and *Luther Ely Smith, Jr.* for petitioner. Reported below: 277 F. 2d 418.

No. 148. Clippinger et al. *v.* United States et al. C. A. 7th Cir. Certiorari denied. *Enos L. Phillips, Hurshal C. Tummelson* and *Ivan A. Elliott* for petitioners. *Solicitor General Rankin, Assistant Attorney General Doub* and *Samuel D. Slade* for the United States. Reported below: 275 F. 2d 529.

No. 149. Webb et ux. *v.* United States. C. A. 4th Cir. Certiorari denied. Petitioners *pro se*. *Solicitor General Rankin, Assistant Attorney General Morton* and *Roger P. Marquis* for the United States. Reported below: 273 F. 2d 416.

No. 152. Allensworth *v.* First Galesburg National Bank & Trust Co. Supreme Court of Illinois. Certiorari denied. Reported below: See 22 Ill. App. 2d 534, 161 N. E. 2d 155.

No. 154. Namoff et al. *v.* Hyland Electrical Supply Co. et al. C. A. 7th Cir. Certiorari denied. *George Cohan* and *Max Cohen* for petitioners. *Porter R. Draper* for respondents. Reported below: 275 F. 2d 14.

No. 157. Perotti et al. *v.* Ohio. Supreme Court of Ohio. Certiorari denied. Reported below: 170 Ohio St. 363, 165 N. E. 2d 1.

No. 156. BANTAM BOOKS, INC., *v.* FEDERAL TRADE COMMISSION. C. A. 2d Cir. Certiorari denied. *Horace S. Manges* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General Bicks, Richard A. Solomon, Daniel J. McCauley, Jr.* and *Alan B. Hobbes* for respondent. Reported below: 275 F. 2d 680.

No. 160. HUNSAKER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Norman L. Easley* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 279 F. 2d 111.

No. 162. SANTA MONICA BANK ET AL. *v.* SECURITIES & EXCHANGE COMMISSION. C. A. 2d Cir. Certiorari denied. *Ernest S. Meyers* for petitioners. *Solicitor General Rankin, Thomas G. Meeker, Joseph B. Levin* and *Ellwood L. Englander* for respondent. Reported below: 279 F. 2d 485.

No. 165. SCHLOSSER, EXECUTOR, *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. *John M. McNally, Jr.* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General Heffron, Loring W. Post* and *Victor A. Altman* for respondent. Reported below: 277 F. 2d 268.

No. 166. HOLM *v.* AMERICAN SHIP BUILDING CO. C. A. 6th Cir. Certiorari denied. *S. Eldridge Sampliner* and *Harvey Goldstein* for petitioner. *Thomas V. Koykka* for respondent. Reported below: 276 F. 2d 201.

No. 171. EVANS PRODUCTION CORP. *v.* SHAW. C. A. 5th Cir. Certiorari denied. *Robert G. Storey* and *Robert M. Martin, Jr.* for petitioner. *George S. Terry* for respondent. Reported below: 276 F. 2d 313.

No. 167. UNION RURAL ELECTRIC ASSOCIATION, INC., *v.* PUBLIC SERVICE CO. OF COLORADO ET AL. Supreme Court of Colorado. Certiorari denied. *Morrison Shafroth* for petitioner. *Gerhard A. Gesell* and *Robert L. Randall* for Public Service Co. of Colorado, and *Seymour O'Brien* and *William B. Rafferty* for Colorado Central Power Co., respondents. Reported below: 142 Colo. 135, 350 P. 2d 543.

No. 193. NORMAN *v.* CALIFORNIA. District Court of Appeal of California, Second Appellate District. Certiorari denied. *Russell E. Parsons* for petitioner. Reported below: 177 Cal. App. 2d 59, 1 Cal. Rptr. 699.

No. 194. DAYAN *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. *Nathan Newby, Jr.* for petitioner. *Roger Arnebergh* and *Philip E. Grey* for respondent.

No. 189. COMMONWEALTH ENGINEERING CO. OF OHIO *v.* UNITED STATES. Court of Claims. Certiorari denied. *Harry A. Toulmin, Jr.* and *George W. Stengel* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub, Samuel D. Slade* and *Herbert E. Morris* for the United States. Reported below: —— Ct. Cl. ——, 180 F. Supp. 396.

No. 201. PENNSYLVANIA TURNPIKE COMMISSION *v.* McGINNES, DISTRICT DIRECTOR OF INTERNAL REVENUE, ET AL. C. A. 3d Cir. Certiorari denied. *Aaron M. Fine* and *Harold E. Kohn* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *A. F. Prescott* for McGinnes, *Frederick G. McGavin* for Manu-Mine Research & Development Co., and *Daniel Mungall, Jr.* for Seaboard Surety Co., respondents. Reported below: 278 F. 2d 330.

No. 190. HERRMANN, TRUSTEE, *v.* ROGERS, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied. *Philip E. Peterson* for petitioner. *Solicitor General Rankin* and *Assistant Attorney General Townsend* for respondent. Reported below: 274 F. 2d 842.

No. 191. GIRARDI *v.* LIPSETT, INC., ET AL. C. A. 3d Cir. Certiorari denied. *B. Nathaniel Richter, Charles A. Lord* and *Seymour I. Toll* for petitioner. *Michael A. Foley* for Lipsett, Inc., respondent. Reported below: 275 F. 2d 492.

No. 192. LADD *v.* NEW YORK CENTRAL RAILROAD CO. Supreme Court of Ohio. Certiorari denied. *Charles H. Brady* and *A. E. Simmons* for petitioner. *Milo J. Warner* and *Wesley A. Wilkinson* for respondent. Reported below: 170 Ohio St. 491, 166 N. E. 2d 231.

No. 173. HOON *v.* HARMER STEEL PRODUCTS & SUPPLY CO. ET AL. C. A. 9th Cir. Certiorari denied. *Nathaniel S. Ruvell* for petitioner. *Thomas L. Morrow, John F. McCarthy* and *Robert A. Leedy* for respondents. Reported below: 278 F. 2d 427.

No. 188. SEABOARD SURETY CO. *v.* WESTWOOD LAKE, INC., ET AL. C. A. 5th Cir. Certiorari denied. *James A. Dixon* for petitioner. *Samuel J. Kanner* for American Cast Iron Pipe Co., respondent. Reported below: 277 F. 2d 397.

No. 195. INDIAN TOWING CO., INC., ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Richard B. Montgomery, Jr.* for petitioners. *Solicitor General Rankin, Assistant Attorney General Doub* and *Alan S. Rosenthal* for the United States. Reported below: 276 F. 2d 300.

No. 196. CURTIS PUBLISHING CO. *v.* VAUGHAN. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Philip H. Strubing* and *John H. Pickering* for petitioner. *Byron N. Scott* and *Hyman Smollar* for respondent. Reported below: 107 U. S. App. D. C. 343, 278 F. 2d 23.

No. 199. LEAGUE OF WOMEN VOTERS *v.* UNITED STATES. Court of Claims. Certiorari denied. *Albert E. Arent* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *Harry Baum* for the United States. Reported below: —— Ct. Cl. ——, 180 F. Supp. 379.

No. 217. COPE ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *William M. Nicholson* for petitioners. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 279 F. 2d 127.

No. 222. ROSENGARTEN ET AL. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Bernard Weiss* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice* and *I. Henry Kutz* for the United States. Reported below: —— Ct. Cl. ——, 181 F. Supp. 275.

No. 206. GENERAL FOODS CORP., MAXWELL HOUSE DIVISION, ET AL. *v.* THE MORMACSURF ET AL. C. A. 2d Cir. Certiorari denied. *Horace T. Atkins* for petitioners. *Eugene Underwood* for respondents. Reported below: 276 F. 2d 722.

No. 207. WEIL *v.* UNITED STATES. Court of Claims. Certiorari denied. *John P. Allison* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, I. Henry Kutz* and *Helen A. Buckley* for the United States. Reported below: —— Ct. Cl. ——, 180 F. Supp. 407.

No. 210. GARVIN ET AL. *v.* PETTIGREW. Supreme Court of Oklahoma. Certiorari denied. *Lee Welch* for petitioners. *Walton Stanley Allen* for respondent. Reported below: 350 P. 2d 970.

No. 213. STICE *v.* KANSAS EX REL. ANDERSON. Supreme Court of Kansas. Certiorari denied. *Carl W. Berueffy* and *Robert F. Bailey* for petitioner. Reported below: 186 Kan. 69, 348 P. 2d 833.

No. 214. AMERICAN STEVEDORES, INC., *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. *Bern Budd* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Alan S. Rosenthal* for the United States. Reported below: 277 F. 2d 255.

No. 215. JOSEPH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Stanford Shmukler* and *Jacob Kossman* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 278 F. 2d 504.

No. 204. TURAJLICH ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Rufus King, Downey Rice* and *Harry Alan Sherman* for petitioners. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 277 F. 2d 805.

No. 202. ANDERSON ET AL. *v.* COUNTY BOARD OF SCHOOL TRUSTEES OF MCHENRY COUNTY, ILLINOIS, ET AL. Supreme Court of Illinois. Certiorari denied. *Hugh M. Matchett* and *John P. Burita* for petitioners. *Harry C. Kinne, Jr.* for County Board of School Trustees of McHenry County, Illinois, respondent.

No. 218. DOGGETT *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. *Daniel R. Dixon* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *I. Henry Kutz* for respondent. Reported below: 275 F. 2d 823.

No. 220. ARABIAN AMERICAN OIL CO. *v.* FARMER. C. A. 2d Cir. Certiorari denied. *Lowell Wadmond, Chester Bordeau* and *George W. Ray, Jr.* for petitioner. *Kalman I. Nulman* for respondent. Reported below: 277 F. 2d 46.

No. 221. BARNHILL ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *O. B. Cline, Jr.* for petitioners. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 279 F. 2d 105.

No. 216. CURCIO ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Samuel Mezansky* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice* and *Meyer Rothwacks* for the United States. Reported below: 279 F. 2d 681.

No. 224. ESTEBAN GANDUXE Y MARINO *v.* ESPERDY, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 2d Cir. Certiorari denied. *Morton Silfen* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Robert G. Maysack* for respondent. Reported below: 278 F. 2d 330.

No. 226. JONES *v.* KAUFMAN. C. A. 7th Cir. Certiorari denied. *Donald B. Jones,* petitioner, *pro se. Charles Rivers Aiken* and *Richard F. Watt* for respondent. Reported below: 275 F. 2d 755.

No. 230. MEMPHIS AFL–CIO LABOR COUNCIL ET AL. *v.* CITY OF MEMPHIS ET AL. Supreme Court of Tennessee, Western Division. Certiorari denied. *Samuel Strong Pharr* for petitioners. *Frank B. Gianotti, Jr., Charles C. Crabtree* and *George E. Morrow* for respondents.

No. 231. CLEARY *v.* INDIANA BEACH, INC. C. A. 7th Cir. Certiorari denied. *John E. Cassidy, Sr.* for petitioner. *Roger D. Branigin* for respondent. Reported below: 275 F. 2d 543.

No. 253. ROBERTS *v.* LOVE ET AL. Supreme Court of Arkansas. Certiorari denied. *Elza Clifton Bond, Jr.* for petitioner. *DuVal L. Purkins* for respondents. Reported below: — Ark. —, 333 S. W. 2d 897.

No. 256. DI SILVESTRO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Joseph W. Di Silvestro,* petitioner, *pro se. Solicitor General Rankin, Acting Assistant Attorney General Leonard* and *Alan S. Rosenthal* for the United States. Reported below: — F. 2d —.

No. 235. FERRO, INC., ET AL. *v.* JOHN THOMPSON BEACON WINDOWS, LTD. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Bolling R. Powell, Jr.* for petitioners. *Harry M. Plotkin* and *John J. Sexton* for respondent. Reported below: 107 U. S. App. D. C. 400, 278 F. 2d 280.

No. 240. SPANGLER ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. *Newman A. Townsend, Jr.* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice* and *Harry Baum* for respondent. Reported below: 278 F. 2d 665.

No. 242. STANDARD ASBESTOS MANUFACTURING & INSULATING CO., INC., ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. *Walter A. Raymond* and *Kenneth C. West* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice* and *A. F. Prescott* for respondent. Reported below: 276 F. 2d 289.

No. 244. NTOVAS *v.* AHRENS, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 7th Cir. Certiorari denied. *F. Raymond Marks, Jr.* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Robert G. Maysack* for respondent. Reported below: 276 F. 2d 483.

No. 245. SMITH, ADMINISTRATOR, *v.* SPERLING ET AL. C. A. 9th Cir. Certiorari denied. *Herman H. Levy* and *Geo. C. Lyon* for petitioner. *Oliver B. Schwab, Harold S. Kant, Ralph E. Lewis, Eugene D. Williams* and *H. R. Kelly* for respondents. Reported below: 277 F. 2d 634.

No. 247. GOETT, ADMINISTRATRIX, *v.* UNION CARBIDE CORP. ET AL. C. A. 4th Cir. Certiorari denied. *Ernest Franklin Pauley, S. Eldridge Sampliner* and *Harvey Goldstein* for petitioner. Reported below: 278 F. 2d 319.

No. 250. FREELAND ET AL. *v.* SUN OIL CO. ET AL. C. A. 5th Cir. Certiorari denied. *Victor A. Sachse* for petitioners. *Cullen R. Liskow* for respondents. Reported below: 277 F. 2d 154.

No. 232. POPEIL BROTHERS, INC., *v.* ZYSSET ET AL. C. A. 7th Cir. Certiorari denied. *Will Freeman* and *George B. Christensen* for petitioner. *Albin C. Ahlberg* and *Warren C. Horton* for respondents. Reported below: 276 F. 2d 354.

No. 234. DIXIE, INC., *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Joseph H. Choate, Jr.* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, I. Henry Kutz* and *Morton K. Rothschild* for respondent. Reported below: 277 F. 2d 526.

No. 259. ESPINOZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Robert A. Scardino* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 278 F. 2d 802.

No. 261. WARD LABORATORIES, INC., ET AL. *v.* FEDERAL TRADE COMMISSION. C. A. 2d Cir. Certiorari denied. *Martin J. Scheiman* for petitioners. *Solicitor General Rankin, Assistant Attorney General Bicks, Richard A. Solomon, Daniel J. McCauley, Jr.* and *Alan B. Hobbes* for respondent. Reported below: 276 F. 2d 952.

No. 263. YOR-WAY MARKETS ET AL. *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. *Joseph M. McLaughlin* for petitioners. *Robert E. Reed* and *William H. Peterson* for respondent. Reported below: —— Cal. 2d ——, 352 P. 2d 519.

No. 264. LATUS *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. *Edward L. P. O'Connor* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General Leonard* and *Morton Hollander,* for the United States, and *Patrick E. Gibbons* for Todd Shipyards Corp., respondents. Reported below: 277 F. 2d 264.

No. 271. AKEL *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *Frances Kahn* for petitioner. Reported below: 7 N. Y. 2d 998, 166 N. E. 2d 514.

No. 267. GLASS *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *Louis Bender* and *Moses Kove* for petitioner. *Edwyn Silberling* and *Jerome C. Ditore,* Special Assistant Attorneys General of New York, for respondent.

No. 269. BOROUGH OF EAST NEWARK ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Allan L. Tumarkin* and *William A. Ancier* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice* and *A. F. Prescott* for the United States. Reported below: 278 F. 2d 776.

No. 265. PARNELL *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. *Dorsey B. Hardeman* 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. ——, 339 S. W. 2d 49.

No. 272. SQUEEZ-A-PURSE CORP. *v.* STILLER ET AL. C. A. 6th Cir. Certiorari denied. *Robert I. Dennison* for petitioner. *Albert R. Teare* and *J. William Freeman* for respondents. Reported below: 280 F. 2d 424.

No. 275. SCHULTETUS ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Paul L. Sedgwick* and *L. W. Anderson* for petitioners. *Solicitor General Rankin, Assistant Attorney General Doub* and *Morton Hollander* for the United States. Reported below: 277 F. 2d 322.

No. 286. FRANANO *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Walter A. Raymond* and *Kenneth C. West* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 277 F. 2d 511.

No. 277. YASA *v.* ESPERDY, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 2d Cir. Certiorari denied. *Abraham Lebenkoff* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Kirby W. Patterson* for respondent. Reported below: — F. 2d —.

No. 279. EQUITABLE LIFE ASSURANCE SOCIETY *v.* UNITED STATES. Court of Claims. Certiorari denied. *John Lord O'Brian, Daniel M. Gribbon, Robert L. Randall, Robert L. Hogg* and *Stuart McCarthy* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Grant W. Wiprud* and *Jerry M. Hamovit* for the United States. Reported below: — Ct. Cl. —, 181 F. Supp. 241.

No. 281. REY *v.* PENN SHIPPING CO., INC. C. A. 2d Cir. Certiorari denied. *Silas Blake Axtell* for petitioner. *Victor S. Cichanowicz* for respondent. Reported below: 277 F. 2d 905.

No. 282. TORNEK, TRADING AS ALLEN V. TORNEK CO., *v.* FEDERAL TRADE COMMISSION. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *B. Paul Noble* for petitioner. *Solicitor General Rankin, Assistant Attorney General Bicks, Richard A. Solomon, Daniel J. McCauley, Jr.* and *Alan B. Hobbes* for respondent. Reported below: 107 U. S. App. D. C. 267, 276 F. 2d 513.

No. 291. GINSBURG *v.* AMERICAN BAR ASSOCIATION ET AL. C. A. 7th Cir. Certiorari denied. *Paul Ginsburg,* petitioner, *pro se. Floyd E. Thompson* for American Bar Association et al. *George B. Christensen* and *Thomas A. Reynolds,* respondents, *pro se* and for other respondents. Reported below: 277 F. 2d 801.

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No. 287. ALLIED VAN LINES, INC., *v.* VANDENBERGH ET AL. Supreme Court of Montana. Certiorari denied. *Lloyd J. Skedd* for petitioner. *Ralph J. Anderson* for respondents. Reported below: —— Mont. ——, 351 P. 2d 537.

No. 289. RAILWAY EXPRESS AGENCY, INC., *v.* W. R. GRACE & Co. Court of Appeals of New York. Certiorari denied. *Robert J. Fletcher* and *James V. Lione* for petitioner. *Emmet L. Holbrook* for respondent. Reported below: 8 N. Y. 2d 103, 168 N. E. 2d 362.

No. 290. GULF SHIPSIDE STORAGE CORP. *v.* UNDERWRITERS AT LLOYD'S, LONDON. C. A. 5th Cir. Certiorari denied. *Frank S. Normann* for petitioner. *Eberhard P. Deutsch* for respondent. Reported below: 276 F. 2d 209.

No. 276. HIDICK *v.* ORION SHIPPING & TRADING CO., INC., ET AL. C. A. 2d Cir. Certiorari denied. *Jacob Rassner* and *Ernest Rassner* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Alan S. Rosenthal* for the United States. *Nicholas J. Healy III* for Orion Shipping & Trading Co., Inc., et al., respondents. Reported below: 278 F. 2d 114.

No. 322. HARRIS *v.* UNITED STATES. Court of Claims. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Doub* and *John G. Laughlin, Jr.* for the United States. Reported below: —— Ct. Cl. ——, —— F. 2d ——.

No. 302. VARGAS *v.* CALIFORNIA. Appellate Department, Superior Court of California, County of Los Angeles. Certiorari denied. Petitioner *pro se*. *Roger Arnebergh* and *Philip E. Grey* for respondent. Reported below: 179 Cal. App. 2d Supp. 863, 3 Cal. Rptr. 925.

No. 295. SLAVITT *v.* MEADER ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Charlotte Slavitt*, petitioner, *pro se*. *Solicitor General Rankin, Assistant Attorney General Doub* and *John G. Laughlin, Jr.* for respondents. Reported below: 107 U. S. App. D. C. 396, 278 F. 2d 276.

No. 135. BRUNDAGE ET UX. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted. *Albert L. Hopkins* and *Samuel H. Horne* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice, Harry Baum* and *Helen A. Buckley* for the United States. Reported below: 275 F. 2d 424.

No. 310. PUGET SOUND PULP & TIMBER CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. *George H. Koster* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Meyer Rothwacks* and *Harry Marselli* for respondent. Reported below: 277 F. 2d 803.

No. 314. PORTSMOUTH BASEBALL CORP. *v.* FRICK, COMMISSIONER OF BASEBALL, ET AL. C. A. 2d Cir. Certiorari denied. *Ambrose V. McCall* and *James P. McGranery* for petitioner. *Louis F. Carroll, Mark F. Hughes, Raymond T. Jackson* and *Warren Daane* for respondents. Reported below: 278 F. 2d 395.

No. 118. CHARLES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted. *Joseph S. Hertogs, Walter H. Duane* and *Arthur J. Phelan* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Eugene L. Grimm* for the United States. Reported below: 278 F. 2d 386.

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No. 270. LANA *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted. *Frances Kahn* for petitioner. *Edward S. Silver* for respondent.

No. 104. ABDUL *v.* UNITED STATES. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied, the Court having duly noted the Solicitor General's concession that the sentence under Count VII of the indictment cannot stand and his undertaking that the Government will duly present to the District Court, under Rule 35 of the Federal Rules of Criminal Procedure, a motion for correction of the sentence. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS would not only correct the sentence under Count VII; they would also grant the writ to review the correctness, under *Spies* v. *United States,* 317 U. S. 492, of the District Court's charge to the jury regarding the requirement of willfulness in the commission of the statutory violations of which the petitioner stands convicted. *Howard K. Hoddick* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Meyer Rothwacks* and *Lawrence K. Bailey* for the United States. Reported below: 278 F. 2d 234.

No. 110. WALKER ET AL. *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted. MR. JUSTICE BLACK took no part in the consideration or decision of this application. *Arthur J. Goldberg, David E. Feller, William M. Nicholson, John Bolt Culbertson* and *Hugo L. Black, Jr.* for petitioners. *T. W. Bruton,* Attorney General of North Carolina, and *Ralph Moody* and *Harry W. McGalliard,* Assistant Attorneys General, for respondent. Reported below: 251 N. C. 465, 112 S. E. 2d 61.

No. 299. LUCAS *v.* DELONG CORPORATION. C. A. 2d Cir. Certiorari denied. *James B. Donovan* and *John P. Walsh* for petitioner. *Edward J. Ennis* and *John L. Ingoldsby, Jr.* for respondent. Reported below: 278 F. 2d 804.

No. 147. GARRETT *v.* SOUTHERN RAILWAY CO. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted. *J. H. Doughty* for petitioner. *Clyde W. Key* for respondent. Reported below: 278 F. 2d 424.

No. 197. WATKINS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted. *William R. Ming, Jr.* and *George N. Leighton* for petitioner. Reported below: 19 Ill. 2d 11, 166 N. E. 2d 433.

No. 243. SACHS *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted. *Henry C. Lowenhaupt* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *Melva M. Graney* for respondent. Reported below: 277 F. 2d 879.

No. 268. CONFORTE *v.* HANNA, JUDGE OF THE FIRST JUDICIAL DISTRICT COURT OF NEVADA, ET AL. Supreme Court of Nevada. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted. *A. L. Wirin* and *Fred Okrand* for petitioner. Reported below: 76 Nev. ——, 351 P. 2d 612.

