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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1960

OPINIONS AND DECISIONS PER CURIAM
JUNE 5 (CONCLUDED) THROUGH JUNE 19, 1961
(END OF TERM)

WALTER WYATT
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ERRATA.

364 U. S. 907, No. 161, *Culombe* v. *Connecticut:* "On petition for writ of certiorari . . ." should read "Certiorari, 363 U. S. 826, . . ." Also, the case should be listed in the Table of Cases Reported on p. xv under "Culombe," instead of p. XIII under "Columbe."

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.

ROBERT F. KENNEDY, Attorney General.
ARCHIBALD COX, Solicitor General.
JAMES R. BROWNING, Clerk.
WALTER WYATT, Reporter of Decisions.
T. PERRY LIPPITT, Marshal.
HELEN NEWMAN, Librarian.

SUPREME COURT OF THE UNITED STATES.

ALLOTMENT OF JUSTICES.

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

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

For the First Circuit, FELIX FRANKFURTER, Associate Justice.

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

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, EARL WARREN, Chief Justice.

For the Fifth Circuit, HUGO L. BLACK, Associate Justice.

For the Sixth Circuit, POTTER STEWART, Associate Justice.

For the Seventh Circuit, TOM C. CLARK, Associate Justice.

For the Eighth Circuit, CHARLES E. WHITTAKER, Associate Justice.

For the Ninth Circuit, WILLIAM O. DOUGLAS, Associate Justice.

For the Tenth Circuit, CHARLES E. WHITTAKER, Associate Justice.

October 14, 1958.

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

TABLE OF CASES REPORTED

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TABLE OF STATUTES CITED

(A) STATUTES OF THE UNITED STATES.

(B) Statutes of the States.

(C) Foreign Statutes.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1960.

COMMUNIST PARTY OF THE UNITED STATES *v.* SUBVERSIVE ACTIVITIES CONTROL BOARD.

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

No. 12. Argued October 11–12, 1960.—
Decided June 5, 1961.

After very extensive hearings under the Subversive Activities Control Act of 1950, the Board in 1953 found that the Communist Party of the United States was a "Communist-action organization," within the meaning of the Act, and ordered it to register as such under § 7. A remand of the case by this Court, 351 U. S. 115, and a second remand by the Court of Appeals led to further proceedings before the Board, involving rulings on additional procedural points and two reconsiderations of the entire record, following which the Board adhered to its conclusion. After denial of motions made by the Party under § 14 (a) and after review on the merits, the Court of Appeals affirmed the Board's order. *Held:* The judgment is affirmed. Pp. 4–115.

1. Certain procedural rulings made by the Board and the Court of Appeals do not constitute prejudicial errors requiring that this proceeding be remanded to the Board again. Pp. 22–35.

(a) A witness having been cross-examined at length following his direct testimony during the initial hearing, and the Board having stricken his testimony on two subjects about which recordings of interviews with him were discovered and produced after remand of the case, it cannot be said on this record that the Board abused its discretion in refusing to strike all of his testimony because ill

health prevented him from submitting to further cross-examination, when the Court of Appeals sustained the Board's ruling. Pp. 22–29.

(b) By failing to raise the question in its previous petition for certiorari in this Court, the Party abandoned its claim of error in the Board's denial of its motion to require production of certain memoranda prepared by a government witness, and the Party could not resurrect that claim by repeating the motion before the Board after this Court's remand of the case. Pp. 29–32.

(c) It cannot be said that the Court of Appeals abused its discretion in denying as untimely motions made by the Party under § 14 (a) more than 5 years after termination of the initial hearings for orders requiring production of documents in connection with the testimony of government witnesses. Pp. 32–35.

2. The Board and the Court of Appeals did not err in their construction of the Act or in their application of it to the Party on this record. Pp. 35–69.

(a) In concluding that the Party was "substantially directed, dominated, or controlled" by the Soviet Union, within the meaning of § 3 (3), the Board and the Court of Appeals did not err either in their construction of the Act or in finding that the facts shown by the record bring the Party within it. Pp. 36–55.

(b) In concluding that the Party "operates primarily to advance the objectives of [the] . . . world Communist movement," within the meaning of § 3 (3), the Board and the Court of Appeals did not err either in their construction of the Act or in finding that the facts shown by this record bring the Party within it. Pp. 55–56.

(c) The Board did not misinterpret or misapply the requirement of § 13 (e) that, in determining whether any organization is a Communist-action organization, it shall "take into consideration" the "extent to which" such organization engages in certain classes of conduct specified therein; nor did it abuse its discretion in its rulings on the admissibility of evidence and objections to questions asked on cross-examination in this connection. Pp. 56–66.

(d) The action of the Court of Appeals in striking one subsidiary finding of the Board did not require another remand of the proceedings to the Board. Pp. 66–67.

(e) Though the Board's description of "the world Communist movement" to which its findings related the Party did not

duplicate in all details the description contained in § 2 of the Act, it was the one meant by Congress. Pp. 68–69.

(f) The Board and the court below did not err in relying on evidence of the conduct in which the Party engaged prior to the enactment of the Act to support their conclusion that it is presently a Communist-action organization. P. 69.

(g) The Court of Appeals having thrice examined the evidence adduced before the Board and having held that the Board's conclusions were supported by a preponderance of the evidence, this Court will not make an independent reappraisal of the evidence. P. 69.

3. Since the only action taken so far against the Party under the Act was to order it to register under § 7, and the consequences which will ensue when the order becomes final depend upon actions to be taken thereafter, the only constitutional issues now properly before this Court pertain to the constitutionality of the registration requirement, as applied in this proceeding. Issues raised as to the constitutionality of other provisions of the Act purporting to regulate or prohibit conduct of registered organizations and their members or otherwise affecting their rights were prematurely raised and will not be considered at this time. *Electric Bond & Share Co.* v. *Securities & Exchange Comm'n*, 303 U. S. 419. Pp. 70–81.

4. Notwithstanding the possible consequences of registration, the registration requirements of § 7 do not constitute a bill of attainder within the meaning of Art. I, § 9, cl. 3 of the Constitution. Pp. 82–88.

5. The registration requirements of § 7 (including the listing of the names, aliases and addresses of the foreign-dominated organization's officers and members and the listing of all printing presses in the possession and control of the organization or its members), as here applied, do not constitute a restraint of freedom of expression and association in violation of the First Amendment. *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449; *Bates* v. *Little Rock*, 361 U. S. 516; *Shelton* v. *Tucker*, 364 U. S. 479, distinguished. Pp. 88–105.

6. The claim that the provisions of § 7 requiring officers of the Party to sign and file registration statements for it subjects them to self-incrimination forbidden by the Fifth Amendment is raised prematurely and will not be considered at this time. Pp. 105–110.

7. The Act does not offend the Due Process Clause of the Fifth Amendment by predetermining legislatively facts upon which the

application of the registration requirements to the Communist Party depends. Pp. 110–115.

107 U. S. App. D. C. 279, 277 F. 2d 78, affirmed.

John J. Abt and *Joseph Forer* argued the cause and filed a brief for petitioner.

Solicitor General Rankin argued the cause for respondent. With him on the brief were *Assistant Attorney General Yeagley, Bruce J. Terris, Kevin T. Maroney, George B. Searls, Lee B. Anderson* and *Frank R. Hunter, Jr.*

Briefs of *amici curiae,* urging reversal, were filed by *Nanette Dembitz* for the American Civil Liberties Union; *Thomas I. Emerson* for the National Lawyers Guild; and *Royal W. France* for Rev. Edwin E. Aiken et al.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This is a proceeding pursuant to § 14 (a) of the Subversive Activities Control Act of 1950 to review an order of the Subversive Activities Control Board requiring the Communist Party of the United States to register as a Communist-action organization under § 7 of the Act. The United States Court of Appeals for the District of Columbia has affirmed the Board's registration order. Because important questions of construction and constitutionality of the statute were raised by the Party's petition for certiorari, we brought the case here. 361 U. S. 951.

The Subversive Activities Control Act is Title I of the Internal Security Act of 1950, 64 Stat. 987, 50 U. S. C. § 781 *et seq.* It has been amended, principally by the Communist Control Act of 1954, 68 Stat. 775, and certain of its provisions have been carried forward in sections of the Immigration and Nationality Act adopted in 1952, 66 Stat. 163, 8 U. S. C. §§ 1182, 1251, 1424, 1451. A brief outline of its structure, in pertinent part, will frame the issues for decision.

Section 2 of the Act recites legislative findings based upon evidence adduced before various congressional committees. The first of these is:

> "There exists a world Communist movement which, in its origins, its development, and its present practice, is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization."

The characteristics of a "totalitarian dictatorship," as set forth in subsections (2) and (3) are the existence of a single, dictatorial political party substantially identified with the government of the country in which it exists, the suppression of all opposition to the party in power, the subordination of the rights of the individual to the state, and the denial of fundamental rights and liberties characteristic of a representative form of government. Subsection (4) finds that the direction and control of the "world Communist movement" is vested in and exercised by the Communist dictatorship of a foreign country; and subsection (5), that the Communist dictatorship of this foreign country, in furthering the purposes of the world Communist movement, establishes and utilizes in various countries action organizations which are not free and independent organizations, but are sections of a world-wide Communist organization and are controlled, directed, and subject to the discipline of the Communist dictatorship of the same foreign country. Subsection (6) sets forth that

> "The Communist action organizations so established and utilized in various countries, acting under such control, direction, and discipline, endeavor to

> carry out the objectives of the world Communist movement by bringing about the overthrow of existing governments by any available means, including force if necessary, and setting up Communist totalitarian dictatorships which will be subservient to the most powerful existing Communist totalitarian dictatorship. Although such organizations usually designate themselves as political parties, they are in fact constituent elements of the world-wide Communist movement and promote the objectives of such movement by conspiratorial and coercive tactics, instead of through the democratic processes of a free elective system or through the freedom-preserving means employed by a political party which operates as an agency by which people govern themselves."

In subsection (7) it is found that the Communist organizations thus described are organized on a secret conspiratorial basis and operate to a substantial extent through "Communist-front" organizations, in most instances created or used so as to conceal their true character and purpose, with the result that the "fronts" are able to obtain support from persons who would not extend their support if they knew the nature of the organizations with which they dealt. Congress makes other findings: that the most powerful existing Communist dictatorship has caused the establishment in numerous foreign countries of Communist totalitarian dictatorships, and threatens to establish such dictatorships in still other countries (10); that Communist agents have devised ruthless espionage and sabotage tactics successfully carried out in evasion of existing law (11); that the Communist network in the United States is inspired and controlled in large part by foreign agents who are sent in under various guises (12); that international travel is prerequisite for the carrying on of activities in furtherance of the Communist movement's purposes (8); that Com-

munists have infiltrated the United States by procuring naturalization for disloyal aliens (14); that under our present immigration laws, many deportable aliens of the subversive, criminal or immoral classes are free to roam the country without supervision or control (13). Subsection (9) finds that in the United States individuals who knowingly participate in the world Communist movement in effect transfer their allegiance to the foreign country in which is vested the direction and control of the world Communist movement. Finally, in § 2 (15), Congress concludes that

> "The Communist movement in the United States is an organization numbering thousands of adherents, rigidly and ruthlessly disciplined. Awaiting and seeking to advance a moment when the United States may be so far extended by foreign engagements, so far divided in counsel, or so far in industrial or financial straits, that overthrow of the Government of the United States by force and violence may seem possible of achievement, it seeks converts far and wide by an extensive system of schooling and indoctrination. Such preparations by Communist organizations in other countries have aided in supplanting existing governments. The Communist organization in the United States, pursuing its stated objectives, the recent successes of Communist methods in other countries, and the nature and control of the world Communist movement itself, present a clear and present danger to the security of the United States and to the existence of free American institutions, and make it necessary that Congress, in order to provide for the common defense, to preserve the sovereignty of the United States as an independent nation, and to guarantee to each State a republican form of government, enact appropriate legislation recognizing the existence of such world-wide con-

spiracy and designed to prevent it from accomplishing its purpose in the United States."

Pursuant to these findings, § 7 (a) of the Act requires the registration with the Attorney General, on a form prescribed by him by regulations, of all Communist-action organizations. A Communist-action organization is defined by § 3 (3) as

> "(a) any organization in the United States (other than a diplomatic representative or mission of a foreign government accredited as such by the Department of State) which (i) is substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement referred to in section 2 of this title, and (ii) operates primarily to advance the objectives of such world Communist movement as referred to in section 2 of this title; and
>
> "(b) any section, branch, fraction, or cell of any organization defined in subparagraph (a) of this paragraph which has not complied with the registration requirements of this title."

Registration must be made within thirty days after the enactment of the Act, or, in the case of an organization which becomes a Communist-action organization after enactment, within thirty days of the date upon which it becomes such an organization; in the case of an organization which is ordered to register by the Subversive Activities Control Board, registration must take place within thirty days of the date upon which the Board's order becomes final. § 7 (c). Registration is to be accompanied by a registration statement, which must contain the name of the organization and the address of its principal office; the names and addresses of its present officers and of individuals who have been its officers within the past twelve months, with a designation of the office held

by each and a brief statement of the functions and duties of each; an accounting of all moneys received and expended by the organization during the past twelve months, including the sources from which the moneys were received and the purposes for which they were expended; the name and address of each individual who was a member during the past twelve months; in the case of any officer or member required to be listed and who uses or has used more than one name, each name by which he is or has been known; and a listing of all printing presses and machines and all printing devices which are in the possession, custody, ownership, or control of the organization or its officers, members, affiliates, associates, or groups in which it or its officers or members have an interest. § 7 (d). Once an organization has registered, it must file an annual report containing the same information as is required in the registration statement. § 7 (e). A registered Communist-action organization must keep accurate records and accounts of all moneys received and expended, and of the names and addresses of its members and of persons who actively participate in its activities. § 7 (f).

Section 7 (b) requires the registration of Communist-front organizations, defined as those substantially directed, dominated, or controlled by a Communist-action organization and primarily operated for the purpose of giving aid and support to a Communist-action organization, a Communist foreign government, or the world Communist movement. § 3 (4). The procedures and requirements of registration for Communist fronts are identical with those for Communist-action organizations, except that fronts need not list their non-officer members.[1] In case of the failure of any organization to

[1] By the Communist Control Act of 1954, 68 Stat. 775, the Subversive Activities Control Board is given jurisdiction to determine, in proper proceedings, whether any organization is a Communist-

register, or to file a registration statement or annual report as required by the Act, it becomes the duty of the executive officer, the secretary, and such other officers of the organization as the Attorney General by regulations prescribes, to register for the organization or to file the statement or report. § 7 (h). Any individual who is or becomes a member of a registered Communist-action organization which he knows to be registered as such but to have failed to list his name as a member is required to register himself within sixty days after he obtains such knowledge; and any individual who is or becomes a member of an organization concerning which there is in effect a final order of the Subversive Activities Control Board requiring that it register as a Communist-action organiza-

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infiltrated organization, defined as (A) an organization substantially directed, dominated, or controlled by an individual or individuals who are, or who within three years have been actively engaged in, giving aid or support to a Communist-action organization, a Communist foreign government, or the world Communist movement, (B) which organization is serving or within three years has served as a means for giving aid or support to any such organization, government or movement, or for the impairment of the military strength of the United States or its industrial capacity to furnish logistical or other material support required by its armed forces. Evidentiary matters relevant to this determination are prescribed for the consideration of the Board. Communist-infiltrated organizations are not required to register with the Attorney General, but are required to label their publications mailed or transmitted through instrumentalities of interstate or foreign commerce, and their communications broadcasts, and are deprived of federal income-tax exemption, of certain benefits under the National Labor Relations Act as amended, etc.

Under § 13A (h), added to the Subversive Activities Control Act of 1950 by the Communist Control Act of 1954, 68 Stat. 775, 779, the provisions depriving labor organizations of National Labor Relations Act labor-union benefits apply to labor organizations determined by the Board to be Communist-action or Communist-front, as well as Communist-infiltrated, organizations. 50 U. S. C. § 792a (h).

tion, but which has not so registered although more than thirty days have elapsed since the order became final, is required to register himself within thirty days of becoming a member or within sixty days after the registration order becomes final, whichever is later. § 8. Criminal penalties are imposed upon organizations, officers and individuals who fail to register or to file statements as required: fine of not more than $10,000 for each offense by an organization; fine of not more than $10,000 or imprisonment for not more than five years or both for each offense by an officer or individual; each day of failure to register constituting a separate offense. Individuals who in a registration statement or annual report willfully make any false statement, or willfully omit any fact required to be stated or which is necessary to make any information given not misleading, are subject to a like penalty. § 15.

The Attorney General is required by § 9 to keep in the Department of Justice separate registers of Communist-action and Communist-front organizations, containing the names and addresses of such organizations, their registration statements and annual reports, and, in the case of Communist-action organizations, the registration statements of individual members. These registers are to be open for public inspection. The Attorney General must submit a yearly report to the President and to Congress including the names and addresses of registered organizations and their listed members. He is required to publish in the Federal Register the fact that any organization has registered as a Communist-action or Communist-front organization, and such publication constitutes notice to all members of the registration of the organization.

Whenever the Attorney General has reason to believe that any organization which has not registered is an organization of a kind required to register, or that any individual who has not registered is required to register, he shall petition the Subversive Activities Control Board

for an order that the organization or individual register in the manner provided by the Act. §§ 12, 13 (a). Any organization or any individual registered, or any individual listed in any registration statement who denies that he holds office or membership in the registered organization and whom the Attorney General, upon proper request, has failed to strike from the register, may, pursuant to designated procedures, file with the Subversive Activities Control Board a petition for cancellation of registration or other appropriate relief. § 13 (b).

The Board, whose organization and procedure are prescribed, §§ 12, 13 (d), 16, is empowered to hold hearings (which shall be public), to examine witnesses and receive evidence, and to compel the attendance and testimony of witnesses and the production of documents relevant to the matter under inquiry. § 13 (c), (d). If after hearing the Board determines that an organization is a Communist-action or a Communist-front organization or that an individual is a member of a Communist-action organization, it shall make a report in writing and shall issue an order requiring the organization or individual to register or denying its or his petition for relief. § 13 (g), (j). If the Board determines that an organization is not a Communist-action or a Communist-front organization or that an individual is not a member of a Communist-action organization, it shall make a report in writing and issue an order denying the Attorney General's petition for a registration order, or canceling the registration of the organization or the individual, or striking the name of the individual from a registration statement or annual report, as appropriate. § 13 (h), (i).

The party aggrieved by any such order of the Board may obtain review by filing in the Court of Appeals for the District of Columbia a petition praying that the order be set aside. The findings of the Board as to the facts, if supported by the preponderance of the evidence, shall

be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material, the court may order such additional evidence to be taken before the Board, and the Board may modify its findings as to the facts, and shall file such modified or new findings, which, if supported by the preponderance of the evidence, shall be conclusive. The court may enter appropriate orders. Its judgment and decree shall be final, except that they may be reviewed in this Court on writ of certiorari. § 14 (a). When an order of the Board requiring the registration of a Communist organization has become final upon the termination of proceedings for judicial review or upon the expiration of the time allowed for institution of such proceedings, the Board shall publish in the Federal Register the fact that its order has become final, and that publication shall constitute notice to all members of the organization that the order has become final. §§ 13 (k), 14 (b).

Section 13 (e) of the Act provides that

> "In determining whether any organization is a 'Communist-action organization', the Board shall take into consideration—
>
> "(1) the extent to which its policies are formulated and carried out and its activities performed, pursuant to directives or to effectuate the policies of the foreign government or foreign organization in which is vested, or under the domination or control of which is exercised, the direction and control of the world Communist movement referred to in section 2 of this title; and
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> "(2) the extent to which its views and policies do not deviate from those of such foreign government or foreign organization; and
>
> "(3) the extent to which it receives financial or other aid, directly or indirectly, from or at the direc-

tion of such foreign government or foreign organization; and

"(4) the extent to which it sends members or representatives to any foreign country for instruction or training in the principles, policies, strategy, or tactics of such world Communist movement; and

"(5) the extent to which it reports to such foreign government or foreign organization or to its representatives; and

"(6) the extent to which its principal leaders or a substantial number of its members are subject to or recognize the disciplinary power of such foreign government or foreign organization or its representatives; and

"(7) the extent to which, for the purpose of concealing foreign direction, domination, or control, or of expediting or promoting its objectives, (i) it fails to disclose, or resists efforts to obtain information as to, its membership (by keeping membership lists in code, by instructing members to refuse to acknowledge membership, or by any other method); (ii) its members refuse to acknowledge membership therein; (iii) it fails to disclose, or resists efforts to obtain information as to, records other than membership lists; (iv) its meetings are secret; and (v) it otherwise operates on a secret basis; and

"(8) the extent to which its principal leaders or a substantial number of its members consider the allegiance they owe to the United States as subordinate to their obligations to such foreign government or foreign organization."

Similarly, § 13 (f) enumerates a set of evidentiary considerations to guide the inquiry and judgment of the Board in determining whether a given organization is or is not a Communist-front organization.

When an organization is registered under the Act, or when there is in effect with respect to it a final order of the Board requiring it to register, § 10 (1) prohibits it, or any person acting in behalf of it, from transmitting through the mails or by any means or instrumentality of interstate or foreign commerce any publication which is intended to be, or which it may be reasonably believed is intended to be, circulated or disseminated among two or more persons, unless that publication, and its envelope, wrapper or container, bear the writing: "Disseminated by [the name of the organization], a Communist organization." Section 10 (2) prohibits the organization, or any person acting in its behalf, from broadcasting or causing to be broadcast any matter over any radio or television station unless the matter is preceded by the statement: "The following program is sponsored by [the name of the organization], a Communist organization." Under § 11 of the Act, the organization is not entitled to exemption from federal income tax under § 101 of the 1939 Internal Revenue Code, and no deduction for federal income-tax purposes is allowed in the case of a contribution to it. It is unlawful for any officer or employee of the United States, or of any department or agency of the United States, or of any corporation whose stock is owned in a major part by the United States, to communicate to any other person who such officer or employee knows or has reason to believe is an officer or member of a Communist organization, any information classified by the President as affecting the security of the United States, knowing or having reason to know that such information has been classified. § 4 (b). It is unlawful for any officer or member of a Communist organization knowingly to obtain or receive, or attempt to obtain or receive, any classified information from any such government officer or employee. § 4 (c). When a Communist organization is registered or when there is in effect with respect to it a

final registration order of the Subversive Activities Control Board, it is unlawful for any member of the organization, knowing or having notice that the organization is registered or the order final, to hold non-elective office or employment under the United States or to conceal or fail to disclose that he is a member of the organization in seeking, accepting, or holding such office or employment; and it is unlawful for him to conceal or fail to disclose that he is a member of the organization in seeking, accepting or holding employment in any defense facility,[2] or, if the organization is a Communist-action organization, to engage in any employment in any defense facility. It is unlawful for such a member to hold office or employment with any labor organization, as that term is defined in § 2 (5) of the National Labor Relations Act, as amended, 29 U. S. C. § 152, or to represent any employer in any matter or proceeding arising or pending under that Act. § 5 (a)(1). It is unlawful for any officer or employee of the United States or of a defense facility, knowing or having notice that the organization is registered or a registration order concerning it is final, to advise or urge a member of the organization, with knowledge or notice that he is a member, to engage in conduct which constitutes any of the above violations of the Act, or for such an officer or employee to contribute funds or services to the organization. § 5 (a)(2). When a Communist organization is registered or when there is in effect with respect to it a final registration order of the Subversive Activities Control Board, it is unlawful for a member of the organization, with knowledge or notice that it is registered or the order final, to apply for a passport, or the renewal of a passport, issued under the authority of the United States,

[2] Under § 5 (b) the Secretary of Defense is authorized and directed to designate and proclaim a list of facilities with respect to the operation of which he finds that the security of the United States requires the application of the controls prescribed by the Act.

or to use or to attempt to use a United States passport; and, in the case of a Communist-action organization, it is unlawful for any officer or employee of the United States to issue or renew a passport for any individual, knowing or having reason to believe that he is a member of the organization. § 6. Aliens who are members or affiliates of any organization during the time it is registered or required to be registered, unless they establish that they did not have knowledge or reason to believe that it was a Communist organization, are ineligible to receive visas, are excluded from admission to the United States, and, if in the United States, are subject to deportation upon the order of the Attorney General. Immigration and Nationality Act, §§ 212 (a)(28)(E), 241 (a)(6)(E), 66 Stat. 163, 185, 205, 8 U. S. C. §§ 1182 (a)(28)(E), 1251 (a)(6)(E).[3] No person shall be naturalized as a citizen of the United States who is, or, with certain exceptions, has within ten years immediately preceding filing of his naturalization petition been, a member or affiliate of any Communist-action organization during the time it is registered or is required to be registered, or a member or affiliate of any Communist-front organization during the time it is registered or required to be registered unless he establishes that he did not have knowl-

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[3] The proviso respecting alien members of Communist fronts is: ". . . unless such aliens establish that they did not have knowledge or reason to believe at the time they became members of or affiliated with such an organization (and did not thereafter and prior to the date upon which such organization was so registered or so required to be registered have such knowledge or reason to believe) that such organization was a Communist organization."

The provisions of § 212 (a)(29)(C) of the Immigration and Nationality Act, 66 Stat. 163, 186, 8 U. S. C. § 1182 (a)(29)(C), also exclude aliens who the consular officer or the Attorney General knows or has reasonable ground to believe probably would, after entry, join, affiliate with, or participate in the activities of an organization registered or required to be registered.

edge or reason to believe that it was a Communist-front organization. Immigration and Nationality Act, § 313 (a)(2)(G), (H), (c), 66 Stat. 163, 240, 241, 8 U. S. C. § 1424 (a)(2)(G), (H), (c). If any person naturalized after the effective date of the Act [4] becomes within five years following his naturalization a member or affiliate of any organization, membership in which or affiliation with which at the time of naturalization would have precluded his having been naturalized, it shall be considered prima facie evidence that such person was not attached to the principles of the Constitution and was not well disposed to the good order and happiness of the United States at the time of naturalization, and in the absence of countervailing evidence, this shall suffice to authorize the revocation of naturalization. Immigration and Nationality Act, § 340 (c), 66 Stat. 163, 261, 8 U. S. C. § 1451 (c). Service in the employ of any organization then registered or in connection with which a final registration order is then in effect is not "employment" for purposes of the Social Security Act, as amended, 70 Stat. 807, 839, 42 U. S. C. § 410 (a)(17), and Chapter 21 of the Internal Revenue Code of 1954, as amended, 70 Stat. 807, 839, 26 U. S. C. § 3121 (b)(17), if performed after June 30, 1956.

Section 4 (f) of the Subversive Activities Control Act of 1950 provides that neither the holding of office nor membership in any Communist organization by any person shall constitute *per se* a violation of penal provisions of the Act or of any other criminal statute, and the fact of registration of any person as an officer or member of such an organization shall not be received in evidence against the person in any prosecution for violations of

[4] Section 25 of the Subversive Activities Control Act of 1950 provided: "If a person who shall have been naturalized after January 1, 1951," etc.

penal provisions of the Act or any other criminal statute. Section 32 provides:

> "If any provision of this title, or the application thereof to any person or circumstances, is held invalid, the remaining provisions of this title, or the application of such provision to other persons or circumstances, shall not be affected thereby."

I.

This litigation has a long history. On November 22, 1950, the Attorney General petitioned the Subversive Activities Control Board for an order to require that the Communist Party register as a Communist-action organization. The Party thereupon brought suit in the District Court for the District of Columbia, seeking to have the proceedings of the Board enjoined. A statutory three-judge court denied preliminary relief, *Communist Party of the United States* v. *McGrath,* 96 F. Supp. 47, but stayed answer and hearings before the Board pending appeal. After this Court denied a petition for extension of the stay, 340 U. S. 950, the Party abandoned the suit. Hearings began on April 23, 1951, and ended on July 1, 1952.[5] Twenty-two witnesses for the Attorney General and three for the Party presented oral testimony; 507 exhibits, many of book length, were received; the stenographic record, exclusive of these exhibits, amounted to more than 14,000 pages. On April 20, 1953, the Board issued its 137-page report concluding that the Party was

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[5] During the course of proceedings before the Board, the Party had again instituted suit in the District Court to enjoin continuation of the hearings because of alleged bias of the hearing panel and because of the Senate's failure before adjournment to confirm the nomination of one member of the Board, who consequently withdrew from the panel. This second injunction suit was dismissed on motion of the Board on February 15, 1952.

a Communist-action organization within the meaning of the Subversive Activities Control Act, and its order requiring that the Party register in the manner prescribed by § 7.[6] Pending disposition in the Court of Appeals for the District of Columbia of the Party's petition for review of the registration order, the Party moved in that court, pursuant to § 14 (a),[7] for leave to adduce additional evidence which it alleged would show that three witnesses for the Attorney General—Crouch, Johnson, and Matusow—had testified perjuriously before the Board. The Court of Appeals denied the motion and affirmed the order of the Board, one judge dissenting. *Communist Party of the United States* v. *Subversive Activities Control Board,* 96 U. S. App. D. C. 66, 223 F. 2d 531. Finding that the Party's allegations of perjury had not been denied by the Attorney General, and concluding that the registration order based on a record impugned by a charge of perjurious testimony on the part of three witnesses whose evidence constituted a not insubstantial portion of the Government's case could not stand, this Court remanded to the Board "to make certain that [it] bases its findings upon untainted evidence." 351 U. S. 115, 125.

On remand the Party filed several motions with the Board seeking to reopen the record for the introduction of additional evidence. These were denied. A motion in the Court of Appeals for leave to adduce additional evidence was similarly denied, except that the Board

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[6] S. Doc. No. 41, 83d Cong., 1st Sess.

[7] Section 14 (a) provides: ". . . If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material, the court may order such additional evidence to be taken before the Board and to be adduced upon the proceeding in such manner and upon such terms and conditions as to the court may seem proper. The Board may modify its findings as to the facts, by reason of the additional evidence so taken, and it shall file such modified or new findings . . . ."

was granted permission to entertain a motion concerning the Party's offer to show that another of the Attorney General's witnesses, Mrs. Markward, had committed perjury with regard to a specified aspect of her testimony. The Board granted the Party's motion; hearings were reopened; Mrs. Markward was cross-examined. Motions by the Party for orders requiring the Government to produce certain documents relevant to the matter of her testimony were denied. On December 18, 1956, the Board issued its 240-page Modified Report. It found that Mrs. Markward was a credible witness, made new findings of fact, and, having expunged the testimony of Crouch, Johnson and Matusow, reaffirmed its conclusion that the Party was a Communist-action organization and recommended that the Court of Appeals affirm its registration order. That court, while affirming the Board's actions in other regards, held that the Party was entitled to production of several documents relating to Mrs. Markward's testimony, and remanded. *Communist Party of the United States* v. *Subversive Activities Control Board,* 102 U. S. App. D. C. 395, 254 F. 2d 314. The scope of this remand was enlarged by subsequent orders requiring the production of recorded statements made to the F. B. I. by the Attorney General's witness Budenz, the existence of these recordings having become known to government counsel and to the Board only at this time. These statements related to Budenz's testimony at the original hearings concerning the "Starobin letter" and the "Childs-Weiner conversation." Motions pursuant to § 14 (a) seeking the production of other government-held documents—memoranda furnished to the Government by the Attorney General's witness Gitlow, and recordings made by the F. B. I. of interviews with Budenz—were denied.

On second remand, the documents specified by the orders of the Court of Appeals were made available to the Party. The hearing was reopened before a member of

the Board sitting as an examiner. When the illness of Budenz made impossible his recall for cross-examination in connection with the documents produced, the examiner denied the Party's motion to strike all of Budenz's testimony, but did strike so much as related to the Starobin and Childs-Weiner matters. After re-evaluating the credibility of Budenz and Markward, and affirming the action of its examiner in striking only that portion of Budenz's testimony which concerned the Starobin letter and the Childs-Weiner conversation, the Board re-examined the record as a whole and issued its Modified Report on Second Remand—its findings of fact consisting principally of the findings contained in its first Modified Report, with a few deletions—again concluding that the Communist Party of the United States was a Communist-action organization, and again recommending that its order to register be affirmed. The same panel of the Court of Appeals affirmed the order, at the same time denying the Party's motion under § 14 (a) for an order requiring production of all statements made by government witnesses and now in the possession of the Government, 107 U. S. App. D. C. 279, 277 F. 2d 78, the dissenting judge again dissenting in part. It is this decision which is now before us for review.

II.

The Communist Party urges, at the outset, that procedural rulings by the Board and the Court of Appeals constitute prejudicial error requiring that this proceeding be remanded to the Board. Before reaching the statutory and constitutional issues which this case presents, we must consider these rulings.

A. *The Board's Refusal to Strike All Testimony of the Witness Budenz.* At the original hearing before the Board, Budenz testified during almost two days on direct examination and five days on cross-examination. His

testimony fills more than 700 pages. Of these, eight pages of direct and thirty pages of cross-examination relate to the Starobin letter; two pages of direct and ten pages of cross-examination relate to the Childs-Weiner conversation. Motions to require production of reports or statements by Budenz to the F. B. I. on these two subjects were denied at that time by the Board. After this Court's remand, the motions were repeated and again denied. The Court of Appeals affirmed the denial of the motions on the ground that there did not then appear to be in the possession of the Government any such reports or statements. Subsequent to the court's remand on other grounds, however, government counsel for the first time discovered in the F. B. I. files mechanical transcriptions of interviews with Budenz concerning the Starobin and Childs-Weiner matters. Counsel reported this discovery to the Court of Appeals, which thereupon enlarged the scope of remand to require the production of all "statements," as defined in 18 U. S. C. § 3500, made by Budenz to the F. B. I. relating to these matters. The question of the propriety of these various rulings on the Party's motions for production is not now before us.

After an inspection of the F. B. I. recordings *in camera* by a member of the Board sitting as an examiner, excerpts relating to the Starobin letter and Childs-Weiner conversation were furnished to the Party. The Party sought to recall Budenz for further cross-examination in light of these statements. Upon receipt of a letter from Budenz's personal physician stating that, because of a serious heart condition, it would imperil Budenz's health to appear, the member-examiner caused an independent physical examination of the witness by a heart specialist. The specialist confirmed that cross-examination might seriously affect Budenz's health or cause his death, and counsel for the Government and the Party agreed that the witness was unavailable for recall. The Party then moved that all of

Budenz's testimony be stricken, on the grounds that its unreliability was shown by his prior statements and that cross-examination which, with the aid of the recordings produced, might permit the Party to discredit Budenz entirely, had been rendered impossible by delay for which the Government was responsible. The examiner denied the motion, but granted an alternative motion to strike so much of Budenz's testimony as concerned the Starobin letter and the Childs-Weiner conversation. The Board and the Court of Appeals have affirmed these rulings. The Party argues that they are error.

The "Childs-Weiner conversation" concerns an interview in New York at which Budenz, Childs and Weiner discussed the financing of the Midwest Daily Record, a Party newspaper then edited by Budenz. At the hearing before the Board, Budenz testified that Childs had asked Weiner if money couldn't be got from abroad, and that Weiner replied that normally it might, but that the channels of communication had been broken for the time being, that perhaps they might be re-established so that money could come. Budenz testified that although it was not definitely stated what Weiner meant by "abroad," Budenz's familiarity with the term as used by Party members led him to believe that it meant "from Moscow." In the recordings produced by the Government made during a series of F. B. I. interviews in 1945, Budenz did not mention this incident, although he did advert to the financing problems of the Daily Record and to trips which he made to New York to seek funds for it. Asked whether he had seen any indication of funds coming from Russia, Budenz replied: "The only indication would be is that in addition to Krumbein as Treasurer, Weiner still maintains a certain general supervisory control over finances." Budenz explained that Weiner was "trusted financially," and again mentioned that Weiner's being "a super financial person" was "indicative" of the source of money. He

did not relate any specific conduct of Weiner's which rendered his status "indicative." In an interview in 1946, as reported in an office memorandum prepared by an F. B. I. agent, Budenz stated that he "could recall only one instance wherein it was indicated that the Soviet Union might be sending money": this was the Childs-Weiner conversation in New York. Childs had asked Weiner, the memorandum stated, whether he didn't expect a consignment "from across the sea."

> ". . . Weiner immediately changed the subject matter, indicating that he did not want to discuss the question of transmission of Soviet funds in the presence of Budenz, even though Budenz was a trusted Communist. Budenz concluded from the remark that was made that funds were actually being sent to this country at that time by the Soviet Union for propaganda purposes."

An F. B. I. document based on an interview with Budenz in 1947 describes the incident as follows:

> ". . . Childs suggested that Weiner try to get some money from Moscow to finance the paper. Weiner stated that he had temporarily lost his contacts in Moscow, hence, he could not do anything."

Finally, in a 1950 interview, as recorded in an office memorandum, Budenz related:

> ". . . Childs asked that funds be advanced him by Weiner from the reserve fund [large sums of money held in bank accounts "in reserve for Moscow" or earmarked for Communist organizations] and Weiner advised that he didn't have any at that time as his communication system had temporarily broken down. Budenz took this to mean that Weiner's source of supply was from foreign countries, particularly Russia."

The "Starobin letter" was an alleged communication from Starobin, a Daily Worker correspondent at the United Nations Conference in San Francisco in 1945, which Budenz had opened and of which he had read only a part before it was taken from him and transmitted to certain higher-ups at the Daily Worker. The letter was purportedly received at about the time of the appearance in a French Communist journal of an article by Jacques Duclos, severely criticizing the reorganization of the Communist Party of the United States as the Communist Political Association under Earl Browder in 1944, a reorganization apparently marked by an ideological shift away from the more revolutionary Marxist-Leninist principles, and toward a doctrine of peaceful Soviet-American coexistence. At roughly the same time, Budenz was instructed to reprint the Duclos article in the Daily Worker; shortly thereafter, the Communist Political Association was reconstituted as the Communist Party U. S. A., Browder was ousted, and the Party, in the words of its new national chairman, William Z. Foster, "suddenly reverted to its basic Communist principles." Budenz testified at the hearing that "In this letter Mr. Starobin stated that D. Z. Manuilsky [a Ukrainian delegate to the conference and an important Communist figure] . . . had expressed indignation at the fact that the American Party had not criticized the American leaders, that is, in the government, more severely, and that the American Party should observe more carefully the guidance and the counsel of the French Communists." The F. B. I. recordings produced pursuant to the remand order of the Court of Appeals show that in 1945 interviews with the F. B. I., Budenz had spoken of "private communications sent from Starobin to us," in connection with the ideological shift which marked the end of the Browder "collaborationist" policy. He did not then speak specifically of the Starobin letter as he described

it in his testimony. In response to a question by his F. B. I. examiner, Budenz agreed that Starobin himself was not an important enough figure to inaugurate a change of policy. This colloquy followed:

> "Q. Do you think then that the instructions relative to this change of policy that Starobin and Fields must have received came from the Russian delegation? Oh, you said maybe Manuilsky, the Ukrainian delegate? A. Sure, sure, I mean—after all, they got the atmosphere there. In fact I mentioned Manuilsky very much, because definitely he is a figure in the CI.
>
> "Q. He certainly is. A. He used to lay down the law like a general, you know, to his troops. . . ."

In 1946, Budenz reported to the F. B. I. that in a letter from the San Francisco Conference, Starobin advised that " 'the French comrades have the line and the support of the Soviet Union—and the French comrades blasted Stettinius and the United States Delegation, and therefore Starobin directed that the Party in this country should immediately blast Stettinius and the United States Delegation.' Budenz stated that in this letter Starobin inferred [*sic*] that he and/or his associates at the Conference had conferred with Manuilsky regarding this question, and that the changed policy was predicated upon Manuilsky's instructions as well as on advice received from French Communists at UNCIO." Testifying in that same year before the House Committee on Un-American Activities, Budenz quoted the Starobin letter as relating that the French Comrades asserted there should be more of an attack upon Stettinius by the American Communists, and that this was likewise the opinion of Comrade Manuilsky.

In ruling on the Party's motion to strike all of Budenz's testimony because of his unavailability for cross-examina-

tion in light of these earlier statements, the Board took account not only of the similarities and variations of the witness's several accounts of the Starobin and Childs-Weiner matters, but also of Budenz's responses under extensive cross-examination on all subjects of his testimony at the initial hearing; of the substantial corroboration of Budenz's testimony by other evidence in the administrative record; and of the failure of the Party to attempt to rebut that testimony, which was specific and detailed. The Board found that the prior statements produced did not demonstrate, in the context of the "pertinent circumstances of record," that Budenz's Starobin and Childs-Weiner testimony was deliberately false, and also that, assuming *arguendo* such testimony were false, all of Budenz's evidence would not thereby be discredited. It concluded that "the fair disposition of the question" was to strike Budenz's testimony only on the two subjects as to which failure of timely production of prior statements had deprived the Party of effective cross-examination. The Court of Appeals, independently reviewing the record, affirmed the Board's refusal to strike, finding that the discrepancies among the various versions of the Starobin-letter and Childs-Weiner-conversation incidents "are not such as to indicate perjury, much less the habit of perjury essential to be shown to taint all the witness's testimony." 107 U. S. App. D. C., at 283, 277 F. 2d, at 82.

The considerations relevant to the Party's contention that all of Budenz's testimony must be expunged are, first, the extent to which his prior statements to the F. B. I., compared with his testimony in the present proceedings, discredit him as a witness and impugn his testimony in its entirety, and, second, the extent to which, on the whole record, it appears that the inability to cross-examine Budenz in light of those prior statements had prejudiced the Party. These are questions which can best be answered by those entrusted with ascertaining the fact; that

is, the tribunal that conducts the hearing and passes judgment on the reliability of the witness in light of his total testimony and its relation to the more than 14,000 pages, exclusive of exhibits, of the administrative transcript. Wide discretion would be left to a trial judge and not less must be left to an agency like the Board in a matter of this kind—a matter of adjusting the process of inquiry to the exigencies of a particular situation as they appear to administrators immediately acquainted with the course of proceedings. On this record we cannot say that both the hearing examiner and the Board abused that discretion, or that the Court of Appeals erred in affirming their rulings. In saying this, we do not ignore the argument of the Party that the deprivation of its opportunity to cross-examine Budenz on the basis of his prior statements is the "fault" of government counsel. Suffice that we find no basis for overruling the determinations below that the Government is not to be charged with an attempt unfairly to hamper the Party's presentation of its case. We would not, therefore, be justified in holding that evidence should have been struck which the Board found otherwise probative, inherently believable, and not discredited despite five days of cross-examination by the Party, and which the Court of Appeals found unexceptionable.

B. *The Board's Refusal to Order Production of the Gitlow Memoranda.* In 1940 Gitlow, who had been during the years prior to 1929 a high official of the Communist Party, turned over to the F. B. I. a quantity of documents and papers pertaining to the Party. Shortly thereafter he dictated a series of memoranda explaining and interpreting them. At the original hearing in the present proceeding, Gitlow, testifying for the Attorney General, identified a number of these documents, which were then put in evidence, and described their contents and significance. The Party moved the Board for an order requiring that the

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Attorney General produce the explanatory memoranda. The motion was denied. In its first petition in the Court of Appeals to review the order of the Board, the Party assigned the Board's refusal to order the production of documentary evidence as error; but it did not mention the Gitlow memoranda in the argument portion of its brief, nor, apparently, in oral argument. The point was not among the questions presented in the petition for certiorari in this Court in 1955 and was not relied on in the briefs here. After our remand, the Party again moved the Board to order production of the memoranda. The Board again refused. The Court of Appeals, in its second opinion reviewing the Board proceedings, held that the ruling by the Board declining to order production could not be corrected on petition to review the Board's order. Relying on *Consolidated Edison Co.* v. *Labor Board,* 305 U. S. 197, the court said that the Party's exclusive remedy was to move the Court of Appeals, under § 14 (a) of the Act, for leave to adduce additional evidence, and that failure to make such a motion at the time when the Board refused to order the documents produced barred the Party from later challenging the action of the Board. After the second remand, the Party did make a motion pursuant to § 14 (a) seeking the Gitlow memoranda. This the court refused, holding that the Party's procedural error could not be cured *nunc pro tunc.*

We may assume *arguendo,* without deciding the point, that the Board erred in refusing to order the Gitlow memoranda produced at the original hearing. But we do not reach the question of the applicability of the *Consolidated Edison* case to this situation. It is too late now for the Party to raise this error of the Board. That error could have been raised here five years ago. Had it been raised then, we could have ordered it cured at the time of the first remand to the Board. The demands not only of orderly procedure but of due procedure as the means of

achieving justice according to law require that when a case is brought here for review of administrative action, all the rulings of the agency upon which the party seeks reversal, and which are then available to him, be presented. Otherwise we would be promoting the "sporting theory" of justice, at the potential cost of substantial expenditures of agency time. To allow counsel to withhold in this Court and save for a later stage procedural error would tend to foist upon the Court constitutional decisions which could have been avoided had those errors been invoked earlier.[8] We hold that the Communist

[8] A totally different situation was presented in *Ballard* v. *United States,* 329 U. S. 187, in which it was held that a litigant who had been a party respondent in a case previously here on certiorari had not lost his right to complain of error in the selection of a jury by failing to argue the error as an independent ground for sustaining the first decision of the Court of Appeals, holding in his favor on other grounds.

Reference is also made to cases in which this Court has exercised its power to control the course of litigation immediately before it—a power which finds an appropriate exercise in the avoidance of premature constitutional adjudication. But the rule which petitioner urges, which would permit saving for a possible later stage in the proceedings errors available but not raised in this Court on review of administrative action, far from enhancing the Court's ability to give effect to the policy of deferring unnecessary constitutional decision, would impede that policy. For it would allow the agencies and lower courts, after our remand, to consider potentially dispositive contentions which, had they been brought to our attention, might have derailed issues on which decision turned.

The reason for demanding that all available issues be raised in the orderly course of administrative review proceedings is made particularly evident by the circumstances of this case. This was a litigation already five years old when it first came here. Unusually extensive hearings and argument had been had before the Board and exhaustive briefing and argument before the Court of Appeals. The petition for certiorari, a document of ninety-three pages plus appendices, presented ten major questions and innumerable subsidiary points. Yet the matter of the Gitlow memoranda, which it is now argued looms so large in the context of this extraordinarily lengthy and complex

Party abandoned its claim of error in the Board's denial of its motion to require the Gitlow documents produced, by failing to raise that question in its previous petition for certiorari here. Of course, it could not resurrect that claim by repeating the same motion before the Board after our remand.

C. *Denial by the Court of Appeals of the Party's Motions for Orders Requiring Production of All Statements by the Witness Budenz, and of All Statements by All Witnesses for the Attorney General.* On February 14, 1958, after this case had been remanded to the Board for the second time, and more than five and a half years after the termination of the initial hearings, the Party moved the Court of Appeals, under § 14 (a), for an order requiring production of all recordings, notes and memoranda made by the F. B. I. of interviews with Budenz, insofar as these related to his testimony at the hearings. On April 14, 1959, after the Board had considered the record for the third time and written its third opinion, the Party filed a second motion in the Court of Appeals, seeking production of all statements by all government witnesses

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proceeding, was not raised, and not raised by highly experienced lawyers who vigorously contended every step of the litigation. We remanded on other grounds and now—after five more years have passed, after the Board and the Court of Appeals have each twice more reconsidered this steadily growing record—we are asked to reverse on a ground which the Party had every opportunity to bring here but which it abandoned. To ignore the abandonment would be a most artificial, decision-shrinking abuse of the wise rule of putting off decisions of constitutional scope. Avoidance of such decisions, however compelling a policy within the limitations of ordered judicial regularity, ought not to be countenanced by grafting an *ad hoc* exception onto a generally applicable rule of appellate procedure and permitting particular litigants to avail themselves of otherwise uncognizable points. No decision of this Court can be found which in similar circumstances authorizes disregard of all that has transpired over ten years of litigation so as to allow petitioner to make waste the half of it by resuscitating a long-stale claim.

relating to their testimony. A motion of similar scope had been made before the Board on second remand in December 1958. The court denied these motions as untimely. We cannot say that in doing so it abused its discretion.

With reference to the Budenz records, the Party seeks to excuse its delay by pointing out that not until early in February 1958 did it discover that the F. B. I. had made mechanical transcriptions of interviews with this witness. The Party was misled, it argues, at the time of the original Board hearings, into believing that no prior statements by Budenz were in the possession of the Government. The short answer to this may be found in the transcript of Budenz's replies to questions of counsel for the Party during his testimony on cross-examination.[9]

[9] "Q: Did you give [the Starobin letter incident] to . . . the FBI.

"A: I am satisfied I gave it to the FBI. I couldn't say definitely, but the FBI question me about everything I write and say, and also about many other things. They question me, and I answer their questions.

"Q: Were your answers reduced in writing?

"A: As a matter of fact, I do know now, since you mention it, that I did give this to the FBI.

"Q: In writing?

"A: No, not in writing.

"Q: Was it taken down by a stenographer?

"A: No, not by a stenographer. They never do that, except in rare cases.

"Q: Was a report written up and then shown to you afterwards?

"A: No. That never happens.

"Q: So all you did was simply have an oral conversation about this incident?

"A: Yes, that is all.

. . . . .

"Q: Was it recorded?

"A: I judge so. It was taken down.

"Q: It was taken down?

[*Footnote 9 is continued on p. 34*]

Although the Party might not have known of the disc recordings made of the Budenz interviews, it knew that notes or records had been taken of those interviews by the F. B. I. Indeed the Party sought production of such reports, insofar as they related to the Starobin letter and the Childs-Weiner conversation, by motions made to the Board at the time Budenz testified. Had similar motions been made with regard to other aspects of Budenz's testimony, or with regard to other witnesses, and had the Board denied those motions, this issue could have been brought here on review five years ago.[10] If production had

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"A: Yes. I mean, it wasn't by a stenographer, but by an FBI agent.

"Q: It was taken down by an agent?

"A: Right.

"Q: Was it taken down in shorthand or longhand, or what?

"A: Longhand.

"Q: When?

"A: That I don't know. The reason I recall it, counselor, if I may say so, is because in connection with my book, everything that was in my book was gone over by the FBI, either before or after its publication . . . .

. . . . . .

"When I say 'gone over,' I mean the information was given to them."

[10] The Party did move, at the original Board hearing, for the production of certain reports by particular government witnesses which, it may be, would be comprehended among those sought by its 1959 motion for "All statements . . . which were made by witnesses who testified for the Attorney General at the administrative hearing and which relate to the subject matters of their testimony." As in the case of the Gitlow memoranda, the question of the Board's denials of these motions was not raised in the petition for certiorari here in 1955, and has thus been waived. We note that one such motion was adverted to in a footnote in the Party's brief in this Court at that time, in connection with its argument that the Board erred in relying on the testimony of Scarletto; this and a similar footnote reference to denial of the Party's motion for production of statements of Budenz concerning the Starobin letter were the only mentions

been ordered, presumably all statements by Budenz would have been found. Statements by others, if they existed, would have been found. We cannot say that the Court of Appeals was clearly wrong in holding that at the time these motions were made it was too late to remand to the Board and require production of documents in order to reopen cross-examination of witnesses who testified in 1951 and 1952.

III.

We come to the Communist Party's contentions that the Board and the Court of Appeals erred in their construction of the Act and in their application of it, on the facts of this record, to the Party. It is argued that both elements of the statutory definition of a Communist-action organization in § 3 (3) of the Act—what have come in the course of this litigation to be known as the "control" and "objectives" components—were misinterpreted below; that the Board misconceived the nature of each of the eight evidentiary considerations directed to its attention by § 13 (e) as pertinent to its determination whether an organization is or is not a Communist-action organization; that the Board misapplied the phrase "world Communist movement" in § 2; and that the Board erred in taking account, as relevant to that determination, of conduct of the Party prior to the date of the Act. The Court of Appeals is said to have erred in failing to remand to the

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in the Party's 224-page brief of motions for production denied by the Board. These were plainly insufficient to raise the issue here. Supreme Court Rules 23, subd. 1 (c), 40, subd. 1 (d) (2).

Nor can we agree that the Party was excused from the necessity of making appropriate motions before the Board respecting documents which it wanted produced, because similar motions with respect to other documents had previously been denied. Especially in administrative proceedings of this length and complexity, it is important that a party bring his particular requests explicitly to the attention of the agency and the reviewing courts.

Board after striking one of its subsidiary findings as unsupported by the evidence. Finally, it is contended, the record as a whole does not support by the preponderance of the evidence, as required by § 14 (a), the conclusion that the Party is a Communist-action organization within the correct meaning of that phrase.

A. *The "Control Component."* Under § 3 (3) of the Act an organization cannot be found to be a Communist-action organization unless it is "substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement . . . ." The Party asserts that this requirement is not satisfied by any lesser demonstration than that the foreign government or foreign organization controlling the world Communist movement exercises over the organization an enforceable, coercive power to exact compliance with its demands. The Court of Appeals disagreed, holding that in the circumstances of this record a consistent, undeviating dedication, over an extended period of time, to carrying out the programs of the foreign government or foreign organization, despite significant variations in direction of those programs, was sufficient. The Subversive Activities Control Board has not, in its reports, articulated any other understanding of the standard, and since its final factual determination was made after the Court of Appeals had put this definitive gloss on § 3 (3), we must attribute to it acceptance of the court's interpretation.

We agree that substantial direction, domination, or control of one entity by another may exist without the latter's having power, in the event of non-compliance, effectively to enforce obedience to its will. The issue which the Communist Party tenders as one of construction of statutory language is more sharply drawn in the abstract sphere of words than in the realm of fact. It is true that the Court of Appeals compendiously expressed

its understanding of the Party's conduct over a course of thirty years, as revealed by this record and as found by the Board, in terms of "voluntary compliance." Opposing this phrase, the Party insists that the statute demands "enforceable control." But neither of these verbalisms was used by Congress, and neither has an invariant content. Nor has the language of the statute: "substantially directed, dominated, or controlled." Each of these notions carries meaning only as a situation in human relationships which arises and takes shape in different modes and patterns in the context of different circumstances.

The statute, as amended, uses the same phrase three times. A Communist-action organization must be one substantially directed, dominated, or controlled by a foreign government or foreign organization of a designated kind. A Communist-front organization must be one substantially directed, dominated, or controlled by a Communist-action organization. § 3 (4). A Communist-infiltrated organization must be one substantially directed, dominated, or controlled by an individual or individuals engaged in giving aid or support to a Communist-action organization, Communist foreign government, or the world Communist movement. § 3 (4)(A). Variations of this language also occur. Subsection 13 (e)(1) refers to "the foreign government or foreign organization in which is vested, or under the domination or control of which is exercised, the direction and control of the world Communist movement . . . ." Section 2 (5) relates that the action organizations established by the Communist dictatorship in which is vested the direction and control of the world Communist movement are sections of a world-wide Communist organization and are "controlled, directed, and subject to the discipline of [that] . . . Communist dictatorship . . . ." Manifestly, the various relationships among nations, organizations, movements and individuals of which the

Act speaks will take a multiplicity of forms. A foreign government "dominates" or "controls" the "direction" of the world Communist movement through very different means and in very different ways than one organization "dominates" or "controls" another, or than an individual "dominates" or "controls" an organization. These differences do not deprive the concepts "domination" and "control" of ample meaning. Throughout various manifestations these concepts denote a relationship in which one entity so much holds ascendancy over another that it is predictably certain that the latter will comply with the directions expressed by the former solely by virtue of that relationship, and without reference to the nature and content of the directions. This is the sense we find in the opinions expounding the decisions of the Court of Appeals. The reports of the Board evidence a similar understanding.

Nothing in the Committee Reports pertinent to the Internal Security Act of 1950, or in what was said by Congressmen in charge of its passage, affords a gloss on "substantially directed, dominated, or controlled," as used in § 3 (3). There is nothing to indicate that Congress meant that phrase to have any arcane, technical meaning. Its reach is suggested, however, by comparison with a cognate enactment, the so-called Voorhis Act of 1940, 54 Stat. 1201, now 18 U. S. C. § 2386, requiring the registration with the Attorney General of, *inter alia,* certain organizations "subject to foreign control." [11] Section 1 (e) of that Act, 54 Stat. 1202, provided that

> "An organization shall be deemed 'subject to foreign control' if (1) it solicits or accepts financial contributions, loans, or support of any kind, directly

[11] A Committee Report pertinent to that Act, H. R. Rep. No. 2582, 76th Cong., 3d Sess. 1, described the organizations at which it was directed as those "substantially controlled or directed by a foreign power . . . ."

> or indirectly, from, or is affiliated directly or indirectly with, a foreign government or a political subdivision thereof, or an agent, agency, or instrumentality of a foreign government or political subdivision thereof, or a political party in a foreign country, or an international political organization, or (2) its policies, or any of them, are determined by or at the suggestion of, or in collaboration with, a foreign government or political subdivision thereof, or an agent, agency, or instrumentality of a foreign government or a political subdivision thereof, or a political party in a foreign country, or an international political organization."

The Committee Report on the House bill from which the Subversive Activities Control Act derived indicates that its enactment was occasioned, in part, by the inadequacy of existing legislation. Although the Voorhis Act had been directed "against both Nazis and Communists," it had "proved largely ineffective against the latter, due in part to the skill and deceit which the Communists have used in concealing their foreign ties." H. R. Rep. No. 2980, 81st Cong., 2d Sess. 2; see also H. R. Rep. No. 1844, 80th Cong., 2d Sess. 5. It is reasonable to infer that Congress intended the registration provisions of the 1950 Act to be applicable, at the very least, to organizations concerning which a showing of "control" was made which would have brought the organization under the registration provisions of the Voorhis Act. And the 1940 Act, by its explicit definitions, did not require what the Party signifies by "enforceable" control.

The subjection to foreign direction, domination, or control of which § 3 (3) speaks is a disposition unerringly to follow the dictates of a designated foreign country or foreign organization, not by the exercise of independent judgment on the intrinsic appeal that those dictates carry, but for the reason that they emanate from that

country or organization. No more apt term than domination or control could be used to describe such a relationship. The nature of the circumstances which bind an organization to unwavering compliance may be diverse. They may consist, of course, of the sort of enforceable power over the organization's members which an employer has over an employee—the power to compel obedience by threat of discharge. But they may also consist of other incidents which assure that the organization will unquestioningly adhere to the line of conduct appointed for it. Some of these incidents are suggested by the evidentiary considerations which Congress has enumerated in § 13 (e) of the Act—foreign financial or other aid whose menaced withdrawal may serve as an instrument of influence, § 13 (e)(3); subjection to, or recognition of, personal disciplinary power of the designated foreign organs by the leaders or a substantial number of the members of an organization, § 13 (e)(6); obligations in the nature of allegiance owed to those foreign organs by an organization's leaders or a substantial number of its members. § 13 (e)(8). Other incidents may involve other forces felt by individuals or groups to be compelling: a recognition of mastery, for example, which makes criticism itself a severe sanction. The existence of direction, domination, or control in each instance is an issue of particular fact. The question whether in the case of a given organization such a compulsion or impulsion arises from the complex of ties which link it to a foreign government or organization that it will, because of those ties alone, adhere in its conduct to decisions made for it abroad, is one which Congress has committed, in the first instance, to an expert trier of fact. Since the determination that an organization is or is not a Communist-action organization is largely a matter of the working out of legislative policy in multiform situations of potentially great variety, the "construction" of

the statute which ensues from its application to particular circumstances by the administrative agency charged with its enforcement is to be given weight by a reviewing court. Cf. *Labor Board* v. *Hearst Publications, Inc.*, 322 U. S. 111. Our decision in *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, is especially apposite here. The case involved the question whether one communications corporation controlled another for purposes of § 2 (b) of the Communications Act of 1934, 48 Stat. 1065, providing that the Federal Communications Commission should not have jurisdiction over any carrier "engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by . . . such carrier." Refusing to set aside an order based on the Commission's finding that the New York Telephone Company controlled the Rochester Telephone Corporation, we said: "Investing the Commission with the duty of ascertaining 'control' of one company by another, Congress did not imply artificial tests of control. This is an issue of fact to be determined by the special circumstances of each case. So long as there is warrant in the record for the judgment of the expert body it must stand." *Id.*, at 145–146.

While under § 14 (a) of the Subversive Activities Control Act, providing that the findings of the Board as to facts shall be conclusive if supported by the preponderance of the evidence, a stricter standard of re-examination is set than that to which administrative findings are ordinarily subject, we cannot in this case say that the Board—and, in affirming its order, the Court of Appeals—have misapplied the Act. Neither its written report nor the opinion of the court below supports the Party's interpretation of them. They do not hold, as the Party suggests, that conformity which stems from nothing more than ideological agreement satisfies the requirements of § 3 (3). What they do hold is that "the definition of a

Communist-action organization was not intended by the Congress to be restricted to organizations which are subject to enforceable demands of the Soviet Union. . . . An organization or a person may be substantially under the direction or domination of another person or organization by voluntary compliance as well as through compulsion. This is especially true if voluntary compliance is simultaneous in time with the direction and is undeviating over a period of time and under variations of direction. If the Soviet Union directs a line of policy and an organization voluntarily follows the direction, the terms of this statutory definition would be met." 102 U. S. App. D. C. 395, 400, 254 F. 2d 314, 319.

This must be read in the context of the facts of record in this proceeding. Since the determinative issue of the meaning of "substantially directed, dominated, or controlled," and the constitutional questions which the construction of this statutory language raises, are to be determined essentially on the basis of the assignment of legal significance to the Board's findings of fact, those findings must be allowed to speak for themselves. They can neither be summarized nor fairly conveyed in bits and pieces. Their large scope and critical importance necessitates and justifies burdening this opinion with more extensive quotation than is customary in cases where summaries of the record may more meaningfully be made. The Board wrote:

> "The present world Communist movement was first manifested organizationally by the formation in March of 1919 in Moscow, Russia, of the Third Communist International. As this event is recorded in the *History of the Communist Party of the Soviet Union* . . . , it was 'on the initiative of the Bolsheviks, headed by Lenin,' that the first Congress of Communist Parties was called in Moscow, the work of which 'was guided by Lenin'; and, 'Thus was

founded an international revolutionary proletarian organization of a new type—the Communist International—the Marxist-Leninist International.'

. . . . . .

"One year later, July 17–August 7, 1920, the Second Congress of the Communist International adopted and promulgated its *Theses and Statutes,* setting forth its aims and purposes as later herein detailed, and described itself as *'a single universal Communist party, of which the parties operating in every country form individual sections.'* . . .

"A 'Statute' of the Comintern insured that it would serve the interests of Russia by providing:

" 'The Communist International fully and unreservedly upholds the gains of the great proletarian revolution in Russia, the first victorious socialist revolution in the world's history, and calls upon all workers to follow the same road. The Communist International makes it its duty to support with all the power at its disposal every Soviet Republic, wherever it may be formed.' . . .

. . . . . .

"The Communist International was in fact a world Communist Party, organized and controlled as to policies and activities by the Soviet Union, consisting of the various Communist Parties of the countries throughout the world, which constituted its sections. With headquarters in Moscow, it embodied an elaborate organizational structure, related to implementing the basic strategy and tactics of Marxism-Leninism. . . . There was no North American Bureau, but the Political Bureau of respondent acted in that capacity, supervising the Communists in Canada, Cuba, Mexico, and others down to the Panama Canal.

"The Soviet Union was the leader of the Communist International, exercising control over its policies

and activities. The Communist Party of the Soviet Union had five votes to one each for the other larger Parties in the Executive Committee of the Comintern (ECCI), which respondent in a 1934 resolution acknowledged to be 'the general staff of the world revolutionary movement giving unity and leadership to the Communist Parties of the world.' . . . The Government of the Soviet Union financed the Comintern. All of the heads of the Comintern who were identified in the record were leading members of the Communist Party of the Soviet Union. . . .

. . . . . .

"Respondent joined this international Communist organization shortly after it was constituted and admittedly until 1940 participated therein. . . . [R]espondent recognized that its membership therein subordinated any national interests . . . .

. . . . . .

"Further, that complete and total allegiance and dedication was demanded in affiliation with the Comintern, and was acknowledged and in turn stressed by respondent, is also shown by its 'Program':

" '. . . The Communist International is an organization for waging class warfare for the liberation of the working class; there can be no reservations in endorsement and affiliation with it. Loyalty "with reservations" is treachery. Endorsement and defense of Soviets in Russia, with failure to advocate the Soviet form of proletarian dictatorship in the United States is hypocrisy.' . . .

. . . . . .

"Fundamental to the world Communist movement were the 21 'Conditions of Admission to the Communist International' promulgated in its *Theses and Statutes* in 1920 . . . . Uncontradicted testimony

and documents establish that these 'Conditions' were endorsed and accepted by respondent and were binding upon it.

. . . . .

". . . Condition No. 12 required the party to be formed upon the basis of democratic centralism, stressing that only when possessed of an 'iron discipline' . . . will it be able to fully and thoroughly carry out its duty as part of the world Communist movement. Condition No. 20, in order to aid control, required that two-thirds of all committee members and members of central institutions consist of comrades who have made open declarations as to their desire to join the Comintern. Condition No. 11 required an inspection of personnel and the removal of unreliable elements from parliamentary party fractions, and Condition No. 13 required a systematic check of personnel to remove petty bourgeois elements which may have infiltrated a party. Condition No. 16 made binding upon the party all resolutions of the Comintern, and Condition No. 21 made liable to exclusion from the party anyone who rejected the theses and conditions of the Third Communist International.

. . . . .

"As to specific policies and programs, Condition No. 15 required the maintenance of a program in accordance with the resolutions of the Comintern. . . .

. . . . .

"Another aspect of the 'Conditions' was to make the allegiance of a section party and its members to the Comintern, and hence to the Soviet Union, paramount to any other. For example, Condition No. 14 obligates every member party of the Comintern 'to render every possible assistance to the Soviet Re-

publics in their struggle against all counter-revolutionary forces.' . . . It directs the member parties to use legal and illegal means to obstruct military efforts against the Soviet Union. . . .

. . . . . .

"These 21 'Conditions' were never changed by the Communist International and were enforced and implemented by respondent and used to educate its members. Considerable documentary material of record also established that respondent fully complied with and fulfilled the requirements of membership in the Communist International and faithfully followed and carried out its instructions and directives.

. . . . . .

"The Communist International was formally dissolved as such in 1943, at which time the United States and the Soviet Union were military allies. One reason given for this formal dissolution by Stalin was that it would remove the foundation for 'fascist' charges that the Soviet Union was meddling in the internal affairs of other nations. . . .

. . . . . .

"The world Communist movement, under the hegemony of the Soviet Union, continued, notwithstanding the 'dissolution' of its organizational form embodied in the Communist International. . . . [T]he world Communist movement, intact in the basic orientation, policies and programs discussed above, continued via the Cominform and by Communist Parties not formally affiliated with it, such as respondent.

. . . . . .

"Respondent, although never formally a member of the Cominform, has . . . remained dedicated to

'proletarian internationalism,' Marxism-Leninism, and the policies and programs of the world Communist movement as continued by the Cominform.

. . . . . .

"We have previously set forth that respondent joined the Communist International shortly after it was constituted and admittedly participated therein until 1940. Respondent offered no substantial evidence concerning this period of its activities, contending that this period is irrelevant, primarily because of an announced disaffiliation from the Communist International in 1940. The circumstances of the disaffiliation . . . show that there was no fundamental or significant change in respondent's relationship to the world Communist movement. . . .

. . . . . .

"The oral testimony and official documents of respondent and of the Comintern show that respondent was under the complete control and direction of the Comintern. Gitlow was a top official of respondent and in the late 1920's a member of the Executive Committee of the Communist International. He stated unequivocally that the Comintern controlled all major policies of respondent. Kornfeder, also a functionary of respondent and who attended the Sixth Congress of the Comintern held in Moscow, corroborated this stating that he knew of no instance during his experience, which lasted until 1934, when respondent deviated from Comintern instructions. Nowell, based on personal experience as a member of respondent and personal contact with the Comintern, as well as what he was instructed while attending the Lenin School in Moscow in 1932, stated that the decisions of the Comintern were binding on respondent. Honig testified to Comintern directives which were carried out by respondent. . . .

"Among the specific instances of record, much of which is uncontroverted documentary material, showing the control exercised over respondent by the Comintern were: a Comintern decision in 1924 which resulted in the amalgamation of various Communist factions in the United States into the single Communist Party; a decision by Joseph Stalin in 1929, adopted by the Comintern, which expelled certain top officials of respondent and designated other individuals as leaders of respondent; advance approval by the Comintern for the holding of Communist Party conventions in the United States; Comintern instructions in 1927 that respondent charge the United States and Great Britain with intervention in Chinese affairs and to attack Chiang Kai-Shek; Comintern decision directing respondent to work for the formation of a farmer-labor party in the United States and a subsequent change directing respondent to go into elections with the Communist Party ticket; and, advance approval by the Comintern of members of respondent who were sent to training schools in Moscow. . . .

. . . . . .

"Respondent makes much of the fact that it 'disaffiliated' from the Communist International in 1940. There was no dispute that respondent in 1940 announced its disaffiliation for the stated purpose of avoiding registration as a foreign agent under the Voorhis Act of October 17, 1940. An issue is the effect of the disaffiliation.

. . . . . .

". . . The Browder report makes clear that the disaffiliation was but an expediency to avoid registration under the Voorhis Act and contains nothing which negatives an intent to continue as before the principle of 'proletarian internationalism.' Various

passages of Browder's report indicate an intent to end only the 'formal' and 'organizational' connection with the Communist International but not to alter the preexisting fundamental relationship. Illustrative of this is that the report states the disaffiliation would not even be considered if it were thought that it would cause the Party to 'waiver' or 'vacillate' in carrying out 'the internationalism founded by Marx and Engels, and brought to its great, historically decisive victories under the leadership of Lenin and Stalin,' and to which 'the life of every Communist is unconditionally consecrated.' . . . Also, the Browder report, by characterizing the Voorhis Act as 'an extreme example of the most vicious and oppressive *Exceptional Laws*' . . . indicates that the *organizational* disaffiliation was in accord with a Comintern 'Condition' that 'In every country where, in consequence of martial law or of other *exceptional laws,* the Communists are unable to carry on their work lawfully, a combination of lawful and unlawful work is absolutely necessary.' . . .

. . . . . .

"The 1929 reorganization followed a solution dictated by Stalin, which was adopted by the Comintern, and accepted by respondent. Lovestone, Gitlow, and others were deposed as leaders of respondent and the leadership placed in a group which included William Z. Foster, present national chairman. The reorganization of respondent was due to a factional dispute which was a reflection of a struggle in the Communist Party of the Soviet Union and in the Communist International between forces led by Stalin and those led by Bukharin. The Foster faction in respondent, representing a minority of only about 10 per cent, supported Stalin whereas the Lovestone-Gitlow faction, representing about 90 per cent, sided with

Bukharin. Notwithstanding this, respondent complied with the Stalin-dictated solution. The record contains no evidence of subsequent material organizational changes until May of 1944 when respondent's name was changed to the Communist Political Association then changed back in 1945 to the name Communist Party. The change to 'CPA' was in the year following the dissolution of the Comintern and, like the announcements on that dissolution, the change was assertedly to promote a peaceful co-existence of the United States and the Soviet Union. While operating under the name 'Communist Political Association,' there was a deemphasis on the more militant principles of Marxism-Leninism and the current publications of the Party put forward the so-called 'Teheran line.' No evidence was presented by respondent to show a break with the basic principles of the international Communist movement. The leadership of respondent remained the same.

"Relevant to the reconstitution of respondent under the name Communist Party, the record shows that in April of 1945 Jacques Duclos, a spokesman for the world Communist movement, issued a statement the substance and effect of which was that it was a mistake to dissolve the Communist Party of the United States. . . .

. . . . . .

"After preparation throughout the Party, respondent was reconstituted as the Communist Party of the United States of America. Earl Browder, for departing from the orthodoxy of Marxism-Leninism, was branded a 'revisionist' and 'deviationist' and deposed as the leader. Foster took over as national chairman. Otherwise those who had been officials and leaders of the CPA and the Party before that, with a few minor exceptions, remained the officers and

leaders of the reconstituted Communist Party. Upon taking over as national chairman, Foster pointed out the necessity for reemphasizing the revolutionary line of Marxism-Leninism. In a report to the reconstitution convention, subsequently published in *Political Affairs,* Foster declared 'Our Party has suddenly reverted to its basic Communist principles' and 'As never before, we must train our Party in the fundamentals of Marxism-Leninism.' . . .

. . . . . .

"As previously found, Foster became a leading officer in respondent in 1929 as a result of a Soviet Union directive. He has been national chairman since the 1945 reconstitution. A prior letter of his to respondent's National Committee in which he opposed Browder's policies had been suppressed from respondent's membership but his position set forth in the letter was approved in the Duclos statement while Browder's policies were condemned. For a number of years prior to respondent's announced disaffiliation from the Communist International, Foster was an an [*sic*] official of the International. He has been to the Soviet Union on numerous occasions on Party business. . . .

. . . . . .

"In addition to Foster, a number of respondent's other present leaders have been functionaries of respondent since the time of the Communist International, have been to the Soviet Union on Party business, and have been indoctrinated and trained in the Soviet Union on Communist strategy and policies. These leaders have taught in Party schools, written for the Party press, and spoken at Party meetings, on various phases of Marxism-Leninism, including the leading position of the Soviet Union,

proletarian internationalism, and the necessity of revolutionary overthrow of imperialist nations, particularly the United States. . . .

. . . . . .

"The continuance in office of Moscow-trained leaders of respondent who were functionaries during the period that respondent was an open member of the open, formal organization of the world Communist movement, and the absence of any substantial evidence showing a repudiation by respondent's leaders of the program and policy of the world Communist movement, as well as the fact that Marxism-Leninism continues to be basic to respondent, are all probative of the issues herein. . . .

. . . . . .

"The reorganization of respondent's leadership pursuant to Stalin's solution for the 1929 factional dispute, . . . was supervised by a Soviet Union representative sent to the United States for that purpose. A number of individuals were identified as having in the past been in the United States as representatives from the Soviet Union to supervise the carrying out of various policies, programs, and activities by respondent. Respondent's acceptance of the authority of these foreign representatives was required by the rule of the Communist International that:

" 'The E. C. C. I. [executive committee] and its Presidium have the right to send their representatives to the various Sections of the Communist International. Such representatives receive their instructions from the E. C. C. I. or from its Presidium, and are responsible to them for their activities. Representatives of the E. C. C. I. have the right to participate in meetings of the central Party bodies as well

as of the local organizations of the Sections to which they are sent . . . . Representatives of the E. C. C. I. are especially obliged to supervise the carrying out of the decisions of the World Congresses and of the Executive Committee of the Communist International.' . . .

. . . . . .

"Eisler is the only foreign representative shown by the record to have been in the United States subsequent to the announced dissolution of the Communist International. Respondent ceased open affiliation with the Comintern to avoid identification as a foreign representative in the United States and the Comintern as an open organization was dissolved in 1943 for Soviet tactical reasons. The absence of further showing as to foreign representatives does not itself, in the context of the record, indicate any change in respondent's nature or character.

. . . . . .

"Respondent's policies, programs, and activities were originally formulated and carried out pursuant to directives of the foreign leadership of the world Communist movement. Such policies, programs, and activities of respondent have been consistently applied throughout respondent's existence in the United States without change or repudiation. Various tactical fluctuations in emphasis have followed those laid down by the world Communist movement. An examination of respondent's current activities shows respondent is still pursuing policies enunciated by the Soviet Union through the Communist International. . . .

. . . . . .

". . . Respondent's witnesses were unable to cite a single instance throughout its history where, in

taking a position on a question which found the views or policies of the Soviet Union and the United States Government in conflict, the CPUSA had agreed with the announced position of the United States; nor could they show a single instance when the CPUSA had disagreed with the Soviet Union on any policy question where both respondent and the Soviet Union have announced a position.

"The testimony of Dr. Mosely and documents submitted through him embraced a tremendous area of international questions on which respondent and the Soviet Union have taken positions. . . . The uniformity is constant and on a wide variety of questions, and is corroborated by other evidence of record.

"It is a material consideration in viewing the spread of this evidence spanning thirty-odd years that respondent, for the first twenty such years in this area of activity, was required by the 'Conditions' for membership in the Communist International to conform to the 'programme and decisions' of the Comintern in its 'propaganda and agitation' . . . ; that during the years since 1943 respondent has without a single exception, as before, continued to adhere to the views and policies of the Soviet Union; and that its witnesses when asked to do so were unable to show conflict in any of these policies. This is strong evidence that the preexisting relationship between respondent and the Soviet Union continued as before, notwithstanding the formal dissolution of the Comintern by the Soviet Union." (Original emphasis throughout.)

It is on the basis of these detailed findings that the Board and the court below predicated their conclusion that the Communist Party was substantially directed, dominated, or controlled by the Soviet Union. We cannot hold that they erred in the construction of the

statute and in finding that the facts shown bring the Party within it.

B. *The "Objectives Component."* Section 3 (3), defining a Communist-action organization, requires a finding that the organization "operates primarily to advance the objectives of [the] . . . world Communist movement as referred to in section 2 of this title." Although asserting that the reference to § 2 is unclear, the Party offered in the Court of Appeals a construction of this requirement which defines the objectives of the world Communist movement as (a) overthrow of existing government by any means necessary, including force and violence, (b) establishment of a Communist totalitarian dictatorship, (c) which will be subservient to the Soviet Union. See § 2 (1), (2), (3), (6). We need not now determine whether this interpretation, insofar as it implies that an organization must operate to advance all of these objectives in order to come within the Act, is correct. Certainly, the elements which the Party has isolated are, singly or collectively, the major "objectives" described in § 2. The Court of Appeals accepted the Party's analysis *arguendo,* and its judgment affirming the order of the Board rests on its conclusion that the Party operates to advance all three of these objectives. This conclusion is supported by the findings of the Board. It adopts the interpretation most favorable to the Party.

Within the framework of these definitions, the Court of Appeals held sufficient to demonstrate the Communist Party's objective to overthrow existing government the finding of the Board that the Party advocates the overthrow of the Government of the United States by force and violence if necessary. The Party argues that this finding is inadequate to satisfy the conception of overthrow embodied in § 2 (1) and (6); that under the compulsion of the First Amendment the Act must be read as reaching only organizations whose purpose to over-

throw existing government is expressed in illegal action or incitement to illegal action; that advocacy of the use of violence "if necessary" amounts at most to the promulgation of abstract doctrine, not incitement. Section 2 (1) recites that the purpose of the world Communist movement is "by treachery, deceit, infiltration . . . , espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization." Section 2 (6) recites that Communist-action organizations "endeavor to carry out the objectives of the world Communist movement by bringing about the overthrow of existing governments by any available means, including force if necessary . . . ." We think that an organization may be found to operate to advance objectives so defined although it does not incite the present use of force. Nor does the First Amendment compel any other construction. The Subversive Activities Control Act is a regulatory, not a prohibitory statute. It does not make unlawful pursuit of the objectives which § 2 defines. In this context, the Party misapplies *Yates* v. *United States,* 354 U. S. 298, and *Dennis* v. *United States,* 341 U. S. 494, on which it relies. See *Barenblatt* v. *United States,* 360 U. S. 109; *Uphaus* v. *Wyman,* 360 U. S. 72; *American Communications Assn.* v. *Douds,* 339 U. S. 382.

C. *The Evidentiary Considerations of Section 13 (e); the Striking by the Court of Appeals of a Subsidiary Finding Under Section 13 (e)(7).* Section 13 (e) prescribes that in determining whether any organization is a Communist-action organization, the Board shall take into consideration the extent of its conduct in eight enumerated dimensions. Accordingly, the Board made basic findings of fact in each, and on them based conclusions. The Party attacks each conclusion as based upon

a misinterpretation or misapplication of the statutory considerations.

As to three of these considerations upon which the Board placed substantial reliance in its determination that the Communist Party is controlled by the Soviet Union and operates primarily to advance the objectives of the world Communist movement—the extent to which its policies are formulated and carried out and its activities performed pursuant to directives or to effectuate policies of the Soviet Union (§ 13 (e)(1)), the extent to which its principal leaders or a substantial number of its members are subject to or recognize the disciplinary power of the Soviet Union (§ 13 (e)(6)), and the extent to which its principal leaders or a substantial number of its members consider the allegiance they owe to the United States as subordinate to their obligations to the Soviet Union (§ 13 (e)(8))—the Party contends that the conclusions of the Board are not supported by its findings of fact. We have considered the Board's report and find the Party's contention without merit.

As to three other considerations—the extent to which an organization receives financial or other aid from the foreign government or foreign organization controlling the world Communist movement (§ 13 (e)(3)), the extent to which it sends its members to a foreign country for instruction and training in the principles, tactics, etc., of the world Communist movement (§ 13 (e) (4)), and the extent to which it reports to the foreign government or foreign organization controlling the world Communist movement (§ 13 (e)(5))—the Board found, respectively, that the Communist Party had received financial aid from the Soviet Union and the Comintern, and had sent its members to the Soviet Union for training, prior to about 1940, but that there was no evidence that these activities continued after that time, and that the Communist Party

"upon occasion" reports to the Soviet Union. From a reading of its Modified Report on Second Remand, it does not appear that the Board relied on these three findings to support its ultimate determination; rather it regarded them as inconclusive, except insofar as Soviet financial aid to the Party during the period before it became a going organization could be considered "a tile in the mosaic," and insofar as foreign-trained Party members themselves served as instructors in Party schools in the United States at later times when there was no evidence of continued foreign training as such. The Party argues that the Board's findings required it to conclude that evidence pertinent to the considerations of § 13 (e)(3), (4), and (5) tended to negate a finding that the Party was foreign-controlled. We cannot say that the basic findings of the Board compelled that conclusion and precluded its own. The Board, directed by Congress to consider "the extent to which" an organization engages in certain classes of conduct, was not, of course, obligated to make findings in each dimension which would be conclusive of the ultimate issues before it. It was required only to consider each of these dimensions—this it has painstakingly done—and, on the whole record before it, to appraise the probative force of the evidence in each dimension. See *Secretary of Agriculture* v. *Central Roig Ref. Co.*, 338 U. S. 604; 96 Cong. Rec. 14530–14534; cf. *id.*, at 13764, 15634. The Board has explained in detail the factors which urged it to take the view it has taken of the evidence concerning financial aid, foreign training and reporting. We cannot say that on the basis of all its findings it accorded inadmissible weight to these considerations.

By § 13 (e)(2), the Board is directed to consider, in determining whether a given organization is a Communist-action organization, "the extent to which its views

and policies do not deviate from those of [the] . . . foreign government or foreign organization" directing the world Communist movement. In connection with this consideration, Dr. Philip Mosely, Professor of International Relations at Columbia University and Director of the University's Russian Institute, appeared as an expert witness for the Attorney General. He enumerated some forty-five major international issues during thirty years with respect to which, his testimony indicated, there had been no substantial difference between the announced positions of the Soviet Union and the Communist Party.[12] As to each issue, documents representative of the respective views of the Soviet and the Party were identified by Dr. Mosely and put into the record as exhibits. Both the Board and the Court of Appeals credited Dr. Mosely's testimony and placed significant reliance on it in concluding that the Communist Party is substantially dominated by the Soviet Union.

The Party urges two contentions relating to this aspect of the case. The first is that the Mosely evidence has no tendency to prove non-deviation, within the meaning of § 13 (e)(2), and no rational relevance to the ultimate issue of Soviet domination of the Party, because Dr. Mosely did not establish that as to each of the international issues concerning which Soviet Union and Party views coincided, the announced Soviet position antedated

[12] Among these were the League of Nations; the Russo-Finnish War, 1939; the Hitler-Stalin non-aggression pact, 1939; attitude toward World War II before and after the German attack on the Soviet Union; dissolution of the Communist International, 1943; West Germany; the Italian election of 1948; North Atlantic Pact; control of atomic energy; election of Yugoslavia to the United Nations Security Council, 1949; Cardinal Mindszenty case, 1949; United Nations action in Korea; Communist China's intervention in Korea, 1950; seating of Communist China in the United Nations; Peace Treaty with Japan, 1951; peace in Korea.

that of the Party,[13] nor did Dr. Mosely testify that the coincidence of views evidenced parroting of the Soviet position by the Party—indeed, he expressly declined, as a matter of expert judgment, to draw any inference from the coincidence alone with respect to the reasoning processes by which the Party arrived at its views. The Party contends that under § 13 (e)(2) the Board was not authorized to consider evidence merely of sameness of policy, but that sameness would become relevant only after the Attorney General had shown that the Party took its position subsequent to, and not independently of, the announced policy of the Soviet. Second, the Party argues that the Board erred in refusing to let it show, both by cross-examination of Dr. Mosely and by proffered original evidence, that many other, assertedly non-Communist groups and individuals also expressed, contemporaneously with the Soviet Union and the Party, views identical to those in which the two concurred—and, further, that the views were correct.

We do not agree that the Board was not entitled to consider and evaluate evidence of a consistent identity of policies of an organization and the Soviet Union until the Government had shown the temporal antecedence of the Soviet's position and negatived the possibility that independent reasoning processes brought about the identity. Here the Board found that the coincidence of policies extended over a vast area of subject matter, was

[13] The Party points out that with respect to a major portion of the paired sets of exhibits put in through Dr. Mosely, the documents demonstrating the Communist Party's position bear earlier dates than those demonstrating the Soviet Union's position. These exhibits were offered only as illustrative of the views which Dr. Mosely testified—his expert opinion being based on a far wider selection of readings—were those taken approximately contemporaneously by the Soviet and the Party in each instance. The Government expressly disclaimed any attempt to establish chronological sequence between the announced positions of the two.

absolutely invariant during more than thirty years—the entire life of the Party—and was unbroken even in the face of sharp reversals in the Soviet's views. Section 13 (e) (2), directing the Board to consider the extent of non-deviation, does not purport to establish a litmus test of domination or control, requiring some fixed minimum level of policy-parroting. This requirement is satisfied by consideration of whatever is logically relevant in this regard. Of course, the Government would have established a stronger case had it shown not only identity of views on more than forty issues, but also that the Soviet's view had always led and the Party's always followed, and that the similarity could not conceivably be the result of autonomous application of similar basic philosophical principles. But this is no reason to say that the Board could not consider, and form its judgment on, the showing that the Government did make in the present proceeding. Certainly, if the Act contained no § 13 (e), Dr. Mosely's testimony would be both relevant and significantly probative with respect to the issue of Soviet domination of the Party. To hold that § 13 (e) (2) makes it a condition precedent to Board consideration of this long-continued, totally unwavering identity of policy lines, that the Attorney General also establish such elusive determinants as the dates of birth of the policies and the ratiocinative processes by which they came into being, we would have to find that by § 13 (e) (2) Congress meant to limit, and severely limit, the evidences of Soviet domination of which the Board could take account. The structure of § 13 (e) will not bear that construction.[14]

[14] The committee reports and other authoritative legislative history pertinent to § 13 (e) (2) are unilluminating in this connection. It is significant that on the occasion of a proposed House amendment which would have deleted the similar non-deviation consideration now found in § 13 (f) (4) of the Act (pertaining to Communist-front organizations), Mr. Nixon, who had been a leading proponent of the legislation

With respect to the rulings precluding the Party from showing certain facts which would have tended to establish that the views in which it paralleled the Soviet Union were correct views, or were reached independently, or were also held by other persons, we do not think that the Board abused its discretion. The questions which the Party sought to ask Dr. Mosely on cross-examination relating to the correctness of the Party's views were of two sorts. The first involved matters of value judgment or opinion, capable of interminable debate but incapable of proof, and which, the Board might reasonably have found, would have added little to the record beyond the witness's personal views.[15] The second sort called for answers of a more

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in its several forms, argued that "if this particular standard is stricken out, it would be virtually impossible in many cases to get sufficient evidence before the Subversive Activities Control Board to justify a finding that an organization was a Communist front." 96 Cong. Rec. 13764. The implication is that Mr. Nixon, and presumably other proponents of the enactment, regarded the § 13 (e) and (f) evidentiary considerations as *expanding* the scope of evidentiary matters of which the Board might take account in determining whether organizations met the definitions of § 3 (3) and (4). The proposed amendment was defeated after debate in the course of which all Congressmen seemed tacitly to assume that non-deviation involved a question of identity of policies, not of causal connection between policies. *Id.*, at 13765–13768. And see *id.*, at 14531–14533, 15194.

[15] *E. g.*, "The article denounces the Japanese invasion of Manchuria as a clear and unprovoked act of aggression against China, does it not? . . . Was [that] . . . not the opinion of every right-thinking person at that time?" "Is it not the universal opinion of every informed observer that the Greek monarchy is a reactionary, fascist and corrupt regime?" "Is it not true that virtually every Commentator on an analysis of the Italian elections in 1948 has expressed the opinion that there was widespread American intervention and interference in these elections? . . . Was there not widespread interference on the part of the United States in that election?" "Was not this United States intervention in Formosa a violation of the Cairo Agreement on Formosa?" "Did not this policy [sending American

objective kind, but related in general to the truth or falsity of particular, detailed assertions of fact selected out of the various documents which the Attorney General had put in evidence as illustrative of the Party's policies.[16] Since in testifying as to the nature of those policies Dr. Mosely had relied on a wide background of study of Party writings, of which the exhibits put into the record were only exemplary, and since even with reference to those particular exhibits Dr. Mosely's testimony rested upon an expert analysis of each article read as a whole—its general tenor, deriving from its use of language, its selection of facts reported, its argumentative and exhortative parts, if any—litigation of the truth *vel non* of individual statements of fact might well have been regarded by the Board as promising to lead into distracting inquiries regarding marginal or remote issues—what in a court would constitute *res inter alios acta*—incommensurate with the materiality of the evidence produced. Objections to both kinds of questions were, in the Board's discretion, properly sustained. As for the question which the Party attempted to put to Dr. Mosely concerning approximately half of the

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troops beyond the 38th parallel in Korea] prove to be disastrous both militarily and politically? . . . And was it not paid for in thousands of United States lives?"

[16] *E. g.*, concerning Attorney General's Exhibit No. 284, a thirteeen-page editorial:

"Q: Petitioner's Exhibit 284 is an article . . . entitled, 'Wall Street's War Against the Korean People,' . . . is that not correct?

"A: Yes, it is the subtitle of an editorial article.

"Q: Now, I call your attention to page 11. Does not the author there say that broad democratic reforms were introduced in North Korea including universal sufferage [*sic*], the secret ballot, and equal status for women, and that the land was distributed to the peasants and that industry was nationalized and that the 8 hour day and social insurance were introduced, and child labor abolished and a system of public education introduced? . . . Are these not correct statements of fact?"

international issues which he discussed, whether in each case an informed American observer, in the exercise of independent judgment and sensitive to the best interests of the United States, might not also reasonably have arrived at the view held by the Party and the Soviet,[17] the question was not improperly disallowed as beyond the permissible scope of cross-examination. Dr. Mosely did not purport on direct examination to establish the thought processes or the political processes by which the Soviet and the Party arrived at their positions, but only that the positions were identical. The Party was permitted to show, and two of its witnesses testified, on both direct and cross-examination, that the policies of the Party were adopted in the autonomously reasoned belief, in each case, that a particular policy was sound and in the best interests of the American people. The Board, in its modified reports, took account of and evaluated this testimony. It was not prejudicial that the Party was not allowed to use the Government's expert witness to negative causal connections which his testimony for the Government did not seek to show.

The Party also argues that it should have been permitted to demonstrate, by cross-examination of Dr. Mosely and by original evidence, that many other persons than the Soviet and the Party held views similar to those

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[17] This question was put in a number of forms. The most typical is the following:

"In your opinion, could an informed American observer basing his views on what is the best interest of the American people reasonably and sincerely conclude, one, that Mr. Malik's proposal was a great service to the cause of peace and in the best interests of the American people as well as all of the people of the world; two, that the representatives of the American government attempted to frustrate Mr. Malik's proposal but were forced into truce negotiations by the overwhelming desire of the people; and three, that American representatives by provocative conduct and various pretexts attempted to cause the breakdown of armistice negotiations in Korea?"

on which the two agreed. We cannot hold that the Board erred in excluding these showings. They took two forms. First, with respect to some twenty-five international issues, the question was put to Dr. Mosely whether many non-Communist commentators did not also support the view expounded by the Party.[18] A similar question was asked of a witness for the Party concerning one more issue. Second, with respect to somewhat more than thirty issues, the Party offered to establish, by questioning Dr. Mosely and by documents proffered in evidence, that particular named individuals and groups had concurred in the views of the Party on each individual issue.[19] The most that the Party could have proved, had it been allowed to make the offered showings, was that on the subject of each specific, isolated one among the forty-five international issues enumerated, a considerable number of persons not Soviet-dominated took positions parallel to those of the Soviet and the Party. This is only to be expected in the case of issues of this character. The Party never offered to show, despite wide latitude allowed by the hearing panel in making proffers after similar proffers had been previously disallowed, that a continuing, substantial body of independent groups and persons concurred with the Party on a significant aggregate num-

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[18] *E. g.*, "Professor, is it not a fact that many non-communist commentators and observers have expressed the view that the American proposals for international control of atomic energy were designed to make it impossible for the Soviet Union to accept them and that the American plan had no real chance of adoption?" "Would it not be accurate to state, Professor, that there was a very large and broad measure of agreement among the people and many of the leaders of both the Soviet Union and the United States on the need for the prompt establishment of a second front in Europe?"

[19] *E. g.*, "Is it not a fact, Professor, that the Federation of American Atomic Scientists urged that the United States abandon its proposal for the international ownership of atomic raw materials in the bulletin published by that organization in March 1950?"

ber of policies among the forty-five. Of the particular sources mentioned in the Party's separate questions and offers of proof, the greatest number of issues with reference to which a single source recurs—the New York Times, or individuals writing in the Times—is ten or less, and in most cases the agreement shown is with only a portion of the Party's position. No other source occurs more than roughly half a dozen times; most, two or three times.[20] On the basis of these proffers, the Board's rulings did not amount to an abuse of the discretion which it must be allowed in the conduct of its hearings to avoid opening the sluices to litigation of the views of a multitude of third parties.

Section 13 (e)(7) requires the Board to consider the extent to which "for the purpose of concealing foreign direction, domination, or control, or of expediting or promoting its objectives," an organization engages in specified secret practices or otherwise operates on a secret basis. In its original report the Board concluded that the Communist Party engages in secret practices for both these purposes. The Court of Appeals, in its first opinion, held that the finding of secret practices was warranted, but that the Government had not established by the preponderance of the evidence the purpose of the practices. Although no new evidence on the point was taken on remand, the Board again found in its two modified reports that the purpose of the practices was to promote the objectives of the Communist Party.[21] In its third opinion the Court of Appeals again held the finding as to purpose

[20] One name appears in connection with six issues, writers in the New York Herald Tribune in connection with seven, President Franklin Roosevelt and George Bernard Shaw three each, etc. Instances in which the New York Times and the New York Herald Tribune are referred to merely as sources for the printed texts of speeches or statements by statesmen, officials, etc., are not included in this count.

[21] It expressly declined to find a purpose to conceal foreign control.

unsupported by the preponderance of the evidence. Nevertheless, holding that the whole record supported the Board's conclusion that the Communist Party was substantially directed, dominated, or controlled by the Soviet Union, it rejected the Party's contention that the striking of this one subsidiary finding as to purpose of secret practices required remand of the proceeding to the Board.

We think that the Court of Appeals did not err in refusing to remand the case on that ground. Cf. *Labor Board* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241. In the summaries of its modified reports, the Board did not rely on, or even refer to, the finding of secret practices. Thus this case is unlike *Securities & Exchange Comm'n* v. *Chenery Corp.*, 318 U. S. 80, and *Labor Board* v. *Virginia Electric & Power Co.*, 314 U. S. 469, in which proceedings were remanded to administrative agencies when this Court found unsupportable the grounds upon which the agencies had expressly rested the orders reviewed. Where a Court of Appeals strikes as not sustained by the evidence a subsidiary administrative finding upon which the agency itself does not purport to rely, it would be an unwarranted exercise of reviewing power to remand for further proceedings. *Labor Board* v. *Reed & Prince Mfg. Co.*, 205 F. 2d 131 (C. A. 1st Cir.). Remand would be called for only if there were a solid reason to believe that without that subsidiary finding the agency would not have arrived at the conclusion at which it did arrive. Reading the modified reports of the Board in the present case—reports written after the Court of Appeals had once held the finding as to the purpose of the Party's secret practices unsupported—this Court cannot conclude that the Court of Appeals was wrong in regarding the finding stricken as one to which the Board did not attach weight and which did not influence its determination.

D. *The Board Findings as to the World Communist Movement; Evidence of Past Practices; the Preponderance of the Evidence.* Under the Act an organization may be found to be a Communist-action organization only if the relations specified in the "control" and "objectives" components of § 3 (3) exist between it and the "world Communist movement referred to in section 2 . . . ." In the present proceeding, the Board, after recognizing that "in section 2 of the Act Congress has found the existence of a world Communist movement and has described its characteristics," set forth its own description, based on the evidence presented in this record, of contemporary Communist institutions in their international aspect, and particularly of the role of the Soviet Union in those institutions. The Party argues that because this description does not duplicate in all details that of § 2 of the Act, the world Communist movement to which the Board found that the Communist Party bore the required statutory relationship is not the world Communist movement referred to in § 2.

But the attributes of the world Communist movement which are detailed in the legislative findings are not in the nature of a requisite category of characteristics comprising a definition of an entity whose existence *vel non* must be established, by proving those characteristics, in each administrative proceeding under the Act. Congress has itself found that that movement exists. The legislative description of its nature is not made a subject of litigation for the purpose of ascertaining the status of a particular organization under the Act. The Attorney General need not prove, in the case of each organization against whom a petition for a registration order is filed, that the international institutions to which the organization can be shown to be related fit the picture in every precise detail set forth in § 2. The only question, once an organization

is found to have certain international relations, is one of statutory interpretation—of identifying the statutory referent. Are the institutions involved in those relations the "world Communist movement" to which Congress referred? We are satisfied from the Board's report that the "world Communist movement" to which its findings related the Communist Party was the same "world Communist movement" meant by Congress.

The Party contends that the Board and the court below erred in relying on evidence of conduct in which it engaged prior to the enactment of the Act to support their conclusion that it is presently a Communist-action organization. This must be rejected. Where the current character of an organization and the nature of its connections with others is at issue, of course past conduct is pertinent. Institutions, like other organisms, are predominantly what their past has made them. History provides the illuminating context within which the implications of present conduct may be known.

Finally, the Party asks that we re-examine the evidence adduced before the Board and review the Board's findings of fact. The Court of Appeals, made thoroughly familiar with this record by three such re-examinations, has held that the Board's conclusions, as expressed in its Modified Report on Second Remand, are supported by a preponderance of the evidence. We see no reason why still another court should independently reappraise the record. We have declined to do this in the case of other agencies as to whom reviewing power on the facts has been vested in the Courts of Appeals, and we find no purpose to be served in departing now from this settled policy of appellate review. *Labor Board* v. *Pittsburgh Steamship Co.*, 340 U. S. 498; *Labor Board* v. *American National Ins. Co.*, 343 U. S. 395; *Federal Trade Comm'n* v. *Standard Oil Co.*, 355 U. S. 396.

IV.

The Party's constitutional attack on the Subversive Activities Control Act of 1950 assails virtually every provision of this extended and intricate regulatory statute. The registration requirement of § 7, by demanding self-subjection to what may be deemed a defamatory characterization and, in addition, disclosure of the identity of all rank-and-file members, is said to abridge the First Amendment rights of free expression and association of the Communist Party and its adherents. See *N. A. A. C. P.* v. *Alabama,* 357 U. S. 449; *Bates* v. *Little Rock,* 361 U. S. 516; cf. *Thomas* v. *Collins,* 323 U. S. 516; *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123. The Party's officers, it is asserted, who by filing a registration statement in its behalf evidence their status as active members of the Party, are required to incriminate themselves in violation of the Fifth Amendment, as are the individual members who must register themselves under § 8 if the Party fails to register or fails to list them. Cf. *Blau* v. *United States,* 340 U. S. 159; *Quinn* v. *United States,* 349 U. S. 155. The provision that Communist organizations label their publications is attacked as a prior restraint on, and such sanctions as denial of tax exemption are attacked as a penalty on the exercise of, the Party's constitutionally protected freedom of speech. Cf. *Talley* v. *California,* 362 U. S. 60; *Speiser* v. *Randall,* 357 U. S. 513. The various consequences of the Party's registration for its individual members—prohibition of application for and use of passports, disqualification from government or defense-facility employment, disqualification from naturalization, subjection to denaturalization, proscription of officership or employment in labor organizations—are said to deny those members due process of law by, in effect, attainting them by association, cf. *De Jonge* v. *Oregon,* 299 U. S. 353; *Wieman* v. *Updegraff,* 344 U. S. 183, and by sub-

jecting them to potential criminal proceedings in which the nature of the organization, membership in which is an element of various offenses, may not be judicially tried. Many of the statute's provisions are challenged as unconstitutionally vague, and it is said that the establishment of an agency, the Subversive Activities Control Board, whose continued existence depends upon its finding the Communist Party a Communist-action organization within the meaning of the Act, necessarily biases the agency and deprives the Party of a fair hearing. In fact, the Party asserts, the statute as written so particularly designates the Communist Party as the organization at which it is aimed, that it constitutes an abolition of the Party by legislative fiat, in the nature of a bill of attainder. The provisions must be read as a whole, it is said; and when so read, they are seen to envisage not the registration and regulation of the Party, but the imposition of impossible requirements whose only purpose is to lay a foundation for criminal prosecution of the Party and its officers and members, in effect "outlawing" the Party.

Many of these questions are prematurely raised in this litigation. Merely potential impairment of constitutional rights under a statute does not of itself create a justiciable controversy in which the nature and extent of those rights may be litigated. *United Public Workers* v. *Mitchell,* 330 U. S. 75; *International Longshoremen's Union* v. *Boyd,* 347 U. S. 222. Even where some of the provisions of a comprehensive legislative enactment are ripe for adjudication, portions of the enactment not immediately involved are not thereby thrown open for a judicial determination of constitutionality. "Passing upon the possible significance of the manifold provisions of a broad statute in advance of efforts to apply the separate provisions is analogous to rendering an advisory opinion upon a statute or a declaratory judgment upon a hypothetical case." *Watson* v. *Buck,* 313 U. S. 387, 402. No rule of practice

of this Court is better settled than "never to anticipate a question of constitutional law in advance of the necessity of deciding it." *Liverpool, New York & Philadelphia S. S. Co.* v. *Commissioners,* 113 U. S. 33, 39; *Arizona* v. *California,* 283 U. S. 423; Mr. Justice Brandeis, concurring, in *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 341. In part, this principle is based upon the realization that, by the very nature of the judicial process, courts can most wisely determine issues precisely defined by the confining circumstances of particular situations. See *Parker* v. *County of Los Angeles,* 338 U. S. 327; *Rescue Army* v. *Municipal Court,* 331 U. S. 549. In part it represents a conception of the role of the judiciary in a government premised upon a separation of powers, a role which precludes interference by courts with legislative and executive functions which have not yet proceeded so far as to affect individual interests adversely. See the Note to *Hayburn's Case,* 2 Dall. 409; *Massachusetts* v. *Mellon,* 262 U. S. 447. These considerations, crucial as they are to this Court's power and obligation in constitutional cases, require that we delimit at the outset the issues which are properly before us in the present litigation.

This proceeding was brought by the Attorney General under § 13 (a) of the Subversive Activities Control Act, seeking an order of the Board that the Communist Party register as a Communist-action organization pursuant to § 7. The Board has issued such an order, in accordance with § 13 (g)(1), which is here reviewed, under § 14 (a). The effect of that order is to require the Party to register and to file a registration statement within thirty days after the order becomes final, § 7 (c)(3), upon pain of fine up to $10,000 for each day of failure to register. When the order becomes final, other consequences also ensue, for the Party, for its members and for other persons. Certain acts of the Party—distributing its publications

through the mails or through the instrumentalities of interstate or foreign commerce, or causing matter to be broadcast by radio or television, without the required identification—are prohibited, § 10, and tax exemption is denied it, § 11. Specified acts of its members—*e. g.*, applying for or using a United States passport, holding government or defense-facility employment, holding labor union office or employment—are forbidden, §§ 5, 6, and those members are definitively subject to certain disqualifications—if aliens, they may not enter the United States, may be deported, may not be naturalized, may in some circumstances be denaturalized, with qualifications. 8 U. S. C. §§ 1182, 1251, 1424, 1451. Employment by the Party is not "employment" for purposes of the Social Security Act, as amended, 42 U. S. C. § 410; contributions to the Party are not tax deductible, Subversive Activities Control Act of 1950, § 11. Acts by third parties with regard to the Party or its members—the contributing of funds or services to the Party by government or defense-facility personnel, issuance of passports to Party members—are, under specified circumstances, prohibited, §§ 5, 6. All of these consequences depend upon action taken subsequent to the time when the registration order becomes final. Some depend upon action which is, at best, highly contingent.[22] The question is which, if any, of these consequences are now before us for constitutional adjudication, as necessarily involved in the determination of the constitutionality of the Board's registration order.

A closely similar issue was presented to this Court in *Electric Bond & Share Co.* v. *Securities & Exchange Comm'n*, 303 U. S. 419. That was a statutory suit brought

[22] For example, before an individual may be subjected to the penalties of §§ 8 and 15 (a) (2), the Party must have failed to register, or failed to list him as a member, and he must subsequently have failed, within the allotted time, to register himself.

by the Securities and Exchange Commission to enforce against certain utility holding companies the provisions of §§ 4 (a) and 5 of the Public Utility Holding Company Act of 1935, 49 Stat. 803. The Act, like the Subversive Activities Control Act, was a statute of many intricate and interlocking sections, with a severability clause. Its fifth section provided that holding companies, as defined, might register with the Commission and file a registration statement containing specified information: unless such a company registered within the time fixed, § 4 (a) subjected it to what the Court referred to as the "penalty for failure to register": criminal liability for engaging in business in interstate commerce; or for selling, transporting, owning or operating utility assets for the transportation of gas or electricity in interstate commerce; or for using the mails or instrumentalities of interstate commerce to distribute or acquire utility securities, or to negotiate, make, or take any step in performing, service, sales or construction contracts for public utility or holding companies; or for owning, controlling or holding voting stock in any subsidiary engaging in any of these activities.[23] Once a holding company registered, prescribed consequences en-

[23] It was evident that the prohibitions of § 4 (a) were so comprehensive that, as pointed out in the brief for the holding companies, "it [was] . . . quite impossible for holding companies to continue in business, unregistered, in the face of these prohibitions." Nor could the companies cease to be holding companies, since § 4 (a) made unlawful, under penalty up to $200,000, the distribution or public offering of utility securities by unregistered holding companies through the mails or instrumentalities of interstate commerce, or the sale of securities by such companies with reason to believe that those securities would be distributed or made the subject of public offering through the mails or instrumentalities of interstate commerce. No doubt for this reason the Court regarded § 4 (a) as a "penalty" for failure to register, rather than as an independent regulatory scheme for unregistered holding companies. See 303 U. S., at 439, 442, 443. A decree requiring the holding companies to comply with §§ 4 (a) and 5 was, in effect, a decree compelling it to register.

sued, some automatic,[24] some requiring the initiation of further proceedings by the Commission. It was unlawful for any registered holding company or any subsidiary company of a registered holding company to sell or offer for sale any security of the holding company from house to house, or to cause any officer or employee of a subsidiary company to sell such a security; it was unlawful for any registered holding company to borrow or to receive any extension of credit from any public utility company in the same holding-company system; it was unlawful for any registered holding company or any subsidiary of such a holding company to make any contribution in connection with the candidacy, nomination, election or appointment of any person for or to any office or position in federal, state or municipal government or to make any contribution to any political party; all contracts made in violation of any provision of the Act were void. Other transactions of registered companies were prohibited unless approved by the Commission, and under the "simplification" provisions of § 11, the Commission was required to take steps to break up the holding-company systems of registered holding companies.

The Commission sued for, and the District Court granted, an injunction restraining companies of the Electric Bond and Share system from operating in violation of § 4 (a) until they had either registered under § 5 or ceased to be holding companies.[25] A cross bill by the com-

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[24] Section 3 of the Act authorized the Commission to exempt from any provision or provisions of the Act certain described classes of holding companies. It was evident from the nature of Electric Bond and Share, as developed in that litigation, that it did not come within any of these categories, and the Court did not mention § 3 in its opinion.

[25] The decree was without prejudice to any rights which the companies might have at law or in equity after registration, and left the companies free to challenge the validity of any provisions of the Act

panies seeking a declaratory judgment that the Act was unconstitutional in its entirety was dismissed. When the case came here, the companies argued that the scheme of the Act was a single, integrated whole; that the registration sections, which were the mechanism by which holding companies were subjected to the statute's various regulatory provisions, could not be separately considered; and that the unconstitutionality of the regulatory provisions invalidated the registration requirement. The Court affirmed the decree, but on the basis of a deliberate abstention from consideration of any but the registration section, § 5, as enforced by the sanctions of § 4 (a). Noting that if the statute's severability clause were given effect, the registration obligation could be validly enforced even though any or all of the "control" provisions applicable to registered companies were unconstitutional, and finding in the legislative history nothing to indicate that the various regulatory sections "were intended to constitute a unitary system, no part of which can fail without destroying the rest," 303 U. S., at 438–439, the Court declined to decide the broad constitutional questions pressed upon it. Likewise, the District Court's dismissal of the cross bill was sustained:

> ". . . By the cross bill, defendants seek a judgment that each and every provision of the Act is unconstitutional. It presents a variety of hypothetical controversies which may never become real. We are invited to enter into a speculative inquiry for the purpose of condemning statutory provisions the effect of which in concrete situations, not yet developed,

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other than §§ 4 (a) and 5. In the present proceeding, of course, the Board's order does not operate to foreclose the Communist Party, or any other person adversely affected by provisions of the Subversive Activities Control Act, from subsequently challenging in appropriate proceedings other of the Act's provisions than those requiring the registration of Communist-action organizations.

> cannot now be definitely perceived. We must decline that invitation." *Id.*, at 443.

Not until eight years later were some of these other related, important questions, at last properly presented, decided.[26]

The decision in *Electric Bond & Share* controls the present case. This Act, like the one involved there, has a section directing that if any of its provisions, or any of its applications, is held invalid, the remaining provisions and other possible applications shall not be affected. The authoritative legislative history clearly demonstrates that a major purpose of the enactment was to regulate Communist-action organizations by means of the public disclosure effected by registration, apart from the other regulatory provisions of the Act.[27] Such is, of course, the very purpose of the severability clause. This being so, our consideration of any other provisions than those of § 7, requiring Communist-action organizations to register and file a registration statement, could in no way affect our decision in the present case. Were every portion of the Act purporting to regulate or prohibit the conduct of registered organizations (or organizations ordered to register) and of their members, as such, unconstitutional, we would still have to affirm the judgment below. Expatiation on the validity of those portions would remain mere pronouncements, addressed to future and hypothetical controversies. This is true with regard to those sections of the Act which prescribe consequences legally enforceable against the Communist Party once a final registration order is in effect against it—the "labeling" and tax-exemption denial provisions of §§ 10 and 11. These

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[26] See *North American Co.* v. *Securities & Exchange Comm'n*, 327 U. S. 686.

[27] See S. Rep. No. 2369, 81st Cong., 2d Sess. 4; H. R. Rep. No. 2980, 81st Cong., 2d Sess. 3; H. R. Rep. No. 1844, 80th Cong., 2d Sess. 2, 5; see also 96 Cong. Rec. 14174, 14237, 14256–14257, 14297, 14598.

are analogous to the proscription of specified credit transactions, or specified security sales, or specified political contributions, by the Public Utility Holding Company Act considered in *Electric Bond & Share*. Although they become operative as soon as a registration order is made final, their application remains in a very real sense problematical. We cannot now foresee what effect, if any, upon the Party the denial of tax exemption will have. We do not know whether the Party now has, or whether it will have at any time after a Board order goes into effect, any taxable income, or, indeed, any income whatever. We do not know that, after such an order is in effect, the Party will wish to utilize the mails or any instrumentality of interstate commerce for the circulation of its publications. We cannot guess the nature of whatever publications it may wish to circulate or their relation to the purposes and functions of the Party. These circumstances may be critical for constitutional determination. It will not do to discount their significance by saying, now, that no difference in circumstances will effect a different constitutional result—that the principles relevant to a determination of the validity of these statutory provisions do not depend upon the variations in circumstances in which they are potentially applicable. For this analysis presupposes that we now understand what are the relevant constitutional principles, whereas the reason of postponing decision until a constitutional issue is more clearly focused by, and receives the impact from, occurrence in particular circumstances is precisely that those circumstances may reveal relevancies that abstract, prospective supposition may not see or adequately assess.

These considerations are equally appropriate in the case of those sections of the Act which proscribe specified conduct by members of an organization concerning which a final registration order is in effect, or which impose obligations upon them, or which subject them to described

disabilities under certain circumstances. It is wholly speculative now to foreshadow whether, or under what conditions, a member of the Party may in the future apply for a passport, or seek government or defense-facility or labor-union employment, or, being an alien, become a party to a naturalization or a denaturalization proceeding. None of these things may happen. If they do, appropriate administrative and judicial procedures will be available to test the constitutionality of applications of particular sections of the Act to particular persons in particular situations. Nothing justifies previsioning those issues now.

But the Party argues that the threat, however indefinite, of future application of these provisions to penalize individuals who are or become its members, affiliates or contributors, will effectively deter persons from associating with it or from aiding and supporting it. Thus, the provisions exercise a present effect upon the Party sufficiently prejudicial to justify its challenging them in this proceeding. In support of this contention, the Party cites cases in which we have held that litigants had "standing" to attack a statute or regulation which operated to coerce other persons to withdraw from profitable relations or associations with the litigants. See, *e. g., Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123; *Pierce* v. *Society of Sisters,* 268 U. S. 510; *Buchanan* v. *Warley,* 245 U. S. 60; *Truax* v. *Raich,* 239 U. S. 33; cf. *N. A. A. C. P.* v. *Alabama,* 357 U. S. 449; *Bates* v. *Little Rock,* 361 U. S. 516. But these cases purported only to discuss what issues a litigant might raise, not when he might raise them. That a proper party is before the court is no answer to the objection that he is there prematurely. In none of the cases cited was the constitutional issue decided on a record which showed only potential deterrence of association with the litigant on the part of an unnamed and uncounted number of per-

sons. In the *Refugee Committee* case, three organizations sued for injunctive or declaratory relief, challenging their inclusion on the Attorney General's list as Communist organizations. Each alleged that it had already suffered injury as a result of the listing: that contributors had withdrawn support, that persons had refused to take part in fund-raising activities, that members had resigned. The case came here on the pleadings, and we held such allegations sufficient as against a motion to dismiss. In *Pierce* v. *Society of Sisters, supra,* private schools were permitted to attack a state compulsory public-education statute: their complaints had alleged that because of the law, students who otherwise would have continued in attendance at the schools had withdrawn.[28] In *Buchanan* v. *Warley, supra,* a contract had been made, performance refused, and the state courts had denied enforcement on the ground of the challenged ordinance; and in *Truax* v. *Raich, supra,* in which an alien employee sued to enjoin enforcement of a statute requiring certain classes of employers to retain not less than eighty per cent native-born citizens or qualified electors, Raich's employer had been arrested for violation of the statute and Raich had been threatened with immediate discharge. In *Terrace* v. *Thompson,* 263 U. S. 197, both landowners and a prospective tenant brought suit to enjoin enforcement of a state statute forbidding aliens to hold land and providing that land transferred to aliens should be forfeit to the State. The complainants alleged that they were prepared to enter into a lease and would have done so but for the statute.

The present proceeding differs from all of these. The record here does not show that any present members, affiliates, or contributors of the Party have withdrawn because of the threatened consequences to them of its

[28] See also *Columbia Broadcasting System, Inc.,* v. *United States,* 316 U. S. 407; *Truax* v. *Corrigan,* 257 U. S. 312.

registration under the Subversive Activities Control Act, or that any prospective members, affiliates, or contributors have been deterred from joining the Party or giving it their support. We cannot know how many, if any, members or prospective members of the Party are also employees or prospective employees of the Government or of defense facilities or labor unions, or how many, if any, contributors to the Party hold government or defense-facility employment. It is thus impossible to say now what effect the provisions of the Act affecting members of a registered organization will have on the Party. Cf. *New Jersey* v. *Sargent,* 269 U. S. 328. To pass upon the validity of those provisions would be to make abstract assertions of possible future injury, indefinite in nature and degree, the occasion for constitutional decision. If we did so, we would be straying beyond our judicial bounds. Of course, the Party may now assert those rights of its members, such as that of anonymity, which are allegedly infringed by the very act of its filing a registration statement, and which could not be otherwise asserted than by raising them here. *N. A. A. C. P.* v. *Alabama, supra; Bates* v. *Little Rock, supra.* But the rights of its members, as potentially affected by the Act, to receive and use passports, seek and hold certain employment, be naturalized and preserve their citizenship once naturalized, are not of this category. We limit our consideration to the constitutionality of § 7 as applied in this proceeding.

V.

The constitutional contentions raised by the Party with respect to the registration requirement of § 7 are (A) that that requirement, in the context of the Act, in effect "outlaws" the Party and is in the nature of a bill of attainder; (B) that compelling organizations to register and to list their members on a showing merely that they are

foreign-dominated and operate primarily to advance the objectives of the world Communist movement constitutes a restraint on freedom of expression and association in violation of the First Amendment; (C) that requiring Party officers to file registration statements for the Party subjects them to self-incrimination forbidden by the Fifth Amendment; (D) that the Act violates due process by legislative predetermination of facts essential to bring the Communist Party within the definition of a Communist-action organization, and that the evidentiary elements prescribed for consideration by the Board bear no rational relation to that definition; (E) that in several aspects the Act is unconstitutionally vague; and (F) that the Subversive Activities Control Board is so necessarily biased against the Communist Party as to deprive it of a fair hearing.

A. *"Outlawry" and Attainder.* Our determination that in the present proceeding all questions are premature which regard only the constitutionality of the various particular consequences of a registration order to a registered organization and its members, does not foreclose the Party from arguing—and it does argue—that in light of the cumulative effect of those consequences the registration provisions of § 7 are not what they seem, but represent a legislative attempt, by devious means, to "outlaw" the Party. The registration requirement, the Party contends, was designed not with the purpose of having Communist-action organizations register, but with a purpose to make it impossible to register, because of the onerous consequences of registration, and thus to establish a pretext for criminal prosecution of the organization and its members. The Act is said to be aimed particularly at the Communist Party as an identifiable entity, intending to punish it, and in this aspect to constitute a bill of attainder prohibited by Art. I, § 9, cl. 3 of the Constitution.

Of course, "only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground." *Flemming* v. *Nestor,* 363 U. S. 603, 617. No such proof is offered here. The Act on its face gives no indication that the registration provisions were not intended to be complied with. None of the consequences which attach to registration, whatever may be their validity when weighed separately in the constitutional balance, is so devoid of rational relation to the purposes of the Act as expressed in its second section that it appears a mere pressuring device meant to catch an organization between two fires. Section 2 recites that the world Communist movement, whose purpose is to employ deceit, secrecy, infiltration, and sabotage as means to establish a Communist totalitarian dictatorship, establishes and utilizes action organizations. The Act requires such organizations to register and to label their communications, and prohibits their members from government, defense-facility and certain labor-organization employment. Section 2 sets forth that Communist-action organizations are sections of a world-wide Communist movement and that international travel of its members and agents facilitates the purposes of the movement. The Act restricts the ingress and access to United States citizenship of alien members of Communist-action organizations and deprives all members of the use of United States passports. Section 2 finds that Communist-action organizations purpose to overthrow the Government of the United States by any available, necessary means. The Act forbids government and defense-facility employees to support such organizations, and withdraws from the organizations and their contributors certain tax exemptions. None of this is so lacking in consonance as to suggest a clandestine purpose behind the registration provisions. Nor does the legislative history contain any such suggestion. Rather, the Committee reports on the bills from which the Act

derived express an object "to require the Communist movement in the United States to operate in the open rather than underground," and "to expose the Communist movement and protect the public against innocent and unwitting collaboration with it." [29]

It is true, as the Party asserts, that bills had been introduced in Congress that would have applied to the Communist Party by name,[30] and it is no doubt also true that the form which the Subversive Activities Control Act finally took was dictated in part by constitutional scruples against outlawing of the Party by "legislative fiat." [31] It is probable, too, that the legislators who voted for the Act in its final form expected that the Communist Party, if it continued to engage in the activities which had been reported to Congress as characterizing its past conduct, would be required to register under § 7.[32] From this the Party would have us conclude that the Act is only an instrument serving to abolish the Communist Party by indirection. But such an analysis ignores our duty of respect for the exercise of the legislative power of Congress, and, more specifically, ignores the crucial constitutional significance of what Congress did when it rejected

[29] S. Rep. No. 2369, 81st Cong., 2d Sess. 4. See note 27, *supra*.