No. 293. GRAHAM *v.* HOULIHAN ET AL. Supreme Court of Errors of Connecticut. Certiorari denied. *Milton Sorokin* and *Ethel Silver Sorokin* for petitioner. *John A. Mettling, James B. Lefebre* and *Paul Smith* for respondents. Reported below: 147 Conn. 321, 160 A. 2d 745.

No. 134. SORGEL, EXECUTOR, ET AL. *v.* COMMERCIAL CREDIT CORP. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion certiorari should be granted, the judgment vacated and the case remanded to the District Court for a completely new jury trial on all issues. *Leon P. Howell* for petitioners. *Berthold Muecke, Jr., J. Francis Ireton* and *Charles W. Trueheart* for respondent. Reported below: 274 F. 2d 449.

No. 138. FOSTER *v.* UNITED STATES. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied, the Court noting the purpose of the Solicitor General promptly to have proceedings commenced to determine the capacity of petitioner to stand trial. We assume that such proceedings will be instituted without delay and expeditiously pressed to a conclusion. *Mary M. Kaufman* for petitioner. *Solicitor General Rankin, Assistant Attorney General Yeagley* and *Kevin T. Maroney* for the United States. Reported below: 278 F. 2d 567.

No. 273. HUTTON, EXECUTOR, ET AL. *v.* HUTTON. Petition for writ of certiorari to the Supreme Court of Mississippi and other relief denied. *J. B. Hutton, Jr.* and *W. S. Henley* for petitioners. Reported below: 239 Miss. 217, 119 So. 2d 369.

No. 170. JOHNSON, FORMERLY COLLECTOR OF INTERNAL REVENUE, ET AL. *v.* DULLES ET AL., EXECUTORS. C. A. 2d Cir. Certiorari denied. MR. JUSTICE HARLAN took no part in the consideration or decision of this application. *Solicitor General Rankin, Assistant Attorney General Rice, Harry Baum* and *James P. Turner* for petitioners. *Norris Darrell* and *Henry N. Ess III* for respondents. Reported below: 273 F. 2d 362.

No. 292. BIVINS *v.* GULF OIL CORP. C. A. 5th Cir. Certiorari denied. THE CHIEF JUSTICE and MR. JUSTICE BLACK are of the opinion certiorari should be granted. *Philip S. Kouri* for petitioner. *William L. Kerr* for respondent. Reported below: 276 F. 2d 753.

No. 205. SCHENLEY INDUSTRIES, INC., *v.* LIND. The motion of the respondent for leave to proceed *in forma pauperis* is granted. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied. *John Milton, Jr.* for petitioner. *Irving J. Soloway* for respondent. Reported below: 278 F. 2d 79.

No. 227. PAULING ET AL. *v.* MCELROY, SECRETARY OF DEFENSE, ET AL. The motion to substitute Robert E. Wilson and Loren K. Olson in the place of H. S. Vance and John F. Floberg as parties respondent is granted. The motion to substitute Thomas E. Gates 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. *Francis Heisler, Charles A. Stewart, A. L. Wirin* and *Fred Okrand* for petitioners. *Solicitor General Rankin, Assistant Attorney General Doub, Morton Hollander* and *John G. Laughlin, Jr.* for respondents. Reported below: 107 U. S. App. D. C. 372, 278 F. 2d 252.

No. 159. REVELL, INC., ET AL. *v.* RIDDELL, DISTRICT DIRECTOR OF INTERNAL REVENUE, ET AL. The motion of Albert H. Allen for leave to file brief, as *amicus curiae,* is denied. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied. *George T. Altman* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice, Melva M. Graney* and *Helen A. Buckley* for respondents. Reported below: 273 F. 2d 649.

No. 283. First National Bank of Chippewa Falls et al. *v.* Charles Henneman Co. et al. Supreme Court of Wisconsin. Certiorari denied. Mr. Justice Whittaker is of the opinion certiorari should be granted. *Marshall Wiley* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice* and *A. F. Prescott* for the United States. *Eugene R. Jackson* and *Edwin Larkin* for Chippewa County, respondent. Reported below: 10 Wis. 2d 260, 103 N. W. 2d 24.

No. 208. Down Town Association of the City of New York *v.* United States. C. A. 2d Cir. Certiorari denied. Mr. Justice Harlan took no part in the consideration or decision of this application. *Timothy N. Pfeiffer* and *Rebecca M. Cutler* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, L. W. Post* and *Louise Foster* for the United States. Reported below: 278 F. 2d 313.

No. 9, Misc. Ware *v.* Smyth, Penitentiary Superintendent. Supreme Court of Appeals of Virginia. Certiorari denied. Petitioner *pro se. Kenneth C. Patty,* First Assistant Attorney General of Virginia, for respondent.

No. 10, Misc. Williams *v.* United States. C. A. 6th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 272 F. 2d 822.

No. 11, Misc. Lipscomb *v.* United States. C. A. 8th Cir. Certiorari denied. *Henry D. Espy* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 273 F. 2d 860.

No. 296. HOCHMAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion certiorari should be granted. *Irving D. Gaines* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 277 F. 2d 631.

No. 298. PORTER *v.* HERTER. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion certiorari should be granted. *Joseph L. Rauh, Jr., Daniel H. Pollitt* and *John Silard* for petitioner. *Solicitor General Rankin* for respondent. Reported below: 107 U. S. App. D. C. 400, 278 F. 2d 280.

No. 13, Misc. KIRSCH *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Petitioner *pro se. William L. Guild,* Attorney General of Illinois, for respondent.

No. 17, Misc. BROOKS *v.* SMYTH, PENITENTIARY SUPERINTENDENT. Supreme Court of Appeals of Virginia. Certiorari denied. Petitioner *pro se. A. S. Harrison, Jr.,* Attorney General of Virginia, for respondent.

No. 23, Misc. BURNS *v.* TAYLOR, WARDEN. C. A. 10th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Rankin, Acting Assistant Attorney General Ryan* and *Harold H. Greene* for respondent. Reported below: 274 F. 2d 141.

No. 26, Misc. O'CONNOR *v.* BURKE, WARDEN. Supreme Court of Wisconsin. Certiorari denied. Petitioner *pro se. John W. Reynolds,* Attorney General of Wisconsin, *William A. Platz* and *Harold H. Persons,* Assistant Attorneys General, for respondent.

No. 25, Misc. CUTLIP *v.* ADAMS, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied. Petitioner *pro se.* *Fred H. Caplan,* Assistant Attorney General of West Virginia, for respondent.

No. 27, Misc. BROADDUS *v.* SMYTH, PENITENTIARY SUPERINTENDENT. Supreme Court of Appeals of Virginia. Certiorari denied. Petitioner *pro se.* *Kenneth C. Patty,* First Assistant Attorney General of Virginia, for respondent.

No. 29, Misc. SHERIDAN *v.* OHIO. Supreme Court of Ohio. Certiorari denied. Reported below: 170 Ohio St. 168, 163 N. E. 2d 175.

No. 30, Misc. IN RE THOMPSON. C. A. 9th Cir. Certiorari denied. *Stanley Mosk,* Attorney General of California, *Doris H. Maier* and *Edsel W. Haws,* Deputy Attorneys General, for respondent.

No. 31, Misc. CARTER *v.* NEW YORK. Appellate Division, Supreme Court of New York, Fourth Judicial Department. Certiorari denied.

No. 33, Misc. POSEY *v.* MURRAY, JUDGE. Supreme Court of Indiana. Certiorari denied. Petitioner *pro se.* *Edwin K. Steers,* Attorney General of Indiana, and *Richard M. Givan,* Assistant Attorney General, for respondent. Reported below: —— Ind. ——, 163 N. E. 2d 893.

No. 37, Misc. SISK *v.* EBY, JUDGE, ET AL. Supreme Court of Indiana. Certiorari denied. Petitioner *pro se.* *Edwin K. Steers,* Attorney General of Indiana, and *Richard M. Givan,* Assistant Attorney General, for respondents. Reported below: —— Ind. ——, 165 N. E. 2d 139.

No. 34, Misc. HARDEN *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. Petitioner *pro se.* *Stanley Mosk,* Attorney General of California, *Arlo E. Smith* and *Albert W. Harris, Jr.,* Deputy Attorneys General, for respondent.

No. 36, Misc. STARR *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied. Petitioner *pro se.* *William L. Guild,* Attorney General of Illinois, for respondent.

No. 39, Misc. FRAZIER *v.* DOWD, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 40, Misc. HILBERT *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied. *David Freeman* for petitioner.

No. 42, Misc. HOBART *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Caryl Warner* for petitioner. *Solicitor General Rankin* for the United States. Reported below: 275 F. 2d 941.

No. 46, Misc. TINSLEY *v.* CALIFORNIA. 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.

No. 47, Misc. RANDOLPH *v.* RHAY, PENITENTIARY SUPERINTENDENT. Supreme Court of Washington. Certiorari denied.

No. 53, Misc. HAWKS *v.* VIRGINIA ET AL. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 54, Misc. CALDWELL *v.* MARYLAND. Criminal Court of Baltimore, Maryland. Certiorari denied.

No. 55, Misc. ARMSTRONG *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 56, Misc. VALENTINO *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 58, Misc. LUSTIG *v.* COMMISSIONER OF INTERNAL REVENUE ET AL. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Rice* and *Harry Baum* for respondents. Reported below: 274 F. 2d 448.

No. 60, Misc. COUSER *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 221 Md. 474, 157 A. 2d 426.

No. 61, Misc. TRUMBLAY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 278 F. 2d 229.

No. 62, Misc. BLANKENSHIP *v.* SMYTH, PENITENTIARY SUPERINTENDENT. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 64, Misc. MANCINI ET AL. *v.* NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 65, Misc. SHERIFF *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se*. *William I. Siegel* and *Edward S. Silver* for respondent.

No. 66, Misc. GOLLA *v.* DELAWARE. Supreme Court of Delaware. Certiorari denied. Reported below: 52 Del. —, 159 A. 2d 585.

No. 67, Misc. PULASKI *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 71, Misc. INGLE *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. Reported below: 53 Cal. 2d 407, 348 P. 2d 577.

No. 72, Misc. WILSON *v.* WARDEN, MARYLAND PENITENTIARY. Court of Appeals of Maryland. Certiorari denied. Reported below: 222 Md. 580, 158 A. 2d 103.

No. 76, Misc. KILLEBREW *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: 275 F. 2d 308.

No. 78, Misc. TURNER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 275 F. 2d 307.

No. 79, Misc. MARINACCIO *v.* NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 80, Misc. GRUBBS *v.* NEW YORK ET AL. C. A. 2d Cir. Certiorari denied.

No. 81, Misc. LESSER *v.* NEW YORK. Court of General Sessions, New York County, New York. Certiorari denied.

No. 82, Misc. KARP *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Julia P. Cooper* for the United States. Reported below: 277 F. 2d 843.

No. 83, Misc. ZAMBARDI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Herbert S. Siegel* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Eugene L. Grimm* for the United States. Reported below: 276 F. 2d 169.

No. 84, Misc. IN RE SIMMONS. Supreme Court of Ohio. Certiorari denied. Reported below: 170 Ohio St. 319, 164 N. E. 2d 420.

No. 88, Misc. SCHACHEL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Ann Thacher Clarke* for petitioner. Reported below: 276 F. 2d 572.

No. 89, Misc. JOHNSTONE *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied. Reported below: 335 S. W. 2d 199.

No. 90, Misc. MAYNARD *v.* ADAMS, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 91, Misc. EARNSHAW *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin* for the United States.

No. 92, Misc. CRAHAN *v.* OHIO ET AL. Supreme Court of Ohio. Certiorari denied. Reported below: 170 Ohio St. 581, 166 N. E. 2d 924.

No. 94, Misc. BAYSIDE NOVELTY CO., INC., ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Abraham Schwartz* for petitioners. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 275 F. 2d 207.

No. 95, Misc. GARFINKLE *v.* SUPERIOR COURT OF NEW JERSEY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 278 F. 2d 674.

No. 96, Misc. WOLFSON *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 97, Misc. REECE *v.* OHIO. Supreme Court of Ohio. Certiorari denied.

No. 101, Misc. REED *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 102, Misc. PAGE ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Herbert Zelenko* for petitioners.

No. 103, Misc. BIRCH *v.* NEW YORK. Appellate Division, Supreme Court of New York, First Judicial Department. Certiorari denied.

No. 104, Misc. CRAWFORD *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin* for the United States.

No. 106, Misc. BARNES *v.* ELLIS, CORRECTIONS DIRECTOR. Court of Criminal Appeals of Texas. Certiorari denied.

No. 110, Misc. FARLEY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin* for the United States.

No. 111, Misc. OWEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Rice* and *Robert N. Anderson* for the United States. Reported below: 277 F. 2d 790.

No. 113, Misc. HANKINS *v.* DISTRICT OF COLUMBIA. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 114, Misc. BOOKER *v.* MURPHY, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 115, Misc. MEARS *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari denied.

No. 117, Misc. OWSLEY *v.* SMYTH, PENITENTIARY SUPERINTENDENT. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 121, Misc. MCCOY *v.* PEPERSACK, WARDEN. Court of Appeals of Maryland. Certiorari denied. Reported below: 222 Md. 594, 158 A. 2d 765.

No. 123, Misc. HASSAN *v.* MAGISTRATES COURT OF THE CITY OF NEW YORK ET AL. Court of Appeals of New York. Certiorari denied.

No. 125, Misc. SIMONETTI *v.* JOHNSTON, STATE HOSPITAL DIRECTOR. Appellate Division, Supreme Court of New York, Third Judicial Department. Certiorari denied.

No. 122, Misc. ZENGER *v.* SCHWARTZ, JUDGE, ET AL. C. A. 2d Cir. Certiorari denied.

No. 128, Misc. ADAMS *v.* KELLY DRILLING CO., INC., ET AL. C. A. 5th Cir. Certiorari denied. *Ernest A. Carrere, Jr.* for petitioner. *John W. Sims, Charles Kohlmeyer, Jr.* and *George B. Matthews* for respondents. Reported below: 273 F. 2d 887.

No. 132, Misc. CASEY *v.* ILLINOIS. Circuit Court of Will County, Illinois. Certiorari denied.

No. 133, Misc. WESLEY *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 18 Ill. 2d 138, 163 N. E. 2d 500.

No. 134, Misc. CAMERON *v.* COCHRAN, CORRECTIONS DIRECTOR. Supreme Court of Florida. Certiorari denied.

No. 135, Misc. FARNSWORTH *v.* RANDOLPH, WARDEN. Circuit Court of Randolph County, Illinois. Certiorari denied.

No. 141, Misc. JAMES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Rankin, Acting Assistant Attorney General Leonard* and *Morton Hollander* for the United States. Reported below: 280 F. 2d 428.

No. 139, Misc. CARPENTER *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 140, Misc. CATALANO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se. Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 281 F. 2d 184.

No. 137, Misc. BERRY *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 18 Ill. 2d 453, 165 N. E. 2d 257.

No. 142, Misc. CARNES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 279 F. 2d 378.

No. 143, Misc. SOLOMON *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 145, Misc. Moss *v.* KENTUCKY. Court of Appeals of Kentucky. Certiorari denied. Petitioner *pro se. John B. Breckenridge,* Attorney General of Kentucky, and *Troy D. Savage,* Assistant Attorney General, for respondent. Reported below: 332 S. W. 2d 650.

No. 146, Misc. MONTGOMERY *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Reported below: 7 N. Y. 2d 1001, 166 N. E. 2d 516.

No. 148, Misc. DAVIS *v.* BANMILLER, WARDEN. Supreme Court of Pennsylvania. Certiorari denied. Petitioner *pro se. Martin H. Lock* for respondent.

No. 150, Misc. BISHOP *v.* MARONEY, WARDEN. Supreme Court of Pennsylvania. Certiorari denied. Reported below: 399 Pa. 208, 159 A. 2d 893.

No. 151, Misc. BODEN *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied. Reported below: 399 Pa. 298, 159 A. 2d 894.

No. 158, Misc. WILSON *v.* BANNAN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 156, Misc. EARLY *v.* COLORADO. Supreme Court of Colorado. Certiorari denied. Petitioner *pro se*. *Duke W. Dunbar,* Attorney General of Colorado, *Frank E. Hickey,* Deputy Attorney General, and *J. F. Brauer,* Assistant Attorney General, for respondent. Reported below: 142 Colo. ——, 352 P. 2d 112.

No. 152, Misc. DEVORE *v.* WILKINS, 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. 160, Misc. MERRITTE *v.* NEW YORK. Appellate Division, Supreme Court of New York, Fourth Judicial Department. Certiorari denied. Petitioner *pro se*. *Alexander J. Hercsa* for respondent.

No. 161, Misc. WADE *v.* KENTUCKY. Court of Appeals of Kentucky. Certiorari denied. Petitioner *pro se*. *John B. Breckenridge,* Attorney General of Kentucky, and *Troy D. Savage,* Assistant Attorney General, for respondent.

No. 162, Misc. DOBY *v.* ELLIS, CORRECTIONS DIRECTOR. Court of Criminal Appeals of Texas. Certiorari denied.

No. 163, Misc. BUCHANAN *v.* HEINZE, WARDEN, ET AL. Supreme Court of California. Certiorari denied.

No. 164, Misc. LAMBERT *v.* MUNICIPAL COURT OF LOS ANGELES JUDICIAL DISTRICT, COUNTY OF LOS ANGELES, ET AL. District Court of Appeal of California, Second Appellate District. Certiorari denied. *Samuel C. McMorris* for petitioner. *Harold W. Kennedy* and *Wm. E. Lamoreaux* for respondents.

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No. 166, Misc. MENARD *v.* NASH, WARDEN. Supreme Court of Missouri. Certiorari denied.

No. 168, Misc. REAGAN *v.* NASH, WARDEN. Supreme Court of Missouri. Certiorari denied.

No. 169, Misc. SNYDER *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 172, Misc. MORRIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin* for the United States.

No. 175, Misc. WOOD *v.* FOGLIANI, WARDEN, ET AL. Supreme Court of Nevada. Certiorari denied.

No. 177, Misc. ROGERS *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States.

No. 180, Misc. CLARK *v.* WARDEN, MARYLAND PENITENTIARY. Court of Appeals of Maryland. Certiorari denied. Reported below: 222 Md. 634, 160 A. 2d 789.

No. 181, Misc. DRISCOLL *v.* COCHRAN, CORRECTIONS DIRECTOR. Supreme Court of Florida. Certiorari denied.

No. 182, Misc. THOMPSON *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. Reported below: 31 N. J. 540, 158 A. 2d 333.

No. 183, Misc. FORD *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 19 Ill. 2d 466, 168 N. E. 2d 33.

No. 184, Misc. CRAWFORD *v.* LYDICK ET AL. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Richard H. Paulson* for Lucien F. Sweet, Circuit Court Judge, respondent. *William H. Culver* and *Louis R. Young* for other individual respondents. Reported below: 280 F. 2d 426.

No. 186, Misc. SCOLERI *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied. *Michael von Moschzisker* for petitioner. *Victor H. Blanc* for respondent. Reported below: 399 Pa. 110, 160 A. 2d 215.

No. 188, Misc. BONDS *v.* NATIONAL SURETY CORP. ET AL. C. A. 5th Cir. Certiorari denied. *Herbert Garon* for petitioner. Reported below: 275 F. 2d 389.

No. 189, Misc. RICKETTS *v.* WILKINS, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 190, Misc. ELLIS *v.* RAINES, WARDEN. Supreme Court of Oklahoma. Certiorari denied.

No. 192, Misc. JACKSON *v.* JACKSON. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Eugene X. Murphy* for petitioner. Reported below: 107 U. S. App. D. C. 255, 276 F. 2d 501.

No. 193, Misc. LINDEN *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 195, Misc. SIMMON *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 198, Misc. MCDANIEL *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 197, Misc. ROBERTS *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied.

No. 196, Misc. MCCARY *v.* KANSAS ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 281 F. 2d 185.

No. 199, Misc. KIRBY *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 222 Md. 421, 160 A. 2d 786.

No. 201, Misc. RAMIREZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Daniel H. Greenberg* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 279 F. 2d 712.

No. 202, Misc. BUTTS *v.* NEW YORK. Appellate Division, Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 203, Misc. BANGHART *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 204, Misc. JENNINGS *v.* RAGEN, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 279 F. 2d 202.

No. 207, Misc. WHITE *v.* UNITED STATES. C. A. 4th 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: 279 F. 2d 740.

No. 211, Misc. JONES *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se. Solicitor General Rankin* for the United States.

No. 208, Misc. CANCEL *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 212, Misc. RUCKLE *v.* WARDEN, BALTIMORE JAIL. Court of Appeals of Maryland. Certiorari denied.

No. 213, Misc. GALLINA *v.* FRASER. C. A. 2d Cir. Certiorari denied. Reported below: 278 F. 2d 77.

No. 217, Misc. SMITH *v.* ILLINOIS. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 218, Misc. MUNSON *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. 224, Misc. MILLER *v.* COLORADO. Supreme Court of Colorado. Certiorari denied. Petitioner *pro se. Duke W. Dunbar,* Attorney General of Colorado, *Frank E. Hickey,* Deputy Attorney General, and *J. F. Brauer,* Assistant Attorney General, for respondent. Reported below: 141 Colo. 576, 349 P. 2d 685.

No. 230, Misc. CUOMO *v.* LAVALLEE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 238, Misc. MONA *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 245, Misc. WILLIAMS *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. *Thomas H. Dent* for petitioner. *Will Wilson,* Attorney General of Texas, *Riley Eugene Fletcher* and *Houghton Brownlee, Jr.* for respondent. Reported below: —— Tex. Cr. R. ——, 335 S. W. 2d 224.

No. 247, Misc. GREGORY *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se*. *William I. Siegel* for respondent.

No. 248, Misc. MALLORY *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied. Petitioner *pro se*. *John M. Dalton,* Attorney General of Missouri, for respondent. Reported below: 336 S. W. 2d 383.

No. 256, Misc. BYRNES *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. Reported below: —— Tex. Cr. R. ——, 335 S. W. 2d 842.

No. 268, Misc. RYAN *v.* BANMILLER, WARDEN. Supreme Court of Pennsylvania. Certiorari denied. Petitioner *pro se*. *Martin H. Lock* for respondent. Reported below: 400 Pa. 326, 162 A. 2d 354.

No. 271, Misc. JACKSON *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 223 Md. 105, 163 A. 2d 120.

No. 281, Misc. WASHINGTON *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. 304, Misc. CAMPBELL *v.* BANNAN, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 279 F. 2d 869.

No. 18, Misc. REICKAUER *v.* SMYTH, PENITENTIARY SUPERINTENDENT. Petition for writ of certiorari to the Supreme Court of Appeals of Virginia and other relief denied. Petitioner *pro se*. *Kenneth C. Patty,* First Assistant Attorney General of Virginia, for respondent.

No. 15, Misc. JONES *v.* SMYTH, PENITENTIARY SUPERINTENDENT. Petition for writ of certiorari to the Supreme Court of Appeals of Virginia denied without prejudice to an application for writ of habeas corpus in the appropriate United States District Court. Petitioner *pro se.* *A. S. Harrison, Jr.,* Attorney General of Virginia, for respondent.

No. 12, Misc. TUNE *v.* SMYTH, PENITENTIARY SUPERINTENDENT. Petition for writ of certiorari to the Supreme Court of Appeals of Virginia denied without prejudice to an application for writ of habeas corpus in the appropriate United States District Court to have determined petitioner's allegation that he was not appointed counsel to defend him at his trial. Petitioner *pro se.* *A. S. Harrison, Jr.,* Attorney General of Virginia, for respondent.

No. 50, Misc. MATEY *v.* ALVIS, WARDEN. Motion to substitute Beryle C. Sacks in place of R. W. Alvis as the party respondent granted. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

No. 77, Misc. WOFFORD *v.* UNITED STATES. Motion of *Dyer Justice Taylor* for leave to withdraw appearance as counsel for petitioner granted. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit denied. Reported below: 107 U. S. App. D. C. 196, 275 F. 2d 654.

No. 205, Misc. GLINTON *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted. *Nancy Carley* for petitioner. *Frank S. Hogan* for respondent. Reported below: 8 N. Y. 2d 849, 168 N. E. 2d 704.

No. 100, Misc. DURHAM *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted. *George A. Schmiedigen* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States.

Rehearing Denied.

No. 14, October Term, 1959. UNITED STATES *v.* DEGE ET VIR, *ante,* p. 51;

No. 54, October Term, 1959. FLEMMING, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, *v.* NESTOR, 363 U. S. 603;

No. 61, October Term, 1959. FEDERAL TRADE COMMISSION *v.* HENRY BROCH & Co., 363 U. S. 166;

No. 138, October Term, 1959. UNITED STATES *v.* AMERICAN-FOREIGN STEAMSHIP CORP. ET AL., 363 U. S. 685;

No. 139, October Term, 1959. KIMM *v.* ROSENBERG, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, 363 U. S. 405;

No. 143, October Term, 1959. COMMISSIONER OF INTERNAL REVENUE *v.* EVANS ET UX., *ante,* p. 92;

No. 283, October Term, 1959. HERTZ CORPORATION (SUCCESSOR TO J. FRANK CONNOR, INC.) *v.* UNITED STATES, *ante,* p. 122;

No. 156, October Term, 1959. MINER ET AL., JUDGES, U. S. DISTRICT COURT, *v.* ATLASS, 363 U. S. 641;

No. 165, October Term, 1959. BROTHERHOOD OF LOCOMOTIVE ENGINEERS ET AL. *v.* MISSOURI-KANSAS-TEXAS RAILROAD CO. ET AL., 363 U. S. 528; and

No. 208, October Term, 1959. CONNALLY ET AL., EXECUTORS, *v.* FEDERAL POWER COMMISSION, 363 U. S. 841. Petitions for rehearing denied.

No. 323, October Term, 1959. HUNT OIL CO. *v.* FEDERAL POWER COMMISSION, 363 U. S. 841;

No. 340, October Term, 1959. SCOTT ET AL. *v.* UNION PRODUCING CO. ET AL., 363 U. S. 842;

No. 352, October Term, 1959. SOCONY MOBIL OIL CO., INC., *v.* FEDERAL POWER COMMISSION, 363 U. S. 842;

No. 368, October Term, 1959. HUMBLE OIL & REFINING CO. *v.* FEDERAL POWER COMMISSION, 363 U. S. 842;

No. 503, October Term, 1959. UNITED STATES *v.* GRAND RIVER DAM AUTHORITY, 363 U. S. 229;

No. 549, October Term, 1959. HANNAH ET AL. *v.* LARCHE ET AL., 363 U. S. 420;

No. 550, October Term, 1959. HANNAH ET AL. *v.* SLAWSON ET AL., 363 U. S. 420;

No. 663, October Term, 1959. GINSBURG *v.* GOURLEY, CHIEF JUDGE, U. S. DISTRICT COURT, 362 U. S. 917;

No. 730, October Term, 1959. KICAK *v.* OHIO, 362 U. S. 949;

No. 744, October Term, 1959. OLSHAUSEN *v.* COMMISSIONER OF INTERNAL REVENUE, 363 U. S. 820;

No. 824, October Term, 1959. KRESHIK ET AL. *v.* SAINT NICHOLAS CATHEDRAL OF THE RUSSIAN ORTHODOX CHURCH OF NORTH AMERICA, 363 U. S. 190;

No. 852, October Term, 1959. BERNSTEIN ET AL. *v.* REAL ESTATE COMMISSION OF MARYLAND ET AL., 363 U. S. 419;

No. 895, October Term, 1959. LIVINGSTON ET AL. *v.* UNITED STATES ET AL., *ante*, p. 281; and

No. 991, October Term, 1959. QUIRKE *v.* ST. LOUIS-SAN FRANCISCO RAILWAY CO. ET AL., 363 U. S. 845. Petitions for rehearing denied.

No. 30, October Term, 1959. OHIO EX REL. EATON *v.* PRICE, CHIEF OF POLICE, *ante*, p. 263. Petition for rehearing denied. MR. JUSTICE STEWART took no part in the consideration or decision of this application.

No. 10, Original, October Term, 1959. UNITED STATES *v.* LOUISIANA ET AL., 363 U. S. 1. Joint motion of Alabama, Mississippi, and Louisiana for leave to file supplement to petitions for rehearing granted. Petitions for rehearing denied. THE CHIEF JUSTICE and MR. JUSTICE CLARK took no part in the consideration or decision of this motion and application.

No. 7, October Term, 1959. WOLFE ET AL. *v.* NORTH CAROLINA, *ante,* p. 177;

No. 321, October Term, 1959. SUN OIL CO. *v.* FEDERAL POWER COMMISSION, *ante,* p. 170;

No. 335, October Term, 1959. SUNRAY MID-CONTINENT OIL CO. *v.* FEDERAL POWER COMMISSION, *ante,* p. 137; and

No. 416, October Term, 1959. GONZALES *v.* UNITED STATES, *ante,* p. 59. Motions for leave to file supplement to petitions for rehearing granted. Petitions for rehearing denied.

No. 71, October Term, 1959. DE VEAU *v.* BRAISTED, 363 U. S. 144. Petition for rehearing denied. MR. JUSTICE HARLAN took no part in the consideration or decision of this application.

No. 706, October Term, 1959. BRASS & COPPER WORKERS FEDERAL LABOR UNION No. 19,322, AFL–CIO, *v.* AMERICAN BRASS CO., KENOSHA DIVISION, 363 U. S. 845. Petition for rehearing denied. MR. JUSTICE BLACK took no part in the consideration or decision of this application.

No. 896, October Term, 1959. DEFOE *v.* SUCHMAN ET AL., 363 U. S. 417. Motion to dispense with printing petition for rehearing granted. Petition for rehearing denied.

No. 410, Misc., October Term, 1959. MAYFIELD *v.* SOUTH CAROLINA, 363 U. S. 846;

No. 466, Misc., October Term, 1959. LEATHER *v.* UNITED STATES, 363 U. S. 831;

No. 572, Misc., October Term, 1959. PENNSYLVANIA EX REL. HAUN *v.* MARONEY, WARDEN, ET AL., 363 U. S. 855;

No. 577, Misc., October Term, 1959. MILLER *v.* ILLINOIS, 363 U. S. 846;

No. 707, Misc., October Term, 1959. COOPER ET AL. *v.* DISTRICT OF COLUMBIA, 363 U. S. 847;

No. 782, Misc., October Term, 1959. EASTMAN *v.* SMYTH, PENITENTIARY SUPERINTENDENT, 363 U. S. 848;

No. 798, Misc., October Term, 1959. BRILLIANT *v.* UNITED STATES, 363 U. S. 806;

No. 870, Misc., October Term, 1959. DRANOW *v.* COMMITTEE ON CHARACTER AND FITNESS IN THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK, FIRST DEPARTMENT, ET AL., 363 U. S. 849;

No. 875, Misc., October Term, 1959. WALKER ET AL. *v.* WALKER ET AL., 363 U. S. 849;

No. 909, Misc., October Term, 1959. OPPENHEIMER *v.* SOUTHERN PACIFIC CO. ET AL., 363 U. S. 823;

No. 925, Misc., October Term, 1959. CUTTING *v.* BANK OF ALASKA (OR NATIONAL BANK OF ALASKA) ET AL., *ante*, p. 283;

No. 945, Misc., October Term, 1959. YOUNGQUIST *v.* BRUCKER, SECRETARY OF THE ARMY, 363 U. S. 851;

No. 946, Misc, October Term, 1959. EX PARTE SHERWOOD, 363 U. S. 851;

No. 956, Misc., October Term, 1959. DE GROAT *v.* NEW YORK, *ante*, p. 284;

No. 964, Misc., October Term, 1959. MORRISON *v.* UNITED STATES, 363 U. S. 851; and

No. 981, Misc., October Term, 1959. TWINING *v.* UNITED STATES, 363 U. S. 854. Petitions for rehearing denied.

No. 993, Misc., October Term, 1959. LOFTON *v.* SHARP ET AL., 363 U. S. 857;

No. 1042, Misc., October Term, 1959. WAY *v.* SETTLE, WARDEN, 363 U. S. 835; and

No. 1050, Misc., October Term, 1959. RICHARDSON *v.* RHAY, PENITENTIARY SUPERINTENDENT, 363 U. S. 834. Petitions for rehearing denied.

No. 52, Misc., October Term, 1959. KAPLAN *v.* NEW YORK, 363 U. S. 805; and

No. 882, Misc., October Term, 1959. LARSON *v.* UNITED STATES, 363 U. S. 849. Motions for leave to file petitions for rehearing denied.

No. 970, Misc., October Term, 1959. FAUBERT *v.* MICHIGAN ET AL., 363 U. S. 835. Petition for rehearing denied. MR. JUSTICE STEWART took no part in the consideration or decision of this application.

OCTOBER 17, 1960.

Miscellaneous Orders.

No. —. ALLIED CHEMICAL CORP. *v.* UNITED STATES. The application for stay presented to MR. JUSTICE FRANKFURTER, and by him referred to the Court, is denied. *John T. Noonan* for applicant. *Solicitor General Rankin* for the United States.

No. 28. KONIGSBERG *v.* STATE BAR OF CALIFORNIA ET AL. Certiorari, 362 U. S. 910, to the Supreme Court of California. The motion of American Civil Liberties Union of Southern California for leave to file brief, as *amicus curiae,* is granted. *A. L. Wirin, Fred Okrand* and *Hugh R. Manes* for movant.

No. 45. FEDERAL POWER COMMISSION *v.* TRANSCONTINENTAL GAS PIPE LINE CORP. ET AL. Certiorari, 362 U. S. 948, to the United States Court of Appeals for the Third Circuit. The motion of Southern California Gas Company et al. for leave to file brief, as *amici curiae,* is granted. *L. T. Rice, Henry F. Lippitt II, Milford Springer, Joseph R. Rensch, J. David Mann, Jr.* and *William W. Ross* for movants.

No. 60. POE ET AL. *v.* ULLMAN, STATE'S ATTORNEY; and

No. 61. BUXTON *v.* ULLMAN, STATE'S ATTORNEY. Appeals from the Supreme Court of Errors of Connecticut. (Probable jurisdiction noted, 362 U. S. 987.) The motion of the American Civil Liberties Union and the Connecticut Civil Liberties Union for leave to file brief, as *amici curiae,* is granted. MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this motion. *Osmond K. Fraenkel* for movants.

No. 73. RADIANT BURNERS, INC., *v.* PEOPLES GAS LIGHT & COKE CO. ET AL. Certiorari, 363 U. S. 809, to the United States Court of Appeals for the Seventh Circuit. The motion of the Solicitor General for leave to participate in oral argument, as *amicus curiae,* is granted. *Solicitor General Rankin* for the United States.

No. 74. NATIONAL LABOR RELATIONS BOARD *v.* MATTISON MACHINE WORKS. Certiorari, 363 U. S. 826, to the United States Court of Appeals for the Seventh Circuit. The motion of International Union, U. A. W., A. F. L.–C. I. O. for leave to file brief, as *amicus curiae,* is granted. *Harold A. Katz* for movant. *Charles B. Cannon* for respondent.

No. 320, Misc. SCHWILLE *v.* RICE, U. S. DISTRICT JUDGE, ET AL. Motion for leave to file petition for writ of mandamus denied. *James P. Donovan* and *William F. Billings* for movant. *Will Wilson,* Attorney General of Texas, *Leon Jaworski, Edward Clark, John D. Cofer* and *Abe Fortas* for respondents.

Probable Jurisdiction Noted.

No. 203. ELI LILLY & CO. *v.* SAV-ON-DRUGS, INC. Appeal from the Supreme Court of New Jersey. Probable jurisdiction noted. *Joseph H. Stamler, Melvin P. Antell* and *Everett I. Willis* for appellant. *Vincent P. Biunno* and *Samuel M. Lane* for appellee. *David D. Furman,* Attorney General of New Jersey, and *Murry Brochin,* Deputy Attorney General, for the State of New Jersey, intervenor-appellee, urging affirmance. Reported below: 31 N. J. 591, 158 A. 2d 528.

No. 306. CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD CO. *v.* UNITED STATES ET AL.; and

No. 307. BENSON, SECRETARY OF AGRICULTURE, *v.* UNITED STATES ET AL. Appeals from the United States District Court for the Eastern District of Wisconsin. Probable jurisdiction noted. *E. R. Eckersall, E. O. Schiewe, R. K. Merrill* and *B. E. Lutterman* for appellant in No. 306. *Carl J. Stephens, Neil Brooks* and *Donald A. Campbell* for appellant in No. 307. *Solicitor General Rankin, Assistant Attorney General Bicks, Richard A. Solomon, Robert W. Ginnane* and *Charlie H. Johns, Jr.* for the United States. *Fletcher Rockwood, Marcellus L. Countryman, Jr., Anthony Kane, Louis E. Torinus, Jr., Charles A. Hart, Jordan J. Hillman, Martin L. Cassell* and *Richard Musenbrock* for the appellee railroad companies. Reported below: 182 F. Supp. 81.

No. 257. H. K. Porter Co., Inc., et al. *v.* Central Vermont Railway, Inc., et al.;

No. 258. Interstate Commerce Commission *v.* Central Vermont Railway, Inc., et al.; and

No. 266. United States *v.* Central Vermont Railway, Inc., et al. Appeals from the United States District Court for the District of Vermont. Probable jurisdiction noted. *E. B. Ussery* for appellants in No. 257. *Robert W. Ginnane* and *H. Neil Garson* for appellant in No. 258. *Solicitor General Rankin, Assistant Attorney General Bicks* and *Richard A. Solomon* for the United States in No. 266. *J. Edgar McDonald, J. Raymond Hoover, William H. Parsons, Horace H. Powers, John F. Reilly* and *William F. Zearfaus* for appellees. Reported below: 182 F. Supp. 516.

Certiorari Granted. (*See also No. 167, Misc., ante, p. 295.*)

No. 198. Montana *v.* Rogers, Attorney General. C. A. 7th Cir. Certiorari granted. *Anna R. Lavin* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for respondent. Reported below: 278 F. 2d 68.

No. 274. Mitchell, Secretary of Labor, *v.* Whitaker House Cooperative, Inc., et al. C. A. 1st Cir. Certiorari granted. *Solicitor General Rankin, Harold C. Nystrom, Bessie Margolin* and *Sylvia S. Ellison* for petitioner. *Cyril M. Joly* for respondents. Reported below: 275 F. 2d 362.

No. 241. Bulova Watch Co., Inc., *v.* United States. Court of Claims. Certiorari granted. *Bernard Weiss* for petitioner. *Solicitor General Rankin, Assistant Attorney*

General Rice, Acting Assistant Attorney General Heffron, Meyer Rothwacks and *A. F. Prescott* for the United States.

Certiorari Denied. (*See also No. 278, ante, p. 294, and No. 112, Misc., ante, p. 293.*)

No. 172. CRAMER ET UX. *v.* ROMINE ET AL. District Court of Appeal of Florida, Third District. Certiorari denied. *John G. Simms* for petitioners. *Richard W. Ervin,* Attorney General of Florida, and *Charles Vocelle,* Special Assistant Attorney General, for respondents. Reported below: 114 So. 2d 629.

No. 209. COMPANHIA ATLANTICA DE DESENVOLVIMENTO E EXPLORACAO DE MINAS *v.* UNITED STATES; and No. 383. UNITED STATES *v.* COMPANHIA ATLANTICA DE DESENVOLVIMENTO E EXPLORACAO DE MINAS. Court of Claims. Certiorari denied. *Francis A. Brick, Jr.* for petitioner in No. 209 and respondent in No. 383. *Solicitor General Rankin, Assistant Attorney General Doub, Morton Hollander* and *Herbert E. Morris* for the United States. *Joel W. Westbrook, James M. Landis* and *Philip J. O'Brien, Jr.* filed a brief for Westbrook et al., as *amici curiae,* in support of petitioner in No. 209. Reported below: —— Ct. Cl. ——, 180 F. Supp. 342.

No. 248. ASTOR *v.* ASTOR. Supreme Court of Florida. Certiorari denied. *W. F. Parker* for petitioner. *William C. Steel* for respondent. Reported below: 120 So. 2d 176.

No. 280. WALLACE *v.* ST. LOUIS-SAN FRANCISCO RAILWAY CO. Supreme Court of Mississippi. Certiorari denied. *Frank E. Everett, Jr.* for petitioner. *C. R. Bolton, D. W. Houston, Sr., James L. Homire* and *Walter W. Dalton* for respondent. Reported below: 239 Miss. 237, 120 So. 2d 131.

No. 249. TANZER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *James J. Silver* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 278 F. 2d 137.

No. 252. AZTECA FILMS, INC., *v.* GENERAL CASUALTY COMPANY OF AMERICA. C. A. 9th Cir. Certiorari denied. *George C. Lyon* and *Henry F. Walker* for petitioner. *Robert E. Dunne* for respondent. Reported below: 278 F. 2d 161.

No. 254. BUFALINO *v.* HOLLAND, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 3d Cir. Certiorari denied. *Leon H. Kline* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Theodore George Gilinsky* for respondent. Reported below: 277 F. 2d 270.

No. 301. INTERNATIONAL HOD CARRIERS' BUILDING & COMMON LABORERS' UNION OF AMERICA, LOCAL 41, AFL–CIO, *v.* MADDEN, REGIONAL DIRECTOR, NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. *Bernard M. Mamet* for petitioner. *Solicitor General Rankin, Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 277 F. 2d 688.

No. 68, Misc. CARTER ET AL. *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Daniel R. Sherry* and *Foster Wood* for petitioners. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Kirby W. Patterson* for the United States. Reported below: 107 U. S. App. D. C. 305, 277 F. 2d 335.

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No. 304. HARRISON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Wallace Miller, Jr.* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 279 F. 2d 19.

No. 7, Misc. ROBINSON *v.* MARONEY, WARDEN. Superior Court of Pennsylvania, Pittsburgh District. Certiorari denied. Petitioner *pro se.* *Anne X. Alpern,* Attorney General of Pennsylvania, and *Frank P. Lawley,* Deputy Attorney General, for respondent.

No. 149, Misc. WATTLEY ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Petitioners *pro se.* *Solicitor General Rankin, Assistant Attorney General Rice* and *Lee A. Jackson* for respondent. Reported below: 275 F. 2d 461.

No. 153, Misc. BARBER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 279 F. 2d 687.

No. 220, Misc. RUSSELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States.

No. 234, Misc. JONES *v.* MONTANA. Supreme Court of Montana. Certiorari denied.

No. 240, Misc. BRATE *v.* NEW YORK. County Court of Albany County, New York. Certiorari denied. *Sol Greenberg* for petitioner.

No. 187, Misc. LATHAN *v.* REID. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Lawrence Speiser* and *Richard Arens* for petitioner. *Solicitor General Rankin, Assistant Attorney General Tyler, Harold H. Greene* and *David Rubin* for respondent. Reported below: 108 U. S. App. D. C. 58, 280 F. 2d 66.

No. 246, Misc. BROWN *v.* NEW YORK. Appellate Division, Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 249, Misc. ALLEN *v.* SMYTH, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 259, Misc. BEGALKE *v.* UNITED STATES. Court of Claims. Certiorari denied. *Robert H. Reiter* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub, Morton Hollander* and *Donald H. Green* for the United States. Reported below: —— Ct. Cl. ——, 286 F. 2d 606.

No. 261, Misc. PLAYER *v.* STEINER, WARDEN. Court of Appeals of Maryland. Certiorari denied. Reported below: 222 Md. 619, 159 A. 2d 852.

No. 266, Misc. WHITAKER *v.* STEINER, WARDEN. Court of Appeals of Maryland. Certiorari denied. Reported below: 223 Md. 648, 162 A. 2d 445.

No. 309, Misc. WOLSTENHOLME *v.* CITY OF OAKLAND ET AL. Supreme Court of California. Certiorari denied. *Lawrence Speiser* for petitioner. *Edward A. Goggin* for respondents. Reported below: —— Cal. 2d ——, 351 P. 2d 321.

No. 272, Misc. FREY *v.* BANMILLER, PENITENTIARY SUPERINTENDENT. Supreme Court of Pennsylvania. Certiorari denied.

No. 274, Misc. HUNTER *v.* ADAMS, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 275, Misc. BENJAMIN *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Reported below: 8 N. Y. 2d 812, 168 N. E. 2d 389.

No. 278, Misc. TRUITT *v.* ILLINOIS. C. A. 7th Cir. Certiorari denied. Reported below: 278 F. 2d 819.

No. 283, Misc. WILLIAMS *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 285, Misc. BENNETT *v.* BYRUM ET AL. Supreme Court of North Carolina. Certiorari denied.

No. 287, Misc. KLUMPP *v.* OHIO. Supreme Court of Ohio. Certiorari denied. *William F. Hopkins* for petitioner. Reported below: 171 Ohio St. 62, 167 N. E. 2d 778.

No. 289, Misc. ADAMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States.

No. 310, Misc. HOMAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 279 F. 2d 767.

No. 312, Misc. Downs *v.* New York. Court of Appeals of New York. Certiorari denied. *Nancy Carley* for petitioner. Reported below: 8 N. Y. 2d 860, 168 N. E. 2d 710.

No. 286, Misc. McMullen *v.* Travelers Insurance Co. Motion for leave to file supplement to petition granted. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied. Petitioner *pro se*. *Ransom W. Chase* for respondent. Reported below: 278 F. 2d 834.

October 24, 1960.

Miscellaneous Orders.

No. 67. Braunfeld et al. *v.* Gibbons, Police Commissioner, et al. Appeal from the United States District Court for the Eastern District of Pennsylvania. (Probable jurisdiction noted, 362 U. S. 987.) The motion to substitute Albert N. Brown in the place of Thomas J. Gibbons as a party appellee and to correct and amend title and caption to show Pennsylvania Retailers' Association as a party appellee is granted. *Stephen B. Narin* for appellants. *David Berger* for Brown et al., and *Arthur Littleton* for Pennsylvania Retailers' Association, appellees.