[30] See H. R. 1884, 80th Cong., 1st Sess. (prohibiting Party members from filing as candidates for elective office); H. R. 2122, 80th Cong., 1st Sess. (making Party membership unlawful); H. R. 4422, 80th Cong., 1st Sess. (requiring registration of Party members as agents of a foreign principal); H. R. 4482, 80th Cong., 1st Sess. (disqualifying political parties affiliated with the Communist Party from the ballot); H. R. 5852, 80th Cong., 2d Sess. (requiring the registration of "Communist-front" organizations; defining "Communist-front" as including the Communist Party).

[31] H. R. Rep. No. 2980, 81st Cong., 2d Sess. 5; H. R. Rep. No. 1844, 80th Cong., 2d Sess. 6; S. Rep. No. 1358, 81st Cong., 2d Sess. 9.

[32] See H. R. Rep. No. 2980, 81st Cong., 2d Sess. 1–2; S. Rep. No. 1358, 81st Cong., 2d Sess. 5; cf. H. R. Rep. No. 1844, 80th Cong., 2d Sess. 1; 96 Cong. Rec. 13765, 14233, 14585.

the approach of outlawing the Party by name and accepted instead a statutory program regulating not enumerated organizations but designated activities. We would be indulging in a revisory power over enactments as they come from Congress—a power which the Framers of the Constitution withheld from this Court—if we so interpreted what Congress refused to do and what in fact Congress did; that is, if we treated this Act as merely a ruse by Congress to evade constitutional safeguards. Congress deemed it an attempt to achieve its legislative purpose consistently with constitutional safeguards.[33]

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[33] See, *e. g.*, S. Rep. No. 1358, 81st Cong., 2d Sess. 9:

"The committee gave serious consideration to the many well-intentioned proposals which were before it which attempted to meet the problems by outlawing the Communist Party. Proponents of this approach differed as to what they desired. Some wanted to bar the Communist Party from the ballot in the elections. Others would have made membership in the Communist Party illegal per se.

"The committee believes that there are several compelling arguments against the outlawing approach. There are grave constitutional questions involved in attempting to interfere with the rights of the States to declare what parties and individuals may qualify for appearance on the ballot. To make membership in a specifically designated existing organization illegal per se would run the risk of being held unconstitutional on the grounds that such an action was legislative fiat.

"Among other policy considerations which militate against this type of approach are the following:

"(1) Illegalization of the party might drive the Communist movement further underground, whereas exposure of its activities is the primary need.

"(2) Illegalization has not proved effective in Canada and other countries which have tried it.

"(3) If the present Communist Party severs the puppet strings by which it is manipulated from abroad, if it gives up its undercover methods, there is no reason for denying it the privilege of openly advocating its beliefs in the way in which true political parties advocate theirs. In politics as well as sports, there are certain rules of the game which must be obeyed. Daggers are out of order on the

Whether it has done so—the issue which is now before us—is to be determined by the manner in which the enactment works in its practical application. "So long as Congress acts in pursuance of its constitutional power, the Judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of that power." *Barenblatt* v. *United States,* 360 U. S. 109, 132. *Oklahoma ex rel. Phillips* v. *Atkinson Co.,* 313 U. S. 508; *Sonzinsky* v. *United States,* 300 U. S. 506; *McCray* v. *United States,* 195 U. S. 27. The true and sole question before us is whether the effects of the statute as it was passed and as it operates are constitutionally permissible.

The Act is not a bill of attainder. It attaches not to specified organizations but to described activities in which an organization may or may not engage. The singling out of an individual for legislatively prescribed punishment constitutes an attainder whether the individual is called by name or described in terms of conduct which, because it is past conduct, operates only as a designation of particular persons. See *Cummings* v. *Missouri,* 4 Wall. 277; *Ex parte Garland,* 4 Wall. 333. The Subversive Activities Control Act is not of that kind. It requires the registration only of organizations which, after the date of the Act, are found to be under the direction, domination, or control of certain foreign powers and to operate primarily to advance certain objectives. This finding

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American playing field. Undercover methods and foreign direction cannot be tolerated on the political field.

"This legislation does not constitute, therefore, a fiat. The Communist Party of the United States is not made guilty of any offense by reason of the enactment of the provisions of this act. If, however, the Communist Party of the United States or any other party now in existence or to be formed operates in such a way that it comes within the definitions and performs activities which are proscribed under the act, then the legislation will apply to it. . . . If such a party changes its characteristics, then the objectives sought by the committee will have been accomplished."

must be made after full administrative hearing, subject to judicial review which opens the record for the reviewing court's determination whether the administrative findings as to fact are supported by the preponderance of the evidence. Present activity constitutes an operative element to which the statute attaches legal consequences, not merely a point of reference for the ascertainment of particular persons ineluctably designated by the legislature.

The fact that activity engaged in prior to the enactment of the legislation may be regarded administratively and judicially as relevant to a determination that an organization is presently foreign-controlled and presently works to advance the objectives of the world Communist movement, does not alter the operative structure of the Act. The incidents which it reaches are nonetheless present incidents. The past is pertinent only as probative of these. In this proceeding the Board has found, and the Court of Appeals has sustained its conclusion, that the Communist Party, by virtue of the activities in which it now engages, comes within the terms of the Act. If the Party should at any time choose to abandon these activities, after it is once registered pursuant to § 7, the Act provides adequate means of relief. As often as once a year it may apply to the Attorney General for cancellation of registration, and, in the event of his refusal to remove it from the register and to relieve it from the duty of filing annual statements, it may petition the Board for a redetermination of its amenability to the registration requirements of the Act, pursuant to a hearing which, again, is subject to judicial review. §§ 13 (b), (i), (j), 14 (a). Far from attaching to the past and ineradicable actions of an organization, the application of the registration section is made to turn upon continuingly contemporaneous fact; its obligations arise only because, and endure only so long as, an organization presently conducts operations of a described character.

Nor is the statute made an act of "outlawry" or of attainder by the fact that the conduct which it regulates is described with such particularity that, in probability, few organizations will come within the statutory terms. Legislatures may act to curb behavior which they regard as harmful to the public welfare, whether that conduct is found to be engaged in by many persons or by one. So long as the incidence of legislation is such that the persons who engage in the regulated conduct, be they many or few, can escape regulation merely by altering the course of their own present activities, there can be no complaint of an attainder. It would be ingenuous to refuse to recognize that the Subversive Activities Control Act of 1950 was designed to reach the Communist Party's operations as then reported to Congress—operations in which, the Board has found, the Party persists. But to base a determination of constitutionality on this design would be to confuse the occasion of legislation with its operative effect and consequently to mistake decisive constitutional determinants. No doubt, the activity whose regulation the Act seeks to achieve is activity historically associated with the Communist Party. From its legislative study of the Communist Party, Congress concluded that that kind of activity was potentially dangerous to the national interest and that it must be subjected to control. But whatever the source from which the legislative experience and instruction derived, the Act applies to a class of activity only, not to the Communist Party as such. Nothing in this offends the constitutional prohibition of attainder.

B. *The Freedoms of Expression and Association Protected by the First Amendment.* The Communist Party would have us hold that the First Amendment prohibits Congress from requiring the registration and filing of information, including membership lists, by organizations substantially dominated or controlled by the foreign powers controlling the world Communist movement and

which operate primarily to advance the objectives of that movement: the overthrow of existing government by any means necessary and the establishment in its place of a Communist totalitarian dictatorship (§§ 3 (3), 2 (1) and (6)). We cannot find such a prohibition in the First Amendment. So to find would make a travesty of that Amendment and the great ends for the well-being of our democracy that it serves.

No doubt, a governmental regulation which requires registration as a condition upon the exercise of speech may in some circumstances affront the constitutional guarantee of free expression.[34] *Thomas* v. *Collins,* 323 U. S. 516. In that case, the Court held that a State could not constitutionally punish for contempt a public speaker who had addressed a labor-organization meeting in violation of a restraining order prohibiting him from soliciting memberships in a labor union without having first registered as a paid labor organizer and secured an organizer's card. The decision was a narrow one, striking down the registration requirement only as applied to the particular circumstances of the case, *id.,* at 541–542—that is, to an individual who, as the Court several times insisted, had come into the State "for one purpose and one only—to make the speech in question." *Id.,* at 533; see

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[34] We need not consider now the decisions in which this Court has struck down regulations requiring not merely registration but the securing of a license, issued either at the arbitrary discretion of licensing officials or by the application of licensing standards so broad or uncertain as to permit arbitrary action by officials, as prerequisite to the right to speak. *E. g., Staub* v. *Baxley,* 355 U. S. 313; *Superior Films, Inc.,* v. *Department of Education,* 346 U. S. 587; *Gelling* v. *Texas,* 343 U. S. 960; *Joseph Burstyn, Inc.,* v. *Wilson,* 343 U. S. 495; *Niemotko* v. *Maryland,* 340 U. S. 268; *Kunz* v. *New York,* 340 U. S. 290; *Largent* v. *Texas,* 318 U. S. 418; *Cantwell* v. *Connecticut,* 310 U. S. 296; *Schneider* v. *State,* 308 U. S. 147; *Hague* v. *C. I. O.,* 307 U. S. 496; *Lovell* v. *Griffin,* 303 U. S. 444. The present statute has no such licensing provision.

also *id.*, at 521, 526.[35] Since this speech was the sole incident of Thomas' conduct upon which the State relied in asserting that he was an "organizer" and thus required to register as such, the Court regarded the statute, in this application, as basing the obligation to register upon speech activity alone.[36] "So long as no more is involved than exercise of the rights of free speech and free assembly," the Court said, "it is immune to such a restriction." *Id.*, at 540. The present statute does not, of course, attach the registration requirement to the incident of speech, but to the incidents of foreign domination and of operation to advance the objectives of the world Communist movement—operation which, the Board has found here, includes extensive, long-continuing organizational, as well as "speech," activity. Thus the *Thomas* case is applicable here only insofar as it establishes that subjection to registration requirements may be a sufficient restraint upon the exercise of liberties protected by the First Amendment to merit that it be weighed in the constitutional balance.

Similarly, we agree that compulsory disclosure of the names of an organization's members may in certain instances infringe constitutionally protected rights of association. *N. A. A. C. P.* v. *Alabama,* 357 U. S. 449; *Bates* v. *Little Rock,* 361 U. S. 516; *Shelton* v. *Tucker,* 364 U. S. 479. But to say this much is only to recognize

[35] After the speech, Thomas had also solicited one individual, by name, to join the union. The Court declined to decide whether such a solicitation, apart from the speech, might constitutionally have been made the basis of punishment for contempt. 323 U. S., at 541. The state court's order adjudging Thomas in contempt imposed a single sentence for both "solicitations," and the Court therefore regarded the statute, in this application, as restraining and punishing Thomas "for uttering, in the course of his address, the general as well as the specific invitation." *Id.*, at 529.

[36] This is clear from the Court's reliance on *De Jonge* v. *Oregon,* 299 U. S. 353.

one of the points of reference from which analysis must begin. To state that individual liberties may be affected is to establish the condition for, not to arrive at the conclusion of, constitutional decision. Against the impediments which particular governmental regulation causes to entire freedom of individual action, there must be weighed the value to the public of the ends which the regulation may achieve. *Schenck* v. *United States,* 249 U. S. 47; *Dennis* v. *United States,* 341 U. S. 494; *American Communications Assn.* v. *Douds,* 339 U. S. 382.

In the *N. A. A. C. P.* and *Bates* cases, this Court examined the circumstances under which disclosure was demanded, and concluded that "whatever interest the State may have in obtaining names of ordinary members has not been shown to be sufficient to overcome [the] . . . constitutional objections to the production order." *N. A. A. C. P.* v. *Alabama,* 357 U. S., at 465. In the *N. A. A. C. P.* case, the Attorney General of Alabama had brought an equity suit to enjoin the Association from conducting further activities within, and to oust it from, the State on the grounds of its non-compliance with Alabama's foreign-corporation registration statute. The Attorney General sought, and the state court ordered, production of lists of the Association's rank-and-file members as pertinent to the issues whether the N. A. A. C. P. was conducting intrastate business in violation of the statute, and whether the extent of that business justified its permanent ouster from the State. Noting that the Association had admitted its presence and conduct of activities in Alabama during almost forty years and that it had offered to comply in all respects with the qualification statute, we said that "we are unable to perceive that the disclosure of the names of [N. A. A. C. P.'s] . . . rank-and-file members has a substantial bearing" upon any issue presented to the Alabama courts. *Id.,* at 464. *Bates* v. *Little Rock, supra,* involved the conviction of

custodians of records of branches of the N. A. A. C. P. for failure to comply with provisions of local regulations which required organizations operating within the municipality to file with a municipal official, *inter alia,* financial statements showing the names of all contributors to the organizations. These regulations were amendments to ordinances levying license taxes on persons engaging in businesses, occupations or professions within municipal limits. Finding that the occupation taxes were based on the nature of the activity or enterprise conducted, not upon earnings or income, and, moreover, that there had been no showing that the N. A. A. C. P. branches were engaged in activity taxable under the ordinances, or had ever been regarded by tax authorities as subject to taxation under the ordinances, the Court concluded that: "In this record we can find no relevant correlation between the power of the municipalities to impose occupational license taxes and the compulsory disclosure and publication of the membership lists of the local branches of the National Association for the Advancement of Colored People." 361 U. S., at 525. Thus, these cases hold that where the required making public of an organization's membership lists bears no rational relation to the interest which is asserted by the State to justify disclosure, and where because of community temper publication might prejudice members whose names were revealed, disclosure cannot constitutionally be compelled.

Shelton v. *Tucker, supra,* did not involve legislation which, as a means of regulating an appropriately defined class of organizations whose activities menaced the public welfare, required those organizations to reveal their members. It involved an Arkansas statute which, conversely, as an incident of the State's attempt to control the activities of a class of individuals—the teachers in its public schools and publicly supported institutions of higher learning—required the individuals to disclose the asso-

ciations to which they belonged. The statute's purported justification lay in its furtherance of the State's effective selection of teaching personnel; to subserve this end, it attempted to "ask every one of its teachers to disclose every single organization with which he has been associated over a five-year period." 364 U. S., at 487–488. The Court, finding that "Many such relationships could have no possible bearing upon the teacher's occupational competence or fitness," *id.*, at 488, and hence that "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," *id.*, at 490, struck the legislation down. Again, the *ratio decidendi* of the decision was the absence of substantial connection between the breadth of disclosure demanded and the purpose which disclosure was asserted to serve.

The present case differs from *Thomas* v. *Collins* and from *N. A. A. C. P., Bates,* and *Shelton* in the magnitude of the public interests which the registration and disclosure provisions are designed to protect and in the pertinence which registration and disclosure bear to the protection of those interests. Congress itself has expressed in § 2 of the Act both what those interests are and what, in its view, threatens them. On the basis of its detailed investigations Congress has found that there exists a world Communist movement, foreign-controlled, whose purpose it is by whatever means necessary to establish Communist totalitarian dictatorship in the countries throughout the world, and which has already succeeded in supplanting governments in other countries. Congress has found that in furthering these purposes, the foreign government controlling the world Communist movement establishes in various countries action organizations which, dominated from abroad, endeavor to bring about the overthrow of existing governments, by force if need be, and to establish

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totalitarian dictatorships subservient to that foreign government. And Congress has found that these action organizations employ methods of infiltration and secretive and coercive tactics; that by operating in concealment and through Communist-front organizations they are able to obtain the support of persons who would not extend such support knowing of their true nature; that a Communist network exists in the United States; and that the agents of communism have devised methods of sabotage and espionage carried out in successful evasion of existing law. The purpose of the Subversive Activities Control Act is said to be to prevent the world-wide Communist conspiracy from accomplishing its purpose in this country.

It is not for the courts to re-examine the validity of these legislative findings and reject them. See *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 590. They are the product of extensive investigation by Committees of Congress over more than a decade and a half.[37] Cf. *Nebbia* v. *New*

[37] Among the Committee reports, see the following: Investigation of Communist Propaganda, H. R. Rep. No. 2290, 71st Cong., 3d Sess.; Investigation of Nazi and Other Propaganda, H. R. Rep. No. 153, 74th Cong., 1st Sess.; Investigation of Un-American Activities and Propaganda, H. R. Rep. No. 2, 76th Cong., 1st Sess.; Investigation of Un-American Propaganda Activities in the United States, H. R. Rep. No. 1476, 76th Cong., 3d Sess.; Investigation of Un-American Propaganda Activities in the United States, H. R. Rep. No. 1, 77th Cong., 1st Sess.; Special Report on Subversive Activities Aimed at Destroying Our Representative Form of Government, H. R. Rep. No. 2748, 77th Cong., 2d Sess.; Sources of Financial Aid for Subversive and Un-American Propaganda, H. R. Rep. No. 1996, 79th Cong., 2d Sess.; Investigation of Un-American Activities and Propaganda, H. R. Rep. No. 2233, 79th Cong., 2d Sess.; Investigation of Un-American Activities and Propaganda, H. R. Rep. No. 2742, 79th Cong., 2d Sess.; The Communist Party of the United States as an Agent of a Foreign Power, H. R. Rep. No. 209, 80th Cong., 1st Sess.; Report on the Communist Party of the United States as an Advocate of Overthrow of Government by Force and Violence, H. R. Comm. Print, 80th Cong., 2d Sess.; Report of the Committee on Un-

York, 291 U. S. 502, 516, 530. We certainly cannot dismiss them as unfounded or irrational imaginings. See *Galvan* v. *Press*, 347 U. S. 522, 529; *American Communications Assn.* v. *Douds*, 339 U. S. 382, 388–389. And if we accept them, as we must, as a not unentertainable appraisal by Congress of the threat which Communist organizations pose not only to existing government in the United States, but to the United States as a sovereign, independent nation—if we accept as not wholly unsupportable the conclusion that those organizations "are not free and independent organizations, but are sections of a world-wide Communist organization and are controlled, directed, and subject to the discipline of the Communist dictatorship of [a] . . . foreign country," § 2 (5)—we must recognize that the power of Congress to regulate Communist organizations of this nature is extensive. "Security against foreign danger is one of the primitive objects of civil society," James Madison wrote in The Federalist (No. 41). "It is an avowed and essential object of the American Union. The powers requisite for attaining it must be effectually confided to the federal councils." The Federalist (Wright ed. 1961) 295. See also The Federalist (Nos. 2–5), *id.*, at 93 *et seq.* Means for effective resistance against foreign incursion—whether in the form of organizations which function, in some technical sense,

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American Activities to the United States House of Representatives, Eightieth Congress, H. R. Comm. Print, 80th Cong., 2d Sess.; Soviet Espionage Within the United States Government (second report), H. R. Comm. Print, 80th Cong., 2d Sess.; The Strategy and Tactics of World Communism, H. R. Doc. No. 619, 80th Cong., 2d Sess., and (Country Studies), H. R. Doc. No. 154, 81st Cong., 1st Sess.; Annual Report of the Committee on Un-American Activities For the Year 1949, H. R. Rep. No. 1950, 81st Cong., 2d Sess.; Report on Atomic Espionage, H. R. Rep. No. 1952, 81st Cong., 2d Sess. For a bibliography of published committee hearings during this period, see Internal Security Manual, S. Doc. No. 47, 83d Cong., 1st Sess. 216–223.

as "agents" of a foreign power,[38] or in the form of organizations which, by complete dedication and obedience to foreign directives, make themselves the instruments of a foreign power—may not be denied to the national legislature. "To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come . . . ." *The Chinese Exclusion Case,* 130 U. S. 581, 606. See also *Perez* v. *Brownell,* 356 U. S. 44; *Ex parte Quirin,* 317 U. S. 1; *Hines* v. *Davidowitz,* 312 U. S. 52; *United States* v. *Curtiss-Wright Export Corp.,* 299 U. S. 304, 315–322; *Mackenzie* v. *Hare,* 239 U. S. 299, 311; *Fong Yue Ting* v. *United States,* 149 U. S. 698; Mr. Justice Bradley, concurring in the *Legal Tender Cases,* 12 Wall. 457, 554, 556.

Of course, congressional power in this sphere, as in all spheres, is limited by the First Amendment. Individual liberties fundamental to American institutions are not to be destroyed under pretext of preserving those institutions, even from the gravest external dangers. But where the problems of accommodating the exigencies of self-preservation and the values of liberty are as complex and intricate as they are in the situation described in the findings of § 2 of the Subversive Activities Control Act—when existing government is menaced by a world-wide integrated movement which employs every combination of possible means, peaceful and violent, domestic and foreign, overt and clandestine, to destroy the government itself—the legislative judgment as to how that threat may best be met consistently with the safeguarding of personal freedom is not to be set aside merely because the

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[38] See the Foreign Agents Registration Act, 52 Stat. 631, as amended, 22 U. S. C. §§ 611–621.

judgment of judges would, in the first instance, have chosen other methods. Especially where Congress, in seeking to reconcile competing and urgently demanding values within our social institutions, legislates not to prohibit individuals from organizing for the effectuation of ends found to be menacing to the very existence of those institutions, but only to prescribe the conditions under which such organization is permitted, the legislative determination must be respected. *United Public Workers* v. *Mitchell,* 330 U. S. 75; *American Communications Assn.* v. *Douds, supra.*

In a number of situations in which secrecy or the concealment of associations has been regarded as a threat to public safety and to the effective, free functioning of our national institutions Congress has met the threat by requiring registration or disclosure.[39] The Federal Corrupt Practices Act, enacted in 1925, 43 Stat. 1070, 2 U. S. C. §§ 241–245, requires all political committees (organizations accepting contributions or making expendi-

[39] Compare 18 U. S. C. § 612 (prohibiting the publication or distribution of written statements concerning candidates for designated national elective offices unless such statements contain the names of the persons or associations responsible for the publication or distribution and, in the case of associations, the names of their officers); 37 Stat. 553, as amended, 39 U. S. C. §§ 233–234 (prescribing the withdrawal of second-class mailing privileges from publications which do not file with the Postmaster General, and publish in the second issue of the publication printed after filing, a statement setting forth the names of the publication's editors, publishers, managers and owners, and, if the owners are corporations, the names of stockholders and other security holders; and prohibiting the printing, by publications enjoying second-class privileges, of paid advertisements not marked as such), sustained against First Amendment challenge in *Lewis Publishing Co.* v. *Morgan,* 229 U. S. 288; Communications Act of 1934, § 317, 48 Stat. 1089, 47 U. S. C. § 317 (requiring, in the case of all matter broadcast by radio for which a valuable consideration is paid by any person, an announcement that the matter has been paid for by such person).

tures to influence the election of candidates for designated national offices in two or more States, or branches of national committees) to have a chairman and a treasurer, and makes it the duty of the treasurer to keep detailed financial accounts and to file with the Clerk of the House of Representatives periodic statements containing, *inter alia,* the names and addresses of all persons contributing more than $100 to the committee during any year. *Burroughs* v. *United States,* 290 U. S. 534, sustained that statute against the claim that Congress lacked constitutional power to regulate such political organizations; the Court found ample authority in congressional power "to preserve the departments and institutions of the general government from impairment or destruction, whether threatened by force or by corruption." *Id.,* at 545. The Federal Regulation of Lobbying Act, 60 Stat. 839, 2 U. S. C. §§ 261–270, applies to any person who solicits or receives money or anything of value to be used principally, or if the person's principal purpose is, to influence the passage or defeat of legislation by Congress. It requires any person receiving any contributions or expending any money for the purposes of influencing the passage or defeat of legislation to file with the Clerk of the House quarterly statements which set out the name and address of each person who has made a contribution of $500 or more not mentioned in the preceding report. It also requires that any person who engages himself for pay for the purpose of attempting to influence the passage or defeat of legislation, before doing anything in furtherance of that objective, register with the Clerk of the House and the Secretary of the Senate, and state in writing, *inter alia,* his name and address and the name and address of the person by whom he is employed, and in whose interest he works. These paid lobbyists must file quarterly reports of all money received and expended in carrying on their work, to whom paid, for what pur-

poses, the names of publications in which they have caused any articles to be published, and the proposed legislation they are employed to support or oppose; this information is to be printed in the Congressional Record. In *United States* v. *Harriss,* 347 U. S. 612, we held that the First Amendment did not prohibit the prosecution of criminal informations charging violation of the registration and reporting provisions of the Act. We said:

> "Present-day legislative complexities are such that individual members of Congress cannot be expected to explore the myriad pressures to which they are regularly subjected. Yet full realization of the American ideal of government by elected representatives depends to no small extent on their ability to properly evaluate such pressures. Otherwise the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal. This is the evil which the Lobbying Act was designed to help prevent.
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> "Toward that end, Congress has not sought to prohibit these pressures. It has merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose. It wants only to know who is being hired, who is putting up the money, and how much. . . ." *Id.,* at 625.

The Foreign Agents Registration Act, first enacted in 1938, 52 Stat. 631, and since several times amended, provides, as now set forth in 22 U. S. C. §§ 611–621, that agents of foreign principals must register with the Attorney General and file periodic registration statements (which are to be held by the Attorney General open to public inspection) containing, among other information, the registrant's name, a comprehensive statement of the

nature of the registrant's business, a complete list of the registrant's employees and a statement of the nature of the work of each (unless this requirement is waived by the Attorney General), the name and address of the registrant's foreign principals, with further information as to the principals' character, ownership and control, the names and addresses of all persons other than a registrant's foreign principal who contribute to the registrant in connection with specified activities of the registrant, and detailed financial accounts. Such agents must also file with the Attorney General and the Librarian of Congress, and must label as emanating from a registered agent of a foreign principal, and mark with the name of the agent and the principal, any political propaganda transmitted in the United States mails or through any instrumentality of interstate or foreign commerce. In addition, Title 18 U. S. C. § 2386, derived from the so-called Voorhis Act of 1940, 54 Stat. 1201, requires the registration with the Attorney General of organizations subject to foreign control which engage in political or civilian military activity (as those terms are defined in the section), organizations which engage in both political and civilian military activity (as defined), and organizations whose purpose is the overthrow of government by the use or threat of force or violence or military measures. Organizations required to register must report, *inter alia,* the names and addresses of their officers, branch officers and contributors, a detailed description of their activities, and a detailed statement of assets, and must file copies of publications which they issue or distribute; registration statements must be kept up to date and are to be open for public examination. Committee reports pertinent to the Subversive Activities Control Act of 1950 state that the necessity for the legislation derived in part from the difficulty of enforcing the Foreign Agents Registration and Voorhis Acts against Communist organizations "due in part to

the skill and deceit which the Communists have used in concealing their foreign ties." [40]

Certainly, as the *Burroughs* and *Harriss* cases abundantly recognize, secrecy of associations and organizations, even among groups concerned exclusively with political processes, may under some circumstances constitute a danger which legislatures do not lack constitutional power to curb. In *New York ex rel. Bryant* v. *Zimmerman,* 278 U. S. 63, this Court held that the Due Process Clause of the Fourteenth Amendment was not offended by a state statute requiring filing with the Secretary of State of the constitution and by-laws, rules and regulations, membership oath, roster of members and list of officers of every association of twenty or more members having as a condition of membership an oath. The statute made it unlawful to become or remain a member of such an association with knowledge that it had failed to comply with the filing requirement. Exceptions for labor unions and benevolent orders indicated that the measure was directed primarily at the Ku Klux Klan. Compelling disclosure of membership lists and other information by organizations of the character of the Klan, the Court found, was reasonable both as a means for providing the government of the State with knowledge of the activities of those organizations within its borders, and because "requiring this information to be supplied for the public files will operate as an effective or substantial deterrent from the violations of public and private right to which the association might be tempted if such a disclosure were not required." *Id.,* at 72. It was the nature of the organization regulated, and hence the danger involved in its covert operation, which justified the statute and caused us to distinguish the *Bryant* case in *N. A. A. C. P.* v. *Alabama,*

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[40] H. R. Rep. No. 2980, 81st Cong., 2d Sess. 2; H. R. Rep. No. 1844, 80th Cong., 2d Sess. 5.

supra, 357 U. S., at 465.[41] In *N. A. A. C. P.* and *Bates* v. *Little Rock, supra,* as we have said, there was no showing of any danger inherent in concealment, no showing that the State, in seeking disclosure, was attempting to cope with any perceived danger. Nor was this kind of danger—arising when secrecy itself is made an active instrument of public harm—put forth to justify the statute which was held invalid in *Shelton* v. *Tucker, supra.*

Congress, when it enacted the Subversive Activities Control Act, did attempt to cope with precisely such a danger. In light of its legislative findings, based on voluminous evidence collected during years of investigation, we cannot say that that danger is chimerical, or that the registration requirement of § 7 is an ill-adjusted means of dealing with it. In saying this, we are not insensitive to the fact that the public opprobrium and obloquy which may attach to an individual listed with the Attorney General as a member of a Communist-action organization is no less considerable than that with which members of the National Association for the Advancement of Colored People were threatened in *N. A. A. C. P.* and *Bates.* But while an angry public opinion, and the evils which it may spawn, are relevant considerations in adjudging, in light of the totality of relevant considerations, the validity of legislation that, in effecting disclosure, may thereby entail some restraints on speech and association, the existence of an ugly public temper does not, as such and without more, incapacitate government to require publicity demanded by rational interests high in the scale of national concern. Where the mask of anonymity which an organization's members wear serves the double pur-

[41] One aspect of the constitutional attack on the New York statute in the *Bryant* case was that the "liberty" protected by the Due Process Clause comprehended freedom to form harmless associations and engage in non-violent associational activity.

pose of protecting them from popular prejudice and of enabling them to cover over a foreign-directed conspiracy, infiltrate into other groups, and enlist the support of persons who would not, if the truth were revealed, lend their support, see § 2 (1), (6), (7), it would be a distortion of the First Amendment to hold that it prohibits Congress from removing the mask.

These considerations lead us to sustain the registration provisions of § 7, as not repugnant to the First Amendment, insofar as they require Communist-action organizations to file a registration statement containing the names and addresses of its present officers and members. The requirement that persons who were officers or members at any time during the year preceding registration must be listed, see § 7 (d)(2), (4), is a reasonable means of assuring that the obligation to list present members and officers will not be evaded. For reasons which do not require elaboration, the requirement that a registering organization list the aliases of officers and members, see § 7 (d)(5), must also be sustained. Nor do we find that § 7 (d)(3), requiring a financial accounting, or § 7 (d)(6),[42] requiring a listing of all printing presses in the possession or control of the organization or its members violates First Amendment rights. Disclosure both of the financial transactions of a Communist-action organization and of the identity of the organs of publication which it controls might not unreasonably have been regarded by Congress as necessary to the objective which the Act seeks to achieve: to bring foreign-dominated organizations out into the open where the public can evaluate their activities informedly against the revealed background of their character, nature, and connections. Of course, printing presses may not be regulated like guns. That generalization gets us nowhere. On the concrete, specific issue before us, we hold that the

[42] Added by an Act of July 29, 1954, 68 Stat. 586.

obligation to give information identifying presses, without more and as applied to foreign-dominated organizations, does not fetter constitutionally protected free expression. No other kind of regulation is involved here. As to the penalties for failure to register, see § 15 (a), which the Party attacks as exorbitant and oppressive, these are not now before us. They have not yet been imposed on the Party and may never be. *United States* v. *Harriss,* 347 U. S. 612; *United States* v. *Wurzbach,* 280 U. S. 396.

It is argued that if Congress may constitutionally enact legislation requiring the Communist Party to register, to list its members, to file financial statements, and to identify its printing presses, Congress may impose similar requirements upon any group which pursues unpopular political objectives or which expresses an unpopular political ideology. Nothing which we decide here remotely carries such an implication. The Subversive Activities Control Act applies only to *foreign-dominated* organizations which work primarily to advance the objectives of a world movement controlled by the government of a *foreign* country. See §§ 3 (3), 2 (4). It applies only to organizations directed, dominated, or controlled by a *particular* foreign country, the leader of a movement which, Congress has found, is "in its origins, its development, and its present practice, . . . a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups . . . , espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization." § 2 (1). This is the full purported reach of the statute,[43] and its fullest effect. There is no

[43] See S. Rep. No. 2369, 81st Cong., 2d Sess. 4; H. R. Rep. No. 2980, 81st Cong., 2d Sess. 3; S. Rep. No. 1358, 81st Cong., 2d Sess. 3, 5, 8; H. R. Rep. No. 1844, 80th Cong., 2d Sess. 2; 96 Cong. Rec. 13731, 14171–14173.

attempt here to impose stifling obligations upon the proponents of a particular political creed as such, or even to check the importation of particular political ideas from abroad for propagation here. The Act compels the registration of organized groups which have been made the instruments of a long-continued, systematic, disciplined activity directed by a foreign power and purposing to overthrow existing government in this country. Organizations are subject to it only when shown, after administrative hearing subject to judicial review, to be dominated by the foreign power or its organs and to operate primarily to advance its purposes. That a portion of the evidence upon which such a showing is made may consist in the expression of political views by the organization does not alter the character of the Act or of the incidents to which it attaches. Such expressions are relevant only as probative of foreign control and of the purposes to which the organization's actions are directed. The Board, in the present proceeding, so understood the Act. The registration requirement of § 7, on its face and as here applied, does not violate the First Amendment.

C. *Self-Incrimination of the Party's Officers.* Section 7 (a) and (c) requires that organizations determined to be Communist-action organizations by the Subversive Activities Control Board register within thirty days after the Board's registration order becomes final. Registration is to be accompanied by a registration statement, prepared in such manner and form as the Attorney General, by regulations, prescribes. § 7 (d). The form which, pursuant to this authority, the Attorney General has prescribed requires that registration statements "shall be signed by the partners, officers, and directors, including the members of the governing body of the organization." 28 CFR § 11.200; Dept. Justice Form ISA–1. If the organization fails to register or to file a registration statement, it is the duty of the executive officer, the secretary,

the president or chairman, the vice-president or vice-chairman, the treasurer, and the members of the governing board, council, or body, to register the organization by filing a registration statement for it within ten days after the expiration of the thirty-day registration period allowed the organization. See 28 CFR § 11.205, issued pursuant to § 7 (h) of the Act. The Party contends that these requirements cannot be imposed and exacted consistently with the Self-Incrimination Clause of the Fifth Amendment. Officers of the Party, it is argued, are compelled, in the very act of filing a signed registration statement, to admit that they *are* Party officers—an admission which we have held incriminating. *Blau* v. *United States,* 340 U. S. 159; cf. *Quinn* v. *United States,* 349 U. S. 155. What is required is said to be not merely the production of documents kept in an official capacity for the Party, see *McPhaul* v. *United States,* 364 U. S. 372; *United States* v. *White,* 322 U. S. 694; *Wilson* v. *United States,* 221 U. S. 361, but individual action by the officers which, by establishing a connection between the officers and the documents, in effect convicts the officers out of their own mouths. Cf. *Curcio* v. *United States,* 354 U. S. 118.

Manifestly, insofar as this contention is directed against the provisions of § 7 (h) and 28 CFR § 11.205, requiring that designated officers file registration statements in default of registration by an organization, it is prematurely raised in the present proceeding. The duties imposed by those provisions will not arise until and unless the Party fails to register. At this time their application is wholly contingent and conjectural. Cf. *Alabama State Federation of Labor* v. *McAdory,* 325 U. S. 450.[44]

We find that the self-incrimination challenge to § 7 (a) and (d), as implemented by the Attorney General's regu-

[44] *A fortiori* we do not reach at this time the question of the validity of § 8 of the Act. See note 22 *supra.*

lations and forms, is also premature at this time. The privilege against self-incrimination is one which normally must be claimed by the individual who seeks to avail himself of its protection. *Vajtauer* v. *Commissioner of Immigration,* 273 U. S. 103; *United States* v. *Murdock,* 284 U. S. 141; *Rogers* v. *United States,* 340 U. S. 367; see also *Smith* v. *United States,* 337 U. S. 137, 147–148; *United States* v. *Monia,* 317 U. S. 424, 427. We cannot know now that the Party's officers will ever claim the privilege. There is no indication that in the past its high-ranking officials have sought to conceal their identity, and no reason to believe that in the future they will decline to file a registration statement whose whole effect, in this regard, is further to evidence a fact which, traditionally, has been one of public notice. Within thirty days after the Board's registration order becomes final, the Party's officers may file signed registration statements in the form required by Form ISA–1. Or they may file statements claiming the privilege in lieu of furnishing the required information. If a claim of privilege is made, it may or may not be honored by the Attorney General. We cannot, on the basis of supposition that privilege will be claimed and not honored, proceed now to adjudicate the constitutionality under the Fifth Amendment of the registration provisions. Whatever proceeding may be taken after and if the privilege is claimed will provide an adequate forum for litigation of that issue.

The Party contends, however, that under the Subversive Activities Control Act there will be no opportunity for its officers to claim the Fifth Amendment privilege without, at the same time, giving up all the protection which the Fifth Amendment secures them. Persons who come forward to make the claim, it is said, will as much reveal themselves to the Attorney General as officers of the Party as if they had in fact filed a registration statement. But it is always true that one who is required to

assert the privilege against self-incrimination may thereby arouse the suspicions of prosecuting authorities. Nevertheless, it is not and has never been the law that the privilege disallows the asking of potentially incriminatory questions or authorizes the person of whom they are asked to evade them without expressly asserting that his answers may tend to incriminate him. *State* v. *Kemp,* 126 Conn. 60, 9 A. 2d 63; *O'Connell* v. *United States,* 40 F. 2d 201 (C. A. 2d Cir.); *In re Knickerbocker Steamboat Co.,* 139 F. 713 (D. C. S. D. N. Y.); *In re Groban,* 99 Ohio App. 512, 135 N. E. 2d 477, aff'd, 164 Ohio St. 26, 128 N. E. 2d 106, aff'd, 352 U. S. 330; *Allhusen* v. *Labouchere,* L. R. 3 Q. B. D. 654; *Fisher* v. *Owen,* L. R. 8 Ch. D. 645. And see *United States* v. *Hiss,* 185 F. 2d 822 (C. A. 2d Cir.); *Commonwealth* v. *Granito,* 326 Mass. 494, 95 N. E. 2d 539. In *United States* v. *Sullivan,* 274 U. S. 259, this Court sustained a conviction for failure to file an income tax return, despite the defendant's objection that answers called for on the return would have incriminated him. Mr. Justice Holmes, for a unanimous Court, wrote that "If the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all. . . . [I]f the defendant desired to test that or any other point he should have tested it in the return so that it could be passed upon. He could not draw a conjurer's circle around the whole matter by his own declaration that to write any word upon the government blank would bring him into danger of the law." *Id.,* at 263–264. This would, of course, be the normal rule. Perhaps *Sullivan* is distinguishable, however, from the situation of registration under the Subversive Activities Control Act. Tax returns must be filed generally, and answers to tax return questions may involve any of a wide variety of activities, whereas the obligation to file a registration

statement compels a few particular individuals to come forward, to identify themselves, and to suggest, at least, their connection with a relatively limited potential sphere of criminal conduct. Then, too, in *Sullivan,* Mr. Justice Holmes assumed that some, at least, of the answers to the questions on the tax return would not have been incriminating, whereas in the case of the registration statement, any claim of the privilege would involve the withholding of all information; thus, there is, presumably, a greater governmental interest in having the privilege claimed specifically on the form in the tax-return circumstances. To suggest these possible distinctions is to recognize that the applicability of the *Sullivan* principle here may raise novel and difficult questions as to the reach of the Fifth Amendment—questions which should not be discussed in advance of the necessity of deciding them. See *Peters* v. *Hobby,* 349 U. S. 331, 338. The stage at which that decision will become necessary, if at all, is the stage at which *Sullivan* itself was decided: when enforcement proceedings for failure to register are instituted against the Party or against its officers. See *People* v. *McCormick,* 102 Cal. App. 2d Supp. 954, 228 P. 2d 349.

In arguing that the issue is not now premature, the Party cites *Boyd* v. *United States,* 116 U. S. 616, for the proposition that, where a statute compelling the production of potentially incriminating information allows the exercise of the Fifth Amendment privilege only under circumstances which effectively nullify the Amendment's protection, the statute may be held "unconstitutional and void," not merely unenforceable in cases in which a proper claim of privilege is made. Assuming *arguendo* that this proposition is correct, the most that can be drawn from it of pertinence to the present case is that, in a prosecution of the Party for failure to register, or in a prosecution of its officers for failure to register the Party, the Court would have to determine whether the Subversive Activities Con-

trol Act is a statute which, like the statute in *Boyd,* unconstitutionally circumscribes the effectual exercise of the privilege. Obviously, such a determination would never have to be made if an enforcement proceeding were never brought—either because Party officials registered pursuant to § 7 (a) and (d) without complaint, or because they did choose to assert the privilege in some form in which it could be recognized. The *Boyd* case involved a statute providing that in proceedings other than criminal arising under the revenue laws, the Government could secure an order of the court requiring the production by an opposing claimant or defendant of any documents under his control which, the Government asserted, might tend to prove any of the Government's allegations. If production were not made, the allegations were to be taken as confessed. On the Government's motion, the District Court had entered such an order, requiring the claimants in a forfeiture proceeding to produce a specified invoice. Although the claimants objected that the order was improper and the statute unconstitutional in coercing self-incriminatory disclosures and permitting unreasonable searches and seizures, they did, under protest, produce the invoice, which was, again over their constitutional objection, admitted into evidence. This Court held that on such a record a judgment for the United States could not stand, and that the statute was invalid as repugnant to the Fourth and Fifth Amendments. In *Boyd,* production had been ordered, objected to, and, the Court held, unconstitutionally compelled. There is nothing in the case which justifies advisory adjudication of self-incrimination questions prior to the time when a demand for information has been, at the least, made and resisted.

D. *Legislative Predetermination of Adjudicative Fact.* It is next asserted that the Act offends the Due Process Clause of the Fifth Amendment by predetermining legislatively facts upon which the application of the registra-

tion provisions to the Communist Party depends. Two arguments are made in this regard. The first is that although § 3 (3), defining a "Communist-action organization," purports to require findings that an organization is controlled by "the foreign government or foreign organization controlling the world Communist movement referred to in section 2 . . ." and operates primarily to advance the objectives "of such world Communist movement as referred to in section 2 . . . ," the existence of a world Communist movement, its direction by the government of a foreign country, and the nature of its objectives are "found" by Congress in § 2, and may not be litigated in proceedings before the Board. Thus, an organization is precluded from showing operative facts which would take it out of § 3 (3): *viz.*, that there is no world Communist movement, or that, if there is, it is not controlled by a foreign government, or that it does not have the objectives attributed to it by § 2. The second argument is that the Board was in effect foreclosed from finding that the Party was not a Communist-action organization by the declarations, in § 2 (9), (12), and (15), that there are in the United States individuals who knowingly and willfully participate in the world Communist movement, that there is a Communist network in the United States, and that the "Communist movement in the United States is an organization . . . ." Given these "facts," it is asserted, nothing is left to the Board but to supply the name of the organization—a name which, the Party contends, is obvious. Further, it is pointed out, Congress in 1954, prior to the Board's final determination in this proceeding, enacted the Communist Control Act, 68 Stat. 775, 50 U. S. C. § 841 *et seq.*, which declares in its second section:

> "The Congress hereby finds and declares that the Communist Party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the Govern-

> ment of the United States. . . . [T]he policies and programs of the Communist Party are secretly prescribed for it by the foreign leaders of the world Communist movement. . . . [I]ts role as the agency of a hostile foreign power renders its existence a clear present and continuing danger to the security of the United States. . . ."

The Board could not, therefore, the Party argues, find that the Communist Party was not a Communist-action organization without contradicting Congress.

First: We have held, *supra,* that the congressional findings that there exists a world Communist movement, that it is directed by the Communist dictatorship of a foreign country, and that it has certain designated objectives, *inter alia,* the establishment of a Communist totalitarian dictatorship throughout the world through the medium of a world-wide Communist organization, § 2 (1), (4), are not open to re-examination by the Board. We find that nothing in this violates due process. Under § 3 (3) of the Act, an organization may not be found to be a Communist-action organization unless it is shown to be, first, "substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement referred to in section 2 . . . ." The only operative function of § 2 in this respect is to designate what Congress meant by "world Communist movement," "the foreign government," etc. The characteristics of the movement and the source of its control are not to be established by the Attorney General in proceedings before the Board, nor may they be disproved. But this is because they are merely defining terms whose truth, as such, is irrelevant to the issues in such proceedings. They are referents which identify "*the* foreign government" to which § 3 (3) adverts. The Board, construing the statute, concluded that that foreign government was the Soviet Union. We affirm that construction.

The statute, then, defines a Communist-action organization in terms of substantial direction, domination, or control by the Soviet Union. The Government offered evidence to show that the Soviet Union substantially directed, dominated, or controlled the Communist Party. The Party had an opportunity to rebut this showing, and it attempted to do so. The Board found that the Government's showing was persuasive; it issued a 240-page report so concluding; and the Court of Appeals affirmed. None of the operative facts were "predetermined," except in the sense in which any statute, as construed, designates the nature of the facts pertinent to issues which may be litigated under it. If, in future years, in a future world situation, the Soviet Union is no longer the foreign country to which § 2 (1) and (4), fairly read in their context, refer—so that substantial domination by the Soviet Union would not bring an organization within the terms of § 3 (3)—that, too, will be a matter of statutory construction which no "findings" in the statute foreclose. The Board or a reviewing court will be able to say that the "world Communist movement," as Congress meant the term in 1950 (and whether or not there really existed, in 1950, a movement having all the characteristics described in § 2), no longer exists, or that Country *X* or *Y*, not the Soviet Union, now directs it. A similar process of adjudication is required under § 3 (3)(a)(ii), the "objectives" component of the definition of a Communist-action organization. It provides that, in order to be found a Communist-action organization, an organization must be shown to operate "primarily to advance the objectives of such world Communist movement as referred to in section 2 . . . ." What those objectives are is made clear by the terms of § 2 itself. They are there described in detail. Whether they are in fact the objectives of some "world Communist movement" which in fact exists may not be litigated, because the question is irrelevant. Whether the

particular organization against whom the Attorney General files a petition for a registration order operates primarily to advance those objectives is the pertinent issue under the statute, and this issue may be litigated. That is all that due process requires.

The decisions cited by the Party, *Tot* v. *United States,* 319 U. S. 463; *McFarland* v. *American Sugar Ref. Co.,* 241 U. S. 79; *Manley* v. *Georgia,* 279 U. S. 1; *Western & Atlantic R. Co.* v. *Henderson,* 279 U. S. 639; and see *Bailey* v. *Alabama,* 219 U. S. 219, have no application here. These cases involved statutes which, purporting to attach legal consequences to one set of facts, created a rebuttable presumption of the existence of that set of facts which arose upon proof of other facts having, this Court found, no rational relation to the facts upon which the statutory consequences turned. The Subversive Activities Control Act, however, does not define a Communist-action organization as one which operates primarily to advance whatever objectives are actually held by the world Communist movement, leaving these objectives as facts to be proved. It finds that the particular objectives set out in § 2 *are* those of the world Communist movement and requires the registration of certain foreign-dominated organizations which operate primarily to advance those objectives. One, and only one, set of facts is in issue under § 3 (3)(a)(ii): whether a particular organization does or does not operate primarily to advance those objectives; and, as to this, the legislation "predetermines" nothing.

Second: We do not find that the congressional assertions in § 2 (9), (12) and (15), that there exist in the United States individuals dedicated to communism, a "Communist network," a "Communist movement," and a Communist "organization," deprive the Party of the fair hearing which due process of law requires. Fairly read, these findings neither compel nor suggest the outcome in

any particular litigation before the Board. They do not create the impression that there is a single Communist-action organization in the United States, still less that the Communist Party is "it." Nor can we hold that the findings of § 2 of the Communist Control Act of 1954 unconstitutionally prejudice the Party. It is not suggested that these were enacted with a purpose to influence the then-pending proceedings in the present case. Rather, they are a portion of legislation deemed necessary by Congress pursuant to its continuing duty to protect the national welfare. Nowhere in the extensive modified reports of the Board nor in the opinions of the Court of Appeals are the 1954 legislative findings considered. While we must, of course, assume that the Board was aware of them, we cannot say that their very annunciation by Congress—in the absence of any showing that the Board took them into account—foreclosed or impaired a fair administrative determination.

The other constitutional questions raised by the Party have been carefully considered, but do not call for detailed discussion. And we must decline, of course, to enter into discussion of the wisdom of this legislation. The Constitution does not prohibit the requirement that the Communist Party register with the Attorney General as a Communist-action organization pursuant to § 7.

The judgment of the Court of Appeals is

Affirmed.

MR. CHIEF JUSTICE WARREN, dissenting.

When this case was here in 1956, the Court refused to pass upon the constitutional issues raised by the parties, and instead remanded to the Board because of the possibility that the record was tainted by perjured testimony. At that time the Court said: "This non-constitutional issue must be met at the outset, because the case must be decided on a non-constitutional issue, if the record calls

for it, without reaching constitutional problems." *Communist Party of the United States* v. *Subversive Activities Control Board,* 351 U. S. 115, 122. The Court also noted that a remand was required because the "fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted." *Id.,* at 124. These statements, applicable in 1956, are even more applicable today, for, in my opinion, the record in this case presents four serious errors of a non-constitutional nature, the proper resolution of which would not only avoid unnecessary constitutional adjudications, but would also be consistent with the requirements of a fair administration of justice.[1] To be sure, I, like most of my Brethren, have views on the constitutional questions which are raised by this case. I also recognize that a decision as to these constitutional questions would probably put an end to this already protracted litigation. However, I do not believe that strongly felt convictions on constitutional questions or a desire to shorten the course of this litigation justifies the Court in resolving any of the constitutional questions presented so long as the record makes manifest, as I think it does, the existence of non-constitutional questions upon which this phase of the proceedings can and should be adjudicated. After persuasively expounding the reasons which underlie this Court's steadfast reluctance to decide

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[1] On remand from this Court, the Board expunged the entire testimony of the alleged perjurers Crouch, Matusow, and Johnson. Although the Board concluded, and the Court of Appeals agreed, that the remaining evidence was sufficient to support an order compelling the petitioner to register, there can be no doubt that the Government's case was weakened by the deletion of the testimony of three important witnesses, and it is therefore on the basis of this already abbreviated record that the non-constitutional errors alleged by the petitioner must be considered.

constitutional questions prematurely, *ante,* pp. 71–81, the Court concludes that the resolution of some of the constitutional issues raised by the parties should be left for another day. However, in a surprising turnabout, the Court then proceeds to decide other constitutional questions, and it reaches these questions only by first brushing aside, on the basis of a procedural technicality or a strained analysis, many important non-constitutional issues. I do not think that the Court's action can be justified.

I.

One of the Government's leading witnesses at the initial hearing before the Board was Benjamin Gitlow. Prior to his expulsion from the Communist Party in 1929, Gitlow had been a high official in the Party. His testimony before the Board covered over 1,400 pages in the record, and the Board relied heavily upon his testimony in finding that the Communist International controlled petitioner, subsidized it, and supervised it through foreign representatives in this country. In addition, the Board relied upon Gitlow's testimony to corroborate the testimony of government witness Joseph Kornfeder, whose demeanor led the Board "to examine his testimony with . . . caution." In 1940, Gitlow turned over to the FBI a large quantity of official documents relating to the Party and its past history. He also prepared and gave to the FBI memoranda which explained and interpreted the documents. During his direct examination at the original hearing before the Board, Gitlow identified many of the original documents and explained their contents and significance. On cross-examination, the petitioner, obviously hoping to impeach Gitlow's damaging testimony, moved for the production of the explanatory memoranda which Gitlow had prepared in 1940. The petitioner's motion was denied by the Board. Although

in its first petition in the Court of Appeals to review the order of the Board, the petitioner assigned the Board's denial of the motion for production as error, the court failed to decide the question, presumably because the petitioner had not pressed the point either in its brief or during oral argument. *Communist Party of the United States* v. *Subversive Activities Control Board,* 102 U. S. App. D. C. 395, 403, 254 F. 2d 314, 322. Nor was the issue raised in the petition for certiorari filed in this Court in 1955. However, after this Court remanded the case in 1956, the petitioner again moved the Board to order production of the memoranda. The Board denied the motion, and, on review, the Court of Appeals held that the Board's ruling could not be corrected by a petition to review the Board's order. Relying on *Consolidated Edison Co.* v. *Labor Board,* 305 U. S. 197, the court said that the petitioner's failure to make a motion in the Court of Appeals for leave to adduce additional evidence under § 14 (a) of the Act [2] at the time the Board initially refused to order production of the memoranda constituted a waiver of the objection. After a second remand to the Board by the Court of Appeals, the Party did seek to have the memoranda produced pursuant to § 14 (a) of the Act. However, the Court of Appeals denied the motion, later explaining that the petitioner's

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[2] The relevant portion of § 14 (a) reads as follows:
"If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material, the court may order such additional evidence to be taken before the Board and to be adduced upon the proceeding in such manner and upon such terms and conditions as to the court may seem proper. The Board may modify its findings as to the facts, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by the preponderance of the evidence shall be conclusive, and its recommendations, if any, with respect to action in the matter under consideration." 64 Stat. 1001–1002.

procedural misstep could not be rectified *nunc pro tunc*. *Communist Party of the United States* v. *Subversive Activities Control Board,* 107 U. S. App. D. C. 279, 282, 277 F. 2d 78, 81.

Today, the Court refuses to reach this important evidentiary question, and it does so by adopting an argument that was unanimously rejected by the Court of Appeals. 102 U. S. App. D. C., at 402–403, 254 F. 2d, at 321–322. The Court holds that petitioner may not now challenge the Board's refusal to order the production of the Gitlow memoranda because it failed to raise the question in its 1955 petition for certiorari. With due respect, I must dissent from this holding, which, to the extent that it transforms Rule 23, par. 1 (c) of our Rules of Procedure [3] into an immutable rule of abandonment, is both unorthodox and unwise. The Court's position will not bear analysis.

It is undoubtedly true that piecemeal appeals should be avoided and that claims not preserved throughout a litigation will not generally be entertained at some subsequent, and perhaps terminal, stage of the proceedings. However, this general rule is not an absolute dogma, and has on numerous occasions yielded to subordinating policy considerations. In fact, the United States Reports are replete with instances wherein the Court decided issues which were never even mentioned in the petition for certiorari. See, *e. g., Boynton* v. *Virginia,* 364 U. S. 454; *Mackey* v. *Mendoza-Martinez,* 362

[3] Rule 23, par. 1 (c) provides:

"The petition for writ of certiorari shall contain . . . .

. . . . . .

"(c) The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. *Only the questions set forth in the petition or fairly comprised therein will be considered by the court.*" (Emphasis added.)

U. S. 384; *Neese* v. *Southern R. Co.*, 350 U. S. 77; *Alma Motor Co.* v. *Timken-Detroit Axle Co.*, 329 U. S. 129; *Marshall* v. *Pletz*, 317 U. S. 383; *Erie R. Co.* v. *Tompkins*, 304 U. S. 64. One of the policy considerations which has always led the Court to forsake the general rules of waiver is the admonition that "we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Service, Inc.*, v. *McLaughlin*, 323 U. S. 101, 105. Thus, in *Neese* v. *Southern R. Co.*, *supra*, the Court refused to pass upon the constitutional question which had been tendered by the petition for certiorari, and instead rested its decision upon the adjudication of an evidentiary question which had not been raised in the petition for certiorari. In so doing, the Court said: "We need not consider respondent's contention that only the jurisdictional question was presented by the petition for certiorari, for in reversing on the above ground we follow the traditional practice of this Court of refusing to decide constitutional questions when the record discloses other grounds of decision, *whether or not they have been properly raised before us by the parties.*" *Id.*, at 78. (Emphasis added.) And in *Alma Motor Co.* v. *Timken-Detroit Axle Co.*, *supra*, the Court avoided a difficult constitutional adjudication by resting its decision on a non-constitutional ground which, as the Court noted, "was neither considered nor decided by the court below, nor argued here." *Id.*, at 132. Only last Term in *Mackey* v. *Mendoza-Martinez*, *supra*, the Court, in an effort to avoid an unnecessary constitutional decision, remanded the case to the District Court for consideration by that court of a non-constitutional issue which had not been raised by either party in any court, but which this Court, *sua sponte*, had discovered lurking in the record. This action was taken even though the case had had a lengthy history and had been before this Court on a previous occasion. See also *Boynton* v. *Virginia*, *supra*. Thus, if

the Court, in order to avoid the adjudication of constitutional questions, has in the past rested its decisions on issues not raised by a petition for certiorari, there certainly should be no objection to avoiding a difficult constitutional decision in this case by resolving a non-constitutional issue which was decided by the Court of Appeals, explicitly raised in the instant petition for certiorari, and thoroughly briefed by counsel for both sides.[4]

Since the petitioner should not be deemed to have waived the Gitlow question if a resolution of that question will make it unnecessary for the Court to reach the constitutional issues presented by this case, the next question which must be considered is whether a determination of the Gitlow question, on the merits, would require a reversal of the judgment below. I think it would. As indicated, the Court of Appeals, relying on the *Consolidated Edison* case, based its decision on the ground that the petitioner waived its objection by not having made a timely motion for leave to adduce additional evidence pursuant to § 14 (a) of the Act. However, the lower court's reliance upon *Consolidated Edison* is misplaced. In that case, an examiner for the Labor Board refused to permit one of the parties to a proceeding to offer the testimony of two witnesses who had not been scheduled to

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[4] In view of the Court's justified concern over the lengthy history of this litigation, it is noteworthy, I think, that many of the cases to which I have referred also involved protracted litigations, which were lengthened even further by the Court's refusal to adjudicate the constitutional issues argued by the parties. However, what was said in the *Alma Motor* case is equally applicable here: "We agree that much time has been wasted by the earlier failure of the parties to indicate, or the Circuit Court of Appeals or this Court to see, the course which should have been followed. This, however, is no reason to continue now on the wrong course. The principle of avoiding constitutional questions is one which was conceived out of considerations of sound judicial administration. It is a traditional policy of our courts." 329 U. S., at 142.

appear. Instead of invoking §§ 10 (e) and (f) of the National Labor Relations Act (which is very similar to § 14 (a) of the Subversive Activities Control Act) and seeking leave of the Court of Appeals to adduce the testimony of the two witnesses, the offering party objected to the examiner's action in a petition to have the Board's final order set aside. The Court of Appeals rejected the claim. This Court recognized that the examiner's action was arbitrary, but, nevertheless, it held that the party's sole remedy in such a situation was to make a motion for leave to adduce the additional testimony of the proffered witnesses, and that by having failed to pursue that remedy, the party waived its objection.

The wisdom of the Court's holding in *Consolidated Edison,* insofar as the waiver question is concerned, is certainly subject to criticism. Not only did the decision permit a clearly arbitrary ruling of an examiner to stand uncorrected, but it also established a cumbersome procedure whereby resort to the Court of Appeals was required every time the Board excluded evidence which the offering party thought should have been admitted. It is not surprising, therefore, that the Courts of Appeals have consistently sought ways to avoid the impact of this Court's decision in *Consolidated Edison.* Thus, one Court of Appeals adopted the fiction of treating the petition for review as including, *sub silentio,* an application by the party for leave to adduce additional evidence. *Mississippi Valley Structural Steel Co.* v. *Labor Board,* 145 F. 2d 664, 667. On another occasion, the same court limited the *Consolidated Edison* holding "to evidence going to the merits of the charge and not to the question of the regularity or fairness of the hearing as conducted by the Board." *Cupples Company Manufacturers* v. *Labor Board,* 103 F. 2d 953, 956. In fact, even the Court of Appeals whose judgment we are now reviewing applied the *Consolidated*

Edison rule with great reluctance.[5] However, it is not necessary to re-evaluate the holding of *Consolidated Edison,* for, in my opinion, that holding is not applicable to the type of situation presented by this case. The statute construed in *Consolidated Edison,* like § 14 (a) of this Act, deals only with a situation wherein a party to a proceeding wishes to introduce additional evidence which he has acquired independently and which will bolster his own case. The statute, by its terms, clearly does not apply to a situation in which a party requests the production of documents for the sole purpose of impeaching his opponent's witnesses. The party making such a request is not attempting "to adduce additional evidence"; he is merely seeking to use documents in the possession of his adversary to impeach testimony which has already been adduced by his adversary. It is thus interesting to note that of all the cases which I have found involving an application of the *Consolidated Edison* principle, not one has dealt with the production of documents for purposes of impeachment.[6] In fact, the most recent decision which involved such a situation properly ignored *Consolidated Edison* and held, on a petition to enforce the Labor

[5] After discussing the different ways in which other courts have attempted to avoid applying the *Consolidated Edison* rule, the Court of Appeals said: "There is much force to these various suggestions, and perhaps we misconstrue the opinion of the Supreme Court. But we are bound by the opinion as we read it." 102 U. S. App. D. C., at 404, 254 F. 2d, at 323.

[6] See *Labor Board* v. *Crompton-Highland Mills, Inc.,* 337 U. S. 217, 221; *Pittsburgh Plate Glass Co.* v. *Labor Board,* 313 U. S. 146, 155; *Coca-Cola Bottling Co. of St. Louis* v. *Labor Board,* 195 F. 2d 955, 956; *Labor Board* v. *Fairchild Engine & Airplane Corp.,* 145 F. 2d 214, 215; *Labor Board* v. *National Laundry Co.,* 78 U. S. App. D. C. 184, 185, 138 F. 2d 589, 590; *California Lumbermen's Council* v. *Federal Trade Comm'n,* 115 F. 2d 178, 183; *Swift & Co.* v. *Labor Board,* 106 F. 2d 87, 91; *Wilson & Co.* v. *Labor Board,* 103 F. 2d 243, 245.

Board's order, that the Board's failure to require the production of a possibly impeaching document required a remand to the Board. This action was taken even though the complaining party had not made a motion in the Court of Appeals for leave to adduce additional evidence. *Labor Board* v. *Adhesive Products Corp.*, 258 F. 2d 403.[7]

Since the Court of Appeals erred in resting its decision on *Consolidated Edison,* it next becomes necessary to consider the Government's contention that, even if the Board should have ordered the production of the memoranda, its failure to do so was merely harmless error. In my judgment, the error committed by the Board was anything but harmless. There can be little doubt that the Board should have ordered the production of the Gitlow memoranda. *Jencks* v. *United States,* 353 U. S. 657, 18 U. S. C. § 3500. It is certainly possible that the petitioner, armed with these memoranda, may have been able to impeach significantly the testimony of Gitlow, who, as has already been indicated, was a key witness for the Government, and whose expulsion from the Party in 1929 undoubtedly made him hostile toward the petitioner. It would be contrary to our traditional scrupulous protection of the right to have potentially impeaching docu-

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[7] Even the court below has not followed its conception of the *Consolidated Edison* rule consistently. Thus, on April 11, 1958, after the case had been remanded to the Board, the court ordered the Government to produce prior statements made by witness Budenz, even though the petitioner had not made a motion pursuant to § 14 (a) for leave to adduce additional evidence when the Board initially denied a motion for production of the Budenz statements. It is difficult to understand why the court did not follow the same procedure with regard to the Gitlow memoranda, especially in view of the fact that petitioner did make a motion for production, pursuant to § 14 (a), the second time that the case was remanded to the Board. Since the case was being remanded in any event, the court's refusal to grant the § 14 (a) motion seems unreasonable.

ments produced for the Court to say that the Board's failure to order the production of this important witness' prior memoranda was merely harmless error. See *Jencks* v. *United States, supra; Campbell* v. *United States,* 365 U. S. 85. Accordingly, since the Court of Appeals committed reversible error in refusing to remand the case for the production of the Gitlow memoranda, I think the Court should abandon its reliance upon an unorthodox procedural technicality, remand the case to the Board for the production of the memoranda and the further cross-examination of Gitlow, and thereby, consistently with its own admonition, avoid the premature adjudication of complex and difficult constitutional issues.

II.

Another of the Government's major witnesses at the hearing before the Board was Louis Budenz. As the Court's opinion indicates, Budenz' testimony filled some 700 pages in the record and was used by the Board to support many of its findings, including the crucial finding that petitioner received financial aid from the Soviet Union after petitioner's disaffiliation from the Communist International. During his direct examination, Budenz made repeated references to the so-called Starobin letter and to the Childs-Weiner conversation. Budenz admitted that he had given reports to the FBI concerning these matters, but, on the Government's objection, the Board erroneously denied the petitioner's motion for the production of all such prior statements. After this Court remanded the case in 1956, the petitioner renewed its motion. On the Government's objection, the motion was again denied by the Board. The Court of Appeals affirmed the Board's action on the ground that the FBI seemingly did not have in its possession any statements made by Budenz concerning the Starobin and Weiner

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matters.[8] However, in response to a petition for rehearing filed by the petitioner in the Court of Appeals, the Government disclosed for the first time that the FBI did have in its possession disc recordings of a five-day interview with Budenz in 1945, and that these discs contained statements pertinent to the Starobin letter and the Childs-Weiner conversation. Accordingly, the Court of Appeals

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[8] The court's conclusion resulted from the Government's representation that Budenz had made no statements to the FBI concerning the Starobin and Weiner matters. However, in view of the following extract from the record, it would seem that the court should have pressed the inquiry further:

Q. "Prior to your appearance before the Un-American Activities Committee, did you tell the FBI about the Starobin letter?

"A. That, I wouldn't recall.

"Q. You don't recall that. You spent 100 hours with the FBI, or more, you said, before you went there?

"A. Yes, but the FBI asked me a very great number of questions, and I answered their questions.

"Q. But the Manuilsky business and the Starobin letter—

"A. I may have told them, counselor. I say I do not recall. The thing is that—

"Q. May I complete my question, please?

"A. Yes.

"Q. The Starobin letter and the Manuilsky incident were supposed to be quite important in this setup that you got up against the Communist Party, was it not? You now say you don't recall whether you gave it to the FBI?

"A. I don't recall the time. The FBI asked me a great number of questions. *Undoubtedly if it were in my book, I must have given it to the FBI.* The point of the matter is that the FBI particularly at that period, and as a matter of fact this has been the general practice, asked me questions. I do not rush out and volunteer a lot of information, as a rule.

"Q. But didn't you regard it as an important incident?

"A. Oh, sure it was important.

"Q. *As a matter of fact, you described it in your book, 'This is My Story,' as—and I quote your language—'the most sensational by-product of the San Francisco conference.' Did you not so describe it?*

"A. *That, I think, was correct.*" (Emphasis added.)

ordered the Government to produce all statements made by Budenz relating to the matters in question. During the Board proceedings that followed, statements made by Budenz relating to the Starobin letter and the Weiner conversation were excerpted from the recorded interview and the FBI memoranda of later interviews, and these extracts were furnished to the petitioner. Based on the apparent inconsistency between the statements produced and the testimony given by Budenz before the Board, the petitioner moved that Budenz be recalled for cross-examination in the light of the produced documents. As it turned out, however, Budenz was severely ill, and, as stipulated by both parties, was unavailable for further examination. The petitioner then moved to have all of Budenz' testimony stricken on the basis of the inconsistencies referred to, and on the further ground that Budenz' unavailability for cross-examination made it impossible for the petitioner to demonstrate exactly how unreliable all of Budenz' testimony had been. The Board agreed to strike Budenz' testimony on the Starobin and Weiner matters, but it refused to strike any other portion of his testimony. On appeal, the Court of Appeals affirmed the Board's rulings.

This Court now affirms the lower court's holding, saying that great weight must be given to those whose primary responsibility it is to consider the credibility of witnesses. However, the problem is not as simple as the Court would have us believe. A distinction must be drawn between those situations in which the unavailability of a witness is due to the fault of neither party, and those situations in which the witness' unavailability is directly attributable to the conduct of one of the parties. The rule to be applied in each of these cases has been succinctly stated by Professor Wigmore:

> "Where the witness' *death* or *lasting illness* would not have intervened to prevent cross-examination

> but for the *voluntary act* of the witness himself or the party offering him—as, by a postponement or other interruption brought about immediately after the direct examination, it seems clear that the direct testimony must be struck out. Upon the same principle, the same result should follow where the illness is but temporary and the offering party might have recalled the witness for cross-examination before the end of the trial.
>
> "But, where the death or illness prevents cross-examination under such circumstances that *no responsibility* of any sort can be attributed to either the witness or his party, it seems harsh measure to strike out all that has been obtained on the direct examination. Principle requires in strictness nothing less. But the true solution would be to avoid any inflexible rule, and to leave it to the trial judge to admit the direct examination so far as the loss of cross-examination can be shown to him to be not in that instance a material loss." Wigmore, Evidence (3d ed.), § 1390.

Thus, as Professor Wigmore indicates, if neither the petitioner nor the respondent had been responsible for Budenz' unavailability, then the Court would be correct in saying that the Board must be given wide latitude in deciding whether to strike Budenz' testimony, and that the Board will be reversed only if it has abused its discretion. However, if Budenz' unavailability was caused by the Government's conduct, then, as Professor Wigmore states, "it seems clear that the direct testimony must be struck out."

The record of this case convincingly demonstrates that the Government was directly responsible for creating the situation in which the petitioner found itself in 1958, when it finally obtained Budenz' prior statements but could make no use of them. Not only did the Govern-

ment, by its objections to the petitioner's original motions for production, prompt the Board to refuse production, but it also prevented the Court of Appeals from rectifying the Board's error by representing to the Court that Budenz had made no statements to the FBI concerning the Starobin and Weiner matters. Then, not until it was too late for Budenz to be called for further cross-examination, was the Court of Appeals apprised of the existence of Budenz' prior statements. I do not mean to imply that the Government deliberately withheld this vital information beyond the time that it could have aided the petitioner. But there can be no doubt that the Government's delay in disclosing the existence of Budenz' prior statements made it impossible for the petitioner to make effective use of those statements. Since the Government's voluntary acts caused the curtailment of Budenz' cross-examination, I think the Court of Appeals should have granted the relief which is normal in this type of situation by ordering the Board to strike all of Budenz' testimony.

Nor can the lower court's error be dismissed as harmless. Reference has already been made to the importance of Budenz' testimony to the Government's case. Moreover, as the Court's opinion demonstrates, and as the Court of Appeals admitted, there were marked discrepancies between Budenz' prior statements and his testimony before the Board. Had the petitioner been given Budenz' prior statements, it might have pursued a course of cross-examination which would have thoroughly discredited Budenz and destroyed the Board's apparent faith in his reliability.[9] However, the petitioner was never able to

[9] In this connection, it should be noted that in three additional places in its Report the Board found it necessary to explain seeming inconsistencies in Budenz' testimony. If the petitioner could have discredited Budenz' testimony on the basis of his prior statements, it is possible that the Board would have resolved these other discrepancies against Budenz and the Government.

conduct such an examination, and the record is therefore clouded by the not unlikely possibility that much of Budenz' testimony was unreliable. This being the case, regard for the elemental rules of fair procedure requires that Budenz' testimony be stricken from the record. Cf. *Communist Party of the United States* v. *Subversive Activities Control Board,* 351 U. S. 115; *Mesarosh* v. *United States,* 352 U. S. 1.

III.

I think the Court of Appeals also erred in its interpretation and application of § 3 (3), one of the most crucial provisions of the Act. That section defines a "Communist-action organization" as one (1) which is directed or dominated "by the foreign government or foreign organization controlling the world Communist movement," and (2) which "operates primarily to advance the objectives of such world Communist movement as referred to in section 2 of this title." 64 Stat. 989. Unfortunately, the statute does not, in terms, define the objectives of the world Communist movement which the alleged Communist-action organization must be found to advance. However, to set the framework for its argument, the petitioner suggested that the objectives of the world Communist movement, as contemplated by the Act, should be defined as: (1) the overthrow of all existing capitalist governments by any means necessary, including force and violence, and (2) the establishment of a Communist totalitarian dictatorship, which (3) will be subservient to the Soviet Union. The Court of Appeals tentatively accepted the petitioner's definition of the objectives, and concluded that the Board's findings demonstrate that the Party operates to advance all of the suggested objectives. With regard to the first of the three objectives, the court relied upon the Board's finding that the Party "advocates the overthrow of the Government

of the United States by force and violence *if necessary.*" (Emphasis added.)

The petitioner contends that, in the light of our decisions in *Dennis* v. *United States,* 341 U. S. 494; and *Yates* v. *United States,* 354 U. S. 298, the objectives component of § 3 (3) should be construed in such a way that an organization could not be deemed to be advancing the first of the three cited objectives unless it engages in advocacy directed at prompting forceful overthrow of the Government, as distinguished from advocacy as an abstract doctrine; that the Board did not find that the Party engaged in illegal advocacy, but instead found that the petitioner merely engaged in the advocacy of force "if necessary," which is tantamount to the advocacy of forceful overthrow as an abstract doctrine; and that the absence of a finding of unlawful advocacy on the part of the petitioner renders the Board's order unsupportable.

In my judgment, the petitioner's argument is eminently correct. In *Yates* v. *United States, supra,* the Court made it clear that a distinction had to be drawn "between advocacy of abstract doctrine and advocacy directed at promoting unlawful action." *Id.,* at 318. It then went on to hold that, while the latter type of advocacy could be prohibited consistently with the dictates of the First Amendment, an attempt to prohibit the former type of advocacy would raise grave constitutional problems. The Court therefore concluded that Congress, well aware of this distinction and of the constitutional problems involved, intended the Smith Act to apply only to advocacy which was aimed at inciting to action. See also *Dennis* v. *United States, supra.* There is no reason to assume that when Congress adopted the Subversive Activities Control Act it was any less aware of the constitutional pitfalls involved in attempting to proscribe advocacy as an abstract doctrine than it was when it passed the Smith Act, for, as the Court said in *Yates,* in construing a con-

gressional enactment, "we should not assume that Congress chose to disregard a constitutional danger zone so clearly marked." *Id.*, at 319. Therefore, since the construction urged by the petitioner will make the statute more compatible with this Court's prior decisions defining the area of prohibition permissible under the First Amendment, it should be adopted, and the Court should hold that the Board cannot require a group to register as a Communist-action organization unless it first finds that the organization is engaged in advocacy aimed at inciting action.[10] Clearly, the Board made no such finding in this case. The Board merely found that the petitioner has engaged in advocating the use of force "if necessary." However, this is not the sort of advocacy which incites to action. At most, it is no more than the formulation of an abstract doctrine, which, as the Court indicated in *Yates*, "is too remote from concrete action to be regarded as the kind of indoctrination preparatory to action which was condemned in *Dennis*." *Id.*, at 321–322.

The Court brushes aside the petitioner's argument by saying that, because this statute is "regulatory" and not "prohibitory," the *Yates* and *Dennis* cases are inapplicable. However, it blinks reality to say that this statute is not prohibitory. There can be little doubt that the registration provisions of the statute and the harsh sanctions which are automatically imposed after an order to register has been issued make this Act as prohibitory as any criminal statute. Therefore, for the reasons which I have stated, I think the Board's order ought to be vacated and the case remanded so that the Board can

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[10] The expansive lengths to which the Court has on occasion gone in construing a statute in a manner designed to avoid constitutional challenges is demonstrated by the decision in *Scales* v. *United States*, decided this day, *post*, p. 203. Certainly, the interpretation of this Act suggested by the petitioner would require far less legislative redrafting than the Court undertook to accomplish in *Scales*.

determine whether the evidence supports a finding that the petitioner is engaging in advocacy aimed at inciting the forceful overthrow of the Government.

IV.

Finally, I think the Court of Appeals erred in sustaining an order of the Board which was based, in part, on a finding which the court admitted lacked evidentiary support. Section 13 (e) of the Act lists eight criteria which the Board should consider in determining whether a group is a Communist-action organization. The seventh of these criteria is the extent to which "for the purpose of concealing foreign direction, domination, or control, or of expediting or promoting its objectives," 64 Stat. 999, an organization engages in certain secret practices or otherwise operates on a secret basis. In its original Report, the Board concluded that the Party engaged in secret practices in order to achieve both of the purposes recited in the Act. The Court of Appeals, in its first opinion, held that the finding of secret practices was proper, but that the Government's evidence failed to demonstrate the purposes for which these practices were pursued. While recognizing this deficiency in the Government's evidence, the Court nevertheless affirmed the Board's order. The two Modified Reports, issued by the Board after the first and second remands, eliminated the original finding that one of the purposes of the secret practices was the concealment of foreign control. However, though no additional evidence was taken regarding secret practices, and even though the Court of Appeals had already expressed its view that the Board's purpose findings were unsupported by the evidence, the two Modified Reports reiterated the finding that the secret practices were engaged in to promote the objectives of the Communist Party. In its third opinion, the Court of Appeals adhered to its ruling that the Board's finding was unsupported by the evidence,

but it nevertheless affirmed the order, holding that the finding was merely a subsidiary one and that the whole record supported the Board's conclusion that the petitioner met the definition of a Communist-action organization contained in § 3 (3).

The Court now adopts the lower court's reasoning, and holds that since the unsupported finding was merely "subsidiary," it is not necessary to remand the case to ascertain whether the Board would reach the same ultimate conclusion in the absence of the unsupported finding. I submit that the Court's action does not square either with the facts, as they appear in the record, or with the prior decisions of this Court. It is unrealistic to characterize the Board's secrecy finding as insignificant and subsidiary. It directly relates to one of the eight enumerated criteria listed in § 13 (e). The Board devoted 19 pages to it in the Modified Report. It is also the only one of the § 13 (e) standards concerning which there was any substantial amount of evidence of post-Act conduct on the part of the Party.[11] In view of these circumstances, and in view of the fact that the Board found it necessary to reassert the finding, even though it knew that the Court of Appeals considered the finding unsupported by the evidence, how can it be said that the

[11] At this point, it should be observed that the vast bulk of the evidence introduced by the Government at the hearing before the Board related to the Party's activities prior to its disaffiliation from the Communist International in 1940. In order to link this stale evidence to the Party's current activities, with which the Act is concerned, the Board indulged in a presumption of continuity, whereby it reasoned that since the Party was under Soviet control prior to 1940, and since the Party still adheres to the principles of Soviet Communism, it must be presumed that the Party is still controlled by the Soviet Union. The validity of such a presumption is certainly dubious. However, if the Board is to be permitted to rely upon this presumption, the least to which the Party is entitled is that the record be free from serious procedural errors and that the findings upon which the Board rests its order be supported by some evidence.

finding is unimportant? Surely, if the finding is as unimportant to the Board's conclusion as the Court of Appeals and this Court seem to think it is, the Board would have abandoned the finding altogether rather than retain it and risk another remand either by the Court of Appeals or by this Court. These factors would not seem to indicate that the finding was trivial, but, on the contrary, that it was crucial to the Board's ultimate conclusion. This being the case, it will not do for the Court of Appeals or for this Court to conclude that the Board would have reached the same conclusion without relying upon the unsupported finding. Congress has placed the responsibility for making that determination in the Board and not in the courts. As this Court said in *Securities & Exchange Comm'n* v. *Chenery Corp.*, 318 U. S. 80, 88, "If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment." An agency's "action must be measured by what . . . [it] did, not by what it might have done." *Id.*, at 93–94. See also *Labor Board* v. *Virginia Elec. & Power Co.*, 314 U. S. 469. Therefore, because the Board's order is clouded by the fact that it rests upon a finding which is admittedly unsupported by the evidence, I think the Court should strike the secrecy finding and remand the case to the Board for reconsideration.

V.

In my view, the Court today strays from the well-trod path of our prior decisions by reaching out to decide constitutional issues prematurely. If the Court would remand on any one of the four errors which I have discussed, and I think each warrants a remand, the resolution of the difficult constitutional issues presented by this case would certainly be postponed, and perhaps

made totally unnecessary. For, if further cross-examination of Gitlow based on the memoranda discredited his testimony, or if all of Budenz' testimony were stricken, or if the Board were required to find that the petitioner actually engaged in advocacy aimed at inciting action, or if the secrecy finding were stricken, the Government's case might be so weakened that it would be impossible for the Board to conclude, on the basis of the present record, that the petitioner is a Communist-action organization, as that term is used in the statute. Moreover, a remand on the basis of these non-constitutional errors is the only disposition that would be consistent with the "fastidious regard for the honor of the administration of justice" which the Court found so compelling in 1956.[12] 351 U. S., at 124.

I think it is unwise for the Court to brush aside the non-constitutional errors disclosed by this record. However, since the Court insists upon doing so, I feel constrained

[12] I cannot agree with the theory of MR. JUSTICE DOUGLAS that the non-constitutional errors herein discussed are less important than the mere possibility of perjury which clouded the record in 1956 and which prompted the Court to remand the case to the Board at that time. For all we know, a cross-examination of Gitlow based on his prior memoranda, or a full cross-examination of Budenz based on his prior statements to the FBI and his testimony inconsistent therewith, might have disclosed further possibilities of perjury. Nor can I agree with the suggestion that since Congress, in the Communist Control Act of 1954, branded the Communist Party as "an instrumentality of a conspiracy to overthrow the Government of the United States," 68 Stat. 775, the Board's hearings and findings are merely superfluous, and the non-constitutional errors committed by the Board and the Court of Appeals are therefore unimportant. In the first place, this theory did not dissuade the Court from remanding to the Board in 1956 because of defects in the record. Moreover, there is nothing in the language or legislative history of the Communist Control Act of 1954 to indicate that Congress intended to repeal those provisions of the Subversive Activities Control Act which carefully delineate the Board's functions and describe the procedural mechanism by which the Board is to apply the Act.

to express my views on a dispositive constitutional issue which now confronts us by virtue of the Court's holding on the non-constitutional questions. I agree with MR. JUSTICE BRENNAN that, once having entered the area of constitutional adjudication, the Court must decide now whether the Act violates the Fifth Amendment privilege against self-incrimination by requiring the petitioner's officers to submit a registration statement on behalf of the petitioner. For the reasons set forth in his opinion, which I join, I believe that the Act does constitute a violation of the Fifth Amendment.

MR. JUSTICE BLACK, dissenting.

I do not believe that it can be too often repeated that the freedoms of speech, press, petition and assembly guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish. The first banning of an association because it advocates hated ideas—whether that association be called a political party or not—marks a fateful moment in the history of a free country. That moment seems to have arrived for this country.

The Subversive Activities Control Act of 1950 [1] here involved defines "Communist action" organizations and requires them to register with the Attorney General giving much information of every kind with regard to their property, income, activities and members. The Communist Party has been ordered to register under that Act by the Subversive Activities Control Board and has challenged the validity of that order on the ground, among others, that the Act is unconstitutional in that it amounts to a complete outlawry of the Communist Party. The contention is that this Act, considered as a whole and in its relation to existing laws which affect members of the Party, imposes such overhanging threats of disgrace,

[1] 64 Stat. 987, as amended, 50 U. S. C. §§ 781–798.

humiliation, fines, forfeitures and lengthy imprisonments upon registered organizations and their members, most of which burdens become effective automatically upon registration, that it will be impossible for the Party to continue to function if the registration order is upheld.

The Court's opinion is devoted chiefly to the task of explaining why it will not decide any of the substantial issues raised by this attack upon the constitutionality of the Act as it is actually written and will actually operate and why it must decide the case just as though none of these other burdens existed and we were dealing with an Act that required nothing more than the registration of an organization. I cannot agree to decide the case on any such hypothetical basis. If registration were the only issue in the case, I would agree at once that Congress has power to require every "person" acting as an agent of a foreign principal to file registration statements comprehensively showing his agency activities as is required, for example, by the Foreign Agents Registration Act.[2] That Act requires the registration of any "person"—including an individual, partnership, association, corporation, organization, or other combination of individuals—"who acts or agrees to act, within the United States, as . . . a public-relations counsel, publicity agent, information-service employee, servant, agent, representative, or attorney for a foreign principal . . . ."[3] Referring to that Act, I said in *Viereck* v. *United States:*

> "Resting on the fundamental constitutional principle that our people, adequately informed, may be trusted to distinguish between the true and the false, the bill is intended to label information of foreign origin so that hearers and readers may not be deceived by the belief that the information comes

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[2] 52 Stat. 631, as amended, 22 U. S. C. §§ 611–621.

[3] 22 U. S. C. § 611.

> from a disinterested source. Such legislation implements rather than detracts from the prized freedoms guaranteed by the First Amendment." [4]

The Act before us now, however, unlike the Foreign Agents Registration Act involved in the *Viereck* case, is not based on the principle that "our people, adequately informed, may be trusted to distinguish between the true and the false." Instead, the present Act, like many other pieces of current legislation, is based on the precisely contrary principle that "our people [even when] adequately informed may [not] be trusted to distinguish between the true and the false." In this regard, the principle upon which Congress acted in passing the Subversive Activities Control Act is identical to that upon which it acted in making membership in the Communist Party a crime in the Smith Act,[5] a provision under which the Court has today sustained the conviction and imprisonment for six years of a person for being a mere member of the Communist Party with knowledge of its purposes.[6] Statutes based upon such a principle, which really amounts to nothing more than the idea that the Government must act as a paternal guardian to protect American voters from hearing public policies discussed, do not implement "the prized freedoms guaranteed by the First Amendment"—they are designed to and do directly detract from those freedoms.

The difference between the Subversive Activities Control Act and the Foreign Agents Registration Act is strikingly illustrated by the reasons Congress has itself given for the enactment of the statute now before us. When Viereck registered under the earlier and genuine registration statute, he was not thereby branded as being engaged

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[4] 318 U. S. 236, 251 (dissenting opinion).

[5] 18 U. S. C. § 2385.

[6] *Scales* v. *United States, post,* p. 203.

in an evil, despicable undertaking bent on destroying this Nation. But that is precisely the effect of the present Act. Registration as a "Communist-action organization" under the Subversive Activities Control Act means, according to the express provisions of the Act, that the Party and its members who register are under the control of a foreign dictatorship,[7] that they have devised "clever and ruthless espionage and sabotage tactics," [8] and that they are a part of a "world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration . . . terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world." [9] A registrant organization is declared, by a finding of Congress, to be "an organization numbering thousands of adherents, rigidly and ruthlessly disciplined," merely awaiting a chance to overthrow this Government by force.[10] And the members of such an

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[7] 50 U. S. C. § 781 (4). "The direction and control of the world Communist movement is vested in and exercised by the Communist dictatorship of a foreign country."

[8] 50 U. S. C. § 781 (11). "The agents of communism have devised clever and ruthless espionage and sabotage tactics which are carried out in many instances in form or manner successfully evasive of existing law."

[9] 50 U. S. C. § 781 (1). "There exists a world Communist movement which, in its origins, its development, and its present practice, is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization."

[10] 50 U. S. C. § 781 (15). "The Communist movement in the United States is an organization numbering thousands of adherents, rigidly and ruthlessly disciplined. Awaiting and seeking to advance a moment when the United States may be so far extended by foreign engagements, so far divided in counsel, or so far in industrial or financial straits, that overthrow of the Government of the United

organization are declared by the Act to have "repudiate[d] their allegiance to the United States, and in effect transfer[red] their allegiance to the foreign country in which is vested the direction and control of the world Communist movement." [11]

This difference standing alone would be sufficient to establish the essential dissimilarity of the Subversive Activities Control Act from genuine registration statutes such as the Foreign Agents Registration Act. For the need of Government to provide means by which the people can obtain useful information—the basis of every genuine registration statute—can certainly be accomplished without resort to official legislative pronouncements as to the treasonable nature of those compelled to register. But this difference does not stand alone in the case of the Subversive Activities Control Act—indeed, there are so many other differences of so much greater magnitude that the recitals of the Act branding those who register under it pale almost into insignificance.

The plan of the Act is to make it impossible for an organization to continue to function once a registration order is issued against it. To this end, the Act first provides crushing penalties to insure complete compliance with the disclosure requirements of registration. Thus, if the Party or its members fail to register within the time required by the Act, or if they fail to make annual reports as required, or to keep records as required, each individual guilty of such failure can be punished

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States by force and violence may seem possible of achievement, it seeks converts far and wide by an extensive system of schooling and indoctrination. . . ."

[11] 50 U. S. C. § 781 (9). "In the United States those individuals who knowingly and willfully participate in the world Communist movement, when they so participate, in effect repudiate their allegiance to the United States, and in effect transfer their allegiance to the foreign country in which is vested the direction and control of the world Communist movement."

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by a fine of $10,000, by imprisonment for five years, or both, for each offense [12]—and each offense means "each day of failure to register" [13] or "each listing of the name or address of any one individual" [14] either by the organization or by an individual. Thus, for a delay of thirty days in filing required reports, a fine of $300,000 and imprisonment for 150 years could be imposed by a trial judge.

Having thus made it mandatory that Communist organizations and individual Communists make a full disclosure of their identities and activities, the Act then proceeds to heap burden after burden upon those so exposed. Certain tax deductions allowed to others are denied to a registered organization.[15] Mail matter must be stamped before the organization sends it out to show that it was disseminated by a "Communist action" organization,[16] with all the treasonable connotations given that term by the recitals of "fact" in the Act. Members of a registered organization cannot hold certain jobs with the Government, or any jobs with private businesses engaged in doing certain work for the Government.[17] Members cannot use or attempt to use a passport and cannot even make application for a passport without being subject to a penalty of five years in the penitentiary.[18] The Act thus makes it extremely difficult for a member of the Communist Party to live in this country and, at the same time, makes it a crime for him to try to get a passport to get out.

In addition to these burdens imposed directly by the Act itself, the registration requirement must also be considered in the context of the other laws now existing

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[12] 50 U. S. C. § 794 (a)(2).
[13] 50 U. S. C. § 794 (a).
[14] 50 U. S. C. § 794 (b)(2).
[15] 50 U. S. C. § 790.
[16] 50 U. S. C. § 789 (1).
[17] 50 U. S. C. § 784.
[18] 50 U. S. C. § 785.

which affect the Communist Party. The Act requires that the information obtained upon registration be given wide publicity [19] thus insuring that those identified as members of the Party will be subjected to all the civil disabilities,[20] criminal prosecutions [21] and public harrassments [22] that have become common in recent years. I agree with MR. JUSTICE DOUGLAS that this aspect of the Act is alone sufficient to establish its invalidity under the self-incrimination provision of the Fifth Amendment. But I think the interrelationship between the present Act and these other laws goes deeper than that, for I think that interrelationship establishes all but conclusively that the present Act cannot be upheld as a mere registration statute. The information elicited by the Act must be considered, not, as in the *Viereck* case, an aid to the exercise of individual judgment by the people, but rather a part of a pattern of suppression by the Government, for that is certainly the inevitable effect of any system that requires registration on the one hand and imposes pains and penalties upon those registering on the other.

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[19] 50 U. S. C. § 788.

[20] There seems to be little doubt that a registered member of the Communist Party would find it almost impossible to get or retain employment in this country. See, *e. g., American Communications Assn.* v. *Douds,* 339 U. S. 382; *Barsky* v. *Board of Regents,* 347 U. S. 442; *Lerner* v. *Casey,* 357 U. S. 468; *Beilan* v. *Board of Education,* 357 U. S. 399; *Nelson* v. *County of Los Angeles,* 362 U. S. 1; *Konigsberg* v. *State Bar of California,* 366 U. S. 36; *In re Anastaplo,* 366 U. S. 82. Cf. *Shelton* v. *Tucker,* 364 U. S. 479.

[21] See, *e. g., Dennis* v. *United States,* 341 U. S. 494; *Yates* v. *United States,* 354 U. S. 298; *Scales* v. *United States, post,* p. 203; *Noto* v. *United States, post,* p. 290.

[22] See, *e. g., Watkins* v. *United States,* 354 U. S. 178; *Sweezy* v. *New Hampshire,* 354 U. S. 234; *Barenblatt* v. *United States,* 360 U. S. 109; *Uphaus* v. *Wyman,* 360 U. S. 72; *Uphaus* v. *Wyman,* 364 U. S. 388; *Wilkinson* v. *United States,* 365 U. S. 399; *Braden* v. *United States,* 365 U. S. 431.

All of these enormous burdens, which are necessarily imposed upon the Party and its members by the act of registration, are dismissed by the Court on the basis of an alleged conflict with the Court-created rule that constitutional questions should be avoided whenever possible. Thus, the Court engages in extended discussions as to whether the people involved will ever want to do the things the Act says they cannot do and whether they will ever object to doing the things the Act says they must do, suggesting, among other things, that the members of the Communist Party may never object to providing the evidence needed to send them to prison for violating the Smith Act; that they may never protest because they are forced to give up the tax deductions that other people receive; that they may be willing to stamp all the Party's mail as coming from an evil organization; that they may never want to hold the jobs from which the Act disqualifies them; and that they may never want to get a passport to get out of the country. On the basis of all these "uncertainties" the Court seems to consider its hands tied because, it says, these are as yet only potential impairments of constitutional rights. In its view, there is no "justiciable" issue at all between the United States and the Communist Party except the bare requirement of registration.

In the context of this case, I can find no justification for the Court's refusal to pass upon the serious constitutional questions raised. The Court of Appeals met its responsibility by deciding the questions. The Government has not asked that the Court refrain from giving a full decision on these important matters. Assuming that the Act is wholly valid aside from registration and that Congress does have power to outlaw groups advocating dangerous ideas, it seems to me unfair to Congress for this Court to refuse to decide whether its Act can be fully enforced. And assuming that the Act is not wholly valid

because of some limitation upon that power, it seems to me that we should say so now. By refusing to do so, the Court in effect allows this serious question to be decided by default. For the Party can no more continue to function with all of these tremendous burdens of undetermined constitutional validity overhanging it and its members than it could if the burdens were considered and upheld. The only sense in which the Court has avoided a constitutional issue is by permitting the destruction of a group seeking to raise the issue of the constitutionality of its destruction.[23]

This whole Act, with its pains and penalties, embarks this country, for the first time, on the dangerous adventure of outlawing groups that preach doctrines nearly all Americans detest. When the practice of outlawing parties and various public groups begins, no one can say where it will end. In most countries such a practice once begun ends with a one-party government. There is something of tragic irony in the fact that this Act, expressly designed to protect this Nation from becoming a "totalitarian dictatorship" with "a single political party," has adopted to achieve its laudable purpose the policy of outlawing a party—a policy indispensable to totalitarian dictatorships. I think we should meet and decide this whole question now in the administration of a sound judicial policy that carries out our responsibilities both to Congress and to the American people.

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[23] In this regard, I think the present case is identical to *Ex parte Young*, 209 U. S. 123. There the Court reached and decided the constitutional question tendered, saying: "It may therefore be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights." *Id.*, at 147.

In my judgment, the Act here under consideration is unconstitutional on at least three grounds in addition to its direct conflict with the self-incrimination provisions of the Fifth Amendment. It is, in the first instance, a classical bill of attainder which our Constitution in two places prohibits, for it is a legislative Act that inflicts pains, penalties and punishments in a number of ways without a judicial trial.[24] The legislative fact-findings as to Communist activities, which the Court—despite the constitutional command for trial of such facts by a court and jury—accepts as facts, supply practically all of the proof needed to bring the Communist Party within the proscriptions of the Act. The Act points unerringly to the members of that Party as guilty people who must be penalized as the Act provides. At the same time, these legislative fact-findings fall little short of being adequate in themselves to justify a finding of guilt against any person who can be identified, however faintly, by any informer, as ever having been a member of the Communist Party. Most of whatever is lacking in the legislative fact-findings is later supplied by administrative fact-findings of an agency which is not a court, which is not manned by independent judges, and which does not have to observe the constitutional right to trial by jury and other trial safeguards unequivocally commanded by the Bill of Rights. Yet, after this agency has made its findings and its conclusions, neither its findings of fact nor the findings of fact of the legislative body can subsequently be challenged in court by any individual who may later be brought up on a charge that he failed to register as required by the Act and the Board. The Act thus not only is a legislative bill of attainder but also violates due process by short-cutting practically all of the Bill of Rights, leaving no

[24] *Cummings* v. *Missouri*, 4 Wall. 277, 323. And see *United States* v. *Lovett*, 328 U. S. 303.

hope for anyone entangled in this legislative-administrative web except what has proved in this case to be one of the most truncated judicial reviews that the history of this Court can afford.[25]

I think also that this outlawry of the Communist Party and imprisonment of its members violate the First Amendment. The question under that Amendment is whether Congress has power to outlaw an association, group or party either on the ground that it advocates a policy of violent overthrow of the existing Government at some time in the distant future or on the ground that it is ideologically subservient to some foreign country. In my judgment, neither of these factors justifies an invasion of rights protected by the First Amendment. Talk about the desirability of revolution has a long and honorable history, not only in other parts of the world, but also in our own country. This kind of talk, like any other, can be used at the wrong time and for the wrong purpose. But, under our system of Government, the remedy for this danger must be the same remedy that is applied to the danger that comes from any other erroneous talk—education and contrary argument.[26] If that remedy is not sufficient, the only meaning of free speech

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[25] This provides yet another difference between the Act under consideration here and the Act under which the prosecution involved in the *Viereck* case was brought. Before Viereck could be convicted for having failed to register or report as a foreign agent, he was entitled to have all the facts upon which his guilt depended determined by a jury under an indictment returned by a grand jury and during the course of a judicial proceeding in which he was accorded the protection of all the forms and procedures designed through the years to protect defendants charged with the commission of a criminal offense.

[26] Cf. *Whitney* v. *California*, 274 U. S. 357, 378: "Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech and assembly." (Brandeis, J., concurring.)

must be that the revolutionary ideas will be allowed to prevail.[27]

This conclusion is not affected by the fact that those advocating a policy of revolution are in sympathy with a foreign government. If there is one thing certain about the First Amendment it is that this Amendment was designed to guarantee the freest interchange of ideas about all public matters and that, of course, means the interchange of *all* ideas, however such ideas may be viewed in other countries and whatever change in the existing structure of government it may be hoped that these ideas will bring about. Now, when this country is trying to spread the high ideals of democracy all over the world—ideals that are revolutionary in many countries—seems to be a particularly inappropriate time to stifle First Amendment freedoms in this country. The same arguments that are used to justify the outlawry of Communist ideas here could be used to justify an outlawry of the ideas of democracy in other countries.

The freedom to advocate ideas about public matters through associations of the nature of political parties and societies was contemplated and protected by the First Amendment. The existence of such groups is now, and for centuries has been, a necessary part of any effective promulgation of beliefs about governmental policies. And the destruction of such groups is now and always has been one of the first steps totalitarian governments take. Within recent months we have learned of such practices in other countries. Only a few weeks ago an executive edict outlawing all parties, groups and associations all the way down through Rotary Clubs was issued in a country where

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[27] Cf. *Gitlow* v. *New York*, 268 U. S. 652, 673: "If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way." (Holmes, J., dissenting.)

the government is largely in the hands of a single man. Indeed, our own ancestors were not unfamiliar with this practice. Men and women belonging to dissenting religious, political or social groups in England before the colonization of this country were sometimes imprisoned, mutilated, degraded by humiliating pillories, exiled and even killed for their views.

A typical example of the type of legislation under which this sort of persecution was carried on is provided by a statute enacted in 1593 to destroy dissenting religious sects and force all the people of England to become regular attendants at the established church.[28] The basic premise upon which its commands rested was not at all unlike that upon which the Act here proceeds:

> "For the better discovering and avoiding of such traiterous and most dangerous Conspiracies and Attempts, as are daily devised and practised against our most gracious Sovereign Lady the Queen's Majesty and the happy Estate of this common Weal, by sundry wicked and seditious Persons, who terming themselves Catholicks, and being indeed Spies and Intelligencers, not only for her Majesty's foreign Enemies, but also for rebellious and traiterous Subjects born within her Highness Realms and Dominions, and hiding their most detestable and devilish Purposes under a false Pretext of Religion and Conscience, do secretly wander and shift from Place to Place within this Realm, to corrupt and seduce her Majesty's Subjects, and to stir them to Sedition and Rebellion . . . ."

These attainted Catholics were not permitted to go "above five Miles" from their homes. For violation of this command they could be sentenced to prison and have

[28] 35 Elizabeth, cc. I and II, entitled "An Act to retain the Queen's Majesty's Subjects in their due Obedience" and "An Act for Restraining Popish Recusants to some certain Places of Abode."

all their goods, lands and other possessions forfeited "to the Queen's Majesty." One has only to read this statute to see how thoroughgoing government can be in making life miserable for groups whose beliefs have fallen into disfavor.

That statute also has peculiar relevance to the consideration of the Subversive Activities Control Act because it too used disclosure as a lever to secure effective enforcement of its provisions. Thus, one section of the statute provided:

> "And be it further enacted and ordained by the Authority aforesaid, That if any Person which shall be *suspected* to be a Jesuit, Seminary or Massing Priest, being examined by any Person having lawful Authority in that Behalf to examine such Person which shall be *so suspected,* shall refuse to answer directly and truly whether he be a Jesuit, or a Seminary or Massing Priest, as is aforesaid, every such Person so refusing to answer shall, for his Disobedience and Contempt in that Behalf, be committed to Prison by such as shall examine him as is aforesaid, and thereupon shall remain and continue in Prison without Bail or Mainprise, until he shall make direct and true Answer to the said Questions whereupon he shall be so examined." (Emphasis supplied.)

One cannot help but wonder whether this Court, were it called upon to consider the constitutionality of a provision of that kind in this country, would pass it off as involving nothing more than potential impairments of religious freedoms and a right to travel which the attainted persons might never want to exercise.

There were many other statutes of this kind passed in England before our Revolutionary War.[29] By no means

[29] A brief history of some of these statutes is set out in my dissenting opinion in *American Communications Assn.* v. *Douds,* 339 U. S. 382, 447–448, notes 3 and 4.

all of them were aimed at the Catholics. Indeed, during the times when the Catholics were themselves in power, almost identical repressive measures were adopted in an attempt to curb the rise of Protestantism.[30] And the persecution of Puritans in England, dramatized by some of the most famous writers of the time, is a story that is, I hope, familiar to most Americans.[31] It is a matter of history that not one of these laws achieved its purpose. Many men died, suffered and were driven from their country. And, in a sense, it might be said that our own country profited from these laws because it was largely founded by refugees from English oppression. But England itself gained little if any profit from its policies of repression. The outlawed groups were not destroyed. Many people have thought that these repressive measures were more effective to bring about revolutions than to stop them. Be that as it may, it cannot be denied that the most tranquil period of English history, from an internal standpoint, has been the period since England abandoned these practices of trying to inculcate belief by oaths and force.

Even after the American Revolution, England continued to pass statutes outlawing groups and punishing their members. One that is of particular interest here because of the many similarities between it and the Act involved in this case was passed in 1799 under the title "An Act for the more effectual Suppression of Societies established for Seditious and Treasonable Purposes; and for better preventing Treasonable and Seditious Practices." [32] The premise upon which this Act was passed

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[30] Several examples of the persecution inflicted upon Protestants by Catholics were set out in the Appendix to my concurring opinion in *Joint Anti-Fascist Refugee Comm.* v. *McGrath,* 341 U. S. 123, 146–149.

[31] See, *e. g.*, Bunyan, The Pilgrims Progress; Milton, Areopagitica.

[32] 39 George III, c. 79.

was also similar to that used here—"a traitorous Conspiracy has long been carried on, in conjunction with the Persons from Time to Time exercising the Powers of Government in *France,* to overturn the Laws, Constitution, and Government, and every existing Establishment, Civil and Ecclesiastical, both in *Great Britain* and *Ireland* . . . ." The Act broadly provided for the suppression and prohibition "as unlawful Combinations and Confederacies" of all such societies, "particularly . . . *Societies of United Englishmen, United Scotsmen, United Britons, United Irishmen,* and *The London Corresponding Society* . . . ." This 1799 English Act, like the Subversive Activities Control Act here, comprehensively provided for fines, forfeitures, penalties and imprisonments. It went on to outlaw places where debates could take place or lectures be given or books be gathered and read unless, under very restrictive standards, licenses had been granted by Justices of the Peace. Great emphasis was laid upon the fact that unlicensed gatherings should be treated as nuisances and disorderly houses. Following the course that such repressive measures always must, and indeed precisely the course that is here being followed by our own Government with respect to the Communist Party,[33] the English Act placed print-

[33] Section 7 (d) (6) of the Act, 50 U. S. C. § 786 (d) (6), requires the "listing, in such form and detail as the Attorney General shall by regulation prescribe, of all printing presses and machines including but not limited to rotary presses, flatbed cylinder presses, platen presses, lithographs, offsets, photo-offsets, mimeograph machines, multigraph machines, multilith machines, duplicating machines, ditto machines, linotype machines, intertype machines, monotype machines, and all other types of printing presses, typesetting machines or any mechanical devices used or intended to be used, or capable of being used to produce or publish printed matter or material, which are in the possession, custody, ownership, or control of the Communist-action or Communist-front organization or its officers, members, affiliates, associates, group, or groups in which the Communist-action or Communist-front organization, its officers or members have an interest."

ing presses, type and everything else useful for publishing discussion of public matters under strict regulations.

The parliamentary debates underlying the enactment of this 1799 English statute indicate plainly the close parallel between it and the Act here under consideration. The chief fear of the English rulers that brought on the 1799 Act was that the people of England would be seduced away from their loyalty to their government if societies were left free to discuss public matters and if the common people were left free to read and hear arguments. William Pitt, the Younger, in offering the bill which provided the basis for the Act, expressed his fear that debating societies and other such manifestations of liberty of press and speech might call "the attention of the lower orders of the people to objects of discussion of the most mischievous tendency, objects which are not calculated for their understandings, and which are of all others the most liable to be attended with dreadful effects." [34] He thought these "dreadful effects" could be averted, in large part, by making individual authors sign everything they wrote. But he then went on to urge that "in order to make the measure effectual, and prevent the press from becoming an engine of corruption and innovation in the hands of factions who are ready to circulate cheap publications, adapted to inflame and pervert the public mind, it will be necessary to keep a general register, not only of the presses used by printers, but of those in the possession of private persons." [35] All of this, Mr. Pitt explained, was necessary in order to render "more effectual" an Act passed at the previous session of Parliament entitled "An Act to empower his majesty to secure and detain such persons as his majesty shall suspect are conspiring against his person and government." [36]

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[34] Parliamentary Debates, Hansard, 1st Series, 34, at 987.

[35] *Id.*, at 988.

[36] *Ibid.*

The debates on the English statute also show the true nature of the "revolutionary" principles advocated by the various societies named which were being used to justify their outlawry. These principles were chiefly parliamentary reform providing for annual sessions of Parliament, universal suffrage and fair parliamentary representation, and repeal of the right of the King to veto measures passed by Parliament.[37] It is, of course, true that Congress has no power to outlaw political parties advocating such measures in this country. But I wonder how this Court could ever reach the question in view of its holding today. And if the Court is, as it holds, truly bound by legislative findings as to the nature of political parties and their involvement with foreign powers, how could it strike down the very statute I have just described? For that statute purported to establish, as a matter of fact, that the named societies were a part of a "traitorous Conspiracy" acting "in conjunction with the Persons from Time to Time exercising the Powers of Government in *France*."

At the very time England was going through its era of terror about the "Jacobins," a heated political struggle involving many of the same issues was going on in this country between the two chief political parties. One of those parties, the Federalists, wanted to outlaw the party of Jefferson on the ground that they too were "Jacobins" and therefore a threat to our security. The Jeffersonians quite naturally opposed such outlawry and in fact opposed any measure which would restrict the freedoms of speech, press, petition and assembly. The difference between the two parties was expressed by Jefferson in this way: "Both of our political parties, at least the honest part of them, agree conscientiously in the same object, the public good . . . . One fears most the

[37] *Id.*, at 984–998.

ignorance of the people; the other, the selfishness of rulers independent of them. Which is right, time and experience will prove." [38] This conflict of ideals and policies was temporarily resolved in favor of the Federalists and the result was the infamous era of the Alien and Sedition Acts.[39] These laws, passed over vigorous Jeffersonian opposition, declared that it was necessary in order to protect the security of the Nation to give the President the broadest of powers over aliens and to make substantial inroads upon the freedoms of speech, press and assembly.

The enforcement of these statutes, particularly the Sedition Act, constitutes one of the greatest blots on our country's record of freedom.[40] Publishers were sent to jail for writing their own views and for publishing the views of others. The slightest criticism of Government or policies of government officials was enough to cause biased federal prosecutors to put the machinery of Government to work to crush and imprison the critic. Rumors which filled the air pointed the finger of suspicion at good men and bad men alike, sometimes causing the social ostracism of people who loved their free country with a deathless devotion.[41] Members of the

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[38] 4 Memoir of Jefferson 28.

[39] The so-called Alien and Sedition Acts comprised three different statutes enacted in 1798: 1 Stat. 570; 1 Stat. 577; and 1 Stat. 596.

[40] For a graphic discussion of the period of the Alien and Sedition Acts, see Bowers, Jefferson and Hamilton, 1925, c. XVI, "Hysterics," and c. XVII, "The Reign of Terror."

[41] Much of this sort of misdirected persecution was doubtless due to the attitude and public statements of the influential Federalist Secretary of State, Timothy Pickering. See Miller, Crisis in Freedom, 89–90 (1951): "By Pickering and his followers, it was held that since honest men who valued the national welfare would not cavil at the Sedition Act, it could be presumed that those who criticized it were no better than Jacobin fellow-travelers. It was laid down as a sound principle that 'when a man is heard to inveigh against this law, set him

Jeffersonian Party were picked out as special targets so that they could be illustrious examples of what could happen to people who failed to sing paeans of praise for current federal officials and their policies. Matthew Lyon, a Congressman of the Jeffersonian Party, was prosecuted, convicted and forced to serve a prison sentence in a disreputable jailhouse because of criticisms he made of governmental officials and their activities. This was a particularly egregious example of the repressive nature of the Sedition Act for Lyon's conviction could not possibly have been upheld under even the most niggardly interpretation of the First Amendment.[42]

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down as a man who would submit to no restraint which is calculated for the peace of society. He deserves to be suspected.' Thus, Jacobin sympathizers were to be known by their attitude toward the Sedition Act; a critical or skeptical frame of mind was *prima facie* evidence of guilt. The Secretary of State looked darkly upon such troublemakers: 'Those who complain of legal provisions for punishing intentional defamation and lies, as bridling the liberty of speech and of the press,' he said, 'may, with equal propriety, complain against laws made for punishing assault and murder, as restraints upon the freedom of men's actions.' " In such an atmosphere, it is small wonder, as Miller observes, that "it became impossible for the Federalists to distinguish between a genuine, freedom-loving American democrat and a French Jacobin bent upon overturning religion, morality and the State." *Id.*, at 90.

[42] The indictment against Lyon alleged two counts of libel against President Adams. The first count alleged that Lyon had made and published the following statement: "As to the Executive, when I shall see the effects of that power bent on the promotion of the comfort, the happiness, and accommodation of the people, that Executive shall have my zealous and uniform support. But whenever I shall, on the part of our Executive, see every consideration of public welfare swallowed up in a continual grasp for power, in an unbounded thirst for ridiculous pomp, foolish adulation, and selfish avarice—when I shall behold men of real merit daily turned out [of] office for no other cause than independency of sentiment—when I shall see men of firmness, merit, years, abilities, and experience, discarded in their applications for office, for fear they possess that independence, and men of meanness preferred for the ease with

Lyon was but one of many who had to go to jail, be fined, or otherwise be made to suffer for the expression of his public views. Carpenters, preachers, lawyers, and many others furnished grist for the prosecutor's biased political activities in the "administration of justice." Unfortunately, our federal courts did not emerge from this fever of hysteria with the kind of reputations that shed lustre on the business of judging. Although the Founders had provided for federal judges to be appointed for life, thus intending to give them the independence necessary for the higher responsibility they had, some federal judges, even including members of the highest courts, presided

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which they can take up and advocate opinions, the consequence of which they know but little of—when I shall see the sacred name of religion employed as a State engine to make mankind hate and persecute each other, I shall not be their humble advocate!" The second count of the indictment alleged that Lyon had caused the publication of the following letter from a person in France: "The misunderstanding between the two Governments has become extremely alarming; confidence is completely destroyed; mistrusts, jealousies, and a disposition to a wrong attribution of motives, are so apparent as to require the utmost caution in every word and action that are to come from your Executive—I mean if your object is to avoid hostilities. Had this truth been understood with you before the recall of Monroe—before the coming and second coming of Pinckney; had it guided the pens that wrote the bullying speech of your President, and stupid answer of your Senate, at the opening of Congress in November last, I should probably have had no occasion to address you this letter. But when we found him borrowing the language of Edmund Burke, and telling the world that, although he should succeed in treating with the French, there was no dependence to be placed in any of their engagements, that their religion and morality were at an end, and they had turned pirates and plunderers, and that it would be necessary to be perpetually armed against them, though you are at peace; we wondered that the answer of both Houses had not been an order to send him to the mad-house. Instead of this, the Senate have echoed the speech with more servility than ever George the Third experienced from either House of Parliament." Cong. Globe, 26th Cong., 1st Sess. 411 (1840).

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over grand juries and trials in a way that is sad to be recalled even at this late date.[43]

All the governmental activities set out above designed to suppress the freedom of American citizens to think their own views and speak their own thoughts and read their own selections, and even more, occurred under the 1798 Sedition Act. And all these things happened despite the fact that the promoters of that legislation were unable to make it as strong as their philosophical and political brethren in England had made their Act for the complete suppression of all kinds of societies. But even this comparatively less repressive law and its enforcement were too much of an infringement upon personal liberty to stand the test of public opinion among the plain, sturdy pioneers of America. In the very next election following its enactment, Jefferson was elected President on a platform which contained, as its principal plank, a promise to abandon the Sedition Act and the policy of repression behind it.[44] Members of Congress and the Senate were elected to help him carry out his pledge. The pledge was carried out, and in order to try to make amends to those who had suffered under this obnoxious

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[43] The part played by federal judges in the creation of the atmosphere of hysteria which characterized the period is discussed in Bowers, Jefferson and Hamilton, 398–402. See also Miller, Crisis in Freedom, 135–142.

[44] The significance of the issue of political freedom in the election of 1800 is shown by the fact that Jefferson devoted a large part of his inaugural address to that subject. It was at that time that he gave new emphasis to the creed of political freedom by which this country lived and prospered for so long: "If there be any among us who would wish to dissolve this Union or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it." The part of Jefferson's First Inaugural Address dealing with political freedom is reprinted in Jones, Primer of Intellectual Freedom, 142 (Harvard University Press, 1949).

law, Congress was busy for many years indemnifying those who had been prosecuted under its provisions and even their descendants.[45] The superior judgment of the people over that of their legislators who passed the Act in the first place was graphically illustrated when Matthew Lyon, who had been sent to jail for refusing to refrain from criticizing Federalist officeholders, was triumphantly re-elected by the people of Vermont while still in jail.

I regret, exceedingly regret, that I feel impelled to recount this history of the Federalist Sedition Act because, in all truth, it must be pointed out that this law—which has since been almost universally condemned as unconstitutional[46]—did not go as far in suppressing

[45] In 1840, for example, President Van Buren signed a bill that indemnified the descendants of Matthew Lyon for the persecution he had suffered under the Sedition Act. See Cong. Globe, 26th Cong., 1st Sess. 410–414, 478 (1840). Appropriately, this act of official denouncement of the Sedition Law was accomplished on July 4 of that year. 6 Stat. 802.

[46] Perhaps the strongest denunciation of the Sedition Act as unconstitutional has come from Congress itself. The report of the Committee of the House of Representatives which presented the bill passed in 1840 to refund the fine imposed under that Act upon Matthew Lyon stated: "The committee do not deem it necessary to discuss at length the character of that law, or to assign all the reasons, however demonstrative, that have induced the conviction of its unconstitutionality. No question connected with the liberty of the press ever excited a more universal and intense interest—ever received so acute, able, long-continued, and elaborate investigation—was ever more generally understood, or so conclusively settled by the concurring opinions of all parties, after the heated political contests of the day had passed away. All that now remains to be done by the Representatives of the people who condemned this act of their agents as unauthorized, and transcending their grant of power, to place beyond question, doubt, or cavil, that mandate of the Constitution prohibiting Congress from abridging the liberty of the press, and to discharge an honest, just, moral, and honorable obligation, is to refund from the Treasury the fine thus illegally and wrongfully obtained from one of their citizens: for which purpose the committee

the First Amendment freedoms of Americans as do the Smith Act and the Subversive Activities Control Act. All the fervor and all the eloquence and all the emotionalism and all the prejudice and all the parades of horrors about letting the people hear arguments for themselves were not sufficient in 1798 to persuade the members of Congress to pass a law which would directly and unequivocally outlaw the party of Jefferson, at which the law was undoubtedly aimed.[47] The same arguments were made then about the "Jacobins," meaning the Jeffersonians, with regard to their alleged subservience to France, that are made today about the Communists with regard to their subservience to Russia. Even the language of the charges that were hurled was substantially the same as that used in the charges made today. The Jacobins were "trained, officered, regimented, and formed to subordination, in a manner that our militia have never yet equalled"; and "it is as certain as any

herewith report a bill." Cong. Globe, 26th Cong., 1st Sess. 411 (1840). Cf. *Abrams* v. *United States*, 250 U. S. 616, 630: "I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force. History seems to me against the notion. I had conceived that the United States through many years had shown its repentance for the Sedition Act of 1798, by repaying fines that it imposed." (Holmes, J., dissenting.)

[47] The real aim of the Sedition Act emerges with indisputable clarity from the debates surrounding its enactment. Thus John Allen, one of the supporters of the Act in the House of Representatives, urged the necessity of the Act in the following terms: "I hope this bill will not be rejected. If ever there was a nation which required a law of this kind, it is this. Let gentlemen look at certain papers printed in this city and elsewhere, and ask themselves whether an unwarrantable and dangerous combination does not exist to overturn and ruin the Government by publishing the most shameless falsehoods against the Representatives of the people of all denominations, that they are hostile to free Governments and genuine liberty, and of course to the welfare of this country; that they ought, therefore, to be displaced, and that the people ought to raise an *insurrection*

future event can be, that they [the Jeffersonians] will take arms against the laws as soon as they dare . . . ." [48]

These charges echoed fears that were expressed time and time again during the congressional debate on the Alien and Sedition Acts. The very same fears are again being voiced today as a justification for curtailing the liberties of the people of America. Thus, § 2 (15) of the Subversive Activities Control Act under consideration says that "[t]he Communist movement in the United States is an organization numbering thousands of adher-

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against the Government. . . . I say, sir, this paper [the Aurora, a paper which supported the Jeffersonian party] must necessarily, in the nature of things, be supported by a powerful party; I do not say of whom that party is composed. The anonymous pieces and paragraphs it contains, evince the talents and industry employed to give it currency; and it is perfectly well understood, by all parties and persons, to contain the opinions of certain great men, and certain gentlemen in this House. This inflammatory address to the Irishmen, is, therefore, understood by them to come clothed with high authority. This is the work of a party; this paper is devoted to party; it is assiduously disseminated through the country by a party; to that party is all the credit due; to that party it owes its existence; if they loved the peace of our Zion, if they sought the repose of our country, it would cease to emit its filth; it has flourished by their smiles; it would perish at their frowns." 8 Annals of Cong. 2093–2100. It is, of course, true that some Congressmen who favored the Sedition Act did so on broader grounds. "Harrison Gray Otis would have employed the Sedition Act against all associations, including the Masons: 'The spirit of association,' he warned, 'is a dangerous thing in a free government, and ought carefully to be watched.'" Miller, Crisis in Freedom, 187.

[48] These charges were made by Fisher Ames in writings published in April 1799. See Ames, Laocoon, reprinted in II Works of Fisher Ames, 109, at 115, 116. Similar sentiments were expressed by Richard Peters, a federal district judge, in a letter, dated August 24, 1798, to Secretary of State Pickering. Judge Peters apparently thought it necessary, for the good of the country, "to get rid of a Set of Villains who are ready to Strike when they think the Crisis arrives." See Miller, Crisis in Freedom, 137.

ents, rigidly and ruthlessly disciplined" only awaiting "a moment when . . . overthrow of the Government of the United States by force and violence may seem possible of achievement . . . ."

This excuse for repression is, of course, not a distinctively American creation. It is the same excuse that was used for the 1799 English Act described above. Thus, Charles Abbot, a member of Parliament, urged as one of the justifications for outlawing the societies named in that Act: "The malignancy of their character is distinguishable by the restless spirit which it infuses into the lowest orders of the people, encouraging them to take up arms, and teaching them that they have great and powerful partisans and leaders *who are secretly prepared to seize the favorable moment* for showing themselves openly at their head, when they can hope to do so with impunity." [49]

The truth is that this statutory outlawry of the Communist Party is not at all novel when considered in the perspective of history. Quite the contrary, it represents nothing more than the adoption by this country, in part at least, of one of the two conflicting views that have emerged from a long-standing and widespread dispute among political philosophers as to what kind of Government will best serve the welfare of the people. That view is that Governments should have almost unlimited powers. The other view is that governmental power should be very strictly limited. Both the Smith Act and the Subversive Activities Control Act are based upon the view that officials of the Government should have power to suppress and crush by force critics and criticisms

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[49] Parliamentary Debates, Hansard, 1st Series, 34, at 1073. (Emphasis supplied.) Cf. *Dennis* v. *United States*, 341 U. S. 494, 510, in which this Court upheld convictions for advocacy of overthrow of the Government "as speedily as circumstances would permit."

of governmental officials and their policies. The contrary view, which Congress necessarily rejected in passing these laws, is that current public officials should never be granted power to use governmental force to keep people from hearing, speaking or publishing such criticisms of Government or from assembling together to petition their Government to make changes in governmental policies, however basic the majority may deem these policies to be.