No. 115. Reynolds *v.* Cochran, Corrections Director. Certiorari, 363 U. S. 801, to the Supreme Court of Florida. Further consideration of the motion to enlarge the record is postponed to the hearing of the case on the merits. *Claude Pepper* for petitioner. *Richard W. Ervin*, Attorney General of Florida, and *George R. Georgieff*, Assistant Attorney General, for respondent.

No. 329, Misc. CORBIN *v.* BANMILLER, WARDEN;
No. 341, Misc. KELLY *v.* HERITAGE, WARDEN;
No. 366, Misc. RICH *v.* HERITAGE, WARDEN;
No. 375, Misc. BUTLER *v.* COCHRAN, CORRECTIONS DIRECTOR;
No. 378, Misc. FULFORD *v.* FLORIDA;
No. 391, Misc. TAYLOR *v.* COCHRAN, CORRECTIONS DIRECTOR; and
No. 406, Misc. MORGAN *v.* MCNEILL, STATE HOSPITAL SUPERINTENDENT. Motions for leave to file petitions for writs of habeas corpus denied.

No. 93, Misc. GATCHELL *v.* COCHRAN, CORRECTIONS DIRECTOR. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for writ of certiorari, certiorari is denied. Petitioner *pro se*. *Richard W. Ervin,* Attorney General of Florida, and *Reeves Bowen,* Assistant Attorney General, for respondent.

No. 362, Misc. SKELTON *v.* WHITTIER, ADMINISTRATOR OF VETERANS AFFAIRS; and
No. 468, Misc. SIMONS *v.* SUPREME COURT OF NORTH DAKOTA ET AL. Motions for leave to file petitions for writs of mandamus denied.

No. 359, Misc. SULLIVAN *v.* DICKSON, WARDEN. Motion for leave to file petition for writ of injunction and other relief denied.

Probable Jurisdiction Noted.

No. 236. MAPP *v.* OHIO. Appeal from the Supreme Court of Ohio. Probable jurisdiction noted. *A. L. Kearns* and *Walter L. Greene* for appellant. *John T. Corrigan* for appellee. Reported below: 170 Ohio St. 427, 166 N. E. 2d 387.

No. 294. LOUISIANA EX REL. GREMILLION, ATTORNEY GENERAL, ET AL. *v.* NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE ET AL. Appeal from the United States District Court for the Eastern District of Louisiana. Probable jurisdiction noted. *Jack P. F. Gremillion,* Attorney General of Louisiana, *George Ponder,* First Assistant Attorney General, and *William P. Schuler,* Assistant Attorney General, for appellants. *Robert L. Carter* and *A. P. Tureaud* for appellees. Reported below: 181 F. Supp. 37.

Certiorari Granted. (*See also No. 129, ante, p. 297, and No. 324, ante, p. 299.*)

No. 321. LOCAL 761, INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL–CIO, *v.* NATIONAL LABOR RELATIONS BOARD ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Benjamin C. Sigal* for petitioner. *Solicitor General Rankin, Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* for the National Labor Relations Board, and *Gerard D. Reilly* for General Electric Co., respondents. Reported below: 107 U. S. App. D. C. 402, 278 F. 2d 282.

No. 313. SMITH *v.* BUTLER ET AL., TRUSTEES. District Court of Appeal of Florida, Third District. Certiorari granted. *William S. Frates* for petitioner. *Harold B. Wahl* and *E. F. P. Brigham* for respondents. Reported below: 118 So. 2d 237.

Certiorari Denied. (*See also No. 93, Misc., ante, p. 868.*)

No. 305. HEIDEMAN *v.* KELSEY, EXECUTOR, ET AL. Supreme Court of Illinois. Certiorari denied. *William C. Wines* for petitioner. *Richard S. Bull* for respondents. Reported below: 19 Ill. 2d 258, 166 N. E. 2d 596.

No. 308. BENTON ET AL. *v.* MCCARTHY ET AL. C. A. 2d Cir. Certiorari denied. *Thaddeus G. Benton* for petitioners. *Edward M. Garlock* for respondents. Reported below: 276 F. 2d 957.

No. 309. DUKE MOLNER WHOLESALE LIQUOR CO., INC., ET AL. *v.* MARTIN, DIRECTOR, DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, ET AL. District Court of Appeal of California, Second Appellate District. Certiorari denied. *Murray M. Chotiner, Russell E. Parsons* and *Jerome L. Ehrlich* for petitioners. Reported below: 180 Cal. App. 2d 873, 4 Cal. Rptr. 9041.

No. 327. PEYTON *v.* ALABAMA. Court of Appeals of Alabama. Certiorari denied. *Crampton Harris* and *Claud D. Scruggs* for petitioner. *MacDonald Gallion,* Attorney General of Alabama, and *George D. Mentz,* Assistant Attorney General, for respondent. Reported below: 40 Ala. App. 556, 120 So. 2d 415.

No. 333. NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO. *v.* MCWEENEY. C. A. 2d Cir. Certiorari denied. *Robert M. Peet* for petitioner. *William Paul Allen* for respondent. Reported below: 282 F. 2d 34.

No. 334. DELTA AIR LINES, INC., *v.* CIVIL AERONAUTICS BOARD. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *James F. Bell* for petitioner. *Solicitor General Rankin, Assistant Attorney General Bicks, Franklin M. Stone* and *O. D. Ozment* for respondent. Reported below: 108 U. S. App. D. C. 88, 280 F. 2d 636.

No. 320. FIORITO *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. *Charles A. Bellows* for petitioner. Reported below: 19 Ill. 2d 246, 166 N. E. 2d 606.

No. 312. GULF OIL CORP. *v.* INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL No. 715, AFL–CIO. C. A. 5th Cir. Certiorari denied. *David W. Stephens* and *David T. Searls* for petitioner. Reported below: 279 F. 2d 533.

No. 317. BROCKI *v.* AMERICAN EXPRESS CO. ET AL. C. A. 6th Cir. Certiorari denied. *Harold Helper* and *Max M. Marston* for petitioner. *Robert E. McKean* for respondents. Reported below: 279 F. 2d 785.

No. 318. WICHITA TELEVISION CORP., INC., DOING BUSINESS AS KARD-TV, *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 10th Cir. Certiorari denied. *Bennett Boskey* and *Daniel M. Moyer* for petitioner. *Solicitor General Rankin, Stuart Rothman, Dominick L. Manoli, Norton J. Come, Duane B. Beeson* and *Standau E. Weinbrecht* for respondent. Reported below: 277 F. 2d 579.

No. 319. CHARLES *v.* SIMMONS ET AL. Supreme Court of Georgia. Certiorari denied. *Charles W. Anderson* for petitioner. *Paul Webb, Jr.* for respondents. Reported below: 215 Ga. 794, 113 S. E. 2d 604.

No. 323. GUTERMA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Richard H. Wels* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 281 F. 2d 742.

No. 325. FRIEDLANDER ET AL. *v.* CHICAGO BAR ASSOCIATION ET AL. Supreme Court of Illinois. Certiorari denied. *Robert J. Nolan* for petitioners. *John Lightenberg* for respondents. Reported below: See 24 Ill. App. 2d 130, 164 N. E. 2d 517.

No. 330. MADDOX *v.* DISTRICT SUPPLY, INC., ET AL. Court of Appeals of Maryland. Certiorari denied. *Luther Robinson Maddox,* petitioner, *pro se.* *Richard W. Galiher* for District Supply, Inc., respondent. Reported below: 222 Md. 31, 158 A. 2d 650.

No. 335. COMMERCE-PACIFIC, INC., *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *George Bouchard* and *Richard A. Perkins* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Melva M. Graney* and *Carolyn R. Just* for the United States. Reported below: 278 F. 2d 651.

No. 43, Misc. BRIGANTI *v.* NEW YORK. Appellate Division, Supreme Court of New York, First Judicial Department. Certiorari denied. Petitioner *pro se.* *Daniel J. Sullivan* for respondent.

No. 119, Misc. EDWARDS *v.* RHAY, PENITENTIARY SUPERINTENDENT. Supreme Court of Washington. Certiorari denied.

No. 129, Misc. SMITH *v.* SETTLE, WARDEN. C. A. 8th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Rankin, Assistant Attorney General Tyler* and *Harold H. Greene* for respondent. Reported below: 280 F. 2d 428.

No. 260, Misc. JAMES *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 291, Misc. BICHELL *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 222 Md. 418, 161 A. 2d 116.

No. 277, Misc. FEBLES *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 292, Misc. DEGENNARO ET AL. *v.* CONNECTICUT. Supreme Court of Errors of Connecticut. Certiorari denied. Petitioners *pro se*. *Abraham S. Ullman* and *Arthur T. Gorman* for respondent. Reported below: 147 Conn. 296, 160 A. 2d 480.

No. 293, Misc. STREIT *v.* BENNETT, WARDEN. Supreme Court of Iowa. Certiorari denied.

No. 295, Misc. FERNBAUGH *v.* HURT, SHERIFF, ET AL. Criminal Court of Appeals of Oklahoma. Certiorari denied. Reported below: 354 P. 2d 787.

No. 297, Misc. ANDERSON *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. 298, Misc. SIEGEL *v.* RAGEN, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 299, Misc. ALDRIDGE *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 19 Ill. 2d 176, 166 N. E. 2d 563.

No. 301, Misc. OPPENHEIMER *v.* PACIFIC ELECTRIC RAILWAY CO. Appellate Department, Superior Court of California, Los Angeles County. Certiorari denied.

No. 316, Misc. NUNLEY *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 311, Misc. BENTLEY *v.* MCLAUGHLIN, JUDGE. Supreme Court of Kansas. Certiorari denied.

No. 314, Misc. HACKETT *v.* TINSLEY, WARDEN. Supreme Court of Colorado. Certiorari denied. Petitioner *pro se*. *Duke W. Dunbar*, Attorney General of Colorado, *Frank E. Hickey*, Deputy Attorney General, and *J. F. Brauer*, Assistant Attorney General, for respondent. Reported below: 143 Colo. ——, 352 P. 2d 799.

No. 317, Misc. CLAYBORN *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 318, Misc. SZABO *v.* CONNECTICUT. Supreme Court of Errors of Connecticut. Certiorari denied.

No. 321, Misc. PROSKAUER *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 322, Misc. KAIN *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 222 Md. 511, 161 A. 2d 454.

No. 323, Misc. WOLFF *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 19 Ill. 2d 318, 167 N. E. 2d 197.

No. 324, Misc. BUTLER *v.* MYERS, CORRECTIONAL SUPERINTENDENT. Supreme Court of Pennsylvania. Certiorari denied.

No. 420, Misc. BICKHAM *v.* LOUISIANA. Supreme Court of Louisiana. Certiorari denied. *G. Wray Gill* for petitioner. Reported below: 239 La. 1094, 121 So. 2d 207.

No. 326, Misc. HILL *v.* GENTRY, CORRECTIONAL OFFICER. C. A. 8th Cir. Certiorari denied. Reported below: 280 F. 2d 88.

No. 331, Misc. ODELL *v.* BURKE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 334, Misc. STONE *v.* WILKINS, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 337, Misc. JACKSON *v.* McGEE, CORRECTIONS DIRECTOR, ET AL. Supreme Court of California. Certiorari denied.

No. 338, Misc. SPADER *v.* WILENTZ, COUNTY PROSECUTOR, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 280 F. 2d 422.

No. 352, Misc. JONES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 279 F. 2d 652.

No. 358, Misc. FITZSIMMONS *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. Petitioner *pro se.* *John G. Thevos* for respondent.

No. 363, Misc. HUGHES *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 364, Misc. GENCARELLI *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 381, Misc. YANKOVICH *v.* BANNAN, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 279 F. 2d 292.

No. 367, Misc. GAYNOR *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 382, Misc. PITTS *v.* NEW YORK. Appellate Division, Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 395, Misc. FREEMAN ET AL. *v.* BANNAN, WARDEN. C. A. 6th Cir. Certiorari denied.

NOVEMBER 7, 1960.

Miscellaneous Orders.

No. 360, Misc. SCOTT *v.* CALIFORNIA. Upon the suggestion of counsel for petitioner of the death of petitioner, the petition for writ of certiorari to the Supreme Court of California is dismissed. *Morris Lavine* for petitioner.

No. 434, Misc. LYONS *v.* NEW YORK. Motion for leave to file petition for writ of certiorari denied.

No. 422, Misc. CORSO *v.* MURPHY, WARDEN;
No. 440, Misc. KITCHEN *v.* UNITED STATES;
No. 441, Misc. FARMER *v.* WILLINGHAM, WARDEN;
No. 454, Misc. STRIGNANO *v.* UNITED STATES; and
No. 466, Misc. IN RE BICKOW. Motions for leave to file petitions for writs of habeas corpus denied.

No. 243, Misc. IN RE SMITH; and
No. 452, Misc. DOBY *v.* COLLINS ET AL. 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*. *Hilton A. Dickson, Jr.*, Attorney General of New Mexico, and *Carl P. Dunifon, Mark C. Reno* and *Norman S. Thayer*, Assistant Attorneys General, for respondent in No. 243, Misc.

Probable Jurisdiction Noted.

No. 373. TORCASO *v.* WATKINS, CLERK. Appeal from the Court of Appeals of Maryland. Probable jurisdiction noted. *Joseph A. Sickles, Carlton R. Sickles, Lawrence Speiser* and *Leo Pfeffer* for appellant. *C. Ferdinand Sybert,* Attorney General of Maryland, *Stedman Prescott, Jr.,* Deputy Attorney General, and *Joseph S. Kaufman,* Assistant Attorney General, for appellee. Reported below: 223 Md. 49, 162 A. 2d 438.

Certiorari Granted.

No. 326. ANDERSON *v.* ALABAMA. Court of Appeals of Alabama. Certiorari granted. *Peter A. Hall, Fred D. Gray* and *Orzell Billingsley, Jr.* for petitioner. *MacDonald Gallion,* Attorney General of Alabama, and *David W. Clark,* Assistant Attorney General, for respondent. Reported below: 270 Ala. 575, 120 So. 2d 414.

No. 329. UNITED STATES, TRUSTEE, *v.* OREGON. Supreme Court of Oregon. Certiorari granted. *Solicitor General Rankin, Acting Assistant Attorney General Leonard, Alan S. Rosenthal* and *David L. Rose* for the United States. *Robert Y. Thornton,* Attorney General of Oregon, and *Catherine Zorn,* Assistant Attorney General, for respondent. Reported below: 220 Ore. 40, 352 P. 2d 539.

No. 339. NATIONAL LABOR RELATIONS BOARD *v.* NEWS SYNDICATE CO., INC., ET AL. C. A. 2d Cir. Certiorari granted. *Solicitor General Rankin, Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* for petitioner. *Gerhard P. Van Arkel* and *David I. Shapiro* for New York Mailers' Union No. 6, International Typographical Union, AFL–CIO, and *Stuart N. Updike* for News Syndicate Co., respondents. Reported below: 279 F. 2d 323.

No. 340. INTERNATIONAL TYPOGRAPHICAL UNION, AFL–CIO, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 1st Cir. Certiorari granted. *Gerhard P. Van Arkel* and *David I. Shapiro* for petitioners. *Solicitor General Rankin, Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 278 F. 2d 6.

No. 388. VERRET ET AL. *v.* OIL TRANSPORT CO., INC., ET AL. C. A. 5th Cir. Certiorari granted limited to questions presented by the petition in connection with 46 U. S. C. § 185 and Admiralty Rule 51. *James J. Morrison, Arthur A. de la Houssaye* and *Raymond H. Kierr* for petitioners. *Eberhard P. Deutsch* for respondents. Reported below: 278 F. 2d 464.

Certiorari Denied. (*See also No. 352, ante, p. 336; No. 357, Misc., ante, p. 338; and Misc. Nos. 434, 243 and 452, ante, p. 876.*)

No. 337. GINSBURG ET UX. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *Gerson Askinas* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice, Harry Baum* and *George F. Lynch* for the United States. Reported below: 278 F. 2d 470.

No. 338. DOMINICAN REPUBLIC *v.* ROACH, TRADING AS RADIO NEWS SERVICE CORP. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Edward L. Carey* and *Walter E. Gillcrist* for petitioner. Reported below: 108 U. S. App. D. C. 51, 280 F. 2d 59.

No. 342. NELSON ET AL. *v.* SIERRA CONSTRUCTION CORP. Supreme Court of Nevada. Certiorari denied. *Morton Galane* for petitioners. *Madison B. Graves* for respondent. Reported below: 76 Nev. ——, 352 P. 2d 125.

No. 343. KRAMER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Alexander Cooper* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 279 F. 2d 754.

No. 344. SOBER ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Alexander Cooper* for petitioners. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 281 F. 2d 244.

No. 346. TIMOLAT ET AL. *v.* BURAS ET AL. C. A. 5th Cir. Certiorari denied. *Charles D. Marshall, Eugene D. Saunders* and *J. Raburn Monroe* for petitioners. Reported below: 275 F. 2d 797.

No. 347. ROBERSON ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *William Earl Badgett* for petitioners. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 282 F. 2d 648.

No. 348. BROWN & WILLIAMSON TOBACCO CORP. ET AL. *v.* HELLENIC LINES LIMITED ET AL. C. A. 4th Cir. Certiorari denied. *John W. R. Zisgen* and *Stuart Sprague* for petitioners. *George Yamaoka* and *Francis P. Kelly* for respondents. Reported below: 277 F. 2d 9.

No. 349. WEYERHAEUSER COMPANY *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. *Thomas R. McMillen* for petitioner. *Solicitor General Rankin, Stuart Rothman, Dominick L. Manoli* and *Morton J. Come* for respondent. Reported below: 276 F. 2d 865.

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No. 350. CARTER ET AL. *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Curtis P. Mitchell* for petitioners. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 108 U. S. App. D. C. 277, 281 F. 2d 640.

No. 351. HOMENTOWSKI *v.* NEW YORK EX REL. CHOMENTOWSKI. C. A. 2d Cir. Certiorari denied. Reported below: —— F. 2d ——.

No. 353. MILLER ET AL. *v.* UNITED STATES. Court of Civil Appeals of Texas, Third Supreme Judicial District. Certiorari denied. *Abe Fortas* and *John D. Cofer* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice, A. F. Prescott* and *Fred E. Youngman* for the United States. Reported below: 331 S. W. 2d 436.

No. 358. W. W. CHAMBERS CO., INC., *v.* NATIONAL LABOR RELATIONS BOARD. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Thomas B. Scott* for petitioner. *Solicitor General Rankin, Stuart Rothman, Dominick L. Manoli, Norton J. Come* and *Herman M. Levy* for respondent. Reported below: 108 U. S. App. D. C. 42, 279 F. 2d 817.

No. 372. MUNSON ET UX. *v.* MCGINNES, DISTRICT DIRECTOR OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. *Frederick E. S. Morrison* and *Calvin H. Rankin* for petitioners. Reported below: 283 F. 2d 333.

No. 364. ROSE ET AL. *v.* BOURNE, INC. C. A. 2d Cir. Certiorari denied. *Morris Shilensky* for petitioners. *Louis Nizer* for respondent. Reported below: 279 F. 2d 79.

No. 354. MIDLAND FORD TRACTOR CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. *Robert Ash* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General Heffron, Robert N. Anderson* and *Morton K. Rothschild* for respondent. Reported below: 277 F. 2d 111.

No. 356. HYCHE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *George E. Trawick* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 278 F. 2d 915.

No. 359. UNITED MINE WORKERS OF AMERICA ET AL. *v.* OSBORNE MINING CO., INC. C. A. 6th Cir. Certiorari denied. *Harrison Combs, M. E. Boiarsky, E. H. Rayson* and *R. R. Kramer* for petitioners. *Harley G. Fowler, John A. Rowntree* and *J. Clarence Evans* for respondent. Reported below: 279 F. 2d 716.

No. 360. AMERICAN STATE BANK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Harvey W. Peters* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General Heffron, Robert N. Anderson* and *John J. Pajak* for the United States. Reported below: 279 F. 2d 585.

No. 371. OLIVER J. OLSON & CO. *v.* LUCKENBACH STEAMSHIP CO. ET AL. C. A. 9th Cir. Certiorari denied. *Gregory A. Harrison* and *J. Stewart Harrison* for petitioner. *Allan E. Charles* for Luckenbach Steamship Co., and *Russell A. Mackey* and *George H. Hauerken* for Marine Leopard Cargo, respondents. Reported below: 279 F. 2d 662.

No. 361. GOLD FUEL SERVICE, INC., *v.* ESSO STANDARD OIL CO. Supreme Court of New Jersey. Certiorari denied. *Sam Weiss* and *Michael J. Pappas* for petitioner. *John J. Monigan* for respondent. Reported below: 32 N. J. 459, 161 A. 2d 246.

No. 365. HAMPTON ET AL. *v.* PARAMOUNT PICTURES CORP. ET AL. C. A. 9th Cir. Certiorari denied. *Theodore R. Kupferman* for petitioners. *Melville B. Nimmer* and *Eric Julber* for Paramount Pictures Corporation, respondent. Reported below: 279 F. 2d 100.

No. 370. CALVO ET AL. *v.* LOUISIANA. Supreme Court of Louisiana. Certiorari denied. *Leon D. Hubert, Jr.* for petitioners. Reported below: 240 La. 75, 121 So. 2d 244.

No. 374. EASTERN AIR LINES, INC., *v.* ST. CLAIR, EXECUTRIX. C. A. 2d Cir. Certiorari denied. *John M. Aherne* for petitioner. *David A. Ticktin* for respondent. Reported below: 279 F. 2d 119.

No. 375. FEDERAL TRADE COMMISSION *v.* DILGER. C. A. 7th Cir. Certiorari denied. *Daniel J. McCauley, Jr.* and *Alan B. Hobbes* for petitioner. *Thomas A. Reynolds* for respondent. *Solicitor General Rankin* and *Robert J. Dodds, Jr.* filed a memorandum for the Secretary of Commerce in opposition to the petition. Reported below: 276 F. 2d 739.

No. 378. HECKENDORN *v.* FIRST NATIONAL BANK OF OTTAWA, ILLINOIS, ADMINISTRATOR. Supreme Court of Illinois. Certiorari denied. *Hugh M. Matchett* and *Edward J. Bradley* for petitioner. *Andrew J. O'Conor* for respondent. Reported below: 19 Ill. 2d 190, 166 N. E. 2d 571.

No. 377. CHISHOLM-MOORE HOIST CORP. *v.* CARLSON. C. A. 2d Cir. Certiorari denied. *Patrick E. Gibbons* for petitioner. *Silas B. Axtell* and *Harvey Goldstein* for respondent. Reported below: 281 F. 2d 766.

No. 380. ELLIS *v.* MUELLER, SECRETARY OF COMMERCE, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Claude L. Dawson* for petitioner. *Solicitor General Rankin, Assistant Attorney General Yeagley* and *Kevin T. Maroney* for respondents. Reported below: 108 U. S. App. D. C. 174, 280 F. 2d 722.

No. 381. PUERTO RICO DRYDOCK & MARINE TERMINALS, INC., *v.* NATIONAL LABOR RELATIONS BOARD. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Ludwig Teller* for petitioner. *Solicitor General Rankin, Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: —— U. S. App. D. C. ——, 284 F. 2d 212.