It is my belief that our Constitution with its Bill of Rights was expressly intended to make our Government one of strictly limited powers. The Founders were intimately familiar with the restrictions upon liberty which inevitably flow from a Government of unlimited powers. By and large, they had found this experience a painful one. Many of them were descended from families that had left England and had come to this country in order to escape laws that could send them to jail or penalize them in various ways for criticizing laws and policies which they thought bore too heavily and unfairly upon them. Others had personally felt the brunt of such repressive measures. Only after they won the Revolutionary War did these people have an opportunity to set up a Government to their liking. To that end they finally settled upon the Constitution, which very clearly adopted the policy of limiting the powers of the Federal Government. Even then the people of this country were not completely satisfied. They demanded more precise and unequivocal limitations upon the powers of Government and obtained the Bill of Rights, the central provisions of which were the First Amendment guarantees of complete religious and political freedom.[50]

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[50] See *Konigsberg* v. *State Bar of California,* 366 U. S. 36, 56 (dissenting opinion); *Feldman* v. *United States,* 322 U. S. 487, 501–502 (dissenting opinion).

In the very face of the provisions of the First Amendment, however, the Court today upholds laws which ignore the wisdom of the Founders' decision to set up a limited Government and adopt the policy of force to crush views about public matters entertained by a small minority in this country. This, to me, marks a major break in the wall designed by the First Amendment to keep this country free by leaving the people free to talk about any kind of change in basic governmental policies they desire to talk about. I see no possible way to escape the fateful consequences of a return to the era in which all governmental critics had to face the probability of being sent to jail except for this Court to abandon what I consider to be the dangerous constitutional doctrine of "balancing" to which the Court is at present adhering. That doctrine is not a new one. In fact, history shows that it has been the excuse for practically every repressive measure that Government has ever seen fit to adopt. Mr. Pitt proved, in 1799, that he was a master of the concept and language of "balancing" in his speech urging the passage of laws to muzzle the press of England in order to prevent the dissemination of the "revolutionary" ideas that England should have parliamentary reform:

> "We cannot too highly prize that sacred liberty [of the press] when we consider that it has been instrumental in bringing our constitution to that envied perfection which it possesses. Yet it must also be admitted that when abused, the most fatal consequences have ever resulted from it. It has been the great principle of the constitution that the liberty of the press should flourish, but it is also clear from the nature of the principle itself, and for the security of the press, that the author or publisher of every work should be amenable to the laws of his country." [51]

[51] Parliamentary Debates, Hansard, 1st Series, 34, at 987.

And there certainly was no shortage of "balancers" in our own Congress when the Alien and Sedition Acts of 1798 were passed.[52]

The "balancing test" of First Amendment freedoms is said to justify laws aimed at the advocacy of overthrow of the Government "as speedily as circumstances would permit." [53] Thus, the "test" being used here is identical to the arguments used to justify the Alien and Sedition Acts of 1798 in this country and the 1799 Sedition Act in England. The unprecedented incorporation into our constitutional law of this time-worn justification for tyranny has been used to break down even the minimal protections [54] of

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[52] See, *e. g.*, the argument of Representative Harper on the floor of the House in favor of the passage of the Sedition Act: "He had often heard in this place, and elsewhere, harangues on the liberty of the press, as if it were to swallow up all other liberties; as if all law and reason, and every right, human and divine, was to fall prostrate before the liberty of the Press; whereas, the true meaning of it is no more than that a man shall be at liberty to print what he pleases, provided he does not offend against the laws, and not that no law shall be passed to regulate this liberty of the press. He admitted that a law which should say a man shall not slander his neighbor would be unnecessary; but it is perfectly within the Constitution to say, that a man shall not do this, or the other, which shall be injurious to the well being of society; in the same way that Congress had a right to make laws to restrain the personal liberty of man, when that liberty is abused by acts of violence on his neighbor." 8 Annals of Cong. 2102.

[53] *Dennis* v. *United States,* 341 U. S. 494. See also *Yates* v. *United States,* 354 U. S. 298; *Scales* v. *United States, post,* p. 203; *Noto* v. *United States, post,* p. 290.

[54] As the Court said in *Bridges* v. *California,* 314 U. S. 252, 263: "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. Those cases do not purport to mark the furthermost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights. For the First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech, or of the

the First Amendment forged by Mr. Justice Holmes and Mr. Justice Brandeis which would bar prosecution for speech or writings in all cases except those in which the words used "so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country." [55]

I realize that these laws are aimed only at the Communist Party. No one need console himself, however, that the policy of using governmental force to crush dissident groups upon which they are based can or will be stopped at that point. The weakening of constitutional safeguards in order to suppress one obnoxious group is a technique too easily available for the suppression of other obnoxious groups to expect its abandonment when the next generally hated group appears. Only eleven years ago, this Court upheld a governmental penalty directed at Communists on the ground that "only a relative handful" would be affected by the penalty involved in that case.[56] Today, it upholds statutes which I think totally outlaw that Party, claiming nonetheless that "[n]othing which we decide here remotely carries . . . [the] implication . . . [that] Congress may impose similar requirements upon any group which pursues unpopular political objectives or which expresses an unpopular political ideology." I am very much afraid that we will see the day when the very implication which the Court now denies is found.

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press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow."

[55] *Abrams* v. *United States*, 250 U. S. 616, 630 (Holmes, J., dissenting). I have recently expressed my belief that the "balancing test" can derive no support whatever from the "clear and present danger" test used by Mr. Justice Holmes and Mr. Justice Brandeis. See *Konigsberg* v. *State Bar of California*, 366 U. S. 36, 56 (dissenting opinion).

[56] *American Communications Assn.* v. *Douds*, 339 U. S. 382, 404.

I am ready to admit that strong arguments can be made for saying that Governments in general should have power to suppress the freedoms of speech, press, petition and assembly. These arguments are particularly strong in countries where the existing Government does not represent the will of the people because history shows that people have a way of not being willing to bear oppressive grievances without protest. Such protests, when bottomed upon facts, lead almost inevitably to an irresistible popular demand for either a redress of those grievances or a change in the Government. It is plain that there are Governments in the world today that desperately need to suppress such protests for they probably could not survive a week or even a day if they were deprived of the power to use their informers to intimidate, their jails to imprison and their firing squads to shoot their critics. In countries of that kind, repressive measures like the Smith Act and the Subversive Activities Control Act are absolutely necessary to protect the ruling tyrants from the spread of information about their misdeeds. But in a democracy like ours, such laws are not only unnecessary but also constitute a baseless insult to the patriotism of our people.

I believe with the Framers of the First Amendment that the internal security of a nation like ours does not and cannot be made to depend upon the use of force by Government to make all the beliefs and opinions of the people fit into a common mold on any single subject. Such enforced conformity of thought would tend only to deprive our people of the bold spirit of adventure and progress which has brought this Nation to its present greatness. The creation of public opinion by groups, organizations, societies, clubs, and parties has been and is a necessary part of our democratic society. Such groups, like the Sons of Liberty and the American Corresponding Societies, played a large part in creating sentiment in this country that led the people of the Colonies to want a nation of

their own. The Father of the Constitution—James Madison—said, in speaking of the Sedition Act aimed at crushing the Jeffersonian Party, that had that law been in effect during the period before the Revolution, the United States might well have continued to be "miserable colonies, groaning under a foreign yoke." [57]

In my judgment, this country's internal security can better be served by depending upon the affection of the people than by attempting to instill them with fear and dread of the power of Government. The Communist Party has never been more than a small group in this country. And its numbers had been dwindling even before the Government began its campaign to destroy the Party by force of law. This was because a vast majority of the American people were against the Party's policies and overwhelmingly rejected its candidates year after year. That is the true American way of securing this Nation against dangerous ideas. Of course that is not the way to protect the Nation against *actions* of violence and treason. The Founders drew a distinction in our Constitution which we would be wise to follow. They gave the Government the fullest power to prosecute overt actions in violation of valid laws but withheld any power to punish people for nothing more than advocacy of their views.

I am compelled to say in closing that I fear that all the arguments and urgings the Communists and their sympathizers can use in trying to convert Americans to an ideology wholly foreign to our habits and our instincts are far less dangerous to the security of this Nation than laws which embark us upon a policy of repression by the outlawry of minority parties because they advocate radical changes in the structure of Government. This widespread program for punishing ideas on the ground that

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[57] Miller, Crisis in Freedom, 84.

they might impair the internal security of the Nation not only sadly fails to protect that security but also diverts our energies and thoughts from the many far more important problems that face us as a Nation in this troubled world.

I would reverse this case and leave the Communists free to advocate their beliefs in proletarian dictatorship publicly and openly among the people of this country with full confidence that the people will remain loyal to any democratic Government truly dedicated to freedom and justice—the kind of Government which some of us still think of as being "the last best hope of earth."

MR. JUSTICE DOUGLAS, dissenting.

I.

The Subversive Activities Control Board found, and the Court of Appeals sustained the finding, that petitioner, the Communist Party of the United States, is "a disciplined organization" operating in this Nation "under Soviet Union control" to install "a Soviet style dictatorship in the United States." Those findings are based, I think, on facts; and I would not disturb them.

The other objections made are not of the character of those which led us to reverse and remand for additional hearings five years ago. There we had a record tainted by perjury. *Communist Party* v. *Control Board,* 351 U. S. 115, 124–125. No one—no matter how venal—could suffer penalties under our regime of law where perjury tainted the record. The present errors that are urged are not of that character.

Had they appeared in a normal administrative hearing and been timely claimed, they might give us pause. If we had before us the question whether a particular organization was, to use the statutory words, a "Communist-front organization" (64 Stat. 987, 989, 50 U. S. C. § 782 (4))

or a "Communist-infiltrated organization" (68 Stat. 775, 777, 50 U. S. C. § 782 (4A)) the errors urged might loom large. For then the decision might turn on intangibles to be closely appraised. The present problem, however, is in a somewhat different posture. We are in a field where Congress has found and declared that the Communist Party is "in fact an instrumentality of a conspiracy to overthrow the Government of the United States," that its "policies and programs" are "secretly prescribed for it by the foreign leaders of the world Communist movement," that it is "the agency of a hostile foreign power." 68 Stat. 775. These congressional findings amount to no more than facts of which some Justices have already taken judicial notice. See, *e. g., Communications Assn.* v. *Douds,* 339 U. S. 382, 427 *et seq.* (opinion of Mr. Justice Jackson). This does not mean that anything goes and that the hearings are *pro forma.* It does suggest, however, that where, as here, the case does not turn on nice nuances which in closer contests might have to be carefully weighed, we should not prolong the administrative hearings which already have extended a decade. With this as a starting point, I agree with the Court that the Court of Appeals did not err in overruling the objections based on procedural errors.

May then the Communist Party, under control of a foreign power, be required to register?

The vices of registration may be not unlike those of licensing. Despite *Times Film Corp.* v. *Chicago,* 365 U. S. 43, I think licensing is an impermissible form of regulation when it vests discretion in the authorities to grant or withhold the exercise of First Amendment rights or to permit them to be exercised only on condition. *Lovell* v. *Griffin,* 303 U. S. 444, 451–452. Licensing, like a tax payable on the exercise of a First Amendment right (*Murdock* v. *Pennsylvania,* 319 U. S. 105), is therefore

unconstitutional. See *Thomas* v. *Collins,* 323 U. S. 516. Yet registration, like licensing, may have aspects of harassment and burden. That is why we said in *Thomas* v. *Collins, supra,* 540:

> "If the exercise of the rights of free speech and free assembly cannot be made a crime, we do not think this can be accomplished by the device of requiring previous registration as a condition for exercising them and making such a condition the foundation for restraining in advance their exercise and for imposing a penalty for violating such a restraining order. So long as no more is involved than exercise of the rights of free speech and free assembly, it is immune to such a restriction. If one who solicits support for the cause of labor may be required to register as a condition to the exercise of his right to make a public speech, so may he who seeks to rally support for any social, business, religious or political cause. We think a requirement that one must register before he undertakes to make a public speech to enlist support for a lawful movement is quite incompatible with the requirements of the First Amendment."

Freedom of association is included in the bundle of First Amendment rights. *N. A. A. C. P.* v. *Alabama,* 357 U. S. 449, 460. So if we had only the question whether those who band together to espouse a political, educational, literary, civic, or ideological cause could be made to register, I would protest. The late Zechariah Chafee spoke of the danger in limiting our freedoms under political pressures. "Universities," he wrote, "should not be transformed, as in Nazi Germany, into loud-speakers for the men who wield political power." The Blessings of Liberty (1956) 241. There have been attempts here to interfere by law in a myriad of ways with the shaping of

public opinion through many groups, attacked because they were nonconformists of one kind or another. As we said recently, the identification of members of groups and fear of reprisal "might deter perfectly peaceful discussions of public matters of importance." *Talley* v. *California,* 362 U. S. 60, 65. There is, in my view, a disability on the part of government to probe the intimacies of relationships in the myriad of lawful societies and groups in this country. See, for example, *United States* v. *Rumely,* 345 U. S. 41, 48, 56–58 (concurring opinion); *Bates* v. *Little Rock,* 361 U. S. 516, 527 (concurring opinion); *Uphaus* v. *Wyman,* 364 U. S. 388, 401, 405–408 (dissenting opinion). From those precedents I would hopefully deduce two principles. First, no individual may be required to register before he makes a speech, for the First Amendment rights are not subject to any prior restraint. Second, a group engaged in lawful conduct may not be required to file with the Government a list of its members, no matter how unpopular it may be. For the disclosure of membership lists may cause harassment of members and seriously hamper their exercise of First Amendment rights. The more unpopular the group, the greater the likelihood of harassment. In logic then it might seem that the Communist Party, being at the low tide of popularity, might make out a better case of harassment than almost any other group on the contemporary scene.

We have, however, as I have said, findings that the Communist Party of the United States is "a disciplined organization" operating in this Nation "under Soviet Union control" with the aim of installing "a Soviet style dictatorship" here. These findings establish that more than debate, discourse, argumentation, propaganda, and other aspects of free speech and association are involved. An additional element enters, *viz.,* espionage, business activities, or the formation of cells for subversion,

as well as the use of speech, press, and association by a foreign power to produce on this continent a Soviet satellite.[1]

Picketing is free speech *plus* (*Bakery Drivers Local* v. *Wohl,* 315 U. S. 769, 776–777 (concurring opinion); *Giboney* v. *Empire Storage Co.,* 336 U. S. 490, 497–503) and hence can be restricted in all instances and banned in some. Registration of those who disseminate propaganda of foreign origin (see *Viereck* v. *United States,* 318 U. S. 236, 251 (dissenting opinion)) has been thought to fall in the same category as barring speech in places that will create traffic conditions (*Schneider* v. *State,* 308 U. S. 147, 160; *Cox* v. *New Hampshire,* 312 U. S. 569) or provoke breaches of the peace. *Chaplinsky* v. *New Hampshire,* 315 U. S. 568. Though the activities themselves are under the First Amendment, the manner of their exercise or their collateral aspects fall without it.

Like reasons underlie our decisions which sustain laws that require various groups to register before engaging in specified activities. Thus lobbyists who receive fees for attempting to influence the passage or defeat of legislation in Congress may be required to register. *United*

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[1] For accounts of the attempts of Communists to infiltrate American trade unions see S. Doc. No. 89, 82d Cong., 1st Sess.; Taft, The Structure and Government of Labor Unions (1954), pp. 19 *et seq.;* Murray, American Labor and the Threat of Communism (1951), 274 Annals Am. Acad. Pol. & Soc. Sci. 125; Paschell and Theodore, Anti-Communist Provisions in Union Constitutions (1954), 77 Monthly Lab. Rev. 1097.

Eric Sevareid writing in the Washington Post for January 15, 1961, said:

"Americans get too hysterical about the Marxists in their midst. Americans do, considering that there are so few. But I notice that it is the hard core of Marxists who now threaten to split Belgium in two; that it was the hard core of Marxists who drove the British Labor Party down the official policy line of neutralism."

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States v. *Harriss*, 347 U. S. 612.[2] Criminal sanctions for failure to report and to disclose all contributions made to political parties are permitted. *Burroughs* v. *United States*, 290 U. S. 534. Publishers of newspapers desiring reduced postal rates have long been required to file with the Postmaster General and with the local post office certain data concerning ownership and circulation; and those disclosure requirements have been sustained. *Lewis Publishing Co.* v. *Morgan*, 229 U. S. 288. In short, the exercise of First Amendment rights often involves business or commercial implications which Congress in its wisdom may desire to be disclosed, just as it did in strictly financial matters under the Public Utility Holding Company Act of 1935. See *Electric Bond & Share Co.* v. *Securities & Exchange Comm'n*, 303 U. S. 419.

If lobbyists can be required to register, if political parties can be required to make disclosure of the sources of their funds, if the owners of newspapers and periodicals must disclose their affiliates, so may a group operating under the control of a foreign power.

The Bill of Rights was designed to give fullest play to the exchange and dissemination of ideas that touch the politics, culture, and other aspects of our life. When an organization is used by a foreign power to make advances here, questions of security are raised beyond the ken of disputation and debate between the people resident here. Espionage, business activities, formation of cells for subversion, as well as the exercise of First Amendment rights, are then used to pry open our society

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[2] The dissents in that case were on grounds not material to the bare issue of registration now before us. The concealment of the main interests behind legislative proposals has been conspicuous. The example of the American Fair Trade League—controlled by manufacturers but purporting to represent retailers only—is told in Federal Trade Commission, Report on Resale Price Maintenance (1945), pp. 43–48.

and make intrusion of a foreign power easy. These machinations of a foreign power add additional elements to free speech just as marching up and down adds something to picketing that goes beyond free speech.

These are the reasons why, in my view, the bare requirement that the Communist Party register and disclose the names of its officers and directors is in line with the most exacting adjudications touching First Amendment activities.

II.

While the Act is pregnant with constitutional questions, I deal now with only one, *viz.*, whether § 7 of the Act is unconstitutional and void as conflicting with the provision against self-incrimination accorded by the Fifth Amendment.

The registration statement prepared by the Attorney General pursuant to § 7 (a) and (b) of the Act asks in Item 2 the name, address, position, and functions of any individual "who at any time during the twelve months preceding the execution of the statement was an officer, director, or person performing the functions of an officer or director" of the Communist Party. Item 3 requires a statement of any alias of any person listed in Item 2. Item 11 asks for the name, alias, and address of each individual "who was a member of the organization at any time during the period" of twelve months prior to the filing of the registration statement. The statement must be signed by the partners, officers, directors, and members of the governing body. 28 CFR, 1960 Supp., § 11.200, Form ISA–1.

Those provisions are not conditional. The Government with all the authority it possesses has ordered the Party to register.

The duty to disclose the names of the officers, directors, and members is explicit. The duty is to make the dis-

closure here and now. The individuals who must make the disclosure are definitely described. There is no uncertainty as to what must be done. The question is whether the command made is constitutional under the Fifth Amendment.

If the requirement of Form ISA–1 that the statement be signed "by the partners, officers, and directors" were deleted and the statement was allowed to be filed by "any agent," the act of signing that implicates the partner, officer, or director would be eliminated. If the Court, sensitive to the high role performed by the Fifth Amendment, also deleted the compulsory disclosure of the others whose association with the Party is required to be disclosed without immunity, the problems presented by those disclosures would disappear. But the Court does none of these things. It requires officers and directors to sign; it requires that the names of officers, directors, and members within the 12-month period be disclosed. Thus the question of self-incrimination of each of those individuals is squarely presented.

III.

First as to the *officers, directors, and others who must sign the registration statement.* These individuals, who could be prosecuted as "active" Communist agents under *Yates* v. *United States,* 354 U. S. 298, and *Scales* v. *United States, post,* p. 203, cannot, in my view, be compelled to sign a registration statement. A compulsory admission of that ingredient of a crime would plainly violate the Fifth Amendment.

If a person who was on the witness stand in a courtroom or appearing before a Congressional Committee were asked whether he was an officer or director of the Communist Party, our decisions in *Blau* v. *United States,* 340 U. S. 159, 161, and *Quinn* v. *United States,* 349 U. S.

155, would protect him from self-incrimination. Under our system federal officials who desire to establish guilt must use the grand jury to get an indictment and a petit jury to obtain conviction. They cannot require the accused to "do their job for them." Chafee, The Blessings of Liberty (1956), p. 207.

The clause of the Fifth Amendment with which we are here concerned provides that "No person . . . shall be compelled in any criminal case to be a witness against himself." The clause has been hospitably construed. The Court said in *Counselman* v. *Hitchcock*, 142 U. S. 547, 562:

> "It is impossible that the meaning of the constitutional provision can only be, that a person shall not be compelled to be a witness against himself in a criminal prosecution against himself. It would doubtless cover such cases; but it is not limited to them. The object was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime. The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard."

As recently stated by Judge Samuel H. Hofstadter:

> "The privilege is applicable to civil cases, grand jury proceedings, legislative inquiries, and virtually every other form of official proceeding. It applies whether the witness is a party to the civil or criminal case or merely a witness. And it applies whether the testimony is directly in issue or is collateral. The witness himself is the judge in each case; he may not be compelled to give testimony which he himself in good faith believes might, in any manner whatever, pave the way to possible prosecution. To claim the privilege requires no special combination of words; the

clause is liberally construed to protect the right it was intended to secure." The Fifth Amendment and the Immunity Act of 1954 (Fund for the Republic, 1955), p. 10.

How then can the Government ask a person to sign a registration statement which makes admissions that would not survive challenge under the Fifth Amendment if asked orally of the individuals that the disclosure implicates?

United States v. *White,* 322 U. S. 694, held that the privilege does not excuse an officer of an organization from producing its records on the grounds that the contents of the records will or may incriminate him. As to the officer or director, it is plain that he incriminates himself not merely by producing records but by signing and filing the registration statement. The preparation of the registration statement and its execution are in the same category as the giving of testimony in the *Blau* and *Quinn* cases, if the Fifth Amendment is to have continuing vitality. Part of what is today required is the furnishing of statements and admissions from the pens of men and women whose very signature may start them on the way to prison. We made clear in *Curcio* v. *United States,* 354 U. S. 118, that the ruling in the *White* case was restricted to the production of books and records. We there upheld the custodian's privilege against testifying as to the "whereabouts of books and records" where that testimony might incriminate him. We said ". . . he cannot lawfully be compelled, in the absence of a grant of adequate immunity from prosecution, to condemn himself by his own oral testimony." *Id.,* 124.

It would seem to follow *a fortiori* that a custodian who need not testify concerning the whereabouts of records, if that testimony would tend to incriminate him, need not put into writing the admission that he is an officer or

director of the Communist Party. What more incriminating admission could be compelled? This was the position of Judge Bazelon in the Court of Appeals, 96 U. S. App. D. C. 66, 114, 223 F. 2d 531, 579, and it seems to me unassailable. See also *Shapiro* v. *United States,* 335 U. S. 1, 27; *Wilson* v. *United States,* 221 U. S. 361, 385.

Electric Bond & Share Co. v. *Securities & Exchange Comm'n, supra,* is irrelevant to our present problem under the Fifth Amendment. No claim was made in that case that the preparation and filing of a registration statement might implicate an officer or director and that the Fifth Amendment therefore protected him against signing unless immunity was granted. The problem in the present case is quite different. It raises the following kind of question: Can Congress, which has made embezzlement of national bank funds a criminal offense, require embezzlers to register without granting them the full immunity (cf. *Ullmann* v. *United States,* 350 U. S. 422) to which they are entitled? That is the closest analogy to the present case.

The compiling, the signing, and the filing of the registration statement required of officers, directors, and others by the registration form is a form of elicited testimony, not the surrender of pre-existing records. Where, as here, such disclosure will reveal knowledge of and relations with the Communist Party, I do not see how it can be demanded, unless immunity is granted.

The Bill of Rights does not go so far as to forbid all interrogation under threat of punishment. It does not prevent the breaking of myriad bonds of secrecy at the command of the Government. It protects only the individual who has himself become the object of the Government's punitive powers. From him it removes the humiliating presence of the questioner. The power of the Government is limited, so that it cannot punish either the silence or the passive hostility of one who claims the

privilege, whether he be a criminal or a prophet or merely a bewildered citizen suddenly caught in the sinister web of suspicion.

The privilege is often criticized as a shield for wrongdoing. But not every hostile silence which greets official interrogation has its beginning in wrongdoing. In a Nation such as ours the Government must often meet with hostility; we are not constrained to admire its activities; we are free to detest them. That freedom could not long remain if the Government were free to require us to recount all our doings. The Government may still threaten silence with prison, but its power to do so stops short when information sought is incriminating. Even so ardent an advocate of the totalitarian state as Thomas Hobbes respected this core of privacy:

> "A covenant not to defend myself from force, by force, is always void. For (as I have shown before) no man can transfer or lay down his right to save himself from death, wounds, and imprisonment, the avoiding whereof is the only end of laying down any right . . . . A covenant to accuse oneself, without assurance of pardon, is likewise invalid. For in the condition of nature, where every man is judge, there is no place for accusation: and in the civil state the accusation is followed with punishment, which, being force, a man is not obliged not to resist." Leviathan, 23 Great Books 90.

The cases dealing with the duty to keep records [3] (see *Shapiro* v. *United States, supra*) can be put to one side. Under the Smith Act, 18 U. S. C. § 2385, the very subject matter under regulation is interwoven with criminal activity. Where individuals compile and sign

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[3] See Meltzer, Required Records, The McCarran Act, and the Privilege Against Self-Incrimination, 18 U. of Chi. L. Rev. 687, 719–728.

the registration statement, as they must, it is the very making of the registration statement that will incriminate them, not the underlying documents.

Signing as an officer or director of the Communist Party—an ingredient of an offense that results in punishment—must be done under the mandate of law. That is compulsory incrimination of those individuals and, in my view, a plain violation of the Fifth Amendment.

IV.

The compulsory disclosure of those who have been *officers, directors, or members* of the Party during the last 12 months is equally objectionable under the Fifth Amendment. Membership in the Party is, by virtue of federal statutes, the start [4] of every prosecution whether it be for active "membership," as in *Scales* v. *United States, supra,* or for conspiracy to teach the doctrine, as in *Dennis* v. *United States,* 341 U. S. 494. Membership is a "link in the chain of evidence" needed for such prosecution, as we held in *Blau* v. *United States, supra,* 161; *Quinn* v. *United States, supra.* It is therefore in the class of disclosure which we have held since the time of Chief Justice Marshall [5] (see *United States* v. *Burr,* 25 Fed.

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[4] It is also the starting point for certain other quasi-penal disabilities, including the roundup of those who may be put in detention camps by virtue of 50 U. S. C. §§ 812–814.

[5] In answering a claim of the prosecution that a witness cannot refuse to answer unless the answer, unconnected with other testimony, would be sufficient to convict him of a crime, Chief Justice Marshall said:

"This would be rendering the rule almost perfectly worthless. Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the court to be the true sense of the rule that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible but a probable case that a witness, by disclosing a single

Cas. No. 14,692e) could not be demanded by reason of the Fifth Amendment. The compulsory disclosure of membership in the Communist Party, which the *Blau* and *Quinn* cases have put within the protection of the Fifth Amendment, is the necessary and immediate effect of filing as a public record the registration statement required by § 7. As in case of officers and directors who must sign the registration statement, this is, in my view, compulsory incrimination of the members and a plain violation of the Fifth Amendment.

If Congress can through use of the registration device compel disclosure of people's activities that violate federal laws, the Fifth Amendment would be cast into limbo.

As I have said, each person required to be listed in the registration statement, were he to be brought before his interrogators, could not be compelled to admit what the statute here requires petitioner to set forth at length. The only difference that exists between compelling each member and officer and between compelling petitioner is the thin "veil" of petitioner's fictitious juridical personality.

Hale v. *Henkel,* 201 U. S. 43, held that a corporation could not claim a privilege against self-incrimination. That case and others—such as *Wilson* v. *United States,*

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fact, may complete the testimony against himself, and to every effectual purpose accuse himself as entirely as he would by stating every circumstance which would be required for his conviction. That fact of itself might be unavailing, but all other facts without it would be insufficient. While that remains concealed within his own bosom he is safe; but draw it from thence, and he is exposed to a prosecution. The rule which declares that no man is compellable to accuse himself would most obviously be infringed by compelling a witness to disclose a fact of this description.

"What testimony may be possessed, or is attainable, against any individual the court can never know. It would seem, then, that the court ought never to compel a witness to give an answer which discloses a fact that would form a necessary and essential part of a crime which is punishable by the laws." 25 Fed. Cas., at 40.

supra, and *United States* v. *White, supra,* which I have mentioned—have implemented a constitutional policy of publicity for associational activities which would be abhorrent if required of individuals and in matters that were less clearly within the realm of day-to-day administrative regulation.

The present requirement for the disclosure of membership lists is not a regulatory provision, but a device for trapping those who are involved in an activity which, under federal statutes, is interwoven with criminality. The primary effect of the required registration is not disclosure to the public but criminal prosecution. I do not see how the Government that has branded an organization as criminal through its judiciary,[6] its legislature,[7] and its executive,[8] can demand that it submit the names of all its members—unless it grants immunity for the disclosure.

Prior to today,[9] the nearest the Court ever came to allowing the registration device to be used as a mecha-

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[6] See *Barenblatt* v. *United States,* 360 U. S. 109, 128.

[7] See Communist Control Act of 1954, § 2, 68 Stat. 775, 50 U. S. C. § 841.

[8] See List of Organizations, App. A, 5 CFR, part 210 (1949 ed.); *Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123, 124–129.

[9] Section 6 of the Mann Act (36 Stat. 825, 827, 18 U. S. C. § 2424) provides that anyone harboring an alien woman in a house of prostitution must register. There is no required form—merely a statement in writing giving the following information: the name of the woman, the place where she is kept, all of the facts as to the date of her entry into the United States, the port of entry, her age, nationality, parentage, and all facts concerning her procuration to come to this country within the knowledge of the person required to furnish the statement. One who files is immune from prosecution by the United States for anything reported in the registration statement. See *United States* v. *Mack,* 112 F. 2d 290, 292. But this provision was held in violation of the Fifth Amendment in *United States* v. *Lombardo,* 228 F. 980, aff'd on other grounds, 241 U. S. 73, because the immunity extended only to federal, not state prosecutions.

nism for compulsory disclosure of criminal activities was *United States* v. *Kahriger,* 345 U. S. 22. See also *Lewis* v. *United States,* 348 U. S. 419. Gamblers were required to register with the Collector of Internal Revenue and to pay an occupational tax. The defense of the Fifth Amendment was rejected on grounds that seemed to some of us at the time to be specious. Registration could be required, the Court held, because it pertained only to "the business of wagering in the future." *United States* v. *Kahriger, supra,* 33. The Fifth Amendment, the Court said, "has relation only to past acts, not to future acts that may or may not be committed." *Id.,* 32. The sluice gates, opened a hair's width by that case, are now flung wide. I remain in agreement with what MR. JUSTICE BLACK said in *United States* v. *Kahriger, supra,* 37: "[W]e have a Bill of Rights that condemns coerced confessions, however refined or legalistic may be the technique of extortion."

V.

It is said that the Party has no standing to assert the rights of its officers, directors or members.

The privilege against self-incrimination is a personal one. It must be claimed; it may be waived. In ordinary circumstances, there is no Fifth Amendment privilege against incriminating another. *Rogers* v. *United States,* 340 U. S. 367. And see *Hale* v. *Henkel, supra,* 69–70; *United States* v. *White, supra,* 704. On the other hand, the intimate connection between associations and their members has long been recognized. In *Beauharnais* v. *Illinois,* 343 U. S. 250, 262, MR. JUSTICE FRANKFURTER writing for the Court said:

> "Long ago this Court recognized that the economic rights of an individual may depend for the effectiveness of their enforcement on rights in the group, even though not formally corporate, to which he belongs."

The case cited was *American Foundries* v. *Tri-City Council,* 257 U. S. 184, where the right of a union to speak for its members was recognized. In *N. A. A. C. P.* v. *Alabama, supra,* the Association was allowed to assert its members' constitutional rights:

> "If petitioner's rank-and-file members are constitutionally entitled to withhold their connection with the Association despite the production order, it is manifest that this right is properly assertable by the Association. To require that it be claimed by the members themselves would result in nullification of the right at the very moment of its assertion. Petitioner is the appropriate party to assert these rights, because it and its members are in every practical sense identical." *Id.,* 459.

We dealt there with a Negro group asserting the First Amendment rights of its members. The members, it was argued, would be harassed if their names were disclosed and that harassment would abridge their First Amendment rights. We agreed with that view, *id.,* 460–462, and held that N. A. A. C. P. could not be forced to disclose to Alabama its membership lists. We did not, I assume, write a rule good for that day only. Nor did I think we wrote only for Negro groups.

Nor did I think we restricted the assertion by a group of the rights of its members to those asserting First Amendment rights. In *Anti-Fascist Refugee Committee* v. *McGrath, supra,* three groups, under circumstances somewhat similar to the present case, claimed the right to invoke their members' rights under both the First and the Fifth Amendments. They had been designated as "communist" by the Attorney General; and the impact of that classification on the status of the members as federal employees was striking and immediate. Could that classification be constitutionally made without a hearing? The consensus of opinion among those who

reached the issue seemed clear—that the groups could raise objections that involved the constitutional rights of their members. The view was forcefully asserted by Mr. Justice Jackson. *Id.*, 186. As MR. JUSTICE FRANKFURTER stated:

> "Designation works an immediate substantial harm to the reputations of petitioners. The threat which it carries for those members who are, or propose to become, federal employees makes it not a finicky or tenuous claim to object to the interference with their opportunities to retain or secure such employees as members." *Id.*, 159.

That was my own view then, *id.*, 174–175, and now.

This analysis has support in a long line of cases where the Court has allowed *A* to assert *B's* constitutional right in seeking redress or prevention of harm to himself. The root of this doctrine is found in equity. In *Truax* v. *Raich*, 239 U. S. 33, an injunction had been sought by an employee who was an alien, seeking to restrain enforcement of an Arizona statute. The right invoked was the employee's own right under the Fourteenth Amendment. But the statute imposed no penalty on the alien for working. It penalized his employer for hiring him. Nevertheless, the injunction issued. In *Pierce* v. *Society of Sisters*, 268 U. S. 510, the proprietors of a private school, to protect their monetary interest in preserving the school, were allowed to assert rights of parents in the education of their children. Similarly, a white vendor was allowed to assert his Negro vendee's rights in enforcing a contract to sell real property, subject to a restrictive city ordinance, in *Buchanan* v. *Warley*, 245 U. S. 60. See also *International Harvester* v. *Department of Taxation*, 322 U. S. 435; *Barrows* v. *Jackson*, 346 U. S. 249; *Bates* v. *Little Rock*, 361 U. S. 516.

Bryant v. *Zimmerman*, 278 U. S. 63, which sustained a *state* law requiring the Ku Klux Klan to file its

membership lists with state officials was explained in *N. A. A. C. P.* v. *Alabama, supra,* 465, as a case involving an organization whose acts were "unlawful intimidation and violence," not First Amendment activities. That explanation was adequate for that case as only First Amendment rights were being considered in *N. A. A. C. P.* v. *Alabama, supra.* No Fifth Amendment question [10] was, however, raised in *Bryant* v. *Zimmerman, supra.*

Petitioner, the Communist Party, seeks in this case to assert that the statute under which it is ordered to register is unconstitutional, because it will have the necessary effect of depriving members of their privilege against being compelled to reveal their connection with the Party. This is not a case, as the majority opinion admits, like *United States* v. *Sullivan,* 274 U. S. 259, where a taxpayer, because he claimed the privilege against self-incrimination with respect to the source of some of his income, argued that he was wholly excused from filing a tax return. Nor is this a case where "one who is required to assert the privilege against self-incrimination may thereby arouse the suspicions of prosecuting authorities." For here, if an individual were to attempt to claim the privilege against filing for the Party, he would admit an ingredient of a crime, namely, his connection with the Party.

Clearly, this is a situation in which only the Party can effectively assert the privilege of its officers, directors, and members. This is the teaching of *N. A. A. C. P.* v. *Alabama, supra,* and of the opinions of Mr. Justice Jackson, MR. JUSTICE FRANKFURTER and myself in *Anti-Fascist Refugee Committee* v. *McGrath, supra,* and of the

[10] The Court had held years earlier in *Twining* v. *New Jersey,* 211 U. S. 78, that the Fifth Amendment was not applicable to the States. And see *Jack* v. *Kansas,* 199 U. S. 372, holding that if immunity from state prosecution were granted, the defense that it offered no immunity from federal prosecution would have been of no avail.

other cases discussed above. When we reject those precedents, we create a special rule for this day only.

The Party is the proper party to raise the objection, because no one else can raise it effectively. The community of interest between the Party and its members is indeed closely analogous to the community of interest between a corporation and its stockholders. See Stevens, Corporations (1949), pp. 788–789. Since the command to register cannot be separated from the means of registration, an attack is properly made on the incriminating features of the statute by petitioner who is commanded to register. See *The Employers' Liability Cases,* 207 U. S. 463, 500–502; *United States* v. *Reese,* 92 U. S. 214, 221. Cf. *Electric Bond & Share Co.* v. *Securities & Exchange Comm'n, supra.*

In *Boyd* v. *United States,* 116 U. S. 616, 638, a court order to produce an invoice, claimed to be privileged under the Fifth Amendment, was held to be unconstitutional and void. One need not, I have assumed, obey an unconstitutional command and raise his constitutional objection only on compliance. Of course, defiance of a governmental command because it is unconstitutional is deep in our traditions. *Thomas* v. *Collins, supra; Staub* v. *City of Baxley,* 355 U. S. 313. Yet heretofore a person claiming that a disclosure would violate his Fifth Amendment rights need not first tender the information claimed to be privileged. A person asked whether he is a member of the Communist Party can invoke the Fifth Amendment and refuse to reply since under existing federal laws the answer would tend to incriminate him. *Quinn* v. *United States, supra,* 162; *Blau* v. *United States, supra,* 161. The answers now demanded by the registration form and the regulations require precisely the kind of answers we held protected against self-incrimination in the *Quinn* and *Blau* cases.

VI.

The fact that there may be other times when the issue may be raised—as for example if a registration statement is not filed and officers or members are prosecuted for that default under § 15 of the Act—seems immaterial. This case is not in the category of those challenges of a law made before it is known how and in what manner it will be enforced and applied. Cf. *Rescue Army* v. *Municipal Court,* 331 U. S. 549; *Federation of Labor* v. *McAdory,* 325 U. S. 450. A final order to register under the Act has been issued. The disclosure requirements are clear and specific. Now is the time to raise Fifth Amendment questions. To relegate the parties to another time and place in order to raise those constitutional objections is to fashion an extremely harsh rule to fit the Communist Party but no one else. Default means the risk of criminal prosecution. No person, I think, should be forced to wait until his default to raise his constitutional objection. The great injustice in what we do today lies in compelling the officials of the Party to violate this law before their constitutional claims can be heard and determined. Never before, I believe, have we forced that choice on a litigant. See *Terrace* v. *Thompson,* 263 U. S. 197, 216. The modern trend has indeed been to protect a person against prosecutions that may involve infringements of his constitutional rights. At times even equity has stepped in. See *Philadelphia Co.* v. *Stimson,* 223 U. S. 605. The prevention of peril and insecurity, involved in the sanctions of some laws, has led to a generous use of the declaratory judgment procedure so that a person need not run the gantlet of a criminal prosecution to get an adjudication of his rights. See *Railway Mail Assn.* v. *Corsi,* 326 U. S. 88; *United Public Workers* v. *Mitchell,* 330 U. S. 75, 91–94. Cf. *McGrath* v. *Kristensen,* 340 U. S. 162. The order requiring registra-

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tion requires disclosure; the constitutionality of that disclosure requirement is before us here and now. This case presents the only effective opportunity to secure the benefits of the Fifth Amendment guarantee. Indeed, if the question were not raised now, the strict rule of *Rogers* v. *United States, supra,* might mean that the question had been waived.

VII.

My conclusion is that while the Communist Party can be compelled to register, no one acting for it can be compelled to sign a statement that he is an officer or director nor to disclose the names of its officers, directors, or members—unless the required immunity is granted. Why then, one may ask, do we have a registration law? Congress (past or present) is attempting to have its cake and eat it too. In my view Congress can require full disclosure of all the paraphernalia through which a foreign dominated and controlled organization spreads propaganda, engages in agitation, or promotes politics in this country. But the Fifth Amendment bars Congress from requiring full disclosure by one Act and by another Act making the facts admitted or disclosed *under compulsion* the ingredients of a crime.

There is a giving of evidence by the filing of a registration. Its filing is the equivalent of officials testifying in investigations conducted by the Executive or Legislative Branch. It is compulsory disclosure of evidence which links officers, directors, and members of the group with a crime. Force and compulsion are outlawed techniques for federal law enforcement. Coerced confessions are taboo because of the long bitter experience of minorities in trying to maintain their freedom under hostile regimes. Our Constitution protects all minorities, no matter how despised they are.

Accordingly, I dissent.

MR. JUSTICE BRENNAN, with whom THE CHIEF JUSTICE joins, dissenting in part.

I agree with the Court and with MR. JUSTICE DOUGLAS that the order requiring that the Party register and disclose its officers and members is not constitutionally invalid as an invasion of the rights of freedom of advocacy and association guaranteed by the First Amendment to Communists as well as to all others.

I also share the Court's view that we are not called upon in this case to decide the constitutionality of the various duties and sanctions attaching to the Party, and to individual members, once orders to register become final. We are required by this case to decide only the validity of the order requiring the petitioner to register in accordance with § 7 of the Act as implemented by the regulations and Form ISA–1 of the Attorney General. We should properly reach at this time only such constitutional questions as necessarily relate to the requirements governing registration.

The questions in addition to those under the First Amendment which seem to me most nearly within the sphere of permissible constitutional adjudication in this proceeding arise from the interaction of the registration requirements with the criminal statutes under which Communist Party membership is implicated. This interplay poses the question whether the registration requirements violate the Fifth Amendment privilege against self-incrimination.

I do not believe that all of the self-incrimination questions raised by the registration provisions are properly adjudicable now. Some may be better left for subsequent adjudication as the necessity arises. For example, we need not decide now, I think, the constitutionality of the provision of § 8 for the self-registration of individual members. That provision becomes

operative only upon the failure of the petitioner, or its officials, to list members in effecting its registration, pursuant to a final order; the Government's brief observes that the criminal sanction against a member arising from nonregistration must be preceded by a final order of the Subversive Activities Control Board directing him to register. § 15 (a)(2). We cannot know at this time the posture in which the case will appear when a member comes under an enforceable duty to register, if he ever does. I also lay aside the requirements of § 7 (h), and its implementing regulation, 28 CFR § 11.205, that Party officials effect the registration of the organization if the organization fails to register itself within 30 days of a final order. That duty, enforceable by criminal sanctions against the officials, arises only in the contingency of nonregistration by petitioner in accordance with the present order. Here again the situation may not arise. I assume that the opportunity of the officials to raise the same objections is not irrevocably lost if we do not consider them now. Nor, finally, do I now concern myself with whether the Party may interpose the constitutional privilege of its members because of the nature of the information about them required to be supplied to complete the registration statement as described in the Attorney General's Form ISA–1. Section 7 (d) requires that the registration statement accompanying the registration shall provide such information as the names and addresses of members, and their past and present aliases, as well as information about the officers and activities of the organization. The Attorney General's regulations and Form ISA–1 implement this requirement.

But I do think we must reach one issue of self-incrimination, namely, whether the requirements of § 7 (d) as spelled out in the Attorney General's regulations and Form ISA–1 are void as necessarily conflicting with the Fifth Amendment privilege of the Party officials who are

charged with the duties necessary to complete the Party's registration. The statute, the regulations and the Form together clearly require that the registration statement shall be completed, signed and filed by designated officials. These officials are the "partners, officers and directors, including the members of the governing body of the organization"; they are explicitly required by the Form to sign the completed statement and vouchsafe their familiarity with, and the accuracy of, its contents. Whether these officials, consistently with the Fifth Amendment privilege, can be required to complete, sign and file the statement is a serious constitutional question. These requirements are in effect an inquiry into the status of officership and knowledge of Party activities of the signatories. Under today's decision in *Scales* v. *United States, post*, p. 203, the answers to such an inquiry might well implicate the officials in criminality in violation of several federal statutes.

I believe that the constitutional validity of the inquiry that I find implicit in these requirements is ripe for adjudication now. I read the Court's opinion as saying that there is no fatal bar to adjudicability of the question merely in the fact that the organization, and not an individual official of the organization, is asserting the privilege in this proceeding. The requirement of "standing"—that a litigant must show that he himself is affected by the operation of the action he challenges as it affects another—is involved here. But as the cases cited by my Brother DOUGLAS show, and the Court seems to concede, a party has been allowed to assert the constitutional rights of another person not before the Court as a named party in a variety of situations where the effect of the challenged state action on himself is derivative from the impact on the other person. Of course, this Court has indicated on a number of occasions that the privilege is a personal right which must normally be claimed by the individual seeking

its protection. See, *e. g., United States ex rel. Vajtauer* v. *Commissioner of Immigration,* 273 U. S. 103, 113; *United States* v. *Murdock,* 284 U. S. 141, 148; *Rogers* v. *United States,* 340 U. S. 367, 371; *Smith* v. *United States,* 337 U. S. 137, 147–148. These statements were made in the context of an issue of waiver—whether a later claim of privilege should be honored where it was contended that the party had an earlier opportunity to make the claim and had failed to do so. The present case presents quite the opposite situation—not whether the privilege is being claimed too late but too early, not waiver but premature assertion.

The issue of justiciability which confronts us is therefore not whether the petitioner may raise the Fifth Amendment question at all but whether it may do so now. I agree with the Court that the cases which have upheld standing in the first sense are not decisive of our problem. The following considerations, in my view, justify our adjudication now: (a) the order imposes a presently enforceable duty on the organization to complete and file Form ISA–1 and creates an incentive for both organization and officials to make the disclosures implicit in the completion, signing and filing of that Form; (b) the inquiry eliciting these disclosures of officership and knowledge is specific and not open to possibly varying answers; (c) the incriminating character of the information thus disclosed is plain; and (d) finally, if the question is not decided now, the officials must run the risk of not being able to make an acceptable claim of privilege at a later time. There thus inheres in putting off decision the substantial possibility of erosion of the privilege. We may and should avoid that undesirable result by deciding the question now.

I think the reasons advanced by the Court in support of the contrary conclusion are overborne by the considerations I have suggested. The Court says that the officials

may sign the statement and comply with the requirements, or may claim the privilege in such a form that it will be honored and thus avoid incrimination, and that in any event, a claim of privilege cannot be evaluated at this time because of the varying and presently unknowable circumstances which may determine whether it would have to be honored. The possibility of "voluntary" compliance by the officials should not be a bar to a decision now. Given the structure of the statute, compliance cannot indisputably be assumed to be a voluntary waiver of the privilege. The organization is under a duty by virtue of the order now before us to file a statement in accordance with the Attorney General's requirements, on penalty of prosecution for not filing a registration statement; the failure of the officials to complete, sign or file Form ISA–1 might subject it to such prosecution. And if the organization should not register within the 30-day period specified in § 7 (c), the officials are duty-bound under § 7 (h) to effect its registration, also on penalty of criminal sanctions. Plainly enough, then, the order generates pressure on the officials to complete, sign and file to avoid the possibility of prosecution either of the organization or themselves. This pressure may be increased by the uncertainties which attend efforts to make an acceptable claim of the privilege. If we pass the opportunity for decision now, officials may well comply out of fear that a later effort to make an acceptable claim of privilege will fail.

A claim of privilege on the registration form which names the official would be self-defeating. For if the admission of officership in the Communist Party is incriminating, then a claim of privilege by name would amount to the very same admission—the claimant would be asserting that he could not complete, sign or file the form because the admission of his officership would incriminate him. The Court suggests that a claim of the priv-

ilege is potentially always incriminating in that it may arouse the suspicions of the interrogators. However, this registration requirement seems to present a different case in important respects. Claiming the privilege here does more than attract suspicion to the claimant; it admits an element of his possible criminality. Moreover, registration is unique because of the initial burden it puts on the potential defendant to come forward and claim the privilege. He may thereby arouse suspicions that previously had not even existed and, indeed, virtually establish a prima facie case against himself. The usual situation in which the privilege is invoked is a judicial, legislative, or administrative proceeding in which the person claiming it appears because there is already some reason to think that he has information on the subject matter of the inquiry. His invocation of the privilege in such circumstances may confirm the suspicions of his interrogators, but is less likely to arouse them initially than in the case of a registration regulation which calls on all persons everywhere, known or unknown, who fall within a prescribed category, to come forward and identify themselves. At least in governmentally initiated inquiries, there are likely to be certain checks on self-accusation, either the explicit requirement of probable cause governing the maintenance of a criminal prosecution or institutional limitations on the exercise of the power of inquiry. Here there is no such initial burden on government, no requirement, for example, that it identify officials in a proceeding for that purpose and then seek to elicit the desired information as to other officials and members from them. I think, therefore, that if the privilege does protect an official from disclosure of his officership and knowledge when an inquiry explicitly in those terms is made, it would also protect him from disclosure in the kind of "indirect" inquiry and response that seems to me implicit in the suggestion that

a claim of the privilege by name may be an adequate alternative.

There remains consideration of the possibility that an anonymous claim of the privilege may be made and honored by the Attorney General. The organization might simply file a statement in which it asserted the privilege on behalf of its officials, listing their titles but not their names. However, on the Court's own reasoning the right to have a claim of privilege honored may depend on a variety of circumstances, including such factors as already existing public knowledge of the information which the claimant seeks to conceal, and it is difficult to see how following this course would advance the attempt of the claimant to have his privilege honored. In a subsequent enforcement proceeding against the organization for failure to register in accordance with the regulations, or against officials for failing to register the organization, the defense of privilege could be met with the same objection that the Court raises here—that the privilege claim could not be evaluated unless the identity of the claimant were known. The possibility that the Attorney General might honor even an anonymous claim of the privilege would simply mean abandonment of one of the requirements in the Form. But I do not see how we can view this case as if that requirement did not exist, since the order under review is to register in accordance with the Attorney General's requirements as they now are. Certainly an official might be sufficiently dubious as to the efficacy of an anonymous claim of the privilege by the organization on his behalf that he would choose one of the alternatives of complying, claiming the privilege by name, or not making any claim, all dangerous courses for him. Therefore, I cannot believe that the Court's suggestion that a claim may be made in a form in which it could be honored presents an official of petitioner with a suffi-

ciently realistic choice to require us to defer consideration of this question until it arises at some time after a choice among these alternatives is made.

I do not read *United States* v. *Sullivan*, 274 U. S. 259, and other cases which the Court cites, *e. g., In re Groban*, 99 Ohio App. 512, 135 N. E. 2d 477, aff'd, 164 Ohio St. 26, 128 N. E. 2d 106, aff'd, 352 U. S. 330, *O'Connell* v. *United States*, 40 F. 2d 201, as indicating a different result here. Those cases seem to me to hold that an individual cannot thwart a legitimate inquiry by refusing to answer any questions at all on the ground that some incriminating questions might be asked; they require that he must at least respond to the inquiry and make his claims of privilege as the incriminating questions are asked. In *Sullivan* the questions were neutral on their face and were asked pursuant to an inquiry in furtherance of the collection of the revenue; a claim of self-incrimination as to all such questions was meaningless in terms of the traditional requirement that the tribunal before which the claim is made have the opportunity to decide whether the claim shall be allowed. See *United States* v. *Burr*, 25 Fed. Cas. 38; *United States ex rel. Vajtauer* v. *Commissioner, supra*, at p. 113.

Moreover, in *Sullivan* a claim of privilege as to individual questions might have aroused suspicions but would not have pinpointed the taxpayer's criminal activities. No such wholesale immunity for the petitioner's officials would be involved in a conclusion that their claim of privilege should be adjudicated without a requirement that they first make it on the registration form specifically, with the attendant risks I have previously considered. The inquiry implicit in the requirements of completing, signing and filing here is precise; it demands disclosure on matters of officership in, and knowledge of, the Communist Party. The incriminating nature of that inquiry

seems plain on its face, since an admission of officership and knowledge would be not merely a possible link in the chain needed to convict under the Smith Act but would establish a main ingredient of the crime proscribed in the membership clause of the Act as this Court construes it today in *Scales* v. *United States*. Cf. *In re Dewar*, 102 Vt. 340, 148 A. 489. Mr. Justice Holmes wrote in *Sullivan* that the taxpayer "could not draw a conjurer's circle around the whole matter by his own declaration that to write any word upon the government blank would bring him into danger of the law." 274 U. S., at p. 264. Petitioner seeks to draw no such "conjurer's circle" for its officials in an essentially noncriminal area of inquiry, but to assert their privilege against replying to an inquiry in a regulatory area permeated with criminal statutes in circumstances where any word upon the paper responsive to the inquiry would involve them in the admission of one of the major elements of a crime, and where the effect of even claiming the privilege is not merely to arouse suspicions of illegality but to admit the same element of the crime.

Nor am I persuaded that this Fifth Amendment claim should not be adjudicated now because some of the officials may not be entitled to the privilege if the fact of their officership is already known. Even on the assumption that public notoriety or prior admission in these or other proceedings would make the privilege inapplicable to such officials, there is nothing in the record to indicate how many officials fall into this category. The Government contends that since the record does not establish that any officials are not publicly known as such, we should refrain from adjudicating the privilege claim now because no one may actually be entitled to invoke it. But since the record also leaves open the possibility that there may be officials entitled to assert the privilege, and since I see

such difficulty in the way of effective assertion of the privilege now or later without disclosure of the information sought to be protected, I do not believe that these persons should be subjected to the risks and uncertainties of deciding on a course of conduct with a view to litigating this question in a subsequent proceeding. Where the danger of compulsory incrimination in violation of the Fifth Amendment thus appears on the face of the requirements it seems to me improper to force any who are affected to hazard the loss of their protection because some, or even all, have no protection at all. Cf. *People* v. *McCormick,* 102 Cal. App. 2d Supp. 954, 963, 228 P. 2d 349, 354–355.

I do not regard this position on adjudicability as calling for the impermissible decision of a hypothetical case. Nor does it open the way to the invalidation of the requirements on their face despite valid applications simply because they might be invalidly applied in other circumstances. See *United States* v. *Raines,* 362 U. S. 17. If the requirements violate the Fifth Amendment, they do so for all subject to them because they require incrimination without an effective protection of the privilege. And it is because I discern no adequate procedural protection for the privilege that I believe the Court should adjudicate this particular question now.

As to the merits of the Fifth Amendment claim, I believe that officials cannot be compelled to complete, sign and file the registration statement without abridging their privilege against self-incrimination. I do not think that the doctrine of *United States* v. *White,* 322 U. S. 694, applies to an inquiry directed to the fact of officership, *qua* officership, and knowledge, *qua* knowledge, as opposed to the production of organizational records by an officer who is their custodian. It is the individual official's own status and knowledge that is the subject of the inquiry I find implicit in the requirement that an

official complete, sign and file the statement. The principle that a custodian of organizational records may be required to produce them, even if their contents would incriminate him personally, is a recognition that an organization acts only through people, and that to recognize the privilege in the custodian of its records might be to immunize the organization's past acts. But these officials are not directed to produce records of their organization as its custodians, but to complete, sign and file as its officials, and thus to identify themselves as possible participants in a criminal conspiracy and as persons presumptively exhibiting the degree of knowledge and activity necessary for a conviction under the membership clause of the Smith Act. Nor are they called on, in fact, to produce records at all, but rather to complete, sign and file a statement which may or may not incorporate the records of the organization. And more than the incorporation of existing records is required in any event. All the information on Form ISA–1 must be supplied whether or not in existing records. In addition, the requirement of signatures does not involve mere authentication or identification of records, cf. *Curcio* v. *United States,* 354 U. S. 118, 125, because the officials are required to vouchsafe completeness and accuracy of the information supplied in the Form. Thus the requirements go far beyond the compulsory production approved in *White.* If the admission both of officership status and knowledge of Party activities cannot be compelled in oral testimony in a criminal proceeding, I do not see how compulsion in writing in a registration statement makes a difference for constitutional purposes. Cf. *People ex rel. Ferguson* v. *Reardon,* 197 N. Y. 236, 243–244, 90 N. E. 829, 832. Since the immunity granted under § 4 (f) of the statute is not complete, I do not think that the official's compliance with the requirements can be exacted consistently with the Fifth Amendment. And if the officials cannot be required

to complete, sign and file Form ISA–1, I do not see how the present order can be upheld. The requirements patently do not contemplate the effectuation of registration by any except Party officials in the precise manner specified by the requirements. I would therefore hold the order invalid insofar as it directs the petitioner to register in accordance with the requirements.

SCALES *v.* UNITED STATES.

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

No. 1. Argued April 29, 1959.—Reargued October 10, 1960.—Decided June 5, 1961.

Petitioner was convicted of violating the so-called membership clause of the Smith Act, which makes a felony the acquisition or holding of membership in any organization which advocates the overthrow of the Government of the United States by force or violence, knowing the purposes thereof. The indictment charged that from January 1946 to the date of its filing in 1954 the Communist Party of the United States was such an organization and that, throughout that period, petitioner was a member thereof with knowledge of the Party's illegal purpose and a specific intent to accomplish overthrow of the Government "as speedily as circumstances would permit." The jury was instructed that it could not convict unless it found that, within the 3-year limitation period, (1) the Party advocated the violent overthrow of the Government, in the sense of present "advocacy of action" to accomplish that end as soon as circumstances were propitious, and (2) petitioner was an "active" member of the Party, and not merely "a nominal, passive, inactive or purely technical" member, with knowledge of the Party's illegal advocacy and a specific intent to bring about violent overthrow "as speedily as circumstances would permit." *Held:* A judgment of the Court of Appeals sustaining the conviction is affirmed. Pp. 205–259.

1. Section 4 (f) of the Internal Security Act of 1950, which provides, in part, that neither "the holding of office nor membership in any Communist organization by any person shall constitute per se a violation" of that or any other criminal statute, did not repeal *pro tanto* the membership clause of the Smith Act by excluding from the reach of that clause membership in any Communist organization. Pp. 206–219.

2. Petitioner's challenge to the constitutionality of the membership clause of the Smith Act must be overruled. Pp. 219–230.

(a) The statute was correctly interpreted by the two lower courts. Pp. 221–224.

(b) As construed and applied, the membership clause of the Smith Act does not violate the Fifth Amendment by impermissibly

imputing guilt to an individual merely on the basis of his associations and sympathies, rather than because of some concrete personal involvement in criminal conduct. Pp. 224–228.

(c) As construed and applied, the membership clause of the Smith Act does not infringe freedom of political expression and association in violation of the First Amendment. Pp. 228–230.

3. The evidence was sufficient to sustain the conviction. Pp. 230–255.

4. None of the trial errors alleged by petitioner raises points meriting reversal. Pp. 255–259.

(a) The admission of evidence about the Party's program for inciting the Negro population in the South to revolt and the admission of a pamphlet called "I Saw the Truth in Korea," which contained a very gruesome description of alleged American atrocities in Korea, were not prejudicial errors warranting reversal of the conviction. Pp. 255–257.

(b) The so-called Jencks Act, 18 U. S. C. § 3500, is not unconstitutional and its application to petitioner in this case did not invalidate his conviction. Pp. 257–258.

(c) Petitioner has made no showing to sustain his contention that congressional findings as to the character of the Communist Party contained in the Communist Control Act of 1954 and the Internal Security Act of 1950 deprived him of a fair trial on that issue. Pp. 258–259.

(d) By his failure to comply with Rule 12 of the Federal Rules of Criminal Procedure, petitioner waived any right he might have had to question the method of choosing grand jurors, and no impropriety in the method of choosing grand jurors has been shown. P. 259.

260 F. 2d 21, affirmed.

Telford Taylor reargued the cause for petitioner. With him on the briefs was *McNeill Smith.*

John F. Davis reargued the cause for the United States. With him on the briefs were *Solicitor General Rankin, Assistant Attorney General Yeagley, Kevin T. Maroney* and *Philip R. Monahan.*

Osmond K. Fraenkel filed a brief for the American Civil Liberties Union, as *amicus curiae,* urging reversal.

MR. JUSTICE HARLAN delivered the opinion of the Court.

Our writ issued in this case (358 U. S. 917) to review a judgment of the Court of Appeals (260 F. 2d 21) affirming petitioner's conviction under the so-called membership clause of the Smith Act. 18 U. S. C. § 2385. The Act, among other things, makes a felony the acquisition or holding of knowing membership in any organization which advocates the overthrow of the Government of the United States by force or violence.[1] The indictment charged that from January 1946 to the date of its filing (November 18, 1954) the Communist Party of the United States was such an organization, and that petitioner

[1] Section 2385 (whose membership clause we place in italics) reads:

"Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government; or

"Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or

"Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; *or becomes or is a member of,* or affiliates with, *any such society, group, or assembly of persons, knowing the purposes thereof*—

"Shall be fined not more than $20,000 or imprisoned not more than twenty years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.

"If two or more persons conspire to commit any offense named in this section, each shall be fined not more than $20,000 or imprisoned not more than twenty years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction."

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throughout that period was a member thereof, with knowledge of the Party's illegal purpose and a specific intent to accomplish overthrow "as speedily as circumstances would permit."

The validity of this conviction is challenged on statutory, constitutional, and evidentiary grounds, and further on the basis of certain alleged trial and procedural errors. We decide the issues raised upon the fullest consideration, the case having had an unusually long history in this Court.[2] For reasons given in this opinion we affirm the Court of Appeals.

I.

Statutory Challenge.

Petitioner contends that the indictment fails to state an offense against the United States. The claim is that § 4 (f) of the Internal Security Act of 1950, 64 Stat. 987,

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[2] Petitioner was first convicted before a jury in the Middle District of North Carolina in 1955. The conviction was upheld by the Court of Appeals, 227 F. 2d 581, and we granted certiorari at the 1955 Term. 350 U. S. 992. The case was first heard here at the 1956 Term, and was later set for reargument at the 1957 Term. Before reargument the judgment of conviction was reversed, upon the Solicitor General's concession that this Court's intervening decision in *Jencks* v. *United States*, 353 U. S. 657, in any event entitled Scales to a new trial. Scales was retried and again convicted in 1958. The Court of Appeals again affirmed, 260 F. 2d 21, and we again brought the case here. 358 U. S. 917. Argument on the present writ was first heard at the 1958 Term, the case being set for reargument at the following Term under an order in which the Court propounded certain questions to which counsel were requested particularly to address themselves. 360 U. S. 924. Before reargument was had, certiorari was granted (361 U. S. 951) in *Communist Party* v. *Subversive Activities Control Board* (No. 12, decided today, *ante*, p. 1), certain of the statutory and constitutional issues in which were closely related to some of those in the *Scales* case. Because of this interrelation of the two cases, the Court deemed it advisable that they should be heard and considered together, and accordingly put over this case for argument with the *Communist Party* case at the present Term. 361 U. S. 952.

50 U. S. C. § 781 *et seq.*, constitutes a *pro tanto* repeal of the membership clause of the Smith Act by excluding from the reach of that clause membership in any Communist organization. Section 4 (f) provides:

> "Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute. The fact of the registration of any person under section 7 or section 8 of this title as an officer or member of any Communist organization shall not be received in evidence against such person in any prosecution for any alleged violation of subsection (a) or subsection (c) of this section or for any alleged violation of any other criminal statute."

To prevail in his contention petitioner must, of course, bring himself within the first sentence of this provision, since the second sentence manifestly refers only to exclusion from evidence of the fact of registration, thus assuming that a prosecution may take place.

We turn first to the provision itself, and find that, as to petitioner's construction of it, the language is at best ambiguous if not suggestive of a contrary conclusion. Section 4 (f) provides that membership or office-holding in a Communist organization shall not constitute "per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute." Petitioner would most plainly be correct if the statute under which he was indicted purported to proscribe membership in Communist organizations, as such, and to punish membership *per se* in an organization engaging in proscribed advocacy. But the membership clause of the Smith Act on its face, much less as we construe it in this case, does not do this, for it neither proscribes membership in Communist organizations, as such, but only in organizations engaging in advocacy of violent overthrow, nor punishes membership

in that kind of organization except as to one "knowing the purposes thereof," and, as we have interpreted the clause, with a specific intent to further those purposes (*infra,* pp. 219–222). We have also held that the proscribed membership must be active, and not nominal, passive or theoretical (*infra,* pp. 222–224). Thus the words of the first sentence of § 4 (f) by no means unequivocally demand the result for which petitioner argues. When we turn from those words to their context, both in the section as a whole and in the scheme of the Act of which they are a part, whatever ambiguity there may be must be resolved, in our view, against the petitioner's contention.

In the context of § 4 as a whole, the first sentence of subsection (f) does not appear to be a provision repealing in whole or in part any other provision of the Internal Security Act. Subsection (a) of § 4 makes it a crime

> "for any person knowingly to combine, conspire, or agree with any other person to perform any act which would substantially contribute to the establishment within the United States of a totalitarian dictatorship . . . the direction and control of which is to be vested in, or exercised by or under the domination or control of, any foreign government, foreign organization or foreign individual . . . ."

Subsection (c) makes it a crime for any officer or member of a "Communist organization" to obtain classified information. We should hesitate long before holding that subsection (f) operates to repeal *pro tanto* either one of these provisions which are found in the same section of which subsection (f) is a part; and indeed the petitioner does not argue for any such quixotic result. The natural tendency of the first sentence of subsection (f) as to the criminal provisions specifically mentioned is to provide clarification of the meaning of those provisions, that is, that an offense is not made out on proof of *mere* member-

ship in a Communist organization. As to these particularly mentioned criminal provisions immunity, such as there is, is specifically granted in the second sentence only, where it is said that the fact of registration shall not be admitted in evidence. Yet petitioner argues that when we come to the last phrase of the first sentence, the tag "or . . . any other criminal statute," the operative part of the sentence, "membership . . . shall [not] constitute per se a violation," has an altogether different purport and effect. What operated as a clarification and guide to construction to the specifically identified provisions is, petitioner argues, a partial repealer as to the statutes referred to in the omnibus clause at the end of the sentence.

It seems apparent from the foregoing that the language of § 4 (f) in its natural import and context should not be taken to immunize members of Communist organizations from the membership clause of the Smith Act, but rather as a mandate to the courts charged with the construction of subsections (a) and (c) "or . . . any other criminal statute" that neither those two named criminal provisions nor any other shall be *construed* so as to make "membership" in a Communist organization "per se a violation." Indeed, as we read the first sentence of § 4 (f), even if the membership clause of the Smith Act could be taken as punishing naked Communist Party membership, it would then be our duty under § 4 (f) to construe it in accordance with that mandate, certainly not to strike it down. Although we think that the membership clause on its face goes beyond making mere Party membership a violation, in that it requires a showing both of illegal Party purposes and of a member's knowledge of such purposes, we regard the first sentence of § 4 (f) as a clear warrant for construing the clause as requiring not only knowing membership, but active and purposive membership, purposive that is as to the organization's criminal ends. (*Infra*, pp. 219–224.) By its terms, then, subsection (f) does not

effect a *pro tanto* repeal of the membership clause; at most it modifies it.

Petitioner argues that if the § 4 (f) provision does not bar this prosecution under the membership clause, then the phrase "or of any other criminal statute" becomes meaningless, for there is no other federal criminal statute that makes this sort of membership a crime. But the argument assumes the answer. The first sentence was intended to clarify, not repeal, § 4 (a) of the Internal Security Act. By a parity of reasoning, its effect on "any other criminal statute" is also clarification, not repeal.

Petitioner's contentions do not stop, however, with the words of § 4 (f) itself. The supposed partial repeal of the membership clause by that provision, it is claimed, is a consequence of the latter's purpose in the whole scheme of the Internal Security Act of 1950, as illuminated by its legislative history. The argument runs as follows: The core of the Internal Security Act is its registration provisions (§§ 7 and 8), requiring disclosure of membership in the Communist Party following a valid final determination of the Subversive Activities Control Board as to the status of the Party. See No. 12, *ante,* p. 1. The registration requirement would be rendered nugatory by a plea of self-incrimination and could only be saved by a valid grant of immunity from prosecution by reason of any such disclosure. However, the immunity provided by the second sentence of § 4 (f) is insufficient, in that it forbids only the use of the "fact of . . . registration" as evidence in any future prosecution, and not also its employment as a "lead" to other evidence. See *Counselman* v. *Hitchcock,* 142 U. S. 547; *Blau* v. *United States,* 340 U. S. 332. Therefore to effectuate the congressional purpose it becomes necessary to consider the first sentence of § 4 (f) a *pro tanto* repealer of the membership clause of the Smith Act, thereby assuring effective immunity from the criminal consequences of registration in this instance.

Although this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute. Certainly the section before us cannot be construed as petitioner argues. The fact of registration may provide a significant investigatory lead not only in prosecutions under the membership clause of the Smith Act, but equally probably to prosecutions under § 4 (a) of the Internal Security Act, let alone § 4 (c). Thus, if we accepted petitioner's argument that § 4 (f) must be read as a partial repealer of the membership clause, we would be led to the extraordinary conclusion that Congress also intended to immunize under § 4 (f) what it prohibited in these other subsections which it passed at the same time. Furthermore, the thrust of petitioner's argument cannot be limited to the membership clause, for it is equally applicable to any prosecution under any of a host of criminal provisions where Communist Party membership might provide an investigatory lead as to the elements of the crime.[3] We cannot attribute any such sweeping purpose to Congress on the basis of the attenuated inference offered by petitioner.

Presented as we are with every indication in the statute itself that Congress had no purpose to bar a prosecution such as this, we turn to the legislative history of the Internal Security Act of 1950 to see if a different conclusion is indicated.

Section 4 (f) is the product of the fusion of provisions contained in measures conceived by the House and the Senate to deal with the problem which is the subject of

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[3] *E. g.*, 18 U. S. C. § 2385 (the remaining provisions of the Smith Act); 29 U. S. C. § 159 (h), repealed by the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, § 201 (d) (non-Communist affidavits to be filed by union officers); or any of the offenses created by the Internal Security Act of 1950, for instance under §§ 4, 5 or 6.

the present Internal Security Act. Primarily, however, § 4 is the result of the Senate's efforts. In 1949 Senator Mundt reintroduced in the Senate a bill, the Mundt-Nixon bill, which had died in committee the year before. S. 2311, 81st Cong., 1st Sess. The bill, which was referred to the Committee on the Judiciary, contained registration provisions similar to those in the present statute, and a § 4 (a), a criminal provision identical to that of the present § 4 (a). In response to an enquiry, the Committee received a letter from an eminent lawyer, the late John W. Davis of New York, to the effect that although the primary purpose of the bill appears to be "ventilation rather than prohibition," there was a question whether "*mere membership* in a Communist political organization, which is . . . required to register [might] constitute an act such as section 4 (a) proscribes? If so," the letter continued, "is there not inherent contradiction between these sections, and might not a person called on to register as a member claim that he would involuntarily incriminate himself by so doing?" (Emphasis supplied.) S. Rep. No. 1358, 81st Cong., 1st Sess., pp. 43–44. Thus, the Davis letter seemed to address itself only to self-incrimination under the proscriptions of § 4 (a), and only to the extent that the membership disclosed by registration would without more constitute a violation of § 4 (a).

In response to this narrow objection the Committee drafted the predecessor of the present § 4 (f). That section, also numbered § 4 (f), provided that:

> "Neither the holding of office nor membership in any Communist organization by any person shall constitute a violation of subsection (a) . . . of this section. The fact of the registration of any person . . . shall not be received in evidence against such person in any prosecution for any alleged violation of subsection (a) . . . ." S. 2311, as amended.

The Committee in reporting the bill out to the Senate made it abundantly clear that whatever objections might be made could, in its view, be overcome by the clarification of § 4 (a) contained in § 4 (f), to wit: that "*mere* membership in an organization required to register is not an overt act such as to bring a person within the prohibitions of section 4. This amendment was inserted to make clear the intent of Congress that registration . . . was not evidence of a violation of section 4 of the bill." [4] (Emphasis supplied.) S. Rep. No. 1358, *supra*, p. 2. To the drafters of the original version of the section, then, the perforce limited immunity of the second sentence of § 4 (f) together with the clarification of the meaning of § 4 (a) in the first sentence was adequate to deal with the self-incrimination problem under § 4 (a), raised by the Davis letter. There is no mention of the Smith Act or any other criminal statute as yet, but the problem of the necessary scope of immunity is no different in relation to § 4 (a) than it would be to such other statutes.

The subsequent history of the section in the Senate reinforces the conclusion that there was no intent to grant a broad immunity such as would meet the reasoning of *Counselman* v. *Hitchcock*. The Mundt-Nixon bill was incorporated in the body of an omnibus measure, the McCarran bill. S. 4037, 81st Cong., 2d Sess. When this bill was reported out to the Senate no further mention was made in the majority report of the Judiciary

[4] The report also stated: "Nowhere does the bill restrict or impair the constitutional privilege against self-incrimination under the fifth amendment. . . . As to whether any registration itself infringes upon the privilege of self-incrimination, . . . [w]ith respect to individual members, a person may be compelled to register, keep records, make reports or statements, etc., concerning any activity which the State properly may regulate, and he is not protected therefrom by the privilege . . . . This becomes purely academic, however, in the light of the specific bar to self-incrimination written into section 4 (f)." *Id.*, at pp. 20–21.

Committee of the sections under consideration. However, Senator Kilgore's minority report squarely presented two questions as to the insufficiency of the immunity provisions of § 4 (f): (1) that the immunity was inadequate to meet the *Counselman* rule, and (2) that in any case there was no immunity of any sort granted in respect of the Smith Act. S. Rep. No. 2369, 81st Cong., 2d Sess., Pt. 2, pp. 12–13. These grounds were urged against the bill also in debate by its opponents. Senator Humphrey read into the Record a "brief" prepared by the Justice Department which in effect restated the objections of the minority report. 96 Cong. Rec. 14475, at 14479. Senator Lehman stated the same objections, and also suggested that the membership clause of the Smith Act as well as § 4 (a) made Communist membership *per se* a crime. This latter contention was vigorously denied by the proponents of the measure.[5] Thus, the Senate passed

[5] Senator Lehman, arguing that the bill required self-incrimination, stated:

"We already have on the statute books more than 20 laws to control and penalize subversive activities. . . . We also have the Smith Act, recently upheld by the Court of Appeals, which makes membership in the Communist Party prima facie evidence of criminal intent. . . .

". . . [R]egistration would constitute self-incrimination, if not under the terms of this law, then under the terms of the Smith Act." 96 Cong. Rec. 14190.

As the debate continued, Senator Long said:

"I was under the impression from hearing the Senator from New York yesterday, that he said that under a previous statute it was unlawful to belong to an organization that advocated the overthrow of the United States government by force . . . that there was a previous act . . . which made it unlawful for one to be a member of [such] an organization . . . .

. . . . . .

"Senator Ferguson. Is it not true that Judge Medina, in his charge to the jury in the trial of the 11 Communists, told them that mere membership in the Communist Party was not sufficient to warrant the jury in convicting them under the Smith Act? [The petitioner in the present case correctly notes that this reference was to the

its predecessor version of § 4 (f), even though it had had clearly presented to it constitutional objections to that provision which are the same as the objections petitioner now makes to a natural and literal reading of the present statute. There was no immunity of any kind against Smith Act prosecutions, and only limited immunity against prosecutions under the comparable provisions of § 4 (a).

The history of the original House measure is likewise relevant to the issue under consideration. That measure,

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Dennis case involving an indictment for conspiracy to advocate, not the membership clause of the Smith Act.]

"Mr. Mundt [who was one of the proponents of the original bill]. Precisely.

"Mr. Ferguson. So that it could not apply to that law.

"Mr. Mundt. It could not conceivably apply. . . . [I]t would still be an incorrect interpretation of the [Smith] Act. . . ." 96 Cong. Rec. 14235.

Senator McCarran, whose name the new omnibus Senate measure bore, stated in connection with the Smith Act:

"It was arresting to hear the Senator from New York declare on Tuesday that—'[t]he Smith Act . . . makes membership in the Communist Party prima facie evidence of criminal intent.'

". . . [O]f course, the statement about the Smith Act making membership in the Communist Party prima facie evidence of criminal intent simply has no foundation in fact.

". . . Of course, in order to make a statement like the one he made a man must not have read Judge Medina's scholarly charge to the jury, in which he specifically pointed out that the Communist membership or affiliation of the 11 defendants was not . . . a part of the charged offense . . . .

. . . . . .

"Mr. President, subsection 4 (f) provides as follows: 'neither the holding of office nor membership . . . shall constitute a violation of subsection (a) . . . .'

". . . I hope the Senator from New York may find time to read [the section as a whole], and then I hope he may see fit to tell the Senate whether he still thinks Communists, *as such*, would obviously be indictable and subject to imprisonment under section 4 (a)." 96 Cong. Rec. 14442–14443. (Emphasis supplied.)

the Wood bill, which also provided for registration, contained no provision similar to § 4 (a), but did have a provision similar to the present § 4 (c), forbidding members of Communist organizations from obtaining classified information. H. R. 9490, 81st Cong., 2d Sess. The bill included an immunity provision in the same subsection as the predecessor to present § 4 (c), which declared that:

> ". . . the fact of the registration of any person . . . shall not be received in evidence against such person in any prosecution for any alleged violation . . . of this section."

Once again, the Wood bill demonstrates the same narrow view of the self-incrimination problem as was evidenced by the Senate bill. In debate Congressmen Celler and Marcantonio, opposing the bill, pointed to the twofold inadequacy of the immunity provision: its failure to meet *Counselman,* and its not reaching other criminal statutes. 96 Cong. Rec. 13739–13740. The House responded to these objections by adding the words "or for any alleged violation of any other . . . criminal statute" at the end of the above-quoted provision. 96 Cong. Rec. 13761. It is, therefore, even clearer than in the case of the Senate's action that there was no attempt to grant complete immunity or to repeal any other statute at least as to prosecution of Communist Party members, since the House's immunity provision in terms only dealt with the admission into evidence of the fact of registration, having no provision comparable to the first sentence of present § 4 (f). That there was no such provision may perhaps be explained by the fact that there was no equivalent to § 4 (a) in need of clarification.

In conference, the substance of the Senate bill was accepted by the conferees, including the criminal provision of the present § 4 (a). The Senate version of § 4 (f) was amended to its present form by the addition of the

House "or any other criminal statute" language to both the first and second sentences of the subsection, and by the addition of "per se" to the first sentence. Thus we are asked by petitioner to hold that although neither House in its preconference bills evidenced any purpose to repeal the Smith Act insofar as Communist Party membership was concerned, let alone other possibly applicable statutes under which registration as a Party member might produce an investigatory lead (see note 3, *supra*), the amalgamation of these two bills was intended, though without any notification by the conferees to either House in their conference reports, to have this result. Nor does the addition of the words "per se" advance petitioner's argument. On its face the addition would seem simply to make more explicit the clarifying purpose of the sentence. In its context of worries that § 4 (a) or the Smith Act makes Communist membership *per se* criminal, and of statements by the proponents of the bills that this was an unfounded fear as to both provisions, the purely clarifying purpose of *per se* is apparent. Furthermore, we are asked to attribute this purpose to the conferees, although neither they nor the proponents of the measure as it finally emerged from conference said a word about such an important departure from the original purposes of the two Houses.[6]

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[6] Perhaps the closest we come to any suggestion that § 4 (f) repeals, *pro tanto*, the Smith Act is the statement by Representative Multer of New York, an opponent of the measure, during the debate on the final version of the bill: "Another very bad provision in this bill is the new—to this House—first sentence [of § 4 (f)] . . . .

"I venture to predict that if this bill becomes law you not only vitiate one of the most important parts of the Smith law, but you will give a new argument and defense to the 11 Communists recently convicted in the Federal court in New York of crimes against the United States, as proscribed in the Smith law," 96 Cong. Rec. 15289, or a similar argument against the bill by Senator Kilgore, 96 Cong. Rec. 15192.

Finally, it is worth noting that after the conference measure returned to the floor of the Senate it was attacked by Senator Kefauver on precisely the same grounds as had been urged against it in both Houses prior to conference: that the immunity conferred by the present § 4 (f) was too narrowly drawn to save the registration provisions against an attack under *Counselman*. 96 Cong. Rec. 15198–15199. This same attack was renewed after the President's veto, which was overridden by Congress.[7] 96 Cong. Rec. 15553–15554.

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[7] Petitioner makes reference to the legislative history of an amendment to the Communist Control Act of 1954, S. 3706, 83d Cong., 2d Sess., introduced and passed with modifications in a hurried and confused debate in both Houses. The amendment, proposed by Senator Humphrey, provided that it would be criminal knowingly and wilfully to become or remain a member of the Communist Party, or any other organization whose purpose is to overthrow the government by force and violence. The amendment was opposed by the proponents of the Internal Security Act of 1950, among others, on the grounds that it would impair the effectiveness of § 4 (f) of the 1950 Act, possibly rendering the registration provisions of that Act unconstitutional. But it seems clear that this result was conceived to flow from the fact that the amendment mentioned the Communist Party by name, thus making registration tantamount to an admission of the crime itself. As Representative Halleck, the then majority leader who opposed the amendment, put it:

". . . [W]e have the Internal Security Act of 1950, which was worked out after the most careful consideration . . . and the Smith Act, under which we have had more than 100 indictments and sixty-some convictions, all of Communist leaders . . . . Those acts we have on the books . . . they have established themselves.

". . . [T]he Attorney-General . . . [s]peaking of the Internal Security Act . . . said: 'Essential to the validity of this careful plan, however, is the provision of section 4 (f) of the act . . . . It is apparent that the enactment of legislation making membership in the Communist Party per se a crime would be in direct conflict with these provisions of the Internal Security Act. If membership alone is made criminal, to require him to declare his membership is to require him to give

The legislative history of § 4 (f), therefore, far from weakening the conclusion flowing from analysis of the terms of the statute itself, fortifies that analysis at every point. To conclude that Congress' desire to protect the registration provisions of the Internal Security Act against pleas of self-incrimination should prevail over its advertent failure to assure that result at the expense of wiping out the membership clause of the Smith Act, as applied to Communists, would require a disregard by this Court of the evident congressional purpose. Whatever may be the consequences of that failure upon the Internal Security Act, we are concerned here solely with the question whether Congress by § 4 (f) intended a partial repeal of the membership clause of the Smith Act. We conclude that it did not and hold that this prosecution is not barred by § 4 (f) of the Internal Security Act of 1950.

II.

Constitutional Challenge to the Membership Clause on its Face.

Petitioner's constitutional attack goes both to the statute on its face and as applied. At this point we deal with the first aspect of the challenge and with one part

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self-incriminating evidence. By nullifying this portion of the act, its entire operation would be jeopardized . . . .'

"In other words, what we are doing permits outlawing the Communist Party, and maintaining the Internal Security Act, the Smith Act, and all other acts by which we deal realistically with the Communist conspiracy." 100 Cong. Rec. 14658.

There is no doubt that the Humphrey amendment is in many respects similar to the membership clause. But it was assumed by many of the proponents of the 1950 Act, perhaps illogically and under a misapprehension as to the law, that the amendment should be defeated to preserve the integrity of the 1950 Act and the Smith Act. Certainly it was considered by no one that the membership clause had been repealed, or its application to Communists barred by § 4 (f) of the 1950 Act.

of its second aspect. The balance of the latter, which essentially concerns the sufficiency of the evidence, is discussed in the next section of this opinion.

It will bring the constitutional issues into clearer focus to notice first the premises on which the case was submitted to the jury. The jury was instructed that in order to convict it must find that within the three-year limitations period [8] (1) the Communist Party advocated the violent overthrow of the Government, in the sense of present "advocacy of action" to accomplish that end as soon as circumstances were propitious; and (2) petitioner was an "active" member of the Party, and not merely "a nominal, passive, inactive or purely technical" member, with knowledge of the Party's illegal advocacy and a specific intent to bring about violent overthrow "as speedily as circumstances would permit."

The constitutional attack upon the membership clause, as thus construed, is that the statute offends (1) the Fifth Amendment,[9] in that it impermissibly imputes guilt to an individual merely on the basis of his associations and sympathies, rather than because of some concrete personal involvement in criminal conduct; and (2) the First Amendment,[10] in that it infringes on free political expression and association. Subsidiarily, it is argued that the statute cannot be interpreted as including a requirement of a specific intent to accomplish violent overthrow, or as requiring that membership in a proscribed organization must be "active" membership, in the absence of both or either of which it is said the statute becomes *a fortiori* unconstitu-

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[8] November 18, 1951, to November 18, 1954. See 18 U. S. C. § 3282.

[9] "No person shall . . . be deprived of life, liberty or property, without due process of law . . . ."

[10] "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

tional.[11] It is further contended that even if the adjective "active" may properly be implied as a qualification upon the term "member," petitioner's conviction would nonetheless be unconstitutional, because so construed the statute would be impermissibly vague under the Fifth and Sixth Amendments,[12] and so applied would in any event infringe the Sixth Amendment, in that the indictment charged only that Scales was a "member," not an "active" member, of the Communist Party.

1. *Statutory Construction.*

Before reaching petitioner's constitutional claims, we should first ascertain whether the membership clause permissibly bears the construction put upon it below. We think it does.

The trial court's definition of the kind of organizational advocacy that is proscribed was fully in accord with what was held in *Yates* v. *United States,* 354 U. S. 298.[13] And the statute itself requires that a defendant must have knowledge of the organization's illegal advocacy.

The only two elements of the crime, as defined below, about which there is controversy are therefore "specific intent" and "active" membership. As to the former, this Court held in *Dennis* v. *United States,* 341 U. S. 494, 499–500, that even though the "advocacy" and "organizing" provisions of the Smith Act, unlike the "literature" section (note 1, *supra*), did not expressly contain such a specific intent element, such a requirement was fairly to be implied. We think that the reasoning of *Dennis*

[11] While the Government undertakes to defend the statute in the absence of either or both of such elements, its ultimate constitutional position rests on the presence of both.

[12] "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . . ."

[13] See note 27, *infra.*

applies equally to the membership clause, and are left unpersuaded by the distinctions petitioner seeks to draw between this clause and the advocacy and organizing provisions of the Smith Act.

We find hardly greater difficulty in interpreting the membership clause to reach only "active" members. We decline to attribute to Congress a purpose to punish nominal membership, even though accompanied by "knowledge" and "intent," not merely because of the close constitutional questions that such a purpose would raise (cf. *infra,* p. 228; *Yates, supra,* at 319), but also for two other reasons: It is not to be lightly inferred that Congress intended to visit upon mere passive members the heavy penalties imposed by the Smith Act.[14] Nor can we assume that it was Congress' purpose to allow the quality of the punishable membership to be measured solely by the varying standards of that relationship as subjectively viewed by different organizations. It is more reasonable to believe that Congress contemplated an objective standard fixed by the law itself, thereby assuring an even-handed application of the statute.

This Court in passing on a similar provision requiring the deportation of aliens who have become members of the Communist Party—a provision which rested on Congress' far more plenary power over aliens, and hence did not press nearly so closely on the limits of constitutionality as this enactment—had no difficulty in interpreting "membership" there as meaning more than the mere voluntary listing of a person's name on Party rolls. *Galvan* v. *Press,* 347 U. S. 522; *Rowoldt* v. *Perfetto,* 355 U. S. 115;

[14] The statute allows a fine of not more than $10,000 and imprisonment for not more than ten years to be imposed, and makes one convicted under the statute ineligible for employment by the United States or any department or agency thereof for five years following conviction. Petitioner was sentenced to imprisonment for six years.

see *Bridges* v. *Wixon,* 326 U. S. 135. A similar construction is called for here.[15]

Petitioner's particular constitutional objections to this construction are misconceived. The indictment was not defective in failing to charge that Scales was an "active" member of the Party, for that factor was not in itself a discrete element of the crime, but an inherent quality of the membership element. As such it was a matter not for the indictment, but for elucidating instructions to the jury on what the term "member" in the statute meant. Nor do we think that the objection on the score of vagueness is a tenable one. The distinction between "active" and "nominal" membership is well understood in common parlance (cf. *Boyce Motor Lines* v. *United States,* 342 U. S. 337; *United States* v. *Petrillo,* 332 U. S. 1; *Sproles* v. *Binford,* 286 U. S. 374), and the point at which one shades into the other is something that goes not to the sufficiency of the statute, but to the adequacy of the trial court's guidance to the jury by way of instructions in a particular case. See note 29, *infra.* Moreover, whatever abstract doubts might exist on the matter, this case presents no such problem. For petitioner's actions on behalf of the Communist Party most certainly amounted to active membership by whatever standards one could reasonably anticipate, and he can therefore hardly be considered to have acted unadvisedly on this score.

We find no substance in the further suggestion that petitioner could not be expected to anticipate a construction of the statute that included within its elements activity and specific intent, and hence that he was not

[15] The element of "activity" in the proscribed membership stands apart from the ingredient of guilty "knowledge" in that the former may be shown by a defendant's participation in general Party affairs, whereas the latter requires linking him with the organization's illegal activities.

duly warned of what the statute made criminal. It is, of course, clear that the lower courts' construction was narrower, not broader, than the one for which petitioner argues in defining the character of the forbidden conduct and that therefore, according to petitioner's own construction, his actions were forbidden by the statute. The contention must then be that petitioner had a right to rely on the statute's, as *he* construed it, being held unconstitutional. Assuming, *arguendo,* that petitioner's construction was not unreasonable, no more can be said than that—in light of the courts' traditional avoidance of constructions of dubious constitutionality and in light of their role in construing the purpose of a statute—there were two ways one could reasonably anticipate this statute's being construed, and that petitioner had clear warning that his actions were in violation of both constructions. There is no additional constitutional requirement that petitioner should be entitled to rely upon the statute's being construed in such a way as possibly to render it unconstitutional. In sum, this argument of a "right" to a literal construction simply boils down to a claim that the view of the statute taken below did violence to the congressional purpose. Of course a litigant is always prejudiced when a court errs, but whether or not the lower courts erred in their construction is an issue which can only be met on its merits, and not by reference to a "right" to a particular interpretation.

We hold that the statute was correctly interpreted by the two lower courts, and now turn to petitioner's basic constitutional challenge.

2. *Fifth Amendment.*

In our jurisprudence guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that

status or conduct to other concededly criminal activity (here advocacy of violent overthrow), that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment. Membership, without more, in an organization engaged in illegal advocacy, it is now said, has not heretofore been recognized by this Court to be such a relationship.[16] This claim stands, and we shall examine it, independently of the claim made under the First Amendment.

Any thought that due process puts beyond the reach of the criminal law all individual associational relationships, unless accompanied by the commission of specific acts of criminality, is dispelled by familiar concepts of the law of conspiracy and complicity. While both are commonplace in the landscape of the criminal law, they are not natural features. Rather they are particular legal concepts manifesting the more general principle that society, having the power to punish dangerous behavior, cannot be powerless against those who work to bring about that behavior.[17]

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[16] But compare *Whitney* v. *California,* 274 U. S. 357; *Burns* v. *United States,* 274 U. S. 328, sustaining state convictions under the organizing and membership provisions of the California Criminal Syndicalism Act.

[17] Complicity has been defined thus: "A person is an accomplice of another person in commission of a crime if:

"(a) with the purpose of promoting or facilitating the commission of the crime, he

"(1) commanded, requested, encouraged or provoked such other person to commit it; or

"(2) aided, agreed to aid or attempted to aid such other person in planning or committing it . . .

. . . . . .

"(b) acting with knowledge that such other person was committing or had the purpose of committing the crime, he knowingly, substantially facilitated its commission . . . ." American Law Institute, Model Penal Code § 2.04 (3), tentative draft No. 1 (1953). The formulation restates the statutory provisions generally found in juris-

The fact that Congress has not resorted to either of these familiar concepts means only that the enquiry here must direct itself to an analysis of the relationship between the fact of membership and the underlying substantive illegal conduct, in order to determine whether that relationship is indeed too tenuous to permit its use as the basis of criminal liability. In this instance it is an organization which engages in criminal activity,[18] and we can

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dictions in the United States. See, *e. g.*, 18 U. S. C. § 2 (a); Ariz. Code Ann., 1939, § 43–116; Vernon's Texas Stat., 1952, Pen. Code, Art. 70; cf. Criminal Code of Canada, Tremeear's, 1944, § 69. It should be noted that the membership clause as here construed is more limited than subsection (b) of this provision, since it is not enough that one has knowingly facilitated the substantive criminal conduct, but there must also be present the specific purpose of facilitating it.

There is, of course, considerable overlap between the law of complicity and the law of conspiracy, and genuine problems arise as to whether a conspirator is, by reason of his conspiracy, to be considered an accomplice and therefore guilty also of the substantive offense. See ALI, Model Penal Code, tentative draft No. 1 (1953), at pp. 20–33; Developments in the Law—Criminal Conspiracy, 72 Harv. L. Rev. 922, 993–1000 (1959). But we are solely concerned here with pointing up the accepted limits of imputation of guilt, not with exploring the problems created by the various provisions by which such imputation is effected.

[18] The problems in attributing criminal behavior to an abstract entity rather than to specified individuals, though perhaps difficult theoretically, as a practical matter resolve themselves into problems of proof. Whether it has been successfully shown that a particular group engages in forbidden advocacy must depend on the nature of the organization, the occasions on which such advocacy took place, the frequency of such occasions, and the position within the group of the persons engaging in the advocacy. (See pp. 253–254, *infra*.) Understood in this way, there is no great difference between a charge of being a member in a group which engages in criminal conduct and being a member of a large conspiracy, many of whose participants are unknown or not before the court. Whatever difficulties might be thought to inhere in ascribing a course of criminal conduct to an abstract entity are certainly cured, so far as any particular defendant

perceive no reason why one who actively and knowingly works in the ranks of that organization, intending to contribute to the success of those specifically illegal activities, should be any more immune from prosecution than he to whom the organization has assigned the task of carrying out the substantive criminal act. Nor should the fact that Congress has focussed here on "membership," the characteristic relationship between an individual and the type of conspiratorial quasi-political associations with the criminal aspect of whose activities Congress was concerned, of itself require the conclusion that the legislature has traveled outside the familiar and permissible bounds of criminal imputability. In truth, the specificity of the proscribed relationship is not necessarily a vice; it provides instruction and warning.[19]

What must be met, then, is the argument that membership, even when accompanied by the elements of knowledge and specific intent, affords an insufficient quantum of participation in the organization's alleged criminal activity, that is, an insufficiently significant form of aid and encouragement to permit the imposition of criminal sanctions on that basis. It must indeed be recognized that a person who merely becomes a member of an illegal organization, by that "act" alone need be doing nothing more than signifying his assent to its purposes and activities on one hand, and providing, on the other, only the sort of moral encouragement which comes from the knowledge that others believe in what the organization is doing. It may indeed be argued that such assent and encouragement do fall short of the concrete, practical impetus given to a criminal enterprise which is lent for instance by a

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is concerned, by the requirement of proof that he knew that the *organization* engages in criminal advocacy, and that it was his purpose to further that criminal advocacy.

[19] See generally Hart, The Aims of the Criminal Law, 23 Law & Contemp. Prob. 401 (1958).

commitment on the part of a conspirator to act in furtherance of that enterprise. A member, as distinguished from a conspirator, may indicate his approval of a criminal enterprise by the very fact of his membership without thereby necessarily committing himself to further it by any act or course of conduct whatever.

In an area of the criminal law which this Court has indicated more than once demands its watchful scrutiny (see *Dennis, supra,* at 516; *Yates, supra,* at 328; and see also *Noto* v. *United States,* decided today, *post,* p. 290), these factors have weight [20] and must be found to be overborne in a total constitutional assessment of the statute. We think, however, they are duly met when the statute is found to reach only "active" members having also a guilty knowledge and intent, and which therefore prevents a conviction on what otherwise might be regarded as merely an expression of sympathy with the alleged criminal enterprise, unaccompanied by any significant action in its support or any commitment to undertake such action.

Thus, given the construction of the membership clause already discussed, we think the factors called for in rendering members criminally responsible for the illegal advocacy of the organization fall within established, and therefore presumably constitutional, standards of criminal imputability.

3. *First Amendment.*

Little remains to be said concerning the claim that the statute infringes First Amendment freedoms. It was settled in *Dennis* that the advocacy with which we are here concerned is not constitutionally protected speech, and it was further established that a combination to pro-

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[20] Compare concurring opinion of Mr. Justice Brandeis in *Whitney* v. *California,* 274 U. S. 357, 372, 373.

mote such advocacy, albeit under the aegis of what purports to be a political party, is not such association as is protected by the First Amendment. We can discern no reason why membership, when it constitutes a purposeful form of complicity in a group engaging in this same forbidden advocacy, should receive any greater degree of protection from the guarantees of that Amendment.

If it is said that the mere existence of such an enactment tends to inhibit the exercise of constitutionally protected rights, in that it engenders an unhealthy fear that one may find himself unwittingly embroiled in criminal liability, the answer surely is that the statute provides that a defendant must be proven to have knowledge of the proscribed advocacy before he may be convicted. It is, of course, true that quasi-political parties or other groups that may embrace both legal and illegal aims differ from a technical conspiracy, which is defined by its criminal purpose, so that *all* knowing association with the conspiracy is a proper subject for criminal proscription as far as First Amendment liberties are concerned. If there were a similar blanket prohibition of association with a group having both legal and illegal aims, there would indeed be a real danger that legitimate political expression or association would be impaired, but the membership clause, as here construed, does not cut deeper into the freedom of association than is necessary to deal with "the substantive evils that Congress has a right to prevent." *Schenck* v. *United States,* 249 U. S. 47, 52. The clause does not make criminal all association with an organization which has been shown to engage in illegal advocacy. There must be clear proof that a defendant "specifically intend[s] to accomplish [the aims of the organization] by resort to violence." *Noto* v. *United States, post,* at p. 299. Thus the member for whom the organization is a vehicle for the advancement of legitimate aims and policies does not fall within the ban of the statute: he

lacks the requisite specific intent "to bring about the overthrow of the government as speedily as circumstances would permit." Such a person may be foolish, deluded, or perhaps merely optimistic, but he is not by this statute made a criminal.

We conclude that petitioner's constitutional challenge must be overruled.[21]

III.

Evidentiary Challenge.

Only in rare instances will this Court review the general sufficiency of the evidence to support a criminal conviction, for ordinarily that is a function which properly belongs to and ends with the Court of Appeals. We do so in this case and in No. 9, *Noto* v. *United States, post,* p. 290—our first review of convictions under the membership clause of the Smith Act—not only to make sure that substantive constitutional standards have not been thwarted, but also to provide guidance for the future to the lower courts in an area which borders so closely upon constitutionally protected rights.

On this phase of the case petitioner's principal contention is that the evidence was insufficient to establish that the Communist Party was engaged in present advocacy of violent overthrow of the Government in the sense required by the Smith Act, that is, in "advocacy of action" for the accomplishment of such overthrow either immediately or as soon as circumstances proved propitious, and uttered in terms reasonably calculated to "incite" to such action. See *Yates* v. *United States, supra,* 318–322. This contention rests largely on the proposition that the

[21] As both sides appear to agree that the "clear and present danger" doctrine, as viewed and applied in *Dennis, supra,* at 508–511, also reaches the membership clause of the Smith Act, and since the petition for certiorari tenders no issue as to the method of applying it here, we do not consider either question.

evidence on this aspect of the case does not differ materially from that which the Court in *Yates* stated was inadequate to establish that sort of Party advocacy there.

In *Yates* the Government sought to use the Communist Party, or at least the California branch of the Party, as the conspiratorial nexus between various individuals charged, among other things, with a conspiracy to engage in illegal advocacy. Upon reversal here for error in the trial court's charge on the nature of the advocacy proscribed by the Smith Act, this Court, in the exercise of its powers under 28 U. S. C. § 2106,[22] went on to consider the adequacy of the evidence for the purpose of determining as to which defendants an acquittal should be ordered, and as to which ones the way for a new trial should be left open. In the process it was stated that the Government's Party-conspiratorial-nexus theory was unavailing because the evidence fell short of establishing that the Party's advocacy constituted "a call to forcible action" for the accomplishment of immediate or future overthrow, in contrast to the teaching of mere "abstract doctrine" favoring that end. 354 U. S., at 329. At the same time, however, it was found that the record reflected certain episodes which, it was considered, might permissibly lend themselves to an inference of illegal advocacy by particular Party members (see *id.*, at 331–333). It was concluded, however, that these and similar episodes were too "sporadic" and remote (*id.*, 330) to justify their attribution to the Party, possibly casting its abstract teaching of the "Communist classics" in a different mold. Accordingly, the Court directed an acquittal of those defendants who had not themselves been connected with such episodes.

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[22] That statute gives the Court power upon review to "direct the entry of such appropriate judgment . . . as may be just under the circumstances."

We agree with petitioner that the evidentiary question here is controlled in large part by *Yates*. The decision in *Yates* rested on the view (not articulated in the opinion, though perhaps it should have been) that the Smith Act offenses, involving as they do subtler elements than are present in most other crimes, call for strict standards in assessing the adequacy of the proof needed to make out a case of illegal advocacy. This premise is as applicable to prosecutions under the membership clause of the Smith Act as it is to conspiracy prosecutions under that statute as we had in *Yates*.

The impact of *Yates* with respect to this petitioner's evidentiary challenge is not limited, however, to that decision's requirement of strict standards of proof. *Yates* also articulates general criteria for the evaluation of evidence in determining whether this requirement is met. The *Yates* opinion, through its characterizations of large portions of the evidence which were either described in detail or referred to by reference to the record, indicates what type of evidence is needed to permit a jury to find that (a) there was "advocacy of action" and (b) the Party was responsible for such advocacy.

First, *Yates* makes clear what type of evidence is not *in itself* sufficient to show illegal advocacy. This category includes evidence of the following: the teaching of Marxism-Leninism and the connected use of Marxist "classics" as textbooks; the official general resolutions and pronouncements of the Party at past conventions; dissemination of the Party's general literature, including the standard outlines on Marxism; the Party's history and organizational structure; the secrecy of meetings and the clandestine nature of the Party generally; statements by officials evidencing sympathy for and alliance with the U. S. S. R. It was the predominance of evidence of this type which led the Court to order the acquittal of several *Yates* defendants, with the comment that they had

not themselves "made a single remark or been present when someone else made a remark which would tend to prove the charges against them." However, this kind of evidence, while insufficient in itself to sustain a conviction, is not irrelevant. Such evidence, in the context of other evidence, may be of value in showing illegal advocacy.

Second, the *Yates* opinion also indicates what kind of evidence is sufficient. There the Court pointed to two series of events which justified the denial of directed acquittals as to nine of the *Yates* defendants. The Court noted that with respect to seven of the defendants, meetings in San Francisco which were described by the witness Foard might be considered to be "the systematic teaching and advocacy of illegal action which is condemned by the statute." 354 U. S., at 331. In those meetings, a small group of members were not only taught that violent revolution was inevitable, but they were also taught techniques for achieving that end. For example, the *Yates* record reveals that members were directed to be prepared to convert a general strike into a revolution and to deal with Negroes so as to prepare them specifically for revolution. In addition to the San Francsico meetings, the Court referred to certain activities in the Los Angeles area "which might be considered to amount to 'advocacy of action' " and with which two *Yates* defendants were linked. *Id.,* 331–332. Here again, the participants did not stop with teaching of the inevitability of eventual revolution, but went on to explain techniques, both legal and illegal, to be employed in preparation for or in connection with the revolution. Thus, one member was "surreptitiously indoctrinated in methods . . . of moving 'masses of people in time of crisis' "; others were told to adopt such Russian prerevolutionary techniques as the development of a special communication system through a newspaper similar to Pravda. *Id.,* 332. Viewed to-

gether, these events described in *Yates* indicate at least two patterns of evidence sufficient to show illegal advocacy: (a) the teaching of forceful overthrow, accompanied by directions as to the type of illegal action which must be taken when the time for the revolution is reached; and (b) the teaching of forceful overthrow, accompanied by a contemporary, though legal, course of conduct clearly undertaken for the specific purpose of rendering effective the later illegal activity which is advocated. Compare *Noto* v. *United States, post,* at 297–299.

Finally, *Yates* is also relevant here in indicating, at least by implication, the type and quantum of evidence necessary to attach liability for illegal advocacy to the Party. In discussing the Government's "conspiratorial-nexus theory" the Court found that the evidence there was insufficient because the incidents of illegal advocacy were infrequent, sporadic, and not fairly related to the period covered by the indictment. In addition, the Court indicated that the illegal advocacy was not sufficiently tied to officials who spoke for the Party as such.

Thus, in short, *Yates* imposes a strict standard of proof, and indicates the kind of evidence that is insufficient to show illegal advocacy under that standard, the kind of evidence that is sufficient, and what pattern of evidence is necessary to hold the Party responsible for such advocacy. With these criteria in mind, we now proceed to an examination of the evidence in this case.

We begin with what was also present in *Yates,* the general evidence as to the doctrines, organization, and tactical procedures of the Communist Party, exposited by Lautner, the Government's foundational witness both here and in *Yates.* Together with documentary evidence, Lautner's testimony, based on high-level participation in Party affairs from 1929 to 1950, furnished the necessary background in Party theory and terminology which is

crucial to the proper appreciation of the tenor of Party pronouncements, for these pronouncements, taken out of this larger context, might appear harmless and peaceable without in reality being so. The distinction that was drawn in *Yates* between theoretical advocacy and advocacy of violence as a rule of action is of course basic, but when the teaching is carried out in a special vocabulary, knowledge of that vocabulary is at least relevant to an understanding of the quality and tenor of the teaching.

Lautner's testimony, having covered the pre-war history of the Party, passed to the 1945 reconstitution of the organization. Prior to that time the Party, as the Communist Political Association, had adhered to the position that the change to a Communist society could be achieved through peaceful, democratic means. The reconstitution, which was finally approved at a National Convention in July of 1945, involved a return to the principles of Marxism-Leninism. As found in the so-called Communist classics, the adoption of a program of industrial concentration, the increased effort among Negroes, especially in the South, the complete repudiation of the former Party leader, Browder, and his doctrine of "revisionism," all signified, so Lautner testified, that the United States was henceforth to be regarded as no exception to the teachings of Lenin that communism could only be achieved in an industrialized nation such as this by resort to violent revolution, and that a belief in peaceful means was foolishness or treachery. Lautner testified that the industrial concentration program, as well as the emphasis on the Negro minority, was an articulation of this doctrine, in that it involved a concentration on those elements in society which the Party believed could do most damage, in time of crisis, to the existing social fabric in relation to their numbers, and that victory at the polls was not its concern. Lautner testified that it was further resolved at the 1945 National Convention that in order to imple-

ment the principles of the reconstitution, a program of thorough re-education of the whole Party membership should be undertaken, and Lautner himself was charged with the duty of carrying out this re-education as a District Organizer and State Chairman. The balance of Lautner's testimony was devoted to a detailed description of the elaborate underground "apparatus" which he and others were charged with setting up in the various portions of the country assigned to them.

Mrs. Hartle testified as to her activities in the Party, primarily in the Pacific Northwest area, from 1934 to approximately 1952. Mrs. Hartle confirmed, in many respects, Lautner's testimony as to Party teaching and doctrine throughout this period. After the 1945 reconstitution she was sent to the National Training School in New York, where thirty "officers and functionaries" from various parts of the country were "re-educated" in accordance with the decisions and resolutions of the 1945 Convention. She was taught about "dialectical materialism," and the theory of struggle between the capitalist class and the working class. They were taught "and reference was made to a quotation . . . that it is the duty of a revolutionary not to try to gloss over this class struggle or to try to compromise it, but to unravel it, to allow this class struggle and help this class struggle to unfold, the clash to proceed." The class was told that "it is the duty of a Marxist-Leninist to be a revolutionary and not a reformist." They were further instructed "that the United States . . . was objectively at the stage for Proletarian revolution," that the time for the proletariat revolution would come when the objective conditions of political or economic crisis coincided with the "subjective condition" of a Communist Party which was large enough, with enough "influence" among the working classes, "to give the necessary leadership to lead to the seizure of power."

Much of the testimony summarized so far may indeed be considered to relate to the mere theory of revolution, abstract advocacy. However, the teaching at the National Training School also descended to a lower level of generality. Mrs. Hartle was told that the "role" of the Communist Party was "preparing the workers and the people to be ready to be able to take power, to know how to take power" when a "revolutionary situation arose." At that time, "the plan and program of the Party would be to lead the working class to seize power" and "to smash the Bourgeois state machine." With respect to this latter task, the class was told:

> ". . . the Bourgeois state machine is not smashed after the seizure of power, but in the course of seizing power that the armies, the police, the prisons have to be dealt with and smashed up and rendered inoperative in the course of the seizure of power, that other matters, that some other matters in replacing the, a state, such as the, some of the administrative apparatus and some other matters would take a longer period of time, but the forcible elements of the capitalist state must be smashed in the course of taking power, but some other things like reorganizing the banking system, or some matters like that, could be done in a somewhat longer process."

In pressing toward the fulfillment of the "subjective conditions" necessary for such action, Mrs. Hartle was taught that "the struggles and activities of the Communist Party prepare the working class for this act of seizure of power," and the history of the Russian Communist Party and Revolution was taught in the school and the events and principles of this history were constantly related to contemporary conditions in the United States. Thus, for example, the class was told that the coalition of workers and peasants which had proved so successful

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in Russia should have its counterpart in America in a coalition of workers and Negroes, especially in the South.

Following her classes at the National Training School, Mrs. Hartle returned to Washington, where she helped to recruit and organize in "underground fashion" the employees of the Boeing Aircraft Plant in that State. At the same time, Mrs. Hartle was active in Party schools in her area. She testified that she had both been instructed and had herself taught:

> ". . . the means by which the ultimate goal might be attained was that those means would be forcible. The teaching was that any teaching, any theory of a peaceful road to socialism, or a growing over from capitalism to socialism was a betrayal of the working class and that the Communist Party leading the working class would have to arm it in the first place with the theory that the workers must know and must be prepared to know that they can only take power forcibly.
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> . . . . . .
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> "The action that Communist Party members should take in preparing for the ultimate goal that I was taught and that I taught, were to build the Communist Party as the vanguard party of the working class, a theoretically equipped party, equipped with the theory of Marxism-Leninism, a highly organized party that could act as a unit, as a monolithic whole, with democratic centralism, the principle guiding it . . . and that the Communist Party should be the connection between the vanguard and the working class millions in this preparation by working with and winning the confidence of the working class and allies of the working class, such as, the Negro people, the poor farmers, other national groups, and in this way, in the course of struggle, constant struggle taking the forms of strikes

and demonstrations and picket lines and marches and various kinds of activities to train the working class and the people for revolutionary battle."

The witness Duran, who attended a Party School in Los Angeles in 1951, described what he had been taught by one Moreau, a member of the National Education Commission of the Communist Party:

"He divided in his explanation the . . . Proletariat . . . as being divided into two groups. Those in industry that would lead the revolution, and those in agriculture that would follow, and speaking about the revolution, Professor Moreau stated to the class in a very emotional manner that he could see himself carrying a gun against the capitalist S. O. B.'s and explained to the class it was all based on the science of Marx and Lenin.

. . . . . .

"In discussing the Proletarian Revolution more thoroughly Professor Moreau explained throughout the school that the Proletarian Revolution would only come about if a Bolshevik rank and file, the sincere Communists, would get out and teach, and teach the people, the desirability of changing the system and the necessity of changing them, and in doing that, we had to teach the people that you cannot change the capitalist system to a Socialist system, to socialism successfully, the peaceful way; it had to be erupted from, and had to be taken away by force and violence, away from them and the entire state machinery of the Bourgeoisie smashed, the F. B. I., the courts and the Army and the Navy, whatever was on it, what—the entire instrumentality of the Bourgeoisie had to be smashed and substituted by the Proletarian machinery.

". . . and during the period of the revolution the transition, the violent transition, we had to make

mass work to get the masses away from the Bourgeoisie so they would not join a counterrevolution movement.

"It meant after the people of the Communist Party, the vanguard, had become satisfied, that the Bourgeoisie machinery was smashed, and they were in control, then they also had to collect guns from the people and control the people themselves.

"Q. Do I understand, Mr. Moreau [*sic*] that during this period of revolution the people, that is, the masses of the people, would be carrying guns?

"A. Yes, sir.

"Q. And after the revolution do I understand that the Party would go around and collect these guns and take them away from the people?

"A. Yes, sir; take them away from those that helped them overthrow the capitalist system in order to assure the revolution itself. . . .

"Immediately after the overthrow of the capitalist system and establishment of the dictatorship of the Proletariat, it became necessary for a Communist to establish Red Army in this country, not only to secure and maintain the dictatorship of the Proletariat, but control the people as well, and those people that did help overthrow the Government would not have any civil rights whatsoever, no voting rights, or anything; they would be dished out to them according to the way they felt, way they fell in with the Communist office by the dictatorship.

"Q. Now, Mr. Duran, what, if anything, did Mr. Moreau teach you in this school about the role that would be played by the Communist Party during this period of revolution when the Government would be overthrown by force and violence?

"A. The role of the Communist Party, and specifically within the Communist Party, the Bolsheviks

was to play a vanguard role, a leading role; that is explained scientifically in that so that first we teach the people the desirability of overthrowing them and teach them the, it could only be done through the Proletarian Revolution, and then when the time is ripe we could stampede them against the capitalist class."

Duran also testified to what he had been taught by Art Berry, District Organizer for seven States, in a Colorado school in 1952:

". . . we were discussing the scientific application of Marx and Lenin to the transition period between capitalism and socialism, and he demonstrated this with the kettle of water, that you could put a quantitative amount of water in a kettle and set it somewhere, nothing would happen, just like the masses, nothing does happen.

". . . [he] said, however, if you get that same amount, same kettle with the same amount of water in it, and put fire underneath it, then you begin to get quantitative changes, and eventually it reaches a nodule point to where it has a qualitative and abrupt transition into steam. He continued, same applied to the development of the revolution in this sense, the American people will not and cannot make a successful change over from capitalism to socialism by themselves, like the fire underneath the water, the Communist Party teaches and leads them to where when the society reaches that nodule point, the Communist people teaches the people before and then leads them to make that abrupt change into the society of socialism.

. . . . .

"Substantially, within the same explanation of violent overthrow of the Government . . . he stated

that not only would it be that, but that we would have to set up barricades, establish a central point from where we would participate from; he stated the 'we' literally speaking 'we', would have to have a central point because during the revolution it may become necessary to ebb, retreat in certain battles, and we would have to learn to retreat in an organizational way and a correct way. It was essential to learn to ebb as it was to flow on the revolution.

"In the ebbing we were to see that we ebb before the enemy wiped everybody out. Ebbing to the central point that had been barricaded, reorganization, and then at the correct time start flowing forward in the revolution."

The witness Obadiah Jones testified concerning a Party Training School in St. Louis which he attended in 1947. Jones was taught "that the only way the national problem could be solved would be in connection with the Proletariat Revolution." Jones was also instructed as to the nature of a Communist army:

"A. He said general staff of an army was different from the Communist Party . . . general staff of an army operated from a safe spot from behind the line and led the army from a far distance, and that the Communist Party went forth and fought with the workers.

"Q. Did he say anything with reference to the techniques?

"A. Yes, he said that you couldn't be a good leader without knowing all of the techniques of fighting.

"Q. Did he say anything with respect to carrying out instructions?

"A. Yes, sir.

"Q. What did he say in that connection?

"A. He said that capitalists in the army did not

> carry out the instructions in full, but the Communists did, irregardless of what the cost would be, they would carry out instructions completely."

At the final session, the students were required by the instructor to take a pledge:

> "The pledge was each of us are Communists or members of the Party and each of us have a responsibility and we must carry out our responsibility and work for the interests of the Party and its recipients and carry out the full will of the Party even though it meant to fight and to kill, we must carry out the demands of the Party and all of them."

The witnesses Clontz, Childs, and Reavis testified primarily as to their dealings with petitioner Scales. We regard this testimony, which finds no counterpart in the *Yates* record with respect to any of the defendants whose acquittal was directed, as being of special importance in two ways: it supplies some of the strongest and most unequivocal evidence against the Party based on the statements and activities of a man whose words and deeds, by virtue of his high Party position, carry special weight in determining the character of the Party from the standpoint of the Smith Act; and it appears clearly dispositive as to the quality of petitioner's Party membership, and his knowledge and intent, when we come to consider him not as a Party official but as the defendant in this case.[23]

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[23] Petitioner complains that the evidence as to Party activities emanating from such witnesses as Lautner, Hartle, Duran, and Jones, was inadmissible because not tied up with him. This confuses the nature of the offense Congress has created, for it is important as a preliminary matter, without adverting to the particular defendant in the prosecution, to prove the character of the organization of which he is charged with being a member. The other side of petitioner's claim on this score would entail giving greater or conclusive weight to petitioner's admissions as to the nature of the Party merely because he is the

In 1948 Ralph C. Clontz, Jr., then a student at Duke Law School, undertook to furnish the F. B. I. with information he had gained about Communist Party activities in North Carolina, and to volunteer his services in attempting to penetrate the Party to acquire further information. As a result, in September of that year, Clontz sent a postcard to petitioner, informing him that he was a law student and that he was interested in communism. Petitioner replied by sending Clontz "a large cardboard box filled with Communist literature." An accompanying letter, headed "Carolina District Communist Party U. S. A." with the notation "Junius Scales, Chairman," explained:

> "Under separate cover I have already sent you a rather varied sample of our literature. I hope you will give it close attention. If I can discuss any matter relating to my Party and its program with you in person, I will be glad to do so."

Several days later Clontz went to visit petitioner and thus began a relationship which was to bring him into intimate contact with the Communist Party, its teachings, purposes and activities.

At an early meeting between the two, petitioner told Clontz that it was impossible for the Communist Party to succeed to power through educating the people in this country and gaining their votes at the polls, but that a forceful revolution would be necessary. At a later meeting, the discussion was not limited to the theoretical inevitability of revolution, but went beyond the theory itself to an explanation of "basic strategy" which the

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defendant in this case. But that would be as illogical on the preliminary question as would be excluding evidence not connected up with petitioner. The evidence as to Scales' words and deeds is weighty and strong against the Party only because of his position in the Party, not because he is the defendant here.

Communist Party was using to give concrete foundation to the theory, *i. e.*, to bringing about the revolution:

> "The defendant [petitioner] explained that basically their strategy was bottomed on a concept that there were two classes of people in this country, that could be used by the Communist Party to foment a revolution.
>
> "The first class he termed the working class or Proletariat, working class, he said, had as its natural born leaders or vanguard, the Communist Party.
>
> "The second class, he described, in this country was what he termed the Negro nation. The Negro nation he described as a separate nation in what he termed the Black Belt, including thirteen Southern States, and the strategy of the Communist Party was to bring the working class, led by the Communist Party, and what he termed the Negro nation, together, to bring about a forceful overthrow of the Government.
>
> "Now Scales and the Communist Party taught that the basic strategy of the Communist Party would never change, but that tactics might be altered as the situation changed."

On petitioner's invitation, Clontz joined the Communist Party on January 17, 1950. He was not assigned to a particular group but became a member "at large," in order to continue his instruction under petitioner. In the course of this instruction, petitioner repeatedly told Clontz of the necessity for revolution to bring about the Dictatorship of the Proletariat. Scales analogized the situation in the United States to that in Russia prior to the 1917 Revolution. He pointed out that revolution would be "easier" in this country than it had been in Russia:

> "that while in the Soviet Union there had been no one to help the Soviet Party, that in this country

> when the revolution started, we would have the benefit of the help from the mother country, Russia, in bringing about our own revolution, because part of the purposes of the Communist Party in the Soviet Union was international in scope and that we naturally would continue to receive help in all circumstances from the Soviet Party when the revolution was started here in this country."

Petitioner explained that the Soviet Union could not be expected to land troops to start a revolution here. A similar procedure had been unsuccessful in China. Rather, he said "that we Communists in this country would have to start the revolution, and we would have to continue fighting it," but that the Soviet Union would aid the Communist Party in this endeavor by furnishing it "with experienced revolutionaries from Russia." [24] He added that "if the United States declared war on the Communists in their revolution, then the Soviet Union would land troops, and he said that would be a bloody time for all." When asked

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[24] As stated by Clontz: "Scales said that we could not expect the Soviet Union to land troops to start our revolution and finish it.

"Scales further said that experience had taught the Communists that that sort of approach was disastrous, . . . that they in China, the Communists, had sent in Russian generals and the only result had been that the Chinese Communists had been licked completely, that the new approach, of the Soviet Union, was shown in the example of Mao, who was then Mao-Tse-Tung, who was then the leader in the Communist Chinese Government.

"He pointed out that Mao had never even been to Russia, but instead the Soviet Union and the Soviet Communist Party had sent over military leaders to instruct Mao, and his leaders, and had sent over professional revolutionaries that could aid them in bringing about their revolution.

"He said that we could count on drawing on the experience of the Soviet Union, and that they also would furnish us when the revolution came with experienced revolutionaries from Russia."

by Clontz when all this would occur, Scales noted that a "depression would greatly accelerate the coming of the revolution" if the Communists used it properly to prepare the masses of the people.

Petitioner arranged for Clontz to be awarded a scholarship to study in New York at the Jefferson School of Social Science, an official Communist Party School, during the month of August 1950. Because Clontz arrived at a time when few scheduled courses were being offered, the bulk of his training at the school was received in private instruction from Doxey A. Wilkerson, the teacher with whom petitioner had communicated in arranging Clontz' scholarship.[25] Wilkerson, like petitioner, told

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[25] At one point in the course of instructing Clontz, Wilkerson wrote out the formula "M–L=F&V" which he told Clontz illustrated the position adopted by the appellate courts in the United States that Marxist-Leninist teaching equalled force and violence. Clontz testified:

"Doxey Wilkerson explained to me that since that formula had been established, action had had to be taken by the National Party to conceal the fact that their principles and their goal and their aims and their doctrines included forceful and violent revolution. He pointed out, for example, that an official statement had been issued by the Education Commission of the Communist Party U. S. A. disowning or disclaiming certain study outlines, certain texts, certain publications put out by the Communist Party.

"In fact, the order had ordered all Communist Party members to turn those in, and the statement, he said, after that particular date—I don't recall the exact date—had said henceforth, we will not recognize these as official Party publications.

"He said by doing that they accomplished two things. They, first of all, established a technicality for Communists on trial and their attorneys, that the Party no longer accepted Marxism-Leninism, because, he said, all Marxism-Leninism included in its teachings and in its concept the basis of a violent revolution.

"He said, secondly, that it did not unduly hamper the Communist Party, that in the future many things would be left unsaid that previously had been said, many things would be left unwritten that previously had been written, that, for example, in teaching a more

Clontz, "that the Communist Party recognized and expressed to themselves that the only kind of means would be proper means, which would be forceful means, that no longer was there any even pretense among intelligent Communists that any voting system or any people's election could bring this government." He also stated, as Scales had, that "the revolution basically would come about by combining the forces of what had been already identified as the Negro nation and the working class as the vanguard."

In line with this strategy, Wilkerson advised Clontz that he should not let his membership in the Communist Party become known, that by remaining "under cover" he "would be much more helpful to the Party when the revolution came." As part of his undercover activity, Clontz was directed to attempt to infiltrate various organizations of the working class in order to achieve "a background of respectability" and to be able to lead such organizations "toward the goal of the Communist Party, . . . the undermining of the Government and overthrowing the Government, bringing communism in the United States." But Clontz was not to lose contact with the Party, for if he "got isolated without Party direction . . . [his] efforts would be pretty

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bare outline, would be given, and the instructor would fill in the revolutionary part, or the students would be sent into the Marxist-Leninist works as references to find the revolution, without having it spelled out in the outline.

"He said, that, naturally, would not change the basic Party goal or the basic aims of the Communist Party, but that it would make it more difficult for Communists to be convicted.

. . . . . .

"One thing I recall during our discussion, he had given me a pamphlet, a study outline entitled White Chauvinism, and he pointed out to me, he said, 'Now I have been instructing you from that outline, but technically it is illegal because we Communists have disclaimed it, so that you are holding an illegal document there, actually.' "

largely wasted." In connection with these instructions, Wilkerson mentioned "one of the things that frightened the United States leaders was they knew that not only did they have to contend with China and the other Communist-dominated countries, but that also in every capitalist country the working class party, the Communists, would be working from within."

When Clontz returned to North Carolina, he reported to petitioner on his activities at the Jefferson School. He also informed petitioner, under instructions from the F. B. I., that he wished to move to New York. Petitioner arranged for Clontz to remain under his direction and to pay dues to him, while in New York, rather than effecting a formal transfer. Clontz moved to New York in March of 1951. While there Scales directed him to "get in with the A. C. L. U. organization to report on what value they might have in the coming struggle . . . ." Clontz had also been advised by an associate of petitioner to "infiltrate . . . the Civilian Defense setup."

The witnesses Childs and Reavis also testified to their relationship with Scales, who among other things arranged for their attendance at Party schools where their instruction followed much the same pattern as that described by Clontz.[26] In 1952 Childs attended a "Party

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[26] One of Childs' early tasks, assigned him by the District Organizer, as a Communist Party member was to serve as bodyguard for a visiting official of the Civil Rights Congress. The official, accompanied by Childs and petitioner, spoke in Chapel Hill in February of 1951 on the Korean War. His theme, according to Childs, was "that the Korean War was being used by the capitalists as a means of oppressing the Negro people . . . that the capitalists are sending the Negroes to Korea to fight the Korean people who are trying to fight for their rights, the same as the Negro people are in the South." Childs took notes on the speech, and testified that the official's "exact words" were:

"In Korea they are still called niggers. Niggers are court-martialed for refusing to have their men slaughtered. Lieutenant Gilbert is one

Training School" of which petitioner was a director. The school was given "for outstanding cadres in the North and South Carolina and Virginia Districts of the Communist Party." It was held on a farm and strict security measures were taken. The District Organizer of Virginia instructed at the school. He told the students that "the role of the Communist Party is to lead the working masses to the overthrow of the capitalist government." With respect to the preliminary task of gaining the "broad coalition" necessary to achieve this task, he stated that,

> ". . . the Communist Party has a program of industrial concentration in which they try to get people, that is, people who are Communist Party members, into key shops or key industries which the Party has determined or designated to be industrial concentration industries or plants. This is so that the Communist Party members in a particular plant will be able to have a cell, or a Communist Party group in which they will be able to more effectively plan for such things as attempting to control the union in that particular plant."

And, in a compulsory recreation period, this same instructor gave a demonstration of jujitsu and, explaining that the students "might be able to use this on a picket line," how to kill a person with a pencil. According to Childs' testimony, "what he showed us to do was to take our pencil, . . . just take the pencil and place it simply in the palm of your hand so that the back will rest against the base of the thumb, and then we were to take it, and the person, and give a quick jab so that it would penetrate through here [demonstrating], and enter the

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example. They say that the nigger is yellow. Yellow, give the niggers in North Carolina and Georgia rifles and tell them to fight for their rights. Yellow, man, you will see fighting like you have never seen before."

heart, and then if we could not do that, we just take it and grab it at the base of the throat."

Reavis attended the Party's New York Jefferson School in 1942. In a course on "Negro History" the students, drawn primarily from the South, were taught that ". . . the Negro people was the only revolutionary group within the United States that we could align themselves [*sic*] with, and hope to reach their [*sic*] gains through the avenue of force and violence, by overthrow of the Government, by Proletariat faction . . . ." Reavis was later advised to seek employment at the Western Electric Plant in Winston-Salem. He stated:

> "I bumped into Mr. Scales at Harvey's home and I—the report said . . . the advice I'd been getting was confirmed by him. I advanced the question on what I should do in case I did get employment there at Western Electric, and I knew it was a, Government work, what I should do in case I was asked to sign certain papers, and I was told to do the same, that they had when signing a Taft-Hartley affidavit, to go ahead and sign them, that before they did, the defendant asked me if I had signed any papers that might be used as proof that I was in the Party, and I didn't remember any."

We conclude that this evidence sufficed to make a case for the jury on the issue of illegal Party advocacy. *Dennis* and *Yates* have definitely laid at rest any doubt that present advocacy of *future* action for violent overthrow satisfies statutory and constitutional requirements equally with advocacy of *immediate* action to that end. 341 U. S., at 509; 354 U. S., at 321. Hence this record cannot be considered deficient because it contains no evidence of advocacy for immediate overthrow.

Since the evidence amply showed that Party leaders were continuously preaching during the indictment period

the inevitability of eventual forcible overthrow, the first and basic question is a narrow one: whether the jury could permissibly infer that such preaching, in whole or in part, "was aimed at building up a seditious group and maintaining it in readiness for action at a propitious time . . . the kind of indoctrination preparatory to action which was condemned in *Dennis*." *Yates, supra,* at 321–322. On this score, we think that the jury, under instructions which fully satisfied the requirements of *Yates*,[27] was entitled to infer from this

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[27] The trial court charged: "Moreover, the teaching in the abstract or teaching objectively, that is, teaching, discussing, explaining, or expounding what is meant by the aim or purpose of any author, group, or society of overthrowing the Government by force and violence is not criminal. For example, study and discussion by the Communist Party or by any other group in classrooms, or in study groups, or public or private meetings with the object of informing the participants or the audience of the aims and purposes of the doctrines of Marx, Lenin, Stalin, or the Communist Party is entirely lawful. Furthermore, without being criminal, the Communist Party could privately or publicly endeavor to persuade its members that they should adopt and espouse the belief that the Government of the United States should be overthrown by force and violence as speedily as circumstances will permit. This is no more than advocating an idea, and advocating an idea is no crime. Moreover, without transgressing the Smith Act, the Party might even instruct its members that it would be for their good and benefit, if this belief or idea were carried into effect.

"All of this is permissible because such utterances are protected by the First Amendment of the Federal Constitution, guaranteeing freedom of speech.

"However, if the Party went further, and with the intention of overthrowing the Government by force and violence, it taught, or advocated a rule or principle of action which both, one, called on its members to take forcible and concrete action at some advantageous time thereafter to overthrow the Government by force and violence, and, two, expressed that call in such written or oral words as would reasonably and ordinarily be calculated to incite its members to take concrete and forcible action for such overthrow; then, if the Com-

systematic preaching that where the explicitness and concreteness, of the sort described previously, seemed necessary and prudent, the doctrine of violent revolution—elsewhere more a theory of historical predictability than a rule of conduct—was put forward as a guide to future action, in whatever tone, be it emotional or calculating, that the audience and occasion required; in short, that "advocacy of action" was engaged in.

The only other question on this phase of the case is whether such advocacy was sufficiently broadly based to permit its attribution to the Party. We think it was. The advocacy of action was not "sporadic" (cf. p. 226, *supra*), the instances of it being neither infrequent, remote in time nor casual.[28] It cannot be said that

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munist Party did that, the Party became such a society or group, as was outlawed by the Smith Act.

"To be criminal the teaching or advocacy, or the call to action just described need not be for immediate action, that is, for action today, tomorrow, next month, or next year. It is criminal, nonetheless, if the action is to be at an unnamed time in the future, to be fixed by the circumstances or on signal from the Party.

"It is criminal if it is a call upon the members to be ready, or to stand in readiness for action, or for a summons to action at a favorable, or opportune time in the future, or as speedily as circumstances will permit, provided always that the urging of such readiness be by words which would reasonably and ordinarily be calculated to spur a person to ready himself for, and to take action towards, the overthrow of the Government. But those to whom the advocacy or urging is addressed must be urged to do something now or in the future, rather than merely to believe in something. In other words, the advocacy must be of concrete action, and not merely a belief in abstract doctrine. However, the immediate concrete action urged should be intended to lead towards the forcible overthrow, and be so understood by those to whom the advocacy is addressed."

[28] Although most of the particularized evidence related to events not within the limitations period, it was of course open to the jury, under proper instructions which were given, to infer that such events reflected the character of Party advocacy during the limitations period. Petitioner does not contend to the contrary.

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the jury could not have found that the criminal advocacy was fully authorized and condoned by the Party. We regard the testimony of the witnesses, whose credibility, of course, is not for us, as indicating a sufficiently systematic and substantial course of utterances and conduct on the part of those high in the councils of the Party, including the petitioner himself, to entitle the jury to infer that such activities reflected tenets of the Party. The testimony described activities in various States, including the teaching at some seven schools, among them the national Party school. The witnesses told of advocacy by high Party officials, including that of leaders of the Party in nine States. Further, there was testimony that the Party followed the principle of "democratic-centralism" whereby a position once adopted by the Party must be unquestionably adhered to by the whole membership. The conformity of the views expressed and the terms employed in advocating violent overthrow in such States as Washington, North Carolina, Missouri, Colorado and Virginia could reasonably be taken by the jury as a practical manifestation of "democratic-centralism." Another concrete illustration of this principle could have been found in the circumstance that in almost every instance where a speaker engaged in advocacy of violent overthrow, he not only advocated violence to his audience but urged others to go out and do likewise. All of these factors combine to justify the inference that the illegal individual advocacy as to which testimony was adduced was in truth the expression of Party policy and purpose.

The requirement of Party imputability is adequately met in the record. (See note 18, *supra*.)

The sufficiency of the evidence as to other elements of the crime requires no exposition. Scales' "active" membership in the Party is indisputable, and that issue was properly submitted to the jury under instructions that

were entirely adequate.[29] The elements of petitioner's "knowledge" and "specific intent" (*ante,* p. 220) require no further discussion of the evidence beyond that already given as to Scales' utterances and activities. Compare *Noto* v. *United States, post,* at 299–300. They bear little resemblance to the fragmentary and equivocal utterances and conduct which were found insufficient in *Nowak* v. *United States,* 356 U. S. 660, 666–667, and in *Maisenberg* v. *United States,* 356 U. S. 670, 673.

We hold that this prosecution does not fail for insufficiency of the proof.

IV.

Alleged Trial Errors.

Petitioner contends that a number of errors were committed, having the effect of vitiating the fairness of his trial. For reasons substantially similar to those given by the Court of Appeals (260 F. 2d 38–46), we find that none of petitioner's contentions raise points meriting reversal.

1. *Admission of Remote or Prejudicial Evidence.*

Petitioner complains as to the admission of certain evidence relating to the Party's general or specific purposes. In particular, he objects to the admission of evidence about the Party's program in the so-called "Black Belt" and especially to the admission of a pamphlet called "I Saw the Truth in Korea," which contained

[29] The trial court charged: "The defendant admits that he was a member of the Party. For his membership to be criminal, however, it is not sufficient that he be simply a member. It must be more than a nominal, passive, inactive, or purely technical membership. In determining whether he was an active or inactive member, consider how much of his time and efforts he devoted to the Party. To be active he must have devoted all, or a substantial part, of his time and efforts to the Party."

a very gruesome description of alleged American atrocities in Korea. There can be no doubt that this matter, and particularly the latter, would not have reflected well on the petitioner or the Party in the eyes of the jury, but if it was relevant to an element of the crime, then whether its asserted prejudicial effect so far outweighed its probative value as to require exclusion of the evidence, was a decision which rested in the sound discretion of the trial judge. Particularly in light of the fact that the most damaging of this material emanated from petitioner himself (260 F. 2d, at 38), we cannot say that its admission involved an abuse of discretion which would warrant our reversal of the conclusions of the trial judge and the Court of Appeals on this score.

We therefore need only consider whether the complained-of evidence was legally relevant and therefore admissible. As we have pointed out in our review of the record, the jury could have inferred that part of the Communist Party's program for violent revolution was the winning of favor with the Negro population in the South, which it thought was particularly susceptible to revolutionary propaganda and action. Surely, then, the evidence of the Party's teaching that the Negro population should be given the right to form a separate nation is not irrelevant to the issue of whether or not the Party's program as a whole constituted a call to stand in readiness for violent action, when this particular plank in the platform was intended as bait for one of the substantial battalions in the hoped-for revolutionary array. Of course, the preaching that the Negro population in the South has the right to form a separate nation does not of itself constitute illegal advocacy. But neither does the teaching of the abstract theory of Marxism-Leninism, which we have held cannot alone form the basis for a conviction for violation of the Smith Act, *Yates* v. *United States, supra;* yet it cannot be seriously urged

that evidence of such teaching is legally irrelevant to the charge. Similarly the evidence of the pamphlet on alleged American atrocities in Korea cannot be said to be irrelevant to the issue of illegal advocacy by the Party. Once again, the pamphlet may not in itself constitute such an incitement to violence as would justify a finding that the Party advocated violent overthrow, but it is possible to infer from it that it was the purpose of the Party to undermine the Government in the eyes of the people in time of war as a preparatory measure, albeit legal in itself, to the teaching and sympathetic reception of illegal advocacy to violent revolution.

Petitioner also argues that this and other evidence was not connected up with him or his activities. Whether it was or not, since it is necessary under the membership clause to prove the advocacy of the Party as an independent element of the offense, this renders admissible evidence not connected up with the defendant in the accepted conspiracy sense. (See note 23, *supra.*) Doubtless because of this there is a special need to make sure that the evidence establishing a defendant's personal knowledge of illegal Party advocacy and his intent in becoming or remaining a Party member to accomplish violent overthrow is cogent and adequately brought home to him. But, having said that, we have said all, in respect to petitioner's claim on this point.

2. *The "Jencks" Claim.*

When this case was first before us we reversed the conviction, 355 U. S. 1, on the authority of our decision in *Jencks* v. *United States,* 353 U. S. 657. Before the second trial Congress enacted the so-called Jencks statute, 18 U. S. C. § 3500. Petitioner, as we understand him, does not now argue that that statute was incorrectly applied in his case; rather he attacks, on constitutional grounds, the statute itself. That the procedure set forth in the statute

does not violate the Constitution and that the procedure required by the decision of this Court in *Jencks* was not required by the Constitution was assumed by us in *Palermo* v. *United States,* 360 U. S. 343. It is enough to say here that there can be no complaint by a criminal defendant that he has been denied the opportunity to examine statements by government witnesses which do not relate to the subject matter of their testimony, for such statements bear no greater relevance to that testimony which he seeks to impeach than would statements by persons unconnected with the prosecution. Whether the statements so relate to prosecution testimony is a decision which is vested not in the Government but in the trial judge with full opportunity for appellate review. Once this question has been determined, whether the statements may be useful for purposes of impeachment is a decision which rests, of course, with the defendant himself.

Petitioner also objects to the limitation of the Act to written statements signed or adopted by the witness or to any form of substantially verbatim transcription of an oral statement by the witness. However, petitioner does not assert that he has been prejudiced by this provision, or that any statement or document requested by him was withheld on the authority of the statute. In these circumstances we perceive no basis for this aspect of petitioner's claims.

3. *Congressional Findings in the Communist Control Act of 1954 and the Internal Security Act of 1950.*

Petitioner asserts that the congressional findings as to the character of the Communist Party contained in both statutes deprived him of a fair trial on the issue of the character of the Party. That legislative action may have the effect of precluding a fair trial is not impossible, see *Delaney* v. *United States,* 199 F. 2d 107, but petitioner's claim here appears to be no more than an afterthought.

There is no showing of any prejudice, nor that during the *voir dire* examination of jurors petitioner attempted to ascertain whether any juror had even heard of these enactments, much less that petitioner attempted to have any juror disqualified on that ground. We cannot on this record regard this as a substantial contention.

Finally, for the reasons stated by the Court of Appeals, 260 F. 2d, at 44–46, we think that petitioner waived any right he might have had to question the method of choosing grand jurors by his failure to comply with Rule 12, Fed. Rules Crim. Proc., and further that no impropriety in the method of choosing grand jurors has been shown.

The judgment of the Court of Appeals must be

Affirmed.

MR. JUSTICE BLACK, dissenting.

Petitioner was convicted for violation of the "membership clause" of the Smith Act which imposes a penalty of up to twenty years' imprisonment together with a fine of $20,000 upon anyone who "becomes or is a member of, or affiliates with, any . . . society, group, or assembly of persons [who teach, advocate, or encourage the overthrow of the existing government by force or violence], knowing the purposes thereof . . . ." [1] Rejecting numerous contentions urged for reversal, the Court upholds a six-year sentence imposed upon petitioner under the authority of its prior decisions in *Dennis* v. *United States* [2] and *Yates* v. *United States*.[3] My reasons for dissenting from this decision are primarily those set out by MR. JUSTICE BRENNAN—that § 4 (f) of the Subversive Activities Control Act [4] bars prosecutions under the membership clause of the Smith Act—and MR. JUSTICE DOUGLAS—that the

[1] 18 U. S. C. § 2385.

[2] 341 U. S. 494.

[3] 354 U. S. 298.

[4] 50 U. S. C. § 783 (f).

First Amendment absolutely forbids Congress to outlaw membership in a political party or similar association merely because one of the philosophical tenets of that group is that the existing government should be overthrown by force at some distant time in the future when circumstances may permit. There are, however, two additional points that I think should also be mentioned.

In an attempt to bring the issue of the constitutionality of the membership clause of the Smith Act within the authority of the *Dennis* and *Yates* cases, the Court has practically rewritten the statute under which petitioner stands convicted by treating the requirements of "activity" and "specific intent" as implicit in words that plainly do not include them. Petitioner's conviction is upheld just as though the membership clause had always contained these requirements. It seems clear to me that neither petitioner nor anyone else could ever have guessed that this law would be held to mean what this Court now holds it does mean. For that reason, it appears that petitioner has been convicted under a law that is, at best, unconstitutionally vague and, at worst, *ex post facto*.[5] He has therefore been deprived of his right to

[5] The fact that the Court's rewriting of the statute has, in this case, narrowed the statute rather than broadened it does not change this conclusion. Petitioner has a right to have the constitutionality of the statute considered on the basis upon which it was originally written, for that was the condition of the statute when he violated it. The danger of the practice in which the Court is engaging is pointed up by its decision in the companion case, *Communist Party* v. *Subversive Activities Control Board*, *ante*, p. 1, in which it imposes the burden upon the members of that Party to guess as to what sections of the Subversive Activities Control Act will be held unconstitutional. The difficulty of that burden is tremendously increased by the decision in this case for they cannot know how many and what kind of additional requirements will be found to be "implied" and placed into the "balance" by which the constitutionality of questionable provisions of that Act will be determined.

be tried under a clearly defined, pre-existing "law of the land" as guaranteed by the Due Process Clause and I think his conviction should be reversed on that ground.[6]

Secondly, I think it is important to point out the manner in which this case re-emphasizes the freedom-destroying nature of the "balancing test" presently in use by the Court to justify its refusal to apply specific constitutional protections of the Bill of Rights. In some of the recent cases in which it has "balanced" away the protections of the First Amendment, the Court has suggested that it was justified in the application of this "test" because no direct abridgment of First Amendment freedoms was involved, the abridgment in each of these cases being, in the Court's opinion, nothing more than "an incident of the informed exercise of a valid governmental function." [7] A possible implication of that suggestion was that if the Court were confronted with what it would call a direct abridgment of speech, it would not apply the "balancing test" but would enforce the protections of the First Amendment according to its own terms. This case causes me to doubt that such an implication is justified. Petitioner is being sent to jail for the express reason that he has associated with people who have entertained unlawful ideas and said unlawful things, and that of course is a *direct* abridgment of his freedoms of speech and assem-

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[6] *Cohen* v. *Hurley*, 366 U. S. 117, 131 (dissenting opinion). See also *Konigsberg* v. *State Bar of California*, 366 U. S. 36, 56 (dissenting opinion).

[7] *Konigsberg* v. *State Bar of California*, 366 U. S. 36, 51. See also *Uphaus* v. *Wyman*, 360 U. S. 72; *Barenblatt* v. *United States*, 360 U. S. 109; *Uphaus* v. *Wyman*, 364 U. S. 388; *Wilkinson* v. *United States*, 365 U. S. 399; *Braden* v. *United States*, 365 U. S. 431; *In re Anastaplo*, 366 U. S. 82. In each of these cases, I disagreed, as I still do, with the majority's characterization of the abridgment involved as "incidental," as I understand that term to have significance in First Amendment cases. See particularly my dissenting opinion in the *Konigsberg* case, *supra*, at 68–71.

bly—under any definition that has ever been used for that term. Nevertheless, even as to this admittedly direct abridgment, the Court relies upon its prior decisions to the effect that the Government has power to abridge speech and assembly if its interest in doing so is sufficient to outweigh the interest in protecting these First Amendment freedoms.[8]

This, I think, demonstrates the unlimited breadth and danger of the "balancing test" as it is currently being applied by a majority of this Court. Under that "test," the question in every case in which a First Amendment right is asserted is not whether there has been an abridgment of that right, not whether the abridgment of that right was intentional on the part of the Government, and not whether there is any other way in which the Government could accomplish a lawful aim without an invasion of the constitutionally guaranteed rights of the people. It is, rather, simply whether the Government has an interest in abridging the right involved and, if so, whether that interest is of sufficient importance, in the opinion of a majority of this Court, to justify the Government's action in doing so. This doctrine, to say the very least, is capable of being used to justify almost any action Government may wish to take to suppress First Amendment freedoms.

MR. JUSTICE DOUGLAS, dissenting.

When we allow petitioner to be sentenced to prison for six years for being a "member"of the Communist Party, we make a sharp break with traditional concepts of First Amendment rights and make serious Mark Twain's lighthearted comment that "It is by the goodness of God that in our country we have those three unspeakably precious

[8] The decisions in both of the cases upon which the Court here relies were rested on the "balancing test." See *Dennis* v. *United States, supra,* at 506–511; *Yates* v. *United States, supra,* at 321.

things: freedom of speech, freedom of conscience, and the prudence never to practice either of them." [1]

Even the Alien and Sedition Laws—shameful reminders of an early chapter in intolerance—never went so far as we go today. They were aimed at conspiracy and advocacy of insurrection and at the publication of "false, scandalous and malicious" writing against the Government, 1 Stat. 596. The Government then sought control over the press "in order to strike at one of the chief sources of disaffection and sedition." Miller, Crisis in Freedom (1951), p. 56. There is here no charge of conspiracy, no charge of any overt act to overthrow the Government by force and violence, no charge of any other criminal act. The charge is being a "member" of the Communist Party, "well-knowing" that it advocated the overthrow of the Government by force and violence, "said defendant intending to bring about such overthrow by force and violence as speedily as circumstances would permit." That falls far short of a charge of conspiracy. Conspiracy rests not in intention alone but in an agreement with one or more others to promote an unlawful project. *United States* v. *Falcone,* 311 U. S. 205, 210; *Direct Sales Co.* v. *United States,* 319 U. S. 703, 713. No charge of any kind or sort of agreement hitherto embraced in the concept of a conspiracy is made here.

We legalize today guilt by association, sending a man to prison when he committed no unlawful act. Today's break with tradition is a serious one. It borrows from the totalitarian philosophy. As stated by O'Brian, National Security and Individual Freedom (1955), pp. 27–28:

> "The Smith Act of 1940 *made it unlawful* for any person to be or to become a member of or affiliate with any society, group, or assembly which teaches,

[1] Following the Equator (1903), Vol. I, p. 198.

> advocates, or encourages the overthrow or destruction of any government in the United States by force or violence. These statutes [the Smith Act together with a 1920 amendment to the Immigration Law, Act of June 5, 1920, 41 Stat. 1008], therefore, imported into our law the alien doctrine of guilt by association, which up to this time had been regarded as abhorrent and which had never been recognized either by the courts or by the Department of Justice, even during the perils and excitements of the First World War."

The case is not saved by showing that petitioner was an active member. None of the activity constitutes a crime. The record contains evidence that Scales was the Chairman of the North and South Carolina Districts of the Communist Party. He recruited new members into the Party, and promoted the advanced education of selected young Party members in the theory of communism to be undertaken at secret schools. He was a director of one such school. He explained the principles of the Party to an FBI agent who posed as someone interested in joining the Party, and furnished him literature, including articles which criticized in vivid language the American "aggression" in Korea and described American "atrocities" committed on Korean citizens. He once remarked that the Party was setting up underground means of communication, and in 1951 he himself "went underground." At the school of which Scales was director, students were told (by someone else) that one of the Party's weaknesses was in failing to place people in key industrial positions. One witness told of a meeting arranged by Scales at which the staff of the school urged him to remain in his position in an industrial plant rather than return to college. In Scales' presence, students at the school were once shown how to kill a person with a pencil, a device which, it was said, might come in handy

on a picket line. Other evidence showed Scales to have made several statements or distributed literature containing implicating passages. Among them were comments to the effect that the Party line was that the Negroes in the South and the working classes should be used to foment a violent revolution; that a Communist government could not be voted into power in this country because the Government controlled communication media, newspapers, the military, and the educational systems, and that force was the only way to achieve the revolution; that if a depression were to come the Communist America would be closer at hand than predicted by William Z. Foster; that the revolution would come within a generation; that it would be easier in the United States than in Russia to effectuate the revolution because of assistance and advice from Russian Communists. Petitioner at different times said or distributed literature which said that the goals of communism could only be achieved by violent revolution that would have to start internally with the working classes.

Not one single illegal act is charged to petitioner. That is why the essence of the crime covered by the indictment is merely belief [2]—belief in the proletarian revolution, belief in Communist creed.

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[2] The prototype of the present prosecution is found in Communist lands. The Communist Government in Czechoslovakia on October 6, 1948, promulgated a law, § 3 of which provided:

"(1) Whoever publicly or before several people instigates against the Republic, against its independence, constitutional unity, territorial integrity or its people's democratic system [of government], its social or economic order, or against its national character as guaranteed by the Constitution, shall be punished for a minor crime by rigorous confinement for from three months to three years.

"(2) The following shall be punished in like manner: Whoever intentionally or through gross negligence makes the dissemination of the instigative statement specified in Subsection 1 possible or easy."

Spinoza summed up in a sentence much of the history of the struggle of man to think and speak what he believes:

> "Laws which decree what every one must believe, and forbid utterance against this or that opinion, have too often been enacted to confirm or enlarge the power of those who dared not suffer free inquiry to be made, and have by a perversion of authority turned the superstition of the mob into violence against opponents." *Tractatus Theologico-Politicus* (London 1862) p. 349.

"The thought of man shall not be tried, for the devil himself knoweth not the thought of man," said Chief Justice Brian in Y. B. Pasch, 17 Edw. IV, f. 2, pl. 2. The crime of belief—presently prosecuted—is a carryback to the old law of treason where men were punished for compassing the death of the King. That law, which had been employed for "suppression of political opposition or the expression of ideas or beliefs distasteful to those in power," Hurst, Historic Background of the Treason Clause, 6 Fed. B. J. 305, 307, was rejected here, and the treason clause of our Constitution was "most praised for the reason that it prevented the use of treason trials as an instrument of political faction." *Id.*, 307. Sedition or treason in the realm of politics and heresy in the ecclesiastical field had long centered on *beliefs* as the abhorrent criminal act. The struggle on this side of the Atlantic was to get rid of that concept and to punish men not for what they thought but for overt acts against the peace of the Nation. *Cramer* v. *United States,* 325 U. S. 1, 28–30. Montesquieu, who was a force in the thinking of those times (*id.*, 15, n. 21), proclaimed against punishing thoughts or words:

> "There was a law passed in England under Henry VIII, by which whoever predicted the king's death

> was declared guilty of high treason. This law was extremely vague; the terror of despotic power is so great that it recoils upon those who exercise it. In the king's last illness, the physicians would not venture to say he was in danger; and surely they acted very right. . . . Marsyas dreamed that he had cut Dionysius's throat. Dionysius put him to death, pretending that he would never have dreamed of such a thing by night if he had not thought of it by day. This was a most tyrannical action: for though it had been the subject of his thoughts, yet he had made no attempt towards it. The laws do not take upon them to punish any other than overt acts." The Spirit of Laws (1949), Vol. 1, pp. 192–193.
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> "Words do not constitute an overt act; they remain only in idea." *Id.*, 193.

These were the notions that led to the restrictive definition of treason, presently contained in Art. III, § 3, of the Constitution, which requires overt acts. *Cramer* v. *United States, supra; Haupt* v. *United States,* 330 U. S. 631, 645 (concurring opinion); Hurst, Treason in the United States, 58 Harv. L. Rev. 395. Our long and painful experience with the law of treason, wholly apart from the First Amendment, should be enough warning that we as a free people should not venture again into the field of prosecuting beliefs.

That was the philosophy behind *Board of Education* v. *Barnette,* 319 U. S. 624, 641–642:

> "We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That

would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us."

Nothing but beliefs is on trial in this case. They are unpopular and to most of us revolting. But they are nonetheless ideas or dogmas or faiths within the broad framework of the First Amendment. See *Barenblatt* v. *United States*, 360 U. S. 109, 145–152 (dissent). The creed truer to our faith was stated by the Bar Committee headed by Charles E. Hughes which in 1920 protested the refusal of the New York Assembly to seat five members of the Socialist Party: [3]

". . . it is of the essence of the institutions of liberty that it be recognized that guilt is personal and cannot be attributed to the holding of opinion or to mere intent in the absence of overt acts . . . ."

Belief in the principle of revolution is deep in our traditions. The Declaration of Independence [4] proclaims it:

"whenever any Form of Government becomes destructive of these Ends, it is the Right of the People

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[3] N. Y. L. Doc., 143d Sess., 1920, Vol. 5, No. 30, p. 4.

[4] "When honest men are impelled to withdraw their allegiance to the established law or custom of the community, still more when they are persuaded that such law or custom is too iniquitous to be longer tolerated, they seek for some principle more generally valid, some 'law' of higher authority, than the established law or custom of the community. To this higher law or more generally valid principle

> to alter or to abolish it, and to institute new Government, laying its Foundation on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness."

This right of revolution has been and is a part of the fabric of our institutions.[5] Last century when Russia invaded Hungary and subdued her, Louis Kossuth came here to enlist American support. On January 8, 1852, Lincoln spoke in sympathy of the Hungarian cause and was a member of a committee which on January 9, 1852, submitted Resolutions in Behalf of Hungarian Freedom. Among these resolutions was one that read:

> "That it is the right of any people, sufficiently numerous for national independence, to throw off, to revolutionize, their existing form of government, and to establish such other in its stead as they may choose." Basler, Vol. II, The Collected Works of Abraham Lincoln (1953), p. 115.

On January 12, 1848, Lincoln in an address before the United States House of Representatives stated: "Any people anywhere, being inclined and having the power, have the *right* to rise up, and shake off the existing government, and form a new one that suits them better. This is a most valuable,—a most sacred right—a right,

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they then appeal in justification of actions which the community condemns as immoral or criminal. They formulate the law or principle in such a way that it is, or seems to them to be, rationally defensible. To them it is 'true' because it brings their actions into harmony with a rightly ordered universe, and enables them to think of themselves as having chosen the nobler part, as having withdrawn from a corrupt world in order to serve God or Humanity or a force that makes for the highest good." Becker, The Declaration of Independence (1942), pp. 277–278.

[5] See the Appendix to this opinion, *post*, p. 275.

which we hope and believe, is to liberate the world." *Id.*, Vol. I, p. 438.

Of course, government can move against those who take up arms against it. Of course, the constituted authority has the right of self-preservation. But we deal in this prosecution of Scales only with the legality of ideas and beliefs, not with overt acts. The Court speaks of the prevention of "dangerous behavior" by punishing those "who work to bring about that behavior." That formula returns man to the dark days when government determined what behavior was "dangerous" and then policed the dissidents for tell-tale signs of advocacy. What is "dangerous behavior" that must be suppressed in its talk-stage has had a vivid history even on this continent. The British colonial philosophy was summed up by Sir William Berkeley, who served from 1641 to 1677 as Virginia's Governor: ". . . I thank God, *there are no free schools* nor *printing*, and I hope we shall not have these hundred years; for *learning* has brought disobedience, and heresy, and sects into the world, and *printing* has divulged them, and libels against the best government. God keep us from both!" 2 Hening's Stat. Va. 1660–1682, p. 517. The history is familiar; much of it is reviewed in Chafee, The Blessings of Liberty (1956). He states in one paragraph what I think is the Jeffersonian conception of the First Amendment rights involved in the present case:

> "We must choose between freedom and fear—we cannot have both. If the citizens of the United States persist in being afraid, the real rulers of this country will be fanatics fired with a zeal to save grown men from objectionable ideas by putting them under the care of official nursemaids." *Id.*, 156.

In recent years we have been departing, I think, from the theory of government expressed in the First Amendment. We have too often been "balancing" the right of

speech and association against other values in society to see if we, the judges, feel that a particular need is more important than those guaranteed by the Bill of Rights. *Dennis* v. *United States,* 341 U. S. 494, 508–509; *Communications Assn.* v. *Douds,* 339 U. S. 382, 399–400; *N. A. A. C. P.* v. *Alabama,* 357 U. S. 449, 463–466; *Uphaus* v. *Wyman,* 360 U. S. 72, 78–79; *Barenblatt* v. *United States,* 360 U. S. 109, 126–134; *Bates* v. *Little Rock,* 361 U. S. 516, 524; *Shelton* v. *Tucker,* 364 U. S. 479; *Wilkinson* v. *United States,* 365 U. S. 399; *Braden* v. *United States,* 365 U. S. 431; *Konigsberg* v. *State Bar,* 366 U. S. 36; *In re Anastaplo,* 366 U. S. 82. This approach, which treats the commands of the First Amendment as "no more than admonitions of moderation" (see Hand, The Spirit of Liberty (1960 ed.), p. 278), runs counter to our prior decisions. See *Lovell* v. *Griffin,* 303 U. S. 444, 450; *Murdock* v. *Pennsylvania,* 319 U. S. 105, 108; *Board of Education* v. *Barnette,* 319 U. S. 624, 639.

It also runs counter to Madison's views of the First Amendment as we are advised by his eminent biographer, Irving Brant:

> "When Madison wrote, 'Congress shall make no law' infringing these rights, he did not expect the Supreme Court to decide, on balance, whether Congress could or could not make a law infringing them. It was true, he observed in presenting his proposals, that state legislative bodies had violated many of the most valuable articles in bills of rights. But that furnished no basis for judging the effectiveness of the proposed amendments:
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> " 'If they are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or

> Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.'
>
> "This statement by Madison, along with all the rest of his speech, is so devastating to the 'balance theory' that efforts have been and are being made to discredit its authenticity. The *Annals of Congress*, it is said, is not an official document, but a compilation of stenographic reports (by a shorthand reporter admitted to the floor for that purpose) published in the press and containing numerous errors. That is true, although the chief complaint was that partially caught sentences were meaningless. In general, that which was clearly reported was truly reported. In the case of this all-important speech, Madison spoke from notes, and the notes in his handwriting are in the Library of Congress. They parallel the speech from end to end, scantily, but leaving no doubt of the fundamental faithfulness of the report." The Madison Heritage, 35 N. Y. U. L. Rev. 882, 899–900.

Brant goes on to relate how Madison opposed a resolution of censure against societies creating the political turmoil that was behind the Whiskey Rebellion. *Id.*, p. 900. He expressed in the House the view that opinions are not objects of legislation. "If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people." *Id.*, p. 900.

The trend of history, as Jefferson noted, has been against the rights of man. He wrote that "The natural progress of things is for liberty to yield and government to gain ground." [6] The formula he prepared for a society where ideas flourished was not punishment of the unorthodox

[6] 7 The Writings of Thomas Jefferson (Memorial ed. 1903) p. 37.

but education and enlightenment of the masses. Jefferson wrote to Madison on December 20, 1787: [7]

> "I own, I am not a friend to a very energetic government. It is always oppressive. It places the governors indeed more at their ease, at the expense of the people. The late rebellion in Massachusetts has given more alarm, than I think it should have done. Calculate that one rebellion in thirteen States in the course of eleven years, is but one for each State in a century and a half. No country should be so long without one. Nor will any degree of power in the hands of government, prevent insurrections. In England, where the hand of power is heavier than with us, there are seldom half a dozen years without an insurrection. In France, where it is still heavier, but less despotic, as Montesquieu supposes, than in some other countries, and where there are always two or three hundred thousand men ready to crush insurrections, there have been three in the course of the three years I have been here, in every one of which greater numbers were engaged than in Massachusetts, and a great deal more blood was spilt. In Turkey, where the sole nod of the despot is death, insurrections are the events of every day. Compare again the ferocious depredations of their insurgents, with the order, the moderation and the almost self-extinguishment of ours. And say, finally, whether peace is best preserved by giving energy to the government, or information to the people. This last is the most certain, and the most legitimate engine of government. Educate and inform the whole mass of the people. Enable them to see that it is their

[7] 6 The Writings of Thomas Jefferson (Memorial ed. 1903) pp. 391–392.

> interest to preserve peace and order, and they will preserve them. And it requires no very high degree of education to convince them of this. They are the only sure reliance for the preservation of our liberty."

This is the only philosophy consistent with the First Amendment. When belief in an idea is punished as it is today, we sacrifice those ideals and substitute an alien, totalitarian philosophy in their stead.[8]

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[8] Gellhorn, American Rights (1960), in commenting on *Dennis* v. *United States*, 341 U. S. 494, and *Yates* v. *United States*, 354 U. S. 298, states:

"The aftermath of the *Yates* case is interesting. By the end of 1956 convictions of Communist leaders under the Smith Act had numbered 114. Many of these cases were still pending in the appellate courts when the *Yates* decision was announced in June of 1957. On one ground or another, convictions were set aside and new trials were granted to many of these defendants. The Department of Justice itself dropped the prosecution of a considerable number, on the ground that they could not properly be convicted on the basis of the evidence now available. Most significantly of all, the cases against the nine remaining defendants in *Yates*, as to whom the Supreme Court had refused to dismiss the charges, were abandoned by the prosecution because there was insufficient evidence that they had advocated action as distinct from opinion. After all the clamor, after all the expressed alarm about the peril into which the United States was being plunged by this handful of misguided fanatics, the prosecution felt itself unable to show persuasively that the Communist spokesmen had engaged in the forbidden incitements to illegality.

"This should stimulate a sober second look at the surface attractions of programs of suppression and coercion. Occasionally the supporters of these programs are scoundrels who falsely parade themselves as upholders of democracy; but more often they are good and sincere men. Men genuinely devoted to worthy ends sometimes endorse efforts to force unanimity of sentiment, not because they consciously espouse authoritarianism, but because they hope thus to assure maximum support for the nation and its people. No matter how well intentioned they may be, however, those efforts themselves create a graver danger than they overcome. The perils sought to be suppressed are regularly overestimated. History shows in one example after another how excessive have been the fears of earlier

"The most indifferent arguments," Bismarck said, "are good when one has a majority of bayonets." That is also true when one has the votes.

What we lose by majority vote today may be reclaimed at a future time when the fear of advocacy, dissent, and nonconformity no longer cast a shadow over us.

APPENDIX TO OPINION OF MR. JUSTICE DOUGLAS.

The constitutions of 15 States have, at one time or another, made specific provision for the right of revolution by reserving to the people the right to "alter, reform or abolish" the existing frame of government. See Pennsylvania Const. of 1873, Art. I, § 2; Maryland Const. of 1867, Dec. of Rights, Art. I; Virginia Const. of 1902, Art. I, § 3; Alabama Const. of 1865, Art. I, § 2; Arkansas Const. of 1874, Art. II, § 1; Idaho Const. of 1889, Art. I, § 2; Kansas Const. of 1858, Art. I, § 2; Kentucky Const. of 1890, Bill of Rights, § 4; Ohio Const. of 1851, Art. I, § 2; Oregon Const. of 1857, Art. I, § 1; Tennessee Const. of 1870, Art. I, § 1; Texas Const. of 1876, Art. I, § 2; Vermont Const. of 1793, c. 1, Art. 7; West Virginia Const. of 1872, Art. 3, § 3; Wyoming Const. of 1889, Art. I, § 1. Some 24 other States have, or have had, slightly varying forms of the same provision. See New Hampshire Const., Pt. I, Art. 10; Massachusetts Const.,

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generations, who shuddered at menaces that, with the benefit of hindsight, we now know were mere shadows. This in itself should induce the modern generation to view with prudent skepticism the recurrent alarms about the fatal potentialities of dissent. In any event, in a world torn between the merits of freedom and the blandishments of totalitarian power, the lovers of freedom cannot afford to sacrifice their moral superiority by adopting totalitarian methods in order to create a self-deluding sense of security. Suppression, once accepted as a way of life, is likely to spread. It reinforces the herd urge toward orthodoxies of all kinds—religious, economic, and moral as well as political." Pp. 82–83.

Part the First, Article VII; Connecticut Const., Article First, § 2; New Jersey Const., Art. I, ¶ 2; Delaware Const., Preamble; North Carolina Const., Art. I, § 3; South Carolina Const., Art. 1, § 1; Rhode Island Const., Art. I, § 1; California Const., Art. I, § 2; Colorado Const., Art. II, § 2; Florida Const., Dec. of Rights, § 2; Indiana Const., Art. I, § 1; Iowa Const., Art. I, § 2; Maine Const., Art. I, § 2; Michigan Const. of 1835, Art. I, § 2; Minnesota Const., Art. I, § 1; Mississippi Const., Art. 3, § 6; Missouri Const., Art. I, § 3; Montana Const., Art. III, § 2; Nevada Const., Art. I, § 2; North Dakota Const., Art. I, § 2; Oklahoma Const., Art. II, § 1; South Dakota Const., Art. VI, § 26; Utah Const., Art. I, § 2. The older constitutions often add a clause which shows the roots of these provisions in the right of revolution. "The doctrine of non-resistance against arbitrary power and oppression is absurd, slavish, and destructive of the good and happiness of mankind," the New Hampshire Const., Pt. I, Art. 10, recites. The same language may be found in Maryland Const., Dec. of Rights, Art. 6; Tennessee Const., Art. I, § 2.

These provisions have been considered by several state courts. It has been held that the general right of the people to alter or abolish the government does not deprive state courts from passing on the validity of constitutional amendments peacefully passed. *Wells* v. *Bain,* 75 Pa. St. 39, 46–49; *Koehler & Lange* v. *Hill,* 60 Iowa 543, 614–617, 15 N. W. 614–616; *Bennett* v. *Jackson,* 186 Ind. 533, 538–541, 116 N. E. 921, 922–923; *Erwin* v. *Nolan,* 280 Mo. 401, 406–407, 217 S. W. 837, 838–839. More recently, several state courts have had occasion to consider these provisions in connection with the persecution of Communists. See *Commonwealth* v. *Widovich,* 295 Pa. 311, 317–318, 145 A. 295, 297–298 (State Sedition Act); *Nelson* v. *Wyman,* 99 N. H. 33, 50–51, 105 A. 2d 756, 770–771 (legislative investigation); *Braverman* v.

Bar Assn. of Balto., 209 Md. 328, 346–347, 121 A. 2d 473, 481–482 (disbarment of a lawyer convicted under the Smith Act). The last two of these decisions relied on language in the decision of this Court in *Dennis* v. *United States*, 341 U. S. 494, 501: "Whatever theoretical merit there may be to the argument that there is a 'right' to rebellion against dictatorial governments is without force where the existing structure of the government provides for peaceful and orderly change."

Yet the right of revolution has always meant more than this. "The words . . . ," said the court in *Wells* v. *Bain*, *supra*, 47, "embrace but three known recognised modes by which the whole people, the state, can give their consent to an alteration of an existing lawful frame of government, viz.:

"1. The mode provided in the existing constitution.

"2. A law, as the instrumental process of raising the body for revision and conveying to it the powers of the people.

"3. A revolution.

"The first two are peaceful means through which the consent of the people to alteration is obtained, and by which the existing government consents to be displaced without revolution. The government gives its consent, either by pursuing the mode provided in the constitution, or by passing a law to call a convention. If consent be not so given by the existing government the remedy of the people is in the third mode—revolution."

This does not mean the helplessness of the established government in the face of armed resistance, for that government has the duty of maintaining existing institutions. *Wells* v. *Bain*, *supra*, 49. But it does mean that the right of revolution is ultimately reserved to the people themselves, whatever formal, but useless, remedies the existing government may offer. This is shown in the history of our own revolution. Legislatures and governments have

the right to protect themselves. They may judge as to the appropriate means of meeting force directed against them, but as to the propriety of the exercise of the ultimate right of revolution, there, as John Locke says, "The people shall be judge." Second Treatise on Civil Government, § 240. To forbid the teaching of the propriety of revolution, even where the teacher believes his own lesson, is to hinder the people in the free exercise of this great sovereign right. See *Dennis* v. *United States,* 341 U. S. 494, 581–586 (dissenting opinion).

Lincoln's full statement, made in 1848 and already referred to, reads:

> "Any people anywhere, being inclined and having the power, have the *right* to rise up, and shake off the existing government, and form a new one that suits them better. This is a most valuable,—a most sacred right—a right, which we hope and believe, is to liberate the world. Nor is this right confined to cases in which the whole people of an existing government, may choose to exercise it. Any portion of such people that *can, may* revolutionize, and make their *own,* of so much of the teritory [*sic*] as they inhabit. More than this, a *majority* of any portion of such people may revolutionize, putting down a *minority,* intermingled with, or near about them, who may oppose their movement. Such minority, was precisely the case, of the tories of our own revolution. It is a quality of revolutions not to go by *old* lines, or *old* laws; but to break up both, and make new ones." I Basler, The Collected Works of Abraham Lincoln (1953), pp. 438–439.

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

I think that in § 4 (f) of the Internal Security Act Congress legislated immunity from prosecution under the

membership clause of the Smith Act. The first sentence of § 4 (f) is: "Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute." The immunity granted by that sentence is not in my view restricted, as the Court holds, to *mere* membership, that is to membership which is nominal, passive or theoretical. The immunity also extends to "active and purposive membership, purposive that is as to the organization's criminal ends," which is the character of membership to which the Court today restricts the application of the membership clause of the Smith Act.

In its approach to the relation of the first sentence of § 4 (f) to the membership clause of the Smith Act, I think the Court asks the wrong question. The question is not whether the Congress meant in § 4 (f) to "repeal" the membership clause of the Smith Act. The "repeal" of a statute connotes its erasure from the statute books. The grant of immunity from prosecution under a criminal statute merely suspends prosecution under the statute so long as the immunity is not withdrawn. For example, when we recently decided in *Reina* v. *United States,* 364 U. S. 507, that the Narcotic Control Act of 1956 legislated immunity from prosecution under state, as well as federal, narcotics laws, our decision did not remotely suggest that the immunity effected the "repeal" of either the state or the federal criminal statutes.

The Congress was faced with a dilemma in legislating the policy of compulsory registration of Communists into the Internal Security Act. This statute represented, in the words of the late John W. Davis, a policy of "ventilation rather than prohibition." Communists were to be forced to expose themselves to public view in order that the menace they present might be dealt with more effectively. The registration provisions of the Act are the

very vitals of that measure. But compulsory disclosure of membership would compel admission of a crime, or provide a link to proof of a crime. Communists then could invoke their constitutional right to silence and the registration provisions would be wrecked on the rock of the Self-Incrimination Clause of the Fifth Amendment. It is no disparagement of the Congress to say that their deliberations reflect great uncertainty how to resolve the dilemma. Congress wrote the Internal Security Act knowing that the privilege against self-incrimination was a solid barrier against compulsory self-incrimination by congressional fiat. The legislative history of § 4 (f) is murky but I think there clearly emerges a congressional decision to extend immunity from prosecution for any membership in a Communist organization in order to safeguard against constitutional frustration the policy of disclosure embodied in the registration provisions.[1]

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[1] Senator McCarran, the floor manager of the bill in the Senate, spoke of the exposure of Communists as one of the "principal objectives" of the bill. 96 Cong. Rec. 14174.

The other principal objective was the definition of certain conduct as criminal, it being the sense of Congress that existing provisions to preserve the security of the Nation were inadequate (H. R. Rep. No. 2980, 81st Cong., 2d Sess., p. 2; S. Rep. No. 1358, 81st Cong., 2d Sess., p. 7; 96 Cong. Rec. 14174–14175) and not effective to combat the threat of subversion from within. The criminal provisions of the Internal Security Act are broad and comprehensive. Section 4 (a) prohibits conspiracy to perform any act which would substantially contribute to the establishment of a totalitarian dictatorship under the direction and control of a foreign power. Section 4 (b) makes it unlawful for a government employee without authorization to communicate classified information to anyone whom he believes to be a representative of a foreign government or member of a Communist organization, and § 4 (c) prohibits the receipt of such information. Section 10 prohibits a Communist organization from using the mails or broadcasting on any radio or television station without designating, by printing on the envelope or announcement as the case may be, that it is "a Communist organization." A mem-

The purpose of the first sentence of § 4 (f) seems clear in the setting of the Act. In § 2 Congress describes the Communist Party as a group bent on overthrowing the Government by force and violence, such as is described in the Smith Act, and establishing a totalitarian dictatorship in the United States. Section 4 (a) makes it a crime to conspire to that end. Sections 7 and 8 provide for compulsory registration of Communist organizations and members. Penalties for not registering are imposed. If members were required to register under the 1950 Act and if membership were a crime under the 1940 Act, then self-incrimination in violation of the Fifth Amendment might be required by the registration requirements of the 1950 Act. Plainly it was with that problem that Congress dealt in § 4 (f).

The bills introduced in the Eighty-first Congress [2] provided for compulsory registration of members of the Communist Party, but afforded no immunity for registering. When the House Committee reported out its bill,[3] a pro-

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ber of a Communist organization which is registered or ordered to register by the Subversive Activities Control Board, who has knowledge or notice of such registration or order, cannot fail to disclose his membership when he is seeking or accepting employment by the United States or at any defense facility. It is also unlawful for such a person to hold employment under the United States, or in any defense facility if he is a member of a Communist-action organization. § 5 (a). Such a person cannot apply for or use a passport. § 6 (a). The Act also modified several existing statutes dealing with subversives and espionage in order to expand their coverage. These extensive criminal provisions belie the thought that Congress regarded the Smith Act as the main gun in the arsenal of antisubversive weapons. The many allusions to the fact that Communists were being more covert in their activities so as to avoid coming within the provisions of the Smith Act make it clear that that Act was not to be of major importance in the campaign against domestic Communists.

[2] S. 2311, 81st Cong., 2d Sess.; H. R. 9490, 81st Cong., 2d Sess.

[3] H. R. 9490, 81st Cong., 2d Sess.; see H. R. Rep. No. 2980, 81st Cong., 2d Sess., p. 8.

vision was included which forbade receipt in evidence of the fact of registration under the Internal Security Act. When the bill reached the floor, Congressman Celler pointed out that the immunity provision was constitutionally insufficient. In the first place, that bill only provided that the fact of registration under the Act should not be received in evidence against the registrant in prosecutions under the Act. Congressman Celler pointed out that there were other criminal statutes, including the Smith Act, for which no immunity was granted.[4] He secondly pointed out that the immunity to be constitutionally protective must be complete; and he discussed *Counselman* v. *Hitchcock,* 142 U. S. 547, in support of that thesis.[5] During these debates and in response to the challenge made by Congressman Celler, the manager of the bill, Congressman Wood, offered an amendment extending the same protection against prosecutions "for any alleged violation of any other criminal statute."[6] It was adopted without discussion and the bill passed the House.

At that juncture it seems obvious that restricting the immunity to use of the fact of registration in any criminal prosecution did not satisfy the constitutional requirements. Such a limited immunity was granted by statute in *Counselman* v. *Hitchcock, supra.* Yet as the Court stated in that case, p. 564:

> "This, of course, protected him against the use of his testimony against him or his property in any prosecution against him or his property, in any criminal proceeding, in a court of the United States. But it had only that effect. It could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his

[4] 96 Cong. Rec. 13739.

[5] *Id.,* 13740.

[6] *Id.,* 13761.

> property, in a criminal proceeding in such court. It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted."

Meanwhile the Senate bill [7] was reported out. The late John W. Davis had stated in a letter to the Senate Committee [8] that compulsory registration might make a member "involuntarily incriminate himself." The Senate bill accordingly provided that neither holding office nor membership in the Communist Party should constitute a violation of certain provisions of the bill; and it also provided that the fact of registration should not be received in evidence against the registrant in prosecutions under those provisions. Senator Kilgore in a minority report [9] made the same point that Congressman Celler had made in the House—that this immunity provision did not even purport to avoid self-incrimination in relation to the membership clause of the Smith Act and did not provide that complete immunity which *Counselman* v. *Hitchcock, supra,* held essential.

Senator Lehman spoke to the same effect when the bill reached the floor: [10]

> " 'In support of the statement made by the Senator from Illinois that the real Communists would simply fail to register, and could not be forced to register, and would be outside the control of the law-enforcement officials, is it not a fact that there would be every reason why a real Communist should not regis-

[7] S. 4037, 81st Cong., 2d Sess.

[8] S. Rep. No. 1358, 81st Cong., 1st Sess., pp. 43–44.

[9] S. Rep. No. 2369, Pt. 2, 81st Cong., 2d Sess., pp. 12–13.

[10] 96 Cong. Rec. 14421.

ter—because if he did register, would not he make himself liable to incrimination under the Smith Act?'

"Mr. DOUGLAS. 'Certainly.'

"Mr. LEHMAN. 'So he would be virtually pleading guilty of a penal offense; would he not?'

"Mr. DOUGLAS. 'Yes; the real leaders would be.' "

Senator Lehman stated on another day of the debate: [11]

"What dyed-in-the-wool Communist will run to the nearest registration office to list himself as such and expose himself to the penalties contained in the Mundt-Ferguson bill? Obviously, if he did, he would lose all his effectiveness as a Communist, besides subjecting himself to the penalties set forth in this bill. He would also expose himself to the penalties set forth in other laws, such as the Smith Act, under which the 11 top Communist leaders were recently convicted. In fact, registration would constitute self-incrimination, if not under the terms of this law, then under the terms of the Smith Act. Obviously, the Communists would not register."

Senator Humphrey voiced the same objection: [12]

". . . his registration would be equivalent to testimony; and under the interpretation of very prominent attorneys,[13] it could be that he could be prosecuted under the Smith Act."

The answers to these objections were wide of the mark. Senator McCarran said that the registrant was immu-

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[11] *Id.*, 14190.

[12] *Id.*, 14500.

[13] This reference apparently was to Charles Evans Hughes, Jr. and John W. Davis. *Id.*, 14500. The statement of Mr. Davis is referred to in note 8, *supra*. That of Mr. Hughes can be found in Hearings on H. R. 5852, Senate Committee on the Judiciary, 80th Cong., 2d Sess. 415–420.

nized from prosecutions under § 4 of the bill.[14] The relevancy of the Smith Act was not recognized. Senator Ferguson and Senator Mundt likewise did not meet the point. They noted[15] that membership was held irrelevant to the Smith Act in the prosecution of *Dennis* v. *United States, supra,* overlooking the fact that that case involved not membership but a conspiracy to practice the Communist dogma.

But no change in the bill was made in this respect before it passed the Senate. The important changes in § 4 (f)—the ones that are critical here—took place in Conferences.[16] No contemporary statement of the intended sweep of the revised § 4 (f) is in the legislative record. But I have set out enough history to indicate that the motivation was clearly the fear that the immunity granted under the earlier versions of the bill was not constitutionally sufficient to compel registration, since it

[14] "In the opinion of the chairman of the Committee on the Judiciary, this provision leans over backward to protect Communists against self-incrimination; but it is one of the many safeguards written into the bill by the Judiciary Committee to assure the complete constitutionality of the measure." *Id.*, 14175. See also *id.*, 14443.

[15] "Mr. LONG. I was under the impression, from hearing the Senator from New York [Sen. Lehman] yesterday, that he said that under a previous statute it was unlawful to belong to an organization that advocated the overthrow of the United States Government by force . . . .

. . . . . .

"Mr. FERGUSON. Is it not true that Judge Medina, in his charge to the jury in the trial of the 11 Communists, told them that mere membership in the Communist Party was not sufficient to warrant the jury in convicting them under the Smith Act?

"Mr. MUNDT. Precisely.

"Mr. FERGUSON. So that it could not apply to that law.

"Mr. MUNDT. It could not conceivably apply. Even if the impression which the junior Senator from Louisiana had were correct, it would still be an incorrect interpretation of the act." *Id.*, 14235.

[16] H. R. Conf. Rep. No. 3112, 81st Cong., 2d Sess., p. 49.

did not extend to prosecutions under the membership clause of the Smith Act.

When the bill came back from the Conference Committee Congressman Multer referred to § 4 (f) in its new form and predicted it would "vitiate one of the most important parts of the Smith law." [17] No reply was made to his comments. And only brief reference was made to § 4 (f) in the Senate. Senator Kefauver said,[18] "There is nothing in the bill which provides that when a person registers that fact shall not be used in evidence against him in connection with the Smith Act." [19] But that statement is irrelevant to our problem because the Senator apparently did not realize that the bill had been amended in Conference to include the words "or any other criminal statute." Senator Kilgore stated that the Conference bill differed from the one approved by the Judiciary Committee over his dissent, since it nullified the Smith Act.[20] No one challenged the statement.

From this legislative history it seems tolerably clear that one purpose of § 4 (f) was to protect registrants from prosecution under the membership clause of the Smith Act.

The Court holds, however, that the first sentence of § 4 (f) is simply "a mandate to the courts charged with the construction of subsections (a) and (c) 'or . . . any other criminal statute' that neither those two named criminal provisions nor any other shall be *construed* so as to make 'membership . . . per se a violation.' " If the phraseology were that immunity is extended only to "*membership per se,*" there might be support for the argument that the immunity granted by § 4 (f) extends only

[17] 96 Cong. Rec. 15289.

[18] *Id.*, 15198.

[19] *Ibid.*

[20] *Id.*, 15192.

to nominal membership, excluding the type of active membership which we have here. But the statute does not say "membership *per se*." It provides that "[n]either the holding of office nor membership in any Communist organization shall constitute *per se* a violation of subsection (a) or subsection (c) of this section or of any other criminal statute." The kind of membership given immunity is not restricted. It may be nominal, short-term, long-term, dues-paying, non-dues-paying, inactive, or active membership. Every type of membership is included. What the Congress is saying is that no type of membership shall violate alone or by itself (that is to say, *per se*) any criminal statute. When Congress said that membership "shall not constitute *per se*" a violation of any criminal statute, it meant that additional conduct besides membership, whatever its nature, is necessary to constitute a violation. Only by transposing *per se* in § 4 (f) and making it modify "membership" can the Court's argument be made plausible. That entails a substantial revision of the Act and a drastic dilution of rights of immunity which have been granted by it.

If the Court is correct in its view, the constitutionality of registration provisions of the 1950 Act are called into question. True, today's decision in *Communist Party of America* v. *Subversive Activities Control Board, ante,* p. 1, puts off to another day the constitutionality of the registration provisions in their conflict with the Fifth Amendment; I have noted my dissent as to the provision of the registration requirements that designated officials of the Party must complete, sign, and file the Party's registration statement. But if "active membership" remains a crime under the Smith Act, there would be a serious question whether any Communist—active or nominal—could constitutionally be compelled to register under the 1950 Act. For it could be urged that the act of registering

would supply one link that might complete the chain of evidence against him under the Smith Act. It is no answer to that contention that mere membership would not support a conviction. As we said in *Blau* v. *United States,* 340 U. S. 159, 161:

> "Whether such admissions by themselves would support a conviction under a criminal statute is immaterial. Answers to the questions asked by the grand jury would have furnished a link in the chain of evidence needed in a prosecution of petitioner for violation of (or conspiracy to violate) the Smith Act. Prior decisions of this Court have clearly established that under such circumstances, the Constitution gives a witness the privilege of remaining silent. The attempt by the courts below to compel petitioner to testify runs counter to the Fifth Amendment as it has been interpreted from the beginning."

This principle had been an established one ever since *Counselman* v. *Hitchcock, supra,* was decided.

The registration provisions of the 1950 Act were the very heart of that law. Disclosure of who the Communists were was the provision from which all other controls stemmed. As the Senate Report stated,[21] the registration requirement is the "central provision" of the Act, the purpose being "(a) to expose the Communist movement and protect the public against innocent and unwitting collaboration with it; (b) to expose, and protect the public against, certain acts which are declared unlawful."

A fair and literal reading of § 4 (f) can save the 1950 Act against this Fifth Amendment objection. By reading § 4 (f) to provide that being a member of the Communist Party shall not "constitute *per se*" a crime, immunity from prosecution under the membership clause of the

[21] S. Rep. No. 2369, 81st Cong., 2d Sess., p. 4.

Smith Act is effected. And that is in full harmony with the purpose to make something more than "membership" necessary for conviction. That something more can be some kind of unlawful activity. After the 1950 Act was passed, membership without other activity was no longer sufficient for Smith Act prosecutions. That seems to me to be the only fair way to read § 4 (f). That conclusion necessarily requires a dismissal of this indictment.

NOTO *v.* UNITED STATES.

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

No. 9. Argued October 10–11, 1960.—Decided June 5, 1961.

Petitioner was convicted of violating the so-called membership clause of the Smith Act, which makes a felony the acquisition or holding of membership in any organization which advocates the overthrow of the Government of the United States by force or violence, knowing the purpose thereof. *Held:* The judgment is reversed, because the evidence was insufficient to prove that the Communist Party presently advocated forcible overthrow of the Government, not as an abstract doctrine, but by the use of language reasonably and ordinarily calculated to incite persons to action, immediately or in the future. Pp. 291–300.

(a) In order to support a conviction under the membership clause of the Smith Act, there must be some substantial direct or circumstantial evidence of a call to violence now or in the future which is both sufficiently strong and sufficiently pervasive to lend color to the otherwise ambiguous theoretical material regarding Communist Party teaching and to justify the inference that such a call to violence may fairly be imputed to the Party as a whole, and not merely to some narrow segment of it. P. 298.

(b) It is *present* advocacy, not an intent to advocate in the future or a conspiracy to advocate in the future, which is an element of the crime under the membership clause of the Smith Act. P. 298.

(c) A defendant must be judged upon the evidence in his own trial, and not upon the evidence in some other trial or upon what may be supposed to be the tenets of the Communist Party. P. 299.

262 F. 2d 501, reversed.

John J. Abt argued the cause and filed a brief for petitioner.

Kevin T. Maroney and *John F. Davis* argued the cause for the United States. With *Mr. Maroney* on the brief were *Solicitor General Rankin* and *Assistant Attorney General Yeagley.*

MR. JUSTICE HARLAN delivered the opinion of the Court.

This case, like No. 1, *Scales* v. *United States, ante,* p. 203, was brought here to test the validity of a conviction under the membership clause of the Smith Act. 361 U. S. 813. The case comes to us from the Court of Appeals for the Second Circuit which affirmed petitioner's conviction in the District Court for the Western District of New York, after a jury trial. 262 F. 2d 501.

The only one of petitioner's points we need consider is his attack on the sufficiency of the evidence, since his statutory and constitutional challenges to the conviction are disposed of by our opinion in *Scales;* and consideration of his other contentions is rendered unnecessary by the view we take of his evidentiary challenge.

In considering that challenge we start from the premise that Smith Act offenses require rigorous standards of proof. *Scales, ante,* p. 230. We find that the record in this case, which was tried before our opinion issued in *Yates* v. *United States,* 354 U. S. 298, bears much of the infirmity that we found in the *Yates* record, and requires us to conclude that the evidence of illegal Party advocacy was insufficient to support this conviction.

A large part of the evidence adduced by the Government on that issue came from the witness Lautner, and the reading of copious excerpts from the "communist classics." This evidence, to be sure, plentifully shows the Party's teaching of abstract doctrine that revolution is an inevitable product of the "proletarian" effort to achieve communism in a capitalist society, but testimony as to happenings which might have lent that evidence to an inference of "advocacy of action" to accomplish that end during the period of the indictment, 1946–1954, or itself supported such an inference, is sparse indeed. Moreover, such testimony as there is of that nature was not broadly based, but was limited almost exclusively to Party doings

in western New York, more especially in the cities of Rochester and Buffalo, the scene of petitioner's principal Party activities. Further, the showing of illegal Party advocacy lacked the compelling quality which in *Scales, ante,* p. 203, was supplied by the petitioner's own utterances and systematic course of conduct as a high Party official. We proceed to a summary of this testimony.

The witness Dietch described mainly episodes from his indoctrination as a member of the Rochester Young Communist League during the years 1935–1938. In that time he knew petitioner, with whom he had gone to high school, and testified that petitioner, then a youth, was an active and convinced member of the League. Apart from those early years, Dietch's testimony as to the Party and the petitioner referred to one other possibly relevant episode, when, in 1951, he obtained for the Party at petitioner's request two pieces of special printing equipment for which petitioner paid $100 and $200. However, this episode is deprived of significance when it appears from the witness' testimony that petitioner explained to him at the time that pressure brought to bear on the Party had made it difficult for it to get its printing done by conventional commercial means.

The witness Geraldine Hicks had joined the Party in 1943 at the request of the F. B. I. and continued to be involved with it until 1953. She knew petitioner in connection with his work as Chairman of the Erie County Communist Party from 1946 until 1950. Her testimony related to classes and meetings which she attended in the Buffalo area, where the "communist classics" were used for teaching purposes. Extensive passages from these works were read into evidence. She also testified as to the importance attributed by the local Party to its "industrial concentration" work and to its recruitment of workers

in those industries as well as to the importance attributed to the recruitment of Negroes.

The witness Chatley, who was a bus driver during the period of his Communist Party membership from 1949 onwards, testified to his contacts with petitioner and other Party members in the Buffalo area. He testified to Party teachings as to the importance of receiving solid support from the labor unions. He was given various items of literature such as the History of the Russian Revolution and The Proletarian Revolution and the Renegade Kautsky, which latter dealt with an early Communist who had been singled out for condemnation because of his views that communism could be achieved ultimately by peaceful means. He was told by petitioner that "if I would re-read the book[s], most of my questions would be answered. He said if there were any points I did not understand he would be happy to clear them up at a later visit." Perhaps the most significant item of Chatley's testimony dealt with an interview with petitioner, at which Chatley was requested to hide out a Party member who was fleeing the F. B. I. in connection with "what the newspapers called this Atom Spy Ring business." So far as the record reveals, the plans never progressed beyond this request. The petitioner had also told Chatley that the Federal Government was building concentration camps:

> ". . . He said they are not building them for ornamental purposes. He said 'They are going to fill them with our people, starting with the leaders.' . . . He said that he expected when they were ready he would be one of the first people to go. He said the Federal Government would continue with these camps and fill them with a lot of people, but the time would come when there would be a show-down,

> working people will stand just so much. It might take several years, it will result in bad times, but in the end it will result in a turn in the country to Marxism and Leninism. He said then his part might be in it, he was willing to suffer anything to bring it to that glorious end."

Certainly the most damaging testimony came from the witness Regan, who as a government agent and Party member from 1947 in the Buffalo-Rochester area gathered considerable information on the Party's "industrial concentration" program in that area. Regan, at the request of petitioner, attended a Party meeting in New York City on creating a Party commission in the United Auto Workers. The conference concerned the penetration of the United Auto Workers, and plans were made for getting people into various shops in automobile plants in the State, who could later assume positions of leadership in the union. At a later date petitioner also discussed the penetration of an automobile plant in the area by Party members sent up from New York City. Regan also received a pamphlet, but not from the petitioner, dealing with the concentration program in the steel industry. The pamphlet stated at one point:

> "1. Three basic industries, steel, railroad, and mining. These are basis [*sic*] to the National economy, that is if any one or all three are shut down by strike our economy is paralyzed. It is necessary for a Marxist revolutionary party to be rooted in these industries."

In 1949 Regan attended a conference in Rochester at which the petitioner spoke: "He discussed concentration work, and he said the task of the Party was to build the Party within the shop in Buffalo . . . he specifically mentioned both steel and Westinghouse Electric." Another speaker said that "steel industry was a basic indus-

try, by basic industry he said the entire section of industry within the country depended on steel." Regan also attended a conference in New York City at which petitioner spoke:

> ". . . He said a Lenin method of work within the shop was to decide upon the particular dependent within the shop, that the shop as a rule depended upon, to suspend production, it was the job of every communist to know the people, executives and product of the company, if possible to direct his attention on the key department, better still, to get a job in the key department."

Several other passages in Regan's testimony should be adverted to for their bearing on the tone of the record before us. Speaking of the war in Korea, Regan testified that the petitioner had said at the conference of the Upstate District of the Party in 1950:

> ". . . the war . . . was caused by an aggressive action of the United States, American troops would follow Wall Street policy. He said it is possible for this to break out in other parts of the world. He mentioned the near East.
>
> "Q. Is that all?
>
> "A. Yes."

No effort was made to link up this conference with particularly trusted Party members, but it does appear that it was at this conference that plans were laid for building a Communist Party club "on the railroad."

Regan also testified to a remark made at another Party conference by a lecturer that a "social democrat was an evolutionist who waited for socialism where the Communist Party would achieve socialism through revolutions." At this same meeting the lecturer recounted an incident

that had occurred at a class she had once taught in New Rochelle, New York, at an unspecified time:

> ". . . She said a person at this class, they were discussing the Soviet Union, asked her would it be possible for him to own twenty pairs of shoes in the Soviet Union. She made the statement he was the kind of a guy they hoped to shoot some day."

The witness recalled a similar intemperate remark by the petitioner during a meeting in 1947:

> "Lumpkin [a Party member] was talking about a visit to his home by a local newspaper reporter. He said the reporter came to his home. They let him in and answered a lot of questions. . . ."
>
> "John Noto said Lumpkin should never let the reporter into the house. Should not have answered any questions. He said 'Sometime I will see the time we can stand a person like this S. O. B. against the wall and shoot him.' "

The witness Greenberg testified largely about the Party program in the upstate area as to setting up printing and mimeographing equipment in case commercial channels were cut off or the Party was forced underground; and three other witnesses testified briefly to the effect that they had known petitioner when he had moved to Newark, New Jersey, and obtained a job under an assumed name as a helper or stockkeeper in the Goodyear Rubber Products Corporation factory, in connection with which he used a false Social Security number.

Finally, there was testimony through the witness Lautner as to the Party's underground organization in northern New York, including petitioner's participation therein as one of the three Party members in charge.

We must consider this evidence in the light most favorable to the Government to see whether it would support

the conclusion that the Party engaged in the advocacy "not of . . . mere abstract doctrine of forcible overthrow, but of action to that end, by the use of language reasonably and ordinarily calculated to incite persons to . . . action" immediately or in the future. *Yates* v. *United States, supra,* at 316. In that case we said:

> ". . . The essence of the *Dennis* holding was that indoctrination of a group in preparation for future violent action, as well as exhortation to immediate action, by advocacy found to be directed to 'action for the accomplishment' of forcible overthrow, to violence as 'a rule or principle of action,' and employing 'language of incitement' . . . is not constitutionally protected . . . . This is quite a different thing from the view of the District Court here that mere doctrinal justification of forcible overthrow, if engaged in with intent to accomplish overthrow, is punishable *per se* under the Smith Act. That sort of advocacy, even though uttered with the hope that it may ultimately lead to violent revolution, is too remote from concrete action to be regarded as the kind of indoctrination preparatory to action which was condemned in *Dennis.* As one of the concurring opinions in *Dennis* put it: 'Throughout our decisions there has recurred a distinction between the statement of an idea which may prompt its hearers to take unlawful action, and advocacy that such action be taken.' " *Id.,* at 321–322.

The great bulk of the evidence in this record seems to us to come within the purview of the first of the contrasted alternatives elaborated in the concurring opinion in *Dennis* v. *United States,* 341 U. S. 494, 545, and referred to in the passage just quoted. We held in *Yates,* and we reiterate now, that the mere abstract teaching of Communist

theory, including the teaching of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action. There must be some substantial direct or circumstantial evidence of a call to violence now or in the future which is both sufficiently strong and sufficiently pervasive to lend color to the otherwise ambiguous theoretical material regarding Communist Party teaching, and to justify the inference that such a call to violence may fairly be imputed to the Party as a whole, and not merely to some narrow segment of it.

Surely the offhand remarks that certain individuals hostile to the Party would one day be shot cannot demonstrate more than the venomous or spiteful attitude of the Party towards its enemies, and might indicate what could be expected from the Party if it should ever succeed to power. The "industrial concentration" program, as to which the witness Regan testified in some detail, does indeed come closer to the kind of concrete and particular program on which a criminal conviction in this sort of case must be based. But in examining that evidence it appears to us that, in the context of this record, this too fails to establish that the Communist Party was an organization which presently advocated violent overthrow of the Government now or in the future, for that is what must be proven. The most that can be said is that the evidence as to that program might justify an inference that the leadership of the Party was preparing the way for a situation in which future acts of sabotage might be facilitated, but there is no evidence that such acts of sabotage were presently advocated; and it is *present* advocacy, and not an intent to advocate in the future or a conspiracy to advocate in the future once a groundwork has been laid, which is an element of the crime under the membership clause. To permit an inference of present advocacy from evidence

showing at best only a purpose or conspiracy to advocate in the future would be to allow the jury to blur the lines of distinction between the various offenses punishable under the Smith Act.

The kind of evidence which we found in *Scales* sufficient to support the jury's verdict of present illegal Party advocacy is lacking here in any adequately substantial degree. It need hardly be said that it is upon the particular evidence in a particular record that a particular defendant must be judged, and not upon the evidence in some other record or upon what may be supposed to be the tenets of the Communist Party. See *Yates, supra,* at 330.

Although our conclusion renders unnecessary consideration of the evidence as to petitioner's personal criminal purpose to bring about the overthrow of the Government by force and violence, a further word may be desirable. While evidence of the industrial concentration program, in which petitioner was active, does not alone justify an inference of the Party's present advocacy of violent overthrow, it may very well tend to show the quite different element of the petitioner's own purpose. Even though it is not enough to sustain a conviction that the Party has engaged in "mere doctrinal justification of forcible overthrow . . . [even] with the intent to accomplish overthrow," *Yates, supra,* at 321, it would seem that such a showing might be of weight in meeting the requirement that the particular defendant in a membership clause prosecution had the requisite criminal intent. But it should also be said that this element of the membership crime, like its others, must be judged *strictissimi juris,* for otherwise there is a danger that one in sympathy with the legitimate aims of such an organization, but not specifically intending to accomplish them by resort to violence, might be punished for his adherence to lawful and con-

stitutionally protected purposes, because of other and unprotected purposes which he does not necessarily share.

In view of our conclusion as to the insufficiency of the evidence as to illegal Party advocacy, the judgment of the Court of Appeals must be

Reversed.

MR. JUSTICE BRENNAN and THE CHIEF JUSTICE would remand to the District Court with direction to that court to dismiss the indictment. For the reasons expressed in MR. JUSTICE BRENNAN'S dissent in *Scales* v. *United States*, *ante*, p. 278, they believe that this prosecution was barred by § 4 (f) of the Internal Security Act. They also believe that the dismissal is required because of the insufficiency of the evidence.

MR. JUSTICE BLACK, concurring.

In 1799, the English Parliament passed a law outlawing certain named societies on the ground that they were engaged in "a traitorous Conspiracy . . . in conjunction with the Persons from Time to Time exercising the Powers of Government in *France* . . . ."[1] One of the many strong arguments made by those who opposed the enactment of this law was stated by a member of that body, Mr. Tierney:

> "The remedy proposed goes to the putting an end to all these societies together. I object to the system, of which this is only a branch; for the right hon. gentleman has told us he intends to propose laws from time to time upon this subject, as cases may arise to require them. I say these attempts lead to

[1] 39 George III, c. 79. For a more complete discussion of the provisions of this law and the arguments surrounding its enactment, see my dissenting opinion in *Communist Party* v. *Subversive Activities Control Board*, decided today, *ante*, p. 1, at 151–154, 162.

> consequences of the most horrible kind. I see that government are acting thus. Those whom they cannot prove to be guilty, they will punish for their suspicion. To support this system, we must have a swarm of spies and informers. They are the very pillars of such a system of government." [2]

The decision in this case, in my judgment, dramatically illustrates the continuing vitality of this observation.

The conviction of the petitioner here is being reversed because the Government has failed to produce evidence the Court believes sufficient to prove that the Communist Party presently advocates the overthrow of the Government by force. The Government is being told, in effect, that if it wishes to get convictions under the Smith Act, it must maintain a permanent staff of informers who are prepared to give up-to-date information with respect to the present policies of the Communist Party. Given the fact that such prosecutions are to be permitted at all, I do not disagree with the wisdom of the Court's decision to compel the Government to come forward with evidence to prove its charges in each particular case. But I think that it is also important to realize the overriding pre-eminence that such a system of laws gives to the perpetuation and encouragement of the practice of informing—a practice which, I think it is fair to say, has not always been considered the sort of system to which a wise government

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[2] See Parliamentary Debates, Hansard, 1st Series, 34, at 991. Cf. *De Jonge* v. *Oregon*, 299 U. S. 353, 365: "The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, 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."

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would entrust the security of a Nation. I have always thought, as I still do think, that this Government was built upon a foundation strong enough to assure its endurance without resort to practices which most of us think of as being associated only with totalitarian governments.

I cannot join an opinion which implies that the existence of liberty is dependent upon the efficiency of the Government's informers. I prefer to rest my concurrence in the judgment reversing petitioner's conviction on what I regard as the more solid ground that the First Amendment forbids the Government to abridge the rights of freedom of speech, press and assembly.

MR. JUSTICE DOUGLAS, concurring.

The utterances, attitudes, and associations in this case, like those in *Scales* v. *United States, ante,* p. 203, are in my view wholly protected by the First Amendment and not subject to inquiry, examination, or prosecution by the Federal Government.

For that reason, as well as for the one mentioned by MR. JUSTICE BRENNAN, I would remand the case to the District Court with directions to dismiss the indictment.

Syllabus.

JARECKI, FORMER COLLECTOR OF INTERNAL REVENUE, ET AL. *v.* G. D. SEARLE & CO.

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

No. 151. Argued March 21, 1961.—Decided June 12, 1961.*

1. Development of new products is not "discovery" within the meaning of § 456 (a) (2) (B) of the Internal Revenue Code of 1939, as amended; and income resulting from the manufacture and sale of certain patented drugs, cameras, camera equipment and stereo products resulting from inventions is not included within the statutory definition of "abnormal income," in § 456 (a), so as to qualify for Korean War excess profits tax relief under the Excess Profits Tax Act of 1950. Pp. 304–313.
2. Such income is not made eligible for Korean War excess profits tax relief by the concluding sentence of paragraph (2) of § 456 (a), which provides that, "The classification of income of any class not described in subparagraphs (A) to (D), inclusive, shall be subject to regulations prescribed by the Secretary." Pp. 313–315.

274 F. 2d 129, reversed.

278 F. 2d 148, affirmed.

Wayne G. Barnett argued the cause for petitioners in No. 151 and for respondent in No. 169. With him on the briefs were former *Solicitor General Rankin, Solicitor General Cox, Assistant Attorneys General Rice* and *Oberdorfer, Acting Assistant Attorneys General Sellers* and *Heffron, Harry Marselli* and *Norman H. Wolfe.*

Isaac M. Barnett argued the cause for petitioner in No. 169. With him on the brief was *David Saperstein.*

Walter J. Cummings, Jr. argued the cause for respondent in No. 151. With him on the brief was *Edwin C. Austin.*

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*Together with No. 169, *Polaroid Corporation* v. *Commissioner of Internal Revenue,* certiorari to the United States Court of Appeals for the First Circuit, argued March 21–22, 1961.

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

These cases present problems in the interpretation of § 456 (a) of the Internal Revenue Code of 1939, a section of the Excess Profits Tax Act of 1950, 64 Stat. 1137. The Act, which is intended to tax at high rates unusually high profits earned during the Korean War, imposes a tax on profits in excess of an amount deemed to represent the taxpayer's normal profits.[1] Recognizing, however, that some profits otherwise subject to tax under this scheme might stem from causes other than the inflated wartime economy, Congress enacted § 456. This section grants relief in certain cases of "abnormal income" as defined in § 456 (a) [2] by allocating some of this income

[1] See H. R. Rep. No. 3142, 81st Cong., 2d Sess. 2; S. Rep. No. 2679, 81st Cong., 2d Sess. 2.

[2] Section 456 (a) provides in part:

"(a) DEFINITIONS.—For the purposes of this section—

"(1) ABNORMAL INCOME.—The term 'abnormal income' means income of any class described in paragraph (2) includible in the gross income of the taxpayer for any taxable year under this subchapter if it is abnormal for the taxpayer to derive income of such class, or, if the taxpayer normally derives income of such class but the amount of such income of such class includible in the gross income of the taxable year is in excess of 115 per centum of the average amount of the gross income of the same class for the four previous taxable years, or, if the taxpayer was not in existence for four previous taxable years, the taxable years during which the taxpayer was in existence.

"(2) SEPARATE CLASSES OF INCOME.—Each of the following subparagraphs shall be held to describe a separate class of income:

"(A) Income arising out of a claim, award, judgment, or decree, or interest on any of the foregoing; or

"(B) Income resulting from exploration, discovery, or prospecting, or any combination of the foregoing, extending over a period of more than 12 months; or

"(C) Income from the sale of patents, formulae, or processes, or any combination of the foregoing, developed over a period of more than 12 months; or

"(D) Income includible in gross income for the taxable year rather

to years other than those in which it was received for purposes of computing the tax.

The dispute in these cases is whether income from the sales of certain new products falls within the statutory definition of "abnormal income." Taxpayers claim that the income from the sales of their products is income resulting from "discovery." They claim it is therefore "abnormal income" within the class defined by § 456 (a)(2)(B) as

> "Income resulting from exploration, discovery, or prospecting, or any combination of the foregoing, extending over a period of more than 12 months."

Taxpayer in No. 151 is a corporation engaged in the manufacture and marketing of drugs. As a result of research extending for more than 12 months, it produced two new drugs, "Banthine," used in the treatment of peptic ulcers, and "Dramamine," for relief from motion sickness. Taxpayer received patents on both drugs, and it asserts that both were new products and not merely improvements on pre-existing compounds. Taxpayer received income from the sale of "Banthine" and "Dramamine" in the years 1950 through 1952. It paid its tax without claiming relief under § 456, and then claimed a refund. On denial of its claim, taxpayer filed a complaint in the District Court for the Northern District of Illinois. The District Court dismissed the complaint, but the Court of Appeals for the Seventh Circuit reversed. It held that "discovery" might include the preparation of new products and that the case must be remanded for a trial

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than for a different taxable year by reason of a change in the taxpayer's method of accounting.

"All the income which is classifiable in more than one of such subparagraphs shall be classified under the one which the taxpayer irrevocably elects. The classification of income of any class not described in subparagraphs (A) to (D), inclusive, shall be subject to regulations prescribed by the Secretary."

on the issue of whether taxpayer's drugs "were actually discoveries." 274 F. 2d 129, 131.

Taxpayer in No. 169 is the inventor and producer of the "Polaroid Land Process," a camera and film which produce a photograph in 60 seconds, and the "Polaroid 3–D Synthetic Polarizer," a device incorporated in the "viewers" through which audiences watched the three dimensional motion pictures in vogue some years ago. These inventions, each the product of more than 12 months' research, are novel, according to taxpayer, and each has been patented. The Polaroid Land equipment was the subject of 238 patents by the end of 1958, and taxpayer characterizes this invention as "revolutionary." Its production was a new departure in the business of taxpayer, which had hitherto been engaged primarily in manufacturing and selling such optical products as polarizing sunglasses, visors and camera filters. In its returns for 1951 through 1953 taxpayer utilized the provisions of § 456 in computing its tax on income from the sales of its photographic equipment and 3–D polarizers. The Commissioner determined that § 456 was not applicable, and the Tax Court upheld his determination of a deficiency. The Court of Appeals for the First Circuit affirmed, holding that taxpayer's inventions were not "discoveries" and its income from their sale not "abnormal income." 278 F. 2d 148.

We granted certiorari in each case to resolve the conflict between the decisions of the First and Seventh Circuits. 364 U. S. 812, 813.

I.

For present purposes we accept, as did the First Circuit, taxpayers' assertions of the novelty of their products. But we also agree with that court that taxpayers' inventions are not "discoveries" as that word is used in § 456 (a)(2)(B) and that income from sales of the new

products may not receive the special treatment provided by § 456.

We look first to the face of the statute. "Discovery" is a word usable in many contexts and with various shades of meaning. Here, however, it does not stand alone, but gathers meaning from the words around it. These words strongly suggest that a precise and narrow application was intended in § 456. The three words in conjunction, "exploration," "discovery" and "prospecting," all describe income-producing activity in the oil and gas and mining industries, but it is difficult to conceive of any other industry to which they all apply. Certainly the development and manufacture of drugs and cameras are not such industries. The maxim *noscitur a sociis,* that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress. See, *e. g., Neal* v. *Clark,* 95 U. S. 704, 708–709. The application of the maxim here leads to the conclusion that "discovery" in § 456 means only the discovery of mineral resources.

When we examine further the construction of § 456 (a)(2) and compare subparagraphs (B) and (C), it becomes unmistakably clear that "discovery" was not meant to include the development of patentable products. If "discovery" were so wide in scope, there would be no need for the provision in subparagraph (C) for "Income from the sale of patents, formulae, or processes." All of this income, under taxpayers' reading of "discovery," would also be income "resulting from . . . discovery" within subparagraph (B). To borrow the homely metaphor of Judge Aldrich in the First Circuit, "If there is a big hole in the fence for the big cat, need there be a small hole for the small one?" The statute admits a reasonable construction which gives effect to all of its provisions. In these circumstances we will not adopt a strained read-

ing which renders one part a mere redundancy. See, *e. g.*, *United States* v. *Menasche*, 348 U. S. 528, 538–539.

Taxpayers assert that it is the "ordinary meaning" of "discovery" which must govern. We find ample evidence both on the face of the statute and, as we shall show, in its legislative history that a technical usage was intended. But even if we were without such evidence we should find it difficult to believe that Congress intended to apply the layman's meaning of "discovery" to describe the products of research. To do so would lead to the necessity of drawing a line between things found and things made, for in ordinary present-day usage things revealed are discoveries, but new fabrications are inventions.[3] It would appear senseless for Congress to adopt this usage, to provide relief for income from discoveries and yet make no provision for income from inventions. Perhaps in the patent law "discovery" has the uncommonly wide meaning taxpayers suggest, but the fields of patents and taxation are each lores unto themselves, and the usage in the patent law (which is by no means entirely in taxpayers' favor) [4] is unpersuasive here. All the evidence is

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[3] In lay terms, Polaroid's photographic equipment and Searle's drugs are probably better called inventions than discoveries. Webster's New International Dictionary, Unabridged (2d ed.) p. 745, makes this distinction: "One DISCOVERS what existed before, but had remained unknown; one INVENTS by forming combinations which are either entirely new, or which attain their end by means unknown before; as, Columbus *discovered* America; Newton *discovered* the law of gravitation; Edison *invented* the phonograph . . . ."

[4] The United States Constitution, Art. I, § 8, cl. 8 gives Congress the power to secure to "Inventors the exclusive Right to their . . . Discoveries." While the terms "discover" and "discovery" are used throughout the patent statutes, they seem generally to appear with "invent" and "invention" as if the terms have separate meanings. See, *e. g.*, 35 U. S. C. § 101: "Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter . . . may obtain a patent therefor . . . ." And see *Dolbear* v. *American Bell Telephone Co.* (*Telephone Cases*), 126 U. S. 1, 532–533.

to the effect that Congress did not intend to introduce the difficult distinction between inventions and discoveries into the excess profits tax law.

The relevant legislative history fortifies the conclusions to which the words of the statute lead us. The word "discovery" has been used for many years in the tax laws, and has always been used with the limited meaning of the finding of mineral deposits. In the Revenue Act of 1918, enacting one of the earliest excess profits tax laws, a limit was placed on the excess profits tax on income from "a bona fide sale of mines, oil or gas wells, or any interest therein, where the principal value of the property has been demonstrated by prospecting or exploration and discovery work done by the taxpayer." Revenue Act of 1918, § 337, 40 Stat. 1096.[5] An identical limitation was imposed on the income tax levied under that Act,[6] and the same usage of "discovery" obtained in the allowance of depletion deductions.[7] The limitation on the income tax on the proceeds of the sale of mineral deposits was re-enacted without significant change in the Revenue Acts of 1921, 1924, 1926, 1928, 1932, 1936 and 1938.[8] It remains in the income tax provisions of the Internal Revenue Code of 1939 as § 105 and has been carried forward as § 632 of the 1954 Code. In each re-enactment "dis-

[5] This section was re-enacted by the Revenue Act of 1921, § 337, 42 Stat. 277.

[6] Revenue Act of 1918, § 211 (b), 40 Stat. 1064.

[7] Revenue Act of 1918, §§ 214 (a)(10), 234 (a)(9), 40 Stat. 1067, 1078, providing "That in the case of mines, oil and gas wells, discovered by the taxpayer . . . where the fair market value of the property is materially disproportionate to the cost, the depletion allowance shall be based upon the fair market value of the property at the date of discovery . . . ."

[8] Revenue Act of 1921, § 211 (b), 42 Stat. 237; Revenue Act of 1924, § 211 (b), 43 Stat. 267; Revenue Act of 1926, § 211 (b), 44 Stat. 23; Revenue Act of 1928, § 102 (a), 45 Stat. 812; Revenue Act of 1932, § 102 (a), 47 Stat. 192; Revenue Act of 1936, § 105, 49 Stat. 1678; Revenue Act of 1938, § 105, 52 Stat. 484.

covery" is linked with "exploration" and "prospecting," and in each the word is restrictively applied to extractive industries. A correspondingly narrow use of "discovery" has continued since 1918 in the depletion allowance sections [9] and appears in § 114 (b)(2) of the 1939 Code. In the more than 30 years preceding the enactment of the section here at issue, during which time "discovery" was used and re-used in successive taxing statutes, the word developed into a term of art of precise and limited meaning.

The Excess Profits Tax Act of 1940, 54 Stat. 975, made specific mention of more types of "abnormal income" qualifying for relief than did the earlier excess profits tax statutes, but there is no indication that it worked any transformation in the meaning of "discovery." Section 721, 54 Stat. 986, as amended, 55 Stat. 21, classified six types of "abnormal income." Among them was the following, at § 721 (a)(2)(C):

> "Income resulting from exploration, discovery, prospecting, research, or development of tangible property, patents, formulae, or processes, or any combination of the foregoing, extending over a period of more than 12 months."

This was the first time specific provision was made for income from invention, relief in cases of such income having previously been obtainable, if at all, only under the "general relief" provisions of the earlier Acts.[10] It is

[9] Revenue Act of 1921, §§ 214 (a)(10), 234 (a)(9), 42 Stat. 241, 256; Revenue Act of 1924, § 204 (c), 43 Stat. 260; Revenue Act of 1926, § 204 (c)(1), 44 Stat. 16; Revenue Act of 1928, § 114 (b)(2), 45 Stat. 821; Revenue Act of 1932, § 114 (b)(2), 47 Stat. 202; Revenue Act of 1934, § 114 (b)(2), 48 Stat. 710; Revenue Act of 1936, § 114 (b)(2), 49 Stat. 1686; Revenue Act of 1938, § 114 (b)(2), 52 Stat. 495.

[10] Section 327 (d) of the Revenue Act of 1918, 40 Stat. 1093, gave the Commissioner power to grant relief in any case in which "the tax . . . would, owing to abnormal conditions affecting the capital or income of the corporation, work upon the corporation an excep-

instructive that the formula "exploration, discovery, or prospecting" was not considered broad enough to cover invention and that the words "research" and "development" were added to cover that source of income. Plainly, "discovery" retained in the World War II excess profits Act the limited meaning which it had had in the previous Acts and which it continued to have in the income tax provisions of the then-current code.[11]

The relief provisions of the Excess Profits Tax Act of 1950, which we here construe, were modeled in part on § 721 of the World War II Act, but were different in significant respects. In the classifications of income in the new § 456, Congress gave separate treatment to income from discovery of minerals and income from invention. It provided relief in subparagraph (B) for "Income *resulting from* exploration, discovery, or prospecting," but provided in subparagraph (C) only for "Income *from the sale of* patents, formulae, or processes." (Emphasis added.) Subparagraph (C) does not encompass all income from inventions. It does not cover income from the sale of products made under a new patent, the sort of income at issue here. Taxpayers assert that the income from their inventions is, realistically speaking, as "abnormal" in their businesses as the discovery of a new mine would be in the business of a prospector. Their income is within the spirit of § 456, they say, and should be held to be within the letter of subparagraph (B). It is clear, however, that Congress, while it may have recognized the abnormal nature of this sort of income, chose

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tional hardship . . . ." Section 721 of the World War II law classified specific types of abnormal income for purposes of computing the tax, and, while it provided relief for all abnormal income of whatever class, was not considered a "general relief" section.

[11] I. R. C. of 1939, §§ 105, 114 (b)(2). It was expressly provided by § 728 of the World War II excess profits tax statute, 54 Stat. 989, that the words used in that statute should have the same meaning as when used in the income tax chapter of the Code.

deliberately to deny relief for it and to limit relief in cases of research and development to that provided in subparagraph (C).

The relief provisions of the World War II Act had been intended to provide "flexible rules," [12] and their application had often been an uncertain affair. In administering § 721 the Commissioner often faced the difficult task of separating income which was the product of "research, or development" from that resulting merely from improved management or sales efforts. The difficulty of distinction led the Tax Court to hold that the distinction must be made "by exercising common sense and judgment," and that "It is entirely possible that the allocation made by one person would never match that made by another." *Ramsey Accessories Mfg. Corp.* v. *Commissioner,* 10 T. C. 482, 489. Congress in 1950 recognized the delay and uncertainty caused by the element of administrative discretion in this and other [13] sections and set about drafting an excess profits tax law on the principle that "subjective judgments . . . should be avoided in the new law." H. R. Rep. No. 3142, 81st Cong., 2d Sess. 20. This principle was expressly followed in the drafting of § 456. The Senate Committee reported on § 456 as follows:

> "The equivalent provision in the World War II law (sec. 721) also permitted adjustments with reference to certain other types of income, particularly that resulting from the sale of tangible property arising out of research and development which extended over a period of more than 12 months. This pro-

[12] H. R. Rep. No. 146, 77th Cong., 1st Sess. 2.

[13] The "general relief" section of the World War II Act, § 722, 54 Stat. 986, as amended, 55 Stat. 23, 701, 56 Stat. 914, 57 Stat. 56, 601, 58 Stat. 55, provided for adjustments in the computation of base period income if the taxpayer established, among other things, "what would be a fair and just amount representing normal earnings" during the base period.

> vision in the old law was a potential loophole of major dimensions. Because there appeared to be no means of restricting such an adjustment to truly meritorious cases other than by the introduction of a large degree of administrative discretion of the type required by the general relief clause of the World War II law (sec. 722), and because the need for a reallocation of such income seemed to be materially less than for the other classes of income described above, the bill omits this item from the list of abnormal types of income for which a reallocation can be made." S. Rep. No. 2679, 81st Cong., 2d Sess. 14.

The House Committee Report was virtually identical. H. R. Rep. No. 3142, 81st Cong., 2d Sess. 13.

Taxpayers recognize, as they must, that Congress intended its change in language to limit the kinds of income eligible for relief. They say, however, that not all income from research and development was excluded. That which comes from inventions not merely patentable but also sufficiently revolutionary to be called "genuine discoveries" is still within the protection of § 456. We find it impossible to believe that an amendment designed to eliminate uncertainty and administrative discretion would introduce into the law—without a congressional word of warning or explanation—a distinction as vague, as dependent upon nuances of scientific opinion, and as unprecedented as that urged by taxpayers.

II.

Taxpayers have another argument, which the First Circuit rejected and which the Seventh Circuit did not reach. Paragraph (1) of § 456 (a) defines "abnormal income" as "income of any class described in paragraph (2)" which meets certain requirements. Paragraph (2) lists four classes of income and provides in its concluding sentence:

> "The classification of income of any class not described in subparagraphs (A) to (D), inclusive,

shall be subject to regulations prescribed by the Secretary."

Taxpayers argue that even if the income here at issue was not provided for under any of the subparagraphs of paragraph (2), it is nevertheless included within this final sentence and is hence eligible for relief.

We need not decide the precise effect of the sentence relied on. In light of the clear purpose of Congress in enacting § 456 to cut down not only the amount of administrative discretion which had prevailed under the predecessor section but also the scope of available relief, the power of the Secretary to extend relief far beyond the four corners of the statute may be doubted.[14] It is sufficient to note that, unlike its predecessor (which made relief available for all "abnormal income," whether or not specified in a particular class),[15] § 456 applies only to those classes specified in § 456 (a)(2). Section 456 does not apply in terms to all abnormal income and contains no indication that the Secretary should create administrative classifications embracing all such income. And even if the sentence relied on gives the Secretary power to expand the classes of abnormal income somewhat beyond the four enumerated in the statute, he has clearly not done so here. The regulations[16] specifically provide that

[14] In fact, the Committee reports state that "Adjustments . . . [under § 456] are limited to income arising out of" the four classes specified in subparagraphs (A) through (D). H. R. Rep. No. 3142, 81st Cong., 2d Sess. 13; S. Rep. No. 2679, 81st Cong., 2d Sess. 14.

[15] Excess Profits Tax Act of 1940, § 721, 54 Stat. 986, as amended, 55 Stat. 21. Section 721 (a)(1) defines "abnormal income" as "income of any class includible in the gross income of the taxpayer . . . ."

[16] Treas. Reg. 130, § 40.456–2 (b) (1951), as amended, T. D. 6026, 1953–2 Cum. Bull. 235: "Other income, not within a class described in subparagraphs (A)–(D) of section 456 (a)(2), to which section 456 is applicable may be grouped by the taxpayer, subject to approval by the Commissioner on the examination of the taxpayer's return, in such classes similar to those specified in subparagraphs (A)–(D)

"Income from the sale of tangible property arising out of research and development which extended over a period of more than 12 months is not included in the list of abnormal types of income to which section 456 is applicable, and such income may not constitute a class of income for purposes of that section." This specific exclusion is clearly in furtherance of the purpose of Congress in deleting "research" and "development" income from its classification of abnormal income. The Commissioner, effecting the will of Congress, has barred relief for the type of income here at issue.

The last sentence of the regulation, on which taxpayers also rely, does not aid them. It provides merely that "research" and "development" income is eligible for relief if it is properly includible in a class of income to which § 456 otherwise applies. As we have held, however, taxpayers' income does not fall within any such class.

Therefore, the judgment of the Court of Appeals for the Seventh Circuit must be reversed and the judgment of the Court of Appeals for the First Circuit affirmed.

It is so ordered.

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of section 456 (a) (2) as are reasonable in a business of the type which the taxpayer conducts, and as are appropriate in the light of the taxpayer's business experience and accounting practice. Income from the sale of tangible property arising out of research and development which extended over a period of more than 12 months is not included in the list of abnormal types of income to which section 456 is applicable, and such income may not constitute a class of income for purposes of that section. However, section 456 is applicable to such income if the income is otherwise properly includible within a class of income to which such section is applicable for example, the class described in section 456 (a) (2) (D)."

CIVIL AERONAUTICS BOARD *v.* DELTA AIR LINES, INC.

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

No. 492. Argued April 27, 1961.—Decided June 12, 1961.*

Once a certificate of public convenience and necessity granted by the Civil Aeronautics Board to an air line has become effective under § 401 (f) of the Federal Aviation Act of 1958, the Board may not alter it without the formal notice and hearing required by § 401 (g)—even though the Board, at the time of certification, has purported to reserve jurisdiction to make summary modifications pursuant to petitions for reconsideration and such petitions have been filed within the time prescribed by the Board's regulations and before the effective date of the certificate. Pp. 317–334.

(a) Congress intended that certificated air lines should enjoy "security of route," so that they might invest the considerable sums required to support their operations, and it provided in § 401 (g) certain minimum protections before a certificated operation could be cancelled. Pp. 321–325.

(b) Notwithstanding the general principle that an administrative order is not "final" *for the purposes of judicial review* until outstanding petitions for reconsideration have been disposed of, the Board may not, by reserving jurisdiction to make summary modifications pursuant to petitions for reconsideration, do indirectly what Congress has forbidden it to do directly. Pp. 325–334.

280 F. 2d 43, affirmed.

John F. Davis argued the cause for petitioner in No. 492. On the briefs were former *Solicitor General Rankin, Solicitor General Cox, Assistant Attorney General Loevinger, Assistant Attorney General Bicks, Richard A. Solomon, Irwin A. Seibel, O. D. Ozment* and *Franklin M. Stone.*

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*Together with No. 493, *Lake Central Airlines, Inc.*, v. *Delta Air Lines, Inc.*, also on certiorari to the same Court.

Albert F. Grisard argued the cause and filed a brief for petitioner in No. 493.

R. S. Maurer argued the cause for respondent. With him on the briefs were *James W. Callison* and *Robert Reed Gray.*

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

This case concerns the power of the Civil Aeronautics Board to alter a certificate of public convenience and necessity, granted to respondent Delta Air Lines, after that certificate had become effective under § 401 (f) of the Federal Aviation Act of 1958. 72 Stat. 731, 755, 49 U. S. C. § 1371 (f).[1] The administrative proceedings from which the present dispute arises date back to May 1955, and involve consideration by the Board of a number of applications for new service between cities located in an area extending from the Great Lakes to Florida. The Board divided the proceedings into two general categories, consolidating the applications for long-haul service in the

[1] This section provides:

"Each certificate shall be effective from the date specified therein, and shall continue in effect until suspended or revoked as hereinafter provided, or until the Board shall certify that operation thereunder has ceased, or, if issued for a limited period of time under subsection (d) (2) of this section, shall continue in effect until the expiration thereof, unless, prior to the date of expiration, such certificate shall be suspended or revoked as provided herein, or the Board shall certify that operations thereunder have ceased: *Provided*, That if any service authorized by a certificate is not inaugurated within such period, not less than ninety days, after the date of the authorization as shall be fixed by the Board, or if, for a period of ninety days or such other period as may be designated by the Board any such service is not operated, the Board may by order, entered after notice and hearing, direct that such certificate shall thereupon cease to be effective to the extent of such service."

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Great Lakes-Southeast Service Case and those for short-haul flights in the *Great Lakes Local Service Investigation Case*. In order to protect fully the interests of local service carriers, the Board allowed these carriers, including petitioner Lake Central Airlines, to intervene in the hearings on the long-haul applications.

At the conclusion of the *Great Lakes-Southeast Service Case* a number of awards were made, including one permitting Delta to extend an existing route northwest so as to provide service from Miami to Detroit and to add Indianapolis and Louisville as intermediate points on its existing Chicago-to-Miami route. Certain restrictions for the protection of local carriers were imposed on many of the awards, these restrictions generally providing that flights between specified intermediate cities had to originate at or beyond given distant points. The stated purpose of these restrictions was to prevent the long-haul carrier from duplicating so-called "turn-around" service already provided by existing local carriers. One such restriction was applied to Delta's run between Detroit and various locations in Ohio but, by and large, Delta's award was free of protective limitations.

The Board's order issued on September 30, 1958, and it specified that Delta's certificate was to become effective on November 29, 1958, unless postponed by the Board prior to that date. Shortly thereafter,within time limits set by the Board,[2] numerous petitions for reconsideration

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[2] The Board's regulations concerning petitions for reconsideration, 14 CFR § 302.37, provide in part that:

"*Petition for reconsideration*—(a) *Time for filing.* A petition for reconsideration, rehearing or reargument may be filed by any party to a proceeding within thirty (30) days after the date of service of a final order by the Board in such proceeding unless the time is shortened or enlarged by the Board, except that such petition may not be filed with respect to an initial decision which has become final through

were filed, including one by Lake Central protesting the breadth of Delta's certificate. Lake Central requested that, if the Board should be unable to decide its petition for reconsideration before November 29, the effective date of the certificate be put off. On November 28, one day before Delta's certificate was to become effective, the Board issued a lengthy memorandum and order, which stated in substance that the requests for stays, with one immaterial exception, were denied, but that judgment on the merits of the petitions for reconsideration would be reserved. The Board explained that the parties had not made a sufficient showing of error to justify postponements and that, in view of the advent of the peak winter season, further delay would be particularly inappropriate; the Board then said:

> "To the extent that we have considered the petitions for reconsideration in the present order we have done so only for the purposes of assessing the probability of error in our original decision. We feel that such action is necessary to a fair consideration of the stay requests, and is in no way prejudicial to the legal rights of those parties seeking reconsideration. Nothing in the present order forecloses the Board from full and complete consideration of the pending petitions for reconsideration on their merits."

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failure to file exceptions thereto. However, neither the filing nor the granting of such a petition shall operate as a stay of such final order unless specifically so ordered by the Board. After the expiration of the period of filing a petition, a motion for leave to file such petition may be filed; but no such motion shall be granted except on a showing of unusual and exceptional circumstances, constituting good cause for failure to make timely filing. Within ten (10) days after a petition for reconsideration, rehearing, or reargument is filed, any party to the proceeding may file an answer in support of or in opposition to the petition."

For reasons not presently pertinent, Delta's certificate became effective on December 5,[3] rather than November 29, 1958, and Delta commenced its newly authorized operations shortly thereafter. On May 7, 1959, the Board issued a new order disposing of the still-pending petitions for reconsideration. By this order, the Board amended Delta's certificate in response to the restrictions proposed by Lake Central. Specifically, the Board barred Delta's operations between ten pairs of intermediate cities unless the flights initiated at Atlanta or points farther south; the effect of this order was to bar certain flights Delta was then operating. Even then, the Board's action was not final; the Board reserved the power to lift these restrictions pending the outcome of the *Great Lakes Local Service Case*.[4] The Board's disposition of the petitions was taken summarily, without formal notice to the parties or the opportunity for a hearing prior to decision.

Delta sought review of this order before the Board, challenging the Board's power to change the terms of its certificate after the effective date thereof without notice or hearing. The Board overruled Delta's objection, stating that: "[W]e believe we have such power, and we have exercised it in the past. Moreover, there is no showing, and we are unable to conclude, that any significant adverse effect will result to either Delta or the public from observance of the conditions here involved." On review in the Court of Appeals for the Second Circuit, however,

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[3] A temporary stay was granted from November 29 to December 5 to enable the Court of Appeals to consider a request by Eastern Air Lines for a judicial stay of certain awards made in the original proceeding. Eastern did not get its stay nor was its challenge on the merits upheld. *Eastern Air Lines* v. *Civil Aeronautics Board*, 271 F. 2d 752.

[4] We are informed that this case has now been completed but no further action has been taken on Delta's restrictions.

the Board's order was overturned, the court reasoning that Congress had made notice and hearing a prerequisite to the exercise of the Board's power to change an existing certificate. *Delta Air Lines, Inc.,* v. *Civil Aeronautics Board,* 280 F. 2d 43.

The issue in this case is narrow and can be stated briefly: Has Congress authorized the Board to alter, without formal notice or hearing, a certificate of public convenience and necessity once that certificate has gone into effect? If not, should it make any difference that the Board has purported to reserve jurisdiction prior to certification to make summary modifications pursuant to petitions for reconsideration? We think that both these questions must be answered in the negative.

Whenever a question concerning administrative, or judicial, reconsideration arises, two opposing policies immediately demand recognition: the desirability of finality, on the one hand, and the public interest in reaching what, ultimately, appears to be the right result on the other.[5] Since these policies are in tension, it is necessary

[5] See Tobias, Administrative Reconsideration: Some Recent Developments in New York, 28 N. Y. U. L. Rev. 1262, where the author observed:

"Re-examination and reconsideration are among the normal processes of intelligent living. Admittedly no warranty of correctness or fitness attaches to a decision or an action simply because it is a thing of the past. Every-day experience teaches the contrary: while the choice first made may well remain the course ultimately followed, often enough it is found on further consideration to require revision. On the other hand, constant re-examination and endless vacillation may become ludicrous, self-defeating, and even oppressive. Whether for better or for worse so far as the merits of the chosen course are concerned, a point may be reached at which the die needs to be cast with some 'finality.' An opposition may thus develop between the right result and the final one."

See also the statement of the Board in its original opinion in this case, denying a motion to reopen the record:

"Our general policy with respect to motions to reopen the record for receipt of data on the most recent operating experience has

to reach a compromise in each case and petitioners have argued at length that the Board's present procedure is a happy resolution of conflicting interests. However, the fact is that the Board is entirely a creature of Congress and the determinative question is not what the Board thinks it should do but what Congress has said it can do. See *United States* v. *Seatrain Lines,* 329 U. S. 424, 433. Cf. *Delta Air Lines* v. *Summerfield,* 347 U. S. 74, 79–80. This proposition becomes clear beyond question when it is noted that Congress has been anything but inattentive to this issue in the acts governing the various administrative agencies. A review of these statutes reveals a wide variety of detailed provisions concerning reconsideration, each one enacted in an attempt to tailor the agency's discretion to the particular problems in the area.[6] In this respect, the Federal Aviation Act is no exception since, in § 401 (f) and (g) of the Act, Congress has stated the limits of the Board's power to reconsider in unequivocal terms. Section 401 (f) provides that "Each certificate shall be effective from the date specified therein, and shall continue in effect until suspended or revoked as herein-

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consistently reflected the requirement of the public interest that the record in major route cases be brought to a close as expeditiously as possible, consistent with the requirements of full hearings, so that final decision may be rendered promptly. Institution of needed new services could be endlessly delayed were we to permit the record to be reopened in the final procedural stages of a case for the submission of more recent operating data (and the attendant cross-examination and exchange of rebuttal evidence). Only in the cases where the situation under consideration has changed radically would such a course of action be justified."

[6] Generally speaking, the less interested Congress has been in what has been called "security of certificate," the wider the scope of reconsideration Congress has allowed to the supervising agency. See generally Davis, Res Judicata in Administrative Law, 25 Texas L. Rev. 199. It cannot be doubted that Congress was powerfully interested in "security of certificate" when it passed the Aviation Act. See 83 Cong. Rec. 6407.

after provided." The phrase "as hereinafter provided" refers to § 401(g), which states:

> "AUTHORITY TO MODIFY, SUSPEND, OR REVOKE
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> "(g) *The Board upon petition or complaint or upon its own initiative, after notice and hearings, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require,* or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: *Provided,* That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Board, with an order of the Board commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Board to have been violated. Any interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of the certificate." (Emphasis added.)

This language represents to us an attempt by Congress to give the Board comprehensive instructions to meet all contingencies and the Board's duty is to follow these instructions,[7] particularly in light of the fact that obedience thereto raises no substantial obstacles. It is true, of course, that statutory language necessarily derives much of its meaning from the surrounding circumstances. However, we think that, while there is no legislative his-

[7] No one contends that the changes made upon reconsideration constituted the correction of inadvertent errors. See *American Trucking Assns., Inc.,* v. *Frisco Transportation Co.,* 358 U. S. 133.

tory directly on point, the background of the Aviation Act strongly supports what we believe to be the plain meaning of § 401 (f) and (g). It is clear from the statements of the supporters of the predecessor of the Aviation Act—the Civil Aeronautics Act of 1938—that Congress was vitally concerned with what has been called "security of route"—*i. e.*, providing assurance to the carrier that its *investment in operations* would be protected insofar as reasonably possible.[8] And there is no other explanation but that Congress delimited the Board's power to reconsider its awards with precisely this factor in mind; hence the language that a certificate *"shall be effective . . .*

[8] Speaking on behalf of the bill which became the predecessor of the Federal Aviation Act—the Civil Aeronautics Act of 1938—Congressman Lea, Chairman of the Committee on Interstate and Foreign Commerce which reported the bill, said:

"One hundred and twenty million dollars has already been invested in commercial aviation in the United States. It is the information of the committee that $60,000,000 of this sum has been wiped out. The fact that so much money has been put into commercial aviation shows the faith, the genius, and the courage of the American people in that they are willing to invest as they have in aviation up to this date. However, in the absence of legislation such as we have now before us these lines are going to find it very difficult if not impossible to finance their operations because of the lack of stability and assurance in their operations. You would not want to invest $200 or $2,000 a mile in a line that has no assurance of security of its route and no protection against cutthroat competition.

"Part of the proposal here is that the regulatory body created by the bill will have authority to issue certificates of convenience and necessity to the operators. This will give assurance of security of route. The authority will also exercise rate control, requiring that rates be reasonable and giving power to protect against cutthroat competition. In my judgment, those two things are the fundamental and essential needs of aviation at this time, security and stability in the route and protection against cutthroat competition.

"These are the two economic fundamentals presented and it is this necessity that the bill seeks to meet. We want to give financial stability to these companies so they can finance their operations and finance them to advantage." 83 Cong. Rec. 6406–6407.

until suspended or revoked as hereinafter provided" (emphasis supplied), language which is absent from several of the Acts to which reference has been made. Thus, the structure of the statute, when considered in light of the factor persuading Congress, indicates to us that the critical date in the mind of Congress was the date on which the carrier commenced operations, with the concomitant investment in facilities and personnel, not the date that abstract legal analysis might indicate as the "final" date. In other words, it seems clear to us that Congress was relatively indifferent to the fluctuations an award might undergo prior to the time it affected practical relationships, but that Congress was vitally concerned with its security after the wheels had been set in motion. In light of this, we think the result we reach follows naturally: to the extent there are uncertainties over the Board's power to alter effective certificates, there is an identifiable congressional intent that these uncertainties be resolved in favor of the certificated carrier and that the specific instructions set out in the statute should not be modified by resort to such generalities as "administrative flexibility" and "implied powers." We do not quarrel with those who would grant the Board great discretion to conjure with certificates prior to effectuation. But, we feel that we would be paying less than adequate deference to the intent of Congress were we not to hold that, after a certificate has gone into effect, the instructions set out in the statute are to be followed scrupulously.

However, petitioners argue that there is an implied exception to the statutory mandate when the Board, pursuant to a petition for reconsideration filed before the certificate's effective date, makes a statement that the certificate is subject to later amendment after further deliberation upon the petition. Petitioners admit that there is no express statutory authority for the Board to entertain

petitions for reconsideration even prior to the effective date of the certificate, but they assert, and we assume *arguendo* they are correct, that the Board has implied power to accept such petitions. This being the case, petitioners claim that the existence of an outstanding petition for reconsideration gives a double meaning to the term "effective" as used in the Act: certificates are "effective" on the date specified therein for the purpose of allowing the certificated carrier to commence operations, but they are not "effective" as the term is used in § 401 (f) so as to preclude modification outside the procedures specified in § 401 (g).

The appeal of this argument comes, in the main, from the general notion that an administrative order is not "final," *for the purposes of judicial review,* until outstanding petitions for reconsideration have been disposed of. See, *e. g., Outland* v. *Civil Aeronautics Board,* 109 U. S. App. D. C. 90, 284 F. 2d 224; *Braniff Airways, Inc.,* v. *Civil Aeronautics Board,* 79 U. S. App. D. C. 341, 147 F. 2d 152. Once it is established that the certificate is not "final" for one purpose, the argument runs, then it is logical to assume that the certificate lacks "finality" for another. The difficulties with this line of reasoning, however, are many. First, insofar as it is bottomed on cases such as *Outland* and *Braniff,* the argument relies on holdings that were never made. The Courts of Appeals in these cases decided only that petitions for review were timely if filed in time from the date on which the Board disposed of pending petitions for reconsideration; the question whether the Board's action on the petitions for reconsideration should have been taken after notice and hearing did not arise. Furthermore, petitioners' argument skips an important logical step; it assumes, without explanation, that questions of administrative finality present the same problems, and therefore deserve the same solutions, as questions concerning the timeliness of an appeal.

In point of fact, this assertion is not only unsupported but erroneous. The pertinent statutory language is not similar in the two instances [9] and the other points under analysis are different. Thus, a court considering the timeliness of a litigant's appeal is concerned with the wisdom of exercising its own power to act, and the result depends on such factors as fairness to the appellant and the intent of Congress in passing a general statute—§ 10 (c) of the Administrative Procedure Act—which applies equally to almost all administrative agencies. There is no call, as *Outland* and similar cases illustrate by their omissions, for considering either the sections of a particular act which are not concerned with appellate review or the problem—which at that point is of historical interest only—whether the petition for reconsideration should have been decided summarily or after notice and hearing. One might argue, of course, that the question is similar in both instances because, if the Board's action on the petition for reconsideration is too late, then an appeal which is timely only from the Board's action on reconsideration is also too late. However, this line of reasoning overlooks the confines of the result we are reaching in this case. We are not saying that the Board cannot entertain petitions for reconsideration after effective certification, nor are we holding that such petitions cannot be *denied* summarily; all we hold is that the petitions cannot be granted and the certificated carrier's operations curtailed without notice or hearing. Therefore, since the cases such as *Outland* concerned the denial of a petition for reconsideration, there is no conflict, express or implied, between those decisions and this one.[10] In this

[9] The "finality" of an order for purposes of judicial review depends on § 10 (c) of the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. § 1009 (c). See 6 Stan. L. Rev. 531.

[10] In addition to the reasons mentioned in the text, those cases involving orders, rather than certificates—see *Western Air Lines* v. *Civil Aeronautics Board*, 194 F. 2d 211—are distinguishable for the

connection, the statement of a leading commentator seems particularly pertinent:

> "The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has, and should have precisely the same scope in all of them runs all through legal discussions. It has all the tenacity of original sin and must constantly be guarded against." Cook, The Logical and Legal Bases of the Conflict of Laws, 159.[11]

Thirdly, were we to adopt the position urged by petitioners, we would have to hold that, in the words of a former chairman of the Board, the power to reconsider a case may be the lever for "nullify[ing] an express provision of the Act." Ryan, The Revocation of an Airline Certificate of Public Convenience and Necessity, 15 J. Air L. & Comm. 377, 384. As Commissioner Ryan indicated, the power the Board asks for in this case seems nothing more or less than the power to do indirectly what it cannot do directly. Parenthetically, it should be noted that, for purposes of this dispute, it is difficult to draw a distinction between a petition for reconsideration filed by a party and one initiated by the Board *sua sponte*. *Sprague* v. *Woll*, 122 F. 2d 128. This being the case, it is all the more significant that the Court in *United States* v. *Seatrain Lines*, 329 U. S. 424, while overruling the Interstate

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reasons stated in *Seatrain, supra*, at 432. Similarly, the cases involving certificates under the Federal Communications Act are distinguishable for the reasons stated by Commissioner Ryan. See Ryan, The Revocation of an Airline Certificate of Public Convenience and Necessity, 15 J. Air L. & Comm. 377, 384–385.