No. 306, Misc. EX PARTE HOWARD. Court of Criminal Appeals of Texas. Certiorari denied. Reported below: —— Tex. Cr. R. ——, —— S. W. 2d ——.

No. 340, Misc. TILLMAN *v.* WARDEN, MARYLAND PENITENTIARY. Court of Appeals of Maryland. Certiorari denied. Reported below: 223 Md. 639, 161 A. 2d 117.

No. 385. NIRESK INDUSTRIES, INC., ET AL. *v.* FEDERAL TRADE COMMISSION. C. A. 7th Cir. Certiorari denied. *Carl F. Geppert* for petitioners. *Solicitor General Rankin, Assistant Attorney General Bicks, Richard A. Solomon, Daniel J. McCauley, Jr.* and *Alan B. Hobbes* for respondent. Reported below: 278 F. 2d 337.

No. 379. CUNARD STEAM-SHIP CO., LTD., *v.* JOHN T. CLARK & SON. C. A. 2d Cir. Certiorari denied. *Thomas F. Daly* for petitioner. *William L. F. Gardiner* for respondent. Reported below: 279 F. 2d 475.

No. 260. EMPLOYERS LIABILITY ASSURANCE CORP., LTD., *v.* DONOVAN, DEPUTY COMMISSIONER, ET AL. C. A. 5th Cir. Motion of respondent Billodoux for leave to proceed *in forma pauperis* granted. Certiorari denied. *R. Emmett Kerrigan* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub, Morton Hollander* and *David L. Rose* for Deputy Commissioner Donovan, and *Peter J. Compagno* for Louis Billodoux, respondents. Reported below: 279 F. 2d 76.

No. 345. CORLISS ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. THE CHIEF JUSTICE, MR. JUSTICE BLACK, and MR. JUSTICE DOUGLAS are of the opinion certiorari should be granted as to petitioner Corliss. *Herman Alderstein* and *Hayden C. Covington* for petitioners. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 280 F. 2d 808.

No. 368. AMERICAN MOTOR SPECIALTIES CO., INC., ET AL. *v.* FEDERAL TRADE COMMISSION. The motion of Mid-South Distributors et al. for leave to defer consideration of the petition is denied. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied. *Meyer Schifrin* for petitioners. *Solicitor General Rankin, Assistant Attorney General Bicks, Charles H. Weston, Daniel J. McCauley, Jr.* and *Alan B. Hobbes* for respondent. *David C. Murchison* and *Robert L. Wald* for movants. Reported below: 278 F. 2d 225.

No. 3, Misc. JANOSKO *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. Petitioner *pro se*. *Eugene T. Urbaniak,* Deputy Attorney General of New Jersey, for respondent.

No. 49, Misc. TURNER *v.* WARDEN, MARYLAND PENITENTIARY. Baltimore City Court of Maryland. Certiorari denied. Petitioner *pro se*. *C. Ferdinand Sybert,* Attorney General of Maryland, and *James H. Norris, Jr.,* Special Assistant Attorney General, for respondent.

No. 51, Misc. MILLER *v.* NEW YORK. Appellate Division, Supreme Court of New York, Fourth Judicial Department. Certiorari denied.

No. 57, Misc. JONES *v.* SMYTH, PENITENTIARY SUPERINTENDENT. Supreme Court of Appeals of Virginia. Certiorari denied. Petitioner *pro se*. *A. S. Harrison, Jr.,* Attorney General of Virginia, for respondent.

No. 118, Misc. JONES *v.* SMYTH, PENITENTIARY SUPERINTENDENT. Supreme Court of Appeals of Virginia. Certiorari denied. Petitioner *pro se*. *A. S. Harrison, Jr.,* Attorney General of Virginia, for respondent.

No. 185, Misc. ELLIS *v.* CARTER, JUDGE. Supreme Court of Alabama. Certiorari denied. Petitioner *pro se*. *MacDonald Gallion,* Attorney General of Alabama, and *Jerry L. Coe,* Assistant Attorney General, for respondent.

No. 232, Misc. DOYON *v.* ROBBINS, WARDEN. Supreme Judicial Court of Maine. Certiorari denied. Petitioner *pro se*. *Frank E. Hancock,* Attorney General of Maine, and *James G. Frost,* Deputy Attorney General, for respondent.

No. 270, Misc. GHASKIN *v.* UNITED STATES ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se.* *Solicitor General Rankin, Assistant Attorney General Tyler* and *Harold H. Greene* for the United States.

No. 307, Misc. STEWART *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 328, Misc. CAVERS *v.* SOUTH CAROLINA. Supreme Court of South Carolina. Certiorari denied. *Matthew J. Perry* and *Jawn A. Sandifer* for petitioner. Reported below: 236 S. C. 305, 114 S. E. 2d 401.

No. 330, Misc. STRUNK ET AL. *v.* BOMAR, WARDEN. C. A. 6th Cir. Certiorari denied. Petitioners *pro se.* *George F. McCanless,* Attorney General of Tennessee, and *Henry C. Foutch,* Assistant Attorney General, for respondent. Reported below: 281 F. 2d 195.

No. 332, Misc. LEE *v.* WIMAN, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. *Eberhard P. Deutsch, Ralph L. Kaskell, Jr.* and *René H. Himel, Jr.* for petitioner. *MacDonald Gallion,* Attorney General of Alabama, and *George D. Mentz,* Assistant Attorney General, for respondents. Reported below: 280 F. 2d 257.

No. 339, Misc. JOHNSON *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 349, Misc. WILLIAMS *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied.

No. 350, Misc. SOUDANI *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied. Reported below: 398 Pa. 546, 159 A. 2d 687.

No. 353, Misc. SPAULDING *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 279 F. 2d 65.

No. 368, Misc. JACKSON *v.* ELLIS, CORRECTIONS MANAGER. Court of Criminal Appeals of Texas. Certiorari denied.

No. 369, Misc. DALEY *v.* CONNECTICUT. Supreme Court of Errors of Connecticut. Certiorari denied. Reported below: 147 Conn. 506, 163 A. 2d 112.

No. 370, Misc. DEAN *v.* CALIFORNIA. District Court of Appeal of California, Second Appellate District. Certiorari denied. *Virgil V. Becker* for petitioner. Reported below: 180 Cal. App. 2d 140, 4 Cal. Rptr. 347.

No. 371, Misc. IN RE HOWAT. C. A. 7th Cir. Certiorari denied. Reported below: 278 F. 2d 582.

No. 374, Misc. WILSON *v.* NEBRASKA. Supreme Court of Nebraska. Certiorari denied. Reported below: 170 Neb. 494, 103 N. W. 2d 258.

No. 377, Misc. KASSIM *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 379, Misc. MACKIEWICZ *v.* COCHRAN, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 392, Misc. EX PARTE LARCH. Supreme Court of Ohio. Certiorari denied. Reported below: 171 Ohio St. 205, 168 N. E. 2d 405.

No. 402, Misc. SIMS *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

Rehearing Denied.

No. 163. DUNSCOMBE *v.* SAYLE, ADMINISTRATOR, *ante*, p. 289;

No. 237. ATLANTA NEWSPAPERS, INC., ET AL. *v.* GRIMES, SHERIFF, ET AL., *ante*, p. 290;

No. 11, Misc. LIPSCOMB *v.* UNITED STATES, *ante*, p. 836;

No. 98, Misc. CEPERO *v.* PUERTO RICO ET AL., *ante*, p. 292; and

No. 204, Misc. JENNINGS *v.* RAGEN, WARDEN, *ante*, p. 850. Petitions for rehearing denied.

NOVEMBER 14, 1960.

Miscellaneous Orders.

No. —. UNITED STATES *v.* UNITED STATES TROTTING ASSN. The appellant's motion to dismiss the appeal under Rule 14 (1) is granted. *Solicitor General Rankin* for the United States.

No. —. NIUKKANEN ET AL. *v.* TURNER, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. The application for stay of deportation and enlargement on bail is denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion the application should be granted. *Nels Peterson* for petitioners.

No. —. GOLDSBY *v.* MISSISSIPPI. The application, as amended, for a stay of execution of the death sentence is granted, pending the timely filing and disposition of a petition for writ of certiorari. *George N. Leighton* for petitioner. *Joe T. Patterson*, Attorney General of Mississippi, and *G. Garland Lyell*, Assistant Attorney General, for respondent.

No. 70, October Term, 1959. EASTERN STATES PETROLEUM CORP. *v.* ROGERS, ATTORNEY GENERAL, ET AL., 361 U. S. 7. The motion to recall the judgment and to reinstate the appeal is denied. *Gerard R. Moran* and *Edwin G. Martin* for appellant.

No. 482, Misc. CRAWFORD *v.* BUCHKOE, WARDEN. Motion for leave to file petition for writ of habeas corpus and other relief denied.

Certiorari Granted.

No. 315. POWER REACTOR DEVELOPMENT CO. *v.* INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL–CIO, ET AL.; and

No. 454. UNITED STATES ET AL. *v.* INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL–CIO, ET AL. Petitions for writs of certiorari to the United States Court of Appeals for the District of Columbia Circuit granted limited to Questions 1 and 2 presented by the petitions for writs of certiorari. *John Lord O'Brian, W. Graham Claytor, Jr.* and *Edward S. Reid, Jr.* for petitioner in No. 315. *Solicitor General Rankin, Assistant Attorney General Doub, Morton Hollander, Courts Oulahan* and *Lionel Kestenbaum* for petitioners in No. 454. *Benjamin C. Sigal, Harold Cranefield* and *Lowell Goerlich* for respondents. Reported below: 108 U. S. App. D. C. 97, 280 F. 2d 645.

No. 392. UNITED STATES *v.* SHIMER. Motion of respondent for leave to proceed *in forma pauperis* and petition for writ of certiorari to the United States Court of Appeals for the Third Circuit granted. *Solicitor General Rankin, Assistant Attorney General Doub, Morton Hollander, Anthony L. Mondello* and *P. G. McElwee* for the United States. *Edward Davis* for respondent. Reported below: 276 F. 2d 792.

No. 357. UNITED STATES *v.* CONSOLIDATED EDISON CO. OF NEW YORK, INC. C. A. 2d Cir. Certiorari granted. *Solicitor General Rankin, Assistant Attorney General Rice* and *Grant W. Wiprud* for the United States. *James K. Polk, Richard J. Smith, Harold F. Noneman* and *Julius M. Jacobs* for respondent. Reported below: 279 F. 2d 152.

No. 376. COMMISSIONER OF INTERNAL REVENUE *v.* LESTER. C. A. 2d Cir. Certiorari granted. *Solicitor General Rankin, Assistant Attorney General Rice* and *C. Guy Tadlock* for petitioner. *Leonard J. Lefkort* for respondent. Reported below: 279 F. 2d 354.

Certiorari Denied.

No. 133. SOLOMON ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *George Stone* for petitioners. *Solicitor General Rankin, Assistant Attorney General Doub, Morton Hollander* and *Anthony L. Mondello* for the United States. Reported below: 276 F. 2d 669.

No. 394. INTERNATIONAL ASSOCIATION OF MACHINISTS ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. *Plato E. Papps* and *Bernard Dunau* for petitioners. *Solicitor General Rankin, Stuart Rothman, Dominick L. Manoli, Norton J. Come* and *Frederick U. Reel* for respondent. Reported below: 279 F. 2d 761.

No. 401. LOCAL 1566, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. *Abraham E. Freedman* for petitioner. *Solicitor General Rankin, Stuart Rothman, Dominick L. Manoli, Norton J. Come* and *Standau E. Weinbrecht* for respondent. Reported below: 278 F. 2d 883.

No. 390. MINNEAPOLIS GAS CO. ET AL. *v.* FEDERAL POWER COMMISSION ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *P. L. Farnand* and *George C. Pardee* for petitioners. *Solicitor General Rankin, Assistant Attorney General Doub, Morton Hollander, Kathryn H. Baldwin, John C. Mason, Howard E. Wahrenbrock* and *Robert L. Russell* for the Federal Power Commission, respondent. *Walter F. Mondale,* Attorney General of Minnesota, *Harold J. Soderberg,* Assistant Attorney General, *Justin R. Wolf, Charles A. Case, Jr., Louise C. Powell, Lawrence I. Shaw, F. Vinson Roach, John W. Scott* and *Bryce Rea, Jr.* for other respondents. Reported below: 108 U. S. App. D. C. 36, 278 F. 2d 870.

No. 391. EASTERN STATES PETROLEUM CORP. *v.* ROGERS, ATTORNEY GENERAL, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Gerard R. Moran* and *Edwin G. Martin* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Alan S. Rosenthal* for respondents. Reported below: 108 U. S. App. D. C. 63, 280 F. 2d 611.

No. 393. CHENG FU SHENG ET AL. *v.* ROGERS, ATTORNEY GENERAL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Jack Wasserman* and *David Carliner* for petitioners. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for respondent. Reported below: 108 U. S. App. D. C. 115, 280 F. 2d 663.

No. 400. HERRON *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON. C. A. 9th Cir. Certiorari denied. Reported below: —— F. 2d ——.

No. 399. GRABLE, ADMINISTRATOR, ET AL. *v.* CITIZENS NATIONAL TRUST & SAVINGS BANK OF RIVERSIDE, CALIFORNIA, ET AL. District Court of Appeal of California, Second Appellate District. Certiorari denied. Petitioners *pro se*. *Rodney K. Potter* and *Harold W. Kennedy* for respondents. Reported below: 180 Cal. App. 2d 353, 4 Cal. Rptr. 353.

No. 403. BORROW *v.* FEDERAL COMMUNICATIONS COMMISSION. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Victor Rabinowitz* and *Leonard B. Boudin* for petitioner. *Solicitor General Rankin, Assistant Attorney General Bicks, Richard A. Solomon, John L. FitzGerald, Max D. Paglin* and *Ruth V. Reel* for respondent. Reported below: —— U. S. App. D. C. ——, 285 F. 2d 666.

No. 404. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, LOCAL UNION No. 310, *v.* NATIONAL LABOR RELATIONS BOARD ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Herbert S. Thatcher* for petitioner. *Solicitor General Rankin, Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* for the National Labor Relations Board, and *Gerard D. Reilly* and *Richard G. Kleindienst* for Shamrock Dairy, Inc., respondents. Reported below: 108 U. S. App. D. C. 117, 280 F. 2d 665.

No. 405. BACA ET AL. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Thurman Arnold* and *Edgar H. Brenner* for petitioners. *Solicitor General Rankin, Assistant Attorney General Doub, Alan S. Rosenthal* and *Kathryn H. Baldwin* for the United States. Reported below: —— Ct. Cl. ——, —— F. 2d ——.

No. 406. Boyd *v.* County of Fresno et al. District Court of Appeal of California, Fourth Appellate District. Certiorari denied. *Max M. Hayden* for petitioner. *Clifton G. Harris* for respondents. Reported below: 178 Cal. App. 2d 443, 2 Cal. Rptr. 779.

No. 407. Citizens Utilities Co. *v.* Federal Power Commission. C. A. 2d Cir. Certiorari denied. *Jesse Climenko, Reuben Goldberg* and *Clifton G. Parker* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub, Alan S. Rosenthal, Herbert E. Morris, John C. Mason, Howard E. Wahrenbrock, Leonard E. Eesley* and *Joseph B. Hobbs* for respondent. Reported below: 279 F. 2d 1.

No. 408. Accardo *v.* United States. C. A. 7th Cir. Certiorari denied. *Stanford Clinton* and *Maurice J. Walsh* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *Meyer Rothwacks* for the United States. Reported below: —— F. 2d ——.

No. 176, Misc. Princeler *v.* United States. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Theodore G. Gilinsky* for the United States. Reported below: 279 F. 2d 433.

No. 376, Misc. Gamble *v.* Warden, Maryland Penitentiary. Court of Appeals of Maryland. Certiorari denied. Reported below: 223 Md. 633, 161 A. 2d 450.

No. 394, Misc. Grecco *v.* Indiana. Supreme Court of Indiana. Certiorari denied. Reported below: —— Ind. ——, 167 N. E. 2d 714.

No. 395. CASH ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Wesley R. Asinof* for petitioners. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 279 F. 2d 159.

No. 398. WURDEMANN ET AL. *v.* HJELM ET AL. Supreme Court of Minnesota. Certiorari denied. *Claude L. Dawson* for petitioners. *Carl W. Cummins, Sr.* for the Jesmer Corporation, respondent. Reported below: 257 Minn. 450, 102 N. W. 2d 811.

No. 402. ALOFF *v.* ASTER ET AL. C. A. 3d Cir. Certiorari denied. Petitioner *pro se*. *Joseph H. Lieberman, George E. Beechwood, John V. Lovitt* and *F. Hastings Griffin, Jr.* for respondents. Reported below: 275 F. 2d 281.

No. 410. OVE GUSTAVSSON CONTRACTING CO., INC., *v.* FLOETE, ADMINISTRATOR OF GENERAL SERVICES ADMINISTRATION, ET AL. C. A. 2d Cir. Certiorari denied. *Anthony B. Cataldo* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *John G. Laughlin, Jr.* for respondents. Reported below: 278 F. 2d 912.

No. 412. NATIONAL LABOR RELATIONS BOARD *v.* REVERE METAL ART CO., INC., ET AL. C. A. 2d Cir. Certiorari denied. *Solicitor General Rankin, Stuart Rothman, Dominick L. Manoli, Norton J. Come* and *Duane B. Beeson* for petitioner. Reported below: 280 F. 2d 96.

No. 341. RITCH *v.* NASHVILLE BRIDGE CO. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BLACK is of the opinion certiorari should be granted. *Robert S. Vance* for petitioner. *Frank M. Young, Jr.* for respondent. Reported below: 276 F. 2d 171.

No. 362. BOND ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE WHITTAKER is of the opinion certiorari should be granted. *Dillard C. Laughlin* and *Samuel Scrivener, Jr.* for petitioners. *Solicitor General Rankin, Acting Assistant Attorney General Heffron* and *A. F. Prescott* for the United States. Reported below: 279 F. 2d 837.

No. 396. ARENA *v.* LUCKENBACH STEAMSHIP CO., INC., ET AL. C. A. 1st Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted. *George J. Engelman* for petitioner. *G. Philip Wardner* and *Leo F. Glynn* for Luckenbach Steamship Co., Inc., respondent. Reported below: 279 F. 2d 186.

No. 397. ROGERS, ATTORNEY GENERAL, SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, ET AL. *v.* SOCIÉTÉ INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S. A., ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE CLARK took no part in the consideration or decision of this application. *Solicitor General Rankin, Dallas S. Townsend, Ralph S. Spritzer* and *Irving Jaffe* for petitioners. *John J. Wilson* for Société Internationale, *Irving Moskovitz, Robert E. Sher, Isadore G. Alk* and *James H. Heller* for Eric G. Kaufman et al., and *Edmund L. Jones* and *C. Frank Reifsnyder* for Ernest Attenhofer et al., respondents. Reported below: 107 U. S. App. D. C. 388, 278 F. 2d 268.

No. 69, Misc. MOORE *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. Petitioner *pro se. Stanley Mosk,* Attorney General of California, and *Doris H. Maier* and *Raymond M. Momboisse,* Deputy Attorneys General, for respondent. Reported below: 53 Cal. 2d 451, 348 P. 2d 584.

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No. 19, Misc. RIADON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 274 F. 2d 304.

No. 45, Misc. GREEN *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. Petitioner *pro se*. *Norman Heine* for respondent.

No. 85, Misc. RATAJCZAK *v.* NEW YORK. Appellate Division, Supreme Court of New York, Fourth Judicial Department. Certiorari denied.

No. 191, Misc. HARRIS *v.* RHAY, PENITENTIARY SUPERINTENDENT. Supreme Court of Washington. Certiorari denied.

No. 227, Misc. MORGAN *v.* MOORE, WARDEN. Court of Criminal Appeals of Texas. Certiorari denied. Petitioner *pro se*. *Will Wilson,* Attorney General of Texas, and *B. H. Timmins, Jr.* and *Leon F. Pesek,* Assistant Attorneys General, for respondent.

No. 242, Misc. JEFFERSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Morris Lavine* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 277 F. 2d 723.

No. 251, Misc. GAINES *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied.

No. 267, Misc. DICKERSON *v.* KANSAS ET AL. Supreme Court of Kansas. Certiorari denied. Reported below: 186 Kan. 518, 350 P. 2d 793.

No. 355, Misc. RAINES *v.* SMYTH, PENITENTIARY SUPERINTENDENT. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 396, Misc. EX PARTE MALTOS. Supreme Court of Ohio. Certiorari denied. Reported below: 171 Ohio St. 217, 168 N. E. 2d 406.

No. 410, Misc. JOHNSON *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Reported below: 8 N. Y. 2d 183, 168 N. E. 2d 641.

No. 414, Misc. BLAIR *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied.

No. 419, Misc. MCNALLY *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

Rehearing Denied.

No. 86. CALIFORNIA COMPANY *v.* COLORADO ET AL., *ante,* p. 285;

No. 134. SORGEL, EXECUTOR, ET AL. *v.* COMMERCIAL CREDIT CORP., *ante,* p. 834;

No. 137. ANDREWS *v.* CITY OF SAN BERNARDINO ET AL., *ante,* p. 288;

No. 26, Misc. O'CONNOR *v.* BURKE, WARDEN, *ante,* p. 837; and

No. 58, Misc. LUSTIG *v.* COMMISSIONER OF INTERNAL REVENUE ET AL., *ante,* p. 840. Petitions for rehearing denied.

No. 256. DI SILVESTRO *v.* UNITED STATES, *ante,* p. 825. Motion of petitioner for leave to proceed further herein *in forma pauperis* granted. Petition for rehearing denied.

No. 695, October Term, 1955. CONSOLIDATED EDISON CO. OF NEW YORK, INC., *v.* UNITED STATES, 351 U. S. 909. Motion for leave to file a second petition for rehearing denied. MR. JUSTICE HARLAN took no part in the consideration or decision of this motion.

NOVEMBER 21, 1960.

Miscellaneous Orders.

No. 67. BRAUNFELD ET AL. *v.* BROWN, POLICE COMMISSIONER, ET AL. Appeal from the United States District Court for the Eastern District of Pennsylvania. The motion of Pennsylvania Retailers' Association for leave to present oral argument is denied. *Arthur Littleton* for movant.

No. 461, Misc. HINES *v.* SACKS, WARDEN;
No. 471, Misc. BOGISH *v.* NEW JERSEY; and
No. 478, Misc. WORTH *v.* BANNAN, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 458, Misc. BAXTER *v.* JOHNSON, CLERK, U. S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS. Motion for leave to file petition for writ of mandamus denied.

Probable Jurisdiction Noted.

No. 103. BAKER ET AL. *v.* CARR ET AL. Appeal from the United States District Court for the Middle District of Tennessee. Probable jurisdiction noted. *Hobart F. Atkins, J. W. Anderson, Charles S. Rhyne* and *Herzel H. E. Plaine* for appellants. *George F. McCanless,* Attorney General of Tennessee, and *Milton P. Rice, James M. Glasgow* and *Jack Wilson,* Assistant Attorneys General, for appellees. *Roger Arnebergh, Henry P.*

Kucera, J. Elliott Drinard, Barnett I. Shur, Alexander G. Brown, Nathaniel H. Goldstick and *Charles S. Rhyne* filed a brief for the National Institute of Municipal Law Officers, as *amicus curiae,* in support of appellants. Reported below: 179 F. Supp. 824.

Certiorari Granted. (*See No. 4, Misc., ante, p. 445.*)

Certiorari Denied.

No. 413. WARREN ET AL., EXECUTORS, *v.* HIGGINS ET AL.; and

No. 414. ZAHNISER ET AL. *v.* HIGGINS ET AL. C. A. 3d Cir. Certiorari denied. *Lynne Anderson Warren* for petitioners in No. 413. *W. Walter Braham* for petitioners in No. 414. *Harold R. Schmidt* and *John L. Laubach, Jr.* for respondents. Reported below: 279 F. 2d 46.

No. 416. GENERAL ELECTRIC CO. *v.* GREPKE. C. A. 7th Cir. Certiorari denied. *Robert Y. Keegan* and *Harry LeVine, Jr.* for petitioner. *Sol Rothberg* for respondent. Reported below: 280 F. 2d 508.

No. 418. EVANS ET AL. *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied. *Peyton Ford, David M. Phelan, Frederick G. McGavin* and *Earl V. Compton* for petitioners. *Anne X. Alpern,* Attorney General of Pennsylvania, *Alfred P. Filippone,* Deputy Attorney General, and *Huette F. Dowling,* Special Deputy Attorney General, for respondent. Reported below: 399 Pa. 387, 160 A. 2d 407.

No. 420. FLEURY *v.* WARDEN, MARYLAND PENITENTIARY. Court of Appeals of Maryland. Certiorari denied. Reported below: 222 Md. 635, 160 A. 2d 790.

No. 384. AMERICAN NATURAL GAS CO. ET AL. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Arthur R. Seder, Jr., Middleton Miller* and *Jules M. Perlberg* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice, Harry Baum* and *Joseph Kovner* for the United States. Reported below: —— Ct. Cl. ——, 279 F. 2d 220.

No. 415. NEW YORK, CHICAGO & ST. LOUIS RAILROAD CO. *v.* WILES. C. A. 3d Cir. Certiorari denied. *Charles Monroe Thorp, Jr.* for petitioner. Reported below: 283 F. 2d 328.

No. 417. SOUTHERN COUNTIES GAS CO. OF CALIFORNIA *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA ET AL. Supreme Court of California. Certiorari denied. *Herman F. Selvin, Reginald L. Vaughan, Joseph R. Rensch* and *Milford Springer* for petitioner. *William M. Bennett* for Public Utilities Commission of California, *Rollin E. Woodbury, Harry W. Sturges, Jr., Oscar A. Trippet* and *Thomas H. Carver* for Southern California Edison Co., and *Joseph A. Ball* for Richfield Oil Corp., respondents. Reported below: —— Cal. 2d ——, 354 P. 2d 4.

No. 419. PAULING *v.* EASTLAND ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *A. L. Wirin* and *Fred Okrand* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *John G. Laughlin, Jr.* for respondents. *David I. Shapiro* and *Lawrence Speiser* filed a brief for American Civil Liberties Union, as *amicus curiae,* in support of the petition. Reported below: —— U. S. App. D. C. ——, 288 F. 2d 126.

No. 252, Misc. GROVES *v.* KETTMANN, CHIEF OF POLICE, ET AL. Supreme Court of California. Certiorari denied. Reported below: —— Cal. 2d ——, 351 P. 2d 1028.

No. 421. D. C. Hall Co. *v.* State Highway Commission of Texas. Court of Civil Appeals of Texas, Eighth Supreme Judicial District. Certiorari denied. *T. S. Christopher* for petitioner. *Will Wilson,* Attorney General of Texas, and *C. K. Richards,* Assistant Attorney General, for respondent. Reported below: 330 S. W. 2d 904.

No. 422. Devonian Gas & Oil Co. *v.* Highland, Trustee, et al. Supreme Court of Pennsylvania. Certiorari denied. *Michael von Moschzisker* for petitioner. *Anne X. Alpern,* Attorney General of Pennsylvania, *John Sullivan,* Deputy Attorney General, and *Robert C. Derrick,* Assistant Attorney General, for Commonwealth of Pennsylvania, respondent. Reported below: 400 Pa. 261, 161 A. 2d 390.

No. 423. Zeid *v.* United States. C. A. 3d Cir. Certiorari denied. Petitioner *pro se. Solicitor General Rankin* for the United States. Reported below: 281 F. 2d 825.

No. 425. United Shoe Machinery Corp. *v.* Hanover Shoe, Inc. C. A. 3d Cir. Certiorari denied. *Ralph M. Carson, Lewis H. Van Dusen, Jr., Theodore Kiendl, Robert D. Salinger* and *Louis L. Stanton, Jr.* for petitioner. *James V. Hayes* for respondent. Reported below: 281 F. 2d 481.

No. 216, Misc. Burke *v.* Pepersack, Warden. Court of Appeals of Maryland. Certiorari denied. Petitioner *pro se. C. Ferdinand Sybert,* Attorney General of Maryland, and *James H. Norris, Jr.,* Special Assistant Attorney General, for respondent. Reported below: 222 Md. 623, 159 A. 2d 853.

No. 427. GENERAL DEVELOPMENT CORP. *v.* UNION CARBIDE & CARBON CORP. C. A. 6th Cir. Certiorari denied. *Howell Van Auken* for petitioner. *Milton F. Mallender* for respondent. Reported below: 280 F. 2d 193.

No. 428. PITTSBURGH CONSOLIDATION COAL CO. *v.* WOUNICK. C. A. 3d Cir. Certiorari denied. *Harold R. Schmidt* and *John L. Laubach, Jr.* for petitioner. *Harry Alan Sherman* and *S. Eldridge Sampliner* for respondent. Reported below: 283 F. 2d 325.

No. 429. VIEW CREST GARDEN APARTMENTS, INC., ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Lyle L. Iversen* for petitioners. *Solicitor General Rankin, Assistant Attorney General Doub* and *Alan S. Rosenthal* for the United States. Reported below: 281 F. 2d 844.

No. 430. JANOUSEK *v.* CHATTERTON ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Joseph O. Janousek,* petitioner, *pro se.* Reported below: 108 U. S. App. D. C. 171, 280 F. 2d 719.

No. 432. PIERCE, EXECUTRIX, *v.* AMERICAN COMMUNICATIONS CO., INC., ET AL. C. A. 1st Cir. Certiorari denied. *David Rines* and *Robert H. Rines* for petitioner. *J. Pierre Kolisch, Robert L. Thompson* and *Edward D. Phinney* for respondents. Reported below: 280 F. 2d 278.

No. 433. SUCRS. DE A. MAYOL & CO., INC., *v.* MITCHELL, SECRETARY OF LABOR. C. A. 1st Cir. Certiorari denied. *Orlando J. Antonsanti* for petitioner. *Solicitor General Rankin, Harold C. Nystrom, Bessie Margolis* and *Beate Bloch* for respondent. Reported below: 280 F. 2d 477.

No. 434. SCHWENKHOFF *v.* FARMERS MUTUAL AUTOMOBILE INSURANCE CO. Supreme Court of Wisconsin. Certiorari denied. *Vaughn S. Conway* and *Irving D. Gaines* for petitioner. *Clyde C. Cross* for respondent. Reported below: 11 Wis. 2d 97, 104 N. W. 2d 154.

No. 436. U. S. MACHINERY MOVERS *v.* BELLER, TRUSTEE. C. A. 8th Cir. Certiorari denied. *Irving Eisenberg* and *Paul I. Baikoff* for petitioner. *A. L. Wensel* for respondent. Reported below: 280 F. 2d 91.

No. 367. FERRARA *v.* CONNECTICUT FIRE INSURANCE CO. ET AL. C. A. 8th Cir. Certiorari denied. THE CHIEF JUSTICE and MR. JUSTICE BLACK would grant certiorari to consider whether the Court of Appeals decided this case on the basis of its view of what Missouri law ought to be, instead of what it is as required by *Erie R. Co.* v. *Tompkins,* 304 U. S. 64. *Joseph S. Levy* and *Bernard D. Craig* for petitioner. *Glenn E. McCann* for respondents. Reported below: 277 F. 2d 388.

No. 105, Misc. LEVINE *v.* COCHRAN, CORRECTIONS DIRECTOR. Supreme Court of Florida. Certiorari denied. Petitioner *pro se.* *Richard W. Ervin,* Attorney General of Florida, and *George R. Georgieff,* Assistant Attorney General, for respondent.

No. 147, Misc. STANLEY *v.* NEW YORK. Appellate Division, Supreme Court of New York, Second Judicial Department. Certiorari denied. Petitioner *pro se.* *Louis J. Lefkowitz,* Attorney General of New York, and *Paxton Blair,* Solicitor General, for respondent.

No. 327, Misc. SHANE *v.* BIBB, PUBLIC SAFETY DIRECTOR. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 265, Misc. La Fever *v.* United States. C. A. 7th Cir. Certiorari denied. Petitioner *pro se.* Solicitor *General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 279 F. 2d 833.

No. 273, Misc. Harris *v.* Buchkoe, Warden, et al. Supreme Court of Michigan. Certiorari denied. Petitioner *pro se. Paul L. Adams,* Attorney General of Michigan, and *Samuel J. Torina,* Solicitor General, for respondents.

No. 290, Misc. Thomas *v.* United States. C. A. 8th Cir. Certiorari denied. *Sidney M. Glazer* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 281 F. 2d 132.

No. 296, Misc. Bell *v.* Cochran, Corrections Director. Supreme Court of Florida. Certiorari denied. Petitioner *pro se. Richard W. Ervin,* Attorney General of Florida, and *B. Clarke Nichols,* Assistant Attorney General, for respondent.

No. 302, Misc. Morgan *v.* Walker, Warden, et al. Supreme Court of Louisiana. Certiorari denied. Petitioner *pro se. Jack P. F. Gremillion,* Attorney General of Louisiana, for respondents.

No. 388, Misc. Haines *v.* Ohio. Supreme Court of Ohio. Certiorari denied. Reported below: 171 Ohio St. 198, 168 N. E. 2d 289.

No. 407, Misc. Helms *v.* Sacks, Warden, et al. C. A. 6th Cir. Certiorari denied. Reported below: 278 F. 2d 687.

No. 206, Misc. WRIGHT *v.* BUCHKOE, WARDEN, ET AL. Supreme Court of Michigan. Certiorari denied. Petitioner *pro se*. *Paul L. Adams,* Attorney General of Michigan, and *Samuel J. Torina,* Solicitor General, for respondents.

No. 315, Misc. LIPSCOMB *v.* WARDEN, MARYLAND PENITENTIARY. Court of Appeals of Maryland. Certiorari denied. Reported below: 223 Md. 640, 162 A. 2d 447.

No. 372, Misc. HOLMES *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. Petitioner *pro se*. *Will Wilson,* Attorney General of Texas, and *B. H. Timmins, Jr.* and *Leon F. Pesek,* Assistant Attorneys General, for respondent. Reported below: —— Tex. Cr. R. ——, 333 S. W. 2d 842.

No. 383, Misc. GREATHOUSE *v.* COX, WARDEN. Supreme Court of New Mexico. Certiorari denied. *F. Gordon Shermack* for petitioner. Reported below: 67 N. M. 374, 355 P. 2d 678.

No. 418, Misc. SUMRALL *v.* COCHRAN, CORRECTIONS DIRECTOR. Supreme Court of Florida. Certiorari denied. Reported below: 122 So. 2d 609.

No. 343, Misc. CARRILLO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States.

No. 469, Misc. FRYE *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Reported below: 4 N. Y. 2d 967, 152 N. E. 2d 521.

Rehearing Denied.

No. 30. HAYES *v.* SEATON, SECRETARY OF THE INTERIOR, *ante*, p. 814;

No. 118. CHARLES *v.* UNITED STATES, *ante*, p. 831;

No. 124. ZACHARY ET AL. *v.* UNITED STATES, *ante*, p. 816;

No. 282. TORNEK, TRADING AS ALLEN V. TORNEK CO., *v.* FEDERAL TRADE COMMISSION, *ante*, p. 829;

No. 286. FRANANO *v.* UNITED STATES, *ante*, p. 828;

No. 292. BIVINS *v.* GULF OIL CORP., *ante*, p. 835;

No. 296. HOCHMAN *v.* UNITED STATES, *ante*, p. 837;

No. 10, Misc. WILLIAMS *v.* UNITED STATES, *ante*, p. 836;

No. 89, Misc. JOHNSTONE *v.* MISSOURI, *ante*, p. 842;

No. 122, Misc. ZENGER *v.* SCHWARTZ, JUDGE, ET AL., *ante*, p. 845;

No. 213, Misc. GALLINA *v.* FRASER, *ante*, p. 851; and

No. 287, Misc. KLUMPP *v.* OHIO, *ante*, p. 866. Petitions for rehearing denied.

DECEMBER 5, 1960.

Miscellaneous Orders.

The Court appoints *Mr. Will Shafroth*, of Colorado, to be Deputy Director of the Administrative Office of the United States Courts, pursuant to the provisions of Section 601 of Title 28 of the United States Code.

No. ——. IN RE LOPINSKY. The motion to amend the attorneys' roll to show the change of name of *Frances Weber Lopinsky* to *Frances L. Horn* is granted.

No. ——. HERTER, SECRETARY OF STATE, *v.* CORT. The application for stay presented to THE CHIEF JUSTICE, and by him referred to the Court, is denied. *Solicitor General Rankin* for the applicant. *Leonard B. Boudin* in opposition.

No. 161. CULOMBE *v.* CONNECTICUT. On petition for writ of certiorari to the Supreme Court of Errors of Connecticut. The motion of Connecticut Association for Retarded Children for leave to file brief, as *amicus curiae,* is granted. *John J. Hunt* on the motion. *Alexander A. Goldfarb* for petitioner. Reported below: 147 Conn. 194, 158 A. 2d 239.

No. 291. GINSBURG *v.* AMERICAN BAR ASSOCIATION ET AL. Certiorari denied, *ante,* p. 829. The motion to remand is denied. *Paul Ginsburg,* petitioner, on the motion *pro se.*

No. 263, Misc. NIX *v.* FLORIDA. Motion for leave to file petition for writ of habeas corpus denied. Petitioner *pro se.* *Richard W. Ervin,* Attorney General of Florida, and *George R. Georgieff,* Assistant Attorney General, for respondent.

Certiorari Granted. (*See also No. 171, Misc., ante, p. 477.*)

No. 16, Misc. BUSHNELL *v.* ELLIS, CORRECTIONS DIRECTOR. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the Court of Criminal Appeals of Texas granted. Case transferred to the appellate docket. Petitioner *pro se.* *Will Wilson,* Attorney General of Texas, and *B. H. Timmins, Jr.* and *Leon F. Pesek,* Assistant Attorneys General, for respondent.

Certiorari Denied. (*See also No. 445, ante, p. 474; No. 461, ante, p. 475; and No. 241, Misc., ante, p. 471.*)

No. 19. EMMONS *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. *Kenneth W. Gemmill, Converse Murdoch* and *P. J. Di Quinzio* for petitioner. *Solicitor General Rankin* for respondent. Reported below: 270 F. 2d 294.

No. 20. WELLER ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. *Richard H. Appert* for petitioners. *Solicitor General Rankin* for respondent. Reported below: 270 F. 2d 294.

No. 262. ANNAT *v.* BEARD ET AL. C. A. 5th Cir. Certiorari denied. *James W. Swain* for petitioner. *Solicitor General Rankin, Assistant Attorney General Morton, Roger P. Marquis* and *S. Billingsley Hill* for respondents. Reported below: 277 F. 2d 554.

No. 355. DIGGS ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Petitioners *pro se. Solicitor General Rankin, Assistant Attorney General Rice, Meyer Rothwacks* and *Grant W. Wiprud* for respondent. Reported below: 281 F. 2d 326.

No. 369. HETHERINGTON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Charles W. Davis, Edward S. Digges, John H. Mitchell, Edward J. Calihan, Jr.* and *Anna R. Lavin* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Wayne G. Barnett* and *Meyer Rothwacks* for the United States. Reported below: 279 F. 2d 792.

No. 438. SINCLAIR, TRUSTEE, *v.* MANDA. C. A. 5th Cir. Certiorari denied. *Robert M. Sturrup* for petitioner. Reported below: 278 F. 2d 629.

No. 439. SACHS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Bernard B. Laven* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 281 F. 2d 189.

No. 440. ROMAN CATHOLIC ARCHBISHOP OF LOS ANGELES, CALIFORNIA, ET AL. *v.* CITY OF SAN MARINO ET AL. District Court of Appeal of California, Second Appellate District. Certiorari denied. *Charles A. Horsky* for petitioners. *Robert H. Dunlap* and *John W. Holmes* for respondents. Reported below: 180 Cal. App. 2d 657, 4 Cal. Rptr. 547.

No. 441. AVON SHOE CO., INC., ET AL. *v.* DAVID CRYSTAL, INC., ET AL. C. A. 2d Cir. Certiorari denied. *Ludwig M. Wilson* for petitioners. *Bernard A. Saslow* and *Harold S. Lynton* for respondents. Reported below: 279 F. 2d 607.

No. 444. BANDLOW ET AL. *v.* ROTHMAN ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Karl M. Dollak* for petitioners. *Solicitor General Rankin, Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* for respondents. Reported below: 108 U. S. App. D. C. 32, 278 F. 2d 866.

No. 450. POLICE COMMISSIONER OF BALTIMORE ET AL. *v.* SIEGEL ENTERPRISES, INC., TRADING AS SIEGEL BOOK & MAGAZINE STORE. Court of Appeals of Maryland. Certiorari denied. *C. Ferdinand Sybert,* Attorney General of Maryland, and *James H. Norris, Jr.,* Special Assistant Attorney General, for petitioners. *Albert Polovoy* for respondent. Reported below: 223 Md. 110, 162 A. 2d 727.

No. 442. COURIER-JOURNAL & LOUISVILLE TIMES CO. *v.* CURTIS, JUDGE, ET AL. Court of Appeals of Kentucky. Certiorari denied. *Wilson W. Wyatt* for petitioner. *Robert P. Hobson* and *Leo T. Wolford* for respondents. Reported below: 335 S. W. 2d 934.

No. 446. THE FORT FETTERMAN ET AL. *v.* SOUTH CAROLINA STATE HIGHWAY DEPARTMENT. C. A. 4th Cir. Certiorari denied. *Charles W. Waring* for petitioners. *D. R. McLeod,* Attorney General of South Carolina, and *Huger Sinkler* for respondent. Reported below: 278 F. 2d 921.

No. 447. VAPOR BLAST MANUFACTURING CO. *v.* MADDEN ET AL. C. A. 7th Cir. Certiorari denied. *Max Raskin* for petitioner. *Solicitor General Rankin, Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* for respondents. Reported below: 280 F. 2d 205.

No. 448. BOARD OF PUBLIC EDUCATION, SCHOOL DISTRICT OF PHILADELPHIA, *v.* INTILLE ET AL. Supreme Court of Pennsylvania. Certiorari denied. *C. Brewster Rhoads* and *Edward B. Soken* for petitioner. *A. Harry Levitan* and *Franklin Poul* for respondents. Reported below: 401 Pa. 1, 163 A. 2d 420.

No. 449. BOARD OF PUBLIC EDUCATION, SCHOOL DISTRICT OF PHILADELPHIA, *v.* WATSON. Supreme Court of Pennsylvania. Certiorari denied. *C. Brewster Rhoads* and *Edward B. Soken* for petitioner. Reported below: 401 Pa. 62, 163 A. 2d 60.

No. 451. MINER ET AL. *v.* COMMERCE OIL REFINING CORP. C. A. 1st Cir. Certiorari denied. *Frederick Bernays Wiener* and *James A. Higgins* for petitioners. *Stephen P. Duggan, Jr.* for respondent. Reported below: 281 F. 2d 465.

No. 452. CONNER AIR LINES, INC., ET AL. *v.* AVIATION CREDIT CORP. ET AL. C. A. 5th Cir. Certiorari denied. *Henry M. Sinclair* and *Don G. Nicholson* for petitioners. *Robert P. Smith, Robert V. Smith, John H. Wahl, Jr.* and *Laurence A. Schroeder* for respondents. Reported below: 280 F. 2d 895.

No. 455. COMMONWEALTH OIL REFINING CO., INC., *v.* THE LUMMUS COMPANY. C. A. 1st Cir. Certiorari denied. *Ruben Rodriguez-Antongiorgi, John F. Dooling, Jr., Richard deY. Manning* and *Milton Pollack* for petitioner. *John T. Cahill* and *Lawrence J. McKay* for respondent. Reported below: 280 F. 2d 915.

No. 458. RENFIELD IMPORTERS, LTD., *v.* BRANDT, DOING BUSINESS AS UNIVERSITY CITY HOUSE OF LIQUORS, ET AL. C. A. 8th Cir. Certiorari denied. *Richmond C. Coburn* and *Alan C. Kohn* for petitioner. *J. L. London* for respondents. Reported below: 278 F. 2d 904.

No. 475. JAMES B. BEAM DISTILLING CO. *v.* BRANDT, DOING BUSINESS AS UNIVERSITY CITY HOUSE OF LIQUORS, ET AL. C. A. 8th Cir. Certiorari denied. *Earl E. Pollock* and *R. Walston Chubb* for petitioner. *J. L. London* for respondents. Reported below: 278 F. 2d 904.

No. 497. JULIUS WILE SONS & CO., INC., *v.* BRANDT, DOING BUSINESS AS UNIVERSITY CITY HOUSE OF LIQUORS, ET AL. C. A. 8th Cir. Certiorari denied. *Donald J. Meyer* and *John Raeburn Green* for petitioner. *J. L. London* for respondents. Reported below: 278 F. 2d 904.

No. 459. BINDLEY *v.* METROPOLITAN LIFE INSURANCE CO. Supreme Court of Missouri. Certiorari denied. *Martin J. O'Donnell* for petitioner. *Henry G. Eager* and *Charles B. Blackmar* for respondent. Reported below: 335 S. W. 2d 64.

No. 462. RHODES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Samuel D. Lopinsky* and *Arthur T. Ciccarello* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 282 F. 2d 59.

No. 463. ORNATO *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied. *Edward P. Good* for petitioner. Reported below: 400 Pa. 626, 163 A. 2d 90.

No. 466. INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, AFL–CIO, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 3d Cir. Certiorari denied. *Lowell Goerlich* and *Harold A. Cranefield* for petitioners. *Solicitor General Rankin, Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* for respondents. Reported below: 280 F. 2d 575.

No. 468. RITHOLZ *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied. *Ernest Goodman* for petitioner. *Paul L. Adams,* Attorney General of Michigan, and *Samuel J. Torina,* Solicitor General, for respondent. Reported below: 359 Mich. 539, 103 N. W. 2d 481.

No. 469. ALEXANDER *v.* BUCKEYE CELLULOSE CORP. C. A. 6th Cir. Certiorari denied. *Jac Chambliss* for petitioner. *Frank F. Dinsmore, Richard W. Barrett* and *William D. Spears* for respondent. Reported below: 281 F. 2d 187.