[11] See also Hancock, Fallacy of the Transplanted Category, 37 Can. B. Rev. 535. One might argue, of course, that judicial review and administrative reconsideration are the same since both threaten a reversal of the prior award. However, Congress has shown no intent to preclude reconsideration, either judicial or administrative, after notice and hearing.

Commerce Commission's contention that it had inherent power to reconsider effective certificates, paid no attention to the fact that the Commission had made the original certificate effective, subject "to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of such authority by this Commission."

Although we feel that the language and background of the statute are sufficiently clear so that affirmance can rest solely on that basis, it seems appropriate, in light of petitioners' vigorous assertion that policy reasons compel their result, to discuss some of the ramifications of our decision. In the first place, it bears repetition that we are *not* deciding that the Board is barred from reconsidering its initial decision. All we hold is that, if the Board wishes to do so, it must proceed in the manner authorized by statute. Thus, for example, the Board may reconsider an effective certificate at any time if it affords the certificated carrier notice and hearing prior to decision; or, if it feels uncertain about the decision prior to its effective date, it may postpone the effective date until all differences have been resolved; and, if neither of these procedures seem practical in a given case, the Board may issue a temporary certificate set to expire on the date the Board prescribes for re-examination.[12]

[12] Although the Board did not purport to issue a temporary certificate as prescribed in § 401 (d)(2), petitioners now argue that the Board's action was "equivalent" to a temporary certification. However, we do not find this proposition persuasive. As stated in the text, *supra*, we think that the Board must bow to the statutory procedure and cannot take short cuts. See note 15, *infra*. Moreover, the most natural reading of § 401 (d)(2)—which says that temporary certificates may be issued for "limited periods"—is that Congress was authorizing the Board to issue certificates running until a specified date. One reason for this construction is obvious; if a temporary certificate had unlimited duration, only subject to immediate revocation when the Board got around to considering various objections, it might play havoc with the ability of the carrier to accept

Indeed, with all these weapons at its command, it is difficult to follow the argument that the Board should be allowed to improvise on the powers granted by Congress in order to preserve administrative flexibility.

Furthermore, it would seem that any realistic appraisal of the relative hardships involved in this case cuts in favor of the respondent. To be sure, the Board may be able to act quicker under the rule it espouses and, by eliminating the necessity of a new hearing, Lake Central will be spared the expense of preparing a new record. However, were the Board correct, respondent would be subjected to the loss of valuable routes, routes it had already begun to operate after considerable initial investment, without being heard in opposition. The Board points out that respondent had notice that the Board had reserved the right to amend the certificate. But it is not clear what comfort respondent could take from such notice; respondent could not hedge, since § 401 (f) of the Act provides that a certificated carrier may lose the right to conduct any service it does not initiate within 90 days of certification. Concededly, the fact of notice gives considerable surface appeal to petitioners' assertions; they can and do argue that respondent knew what it was getting into and should not be heard to complain when the gamble turns out unfavorably. However, it must be remembered that the problem is not presented to us in the abstract; we are dealing with it in the context of this

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advance reservations. Just such a contention was made by Delta before the Board in its petition for a stay of the Board's May 7, 1959, order on reconsideration. Delta pointed out:

"It is a fact that schedules for May and June, and timetables showing this early morning Chicago-Indianapolis-Evansville and Evansville-Indianapolis-Chicago service, have been released to the public and many reservations have been booked for these months. Furthermore, pilot bidding procedures and problems involving equipment rotation prohibit the immediate cancellation of this flight on short notice."

particular statute. And, as stated above, a major purpose behind the enactment of the Aviation Act was to eliminate the element of risk from a carrier's operations. With Congress on record as affirmatively desiring to eliminate the necessity of gambling, we do not feel that the "assumption of the risk" argument carries much weight. The Board also argues that respondent "in substance" enjoyed the hearing contemplated by § 401 (g) because the matters impelling the Board to change its mind were matters that had been thrashed out during the hearings on the original certificate. However, this contention assumes a fact that we do not have before us—that a hearing would not have disclosed any further evidence or, perhaps more importantly, any post-certification events weighty enough to alter the Board's thinking.[13]

In short, our conclusion is that Congress wanted certificated carriers to enjoy "security of route" so that they might invest the considerable sums required to support their operations; and, to this end, Congress provided certain minimum protections before a certificated operation could be cancelled. We do not think it too much to ask that the Board furnish these minimum protections as a matter of course, whether or not the Board in a given

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[13] It appears clear, and the Board does not disagree, that the "hearing" specified in § 401 (g) means a "hearing" *prior* to decision. And, the Board does not contend that this requirement could have been satisfied by the allowance of a hearing *after* the decision on reconsideration was handed down. This course of action seems wise since (1) it is generally accepted on both principle and authority that a hearing after decision, although permissible in special circumstances, is not the equivalent of a predetermination hearing, see, *e. g.*, Gelhorn and Byse, Administrative Law, 774; (2) it is not entirely clear that Delta could have procured a hearing after the Board's decision. Delta sought a stay of the Board's May 7 order until after the *Great Lakes Local Service Investigation Case* was decided, presumably with a view to introducing further evidence on the present point in that case; the request for a stay was denied.

case might think them meaningless. It might be added that some authorities have felt strongly enough about the practical significance of these protections to suggest that their presence may be required by the Fifth Amendment. See *Seatrain Lines* v. *United States,* 64 F. Supp. 156, 161; *Handlon* v. *Town of Belleville,* 4 N. J. 99, 71 A. 2d 624; see also 63 Harv. L. Rev. 1437, 1439.

Petitioners' final argument is that their position is supported by consistent administrative construction and analogous case authority. The administrative construction argument appears less than substantial in light of the fact that, on the last and, it appears, only occasion when the present question was expressly considered, the Board said in dictum that it had "grave doubts" about proceeding in the manner followed in this case. *Kansas City-Memphis-Florida Case,* 9 C. A. B. 401; [14] cf. *Smith Bros., Revocation of Certificate,* 33 M. C. C. 465. See generally Ryan, *supra,* where Commissioner Ryan went to great lengths to expose what he felt were the fallacies in the contentions now advanced by petitioners. With respect to prior cases, petitioners again are unable to cite any holdings on point. Petitioners rely heavily on *Frontier Airlines, Inc.,* v. *Civil Aeronautics Board,* 104 U. S. App. D. C. 78, 259 F. 2d 808, but the dispute here involved was not raised in that case. The closest analogy in *Frontier*

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[14] Since *Kansas City,* the Board has reconsidered an effective award on three occasions. *United Western, Acquisition of Air Carrier Property,* 11 C. A. B. 701; *Service to Phoenix Case,* Order E–12039 (1957); *South Central Area Local Service Case,* Order E–14219 (1959). *United Western* did not involve a certificate of public convenience and necessity and, thus, has no relevance. See note 10, *supra. Service to Phoenix* involved a denial of reconsideration except on one point, which might arguably be termed the correction of inadvertent error. See note 7, *supra. South Central* did involve the alteration of a certificated carrier's rights. As stated, the present point was not raised in any of these three cases.

is to the argument put forward by a party whose petition for reconsideration had been *denied;* and the Court of Appeals reported this argument and the reasons for overruling it as follows:

> "[T]he order on reconsideration is a nullity because it was rendered after the petition for judicial review had been filed and after the certificates previously issued had become effective; and, if that order is a nullity, the basic order is also a nullity because it fails to cover certain points.
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> . . . . .
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> "We do not find the order denying reconsideration invalid because rendered after this petition was filed. No harm was done. Had the Board been of a mind to grant reconsideration, it could have so indicated and a motion to remand would have been in order."

Perhaps more favorable to petitioners is this Court's decision in *United States* v. *Rock Island Motor Transport Co.,* 340 U. S. 419, where it was held that the Interstate Commerce Commission could modify a motor carrier's effective certificate pursuant to a reservation in the initial order. However, two important distinctions between that case and this are apparent: (1) the Motor Carrier Act makes express provision for summary modifications after certification, 49 U. S. C. § 308, and (2) the Court in *Rock Island* was very careful to limit its holding to the particular modification made in that case. Finally, the decision which is analytically most relevant to this case, *United States* v. *Seatrain Lines, supra,* furnishes support for respondent, rather than petitioners. While *Seatrain* may be distinguishable on its facts,[15] the Court spoke in

[15] The potentially distinguishing feature about *Seatrain* is that the Court's holding may rest on an alternate ground—*viz.:* that the Commission had no power to impose the conditions it did in the first instance. However, *Seatrain cannot* be distinguished on the grounds

general terms of the rule that supervising agencies desiring to change existing certificates must follow the procedures "specifically authorized" by Congress and cannot rely on their own notions of implied powers in the enabling act. In short, we do not find that prior authority clearly favors either side; however, to the extent that a broad observation is permissible, we think that both administrative and judicial feelings have been opposed to the proposition that the agencies may expand their powers of reconsideration without a solid foundation in the language of the statute. Therefore, since the language and background of the statute are against, rather than for, the Board, the judgment of the Court of Appeals must be

Affirmed.

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

This is an airline route proceeding brought before the Civil Aeronautics Board. The case involves the effect upon the proceeding, and hence upon a certificate of convenience and necessity ordered to be issued therein, of a timely motion for reconsideration.

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that the Court said "the certificate, when finally granted and the time fixed for rehearing has passed, is not subject to revocation in whole or in part except as specifically authorized . . . ." The point is that, under the Water Carrier Act, the Commission had express authority to entertain petitions for reconsideration *at any time*. See 49 U. S. C. § 916 (a), incorporating 49 U. S. C. § 17 (6) and (7). Therefore, it is clear that the Commission in *Seatrain* could have reached with impunity the result it wanted to reach by following the procedures set out by Congress. The force of the *Seatrain* decision is, then, that the commissions and boards must follow scrupulously the statutory procedures before they can alter existing operations and that arguments to the effect that "this is just another way of doing it" will not prevail.

Specifically, the question presented is whether, in the light of the provisions of §§ 401 (f) and 401 (g) of the Federal Aviation Act,[1] the Board, by allowing its certificate to become "effective," notwithstanding a timely filed and unruled motion for reconsideration, lost all power to grant the motion and accordingly to modify its order and the resulting certificate.

This case is but a facet of a multi-party, highly complex and protracted route proceeding, known as the "Great Lakes-Southeast Service Case," commenced before the Civil Aeronautics Board in May 1955. It involved, "predominantly," the "long-haul" service needs of an area extending roughly between the Great Lakes and Florida. Numerous trunkline carriers sought new or additional operating rights in that area. The Board was also confronted with a number of petitions by local carriers for authority to provide new or improved short-haul service between certain intermediate cities in that area.

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[1] Section 401 (f) of the Federal Aviation Act (72 Stat. 755–756, 49 U. S. C. § 1371 (f)) provides, in relevant part, as follows:

"(f) Each certificate shall be effective from the date specified therein, and shall continue in effect until suspended or revoked as hereafter provided, or until the Board shall certify that operation thereunder has ceased or, if issued for a limited period of time under subsection (d)(2) of this section, shall continue in effect until the expiration thereof, unless, prior to the date of expiration, such certificate shall be suspended or revoked as provided herein, or the Board shall certify that operations thereunder have ceased . . . ."

Section 401 (g) of the Act (72 Stat. 756, 49 U. S. C. § 1371 (g)) provides, in relevant part, as follows:

"(g) The Board upon petition or complaint or upon its own initiative, after notice and hearings, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate . . . ."

In an effort to keep the proceeding within manageable bounds, the Board declined to consolidate those short-haul petitions with this case, and, instead, directed the institution of a separate proceeding (*Great Lakes Local Service Investigation*) for their resolution, but it did announce that, to make sure that this separation would not deprive them of an opportunity to be heard in protection of their rights, the local service carriers would be permitted to intervene in this case.

As one of the many contending trunkline carriers, respondent, Delta Air Lines, Inc., petitioned for authority (1) to extend an existing route northwesterly to provide service from Miami to Detroit, and (2) to add Indianapolis and Louisville as intermediate points on its existing Chicago-to-Miami route. Petitioner, Lake Central Airlines, Inc., a local or short-haul carrier operating a line between Chicago and Indianapolis, and also serving Louisville, intervened to object to the Delta petition unless its proposed new service to Indianapolis and Louisville be restricted to northbound flights originating, and to southbound flights terminating, at or south of Atlanta. Upon this issue, Lake Central offered evidence that it would suffer injury and damage, through diversion of its local traffic, by the proposed new Delta service unless it be so restricted.

On September 30, 1958, the Board filed its opinion and order in which, among other things, it authorized Delta to add Indianapolis and Louisville as intermediate points on its Chicago-to-Miami route, without imposing the restrictions that Lake Central had asked. Consistently with its custom, the Board stated in its order that the certificate thereby authorized to Delta would become effective on the 60th day after entry of the order (November 29).

Within the 30 days allowed by the Board's rule for the filing of a motion for reconsideration,[2] Lake Central filed with the Board on October 31, 1958, its motion for reconsideration, elaborating the grounds it had asserted and supported with evidence, in opposition to Delta's petition. It also asked in that motion that the effective date of the Delta certificate be stayed pending decision by the Board of the motion for reconsideration.

On November 28, 1958, one day prior to the date upon which, as stated in the Board's order of September 30, the Delta certificate would become effective, the Board filed a lengthy memorandum and order in which it denied Lake Central's request (and also—with one exception not material here—the similar requests of others) for a stay of the effective date of the Delta certificate until after the Board had decided Lake Central's motion for reconsideration. In that order, the Board expressed its view that "the parties [had] not made a sufficient showing of prob-

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[2] Section 302.37 (a) of the Rules of Practice of the Civil Aeronautics Board, 14 CFR § 302.37 (a) (1956 Rev. ed.), provides, in relevant part, as follows:

"*Petition for reconsideration*—(a) *Time for filing.* A petition for reconsideration, rehearing or reargument may be filed by any party to a proceeding within thirty (30) days after the date of service of a final order by the Board in such proceeding unless the time is shortened or enlarged by the Board, except that such petition may not be filed with respect to an initial decision which has become final through failure to file exceptions thereto. However, neither the filing nor the granting of such a petition shall operate as a stay of such final order unless specifically so ordered by the Board. . . ."

In a recent revision of its Rules, the Board has reduced the time within which a petition for reconsideration may be filed from 30 to 20 days. See 14 CFR § 302.37 (1960 Supp.).

49 U. S. C. § 1486 (a) provides that decisions of the Board shall be subject to review by the Courts of Appeals upon petition "filed within sixty days after the entry of such order," by any person having a substantial interest in the order.

able legal error or abuse of discretion" to warrant the issuance of a stay, and that, in view of the approaching peak winter season, the "new services to Florida [were] immediately required."

Then, turning to the motions for reconsideration, the Board said in that order that, "because of the detailed matters raised in the petitions for reconsideration, it [would] not be possible to finally dispose of them until after November 29," but the Board promptly would "address itself to the merits of the petitions for reconsideration, and [its] order dealing with [those] matters [would] issue at a later date." It thus and otherwise made clear that its denial of the stays was not intended to be "[in any] way prejudicial to the legal rights of those parties seeking reconsideration." It concluded: "Nothing in the present order forecloses the Board from full and complete consideration of the pending petitions for reconsideration on their merits."

Thereafter, on May 7, 1959, the Board granted Lake Central's petition for reconsideration and accordingly entered its final order restricting Delta's service of Indianapolis and Louisville to northbound flights originating, and to southbound flights terminating, at or south of Atlanta; but the Board did say in that order that "If, after deciding the issues presented in the *Great Lakes Local Service* case, we conclude that the long-haul restrictions are not required, we will have full freedom to remove them at that time." It is this order that gives rise to the present controversy.

On Delta's appeal from that order, the United States Court of Appeals for the Second Circuit reversed. 280 F. 2d 43. It held that, notwithstanding the timely filed and unruled motion for reconsideration, "once [the Board allowed the] certificate [to] become effective," it lost all power thereafter to grant the motion and accordingly to modify its order and the resulting certificate, and that

"it is only in a [separate and plenary] proceeding satisfying the requirements of Section 401 (g) that an effective certificate authorizing unrestricted service may be modified by subsequently imposed restrictions." 280 F. 2d, at 48. Because of the importance of the question involved to the proper administration of the Act, we brought the case here. 364 U. S. 917, 918.

The Court now affirms that judgment. It does so upon grounds which, I am bound to say, with all respect, seem to me to be spurious and legally indefensible, as I shall endeavor to show.

Although the Federal Aviation Act does not expressly provide for motions for reconsideration by the Board of its orders, it is clear, and indeed it is agreed by the parties, that the Board has power to provide for, and to entertain, such motions, for "[t]he power to reconsider is inherent in the power to decide." *Albertson* v. *Federal Communications Comm'n,* 87 U. S. App. D. C. 39, 41, 182 F. 2d 397, 399. See also *Braniff Airways* v. *Civil Aeronautics Board,* 79 U. S. App. D. C. 341, 147 F. 2d 152.

Pursuant to that power, the Board adopted its Rule of Practice prescribing, in pertinent part, that "a petition for reconsideration, rehearing or reargument may be filed by any party to a proceeding within thirty (30) days after the date of service of a final order by the Board in such proceeding . . . ."[3] It is admitted that Lake Central filed its motion for reconsideration within the 30 days allowed by that rule.

Under every relevant reported decision, save one to be later noted, a timely motion for reconsideration, being an authorized and appropriate step in the proceeding, "operate[s] to retain the Board's authority over the [original] order," *Waterman S. S. Corp.* v. *Civil Aeronautics Board,* 159 F. 2d 828, 829 (C. A. 5th Cir.),

[3] See note 2.

"reopen[s] the case," *Black River Valley Broadcasts* v. *McNinch,* 69 App. D. C. 311, 316, 101 F. 2d 235, 240, and prevents the "proposed decision"—which, at that stage, is all it is (*Waterman* case, *supra,* at 828)—from becoming "final." *Outland* v. *Civil Aeronautics Board,* 109 U. S. App. D. C. 193, 284 F. 2d 224, 227. The proceeding being thus held open by the motion, and the Board having both the power and the duty to decide it, it would seem to be fundamental that the Board has power *to decide it either way*—including, of course, the "power to grant [it]," *Enterprise Co.* v. *Federal Communications Comm'n,* 97 U. S. App. D. C. 374, 378, 231 F. 2d 708, 712, as it did here.

It seems necessarily true, and is well settled by the cases, that "Where a motion for rehearing is in fact filed there is no final action until the rehearing is denied . . . [for] there is always a possibility that the order complained of will be modified in a way which renders judicial review unnecessary," *Outland* v. *Civil Aeronautics Board,* 109 U. S. App. D. C., at 93, 284 F. 2d, at 227, and "although the [motion] did not . . . supersede or suspend the order, [it did operate] to retain the Board's authority over the order, so that the order overruling the motion should be taken as the final . . . [order] intended by the statute to start the running of the sixty-day period for judicial review." *Waterman S. S. Corp.* v. *Civil Aeronautics Board, supra,* at 829. It necessarily follows that, if a timely motion for reconsideration is pending before the Board, its "proposed decision" (*id.,* at 828) has "not become final in the sense that it [is] no longer subject to change upon reconsideration," *Enterprise Co.* v. *Federal Communications Comm'n,* 97 U. S. App. D. C., at 378, 231 F. 2d, at 712, and "jurisdiction over [that] order remains with the [Board] until the time for appeal has expired, and that time is tolled by an application for rehearing." (*Ibid.*) Hence, "no [final] rights accrued to [Delta] as a result of the order originally granting [its] permit," *Black River Valley Broadcasts* v. *McNinch,* 69

App. D. C., at 316, 101 F. 2d, at 240. See also, *e. g., Braniff Airways* v. *Civil Aeronautics Board, supra; Albertson* v. *Federal Communications Comm'n, supra; Western Air Lines* v. *Civil Aeronautics Board,* 194 F. 2d 211 (C. A. 9th Cir.); and *Butterfield Theatres* v. *Federal Communications Comm'n,* 99 U. S. App. D. C. 71, 237 F. 2d 552.

"There is no doubt under the decisions and practice in this Court that where a motion for a new trial in a court of law, or a petition for a rehearing in a court of equity, is duly and seasonably filed, it suspends the running of the time for taking . . . an appeal, and that the time within which [a] proceeding to review must be initiated begins from the date of the denial of . . . the motion . . . ," *Morse* v. *United States,* 270 U. S. 151, 153–154, and "[t]his is also true in administrative proceedings," *Black River Valley Broadcasts* v. *McNinch,* 69 App. D. C., at 316, 101 F. 2d, at 240.[4]

The only reported decision to the contrary is *Consolidated Flowers Shipments* v. *Civil Aeronautics Board,* 205 F. 2d 449 (C. A. 9th Cir.). It was there held that the time within which a petition for review must be filed runs from the date of the Board's decision, not from the date on which it overruled a timely motion for reconsideration; and, inasmuch as the petition for review had not been filed within the former period, the court dismissed the petition as untimely. Recognizing that this result was contrary to its prior decisions,[5] the Court thought it was

[4] See *Saginaw Broadcasting Co.* v. *Federal Communications Comm'n,* 68 App. D. C. 282, 287, 96 F. 2d 554, 559; *Southland Industries, Inc.,* v. *Federal Communications Comm'n,* 69 App. D. C. 82, 99 F. 2d 117; *Woodmen of World Life Ins. Assn.* v. *Federal Communications Comm'n,* 69 App. D. C. 87, 99 F. 2d 122; *Red River Broadcasting Co.* v. *Federal Communications Comm'n,* 69 App. D. C. 1, 98 F. 2d 282.

[5] See *Western Air Lines* v. *Civil Aeronautics Board,* 196 F. 2d 933 (C. A. 9th Cir.); *Southwest Airways Co.* v. *Civil Aeronautics Board,* 196 F. 2d 937; *Western Air Lines* v. *Civil Aeronautics Board,* 194 F. 2d 211.

required to so hold because of the last sentence of § 10 (c) of the Administrative Procedure Act, 5 U. S. C. § 1009 (c), saying that, for the purposes of appeal, "agency action *otherwise final* shall be final for the purposes of this subsection whether or not there has been presented or determined any application . . . for any form of reconsideration . . . ." (Emphasis added.) The fallacy of that reasoning was completely exposed and soundly rejected in *Outland* v. *Civil Aeronautics Board, supra.*[6]

[6] In *Outland* v. *Civil Aeronautics Board, supra,* the United States Court of Appeals for the District of Columbia exposed the fallacy in, and soundly rejected the reasoning of, the *Consolidated Flowers* case, *supra,* in the following language:

"The legislative history of 5 U. S. C. A. § 1009 (c) indicates that it was adopted to achieve harmony with the holding in *Levers* v. *Anderson,* 1945, 326 U. S. 219, 66 S. Ct. 72, 90 L. Ed. 26 to the effect that a motion for rehearing was not necessary to exhaust administrative remedies. However, while making judicial review available without a motion for rehearing, that statute did not operate to repeal the law with respect to finality. Where a motion for rehearing is in fact filed there is no final action until the rehearing is denied, as we said in *Braniff Airways, Inc.* v. *Civil Aeronautics Board, supra.* Section 1009 (c) does not command a motion for rehearing in order to reach finality by exhaustion of administrative remedies; it leaves that to each litigant's choice. But when the party elects to seek a rehearing there is always a possibility that the order complained of will be modified in a way which renders judicial review unnecessary. Practical considerations, therefore, dictate that when a petition for rehearing is filed, review may properly be deferred until this has been acted upon. The contrary result reached by the Ninth Circuit has caused parties to file so called 'protective' petitions for judicial review while petitions for rehearing before the Board were pending. A whole train of unnecessary consequences flowed from this: the Board and other parties may be called upon to respond and oppose the motion for review; when the Board acts, the petition for judicial review must be amended to bring the petition up to date.

"We hold that when a motion for rehearing is made, the time for filing a petition for judicial review does not begin to run until the motion for rehearing is acted upon by the Board." 109 U. S. App. D. C., at 92–93, 284 F. 2d, at 227–228.

And on May 1, 1961, the Ninth Circuit itself specifically overruled that case. *Samuel B. Franklin & Co.* v. *Securities Exchange Commission,* 290 F. 2d 719.

There is only one reported decision, involving procedures before the Civil Aeronautics Board, that has presented the precise question we have here. It is *Frontier Airlines, Inc.,* v. *Civil Aeronautics Board,* 104 U. S. App. D. C. 78, 259 F. 2d 808. There, just as here, after a Board certificate had been permitted to become "effective," the Board granted an earlier and timely filed motion for reconsideration and revised the certificate accordingly. It was contended that the revision of the order and, hence, also of the certificate, so made, was "a nullity because it was rendered . . . after the certificate . . . had become effective." (104 U. S. App. D. C., at 80, 259 F. 2d, at 810.) That contention was there soundly rejected.

It therefore seems quite clear to me that, under historic legal procedures and all, save one, of the numerous relevant decisions, the timely filing of the motion for reconsideration—being a legally authorized step in the proceeding—kept the proceeding open and continuing; that having the power, as well as the duty, to decide that motion, the Board had power to grant it, as it did, and thus, necessarily, accordingly to revise its earlier decision—which, until then, was only "a proposed decision" (*Waterman* case, *supra,* at 828)—and that, inasmuch as the Board sustained that motion, the earlier "proposed decision" never did become the final decision in the proceeding.

Inasmuch as all of the reported cases, save the discredited and now overruled *Consolidated Flowers* case, *supra,* are against it, Delta is compelled to rely almost entirely on its claim that the "plain language" of § 401 (f) deprives the Board of power, once it has allowed a certificate to become "effective," to revise its initial decision and the

resulting certificate in pursuance of an earlier and timely filed motion for reconsideration; and that, once it has been so permitted to become "effective," the certificate may be modified or altered only by a separate and independent plenary proceeding under § 401 (g).

The obvious defects in that argument are that (1) under § 401 (f), the "proposed decision" (*Waterman* case, *supra,* at 228) remained subject to revision by the Board in response to the timely filed motion for reconsideration, and (2) the argument ignores the fact that § 401 (g) applies only to proceedings to alter, amend, suspend or revoke a certificate in existence after the authorization proceeding has been fully concluded and finally ended—*i. e.,* after all timely filed motions for reconsideration have been denied, and the time for appeal has expired without an appeal being taken or, if an appeal was taken, the Board's decision has been finally affirmed.

Surely it cannot be doubted that, if the Board, instead of granting it, had denied the motion for reconsideration, the Court of Appeals, on judicial review, or this Court on certiorari, could reverse the Board's decision and remand the case to the Board with directions to grant the motion for reconsideration. It is certain that such a judgment would operate not only on the Board's decision but, as well, on its "effective" certificate. If the Board has power, when thus directed by the judgment of a reviewing court, to revise, modify or vacate its erroneous decision and its resulting certificate, even though "effective," why should the result be different if the Board, without such judicial direction, notes its error, grants the timely filed and pending motion for reconsideration, and accordingly revises its decision and the resulting certificate?

Apart from the discredited and now overruled Ninth Circuit case of *Consolidated Flowers Shipments* v. *Civil Aeronautics Board, supra,* Delta cites no case that involves the effect upon a Board decision of a timely filed motion

for reconsideration, or of a Board-revised order made in pursuance of such a motion, or that in any way supports it. Its claim of support by *United States* v. *Seatrain Lines,* 329 U. S. 424; *Watson Bros. Transportation Co.* v. *United States,* 132 F. Supp. 905; and *Smith Bros. Revocation of Certificate,* 33 M. C. C. 465, is wholly unfounded. None of those cases involved or dealt with the question we have here. None of them involved or dealt with any question respecting the effect of a timely filed motion for reconsideration upon an administrative order. To the contrary, in each of them the administrative proceeding had long since finally ended—*i. e.,* all timely filed motions for reconsideration had been denied, the time for judicial review had expired, and the proceeding was in all respects closed.

The only relevant statement in the *Seatrain* case, *supra,* is squarely opposed to Delta's position, namely, "The certificate, when finally granted *and the time fixed for rehearing it has passed,* is not subject to revocation in whole or in part except as specifically authorized by Congress [*i. e.,* in an independent plenary proceeding]." 329 U. S., at 432, 433. (Emphasis added.) Here, "the time fixed for rehearing [had not] passed," but, instead, an appropriate motion for reconsideration had been timely filed and was pending. Surely, the Board not only had power, but also a duty, to rule on that motion and, if it found it meritorious, to sustain it, and accordingly to revise its decision and resulting certificate.

The *Watson* case, *supra,* has no relevance whatever to this one. In the *Smith* case, *supra,* the Commission was careful to point out that ". . . the certificate marks the end of the proceedings, *just as the entry of a final judgment or decree marks the end of a court proceeding.* . . ." 33 M. C. C., at 472. (Emphasis added.) It is certain that "a proposed decision" (*Waterman* case, *supra,* at 228) of a court does not, while a timely filed

motion for new trial, rehearing or reconsideration is pending, end the proceeding, but it is the denial of the motion, and expiration of the time to appeal, that "marks the end of a court proceeding"; and "[t]his is also true in administrative proceedings." *Black River Valley Broadcasts* v. *McNinch*, 69 App. D. C., at 316, 101 F. 2d, at 240.

Section 401 (f) contemplates that the Board may issue a certificate of convenience and necessity "for a limited period of time under subsection (d)(2) of [that] section." Although the Board did not expressly say, in its order of September 30, 1958, that the certificate thereby authorized to Delta would continue only "for a limited period of time," it did expressly point out in its order of November 28, 1958, denying Lake Central's motion for a stay and permitting the Delta certificate to become effective, that Lake Central's motion for reconsideration was still pending undetermined, and that it promptly would "address itself to the merits of [that] petition for reconsideration, and [that its] order dealing with [that] matter [would] issue at a later date." Hence, the Delta certificate, though thus allowed to become "effective," was, in the law's regard, as surely "issued for [the] limited period of time" expiring with the date of the possible grant of Lake Central's motion for reconsideration, as if that limitation had been expressed in the Board's authorizing order and certificate.

Here, as in *Western Air Lines* v. *Civil Aeronautics Board*, 194 F. 2d, 211, 214 (C. A. 9th Cir.), Delta "acted with its eyes open and at its own risk. It was aware that the proceedings before the Board had not become final, and would not until the expiration of the period of 30 days within which petitions for reconsideration might be filed."

Surely Lake Central's timely filed motion for reconsideration kept the whole proceeding open, including the Board's order and resulting certificate, until that motion

was denied. It was not denied. Instead, it was granted, as surely the Board had power to do. Therefore, the Board's originally "proposed decision" never did become the final decision in the proceeding. And when that "proposed decision" thus fell, the certificate which it authorized, and which had been permitted to become *temporarily* "effective," necessarily fell with it, as it was always subject to the results of that motion.

It is not to be gainsaid that the practice, sometimes, as here, followed by the Board, of permitting route certificates to become "effective" while nonfrivolous motions for rehearing or reconsideration are pending undetermined,[7] is perilous business and only rarely, if ever, is justified. But it does not follow that, once having permitted a route certificate to become "effective," the Board has lost all power to decide a pending motion for reconsideration, and, if found meritorious, to grant it, and thus itself to rectify the errors in its "proposed decision" and in the route certificate that was thereby erroneously authorized.

For these reasons, I think the Court has fallen into clear error in affirming the judgment of the court below, which, in my view, is contrary to the settled law and should be reversed.

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[7] In many instances, the Board has permitted certificates to become effective notwithstanding a motion or motions for reconsideration were pending undetermined. And in a number of such cases, as here, the Board has granted such motions and accordingly modified the "effective" certificate. See, *e. g., North Central* case, 8 C. A. B. 208; *Cincinnati-New York Additional Service*, 8 C. A. B. 603; *United-Western, Acquisition of Air Carrier Property*, 11 C. A. B. 701; *Service to Phoenix* case, Order E–12039 (1957); *South Central Area Local Service* case, Order E–14219 (1959).

HORTON *v.* LIBERTY MUTUAL INSURANCE CO.

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

No. 478. Argued May 3, 1961.—Decided June 12, 1961.

Petitioner was injured while working in Texas for an employer insured by respondent insurance company. Under the Texas Workmen's Compensation Law, he filed a claim with the Texas Industrial Accident Board for $14,035. The Board awarded him only $1,050. Basing jurisdiction on diversity of citizenship, respondent sued in a Federal District Court to have the award set aside, alleging that petitioner was entitled to nothing but had claimed and would claim $14,035. Petitioner moved to dismiss the suit on the ground that the value of the "matter in controversy" was only $1,050. *Held:* The "matter in controversy" was more than $10,000, within the meaning of 28 U. S. C. § 1332, as amended in 1958, and the Federal District Court had jurisdiction. Pp. 349–355.

(a) Notwithstanding the 1958 amendment which forbade the *removal* of state workmen's compensation cases from state courts to Federal District Courts, the District Court had jurisdiction to try this civil case *originally filed therein*, if the matter in controversy exceeded $10,000. Pp. 350–352.

(b) In view of the allegation in respondent's complaint that petitioner had claimed and would claim $14,035 and petitioner's failure to deny that allegation or to disclaim any part of his original claim, the amount in controversy exceeded $10,000. Pp. 352–354.

(c) Under the Texas Workmen's Compensation Law, as construed by the State Supreme Court, this suit was not an appeal from a state administrative order, and its dismissal by the District Court was not supportable on the ground that it was such an appeal. Pp. 354–355.

275 F. 2d 148, affirmed.

Joe H. Tonahill and *William VanDercreek* argued the cause and filed a brief for petitioner.

Howell Cobb argued the cause for respondent. With him on the brief was *Major T. Bell.*

MR. JUSTICE BLACK delivered the opinion of the Court.

This case raises questions under that part of 28 U. S. C. § 1332, as amended in 1958,[1] which grants jurisdiction to United States District Courts of all civil actions between citizens of different States "where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs . . . ."

Petitioner, Horton, was injured while working for an employer in Texas insured by the respondent, Liberty Mutual Insurance Company. Pursuant to the Texas Workmen's Compensation Law,[2] petitioner filed a claim with the Texas Industrial Accident Board against his employer and the respondent insurance company alleging that he had been totally and permanently incapacitated and claiming the maximum recovery under the law of $35 per week for 401 weeks, or a total of $14,035. After administrative hearings the Board decided that petitioner would be disabled for only 30 weeks and accordingly made an award of only $1,050. Section 5 of Art. 8307 of the Texas Workmen's Compensation Law permits either the employee or the insurance company, if dissatisfied with an award, to "bring suit in the county where the injury occurred to set aside said final ruling," in which event the issues shall be determined "upon trial de novo, and the burden or [*sic*] proof shall be upon the party claiming compensation," but in no event shall the court allow recovery in excess of the statutory maximum of $14,035. Acting under this provision of state law, the respondent, on April 30, 1959, the very day of the award, filed this diversity case in the United States District Court to set aside the award, alleging that petitioner had claimed, was claiming and would claim $14,035, but denying that petitioner was entitled to recover anything at all under Texas

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[1] Act of July 25, 1958, 72 Stat. 415.

[2] Vernon's Tex Ann. Civ. Stat., Arts. 8306–8309.

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law. One week later the petitioner, who also was dissatisfied with the award, filed an action in the state court to set aside the Board's award and to recover in that court the full $14,035. After that, petitioner moved to dismiss the respondent's federal court suit on the ground that the value of the "matter in controversy" was only the amount of the award, $1,050, and not the amount of his claim of $14,035, although he also contemporaneously filed, subject to his motion to dismiss, what he designated as a compulsory counterclaim [3] for the full amount he had claimed before the Texas Board and in his Texas State Court suit. The District Court held that the "matter in controversy" in the federal action was only the amount of the $1,050 award that the respondent company had asked the court to set aside. In so holding the District Court relied on *National Surety Corp.* v. *Chamberlain,*[4] in which another District Court in Texas had reached the same conclusion as to jurisdiction largely on the basis of what it deemed to have been the purpose of Congress in enacting the 1958 amendment to 28 U. S. C. § 1332, which amendment rather severely cut down the jurisdiction of Federal District Courts, particularly in state workmen's compensation cases. The Court of Appeals reversed,[5] and we granted certiorari to decide the important jurisdictional questions raised under the 1958 amendment.[6]

For reasons to be stated, we hold that the District Court has jurisdiction of the controversy.

First. It is true, as the *Chamberlain* opinion pointed out, that the purpose and effect of the 1958 amendment

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[3] With exceptions not here relevant, Rule 13 (a) of the Federal Rules of Civil Procedure requires a party to file a counterclaim arising out of the transaction or occurrence that is the subject of the opposing party's claim.

[4] 171 F. Supp. 591.

[5] 275 F. 2d 148.

[6] 364 U. S. 814.

were to reduce congestion in the Federal District Courts partially caused by the large number of civil cases that were being brought under the long-standing $3,000 jurisdictional rule. This effort to reduce District Court congestion followed years of study by the United States Judicial Conference and the Administrative Office of the United States Courts, as well as by the Congress.[7] To accomplish this purpose the 1958 amendment took several different but related steps. It raised the requisite jurisdictional amount from $3,000 to $10,000 in diversity and federal question cases; it provided that a corporation is to be deemed a citizen not only of the State by which it was incorporated but also of the State where it has its principal place of business; and, most importantly here, it also for the first time forbade the *removal* of state workmen's compensation cases from state courts to United States District Courts. By granting district judges a discretionary power to impose costs on a federal court plaintiff if he should "recover less than the sum or value of $10,000," the amendment further manifested a congressional purpose to discourage the trying of suits involving less than $10,000 in federal courts. In discussing the question of state workmen's compensation cases, the Senate Report on the amendment evidenced a concern not only about the problem of congestion in the federal courts, but also about trial burdens that claimants might suffer by having to go to trial in federal rather than state courts due to the fact that the state courts are likely to be closer to an injured worker's home and may also

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[7] See H. R. Rep. No. 1706, 85th Cong., 2d Sess.; S. Rep. No. 1830, 85th Cong., 2d Sess.; Hearings on H. R. 2516 and H. R. 4497, Subcommittee of House Committee on the Judiciary, 85th Cong., 1st Sess. With particular reference to the provision barring removal of state workmen's compensation cases, see 104 Cong. Rec. 12689–12690; S. Rep. No. 1830, *supra*, p. 9; Annual Report of the Proceedings of the Judicial Conference of the United States, 1957, p. 15.

provide him with special procedural advantages in workmen's compensation cases.[8]

The foregoing are some of the appealing considerations that led the District Court to conclude that it would frustrate the congressional purpose to permit insurers to file workmen's compensation suits in federal courts when Congress had deliberately provided that such suits could not be removed to federal courts if filed by claimants in state courts. But after the most deliberate study of the whole problem by lawyers and judges and after its consideration by lawyers on the Senate Judiciary Committee in the light of statistics on both removals and original filings,[9] Congress used language specifically barring removal of such cases from state to federal courts and at the same time left unchanged the old language which just as specifically permits civil suits to be filed in federal courts in cases where there are both diversity of citizenship and the prescribed jurisdictional amount. In this situation we must take the intent of Congress with regard to the filing of diversity cases in Federal District Courts to be that which its language clearly sets forth. Congress could very easily have used language to bar filing of workmen's compensation suits by the insurer as well as removal of such suits, and it could easily do so still. We therefore hold that under the present law the District Court has jurisdiction to try this civil case between citizens of different States if the matter in controversy is in excess of $10,000.

Second. We agree with petitioner that determination of the value of the matter in controversy for purposes of federal jurisdiction is a federal question to be decided under federal standards,[10] although the federal courts must, of course, look to state law to determine the nature

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[8] S. Rep. No. 1830, 85th Cong., 2d Sess., pp. 8–9.

[9] See, *id.*, p. 8.

[10] See, *e. g.*, *Shamrock Oil Corp.* v. *Sheets*, 313 U. S. 100, 104.

and extent of the right to be enforced in a diversity case. It therefore is not controlling here that Texas has held that the crucial factor for allocating its cases among different state courts on an amount-in-controversy basis is the amount originally claimed before its State Compensation Board.[11]

The general federal rule has long been to decide what the amount in controversy is from the complaint itself, unless it appears or is in some way shown that the amount stated in the complaint is not claimed "in good faith." [12] In deciding this question of good faith we have said that it "must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal." [13] The complaint of the respondent company filed in the District Court, while denying any liability at all and asking that the award of $1,050 against it be set aside, also alleges that petitioner Horton has claimed, now claims and will claim that he has suffered total and permanent disability and is entitled to a maximum recovery of $14,035, which, of course, is in excess of the $10,000 requisite to give a federal court jurisdiction of this controversy. No denial of these allegations in the complaint has been made, no attempted disclaimer or surrender of any part of the original claim has been made by petitioner, and there has been no other showing, let alone a showing "to a legal certainty," of any lack of good faith on the part of the respondent in alleging that a $14,035 claim is in controversy. It would contradict the whole record as well as the allegations of the complaint to say that this dispute involves only $1,050. The claim before

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[11] *Booth* v. *Texas Employers' Ins. Assn.*, 132 Tex. 237, 252, 123 S. W. 2d 322, 331.

[12] *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U. S. 283, 288, and cases there cited.

[13] *Id.*, at 289. See also *Bell* v. *Preferred Life Assurance Society*, 320 U. S. 238, 240; *Aetna Casualty Co.* v. *Flowers*, 330 U. S. 464, 468.

the Board was $14,035; the state court suit of petitioner asked that much; the conditional counterclaim in the federal court claims the same amount. Texas law under which this claim was created and has its being leaves the entire $14,035 claim open for adjudication in a *de novo* court trial, regardless of the award. Thus the record before us shows beyond a doubt that the award is challenged by both parties and is binding on neither; that petitioner claims more than $10,000 from the respondent and the respondent denies it should have to pay petitioner anything at all. No matter which party brings it into court, the controversy remains the same; it involves the same amount of money and is to be adjudicated and determined under the same rules. Unquestionably, therefore, the amount in controversy is in excess of $10,000.

Third. Petitioner contends, however, that even though the amount in controversy is more than $10,000, the suit filed by the company is nothing more than an appeal from a state administrative order, that a Federal District Court has no appellate jurisdiction and that the dismissal of the case by the District Court therefore is supportable on that ground. This contention rests almost entirely on *Chicago, R. I. & P. R. Co.* v. *Stude,* 346 U. S. 574, 581, which held that a United States District Court was without jurisdiction to consider an appeal "taken administratively or judicially in a state proceeding." Aside from many other relevant distinctions which need not be pointed out, the *Stude* case is without weight here because, as shown by the Texas Supreme Court's interpretation of its compensation act:

> "The suit to set aside an award of the board is in fact a suit, not an appeal. It is filed as any other suit is filed and when filed the subject matter is withdrawn from the board." [14]

[14] *Booth* v. *Texas Employers' Ins. Assn.,* 132 Tex. 237, 246, 123 S. W. 2d 322, 328.

It is true that as conditions precedent to filing a suit a claim must have been filed with the Board and the Board must have made a final ruling and decision. But the trial in court is not an appellate proceeding. It is a trial *de novo* wholly without reference to what may have been decided by the Board.[15]

The Court of Appeals was right in holding that the District Court had jurisdiction of this case and its judgment is

Affirmed.

MR. JUSTICE CLARK, with whom THE CHIEF JUSTICE, MR. JUSTICE BRENNAN and MR. JUSTICE STEWART join, dissenting.

The Court turns a new furrow in the field of diversity jurisdiction today and, in so doing, plows under a rule of almost a quarter of a century's standing—the rule that in determining jurisdiction, "the sum claimed by the plaintiff controls if the claim is apparently made in good faith." *St. Paul Indemnity Co.* v. *Red Cab Co.*, 303 U. S. 283, 288 (1938). Here the respondent Insurance Company filed suit "to set aside" an award of $1,050 given Horton by the Texas Industrial Accident Board. The Court, instead of testing the jurisdictional amount by this sum, looks instead to allegations of the Insurance Company that Horton, the defendant in the action, "*will claim* the sum

[15] The character of the lawsuit is further illuminated by decisions of the Texas Supreme Court holding that the administrative award becomes vacated and unenforceable once the court has acquired jurisdiction of the cause and the parties even if a voluntary nonsuit is taken and the case dismissed without judgment on the merits. *Zurich General Accident Co.* v. *Rodgers*, 128 Tex. 313, 97 S. W. 2d 674; *Texas Reciprocal Ins. Assn.* v. *Leger*, 128 Tex. 319, 97 S. W. 2d 677. This makes it all the more clear that the matter in controversy between the parties to the suit is not merely whether the award will be set aside since the suit automatically sets it aside for determination of liability *de novo*.

of [$14,035] . . . ." (Emphasis added.) This is the first time the Court has let a plaintiff affix jurisdiction by prophesying what the defendant would or might claim, rather than by stating what the plaintiff itself did claim. In so generously construing the statute, the Court confounds the test heretofore applied in diversity cases. It also nullifies the result of "years of study by the United States Judicial Conference and the Administrative Office of the United States Courts, as well as by the Congress," *ante,* p. 351, in the adoption of the Act of July 25, 1958, 72 Stat. 415, increasing the jurisdictional amount in diversity cases to $10,000. Once again the United States District Courts in Texas will be flooded by compensation cases,[1] and the Congress once again will be obliged to amend the diversity statute. Moreover, today's decision practically wipes out the long-existing distinction between declaratory judgment actions and conventional suits. See 28 U. S. C. § 2201. For these reasons I must dissent.

Petitioner, an injured workman, filed a claim under the Texas Workmen's Compensation Act before the Texas Industrial Accident Board for the maximum allowable recovery, $14,035 (401 weeks at $35 per week). The Board, after a hearing, awarded petitioner $1,050 ($35 per week for 30 weeks). Within hours of the award, respondent, the compensation insurer, literally raced into Federal District Court and filed suit to set aside the Board's decision. The diversity action was brought pursuant to Vernon's Tex. Ann. Civ. Stat., Art. 8307, § 5, which allows the issues to be determined "upon trial de novo, [where] . . . the burden or [*sic*] proof shall be upon the party claiming compensation." Upon petitioner's motion, the District Court dismissed the action for lack of jurisdiction. The Court of Appeals reversed.

[1] In 1957, 2,147 workmen's compensation cases were commenced in the United States District Courts of Texas. S. Rep. No. 1830, 85th Cong., 2d Sess. 8.

The jurisdictional limits of Federal District Courts are bounded on one side by the Constitution and on the other by the enactments of Congress. Only that judicial power expressly granted by statute may be exercised by the *nisi prius* courts. *Lockerty* v. *Phillips,* 319 U. S. 182 (1943); *Kline* v. *Burke Construction Co.,* 260 U. S. 226 (1922); *Sheldon* v. *Sill,* 8 How. 441 (1850). In the light of such history, this Court has repeatedly held that such jurisdiction is to be narrowly interpreted. "The policy of the [diversity] statute calls for its strict construction." *Healy* v. *Ratta,* 292 U. S. 263, 270 (1934). See *Indianapolis* v. *Chase National Bank,* 314 U. S. 63 (1941); *St. Paul Indemnity Co.* v. *Red Cab Co., supra.*

The argument that the federal court, in diversity cases, is just another state court is inapposite here. As the Court points out, the determination of whether a case comes within the jurisdiction of a District Court "is a federal question to be decided under federal standards." *Ante,* p. 352. The jurisdictional statute, "which is nationwide in its operation, was intended to be uniform in its application, unaffected by local law definition or characterization of the subject matter to which it is to be applied." *Shamrock Oil Corp.* v. *Sheets,* 313 U. S. 100, 104 (1941). Regardless of the method used by the Texas courts to determine the jurisdictional amounts for such cases, we must scrupulously apply the standard set by Congress for federal courts.

The statute conferring jurisdiction on District Courts in suits between parties of diverse citizenship limits it to those actions "where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs . . . ." 28 U. S. C. § 1332 (a). In most cases, the determination of the amount in controversy is exceedingly simple, *e. g.,* liquidated damages. However, where the relief sought is difficult to define in terms of money, or is of differing value to the parties, the statute does not admit

of ready application. To clarify these situations, this Court, in *St. Paul Indemnity Co.* v. *Red Cab Co., supra,* at 288, stated: "[U]nless the law gives a different rule, *the sum claimed by the plaintiff controls* if the claim is apparently made in good faith." (Emphasis added.)

The application of the foregoing rules to the problem here results in a simple solution. At the time respondent filed its complaint, there was enforceable against it a liability in the amount of $1,050. If petitioner defaulted, the District Court would set aside the Board award. If respondent lost and petitioner filed no counterclaim, the judgment could only be for $1,050. It was only if petitioner counterclaimed for an amount in excess of the jurisdictional amount of $10,000, that respondent could have controverted a claim cognizable in federal court. It seems impossible to avoid the conclusion that the Court is allowing diversity jurisdiction to be predicated upon a counterclaim which might possibly be filed by petitioner. Even a "disclaimer or surrender of [a] . . . part of the original claim" would not change the Court's insistence upon looking to the alleged counterclaim if that were more than the respondent's claim, for the jurisdictional minimum. Apparently the Court would require a "denial of these allegations" that petitioner will claim an amount in excess of the jurisdictional limit before considering the respondent's prayer to set aside the Board's award as the source of the jurisdictional amount. *Ante,* p. 353. Not only is this in patent conflict with *St. Paul Indemnity Co.* v. *Red Cab Co., supra,* but it distorts the meaning of Rule 3, Federal Rules of Civil Procedure, which states, "[a] civil action is commenced by filing a complaint with the court." Here the Court evidently holds that if the complaint, insufficient to meet the jurisdictional standards, alleges that a possible compulsory counterclaim, sufficient to meet such standards, may be filed by the defendant, federal jurisdiction attaches. Certainly

we have never permitted a District Court to acquire jurisdiction under 28 U. S. C. § 1331 (a) [2] where the plaintiff does not allege a federal question but claims that the defendant will raise such an issue. "[W]hether a case is one [involving a federal question] . . . must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, *unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose.*" *Taylor* v. *Anderson,* 234 U. S. 74, 75–76 (1914). (Emphasis added.) See *Skelly Oil Co.* v. *Phillips Petroleum Co.,* 339 U. S. 667 (1950); *First National Bank* v. *Williams,* 252 U. S. 504 (1920); *Louisville & N. R. Co.* v. *Mottley,* 211 U. S. 149 (1908). To allow such a procedure in diversity cases is to unbalance the entire jurisdictional pattern.

In essence, the Court has permitted respondent to turn its suit into an action for a declaratory judgment without meeting the requirements of the Declaratory Judgment Act. 28 U. S. C. § 2201. That Act provides that "[i]n a case of actual controversy within its jurisdiction . . . any court of the United States, *upon the filing of an appropriate pleading, may declare* the rights and other legal relations of any interested party seeking such declaration . . . ." (Emphasis added.)

The complaint filed in the District Court was not styled a declaratory judgment action, and it did not seek such relief. More importantly, respondent has succeeded in avoiding the element of discretion permitted by the statute. See *Brillhart* v. *Excess Ins. Co.,* 316 U. S. 491 (1942). Declaratory relief is a procedural remedy and, therefore, the construction of the Act is a federal matter.

[2] "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

See *Aetna Life Ins. Co.* v. *Haworth,* 300 U. S. 227 (1937). Whether or not such relief should be granted does not depend upon whether the state courts would exercise their discretion to grant a declaratory judgment in the same situation.[3] Differing factors are pertinent to the discretionary decisions of the two separate judicial systems, state and federal. In the latter system, discretionary refusal to entertain the action frequently occurs when the suit involves a state statute, such as the one here. See *Federation of Labor* v. *McAdory,* 325 U. S. 450 (1945). Moreover, it is even questionable whether respondent has satisfied the jurisdictional amount requirement for such actions. See *Travelers Ins. Co.* v. *Greenfield,* 154 F. 2d 950; *New York Life Ins. Co.* v. *Greenfield,* 154 F. 2d 953; *Commercial Casualty Ins. Co.* v. *Fowles,* 154 F. 2d 884; *Mutual Life Ins. Co.* v. *Moyle,* 116 F. 2d 434. That the Declaratory Judgment Act in no way affects the jurisdictional requirements for federal courts is clear. "To sanction suits for declaratory relief as within the jurisdiction of the District Courts merely because . . . artful pleading anticipates a defense based on federal law would contravene the whole trend of jurisdictional legislation by Congress, disregard the effective functioning of the federal judicial system and distort the limited procedural purpose of the Declaratory Judgment Act." *Skelly Oil Co.* v. *Phillips Petroleum Co., supra,* at 673–674.

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[3] The argument that the suit here is not really one to set aside the Board award (because the moment it was filed that award was voided and the suit is, in reality, a new proceeding in which the workman must establish liability), when coupled with the result here, leads to the total abandonment of the rule of *St. Paul Indemnity Co.* v. *Red Cab Co.,* 303 U. S. 283 (1938). It would permit jurisdiction to be established by the plaintiff's allegation that at some prior time the defendant had claimed, even if only extrajudicially, an amount equal to the jurisdictional minimum.

Finally, today's decision effectively emasculates the recent congressional attempt to limit diversity jurisdiction, especially in workmen's compensation cases. In order to decrease "the workload of the Federal courts," which "has greatly increased because of the removal of workmen's compensation cases from the State courts to the Federal courts," the Judicial Conference of the United States urged the passage of the current legislation. S. Rep. No. 1830, 85th Cong., 2d Sess. 7. Workmen's compensation cases were singled out and specifically dealt with because they "arise and exist only by virtue of State laws. No Federal question is involved and no law of the United States is involved in these cases." *Id.*, at 8. To accomplish the desired result of restricting federal diversity jurisdiction, Congress raised the minimum jurisdictional amount from $3,000 to $10,000. Corporations were deemed citizens of more than one State and removal of workmen's compensation cases to federal courts was forbidden.

To further limit the number of diversity cases, the Congress enacted 28 U. S. C. § 1332 (b), which provides that

> "where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, *computed without regard to any . . . counterclaim to which the defendant may be adjudged to be entitled,* . . . the district court . . . may impose costs on the plaintiff." (Emphasis added.)

This provision makes little sense when applied to the result now approved by the Court. If respondent were to obtain the relief it sought, namely, to have the Board's award of less than $10,000 "vacated, set aside, voided and declared to be of no further force and effect," it is clear that costs could be assessed against it under § 1332 (b). This produces an anomalous situation which the Court

must implicitly approve. Respondent has no hope of avoiding possible liability under the cost sanction of § 1332 (b). This is so because the relief it obtains must be measured against the jurisdictional minimum "without regard" for Horton's possible counterclaim. We are therefore left with the strange result that while respondent has met the requirements of § 1332 (a), yet under § 1332 (b) it will be liable for costs for failing to meet the same requirements.

Moreover, the Senate Report expressed concern for the problems of the injured employee in federal court,

> "[S]ome of these State [workmen's compensation] statutes limit the venue to the place where the accident occurred or to the district of the workman's residence. When removed to the Federal court the venue provisions of the State statute cannot be applied. Very often cases removed to the Federal courts require the workman to travel long distances and to bring his witnesses at great expense. This places an undue burden upon the workman and very often the workman settles his claim because he cannot afford the luxury of a trial in Federal court." S. Rep. No. 1830, 85th Cong., 2d Sess. 9.

While 28 U. S. C. § 1332 does not specifically prohibit the filing of original workmen's compensation cases, a clearer expression of congressional dislike for saddling federal courts with such cases could hardly be imagined. We should, therefore, give effect to this policy wherever possible. Not only does the decision today fail to do this, but the Court goes out of its way to defeat the congressional intent. The statement that "the workman has the option to file his case in either the Federal or the State court," S. Rep. No. 1830, 85th Cong., 2d Sess. 9, is no longer correct. It is now an unequal race to the courthouse door—a race which the insurers will invariably win,

since they have resident counsel in Austin (the location of the Texas Industrial Accident Board) who quickly secure news of Board awards and are thus enabled to "beat" the workman in the choice of forums. Thus, the Court—contrary to the specifically expressed intention of the Congress—grants the insurance companies the option of going into federal court, with all its attendant difficulties to the already overburdened federal judiciary and the impecunious workman. We thought differently in 1957, when we refused to "read legislation with a jaundiced eye," saying that "it will not do for us to tell the Congress 'We see what you were driving at but you did not use choice words to describe your purpose.' " *United States* v. *Union Pacific R. Co.*, 353 U. S. 112, 118. Congress closed the back door and locked it tight in 1958, only to have the Court break down the front door today and hang out the welcome sign.

GORI *v.* UNITED STATES.

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

No. 486. Argued May 3, 1961.—
Decided June 12, 1961.

On the record in this case, petitioner's conviction at his second trial in a Federal District Court for violation of 18 U. S. C. § 659, after his first trial had been terminated by the trial judge's declaration of a mistrial *sua sponte* and without petitioner's "active and express consent," but concededly in the trial court's exercise of discretion out of regard for petitioner's interest, did not violate the Fifth Amendment's prohibition of double jeopardy. Pp. 364–370.

282 F. 2d 43, affirmed.

Harry I. Rand argued the cause for petitioner. With him on the brief were *Milton C. Weisman* and *Jerome Lewis.*

Beatrice Rosenberg argued the cause for the United States. With her on the briefs were former *Solicitor General Rankin, Solicitor General Cox, Assistant Attorney General Miller* and *Assistant Attorney General Wilkey.*

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

Opinion of the Court, by MR. JUSTICE FRANKFURTER, announced by MR. JUSTICE CLARK.

In view of this Court's prior decisions, our limited grant of certiorari in this case [1] brings a narrow question here. We are to determine whether, in the particular circumstances of this record, petitioner's conviction at his sec-

[1] 364 U. S. 917.

ond trial [2] for violation of 18 U. S. C. § 659,[3] after his first trial had been terminated by the trial judge's declaration of a mistrial *sua sponte* and without petitioner's "active and express consent," [4] violates the Fifth Amendment's prohibition of double jeopardy. The Court of Appeals for the Second Circuit *in banc* affirmed petitioner's conviction (one judge dissenting), holding his constitutional objection without merit. 282 F. 2d 43. We agree that the Fifth Amendment does not require a contrary result.[5]

Petitioner was brought to trial before a jury in the District Court for the Eastern District of New York on February 4, 1959, on an information charging that he had knowingly received and possessed goods stolen in interstate commerce. That same afternoon, during the direct examination of the fourth witness for the Government, the presiding judge, on his own motion and with neither approval nor objection by petitioner's counsel,[6] withdrew a juror and declared a mistrial. It is unclear what reasons caused the court to take this action, which the Court of Appeals characterized as "overassiduous" and criticized

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[2] Prior to the proceedings in the two trials which are relevant for present purposes, denominated the "first" and "second" trials herein, there had been a mistrial granted upon motion of petitioner.

[3] The statute makes unlawful, *inter alia,* the receipt or possession of any goods stolen from a vehicle and moving as, or constituting, an interstate shipment of freight, knowing the goods to be stolen.

[4] 282 F. 2d 43, 46.

[5] We cannot, of course, determine what result would obtain had the Court of Appeals, in light of its close acquaintance with the local situation, decided that petitioner's mistrial operated to bar his further prosecution, and were such a decision before us.

[6] In light of our disposition, we need not reach the Government's suggestion that petitioner's failure to object to the mistrial adversely affects his claim. We note petitioner's argument that, because of the precipitous course of events, there was no opportunity for such objection.

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as premature.[7] Apparently the trial judge inferred that the prosecuting attorney's line of questioning presaged inquiry calculated to inform the jury of other crimes by the accused, and took action to forestall it. In any event, it is obvious, as the Court of Appeals concluded, that the judge "was acting according to his convictions in protecting the rights of the accused." 282 F. 2d, at 46. The court below did not hold the mistrial ruling erroneous or an abuse of discretion. It did find the prosecutor's conduct unexceptionable and the reason for the mistrial, therefore, not "entirely clear." It did say that "the judge should have awaited a definite question which would have permitted a clear-cut ruling," and that, in failing to do so, he displayed an "overzealousness" and acted "too hastily." *Id.*, at 46, 48. But after discussing the wide range of discretion which the "fundamental concepts of the federal administration of criminal justice" allow to the trial judge in determining whether or not a mistrial is appropriate—a responsibility which "is particularly acute in the avoidance of prejudice arising from nuances in the heated atmosphere of trial, which cannot be fully depicted in the cold record on appeal," *id.*, at 47—and the corresponding affirmative responsibility for the conduct of a criminal trial which the federal precedents impose, it concluded:

> "On this basis we do not believe decision should be difficult, for the responsibility and discretion exer-

[7] "The colloquy [immediately preceding the mistrial] . . . demonstrates that the prosecutor did nothing to instigate the declaration of a mistrial and that he was only performing his assigned duty under trying conditions. This is borne out by the entire transcript, including also that covering the morning session. Nor does it make entirely clear the reasons which led the judge to act, though the parties appear agreed that he intended to prevent the prosecutor from bringing out evidence of other crimes by the accused. Even so, the judge should have awaited a definite question which would have permitted a clear-cut ruling. . . ." 282 F. 2d, at 46.

cised by the judges below seem to us sound. . . ." *Id.*, at 48.

Certainly, on the skimpy record before us[8] it would exceed the appropriate scope of review were we ourselves to attempt to pass an independent judgment upon the propriety of the mistrial, even should we be prone to do so—as we are not, with due regard for the guiding familiarity with district judges and with district court conditions possessed by the Courts of Appeals.

On March 9, 1959, petitioner moved to dismiss the information on the ground that to try him again would constitute double jeopardy. The motion was denied and he was retried in April. He now attacks the conviction in which the second trial resulted.

In this state of the record, we are not required to pass upon the broad contentions pressed, respectively, by counsel for petitioner and for the Government. The case is one in which, viewing it most favorably to petitioner, the mistrial order upon which his claim of jeopardy is based was found neither apparently justified nor clearly erroneous by the Court of Appeals in its review of a cold record. What that court did find and what is unquestionable is that the order was the product of the trial judge's extreme solicitude—an overeager solicitude, it may be—in favor of the accused.

Since 1824 it has been settled law in this Court that "The double-jeopardy provision of the Fifth Amend-

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[8] The record here contains, with respect to the February 4 trial, two paragraphs from the Government's opening, four paragraphs from the petitioner's opening, a six-line colloquy between the court and prosecuting counsel, a portion of the examination of the third of the Government's first three witnesses, and the entire transcript of the testimony of the fourth witness. The last two items are set out in the affidavit of the Assistant United States Attorney in opposition to petitioner's motion to dismiss the information following the mistrial.

ment . . . does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment." *Wade* v. *Hunter,* 336 U. S. 684, 688. *United States* v. *Perez,* 9 Wheat. 579; *Thompson* v. *United States,* 155 U. S. 271; *Keerl* v. *Montana,* 213 U. S. 135, 137–138; see *Ex parte Lange,* 18 Wall. 163, 173–174; *Green* v. *United States,* 355 U. S. 184, 188. Where, for reasons deemed compelling by the trial judge, who is best situated intelligently to make such a decision, the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over his objection, and he may be retried consistently with the Fifth Amendment. *Simmons* v. *United States,* 142 U. S. 148; *Logan* v. *United States,* 144 U. S. 263; *Dreyer* v. *Illinois,* 187 U. S. 71, 85–86. It is also clear that "This Court has long favored the rule of discretion in the trial judge to declare a mistrial and to require another panel to try the defendant if the ends of justice will be best served . . . ," *Brock* v. *North Carolina,* 344 U. S. 424, 427,[9] and that we have consistently declined to scrutinize with sharp surveillance the exercise of that discretion. See *Lovato* v. *New Mexico,* 242 U. S. 199; cf. *Wade* v. *Hunter, supra.* In the *Perez* case, the authoritative starting point of our law in this field, Mr. Justice Story, for a unanimous Court, thus stated the principles which have since guided the federal courts in their application of the concept of double jeopardy to situations giving rise to mistrials:

> ". . . We think, that in all cases of this nature, the law has invested Courts of justice with the authority

[9] *Brock* v. *North Carolina* was a state prosecution and therefore arose, of course, under the Due Process Clause of the Fourteenth Amendment. The passage quoted from *Brock,* however, related to the application in federal prosecutions of the double jeopardy provision of the Fifth.

> to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the judges, under their oaths of office. . . ." 9 Wheat., at 580.

The present case falls within these broad considerations. Judicial wisdom counsels against anticipating hypothetical situations in which the discretion of the trial judge may be abused and so call for the safeguard of the Fifth Amendment—cases in which the defendant would be harassed by successive, oppressive prosecutions, or in which a judge exercises his authority to help the prosecution, at a trial in which its case is going badly, by affording it another, more favorable opportunity to convict the accused. Suffice that we are unwilling, where it clearly appears that a mistrial has been granted in the sole interest of the defendant, to hold that its necessary consequence is to bar all retrial. It would hark back to the formalistic artificialities of seventeenth century criminal procedure so to confine our federal trial courts by compelling them to navigate a narrow compass between Scylla and Charybdis. We would not thus make them unduly hesitant

conscientiously to exercise their most sensitive judgment—according to their own lights in the immediate exigencies of trial—for the more effective protection of the criminal accused.

Affirmed.

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

The place one comes out, when faced with the problem of this case, depends largely on where one starts.

Today the Court phrases the problem in terms of whether a mistrial has been granted "to help the prosecution" on the one hand or "in the sole interest of the defendant" on the other. The former is plainly in violation of the provision of the Fifth Amendment that no person shall ". . . be subject for the same offence to be twice put in jeopardy of life or limb . . . ." That was what we said in *Green* v. *United States,* 355 U. S. 184, 188. But not until today, I believe, have we ever intimated that a mistrial ordered "in the sole interest of the defendant" was no bar to a second trial where the mistrial was not ordered at the request of the defendant or with his consent. Yet that is the situation presented here, for the Court of Appeals found that the trial judge "was acting according to his convictions in protecting the rights of the accused." [1]

There are occasions where a second trial may be had, although the jury which was impanelled for the first trial was discharged without reaching a verdict and without the defendant's consent. Mistrial because the jury was unable to agree is the classic example; and that was the criti-

[1] In this case the trial judge said:

"I declare a mistrial and I don't care whether the action is dismissed or not. I declare a mistrial because of the conduct of the district attorney."

cal circumstance in *United States* v. *Perez,* 9 Wheat. 515; *Logan* v. *United States,* 144 U. S. 263; *Dreyer* v. *Illinois,* 187 U. S. 71; *Moss* v. *Glenn,* 189 U. S. 506; *Keerl* v. *Montana,* 213 U. S. 135. Tactical situations of an army in the field have been held to justify the withdrawal of a court-martial proceeding and the institution of another one in calmer days. *Wade* v. *Hunter,* 336 U. S. 684. Discovery by the judge during the trial that "one or more members of a jury might be biased against the Government or the defendant" has been held to warrant discharge of the jury and direction of a new trial. *Id.,* 689. And see *Simmons* v. *United States,* 142 U. S. 148; *Thompson* v. *United States,* 155 U. S. 271. That is to say, "a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments." [2] *Wade* v. *Hunter, supra,* 689. While the matter is said to be in the sound discretion of the trial court, that discretion has some guidelines—"a trial can be discontinued when particular circumstances manifest a necessity for so doing, and when failure to discontinue would defeat the ends of justice." *Id.,* 690.

To date these exceptions have been narrowly confined. Once a jury has been impanelled and sworn, jeopardy attaches and a subsequent prosecution is barred, if a mistrial is ordered—absent a showing of imperious necessity.[3] As stated by Mr. Justice Story in *United States* v.

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[2] In *Lovato* v. *New Mexico,* 242 U. S. 199, 201, the jury was dismissed so that the defendant could be arraigned and could plead; and it was then impanelled again. The case stands for no more than the settled proposition that "a mere irregularity of procedure" does not always amount to double jeopardy.

[3] See *United States* v. *Watson,* 28 Fed. Cas. 499; *United States* v. *Whitlow,* 110 F. Supp. 871; *Ex parte Ulrich,* 42 F. 587.

In state cases, a second prosecution has been barred where the jury was discharged through the trial judge's misconstruction of the law. *Jackson* v. *Superior Court,* 10 Cal. 2d 350, 74 P. 2d 243, 113 A. L. R.

Coolidge, 25 Fed. Cas. 622, the discretion is to be exercised "only in very extraordinary and striking circumstances."

That is my starting point. I read the Double Jeopardy Clause as applying a strict standard. "The prohibition is not against being twice punished; but against being twice put in jeopardy." *United States* v. *Ball*, 163 U. S. 662, 669. It is designed to help equalize the position of government and the individual, to discourage abusive use of the awesome power of society. Once a trial starts jeopardy attaches. The prosecution must stand or fall on its performance at the trial. I do not see how a mistrial directed because the prosecutor has no witnesses is different from a mistrial directed because the prosecutor abuses his office and is guilty of misconduct. In neither is there a breakdown in judicial machinery such as happens when the judge is stricken, or a juror has been discovered to be disqualified to sit, or when it is impossible

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1422; *State* v. *Spayde*, 110 Iowa 726, 80 N. W. 1058; *State* v. *Callendine*, 8 Iowa 288; *Lillard* v. *Commonwealth*, 267 S. W. 2d 712 (Ky.); *Mullins* v. *Commonwealth*, 258 Ky. 529, 80 S. W. 2d 606; *Robinson* v. *Commonwealth*, 88 Ky. 386, 11 S. W. 210; *Williams* v. *Commonwealth*, 78 Ky. 93; *Yarbrough* v. *State*, 90 Okla. Cr. 74, 210 P. 2d 375; *Loyd* v. *State*, 6 Okla. Cr. 76, 116 P. 959.

Where the trial judge has made a mistake in concluding that the jury was illegally impanelled, or biased, a second prosecution has been barred. *Whitmore* v. *State*, 43 Ark. 271; *Gillespie* v. *State*, 168 Ind. 298, 80 N. E. 829; *O'Brian* v. *Commonwealth*, 72 Ky. 333; *People* v. *Parker*, 145 Mich. 488, 108 N. W. 999; *State* v. *Nelson*, 19 R. I. 467; *State* v. *M'Kee*, 17 S. C. L. (1 Bail.) 651, 21 Am. Dec. 499; *Tomasson* v. *State*, 112 Tenn. 596, 79 S. W. 802. See also *Hilands* v. *Commonwealth*, 111 Pa. St. 1, 2 A. 70, 56 Am. Rep. 235, as limited by *Commonwealth* v. *Simpson*, 310 Pa. 380, 165 A. 498. Cf. *Maden* v. *Emmons*, 83 Ind. 331.

The accused has also been discharged where the trial judge erred in his estimate of the prejudicial quality of the remarks made by counsel for the accused, *Armentrout* v. *State*, 214 Ind. 273, 15 N. E. 2d 363, or of the jurors' drinking beer which had been brought in by the bailiff. *State* v. *Leunig*, 42 Ind. 541.

or impractical to hold a trial at the time and place set. The question is not, as the Court of Appeals thought, whether a defendant is "to receive absolution for his crime." 282 F. 2d 43, 48. The policy of the Bill of Rights is to make rare indeed the occasions when the citizen can for the same offense be required to run the gantlet twice. The risk of judicial arbitrariness rests where, in my view, the Constitution puts it—on the Government.

UNITED STATES *v.* SHIMER.

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

No. 392. Argued April 27, 1961.—Decided June 12, 1961.

Under Title III of the Servicemen's Readjustment Act of 1944, as amended in 1945, the Veterans' Administration guaranteed up to $4,000 or 4/13 of the indebtedness outstanding at any time on a loan of $13,000 made by a lending institution to a World War II veteran and secured by a mortgage on a home in Pennsylvania purchased by him with the proceeds. The veteran soon defaulted, and the mortgagee notified the Administration, obtained a Pennsylvania judgment foreclosing the mortgage, and bought the property at a sheriff's sale for $250. The Veterans' Administration paid the entire guaranty of $4,000 and sued in a Federal District Court to recover that amount from the veteran as indemnity. The District Court held that the veteran was not liable on the ground that, under Pennsylvania law, the Administration had been released from liability as guarantor by the mortgagee's purchase of the property at the sheriff's sale, followed by its failure to petition for a judicial determination of its "fair market value," pursuant to a Pennsylvania Deficiency Judgment Act. The Court of Appeals affirmed. *Held:* The judgment is reversed, since the courts below erred in applying a state statute which was in conflict with a valid Regulation of the Veterans' Administration issued pursuant to the Act and agreed to by the veteran when the loan was made. Pp. 375–388.

(a) Application of state law to determine the Administration's obligation to the mortgagee was inconsistent with the applicable Regulations prescribed by the Administration. Pp. 377–381.

(b) Section 504 of the Act authorized the Veterans' Administrator to displace state law by establishing the exclusive procedures prescribed by the Regulations and followed in this case. Pp. 381–385.

(c) The Act affords an independent right of indemnity to the Administration. Pp. 386–387.

(d) Under the applicable Regulations, the veteran cannot escape liability for indemnity on the theory that there was no debt due *from him* at the time of payment on the guaranty. Pp. 387–388.

276 F. 2d 792, reversed and case remanded.

Wayne G. Barnett argued the cause for the United States. With him on the briefs were former *Solicitor General Rankin, Solicitor General Cox, Assistant Attorney General Orrick, Assistant Attorney General Doub, Alan S. Rosenthal, Anthony L. Mondello, Pinckney G. McElwee* and *Morton Hollander.*

The cause was submitted on brief by *Edward Davis* for respondent.

William F. McKenna and *Samuel E. Neel* filed a brief for the National Association of Mutual Savings Banks et al., as *amici curiae,* urging reversal.

MR. JUSTICE HARLAN delivered the opinion of the Court.

The United States brought this action in the Eastern District of Pennsylvania to recover from Shimer, on theories of subrogration and indemnity, an amount of $4,000 which the Veterans' Administration, as guarantor of a loan made to him by Excelsior Saving Fund and Loan Association, had paid to that institution.

The relevant facts, as stipulated by the parties, are these: In 1948 Shimer, a World War II veteran, borrowed $13,000 from Excelsior secured by a mortgage upon residential realty which Shimer purchased with the proceeds. At Shimer's request the Veterans' Administration, pursuant to Title III of the Servicemen's Readjustment Act of 1944, as amended in 1945,[1] granted a maximum guarantee of the loan—that is, the lesser of $4,000 or 4/13 of the indebtedness outstanding at any particular time.[2] Both

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[1] 58 Stat. 291, as amended by 59 Stat. 626.

[2] "SEC. 500. (a) Any person who shall have served in the active military or naval service of the United States at any time on or after September 16, 1940, and prior to the termination of the present war . . . shall be eligible for the benefits of this title. Any loan made by such veteran within ten years after the termination of the

the "Home Loan Report" signed by Shimer, and the Administration certificate of guaranty, specified that the rights of the parties would be governed by Regulations of the Administration in effect at the date of the loan and guaranty. Shimer defaulted in 1948, and in 1949 Excelsior, as mortgagee, notified the Veterans' Administration of his default and obtained a Pennsylvania judgment foreclosing the mortgage which then secured a debt in excess of $13,000.[3] After the property was purchased by Excelsior at a sheriff's sale for $250, the Veterans' Administration paid it the entire guaranty of $4,000 and brought the present action against Shimer.

In the Court of Appeals, the United States chose to rely exclusively on the Administration's alleged right of indemnity against Shimer, and accordingly does not press its claim here upon a theory of subrogation. The Court of Appeals held that the United States was not entitled to recover, reaching this result by applying a well-established principle of surety law which both parties agree was recognized by Congress when it passed Title III: The Veterans' Administration, as guarantor, could not recover from its principal, Shimer, any amount it was not obli-

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war for any of the purposes, and in compliance with the provisions, specified in this title, is automatically guaranteed by the Government by this title in an amount not exceeding fifty per centum of the loan: *Provided,* That the aggregate amount guaranteed shall not exceed . . . $4,000 in the case of real-estate loans . . . .

"(b) Loans guaranteed under this title shall be payable under such terms and conditions as may be agreed upon by the parties thereto, subject to the conditions and limitations of this title and the regulations issued pursuant to section 504: *Provided,* That the liability under the guaranty within the limitations of this title shall decrease or increase pro rata with any decrease or increase of the amount of the unpaid portion of the obligation . . . ."

[3] The computation of the amount of the unpaid debt and the amount consequently owing on the guaranty will be open for further consideration by the District Court on the remand which will result from this opinion.

gated to pay the mortgagee, Excelsior, on his behalf. Turning to state law to determine the extent of the Administration's obligation to Excelsior, the court below considered that under Pennsylvania law both Shimer and the Veterans' Administration had been released from any further liability to Excelsior at the time the Administration paid its $4,000 guarantee, that is, after the foreclosure sale. 276 F. 2d 792. Under the Pennsylvania Deficiency Judgment Act [4] a mortgagee who purchases the mortgaged property in execution proceedings cannot recover a deficiency judgment unless and until the mortgagee obtains a court determination of the fair market value of the mortgaged property and credits that amount to the unsatisfied liability. When, as eventuated in this case, the mortgagee fails to bring a proceeding for this purpose within six months after the foreclosure sale, the debtor and guarantor are permanently discharged.

We granted certiorari, 364 U. S. 889, to pass upon the contentions of the United States that: (1) the application of state law to determine the Administration's obligation to Excelsior is inconsistent with the Regulations prescribed by the agency charged with administering the Servicemen's Readjustment Act; (2) these Regulations are authorized by the federal enactment; and (3) a right of indemnity under federal law arises in favor of the Veterans' Administration upon proper payment of its obligations as guarantor.

I.

The Regulations promulgated by the Veterans' Administration make clear that they were intended to create a uniform system for determining the Administration's obligation as guarantor, which in its operation would displace state law. Section 36.4321, 12 Fed. Reg. 8344, in

[4] Purdon's Pa. Stat., Tit. 12, §§ 2621.1–2621.11.

subsection (a) [5] implements the "pro rata" requirements of § 500 (b) of the statute, Note 2, *supra,* and establishes the procedure for computing the amount of the guaranty which the mortgagee can, under § 506 of the statute, demand to have applied against his unpaid claim on the date of default.[6] In this instance it is agreed that such amount is $4,000. However, we are informed by the Solicitor General that the mortgagee is both allowed and encouraged to delay collecting on the guaranty until after all events which may lead to a government offset have taken place. The Administration's potential right as subrogee to some portion of the proceeds of a foreclosure sale is such a possible offset. Accordingly, Excelsior waited until after the foreclosure sale to collect on the guaranty. This brought Excelsior within subsection (b) of § 36.4321 which provides that "Credits accruing from the proceeds of a sale . . . of the security subsequent to the date of computation [pursuant to subsection (a), *supra*], and prior to the submission of the [guaranty] claim" shall be applied in reduction of the outstanding debt and "the amount payable on the claim shall in no event exceed the remaining balance of the indebtedness."

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[5] Section 36.4321 (a) provides in relevant part:
"*Computation of guaranty claims; subsequent accountings.* (a) Subject to the limitation that the total amounts payable shall in no event exceed the amount originally guaranteed, the amount payable on a claim for the guaranty shall be the percentage of the loan originally guaranteed applied to the indebtedness computed as of the date of claim but not later than (1) the date of judgment or of decree of foreclosure . . . ."

[6] Section 506 of the Act provides: "In the event of default in the payment of any loan guaranteed under this title, the holder of the obligation shall notify the Administrator who shall thereupon pay to such holder the guaranty not in excess of the pro rata portion of the amount originally guaranteed, and shall be subrogated to the rights of the holder of the obligation to the extent of the amount paid on the guaranty . . . ."

It was at this point that the Court of Appeals applied the Pennsylvania Deficiency Judgment Act to determine the "Credits accruing from the proceeds of . . . [the foreclosure] sale." However, the method of determining these credits is also specified in the Regulations, indeed spelled out in § 36.4320, 13 Fed. Reg. 7739–7741, in such great detail that there can be little doubt of an administrative intent that such method should provide the exclusive procedure.[7] In substance, that section provides that in every case at least the amount realized at the foreclosure sale is to be credited. It also specifies the way in which the Veterans' Administration can require the mortgagee to credit more than the amount received at the foreclosure sale and thereby protect itself against the very risk the Pennsylvania Deficiency Judgment Act was designed to alleviate—the risk of having to make good its guaranty simply because the mortgaged property is sold for an inadequate price at a judicial sale. The Administrator is authorized to "specify in advance of such sale the minimum amount which shall be credited to the indebtedness of the borrower on account of the value of the security to be sold." The mortgagee must then reduce the balance of the unpaid debt by at least this minimum amount before collecting on the guaranty.

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[7] Section 36.4320 (whose length and intricacy is such as to make impracticable its spreading in this opinion) was amended in particulars not here relevant and was generally clarified between the dates of the loan and guarantee and the dates of foreclosure and sale. We consider applicable the later wording in light of § 36.4300 of the Regulations which was in effect at the date of the loan and which provided:

"*Applicability.* The regulations in this part and amendments thereto shall be applicable to each loan entitled to an automatic guaranty, or otherwise guaranteed or insured, on or after the date of publication thereof in the FEDERAL REGISTER, and *shall be applicable to such loans previously guaranteed or insured to the extent that no legal rights vested thereunder are impaired.*" (Emphasis added.) 12 Fed. Reg. 8342.

The mortgagee has the option, however, of selling any property it purchased at or below this minimum amount to the Veterans' Administration for the specified minimum amount. If, as in the present case, the Administrator does not specify a minimum amount "the holder [mortgagee] shall credit against the indebtedness the net proceeds of the sale . . . ."

In effect, then, the scheme set up by the Regulations provides the Veterans' Administration with a measure of assurance that there shall be credited against the unpaid debt at least what the Administrator regards as the fair value of the mortgaged property. In terms of the present case: With an unpaid balance of indebtedness of $13,000, the Veterans' Administration should not have to pay its full guaranty of $4,000 unless the property which Excelsior may retain is worth less than $9,000. If Excelsior purchased property worth $10,000 for $250 at the foreclosure sale, the Administration should not have to pay more than $3,000 on its $4,000 guaranty, or, to state the matter more precisely, the Administration should realize a $1,000 credit as set off against its $4,000 guaranty which Excelsior could have claimed at the time of default. Accordingly, if the Administrator regarded the mortgaged property as worth $10,000 he could have specified (which he did not) a minimum credit (or "upset price") of that amount which Excelsior would then have had to credit against the $13,000 unpaid debt. If Excelsior had purchased the property for $10,000 or less, it would have had an option to reconvey the property at a valuation of $10,000 to the Veterans' Administration.

This scheme of protection, while intended to remedy the same abuses at which the Pennsylvania Deficiency Judgment Act is directed, is, of course, inconsistent with the Pennsylvania procedures which provide for a judicial determination of the amount to be credited against an

outstanding debt and do not obligate the guarantor to purchase the mortgaged property at its judicially determined value. We have no doubt that this regulatory scheme, complete as it is in every detail, was intended to provide the whole and exclusive source of protection of the interests of the Veterans' Administration as guarantor and was, to this extent, meant to displace inconsistent state law.[8]

II.

We think that the Servicemen's Readjustment Act authorized the Veterans' Administrator to displace state law by establishing these exclusive procedures.[9] In this regard it is important to recall the scope of our review in a case such as this. More than a half-century ago this Court declared that "where Congress has committed to

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[8] This conclusion is fortified by § 36.4320 (d) which specifically excludes and waives one type of state protection of guarantors and lenders which otherwise would have seemed to fit the other provisions of the section. Subdivision (d) provides:

"If a minimum bid is required under applicable State law, or decree of foreclosure or order of sale, or other lawful order or decree, the holder may bid an amount not exceeding such amount legally required. If an amount has been specified by the Administrator and the holder is the successful bidder for an amount not exceeding the amount legally required, such specified amount shall govern for the purposes of this section and for the purpose of computing the ultimate loss under the guaranty or insurance. In the event no amount is specified and the holder is the successful bidder for an amount not exceeding the amount legally required, the amount paid or payable by the Administrator under the guaranty shall not be subject to any adjustment by reason of such bid."

[9] Section 504 of the Act provides: "The Administrator is authorized to promulgate such rules and regulations not inconsistent with this title, as amended, as are necessary and appropriate for carrying out the provisions of this title, and may delegate to subordinate employees authority to issue certificates, or other evidence, of guaranty of loans guaranteed under the provisions of this title, and to exercise other administrative functions hereunder."

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the head of a department certain duties requiring the exercise of judgment and discretion, his action thereon, whether it involve questions of law or fact, will not be reviewed by the courts, unless he has exceeded his authority or this court should be of opinion that his action was clearly wrong." *Bates & Guild Co.* v. *Payne,* 194 U. S. 106, 108–109. This admonition has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations. See, *e. g., National Broadcasting Co.* v. *United States,* 319 U. S. 190; *Labor Board* v. *Hearst Publications, Inc.,* 322 U. S. 111; *Republic Aviation Corp.* v. *Labor Board,* 324 U. S. 793; *Securities & Exchange Comm'n* v. *Chenery Corp.,* 332 U. S. 194; *Labor Board* v. *Seven-Up Bottling Co.,* 344 U. S. 344.

In the present case we need only consider the statutory authorization for § 36.4320 (a)(4) which provides that "If a minimum amount [the upset price] has not been specified by the Administrator . . . the holder shall credit against the indebtedness the net proceeds of the sale . . . ." It would, of course, have been possible for the Administrator to have promulgated regulations consistent with much of the present scheme which would have, in addition, accepted the benefits of local law which tended further to reduce a guarantor's risk of loss from sale of the mortgaged property at an inadequate price. Thus, with specific reference to the Pennsylvania Deficiency Judgment Act, there would have been nothing inherently illogical about administrative regulations providing for an "upset price" device and then adding that, in situations where the "upset price" technique was not used by the Administrator, the Veterans' Administration

was to be entitled to the benefits of the state judicial assessment of the value of property purchased by the mortgagee. However, the Veterans' Administrator has chosen not to take advantage of laws like that of Pennsylvania. If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.

It is doubtless true that the policy of the Act is, broadly stated, to enable veterans to obtain loans and to obtain them with the least risk of loss upon foreclosure, to both veteran and the Veterans' Administration as guarantor of the veteran's indebtedness, and it is equally clear that had the Regulations adopted or included the provisions of the Pennsylvania Deficiency Judgment Act this would have furthered at least the second of these purposes. However, there are also ample indications both in the Act and in its legislative history that Congress intended the guaranty provisions to operate as the substantial equivalent of a down payment in the same amount by the veteran on the purchase price, in order to induce prospective mortgagee-creditors to provide 100% financing for a veteran's home.[10] The Regulations which the Administrator has adopted provide what the agency could allowably view as a more effective reconciliation of these twofold ends than might be accomplished by a complete or partial adoption of the law of a State such as Pennsylvania.

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[10] See, *e. g.*, H. R. Rep. No. 1418, 78th Cong., 2d Sess., pp. 3, 9; Hearings before Subcommittee of the Senate Committee on Finance on H. R. 3749, 79th Cong., 1st Sess., pp. 31–33 (General Omar Bradley).

The Regulations assure a Pennsylanvia mortgagee-creditor that he will be able either to recover the full amount of the guaranty or to sell the mortgaged property to the United States and recover the amount of its loss after such sale. For example, in the present situation Excelsior knew that it could either recover $4,000 from the Veterans' Administration and keep the mortgaged property, or that it could sell the mortgaged property to the United States, recovering on its guaranty the amount by which the unpaid debt exceeded the price which the United States had paid. The only risk of loss with which Excelsior would have been faced was the risk of having on its hands a property worth less than $9,000 to secure a residual debt of $9,000 (after the United States had paid $4,000 of the total debt of $13,000). This is precisely the risk which Excelsior would have had to assume had it insisted upon a $4,000 down payment by the veteran and lent $9,000 on the property. Presumably therefore it was willing to accept a $4,000 guarantee under the Administrator's Regulations in exchange for a $4,000 down payment.

In contrast, a mortgagee whose federal guaranty was subject to the law of a State such as Pennsylvania would be subjected both to an additional cost and to an additional risk, neither of which is present when there is an equivalent down payment. The additional cost is that required in every case to litigate the value of the mortgaged property. The additional risk is that, if it was judicially determined that the property was worth more than the amount for which the mortgagee could in fact sell it, the mortgagee would have to absorb the cost of the judicial error and could recover on its guaranty only the difference between the unpaid debt and the amount of the judicial estimate of the value of the property. Thus if the value of the mortgaged property in the present case had been judicially assessed at $10,000, Excelsior, after

payment of the resulting $3,000 on the guaranty, would have been left with the mortgaged property in place of an unrequited $10,000 loan, whereas had it insisted on a $4,000 down payment from the veteran it would have had the mortgaged property to stand for a $9,000 loan.[11]

We cannot say that a Pennsylvania lender would not prefer a down payment to a guaranteed loan in the same amount if the Pennsylvania Deficiency Judgment Act were applicable. Nor can we say that the Administrator has unreasonably sacrificed either the Government's or the veteran's protection in relying exclusively on the "upset price" device in order to preserve the interchangeability of a guaranty with a down payment. The Veterans' Administration can and does protect itself from a sale at an inadequate price by specifying the minimum credit which the mortgagee must subtract from the unpaid debt. In protecting itself it also places its own financial resources behind the debtor-veteran who may be forced to reimburse the Administrator only if the Administrator considers that the property has been sold at a fair price, and who retains all the benefits of state law as against the mortgagee.

We consider the Regulations to be a reasonable accommodation of the statutory ends, first, of making a federal guaranty the substantial equivalent of a down payment, and, second, of protecting both the Veterans' Administration and the veteran from unnecessary loss on a foreclosure sale. And since we find nothing in the statute or the legislative history antagonistic to this accommodation, we hold the Regulations to be a valid exercise of the authority granted the Administrator in § 504 of the Servicemen's Readjustment Act (note 9, *supra*).

[11] Pennsylvania law does not require a mortgagee who purchases the mortgaged property at a foreclosure sale for an amount less than the unpaid debt to return any portion of the down payment pursuant to a judicial assessment of the value of the property.

III.

Respondent's final contention is that even though the Veterans' Administration was obligated on its guaranty to Excelsior, the Administration nevertheless had no right to indemnity from him. It is argued, first, that under the Act the Administration, in circumstances like these, can recover over against the veteran only on a theory of subrogation to the mortgagee's rights. The Administrator having proceeded in this instance simply on a theory of indemnity, it is claimed that there is no statutory authorization for the present suit.

Prior to the amendment of the Act in 1945, it was assumed that the ordinary concomitants of a guaranty relationship would follow upon the mere authorization of Government guaranteed loans and that these included the guarantor's right of indemnity. Restatement of the Law of Security, § 104; Decisions of the Administrator of Veterans' Affairs, No. 625, Vol. 1, p. 1154. The 1945 amendments made explicit that payment of the guaranty would be due on the veteran's default and that thereupon the Administrator "shall be subrogated to the rights of the holder of the obligation to the extent of the amount paid on the guaranty."

It is argued that this amendment, by negative implication, overruled or rejected what the Administrator had previously regarded as his independent right to indemnity, but surely this is carrying a negative implication too far. We cannot agree that Congress, without any statutory reference to the problem and without any discussion of it, intended to relieve the veteran of direct liability for amounts properly paid on his behalf by the Veterans' Administration. Not only might such a waiver of a guarantor's normal rights require a more burdensome route to recovery over from the principal, but it would deprive the guarantor of any recovery on occasions when

the mortgagee's rights were limited as against the debtor by state law, yet were protected against the Administrator by state or federal law. Relief from liability in these circumstances would convert a guaranty into a grant of aid. But the entire history of the "home loan" provisions of the statute is inconsistent with an intent to make outright grants, rather than loans of cash (S. 1767, 78th Cong., 2d Sess.) or credit, to returning servicemen.

Moreover, the recognition of a loss to the guarantor merely because of a failure of the lender's rights against the principal is incompatible with the background of general surety law against which the statute was drawn. See, *e. g., Leslie* v. *Compton,* 103 Kan. 92, 172 P. 1015. Indeed, at the time of the 1945 amendments to the Act the Administrator had already ruled that there was a right to recover over against the veteran on a theory of indemnity in situations where recovery by way of subrogation was barred by state law. Decisions of the Administrator of Veterans' Affairs, No. 625, Vol. 1, p. 1154.

For these reasons, we are constrained to agree with the uniform construction of the lower courts, including that of the two courts below, that the statute affords an independent right of indemnity to the Veterans' Administration. See *United States* v. *Shimer,* 276 F. 2d 792; *McKnight* v. *United States,* 259 F. 2d 540; *United States* v. *Jones,* 155 F. Supp. 52; *United States* v. *Gallardo,* 154 F. Supp. 373; *United States* v. *Henderson,* 121 F. Supp. 343.

Finally, we find untenable respondent's argument that the applicable Regulation does not support recovery because there was no debt due *from the veteran* at the time of payment on the guaranty. Section 36.4323 (e), 11 Fed. Reg. 2123, provides: "Any amounts paid by the Administrator on account of the liabilities of any veteran guaranteed or insured under the provisions of the act shall constitute a debt owing to the United States by such veteran." The Regulation is merely declaratory of

a surety's customary right of indemnity for amounts paid pursuant to an obligation of the guarantor assumed with the consent of the principal. Restatement of the Law of Security, § 104. This right is in general unaffected by defenses of the principal which are not available to the guarantor.[12] Simpson, Suretyship, at p. 227; Stearns, Law of Suretyship, § 284. The Regulation certainly indicates no purpose to depart from the general rule in the case of guaranties by the Veterans' Administration.[13]

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

It is so ordered.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS would affirm the judgment for the reasons stated by the Court of Appeals, 276 F. 2d 792.

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[12] Moreover, at the time the Veterans' Administration became liable on its guaranty (*i. e.*, on the veteran's default and prior to the foreclosure sale, see notes 5 and 6, *supra*) the Administration and the respondent veteran had no defenses to payment either under state law or under the Regulations of the Administrator.

[13] This is made particularly clear by the form of the Regulation which was the predecessor of 11 Fed. Reg. 2123. The earlier Regulation, 9 Fed. Reg. 12655, provided:

"(a) Any amounts paid to the creditor by the Administrator pursuant to the guaranty shall constitute a debt due to the United States by the veteran on whose application the guaranty was made . . . ."

COMMUNIST PARTY, U. S. A., ET AL. *v.* CATHERWOOD, INDUSTRIAL COMMISSIONER.

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK.

No. 495. Argued May 4, 1961.—Decided June 12, 1961.

The New York State Industrial Commissioner terminated petitioners' registrations and liability for state taxation as employers under the New York State Unemployment Insurance Law, and the New York Court of Appeals sustained such action, on the ground that it was required by the Communist Control Act of 1954, which declares that the Communist Party of the United States is an instrumentality of a conspiracy to overthrow the Government of the United States by force and violence and that it and any of its successors "are not entitled to any of the rights, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof." This termination of state registration had the indirect effect of increasing petitioners' tax rate under the Federal Unemployment Tax Act from about 1% to 3%. The Internal Revenue Service continued to treat petitioners as covered by the latter Act and to collect taxes from them thereunder. *Held:* The Communist Control Act of 1954 does not require exclusion of petitioners from New York's unemployment compensation system; the judgment is reversed and the case is remanded for further proceedings. Pp. 389–395.

8 N. Y. 2d 77, 168 N. E. 2d 242, reversed and case remanded.

John J. Abt argued the cause and filed a brief for petitioners.

Julius L. Sackman argued the cause for respondent. With him on the brief were *Louis J. Lefkowitz,* Attorney General of New York, *Paxton Blair,* Solicitor General, and *Samuel Stern,* Assistant Attorney General.

MR. JUSTICE HARLAN delivered the opinion of the Court.

We here review the upholding by the New York Court of Appeals of the action of the New York State Indus-

trial Commissioner terminating petitioners' registration and liability to state taxation as employers under the New York State Unemployment Insurance Law. N. Y. Labor Law, §§ 511–512, 517–518, 570, 577, 581. This determination was effected under what was conceived to be the compulsion of a federal statute, the Communist Control Act of 1954, 68 Stat. 775, 50 U. S. C. §§ 841–844, which provides, in pertinent part:

> "Section 2. The Congress hereby finds and declares that the Communist Party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States . . . . Therefore the Communist Party should be outlawed.
>
> "Section 3. The Communist Party of the United States, or any successors of such party regardless of the assumed name, whose object or purpose is to overthrow the Government of the United States, or the government of any State, Territory, District, or possession thereof, or the government of any political subdivision therein by force and violence, *are not entitled to any of the rights, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof; and whatever rights, privileges, and immunities which have heretofore been granted to said party or any subsidiary organization by reason of the laws of the United States or any political subdivision thereof, are hereby terminated:* Provided, however, That nothing in this section shall be construed as amending the Internal Security Act of 1950, as amended." (Emphasis supplied.)

New York has an "experience rating" scheme whereby employers with consistent records of high employment

levels are taxed at a lower rate than would otherwise obtain. Under the Federal Unemployment Tax Act, 26 U. S. C. §§ 3301–3308, an employer is entitled to a federal tax credit for the amount paid in state unemployment taxes. If the state taxing structure allows for a reduction in tax rate to employers with good employment records under a federally certified "experience rating" system, the federal tax is nevertheless reduced by the highest rate imposed by the State, so that the employer retains the full benefit of his experience rating reduction. Thus, before the termination of their New York registration the combined federal and state tax rate of the petitioner, Communist Party, U. S. A., was 1%, and that of the petitioner, Communist Party of New York State, was, according to its representations, 1.1%. The effect of the registration termination as to both was to increase the rate to 3%, the rate provided in the federal statute.[1]

We granted certiorari, 364 U. S. 918, to consider the petitioners' claims that New York has mistakenly construed the Communist Control Act of 1954 to require termination of their status as employers under the New York statute, and, contrariwise, that both § 3 of the Communist Control Act, so construed, and New York's termination of registration infringed the Constitution of the United States.[2]

We must reject at the outset respondent's contention that the Court of Appeals' decision rested on a determination, based on judicial notice which was not displaced by any proof, that petitioners were not employers within the

[1] The basic federal rate was increased to 3.1% by Public Law 86–778, § 523 (c), 74 Stat. 924, 982, effective 1961. 26 U. S. C. § 3301.

[2] Petitioners argue that the Act on its face and as applied violates the Due Process Clause of the Fifth Amendment and Art. I, § 9, cl. 3 of the Federal Constitution, which provides that "no Bill of Attainder or ex post facto Law shall be passed." Petitioners also contingently assert a Fourteenth Amendment claim, see note 6, *infra*.

meaning of § 512 of the New York Labor Law, but a criminal conspiracy. It is entirely clear that the Industrial Commissioner and the Unemployment Insurance Referee,[3] the Unemployment Insurance Appeal Board,[4] and the Court of Appeals [5] all based their determination squarely on what they conceived to be the compulsion of the Communist Control Act. The Court of Appeals' amended remittitur, which states that the questions of the construction and constitutionality of the Communist Control Act "were presented and necessarily passed upon," puts the matter beyond doubt.[6]

Following the familiar rule that decision of Constitutional questions should be avoided wherever fairly possible, we turn at once to the federal statute which this Court has not heretofore had occasion to construe. Apart from unrevealing random remarks during the course of debate in the two Houses, there is no legislative history which in any way serves to give content to the vague terminology of § 3 of the Communist Control Act. The

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[3] The Referee, in reviewing the administrative action of the Commissioner, stated that "the Commissioner's representatives . . . urge that Congress has effectively outlawed the Communist Party and thus, by force of law, the Referee is bound to find that . . . there could not have been any valid employment . . . ." (R. 5.) This contention the Referee accepted, holding that "Congress effectively terminated the right of the Parties to enter into contracts of employment . . . ." (R. 7.)

[4] The Board affirmed the Referee's conclusions of law. (R. 2.)

[5] See 8 N. Y. 2d 77, at 83, 168 N. E. 2d 242, at 245, for the opinion of Chief Judge Desmond, with whom Judge Dye concurred, and 8 N. Y. 2d, at 90–91, 168 N. E. 2d, at 248–249, for the opinion of Judge Van Voorhis, with whom Judge Burke concurred. Two judges of the court dissented, and one judge did not participate.

[6] Petitioners also argue that if the administrative action rested upon some state procedural ground, as respondent contends, then that action violated the Due Process Clause of the Fourteenth Amendment. We do not reach this contention.

statute contains no definition, and neither committee reports nor authoritative spokesmen attempt to give any definition, of the clause "rights, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the United States or any political subdivision thereof." Respondent would have us construe this language to mean that wherever a situation advantageous to the petitioners occurs by reference to the statutory or common law of a State or any other government in the United States, this is to be considered a "right," "privilege," or "immunity," and must be deemed to be withheld by the Act. On this basis New York has reasoned that liability to taxation as an employer, though not a privilege in the ordinary sense of the term, is nonetheless a recognition of the common-law contractual capacity to employ, and as such is advantageous to petitioners; and further, that an employer whose employees are unable to benefit from state and federal unemployment insurance programs will be disadvantaged in finding and keeping employees. Therefore it was thought that the Communist Control Act required termination of the registration of petitioners as employers.

This interpretation, raising as it does novel constitutional questions, the answers to which are not necessarily controlled by decisions of this Court in connection with other legislation dealing with the Communist Party, must, we think, be rejected. Not only does the language of the statute fall far short of compelling such an interpretation, but there are good indications that the particular result of barring petitioners as employers under state and federal unemployment insurance systems was not within the contemplation of this Act. The Internal Revenue Service has continued to collect taxes from petitioners under the Federal Unemployment Tax Act,[7]

[7] The Solicitor General, in a letter to the Clerk of this Court responding to a certification by the Court to the Attorney General

and Congress in 1956 has dealt in terms with a like matter, excluding from federal old-age, survivors and disability benefits, 42 U. S. C., c. 7, subchapter II, employment with any organization required to register by the Subversive Activities Control Board and removing from the coverage of the Federal Insurance Contributions Act, 26 U. S. C., c. 21, any such organization,[8] thus tying the exclusion to the administrative fact findings and determinations required by the Internal Security Act of 1950, 64 Stat. 987; see *Communist Party* v. *Subversive Activities Control Board, ante,* p. 1.

In face of these considerations we should hesitate long before attributing to Congress a purpose to effectuate the similar exclusion in this instance by legislative fiat. Our reluctance to accept a state interpretation which would have that effect is fortified both by the difficult constitutional questions that would result and by the undesirability of having conflicting state and federal administrative interpretations of a federal statute establishing this "coordinated and dual system" (*Buckstaff Co.* v. *McKinley,* 308 U. S. 358, 364) of employment insurance.

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of the United States that the constitutionality of a federal statute had been drawn into question in this case, stated that "[t]here is no need to file a brief describing the practice of federal agencies in interpreting the statute [The Communist Control Act of 1954], for this information is already set forth in the opinion of Judge Fuld in the New York Court of Appeals." The dissenting opinion of Judge Fuld states that "the federal authorities, admittedly aware of the Industrial Commissioner's position, have taken one diametrically opposed and continue to recognize the Communist Party as an employer subject to the Federal act."

[8] 42 U. S. C. § 410 (a)(17) and 26 U. S. C. § 3121 (b)(17), Act of August 1, 1956, § 121 (c) and (d), 70 Stat. 839. No similar exclusion, however, has been made from the coverage of the Federal Unemployment Tax Act, 26 U. S. C., c. 23, which imposes the federal tax against which the state taxes involved in this case are credited. See p. 391, *supra.*

We hold that the Communist Control Act of 1954 does not require exclusion of the petitioners from New York's unemployment compensation system. Since the New York Court of Appeals' decision unmistakably rested on the contrary premise, its judgment must be reversed and the case remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE BLACK concurs in the result.

POWER REACTOR DEVELOPMENT CO. *v.* INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL–CIO, ET AL.

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

No. 315. Argued April 26–27, 1961.—Decided June 12, 1961.*

Under §§ 104b and 185 of the Atomic Energy Act, the Atomic Energy Commission issued a provisional construction permit authorizing a private corporation to construct, but not to operate, on the shores of Lake Erie about 35 miles from the center of Detroit and about 30 miles from the center of Toledo, a fast-neutron breeder reactor for the generation of electric power, subject to the condition that, before issuance of a license to operate it, the final hazards summary report must show that "the final design provides reasonable assurance . . . that the health and safety of the public will not be endangered by operation of the reactor." After three labor unions had intervened and opposed continuation of the provisional construction permit in effect, the Commission held extensive hearings, after which it found reasonable assurance in the record "that a utilization facility of the general type proposed . . . can be constructed and operated at the location without undue risk to the health and safety of the public," and it continued in effect the provisional construction permit, subject to substantially the same condition. The Court of Appeals set aside the order and remanded the case to the Commission. *Held:* The Court of Appeals erred in setting aside the Commission's order continuing the provisional construction permit in effect. Pp. 398–416.

(a) It is clear from the face of the statute that Congress contemplated a step-by-step procedure: First an applicant would have to get a construction permit, then he would have to construct his facility, and then he would have to ask the Commission to grant him a license to operate the facility. Pp. 403–405.

(b) It is clear from § 182a that, before licensing the operation of the reactor, the Commission will have to make a positive finding

*Together with No. 454, *United States et al.* v. *International Union of Electrical, Radio and Machine Workers, AFL–CIO, et al.*, also on certiorari to the same Court.

that operation of the facility "will provide adequate protection to the health and safety of the public." Pp. 405–406.

(c) Under the provisions of the Act and the Commission's regulations, the Commission proceeded properly in issuing the provisional construction permit on a finding of reasonable assurance in the record that a utilization facility of the general type proposed could be constructed and operated at the location proposed without undue risk to the health and safety of the public, and deferring until application for the grant of an operating license a definitive finding that operation of the facility "will provide adequate protection for the health and safety of the public." Pp. 406–410.

(d) A different conclusion is not required by the legislative history of the Act. Pp. 410–414.

(e) Before granting a permit for construction of a reactor near a large population center, the Commission is not required to find that there are "compelling reasons" for doing so. P. 414.

(f) This Court cannot assume that the Commission will exceed its powers in passing on an application for a license to operate the reactor or that the many safeguards provided to protect the public interest will not be fully effective. Pp. 414–416.

108 U. S. App. D. C. 97, 280 F. 2d 645, reversed and case remanded.

Solicitor General Cox argued the cause for petitioners in No. 454. With him on the briefs were former *Solicitor General Rankin, Assistant Attorney General Orrick, Assistant Attorney General Doub, Daniel M. Friedman, Morton Hollander, Neil D. Naiden, Courts Oulahan* and *Lionel Kestenbaum.*

W. Graham Claytor, Jr. argued the cause for petitioner in No. 315. With him on the briefs were *John Lord O'Brian, David E. McGiffert, Edward S. Reid, Jr.* and *Richard B. Gushee.*

Benjamin C. Sigal argued the cause for respondents. With him on the brief were *Harold Cranefield* and *Lowell Goerlich.*

R. M. Stroud filed a brief for Adolph J. Ackerman, as *amicus curiae.*

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MR. JUSTICE BRENNAN delivered the opinion of the Court.

This case is the first contested licensing proceeding to be decided by the Atomic Energy Commission under the Atomic Energy Act of 1954, 68 Stat. 919, 42 U. S. C. § 2011 *et seq.* It presents the question whether the Commission erred in continuing in effect a provisional construction permit which authorizes the petitioner Power Reactor Development Company to construct, but not to operate, a fast-neutron breeder reactor for the generation of electric power. The Court of Appeals for the District of Columbia Circuit set that order aside. 108 U. S. App. D. C. 97, 280 F. 2d 645 (1960). We granted certiorari, 364 U. S. 889 (1960), on petitions of the United States and of Power Reactor Development Company (hereafter PRDC), to decide an important question of the scope of the Commission's power under the Atomic Energy Act of 1954.

Stated more precisely, the question before us is whether the Commission, in issuing a permit for the construction of a facility which will utilize nuclear materials, such as the power reactor presently involved, must make the same definitive finding of safety of operation as it admittedly will have to make before it licenses actual operation of the facility. The Court of Appeals said: "It is undisputed that the Commission must make such a finding when it authorizes operation. The question is whether it must make such a finding when it authorizes construction. In our opinion it must." 108 U. S. App. D. C., at 100, 280 F. 2d, at 648. Petitioners agree that some finding directed to safety of operation must be made at the construction-permit stage of the proceeding, but argue that the Court of Appeals erred in holding that the Commission must have the same degree of certitude at this preliminary point as when it licenses operation. In order to understand how the controversy arises and what is involved in

its resolution, it will be necessary to state the proceedings in the case at some length, and then describe in detail the governing statute and administrative regulations. For the decision of this case ultimately turns on a comparison of what the Commission found with what the statute and regulations require.

The case began on January 7, 1956, when PRDC filed with the Commission (hereafter sometimes referred to as the AEC) an application to construct and operate a developmental power reactor of a relatively new type. This device has two characteristics which distinguish it from other nuclear reactors. First, the neutrons which fly about inside the reactor (to use crude but graphic layman's terminology) and split atoms of fissionable Uranium–235—thus releasing new neutrons and energy in the form of heat—are "fast" neutrons. That is, they travel at a velocity of about 10,000 miles per second, much faster than neutrons in ordinary reactors. Second, this reactor is a "breeder": it has the property of being able to produce about 1.2 times as much fissionable material as it consumes. This result comes about through a sort of modern alchemy; when the neutrons fly outside the inner core of the reactor, which is composed of fissionable U–235, they enter a blanket of nonfissionable U–238. Atoms in this blanket are changed, when struck by a neutron, into Plutonium, itself a fissionable fuel which can be removed from the reactor and be put to possible use in other installations. Thus, the reactor "breeds" Plutonium faster than it uses up U–235. It not only generates energy to produce electric power, it also creates new reactor fuel. This "breeder" effect is attainable because of the use of fast neutrons. Two boron control rods inserted into the reactor are a means designed to reduce its power level at any time. And in addition to these rods, eight more boron rods are suspended by an electromagnet over the reactor; in case the reactivity rises to a danger-

ously high level, these safety rods are intended to drop into the reactor automatically and shut it down immediately. The whole machine is housed in a series of thick concrete, graphite, and steel layers, all underground. Over this entire complex is placed a football-shaped building, enclosed in a two-inch steel shield capable of containing an explosion equal in force to 1,000 pounds of TNT, which is greater than any explosion which any of the experts who testified in this case believes is at all likely to result from an accident in the operation of the reactor. The application, after describing the reactor in much greater detail than this rudimentary summary, went on to provide that the reactor would be located at Lagoona Beach, Mich., on the shores of Lake Erie, about 35 miles from the center of Detroit, Mich., and about 30 miles from the center of Toledo, Ohio.

The Commission took the case under advisement and, on August 4, 1956, despite a report of its Advisory Committee on Reactor Safeguards which was at best noncommittal about the probable safety of the proposed reactor in operation, issued a provisional construction permit without having held public hearings, as the law at that time permitted it to do. This permit was subject to the following condition:

> "The conversion of this permit to a license is subject to submittal by PRDC to the Commission (by amendment of the application) of the complete, final Hazards Summary Report (portions of which may be submitted and evaluated from time to time). The final Hazards Summary Report must show that the final design provides reasonable assurance . . . that the health and safety of the public will not be endangered by operation of the reactor . . . ."

On August 31, 1956, in accordance with the Commission's then existing rules of practice, the respondents in

this Court, International Union of Electrical, Radio, and Machine Workers, United Automobile, Aircraft, and Agricultural Implement Workers of America, and United Papermakers and Paperworkers, petitioned the Commission for permission to intervene and oppose continuation in effect of PRDC's provisional construction permit. The AEC granted permission to intervene on October 8, 1956, and set the case down for a hearing before one of its hearing examiners. Extensive hearings were held between January 8, 1957, and August 7, 1957, and on November 22, 1957, in accordance with the AEC's order setting the case for hearing before him, the examiner, instead of issuing an initial decision and opinion of his own, transferred and certified the record of the hearings to the full Commission for its consideration. Oral argument was had before the Commission on May 29, 1958. On December 10, 1958, the Commission rendered its "Opinion and Initial Decision" continuing PRDC's permit in effect, subject to the same condition recited above. To its opinion were appended extensive findings of fact, including Finding 22, which is of central importance to the decision of this case. That finding reads as follows:

> "22. The Commission finds reasonable assurance in the record that a utilization facility of the general type proposed in the PRDC application and amendments thereto can be constructed and will be able to be operated at the location proposed without undue risk to the health and safety of the public."

Commissioners Vance and Floberg joined in the opinion. Commissioner Graham filed a short concurring opinion agreeing with the Commission's basic safety findings, just quoted, but doing so in much shorter compass than the majority. Commissioners Libby and McCone (the chairman) took no part in the decision. The result of this initial opinion was an order continuing PRDC's provi-

sional construction permit in effect, but containing the same condition which the original permit, issued on August 4, 1956, had contained.

The intervening unions, as was their right, filed detailed exceptions to this initial decision. The Commission fully reconsidered all the contentions and reviewed the evidence presented at the lengthy hearings, with particular attention to the testimony of the scientific experts, several of them members of the Advisory Committee on Reactor Safeguards, who had testified. On May 26, 1959, the Commission issued its "Opinion and Final Decision," dealing with all questions presented in even greater detail and reaffirming its initial decision. The Commission emphasized that "public safety is the first, last, and a permanent consideration in any decision on the issuance of a construction permit or a license to operate a nuclear facility." Even after operation of the reactor is licensed—if it ever is—the Commission, it said, will retain jurisdiction over PRDC's activities to ensure that the highest safety standards are maintained. The opinion went on to examine the suitability of the proposed site, noted that it was near a great population center, and nevertheless concluded that at the present stage there was reasonable assurance that the general type of reactor proposed by PRDC would be safe enough at that location. The Commission pointed out, however, that its action in allowing PRDC to proceed with construction was by its nature tentative and preliminary, and that it was by no means committed to the issuance of an operating license. "PRDC has been on notice since before the first shovel of dirt was moved," it said, "that its construction permit is *provisional* upon further demonstration of many technological and financial facts, including the complete safety of the reactor." A more severe safety test would have to be passed when the reactor was completed, the opinion said, since "[t]he degree of 'reasonable assurance' . . .

that satisfies us . . . for purposes of the *provisional* construction permit would not be the same as we would require in considering the issuance of the *operating* license." The Commission then made new findings of fact, including the following counterpart of its initial Finding 22:

> "22. The Commission finds reasonable assurance in the record, for the purposes of this provisional construction permit, that a utilization facility of the general type proposed in the PRDC Application and amendments thereto can be constructed and operated at the location without undue risk to the health and safety of the public."

All three of the Commissioners who took part in the case joined in this final decision, and the Commission entered its final order continuing in effect the PRDC provisional construction permit, but again subject to the condition that a more extensive safety investigation, and a definitive safety finding, would have to be made before operation was permitted.

The intervening unions, respondents in this Court, then petitioned the Court of Appeals for the District of Columbia Circuit to review and set aside this order of the Commission. Only the final order continuing the permit in effect was drawn in question. No complaint was made of the original *ex parte* grant of the permit in 1956. PRDC intervened in the Court of Appeals in support of the AEC. On June 10, 1960, by a divided vote, a three-judge panel of the Court of Appeals set aside the AEC's order and remanded the case to the Commission. A petition for rehearing *en banc* was denied, two judges dissenting, and we brought the case here.

We turn now to an examination of the statutes and regulations pursuant to which the Commission purported to continue in effect PRDC's construction permit. The

basic provision is § 104b of the Atomic Energy Act of 1954, 42 U. S. C. § 2134 (b), which authorizes the AEC to "issue licenses to persons applying therefor for utilization and production facilities involved in the conduct of research and development activities . . . . In issuing licenses under this subsection, the Commission shall impose the minimum amount of such regulations and terms of license as will permit the Commission to fulfill its obligations under this chapter to promote the common defense and security and to protect the health and safety of the public . . . ." Two things about this section should be emphasized. First, there is no doubt that the term "licenses" as used therein includes the provisional construction permit which PRDC has received. The last sentence of § 185, 42 U. S. C. § 2235, expressly so provides, as we shall soon see. And second, there is also no doubt that construction permits, like all other licenses, can be issued only consistently with the health and safety of the public. But the responsibility for safeguarding that health and safety belongs under the statute to the Commission. And § 104b, especially when read in connection with the general rule-making power conferred by § 161i (3), 42 U. S. C. § 2201 (i) (3), clearly contemplates that the Commission shall by regulation set forth what the public safety requires as a prerequisite to the issuance of any license or permit under the Act.

The issuance of construction permits is subject to § 185, 42 U. S. C. § 2235. That section provides that

> "All applicants for licenses to construct or modify production or utilization facilities shall, if the application is otherwise acceptable to the Commission, be initially granted a construction permit. The construction permit shall state the earliest and latest dates for the completion of the construction or modification. Unless the construction or modification of the facility is completed by the completion date, the

> construction permit shall expire, and all rights thereunder be forfeited, unless upon good cause shown, the Commission extends the completion date. Upon the completion of the construction or modification of the facility, upon the filing of any additional information needed to bring the original application up to date, and upon finding that the facility authorized has been constructed and will operate in conformity with the application as amended and in conformity with the provisions of this chapter and of the rules and regulations of the Commisson, and in the absence of any good cause being shown to the Commission why the granting of a license would not be in accordance with the provisions of this chapter, the Commission shall thereupon issue a license to the applicant. For all other purposes of this chapter, a construction permit is deemed to be a 'license.' "

It is clear from the face of this statute—and all parties agree—that Congress contemplated a step-by-step procedure. First an applicant would have to get a construction permit, then he would have to construct his facility, and then he would have to ask the Commission to grant him a license to operate the facility. This procedure is described in its general outlines in Marks and Trowbridge, Framework for Atomic Industry, 76–77 (1955). See also Green, The Law of Reactor Safety, 12 Vand. L. Rev. 112, 121–127 (1958). The second step of the procedure, the application for and granting of an operating license, is governed by § 182a, 42 U. S. C. § 2232 (a). That provision reads, in pertinent part:

> "In connection with applications for licenses to operate production or utilization facilities, the applicant shall state such technical specifications . . . and such other information as the Commission may, by rule or regulation, deem necessary in order to enable it to find that the utilization or production of special

> nuclear material will be in accord with the common defense and security and will provide adequate protection to the health and safety of the public."

It is clear from this provision that before licensing the operation of PRDC's reactor, the AEC will have to make a positive finding that operation of the facility will "provide adequate protection to the health and safety of the public." What is not clear, and what is at the center of the controversy in this case, is whether the Commission must also have made such a finding when it issued PRDC's construction permit. There is nothing on the face of either § 182 or § 185 which tells us what safety findings must be made before this preliminary step is taken. We know, however, from § 104b that some such finding must be made. For enlightenment on the nature of this finding, both parties urge us to examine the Commission's regulations, and accordingly we proceed to do so.

The crucial regulation for our purposes is the Commission's regulation 50.35, 10 CFR § 50.35:

> "§ 50.35. *Extended time for providing technical information.* Where, because of the nature of a proposed project, an applicant is not in a position to supply initially all of the technical information otherwise required to complete the application, he shall indicate the reason, the items or kinds of information omitted, and the approximate times when such data will be produced. If the Commission is satisfied that it has information sufficient to provide reasonable assurance that a facility of the general type proposed can be constructed and operated at the proposed location without undue risk to the health and safety of the public and that the omitted information will be supplied, it may process the application and issue a construction permit on a provisional basis without the omitted information subject

> to its later production and an evaluation by the Commission that the final design provides reasonable assurance that the health and safety of the public will not be endangered."

This regulation, obviously, elaborates upon and describes in fuller detail the step-by-step licensing procedure contemplated by §§ 182 and 185. It states, pursuant to the authority conferred by §§ 104b and 161i (3), what safety findings shall be required at each stage of the proceeding. There is general agreement that the second safety finding referred to, "that the final design provides reasonable assurance that the health and safety of the public will not be endangered," comports with the requirements of § 182 concerning the issuance of a license to operate. There is also agreement that the regulation's first required safety finding, "that [the AEC] has information sufficient to provide reasonable assurance that a facility of the general type proposed can be constructed and operated at the proposed location without undue risk to the health and safety of the public," is a valid exercise of the rule-making power conferred upon the AEC by statute, and requires that some finding as to safety of operation be made even before a provisional construction permit is granted. The question is whether that first finding must be backed up with as much conviction as to the safety of the final design of the specific reactor in operation as the second, final finding must be.

We think the great weight of the argument supports the position taken by PRDC and by the Commission, that Reg. 50.35 permits the Commission to defer a definitive safety finding until operation is actually licensed. The words of the regulation themselves certainly lean strongly in that direction. The first finding is to be made, by definition, on the basis of incomplete information, and concerns only the "general type" of reactor proposed.