No. 476. MONCRIEF ET AL. *v.* PASOTEX PETROLEUM CO. C. A. 10th Cir. Certiorari denied. *Luther Bohanon* and *Dee J. Kelly* for petitioners. *George N. Otey* for respondent. Reported below: 280 F. 2d 235.

No. 471. PREFORMED LINE PRODUCTS CO. *v.* WATSON, COMMISSIONER OF PATENTS. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Patrick H. Hume* and *C. Willard Hayes* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Alan S. Rosenthal* for respondent. Reported below: 108 U. S. App. D. C. 95, 280 F. 2d 643.

No. 472. PANHANDLE EASTERN PIPE LINE CO. *v.* MICHIGAN CONSOLIDATED GAS CO. ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Raymond N. Shibley* and *G. R. Redding* for petitioner. *Charles V. Shannon, Stanley M. Morley* and *Arthur R. Seder, Jr.* for respondents. Reported below: 108 U. S. App. D. C. 371, 282 F. 2d 854; 108 U. S. App. D. C. 409, 283 F. 2d 204.

No. 474. GRAVES ET AL. *v.* ANSCHUTZ OIL CO., INC. C. A. 10th Cir. Certiorari denied. *E. Albert Morrison* for petitioners. Reported below: 280 F. 2d 364.

No. 477. CUNNINGHAM *v.* ALABAMA. Court of Appeals of Alabama. Certiorari denied. *Arthur D. Shores* and *Orzell Billingsley, Jr.* for petitioner. *MacDonald Gallion,* Attorney General of Alabama, and *David W. Clark,* Assistant Attorney General, for respondent. Reported below: 40 Ala. App. 18, 121 So. 2d 888; 270 Ala. 731, 121 So. 2d 890.

No. 480. SANTOS *v.* UNITED STATES. Court of Claims. Certiorari denied. *Robert Ash* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General Sellers* and *Robert N. Anderson* for the United States. Reported below: —— Ct. Cl. ——, 277 F. 2d 806.

No. 470. WILLETT ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. *Charles I. Dawson* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice, Robert N. Anderson* and *Morton K. Rothschild* for respondent. Reported below: 277 F. 2d 586.

No. 479. HOHENSEE *v.* AKRON BEACON JOURNAL PUBLISHING CO. ET AL. C. A. 6th Cir. Certiorari denied. *James C. Newton* for petitioner. *C. Blake McDowell* for respondents. Reported below: 277 F. 2d 359.

No. 481. THE R. A. TURRENTINE *v.* AMERICAN HOME ASSURANCE CO. ET AL. C. A. 5th Cir. Certiorari denied. *Robert Eikel* for petitioner. *Edmond J. Ford, Jr.* for respondents. Reported below: 279 F. 2d 811.

No. 411. MAGIN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted. *Ray M. Foreman* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 280 F. 2d 74.

No. 482. TENNESSEE LIFE INSURANCE CO. *v.* PHINNEY, DISTRICT DIRECTOR OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted. *Robert K. Jewett* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General Sellers, Melva M. Graney* and *John J. Pajak* for respondent. Reported below: 280 F. 2d 39.

No. 305, Misc. RUSHING *v.* WILKINSON, WARDEN. C. A. 5th Cir. Certiorari denied. *Francis J. Mizell, Jr.* for petitioner. Reported below: 272 F. 2d 633.

No. 443. Sociedad Maritima San Nicolas, S. A., *v.* Monteiro. Motion to dispense with printing respondent's brief granted. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied. *Joseph Cardillo, Jr.* and *Donald F. Mooney* for petitioner. Reported below: 280 F. 2d 568.

No. 460. Riela *v.* New York. County Court of Tioga County, New York. Certiorari denied. The Chief Justice, Mr. Justice Black and Mr. Justice Douglas are of the opinion certiorari should be granted. *Louis Mansdorf* for petitioner. *George Boldman* and *Eliot H. Lumbard* for respondent. Reported below: 7 N. Y. 2d 571, 166 N. E. 2d 840.

No. 464. Puerto Rico *v.* Sampedro. C. A. 1st Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the United States Court of Appeals for the First Circuit denied. *Hiram R. Cancio,* Attorney General of Puerto Rico, *Juan B. Fernandez Badillo,* Solicitor General, and *Arturo Estrella,* Deputy Solicitor General, for petitioner. *Gerardo Ortiz Del Rivero* for respondent. Reported below: 281 F. 2d 888.

No. 14, Misc. Hall *v.* Hand, Warden. Supreme Court of Kansas. Certiorari denied. Petitioner *pro se. John Anderson, Jr.,* Attorney General of Kansas, and *Charles N. Henson, Jr.* for respondent.

No. 155, Misc. Stegall *v.* United States. C. A. 6th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Theodore Gilinsky* for the United States. Reported below: 279 F. 2d 872.

No. 41, Misc. BUFFA ET AL. *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. Petitioners *pro se*. *John G. Thevos* for respondent. Reported below: 31 N. J. 378, 157 A. 2d 694.

No. 200, Misc. MCNALLY *v.* HEINZE, WARDEN. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Stanley Mosk,* Attorney General of California, and *Doris H. Maier* and *Raymond M. Momboisse,* Deputy Attorneys General, for respondent.

No. 408, Misc. LEACH *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 411, Misc. OWENS *v.* ELLIS, CORRECTIONS DIRECTOR, ET AL. Court of Criminal Appeals of Texas. Certiorari denied.

No. 431, Misc. KANGRGA ET AL. *v.* BAJKIC ET AL. Court of Appeals of New York. Certiorari denied. *Werner Galleski* and *Arnold Davis* for petitioners. *George C. Dix* for respondents.

No. 432, Misc. SHEPHERD *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 108 U. S. App. D. C. 240, 281 F. 2d 603.

No. 473, Misc. SMITH *v.* INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA ET AL. Supreme Court of California. Certiorari denied.

No. 483, Misc. HURTT *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied.

Rehearing Denied:

No. 308. BENTON ET AL. *v.* MCCARTHY ET AL., *ante*, p. 870;

No. 330. MADDOX *v.* DISTRICT SUPPLY, INC., ET AL., *ante*, p. 872; and

No. 329, Misc. CORBIN *v.* BANMILLER, WARDEN, *ante*, p. 868. Petitions for rehearing denied.

No. 256. DI SILVESTRO *v.* UNITED STATES, *ante*, p. 825. Motion for leave to file a second petition for rehearing denied.

DECEMBER 12, 1960.

Miscellaneous Order.

No. 561. BUSHNELL *v.* ELLIS, CORRECTIONS DIRECTOR. It is ordered that *Percy Don Williams, Esquire*, of Houston, Texas, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for petitioner in this case.

Certiorari Granted. (*See also No. 456, ante, p. 505.*)

No. 486. GORI *v.* UNITED STATES. C. A. 2d Cir. Certiorari granted limited to the question of double jeopardy presented by the petition. *Jerome Lewis, Milton C. Weisman* and *Harry I. Rand* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 282 F. 2d 43.

No. 492. CIVIL AERONAUTICS BOARD *v.* DELTA AIR LINES, INC. C. A. 2d Cir. Certiorari granted. *Solicitor General Rankin, Assistant Attorney General Bicks, Richard A. Solomon, Irwin A. Seibel, Franklin M. Stone* and *O. D. Ozment* for petitioner. *James W. Callison* and *Robert Reed Gray* for respondent. Reported below: 280 F. 2d 43.

No. 493. LAKE CENTRAL AIRLINES, INC., *v.* DELTA AIR LINES, INC. C. A. 2d Cir. Certiorari granted. *Albert F. Grisard* for petitioner. *James W. Callison* and *Robert Reed Gray* for respondent. Reported below: 280 F. 2d 43.

No. 495. COMMUNIST PARTY, U. S. A., ET AL. *v.* LUBIN, INDUSTRIAL COMMISSIONER. Motion for leave to substitute Martin P. Catherwood in the place of Isador Lubin as the party respondent granted. Petition for writ of certiorari to the Court of Appeals of New York granted. *John J. Abt* for petitioners. *Louis J. Lefkowitz,* Attorney General of New York, *Paxton Blair,* Solicitor General, and *Julius L. Sackman* for respondent. Reported below: 8 N. Y. 2d 77, 168 N. E. 2d 242; 8 N. Y. 2d 1001, 169 N. E. 2d 427.

Certiorari Denied. (*See also No. 403, Misc., ante, p. 506.*)

No. 366. MARSHMAN ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 512. COMMISSIONER OF INTERNAL REVENUE *v.* ESTATE OF STOUFFER. C. A. 6th Cir. Certiorari denied. *Charles W. Steadman* and *William F. Snyder* for petitioners in No. 366. *Solicitor General Rankin, Acting Assistant Attorney General Sellers* and *I. Henry Kutz* for petitioner in No. 512 and respondent in No. 366. *James C. Davis* for respondent in No. 512. Reported below: 279 F. 2d 27.

No. 498. HICKEY ET AL. *v.* ILLINOIS CENTRAL RAILROAD. C. A. 7th Cir. Certiorari denied. *George D. Sullivan, Jr., Burton H. Young* and *Werner W. Schroeder* for petitioners. *Herbert J. Deany, Robert S. Kirby* and *Joseph H. Wright* for respondent. Reported below: 278 F. 2d 529.

No. 485. ROBINSON *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *De Long Harris* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 109 U. S. App. D. C. —, 283 F. 2d 508.

No. 490. UNITED STATES *v.* SCHMIDT PRITCHARD & CO. ET AL. United States Court of Customs and Patent Appeals. Certiorari denied. *Solicitor General Rankin, Assistant Attorney General Doub* and *Alan S. Rosenthal* for the United States. *J. Bradley Colburn* for respondents. Reported below: 47 C. C. P. A. (Cust.) 152, — F. 2d —.

No. 504. LALANCETTE *v.* GOLOSKIE ET AL. Supreme Court of Rhode Island. Certiorari denied. *Francis D. Fox* for petitioner. Reported below: — R. I. —, 163 A. 2d 325.

No. 494. TURPIN *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted. *William B. Bryant, Joseph C. Waddy* and *William C. Gardner* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 108 U. S. App. D. C. 274, 281 F. 2d 637.

No. 365, Misc. CUNNINGHAM *v.* UNITED STATES. Court of Claims. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Doub* and *Alan S. Rosenthal* for the United States. Reported below: — Ct. Cl. —, 181 F. Supp. 269.

No. 487. ISAACS *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. *Richard H. Love* for petitioner. Reported below: 222 Md. 242, 159 A. 2d 636.

No. 488. SNAKARD *v.* FRANKFORT OIL CO. C. A. 10th Cir. Certiorari denied. *Peyton Ford* and *John B. Dudley, Jr.* for petitioner. *Mathias F. Correa, John W. Nields, T. Murray Robinson* and *Leon Shipp* for respondent. Reported below: 279 F. 2d 436.

No. 499. FLOTILL PRODUCTS, INC., *v.* FEDERAL TRADE COMMISSION. C. A. 9th Cir. Certiorari denied. *William Simon, John Bodner, Jr.* and *Jefferson E. Peyser* for petitioner. *Solicitor General Rankin, Assistant Attorney General Bicks, Charles H. Weston, PGad B. Morehouse* and *Alan B. Hobbes* for respondent. Reported below: 278 F. 2d 850.

No. 502. AMERICAN MUTUAL LIABILITY INSURANCE CO. *v.* ASHLEY ET AL. C. A. 9th Cir. Certiorari denied. *M. Mitchell Bourquin* for petitioner. *J. Wilmar Jensen* for respondents. Reported below: 281 F. 2d 689.

No. 506. HALL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Evan A. McLinn* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 279 F. 2d 389.

No. 511. HOWZE *v.* ARROW TRANSPORTATION CO. ET AL. C. A. 5th Cir. Certiorari denied. *Jacob Rassner* for petitioner. *Eberhard P. Deutsch* and *René H. Himel, Jr.* for Arrow Transportation Co., and *C. A. L. Johnstone, Jr.* for Zurich Insurance Co., respondents. Reported below: 280 F. 2d 403.

No. 508. HEEBNER ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. *John T. Sapienza* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice* and *Harry Baum* for respondent. Reported below: 280 F. 2d 228.

No. 513. ZIRIN *v.* MCGINNES, DISTRICT DIRECTOR OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. *Henry L. Schimpf, Jr.* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Alan S. Rosenthal* for respondent. Reported below: 282 F. 2d 113.

No. 522. VACO PRODUCTS CO. *v.* AMP INCORPORATED. C. A. 7th Cir. Certiorari denied. *Albert I. Kegan* for petitioner. *Truman S. Safford* and *William J. Keating* for respondent. Reported below: 280 F. 2d 518.

No. 505. COTA *v.* CALIFORNIA. Appellate Department, Superior Court of California, Los Angeles County. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted. THE CHIEF JUSTICE took no part in the consideration or decision of this application. Petitioner *pro se*. *Roger Arnebergh* and *Philip E. Grey* for respondent.

No. 52, Misc. BADGLEY *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. Petitioner *pro se*. *Will Wilson,* Attorney General of Texas, and *B. H. Timmins, Jr.* and *Leon F. Pesek,* Assistant Attorneys General, for respondent.

No. 154, Misc. LANGEL *v.* DISTRICT COURT OF IOWA FOR BLACK HAWK COUNTY. Supreme Court of Iowa. Certiorari denied. Petitioner *pro se*. *Norman A. Erbe,* Attorney General of Iowa, for respondent.

No. 223, Misc. KINCH *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se.* *Louis J. Lefkowitz,* Attorney General of New York, and *Joseph J. Rose,* Assistant Attorney General, for respondent.

No. 225, Misc. SCHAFFER *v.* CALIFORNIA. 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. 253, Misc. WILLIAMS *v.* LAVALLEE, WARDEN. C. A. 2d Cir. Certiorari denied. *John F. Finerty, Curtis F. McClane* and *Rowland Watts* for petitioner. *William I. Siegel* for respondent. Reported below: 276 F. 2d 645.

No. 294, Misc. RUTHERFORD *v.* ILLINOIS CENTRAL RAILROAD CO. C. A. 5th Cir. Certiorari denied. *John W. Freels, James L. Byrd* and *Joseph H. Wright* for respondent. Reported below: 278 F. 2d 310.

No. 345, Misc. LYLES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *William F. Walsh* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 279 F. 2d 358.

No. 351, Misc. HEATH ET AL. *v.* HEINZE, WARDEN, ET AL. Supreme Court of California. Certiorari denied.

No. 385, Misc. PETERSEN *v.* LAVALLEE, WARDEN. C. A. 2d Cir. Certiorari denied. *Edward Q. Carr, Jr.* for petitioner. *Louis J. Lefkowitz,* Attorney General of New York, for respondent. Reported below: 279 F. 2d 396.

No. 400, Misc. BRINKMAN *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *Joseph Lonardo* for petitioner. Reported below: 8 N. Y. 2d 1, 167 N. E. 2d 327.

No. 404, Misc. GEORGE *v.* UNITED STATES. C. A. 9th 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. 437, Misc. TRANOWSKI *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 20 Ill. 2d 11, 169 N. E. 2d 347.

No. 474, Misc. CARVIN *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 20 Ill. 2d 32, 169 N. E. 2d 260.

No. 497, Misc. MAES *v.* TINSLEY, WARDEN. Supreme Court of Colorado. Certiorari denied. Petitioner *pro se*. *Duke W. Dunbar,* Attorney General of Colorado, *Frank E. Hickey,* Deputy Attorney General, and *J. F. Brauer,* Assistant Attorney General, for respondent. Reported below: 143 Colo. 405, 353 P. 2d 586.

No. 500, Misc. CLINTON *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: —— U. S. App. D. C. ——, —— F. 2d ——.

No. 424, Misc. IN RE SCHOENBURG. C. A. 5th Cir. Certiorari denied. *Robert H. Rice* for petitioner. Reported below: 279 F. 2d 806.

No. 423, Misc. AKERS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 280 F. 2d 198.

No. 438, Misc. WILLIAMS *v.* MYERS, PENITENTIARY SUPERINTENDENT. Supreme Court of Pennsylvania. Certiorari denied.

No. 442, Misc. MCNUTT *v.* TEXAS ET AL. Court of Criminal Appeals of Texas. Certiorari denied.

No. 444, Misc. KING *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 279 F. 2d 342.

No. 447, Misc. STANLEY *v.* NEW YORK. Appellate Division, Supreme Court of New York, First Judicial Department. Certiorari denied.

No. 450, Misc. HARRISON *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 456, Misc. RUCKER *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin* for the United States.

No. 481, Misc. STEVENS *v.* ADAMS, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 494, Misc. MAHURIN *v.* WAGGONER ET AL. Supreme Court of Missouri. Certiorari denied.

No. 495, Misc. KENNEDY *v.* WILKINS, WARDEN. Appellate Division, Supreme Court of New York, Fourth Judicial Department. Certiorari denied.

No. 412, Misc. IN RE MCDANIEL. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit and other relief denied.

Rehearing Denied.

No. 33. MCPHAUL *v.* UNITED STATES, *ante*, p. 372;

No. 363. OHIO EX REL. KING *v.* SHANNON, PRESIDING JUDGE, MUNICIPAL COURT OF CINCINNATI, OHIO, *ante*, p. 337;

No. 248, Misc. MALLORY *v.* MISSOURI, *ante*, p. 852; and

No. 379, Misc. MACKIEWICZ *v.* COCHRAN, CORRECTIONS DIRECTOR, *ante*, p. 887. Petitions for rehearing denied.

DECEMBER 19, 1960.

Miscellaneous Orders.

No. 546, October Term, 1959. STANTON ET UX. *v.* UNITED STATES, 363 U. S. 278. The motion to confirm compliance by the District Court with the directions of this Court and for other relief is denied. *Clendon H. Lee* on the motion. *Solicitor General Rankin* for the United States in opposition.

No. 200. LATHROP *v.* DONOHUE. Appeal from the Supreme Court of Wisconsin. The motion of the Missouri Bar for leave to present oral argument, as *amicus curiae*, is denied.

No. 559, Misc. CHING *v.* UNITED STATES. Motion for leave to file petition for writ of habeas corpus denied.

No. 111. PUGACH *v.* DOLLINGER, DISTRICT ATTORNEY OF BRONX COUNTY, ET AL. Certiorari, 363 U. S. 836, to the United States Court of Appeals for the Second Circuit. The motion of the District Attorneys' Association of the State of New York for leave to present oral argument, as *amicus curiae,* is denied.

No. 48, Misc. CLARKE *v.* SOUTH CAROLINA. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for writ of certiorari, certiorari is denied. Petitioner *pro se. Daniel R. McLeod,* Attorney General of South Carolina, and *J. C. Coleman, Jr.,* Assistant Attorney General, for respondent.

Certiorari Granted.

No. 501. BINKS MANUFACTURING CO. *v.* RANSBURG ELECTRO-COATING CORP. C. A. 7th Cir. Certiorari granted. *Charles F. Meroni* for petitioner. *James P. Hume, Elbert R. Gilliom* and *Harry T. Ice* for respondent. Reported below: 281 F. 2d 252.

No. 533. UNITED STATES *v.* NEUSTADT ET AL. C. A. 4th Cir. Certiorari granted. *Solicitor General Rankin, Assistant Attorney General Doub* and *John G. Laughlin, Jr.* for the United States. *Lawrence J. Latto* for respondents. Reported below: 281 F. 2d 596.

Certiorari Denied. (See also No. 518, ante, p. 517; and No. 48, Misc., supra.)

No. 489. MONOLITH PORTLAND MIDWEST CO. *v.* RECONSTRUCTION FINANCE CORP. C. A. 9th Cir. Certiorari denied. *Joseph T. Enright* and *Norman Elliott* for petitioner. *Solicitor General Rankin, Assistant Attorney General Doub* and *Alan S. Rosenthal* for respondent. Reported below: 282 F. 2d 439.

No. 496. BANK OF THE PHILIPPINE ISLANDS *v.* ROGERS, ATTORNEY GENERAL, ET AL.; and

No. 520. PHILIPPINE NATIONAL BANK *v.* ROGERS, ATTORNEY GENERAL, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Joseph B. Friedman* for petitioner in No. 496. *Matthew E. McCarthy* for petitioner in No. 520. *Solicitor General Rankin, Dallas S. Townsend* and *Irving Jaffe* for respondents. Reported below: 108 U. S. App. D. C. 179, 281 F. 2d 12.

No. 519. RATKE ET AL. *v.* PICARD, U. S. DISTRICT JUDGE. C. A. 6th Cir. Certiorari denied. *Milton A. Bass* and *Solomon H. Friend* for petitioners. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for respondent. Reported below: 283 F. 2d 945.

No. 502, Misc. CAMPBELL *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. *Josiah Lyman* for petitioner. *Will Wilson,* Attorney General of Texas, and *Riley Eugene Fletcher,* Assistant Attorney General, for respondent. Reported below: —— Tex. Cr. R. ——, 338 S. W. 2d 255.

No. 354, Misc. JOHNSON *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted. *Bernard A. Golding* for petitioner. *Will Wilson,* Attorney General of Texas, *Tom I. McFarling* and *Leon Pesek,* Assistant Attorneys General, and *Lee P. Ward, Jr.* for respondent. Reported below: —— Tex. Cr. R. ——, 336 S. W. 2d 175.

No. 501, Misc. GONZALEZ *v.* CALIFORNIA. Appellate Department, Superior Court of California, County of Los Angeles. Certiorari denied.

No. 509. AMBASSADOR HOTEL CO. OF LOS ANGELES *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. *John E. Hughes, John W. Hughes* and *Harold R. Burnstein* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Lee A. Jackson* and *Harry Marselli* for respondent. Reported below: 280 F. 2d 303.

No. 517. VITTER ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *George R. Blue* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice* and *Meyer Rothwacks* for the United States. Reported below: 279 F. 2d 445.

No. 523. HENNESSEY, DOING BUSINESS AS HENNESSEY & Co., *v.* CROWN ET AL. C. A. 7th Cir. Certiorari denied. *Milton K. Joseph* for petitioner. *Albert E. Jenner, Jr.* for respondents.

No. 514. STONE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. THE CHIEF JUSTICE, MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion certiorari should be granted. *Archibald Palmer* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 282 F. 2d 547.

No. 116, Misc. BACA *v.* COLORADO. Supreme Court of Colorado. Certiorari denied. Petitioner *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. 421, Misc. HOLT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Rankin* for the United States. Reported below: 279 F. 2d 735.

No. 492, Misc. CURRY *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.

Rehearing Denied.

No. 265, Misc. LA FEVER *v.* UNITED STATES, *ante*, p. 904. Petition for rehearing denied.

DECEMBER 27, 1960.

Dismissal Under Rule 60.

No. 82. COLUMBIAN FUEL CORP. *v.* SUPERIOR COURT OF DELAWARE FOR NEW CASTLE COUNTY ET AL. Certiorari, 363 U. S. 818, to the Supreme Court of Delaware. Writ of certiorari dismissed pursuant to stipulation of counsel under Rule 60 of the Rules of this Court. *Andrew B. Kirkpatrick, Jr.* for petitioner. *Howard L. Williams* for Cities Service Gas Company, respondent. *President Judge Charles L. Terry* and *Associate Judges Andrew D. Christie, James B. Carey, William J. Storey* and *Albert J. Stiftel* of the Superior Court of Delaware for New Castle County consented to the stipulation. Reported below: 52 Del. ——, 158 A. 2d 478.

JANUARY 9, 1961.

Miscellaneous Orders.

No. 111. PUGACH *v.* DOLLINGER, DISTRICT ATTORNEY OF BRONX COUNTY, ET AL. Certiorari, 363 U. S. 836, to the United States Court of Appeals for the Second Circuit. The motion of the New York Civil Liberties Union et al. for leave to file brief, as *amici curiae*, is granted. *Emanuel Redfield* on the motion.

No. 155. MICHIGAN NATIONAL BANK ET AL. *v.* MICHIGAN ET AL. Appeal from the Supreme Court of Michigan. Probable jurisdiction noted, *ante,* p. 810. The motion of the Franklin National Bank of Long Island for leave to file brief, as *amicus curiae,* is denied. The motion of Mellon National Bank and Trust Company et al. for leave to file brief, as *amici curiae,* is denied. The motion to strike names of State Bank of St. Johns et al. from motion of Community National Bank of Pontiac et al. for leave to file brief, as *amici curiae,* is granted, and the motion of Community National Bank of Pontiac et al. for leave to file brief, as *amici curiae,* is denied.

No. 229, Misc. FOGLE *v.* MARONEY, WARDEN. Motion for leave to file petition for writ of habeas corpus denied.

No. 546, Misc. STURDEVANT *v.* KERR, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus denied.

No. 526, Misc. CUMMINGS *v.* PALMER ET AL.; and
No. 595, Misc. MOJICA *v.* UNITED STATES. Motions for leave to file petitions for writs of certiorari denied.

No. 551, Misc. BERSET *v.* UNITED STATES ET AL. Motion for leave to file petition for writ of injunction denied.

Probable Jurisdiction Noted.

No. 126, Misc. HOYT *v.* FLORIDA. Appeal from the Supreme Court of Florida. Motion for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted, and case transferred to appellate docket. *Herbert B. Ehrmann* and *C. J. Hardee, Jr.* for appellant. *Richard W. Ervin,* Attorney General of Florida, and *George R. Georgieff,* Assistant Attorney General, for appellee. Reported below: 119 So. 2d 691.

Certiorari Granted.

No. 527. CHAUFFEURS, TEAMSTERS & HELPERS LOCAL UNION No. 795 ET AL. *v.* YELLOW TRANSIT FREIGHT LINES, INC., ET AL. C. A. 10th Cir. Certiorari granted. *David Previant* for petitioners. *Charles B. Blackmar, Carl T. Smith* and *Malcolm Miller* for respondents. Reported below: 282 F. 2d 345.

No. 533, Misc. HAMILTON *v.* ALABAMA. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the Supreme Court of Alabama granted. Case transferred to appellate docket. *Thurgood Marshall, Jack Greenberg, Peter A. Hall* and *Orzell Billingsley, Jr.* for petitioner. *MacDonald Gallion,* Attorney General of Alabama, and *James W. Webb* and *John G. Bookout,* Assistant Attorneys General, for respondent. Reported below: —— Ala. ——, 122 So. 2d 602.

Certiorari Denied. (See also No. 515, ante, p. 628; No. 516, ante, p. 630; and Misc. Nos. 526 and 595, supra.)

No. 453. BRYAN ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. *Stanley Worth, Claude C. Pierce* and *Edward S. Smith* for petitioners. *Solicitor General Rankin, Assistant Attorney General Rice* and *Harry Baum* for respondent. Reported below: 281 F. 2d 238.

No. 491. CHICAGO, ROCK ISLAND & PACIFIC RAILROAD CO. *v.* CHICAGO & NORTH WESTERN RAILWAY CO.; and

No. 525. CHICAGO & NORTH WESTERN RAILWAY CO. *v.* CHICAGO, ROCK ISLAND & PACIFIC RAILROAD CO. C. A. 8th Cir. Certiorari denied. *Alden B. Howland* and *Bennett A. Webster, Jr.* for petitioner in No. 491. *Carl McGowan* for petitioner in No. 525 and respondent in No. 491. Reported below: 280 F. 2d 110.

No. 524. COMMISSIONER OF INTERNAL REVENUE *v.* FACTOR. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Solicitor General Rankin, Assistant Attorney General Rice, A. F. Prescott* and *Victor A. Altman* for petitioner. Reported below: 108 U. S. App. D. C. 183, 281 F. 2d 16.

No. 531. CLARK ET UX. *v.* DWYER, DIRECTOR OF AGRICULTURE OF THE STATE OF WASHINGTON. Supreme Court of Washington. Certiorari denied. *Cutler W. Halverson* for petitioners. *John J. O'Connell,* Attorney General of Washington, and *Ernest M. Furnia* and *Richard M. Montecucco,* Assistant Attorneys General, for respondent. Reported below: 56 Wash. 2d 425, 353 P. 2d 941.

No. 544. AHEARN ET AL. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Claude L. Dawson, Keith L. Seegmiller* and *Irving Wilner* for petitioners. Reported below: —— Ct. Cl. ——, —— F. 2d ——.

No. 547. ALABAMA *v.* TRANSCONTINENTAL GAS PIPE LINE CORP. Supreme Court of Alabama. Certiorari denied. *MacDonald Gallion,* Attorney General of Alabama, *William H. Burton,* Assistant Attorney General, and *Guy Sparks,* Special Assistant Attorney General, for petitioner. *Samuel M. Johnston* and *Jos. F. Johnston* for respondent. Reported below: —— Ala. ——, 123 So. 2d 172.

No. 549. WEINHEIMER *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *H. Clifford Allder* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: —— U. S. App. D. C. ——, 283 F. 2d 510.

No. 530. MENDE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *George M. Bryant* and *Walter M. Campbell* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 282 F. 2d 881.

No. 536. UNITED STATES *v.* GAVAGAN ET AL. C. A. 5th Cir. Certiorari denied. *Solicitor General Rankin, Assistant Attorney General Doub, Alan S. Rosenthal* and *David L. Rose* for the United States. *Chester Bedell* and *Nathan Bedell* for respondents. Reported below: 280 F. 2d 319.

No. 537. ENNIS ET AL. *v.* EVANS ET AL. C. A. 3d Cir. Certiorari denied. *Januar D. Bove, Jr.*, Attorney General of Delaware, *James M. Tunnell, Jr.* and *Everett F. Warrington* for petitioners. *Louis L. Redding* for respondents. Reported below: 281 F. 2d 385.

No. 540. FACTOR *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. *Robert E. Sher, Isadore G. Alk* and *Jack B. Rubin* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, A. F. Prescott* and *Victor A. Altman* for respondent. Reported below: 281 F. 2d 100.

No. 541. PIASECKI AIRCRAFT CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. *K. Norman Diamond, James J. Davis* and *Lowell Goerlich* for petitioner. Reported below: 280 F. 2d 575.

No. 542. GRACE LINE, INC., *v.* FEDERAL MARITIME BOARD. C. A. 2d Cir. Certiorari denied. *Lawrence J. McKay* for petitioner. *Solicitor General Rankin, Assistant Attorney General Bicks, Irwin A. Seibel* and *Robert E. Mitchell* for respondent. Reported below: 280 F. 2d 790.

No. 545. BERRY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Merle L. Silverstein* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 283 F. 2d 465.

No. 548. HARSHBERGER, ADMINISTRATRIX, *v.* ASSOCIATED TRANSPORT, INC., ET AL. C. A. 2d Cir. Certiorari denied. *Raymond R. Dickey* for petitioner. *Copal Mintz* for respondents. Reported below: 282 F. 2d 179.

No. 551. GINSBURG *v.* GINSBURG ET AL. C. A. 9th Cir. Certiorari denied. *Paul Ginsburg,* petitioner, *pro se. James R. Moore* for respondents.

No. 532. DICKSON, WARDEN, *v.* CHAVEZ ET AL. Motions of respondents for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied. *Stanley Mosk,* Attorney General of California, and *Arlo E. Smith,* Deputy Attorney General, for petitioner. *Richard Gladstein, Norman Leonard* and *Ruth Jacobs* for respondents. Reported below: 280 F. 2d 727.

No. 28, Misc. FISCHER *v.* NEW YORK. Appellate Division, Supreme Court of New York, Second Judicial Department. Certiorari denied. Petitioner *pro se. Frank D. O'Connor, Morton Greenspan* and *Benj. J. Jacobson* for respondent.

No. 32, Misc. DENUIT *v.* OHIO. Supreme Court of Ohio. Certiorari denied.

No. 157, Misc. ALLEN *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied. Petitioner *pro se. Paul L. Adams,* Attorney General of Michigan, and *Samuel J. Torina,* Solicitor General, for respondent.

No. 555. BUNCH *v.* SMYTH, PENITENTIARY SUPERINTENDENT. Supreme Court of Appeals of Virginia. Certiorari denied. *O. P. Easterwood, Jr.* for petitioner. Reported below: 202 Va. 126, 116 S. E. 2d 33.

No. 538. EMMET ET AL. *v.* WHITTIER, ADMINISTRATOR OF VETERANS AFFAIRS, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE HARLAN took no part in the consideration or decision of this application. *John Geyer Tausig, Nathaniel F. Bedford* and *Lawrence A. Schei* for petitioners. Reported below: 108 U. S. App. D. C. 191, 281 F. 2d 24.

No. 342, Misc. ROWE *v.* MAINE. Supreme Judicial Court of Maine. Certiorari denied. Reported below: 156 Me. 348, 163 A. 2d 757.

No. 393, Misc. EX PARTE ROCKHOLT. Supreme Court of Alabama. Certiorari denied. Reported below: —— Ala. ——, 122 So. 2d 162.

No. 451, Misc. SWAN *v.* GLADDEN, WARDEN. Supreme Court of Oregon. Certiorari denied. Reported below: —— Ore. ——, —— P. 2d ——.

No. 453, Misc. SMITH *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 223 Md. 228, 163 A. 2d 622.

No. 464, Misc. SHANNON *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. Reported below: —— Tex. Cr. R. ——, 338 S. W. 2d 462.

No. 433, Misc. PAUL *v.* WILKINS, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 254, Misc. COLLINS *v.* DICKSON, WARDEN. 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. 269, Misc. BAKER *v.* COCHRAN, CORRECTIONS DIRECTOR. Supreme Court of Florida. Certiorari denied. Petitioner *pro se.* *Richard W. Ervin,* Attorney General of Florida, and *George R. Georgieff,* Assistant Attorney General, for respondent.

No. 300, Misc. SMITH ET AL. *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. *Hymen B. Mintz* for petitioners. Reported below: 32 N. J. 501, 161 A. 2d 520.

No. 356, Misc. WALLACE *v.* BENNETT, WARDEN. Supreme Court of Iowa. Certiorari denied. Petitioner *pro se.* *Norman A. Erbe,* Attorney General of Iowa, for respondent.

No. 387, Misc. WALKER *v.* WALKER, WARDEN. Supreme Court of Louisiana. Certiorari denied. Petitioner *pro se.* *Jack P. F. Gremillion,* Attorney General of Louisiana, and *Teddy W. Airhart, Jr.* and *Scallan E. Walsh,* Assistant Attorneys General, for respondent.

No. 426, Misc. CUCINOTTI *v.* NEW YORK. Appellate Division, Supreme Court of New York, Fourth Judicial Department. Certiorari denied.

No. 429, Misc. VANDERSEE *v.* RICHMAN, ATTORNEY GENERAL OF NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 439, Misc. LESTER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Osmond K. Fraenkel* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 282 F. 2d 750.

No. 475, Misc. BELCHER *v.* MCGARRAGHY, U. S. DISTRICT JUDGE, ET AL. 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 respondents.

No. 477, Misc. SMITH *v.* FAY, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 484, Misc. IN RE SMITH. Supreme Court of New Mexico. Certiorari denied.

No. 486, Misc. NEAL ET AL. *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioners *pro se*. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States.

No. 488, Misc. CLAYTON *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 498, Misc. LAMUTE *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 508, Misc. CUMMINS *v.* STROUL, DOING BUSINESS AS STROUL NEWS AGENCY. C. A. 3d Cir. Certiorari denied.

No. 489, Misc. HENSON *v.* WARDEN, MARYLAND PENITENTIARY. Court of Appeals of Maryland. Certiorari denied. Reported below: 223 Md. 674, 164 A. 2d 273.

No. 493, Misc. SMITH *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se. Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: —— U. S App. D. C. ——, 283 F. 2d 607.

No. 516, Misc. DAVIS *v.* ELLIS, CORRECTIONS DIRECTOR, ET AL. Court of Criminal Appeals of Texas. Certiorari denied. Reported below: 165 Tex. Cr. R. 2, 302 S. W. 2d 419.

No. 519, Misc. DAVIS *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. 571, Misc. LLOYD *v.* JONES, WARDEN. Court of Appeals of Kentucky. Certiorari denied. Petitioner *pro se. John B. Breckinridge,* Attorney General of Kentucky, and *Ray Corns,* Assistant Attorney General, for respondent. Reported below: 339 S. W. 2d 479.

No. 573, Misc. ILLOVA *v.* BANNAN, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 283 F. 2d 117.

Rehearing Denied.

No. 24. UNITED STATES *v.* HOUGHAM ET AL., *ante,* p. 310. Motion for leave to file a petition for rehearing denied.

No. 133. SOLOMON ET AL. *v.* UNITED STATES, *ante*, p. 890;

No. 403. BORROW *v.* FEDERAL COMMUNICATIONS COMMISSION, *ante*, p. 892;

No. 405. BACA ET AL. *v.* UNITED STATES, *ante*, p. 892;

No. 418. EVANS ET AL. *v.* PENNSYLVANIA, *ante*, p. 899;

No. 425. UNITED SHOE MACHINERY CORP. *v.* HANOVER SHOE, INC., *ante*, p. 901;

No. 426. KIRSCHKE ET AL. *v.* CITY OF HOUSTON, *ante*, p. 474;

No. 431. FORD MOTOR CO. *v.* PACE ET AL., *ante*, p. 444; and

No. 343, Misc. CARRILLO *v.* UNITED STATES, *ante*, p. 905. Petitions for rehearing denied.

JANUARY 10, 1961.

Miscellaneous Order.

No. —. DANNER, REGISTRAR, UNIVERSITY OF GEORGIA, *v.* HOLMES ET AL. Motion to vacate order setting aside supersedeas and stay pending appeal presented to MR. JUSTICE BLACK, and by him referred to the Court, denied. *Eugene Cook*, Attorney General of Georgia, and *B. D. Murphy* and *E. Freeman Leverett*, Assistant Attorneys General, on the motion. *Thurgood Marshall, Constance Baker Motley, Jack Greenberg* and *James M. Nabrit III*, in opposition, for respondents.

JANUARY 16, 1961.

Miscellaneous Orders.

No. 200. LATHROP *v.* DONOHUE. Appeal from the Supreme Court of Wisconsin. (Question of jurisdiction postponed to hearing on the merits, *ante*, p. 810.) Motion of *David Levinson* for leave to proceed *in forma pauperis*, as *amicus curiae*, is denied.

An order of THE CHIEF JUSTICE designating and assigning MR. JUSTICE REED (retired) to perform judicial duties in the United States Court of Claims beginning January 18, 1961, and ending January 19, 1961, and for such further time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

No. 9, Original. ARIZONA *v.* CALIFORNIA ET AL. The report of the Special Master is received and ordered filed. THE CHIEF JUSTICE took no part in the consideration or decision of this case. [For earlier orders herein, see 344 U. S. 919; 347 U. S. 985, 986; 348 U. S. 947; 350 U. S. 114, 812; 351 U. S. 977; 354 U. S. 918; 357 U. S. 902.]

No. 62. LEAHY *v.* UNITED STATES. Certiorari, 363 U. S. 810, to the United States Court of Appeals for the Ninth Circuit. Motion of *Clark A. Barrett* for leave to withdraw appearance as counsel for petitioner granted.

No. 621, Misc. STANLEY *v.* JOHNSTON, STATE HOSPITAL DIRECTOR. Motion for leave to file petition for writ of habeas corpus denied.

No. 617, Misc. DOUGLAS *v.* KLOEB, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus and other relief denied.

Probable Jurisdiction Noted.

No. 539. KESLER *v.* DEPARTMENT OF PUBLIC SAFETY, FINANCIAL RESPONSIBILITY DIVISION, STATE OF UTAH. Appeal from the United States District Court for the District of Utah. Probable jurisdiction noted. *E. J. Skeen* for appellant. Reported below: 187 F. Supp. 277.

Certiorari Denied. (*See also No. 437, ante, p. 662.*)

No. 465. TERRY *v.* CALIFORNIA. District Court of Appeal of California, Second Appellate District. Certiorari denied. *Russell E. Parsons* for petitioner. *Stanley Mosk,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Jack K. Weber,* Deputy Attorney General, for respondent. Reported below: 180 Cal. App. 2d 48, 4 Cal. Rptr. 597.

No. 510. KRAVITZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Jacob Kossman* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice* and *Meyer Rothwacks* for the United States. Reported below: 281 F. 2d 581.

No. 535. EMERSON *v.* HOLLOWAY CONCRETE PRODUCTS CO., INC. C. A. 5th Cir. Certiorari denied. *Frederick Bernays Wiener* and *Alton G. Pitts* for petitioner. *O. B. McEwan* for respondent. Reported below: 282 F. 2d 271.

No. 550. UNITED NEW YORK AND NEW JERSEY SANDY HOOK PILOTS ASSN. ET AL. *v.* HALECKI, ADMINISTRATRIX; and

No. 569. HALECKI, ADMINISTRATRIX, *v.* UNITED NEW YORK AND NEW JERSEY SANDY HOOK PILOTS ASSN. ET AL. C. A. 2d Cir. Certiorari denied. *Lawrence J. Mahoney* for petitioners in No. 550 and respondents in No. 569. *Nathan Baker, Bernard Chazen* and *Milton Garber* for petitioner in No. 569. Reported below: 282 F. 2d 137.

No. 560. RHAY, PENITENTIARY SUPERINTENDENT, *v.* GRIFFITH. C. A. 9th Cir. Certiorari denied. *John J. O'Connell,* Attorney General of Washington, and *Stephen C. Way,* Assistant Attorney General, for petitioner. Reported below: 282 F. 2d 711.

No. 557. CRISP COUNTY, GEORGIA, ET AL. *v.* SEABOARD AIR LINE RAILROAD CO. C. A. 5th Cir. Certiorari denied. *H. H. Perry, Jr.* for petitioners. *Charles T. Abeles* for respondent. Reported below: 280 F. 2d 873.

No. 565. AMERICAN DREDGING CO. *v.* GULF OIL CORP. ET AL. C. A. 3d Cir. Certiorari denied. *T. E. Byrne, Jr.* for petitioner. *Thomas F. Mount* and *Richard W. Palmer* for Atlantic Refining Co., *Raymond T. Greene* for Esso Standard Oil Co., *Thomson F. Edwards* for Gulf Oil Corp., and *Joseph M. Brush* for Texaco, Inc., respondents. Reported below: 282 F. 2d 73.

No. 572. BUSH ET UX. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Hobart F. Atkins* for petitioners. *Solicitor General Rankin* for the United States. Reported below: 283 F. 2d 51.

No. 552. ESTATE OF CUNHA *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. MR. JUSTICE WHITTAKER is of the opinion certiorari should be granted. *Thomas J. Beddow* and *Meade C. Patrick* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Robert N. Anderson* and *L. W. Post* for respondent. Reported below: 279 F. 2d 292.

No. 578. SCHWARTZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted. *Jacob Kossman* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 283 F. 2d 107.

No. 413, Misc. DICKSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 262, Misc. ADAMS *v.* BANMILLER, WARDEN. Court of Common Pleas of Delaware County, Pennsylvania. Certiorari denied. Petitioner *pro se*. *Frank P. Lawley,* Deputy Attorney General of Pennsylvania, for respondent.

No. 390, Misc. BARCLAY *v.* COURT OF OYER AND TERMINER, DELAWARE COUNTY. Supreme Court of Pennsylvania. Certiorari denied.

No. 417, Misc. VANDERSEE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 279 F. 2d 176.

No. 514, Misc. RUTHERFORD *v.* OHIO. Supreme Court of Ohio. Certiorari denied. *Robert B. Krupansky* for petitioner.

No. 518, Misc. ERNST *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. Petitioner *pro se*. *Norman Heine* for respondent.

No. 544, Misc. HOOPER *v.* BENNETT, WARDEN. Supreme Court of Iowa. Certiorari denied.

No. 545, Misc. HUNT *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 103 U. S. App. D. C. 309, 258 F. 2d 161.

No. 605, Misc. BROWN *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. 554, Misc. BARNES *v.* SACKS, WARDEN. Supreme Court of Ohio. Certiorari denied. Reported below: 171 Ohio St. 206, 168 N. E. 2d 492.

No. 560, Misc. WILKINS *v.* BANMILLER, WARDEN. Supreme Court of Pennsylvania. Certiorari denied. Reported below: 401 Pa. 347, 164 A. 2d 333.

No. 561, Misc. BROWN *v.* OHIO. Supreme Court of Ohio. Certiorari denied.

Rehearing Denied.

No. 291. GINSBURG *v.* AMERICAN BAR ASSOCIATION ET AL., *ante*, p. 829;

No. 411. MAGIN *v.* UNITED STATES, *ante*, p. 914;

No. 446. THE FORT FETTERMAN ET AL. *v.* SOUTH CAROLINA STATE HIGHWAY DEPARTMENT, *ante*, p. 910;

No. 460. RIELA *v.* NEW YORK, *ante*, p. 915;

No. 481. THE R. A. TURRENTINE *v.* AMERICAN HOME ASSURANCE CO. ET AL., *ante*, p. 914;

No. 518. ALLRED ET AL. *v.* HEATON ET AL., *ante*, p. 517;

No. 155, Misc. STEGALL *v.* UNITED STATES, *ante*, p. 915;

No. 237, Misc. RAY *v.* OHIO, *ante*, p. 476;

No. 241, Misc. SCOTT *v.* CALIFORNIA, *ante*, p. 471;

No. 424, Misc. IN RE SCHOENBURG, *ante*, p. 923;

No. 431, Misc. KANGRGA ET AL. *v.* BAJKIC ET AL., *ante*, p. 916; and

No. 473, Misc. SMITH *v.* INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA ET AL., *ante*, p. 916. Petitions for rehearing denied.

No. 269. BOROUGH OF EAST NEWARK ET AL. *v.* UNITED STATES, *ante*, p. 828; and

No. 352, Misc. JONES *v.* UNITED STATES, *ante*, p. 875. Motions for leave to file petitions for rehearing denied.

JANUARY 19, 1961.

Dismissal Under Rule 60.

No. 62. LEAHY *v.* UNITED STATES. Certiorari, 363 U. S. 810, to the United States Court of Appeals for the Ninth Circuit. Writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. *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.

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