The second finding is phrased unequivocally in terms of "reasonable assurance," while the first speaks more tentatively of "information sufficient to provide reasonable assurance." The Commission, furthermore, had good reason to make this distinction. For nuclear reactors are fast-developing and fast-changing. What is up to date now may not, probably will not, be as acceptable tomorrow. Problems which seem insuperable now may be solved tomorrow, perhaps in the very process of construction itself. We see no reason why we should not accord to the Commission's interpretation of its own regulation and governing statute that respect which is customarily given to a practical administrative construction of a disputed provision. Particularly is this respect due when the administrative practice at stake "involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294, 315 (1933). And finally, and perhaps demanding particular weight, this construction has time and again been brought to the attention of the Joint Committee of Congress on Atomic Energy, which under § 202 of the Act, 42 U. S. C. § 2252, has a special duty during each session of Congress to "conduct hearings in either open or executive session for the purpose of receiving information concerning the development, growth, and state of the atomic energy industry," and to oversee the operations of the AEC. See, *e. g.*, Hearings on Development, Growth, and State of the Atomic Energy Industry, 84th Cong., 2d Sess., p. 106 (1956); Hearings on Development, etc., 85th Cong., 2d Sess., pp. 119–121 (1958); Hearings on Development, etc., 86th Cong., 2d Sess., pp. 103–109, 677–678 (1960); Hearings on Development, etc., 87th Cong., 1st Sess., pp. 29–32 (1961); Hearings on

Governmental Indemnity for Private Licensees and AEC Contractors Against Reactor Hazards, 84th Cong., 2d Sess., pp. 62–65 (1956); A Study of AEC Procedures and Organization in the Licensing of Reactor Facilities, 85th Cong., 1st Sess., pp. 11–14, 100–108 (Joint Comm. Print 1957). No change in this procedure has ever been suggested by the Committee, although it has on occasion been critical of other aspects of the PRDC proceedings not before us. It may often be shaky business to attribute significance to the inaction of Congress, but under these circumstances, and considering especially the peculiar responsibility and place of the Joint Committee on Atomic Energy in the statutory scheme, we think it fair to read this history as a *de facto* acquiescence in and ratification of the Commission's licensing procedure by Congress. Cf., *e. g., Ivanhoe Irrig. Dist.* v. *McCracken,* 357 U. S. 275, 292–294 (1958); *Brooks* v. *Dewar,* 313 U. S. 354, 360–361 (1941). This same procedure has been used in each of the nine instances in which the Commission has granted a provisional construction permit for a developmental nuclear power reactor, *e. g., Yankee Atomic Elec. Co.,* CPPR–5 (AEC 1957), and we hold that it was properly used in this case.

It is plain that the statute and regulations, as so construed and applied, were complied with fully. The Commission did not, as respondents' argument seems at times to suggest, find merely that the construction of the reactor would present no safety problem. The Commission's opinion and findings clearly were deeply concerned about the prospective safety of operation of the proposed reactor. Admitting that on the basis of the facts before it it was unable to make a definitive finding of safety, the Commission nevertheless found—and respondents do not deny that the finding was supported by substantial evidence—that it had information sufficient to provide

reasonable assurance that the general type of reactor proposed could be operated without undue risk to the health and safety of the public. Its Finding 22, which we have quoted, was in the very words of Reg. 50.35, except for the insertion of the phrase, "for the purposes of this provisional construction permit." This phrase was merely declaratory of the nature of the proceeding before the Commission, and in no way denigrated the finding as to safety of operation.

Respondents contend nevertheless that their construction of the statute is compelled by the legislative history. Since the Court of Appeals relied heavily on this history, we have studied it carefully. Two incidents are cited in particular. First, the Joint Committee stated in its report on the bill which became the Atomic Energy Act of 1954, and which when reported contained §§ 182 and 185 in substantially their present shape, that "[s]ection 185 . . . requires the issuance of a license if the construction is carried out in accordance with the terms of the construction permit." S. Rep. No. 1699, 83d Cong., 2d Sess., p. 28 (1954); H. R. Rep. No. 2181, 83d Cong., 2d Sess., p. 28 (1954). The best we can say about this statement, with all deference, is that it must have been inadvertent. Witnesses who appeared before the Joint Committee at the hearings on the bill had made the very complaint that under the words of the bill as proposed a company might invest large sums in construction of a reactor, and then be denied the right to operate it. This situation, they claimed, was unfair, and would substantially discourage the private investment in the field of atomic power which it was one of the bill's major purposes to stimulate. See Hearings before the Joint Committee on Atomic Energy on the Bill to Amend the Atomic Energy Act of 1946, 83d Cong., 2d Sess., Pt. I., pp. 113, 119 (statement of Paul W. McQuillen, representing

the Dow Chemical-Detroit Edison and Associates atomic power development project, predecessors of PRDC); pp. 226–227 (statement of E. H. Dixon, chairman of the Committee on Atomic Power of the Edison Electric Institute and president of Middle-South Utilities, Inc.); p. 417 (statement of the Special Committee on Atomic Energy of the Association of the Bar of the City of New York). In spite of these pleas, however, the bill was unchanged. Industry spokesmen renewed the argument the next year when they sought unsuccessfully to have § 185 amended. Hearings on Development, etc., 84th Cong., 1st Sess., pp. 258, 261 (1955). Even a glance at § 185 suffices to show that issuance of a construction permit does not make automatic the later issuance of a license to operate. For that section sets forth three conditions, in addition to the completion of the construction, which must be met before an operating license is granted: (1) filing of any additional information necessary to bring the application up to date—information which will necessarily in this case include detailed safety data concerning the final design of petitioner's reactor; (2) a finding that the reactor will operate in accordance with the act and regulations—*i. e.*, that the safety and health of the public will be adequately protected—and with the construction permit itself, which is expressly conditioned upon a full investigation and finding of safety before operation is permitted; and (3) the absence of any good cause why the granting of a license to operate would not be in accordance with the Act—*e. g.*, a showing by respondent unions, who will have full rights to appear and contest the issuance of an operating license, that the reactor may not be reasonably safe.

Respondents rely more heavily on another event during the debates on this bill on the floor of the Senate. Senator Humphrey, an opponent of the bill, expressed a

desire that it be made clear that "the construction permit is equivalent to a license," and that "the revised section 182 on license application . . . appl[ies] directly to construction permits." 100 Cong. Rec. 12014 (July 26, 1954). Senator Hickenlooper, floor manager of the bill and the ranking Senate member of the Joint Committee on Atomic Energy, indicated that he agreed with this construction of §§ 182 and 185. Senator Humphrey wanted these matters made clear because he feared that otherwise a construction permit could be easily obtained and substantial investment made in construction, and then the Commission would feel obliged, perhaps under pressure, to issue an operating license in order that this investment should not go to waste. The language used in the exchange between Senators Humphrey and Hickenlooper is susceptible, if read broadly and out of context, of the construction which respondents attribute to it, namely, that no § 185 construction permit may be issued unless the Commission has made the same safety-of-operation finding which it must make under § 182a before allowing actual operation. But the context of the exchange makes it clear that no such implication was intended by the participants. Senator Humphrey's statements were made during the consideration of an amendment which he had himself proposed on July 16. This amendment would have added the following clause to the end of § 185:

> "and no construction permit shall be issued by the Commission until after the completion of the procedures established by section 182 for the consideration of applications for licenses under this act."

Upon being assured by Senator Hickenlooper that an earlier amendment which Senator Hickenlooper himself had offered to § 189 took care of the problem, Senator Humphrey withdrew his proposal. This amendment to

§ 189, which was adopted, was concerned solely with hearings and judicial review. Plainly Senator Humphrey's concern was not with the substantive safety findings necessary to the issuance of a construction permit, but rather with the procedural safeguards with which that issuance should, in his opinion, be surrounded. The reference to the application of § 182 to construction permits was made not with § 182a in mind—that subsection sets out the substantive safety standard for the issuance of an operating license—but rather with a view to the application of § 182b, about which Senator Humphrey particularly asked Senator Hickenlooper during the exchange on the floor referred to, and which merely provides that notice of a license application must be published and given to any appropriate regulatory agencies, a procedural requirement which was fully satisfied in this case. This interpretation of the meaning of Senator Humphrey's remarks is borne out by a statement of Representative Holifield, who, together with Representative Price, had dissented from the favorable report of the Joint Committee, precisely because, *inter alia,* under the bill as reported a construction permit did not have to be preceded by the same *procedures* as an operating license. See S. Rep. No. 1699, 83d Cong., 2d Sess., p. 123 (1954); H. R. Rep. No. 2181, 83d Cong., 2d Sess., p. 123 (1954). Representative Price wanted the same amendment added to § 185 which Senator Humphrey proposed, and he characterized this amendment as necessary to ensure "that the same procedural safeguards in the case of licenses be applied to construction permits." 100 Cong. Rec. 10959 (July 19, 1954). We think, therefore, that Senator Humphrey's statement referred only to procedural prerequisites of construction permits, and had nothing to do with the substantive safety considerations which this case involves. If there were any doubt about this matter, the

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consistent administrative practice, made known to Congress many times and never disturbed by it, would dictate this conclusion.

The Court of Appeals put forward as an alternative basis for its decision the holding that under the law the Commission may not authorize the construction of a reactor near a large population center without "compelling reasons" for doing so, 108 U. S. App. D. C., at 103–104, 280 F. 2d, at 651–652, and that no such reasons had been found by the AEC in this case. It is not clear whether respondents have abandoned that contention in this Court, and it is likewise uncertain whether they ever presented it to the Commission, a step which would ordinarily be a prerequisite to its consideration by the Court of Appeals. In any event, the position is without merit. The statute and regulations say nothing about "compelling reasons." Of course Congress (and the Commission, too, for that matter) had the problem of safety uppermost in mind, and of course that problem is most acute when a reactor, potentially dangerous, is located near a large city. But the Commission found reasonable assurance, for present purposes, that the reactor could be safely operated at the proposed location, and that is enough to satisfy the requirements of law. The Commission recognized that the site and all its properties are among the most important ingredients of a finding of safety *vel non*. It considered the site along with all the other relevant data. There is no warrant in the statute for setting aside the Commission's conclusion.

We hold, therefore, that the Court of Appeals erred in setting aside the order of the AEC continuing PRDC's provisional construction permit in effect. We deem it appropriate to add a few words concerning the fears of nuclear disaster which respondents so urgently place before us. The respondents' argument is tantamount to

an insistence that the Commission cannot be counted on, when the time comes to make a definitive safety finding, wholly to exclude the consideration that PRDC will have made an enormous investment. The petitioners concede that the Commission is absolutely denied any authority to consider this investment when acting upon an application for a license for operation. PRDC has been on notice long since that it proceeds with construction at its own risk, and that all its funds may go for naught. With its eyes open, PRDC has willingly accepted that risk, however great. No license to operate may be issued to PRDC until a full hazards report has been filed, until the AEC's Advisory Committee on Reactor Safeguards makes a full investigation and public report on safety to the Commission, until the Commission itself, after notice and hearings at which respondents, if they desire, may be heard, has made the safety-of-operation finding required by § 182a and Reg. 50.35, and until the other requirements of § 185 have been met. It may be that an operating license will never be issued. If one is, that will not be the end of the matter. The respondents may have judicial review. Moreover, the Commission's responsibility for supervision of PRDC continues. For, under Reg. 50.57, 10 CFR § 50.57, operation at full power (100,000 electric kilowatts) will not be permitted until several steps of gradually increasing operation have been successfully mastered, with a full public hearing at each step, and no further advance permitted without the AEC's being fully satisfied that a step-up will meet the high safety standards imposed by law. This is the multi-step scheme which Congress and the Commission have devised to protect the public health and safety. We hold that the actions of the Commission up to now have been within the Congressional authorization. We cannot assume that the Commission will exceed its powers, or that these

many safeguards to protect the public interest will not be fully effective.

Accordingly, the judgment is reversed and the causes are remanded to the Court of Appeals for further proceedings consistent with this opinion.

Reversed and remanded.

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

The only requirement in the Act for a finding that the facilities involved here "will provide adequate protection to the health and safety of the public" is found in § 182 which is headed "License Applications." [1] By the terms of § 185 a construction permit is, apart from the requirements of § 185, "deemed to be a 'license.' " [2] Section 185 governs applications for construction permits. It has no separate or independent standards for safety, no specific requirement for a finding on "safety." If the facility is finished and will operate "in conformity with" the Act, the license issues "in the absence of any good cause being shown to the Commission why the granting of a license would not be in accordance with the provisions of" the Act. As the Committee Report stated, "Section 185 . . . *requires* the issuance of a license if the construction is carried out in accordance with the terms of the construction permit." [3] In other words, the finding on "safety," if it is to be made (as it assuredly must be), must be made at the time the construction permit is issued or not at all.

While in the present case the Commission "finds reasonable assurance in the record, for the purposes of this provisional construction permit," that the facility can be operated "without undue risk to the health and safety of

[1] See Appendix to this opinion, *post*, p. 419.

[2] *Ibid.*

[3] 1 Leg. Hist. 1024. (Emphasis added.)

the public," it also finds that "It has not been positively established" that a facility of this character "can be *operated* without a credible possibility of releasing significant quantities of fission products to the environment." The Commission added that there was "reasonable assurance" before the date when the facility went into operation that research and investigation would definitely establish "whether or not the reactor proposed by Applicant can be so operated."

Plainly these are not findings that the "safety" standards have been met. They presuppose—contrary to the premise of the Act—that "safety" findings can be made *after construction is finished.* But when that point is reached, when millions have been invested, the momentum is on the side of the applicant, not on the side of the public. The momentum is not only generated by the desire to salvage an investment. No agency wants to be the architect of a "white elephant." Congress could design an Act that would give a completed structure that momentum. But it is clear to me it did not do so.

When this measure was before the Senate, Senator Humphrey proposed an amendment that read, "no construction permits shall be issued by the Commission until after the completion of the procedures established by section 182 for the consideration of applications for licenses under this act." [4] That amendment would plainly have made the present findings inadequate, for they leave the issue of "safety" wholly in conjecture and unresolved.

Senator Humphrey explained his amendment as follows: [5]

> "The purpose of the amendment when it was prepared was to make sure that the construction of a facility was not permitted prior to the authorization

[4] 3 Leg. Hist. 3759.

[5] *Ibid.*

of a license, because had that been done what it would have amounted to would be getting an investment of a substantial amount of capital, which surely would have been prejudicial in terms of the Commission issuing the license. In other words, if the Commission had granted the construction permit for some form of nuclear reactor, and then the question of a license was not fully resolved, surely there would have been considerable pressure, and justifiably so, for the Commission to have authorized the license once it had authorized the permit for construction.

"The chairman of the committee tells me he has modified certain sections by the committee amendments to the bill, of which at that time I was not aware. The chairman indicates to me that under the terms of the bill, as amended, the construction permit is equivalent to a license. In other words, as I understand, under the bill a construction permit cannot be interpreted in any other way than being equal to or a part of the licensing procedure. Is that correct?"

His question was answered by Senator Hickenlooper, who was in charge of the bill: [6]

"A license and a construction permit are equivalent. They are the same thing, and one cannot operate until the other is granted.

"The same is true with reference to hearings. Therefore, we believe, and we assure the Senator, that the amendment is not essential to the problem which he is attempting to reach."

Senator Humphrey then asked if § 182 applied "directly to construction permits." [7] Senator Hickenlooper

[6] *Ibid.*

[7] *Ibid.*

replied "Yes." [8] Senator Humphrey accordingly withdrew his amendment.[9]

This legislative history makes clear that the time when the issue of "safety" must be resolved is before the Commission issues a construction permit. The construction given the Act by the Commission (and today approved) is, with all deference, a light-hearted approach to the most awesome, the most deadly, the most dangerous process that man has ever conceived.[10]

APPENDIX TO OPINION OF MR. JUSTICE DOUGLAS.

Section 182a provides in relevant part:

"LICENSE APPLICATIONS.—

"a. Each application for a license hereunder shall be in writing and shall specifically state such information as the Commission, by rule or regulation, may determine to be necessary to decide such of the technical and financial qualifications of the applicant, the character of the applicant, the citizenship of the applicant, or any other qualifications of the applicant as the Commission may deem appropriate for the license. In connection with applications for licenses to operate production or utilization facilities, the applicant shall state such technical specifications, including information of the amount, kind,

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[8] *Ibid.*

[9] *Ibid.*

[10] See Biological and Environmental Effects of Nuclear War, Summary-Analysis of Hearings, June 22–26, 1959, Joint Committee on Atomic Energy, 86th Cong., 1st Sess.; Fallout From Nuclear Weapons Tests, Summary-Analysis of Hearings, May 5–8, 1959, Joint Committee on Atomic Energy, 86th Cong., 1st Sess. For an analysis of the administrative law techniques used by the Commission in this case, see Jalet, A Study in Administrative Law, 47 Georgetown L. J. 47 (1958).

and source of special nuclear material required, the place of the use, the specific characteristics of the facility, and such other information as the Commission may, by rule or regulation, deem necessary in order to enable it to find that the utilization or production of special nuclear material will be in accord with the common defense and security and will provide adequate protection to the health and safety of the public. Such technical specifications shall be a part of any license issued."

Section 185 provides:

"CONSTRUCTION PERMITS.—All applicants for licenses to construct or modify production or utilization facilities shall, if the application is otherwise acceptable to the Commission, be initially granted a construction permit. The construction permit shall state the earliest and latest dates for the completion of the construction or modification. Unless the construction or modification of the facility is completed by the completion date, the construction permit shall expire, and all rights thereunder be forfeited, unless upon good cause shown, the Commission extends the completion date. Upon the completion of the construction or modification of the facility, upon the filing of any additional information needed to bring the original application up to date, and upon finding that the facility authorized has been constructed and will operate in conformity with the application as amended and in conformity with the provisions of this Act and of the rules and regulations of the Commission, and in the absence of any good cause being shown to the Commission why the granting of a license would not be in accordance with the provisions of this Act, the Commission shall thereupon issue a license to the applicant. For all other purposes of this Act, a construction permit is deemed to be a 'license.' "

Syllabus.

LOTT ET AL. *v.* UNITED STATES.

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

No. 238. Argued April 18, 1961.—
Decided June 12, 1961.

Having been indicted jointly with two other defendants in a Federal District Court for willfully attempting and conspiring to evade the federal income taxes of their corporate employer, petitioners entered pleas of *nolo contendere*. The Court accepted their pleas but postponed pronouncement of judgment pending conclusion of the jury trial of the other two defendants. After conclusion of that trial about three months later, the Court orally pronounced its judgment convicting petitioners and sentencing them to imprisonment. A formal judgment was signed and filed with the clerk three days later. The next day, petitioners filed separate motions in arrest of judgment, which were denied 20 days later. Two days after such denial, petitioners filed notices of appeal. *Held:* The appeals were not untimely under Rule 37 (a)(2) of the Federal Rules of Criminal Procedure—regardless of whether that Rule is modified by Rule 34—since it was the judgment of conviction and sentence, not the pleas of *nolo contendere* and their acceptance, that constituted the "determination of guilt" within the meaning of Rule 34, such motions were made within 5 days after that determination, as required by Rule 34, and the notices of appeal were filed within 10 days after denial of such motions, as required by Rule 37 (a)(2). Pp. 422–427.

280 F. 2d 24, reversed and cause remanded.

C. W. Wellen argued the cause for petitioners. With him on the brief were *John H. Crooker* and *Joe S. Moss.*

Bruce J. Terris argued the cause for the United States. With him on the briefs were former *Solicitor General Rankin, Solicitor General Cox, Assistant Attorney General Rice, Assistant Attorney General Oberdorfer, Meyer Rothwacks* and *Lawrence K. Bailey.*

MR. JUSTICE WHITTAKER delivered the opinion of the Court.

This case is concerned with the timeliness of an appeal from a judgment of conviction and sentence in a criminal case under Rule 37 (a)(2) of the Federal Rules of Criminal Procedure.[1]

These three petitioners, having been jointly indicted, with two others, on five counts in the United States District Court for the Southern District of Texas for willfully attempting and conspiring to evade the federal income taxes of their corporate employer,[2] entered, and the court accepted, pleas of *nolo contendere* on March 17, 1959. But the court decided that pronouncement of its judgment should await conclusion of the impending jury trial of the other two defendants.[3] Soon after the con-

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[1] "RULE 37. TAKING APPEAL; AND PETITION FOR WRIT OF CERTIORARI.

"(a) Taking Appeal to a Court of Appeals.

. . . . . .

"(2) *Time for Taking Appeal.* An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion. . . ."

[2] The corporate employer and taxpayer was Farnsworth & Chambers Co., Inc. Petitioners were employee-officers of that corporation, and collectively owned approximately 7 percent of its issued and outstanding capital stock. The first four counts of the indictment charged willful attempt to evade the corporation's income taxes for the years 1951, 1952, 1953 and 1954, respectively, and the fifth count charged a conspiracy to commit the four substantive offenses charged.

[3] The two codefendants who stood trial were Richard A. Farnsworth, Sr., and his son. They owned a major part of the corporation's capital stock. Their trial, which began on April 6, 1959, and continued through June 9, resulted in a verdict of acquittal of the son on all counts, and a failure of the jury to agree on any of the counts as to the father.

clusion of that rather protracted trial, the court, on June 19, 1959, orally pronounced its judgment convicting petitioners and sentencing them to imprisonment.[4] Three days later, on June 22, formal judgment was prepared, signed by the judge and filed with the clerk. The next day, June 23, petitioners filed their separate "motion[s] in arrest of judgment." [5] Those motions were denied on July 13. Two days later, on July 15, petitioners filed their separate notices of appeal from the judgment to the United States Court of Appeals for the Fifth Circuit.[6]

On the Government's motion, that court dismissed the appeals as untimely under Rule 37 (a)(2). 280 F. 2d 24. It held, in effect, that, although there is no such express limitation in the Rules, the provisions of Rule 34 [7] impliedly modify and limit the provisions of Rule 37 (a)(2). And it concluded that, although "motion[s] . . . in arrest of judgment" had, in fact, "been made within the 10-day period" after entry of the judgment appealed from (Rule 37 (a)(2)), it cannot be so regarded under these Rules because the tender by petitioners and acceptance by the court of the pleas of *nolo contendere* on March 17 constituted the "determination

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[4] Petitioners were sentenced to imprisonment—Blocker for three years, Lott and Frazier for two years, on each count, the sentences to run concurrently, and each was fined $20,000.

[5] Each of the motions in arrest prayed, *inter alia*, "that the judgment and sentence . . . be arrested and set aside, that the indictment . . . be dismissed, and that [there] be granted such other relief as justice may demand."

[6] Actually, only Lott appealed on July 15. Blocker and Frazier appealed two days later, on July 17.

[7] "*Rule 34. Arrest of Judgment.*

"The court shall arrest judgment if the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged. The motion in arrest of judgment shall be made within 5 days after determination of guilt or within such further time as the court may fix during the 5-day period."

of [their] guilt," and, inasmuch as the motions in arrest were not made "within 5 days after [that] *determination of guilt*" as required by Rule 34, it followed that, to be timely under Rule 37 (a)(2), the appeals had to "be taken within 10 days after entry of the judgment or order appealed from" (Rule 37 (a)(2)), or by June 30 or July 2—depending upon whether it was the oral pronouncement of June 19 or the formal entry of June 22 that constituted the judgment—and not "within 10 days after entry of the order denying the motion." (Rule 37 (a)(2).) 280 F. 2d, at 27–28. Because of a conflict between the circuits upon the question presented [8] and of its importance to the proper administration of the criminal Rules, we granted certiorari. 364 U. S. 813.

Buttressed by *Lujan* v. *United States,* 204 F. 2d 171 (C. A. 10th Cir.), and *Smith* v. *United States,* 273 F. 2d 462 (C. A. 10th Cir.), holding, on similar facts, that Rule 37 (a)(2) alone and unaffected by any other Rule prescribes the time within which an appeal must be taken to a Court of Appeals in a criminal case, and further buttressed by their belief that this Court, too, so held, even if *sub silentio,* in exercising jurisdiction, under facts virtually identical to those here, in *Sullivan* v. *United States,* 348 U. S. 170, petitioners point to the facts that Rule 37 (a)(2) is captioned "*Time for Taking Appeal*"; that it is the only Rule that purports to deal with the subject; that it does not speak of motions filed within five days, nor after "verdict or finding of guilty" (Rule 33), nor after "determination of guilt" (Rule 34)—

[8] In accord with the decision below is *United States* v. *Bertone,* 249 F. 2d 156 (C. A. 3d Cir.). And see *O'Neal* v. *United States,* 264 F. 2d 809 (C. A. 5th Cir.); *Drown* v. *United States,* 198 F. 2d 999 (C. A. 9th Cir.); *Godwin* v. *United States,* 185 F. 2d 411 (C. A. 8th Cir.). To the contrary are *Lujan* v. *United States,* 204 F. 2d 171 (C. A. 10th Cir.); *Smith* v. *United States,* 273 F. 2d 462 (C. A. 10th Cir.); and see *Sullivan* v. *United States,* 212 F. 2d 125 (C. A. 10th Cir.), affirmed, 348 U. S. 170.

whatever that term may mean—and makes no reference to timeliness, under any other Rule, of the motions of which it speaks, but that it simply says in plain and unmistakable language that "An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion . . . in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion." Then, after pointing to the admitted fact that their motions in arrest were "made within the 10-day period"—actually within three days—after entry of the judgment appealed from, and that they appealed on the second day after their motions were denied, petitioners strenuously insist that their appeals were timely. They contend that to hold their appeals to have been untimely, in these circumstances, would be to mutilate the plain language of Rule 37 (a)(2) and to make of it a trap even for the wary—including their experienced and competent counsel who were doing their best to protect petitioners' rights of appeal. And they insist that such a snare should not be permitted to deprive one of the valuable right of an appeal upon which his liberty, or even his life, may well depend.

Though we are impressed by this demonstration and argument, as also by the legalisms of the Government's countervailing argument, and although recognizing, as we do, the obscurity, if not inconsistency, in these Rules that has been exposed by this case, we need not here decide whether Rules 33 and 34 modify Rule 37 (a)(2) so as to limit the time which it specifies for the taking of an appeal—but may and should leave that problem and its kindred ones, brought to the fore in this case, for resolution by the rule-making process,[9] *United States* v. *Robin-*

[9] In light of the confusion that has arisen under these Rules, as exposed by this case, it is hoped that those who advise the Court

son, 361 U. S. 220—for we have concluded that it was the judgment of conviction and sentence, not the tender and acceptance of the pleas of *nolo contendere,* that constituted the "determination of guilt" within the meaning of Rule 34. And, inasmuch as the motions in arrest were "made within 5 days after [that] determination of guilt," as required by Rule 34, and thus, in any view, were also "made within the 10-day period" after entry of the judgment appealed from, as required by Rule 37 (a)(2), the appeal, taken "within 10 days after entry of the order denying the motion," was timely.

Although it is said that a plea of *nolo contendere* means literally "I do not contest it," *Piassick* v. *United States,* 253 F. 2d 658, 661, and "is a mere statement of unwillingness to contest and no more," *Mickler* v. *Fahs,* 243 F. 2d 515, 517, it does admit "every essential element of the offense [that is] well pleaded in the charge." *United States* v. *Lair,* 195 F. 47, 52 (C. A. 8th Cir.). Cf. *United States* v. *Frankfort Distilleries,* 324 U. S. 293, 296. Hence, it is tantamount to "an admission of guilt for the purposes of the case," *Hudson* v. *United States,* 272 U. S. 451, 455, and "nothing is left but to render judgment, for the obvious reason that in the face of the plea no issue of fact exists, and none can be made while the plea remains of record," *United States* v. *Norris,* 281 U. S. 619, 623. Yet the plea itself does not constitute a conviction nor hence a "determination of guilt." It is only a confession of the well-pleaded facts in the charge. It does not dispose of the case. It is still up to the court "to render judgment" thereon. *United States* v. *Norris, supra,* at 623. At any time before sentence is imposed—*i. e.,* before the pronouncement of judgment—the plea may

with respect to the exercise of its rule-making powers—more particularly of course the Judicial Conference of the United States (28 U. S. C. § 331) and the Advisory Committee on Federal Rules of Criminal Procedure—will give these problems their early attention.

be withdrawn, with the consent of the court. Rule 32 (d), Fed. Rules Crim. Proc. Necessarily, then, it is the judgment of the court—not the plea—that constitutes the "determination of guilt." Apart from the opinion below, we have not been cited to any case, and have found none, that holds or even intimates the contrary.

In view of this disposition of the jurisdictional question, we need not decide petitioners' alternative contentions that their motions in arrest should be treated as motions under Rule 12 (b)(2) of the Federal Rules of Criminal Procedure (see *Finn* v. *United States,* 256 F. 2d 304, 306 (C. A. 4th Cir.); *Hotch* v. *United States,* 208 F. 2d 244, 250 (C. A. 9th Cir.); *United States* v. *Holmes,* 110 F. Supp. 233, 234 (D. C. S. D. Tex.)), or as motions to vacate sentences under 28 U. S. C. § 2255 (see *Marteney* v. *United States,* 216 F. 2d 760 (C. A. 10th Cir.); *Finn* v. *United States, supra*).

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

Reversed and remanded.

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

The Court characterizes "determination of guilt," as used in Rule 34,[1] by the significant phrase, "whatever that term may mean." It then finds that the acceptance of a *nolo contendere* plea is not such a determination. I submit that this Court has held that acceptance of such a plea is a "determination of guilt," and that today's deci-

[1] Rule 34 states in pertinent part that "[t]he motion in arrest of judgment shall be made within 5 days after determination of guilt or within such further time as the court may fix during the 5-day period."

sion is not only contrary to prior cases, but is also out of tune with the long-accepted practice of both federal and state courts. Believing that it will result in such confusion as to the requirements of our Rules that the administration of criminal justice will be adversely affected, I must respectfully dissent.

At the time petitioners Blocker and Frazier offered their pleas (March 17), the Government objected to their acceptance by the court, as it did when Lott offered his (March 20). The court heard counsel and warned the parties of the seriousness of the charge, *i. e.*, that the charge was willful tax avoidance, that the plea was voluntarily made without promises, and that the sentence might be five years' confinement in addition to a large fine. After being assured by each of the parties that he wished to enter his plea, the court accepted them. Orders were entered in the minutes of the court as to each defendant, accepting the pleas and directing that a "pre-sentence investigation" be undertaken "for sentence at conclusion of entire case." The delay as to sentence was occasioned by the awaited trial of two additional defendants who had pleaded not guilty. The record shows that on June 19, after that trial was concluded (one defendant being acquitted and the other having a hung jury), petitioners appeared in court "on the criminal action docket *for sentence* . . . ." (Emphasis added.) The court, in addressing the parties, said, "[a]ll three of you have entered a plea of nolo contendere, and *that is equivalent to a plea of guilty.*" (Emphasis added.) Neither counsel nor the parties made any comment on this characterization of their pleas. Thereafter, petitioners and their counsel made statements in mitigation, after which sentence was pronounced. At no time were any motions made for permission to withdraw the pleas. On June 22, the formal judgments and commitments on the sentences were entered and each petitioner filed a motion in arrest

of judgment on the next day. It is these motions that the Court of Appeals held should have been filed within five days of the acceptance of the pleas of *nolo contendere* in March. The Court, however, holds that the crucial date on which the "determination of guilt" was made was the day of the judgment of conviction and sentence.[2] Since the motions in arrest came within five days thereafter, the Court says they were timely under Rule 34, as were the appeals that followed, under Rule 37 (a)(2).[3]

Rule II (2) of the Criminal Appeals Rules, 292 U. S. 661, 662, the predecessor of present Rule 34, stated that "motions in arrest of judgment . . . shall be made within three (3) days after verdict or finding of guilt." Certainly "verdict" referred to a jury verdict of guilt. A plea of guilty has always been considered the equivalent of a jury finding of guilty. See *United States* v. *Norris,* 281 U. S. 619 (1930); *United States* v. *Bradford,* 194 F. 2d 197. The same is true of a plea of *nolo contendere.* Our cases have long and consistently held that, "like the plea of guilty, it is an admission of guilt for the purposes of the case." *Hudson* v. *United States,* 272 U. S. 451, 455 (1926). As this Court said in *United States* v. *Norris,*

[2] Whether this date is June 19, when the court orally pronounced sentence, or June 22, when the court formally entered judgments and commitments, is not made clear for, under the Court's rationale, these appeals would be timely if either date were considered that of the "determination of guilt."

[3] While the Court does not place its decision solely on the language of Rule 37 (a)(2), it is well to note that under that Rule an appeal must be taken "within ten days after entry of the judgment." If, however, a motion "in arrest of judgment has been made within the 10-day period," the appeal period is tolled until the motion is overruled. Petitioners argue that since their motions in arrest were filed within the "10-day period" subsequent to judgment and were not overruled until July 13, their appeals (filed July 17) are timely. I assume that the Court considers this contention—making Rule 34 mere surplusage—entirely untenable since it specifically refuses to pass upon it.

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supra, after its entry, "the plea of *nolo contendere,* upon that question [of guilt or innocence] and for that case, was as conclusive as a plea of guilty would have been. . . . The court was no longer concerned with the question of guilt, but only with the *character and extent of the punishment.* . . . The remedy of the accused . . . was to withdraw, by leave of court, the plea of *nolo contendere* . . . ." At p. 623. (Emphasis added.)

Rule 34, the successor to Rule II (2), is likewise clear and unambiguous—it says the motion must be filed within five days of "determination of guilt," not the time of judgment or sentence. The Court today, however, rewrites the Rule by holding that the judgment date is the controlling one. "[I]t is the judgment of the court . . . that constitutes the 'determination of guilt.' " *Ante,* p. 427. It has, however, long been recognized that determination of guilt and entry of judgment are disparate. *United States* v. *Norris, supra;* Fed. Rules Crim. Proc., 32 (b). If the framers of the Rules had intended to have the time for filing the motion in arrest run from the date of judgment, they would have said so. Instead they said that Rule 34 *"continues existing law* except that it enlarges the time for making motions in arrest of judgment from 3 days to 5 days. See Rule II (2) of Criminal Appeals Rules, 292 U. S. 661."[4] (Emphasis added.) "Existing law" did not allow motions in arrest unless made within three days of "verdict or finding of guilt."

The majority notes petitioners' argument that *Sullivan* v. *United States,* 348 U. S. 170 (1954), supports today's decision "even if *sub silentio.*" With due deference, I say it does not. No question of jurisdiction was raised or considered in that case, either in the Court of Appeals

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[4] Notes of Advisory Committee on Rules, 18 U. S. C. (1958 ed.), at p. 3428.

or in this Court.[5] The case dealt solely with the merits of motions to dismiss and to withdraw a plea of *nolo contendere* under Rule 32 (d) after sentence.

The Court attempts to bolster its decision by noting that a *nolo contendere* plea "does not constitute a conviction," that it "does not dispose of the case" and that "[i]t is still up to the court 'to render judgment' thereon." However, these statements are just as true when a guilty plea is accepted or the jury returns a verdict of guilty. They certainly were equally true under former Rule II (2). The judgment sentencing and committing the defendant in each of these instances would still have to be entered. In actual practice, then, nothing more is left to be done by the court after accepting a *nolo contendere* plea than is necessary after accepting a guilty plea or after a jury returns a verdict of guilty. In each of the three situations, guilt has been determined upon the acceptance by the court of the respective pleas or of the verdict of the jury. In each case, motions to withdraw the pleas or to set aside the verdict may be made, and might be granted, but their availability does not alter the fact that, until any such motion is granted, there has been a determination of guilt.

It appears rather unseemly to me for the Court to enlarge, through judicial decision, the time for filing motions in arrest and, in consequence, that for taking an appeal. Only last Term, we said in *United States* v. *Robinson,* 361 U. S. 220, 229 (1960), that this should be effected "through the rule-making process . . . ." As was pointed out there, Rule 45 (b) specifically provides that "the court may not enlarge the period for taking any

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[5] Petitioner's plea of *nolo contendere* was entered on April 8 and immediately accepted by the court. His motion in arrest of judgment was filed on May 29 and denied on June 23. The District Court gave no reason for its denial. The appeal was filed June 23.

action under Rules 33, 34 and 35, except as otherwise provided in those rules, or the period for taking an appeal." The Court has, by today's opinion, enlarged the time provided in these Rules, contrary to their express provision, contrary to our prior cases, and contrary to the long-established practice at the Bar. In so doing, it places these Rules in a state of utter confusion, and must thereby surely drive the Bar and the trial courts to procedural distraction. I would affirm.

RECK *v.* PATE, WARDEN.

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

No. 181. Argued April 19, 1961.—Decided June 12, 1961.

Petitioner, then a mentally retarded 19-year-old youth with no criminal record, was arrested in 1936 on suspicion of stealing bicycles. After being held virtually incommunicado and interrogated by groups of police officers for nearly four days while sick and faint, inadequately fed, without a hearing and without the advice of counsel, family or friends, he confessed to participation in a murder. At his trial in an Illinois State Court for murder, his two written confessions were admitted in evidence over his timely objection, and he was convicted and sentenced to prison for 199 years. *Held:* On the record in this case, petitioner's confessions were coerced, and the State violated the Due Process Clause of the Fourteenth Amendment by using them as evidence in his trial. Pp. 433–444.

274 F. 2d 250, judgment vacated and case remanded.

Donald Page Moore argued the cause for petitioner. With him on the brief was *Anthony Bradley Eben.*

William C. Wines, Assistant Attorney General of Illinois, argued the cause for respondent. With him on the brief were *William G. Clark,* Attorney General, and *Raymond S. Sarnow* and *A. Zola Groves,* Assistant Attorneys General.

MR. JUSTICE STEWART delivered the opinion of the Court.

On the night of January 2, 1936, Dr. Silber C. Peacock, a Chicago physician, left his Edgewater Beach apartment in response to an emergency telephone call to attend a sick child. He never returned. The next day his lifeless body was found in his automobile on a Chicago street. It was apparent that he had been brutally murdered. On Wednesday, March 25, 1936, the petitioner,

Emil Reck, and three others were arrested by the Chicago police on suspicion of stealing bicycles. Late the following Saturday afternoon Reck confessed to participation in the murder of Dr. Peacock. The next day he signed another written confession. At Reck's subsequent trial in the Criminal Court of Cook County, Illinois, the two confessions were, over timely objection, received in evidence against him. The jury found Reck guilty of murder, and he was sentenced to prison for a term of 199 years.

The conviction was affirmed by the Illinois Supreme Court, *People* v. *Reck,* 392 Ill. 311, 64 N. E. 2d 526. Several years later Reck filed a petition under the Illinois Post-Conviction Hearing Act, alleging that his confessions had been procured by coercion and that their use as evidence at his trial had, therefore, violated the Due Process Clause of the Fourteenth Amendment.[1] After a hearing, the Criminal Court of Cook County denied relief. The Supreme Court of Illinois affirmed the Criminal Court's finding that due process had not been violated at Reck's trial. *Reck* v. *People,* 7 Ill. 2d 261, 130 N. E. 2d 200. This Court denied certiorari "without prejudice to an application for a writ of habeas corpus in an appropriate United States District Court." *Reck* v. *Illinois,* 351 U. S. 942.

Reck then filed a petition for habeas corpus in the United States District Court for the Northern District of Illinois. The writ issued, and at the hearing the District Court received in evidence the transcripts of all relevant proceedings in the Illinois courts.[2] In an opin-

[1] So far as the record shows, this was the first time after the trial that petitioner raised this issue.

[2] The transcripts of the pre-trial sanity proceedings, of the proceedings at the hearing on the admissibility of the confessions conducted by the trial judge outside the presence of the jury, of the trial proceedings in the presence of the jury, and of the proceedings at the post-conviction hearing.

ion reviewing in detail the circumstances surrounding Reck's confession, the District Court held "the Due Process Clause not violated in the instant case." 172 F. Supp. 734. The Court of Appeals for the Seventh Circuit affirmed, one judge dissenting, 274 F. 2d 250, and we granted certiorari, 363 U. S. 838. The only question presented is whether the State of Illinois violated the Due Process Clause of the Fourteenth Amendment by using as evidence at Reck's trial confessions which he had been coerced into making.

The question whether there has been a violation of the Due Process Clause of the Fourteenth Amendment by the introduction of an involuntary confession is one which it is the ultimate responsibility of this Court to determine. See *Malinski* v. *New York,* 324 U. S. 401, 404; *Thomas* v. *Arizona,* 356 U. S. 390, 393; *Watts* v. *Indiana,* 338 U. S. 49, 51–52. After thoroughly reviewing the record in this case, we are satisfied that the district judge's summary of the undisputed facts is accurate and complete. Neither in brief nor oral argument did the respondent take issue with these findings. No useful purpose would be served by attempting to paraphrase the district judge's words:

> ". . . Emil Reck was at the time of this horrible crime but nineteen years old. Throughout his life he had been repeatedly classified as mentally retarded and deficient by psychologists and psychiatrists of the Institute for Juvenile Research in Chicago. At one time he had been committed to an institution for the feebleminded, where he had spent a year. He dropped out of school at the age of 16, never having completed the 7th grade, and was found to have the intelligence of a child between 10 and 11 years of age at the time of his trial. Aside from his retardation, he was never a behavior problem and bore no criminal record.

"Reck was arrested in Chicago without a warrant at 11:00 a. m. Wednesday, March 25, 1936, on suspicion of stealing bicycles. He was then shuttled between the North Avenue Police Station and the Shakespeare Avenue Police Station until 1:15 p. m., at which time he was returned to the North Avenue Police Station and there interrogated mainly about bicycle thefts until 6:30 or 7:00 p. m. He was then taken to the Warren Avenue Police Station where he spent the night. During this time he was fed a ham sandwich and coffee at the North Avenue Station and a bologna sausage sandwich at the North Avenue Station and a bologna sausage sandwich at the Warren Avenue Station.

"On Thursday, at 10:00 a. m., Reck was brought back to the North Avenue Station where he was interrogated some six or seven hours about various crimes in the District. Afterwards, he was sent to the Shakespeare Station and later that evening he was taken downtown to the Detective Bureau where he was exhibited at a so-called 'show-up.' The record does not indicate where Reck spent the night. The record shows that Reck was fed an egg sandwich and a glass of milk on Thursday but apparently nothing else.

"The record is silent as to where Reck spent Friday morning but it is clear that interrogation was resumed sometime in the early afternoon. Friday evening over one hundred people congregated in the North Avenue Police Station where Reck was exhibited on the second floor. Shortly after 7:00 p. m. Reck fainted and was brought to the Cook County Hospital where he was examined by an intern who found no marks or bruises upon his body and rejected him for treatment. Reck was then taken directly back

to the North Avenue Station where he was immediately again placed on exhibition. He again became sick and was taken to an unfurnished handball room, where a Sergeant Aitken, assigned to the Peacock murder investigation, questioned him about the Peacock murder for a short period of time. Reck again became sick and a Dr. Abraham was called who later testified that Reck was extremely nervous, that he was exposed and that his shirt was unbuttoned and hanging outside of his pants. He was rubbing his abdomen and complaining of pain in that region. After an examination of 60 to 90 seconds, Dr. Abraham left and Reck was questioned intermittently and exhibited to civilians until approximately 9:30 p. m. when he became ill and vomited a considerable amount of blood on the floor.

"Reck was again brought to the Cook County Hospital at 10:15 p. m. on Friday where he was placed in a ward and given injections of morphine, atropine, and ipecac twice during the evening. At about 2:00 a. m. two physicians, Doctor Scatliff and Doctor Day, who were members of a Chicago Medical Society which had been assisting the police in the Peacock murder came at the request of Prosecutor Kearney to see if there were any marks of brutality on Reck. They found the door to Reck's room barred by a police officer. After securing permission from one, Police Captain O'Connell, they went in and found Reck asleep and therefore made only a cursory examination in the dark which revealed nothing conclusive. At 9:00 a. m. on Saturday, Reck told Dr. Zachary Felsher of the Cook County Hospital that the police had been beating him in the stomach. He also told Dr. Weissman of the same hospital that he had been beaten in the abdomen and chest over

a three-day period. This was the first time since his arrest some 70 hours before that Reck had conversed with any civilian outside the presence of police officers. His father had attempted to see Reck on Thursday and Friday at the North Avenue Police Station and on Saturday at the Cook County Hospital. Each time he was refused.

"At 9:30 a. m. on Saturday, Reck was removed from the hospital in a wheelchair and was questioned about the Peacock murder as soon as he was transferred into Captain O'Connell's car to be transported to the North Avenue Police Station, where the questioning continued until the afternoon, when he was taken to the State's Attorney's office at approximately 2:00 p. m.

"Previously to this, on Friday evening, two of the boys, Nash and Goeth, who had been arrested with Reck, had confessed to the murder of Dr. Peacock, implicating Reck and one other boy, Livingston. At about 3:00 a. m. on Saturday, Livingston also agreed to sign a confession. (Upon arraignment, Livingston pleaded not guilty and alleged that he was subjected to physical abuse by the police.)

"On Saturday afternoon, Reck was questioned about the whereabouts of the gun which Goeth had told police that Reck possessed. After intensive interrogation, Reck admitted that Goeth had told him of the Peacock murder. About 4:30 p. m. in front of a group of officers and prosecutors, Reck was confronted with Nash and Goeth. Nash told the story which became his signed confession. Reck denied participation in the crime. Goeth then made the statement that Nash was telling the truth and implicated Reck. At this point Reck stated that he was present at the crime but that Livingston and not he struck Dr. Peacock.

"At 5:55 p. m. of the same Saturday, March 28, 1936, a joint confession was taken, at which time Reck was very weak and sick looking. At this point, Reck had been in custody almost 80 hours without counsel, without contact with his family, without a court appearance and without charge or bail. The text of this joint confession reveals mostly yes and no answer in the case of Reck. The interrogation did not deal with the gun or the automobile used in the crime and was signed by all that Saturday night.

"On Sunday, Reck was again interrogated in the State's Attorney's office and at 4:30 p. m. his individual statement was taken which was more or less a reiteration of the joint confession. The boys then washed up and were given clean clothes. Thereafter, in a formal ceremony in front of numerous officers and prosecutors as well as twelve invited civilians, the statements were read to the boys, they were duly cautioned and the confessions were then signed. The boys did not know there were civilians present and were not permitted counsel. At this time Reck had been without solid food since Friday when he had an egg sandwich. He was placed on a milk diet by the doctor Friday night at the hospital.

"Reck was held in custody Monday, Tuesday and Wednesday, March 30 through April 1. Why, is not revealed in the record. On Thursday, April 2, 1936, Reck was arraigned in open court and pleaded *not guilty*. He had not seen his father or other relatives or any lawyer during this entire period." [3]

[3] The brief factual summary in the opinion of the Supreme Court of Illinois affirming the denial of post-conviction relief is entirely consistent with these findings:

"Petitioner was in the custody of the police for a week, during which time he was frequently ill, fainted several times, vomited blood

As the district judge further noted, the record "carries an unexpressed import of police brutality. . . ." Reck testified at length to beatings inflicted upon him on each of the four days he was in police custody before he confessed. His testimony was corroborated. The police, however, denied beating Reck, and, in view of this conflict in the evidence, we proceed upon the premise, as did the District Court, that the officers did not inflict deliberate physical abuse or injury upon Reck during the period they held him in their custody.[4] See *Thomas* v. *Arizona,* 356 U. S. 390, 402–403; *Stein* v. *New York,* 346 U. S. 156, 183–184; *Ashcraft* v. *Tennessee,* 322 U. S. 143, 152–153; *Ward* v. *Texas,* 316 U. S. 547, 551–552.

But it is hardly necessary to state that the question whether a confession was extracted by coercion does not depend simply upon whether the police resorted to the crude tactic of deliberate physical abuse. "[T]he blood of the accused is not the only hallmark of an unconstitutional inquisition." *Blackburn* v. *Alabama,* 361 U. S. 199, 206. The question in each case is whether a defendant's will was overborne at the time he confessed. *Chambers* v. *Florida,* 309 U. S. 227; *Watts* v. *Indiana,* 338 U. S. 49, 52, 53; *Leyra* v. *Denno,* 347 U. S. 556, 558. If so, the confession cannot be deemed "the product of a rational intellect and a free will," *Blackburn, supra,* at 208. In resolving the issue all the circumstances attendant upon the confession must be taken into account. See *Fikes* v. *Alabama,* 352 U. S. 191, 198; *Payne* v. *Arkansas,* 356 U. S. 560, 567. Physical mistreatment is but one such circumstance, albeit a circumstance which by itself weighs heavily. But other circumstances may combine to pro-

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on the floor of the police station and was twice taken to the hospital on a stretcher. During that week no formal charge was placed against petitioner, and he was confined practically *incommunicado.*" 7 Ill. 2d 261, 264, 130 N. E. 2d 200, 202.

[4] This was also the implicit finding of the trial judge.

duce an effect just as impellingly coercive as the deliberate use of the third degree. Such, we think, were the undisputed circumstances of this case, as set out in detail by the District Court.

At the time of his arrest Reck was a nineteen-year-old youth of subnormal intelligence. He had no prior criminal record or experience with the police. He was held nearly eight days without a judicial hearing. Four of those days preceded his first confession. During that period Reck was subjected each day to six- or seven-hour stretches of relentless and incessant interrogation. The questioning was conducted by groups of officers. For the first three days the interrogation ranged over a wide variety of crimes. On the night of the third day of his detention the interrogation turned to the crime for which petitioner stands convicted. During this same four-day period he was shuttled back and forth between police stations and interrogation rooms. In addition, Reck was intermittently placed on public exhibition in "show-ups." On the night before his confession, petitioner became ill while on display in such a "show-up." He was taken to the hospital, returned to the police station and put back on public display. When he again became ill he was removed from the "show-up," but interrogation in the windowless "handball court" continued relentlessly until he grew faint and vomited blood on the floor. Once more he was taken to the hospital, where he spent the night under the influence of drugs. The next morning he was removed from the hospital in a wheel chair, and intensive interrogation was immediately resumed. Some eight hours later Reck signed his first confession. The next afternoon he signed a second.

During the entire period preceding his confessions Reck was without adequate food, without counsel, and without the assistance of family or friends. He was, for all practical purposes, held incommunicado. He was physically

weakened and in intense pain. We conclude that this total combination of circumstances "is so inherently coercive that its very existence is irreconcilable with the possession of mental freedom by a lone suspect against whom its full coercive force is brought to bear." *Ashcraft* v. *Tennessee,* 322 U. S. 143, 154.

It is true that this case lacks the physical brutality present in *Brown* v. *Mississippi,* 297 U. S. 278, the threat of mob violence apparent in *Payne* v. *Arkansas,* 356 U. S. 560, the thirty-six hours of consecutive questioning found in *Ashcraft* v. *Tennessee,* 322 U. S. 143, the threats against defendant's family used in *Harris* v. *South Carolina,* 338 U. S. 68, or the deception employed in *Spano* v. *New York,* 360 U. S. 315, and *Leyra* v. *Denno,* 347 U. S. 556. Nor was Reck's mentality apparently so irrational as that of the petitioner in *Blackburn* v. *Alabama,* 361 U. S. 199. However, it is equally true that Reck's youth, his subnormal intelligence, and his lack of previous experience with the police make it impossible to equate his powers of resistance to overbearing police tactics with those of the defendants in *Stein* v. *New York,* 346 U. S. 156, or *Lisenba* v. *California,* 314 U. S. 219.

Although the process of decision in this area, as in most, requires more than a mere color-matching of cases, it is not inappropriate to compare this case with *Turner* v. *Pennsylvania,* 338 U. S. 62, where we held a confession inadmissible on a record disclosing circumstances less compelling. Decision in *Turner* rested basically on three factors: the length of detention, the amount and manner of interrogation, and the fact that Turner had been held incommunicado by the police. Turner had been in custody for four nights and five days before he confessed. He had been questioned intermittently, as much as six hours in a day, sometimes by one, sometimes by several officers. He had been interrogated a total of some twenty-three hours. Reck was held the same length of time, under basically the same circumstances, before his second con-

fession. He was held some twenty-four hours less than Turner before his first confession, but during that period he was subjected to more concentratedly intensive interrogation, in longer stretches. He also spent considerable periods of time on public display in "show-ups," a factor not present in Turner. In addition, Reck was weakened by illness, pain, and lack of food. Finally, unlike Turner, Reck must be regarded as a case of at least borderline mental retardation. The record here thus presents a totality of coercive circumstances far more aggravated than those which dictated our decision in *Turner*. See also *Johnson* v. *Pennsylvania,* 340 U. S. 881; *Fikes* v. *Alabama,* 352 U. S. 191.

It cannot fairly be said on this record that "[t]he inward consciousness of having committed a murder and a robbery and of being confronted with evidence of guilt which [petitioner] could neither deny nor explain seems enough to account for the confessions here." *Stein* v. *New York,* 346 U. S. 156, 185. It is true that, as in *Stein,* Reck did not confess until confronted with the incriminating statements of his companions. But beyond this the circumstances in *Stein* bear little resemblance to those involved in this case. The defendants in *Stein* were questioned a total of twelve hours during a thirty-two-hour detention. Part of that time was spent working out a "bargain" with police officers. Neither defendant was "young, soft, ignorant or timid." *Stein, supra,* at 185. Nor were they "inexperienced in the ways of crime or its detection" or "dumb as to their rights." *Id.,* at 186. By contrast, Reck was in fact young and ignorant. He was in fact inexperienced in the ways of crime and its detection. Moreover, he was subjected to pressures much greater than were the defendants in *Stein.* He was held incommunicado and questioned over a much longer period. He was physically ill during much of that time, in pain, and weakened by lack of food. Confrontation with the confessions of his companions in these circumstances could

well have been the event which made further resistance seem useless to Reck, whether he was guilty or not. On this record, therefore, the fact that his confession came hard upon the confessions of others who implicated him has little independent significance.

The State has made no effort to distinguish between the Saturday and Sunday confessions. Nor could it properly do so. The coercive circumstances preceding the first confession existed through Sunday. Reck remained in police custody, without a judicial hearing. He was subjected to further interrogation. He did not see counsel, family or friends between Saturday afternoon and Sunday afternoon. There are no other facts in the record suggesting that the Sunday confession was an act independent of the confession extracted on Saturday. Both confessions are subject to the same infirmities. Under the Due Process Clause of the Fourteenth Amendment neither was admissible at Reck's trial.

The petitioner's detention is in violation of the Constitution of the United States, and he is therefore entitled to be released. The judgments of the Court of Appeals and the District Court are vacated and the case remanded to the latter. On remand, the District Court should enter such orders as are appropriate and consistent with this opinion allowing the State a reasonable time in which to retry the petitioner. Cf. *Rogers* v. *Richmond,* 365 U. S. 534, 549; *Irvin* v. *Dowd,* 366 U. S. 717, 729.

Vacated and remanded.

MR. JUSTICE DOUGLAS, concurring.

Emil Reck at the age of twelve was classified as a "high grade mental defective" [1] and placed in an institution for

[1] At an interview taking place a few weeks after his arrest in 1936, Reck knew that the Mississippi was a big river, that New York was a big city, that Washington, D. C., was our capital, and that Hoover preceded Roosevelt. But he was unable to divide 25 by 5;

mental defectives. He dropped out of school when he was sixteen. Though he was retarded he had no criminal record, no record of delinquency. At the time of his arrest, confession, and conviction he was nineteen years old.

He was arrested Wednesday morning, March 25, 1936. The next day, March 26, his father went to the police asking where his son was and asking to see him. The police would give him no information. On March 27 his father came to the police station again but was not allowed to see his son. Later the father tried to see his son at the hospital but was denied admission.

The father was denied the right to see his son over and again. The son was held for at least eight full days *incommunicado*. He was arraigned before a magistrate on April 2, 1936, only after he had confessed.

The late Professor Alexander Kennedy of the University of Edinburgh has put into illuminating words the manner in which long-continued interrogation under conditions of stress can give the interrogator effective command over the prisoner.[2] The techniques—now explained in a vast literature—include (1) disorientation and disillusion; (2) synthetic conflict and tension; (3) crisis and conversion; (4) rationalization and indoctrination; (5) apologetics and exploitation.[3]

The device of "synthetic conflict and tension" is summarized as follows: [4]

> "Production by conditioning methods of a state of psychological tension with its concomitant physical

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he did not know how many weeks were in a year, how many feet in a yard, how many quarts in a gallon, when Columbus discovered America, who the opponents were in the Civil War, or the capitals of Illinois, England, France, or Germany.

[2] Kennedy, The Scientific Lessons of Interrogation, Proc. Roy. Instn. 38, No. 170 (1960).

[3] *Id.*, pp. 96–97.

[4] *Id.*, p. 96.

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changes in heart, respiration, skin and other organs, the feeling being unattached to any particular set of ideas. This is later caused to transfer itself to synthetic mental conflicts created out of circumstances chosen from the subject's life-history, but entirely irrelevant to the reasons for his detention. The object is to build up anxiety to the limits of tolerance so as to invoke pathological mental mechanisms of escape comparable to those of Conversion Hysteria."

Whether the police used this technique on Emil Reck no one knows. We do know from this record that Emil Reck was quite ill during his detention. He was so ill that he was taken to a hospital *incommunicado*. He was so ill he passed blood. What actually transpired no one will know. The records coming before us that involve the relations between the police and a prisoner during periods of confinement are extremely unreliable. The word of the police is on the side of orderly procedure, nonoppressive conduct, meticulous regard for the sensibilities of the prisoner. There is the word of the accused against the police. But his voice has little persuasion.

We do know that long detention, while the prisoner is shut off from the outside world, is a recurring practice in this country—for those of lowly birth, for those without friends or status.[5] We also know that detention *incommunicado* was the secret of the inquisition and is the secret of successful interrogation in Communist countries. Professor Kennedy summarized the matter:[6]

"From the history of the Inquisition we learn that certain empirical discoveries were made and recog-

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[5] "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread." Anatole France as quoted in Cournos, A Modern Plutarch (1928), p. 27.

[6] *Id.*, p. 94.

nised as important by a thoughtful and objective minority of those concerned. The first was that if a prisoner were once induced to give a detailed history of his past and to discuss it with his interrogators in the absence of threat or persuasion or even of evidence of interest, he might after an emotional crisis recant and confess his heresies. The second discovery was that true and lasting conversion could never be produced by the threat of physical torture. Torture not infrequently had the opposite effect and induced a negative mental state in which the prisoner could no longer feel pain but could achieve an attitude of mental detachment from his circumstances and with it an immunity to inquisition. The most surprising feature was the genuine enthusiasm of those who did recant. While these results were necessarily ascribed at the time to the powers of persuasion of the Inquistadores, it is evident in retrospect that something was happening which was often beyond their control. The same facts come to light in the long history of Russian political interrogation. In the Leninist period, the success of the immensely tedious method of didactic interrogation then in use was similarly ascribed to the appeal of Marxist doctrine to reason. The fact is that in conditions of confinement, detailed history-taking without reference to incriminating topics and the forming of a personal relationship with an interrogator who subscribes to a system of political or religious explanation, there may occur an endogenous and not always predictable process of conversion to the ideas and beliefs of the interrogator."

Television teaches that confessions are the touchstone of law enforcement. Experience however teaches that confessions born of long detention under conditions of stress, confusion, and anxiety are extremely unreliable.

People arrested by the police may produce confessions that come gushing forth and carry all the earmarks of reliability. But detention *incommunicado* for days on end is so fraught with evil that we should hold it to be inconsistent with the requirements of that free society which is reflected in the Bill of Rights. It is the means whereby the commands of the Fifth Amendment (which I deem to be applicable to the States) are circumvented. It is true that the police have to interrogate to arrest; it is not true that they may arrest to interrogate.[7] I would hold that any confession obtained by the police while the defendant is under detention is inadmissible, unless there is prompt arraignment and unless the accused is informed of his right to silence and accorded an opportunity to consult counsel. This judgment of conviction should therefore be reversed.

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

Twenty-five years ago a jury found Reck guilty of the savage murder of Dr. Silber C. Peacock. His first attempt to upset that conviction came nine years later when he sought a writ of error to the Supreme Court of Illinois. It was denied by opinion, *People* v. *Reck,* 392 Ill. 311, 64 N. E. 526 (1946). This Court denied certiorari. *Reck* v. *Illinois,* 331 U. S. 855 (1947). In the same year the Illinois Supreme Court again denied Reck's applica-

[7] In ordinary circumstances, the police, under law, are to conduct investigations of crime by interview, and not by interrogation. Typically, it is the Grand Jury or a Court, not the police, which has the power to compel testimony, subject to the limitations of relevance and privilege. See *United States* v. *Bufalino,* 285 F. 2d 408, 415, 416, 420. To allow the police to use their power to arrest as a substitute for the power of subpoena is, I think, to strip the Fifth Amendment of its meaning.

tion for discharge. The next year the United States District Court for the Northern District of Illinois did likewise. Then, in 1952, an application under the Illinois Post-Conviction Hearing Act was filed to test the validity of Reck's 199-year sentence imposed 16 years previously. His application was denied after a full hearing by the trial court, and the Illinois Supreme Court affirmed by a unanimous opinion. *Reck* v. *People,* 7 Ill. 2d 261, 130 N. E. 2d 200 (1955). Petition for certiorari was again denied, without prejudice to the filing of appropriate proceedings in Federal District Court. 351 U. S. 942 (1956). This case was then filed in the United States District Court where no witnesses were heard, the court being satisfied with reviewing the record. Once again relief was denied, 172 F. Supp. 734, and the Court of Appeals affirmed. 274 F. 2d 250.

Today—25 years after his conviction—this Court overturns the decision of the original trial judge, the judgment and findings of a state trial judge on post-conviction hearing, the unanimous opinion of the Supreme Court of Illinois on that appeal, decisions of both the Supreme Court of Illinois and a federal district judge on separate applications for habeas corpus and, finally, those of a federal district judge and Court of Appeals in this case. All of these courts are overruled on the ground that "a totality of coercive circumstances" surrounded Reck's confession. The Court second-guesses the findings of the trial judge and those of the only other trial court that heard and saw any of the witnesses, both of which courts impartially declared the confession to be entirely voluntary.

The Court has quoted at length and with approval the summary of the evidence by the United States district judge. I quote in the margin the findings of the two state judges who saw the witnesses and heard the evidence,

one a few weeks after the events,[1] and the other sixteen years thereafter.[2] A casual comparison of the three findings shows that the federal judge—to say the least—has imported conclusions and added embellishments not present in the cold record of the trial. I need only cite

[1] The original trial judge, after a hearing on the admissibility of the confession, stated:

"The Court has listened attentively to all of the testimony presented in support of the exhibits and against the introduction of the exhibits. The law in this state is that the burden is on the People to establish by a preponderance of the evidence that a confession or what is introduced as a confession was made voluntarily and freely. If there was any coercion or promise of immunity or reward for making the confession, or if the person making the confession was abused in any way either by striking or threatening or any form of mental or physical abuse, then the confessions would not be free and voluntary confessions.

"After considering all the testimony introduced on this preliminary hearing, the Court finds that the confessions are free and voluntary; and the Court is satisfied that that is established not only by a greater weight of the evidence, but by an overwhelming weight of the evidence. Therefore, the Court will admit these confessions. The Court has admitted the confessions. Now, as to the weight that shall be given to the confessions, that is for the jury."

[2] At the conclusion of the post-conviction hearing, the judge stated:

"Well, the defendant testified that he was arrested on March 25th and that he was taken to a hospital on March 27th. Now, without considering the testimony of the police officers at all, Mr. Kearney testified that he was an Assistant State's Attorney at that time and is now practicing law; that on Friday, at about 10 P. M., he went to the North Avenue Station, after having received a phone call from Chief Aitken; that he told everyone there that he was from the State's Attorney's Office; that he called Dr. Scatliff and Dr. Day and had them go to the County Hospital to examine the petitioner because the petitioner had complained that he was ill; that at the time he took the statement of the petitioner, a member of the Grand Jury was present and several doctors were present during the taking of the statement of the petitioner. He said that he and Assistant State's Attorney Crowley, now Judge Crowley, questioned Reck and Reck gave the answers. He says that he saw no marks or bruises

one example, where he finds that his "cold summary . . . carries an unexpressed import of police brutality . . . ." While the Court of Appeals, at least *sub silentio,* overturned some of these findings, the State does not take issue with the basic facts in the summary but does strenu-

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on Reck. Reck at no time complained of any brutality. No one struck or threatened Reck in the presence of Mr. Kearney. He says that he first saw Reck and then the police brought him to the State's Attorney's Office from the County Hospital. Reck told Mr. Kearney that he had been to the County Hospital, but he didn't tell him why. Then Kearney called Dr. Scatliff and Dr. Day at twelve midnight and asked them to go to the County Hospital to see what, if anything, was wrong with Reck. Dr. Scatliff testified that he saw Reck at the County Hospital in the middle of the night on Friday to Saturday and that Dr. Day was with him. That first, he made a visual examination; that when he arrived in the room Reck was asleep, but he was aroused, and Reck was asked if he was ill and Reck merely grunted. The doctor asked Reck if he was in pain and Reck said 'No.' He asked Reck what the trouble was and Reck pointed to his stomach. The doctor then testified that we looked him over, he and Dr. Day; that he, Dr. Scatliff, found no bruises or discolorations. Dr. Scatliff said that he pressed on the stomach of this petitioner and the petitioner said nothing. Again, on Sunday, he saw the petitioner and the petitioner had no marks or bruises; that he was asked if he had been mistreated and the petitioner said he had not. The petitioner was asked if he had eaten and the petitioner said he had eaten. On cross-examination he testified that he did not examine the petitioner's stool or urine; that he pressed on his abdomen and there was no evidence of pain; that he had been told that petitioner bled from the mouth, while at the police station, and he testified that bleeding from the mouth could be caused by dental disorders, tumors, by injuries to the stomach, that he had been told that defendant had a gastric ulcer and that, in his opinion, a gastric ulcer could cause bleeding. He also testified on recross examination that a blow on the stomach would aggravate and cause a dormant ulcer to become active and cause bleeding. Captain Aitken testified that while he was talking to the defendant, to the petitioner, the petitioner commenced to bleed from the mouth; that he asked the petitioner what the trouble was, and the petitioner said he had ulcers; that then the doctor recommended that the petitioner be taken to the hospital. Mr. Blair Varnes also testified, an attorney, that he was present at

ously object to its conclusory findings. Perhaps the explanation for these differences is best explained by the federal judge himself, when he finds that he has read "[t]he record . . . in the light most favorable" to Reck; and further that "Reck's confession was tested before a judge and jury who had the opportunity to observe witnesses and weigh other fresh evidence at first hand while I must make my decision on the basis of a cold and ancient record, *which can appear misleading.*" (Emphasis added.)

Although the Court says that it proceeds "upon the premise, as did the District Court, that the officers did not inflict deliberate physical abuse or injury upon Reck," it nonetheless finds the confession to have been coerced. I assume, therefore, that the Court bases its reversal on psychological or mental coercion. In so doing it goes far beyond the holding of any of the prior cases of this Court.

I shall not repeat the facts except to note that Reck was arrested on Wednesday; he was not interrogated concerning Dr. Peacock's murder until Friday, when he immediately became ill, and was hospitalized; later that night all three of his confederates confessed; confronted with them on Saturday—each accusing him of participation in the murder—he confessed. There was no evidence of physical brutality, no request for counsel, nor, unlike *Turner* v. *Pennsylvania*, 338 U. S. 62 (1949), for relatives or friends. Nor did he ask for food or make any indication of any desire or need therefor, showing, in the light of the record, nothing more than the lack of interest in food of one who had suffered from stomach ulcers for years. How the Court can now—25 years later—find on this "cold" record that these circumstances amounted to

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the taking of one of the statements, and he said he saw no bruises on the petitioner and the petitioner made no complaint to him. I do not believe there is sufficient evidence before this Court to disturb the finding of the jury."

mental or psychological coercion is beyond my comprehension. I agree with the score of judges who have decided to the contrary.

Since mental coercion is the keystone of its rationale, the Court properly sets to one side the cases involving physical brutality, *e. g., Brown* v. *Mississippi,* 297 U. S. 278 (1936). While they dealt with factors bearing upon the mental state of the defendants, the Court properly distinguishes cases involving threats of mob violence, the wearing down of the accused by protracted questioning, threats against members of the defendant's family, and those in which deception was practiced.[3] Nor can Reck be classified as a mental defective, as was the case in *Blackburn* v. *Alabama,* 361 U. S. 199 (1960).

The Court relies heavily on *Turner* v. *Pennsylvania, supra.* I do not agree that it presented this Court with "a totality of coercive circumstances" significantly less "aggravated" than the situation presented here. In *Turner* the Court reviewed the Pennsylvania Supreme Court's affirmance of petitioner's conviction by a jury. In the present case no claim is made that the codefendants' confessions, with which Reck was confronted, were in fact not made and did not in fact implicate Reck in the murder of which he was convicted. In *Turner,* however, the petitioner "was falsely told that other suspects had 'opened up' on him." 338 U. S., at 64. Such a falsification, in my judgment, presents a much stronger case for relief because at the outset Pennsylvania's officers resorted to trickery. Moreover, such a psychological artifice tends to prey upon the mind, leading its victim to either resort to countercharges or to assume that "further resistance [is] useless," and abandonment of claimed innocence the only course to follow.

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[3] *E. g., Payne* v. *Arkansas,* 356 U. S. 560 (1958); *Ashcraft* v. *Tennessee,* 322 U. S. 143 (1944); *Harris* v. *South Carolina,* 338 U. S. 68 (1949); *Spano* v. *New York,* 360 U. S. 315 (1959).

Further, the issue of voluntariness of the confession in *Turner* was submitted to the jury, but the trial judge refused to charge "that in considering the voluntariness of the confession the prolonged interrogation should be considered." At p. 65. And the appellate court considered it an indifferent circumstance that "a convicted murderer" was held five days in jail. 358 Pa. 350, 356, 58 A. 2d 61, 64. Finally, in *Turner* the "Supreme Court of Pennsylvania affirmed the conviction in an opinion stressing the probable guilt of the petitioner and assuming that the alternatives before it were either to approve the conduct of the police or to turn the petitioner 'loose upon [society] after he has confessed his guilt.'" 338 U. S., at 65. This Court might well have disagreed in that case with findings so made, and, with less hesitation than is appropriate here, where the determinations of voluntariness have been so constant and so numerous, have reached an opposite conclusion. In this case we are not considering the validity of a conviction by certiorari to the court affirming that judgment. Voluntariness has not been here inadequately tested by a standard which refuses to take account of relevant factors. Cf. *Rogers* v. *Richmond,* 365 U. S. 534 (1961). To the contrary, a proper standard has been successively applied by at least two trial courts and several appellate courts, no one of which felt itself forced to choose between what it considered equally undesirable results, and with whose conclusions this Court may not so lightly disagree.

Similarly, in *Fikes* v. *Alabama,* 352 U. S. 191, 196–197 (1957), also relied on by the Court, the confession was wrung from an "uneducated Negro, certainly of low mentality, if not mentally ill." Fikes "was a weaker and more susceptible subject than the record in that case reveals Turner to have been." Unlike Reck, Fikes was removed from the local jail to a state prison far from his home and the Court recognized that petitioner's location was a fact

"to be weighed." So, too, in *Fikes* the petitioner's lawyer was barred from seeing him, unlike the situation here, where no request for counsel was made.

Of course, I agree with the Court that confession cases are not to be resolved by color-matching. Comparisons are perhaps upon occasion unavoidable, and may even be proper, as in a case "on all fours" whose facts approach identity with those of the one claimed apposite. I do not find that to be the situation here, however. In my view, the Court today moves onto new ground, and does not merely retread the steps it took in *Turner*. In my judgment, neither the elusive, measureless standard of psychological coercion heretofore developed in this Court by accretion on almost an *ad hoc,* case-by-case basis, nor the disposition made in *Turner* requires us to disagree with more than a score of impartial judges who have previously considered these same facts. Perhaps, as these cases indicate, reasonable minds may differ in the gauging of the cumulative psychological factors upon which the Court bases its reversal, but in what case, I ask, has a court dealing with the same extrinsic facts, a quarter of a century after conviction, overturned so many decisions by so many judges, both state and federal, entirely upon psychological grounds? When have the conclusions of so many legal minds been found to be so unreasonable by so few?

Certainly, I walk across this shadowy field no more sure-footedly than do my Brothers, but after reading the whole record and the opinions of all of the courts that have heard the case I am unpersuaded that the combined psychological effect of the circumstances somehow, in some way made Reck speak. The fact is, as the Court of Appeals said, when confronted with and accused by all three of his confederates, Reck knew the "dance was over and the time had come to pay the fiddler," quoting from Mr. Justice Jackson's opinion for the Court in *Stein* v. *New York,* 346 U. S. 156, 186 (1953).

DEUTCH *v.* UNITED STATES.

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

No. 233. Argued March 22–23, 1961.—Decided June 12, 1961.

Summoned to testify before a Subcommittee of the House of Representatives Committee on Un-American Activities, which was investigating Communist Party activities in the Albany, N. Y., area, petitioner, who had not attended the hearings in Albany and was questioned in Washington, D. C., freely answered questions about his own Communist activities at Cornell University and Ithaca, N. Y.; but he refused to name persons with whom he had been associated in such activities there. He was convicted of a violation of 2 U. S. C. § 192, which makes it a misdemeanor for any person summoned as a witness by a congressional committee to refuse to answer any question pertinent to the question under inquiry. At his trial, in an effort to prove the pertinency of the questions he refused to answer, the Government offered documentary evidence of statements made by the Chairman of the Subcommittee at the hearings in Albany, which tended to show that the subject of those hearings was Communist infiltration in the Albany area, particularly in the field of labor, and one witness testified that petitioner's hearing was a continuation of the Albany hearings, that the subject of those hearings was Communist infiltration in the Albany area and that the topic under inquiry was not Communism either at Cornell or in educational institutions generally. It also introduced transcripts of the testimony of two witnesses at the Albany hearings who, in addition to testifying about Communist infiltration into labor unions in the Albany area, had been led into some testimony about Communist activities by petitioner and others at Cornell. *Held:* On the record in this case, the Government failed to prove an essential element of the offense, that the questions which petitioner refused to answer were pertinent to the subject under inquiry, and his conviction must be set aside. Pp. 457–472.

108 U. S. App. D. C. 143, 280 F. 2d 691, reversed.

Henry W. Sawyer III argued the cause for petitioner. With him on the brief was *George Herbert Goodrich.*

Kevin T. Maroney argued the cause for the United States. With him on the briefs were former *Solicitor General Rankin, Solicitor General Cox, Assistant Attorney General Yeagley* and *Bruce J. Terris.*

MR. JUSTICE STEWART delivered the opinion of the Court.

Once again we are called upon to review a criminal conviction for refusal to answer questions before a subcommittee of the Committee on Un-American Activities of the House of Representatives.[1] See *Quinn* v. *United States,* 349 U. S. 155; *Emspak* v. *United States,* 349 U. S. 190; *Watkins* v. *United States,* 354 U. S. 178; *Barenblatt* v. *United States,* 360 U. S. 109; *Wilkinson* v. *United States,* 365 U. S. 399; *Braden* v. *United States,* 365 U. S. 431. The petitioner was brought to trial in the District Court for the District of Columbia upon an indictment which charged that he had violated 2 U. S. C. § 192 by refusing to answer five questions "which were pertinent to the question then under inquiry" by the subcommittee. He waived a jury and was convicted upon four of the five counts of the indictment. The judgment was affirmed by the Court of Appeals, 108 U. S. App. D. C. 143, 280 F. 2d 691, and we brought the case here because of doubt as to the validity of the conviction in the light of our pre-

[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." 2 U. S. C. § 192.

vious decisions.[2] 364 U. S. 812. A careful review of the trial record convinces us that the District Court should have ordered an acquittal.

At the trial the Government's case consisted largely of documentary evidence. That evidence showed that a subcommittee of the House Committee on Un-American Activities conducted hearings in Albany, New York, in July of 1953, and again in early April of 1954. The petitioner was not present on either occasion. He was subpoenaed to appear before the subcommittee in Albany on April 9, 1954, but, at the request of his counsel, it was agreed that he should appear instead before the subcommittee three days later in the Old House Office Building in Washington, D. C.

He appeared there on the appointed day, accompanied by counsel, and without further ado his interrogation began. The petitioner freely answered all preliminary questions, revealing that he was then twenty-four years old and a graduate student at the University of Pennsylvania. He stated that his early education had been in the public schools of Brooklyn, New York, from where he had gone to Cornell University in 1947 for four years as an undergraduate and two additional years as a graduate student.

The subcommittee's counsel then made the following statement:

> "Mr. Deutch, during hearings at Albany last week, the committee heard testimony regarding the existence of a Communist Party group or cell operating among undergraduates at Cornell University, among certain graduates at Cornell and in the city of Ithaca.

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[2] See, in addition to the cases cited in the text, *supra: Sinclair* v. *United States,* 279 U. S. 263; *United States* v. *Bryan,* 339 U. S. 323; *United States* v. *Fleischman,* 339 U. S. 349; *United States* v. *Rumely,* 345 U. S. 41; *Sacher* v. *United States,* 356 U. S. 576; *Flaxer* v. *United States,* 358 U. S. 147. See also *McPhaul* v. *United States,* 364 U. S. 372.

> "In connection with that testimony, the committee was informed that you were a member of one or more of those groups. If so, I would like to ask you certain matters relating to your activity there.
>
> "Were you a member of a group of the Communist Party at Cornell?"

The petitioner answered, "under protest," that he had indeed been a member of the Communist Party while at Cornell.[3] He then testified freely and without further objection as to his own activities and associations. He stated that "from the age of 13 or 14 I had read many books on Marxism and at that time was very much impressed with trying to solve certain of the injustices we have nowadays." He said that when he got to college "I felt if I had ideas I shouldn't be half pregnant about them, so when I came to college I was approached and joined." He stated that the approach to join the Party had been made by a student.

As to the general nature of his Communist Party activities at Cornell, he said "about all that happened were bull sessions on Marxism, and some activities like giving out a leaflet or two. The people I met didn't advocate the overthrowing of the Government by force and violence, and if they had, I wouldn't have allowed it." He testified that he had known one faculty member at Cornell who was a Communist, but that this person had quit the Party. He stated that he had once received from "a personal friend," who was not connected with the Cornell faculty, a $100 contribution to give to the Party. He

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[3] "I will answer that question, but only under protest.

"I wish to register a challenge as to the jurisdiction of this committee under Public Law 601, which is the committee's enabling legislation. This question, or any similar questions involving my associations, past or future, I am answering, but only under protest as to its constitutionality. But, under your jurisdiction as stated, I answer yes, I was a member of the Communist Party."

stated that he had been the only graduate student at Cornell who was a Communist, and that, as the "head" (and lone member) of the "graduate group," he had attended meetings in a private house where a "maximum of 4 or 5" people were present. Many of his answers indicated a lack of awareness of the details of Communist activities at Cornell.[4] The petitioner testified that as of the time of the hearings he was no longer a member of the Communist Party, but he volunteered the information that "[t]o a great extent it is only fair to say I am a Marxist today—I don't want to deny that."

While the petitioner's answers to the many questions put to him about his own activities and conduct were thus

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[4] The following colloquies are typical:

"Mr. Doyle: Who published the leaflets?

"Mr. Deutch: I believe the Communist Party published them.

"Mr. Doyle: What Communist Party? Where did you get the leaflets? From the national headquarters?

"Mr. Deutch: I don't believe so. It was a local branch.

"Mr. Doyle: Where was the office of the local branch from which you got these leaflets?

"Mr. Deutch: I didn't know where it was. I was just asked to distribute them."

. . . . .

"Mr. Tavenner: Were you ever a member of the Downtown Club of the Communist Party in Ithaca?

"Mr. Deutch: I don't believe so.

"Mr. Tavenner: Did you attend meetings of that group?

"Mr. Deutch: No. That is, I don't believe so. The reason I wonder is because that organization became defunct so that there was really no organization. Downtown was Uptown, and there were so few people that I just want to qualify that statement."

. . . . .

"Mr. Scherer: Let me ask you this question. You knew where the meetings were held?

"Mr. Deutch: I don't believe I know exactly where they were. This is because—since Mr. Richardson drove me there." [Mr. Richardson was a law student at Cornell who had joined the Communist Party at the behest of the Federal Bureau of Investigation. See p. 466, *infra*.]

fully responsive, he refused to answer five questions he was asked concerning other people. He declined to give the names of the faculty member who had been a Communist, of the friend who had made the $100 contribution, of the student who had originally approached him about joining the Communist Party, and of the owners of the house where the meetings had been held. He also declined to say whether he was acquainted with one Homer Owen. For his refusal to answer these questions he was indicted, tried, and convicted.[5]

The reason which the petitioner gave the subcommittee for his refusal to answer these questions can best be put in his own words:

> "Sir, I am perfectly willing to tell about my own activities, but do you feel I should trade my moral scruples by informing on someone else? . . . I can only say that whereas I do not want to be in

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[5] The questions, as set out in the five counts of the indictment, were as follows:

"Count One

"The committee was advised that a witness by the name of Ross Richardson has stated that you acted as liaison between a Communist Party group on the campus and a member of the faculty at Cornell, and that you knew the name of the member of that faculty, who was a member of the Communist Party. Will you tell us who that member of the faculty was?

"Count Two

"Will you tell the committee, please, the source of that $100 contribution, if it was made?

"Count Three

"Where were these meetings held?

"Count Four

"Were you acquainted with Homer Owen?

"Count Five

"The witness is directed to give the name of the person by whom he was approached."

The petitioner was convicted on all but Count Three.

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> contempt of the committee, I do not believe I can answer questions about other people, but only about myself. . . . I happen to have been a graduate student—the only one there, and the organization is completely defunct, and the individual you are interested in wasn't even a professor. The magnitude of this is really beyond reason."

The chairman of the subcommittee ruled that it was the petitioner's duty nevertheless to answer the questions:

> "That decision does not rest with you as to whether or not the scope of this inquiry—as to whether or not certain individuals are important now or not. That is the responsibility of we Representatives to determine. That determination cannot rest with you. It may be very true that the individual to whom you have referred is no longer a member of the Communist Party. However, that is a supposition on your part—and a supposition which the committee cannot accept. . . . I think that it is only fair to advise the witness—again advise the witness—that any scruples he may have due to a desire to protect friends and acquaintances, is not a legal reason for declining to answer the questions which are now being put to you, and which will be put to you by counsel."

In an effort to prove the pertinence of the questions which the petitioner had refused to answer, the Government offered at the trial the transcripts of the opening statements of Subcommittee Chairman Kearney at the Albany hearings in 1953 and 1954 and of Subcommittee Chairman Velde at a hearing in Chicago in 1954, as well as an additional portion of the transcript of the 1954 Albany hearing. One witness, the counsel for the Committee on Un-American Activities, testified. A review

of this evidence convinces us that the Government failed to prove the charge in the indictment that the questions which the petitioner refused to answer were "pertinent to the question then under inquiry" by the subcommittee before which he appeared.

The Chairman's opening statement at the Albany hearing in 1953 consisted largely of a paraphrase of the Committee's authorizing resolution and a general summary of the Committee's past activities.[6] The only statement of a specific purpose was as follows:

> "The committee, in its course of investigation, came into possession of reliable information indicat-

[6] "The committee is charged by the Congress of the United States with the responsibility of investigating the extent, character and objects of un-American propaganda activities in the United States, the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries, or of a domestic origin, and attacks the principles of the form of government as guaranteed by our Constitution and all other questions in relation thereto that will aid Congress in any necessary remedial legislation.

"It has been fully established by testimony before this and other congressional committees and before the courts of our land that the Communist Party of the United States is part of an international conspiracy, which is being used as a tool or a weapon by a foreign power to promote its own foreign policy and which has for its objective the overthrow of the governments of all non-Communist countries, resorting to the use of force and violence if necessary. This organization cannot live and expand within the United States except by the promulgation and diffusion of subversive and un-American propaganda designed to win adherence to its cause.

"The first witness in this hearing will testify regarding certain aspects of the worldwide Communist conspiracy, which should demonstrate what a serious matter it is to permit individuals who are subject to the directives and discipline of the Communist Party to be placed in positions of leadership in any functional organization.

"The committee, in its course of investigation, came into possession of reliable information indicating Communist Party activities within the Albany area. The committee decided that this information was

ing Communist Party activities within the Albany area. The committee decided that this information was of such a character as to merit an investigation to determine its nature, extent, character, and objects."

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of such a character as to merit an investigation to determine its nature, extent, character, and objects.

"Many witnesses have appeared before this committee, sitting in various places throughout the United States, and have revealed their experiences as former Communist Party members. Such testimony has added immeasurably to the sum total of the knowledge, character, extent, and objects of Communist activities in this country.

"Witnesses from Hollywood, labor unions, the legal profession, medical profession, and other groups have made a great contribution to the defense of our country by disclosing to this committee facts within their knowledge.

"In the view of this committee, such testimony should not be held against an individual where it has that character of trustworthiness which convinces one that the witness has completely and finally terminated Communist Party membership and that such testimony has been given in all good faith.

"The committee is not concerned with the political beliefs or opinions of any witness who has been called before it. It is concerned only with the facts showing the extent, character, and objects of the Communist Party activities.

"In keeping with the long-standing policy of this committee, any individual or organization whose name is mentioned during the course of the hearings in such a manner as to adversely affect them shall have an opportunity to appear before the committee for the purpose of making a denial or explanation of any adverse references.

"I would also like at this time, before the beginning of these hearings, to make this announcement to the public: We are here at the discretion of the Congress of the United States, trying to discharge a duty and obligation that has been placed upon us. The public is here by permission of the committee and not by any compulsion. Any attempt or effort on the part of anyone to make a demonstration or audible comment in this hearing room, either favorably or unfavorably, toward the committee's undertaking, or to what any witness may have to say, will not be countenanced by the committee. If such conduct should occur, the officers on duty will be requested to eject the offenders from the hearing room."

At the opening of the Albany hearings in 1954 the Chairman stated that the subcommittee would "resume this morning the investigation of Communist Party activities within the capital area." He made clear that the hearings were "a continuation of the open hearings which were conducted in Albany" in 1953. He pointed out that testimony at the 1953 hearings had "related to the efforts of the Communist Party to infiltrate industry and other segments of society in the capital area." "This committee," he said, ". . . is investigating communism within the field of labor where it has substantial evidence that it exists."

The opening statement of the Chairman of the subcommittee which held hearings in Chicago in 1954 is the same statement that was before this Court in *Watkins* v. *United States,* 354 U. S. 178, 210. As was pointed out in the *Watkins* opinion, Mr. Velde "did no more than paraphrase the authorizing resolution and give a very general sketch of the past efforts of the Committee." [7] Moreover, the statement indicated that that subcommittee hearing was directed primarily towards investigation of activities in the Chicago area: "We are here in Chicago, Ill., realizing that this is the center of the great midwestern area of the United States. It cannot be said that subversive infiltration has had a greater, nor a lesser success in infiltrating this important area. The hearings today are the culmination of an investigation that has been conducted by the committee's competent staff and is a part of the committee's intention for holding hearings in various parts of the country."

The transcripts of part of the testimony of two witnesses at the 1954 Albany hearings, John Marqusee and Emmanuel Richardson, were also introduced at the petitioner's

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[7] The entire statement of Mr. Velde is set out at 354 U. S, 210–211, n. 49.

trial. These transcripts showed that Marqusee's testimony had related primarily to Communist infiltration of a labor union in Schenectady for which he had worked during a summer vacation in 1948.[8] At that time he had been a student in the New York State School of Industrial and Labor Relations, which, he had testified, was a part of Cornell University. He had told the subcommittee that he had never had any contact with the Communist Party before taking the labor union job. The transcripts showed that he had explained that he had taken the job in accordance with the school's requirement "that every student should put forth his efforts in securing a job during the summer, during the intervening summers of his 4-year program, 1 summer with a labor union, 1 with a management group, if possible, and 1 summer with a neutral agency, such as a mediation agency or arbitration service." There was no mention of the Cornell Graduate School, nor of the petitioner, in the transcript of Marqusee's testimony.

The transcript of Richardson's testimony showed that he had testified that as a student at the Cornell Law School in 1950 he had joined the Communist Party at the request of the Federal Bureau of Investigation. He had named several people he had known as Communists on the Cornell campus, including the petitioner and Homer Owen. He had stated that the petitioner had known a member of the Cornell faculty who was a Communist Party member, and that he had once received through the petitioner a contribution to the Party from someone else of "one hundred and some dollars." The transcript showed that Richardson had also testified at length concerning Communist infiltration into a labor union in a plant in Syracuse where he had worked during the summers of 1951 and 1952.

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[8] Schenectady is sixteen miles from Albany.

After these transcripts had been introduced at the petitioner's trial, the Government called its only witness, Frank S. Tavenner, Jr., who had been the "interrogating attorney" at the Albany hearings and at the petitioner's hearing before the subcommittee in Washington.[9] Mr. Tavenner emphasized that the hearing in Washington was a continuation of the Albany hearings, which he characterized as "a general investigation of Communist Party activities in what was referred to as the 'Capital Area.' " Under interrogation of government counsel, the witness expressly disclaimed that the purpose of the Washington hearing had been to investigate Communist activities in educational institutions.[10] He was asked what "connection was there between [the subject of the petitioner's testimony] and the investigations entitled 'Albany, New York'?" This question was never answered.

On this record the District Court found the subject under inquiry to be "the infiltration of Communism into educational and labor fields." 147 F. Supp., at 91. The Court of Appeals never stated what it thought the subject under inquiry by the subcommittee was.

As our cases make clear, two quite different issues regarding pertinency may be involved in a prosecution under 2 U. S. C. § 192. One issue reflects the requirement of the Due Process Clause of the Fifth Amendment that the pertinency of the interrogation to the topic under the

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[9] The subcommittee before which the petitioner appeared, "for the purpose of taking this testimony this morning," consisted of Representative Jackson, Acting Chairman, and Representatives Scherer and Doyle. The subcommittee which had conducted the hearings at Albany a few days earlier was composed of Representative Kearney, Chairman, and Representatives Scherer and Walter.

[10] "Q. How does it happen that Mr. Deutch's testimony appears in 'Education—8' if it was a part actually of 'Albany'?

"A. Well, the staff in the releasing of this testimony at a later date placed it for convenience under the heading of Education."

congressional committee's inquiry must be brought home to the witness at the time the questions are put to him. "Unless the subject matter has been made to appear with undisputable clarity, it is the duty of the investigative body, upon objection of the witness on grounds of pertinency, to state for the record the subject under inquiry at that time and the manner in which the propounded questions are pertinent thereto." *Watkins* v. *United States,* 354 U. S., at 214–215. See *Barenblatt* v. *United States,* 360 U. S., at 123–124. The other and different pertinency issue stems from the prosecution's duty at the trial to prove that the questions propounded by the congressional committee were in fact "pertinent to the question under inquiry" by the committee. "Undeniably a conviction for contempt under 2 U. S. C. § 192 cannot stand unless the questions asked are pertinent to the subject matter of the investigation." *Barenblatt, supra,* at 123. "[T]he statute defines the crime as refusal to answer 'any question pertinent to the question under inquiry.' Part of the standard of criminality, therefore, is the pertinency of the questions propounded to the witness." *Watkins, supra,* at 208. See *Wilkinson* v. *United States,* 365 U. S., at 407–409, 413; *Braden* v. *United States,* 365 U. S., at 433, 435–436; *Sacher* v. *United States,* 356 U. S. 576, 577; *Sinclair* v. *United States,* 279 U. S. 263, 296–297. These two basically different issues must not be blurred by treating them as a single question of "pertinency."

With regard to the first issue, it is evident that the petitioner was not made aware at the time he was questioned of the question then under inquiry nor of how the questions which were asked related to such a subject. The chairman made no opening statement, and the petitioner heard no other witnesses testify. The resolution creating the subcommittee revealed nothing. It was

merely a general resolution authorizing the creation of a subcommittee to act for the Committee. Committee counsel simply advised the petitioner that the committee had previously heard evidence regarding Communist activity at Cornell, and that he proposed to ask the petitioner "certain matters relating to your activity there." As to his own activity there the petitioner freely testified. When the petitioner declined to give the names of other people, no clear explanation of the topic under inquiry was forthcoming.

It is also evident, however, that the thoughts which the petitioner voiced in refusing to answer the questions about other people can hardly be considered as the equivalent of an objection upon the grounds of pertinency. Although he did indicate doubt as to the importance of the questions, the petitioner's main concern was clearly his own conscientious unwillingness to act as an informer. It can hardly be considered, therefore, that the objections which the petitioner made at the time were "adequate, within the meaning of what was said in *Watkins, supra,* at 214–215, to trigger what would have been the Subcommittee's reciprocal obligation had it been faced with a pertinency objection." *Barenblatt, supra,* at 124.

We need not pursue the matter, however, because, in any event, it is clear that the Government at the trial failed to carry its burden of proving the pertinence of the questions. See *Bowers* v. *United States,* 92 U. S. App. D. C. 79, 202 F. 2d 447, 452. The first step in proving that component of the offense was to show the subject of the subcommittee's inquiry. *Wilkinson* v. *United States,* 365 U. S., at 407. As related above, the Government offered documentary evidence of statements made by the chairman of the subcommittees at two hearings in Albany which tended to show that those subcommittees were investigating Communist infiltration in the Albany or

"capital" area, particularly in the field of labor.[11] The Government presented one witness who testified that the petitioner's hearing was a continuation of the Albany hearings, and that the subject of those hearings was Communist infiltration in the Albany area. He disavowed any implication that the topic under inquiry was Communism either at Cornell or in educational institutions generally.

Yet the questions which the petitioner was convicted of refusing to answer obviously had nothing to do with the Albany area or with Communist infiltration into labor unions. It can hardly be seriously contended that Cornell University is in the Albany area. Indeed, we may take judicial notice of the fact that Ithaca is more than one hundred and sixty-five miles from Albany, and in an entirely different economic and geographic area of New York. The petitioner was asked nothing about Albany or the Albany area. So far as the record shows, he knew nothing about that subject. He was asked nothing about labor or labor unions. So far as the record shows, he knew nothing about them. He was asked nothing about any possible connection between Cornell or its graduate school and Communist infiltration in Albany. Yet the petitioner was basically a cooperative witness, and there is nothing in the record to indicate that, except for giving the names of others, he would not have freely answered any inquiry the subcommittee wished to pursue with respect to these subjects. It is true that the transcript of the testimony of two witnesses at the Albany hearings established that, in addition to testifying about Communist infiltration into labor unions in the Albany area, they had been willingly led into some testimony about Communist activities by the petitioner and others at Cor-

[11] We disregard the evidence indicating that the subject under inquiry was Communist activities in the Chicago area.

nell. But that excursion can hardly justify a disregard of the Government's careful proof at the petitioner's trial of what the subject under inquiry actually was. The pertinence of the interrogation of those two witnesses is not before us. The pertinence of the petitioner's interrogation is.

In enacting 2 U. S. C. § 192, the Congress invoked the aid of the federal judicial system to protect itself from contumacious conduct. *Watkins, supra,* at 207. "In fulfillment of their obligation under this statute, the courts must accord to the defendants every right which is guaranteed to defendants in all other criminal cases." *Id.*, at 208. "One of the rightful boasts of Western civilization is that the [prosecution] has the burden of establishing guilt solely on the basis of evidence produced in court and under circumstances assuring an accused all the safeguards of a fair procedure." *Irvin* v. *Dowd,* 366 U. S. 717, 729 (concurring opinion). Among these is the presumption of the defendant's innocence. *Sinclair* v. *United States,* 279 U. S., at 296–297; *Flaxer* v. *United States,* 358 U. S., at 151. It was incumbent upon the prosecution in this case to prove that the petitioner had committed the offense for which he was indicted. One element of that offense was the pertinence to the subject matter under inquiry of the questions the petitioner refused to answer.[12] We hold, as a matter of law, that there was a failure of such proof in this case. *Sacher* v. *United States,* 356 U. S. 576; see *Sinclair* v. *United States,* 279 U. S., at 298–299; *Braden* v. *United States,* 365 U. S., at 436–437.

We do not decide today any question respecting the power or legislative purpose of this subcommittee of the House Un-American Activities Committee. Nor do we reach the large issues stirred by the petitioner's First

[12] This was hardly a matter within the peculiar knowledge of the petitioner. Cf. *McPhaul* v. *United States,* 364 U. S. 372, 379.

Amendment claims. Our decision is made within the conventional framework of the federal criminal law, and in accord with its traditional concepts. In a word, we hold only that the Government failed to prove its case.[13]

Reversed.

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

There is, of course, no doubt that a showing of "pertinency" is an essential part of the Government's burden in a prosecution under 2 U. S. C. § 192. But the nature of this burden may differ, dependent upon what transpired at the Congressional inquiry giving rise to the prosecution.

In a case where the prosecution involves the defendant's refusal to answer a question whose pertinency was explained to him by the Congressional Committee before which he appeared as a witness—following his appropriate objection that the question was not pertinent to the matter "under inquiry," see *Barenblatt* v. *United States,* 360 U. S. 109, 123–124—the Government must stand or fall upon that explanation. For it would be obviously unfair to allow the Government at trial to prove perti-

[13] For a Court opinion specifically to join issue with what is written in dissent is a practice ordinarily to be avoided. One of the dissenting opinions in this case, however, is largely based upon what are asserted to be "the undisputed relevant facts in the record." Since every litigant is entitled to have his case reviewed on the facts in the record, it is appropriate to state explicitly that:

(1) The record affirmatively shows that neither Marqusee nor Richardson testified, directly or indirectly, to "passing out handbills at strike scenes" or to any "plan of using the prestige and innocent aid of the university's placement service in getting summer jobs with labor unions in upper New York," or anywhere else.

(2) The record affirmatively shows that at no time did the subcommittee, or anyone on its behalf, "advise" the petitioner, or anyone else, that the subcommittee was investigating the infiltration of communism into the "educational and labor fields."

nency on a different theory than was given to the defendant at the time he testified, and on the basis of which he presumably determined that he need not answer the question put.

Where, however, the defendant made no "pertinency" objection as a witness before the Congressional Committee, the Government at trial is left free to satisfy the requirement of pertinency in any way it may choose. The present case is such a one, for, as the Court's opinion recognizes, the petitioner here made no adequate pertinency objection before the House Un-American Activities Subcommittee.

I dissent because in my opinion the Court's holding that the Government failed to establish "pertinency" rests on a too niggardly view of both the issue and the record. Pertinency, which in the context of an investigatory proceeding is of course a term of wider import than "relevancy" in the context of a trial, is to be judged not in terms of the immediate probative significance of a particular question to the matter under authorized inquiry, but in light of its tendency to elicit information which might be a useful link in the investigatory chain. See *Carroll* v. *United States,* 16 F. 2d 951, 953. An investigation must proceed "step by step." *Ibid.*

Pertinency is found lacking here because (1) inquiry as to affairs relating to petitioner's student days at Cornell University, situated at Ithaca, N. Y., it is said, was not germane to the Subcommittee's investigation as to Communist activities in "the Albany area"; and (2) in any event, such investigation, the Court finds, related only to alleged Communist infiltration into labor unions and not as well to infiltration "at Cornell or in educational institutions generally." I can agree with neither facet of this holding.

It is quite true, as the Court says, that Ithaca is some 165 miles away from Albany, but it seems to me much

too refined to say, as a matter of law, that the trial court could not reasonably determine that Ithaca was within the Subcommittee's terms of reference. Indeed, I think it fair to suggest that in common usage, at least among New Yorkers, "Albany area" would be regarded as aptly descriptive of "upstate" New York. In relation to "pertinency" the matter should not be judged as if it were one of technical jurisdiction or venue.

The other aspect of the Court's holding seems to me equally infirm. Accepting, as I shall, the Court's view that the trial record shows that the Subcommittee, at the relevant time, was investigating only alleged Communist "labor union," and not "educational," infiltration, it seems to me abundantly clear that the lower courts were justified in concluding that all of the questions with respect to which the petitioner was convicted * were pertinent to that matter.

Only shortly before it examined petitioner, the Subcommittee had interrogated two witnesses, Marqusee and Richardson, with respect to their Communist affiliations, their summer work with two labor unions in Schenectady and in Syracuse, and Communist infiltration into such unions, all while they were both students at Cornell. One of these witnesses, Richardson, had testified that during this period he had known the petitioner, and one Homer Owen (Count Four of the indictment), as Communists on the Cornell campus. I do not see why it should now be deemed either that the Subcommittee's interest in petitioner's testimony was confined to "educational infiltration," or that its preliminary questioning of him might not have led to developing information bearing on "labor union infiltration," possibly stemming from student Communist activity on the Cornell campus, had

* Counts One, Two, Four, and Five of the indictment, set forth in note 5 of the Court's opinion. *Ante*, p. 461.

further inquiry not been blocked by petitioner's refusal to answer.

I cannot agree that the decision of this case has been made "within the conventional framework of the federal criminal law." For surely in judging the pertinency of a question put in the course of an otherwise valid Congressional inquiry, as this one is recognized to have been, we should not insist that the inquiring committee follow stricter rules than the courts themselves apply in determining, for example, the sufficiency of a plea of self-incrimination under the "link in the chain" rule, see, *e. g.*, *Blau* v. *United States,* 340 U. S. 159, or in judging "materiality" in a perjury case, see, *e. g.*, *Carroll* v. *United States, supra.* In reversing this conviction, I think the Court has strayed from the even course of decision.

I would affirm.

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

I must say, with all respect, that I think the Court has grossly misread this record. For, after studying and analyzing it, it seems entirely clear to me that not only did petitioner fail to complain of any uncertainty about the subject under inquiry, or object that the questions put to him were not pertinent to the inquiry, but, moreover, at least three of the questions he refused to answer were, on their face, clearly pertinent to the inquiry as a matter of law. Demonstration of these facts can be made only by carefully setting forth in detail the undisputed relevant facts in the record. I now turn to that task.

Acting under the statutory command of Congress to investigate and report to it on the extent, character and objects of "un-American propaganda activities," the "diffusion . . . of subversive . . . propaganda," and "all other questions in relation thereto that would aid

Congress in any necessary remedial legislation," [1] a Subcommittee of the House Committee on Un-American Activities conducted investigatory hearings at Albany, New York, on April 7, 8 and 9, 1954, relative to Communist subversive activities. At those hearings evidence was adduced, principally by the testimony of a former graduate student of the School of Industrial and Labor Relations of Cornell University, one Marqusee, and by one Richardson, a former student in the Cornell Law School, that a Communist cell existed in that University from 1947 through 1953. Those witnesses testified that they were members of that cell, and, in addition to holding frequent secret meetings and occasionally passing out handbills at strike scenes, the members of the cell formulated and carried out a plan of using the prestige and innocent aid of the university's placement service in getting summer jobs with labor unions in upper New York—particularly, Ithaca, Schenectady and Syracuse—where, by fellow Communists, they were put in contact with the leaders of Communist cells in the unions and there further carried on their Communist activities. Richardson—who was in fact an employee of, and regularly reported to, the Federal Bureau of Investigation—testified that there were at least six members of the Cornell cell and that one of the most active members of it was petitioner, Deutch, and that another was one Homer Owen. Richardson further testified that, in 1952 and 1953, Deutch was the liaison between an undisclosed member of the Cornell faculty and that cell; that, in that period, Deutch collected for and turned over to the cell various contributions, including one for $100, but declined to name the donor.

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[1] Legislative Reorganization Act of 1946, 60 Stat. 812, 828. Rule XI (1)(q)(2), Rules of the House of Representatives. H. Res. 5, 83d Cong., 1st Sess., 99 Cong. Rec. 15. And see pp. 18, 24.

Having this and other similar information, the Subcommittee determined to interrogate Deutch, and, locating him in the graduate school of the University of Pennsylvania in Philadelphia, it caused him to be subpoenaed to appear before the Subcommittee at Albany on Friday, April 9, 1954. But, at the request of petitioner's counsel, and for petitioner's convenience, the Subcommittee agreed to take petitioner's testimony in executive session at Washington, D. C., on Monday, April 12, instead of at Albany on Friday, April 9.

At the appointed time, petitioner, accompanied by his counsel, appeared before the Subcommittee in Washington and was sworn and interrogated. After asking and obtaining his name, place and date of birth, and his educational background, the committee advised petitioner that the particular aspect of Communist infiltration into the educational and labor fields to be inquired into in his interrogation was the existence and nature of ". . . a Communist Party group or cell operating among undergraduates . . . [and] graduates at Cornell . . . ." Specifically, counsel for the committee stated:

> "Mr. Deutch, during hearings at Albany last week, the committee heard testimony regarding the existence of a Communist Party group or cell operating among undergraduates at Cornell University, among certain graduates at Cornell and in the city of Ithaca.
>
> "In connection with that testimony, the committee was informed that you were a member of one or more of those groups. If so, I would like to ask you [about] certain matters relating to your activity there."

The subject under inquiry, so stated, would appear to have been thus made quite plain. It appears to have been entirely plain to petitioner and his counsel, as neither of them then, or at any time during the hearing, mani-

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fested any want of understanding of the subject or asked for any further explanation of it.

Thereupon the following immediately occurred:

"[Mr. Tavenner—counsel for the Committee]: Were you a member of a group of the Communist Party at Cornell?

"Mr. Deutch: I will answer that question, but only under protest.

"I wish to register a challenge as to the jurisdiction of this committee under Public Law 601, which is the committee's enabling legislation. This question, or any similar questions involving my associations, past or future, I am answering, but only under protest as to its constitutionality. But, under your jurisdiction as stated, I answer yes, I was a member of the Communist Party.

"Mr. Tavenner: The committee was advised that a witness by the name of Ross Richardson has stated that you acted as liaison between a Communist Party group on the campus and a member of the faculty at Cornell, and that you knew the name of the member of that faculty, who was a member of the Communist Party.

"Will you tell us who that member of the faculty was?

"Mr. Deutch: Sir, I am perfectly willing to tell about my own activities, but do you feel I should trade my moral scruples by informing on someone else?

. . . . .

"Mr. Jackson [the acting chairman of the Subcommittee]: That is entirely beside the point. You have been asked a question and we must insist that you answer the question or decline to answer it, and

your declination must consist of something more than your moral scruples.

"Mr. Deutch: As to details of that, I think the whole question has been magnified more than it should have.

"Mr. Jackson: There is a question pending and the Chair must insist that you answer the question that has been asked.

"Mr. Deutch: I can only say that whereas I do not want to be in contempt of the committee, I do not believe I can answer questions about other people, but only about myself.

"Mr. Jackson: You therefore refuse to answer the question that is pending, is that correct?

"Mr. Deutch: Yes, sir . . . ."

Petitioner's refusal to answer that question resulted in Count One of his subsequent indictment.

A colloquy then ensued between petitioner and the acting chairman and another member of the Subcommittee, at the conclusion of which petitioner stated: "The only thing I am saying, sir, my challenge is, is it constitutional under Public Law 601?"

Thereupon the following occurred:

"Mr. Tavenner: The committee received testimony from Ross Richardson to the effect that you collected certain donations for the benefit of the Communist Party, and that on one occasion you delivered to him the sum of $100, without designating to him the source of it. Will you tell the committee, please, the source of that $100 contribution, if it was made?

"Mr. Deutch: No; this contribution was made—I believe I gave you the reason why I decline to answer regarding names, and this was from a personal friend."

In reply to the acting chairman's direction to answer the question, petitioner stated:

> "Mr. Deutch: I feel like I can't answer that question. I realize there are many problems facing me, and it wasn't an easy decision to make.
>
> "Mr. Jackson: The Chair directs again that you answer.
>
> "Mr. Deutch: I am unable to.
>
> "Mr. Tavenner: . . . I want to know if you refuse to answer the question.
>
> "Mr. Deutch: Yes, sir."

Petitioner's refusal to answer that question resulted in Count Two of his subsequent indictment.

The background of the question, and the question, that resulted in Count Three of the indictment are omitted, because the District Court dismissed that Count, and it is not before us.

Petitioner then refused, though directed by the acting chairman, to answer the question: "Were you acquainted with Homer Owen?" And that refusal resulted in Count Four of his subsequent indictment.

Then, after saying ". . . so when I came to college I was approached and joined [the Communist Party]," petitioner was asked and answered as follows:

> "Mr. Tavenner: By whom were you approached?
>
> "Mr. Deutch: I was approached by a student. I don't wish to give his name.
>
> "Mr. Jackson: The witness is directed to give the name of the person by whom he was approached.
>
> "Mr. Deutch: I decline to give the name."

Petitioner's refusal to answer that question resulted in Count Five of his indictment.

This, I submit, is a fair statement of the undisputed relevant facts, and it sets forth literally every contention, objection and reason given by petitioner at the hearing

for his refusal to answer these questions. Apart from the formal testimony of Mr. Tavenner and some documentary exhibits offered by the Government, this was the evidence that was offered and received at petitioner's contempt trial in the District Court.

I think this record provides an ample basis to support the District Court's finding that, in general, "The Committee was investigating the infiltration of Communism into educational and labor fields," 147 F. Supp., at 91, but whether or not that was the general and announced subject of the hearings is immaterial to this case, because here petitioner was told, near the beginning of his interrogation and before the relevant questions were propounded, that the subject about which the committee wished to interrogate him was "the existence of a Communist Party group or cell operating among [students] at Cornell University . . . [and] matters relating to [his] activity there." Like the Court of Appeals, I think these "quoted statements made to [petitioner] by the committee counsel and a committee member clearly indicated the object of the inquiry" of petitioner—*i. e.*, the nature and extent of Communist infiltration at Cornell—"and the pertinency of the questions [to that subject]." 108 U. S. App. D. C., at 148, 280 F. 2d, at 696.

Likewise, it seems entirely clear to me, as it did to the Court of Appeals, that not only did petitioner fail to object to any question on the ground of pertinency but "Never once did he indicate unawareness of the purpose of the hearing, or doubt as to the pertinency of the questions." 108 U. S. App. D. C., at 146, 280 F. 2d, at 694. It also seems plain to me, as it did to the Court of Appeals, that petitioner "declined to answer the questions, not on the ground of pertinency [but rather on the ground] that it was against his 'moral scruples' to answer questions about other people." 108 U. S. App. D. C., at 147, 280 F. 2d, at 695. "Nor," as said by the Court of Appeals, "did he claim that he did not understand how the ques-

tions related to the subject under inquiry, or what that subject was. On the contrary, it is quite obvious that he recognized that the questions were pertinent to the subject under inquiry, and he based his refusal to answer solely and simply on the fact that he did not wish to give the names of other persons . . . [and] [n]ot until the trial in the District Court, in what appears to be afterthought, did appellant raise the questions of pertinency and unawareness of the subject matter of the inquiry." 108 U. S. App. D. C., at 147–148, 280 F. 2d, at 695–696. It thus seems clear to me, as it did to the Court of Appeals, that "the Government has proved beyond a reasonable doubt that the subject under inquiry and the pertinency of the questions were made to appear at the committee hearing with 'indisputable clarity.'" 108 U. S. App. D. C., at 147, 280 F. 2d, at 695.

Yet this Court now reverses the findings and judgments of the two courts below upon the sole ground "that the Government at the trial failed to carry its burden of proving the pertinence of the questions." I am compelled by the evidence, respectfully, to disagree.

Here, whether or not petitioner was told or knew that the general subject of the inquiry was "infiltration of Communism into educational and labor fields," he was specifically told that the committee had information that he had recently been a member of a Communist cell at Cornell, had acted as the liaison between an undisclosed member of the faculty and that cell, had collected and turned over to the cell monies from donors whom he refused to identify; and, then, coming specifically to the particular subject about which the committee desired to interrogate him, petitioner was told that the committee wished to interrogate him about "a Communist Party group or cell operating among undergraduates . . . [and] . . . graduates at Cornell and in the city of Ithaca" and "matters relating to [his] activity there." In the second place, the subject under inquiry, thus stated, was not only

crystal clear but appears to have been entirely plain to petitioner and his counsel, as neither of them then, or at any time during the hearing, manifested any want of understanding of the subject or asked for any further explanation of it. In the third place, neither petitioner nor his counsel made any objection, or even hinted any objection, to any question put to petitioner at the hearing on the ground of pertinency. Instead, petitioner said: "The only thing I am saying, sir, my challenge is, is it constitutional under Public Law 601?" And, finally, at the trial the Government proved this specific committee purpose by introducing into evidence not only the record made at the hearing but also the testimony of the Committee's counsel as to these matters. It is, therefore, passing strange that the Court is unable to find any proof of pertinency of the questions.

In *Watkins* v. *United States,* 354 U. S. 178, the witness had expressly "objected to the questions on the grounds of lack of pertinency" (*id.,* at 214), and the committee failed to clarify that matter. Hence, we said: "Unless the subject matter has been made to appear with undisputable clarity, it is the duty of the investigative body, *upon objection of the witness on grounds of pertinency,* to state for the record the subject under inquiry at that time and the manner in which the propounded questions are pertinent thereto." *Id.,* at 214–215. (Emphasis added.) Here, as stated, not only was pertinency made to appear with "undisputable clarity," but moreover petitioner and his counsel gave every indication to the committee that they were aware of the subject under inquiry and made no objection whatever on the ground of pertinency.

In *Barenblatt* v. *United States,* 360 U. S. 109, the witness had said at the hearing, "I might wish to . . . challenge the pertinency of the question to the investigation," and at another point, in a lengthy written statement, he quoted from this Court's opinion in *Jones* v. *Securities &*

Exchange Comm'n, 298 U. S. 1, language relating to a witness' right to be informed of the pertinency of questions asked him by an administrative agency, and then contended in this Court that his conviction for contempt of Congress should be reversed because the subject of the inquiry and the relevancy of the questions thereto were not made clear. In rejecting that claim, and in contrasting that situation from the one existing in the *Watkins* case, we said: "These statements cannot, however, be accepted as the equivalent of a pertinency objection. At best they constituted but a contemplated objection to questions still unasked, and buried as they were in the context of petitioner's general challenge to the power of the Subcommittee they can hardly be considered adequate, within the meaning of what was said in *Watkins, supra,* at 214–215, to trigger what would have been the Subcommittee's reciprocal obligation had it been faced with a pertinency objection." 360 U. S., at 123–124.

I also think that this Court's decision in *United States* v. *Bryan,* 339 U. S. 323, is highly relevant to this question. For it is as true here, as it was there, that if petitioner did not understand the subject under inquiry or believed that the questions put to him were not relevant to that subject, "a decent respect for the House of Representatives, by whose authority [he was being questioned], would have required that [he] state [his] reasons for [refusing answers to the questions]." *Id.,* at 332. Such an objection would have given the Subcommittee an opportunity to avoid the blocking of its inquiry by a further and even more detailed explanation of the subject under inquiry and the manner in which the propounded questions were pertinent thereto. "To deny the Committee the opportunity to consider [such an] objection or remedy it is in itself a contempt of its authority and an obstruction of its processes. See *Bevan* v. *Kreiger,* 289 U. S. 459, 464–465 (1933)." 339 U. S., at 333. Petitioner's failure to

make any such objection at the hearing, but raising it, for the first time, at his contempt trial, was patently an attempted "evasion of the duty of one summoned . . . before a congressional committee[, and] cannot be condoned." *Id.*, at 333. And see *McPhaul* v. *United States,* 364 U. S. 372, 379.

This alone should be, and is for me, a complete answer to petitioner's claim, and to the Court's holding, "that the Government at the trial failed to carry its burden of proving the pertinence of the questions."

But, in addition, at least the questions involved in Counts One, Two and Five of the indictment were, on their face, clearly pertinent to the inquiry as a matter of law.[2] Petitioner had been specifically told that the particular subject upon which he was to be interrogated was "the existence of a Communist Party group or cell operating among undergraduates . . . [and] graduates at Cornell and in the city of Ithaca," and "matters relating to [his] activity there." Surely the questions involved in Counts One, Two and Five of the Indictment were, on their face, clearly pertinent to that subject. One cannot profitably elaborate a truth so plain. *Barenblatt* v. *United States,* 360 U. S. 109, 123–125. And see *McPhaul* v. *United States,* 364 U. S. 372, 380–381.

For these reasons, I am bound to think that the two courts below were right, and that the judgment should be affirmed.

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[2] Inasmuch as a general sentence was imposed on the four counts of no more than the law allows to be imposed on any one count, it follows that if any one of the four counts was adequately proved by the Government the judgment must be affirmed. *Barenblatt* v. *United States, supra,* at 126, note 25.

CONNER *v.* SIMLER.

ON PETITION FOR REHEARING.

No. 685. Decided June 12, 1961.

Rehearing and certiorari granted; judgment vacated; and case remanded.

Reported below: 282 F. 2d 382.

Peyton Ford for petitioner.

John B. Ogden for respondent.

PER CURIAM.

The petition for rehearing is granted. The order entered March 20, 1961, 365 U. S. 844, denying the petition for writ of certiorari is vacated and the petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted. The judgment is vacated and the case is remanded to the Court of Appeals for reconsideration in the light of *Southard* v. *MacDonald,* 360 P. 2d 940.

THE CHIEF JUSTICE, MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS dissent from vacation of the Court of Appeals judgment which held that the respondent Simler was entitled to have the facts of his case in the United States District Court determined by a jury as we believe is required by Rule 38 of the Federal Rules of Civil Procedure, our prior decisions and the Seventh Amendment to the Constitution of the United States.

CRASKA, ALIAS DAVIS, *v.* NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 877. Decided June 12, 1961.

Appeal dismissed and certiorari denied.

Appellant *pro se.*

Louis J. Lefkowitz, Attorney General of New York, and *Robert E. Fischer,* Special 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.

CERVIERI ET UX. *v.* PORT OF NEW YORK AUTHORITY.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

No. 886. Decided June 12, 1961.

Appeal dismissed and certiorari denied.
Reported below: 34 N. J. 144, 167 A. 2d 609.

Appellants *pro se.*

Sidney Goldstein and *Russell E. Watson* 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.

TORCASO *v.* WATKINS, CLERK.

APPEAL FROM THE COURT OF APPEALS OF MARYLAND.

No. 373. Argued April 24, 1961.—Decided June 19, 1961.

Appellant was appointed by the Governor of Maryland to the office of Notary Public; but he was denied a commission because he would not declare his belief in God, as required by the Maryland Constitution. Claiming that this requirement violated his rights under the First and Fourteenth Amendments, he sued in a state court to compel issuance of his commission; but relief was denied. The State Court of Appeals affirmed, holding that the state constitutional provision is self-executing without need for implementing legislation and requires declaration of a belief in God as a qualification for office. *Held:* This Maryland test for public office cannot be enforced against appellant, because it unconstitutionally invades his freedom of belief and religion guaranteed by the First Amendment and protected by the Fourteenth Amendment from infringement by the States. Pp. 489–496.

223 Md. 49, 162 A. 2d 438, reversed.

Leo Pfeffer and *Lawrence Speiser* argued the cause for appellant. With them on the briefs were *Joseph A. Sickles, Carlton R. Sickles, Bruce N. Goldberg, Rowland Watts* and *George Kaufmann.*

Thomas B. Finan, Attorney General of Maryland, and *Joseph S. Kaufman,* Deputy Attorney General, argued the cause and filed a brief for appellee. *C. Ferdinand Sybert,* former Attorney General of Maryland, and *Stedman Prescott, Jr.,* former Deputy Attorney General, appeared with *Mr. Kaufman* on the motion to dismiss or affirm.

Briefs of *amici curiae,* urging reversal, were filed by *Herbert A. Wolff* and *Leo Rosen* for the American Ethical Union, and by *Herbert B. Ehrmann, Lawrence Peirez, Isaac G. McNatt, Abraham Blumberg, Arnold Forster, Paul Hartman, Theodore Leskes, Edwin J. Lukas* and *Sol Rabkin* for the American Jewish Committee et al.

MR. JUSTICE BLACK delivered the opinion of the Court.

Article 37 of the Declaration of Rights of the Maryland Constitution provides:

> "[N]o religious test ought ever to be required as a qualification for any office of profit or trust in this State, other than a declaration of belief in the existence of God . . . ."

The appellant Torcaso was appointed to the office of Notary Public by the Governor of Maryland but was refused a commission to serve because he would not declare his belief in God. He then brought this action in a Maryland Circuit Court to compel issuance of his commission, charging that the State's requirement that he declare this belief violated "the First and Fourteenth Amendments to the Constitution of the United States . . . ."[1] The Circuit Court rejected these federal constitutional contentions, and the highest court of the State, the Court of Appeals, affirmed,[2] holding that the state constitutional provision is self-executing and requires declaration of belief in God as a qualification for office without need for implementing legislation. The case is therefore properly here on appeal under 28 U. S. C. § 1257 (2).

There is, and can be, no dispute about the purpose or effect of the Maryland Declaration of Rights requirement before us—it sets up a religious test which was designed to

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[1] Appellant also claimed that the State's test oath requirement violates the provision of Art. VI of the Federal Constitution that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." Because we are reversing the judgment on other grounds, we find it unnecessary to consider appellant's contention that this provision applies to state as well as federal offices.

[2] 223 Md. 49, 162 A. 2d 438. Appellant's alternative contention that this test violates the Maryland Constitution also was rejected by the state courts.

and, if valid, does bar every person who refuses to declare a belief in God from holding a public "office of profit or trust" in Maryland. The power and authority of the State of Maryland thus is put on the side of one particular sort of believers—those who are willing to say they believe in "the existence of God." It is true that there is much historical precedent for such laws. Indeed, it was largely to escape religious test oaths and declarations that a great many of the early colonists left Europe and came here hoping to worship in their own way. It soon developed, however, that many of those who had fled to escape religious test oaths turned out to be perfectly willing, when they had the power to do so, to force dissenters from their faith to take test oaths in conformity with that faith. This brought on a host of laws in the new Colonies imposing burdens and disabilities of various kinds upon varied beliefs depending largely upon what group happened to be politically strong enough to legislate in favor of its own beliefs. The effect of all this was the formal or practical "establishment" of particular religious faiths in most of the Colonies, with consequent burdens imposed on the free exercise of the faiths of nonfavored believers.[3]

There were, however, wise and far-seeing men in the Colonies—too many to mention—who spoke out against test oaths and all the philosophy of intolerance behind them. One of these, it so happens, was George Calvert (the first Lord Baltimore), who took a most important part in the original establishment of the Colony of Maryland. He was a Catholic and had, for this reason, felt compelled by his conscience to refuse to take the Oath of Supremacy in England at the cost of resigning from high governmental office. He again refused to take that oath when it was demanded by the Council of the Colony of

[3] See, *e. g.*, I Stokes, Church and State in the United States, 358–446. See also cases cited, note 7, *infra*.

Virginia, and as a result he was denied settlement in that Colony.[4] A recent historian of the early period of Maryland's life has said that it was Calvert's hope and purpose to establish in Maryland a colonial government free from the religious persecutions he had known—one "securely beyond the reach of oaths . . . ." [5]

When our Constitution was adopted, the desire to put the people "securely beyond the reach" of religious test oaths brought about the inclusion in Article VI of that document of a provision that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." Article VI supports the accuracy of our observation in *Girouard* v. *United States,* 328 U. S. 61, 69, that "[t]he test oath is abhorrent to our tradition." Not satisfied, however, with Article VI and other guarantees in the original Constitution, the First Congress proposed and the States very shortly thereafter

[4] The letter from the Virginia Council to the King's Privy Council is quoted in Hanley, Their Rights and Liberties (Newman Press 1959), 65, as follows:

"According to the instructions from your Lordship and the usual course held in this place, we tendered the oaths of supremacy and allegiance to his Lordship[;] [Baltimore] and some of his followers, who making profession of the Romish Religion, utterly refused to take the same. . . . His Lordship then offered to take this oath, a copy whereof is included . . . but we could not imagine that so much latitude was left for us to decline from the prescribed form, so strictly exacted and so well justified and defended by the pen of our late sovereign, Lord King James of happy memory. . . . Among the many blessings and favors for which we are bound to bless God . . . there is none whereby it hath been made more happy than in the freedom of our Religion . . . and that no papists have been suffered to settle their abode amongst us. . . ."

Of course this was long before Madison's great Memorial and Remonstrance and the enactment of the famous Virginia Bill for Religious Liberty, discussed in our opinion in *Everson* v. *Board of Education,* 330 U. S. 1, 11–13.

[5] Hanley, *op. cit., supra,* p. 65.

adopted our Bill of Rights, including the First Amendment.[6] That Amendment broke new constitutional ground in the protection it sought to afford to freedom of religion, speech, press, petition and assembly. Since prior cases in this Court have thoroughly explored and documented the history behind the First Amendment, the reasons for it, and the scope of the religious freedom it protects, we need not cover that ground again.[7] What was said in our prior cases we think controls our decision here.

In *Cantwell* v. *Connecticut,* 310 U. S. 296, 303–304, we said:

> "The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws. . . . Thus the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be."

Later we decided *Everson* v. *Board of Education,* 330 U. S. 1, and said this at pages 15 and 16:

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor

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[6] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

[7] See, *e. g.,* the opinions of the Court and also the concurring and dissenting opinions in *Reynolds* v. *United States,* 98 U. S. 145; *Davis* v. *Beason,* 133 U. S. 333; *Cantwell* v. *Connecticut,* 310 U. S. 296; *West Virginia State Bd. of Education* v. *Barnette,* 319 U. S. 624; *Fowler* v. *Rhode Island,* 345 U. S. 67; *Everson* v. *Board of Education,* 330 U. S. 1; *Illinois ex rel. McCollum* v. *Board of Education,* 333 U. S. 203; *McGowan* v. *Maryland,* 366 U. S. 420.

> the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.' "

While there were strong dissents in the *Everson* case, they did not challenge the Court's interpretation of the First Amendment's coverage as being too broad, but thought the Court was applying that interpretation too narrowly to the facts of that case. Not long afterward, in *Illinois ex rel. McCollum* v. *Board of Education,* 333 U. S. 203, we were urged to repudiate as dicta the above-quoted *Everson* interpretation of the scope of the First Amendment's coverage. We declined to do this, but instead strongly reaffirmed what had been said in *Everson,* calling attention to the fact that both the majority and the minority in *Everson* had agreed on the principles declared in this part of the *Everson* opinion. And a concurring opinion in *McCollum,* written by MR. JUSTICE FRANKFURTER and joined by the other *Everson* dissenters, said this:

> "We are all agreed that the First and Fourteenth Amendments have a secular reach far more penetrat-

> ing in the conduct of Government than merely to forbid an 'established church.' . . . We renew our conviction that 'we have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion.' " [8]

The Maryland Court of Appeals thought, and it is argued here, that this Court's later holding and opinion in *Zorach* v. *Clauson,* 343 U. S. 306, had in part repudiated the statement in the *Everson* opinion quoted above and previously reaffirmed in *McCollum.* But the Court's opinion in *Zorach* specifically stated: "We follow the *McCollum* case." 343 U. S., at 315. Nothing decided or written in *Zorach* lends support to the idea that the Court there intended to open up the way for government, state or federal, to restore the historically and constitutionally discredited policy of probing religious beliefs by test oaths or limiting public offices to persons who have, or perhaps more properly profess to have, a belief in some particular kind of religious concept. [9]

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[8] 333 U. S., at 213, 232. Later, in *Zorach* v. *Clauson,* 343 U. S. 306, 322, MR. JUSTICE FRANKFURTER stated in dissent that "[t]he result in the McCollum case . . . was based on principles that received unanimous acceptance by this Court, barring only a single vote."

[9] In one of his famous letters of "a Landholder," published in December 1787, Oliver Ellsworth, a member of the Federal Constitutional Convention and later Chief Justice of this Court, included among his strong arguments against religious test oaths the following statement:

"In short, test-laws are utterly ineffectual: they are no security at all; because men of loose principles will, by an external compliance, evade them. If they exclude any persons, it will be honest men, men of principle, who will rather suffer an injury, than act contrary to the dictates of their consciences. . . ." Quoted in Ford, Essays on the Constitution of the United States, 170. See also 4 Elliot, Debates in the Several State Conventions on the Adoption of the Federal Constitution, 193.

We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person "to profess a belief or disbelief in any religion." Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers,[10] and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.[11]

In upholding the State's religious test for public office the highest court of Maryland said:

> "The petitioner is not compelled to believe or disbelieve, under threat of punishment or other compulsion. True, unless he makes the declaration of belief he cannot hold public office in Maryland, but he is not compelled to hold office."

The fact, however, that a person is not compelled to hold public office cannot possibly be an excuse for barring him

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[10] In discussing Article VI in the debate of the North Carolina Convention on the adoption of the Federal Constitution, James Iredell, later a Justice of this Court, said:

". . . [I]t is objected that the people of America may, perhaps, choose representatives who have no religion at all, and that pagans and Mahometans may be admitted into offices. But how is it possible to exclude any set of men, without taking away that principle of religious freedom which we ourselves so warmly contend for?"

And another delegate pointed out that Article VI "leaves religion on the solid foundation of its own inherent validity, without any connection with temporal authority; and no kind of oppression can take place." 4 Elliot, *op. cit., supra*, at 194, 200.

[11] Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others. See *Washington Ethical Society* v. *District of Columbia*, 101 U. S. App. D. C. 371, 249 F. 2d 127; *Fellowship of Humanity* v. *County of Alameda*, 153 Cal. App. 2d 673, 315 P. 2d 394; II Encyclopaedia of the Social Sciences 293; 4 Encyclopaedia Britannica (1957 ed.) 325–327; 21 *id.*, at 797; Archer, Faiths Men Live By (2d ed. revised by Purinton), 120–138, 254–313; 1961 World Almanac 695, 712; Year Book of American Churches for 1961, at 29, 47.

from office by state-imposed criteria forbidden by the Constitution. This was settled by our holding in *Wieman* v. *Updegraff*, 344 U. S. 183. We there pointed out that whether or not "an abstract right to public employment exists," Congress could not pass a law providing "'. . . that no federal employee shall attend Mass or take any active part in missionary work.'" [12]

This Maryland religious test for public office unconstitutionally invades the appellant's freedom of belief and religion and therefore cannot be enforced against him.

The judgment of the Court of Appeals of Maryland is accordingly reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE FRANKFURTER and MR. JUSTICE HARLAN concur in the result.

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[12] 344 U. S., at 191–192, quoting from *United Public Workers* v. *Mitchell*, 330 U. S. 75, 100.

Syllabus.

POE ET AL. *v.* ULLMAN, STATE'S ATTORNEY.

APPEAL FROM THE SUPREME COURT OF ERRORS OF CONNECTICUT.

No. 60. Argued March 1–2, 1961.—Decided June 19, 1961.*

These are appeals from a decision of the Supreme Court of Errors of Connecticut affirming dismissals of complaints in three cases in which the plaintiffs sued for declaratory judgments that certain Connecticut statutes which prohibit the use of contraceptive devices and the giving of medical advice on their use violate the Fourteenth Amendment by depriving the plaintiffs of life and property without due process of law. The complaints alleged that two plaintiffs who were married women needed medical advice on the use of such devices for the protection of their health but that a physician, who was the plaintiff in the third case, was deterred from giving such advice because the State's Attorney intended to prosecute offenses against the State's laws and he claimed that the giving of such advice and the use of such devices were forbidden by state statutes. However, it appeared that the statutes in question had been enacted in 1879 and that no one ever had been prosecuted thereunder except two doctors and a nurse, who were charged with operating a birth-control clinic, and that the information against them had been dismissed after the State Supreme Court had sustained the legislation in 1940 on an appeal from a demurrer to the information. *Held:* The appeals are dismissed, because the records in these cases do not present controversies justifying the adjudication of a constitutional issue. Pp. 498–509.

147 Conn. 48, 156 A. 2d 508, appeal dismissed.

Fowler V. Harper argued the cause and filed a brief for appellants.

Raymond J. Cannon, Assistant Attorney General of Connecticut, argued the cause for appellee. With him on the brief was *Albert L. Coles,* Attorney General.

Harriet Pilpel argued the cause for the Planned Parenthood Federation of America, Inc., as *amicus curiae,* urging

*Together with No. 61, *Buxton* v. *Ullman, State's Attorney,* also on appeal from the same Court.

reversal. With her on the brief were *Morris L. Ernst* and *Nancy F. Wechsler.*

Briefs of *amici curiae,* urging reversal, were filed by *Whitney North Seymour* for Dr. Willard Allen et al., and by *Osmond K. Fraenkel* and *Rowland Watts* for the American Civil Liberties Union et al.

MR. JUSTICE FRANKFURTER announced the judgment of the Court and an opinion in which THE CHIEF JUSTICE, MR. JUSTICE CLARK and MR. JUSTICE WHITTAKER join.

These appeals challenge the constitutionality, under the Fourteenth Amendment, of Connecticut statutes which, as authoritatively construed by the Connecticut Supreme Court of Errors, prohibit the use of contraceptive devices and the giving of medical advice in the use of such devices. In proceedings seeking declarations of law, not on review of convictions for violation of the statutes, that court has ruled that these statutes would be applicable in the case of married couples and even under claim that conception would constitute a serious threat to the health or life of the female spouse.

No. 60 combines two actions brought in a Connecticut Superior Court for declaratory relief. The complaint in the first alleges that the plaintiffs, Paul and Pauline Poe,[1] are a husband and wife, thirty and twenty-six years old respectively, who live together and have no children. Mrs. Poe has had three consecutive pregnancies terminating in infants with multiple congenital abnormalities from which each died shortly after birth. Plaintiffs have consulted Dr. Buxton, an obstetrician and gynecologist of eminence, and it is Dr. Buxton's opinion that the cause of the infants' abnormalities is genetic, although the

[1] Plaintiffs in the two cases composing No. 60 sue under fictitious names. The Supreme Court of Errors of Connecticut approved this procedure in the special circumstances of the cases.

underlying "mechanism" is unclear. In view of the great emotional stress already suffered by plaintiffs, the probable consequence of another pregnancy is psychological strain extremely disturbing to the physical and mental health of both husband and wife. Plaintiffs know that it is Dr. Buxton's opinion that the best and safest medical treatment which could be prescribed for their situation is advice in methods of preventing conception. Dr. Buxton knows of drugs, medicinal articles and instruments which can be safely used to effect contraception. Medically, the use of these devices is indicated as the best and safest preventive measure necessary for the protection of plaintiffs' health. Plaintiffs, however, have been unable to obtain this information for the sole reason that its delivery and use may or will be claimed by the defendant State's Attorney (appellee in this Court) to constitute offenses against Connecticut law. The State's Attorney intends to prosecute offenses against the State's laws, and claims that the giving of contraceptive advice and the use of contraceptive devices would be offenses forbidden by Conn. Gen. Stat. Rev., 1958, §§ 53–32 and 54–196.[2]

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[2] As a matter of specific legislation, Connecticut outlaws only the use of contraceptive materials. Conn. Gen. Stat. Rev., 1958, § 53–32 provides:

"*Use of drugs or instruments to prevent conception.* Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned."

There are no substantive provisions dealing with the sale or distribution of such devices, nor with the giving of information concerning their use. These activities are deemed to be involved in law solely because of the general criminal accessory enactment of Connecticut. This is Conn. Gen. Stat. Rev., 1958, § 54–196:

"*Accessories.* Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender."

Alleging irreparable injury and a substantial uncertainty of legal relations (a local procedural requisite for a declaration), plaintiffs ask a declaratory judgment that §§ 53–32 and 54–196 are unconstitutional, in that they deprive the plaintiffs of life and liberty without due process of law.

The second action in No. 60 is brought by Jane Doe, a twenty-five-year-old housewife. Mrs. Doe, it is alleged, lives with her husband, they have no children; Mrs. Doe recently underwent a pregnancy which induced in her a critical physical illness—two weeks' unconsciousness and a total of nine weeks' acute sickness which left her with partial paralysis, marked impairment of speech, and emotional instability. Another pregnancy would be exceedingly perilous to her life. She, too, has consulted Dr. Buxton, who believes that the best and safest treatment for her is contraceptive advice. The remaining allegations of Mrs. Doe's complaint, and the relief sought, are similar to those in the case of Mr. and Mrs. Poe.

In No. 61, also a declaratory judgment action, Dr. Buxton is the plaintiff. Setting forth facts identical to those alleged by Jane Doe, he asks that the Connecticut statutes prohibiting his giving of contraceptive advice to Mrs. Doe be adjudged unconstitutional, as depriving him of liberty and property without due process.

In all three actions, demurrers were advanced, *inter alia,* on the ground that the statutes attacked had been previously construed and sustained by the Supreme Court of Errors of Connecticut, and thus there did not exist the uncertainty of legal relations requisite to maintain suits for declaratory judgment. While the Connecticut Supreme Court of Errors in sustaining the demurrers referred to this local procedural ground, relying on *State* v. *Nelson,* 126 Conn. 412, 11 A. 2d 856, and *Tileston* v. *Ullman,* 129 Conn. 84, 26 A. 2d 582, app. dism'd, 318 U. S. 44, we cannot say that its decision rested on it. 147 Conn.

48, 156 A. 2d 508. We noted probable jurisdiction. 362 U. S. 987.

Appellants' complaints in these declaratory judgment proceedings do not clearly, and certainly do not in terms, allege that appellee Ullman threatens to prosecute them for use of, or for giving advice concerning, contraceptive devices. The allegations are merely that, in the course of his public duty, he intends to prosecute any offenses against Connecticut law, and that he claims that use of and advice concerning contraceptives would constitute offenses. The lack of immediacy of the threat described by these allegations might alone raise serious questions of non-justiciability of appellants' claims. See *United Public Workers* v. *Mitchell,* 330 U. S. 75, 88. But even were we to read the allegations to convey a clear threat of imminent prosecutions, we are not bound to accept as true all that is alleged on the face of the complaint and admitted, technically, by demurrer, any more than the Court is bound by stipulation of the parties. *Swift & Co.* v. *Hocking Valley R. Co.,* 243 U. S. 281, 289. Formal agreement between parties that collides with plausibility is too fragile a foundation for indulging in constitutional adjudication.

The Connecticut law prohibiting the use of contraceptives has been on the State's books since 1879. Conn. Acts 1879, c. 78. During the more than three-quarters of a century since its enactment, a prosecution for its violation seems never to have been initiated, save in *State* v. *Nelson,* 126 Conn. 412, 11 A. 2d 856. The circumstances of that case, decided in 1940, only prove the abstract character of what is before us. There, a test case was brought to determine the constitutionality of the Act as applied against two doctors and a nurse who had allegedly disseminated contraceptive information. After the Supreme Court of Errors sustained the legislation on appeal from a demurrer to the information, the State

moved to dismiss the information. Neither counsel nor our own researches have discovered any other attempt to enforce the prohibition of distribution or use of contraceptive devices by criminal process.[3] The unreality of these law suits is illumined by another circumstance. We were advised by counsel for appellants that contraceptives are commonly and notoriously sold in Connecticut drug stores.[4] Yet no prosecutions are recorded; and certainly such ubiquitous, open, public sales would more quickly invite the attention of enforcement officials than the conduct in which the present appellants wish to engage—the giving of private medical advice by a doctor to his individual patients, and their private use of the devices prescribed. The undeviating policy of nullification by Connecticut of its anti-contraceptive laws throughout all the long years that they have been on the statute books bespeaks more than prosecutorial paralysis. What was said in another context is relevant here. "Deeply embedded traditional ways of carrying out state policy . . ."—or not carrying it out—"are often tougher and truer law than the dead words of the written text." *Nashville, C. & St. L. R. Co.* v. *Browning,* 310 U. S. 362, 369.

The restriction of our jurisdiction to cases and controversies within the meaning of Article III of the Constitution, see *Muskrat* v. *United States,* 219 U. S. 346, is not the sole limitation on the exercise of our appellate powers, especially in cases raising constitutional ques-

[3] The assumption of prosecution of spouses for use of contraceptives is not only inherently bizarre, as was admitted by counsel, but is underscored in its implausibility by the disability of spouses, under Connecticut law, from being compelled to testify against one another.

[4] It is also worthy of note that the Supreme Court of Errors has held that contraceptive devices could not be seized and destroyed as nuisances under the State's seizure statutes. See *State* v. *Certain Contraceptive Materials,* 126 Conn. 428, 11 A. 2d 863, decided on the same day as the *Nelson* case.

tions. The policy reflected in numerous cases and over a long period was thus summarized in the oft-quoted statement of Mr. Justice Brandeis: "The Court [has] developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision." *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 341, 346 (concurring opinion). In part the rules summarized in the *Ashwander* opinion have derived from the historically defined, limited nature and function of courts and from the recognition that, within the framework of our adversary system, the adjudicatory process is most securely founded when it is exercised under the impact of a lively conflict between antagonistic demands, actively pressed, which make resolution of the controverted issue a practical necessity. See *Little* v. *Bowers,* 134 U. S. 547, 558; *California* v. *San Pablo & Tulare R. Co.,* 149 U. S. 308, 314; *United States* v. *Fruehauf,* 365 U. S. 146, 157. In part they derive from the fundamental federal and tripartite character of our National Government and from the role—restricted by its very responsibility—of the federal courts, and particularly this Court, within that structure. See the Note to *Hayburn's Case,* 2 Dall. 409; *Massachusetts* v. *Mellon,* 262 U. S. 447; 488–489; *Watson* v. *Buck,* 313 U. S. 387, 400–403; *Alabama State Federation of Labor* v. *McAdory,* 325 U. S. 450, 471.

These considerations press with special urgency in cases challenging legislative action or state judicial action as repugnant to the Constitution. "The best teaching of this Court's experience admonishes us not to entertain constitutional questions in advance of the strictest necessity." *Parker* v. *County of Los Angeles,* 338 U. S. 327, 333. See also *Liverpool, N. Y. & P. S. S. Co.* v. *Commissioners,* 113 U. S. 33, 39. The various doctrines of "stand-

ing," [5] "ripeness," [6] and "mootness," [7] which this Court has evolved with particular, though not exclusive, reference to such cases are but several manifestations—each having its own "varied application" [8]—of the primary conception that federal judicial power is to be exercised to strike down legislation, whether state or federal, only at the instance of one who is himself immediately harmed, or immediately threatened with harm, by the challenged action. *Stearns* v. *Wood,* 236 U. S. 75; *Texas* v. *Interstate Commerce Comm'n,* 258 U. S. 158; *United Public Workers* v. *Mitchell,* 330 U. S. 75, 89–90. "This court can have no right to pronounce an abstract opinion upon the constitutionality of a State law. Such law must be brought into actual, or threatened operation upon rights properly falling under judicial cognizance, or a remedy is not to be had here." *Georgia* v. *Stanton,* 6 Wall. 50, 75, approvingly quoting Mr. Justice Thompson, dissenting, in *Cherokee Nation* v. *Georgia,* 5 Pet. 1, 75; also quoted in *New Jersey* v. *Sargent,* 269 U. S. 328, 331. "The party who invokes the power [to annul legislation on grounds

[5] See, *e. g., Braxton County Court* v. *West Virginia,* 208 U. S. 192; *Yazoo & Mississippi Valley R. Co.* v. *Jackson Vinegar Co.,* 226 U. S. 217; *Fairchild* v. *Hughes,* 258 U. S. 126; *Tileston* v. *Ullman,* 318 U. S. 44; *United States* v. *Raines,* 362 U. S. 17. Cf. *Owings* v. *Norwood's Lessee,* 5 Cranch 344.

[6] See, *e. g., New Jersey* v. *Sargent,* 269 U. S. 328; *Arizona* v. *California,* 283 U. S. 423; *International Longshoremen's Union* v. *Boyd,* 347 U. S. 222. Cf. *Coffman* v. *Breeze Corporations,* 323 U. S. 316.

[7] See, *e. g., San Mateo County* v. *Southern Pacific R. Co.,* 116 U. S. 138; *Singer Mfg. Co.* v. *Wright,* 141 U. S. 696; *Mills* v. *Green,* 159 U. S. 651; *Kimball* v. *Kimball,* 174 U. S. 158; *Tennessee* v. *Condon,* 189 U. S. 64; *American Book Co.* v. *Kansas,* 193 U. S. 49; *Jones* v. *Montague,* 194 U. S. 147; *Security Mutual Life Ins. Co.* v. *Prewitt,* 200 U. S. 446; *Richardson* v. *McChesney,* 218 U. S. 487; *Berry* v. *Davis,* 242 U. S. 468; *Atherton Mills* v. *Johnston,* 259 U. S. 13.

[8] Mr. Justice Brandeis, concurring, in *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 341, 347.

of its unconstitutionality] must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement . . . ." *Massachusetts* v. *Mellon,* 262 U. S. 447, 488.[9]

This principle was given early application and has been recurringly enforced in the Court's refusal to entertain cases which disclosed a want of a truly adversary contest, of a collision of actively asserted and differing claims. See, *e. g., Cleveland* v. *Chamberlain,* 1 Black 419; *Wood-Paper Co.* v. *Heft,* 8 Wall. 333. Such cases may not be "collusive" in the derogatory sense of *Lord* v. *Veazie,* 8 How. 251—in the sense of merely colorable disputes got up to secure an advantageous ruling from the Court. See *South Spring Hill Gold Mining Co.* v. *Amador Medean Gold Mining Co.,* 145 U. S. 300, 301. The Court has found unfit for adjudication any cause that "is not in any real sense adversary," that "does not assume the 'honest and actual antagonistic assertion of rights' to be adjudicated—a safeguard essential to the integrity of the judicial process, and one which we have held to be indispensable to adjudication of constitutional questions by this Court." *United States* v. *Johnson,* 319 U. S. 302, 305. The requirement for adversity was classically expounded in *Chicago & Grand Trunk R. Co.* v. *Wellman,* 143 U. S. 339, 344–345:

> ". . . The theory upon which, apparently, this suit was brought is that parties have an appeal from the

[9] The *Mellon* cases involved what is technically designated as the problem of "standing," but the concern which they exemplify that constitutional issues be determined only at the suit of a person immediately injured has equal application here. It makes little sense to insist that only the parties themselves whom legislation immediately threatens may sue to strike it down and, at the same time, permit such suit when there is not even a remote likelihood that the threat to them will in fact materialize.

> legislature to the courts; and that the latter are given an immediate and general supervision of the constitutionality of the acts of the former. Such is not true. Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any act of any legislature, State or Federal, and the decision necessarily rests on the competency of the legislature to so enact, the court must, in the exercise of its solemn duties, determine whether the act be constitutional or not; but such an exercise of power is the ultimate and supreme function of courts. It is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act."

What was said in the *Wellman* case found ready application in proceedings brought under modern declaratory judgment procedures. For just as the declaratory judgment device does not "purport to alter the character of the controversies which are the subject of the judicial power under the Constitution," *United States* v. *West Virginia*, 295 U. S. 463, 475, it does not permit litigants to invoke the power of this Court to obtain constitutional rulings in advance of necessity. *Electric Bond & Share Co.* v. *Securities and Exchange Comm'n*, 303 U. S. 419, 443. The Court has been on the alert against use of the declaratory judgment device for avoiding the rigorous insistence on exigent adversity as a condition for evoking Court adjudication. This is as true of state court suits for declaratory judgments as of federal. By exercising their jurisdiction, state courts cannot determine the jurisdiction to be exercised by this Court. *Tyler*

v. *Judges of the Court of Registration,* 179 U. S. 405; *Doremus* v. *Board of Education,* 342 U. S. 429. Although we have held that a state declaratory-judgment suit may constitute a case or controversy within our appellate jurisdiction, it is to be reviewed here only "so long as the case retains the essentials of an adversary proceeding, involving a real, not a hypothetical, controversy, which is finally determined by the judgment below." *Nashville, C. & St. L. R. Co.* v. *Wallace,* 288 U. S. 249, 264. It was with respect to a state-originating declaratory judgment proceeding that we said, in *Alabama State Federation of Labor* v. *McAdory,* 325 U. S. 450, 471, that "The extent to which the declaratory judgment procedure may be used in the federal courts to control state action lies in the sound discretion of the Court. . . ." Indeed, we have recognized, in such cases, that ". . . the discretionary element characteristic of declaratory jurisdiction, and imported perhaps from equity jurisdiction and practice without the remedial phase, offers a convenient instrument for making . . . effective . . ." the policy against premature constitutional decision. *Rescue Army* v. *Municipal Court,* 331 U. S. 549, 573, n. 41.

Insofar as appellants seek to justify the exercise of our declaratory power by the threat of prosecution, facts which they can no more negative by complaint and demurrer than they could by stipulation preclude our determining their appeals on the merits. Cf. *Bartemeyer* v. *Iowa,* 18 Wall. 129, 134–135. It is clear that the mere existence of a state penal statute would constitute insufficient grounds to support a federal court's adjudication of its constitutionality in proceedings brought against the State's prosecuting officials if real threat of enforcement is wanting. See *Ex parte La Prade,* 289 U. S. 444, 458. If the prosecutor expressly agrees not to prosecute, a suit against him for declaratory and injunctive relief is not such an adversary case as will be reviewed here. *C. I. O.*

v. *McAdory*, 325 U. S. 472, 475. Eighty years of Connecticut history demonstrate a similar, albeit tacit agreement. The fact that Connecticut has not chosen to press the enforcement of this statute deprives these controversies of the immediacy which is an indispensable condition of constitutional adjudication. This Court cannot be umpire to debates concerning harmless, empty shadows. To find it necessary to pass on these statutes now, in order to protect appellants from the hazards of prosecution, would be to close our eyes to reality.

Nor does the allegation by the Poes and Doe that they are unable to obtain information concerning contraceptive devices from Dr. Buxton, "for the sole reason that the delivery and use of such information and advice may or will be claimed by the defendant State's Attorney to constitute offenses," disclose a necessity for present constitutional decision. It is true that this Court has several times passed upon criminal statutes challenged by persons who claimed that the effects of the statutes were to deter others from maintaining profitable or advantageous relations with the complainants. See, *e. g.*, *Truax* v. *Raich*, 239 U. S. 33; *Pierce* v. *Society of Sisters*, 268 U. S. 510. But in these cases the deterrent effect complained of was one which was grounded in a realistic fear of prosecution. We cannot agree that if Dr. Buxton's compliance with these statutes is uncoerced by the risk of their enforcement, his patients are entitled to a declaratory judgment concerning the statutes' validity. And, with due regard to Dr. Buxton's standing as a physician and to his personal sensitiveness, we cannot accept, as the basis of constitutional adjudication, other than as chimerical the fear of enforcement of provisions that have during so many years gone uniformly and without exception unenforced.

Justiciability is of course not a legal concept with a fixed content or susceptible of scientific verification. Its utilization is the resultant of many subtle pressures,

including the appropriateness of the issues for decision by this Court and the actual hardship to the litigants of denying them the relief sought. Both these factors justify withholding adjudication of the constitutional issue raised under the circumstances and in the manner in which they are now before the Court.

Dismissed.

MR. JUSTICE BLACK dissents because he believes that the constitutional questions should be reached and decided.

MR. JUSTICE BRENNAN, concurring in the judgment.

I agree that this appeal must be dismissed for failure to present a real and substantial controversy which unequivocally calls for adjudication of the rights claimed in advance of any attempt by the State to curtail them by criminal prosecution. I am not convinced, on this skimpy record, that these appellants as individuals are truly caught in an inescapable dilemma. The true controversy in this case is over the opening of birth-control clinics on a large scale; it is that which the State has prevented in the past, not the use of contraceptives by isolated and individual married couples. It will be time enough to decide the constitutional questions urged upon us when, if ever, that real controversy flares up again. Until it does, or until the State makes a definite and concrete threat to enforce these laws against individual married couples—a threat which it has never made in the past except under the provocation of litigation—this Court may not be compelled to exercise its most delicate power of constitutional adjudication.

MR. JUSTICE DOUGLAS, dissenting.

I.

These cases are dismissed because a majority of the members of this Court conclude, for varying reasons, that

this controversy does not present a justiciable question. That conclusion is too transparent to require an extended reply. The device of the declaratory judgment is an honored one. Its use in the federal system is restricted to "cases" or "controversies" within the meaning of Article III. The question must be "appropriate for judicial determination," not hypothetical, abstract, academic or moot. *Aetna Life Ins. Co.* v. *Haworth,* 300 U. S. 227, 240. It must touch "the legal relations of parties having adverse legal interests." *Id.,* 240–241. It must be "real and substantial" and admit of "specific relief through a decree of a conclusive character." *Id.,* 241. The fact that damages are not awarded or an injunction does not issue, the fact that there are no allegations of irreparable injury are irrelevant. *Id.,* 241. This is hornbook law. The need for this remedy in the federal field was summarized in a Senate Report as follows:

> ". . . it is often necessary, in the absence of the declaratory judgment procedure, to violate or purport to violate a statute in order to obtain a judicial determination of its meaning or validity." S. Rep. No. 1005, 73d Cong., 2d Sess., pp. 2–3.

If there is a case where the need for this remedy in the shadow of a criminal prosecution is shown, it is this one, as MR. JUSTICE HARLAN demonstrates. Plaintiffs in No. 60 are two sets of husband and wife. One wife is pathetically ill, having delivered a stillborn fetus. If she becomes pregnant again, her life will be gravely jeopardized. This couple have been unable to get medical advice concerning the "best and safest" means to avoid pregnancy from their physician, plaintiff in No. 61, because if he gave it he would commit a crime. The use of contraceptive devices would also constitute a crime. And it is alleged—and admitted by the State—that the State's Attorney intends to enforce the law by prosecuting offenses under the laws.

A public clinic dispensing birth-control information has indeed been closed by the State. Doctors and a nurse working in that clinic were arrested by the police and charged with advising married women on the use of contraceptives. That litigation produced *State* v. *Nelson,* 126 Conn. 412, 11 A. 2d 856, which upheld these statutes. That same police raid on the clinic resulted in the seizure of a quantity of the clinic's contraception literature and medical equipment and supplies. The legality of that seizure was in question in *State* v. *Certain Contraceptive Materials,* 126 Conn. 428, 11 A. 2d 863.

The Court refers to the *Nelson* prosecution as a "test case" and implies that it had little impact. Yet its impact was described differently by a contemporary observer who concluded his comment with this sentence: "This serious setback to the birth control movement [the *Nelson* case] led to the closing of all the clinics in the state, just as they had been previously closed in the state of Massachusetts." [1] At oral argument, counsel for appellants confirmed that the clinics are still closed. In response to a question from the bench, he affirmed that "no public or private clinic" has dared give birth-control advice since the decision in the *Nelson* case.[2]

These, then, are the circumstances in which the Court feels that it can, contrary to every principle of American or English common law,[3] go outside the record to con-

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[1] Himes, A Decade of Progress in Birth Control, 212 Annals Am. Acad. Pol. & Soc. Sci. 88, 94 (1940).

[2] It may be, as some suggest, that these bizarre laws are kept on the books solely to insure that traffic in contraceptives will be furtive, or will be limited to those who, by the accident of their education, travels, or wealth, need not rely on local public clinics for instruction and supply. Yet these laws—as the decision below shows—are not limited to such situations.

[3] "On the continent there was some speculation during the middle ages as to whether a law could become inoperative through long-continued desuetude. In England, however, the idea of prescription

clude that there exists a "tacit agreement" that these statutes will not be enforced. No lawyer, I think, would advise his clients to rely on that "tacit agreement." No police official, I think, would feel himself bound by that "tacit agreement." After our national experience during the prohibition era, it would be absurd to pretend that all criminal statutes are adequately enforced. But that does not mean that bootlegging was the less a crime. Cf. *Costello* v. *United States,* 365 U. S. 265. In fact, an arbitrary administrative pattern of non-enforcement may increase the hardships of those subject to the law. See J. Goldstein, Police Discretion Not to Invoke the Criminal Process, 69 Yale L. J. 543.

When the Court goes outside the record to determine that Connecticut has adopted "The undeviating policy of nullification . . . of its anti-contraceptive laws," it selects a particularly poor case in which to exercise such a novel power. This is not a law which is a dead letter. Twice since 1940, Connecticut has re-enacted these laws as part of general statutory revisions. Consistently, bills to remove the statutes from the books have been rejected by the legislature. In short, the statutes—far from being the accidental left-overs of another era—are the center of a continuing controversy in the State. See, *e. g.*, The New Republic, May 19, 1947, p. 8.

Again, the Court relies on the inability of counsel to show any attempts, other than the *Nelson* case, "to enforce the prohibition of distribution or use of contraceptive devices by criminal process." Yet, on oral argument, counsel for the appellee stated on his own knowl-

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and the acquisition or loss of rights merely by the lapse of a particular length of time found little favour. . . . There was consequently no room for any theory that statutes might become obsolete." Plucknett, A Concise History of the Common Law (1956), pp. 337–338.

edge that several proprietors had been prosecuted in the "minor police courts of Connecticut" after they had been "picked up" for selling contraceptives. The enforcement of criminal laws in minor courts has just as much impact as in those cases where appellate courts are resorted to. The need of the protection of constitutional guarantees, and the right to them, are not less because the matter is small or the court lowly. See *Thompson* v. *City of Louisville,* 362 U. S. 199; *Tumey* v. *Ohio,* 273 U. S. 510. Nor is the need lacking because the dispensing of birth-control information is by a single doctor rather than by birth-control clinics. The nature of the controversy would not be changed one iota had a dozen doctors, representing a dozen birth-control clinics, sued for remedial relief.

What are these people—doctor and patients—to do? Flout the law and go to prison? Violate the law surreptitiously and hope they will not get caught? By today's decision we leave them no other alternatives. It is not the choice they need have under the regime of the declaratory judgment and our constitutional system. It is not the choice worthy of a civilized society. A sick wife, a concerned husband, a conscientious doctor seek a dignified, discrete, orderly answer to the critical problem confronting them. We should not turn them away and make them flout the law and get arrested to have their constitutional rights determined. See *Railway Mail Assn.* v. *Corsi,* 326 U. S. 88. They are entitled to an answer to their predicament here and now.

II.

The right of the doctor to advise his patients according to his best lights seems so obviously within First Amendment rights as to need no extended discussion. The leading cases on freedom of expression are generally framed

with reference to public debate and discourse. But as Chafee said, "the First Amendment and other parts of the law erect a fence inside which men can talk. The law-makers, legislators and officials stay on the outside of that fence. But what the men inside the fence say when they are let alone is no concern of the law." The Blessings of Liberty (1956), p. 108.

The teacher (*Sweezy* v. *New Hampshire,* 354 U. S. 234) as well as the public speaker (*Thomas* v. *Collins,* 323 U. S. 516) is included. The actor on stage or screen, the artist whose creation is in oil or clay or marble, the poet whose reading public may be practically nonexistent, the musician and his musical scores, the counselor whether priest, parent or teacher no matter how small his audience—these too are beneficiaries of freedom of expression. The remark by President James A. Garfield that his ideal of a college was a log in the woods with a student at one end and Mark Hopkins at another (9 Dict. Am. Biog., p. 216) puts the present problem in proper First Amendment dimensions. Of course a physician can talk freely and fully with his patient without threat of retaliation by the State. The contrary thought—the one endorsed *sub silentio* by the courts below—has the cast of regimentation about it, a cast at war with the philosophy and presuppositions of this free society.

We should say with Kant that "It is absurd to expect to be enlightened by Reason, and at the same time to prescribe to her what side of the question she must adopt." [4] Leveling the discourse of medical men to the morality of a particular community is a deadening influence. Mill spoke of the pressures of intolerant groups that produce "either mere conformers to commonplace, or time-servers for truth." [5] We witness in this case a sealing of the lips of a doctor because he desires to observe

[4] The Critique of Pure Reason, 42 Great Books, p. 221.

[5] On Liberty of Thought and Discussion, 43 Great Books, p. 282.

the law, obnoxious as the law may be. The State has no power to put any sanctions of any kind on him for any views or beliefs that he has or for any advice he renders. These are his professional domains into which the State may not intrude. The chronicles are filled with sad attempts of government to stomp out ideas, to ban thoughts because they are heretical or obnoxious. As Mill stated, "Our merely social intolerance kills no one, roots out no opinions, but induces men to disguise them, or to abstain from any active effort for their diffusion." [6] When that happens society suffers. Freedom working underground, freedom bootlegged around the law is freedom crippled. A society that tells its doctors under pain of criminal penalty what they may not tell their patients is not a free society. Only free exchange of views and information is consistent with "a civilization of the dialogue," to borrow a phrase from Dr. Robert M. Hutchins. See *Wieman* v. *Updegraff*, 344 U. S. 183, 197 (concurring opinion).

III.

I am also clear that this Connecticut law as applied to this married couple deprives them of "liberty" without due process of law, as that concept is used in the Fourteenth Amendment.

The first eight Amendments to the Constitution have been made applicable to the States only in part. My view has been that when the Fourteenth Amendment was adopted, its Due Process Clause incorporated all of those Amendments. See *Adamson* v. *California*, 332 U. S. 46, 68 (dissenting opinion). Although the history of the Fourteenth Amendment may not be conclusive, the words "due process" acquired specific meaning from Anglo-American experience.[7] As MR. JUSTICE BRENNAN re-

[6] *Ibid.*

[7] See Konvitz, Fundamental Liberties of a Free People (1957), pp. 37–39; Green, The Bill of Rights, the Fourteenth Amendment

cently stated, "The Bill of Rights is the primary source of expressed information as to what is meant by constitutional liberty. The safeguards enshrined in it are deeply etched in the foundations of America's freedoms." The Bill of Rights and the States (1961), 36 N. Y. U. L. Rev. 761, 776. When the Framers wrote the Bill of Rights they enshrined in the form of constitutional guarantees those rights—in part substantive, in part procedural—which experience indicated were indispensable to a free society. Some would disagree as to their importance; the debate concerning them did indeed start before their adoption and has continued to this day. Yet the constitutional conception of "due process" must, in my view, include them all until and unless there are amendments that remove them. That has indeed been the view of a full court of nine Justices, though the members who make up that court unfortunately did not sit at the same time.[8]

Though I believe that "due process" as used in the Fourteenth Amendment includes all of the first eight Amendments, I do not think it is restricted and confined to them. We recently held that the undefined "liberty" in the Due Process Clause of the Fifth Amendment includes freedom to travel. *Kent* v. *Dulles,* 357 U. S. 116, 125–127. Cf. *Edwards* v. *California,* 314 U. S. 160,

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and the Supreme Court, 46 Mich. L. Rev. 869, 904 *et seq.* (1948); Holmes, The Fourteenth Amendment and the Bill of Rights, 7 S. C. L. Q. Rev. 596 (1955).

And see Mr. Justice Rutledge (concurring) in *In re Oliver,* 333 U. S. 257, 280–281.

[8] I start with Justices Bradley, Swayne, Field, Clifford and Harlan. To this number, Mr. Justice Brewer can probably be joined on the basis of his agreement "in the main" with Mr. Justice Harlan in *O'Neil* v. *Vermont,* 144 U. S. 323, 371. See the Appendix to MR. JUSTICE BLACK'S dissent in *Adamson* v. *California, supra,* 120–123. To these I add MR. JUSTICE BLACK, Mr. Justice Murphy, Mr. Justice Rutledge and myself (*Adamson* v. *California, supra,* 68, 123).

177, 178 (concurring opinion). The right "to marry, establish a home and bring up children" was said in *Meyer* v. *Nebraska,* 262 U. S. 390, 399, to come within the "liberty" of the person protected by the Due Process Clause of the Fourteenth Amendment. As I indicated in my dissent in *Public Utilities Comm'n* v. *Pollak,* 343 U. S. 451, 467, "liberty" within the purview of the Fifth Amendment includes the right of "privacy," a right I thought infringed in that case because a member of a "captive audience" was forced to listen to a government-sponsored radio program. "Liberty" is a conception that sometimes gains content from the emanations of other specific guarantees (*N. A. A. C. P.* v. *Alabama,* 357 U. S. 449, 460) or from experience with the requirements of a free society.

For years the Court struck down social legislation when a particular law did not fit the notions of a majority of Justices as to legislation appropriate for a free enterprise system. Mr. Justice Holmes, dissenting, rightly said that "a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire.* It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States." *Lochner* v. *New York,* 198 U. S. 45, 75–76.

The error of the old Court, as I see it, was not in entertaining inquiries concerning the constitutionality of social legislation but in applying the standards that it did. See *Tot* v. *United States,* 319 U. S. 463; *Giboney* v. *Empire Storage Co.,* 336 U. S. 490. Social legislation dealing with business and economic matters touches no particularized prohibition of the Constitution, unless it be

the provision of the Fifth Amendment that private property should not be taken for public use without just compensation. If it is free of the latter guarantee, it has a wide scope for application. Some go so far as to suggest that whatever the majority in the legislature says goes (cf. *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 64), that there is no other standard of constitutionality. That reduces the legislative power to sheer voting strength and the judicial function to a matter of statistics. As Robert M. Hutchins has said, "It is obviously impossible to raise questions of freedom and justice if the sole duty of the court is to decide whether the case at bar falls within the scope of the duly issued command of a duly constituted sovereign." Two Faces of Federalism (1960), p. 18. While the legislative judgment on economic and business matters is "well-nigh conclusive" (*Berman* v. *Parker*, 348 U. S. 26, 32), it is not beyond judicial inquiry. Cf. *United States* v. *Oregon*, 366 U. S. 643, 649 (dissenting opinion).

The regime of a free society needs room for vast experimentation. Crises, emergencies, experience at the individual and community levels produce new insights; problems emerge in new dimensions; needs, once never imagined, appear. To stop experimentation and the testing of new decrees and controls is to deprive society of a needed versatility. Yet to say that a legislature may do anything not within a specific guarantee of the Constitution may be as crippling to a free society as to allow it to override specific guarantees so long as what it does fails to shock the sensibilities of a majority of the Court.[9]

[9] "The due process clause is said to exact from the states all that is 'implicit in the concept of ordered liberty.' It is further said that the concept is a living one, that it guarantees basic rights, not because they have become petrified as of any one time, but because due process follows the advancing standards of a free society as to what

The present legislation is an excellent example. If a State banned completely the sale of contraceptives in drug stores, the case would be quite different. It might seem to some or to all judges an unreasonable restriction. Yet it might not be irrational to conclude that a better way of dispensing those articles is through physicians. The same might be said of a state law banning the manufacture of contraceptives. Health, religious, and moral arguments might be marshalled pro and con. Yet it is not for judges to weigh the evidence. Where either the sale or the manufacture is put under regulation, the strictures are on business and commercial dealings that have had a long history with the police power of the States.

The present law, however, deals not with sale, not with manufacture, but with *use*. It provides:

> "Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned." Conn. Gen. Stat., 1958, § 53–32.

The regulation as applied in this case touches the relationship between man and wife. It reaches into the intimacies of the marriage relationship. If we imagine a regime of full enforcement of the law in the manner of

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is deemed reasonable and right. It is to be applied, according to this view, to facts and circumstances as they arise, the cases falling on one side of the line or the other as a majority of nine justices appraise conduct as either implicit in the concept of ordered liberty or as lying without the confines of that vague concept. Of course, in this view, the due process clause of the Fifth Amendment, which confessedly must be construed like that of the Fourteenth, may be repetitious of many of the other guaranties of the first eight amendments and may render many of their provisions superfluous." Roberts, The Court and the Constitution (1951), p. 80.

an Anthony Comstock,[10] we would reach the point where search warrants issued and officers appeared in bedrooms to find out what went on.[11] It is said that this is not that case. And so it is not. But when the State makes "use" a crime and applies the criminal sanction to man

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[10] Anthony Comstock (1844–1915)—the Congregationalist who inspired the foundation of the New York Society for the Suppression of Vice in 1873 and the Watch and Ward Society of Boston in 1876 and who inspired George Bernard Shaw to use the opprobrious word "comstockery" in Mrs. Warren's Profession—was responsible for the passage in 1879 of this Connecticut law.

"Anthony Comstock had moral earnestness and it can't be faked. His concern was with Puritan theology rather than Puritan ethics. Righteousness seemed to him less important than salvation and consequently tricks which seemed shabby to neutrals left him without shame. A man who fights for the safety of his immortal soul can hardly be expected to live up to the best Queensberry traditions in the clinches. To grant the major premises of Comstock's religious and social philosophy is to acquit him of any lack of logic. Obscenity was to Anthony poison to soul and body, and anything remotely touching upon sex was to his mind obscene. He seems to have believed implicitly in medical theories which have since his time been discarded. Even in his day beliefs were changing, but Comstock was loyal to the old-line ideas. It was his notion that idiocy, epilepsy and locomotor-ataxia were among the ailments for which autoeroticism was responsible. Since death and damnation might be, according to his belief, the portion of the girl or boy who read a ribald story, it is easy to understand why he was so impatient with those who advanced the claims of art. Even those who love beauty would hardly be prepared to burn in hell forever in its service. Comstock's decision was even easier, for he did not know, understand or care anything about beauty." Broun and Leech, Anthony Comstock (1927), pp. 265–266.

[11] Those warrants would, I think, go beyond anything so far known in our law. The law has long known the writ *de ventre inspiciendo* authorizing matrons to inspect the body of a woman to determine if she is pregnant. This writ was issued to determine before a hanging whether a convicted female was pregnant or to ascertain whether rightful succession of property was to be defeated by assertion of a suppositious heir. See 1 Blackstone Commentaries (Jones ed. 1915), p. 651.

and wife, the State has entered the innermost sanctum of the home. If it can make this law, it can enforce it. And proof of its violation necessarily involves an inquiry into the relations between man and wife.

That is an invasion of the privacy that is implicit in a free society. A noted theologian who conceives of the use of a contraceptive as a "sin" nonetheless admits that a "use" statute such as this enters a forbidden domain.

> ". . . the Connecticut statute confuses the moral and legal, in that it transposes without further ado a private sin into a public crime. The criminal act here is the private use of contraceptives. The real area where the coercions of law might, and ought to, be applied, at least to control an evil—namely, the contraceptive industry—is quite overlooked. As it stands, the statute is, of course, unenforceable without police invasion of the bedroom, and is therefore indefensible as a piece of legal draughtsmanship." Murray, We Hold These Truths (1960), pp. 157–158.

This notion of privacy is not drawn from the blue.[12] It emanates from the totality of the constitutional scheme under which we live.[13]

> "One of the earmarks of the totalitarian understanding of society is that it seeks to make all

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[12] The right "to be let alone" had many common-law overtones. See Cooley, Torts (2d ed. 1888), p. 29; Warren and Brandeis, Right To Privacy, 4 Harv. L. Rev. 192. Cf. Ohio Rev. Code, § 2905.34, which makes criminal knowing "possession" of "a drug, medicine, article, or thing intended for the prevention of conception," doctors and druggists being excepted. § 2905.37.

[13] Mr. Justice Murphy dissenting in *Adamson* v. *California*, 332 U. S. 46, 124, said:

"I agree that the specific guarantees of the Bill of Rights should be carried over intact into the first section of the Fourteenth Amendment. But I am not prepared to say that the latter is entirely and necessarily limited by the Bill of Rights. Occasions may arise where

> subcommunities—family, school, business, press, church—completely subject to control by the State. The State then is not one vital institution among others: a policeman, a referee, and a source of initiative for the common good. Instead, it seeks to be coextensive with family and school, press, business community, and the Church, so that all of these component interest groups are, in principle, reduced to organs and agencies of the State. In a democratic political order, this megatherian concept is expressly rejected as out of accord with the democratic understanding of social good, and with the actual make-up of the human community." [14]

Can there be any doubt that a Bill of Rights that in time of peace bars soldiers from being quartered in a home "without the consent of the Owner" [15] should also bar the police from investigating the intimacies of the marriage relation? The idea of allowing the State that leeway is congenial only to a totalitarian regime.

I dissent from a dismissal of these cases and our refusal to strike down this law.

MR. JUSTICE HARLAN, dissenting.

I am compelled, with all respect, to dissent from the dismissal of these appeals. In my view the course which the Court has taken does violence to established concepts

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a proceeding falls so far short of conforming to fundamental standards of procedure as to warrant constitutional condemnation in terms of a lack of due process despite the absence of a specific provision in the Bill of Rights."

[14] Calhoun, Democracy and Natural Law, 5 Nat. Law Forum, 31, 36 (1960).

[15] The Third Amendment provides:

"No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law."

of "justiciability," and unjustifiably leaves these appellants under the threat of unconstitutional prosecution. Regrettably, an adequate exposition of my views calls for a dissenting opinion of unusual length.

Between them these suits seek declaratory relief against the threatened enforcement of Connecticut's antibirth-control laws making criminal the use of contraceptives, insofar as such laws relate to the use of contraceptives by married persons and the giving of advice to married persons in their use.[1] The appellants, a married couple, a married woman, and a doctor, ask that it be adjudged, contrary to what the Connecticut courts have held, that such laws, as threatened to be applied to them in circumstances described in the opinion announcing the judgment of the Court (*ante,* pp. 498–500), violate the Fourteenth Amendment, in that they deprive appellants of life, liberty, or property without due process.

The plurality opinion of the Court gives, as the basis for dismissing the appeals, the reason that, as to the two married appellants, the lack of demonstrated enforcement of the Connecticut statute bespeaks an absence of exigent adversity which is posited as the condition for evoking adjudication from us, and, as to the doctor, that his compliance with the state statute is uncoerced by any "realistic fear of prosecution," giving due recognition to his "standing as a physician and to his personal sensitiveness." With these reasons it appears that the concurring opinion agrees.

In *Alabama State Federation of Labor* v. *McAdory,* 325 U. S. 450, 462, it was said that "declaratory judgment procedure may be resorted to only in the sound discretion of the Court and where the interests of justice will be

[1] These statutes, Conn. Gen. Stat., Rev. 1958, § 53–32 (forbidding the use of contraceptives), and Conn. Gen. Stat., Rev. 1958, § 54–196 (the general accessory law), are set forth in note 2 of the plurality opinion, *ante,* p. 499.

advanced and an adequate and effective judgment may be rendered." In my view of these cases a present determination of the Constitutional issues is the only course which will advance justice, and I can find no sound reason born of considerations as to the possible inadequacy or ineffectiveness of the judgment that might be rendered which justifies the Court's contrary disposition. While ordinarily I would not deem it appropriate to deal, in dissent, with Constitutional issues which the Court has not reached, I shall do so here because such issues, as I see things, are entangled with the Court's conclusion as to the nonjusticiability of these appeals.

PART ONE.

Justiciability.

There can be no quarrel with the plurality opinion's statement that "Justiciability is of course not a legal concept with a fixed content or susceptible of scientific verification," but, with deference, the fact that justiciability is not precisely definable does not make it ineffable. Although a large number of cases are brought to bear on the conclusion that is reached, I think it is fairly demonstrable that the authorities fall far short of compelling dismissal of these appeals.[2] Even so, it is suggested that the cases

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[2] Only two cases are squarely relied on, *C. I. O.* v. *McAdory*, 325 U. S. 472, a companion case to *Alabama State Federation of Labor* v. *McAdory*, *supra*, discussed at pp. 526–527, *infra*, and tendering the same issues; and *Ex parte La Prade*, 289 U. S. 444. The appeal in the principal *McAdory* case was dismissed because the state statute there challenged had not yet been construed by the state courts, and it was thought that state construction might remove some Constitutional doubts. In the companion *McAdory* case, the appeal was likewise dismissed, the State having "agreed not to enforce § 7 of the Act [there challenged] until the final decision as to the section's validity by this Court in *Alabama State Federation of Labor* v. *McAdory* . . . ." *Id.*, at 475. In the present appeals there is

do point the way to a "rigorous insistence on exigent adversity" and a "policy against premature constitutional decision," which properly understood does indeed demand that result.

The policy referred to is one to which I unreservedly subscribe. Without undertaking to be definitive, I would suppose it is a policy the wisdom of which is woven of several strands: (1) Due regard for the fact that the source of the Court's power lies ultimately in its duty to decide, in conformity with the Constitution, the particular controversies which come to it, and does not arise from some generalized power of supervision over state and national legislatures; (2) therefore it should insist that litigants bring to the Court interests and rights which require present recognition and controversies demanding immediate resolution; (3) also it follows that the controversy must be one which is in truth and fact the litigant's own, so that the clash of adversary contest which is needed to sharpen and illuminate issues is present and gives that aid on which our adjudicatory system has come to rely; (4) finally, it is required that other means of redress for the particular right claimed be unavailable, so that the process of the Court may not become overburdened and conflicts with other courts or departments of government may not needlessly be created, which might come about if either those truly affected are not the ones demanding relief, or if the relief we can give is not truly needed.

In particularization of this composite policy the Court, in the course of its decisions on matters of justiciability, has developed and given expression to a number of important limitations on the exercise of its jurisdiction, the

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no agreement not to prosecute, no companion case awaiting disposition, and no uncertainty about state law due to lack of state construction.

As to *Ex parte La Prade, supra,* see note 11, *infra.*

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presence or absence of which here should determine the justiciability of these appeals. Since all of them are referred to here in one way or another, it is well to proceed to a disclosure of those which are *not* involved in the present appeals, thereby focusing attention on the one factor on which reliance appears to be placed by both the plurality and concurring opinions in this instance.

First: It should by now be abundantly clear that the fact that only Constitutional claims are presented in proceedings seeking *anticipatory* relief against state criminal statutes does not for that reason alone make the claims premature. See, *e. g., Terrace* v. *Thompson,* 263 U. S. 197; *Pierce* v. *Society of Sisters,* 268 U. S. 510; *Euclid* v. *Ambler Co.,* 272 U. S. 365. Whatever general pronouncements may be found to the contrary must, in context, be seen to refer to considerations quite different from anything present in these cases.

Thus in *Alabama State Federation of Labor* v. *McAdory, supra,* anticipatory relief was withheld for the precise reason that normally this Court ought not to consider the Constitutionality of a state statute in the absence of a controlling interpretation of its meaning and effect by the state courts. To the same effect see *Parker* v. *Los Angeles County,* 338 U. S. 327; *Watson* v. *Buck,* 313 U. S. 387; *Beal* v. *Missouri Pacific R. Co.,* 312 U. S. 45. Indeed, without belaboring the point, the principle that anticipatory relief against state criminal statutes is not unavailable as a general matter may best be illustrated by several cases recently decided in this Court. In *Harrison* v. *N. A. A. C. P.,* 360 U. S. 167, the premise of our action was that anticipatory relief should be obtained, if possible—with review here on certiorari or appeal—in a state court which could then authoritatively construe a new and ambiguous state statute; only if such relief were unavailable, should a Federal District Court exercise its

statutory jurisdiction. And in our recent decisions upholding the Constitutionality of state Sunday-closing laws, 366 U. S. 420, *et seq.*, not one of the opinions paused even slightly over the appropriateness of anticipatory relief, although in one case that issue was argued, *Gallagher* v. *Crown Kosher Super Market*, 366 U. S. 617.

Hence, any language in the cases where the Court has abstained from exercising its jurisdiction, to the effect that we should not "entertain constitutional questions in advance of the strictest necessity," *Parker* v. *Los Angeles County, supra*, at 333, is not at all apposite in the present cases. For these appeals come to us from the highest court of Connecticut, thus affording us—in company with previous state interpretations of the same statute—a clear construction of the scope of the statute, thereby in effect assuring that our review constitutes no greater interference with state administration than the state procedures themselves allow.

Second: I do not think these appeals may be dismissed for want of "ripeness" as that concept has been understood in its "varied applications." [3] There is no lack of "ripeness" in the sense that is exemplified by cases such as *Stearns* v. *Wood*, 236 U. S. 75; *Electric Bond & Share Co.* v. *Securities & Exchange Comm'n*, 303 U. S. 419; *United Public Workers* v. *Mitchell*, 330 U. S. 75; *Inter-*

[3] Manifestly the type of ripeness found wanting in cases such as *Massachusetts* v. *Mellon*, 262 U. S. 447, *Texas* v. *Interstate Commerce Comm'n*, 258 U. S. 158, *New Jersey* v. *Sargent*, 269 U. S. 328, and *Arizona* v. *California*, 283 U. S. 423, is not lacking in the cases before us. For the recurrent theme of those cases, all of which challenge federal action as an encroachment on state sovereignty, is the fact that the mere existence of state sovereign powers and prerogatives which may bear generally upon individual rights raises no such concrete and practical issues as courts are accustomed to consider, so that adjudication upon their validity in such circumstances would take place in the most abstract kind of setting.

national Longshoremen's Union v. *Boyd,* 347 U. S. 222; and perhaps again *Parker* v. *Los Angeles County, supra.* In all of those cases the lack of ripeness inhered in the fact that the need for some further procedure, some further contingency of application or interpretation, whether judicial, administrative or executive, or some further clarification of the intentions of the claimant, served to make remote the issue which was sought to be presented to the Court. Certainly the appellants have stated in their pleadings fully and unequivocally what it is that they intend to do; no clarifying or resolving contingency stands in their way before they may embark on that conduct. Thus there is no circumstance besides that of detection or prosecution to make remote the particular controversy. And it is clear beyond cavil that the mere fact that a controversy such as this is rendered still more unavoidable by an actual prosecution, is not *alone* sufficient to make the case too remote, not ideally enough "ripe" for adjudication, at the prior stage of anticipatory relief.

Moreover, it follows from what has already been said that there is no such want of ripeness as was presented in *Rescue Army* v. *Municipal Court,* 331 U. S. 549, or in our recent decisions dismissing the appeals in *Atlanta Newspapers* v. *Grimes,* 364 U. S. 290, and *United States* v. *Fruehauf,* 365 U. S. 146, where the records presented for adjudication a controversy so artificially truncated as to make the cases not susceptible to intelligent decision. I cannot see what further elaboration is required to enable us to decide the appellants' claims, and indeed neither the plurality opinion nor the concurring opinion—notwithstanding the latter's characterization of this record as "skimpy"— suggests what more grist is needed before the judicial mill could turn.

Third: This is not a feigned, hypothetical, friendly or colorable suit such as discloses "a want of a truly adversary

contest." Clearly these cases are not analogous to *Wood-Paper Co.* v. *Heft,* 8 Wall. 333, or *South Spring Hill Gold Mining Co.* v. *Amador Medean Gold Mining Co.,* 145 U. S. 300, where prior to consideration the controversy in effect became moot by the merger of the two contesting interests. Nor is there any question of collusion as in *Lord* v. *Veazie,* 8 How. 251, or in *United States* v. *Johnson,* 319 U. S. 302. And there is nothing to suggest that the parties by their conduct of this litigation have cooperated to force an adjudication of a Constitutional issue which—were the parties interested solely in winning their cases rather than obtaining a Constitutional decision—might not arise in an arm's-length contested proceeding. Such was the situation in *Chicago & Grand Trunk R. Co.* v. *Wellman,* 143 U. S. 339, where the parties sought a ruling as to whether a particular passenger rate was unconstitutionally confiscatory, having stipulated all the debatable and contingent facts which otherwise might have rendered a Constitutional decision unnecessary.

In the present appeals no more is alleged or conceded than is consistent with undisputed facts and with ordinary practice in deciding a case for anticipatory relief on demurrer. I think it is unjustifiably stretching things to assume that appellants are not deterred by the threat of prosecution from engaging in the conduct in which they assert a right to engage, or to assume that appellee's demurrer to the proposition that he asserts the right to enforce the statute against appellants at any time he chooses is anything but a candid one.

Indeed, as will be developed below, I think both the plurality and concurring opinions confuse on this score the predictive likelihood that, had they not brought themselves to appellee's attention, he would not enforce the statute against them, with some entirely suppositious "tacit agreement" not to prosecute, thereby ignoring the

prosecutor's claim, asserted in these very proceedings, of a right, at his unbounded prosecutorial discretion, to enforce the statute.

Fourth: The doctrine of the cases dealing with a litigant's lack of standing to raise a Constitutional claim is said to justify the dismissal of these appeals. The precedents put forward as examples of this doctrine, see the plurality opinion, note 5, as well as cases such as *Frothingham* v. *Mellon* and *Massachusetts* v. *Mellon,* 262 U. S. 447, and *Texas* v. *Interstate Commerce Comm'n,* 258 U. S. 158, do indeed stand for the proposition that a legal claim will not be considered at the instance of one who has no real and concrete interest in its vindication. This is well in accord with the grounds for declining jurisdiction suggested above. But this doctrine in turn needs further particularization lest it become a catchall for an unarticulated discretion on the part of this Court to decline to adjudicate appeals involving Constitutional issues.

There is no question but that appellants here are asserting rights which are peculiarly their own, and which, if they are to be raised at all, may be raised most appropriately by them. Cf. *Tileston* v. *Ullman,* 318 U. S. 44; *Texas* v. *Interstate Commerce Comm'n, supra; Yazoo & Mississippi Valley R. Co.* v. *Jackson Vinegar Co.,* 226 U. S. 217; *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 341 (concurring opinion). Nor do I understand the argument to be that this is the sort of claim which is too remote ever to be pressed by anyone, because no one is ever sufficiently involved. Cf. *Massachusetts* v. *Mellon, Frothingham* v. *Mellon, supra.* Thus, in truth, it is not the parties pressing this claim but the occasion chosen for pressing it which is objected to. But as has been shown the fact that it is anticipatory relief which is asked cannot of itself make the occasion objectionable.

We are brought, then, to the precise failing in these proceedings which is said to justify refusal to exercise our mandatory appellate jurisdiction: that there has been but one recorded Connecticut case dealing with a *prosecution* under the statute.[4] The significance of this lack of recorded evidence of prosecutions is said to make the presentation of appellants' rights too remote, too contingent, too hypothetical for adjudication in the light of the policies already considered. See pp. 526–530, *supra*. In my view it is only as a result of misconceptions both about the purport of the record before us and about the nature of the rights appellants put forward that this conclusion can be reached.

As far as the record is concerned, I think it is pure conjecture, and indeed conjecture which to me seems contrary to realities, that an open violation of the statute by a doctor (or more obviously still by a birth-control clinic) would not result in a substantial threat of prosecution. Crucial to the opposite conclusion is the description of the 1940 prosecution instituted in *State* v. *Nelson*, 126 Conn. 412, 11 A. 2d 856, as a "test case" which, as it is viewed, scarcely even punctuates the uniform state practice of nonenforcement of this statute. I read the history of Connecticut enforcement in a very different light. The *Nelson* case, as appears from the state court's opinion, was a prosecution of two doctors and a nurse for aiding and abetting violations of this statute by married women in prescribing and advising the use of contraceptive materials by them. It is true that there is

[4] Some support is sought to be drawn for the supposition of state acquiescence in violation of the statute from the case of *State* v. *Certain Contraceptive Materials*, 126 Conn. 428, 11 A. 2d 863. But that case held no more than that contraceptive materials could not be seized under the authority of a statute interpreted to deal with the seizure of gambling paraphernalia.

evidence of a customary unwillingness to enforce the statute prior to *Nelson,* for in that case the prosecutor stated to the trial court in a later motion to discontinue the prosecutions that "When this Waterbury clinic [operated by the defendants] was opened there were in open operation elsewhere in the State at least eight other contraceptive clinics which had been in existence for a long period of time and no questions as to their right to operate had been raised . . . ." [5]

What must also be noted is that the prosecutor followed this statement with an explanation that the primary purpose of the prosecution was to provide clear warning to all those who, like Nelson, might rely on this practice of nonenforcement. He stated that the purpose of the prosecution was:

> "the establishment of the constitutional validity and efficacy of the statutes under which these accused are informed against. Henceforth any person, whether a physician or layman, who violates the provisions of these statutes, must expect to be prosecuted and punished in accordance with the literal provisions of the law." [6]

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[5] The "circumstances" of the *Nelson* case may best be gathered from the remarks of the State's prosecuting attorney, Mr. Fitzgerald, seeking the approval of the trial judge for a *nolle prosequi* in that case after the decision of the State Supreme Court. In an affidavit accompanying a transcript of the proceedings on the State's motion, the attorney for the defendants stated that "said criminal prosecutions were prosecutions instituted by the State upon complaint of a citizen and were instituted in no sense with the prior knowledge or approval of the accused and there was no pre-trial acquiescence by the accused that said actions would be instituted to test the constitutionality of the statutes in question."

[6] This statement was made in the same proceedings referred to in note 5, *supra.*

Thus the respect in which *Nelson* was a test case is only that it was brought for the purpose of making entirely clear the State's power and willingness to enforce against "*any* person, whether a physician or layman" (emphasis supplied), the statute and to eliminate from future cases the very doubt about the existence of these elements which had resulted in eight open birth-control clinics, and which would have made unfair the conviction of Nelson.

The plurality opinion now finds, and the concurring opinion must assume, that the only explanation of the absence of recorded prosecutions subsequent to the *Nelson* case is that Connecticut has renounced that intention to prosecute and punish "*any* person . . . in accordance with the literal provisions of the law" which it announced in *Nelson*. But if renunciation of the purposes of the *Nelson* prosecution is consistent with a lack of subsequent prosecutions, success of that purpose is no less consistent with this lack. I find it difficult to believe that doctors generally—and not just those operating specialized clinics—would continue openly to disseminate advice about contraceptives after *Nelson* in reliance on the State's supposed unwillingness to prosecute, or to consider that high-minded members of the profession would in consequence of such inaction deem themselves warranted in disrespecting this law so long as it is on the books. Nor can I regard as "chimerical" the fear of enforcement of these provisions that seems to have caused the disappearance of at least nine birth-control clinics.[7] In short, I fear that the Court has indulged in a bit of sleight of hand to be rid of this case. It has treated the significance of the absence of prosecutions during the twenty years since *Nelson* as identical with that of the absence of prosecutions during the years before

[7] See Brief of Planned Parenthood Federation of America, Inc., as *amicus curiae,* p. 4, and Appendix f.

Nelson. It has ignored the fact that the very purpose of the *Nelson* prosecution was to change defiance into compliance. It has ignored the very possibility that this purpose may have been successful.[8] The result is to postu-

[8] The concurring opinion concludes, apparently on the basis of the *Nelson* episode, that the "true controversy in this case is over the opening of birth-control clinics on a large scale . . . ." It should be said at once that as to *these* appeals this is an entirely unwarranted assumption. The *amicus curiae* in this case, the Planned Parenthood Federation of America, Inc., is indeed interested in such clinics, see note 7, *supra*, but as to the actual parties here, there is not one word in the record or their briefs to suggest that their interest is anything other than they say it is. The *Nelson* prosecution, it is true, involved a doctor and nurses at a birth-control clinic, but there is nothing about these statutes as they have been authoritatively construed in this and previous cases, that limits their application to advice given by a doctor in a clinic of that sort, as opposed to advice given by a doctor in some less specialized clinic, a hospital or in his own office.

The only conceivable sense in which "The true controversy in this case is over the opening of birth-control clinics" must lie in the circumstance that since the notorious and avowed purpose of such a clinic is the violation of these statutes, there would not be the same problem of detection or proof of violations as might otherwise present itself. The relevance in turn of this circumstance must be that, in the view of the concurring opinion there is a present threat of enforcement against any such clinic—which I too believe—but coupled with a further assumption—one shared by the plurality opinion though lacking any factual warrant whatever—that these statutes do not also deter members of the medical profession in general from violating these statutes. Furthermore both opinions must share the assumption that the appellants may be required to hold what may be their constitutional rights at the whim and pleasure of the prosecutor. In sum, the strong implication of the concurring opinion that a suit for anticipatory relief brought by a birth-control clinic (though it would raise no different issues and present a record no less "skimpy") would succeed in invoking our jurisdiction where these suits fail, exposes the fallacy underlying the Court's disposition: the unprecedented doctrine that a suit for anticipatory relief will be entertained at the instance of one who is forced to violate a statute flagrantly, but not at the urging of one who may violate it surreptitiously with a high probability of avoiding detection.

late a security from prosecution for open defiance of the statute which I do not believe the record supports.[9]

These considerations alone serve to bring appellants so squarely within the rule of *Pierce* v. *Society of Sisters,* 268 U. S. 510, and *Truax* v. *Raich,* 239 U. S. 33, that further demonstration would be pointless.

But even if Dr. Buxton were not in the litigation and appellants the Poes and Doe were seeking simply to use contraceptives without any need of consulting a physician beforehand—which is not the case we have, although it is the case which the plurality opinion of the Court is primarily concerned to discuss—even then I think that it misconceives the concept of justiciability and the nature of these appellants' rights to say that the failure of the State to carry through any criminal prosecution requires dismissal of their appeals.

The Court's disposition assumes that to decide the case now, in the absence of any consummated prosecutions, is unwise because it forces a difficult decision in advance of any exigent necessity therefor. Of course it is abundantly clear that this requisite necessity can exist prior to any actual prosecution, for that is the theory of anticipatory relief, and is by now familiar law. What must be relied on, therefore, is that the historical absence of prosecutions in some way leaves these appellants free to violate the statute without fear of prosecution, whether or not the law is Constitutional, and thus absolves us from the duty of deciding if it is. Despite the sug-

[9] In this regard it is worth comparing the record of the Federal Communications Commission in enforcing its regulations by means of a threat of revocation of station licenses. The Commission has not, as is generally known, used this sanction much more readily than Connecticut has invoked criminal penalties to enforce the laws here in question, but no one would discount entirely the efficacy of the threat or suggest that open defiance of Commission regulations is without substantial risks.

gestion of a "tougher and truer law" of immunity from criminal prosecution and despite speculation as to a "tacit agreement" that this law will not be enforced, there is, of course, no suggestion of an estoppel against the State if it should attempt to prosecute appellants. Neither the plurality nor the concurring opinion suggests that appellants have some legally cognizable right not to be prosecuted if the statute is Constitutional. What is meant is simply that the appellants are more or less free to act without fear of prosecution because the prosecuting authorities of the State, in their discretion and at their whim, are, as a matter of prediction, unlikely to decide to prosecute.

Here is the core of my disagreement with the present disposition. As I will develop later in this opinion, the most substantial claim which these married persons press is their right to enjoy the privacy of their marital relations free of the enquiry of the criminal law, whether it be in a prosecution of them or of a doctor whom they have consulted. And I cannot agree that their enjoyment of this privacy is not substantially impinged upon, when they are told that if they use contraceptives, indeed whether they do so or not, the only thing which stands between them and being forced to render criminal account of their marital privacy is the whim of the prosecutor.[10] Connecticut's highest court has told us in the clearest terms that, given proof, the prosecutor will succeed if he decides to bring a proceeding against one of the appellants for taking

[10] It is suggested that prosecution is unlikely because of an interspousal testimonial privilege in Connecticut. Assuming that such a privilege exists and is applicable here, the testimony of either spouse is not necessary to a conviction. Furthermore, as will be argued, the real incursion here inheres in the institution of a prosecution in this matter at all, with the consequent need of an opportunity for the parties—guilty or innocent—to defend themselves against the charges. See p. 548, *infra*.

the precise actions appellants have announced they intend to take. The State Court does not agree that there has come into play a "tougher and truer law than the dead words of the written text," and in the light of twelve unsuccessful attempts since 1943 to change this legislation, *Poe* v. *Ullman,* 147 Conn. 48, 56, 156 A. 2d 508, 513, n. 2, this position is not difficult to understand. Prosecution and conviction for the clearly spelled-out actions the appellants wish to take is not made unlikely by any fortuitous factor outside the control of the parties, nor is it made uncertain by possible variations in the actions appellants actually take from those the state courts have already passed upon. All that stands between the appellants and jail is the legally unfettered whim of the prosecutor and the Constitutional issue this Court today refuses to decide.

If we revert again to the reasons underlying our reluctance to exercise a jurisdiction which technically we possess, and the concrete expression of those underlying reasons in our cases, see pp. 526–531, *supra,* then I think it must become clear that there is no justification for failing to decide these married persons' appeals. The controversy awaits nothing but an actual prosecution, and, as will be shown, the substantial damage against which these appellants, Mrs. Doe and the Poes, are entitled to protection will be accomplished by such a prosecution, whatever its outcome in the state courts or here. By the present decision, although as a general matter the parties would be entitled to our review in an anticipatory proceeding which the State allowed to be instituted in its courts, these appellants are made to await actual prosecution before we will hear them. Indeed it appears that whereas appellants would surely have been entitled to review were this a new statute, see *Harrison* v. *N. A. A. C. P., supra,* the State here is enabled to maintain at least some substantial measure of compliance with

this statute and still obviate any review in this Court, by the device of purely discretionary prosecutorial inactivity. It seems to me to destroy the whole purpose of anticipatory relief to consider the prosecutor's discretion, once all legal and administrative channels have been cleared, as in any way analogous to those other contingencies which make remote a controversy presenting Constitutional claims.

In this light it is not surprising that the Court's position is without support in the precedents.[11] Indeed it seems to me that *Pierce* v. *Society of Sisters*, 268 U. S. 510, provides very clear authority contrary to the position of the Court in this case, for there a Court which included Justices Holmes, Brandeis, and Stone rejected a claim of prematureness and then passed upon and held unconstitutional a state statute whose sanctions were not even to become effective for more than seventeen months after the time the case was argued to this Court. The Court found allegations of present loss of business, caused by the threat of the statute's future enforcement against the Society's clientele, sufficient to make the injury to the Society "present and very real." 268 U. S., at 536. I cannot regard as less present, or less real, the tendency to discourage the exercise of the liberties of these appellants, caused by reluctance to submit their freedoms from prose-

[11] There is a much discredited dictum in *Ex parte La Prade*, 289 U. S. 444, that in an injunction action there must be an allegation of threatened immediate enforcement of the statute. See 50 Yale L. J. 1278; Borchard, Challenging "Penal" Statutes by Declaratory Action, 52 Yale L. J. 445; 62 Harv. L. Rev. 870–871. But against this dictum (which even in its context was justified only as a natural consequence of the rule of *Ex parte Young*, 209 U. S. 123, involving suits against state officers) one can array numerous cases in which proof of any such immediate threat was considered unnecessary and the Court proceeded to a determination of the merits. See, *e. g.*, *Pennsylvania* v. *West Virginia*, 262 U. S. 553; *Euclid* v. *Ambler Co.*, 272 U. S. 365; *Carter* v. *Carter Coal Co.*, 298 U. S. 238; *Currin* v. *Wallace*, 306 U. S. 1.

cution and conviction to the discretion of the Connecticut prosecuting authorities. I therefore think it incumbent on us to consider the merits of appellants' Constitutional claims.

PART TWO.

Constitutionality.

I consider that this Connecticut legislation, as construed to apply to these appellants, violates the Fourteenth Amendment. I believe that a statute making it a criminal offense for *married couples* to use contraceptives is an intolerable and unjustifiable invasion of privacy in the conduct of the most intimate concerns of an individual's personal life. I reach this conclusion, even though I find it difficult and unnecessary at this juncture to accept appellants' other argument that the judgment of policy behind the statute, so applied, is so arbitrary and unreasonable as to render the enactment invalid for that reason alone. Since both the contentions draw their basis from no explicit language of the Constitution, and have yet to find expression in any decision of this Court, I feel it desirable at the outset to state the framework of Constitutional principles in which I think the issue must be judged.

I.

In reviewing state legislation, whether considered to be in the exercise of the State's police powers, or in provision for the health, safety, morals or welfare of its people, it is clear that what is concerned are "the powers of government inherent in every sovereignty." *The License Cases,* 5 How. 504, 583. Only to the extent that the Constitution so requires may this Court interfere with the exercise of this plenary power of government. *Barron* v. *Mayor of Baltimore,* 7 Pet. 243. But precisely because it is the Constitution alone which warrants judicial interference in sovereign operations of the State,

the basis of judgment as to the Constitutionality of state action must be a rational one, approaching the text which is the only commission for our power not in a literalistic way, as if we had a tax statute before us, but as the basic charter of our society, setting out in spare but meaningful terms the principles of government. *McCulloch* v. *Maryland,* 4 Wheat. 316. But as inescapable as is the rational process in Constitutional adjudication in general, nowhere is it more so than in giving meaning to the prohibitions of the Fourteenth Amendment and, where the Federal Government is involved, the Fifth Amendment, against the deprivation of life, liberty or property without due process of law.

It is but a truism to say that this provision of both Amendments is not self-explanatory. As to the Fourteenth, which is involved here, the history of the Amendment also sheds little light on the meaning of the provision. Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights, 2 Stan. L. Rev. 15. It is important to note, however, that two views of the Amendment have not been accepted by this Court as delineating its scope. One view, which was ably and insistently argued in response to what were felt to be abuses by this Court of its reviewing power, sought to limit the provision to a guarantee of procedural fairness. See *Davidson* v. *New Orleans,* 96 U. S. 97, 105; Brandeis, J., in *Whitney* v. *California,* 274 U. S. 357, at 373; Warren, The New "Liberty" under the 14th Amendment, 39 Harv. L. Rev. 431; Reeder, The Due Process Clauses and "The Substance of Individual Rights," 58 U. Pa. L. Rev. 191; Shattuck, The True Meaning of The Term "Liberty" in Those Clauses in the Federal and State Constitutions Which Protect "Life, Liberty, and Property," 4 Harv. L. Rev. 365. The other view which has been rejected would have it that the Fourteenth Amendment, whether by way of the Privileges and Immunities Clause or the Due

Process Clause, applied against the States only and precisely those restraints which had prior to the Amendment been applicable merely to federal action. However, "due process" in the consistent view of this Court has ever been a broader concept than the first view and more flexible than the second.

Were due process merely a procedural safeguard it would fail to reach those situations where the deprivation of life, liberty or property was accomplished by legislation which by operating in the future could, given even the fairest possible procedure in application to individuals, nevertheless destroy the enjoyment of all three. Compare, *e. g., Selective Draft Law Cases,* 245 U. S. 366; *Butler* v. *Perry,* 240 U. S. 328; *Korematsu* v. *United States,* 323 U. S. 214. Thus the guaranties of due process, though having their roots in Magna Carta's *"per legem terrae"* and considered as procedural safeguards "against executive usurpation and tyranny," have in this country "become bulwarks also against arbitrary legislation." *Hurtado* v. *California,* 110 U. S. 516, at 532.

However it is not the particular enumeration of rights in the first eight Amendments which spells out the reach of Fourteenth Amendment due process, but rather, as was suggested in another context long before the adoption of that Amendment, those concepts which are considered to embrace those rights "which are . . . *fundamental;* which belong . . . to the citizens of all free governments," *Corfield* v. *Coryell,* 4 Wash. C. C. 371, 380, for "the purposes [of securing] which men enter into society," *Calder* v. *Bull,* 3 Dall. 386, 388. Again and again this Court has resisted the notion that the Fourteenth Amendment is no more than a shorthand reference to what is explicitly set out elsewhere in the Bill of Rights. *Slaughter-House Cases,* 16 Wall. 36; *Walker* v. *Sauvinet,* 92 U. S. 90; *Hurtado* v. *California,* 110 U. S. 516; *Presser* v. *Illinois,* 116 U. S. 252; *In re Kemmler,* 136 U. S. 436;

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Twining v. *New Jersey,* 211 U. S. 78; *Palko* v. *Connecticut,* 302 U. S. 319. Indeed the fact that an identical provision limiting federal action is found among the first eight Amendments, applying to the Federal Government, suggests that due process is a discrete concept which subsists as an independent guaranty of liberty and procedural fairness, more general and inclusive than the specific prohibitions. See *Mormon Church* v. *United States,* 136 U. S. 1; *Downes* v. *Bidwell,* 182 U. S. 244; *Hawaii* v. *Mankichi,* 190 U. S. 197; *Balzac* v. *Porto Rico,* 258 U. S. 298; *Farrington* v. *Tokushige,* 273 U. S. 284; *Bolling* v. *Sharpe,* 347 U. S. 497.

Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.

It is this outlook which has led the Court continuingly to perceive distinctions in the imperative character of Constitutional provisions, since that character must be discerned from a particular provision's larger context. And inasmuch as this context is one not of words, but of

history and purposes, the full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, see *Allgeyer* v. *Louisiana,* 165 U. S. 578; *Holden* v. *Hardy,* 169 U. S. 366; *Booth* v. *Illinois,* 184 U. S. 425; *Nebbia* v. *New York,* 291 U. S. 502; *Skinner* v. *Oklahoma,* 316 U. S. 535, 544 (concurring opinion); *Schware* v. *Board of Bar Examiners,* 353 U. S. 232, and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment. Cf. *Skinner* v. *Oklahoma, supra; Bolling* v. *Sharpe, supra.*

As was said in *Meyer* v. *Nebraska,* 262 U. S. 390, 399, "this Court has not attempted to define with exactness the liberty thus guaranteed . . . . Without doubt, it denotes not merely freedom from bodily restraint . . . ." Thus, for instance, when in that case and in *Pierce* v. *Society of Sisters,* 268 U. S. 510, the Court struck down laws which sought not to require what children must learn in schools, but to prescribe, in the first case, what they must *not* learn, and in the second, *where* they must acquire their learning, I do not think it was wrong to put those decisions on "the right of the individual to . . . establish a home and bring up children," *Meyer* v. *Nebraska, ibid.,* or on the basis that "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruc-

tion from public teachers only," *Pierce* v. *Society of Sisters,* at 535. I consider this so, even though today those decisions would probably have gone by reference to the concepts of freedom of expression and conscience assured against state action by the Fourteenth Amendment, concepts that are derived from the explicit guarantees of the First Amendment against federal encroachment upon freedom of speech and belief. See *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, and 656 (dissenting opinion); *Prince* v. *Massachusetts,* 321 U. S. 158, 166. For it is the purposes of those guarantees and not their text, the reasons for their statement by the Framers and not the statement itself, see *Palko* v. *Connecticut,* 302 U. S. 319, 324–327; *United States* v. *Carolene Prods.,* 304 U. S. 144, 152–153, which have led to their present status in the compendious notion of "liberty" embraced in the Fourteenth Amendment.

Each new claim to Constitutional protection must be considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed. Though we exercise limited and sharply restrained judgment, yet there is no "mechanical yardstick," no "mechanical answer." The decision of an apparently novel claim must depend on grounds which follow closely on well-accepted principles and criteria. The new decision must take "its place in relation to what went before and further [cut] a channel for what is to come." *Irvine* v. *California,* 347 U. S. 128, 147 (dissenting opinion). The matter was well put in *Rochin* v. *California,* 342 U. S. 165, 170–171:

> "The vague contours of the Due Process Clause do not leave judges at large. We may not draw on our merely personal and private notions and disregard the limits that bind judges in their judicial function. Even though the concept of due process of law is not final and fixed, these limits are derived from con-

> siderations that are fused in the whole nature of our judicial process . . . . These are considerations deeply rooted in reason and in the compelling traditions of the legal profession."

On these premises I turn to the particular Constitutional claim in this case.

II.

Appellants contend that the Connecticut statute deprives them, as it unquestionably does, of a substantial measure of liberty in carrying on the most intimate of all personal relationships, and that it does so arbitrarily and without any rational, justifying purpose. The State, on the other hand, asserts that it is acting to protect the moral welfare of its citizenry, both directly, in that it considers the practice of contraception immoral in itself, and instrumentally, in that the availability of contraceptive materials tends to minimize "the disastrous consequence of dissolute action," that is fornication and adultery.

It is argued by appellants that the judgment, implicit in this statute—that the use of contraceptives by married couples is immoral—is an irrational one, that in effect it subjects them in a very important matter to the arbitrary whim of the legislature, and that it does so for no good purpose. Where, as here, we are dealing with what must be considered "a basic liberty," cf. *Skinner* v. *Oklahoma, supra,* at 541, "There are limits to the extent to which the presumption of constitutionality can be pressed," *id.,* at 544 (concurring opinion), and the mere assertion that the action of the State finds justification in the controversial realm of morals cannot justify alone any and every restriction it imposes. See *Alberts* v. *California,* 354 U. S. 476.

Yet the very inclusion of the category of morality among state concerns indicates that society is not limited in its objects only to the physical well-being of the com-

munity, but has traditionally concerned itself with the moral soundness of its people as well. Indeed to attempt a line between public behavior and that which is purely consensual or solitary would be to withdraw from community concern a range of subjects with which every society in civilized times has found it necessary to deal. The laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up, as well as laws forbidding adultery, fornication and homosexual practices which express the negative of the proposition, confining sexuality to lawful marriage, form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis. Compare *McGowan* v. *Maryland*, 366 U. S. 420.

It is in this area of sexual morality, which contains many proscriptions of consensual behavior having little or no direct impact on others, that the State of Connecticut has expressed its moral judgment that all use of contraceptives is improper. Appellants cite an impressive list of authorities who, from a great variety of points of view, commend the considered use of contraceptives by married couples. What they do not emphasize is that not too long ago the current of opinion was very probably quite the opposite,[12] and that even today the issue is not

[12] The so-called Comstock Law, 17 Stat. 598, may be regarded as characteristic of the attitude of a large segment of public opinion on this matter through the end of the last century. It was only by judicial interpretation at a later date that the absolute prohibitions of the law were qualified to exclude professional medical use. *Youngs Rubber Corp.* v. *Lee & Co.*, 45 F. 2d 103; *Davis* v. *United States*, 62 F. 2d 473; *United States* v. *One Package*, 86 F. 2d 737; 50 Harv. L. Rev. 1312. However, the Comstock Law in its original form "started a fashion" and many States enacted similar legislation, some of which is still on the books. See Stone and Pilpel, The Social and Legal Status of Contraception, 22 N. C. L. Rev. 212; Legislation Note,

free of controversy. Certainly, Connecticut's judgment is no more demonstrably correct or incorrect than are the varieties of judgment, expressed in law, on marriage and divorce, on adult consensual homosexuality, abortion, and sterilization, or euthanasia and suicide. If we had a case before us which required us to decide simply, and in abstraction, whether the moral judgment implicit in the application of the present statute to married couples was a sound one, the very controversial nature of these questions would, I think, require us to hesitate long before concluding that the Constitution precluded Connecticut from choosing as it has among these various views. Cf. *Alberts* v. *California,* 354 U. S. 476, 500–503 (concurring opinion).

But, as might be expected, we are not presented simply with this moral judgment to be passed on as an abstract proposition. The secular state is not an examiner of consciences: it must operate in the realm of behavior, of overt actions, and where it does so operate, not only the underlying, moral purpose of its operations, but also the *choice of means* becomes relevant to any Constitutional judgment on what is done. The moral presupposition on which appellants ask us to pass judgment could form the basis of a variety of legal rules and administrative choices, each presenting a different issue for adjudication. For example, one practical expression of the moral view propounded here might be the rule that a marriage in which

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45 Harv. L. Rev. 723; Note, 6 U. of Chi. L. Rev. 260; Murray, America's Four Conspiracies, at 32–33, in Religion in America (Cogley ed.). Indeed the criticism of these measures assumes that they represented general public opinion, though of a bygone day. See, *e. g.,* Knopf, Various Aspects of Birth Control; Birth Control Clinical Research Bureau, Laws Relating to Birth Control in the United States and its Territories, foreword and introduction; Stone and Pilpel, *supra;* Hearings on H. R. 11082, 72d Cong., 1st Sess. See generally, Broun and Leech, Anthony Comstock; Dennett, Birth Control Laws.

only contraceptive relations had taken place had never been consummated and could be annulled. Compare, *e. g.*, 2 Bouscaren, Canon Law Digest, 307–313. Again, the use of contraceptives might be made a ground for divorce, or perhaps tax benefits and subsidies could be provided for large families. Other examples also readily suggest themselves.

III.

Precisely what is involved here is this: the State is asserting the right to enforce its moral judgment by intruding upon the most intimate details of the marital relation with the full power of the criminal law. Potentially, this could allow the deployment of all the incidental machinery of the criminal law, arrests, searches and seizures; inevitably, it must mean at the very least the lodging of criminal charges, a public trial, and testimony as to the *corpus delicti*. Nor could any imaginable elaboration of presumptions, testimonial privileges, or other safeguards, alleviate the necessity for testimony as to the mode and manner of the married couples' sexual relations, or at least the opportunity for the accused to make denial of the charges. In sum, the statute allows the State to enquire into, prove and punish married people for the private use of their marital intimacy.

This, then, is the precise character of the enactment whose Constitutional measure we must take. The statute must pass a more rigorous Constitutional test than that going merely to the plausibility of its underlying rationale. See pp. 542–545, *supra*. This enactment involves what, by common understanding throughout the English-speaking world, must be granted to be a most fundamental aspect of "liberty," the privacy of the home in its most basic sense, and it is this which requires that the statute be subjected to "strict scrutiny." *Skinner* v. *Oklahoma*, *supra*, at 541.

That aspect of liberty which embraces the concept of the privacy of the home receives explicit Constitutional protection at two places only. These are the Third Amendment, relating to the quartering of soldiers,[13] and the Fourth Amendment, prohibiting unreasonable searches and seizures.[14] While these Amendments reach only the Federal Government, this Court has held in the strongest terms, and today again confirms, that the concept of "privacy" embodied in the Fourth Amendment is part of the "ordered liberty" assured against state action by the Fourteenth Amendment. See *Wolf* v. *Colorado,* 338 U. S. 25; *Mapp* v. *Ohio, post,* p. 643.

It is clear, of course, that this Connecticut statute does not invade the privacy of the home in the usual sense, since the invasion involved here may, and doubtless usually would, be accomplished without any physical intrusion whatever into the home. What the statute undertakes to do, however, is to create a crime which is grossly offensive to this privacy, while the Constitution refers only to methods of ferreting out substantive wrongs, and the procedure it requires presupposes that substantive offenses may be committed and sought out in the privacy of the home. But such an analysis forecloses any claim to Constitutional protection against this form of deprivation of privacy, only if due process in this respect is limited to what is explicitly provided in the Constitution, divorced from the rational purposes, historical roots, and subsequent developments of the relevant provisions.

[13] "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law."

[14] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Perhaps the most comprehensive statement of the principle of liberty underlying these aspects of the Constitution was given by Mr. Justice Brandeis, dissenting in *Olmstead* v. *United States,* 277 U. S. 438, at 478:

> "The protection guaranteed by the [Fourth and Fifth] Amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. . . ."

I think the sweep of the Court's decisions, under both the Fourth and Fourteenth Amendments, amply shows that the Constitution protects the privacy of the home against all unreasonable intrusion of whatever character. "[These] principles . . . affect the very essence of constitutional liberty and security. They reach farther than [a] concrete form of the case . . . before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employés of the sanctity of a man's home and the privacies of life. . . ." *Boyd* v. *United States,* 116 U. S. 616, 630. "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." *Wolf* v. *Colorado, supra,* at 27. In addition, see, *e. g., Davis* v. *United States,* 328 U. S. 582, 587;

Oklahoma Press Pub. Co. v. *Walling,* 327 U. S. 186, 202–203; *Frank* v. *Maryland,* 359 U. S. 360, 365–366; *Silverman* v. *United States,* 365 U. S. 505, 511.

It would surely be an extreme instance of sacrificing substance to form were it to be held that the Constitutional principle of privacy against arbitrary official intrusion comprehends only physical invasions by the police. To be sure, the times presented the Framers with two particular threats to that principle, the general warrant, see *Boyd* v. *United States, supra,* and the quartering of soldiers in private homes. But though "Legislation, both statutory and constitutional, is enacted, . . . from an experience of evils, . . . its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. . . . [A] principle to be vital must be capable of wider application than the mischief which gave it birth." *Weems* v. *United States,* 217 U. S. 349, 373.

Although the form of intrusion here—the enactment of a substantive offense—does not, in my opinion, preclude the making of a claim based on the right of privacy embraced in the "liberty" of the Due Process Clause, it must be acknowledged that there is another sense in which it could be argued that this intrusion on privacy differs from what the Fourth Amendment, and the similar concept of the Fourteenth, were intended to protect: here we have not an intrusion into the home so much as on the life which characteristically has its place in the home. But to my mind such a distinction is so insubstantial as to be captious: if the physical curtilage of the home is protected, it is surely as a result of solicitude to protect the privacies of the life within. Certainly the safeguarding of the home does not follow merely from the sanctity of property rights. The home derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw

to its protection the principles of more than one explicitly granted Constitutional right. Thus, Mr. Justice Brandeis, writing of a statute which made "it punishable to teach [pacifism] in any place [to] a single person . . . no matter what the relation of the parties may be," found such a "statute invades the privacy and freedom of the home. Father and mother may not follow the promptings of religious belief, of conscience or of conviction, and teach son or daughter the doctrine of pacifism. If they do any police officer may summarily arrest them." *Gilbert* v. *Minnesota,* 254 U. S. 325, 335–336 (dissenting opinion). This same principle is expressed in the *Pierce* and *Meyer* cases, *supra.* These decisions, as was said in *Prince* v. *Massachusetts,* 321 U. S. 158, at 166, "have respected the private realm of family life which the state cannot enter."

Of this whole "private realm of family life" it is difficult to imagine what is more private or more intimate than a husband and wife's marital relations. We would indeed be straining at a gnat and swallowing a camel were we to show concern for the niceties of property law involved in our recent decision, under the Fourth Amendment, in *Chapman* v. *United States,* 365 U. S. 610, and yet fail at least to see any substantial claim here.

Of course, just as the requirement of a warrant is not inflexible in carrying out searches and seizures, see *Abel* v. *United States,* 362 U. S. 217; *United States* v. *Rabinowitz,* 339 U. S. 56, so there are countervailing considerations at this more fundamental aspect of the right involved. "[T]he family . . . is not beyond regulation," *Prince* v. *Massachusetts, supra,* and it would be an absurdity to suggest either that offenses may not be committed in the bosom of the family or that the home can be made a sanctuary for crime. The right of privacy most manifestly is not an absolute. Thus, I would not suggest that adultery, homosexuality, fornication and incest are immune from criminal enquiry, however privately practiced. So much

has been explicitly recognized in acknowledging the State's rightful concern for its people's moral welfare. See pp. 545–548, *supra*. But not to discriminate between what is involved in this case and either the traditional offenses against good morals or crimes which, though they may be committed anywhere, happen to have been committed or concealed in the home, would entirely misconceive the argument that is being made.

Adultery, homosexuality and the like are sexual intimacies which the State forbids altogether, but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected. It is one thing when the State exerts its power either to forbid extra-marital sexuality altogether, or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy.

In sum, even though the State has determined that the use of contraceptives is as iniquitous as any act of extra-marital sexual immorality, the intrusion of the whole machinery of the criminal law into the very heart of marital privacy, requiring husband and wife to render account before a criminal tribunal of their uses of that intimacy, is surely a very different thing indeed from punishing those who establish intimacies which the law has always forbidden and which can have no claim to social protection.

In my view the appellants have presented a very pressing claim for Constitutional protection. Such difficulty as the claim presents lies only in evaluating it against the State's countervailing contention that it be allowed to enforce, by whatever means it deems appropriate, its judgment of the immorality of the practice this law con-

demns. In resolving this conflict a number of factors compel me to conclude that the decision here must most emphatically be for the appellants. Since, as it appears to me, the statute marks an abridgment of important fundamental liberties protected by the Fourteenth Amendment, it will not do to urge in justification of that abridgment simply that the statute is rationally related to the effectuation of a proper state purpose. A closer scrutiny and stronger justification than that are required. See pp. 542–545, *supra*.

Though the State has argued the Constitutional permissibility of the moral judgment underlying this statute, neither its brief, nor its argument, nor anything in any of the opinions of its highest court in these or other cases even remotely suggests a justification for the obnoxiously intrusive means it has chosen to effectuate that policy. To me the very circumstance that Connecticut has not chosen to press the enforcement of this statute against individual users, while it nevertheless persists in asserting its right to do so at any time—in effect a right to hold this statute as an imminent threat to the privacy of the households of the State—conduces to the inference either that it does not consider the policy of the statute a very important one, or that it does not regard the means it has chosen for its effectuation as appropriate or necessary.

But conclusive, in my view, is the utter novelty of this enactment. Although the Federal Government and many States have at one time or other had on their books statutes forbidding or regulating the distribution of contraceptives, none, so far as I can find, has made the *use* of contraceptives a crime.[15] Indeed, a diligent search has

[15] See tabulation of statutes in Birth Control Legislation, 9 Cleveland-Marshall Law Review, 245 (1960); Legislation Note, 45 Harv. L. Rev. 723 (1932); Birth Control Clinical Research Bureau, Laws Relating to Birth Control in the United States and its Territories (1938).

revealed that no nation, including several which quite evidently share Connecticut's moral policy,[16] has seen fit to effectuate that policy by the means presented here.

Though undoubtedly the States are and should be left free to reflect a wide variety of policies, and should be allowed broad scope in experimenting with various means of promoting those policies, I must agree with Mr. Justice Jackson that "There are limits to the extent to which a legislatively represented majority may conduct . . . experiments at the expense of the dignity and personality" of the individual. *Skinner* v. *Oklahoma, supra.* In this instance these limits are, in my view, reached and passed.

I would adjudicate these appeals and hold this statute unconstitutional, insofar as it purports to make criminal the conduct contemplated by these married women. It follows that if their conduct cannot be a crime, appellant Buxton cannot be an accomplice thereto. I would reverse the judgment in each of these cases.

MR. JUSTICE STEWART, dissenting.

For the reasons so convincingly advanced by both MR. JUSTICE DOUGLAS and MR. JUSTICE HARLAN, I join them in dissenting from the dismissal of these appeals. Since the appeals are nonetheless dismissed, my dissent need go no further. However, in refraining from a discussion of the constitutional issues, I in no way imply that the ultimate result I would reach on the merits of these controversies would differ from the conclusions of my dissenting Brothers.

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[16] Unqualified disapproval of contraception is implicit in the laws of Belgium, Droit Penal, § 383; France, Code Penal, Art. 317; Ireland, Censorship of Publications Act of 1929, §§ 16, 17, Criminal Law Amendment Act of 1935, § 17; Italy, Codice Penale, Arts. 553, 555; and Spain, Codigo Penal, Art. 416. Compare the more permissive legislation in Canada, Criminal Code, § 150; Germany, Strafgesetzbuch, § 184; and Switzerland, Code Penal, Art. 211.

PIEMONTE *v.* UNITED STATES.

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

No. 122. Argued March 21, 1961.—Decided June 19, 1961.

While serving a sentence for a federal narcotics offense, petitioner was summoned before a federal grand jury and asked questions concerning his crime as well as other transactions in narcotics. 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 concerning violations of the narcotics laws, the United States Attorney obtained a court order granting petitioner immunity and directing him to testify. On his refusal to do so, partly because he feared for his life and that of his family, he was adjudged guilty of criminal contempt. *Held:* The conviction is sustained. *Reina* v. *United States*, 364 U. S. 507. Pp. 556–561.

276 F. 2d 148, affirmed.

Melvin B. Lewis argued the cause and filed a brief for petitioner.

Theodore George Gilinsky argued the cause for the United States. With him on the briefs were former *Solicitor General Rankin, Solicitor General Cox, Assistant Attorney General Wilkey, Acting Assistant Attorney General Foley, Beatrice Rosenberg* and *J. F. Bishop.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

Petitioner, Armando Piemonte, while serving a six-year sentence for the sale and possession of heroin, was brought by writ of habeas corpus *ad testificandum* before a federal grand jury inquiring into narcotics offenses. Having consulted his counsel prior to his appearance, before the grand jury he refused to answer all questions

concerning his crime as well as other transactions in narcotics, under the claim of his privilege against self-incrimination. Three days later, the United States Attorney petitioned for an order directing Piemonte to answer the questions put to him. The petition stated that the grand jury was conducting an investigation of illegal narcotics activities, that Piemonte's testimony was required for the investigation in the public interest, that having been questioned on matters relating to narcotics Piemonte claimed his privilege against self-incrimination, wherefore request was made that Piemonte be required to testify pursuant to 18 U. S. C. § 1406. That provision of the Narcotic Control Act of 1956 gives immunity from future prosecution to any witness who is compelled by court order to testify before a federal court or grand jury concerning violations of the narcotics laws.[1]

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[1] "Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any violation of—

"(1) any provision of part I or part II of subchapter A of chapter 39 of the Internal Revenue Code of 1954 the penalty for which is provided in subsection (a) or (b) of section 7237 of such Code,

"(2) subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act, as amended (21 U. S. C., sec. 174), or

"(3) the Act of July 11, 1941, as amended (21 U. S. C., sec. 184a),

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 or produce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. 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

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The section's breadth and constitutionality were considered earlier this Term in *Reina* v. *United States*, 364 U. S. 507.

The district judge, having granted Piemonte immunity from "prosecution which might arise from any answers that you give to this Grand Jury concerning the matter of their investigation," ordered him to testify "relative to the aforementioned inquiry of said Grand Jury . . . ." Piemonte was granted an opportunity to consult his lawyer and his duty to appear before the grand jury was delayed for a day. The next morning he renewed his refusal to answer the questions propounded to him about narcotics activities and again invoked his Fifth Amendment privilege.

That afternoon he was taken back before the District Court to answer an order to show cause why he should not be cited for contempt for deliberately disobeying the previous order to testify. He was represented by his counsel at this proceeding. Having examined the transcript of the grand jury's morning proceedings, the judge asked petitioner if he persisted in refusing to answer the questions, to which Piemonte replied in the affirmative. The judge gave Piemonte's counsel four days to prepare for a plenary hearing of the charge of contumacy, but denied Piemonte's motion for a jury trial.

At the subsequent hearing, the Government stood on its case based on the grand jury transcripts and the court's order to testify. The judge again asked Piemonte if he persisted in his refusal to obey the court's order.

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having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except prosecution described in the next sentence) against him in any court. No witness shall be exempt under this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section."

Piemonte took the stand in his own behalf, and made the following explanation for his refusal to testify:

> "Well, I am doing time in the penitentiary. I fear for my life. I fear for the life of my wife, my two stepchildren, and my family. I can't do something like that. I want to live, too."

After his counsel's elaboration of this argument, the judge again asked Piemonte if he would testify. Upon his refusal, the judge declared him guilty of contempt of court for willful failure to obey a lawful order. After hearing argument on the sentence, the judge once again offered to give petitioner the opportunity to answer the questions. The refusal having been made definitive, sentence was fixed at eighteen months, to commence at the termination of the imprisonment he was serving.

The contempt judgment was affirmed by the Court of Appeals for the Seventh Circuit, 276 F. 2d 148, and we granted certiorari, 364 U. S. 811.

This record surely evinces the utmost solicitude by the trial court for the defendant's interests. His only claim for reversal here is based upon alleged defects in the proceedings which resulted in his conviction of criminal contempt.[2]

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[2] Neither before the Court of Appeals nor here was fear for himself or his family urged by Piemonte as a valid excuse from testifying. Nor would this be a legal excuse. Every citizen of course owes to his society the duty of giving testimony to aid in the enforcement of the law. See *Brown* v. *Walker*, 161 U. S. 591, 600. Lord Chancellor Hardwicke's pithy phrase cannot be too often recalled: "[T]he public has a right to every man's evidence." 12 Hansard's Debates 693; 8 Wigmore, Evidence (3d ed.), p. 64, § 2192.

If two persons witness an offense—one being an innocent bystander and the other an accomplice who is thereafter imprisoned for his participation—the latter has no more right to keep silent than the former. The Government of course has an obligation to protect its citizens from harm. But fear of reprisal offers an immunized prisoner no more dispensation from testifying than it does any innocent bystander without a record.

Petitioner's first claim is that he was subjected to so many differing interpretations of whether he had a privilege to refrain from testifying as to certain questions that the order commanding him to answer lacked sufficient clarity. This is a sheer afterthought. Neither Piemonte nor his counsel ever claimed confusion in the District Court as a basis for his refusal to testify. Nor do the facts reveal that petitioner could have been misled by the out-of-context statements he pieces together for purposes of review.

The first morning before the grand jury, the government attorney asked petitioner:

> "Didn't your lawyer advise you, Mr. Piemonte, on those matters that you pleaded guilty to in the indictment that you have no Constitutional privilege against self-incrimination?"

However, the Government, in order to avoid any argumentative opportunities as to the scope of the area for which it sought immunity, did not attempt to secure an order directing answers for the particular questions relating to matters involved in his former conviction. It requested a broad order of immunity to cover the entire scope of what was under investigation by the grand jury. The United States Attorney told the district judge in seeking the order compelling testimony:

> "[S]o that the Court would not have any misconception of the idea of the Government counsel on this matter, we, too, think that the constitutional privilege claimed by the witness is well taken in this matter."

Petitioner plainly must have known—and gave every indication that he knew—that he was required to answer all questions put to him by the grand jury in return for equivalent, compensating immunity. We find no merit in an argument which is contradicted by petitioner's own

assertion, supported by his counsel's argument, that he refused to testify solely because of fear.

Secondly, petitioner argues that the oral grant of immunity by the district judge was null and void, because the judge said "this Court now grants you immunity from prosecution . . ." and "I now grant you immunity from such prosecution . . . ," when in reality the statute, not the court, grants the immunity. The puerility of this contention is emphasized by petitioner's disregard of the judge's introductory basis of his pronouncement as "in accordance with the provisions of the Narcotic Control Act."

The remaining contentions of petitioner are of even less substantiality, and accordingly the judgment below is

Affirmed.

MR. CHIEF JUSTICE WARREN, with whom MR. JUSTICE DOUGLAS concurs, dissenting.

This case represents another long step in the constantly expanding use by the federal district judges of their summary contempt power to mete out severe prison sentences without according the defendants the benefit of a jury trial and the other rights guaranteed by the Fifth and Sixth Amendments.[1] In an ordinary case of this nature, I would content myself with saying that the conviction

[1] Only in the last few years has it become the fashion for district judges to use the summary contempt power as a device for imposing long terms of imprisonment. See, *e. g., Reina* v. *United States,* 364 U. S. 507 (two years' imprisonment); *Brown* v. *United States,* 359 U. S. 41 (fifteen months' imprisonment); *Green* v. *United States,* 356 U. S. 165 (three years' imprisonment); *Collins* v. *United States,* 269 F. 2d 745 (three years' imprisonment); *Tedesco* v. *United States,* 255 F. 2d 35 (two years' imprisonment); *Corona* v. *United States,* 250 F. 2d 578 (two years' imprisonment). Prior to this recent trend, the summary contempt power was seldom used to impose more than a nominal fine or a short term of imprisonment. See *Brown* v. *United States, supra,* at 58–59 (dissenting opinion).

should be reversed on the ground that a federal district judge has no power to impose such punishment in a summary proceeding. See *Green* v. *United States*, 356 U. S. 165, 193 (dissenting opinion); *Reina* v. *United States*, 364 U. S. 507, 515 (dissenting opinion). However, the facts of this case are so disquieting that I am compelled to add a few additional comments.

In 1958, the petitioner was convicted of selling and possessing narcotics in violation of the federal narcotics laws and was sentenced by a Federal District Court to six years' imprisonment. In 1959, while serving his sentence at the Leavenworth Penitentiary, the petitioner was subpoenaed to testify before a federal grand jury conducting an investigation of possible narcotics offenses. He was asked to indicate where he had obtained the narcotics which he was convicted of having possessed and sold. Invoking his Fifth Amendment privilege against self-incrimination, the petitioner refused to answer the question.[2] He was then asked whether he knew several named

[2] "Q. You are now incarcerated in the penitentiary, are you not, Mr. Piemonte?

"A. That's right.

"Q. Which one?

"A. Leavenworth Penitentiary.

"Q. You are serving a term of six years?

"A. Six years.

"Q. And that is for the sale and possession of heroin?

"A. Yes, sir.

"Q. Mr. Piemonte, that sale and possession of heroin, there were two sales, were there not, one ounce and 95 grains of heroin that you sold for $3100.00, and another sale—the first one was on November 23, 1957, and the second one was on November 27, 1957, when you sold eight ounces 354 grains for $3,000.00 to Agent Davis; those were the charges in the indictment?

"A. Right.

"Q. Now, Mr. Piemonte, our information is that you were in the narcotic business—Strike that question.

"These two sales of heroin, the first one for $3100.00, and the second

individuals and whether he had obtained the narcotics from any of those individuals. Still relying upon his Fifth Amendment privilege, the petitioner refused to answer each of the questions. On petition of the Government, the District Court authorized the granting of immunity to the petitioner pursuant to 18 U. S. C. § 1406 and instructed him to answer the questions asked by the grand jury. Upon being recalled before the grand jury, the petitioner again invoked the Fifth Amendment and refused to identify those from whom he had obtained the narcotics which constituted the basis for his 1958 conviction.[3] In response to a subsequent order to show cause why he should not be held in contempt of court, the petitioner asserted, as an additional reason for not answering, that the lives of his wife and children, as well as his own life, would be endangered were he to answer the questions. Having denied the petitioner's request for a jury trial, the district judge summarily found the petitioner guilty of contempt of court and sentenced

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one for $3,000.00, on November 23, 1957, and November 27, 1957, will you tell the Grand Jury, please, where you got the heroin?

"A. Sir, I am taking the 5th Amendment. I decline to answer any questions under the Constitution, the 5th Amendment."

[3] "Q. Now I am going to go over some of those questions that you claimed your privilege on and repeat them to you.

"Now you were convicted in the Federal Court here in Chicago for the sale of heroin on November 23, 1957 that you got $3100 for and another sale on the 27th day of November 1957 that you got $3,000 for.

"Now those were the two sales upon which you were convicted and sentenced to the penitentiary at Leavenworth, is that right?

"A. Right.

"Q. Now the question:

"These two sales of heroin, the first one for $3100 and the second one for $3,000 on November 23, 1957 and November 27, 1957, will you tell the Grand Jury, please, where you got that heroin?

"A. I stand on the Fifth Amendment. I decline to answer as it may tend to incriminate me."

him to eighteen months' imprisonment, to be served after the completion of the six-year sentence imposed in 1958.

In my opinion, the Government has subjected the petitioner to unjustifiable harassment. The petitioner has been convicted for his admittedly illegal conduct and is presently paying his debt to society for that conduct. However, not being satisfied with this punishment, the Government sought to extract from the petitioner, under the threat of a contempt conviction, testimony which it could not have compelled at the original trial in 1958, and which it knows might well endanger petitioner's life and the lives of his loved ones. In my view, the Government's attempt to compel the petitioner to testify about conduct for which he has already been punished, and the District Court's imposition of an additional term in the penitentiary for petitioner's refusal to testify about such conduct represents the type of harassment which violates the spirit of the Double Jeopardy Clause of the Fifth Amendment. Cf. *Abbate* v. *United States,* 359 U. S. 187, 196 (separate opinion of MR. JUSTICE BRENNAN); *Ciucci* v. *Illinois,* 356 U. S. 571, 573 (dissenting opinion). I think it can fairly be said that the treatment which the petitioner has received from the Government and the District Court falls far short of that fundamental fairness which the Constitution guarantees and to which even the basest prisoner in the penitentiary is entitled.[4] Therefore, even if the Court is unwilling to recognize that the Constitution prohibits the imposition of punishment in a summary proceeding, it ought to exercise its supervisory power over the lower federal courts to rectify the abuse of the summary contempt power which the record in this case makes manifest. See *Offutt* v. *United States,* 348 U. S. 11.

[4] I do not mean to imply that a person who is incarcerated may, for that reason alone, be excused from testifying before a grand jury. However, I do believe that he cannot be compelled to testify concerning the illegal activity for which he has been incarcerated.

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

Petitioner, while a prisoner in a federal penitentiary serving a six-year sentence on a narcotics conviction, was summoned before a grand jury and interrogated about transactions in narcotics.

I.

One series of questions was opened with the following: "Mr. Piemonte, were you in the narcotics business in 1954?" Following the tender of immunity, petitioner was again asked a series of questions, some of them relating to transactions in narcotics in that year. Among the questions was the following: "Have you supplied Jeremiah Pullings with any heroin?"

These questions and these refusals to answer were on August 10 and 14, 1959. The sentence for contempt was imposed on August 18, 1959. After that date and before February 29, 1960, the date when the Court of Appeals affirmed the appeal, the grand jury returned another indictment against petitioner. This was on September 2, 1959. This indictment charged petitioner and others with a conspiracy to buy and sell narcotics commencing in August 1954. One of the overt acts charged was a conversation in 1955 between Jeremiah Pullings and one of petitioner's co-conspirators under the September 2, 1959, indictment. These 1954 and 1955 transactions, for which petitioner now stands indicted, were ones on which he refused to testify and for which he has been committed for contempt.

Once an indictment was returned, the proceedings of this grand jury became a part of a criminal prosecution directed against petitioner. *Counselman* v. *Hitchcock,* 142 U. S. 547, 562; *United States* v. *Monia,* 317 U. S. 424, 427. When the citizen is formally accused by indictment, he has a constitutional right to stand mute and to refuse

to testify. His right not to take the stand in a federal criminal trial transcends his privilege against self-incrimination. No immunity statute, no pressure of government, no threats of the prosecution can be used to deprive the citizen of this right. See *Wilson* v. *United States,* 149 U. S. 60; *Stewart* v. *United States,* 366 U. S. 1. And it is unthinkable that a district judge would ever hold a defendant in contempt because he refused to take the stand at his own trial. The district judge did no such thing here. But that was the posture of the case when it was decided by the Court of Appeals. For by then the matters about which petitioner refused to answer had become in form and in effect an indictment against him.

There is no power in our free society to compel a person to talk about a matter on which he has been indicted or to penalize him for failure to do so. We might as well say that an accused can be committed for contempt for failure to take the stand at his own trial.

We are advised that after we granted certiorari the indictment against petitioner was dismissed on motion of the Government for lack of evidence. That seems irrelevant. The truth is that the grand jury before which petitioner was summoned did indict him. Petitioner was in fact held in contempt for refusal to testify in a criminal proceeding against him. That is not permissible under the procedures of our free society, whatever may have been the ultimate fate of that criminal proceeding.

II.

I think the imposition of an eighteen months' sentence was beyond the power of a federal court in a summary proceeding. That was the view stated by MR. JUSTICE BLACK in his dissenting opinion in *Green* v. *United States,* 356 U. S. 165, 193, with which I agreed then and still agree. There is nothing I can find in the Constitution

which permits those who defy a court's decree to be tried in one way and those who defy a mandate of the Congress [1] or an order of the Executive [2] to be tried in another way. Whatever the criminal charge may be, an accused is entitled to the protections afforded by the Constitution—indictment by a grand jury and trial before a petit jury which sits to determine guilt. Determination of guilt by a judge, without these safeguards interposed between the accused and government, marks a continuing erosion of civil rights. The evil is compounded here by reason of the fact that contempt is used to increase a punishment already imposed for an offense as respects which no second indictment could ever be returned. Criminal contempt is used to undermine not only the guarantees of an indictment by a grand jury and a trial by one's peers but also to destroy the protection of double jeopardy.

Plainly this judgment of conviction should not stand.

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[1] See *Watkins* v. *United States,* 354 U. S. 178.

[2] See *Hirabayashi* v. *United States,* 320 U. S. 81; *Korematsu* v. *United States,* 323 U. S. 214.

CULOMBE *v.* CONNECTICUT.

CERTIORARI TO THE SUPREME COURT OF ERRORS OF CONNECTICUT.

No. 161. Argued January 19, 1961.—Decided June 19, 1961.

Petitioner, then a 33-year-old illiterate mental defective of the moron class who was suggestible and subject to intimidation, was taken into custody by state police officers on Saturday afternoon and held without benefit of counsel, though he requested counsel, without the prompt arraignment required by state law, and without being advised of his constitutional rights. He was questioned intermittently by police officers until Wednesday night, when, after being upset by seeing his wife and sick daughter and being urged by his wife to tell the truth, he confessed to participation in a holdup in which two men were murdered. This confession was admitted in evidence over his timely objection at his trial in a state court, and he was convicted of murder. *Held:* On all the circumstances of this record, this confession was not voluntary; its admission in evidence deprived petitioner of due process of law in violation of the Fourteenth Amendment; and his conviction must be set aside. Pp. 568–642.

147 Conn. 194, 158 A. 2d 239, reversed.

Alexander A. Goldfarb argued the cause and filed a brief for petitioner.

John D. LaBelle argued the cause and filed a brief for respondent.

John J. Hunt filed a brief for the Connecticut Association for Retarded Children, as *amicus curiae,* urging reversal.

MR. JUSTICE FRANKFURTER announced the judgment of the Court and an opinion in which MR. JUSTICE STEWART joins.

Once again the Court is confronted with the painful duty of sitting in judgment on a State's conviction for murder, after a jury's verdict was found flawless by the State's highest court, in order to determine whether the

defendant's confessions, decisive for the conviction, were admitted into evidence in accordance with the standards for admissibility demanded by the Due Process Clause of the Fourteenth Amendment. This recurring problem touching the administration of criminal justice by the States presents in an aggravated form in this case the anxious task of reconciling the responsibility of the police for ferreting out crime with the right of the criminal defendant, however guilty, to be tried according to constitutional requirements.

On December 15, 1956, the dead bodies of two men were found in Kurp's Gasoline Station in New Britain, Connecticut. Edward J. Kurpiewski, the proprietor, was found in the boiler room with a bullet in his head. Daniel J. Janowski, a customer, was found in the men's toilet room shot twice in the head. Parked at the pumps in front of the station was Janowski's car. In it was Janowski's daughter, physically unharmed. She was the only surviving eyewitness of what had happened at the station. She was eighteen months old.

The Kurp's affair was one in a series of holdups and holdup killings that terrified the operators of gasoline stations, package stores and small shops throughout the environing Connecticut area. Newspapers and radio and television broadcasters reported each fresh depredation of the "mad killers." At Hartford, the State Police were at work investigating the crimes, apparently with little evidence to go on. At the scene of the killings of Kurpiewski and Janowski no physical clues were discovered.[1] The bullet slugs removed from the brains of the two victims were split and damaged.

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[1] At the trial of petitioner and his co-defendant Taborsky for the killings at Kurp's, no evidence of any importance was presented by the State that did not derive, directly or indirectly, from the confessions and disclosures obtained from the two men during February and March 1957.

In the last week of February 1957, for reasons which do not appear in this record, suspicion in connection with at least two of the holdups under investigation, holdups of a country store in Coventry and of a package store in Rocky Hill, focused on two friends, Arthur Culombe and Joseph Taborsky. On the afternoon of February 23, the two were accosted by teams of officers and asked to come to State Police Headquarters. They were never again out of police custody. In the Headquarters' interrogation room and elsewhere, they were questioned about the Coventry and Rocky Hill holdups, Kurp's, and other matters. Within ten days Culombe had five times confessed orally to participation in the Kurp's Gasoline Station affair—once re-enacting the holdup for the police—and had signed three typed statements incriminating himself and Taborsky in the Kurp's killings. Taborsky also confessed.

The two were indicted and tried jointly for murder in the first degree before a jury in the Superior Court at Hartford. Certain of their oral and written statements were permitted to go to the jury over their timely objections that these had been extracted from them by police methods which made the confessions inadmissible consistently with the Fourteenth Amendment. Both men were convicted of first-degree murder and their convictions affirmed by the Supreme Court of Errors. 147 Conn. 194, 158 A. 2d 239. Only Culombe sought review by this Court. Because his petition for certiorari presented serious questions concerning the limitations imposed by the Federal Due Process Clause upon the investigative activities of state criminal law enforcement officials, we issued the writ. 363 U. S. 826.

I.

The occasion which in December 1956 confronted the Connecticut State Police with two corpses and an infant as their sole informants to a crime of community-disturb-

ing violence is not a rare one. Despite modern advances in the technology of crime detection, offenses frequently occur about which things cannot be made to speak. And where there cannot be found innocent human witnesses to such offenses, nothing remains—if police investigation is not to be balked before it has fairly begun—but to seek out possibly guilty witnesses and ask them questions, witnesses, that is, who are suspected of knowing something about the offense precisely because they are suspected of implication in it.

The questions which these suspected witnesses are asked may serve to clear them. They may serve, directly or indirectly, to lead the police to other suspects than the persons questioned. Or they may become the means by which the persons questioned are themselves made to furnish proofs which will eventually send them to prison or death. In any event, whatever its outcome, such questioning is often indispensable to crime detection. Its compelling necessity has been judicially recognized as its sufficient justification, even in a society which, like ours, stands strongly and constitutionally committed to the principle that persons accused of crime cannot be made to convict themselves out of their own mouths.

But persons who are suspected of crime will not always be unreluctant to answer questions put by the police. Since under the procedures of Anglo-American criminal justice they cannot be constrained by legal process to give answers which incriminate them, the police have resorted to other means to unbend their reluctance, lest criminal investigation founder.[2] Kindness, cajolery, entreaty,

[2] It is significant that the proposal most frequently made with the object of curbing third-degree methods by the police is the provision of some form of preliminary judicial interrogation of persons accused of crime, in which proceeding the privilege against self-incrimination is to be so far withdrawn as to permit the prosecution, upon subsequent trial of the accused, to comment on his refusal to answer questions. See IV National Commission on Law Observ-

deception, persistent cross-questioning, even physical brutality have been used to this end.[3] In the United States, "interrogation" has become a police technique,[4] and detention for purposes of interrogation a common, al-

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ance and Enforcement, Report No. 11, Lawlessness in Law Enforcement (hereinafter IV Wickersham) (1931), 5–6; Kauper, Judicial Examination of the Accused—A Remedy for the Third Degree, 30 Mich. L. Rev. 1224 (1932); Pound, Legal Interrogation of Persons Accused or Suspected of Crime, 24 J. Crim. L. & Criminology 1014 (1934); McCormick, Some Problems and Developments in the Admissibility of Confessions, 24 Tex. L. Rev. 239, 277 (1946). Cf. Report of Committee on Lawless Enforcement of Law, Section of Criminal Law and Criminology of the American Bar Assn., 1 Am. J. Pol. Sci. (hereinafter ABA Committee Report) 575, 593 (1930). Underlying these proposals is the recognition that some form of interrogation of criminal suspects is necessary to effective law enforcement.

[3] For the prevalence in this country of various methods of police pressuring ranging from persistent questioning to beatings see, *e. g.*, ABA Committee Report, *passim;* IV Wickersham, *passim;* Booth, Confessions, and Methods Employed in Procuring Them, 4 So. Calif. L. Rev. 83 (1930); Note, 43 Harv. L. Rev. 617 (1930); Hopkins, Our Lawless Police (1931), *passim;* Report of the President's Committee on Civil Rights, To Secure These Rights (1947), 25–27. See also authorities cited in note 5, *infra.* Although the third degree is, in England, spoken of as the American practice, England herself is not free of police interrogation and cross-questioning. Report of the Royal Commission on Police Powers and Procedure [Cmd. 3297] (1929), 100–102; Preliminary Investigations of Criminal Offences, A Report by Justice (1960), 9–10; Williams, Questioning by the Police: Some Practical Considerations, [1960] Crim. L. Rev. 325, 328–331; Williams, Police Detention and Arrest Privileges Under Foreign Law, England, 51 J. Crim. L., Criminology & Pol. Sci. 413 (1960). A Royal Commission is now engaged in a comprehensive inquiry concerning the police which will, apparently, include study of police methods insofar as these may relate to the control and administration of the police and their relationship with the public. See the Commission's terms of reference, Royal Commission on the Police 1960, Interim Report [Cmd. 1222] (1960), iv.

[4] See, *e. g.*, Kidd, Police Interrogation (1940); Mulbar, Interrogation (1951); Dienstein, Technics for the Crime Investigator (1952), 97–115; Inbau and Reid, Lie Detection and Criminal Interrogation

though generally unlawful, practice.[5] Crime detection officials, finding that if their suspects are kept under tight police control during questioning they are less likely to be distracted, less likely to be recalcitrant and, of course, less likely to make off and escape entirely, not infrequently take such suspects into custody for "investigation."

This practice has its manifest evils and dangers. Persons subjected to it are torn from the reliances of their daily existence and held at the mercy of those whose job it is—if such persons have committed crimes, as it is supposed they have—to prosecute them. They are deprived of freedom without a proper judicial tribunal having found them guilty, without a proper judicial tribunal having found even that there is probable cause to believe that they may be guilty.[6] What actually happens

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(3d ed. 1953); O'Hara, Fundamentals of Criminal Investigation (1956), 95–126. Compare with the highly sophisticated methods of police interrogation described in these volumes Lord Brampton's address to Police Constables printed, in part, in Report of the Royal Commission, *supra*, note 3, Appendix 8, at 147: "Perhaps the best maxim for a constable to bear in mind with respect to an accused person is, *'Keep your eyes and your ears open, and your mouth shut.'*" See also *Regina* v. *Male and Cooper*, 17 Cox C. C. 689, 690.

[5] American Civil Liberties Union, Illinois Division, Secret Detention by the Chicago Police (1959); see also Foote, Law and Police Practice: Safeguards in the Law of Arrest, 52 Nw. U. L. Rev. 16, 20–27 (1957); Hall, The Law of Arrest in Relation to Contemporary Social Problems, 3 U. of Chi. L. Rev. 345, 359–362 (1936); Hall, Police and Law in a Democratic Society, 28 Ind. L. J. 133, 154 (1953).

[6] For a thorough discussion of the evils inherent in the detention of suspected persons for interrogation, see Memorandum on the Detention of Arrested Persons and Their Production Before a Committing Magistrate, Transmitted to Sub-committee No. 2 of the Committee on the Judiciary of the House of Representatives (1944), in Chafee, Documents on Fundamental Human Rights, Pamphlets 1–3 (1951–1952), 483. Beyond the obvious, immediate considerations concerning incarceration without judicial hearing, the threat of the third degree, deprivation of counsel at a possibly critical period in the criminal proceeding, etc., there lie other less evident but equally

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to them behind the closed door of the interrogation room is difficult if not impossible to ascertain. Certainly, if through excess of zeal or aggressive impatience or flaring up of temper in the face of obstinate silence a prisoner is abused,[7] he is faced with the task of overcoming, by his lone testimony, solemn official denials.[8] The prisoner knows this—knows that no friendly or disinterested witness is present—and the knowledge may itself induce fear.[9] But, in any case, the risk is great that the police

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significant menaces. There is the threat that a police system which has grown to rely too heavily on interrogation will not pursue, or learn, other crime detection methods, and the consequent danger that the police will feel themselves under pressure to secure confessions. See IV Wickersham, at 187–189; Glueck, Crime and Justice (1936), 76. There is the danger that the police, by offending canons of fairness regarded as fundamental by the people, will create an atmosphere of public resentment to authority inimical to law enforcement. See Hall, The Law of Arrest in Relation to Contemporary Social Problems, 3 U. of Chi. L. Rev. 345, 373 (1936); Williams, Questioning by the Police: Some Practical Considerations, [1960] Crim. L. Rev. 325, 337.

[7] See IV Wickersham, at 174: "But there is danger that the process of questioning may develop into the third degree. Once the interrogation has begun, the police or other officials are naturally reluctant to leave off until the desired information has been obtained, regardless of the prisoner's fatigue or need of sleep; and the baffled questioner, getting obstinate silence or evasive and impudent replies, is easily tempted to eke out his unsuccessful questions by threats or violence."

[8] There can be no doubt that the secrecy in which police-station interrogation is usually carried out is a condition which encourages questioning to run over into violence. See ABA Committee Report, at 587–588; Hogan and Snee, The McNabb-Mallory Rule: Its Rise, Rationale and Rescue, 47 Geo. L. J. 1, 27 (1958); cf. IV Wickersham, at 31. Historically there has been intimate connection between the use of torture and secret investigations. Filamor, Third Degree Confession, 13 Bombay L. J. 339, 342 (1936).

[9] See ABA Committee Report, at 579: ". . . [T]he prisoner knows that he is wholly at the mercy of his inquisitor and that the severe cross-examination may at any moment shift to a severe beating."

will accomplish behind their closed door precisely what the demands of our legal order forbid: make a suspect the unwilling collaborator in establishing his guilt. This they may accomplish not only with ropes and a rubber hose, not only by relay questioning persistently, insistently subjugating a tired mind, but by subtler devices.

In the police station a prisoner is surrounded by known hostile forces. He is disoriented from the world he knows and in which he finds support.[10] He is subject to coercing impingements, undermining even if not obvious pressures of every variety. In such an atmosphere, questioning that is long continued—even if it is only repeated at intervals, never protracted to the point of physical exhaustion—inevitably suggests that the questioner has a right to, and expects, an answer.[11] This is so, certainly, when the prisoner has never been told that he need not answer and when, because his commitment to custody seems to be at the will of his questioners, he has every

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[10] See Report of the Royal Commission on Police Powers and Procedure [Cmd. 3297] (1929), at 61: ". . . [P]ersons in custody . . . are from the nature of things at a disadvantage because of their position. As one witness expressed it to us, 'the whole of the influences around them appear to them to be hostile' and we think that a right of asking questions in these circumstances is in itself a source of danger. . . ."

[11] O'Brien, J., dissenting, in *Regina* v. *Johnston,* 15 Irish Common Law Reports, 60, 87, 90 (Crim. App.): ". . . [I]t appears to me that answers given by a prisoner to questions put to him by those in whose custody he is, respecting the offence with which he is charged, cannot be regarded as voluntary statements, except the prisoner be at the same time apprised that he is not obliged to answer them, and that his answers may be given in evidence against him at his trial. The very fact of these questions being put by such a person, unaccompanied by any such caution, conveys to the prisoner's mind the idea of some obligation on his part to answer them, and deprives the statement of that voluntary character which is essential to its admissibility." Cf. Cuthbert W. Pound, Inquisitorial Confessions, 1 Cornell L. Q. 77, 80 (1916).

reason to believe that he will be held and interrogated until he speaks.[12]

However, a confession made by a person in custody is not always the result of an overborne will. The police may be midwife to a declaration naturally born of remorse, or relief, or desperation, or calculation. If that is so, if the "suction process" [13] has not been at the prisoner and drained his capacity for freedom of choice, does not the awful responsibility of the police for maintaining the peaceful order of society justify the means which they have employed? It will not do to forget, as Sir Patrick (now Lord Justice) Devlin has put it, that "The least criticism of police methods of interrogation deserves to be most carefully weighed because the evidence which such interrogation produces is often decisive; the high degree of proof which the English law requires—proof beyond reasonable doubt—often could not be achieved by the prosecution without the assistance of the accused's own statement." [14] Yet even if one cannot adopt "an undiscriminating hostility to mere interrogation . . . without unduly fettering the States in protecting society from the criminal," [15] there remain the questions: When,

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[12] Cf. Wilde, C. J., in *Regina* v. *Pettit*, 4 Cox C. C. 164, 165: "The law is so extremely cautious in guarding against anything like torture, that it extends a similar principle to every case where a man is not a free agent in meeting an inquiry. If this sort of examination be admitted in evidence, it is hard to say where it might stop. A person in custody, or in other imprisonment, questioned by a magistrate, who has power to commit him and power to release him, might think himself bound to answer for fear of being sent to gaol. The mind in such a case would be likely to be affected by the very influences which render the statements of accused persons inadmissible." Cf. IV Wickersham, at 93.

[13] *Watts* v. *Indiana*, 338 U. S. 49, 53 (opinion of FRANKFURTER, J.).

[14] Devlin, The Criminal Prosecution in England (1958), 58.

[15] Jackson, J., dissenting in *Ashcraft* v. *Tennessee*, 322 U. S. 143, 156, 160.

applied to what practices, is a judgment of impermissibility drawn from the fundamental conceptions of Anglo-American accusatorial process "undiscriminating"? What are the characteristics of the "mere interrogation" which is allowable consistently with those conceptions?

II.

The problem which must be faced in fair recognition of the States' basic security and of the States' observance of their own standards, apart from the sanctions of the Fourteenth Amendment, in bringing the guilty to justice is that which Mr. Justice Jackson described in dealing with three cases before us:

> "In each case police were confronted with one or more brutal murders which the authorities were under the highest duty to solve. Each of these murders was unwitnessed, and the only positive knowledge on which a solution could be based was possessed by the killer. In each there was reasonable ground to *suspect* an individual but not enough legal evidence to *charge* him with guilt. In each the police attempted to meet the situation by taking the suspect into custody and interrogating him . . . .
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> ". . . . [N]o one suggests that any course held promise of solution of these murders other than to take the suspect into custody for questioning. The alternative was to close the books on the crime and forget it, with the suspect at large. This is a grave choice for a society in which two-thirds of the murders already are closed out as insoluble.
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> . . . . .
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> ". . . The suspect neither had nor was advised of his right to get counsel. This presents a real dilemma in a free society. To subject one without counsel to questioning which may and is intended to

> convict him, is a real peril to individual freedom. To bring in a lawyer means a real peril to solution of the crime, because, under our adversary system, he deems that his sole duty is to protect his client—guilty or innocent—and that in such a capacity he owes no duty whatever to help society solve its crime problem. Under this conception of criminal procedure, any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances." *Watts* v. *Indiana,* 338 U. S. 49, 57, 58–59.

The nature and components of this problem, concerning as it does liberty and security, had better be overtly and critically examined than smothered by unanalyzed assumptions. That judges who agree on relatively legal considerations may disagree in their application to the same set of circumstances does not weaken the validity of those considerations nor minimize their importance. Differences in the appraisal of the same facts is a commonplace of adjudication.

The critical elements of the problem may be quickly isolated in light of what has already been said. Its first pole is the recognition that "Questioning suspects is indispensable in law enforcement." [16] As the Supreme Court of New Jersey put it recently: "the public interest requires that interrogation, and that at a police station, not completely be forbidden, so long as it is conducted fairly, reasonably, within proper limits and with full regard to

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[16] *People* v. *Hall,* 413 Ill. 615, 624, 110 N. E. 2d 249, 254. See 3 Wigmore on Evidence (3d ed. 1940), § 851; Filamor, Third Degree Confession, 13 Bombay L. J. 339, 347 (1936); Kidd, Police Interrogation (1940), 13–15; Mulbar, Interrogation (1951), 3–4; O'Hara, Fundamentals of Criminal Investigation (1956), 8–10; Inbau and Reid, Lie Detection and Criminal Investigation (3d ed. 1953), 195–197.

the rights of those being questioned." [17] But if it is once admitted that questioning of suspects is permissible, whatever reasonable means are needed to make the questioning effective must also be conceded to the police.

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[17] *State* v. *Smith*, 32 N. J. 501, 534, 161 A. 2d 520, 537. The need to permit police interrogation of suspects in custody has been persistently asserted in this country. See, *e. g.*, H. R. Rep. No. 1815, 85th Cong., 2d Sess. 5–7 ("If the police . . . are, in effect, prevented from conducting a proper and reasonable interrogation of suspects, law enforcement is faced with a serious challenge." *Id.*, at 5.); S. Rep. No. 1478, 85th Cong., 2d Sess. 7–11 ("We abhor . . . the idea . . . that the police do not have the right to reasonably interrogate persons held in custody prior to arraignment. This subcommittee believe that the police not only have the right, but they have the duty to conduct reasonable interrogation of persons charged with crime." *Id.*, at 11.); H. R. Rep. No. 352, 86th Cong., 1st Sess. 4, 6–9 ("[T]o preclude police questioning would have a devastating effect on the criminal law." *Id.*, at 4.); Admission of Evidence in Certain Cases, Hearings before Subcommittee No. 2 of the Committee on the Judiciary, House of Representatives, on H. R. 3690, 78th Cong., 1st Sess., Ser. No. 12, 1–10, 27–60; Supreme Court Decisions, Hearings before the Special Subcommittee to Study Decisions of the Supreme Court of the United States, of the Committee on the Judiciary, House of Representatives, 85th Cong., 2d Sess., Ser. No. 12, pt. 1, 2–21, 30–101, 157–190; Admission of Evidence (Mallory Rule), Hearings before the Subcommittee on Improvements in the Federal Criminal Code of the Committee on the Judiciary, Senate, on H. R. 11477, S. 2970, S. 3325, S. 3355, 85th Cong., 2d Sess. 22–45, 64–74, 128–149, 160–162; Confessions and Police Detention, Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, Senate, 85th Cong., 2d Sess. 2–8, 119–141; 93 Cong. Rec. 1390; 105 Cong. Rec. 12863; Wickersham, The Supreme Court and Federal Criminal Procedure, 44 Cornell L. Q. 14, 19–22 (1958); Inbau, The Confession Dilemma in the United States Supreme Court, 43 Ill. L. Rev. 442 (1948); Inbau, Law and Police Practice: Restrictions in the Law of Interrogation and Confessions, 52 Nw. U. L. Rev. 77, 80–82 (1957); Hall, Police and Law in a Democratic Society, 28 Ind. L. J. 133, 176 (1953); cf. IV Wickersham, at 173–174. And see Williams, Questioning by the Police: Some Practical Considerations, [1960] Crim. L. Rev. 325, 332–334, 340–341.

Often prolongation of the interrogation period will be essential, so that a suspect's story can be checked and, if it proves untrue, he can be confronted with the lie; if true, released without charge.[18] Often the place of questioning will have to be a police interrogation room, both because it is important to assure the proper atmosphere of privacy and non-distraction if questioning is to be made productive,[19] and because, where a suspect is questioned but not taken into custody, he—and in some cases his associates—may take prompt warning and flee the premises. Legal counsel for the suspect will generally prove a thorough obstruction to the investigation.[20] Indeed, even to inform the suspect of his legal right to keep silent will prove an obstruction. Whatever fortifies the suspect or seconds him in his capacity to keep his mouth closed is a potential obstacle to the solution of crime.

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[18] See Coakley, Law and Police Practice: Restrictions in the Law of Arrest, 52 Nw. U. L. Rev. 2, 8–10 (1957), criticizing as possibly too short, in some cases, the twenty-four-hour maximum prehearing detention period provided by § 11 of the Uniform Arrest Act. The Act is found in Warner, The Uniform Arrest Act, 28 Va. L. Rev. 315, 343, 347 (1942).

[19] See Mulbar, Interrogation (1951), 18–19.

[20] See Confessions and Police Detention, Hearings, *supra*, note 17, at 117–118; H. R. Rep. No. 352, 86th Cong., 1st Sess. 8. See also Kauper, Judicial Examination of the Accused—A Remedy for the Third Degree, 30 Mich. L. Rev. 1224, 1247 (1932), suggesting that the presence of counsel would be obstructive even at an interrogation where the accused was deprived of his privilege against self-incrimination. It is significant that critics of French criminal procedure attribute the presence of third-degree methods and extra-judicial police interrogation in France to the impediment to judicial inquisition introduced by the law of 1897, giving suspects the right to be represented by counsel before the *juge d'instruction*. Hamson, The Prosecution of the Accused—English and French Legal Methods, [1955] Crim. L. Rev. 272, 275–276, 278; Vouin, The Protection of the Accused in French Criminal Procedure, 5 Int'l & Comp. L. Q. 1, 17 (1956).

At the other pole is a cluster of convictions each expressive, in a different manifestation, of the basic notion that the terrible engine of the criminal law is not to be used to overreach individuals who stand helpless against it.[21] Among these are the notions that men are not to be imprisoned at the unfettered will of their prosecutors, nor subjected to physical brutality by officials charged with the investigation of crime. Cardinal among them, also, is the conviction, basic to our legal order, that men are not to be exploited for the information necessary to condemn them before the law, that, in Hawkins' words, a prisoner is not "to be made the deluded instrument of his own conviction." 2 Hawkins, Pleas of the Crown (8th ed. 1824), 595. This principle, branded into the consciousness of our civilization by the memory of the secret inquisitions, sometimes practiced with torture, which were borrowed briefly from the continent during the era of the Star Chamber,[22] was well known to those who established the American governments.[23] Its essence is the require-

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[21] These involve, as Sir Patrick Devlin put it, "the recognition, by every system of law in which the liberty of the subject is considered, that inquiry into crime cannot be left simply to administrative discretion. In most systems it has been found necessary to regulate, formally or informally, the power of interrogation." Devlin, The Criminal Prosecution in England (1958), 13–14.

[22] For the history of this episode in English judicial practice see 5 Holdsworth, A History of English Law (1924), 184–196; Lowell, The Judicial Use of Torture, 11 Harv. L. Rev. 220, 290 (1897).

[23] Patrick Henry, in 3 Elliot's Debates (2d ed. 1891), 447–448: ". . . What has distinguished our ancestors?—That they would not admit of tortures, or cruel and barbarous punishment. But [in the absence of a Bill of Rights] Congress may introduce the practice of the civil law, in preference to that of the common law. They may introduce the practice of France, Spain, and Germany—of torturing, to extort a confession of the crime. They will say that they might as well draw examples from those countries as from Great Britain, and they will tell you that there is such a necessity of strengthening the arm of government, that they must have a criminal

ment that the State which proposes to convict and punish an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips. See *Blackburn* v. *Alabama,* 361 U. S. 199, 206–207; *Chambers* v. *Florida,* 309 U. S. 227, 235–238. Quite early the English courts acknowledged the barrier that, in this regard, set off the accusatorial system from the inquisitorial.[24] And soon

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equity, and extort confession by torture, in order to punish with still more relentless severity. We are then lost and undone."

[24] See Gilbert on Evidence (3d ed. 1769) 140: ". . . but then this Confession must be voluntary and without Compulsion; for our Law in this differs from the Civil Law, that it will not force any Man to accuse himself; and in this we do certainly follow the Law of Nature, which commands every Man to endeavor his own Preservation; and therefore Pain and Force may compel Men to confess what is not the Truth of Facts, and consequently such extorted Confessions are not to be depended on." And see *Brown* v. *Walker,* 161 U. S. 591, 596–597; 1 Cooley's Constitutional Limitations (8th ed. 1927) 647–648; cf. 2 Story on the Constitution (4th ed. 1873) § 1788.

Of course, the continental countries which employ inquisitorial modes of criminal procedure have themselves long ago given up reliance upon the tortures which they once used to wring incriminating information out of the accused and which were a salient feature of the inquisitorial system at the time that the English definitely rejected it in the seventeenth century. For descriptions of the development and modern character of the inquisitorial method, see Keedy, The Preliminary Investigation of Crime in France, 88 U. of Pa. L. Rev. 385, 692, 915 (1940); Garner, Criminal Procedure in France, 25 Yale L. J. 255 (1916); Ploscowe, The Development of Present-Day Criminal Procedures in Europe and America, 48 Harv. L. Rev. 433 (1935); Hamson, The Prosecution of the Accused—English and French Legal Methods, [1955] Crim. L. Rev. 272; and see Vouin, Provisional Release in French Penal Law, 108 U. of Pa. L. Rev. 355 (1960). A description of the careful procedural safeguards which the inquisitorial system now maintains is found in Vouin, The Protection of the Accused in French Criminal Procedure, 5 Int'l & Comp. L. Q. 1 (1956), and an interesting study of some of those safeguards in operation in a particular case is Vouin, L'Affaire Drummond, [1955] Crim. L. Rev. 5.

they came to enforce it by the rigorous demand that an extra-judicial confession, if it was to be offered in evidence against a man, must be the product of his own free choice.[25] So fundamental, historically, is this concept, that the

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[25] *Rex* v. *Rudd,* 1 Cowp. 331, 334. See *Ibrahim* v. *Rex,* [1914] A. C. 599, 609–610 (P. C.). Wigmore, it is true, attributes to the English exclusionary rule the sole purpose of assuring the reliability of evidence. See 3 Wigmore on Evidence (3d ed. 1940) §§ 815–867. There can be no doubt, of course, that the fear of false confessions played a large part in the adoption of the rule. See *Rex* v. *Warickshall,* 1 Leach 298, 299–300; 3 Russell on Crimes (6th ed. 1896) 478, n. (e). But it is equally clear that there soon mingled with this original and at first exclusive impetus another independent and sufficient, although historically diverse, reason for the rule: the conception that the use of extorted confessions set at naught the underlying tenet of the accusatorial system, that men might not be compelled to speak what would convict them. See Gilbert on Evidence, quoted note 24, *supra.* Quite apart from testimonial unreliability, where it appeared that coercion had been applied to extract extra-judicial incriminating statements, the courts refused to be party to such proceedings. *Regina* v. *Jarvis,* 10 Cox C. C. 574, 576 (Crim. App.); *Regina* v. *Thompson,* [1893] 2 Q. B. 12, 18–19 (Cr. Cas. Res.); *Chalmers* v. *H. M. Advocate,* [1954] Sess. Cas. 66, 78–79, 81–82 (J. C.); O'Brien, J., dissenting in *Regina* v. *Johnston,* 15 Irish Common Law Reports 60, 87, 88. Compare *Bram* v. *United States,* 168 U. S. 532, 543. And see McCormick, The Scope of Privilege in the Law of Evidence, 16 Tex. L. Rev. 447, 451–457 (1938); Smith, Public Interest and the Interests of the Accused in the Criminal Process—Reflections of a Scottish Lawyer, 32 Tulane L. Rev. 349, 354–355 (1958); Lowell, The Judicial Use of Torture, 11 Harv. L. Rev. 220, 290, 296 (1897). In this way, the conceptions underlying the rule excluding coerced confessions and the privilege against self-incrimination have become, to some extent, assimilated. See 1 Stephen, A History of the Criminal Law of England (1883), 440; 1 Taylor on Evidence (12th ed. 1931) 556; Fraenkel, From Suspicion to Accusation, 51 Yale L. J. 748, 753 (1942); Report of the Royal Commission on Police Powers and Procedures [Cmd. 3297] (1929) 24; IV Wickersham, at 26–27. Our own decisions enforcing the Due Process Clause of the Fourteenth Amendment have made clear that "The aim of the requirement of due process is not to exclude presumptively

Fourteenth Amendment, as enforced by our decisions, applied it as a limitation upon the criminal procedure of the States. Consistently with that Amendment neither the body nor mind of an accused may be twisted until he breaks. *Brown* v. *Mississippi,* 297 U. S. 278; *Leyra* v. *Denno,* 347 U. S. 556.

Recognizing the need to protect criminal suspects from all of the dangers which are to be feared when the process of police interrogation is entirely unleashed, legislatures have enacted several kinds of laws designed to curb the worst excesses of the investigative activity of the police. The most widespread of these are the ubiquitous statutes requiring the prompt taking of persons arrested before a judicial officer; [26] these are responsive both to the fear

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false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false." *Lisenba* v. *California,* 314 U. S. 219, 236. See *Rogers* v. *Richmond,* 365 U. S. 534, and authorities cited therein. And see *State* v. *Smith,* 32 N. J. 501, 541–544, 161 A. 2d 520, 541–543 (1960).

[26] See *McNabb* v. *United States,* 318 U. S. 332, 342–343, n. 7. The most prevalent American provision is that requiring judicial examination "without unnecessary delay." See, *e. g.,* Fed. Rules Crim. Proc., 5 (a); Cal. Penal Code, § 849; Ill. Rev. Stat., 1959, c. 38, § 660; N. Y. Code Crim. Proc., § 165; American Law Institute, Code Crim. Proc., 1931, §§ 6, 35; and see 1 Alexander, The Law of Arrest (1949), 623–633. Some jurisdictions fix specific periods of permissible pre-examination detention. See Cal. Penal Code, § 825 (without unnecessary delay; two-day maximum); Mo. Rev. Stat., 1959, § 544.170 (twenty hours unless prisoner charged and held by warrant); N. H. Rev. Stat., 1955, §§ 594:2, 594:19, 594:20, 594:22, 594:23 (four-hour detention without arrest in certain cases; twenty-four hours after night arrest; examination without unreasonable delay if arrest is by warrant; other arrests require prompt examination; twenty-four-hour maximum); R. I. Gen. Laws, 1956, §§ 12–7–1, 12–7–13 (two-hour detention without arrest in certain cases; twenty-four hours after arrest). Judicial decisions as to what constitutes unnecessary or unreasonable delay, under the pertinent statutes or at common law, are not wholly harmonious. Compare *Keefe* v. *Hart,*

of administrative detention without probable cause and to the known risk of opportunity for third-degree practices which is allowed by delayed judicial examination.[27] Other statutes outlaw the sweating, beating or imprison-

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213 Mass. 476, 100 N. E. 558 (jury could find one and a quarter hours unlawful), with *Lynn* v. *Weaver,* 251 Mich. 265, 231 N. W. 579 (four hours lawful); *Madsen* v. *Hutchison,* 49 Idaho 358, 290 P. 208 (five hours unlawful as matter of law; no extenuating circumstances found), with *Haggard* v. *First Nat. Bank of Mandan,* 72 N. D. 434, 8 N. W. 2d 5 (jury can find five hours lawful under circumstances); *Dragna* v. *White,* 45 Cal. 2d 469, 473, 289 P. 2d 428, 430 (dictum that less than two days may be unlawful under Cal. Penal Code, § 825), with *People* v. *Sewell,* 95 Cal. App. 2d 850, 856, 214 P. 2d 113, 117 (suggestion that two-day detention is lawful under § 825; no consideration of circumstances). Cases can be found holding necessary or reasonable relatively long periods of delay. *E. g., People* v. *Kelly,* 404 Ill. 281, 288, 89 N. E. 2d 27, 30–31, *semble; Commonwealth* v. *Banuchi,* 335 Mass. 649, 141 N. E. 2d 835; *Mulberry* v. *Fuellhart,* 203 Pa. 573, 53 A. 504; *Peloquin* v. *Hibner,* 231 Wis. 77, 285 N. W. 380 (alternative holding); *United States ex rel. Goodchild* v. *Burke,* 245 F. 2d 88 (C. A. 7th Cir.) (Wisconsin law). But see *Mallory* v. *United States,* 354 U. S. 449.

Outside the United States, too, legislation requiring that arrested persons be brought before a magistrate within some fixed period of time is common, although the period fixed varies from country to country. See, *e. g.,* Criminal Code of Canada, § 438 (2) (twenty-four hours whenever a justice is available within twenty-four hours; if not, as soon thereafter as possible); Magistrates' Courts Act, 1952, 15 & 16 Geo. VI & 1 Eliz. II, c. 55, § 38 (police must release on recognizance persons arrested without warrant who cannot practicably be brought before a magistrate within twenty-four hours, unless the offense is serious); Criminal Procedure (Scotland) Act, 1887, 50 & 51 Vict., c. 35, § 17 (examination on declaration may be delayed forty-eight hours to permit person arrested to secure counsel); compare the new French Code de Procédure Pénale, Arts. 63, 77, 154 (twenty-four-hour detentions for investigation in certain cases). For discussion of such foreign regulations, see Working Papers E through V, United Nations, 1958 Seminar on the Protection of Human Rights in Criminal Law and Procedure, Baguio City, Philip-

[*Footnote 27 is on p. 586*]

ment of suspects for the purpose of extorting confessions,[28] or assure imprisoned suspects the right to communicate with friends or legal counsel.[29] But because it is the courts which are charged, in the ultimate, both with the

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pines (1958), and the Symposium: The Comparative Study of Conditional Release, 108 U. of Pa. L. Rev. 290–365 (1960).

In sum, it seems fair to say that there is unanimity for the proposition that "Strict observance of some reasonably definite and rather short time-limit for the detention of a prisoner after arrest without judicial sanction is vital to personal liberty." Statement by the Committee on the Bill of Rights of the American Bar Assn., Submitted to Subcommittee No. 2 of the Committee on the Judiciary, House of Representatives, in Chafee, Documents on Fundamental Human Rights, Pamphlets 1–3 (1951–1952), 480. But there is wide divergence of views concerning how definite is "reasonably definite" and how short is "rather short."

[27] Instances of third-degree treatment of prisoners almost invariably occur during the period between arrest and preliminary examination. IV Wickersham, at 169; Annual Report of the Committee on Criminal Courts, Law and Procedure for 1927–1928 to the Association of the Bar of the City of New York, Year Book, 1928, of the Assn. of the Bar, City of New York 235, 243, 253; Leibowitz, Law and Police Practice: Safeguards in the Law of Interrogation and Confessions, 52 Nw. U. L. Rev. 86, 87 (1957); Hall, The Law of Arrest in Relation to Contemporary Social Problems, 3 U. of Chi. L. Rev. 345, 357 (1936).

[28] *E. g.*, Ill. Rev. Stat., 1959, c. 38, § 379 (penalizing assault and battery or imprisonment by two or more persons for the purpose of obtaining confessions); Ky. Rev. Stat., 1960, § 422.110 (penalizing attempts by persons having custody of prisoners charged with crime to obtain incriminating information by plying with questions, by threats or by other wrongful means; confession so obtained made inadmissible in evidence).

[29] *E. g.*, Cal. Penal Code, § 825 (attorneys permitted to see arrested persons; officers neglecting or refusing to permit such visits are guilty of a misdemeanor and civilly liable for statutory forfeiture); N. H. Rev. Stat., 1955, §§ 594:15, 594:16, 594:17 (relatives, friends and attorney to be notified of arrest and permitted to see person arrested; violation of these provisions made criminal); Tex. Penal Code, Art. 1176 (makes it unlawful for persons having prisoners in

enforcement of the criminal law and with safeguarding the criminal defendant's rights to procedures consistent with fundamental fairness, the problem of reconciling society's need for police interrogation with society's need for protection from the possible abuses of police interrogation decisively devolves upon the courts, particularly in connection with the rules of evidence which regulate the admissibility of extrajudicial confessions. Under our federal system this task, with respect to local crimes, is, of course, primarily the responsibility of the state courts. The Fourteenth Amendment, however, limits their freedom in this regard. It subjects their broad powers to a limited, but searching, federal review and places upon this Court the obligation—with all the deference and caution which exercise of such a competence demands—to adjudicate what due process of law requires by way of restricting the state courts in their use of the products of police interrogation.

That judgment is what is at issue in this case.

III.

The dilemma posed by police interrogation of suspects in custody and the judicial use of interrogated confessions to convict their makers cannot be resolved simply by wholly subordinating one set of opposing considerations to the other. The argument that without such interrogation it is often impossible to close the hiatus between suspicion and proof, especially in cases involving professional criminals, is often pressed in quarters responsible and not unfeeling. It is the same argument that

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custody to prevent prisoners' consultation or communication with counsel). For citation to statutes employing various approaches to elimination of third-degree practices and the protection of prisoners' interests, see McCormick, Some Problems and Developments in the Admissibility of Confessions, 24 Tex. L. Rev. 239, 251–254 (1946).

was once invoked to support the lash and the rack.[30] Where it has been put to this Court in its extreme form, as justifying the all-night grilling of prisoners under circumstances of sustained, week-long terror, we have rejected it. *Chambers* v. *Florida,* 309 U. S. 227, 240–241. "The Constitution proscribes such lawless means irrespective of the end."

But asking questions is not the lash or the rack, and to say that the argument *ex necessitate* is not the short answer to every situation in which it is invoked is not to dismiss it altogether. Due process does not demand of the States, in their administration of the criminal law, standards of favor to the accused which our civilization, in its most sensitive expression, has never found it practical to adopt. The principle of the Indian Evidence Act which excludes all confessions made to the police or by persons while they are detained by the police[31] has never been accepted in England[32] or in

[30] Under the inquisitorial system as it was practiced with systematized torture (the system embodied, for example, in the French Ordinance of 1670), the rack was applied to suspects in whose cases the preliminary examination had developed indications of guilt sufficient to justify its use but insufficient to satisfy the severe burden of proof necessary to conviction. See Lowell, The Judicial Use of Torture, 11 Harv. L. Rev. 220, 224–228 (1897).

[31] The Indian Evidence Act, 1872. Section 25 excludes confessions made to a police officer; § 26 excludes confessions made by any person while in the custody of a police officer, except in the immediate presence of a magistrate. However, § 27 provides that "when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police-officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved." Compare the bill, reported to have passed one house of the California Legislature in 1929, set out in Booth, Confessions, and Methods Employed in Procuring Them, 4 So. Calif. L. Rev. 83, 84–85, n. 3a (1930). And see the provision submitted without rec-

[*Footnote 32 is on p. 589*]

this country.[33] Nor has the principle of the Scottish cases barring the use in evidence of a defendant's incriminating responses to police questioning at any time after suspicion has focused on him.[34] Rather, this Court (in cases coming here from the lower federal courts),[35] the courts of England[36] and of Canada,[37] and

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ommendation by the Commission on Penal Procedure at the Sixth Congress of the International Association of Democratic Lawyers, in Coe, Practices of Police and Prosecution Prior to Trial, 17 Law. Guild Rev. 62, 64 (1957).

[32] *E. g., Ibrahim* v. *Rex,* [1914] A. C. 599 (P. C.); *Regina* v. *May,* 36 Cr. App. Rep. 91.

[33] *Hopt* v. *Utah,* 110 U. S. 574; *Sparf and Hansen* v. *United States,* 156 U. S. 51; *Pierce* v. *United States,* 160 U. S. 355. And see *Wilson* v. *United States,* 162 U. S. 613, 623; *Bilokumsky* v. *Tod,* 263 U. S. 149, 157.

[34] *Chalmers* v. *H. M. Advocate,* [1954] Sess. Cas. 66 (J. C.). As expressed in the opinion of the Lord Justice-General,

"... The theory of our law is that at the stage of initial investigation the police may question anyone with a view to acquiring information which may lead to the detection of the criminal; but that, when the stage has been reached at which suspicion, or more than suspicion, has in their view centred upon some person as the likely perpetrator of the crime, further interrogation of that person becomes very dangerous, and, if carried too far, *e. g.,* to the point of extracting a confession by what amounts to cross-examination, the evidence of that confession will almost certainly be excluded." *Id.,* at 78.

[35] *United States* v. *Carignan,* 342 U. S. 36; cf. *United States* v. *Mitchell,* 322 U. S. 65. And see *Bram* v. *United States,* 168 U. S. 532, 558; *Ziang Sung Wan* v. *United States,* 266 U. S. 1, 14; *McNabb* v. *United States,* 318 U. S. 332, 346.

[36] *Rex* v. *Thornton,* 1 Mood. 27; *Rex* v. *Gilham,* 1 Mood. 186; *Rex* v. *Voisin,* [1918] 1 K. B. 531 (Crim. App.); *Regina* v. *Straffen,* [1952] 2 Q. B. 911 (Crim. App.); and see *Lambe's Case,* 2 Leach 552, 554. Irish courts reach the same result. *Rex* v. *Gibney,* Jebb's Res. Cas. 14; *Regina* v. *Johnston,* 15 Irish Common Law Rep. 60 (Crim. App.). Several English decisions at the end of the last century appeared to lay down a *per se* rule excluding confessions by persons questioned in custody, see *Regina* v. *Gavin,* 15 Cox C. C.

[*Footnote 37 is on p. 590*]

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the courts of all the States [38] have agreed in holding permissible the receipt of confessions secured by the questioning of suspects in custody by crime-detection officials. And, in a long series of cases, this Court has held that the

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656; *Regina* v. *Male and Cooper*, 17 Cox C. C. 689, but these cases have since been laid to rest. *Rex* v. *Best*, [1909] 1 K. B. 692 (Crim. App.). Perhaps the best statement of the current English law, subject to some qualification with respect to the Judges' Rules, see text at notes 39–47, *infra*, is that in *Rex* v. *Voisin*, [1918] 1 K. B. 531, 539 (Crim. App.):

". . . [T]he mere fact that a statment is made in answer to a question put by a police constable is not in itself sufficient to make the statement inadmissible in law. It may be, and often is, a ground for the judge in his discretion excluding the evidence; but he should do so only if he thinks the statement was not a voluntary one . . . , or was an unguarded answer made under circumstances that rendered it unreliable, or unfair for some reason to be allowed in evidence against the prisoner." See *Ibrahim* v. *Rex*, [1914] A. C. 599, 610–614 (P. C.).

[37] *Boudreau* v. *Rex*, [1949] 3 D. L. R. 81 (S. C. Can.); *Rex* v. *Bellos*, [1927] 3 D. L. R. 186 (S. C. Can.); *Regina* v. *Day*, 20 Ont. 209 (Q. B.); *Regina* v. *Elliott*, 31 Ont. 14 (D. C.). In Canada, as in England, however, trial judges exercise a broad discretion to exclude confessions by prisoners in response to police questioning where, under all the circumstances, admission of the confessions is deemed unfair. See *Rex* v. *Anderson*, [1942] 3 D. L. R. 179 (C. A., B. C.). Compare *Rex* v. *Kooten*, [1926] 4 D. L. R. 771 (K. B., Man.), with the Canadian cases cited in notes 47 and 48, *infra*. And in both countries the heavy burden placed on the Crown affirmatively to demonstrate the voluntariness of any offered statement as a condition of its admissibility, *Regina* v. *Thompson*, [1893] 2 Q. B. 12 (Cr. Cas. Res.), often operates to exclude interrogated confessions. See, *e. g.*, *Rex* v. *Chadwick*, 24 Crim. App. Rep. 138 (Recorder erred in determining issue of voluntariness on depositions; burden is on Crown affirmatively to show that confession is voluntary); *Rex* v. *Dick*, [1947] 2 D. L. R. 213 (C. A., Ont.); *Rex* v. *Howlett*, [1950] 2 D. L. R. 517 (C. A., Ont.). The Canadian law is discussed in Kaufman, The Admissibility of Confessions in Criminal Matters (1960).

[38] Alabama: *Ingram* v. *State*, 252 Ala. 497, 42 So. 2d 36 (1949); *Myhand* v. *State*, 259 Ala. 415, 66 So. 2d 544 (1953). Arizona: *State* v. *Miller*, 62 Ariz. 529, 158 P. 2d 669 (1945); *Hightower* v. *State*, 62

Fourteenth Amendment does not prohibit a State from such detention and examination of a suspect as, under all the circumstances, is found not to be coercive. See *Lisenba* v. *California,* 314 U. S. 219; *Lyons* v. *Oklahoma,*

Ariz. 351, 158 P. 2d 156 (1945), *semble; State* v. *Jordan,* 83 Ariz. 248, 320 P. 2d 446 (1958), *semble.* Arkansas: *State* v. *Browning,* 206 Ark. 791, 178 S. W. 2d 77 (1944); *Moore* v. *State,* 229 Ark. 335, 315 S. W. 2d 907 (1958); and see *Dorsey* v. *State,* 219 Ark. 101, 240 S. W. 2d 30 (1951). California: *People* v. *Bashor,* 48 Cal. 2d 763, 312 P. 2d 255 (1957); and see *Rogers* v. *Superior Court,* 46 Cal. 2d 3, 291 P. 2d 929 (1955). Colorado: *Cahill* v. *People,* 111 Colo. 29, 137 P. 2d 673 (1943); *Downey* v. *People,* 121 Colo. 307, 215 P. 2d 892 (1950); *Leick* v. *People,* 136 Colo. 535, 322 P. 2d 674 (1958). Connecticut: *State* v. *Zukauskas,* 132 Conn. 450, 45 A. 2d 289 (1945); *State* v. *Buteau,* 136 Conn. 113, 68 A. 2d 681 (1949); and see *State* v. *Guastamachio,* 137 Conn. 179, 75 A. 2d 429 (1950). Delaware: *Garner* v. *State,* 51 Del. 301, 145 A. 2d 68 (1958). Florida: *Graham* v. *State,* 91 So. 2d 662 (Fla. 1956); *Singer* v. *State,* 109 So. 2d 7, 26 (Fla. 1959); and see *Finley* v. *State,* 153 Fla. 394, 14 So. 2d 844 (1943); *Rollins* v. *State,* 41 So. 2d 885 (Fla. 1949). Georgia: *Bryant* v. *State,* 191 Ga. 686, 13 S. E. 2d 820 (1941), 197 Ga. 641, 30 S. E. 2d 259 (1944); *Russell* v. *State,* 196 Ga. 275, 26 S. E. 2d 528 (1943); and see *Ferguson* v. *State,* 215 Ga. 117, 109 S. E. 2d 44 (1959), rev'd on other grounds, 365 U. S. 570. Hawaii: *Territory* v. *Young and Nozawa,* 37 Haw. 189 (1945); *Territory* v. *Aquino,* 43 Haw. 347 (1959). Idaho: *State* v. *Behler,* 65 Idaho 464, 146 P. 2d 338 (1944), *semble;* and see *State* v. *Johnson,* 74 Idaho 269, 261 P. 2d 638 (1953). Illinois: *People* v. *Lazenby,* 403 Ill. 95, 85 N. E. 2d 660 (1949); *People* v. *Hall,* 413 Ill. 615, 110 N. E. 2d 249 (1953); *Davies* v. *People,* 10 Ill. 2d 11, 139 N. E. 2d 216 (1956); *People* v. *Goard,* 11 Ill. 2d 495, 144 N. E. 2d 603 (1957); *Napue* v. *People,* 13 Ill. 2d 566, 571, 150 N. E. 2d 613, 616 (1958) (dictum), rev'd on other grounds, 360 U. S. 264; *People* v. *Miller,* 13 Ill. 2d 84, 148 N. E. 2d 455 (1958); and see *People* v. *Lettrich,* 413 Ill. 172, 108 N. E. 2d 488 (1952). Indiana: *Krauss* v. *State,* 229 Ind. 625, 100 N. E. 2d 824 (1951); *Pearman* v. *State,* 233 Ind. 111, 117 N. E. 2d 362 (1954); and see *Davis* v. *State,* 235 Ind. 620, 137 N. E. 2d 30 (1956). Iowa: *State* v. *Williams,* 245 Iowa 494, 62 N. W. 2d 742 (1954); *State* v. *Harriott,* 248 Iowa 25, 79 N. W. 2d 332 (1956); *State* v. *Triplett,* 248 Iowa 339, 79 N. W. 2d 391 (1956). Kansas: *State* v. *Vargas,* 180 Kan. 716, 308 P. 2d 81

322 U. S. 596; *Gallegos* v. *Nebraska*, 342 U. S. 55; *Brown* v. *Allen*, 344 U. S. 443; *Stein* v. *New York*, 346 U. S. 156, 184; *Crooker* v. *California*, 357 U. S. 433; *Cicenia* v. *Lagay*, 357 U. S. 504. And see *Townsend* v. *Burke*, 334 U. S. 736, 738.

(1957); and see *State* v. *Smith*, 158 Kan. 645, 149 P. 2d 600 (1944). Kentucky: *Commonwealth* v. *Mayhew*, 297 Ky. 172, 178 S. W. 2d 928 (1943); *Curtis* v. *Commonwealth*, 312 Ky. 205, 226 S. W. 2d 753 (1949); *Reed* v. *Commonwealth*, 312 Ky. 214, 226 S. W. 2d 513 (1949); *Milam* v. *Commonwealth*, 275 S. W. 921 (Ky. 1955); *Karl* v. *Commonwealth*, 288 S. W. 2d 628 (Ky. 1956). Louisiana: *State* v. *Holmes*, 205 La. 730, 18 So. 2d 40 (1944); *State* v. *Joseph*, 217 La. 175, 46 So. 2d 118 (1950); *State* v. *Solomon*, 222 La. 269, 62 So. 2d 481 (1952); *State* v. *Weston*, 232 La. 766, 95 So. 2d 305 (1957); and see *State* v. *Green*, 221 La. 713, 60 So. 2d 208 (1952). Maine: *State* v. *Priest*, 117 Me. 223, 103 A. 359 (1918). Maryland: *Cox* v. *State*, 192 Md. 525, 64 A. 2d 732 (1949); *James* v. *State*, 193 Md. 31, 65 A. 2d 888 (1949); *Merchant* v. *State*, 217 Md. 61, 141 A. 2d 487 (1958). Massachusetts: *Commonwealth* v. *Mabey*, 299 Mass. 96, 12 N. E. 2d 61 (1937); *Commonwealth* v. *Banuchi*, 335 Mass. 649, 141 N. E. 2d 835 (1957). Michigan: *People* v. *La Panne*, 255 Mich. 38, 237 N. W. 38 (1931), *semble;* and see *People* v. *Hamilton*, 359 Mich. 410, 416–417, 102 N. W. 2d 738 (1960). Minnesota: *State* v. *Schabert*, 222 Minn. 261, 24 N. W. 2d 846 (1946). Mississippi: *Winston* v. *State*, 209 Miss. 799, 48 So. 2d 513 (1950), *semble; Crouse* v. *State*, 229 Miss. 15, 89 So. 2d 919 (1956), *semble*. Missouri: *State* v. *Ellis*, 354 Mo. 998, 193 S. W. 2d 31 (1946); *State* v. *Francies*, 295 S. W. 2d 8 (Mo. 1956); *State* v. *Smith*, 310 S. W. 2d 845 (Mo. 1958); and see *State* v. *Lee*, 361 Mo. 163, 233 S. W. 2d 666 (1950). Montana: *State* v. *Dixson*, 80 Mont. 181, 260 P. 138 (1927); *State* v. *Robuck*, 126 Mont. 302, 248 P. 2d 817 (1952). Nebraska: *Kitts* v. *State*, 151 Neb. 679, 39 N. W. 2d 283 (1949); *Gallegos* v. *State*, 152 Neb. 831, 43 N. W. 2d 1 (1950), aff'd, 342 U. S. 55; *Parker* v. *State*, 164 Neb. 614, 83 N. W. 2d 347 (1957). Nevada: *State* v. *Boudreau*, 67 Nev. 36, 214 P. 2d 135 (1950); *Ex parte Sefton*, 73 Nev. 2, 306 P. 2d 771 (1957). New Hampshire: *State* v. *Howard*, 17 N. H. 171 (1845); and see *State* v. *George*, 93 N. H. 408, 43 A. 2d 256 (1945). New Jersey: *State* v. *Pierce*, 4 N. J. 252, 72 A. 2d 305 (1950); *State* v. *Cooper*, 10 N. J. 532, 92 A. 2d 786 (1952); *State* v. *Grillo*, 11 N. J. 173, 93 A. 2d 328 (1952); *State* v. *Wise*, 19 N. J. 59, 115 A. 2d 62 (1955); *State* v. *Smith*, 32 N. J. 501, 161 A. 2d 520 (1960). New

It is true that the English courts have long tended severely to discourage law enforcement officers from asking questions of persons under arrest or who are so far suspected that their arrest is imminent. The judges have

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Mexico: *State* v. *Lindemuth,* 56 N. M. 257, 243 P. 2d 325 (1952); *State* v. *Griego,* 61 N. M. 42, 294 P. 2d 282 (1956); *State* v. *Padilla,* 66 N. M. 289, 347 P. 2d 312 (1959). New York: *People* v. *Perez,* 300 N. Y. 208, 90 N. E. 2d 40 (1949); *People* v. *Spano,* 4 N. Y. 2d 256, 150 N. E. 2d 226 (1958), rev'd, 360 U. S. 315; *People* v. *Vargas,* 7 N. Y. 2d 555, 166 N. E. 2d 831 (1960); and see *People* v. *Alex,* 265 N. Y. 192, 192 N. E. 289 (1934); *People* v. *Elmore,* 277 N. Y. 397, 14 N. E. 2d 451 (1938); *People* v. *Lovello,* 1 N. Y. 2d 436, 136 N. E. 2d 483 (1956). But see *People* v. *Di Biasi,* 7 N. Y. 2d 544, 166 N. E. 2d 825 (1960) (post-indictment). North Carolina: *State* v. *Brown,* 233 N. C. 202, 63 S. E. 2d 99 (1951); *State* v. *Rogers,* 233 N. C. 390, 64 S. E. 2d 572 (1951); *State* v. *Davis,* 253 N. C. 86, 116 S. E. 2d 365 (1960). North Dakota: *State* v. *Nagel,* 75 N. D. 495, 28 N. W. 2d 665 (1947); *State* v. *Braathen,* 77 N. D. 309, 43 N. W. 2d 202 (1950). Ohio: *State* v. *Collett,* 58 N. E. 2d 417 (Ohio App. 1944), app. dism'd, 144 Ohio St. 639, 60 N. E. 2d 170 (1945); *State* v. *Lowder,* 79 Ohio App. 237, 72 N. E. 2d 785 (1946), app. dism'd, 147 Ohio St. 530, 72 N. E. 2d 102 (1947). Oklahoma: *Fry* v. *State,* 78 Okla. Cr. 299, 147 P. 2d 803 (1944); *Hendrickson* v. *State,* 93 Okla. Cr. 379, 229 P. 2d 196 (1951); *Thacker* v. *State,* 309 P. 2d 306 (Okla. Cr., 1957); and see *Application of Fowler,* 356 P. 2d 770, 778 (Okla. Cr., 1960). Oregon: *State* v. *Folkes,* 174 Ore. 568, 150 P. 2d 17 (1944); *State* v. *Nunn,* 212 Ore. 546, 321 P. 2d 356 (1958); and see *State* v. *Leland,* 190 Ore. 598, 227 P. 2d 785 (1951), aff'd, 343 U. S. 790 (1952). Pennsylvania: *Commonwealth* v. *Agoston,* 364 Pa. 464, 72 A. 2d 575 (1950); *Commonwealth* v. *Bibalo,* 375 Pa. 257, 100 A. 2d 45 (1953); *Commonwealth ex rel. Sleighter* v. *Banmiller,* 392 Pa. 133, 139 A. 2d 918 (1958). Rhode Island: *State* v. *Andrews,* 86 R. I. 341, 134 A. 2d 425 (1957). South Carolina: *State* v. *Brown,* 212 S. C. 237, 47 S. E. 2d 521 (1948); *State* v. *Bullock,* 235 S. C. 356, 111 S. E. 2d 657 (1959); and see *State* v. *Chasteen,* 228 S. C. 88, 88 S. E. 2d 880 (1955). South Dakota: *State* v. *Landers,* 21 S. D. 606, 114 N. W. 717 (1908); *State* v. *Nicholas,* 62 S. D. 511, 253 N. W. 737 (1934), *semble.* Tennessee: *Wynn* v. *State,* 181 Tenn. 325, 181 S. W. 2d 332 (1944); *Ford* v. *State,* 184 Tenn. 443, 201 S. W. 2d 539 (1945); *Taylor* v. *State,* 191 Tenn. 670, 235 S. W. 2d 818 (1950); and see *McGhee* v. *State,* 183 Tenn. 20, 189 S. W. 2d

many times deprecated the practice even while receiving in evidence the confessions it has produced.[39] The manual known as the Judges' Rules, first issued in 1912, augmented in 1918, and clarified by a Home Office Circular

826 (1945); *Acklen* v. *State*, 196 Tenn. 314, 267 S. W. 2d 101 (1954). Texas: *Dimery* v. *State*, 156 Tex. Cr. R. 197, 240 S. W. 2d 293 (1951); *Leviness* v. *State*, 157 Tex. Cr. R. 160, 247 S. W. 2d 115 (1952); *Golemon* v. *State*, 157 Tex. Cr. R. 534, 247 S. W. 2d 119 (1952); *LeFors* v. *State*, 161 Tex. Cr. R. 544, 278 S. W. 2d 837 (1954); *Walker* v. *State*, 162 Tex. Cr. R. 408, 286 S. W. 2d 144 (1955); *Childress* v. *State*, 166 Tex. Cr. R. 95, 312 S. W. 2d 247 (1958). Utah: *Mares* v. *Hill*, 118 Utah 484, 222 P. 2d 811 (1950); and see *State* v. *Gardner*, 119 Utah 579, 230 P. 2d 559 (1951); *State* v. *Braasch*, 119 Utah 450, 229 P. 2d 289 (1951). Vermont: *State* v. *Blair*, 118 Vt. 81, 99 A. 2d 677 (1953); *State* v. *Goyet*, 120 Vt. 12, 132 A. 2d 623 (1957). Virginia: *James* v. *Commonwealth*, 192 Va. 713, 66 S. E. 2d 513 (1951); *Campbell* v. *Commonwealth*, 194 Va. 825, 75 S. E. 2d 468 (1953); *Mendoza* v. *Commonwealth*, 199 Va. 961, 103 S. E. 2d 1 (1958). Washington: *State* v. *Winters*, 39 Wash. 2d 545, 236 P. 2d 1038 (1951); *State* v. *Johnson*, 53 Wash. 2d 666, 335 P. 2d 809 (1959). West Virginia: *State* v. *Digman*, 121 W. Va. 499, 5 S. E. 2d 113 (1939); *State* v. *Bruner*, 143 W. Va. 755, 105 S. E. 2d 140 (1958); and see *State* v. *Brady*, 104 W. Va. 523, 140 S. E. 546 (1927). Wisconsin: *State* v. *Fransisco*, 257 Wis. 247, 43 N. W. 2d 38 (1950); *Kiefer* v. *State*, 258 Wis. 47, 44 N. W. 2d 537 (1950); *State* v. *Babich*, 258 Wis. 290, 45 N. W. 2d 660 (1951); *State* v. *Stortecky*, 273 Wis. 362, 77 N. W. 2d 721 (1956); *State* v. *Bronston*, 7 Wis. 2d 627, 97 N. W. 2d 504, 98 N. W. 2d 468 (1959). Wyoming: *Mortimore* v. *State*, 24 Wyo. 452, 161 P. 766 (1916); *State* v. *Lantzer*, 55 Wyo. 230, 99 P. 2d 73 (1940).

[39] *Regina* v. *Berriman*, 6 Cox C. C. 388, 388–389 ("I very much disapprove of this proceeding. By the law of this country, no person ought to he [*sic*] made to criminate himself, and no police officer has any right, until there is clear proof of a crime having been committed, to put searching questions to a person for the purpose of eliciting from him whether an offence has been perpetrated or not. If there is evidence of an offence, a police officer is justified, after a proper caution, in putting to a suspected person interrogatories with a view to ascertaining whether nor not there are fair and reasonable grounds for apprehending him. Even this course should be very sparingly resorted to. . . . I wish it to go forth amongst those

published in 1930, embodies the attitude of the English Bench in this regard.[40] While encouraging police officers to put questions to all possibly informed persons, whether or not suspected, during the early phase of their investi-

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who are inferior officers in the administration of justice, that such a practice is entirely opposed to the spirit of our law."); *Regina* v. *Mick,* 3 F. & F. 822, 823 ("I entirely disapprove of the system of police officers examining prisoners. The law has surrounded prisoners with great precautions to prevent confessions being extorted from them, and the magistrates are not allowed to question prisoners, or to ask them what they have to say; and it is not for policemen to do these things. It is assuming the functions of the magistrate without those precautions which the magistrates are required by the law to use, and assuming functions which are entrusted to the magistrates and to them only."); *Regina* v. *Reason,* 12 Cox C. C. 228, 229 ("It is the duty of the police-constable to hear what the prisoner has voluntarily to say, but after the prisoner is taken into custody it is not the duty of the police-constable to ask questions."); *Regina* v. *Cheverton,* 2 F. & F. 833, 835; *Regina* v. *Regan,* 17 Law Times Rep. (N. S.) 325, 326.

[40] The first four of the rules, drawn up by the judges of the King's Bench at the request of the Home Secretary, were circulated in 1912. Their text is set forth in *Rex* v. *Voisin,* [1918] 1 K. B. 531, 539, n. (3). A memorandum approved by the judges in 1918 increased their number to nine. See 145 Law Times 389 (Sept. 28, 1918). Ambiguities in the rules were pointed out by a Royal Commission in 1929, see Report of the Royal Commission on Police Powers and Procedure [Cmd. 3297] (1929) 69–74, and in response to the Commission's observations a clarifying circular was issued by the Home Office in 1930 with the approval of the judges. See 6 Police Journal (1933) 342, 352–356; 1 Taylor on Evidence (12th ed. 1931) 557–559. Further Home Office Circulars in 1947 and 1948 were approved by the Lord Chief Justice. For the text of the Rules and Circulars as presently in operation, see 1 Stone's Justices' Manual (92d ed. 1960) 353–356. See also Devlin, The Criminal Prosecution in England (1958), 38–42, 137–141. The Home Secretary recently responded to Parliament that he had been in touch with the Lord Chief Justice, who had agreed that the time had come when it would be appropriate for the judges to carry out a review of the scope and operation of the Judges' Rules, 636 H. C. Deb., Hansard, No. 75 [written answers] 145 (March 16, 1961).

gation which aims at discovering who committed the offense, the Rules admonish that so soon as the officers make up their minds to charge a particular person with a crime, they should caution him, first, that he need say nothing and, second, that what he says may be used in evidence, before questioning him or questioning him further. Persons in custody are not to be questioned, except that when a prisoner, having been cautioned, volunteers a statement, such questions may be asked as are fairly needed to remove ambiguities, so long as the questioner does not seek to elicit information beyond the scope of what the prisoner has offered. If two or more persons are charged with an offense and the police have taken the statement of one of them, copies may be furnished to the others but nothing should be said or done to invite a reply.[41] The Judges' Rules are not "law" in the sense

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[41] The Rules, in pertinent part, are:

"(1) When a police officer is endeavouring to discover the author of a crime, there is no objection to his putting questions in respect thereof to any person or persons, whether suspected or not, from whom he thinks that useful information can be obtained.

"(2) Whenever a police officer has made up his mind to charge a person with a crime, he should first caution such person before asking any questions or any further questions, as the case may be.

"(3) Persons in custody should not be questioned without the usual caution being first administered.

"(4) If the prisoner wishes to volunteer any statement, the usual caution should be administered . . . .

. . . . . .

"(7) A prisoner making a voluntary statement must not be cross-examined, and no questions should be put to him about it except for the purpose of removing ambiguity in what he has actually said. For instance, if he has mentioned an hour without saying whether it was morning or evening, or has given a day of the week and day of the month which do not agree, or has not made it clear to what individual or what place he intended to refer in some part of his statement, he may be questioned sufficiently to clear up the point.

"(8) When two or more persons are charged with the same offence and statements are taken separately from the persons charged, the

that any violation of them by a questioning officer *eo ipso* renders inadmissible in evidence whatever incriminatory responses he may obtain.[42] But it is clear that the judges presiding at criminal trials have broad discretion to exclude any confession procured by methods which offend against the letter or the spirit of the Rules,[43] and violations have in a few instances seemed to influence, although not to control, the judgment of the Court of Criminal Appeal in quashing convictions.[44] For these reasons,

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police should not read these statements to the other persons charged, but each of such persons should be furnished by the police with a copy of such statements and nothing should be said or done by the police to invite a reply. If the person charged desires to make a statement in reply, the usual caution should be administered."

These must be read in connection with the Home Office Circular of 1930, which states:

"Rule 3 was never intended to encourage or authorize the questioning or cross-examination of a person in custody after he has been cautioned, on the subject of the crime for which he is in custody, and long before this Rule was formulated, and since, it has been the practice for the Judge not to allow any answer to a question so improperly put to be given in evidence; but in some cases it may be proper and necessary to put questions to a person in custody after the caution has been administered. For instance, a person arrested for a burglary may, before he is formally charged, say, 'I have hidden or thrown the property away,' and after caution he would properly be asked, 'Where have you hidden or thrown it?'; or a person, before he is formally charged as a habitual criminal, is properly asked to give an account of what he has done since he last came out of prison. Rule 3 is intended to apply to such cases and, so understood, is not in conflict with and does not qualify Rule 7, which prohibits any question upon a voluntary statement except such as is necessary to clear up ambiguity."

[42] *Regina* v. *Wattam*, 36 Crim. App. Rep. 72, 77; *Regina* v. *Straffen*, [1952] 2 Q. B. 911, 914 (Crim. App.).

[43] *Ibid.*; *Rex* v. *May*, 36 Crim. App. Rep. 91, 93; *Rex* v. *Voisin*, [1918] 1 K. B. 531, 539–540; see "Questioning an Accused Person," 92 J. P. 743, 758 (1928); Brownlie, Police Questioning, Custody and Caution, [1960] Crim. L. Rev. 298.

[44] See *Rex* v. *Dwyer*, 23 Crim. App. Rep. 156; *Regina* v. *Bass*, 37 Crim. App. Rep. 51.

and because of the respect which attaches to the Rules in view of their source, they have doubtless had a pervasive effect upon actual police practices, and they appear to be regarded by the constabulary as a more or less infrangible code.[45] Inasmuch as the same conception is shared by counsel for the Crown, the contemporary English reports do not disclose cases involving the sort of claims of coercion so frequently litigated in our courts. It may well be that their circumstances seldom arise;[46] when they do, the Crown does not offer the confession; if it were offered—in a case, for example, where several hours of questioning could be shown—the trial judge would almost certainly exclude it.[47]

This principle by which the English trial judges have supplemented the traditional Anglo-American rule that

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[45] See Devlin, The Criminal Prosecution in England (1958), *passim*.

[46] No doubt the Judges' Rules are sometimes broken, but the reported breaches themselves seem relatively mild—compared with what is common American police practice—so that even these appear to support the conclusion that, in the large, the tenor of the Rules is that which prevails in practical operation among the English constabulary. See the several articles composing the "Special Issue on Police Questioning," [1960] Crim. L. Rev. 298–356; Elliott, Book Review, 5 J. Soc. Public Teachers of Law (N. S.) 230 (1960).

The furor, both within and without Parliament, raised by an afternoon's questioning of Miss Savidge, is illuminating. See Inquiry In Regard to the Interrogation By the Police of Miss Savidge, Report of the Tribunal appointed under the Tribunals of Inquiry (Evidence) Act, 1921 [Cmd. 3147] (1928); 217 H. C. Deb. 1216–1220, 1303–1339, 1921–1931 (5th ser. 1928). So is the comment to which the English practice has sometimes given occasion. See, *e. g.*, Forsyth, The History of Lawyers (1875), 282, n. 1: "Not long ago, at a trial at the Central Criminal Court, a policeman was asked whether the prisoner had not made a statement. He answered, 'No: he was beginning to do so; *but I knew my duty better,* and I prevented him.'"

[47] See the 1905 decision, *Rex* v. *Knight,* 21 T. L. Rep. 310; and see *Rex* v. *Kay,* 11 B. C. 157.

confessions are admissible if voluntary, by the exercise of a discretion to exclude incriminating statements procured by methods deemed oppressive although not deemed fundamentally inconsistent with accusatorial criminal procedure,[48] has not been imitated in the United States.[49] In 1943 this Court, in *McNabb* v. *United States,* 318 U. S. 332, drew upon its supervisory authority over the administration of federal criminal justice to inaugurate an exclusionary practice considerably less stringent than the English. That practice requires the exclusion of any confession "made during illegal detention due to failure promptly to carry a prisoner before a committing magistrate, whether or not the 'confession is the result of torture, physical or psychological . . . .'" *Upshaw* v. *United States,* 335 U. S. 410, 413.[50] Its purpose is to give effect to the requirement that persons arrested be brought without unnecessary delay before a judicial officer—a safeguard which our society, like other civilized

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[48] Compare *Rex* v. *Godwin,* [1924] 2 D. L. R. 362 (K. B., N. B.), with *Ibrahim* v. *Rex,* [1914] A. C. 599 (P. C.). And see *Rex* v. *Pattison,* 21 Cr. App. Rep. 139.

[49] The Judges' Rules' requirement of a caution has been adopted, however, and made a condition of admissibility of incriminating statements, by the Uniform Code of Military Justice, 10 U. S. C. § 831. The same requirement, with certain exceptions, prevails by statute in Texas. Tex. Code Crim. Proc., Arts. 726, 727. Compare S. 3325, 85th Cong., 2d Sess.

[50] In *McNabb,* our decision turned on the failure of the arresting officers to comply with procedures prescribed by federal statutes then in effect requiring prompt production of persons arrested for preliminary examination. Compare *Anderson* v. *United States,* 318 U. S. 350. The *Upshaw* case and *Mallory* v. *United States,* 354 U. S. 449, carried the same exclusionary rule over in implementation of Fed. Rules Crim. Proc., 5 (a). Of course, our decision in *United States* v. *Mitchell,* 322 U. S. 65, makes clear that confessions made during the period immediately following arrest and before delay becomes unlawful are not to be excluded under the rule.

societies, has found essential to the protection of personal liberty.[51]

The *McNabb* case was an innovation which derived from our concern and responsibility for fair modes of criminal proceeding in the federal courts.[52] The States, in the large, have not adopted a similar exclusionary principle.[53] And although we adhere unreservedly to *McNabb*

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[51] 318 U. S., at 343–344:

". . . The awful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication. Legislation . . . requiring that the police must with reasonable promptness show legal cause for detaining arrested persons, constitutes an important safeguard—not only in assuring protection for the innocent but also in securing conviction of the guilty by methods that commend themselves to a progressive and self-confident society. For this procedural requirement checks resort to those reprehensible practices known as the 'third degree' which, though universally rejected as indefensible, still find their way into use. It aims to avoid all the evil implications of secret interrogation of persons accused of crime. It reflects not a sentimental but a sturdy view of law enforcement. It outlaws easy but self-defeating ways in which brutality is substituted for brains as an instrument of crime detection." See notes 26, 27, *supra*.

[52] Prior to *McNabb*, the rule prevailing in the federal courts made voluntariness the test of admissibility. *Ziang Sung Wan* v. *United States*, 266 U. S. 1. See also *Bram* v. *United States*, 168 U. S. 532.

[53] See cases cited in note 38, *supra*. Alabama, Arizona, Arkansas, California, Connecticut, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana (*semble*), Maryland, Massachusetts (*semble*), Mississippi, Missouri, Nevada, New Jersey, New York, North Carolina (*semble*), North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania (no prompt-arraignment statute), Rhode Island (*semble*), Tennessee (no prompt-arraignment statute), Texas, Utah, Vermont (*semble*), Virginia, Washington and Wisconsin (*semble*) have expressly rejected *McNabb*. Colorado appears clearly to reject it. Minnesota also appears to reject it, the decision in *State* v. *Schabert*, 222 Minn. 261, 24 N. W. 2d 846, qualifying whatever suggestion might have been inferred from the opinion in the earlier appeal of the same

for federal criminal cases, we have not extended its rule to state prosecutions as a requirement of the Fourteenth Amendment. *Gallegos* v. *Nebraska,* 342 U. S. 55, 63–64 (opinion of Reed, J.); *Brown* v. *Allen,* 344 U. S. 443, 476; *Stein* v. *New York,* 346 U. S. 156, 187–188; cf. *Lyons* v. *Oklahoma,* 322 U. S. 596, 597–598, n. 2; *Townsend* v. *Burke,* 334 U. S. 736, 738; *Stroble* v. *California,* 343 U. S. 181, 197.

In light of our past opinions and in light of the wide divergence of views which men may reasonably maintain concerning the propriety of various police investigative procedures not involving the employment of obvious brutality, this much seems certain: It is impossible for this Court, in enforcing the Fourteenth Amendment, to attempt precisely to delimit, or to surround with specific, all-inclusive restrictions, the power of interrogation allowed to state law enforcement officers in obtaining confessions. No single litmus-paper test for constitutionally impermissible interrogation has been evolved: neither extensive cross-questioning—deprecated by the English judges; nor undue delay in arraignment—proscribed by *McNabb;* nor failure to caution a prisoner—enjoined by the Judges' Rules; nor refusal to permit communication with friends and legal counsel at stages in the proceeding when the prisoner is still only a suspect—prohibited by several state statutes. See *Lisenba* v. *Cali-*

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case, 218 Minn. 1, 15 N. W. 2d 585, that *McNabb* would be followed. There is dictum in Kentucky suggesting that protracted pre-arraignment delay would not *eo ipso* cause exclusion of a confession. *Reed* v. *Commonwealth,* 312 Ky. 214, 218, 226 S. W. 2d 513, 514–515 (1949). Idaho, where *State* v. *Johnson,* 74 Idaho 269, 261 P. 2d 638, limits and in part overrules *State* v. *Kotthoff,* 67 Idaho 319, 177 P. 2d 474 (a decision whose reasoning seems in some respects similar to that of *McNabb*) must now be regarded as uncommitted. The only State to follow *McNabb* is Michigan. *People* v. *Hamilton,* 359 Mich. 410, 102 N. W. 2d 738.

fornia, 314 U. S. 219; *Crooker* v. *California,* 357 U. S. 433; *Ashdown* v. *Utah,* 357 U. S. 426.

Each of these factors, in company with all of the surrounding circumstances—the duration and conditions of detention (if the confessor has been detained), the manifest attitude of the police toward him, his physical and mental state, the diverse pressures which sap or sustain his powers of resistance and self-control—is relevant.[54] The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process. *Rogers* v. *Richmond,* 365 U. S. 534. The line of distinction is that at which governing self-direction is lost and compulsion, of whatever nature or however infused, propels or helps to propel the confession.

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[54] Cf. *Cicenia* v. *Lagay,* 357 U. S. 504, 509:

". . . On the one hand, it is indisputable that the right to counsel in criminal cases has a high place in our scheme of procedural safeguards. On the other hand, it can hardly be denied that adoption of petitioner's position [that any state denial of a defendant's request to confer with counsel during police questioning violates due process] would constrict state police activities in a manner that in many instances might impair their ability to solve difficult cases. A satisfactory formula for reconciling these competing concerns is not to be found in any broad pronouncement that one must yield to the other in all instances. Instead, . . . this Court, in judging whether state prosecutions meet the requirements of due process, has sought to achieve a proper accommodation by considering a defendant's lack of counsel one pertinent element in determining from all the circumstances whether a conviction was attended by fundamental unfairness."

IV.

The inquiry whether, in a particular case, a confession was voluntarily or involuntarily made involves, at the least, a three-phased process. First, there is the business of finding the crude historical facts, the external, "phenomenological" occurrences and events surrounding the confession. Second, because the concept of "voluntariness" is one which concerns a mental state, there is the imaginative recreation, largely inferential, of internal, "psychological" fact. Third, there is the application to this psychological fact of standards for judgment informed by the larger legal conceptions ordinarily characterized as rules of law but which, also, comprehend both induction from, and anticipation of, factual circumstances.

In a case coming here from the highest court of a State in which review may be had, the first of these phases is definitely determined, normally, by that court. Determination of what happened requires assessments of the relative credibility of witnesses whose stories, in cases involving claims of coercion, are frequently, if indeed not almost invariably, contradictory. That ascertainment belongs to the trier of facts before whom those witnesses actually appear, subject to whatever corrective powers a State's appellate processes afford.

This means that all testimonial conflict is settled by the judgment of the state courts. Where they have made explicit findings of fact, those findings conclude us and form the basis of our review—with the one *caveat,* necessarily, that we are not to be bound by findings wholly lacking support in evidence. See *Thompson* v. *Louisville,* 362 U. S. 199. Where there are no explicit findings, or in the case of *lacunae* among the findings, the rejection of a federal constitutional claim by state criminal courts applying

proper constitutional standards [55] resolves all conflicts in testimony bearing on that claim against the criminal defendant. In such instances, we consider only the uncontested portions of the record: the evidence of the prosecution's witnesses and so much of the evidence for the defense as, fairly read in the context of the record as a whole, remains uncontradicted. *Ashcraft* v. *Tennessee,* 322 U. S. 143, 152–153; *Lyons* v. *Oklahoma,* 322 U. S. 596, 602–603; *Watts* v. *Indiana,* 338 U. S. 49, 50–52 (opinion of FRANKFURTER, J.); *Gallegos* v. *Nebraska,* 342 U. S. 55, 60–62; *Stein* v. *New York,* 346 U. S. 156, 180–182; *Payne* v. *Arkansas,* 356 U. S. 560, 561–562; *Thomas* v. *Arizona,* 356 U. S. 390, 402–403.

The second and third phases of the inquiry—determination of how the accused reacted to the external facts, and of the legal significance of how he reacted—although distinct as a matter of abstract analysis, become in practical operation inextricably interwoven. This is so, in part, because the concepts by which language expresses an otherwise unrepresentable mental reality are themselves generalizations importing preconceptions about the reality to be expressed. It is so, also, because the apprehension of mental states is almost invariably a matter of induction, more or less imprecise, and the margin of error which is thus introduced into the finding of "fact" must be accounted for in the formulation and application of the "rule" designed to cope with such classes of facts. The

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[55] The record in this case does not make clear, as did that in *Rogers* v. *Richmond,* 365 U. S. 534, that the legal standard applied by the trial judge in passing upon the admissibility of Culombe's confessions was, under this Court's decisions, an impermissible one. In view of the disposition which we make upon the facts of this case, viewed under the assumption that a proper criterion of judgment was employed below, we need not further pursue the inquiry whether the trial judge's standard satisfied the constitutional requirements regarding coercion.

notion of "voluntariness" is itself an amphibian. It purports at once to describe an internal psychic state and to characterize that state for legal purposes. Since the characterization is the very issue "to review which this Court sits," *Watts* v. *Indiana,* 338 U. S. 49, 51 (opinion of FRANKFURTER, J.), the matter of description, too, is necessarily open here. See *Lisenba* v. *California,* 314 U. S. 219, 237–238; *Ward* v. *Texas,* 316 U. S. 547, 550; *Haley* v. *Ohio,* 332 U. S. 596, 599; *Malinski* v. *New York,* 324 U. S. 401, 404, 417.

No more restricted scope of review would suffice adequately to protect federal constitutional rights. For the mental state of involuntariness upon which the due process question turns can never be affirmatively established other than circumstantially—that is, by inference; and it cannot be competent to the trier of fact to preclude our review simply by declining to draw inferences which the historical facts compel. Great weight, of course, is to be accorded to the inferences which are drawn by the state courts. In a dubious case, it is appropriate, with due regard to federal-state relations, that the state court's determination should control. But where, on the uncontested external happenings, coercive forces set in motion by state law enforcement officials are unmistakably in action; where these forces, under all the prevailing states of stress, are powerful enough to draw forth a confession; where, in fact, the confession does come forth and is claimed by the defendant to have been extorted from him; and where he has acted as a man would act who is subjected to such an extracting process—where this is all that appears in the record—a State's judgment that the confession was voluntary cannot stand.

> ". . . [I]f force has been applied, this Court does not leave to local determination whether or not the confession was voluntary. There is torture of mind as well as body; the will is as much affected by fear

as by force. And there comes a point where this Court should not be ignorant as judges of what we know as men." *Watts* v. *Indiana, supra,* at 52.

V.

We turn, then, to the uncontested historical facts as they appear in this record. Since judgment as to legal voluntariness *vel non* under the Due Process Clause is drawn from the totality of the relevant circumstances of a particular situation, a detailed account of them is unavoidable. When Culombe's confessions were offered by the prosecution and objected to as constitutionally inadmissible, the Connecticut Superior Court, pursuant to the applicable Connecticut procedure,[56] excused the jury and took evidence bearing on the issue of coercion. It later made explicit findings setting forth the facts which it credited and deemed relevant. On the basis of these findings and—insofar as they do not cover all aspects of the testimony—of evidence that is uncontradicted, the following may be taken as established.[57]

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[56] *State* v. *Buteau,* 136 Conn. 113, 116–118, 68 A. 2d 681, 682–683; *State* v. *Lorain,* 141 Conn. 694, 699–700, 109 A. 2d 504, 506–507. And see *State* v. *McCarthy,* 133 Conn. 171, 177, 49 A. 2d 594, 596–597.

[57] Portions of the following statement of facts are based upon testimony introduced into the record in the case of Taborsky, Culombe's co-defendant, who was tried jointly with Culombe. Virtually all of the evidence concerning Culombe's mental capacity was introduced, not at the time of the trial to the court of the issue of coercion relevant to the admissibility of Culombe's confessions, but at a later stage of the trial, in connection with Culombe's defense of insanity. Since all of this evidence was in the record at the time that the Supreme Court of Errors considered and rejected Culombe's federal claim of coercion, and since the opinion of that court does not indicate that it considered the material improperly before it as a matter of state procedure, we need not now decide what effect such a ruling would have on the scope of our review. Compare *Blackburn* v. *Alabama,* 361 U. S. 199, 209–211.

In February 1957, the Connecticut State Police at Hartford were investigating a number of criminal incidents. In connection with certain of these (other than the Kurp's Gasoline Station killings in New Britain) it was decided on Saturday, February 23 to have two men, Arthur Culombe and Joseph Taborsky, picked up and viewed by witnesses. Lieutenant Rome, who was in charge of the investigation, delegated teams of officers to go to different addresses where the men might be located.

Shortly after 2 p. m., two officers accosted Culombe and Taborsky entering a car in front of the home of the latter's mother in Hartford. They told Taborsky that Lieutenant Rome wanted to talk to him at State Police Headquarters. They said that this was not an arrest. Taborsky stated that he was willing to go and Culombe drove him to Headquarters, following the officer's car. Leaving Taborsky, Culombe immediately drove home.

Shortly after his arrival, at about 2:30 p. m., Sergeant Paige and another officer came to Culombe's apartment to bring him back to Headquarters. They told Culombe that he was not arrested, that Lieutenant Rome wanted to talk to him. Culombe drove Sergeant Paige to Headquarters in his, Culombe's, car. From this time, Culombe was never again out of the effective control of the police.

Lieutenant Rome spoke briefly to Culombe and Taborsky and asked them if they would agree to accompany several officers to Coventry and Rocky Hill for purposes of possible identification. They consented. Sergeant Paige and two other officers took Culombe and Taborsky on this trip, which consumed about three hours, between 3 and 6 p. m. In the car, Culombe was questioned concerning his possible participation in several crimes. He was not then regarded as under arrest. During the stops at Coventry and Rocky Hill, after Culombe and Taborsky, at the officers' request, had entered a country store and a package store feigning to be customers, the

two men were left for brief periods of time in the police cruiser with only Officer Griffin present. Griffin permitted them to drink the contents of a bottle of liquor which Taborsky carried.

On the return to Hartford the group stopped at a diner for dinner. Culombe and Taborsky were told to order what they wanted and ate well. At Headquarters Culombe was questioned for an hour by Paige concerning his possession of guns. He told Paige that he was a gun collector and had seven or eight guns at his home which he agreed to turn over to the police. The reason Culombe revealed this information to Paige was that the guns were registered and Culombe knew that Paige could have traced them to him in any event.

Paige and another officer took Culombe to his home, where Culombe left them in the living room and went to the bedroom. Following, they found him with two guns. They found a clip of cartridges in a drawer which he had just closed and six more guns in a small safe. They took these. Culombe and the second officer left and waited together on the street near the cruiser, the officer holding Culombe's arm, for approximately twenty minutes while Paige remained in Culombe's apartment questioning Culombe's wife.

Culombe was taken back to Headquarters. Paige talked with him for a short while, then discontinued his investigation for the night. Rome talked with Culombe for about two hours, apparently over a three- or three-and-a-half-hour period. The talk concerned the Kurp's killings and other matters. At this time Culombe and Taborsky were kept in separate rooms. Rome would question one, then the other, staying with each man until he got some bit of information that he could have checked. During respites of questioning by Rome, Culombe remained in the interrogation room.

At one point, Culombe told Rome that he wanted to see a lawyer but did not give the name of any specific lawyer. Rome replied that Culombe could have any lawyer he wanted if Culombe would tell Rome what lawyer to call. Rome knew that Culombe, an illiterate, was unable to use the telephone directory.

About 10 p. m., Rome put Culombe under arrest by virtue of a Connecticut statute permitting arrest without a warrant where the arresting officer has cause to suspect that the person arrested has committed a felony. The statute requires that persons so arrested be presented with reasonable promptness before the proper authority.[58] Culombe was taken to a cell at Headquarters sometime before midnight. However, the log book in which notation is customarily made of prisoners detained in the Headquarters cell blocks shows no entry for Culombe Saturday night.

Concerning the purpose of the questioning which began on Saturday and continued intermittently until Culombe confessed the following Wednesday, Sergeant Paige candidly admitted that it was intended to obtain a confession if a confession was obtainable.[59] Lieutenant Rome agreed that he had kept after Culombe until he got answers which he could prove were correct.[60] There is

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[58] Conn. Gen. Stat., 1955 Supp., § 195d, now Conn. Gen. Stat., 1958, § 6–49: ". . . [M]embers of the state police department . . . shall arrest, without previous complaint and warrant, any person who such officer has reasonable grounds to believe has committed or is committing a felony. Any person so arrested shall be presented with reasonable promptness before proper authority."

[59] "Q. All of the questioning of Culombe, from the time that he was taken into custody was with the object in view of obtaining a confession if a confession was obtainable, that is true, isn't it? A. That is correct." (Cross-examination of Sergeant Paige.)

[60] "Q. You kept after him, to use very conservative words? A. Yes, sir. Q. Until you received the answers that you wanted?

no indication that at any time Culombe was warned of his right to keep silent. Neither Paige nor anyone in Paige's hearing cautioned Culombe concerning his constitutional rights.[61]

On Sunday, February 24, Culombe was questioned for a short time about the New Britain killings and denied that he was involved. He was also questioned by Paige and a Hartford detective about another robbery. The following morning Culombe and Taborsky were driven to New Britain and, after a substantial wait at the Detective Headquarters building, were booked for breach of the peace at New Britain Police Headquarters. Crowds lined both sides of the street where the stations were located. After the booking, en route back to Hartford, the cruiser in which Culombe rode stopped at Kurp's gas station. Rome asked Culombe if he recognized the place; Culombe said that he did not. On Monday afternoon Culombe was again questioned at Headquarters concerning Kurp's as well as other matters. Lieutenant Rome questioned him for two or three hours. Sergeant Paige also questioned him for twenty minutes or half an hour, but this appears to have been concurrent with Rome's questioning. Culombe then confessed to the

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That's right, isn't it? A. No, sir. Until we received the answers which we proved were correct. Q. The answers that you wanted were admissions of guilt? You wanted those answers? A. No, sir, not if he were not guilty. Q. You were bound and determined, weren't you, Lieutenant, to get such answers? A. No, sir. Not if he were guilty. [*Sic*] We wanted answers that we could prove were correct." (Cross-examination of Lieutenant Rome.)

[61] "Q. Were they told of their rights, Constitutional rights? A. I didn't tell them. Q. You didn't hear anyone else tell it to them? A. No, sir, not that I know of." (Cross-examination of Sergeant Paige.) It is unclear from the context of these responses whether they are meant to refer to the whole of Culombe's period of detention or only to Saturday afternoon.

theft of certain canned goods and made a statement about them that was reduced to writing.

On Tuesday, February 26, Culombe was removed from his cell to be taken to the New Britain Police Court for presentation on the breach of the peace charge. At that time Rome told him that he was to be brought to court and would have an opportunity to see a lawyer. At New Britain there were again crowds on the street, but not as heavy as Monday's.

The courtroom was crowded. Once in it, Culombe and Taborsky were placed in a prisoners' pen, a wire-mesh, cage-like affair in the corner of the room. Photographers with flashbulbs took photographs of them in the pen. The crowd was between the pen and the judge's bench. When court convened, the two men were presented for breach of the peace. Culombe was not required to plead. He was not heard by the court. He was not taken out of the pen and brought before the bench. He was not told that he might have counsel. No one informed the judge that Culombe had previously asked to see a lawyer. At Lieutenant Rome's suggestion, the prosecuting attorney moved for a continuance. Without giving Culombe an occasion to contest the motion or participate in any way in the proceedings, the court continued the case for a week and issued a mittimus committing Culombe to the Hartford County Jail until released by due course of law.

The idea of presenting Culombe and Taborsky on charges of breach of the peace was Rome's, in collaboration with the alternate prosecutor.[62] Its purpose, Rome

[62] Rome admitted that he might have told someone that he was taking a chance presenting Culombe on a breach of the peace charge (there was a chance, he said, as to whether or not the police could get a conviction for breach of the peace), and that he had thanked the alternate prosecutor for coming down to Hartford from New Britain on Sunday night at his request in connection with this matter.

testified, was "To help me investigate some serious crimes in the state of Connecticut." This breach of the peace prosecution was later nolled, Culombe having never been brought back before the Police Court because "It wasn't necessary." [63] In testimony admitted in Taborsky's case, Rome conceded that he could have booked Taborsky (and hence, presumably, Culombe, since the legal proceedings against the two men were at all stages prosecuted simultaneously) on Sunday and presented him on Monday, but delayed because he, Rome, wanted more time, more interrogation. Presenting the man on Monday, although it would have been in accordance with the Connecticut statute requiring presentation with reasonable promptness, was not, Rome testified, "in accordance with good investigation." [64]

On leaving the Police Court, and after another stop at Kurp's, Culombe was returned to Headquarters in Hartford, where he and Taborsky were questioned by Rome and other officers during an indeterminate period that cannot have been more than about two hours. At 3 or 4 that afternoon, Rome visited the Culombe home and questioned Culombe's wife for half an hour. Rome

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[63] The testimony is Lieutenant Rome's.

[64] "Q. You could have presented him on Monday, couldn't you? A. Yes, sir. Q. And you didn't do that? A. No, sir. Q. Why didn't you do it? . . . THE WITNESS: It wasn't in accordance with good investigation. Q. But it was in accordance with the Statute, wasn't it? A. Yes, sir. Q. With reasonable promptness to bring him before a proper authority? A. Reasonable promptness—Tuesday morning, yes. . . . Q. You didn't bring him before the Court on Monday? A. No, sir. Q. And with reasonable promptness, you could have, couldn't you? A. Yes, sir. Q. But you wanted to hold him and do some more grilling, didn't you? MR. BILL: Objection to the grilling. THE COURT: I will sustain it. Q. You wanted to interrogate him some more, didn't you? A. Yes, Mr. Burke. Q. And that is why you didn't bring him before the proper authority—you wanted some more time? A. Yes, Mr. Burke." (Cross-examination of Lieutenant Rome.)

then returned to Headquarters where, shortly thereafter, Mrs. Culombe arrived, brought in a police cruiser by a policewoman pursuant to arrangements made by Rome, but by her own request or, at the least, her own agreement. Her children were with her. She spoke briefly with Rome, who asked her if she "would go along and lay the cards on the table to her husband and see if he wouldn't confess." [65] Mrs. Culombe was then taken to a room where, in the presence of Rome and the policewoman, she talked to Culombe during a quarter of an hour. The children were not in the room. Mrs. Culombe asked Culombe if he were responsible for the New Britain killings and told him that if he were he should tell the police the truth. Rome permitted this confrontation because "it is another way of getting a confession." He admitted that he asked Mrs. Culombe to help the police and that she did help them indirectly; that he tried to use her as a means of securing her husband's confession.

After Mrs. Culombe left the room, Rome continued to question Culombe concerning certain conversations between Culombe and Taborsky. Culombe and Rome went to the door of the room and Rome called Culombe's thirteen-year-old daughter into the room, saying: "Honey, come in here and . . . . You tell me how they went into the bedroom and talked—Joe Taborsky and your father." There is no indication that the girl did come into the room or that she said anything.

Culombe was returned to his cell. Paige came to the cell and began to ask him questions, but Culombe was upset by the scene with his family and choked up or sobbed and told Paige that he did not want to talk. Paige discontinued the questioning and sat with Culombe for fifteen or twenty minutes until other officers came to remove Culombe to the County Jail pursuant to the mit-

[65] The testimony is Lieutenant Rome's.

timus of the New Britain Police Court. Paige admitted that Culombe's confrontation by his wife had been an "ordeal," and Rome agreed that the prisoner was "upset." Culombe was logged in at the jail between 8 and 9 that night.

At about 10 a. m. on Wednesday, February 27, jail guards came to Culombe's cell, led him to the gates of the jail, and turned him into the custody of Sergeant Paige and several other State Police officers. Notation was made on the books of the jail that the State Police had "borrowed" Culombe.[66] Held at Headquarters until 1 p. m., Culombe was then brought to the interrogation room for questioning by Paige and Detective Murphy. Paige, who was at first alone in the room with Culombe, began by telling Culombe that Culombe had been lying to him. He suggested that, whenever Culombe did not want to answer a question, Culombe say "I don't want to answer" instead of lying. Culombe agreed, and thereupon Paige, who held a list of the crimes being investigated, went through it questioning Culombe about his participation in each. Answering each question, Culombe stated either that he had not been there or that he did not want to talk about it. When Paige had gotten through the list, Murphy, having come in, took the list over and repeated the same questions that Culombe had answered or refused to answer for Paige. Paige left the room for a while, then re-entered. Murphy asked Culombe whether Culombe did not want to cooperate. Culombe said that he did but that it was a hard decision to make. Murphy asked whether Culombe was in fear of anyone and Culombe answered that he was in fear of Taborsky. After approximately an hour and a half, Culombe told the police that they were looking for four

[66] The Superior Court ruled that this borrowing was illegal under Connecticut law; the Supreme Court of Errors found it unnecessary to pass on the point.

guns and two men and that he had not done any killing himself. Immediately, Rome, who had been listening to the interrogation over an intercommunication system, came into the room and, shortly thereafter, Detective O'Brien also arrived. Culombe agreed to show the officers where the guns would be found.[67] He requested that they travel in an unmarked car and was assured that the cruiser would carry no identifying insignia. At about 3:30 p. m., the four officers and Culombe left Headquarters for Culombe's home.

During the short ride, Rome questioned Culombe in the rear seat of the car. The other three officers sat up front. When Culombe began to give answers which Rome regarded as significant, Rome told O'Brien, who had been driving, to let Murphy take the wheel. O'Brien, who was skilled at shorthand, understood that this meant that he was to take the conversation down. He did so. In it Culombe admitted participation in a number of crimes, including the gas station holdup. He gave a detailed description of what happened at Kurp's in which he related that he and Taborsky had robbed the station and that Taborsky had shot both the proprietor and the customer. Several officers testified to the content of this oral confession at the trial.

Culombe, the four officers and two police photographers entered the Culombes' project apartment. There they found Mrs. Culombe with her younger, five-year-old daughter. After directing Rome to a cache behind the medicine cabinet where certain weapons were concealed and to a safe compartment containing parts of a gun,

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[67] Culombe requested that Mr. Bill, the State's Attorney, be told what he was doing, that he was cooperating. He said that he wanted Mr. Bill to see the statements that he made. The officers seem to have told Culombe that Mr. Bill would be notified of his cooperation but, in fact, Mr. Bill was never so notified.

Culombe spoke with his wife in the living room in the presence of at least one detective. He told her that he had decided to cleanse his conscience and make a clean breast of things; that he was afraid that Taborsky might harm her, and so he was cooperating. He also said that he wanted to save Mrs. Culombe embarrassment as far as the neighbors were concerned.[68] Leaving the apartment in the cruiser, Culombe directed the officers to a nearby swampy area where he pointed out the location in which he had disposed of one gun and part of another used at Kurp's. He led them to another swamp where a raincoat said to have been worn on the night of the holdup was recovered. After several other like stops he was taken back to Headquarters, arriving just after 6 p. m. There, in response to brief questioning in the presence of Major Remer and Commissioner Kelly, he repeated his confessions of the early afternoon.

Culombe was taken to dinner. Shortly afterwards he again saw Mrs. Culombe, who had come to Headquarters with her five-year-old. The child was sick. Mrs. Culombe told Culombe that the child was sick and Culombe said that he thought that the policewoman would take it to the hospital if she were asked. At about 8 p. m., Rome, Paige, O'Brien and County Detective Matus brought Culombe to the interrogation room to reduce his several confessions to writing. Culombe made a number of statements. The manner of taking them (no doubt complicated by Culombe's illiteracy and his tendency to give rambling and non-consecutive answers) was as follows: Rome questioned Culombe; Culombe

[68] Culombe testified that his five-year-old daughter, who was present in the room, appeared sick to him at that time. The officers testified that they did not notice any illness in the child and that Culombe had expressed no apprehension concerning her health, but it is undisputed that the little girl had to be taken to a hospital that night with mumps.

answered; Rome transposed the answer into narrative form; Culombe agreed to it; Rome dictated the phrase or sentence to O'Brien. Each completed statement was read to and signed by Culombe. The last of them related to the Kurp's holdup and to another crime committed earlier on the same day. It was started shortly before 11 p. m. and the Kurp's episode was reached at 12:30 a. m. The Kurp's statement required a half hour to compose.

At the end of this four-and-a-half-hour interview, Culombe was unshaved, his clothing a sorry sight. He was tired. He spent that night in a cell at State Police Headquarters at his own request, apparently because he was afraid of Taborsky, who was still lodged in the Hartford Jail. Although the confession which he signed that night was not put in as an exhibit at the trial, it was fully laid before the jury by the receipt in evidence of another typed paper substituted for it by stipulation and whose contents, several officers testified, embodied the substance of what Culombe told them shortly after midnight Wednesday.[69]

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[69] Because the Wednesday-midnight confession also contained references to another criminal offense, it was not physically offered in evidence at the trial. Counsel for the State and for the defense stipulated that another document, a substantially verbatim copy of the Kurp's portion of the confession, might be substituted for it. This was the so-called Monday confession. It was a paper prepared by the police from the Wednesday-midnight statement which was read to, and signed by, Culombe the following Monday. Notwithstanding the stipulation, the prosecution laid a foundation for the introduction as an exhibit of the Monday confession by offering testimony before the jury, first, that Culombe had made a statement Wednesday night; second, that it had been committed to writing; and third, that this writing was substantially identical to the typed paper which Culombe signed on Monday (witnesses on the stand examined and compared the documents). The Monday confession was then submitted to the jury. Under these circumstances, the effective use of the Wednesday-midnight statement was much the

On Thursday, February 28, Rome had Culombe brought into a room where he was talking to Taborsky. At the Lieutenant's direction, Culombe repeated his confession. Later Culombe was presented in the Superior Court on a charge of first-degree murder pursuant to a bench warrant issued that morning. The presiding judge warned Culombe of his rights to keep silent and to have counsel. He asked Culombe if he wanted counsel and Culombe replied that he did. Culombe said that he did not want the public defender, that he wanted attorney McDonough but could not afford to pay for his services. The judge promised that the court would see that Culombe had the attorney of his choice at state expense. He then informed Culombe that the police wished to conduct an investigation into the charges against him and had requested an order releasing Culombe into their custody for that purpose. Asked if he was willing to cooperate, Culombe said that he was. He was told that this might mean that he would be taken to the sites of various crimes and again said that he was willing to cooperate; he wanted "to cooperate with them in any way I can." Accordingly, the court released Culombe to the State Police Commissioner for the purpose of continuing the investigation.

At Kurp's gasoline station, Culombe re-enacted the holdup for Rome and other officers. Later that afternoon, at Headquarters, New York detectives talked to him concerning a New York killing. No further investigation relating to the Connecticut crimes was conducted that day or Friday. Culombe remained in the cell block at Headquarters, rather than at the County Jail, at his

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same as if it had gone physically to the jury, and for purposes of the constitutional issue presented here we may treat the Wednesday-midnight confession as put in evidence. See *Malinski* v. *New York*, 324 U. S. 401.

own request. On Friday night he first saw Mr. McDonough, his court-appointed counsel, and also saw his wife.

Two state psychiatrists examined Culombe during two hours on Saturday, March 2. At 10 p. m. that evening, when Culombe was alone in his cell, he called out to the guard assigned to the cell block and said that he wanted to volunteer some information relating to the Kurp's holdup. The guard had not previously spoken to Culombe during his watch except to say, "Hi, Art," when he first came on duty at 6 o'clock. Culombe now narrated a new version of what had happened at Kurp's. This was generally similar to his previous statements except that in it he admitted that he himself had shot Kurpiewski. The guard telephoned this information to Lieutenant Rome and Culombe thanked him. At trial the guard related the occasion and contents of this oral confession to the jury.

Sunday morning, Rome, the guard to whom Culombe had confessed the night before, and another officer interviewed Culombe in the interrogation room. In answer to Rome's question, Culombe said that he wanted to change the story that he had previously given. He then said that he had shot Kurpiewski. Following the same procedure that had been used on Wednesday night, a detailed statement of his new version of the New Britain killings was composed and Culombe signed it. It was received in evidence at the trial. Later in the afternoon attorney McDonough spoke with Culombe and Rome at Headquarters. He told Culombe not to sign any more papers or to talk to the police. He told Rome that he did not want the police bothering Culombe further and requested that Culombe be removed from Headquarters to the County Jail. This was done.

The following day, Monday, March 4, Lieutenant Rome and Detective O'Brien visited Culombe at the jail for

half an hour. Rome brought a new typed statement prepared by the police. This was a substantially verbatim transcription of the document which Culombe had signed on Wednesday, but with all references to the second, separate crime committed on December 15, 1956, deleted. Rome read the transcription to Culombe and Culombe signed it. It was admitted at trial. Rome did not notify McDonough that Culombe's signature was to be obtained because he was worried that if he did, McDonough would not permit Culombe to sign. Rome testified that he could "do better without" the attorney: Culombe "was cooperative. . . . I needed his cooperation and got it."

The man who was thus cooperative with the police, Arthur Culombe, was a thirty-three-year-old mental defective of the moron class with an intelligence quotient of sixty-four [70] and a mental age of nine to nine and a half years. He was wholly illiterate.[71] Expert witnesses for the State, whose appraisal of Culombe's mental condition was the most favorable adduced at trial, classified him as a "high moron" and "a rather high grade mentally defective" and testified that his reactions would not be the same as those of the chronological nine-year-old because his greater physical maturity and fuller background of experience gave him a perspective that the nine-year-old would not possess. Culombe was, however, "handicapped."

Culombe had been in mental institutions for diagnosis and treatment. He had been in trouble with the law since he was an adolescent and had been in prison at least twice in Connecticut since his successful escape from a Massachusetts training school for mental defectives.

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[70] As measured on the full scale Wechsler-Bellevue test. The normal intelligence quotient on this scale is ninety to one hundred and ten.

[71] Culombe can read and write only his name.

During the three years immediately preceding his arrest he had held down, and adequately performed, a freight handler's job and had supported his wife and two young children. A psychiatrist testifying for the State said that, although he was not a fearful man, Culombe was suggestible and could be intimidated.[72]

Ten days after his last confession, on March 14, 1957, Culombe was indicted for first-degree murder.

VI.

In the view we take of this case, only the Wednesday confessions need be discussed.[73] If these were coerced, Culombe's conviction, however convincingly supported by other evidence, cannot stand. *Malinski* v. *New York,* 324 U. S. 401; *Stroble* v. *California,* 343 U. S. 181; *Payne* v. *Arkansas,* 356 U. S. 560. On all the circumstances of this record we are compelled to conclude that these confessions were not voluntary. By their use petitioner was deprived of due process of law.

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[72] Again, this is the most favorable diagnosis of Culombe's capacity in this regard. The report of a clinical psychologist appointed by the court to examine Culombe both for the State and for the defense states: "In addition to being saddled with deficient mental equipment with which he must try to cope with life's problems, Mr. C. is also possessed of that character defect so frequently found in individuals of low intellectual calibre: he is enormously suggestible. Thus, lacking in the capacity for sufficient critical judgment, his manner of thinking, his pattern of living and his way of behaving can all easily be influenced by those persons closest to him. . . ."

[73] Timely question was raised at trial concerning the voluntariness of each of Culombe's Wednesday confessions, and both were found voluntary by the Connecticut court. The petition for certiorari in this Court adverts among the questions presented only to the written, Wednesday-midnight confession. However, in view of the intimate connection between the afternoon and midnight confessions, we regard the petition as fairly comprising a claim that the oral confession, as well, is unconstitutionally tainted by coercion.

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Consideration of the body of this Court's prior decisions which have found confessions coerced informs this conclusion. For although the question whether a particular criminal defendant's will has been overborne and broken is one, it deserves repetition, that must be decided on the peculiar, individual set of facts of his case, it is only by a close, relevant comparison of situations that standards which are solid and effectively enforceable—not doctrinaire or abstract—can be evolved. In approaching these decisions, we may put aside at the outset cases involving physical brutality,[74] threats of physical brutality,[75] and such convincingly terror-arousing, and otherwise unexplainable, incidents of interrogation as the removal of prisoners from jail at night for questioning in secluded places,[76] the shuttling of prisoners from jail to jail, at distances from their homes, for questioning,[77] the keeping of prisoners unclothed or standing on their feet for long periods during questioning.[78] No such obvious, crude devices appear in this record. We may put aside also cases where deprivation of sleep has been used to sap a prisoner's strength and drug him[79] or where bald disregard of his rudimentary need for food is a factor that adds to enfeeblement.[80] Culombe was not subject to wakes or starvation. We may put aside cases stamped

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[74] *Brown* v. *Mississippi,* 297 U. S. 278; cf. *Ward* v. *Texas,* 316 U. S. 547. And see *Pennsylvania ex rel. Herman* v. *Claudy,* 350 U. S. 116.

[75] Cf. *Malinski* v. *New York,* 324 U. S. 401. And see *Lee* v. *Mississippi,* 332 U. S. 742.

[76] *White* v. *Texas,* 310 U. S. 530; *Vernon* v. *Alabama,* 313 U. S. 547.

[77] *Ward* v. *Texas,* 316 U. S. 547.

[78] *Malinski* v. *New York,* 324 U. S. 401; *Lomax* v. *Texas,* 313 U. S. 544.

[79] *Chambers* v. *Florida,* 309 U. S. 227; *Leyra* v. *Denno,* 347 U. S. 556.

[80] *Payne* v. *Arkansas,* 356 U. S. 560.

with the overhanging threat of the lynch mob,[81] for although it is true that Culombe saw crowds of people gathered to witness his booking and presentation in New Britain, this circumstance must be accounted of small significance here. There were no mobs at Hartford where he was held securely imprisoned at State Police Headquarters.[82] Finally, we may put aside cases of gruelling, intensely unrelaxing questioning over protracted periods.[83] Culombe's most extended session prior to his first confession ran three and a half hours with substantial respites. Because all of his questioning concerned not one but several offenses, it does not present an aspect of relentless, constantly repeated probing designed to break concentrated resistance. Particularly, the sustained four-and-a-half-hour interview that preceded the Wednesday-midnight confession was almost wholly taken up with matters other than Kurp's, and at that time, far from resisting, Culombe was wholly cooperating with the police.

Similarly, our decisions in *Haley* v. *Ohio,* 332 U. S. 596, and *Blackburn* v. *Alabama,* 361 U. S. 199, are not persua-

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[81] *Chambers* v. *Florida,* 309 U. S. 227; *Payne* v. *Arkansas,* 356 U. S. 560.

[82] Cf. *Thomas* v. *Arizona,* 356 U. S. 390.

[83] *Ashcraft* v. *Tennessee,* 322 U. S. 143 (relay questioning for more than thirty-six hours with one five-minute pause); *Watts* v. *Indiana,* 338 U. S. 49 (relay questioning from 11:30 p. m. to 2:30 or 3 a. m. on the first day of detention and from 5:30 p. m. to 3 a. m. on four of the five succeeding days); *Harris* v. *South Carolina,* 338 U. S. 68 (relay questioning in a hot cubicle throughout one evening and during eleven and a half hours, with a one-hour respite, the next day; then, on the day following, more than a half-dozen hours of questioning before the confession was made); *Leyra* v. *Denno,* 347 U. S. 556 (questioning throughout afternoon and evening on the first day; 10 a. m. to midnight on the second; then from 9 a. m. on the third until 8:30 a. m. on the morning of the fourth, with the questioning later resuming, after a brief recess, until Leyra confessed). Cf. *Chambers* v. *Florida,* 309 U. S. 227. But see *Lisenba* v. *California,* 314 U. S. 219.

sive here. Haley, a fifteen-year-old boy, was arrested at his home and taken to a police station at midnight, where he was questioned by relays of officers until he confessed at 5 a. m. He had seen no friend or legal counsel during that time and he was subsequently held incommunicado for three days. On the totality of circumstances, the Court held his confession coerced. But Culombe was never questioned concerning one crime for five hours. Indeed, he was never questioned during five hours at a stretch. He was never questioned in the early morning hours. And while Haley, whose questioning began immediately on his arrival at the station and did not let up until he confessed, had every reason to expect that his relay interrogators intended to keep the pace up till he broke,[84] Culombe, at the time of his confessions, had been questioned on several previous days and knew that the sessions had not run more than a few hours. Moreover, Culombe, despite his mental age of nine or nine and a half, cannot be viewed as a child. Expert testimony in the record, which the Connecticut courts may have credited, precludes the application to Culombe of standards appropriate to the adolescent Haley.

Nor, without guessing, as untutored laymen and not professionally informed as judges, about the susceptibility of a mental defective to overreaching, can we apply to Culombe the standards controlling the case of the active psychotic, Blackburn. The expert evidence of hallucinations, delusional ideas and complete loss of contact with his surroundings which we found uncontradicted in the *Blackburn* record has no counterpart in Culombe's. Also, Blackburn, like Haley, confessed after a protracted questioning session—eight or nine hours, with a one-hour break, in Blackburn's case—more exhausting than any single period that Culombe underwent.

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[84] See also *Spano* v. *New York*, 360 U. S. 315.

On the other hand, what must enter our judgment about Culombe's mental equipment—that he is suggestible and subject to intimidation—does not permit us to attribute to him powers of resistance comparable to those which the Court found possessed by the defendant Cooper in *Stein* v. *New York,* 346 U. S. 156, who haggled for terms with the officials to whom he confessed,[85] or the defendant James in *Lisenba* v. *California,* 314 U. S. 219, who bragged immediately before his confession that there were not enough men in the District Attorney's office to make him talk. Culombe was detained in the effective custody of the police for four nights and a substantial portion of five days before he confessed. During that time he was questioned so repeatedly, although intermittently, that he cannot but have been made to believe what the police hardly denied, that the police wanted answers and were determined to get them.[86] Other than

[85] The defendant Stein, like Cooper, was "an experienced criminal. . . . These men were not young, soft, ignorant or timid." 346 U. S., at 185. Although Culombe, too, has had considerable criminal experience, its value to him, as a school for toughening his resistance, must be duly discounted in light of his subnormal mental capacities. The testimony of a psychiatric expert for the prosecution is that "as a mental defective he is suggestible. I don't think that he is a fearful man. I think that he can be intimidated, and to use his own expression 'I don't have the Moxie that someone else has.' . . . He is suggestible and he can be intimidated. . . . I would say this—with benevolent influences, he gets along, as I said he did in the last three and a half years. With sufficiently intimidating malignant influences, he doesn't."

[86] Compare *Thomas* v. *Arizona,* 356 U. S. 390 (confession before justice of the peace at preliminary hearing on morning following afternoon of defendant's arrest; defendant warned of his rights to counsel and to plead not guilty); *Ashdown* v. *Utah,* 357 U. S. 426 (defendant cautioned that she can refuse to answer and can consult with counsel); *Brown* v. *Allen,* 344 U. S. 443 (defendant repeatedly warned that he can remain silent and have assistance of counsel; whenever defendant told police that he wanted to stop the conversation his request was respected and he was returned to jail).

his questioners and jailers and the police officials who booked him at New Britain, he spoke to only two people: Taborsky, of whom he was afraid, and his own wife, who, by prearrangement with Lieutenant Rome, asked him to tell the police the truth.[87] The very duration of such a detention distinguishes this case from those in which we have found to be voluntary confessions given after several hours questioning or less on the day of arrest. See *Stroble* v. *California,* 343 U. S. 181; *Cicenia* v. *Lagay,* 357 U. S. 504; *Ashdown* v. *Utah,* 357 U. S. 426; cf. *Crooker* v. *California,* 357 U. S. 433. In other cases, in which we have sustained convictions resting on confessions made after prolonged detention, questioning of the defendant was sporadic, not systematic,[88] or had been discontin-

[87] Compare *Brown* v. *Allen,* 344 U. S. 443 (defendant saw counsel and at least two friends during detention, one of whom was located by police at his request; it is true that one of these friends appears to have been cooperating with the police in certain regards, but there is no indication that she attempted to persuade the prisoner to confess); *Lyons* v. *Oklahoma,* 322 U. S. 596 (defendant's wife and family visited him in jail).

[88] In *Gallegos* v. *Nebraska,* 342 U. S. 55, the defendant was arrested in Texas by Texas authorities and, when questioned, gave a false name. He was held in custody and again questioned—after intervals first of twenty-one, then of forty-eight hours—for the purpose of establishing his identity. On the second occasion, he gave his name and admitted that he had been in Nebraska. On the following day, he confessed to a crime committed in that State. He was removed to Nebraska and during his first questioning by Nebraska officers, a week after his Texas confession, he again confessed. No claim of coercion was pressed in this Court in *Gallegos,* counsel for the petitioner relying on the fact of illegally prolonged detention without preliminary examination and before appointment of counsel. In *Lyons* v. *Oklahoma,* 322 U. S. 596, the defendant was questioned for two hours on the day of his arrest, then remained in jail (where his family visited him) for eleven days. At the end of this period he was subjected to one prolonged, night-long interrogation session under intimidating circumstances and he confessed. This confession was not offered in evidence, having concededly been coerced. He con-

ued during a considerable period prior to confession,[89] so that we did not find, in the circumstances there presented, that police interrogators had overborne the accused.

The cases most closely comparable to the present one on their facts are *Turner* v. *Pennsylvania,* 338 U. S. 62, *Johnson* v. *Pennsylvania,* 340 U. S. 881, and *Fikes* v. *Alabama,* 352 U. S. 191. Turner, like Culombe, was arrested without a warrant and, without having been brought before a magistrate,[90] was detained during four nights and about five days before he confessed. Like Culombe, also, he was questioned in daylight and evening hours, sometimes by one, sometimes by several officers. Turner

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fessed again the same evening, after he had been taken to the state penitentiary and delivered into custody of the warden; and the question raised was whether the coercive influences attending the initial confession also infected the later one. The whole pattern of factors in *Lyons* was different from that of the present case and involved wholly different considerations. Cf. *United States* v. *Bayer,* 331 U. S. 532. And see *Wilson* v. *Louisiana,* 341 U. S. 901 (defendant had been interrogated during four or five hours following his arrest and confessed; two days later he was asked to repeat his story and he again confessed, there being no indication in the record that he was questioned on the second occasion).

[89] In *Brown* v. *Allen,* 344 U. S. 443, the defendant had been arrested on Monday, twice questioned for an hour or two on that day, and questioned daily for a couple of hours on Tuesday and Wednesday. On Thursday he was confronted by witnesses and, after they had related certain information, he was asked whether he had any questions to ask them. On each occasion he was warned that he need make no statement and that he had a right to the assistance of counsel before he made any statement. He was not again interviewed until the following Saturday, when the charges against him were read to him, he was asked if he wanted to make a statement, and—without questioning—he confessed. See also note 87, *supra.*

[90] Culombe's appearance before the New Britain Police Court, whether or not it legitimated his detention under Connecticut law, hardly afforded him the protection of a preliminary examination with respect to the felonies of which he was suspected. See p. 632, *infra.*

saw no visitors during his detention; Culombe saw only his wife, who gave him scant support. It is true that Turner's interrogation amounted to a total of more than twenty-three hours, as against the approximately twelve and one half hours that Culombe was questioned prior to his first confession, and that Turner was questioned on two days for as many as six hours (in two sessions, on each occasion), while Culombe was never questioned for more than three hours on any one day. It is true also that Turner's questioning involved only a single crime, not several. But Turner was not a mental defective, as is Culombe, and certain significant pressures brought to bear on Culombe—the use of his family, the intimidating effect of the New Britain Police Court hearing—were absent in the *Turner* record. The Court held Turner's confession coerced.

Johnson, indicted as Turner's accomplice, was detained during approximately the same period and under the same conditions as was Turner. He was questioned, however, for only somewhat more than six hours over these five days, never more than an hour and a half at a sitting. At least five officers participated, at one time or another, in the questioning. At his separate trial, both his own confession and Turner's were admitted. This Court reversed *per curiam*.[91]

The facts on which the Court relied in *Fikes* were these. The defendant, a twenty-seven-year-old Negro with a third-grade education, apparently schizophrenic and highly suggestible, and who had previously been involved with the law on only one occasion, was apprehended by private persons in a white neighborhood in Selma, Alabama, at midnight on a Saturday. Jailed and held by the

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[91] Without entering into further discussion of this admittedly not unambiguous decision, one may draw from it, at the least, a reffirmance of what was decided in *Turner*.

police on open charges, he was questioned for four and a half or five hours in two sessions on Sunday, and during the second of these sessions he was driven around the city to the locations of several unsolved burglaries. That day he talked to the sheriff of his home county, called to Selma at his request. On Monday he talked to his employer. After two hours of questioning in the morning he was taken to a state prison fifty-five miles from Selma and eighty miles from his home, where he was questioned during several hours in the afternoon and a short while in the evening. Thereafter, he was kept in a segregation unit at the prison, where he saw only jailers and police officers. He did not consult counsel, nor was he brought before a magistrate—despite the requirement of Alabama law that he be taken forthwith for a magistrate's hearing—prior to the time of his confession.

On Tuesday he was not questioned. On Wednesday he was questioned several hours in the afternoon and into the evening. On Thursday the questioning totaled three and a half hours in two sessions, and on that day his father, who had come to the prison to see him, was turned away. Thursday evening his first confession, consisting largely of yes-and-no answers to often leading or suggestive questions by an examiner, was taken. Saturday he was questioned again for three hours. A lawyer who came to the prison to see him was refused admission. On Sunday, however, Fikes' father was permitted to see him. The following Tuesday, after questioning of two and a half hours, he confessed a second time. Both confessions were admitted in evidence at his trial.

This Court reversed Fikes' conviction. That reversal was on a record which showed, as does Culombe's, only intermittent interrogation and no total denial of friendly communication to the prisoner. It showed also, as does the present record, a background atmosphere of community outrage but no appreciable threat of lynch violence.

Particularly significant, Fikes, like Culombe, was suspected not of only one, but of a number of offenses under investigation. Fikes, concededly, was removed to a prison located at a considerable distance from his home, as Culombe was not. This is a factor to be considered. But in *Fikes* that removal was purportedly—and not unconvincingly—justified by concern for the prisoner's safety, compare *Ward* v. *Texas,* 316 U. S. 547, and was not, as such, a predominant element in our decision.

We find that the present case is not less strong for reversal than *Fikes* v. *Alabama.* Culombe—certainly not a stronger man than Fikes—was apparently never informed of his constitutional rights, as was Fikes. Nevertheless, he expressly told the police that he wanted counsel, as Fikes did not, and his request was in effect frustrated. We are told that this was because Culombe did not know the name of any particular attorney and the police do not regard it as an appropriate practice for them to suggest attorneys' names to prisoners. However laudable this policy may be in the general run of things, it manifests an excess of police delicacy when a totally illiterate man, detained at police headquarters and suspected of many serious felonies, obviously needs a lawyer and asks for one. In any event, in every county in Connecticut there is a public defender.[92]

Moreover, Culombe was subjected to other pressures not brought to bear on Fikes. By Lieutenant Rome's arrangement, Mrs. Culombe was permitted—indeed asked—to confront her husband and tell him to confess. Culombe's thirteen-year-old daughter was called upon in his presence to recount incriminating circumstances. This may fall short of the crude chicanery of employing persons intimate with an accused, to play on his emotions,

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[92] Conn. Gen. Stat., 1949, § 8796, now Conn. Gen. Stat., 1958, § 54–80.

that was involved in *Spano* v. *New York,* 360 U. S. 315. But it appears, in conjunction with all of the other circumstances, to have had precisely the effect that Rome, by his own admission, calculated: "it is another way of getting a confession." [93]

What appears in this case, then, is this. Culombe was taken by the police and held in the carefully controlled environment of police custody for more than four days before he confessed. During that time he was questioned—questioned every day about the Kurp's affair—and with the avowed intention, not merely to check his story to ascertain whether there was cause to charge him, but to obtain a confession if a confession was obtainable.

All means found fit were employed to this end. Culombe was not told that he had a right to remain silent. Although he said that he wanted a lawyer, the police made no attempt to give him the help he needed to get one.[94] Instead of bringing him before a magistrate with

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[93] We have duly taken into account, in this regard, the finding by the Connecticut Superior Court: "Nothing was said or done by the police to Mrs. Culombe or the children to cause anxiety on the part of Culombe or to reduce his resistance or will power, or to influence him to confess." Whatever was done *to* Mrs. Culombe, it is what was done *with* her, and *with* her daughter, that is significant. To the extent that this finding can be read—as we think it cannot—to mean that no use was made of Culombe's family which in fact reduced his resistance, such a finding would lack support in evidence. *Thompson* v. *Louisville,* 362 U. S. 199. It is the uncontroverted testimony of both Rome and Paige that Culombe was upset by his wife's visit of Tuesday night, and Paige testified that Culombe thereafter choked up or sobbed.

[94] We do not ignore that Culombe never repeated his request for a lawyer after Saturday night. In view of its frustration at that time, this is not surprising. Lieutenant Rome told him on Tuesday morning that he would have a chance to consult counsel at court—a promise that was not made good.

It is also true that Culombe several times saw his wife, at home and at State Police Headquarters, and that he did not request that

reasonable promptness, as Connecticut law requires, to be duly presented for the grave crimes of which he was in fact suspected (and for which he had been arrested under the felony-arrest statute), he was taken before the New Britain Police Court on the palpable ruse of a breach-of-the-peace charge concocted to give the police time to pursue their investigation. This device is admitted. It had a two-fold effect. First, it kept Culombe in police hands without any of the protections that a proper magistrate's hearing would have assured him. Certainly, had he been brought before it charged with murder instead of an insignificant misdemeanor, no court would have failed to warn Culombe of his rights and arrange for appointment of counsel.[95] Second, every circumstance of the Police Court's procedure was, in itself, potentially intimidating. Culombe had been told that morning that

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she secure an attorney for him. Under the stressing circumstances of these meetings, such reserve of thought can hardly have been expected. Culombe's own explanation for his failure to make this request of his wife is that which the circumstances, even without his testimony, compel: "I didn't ask her. I didn't even think of it, to begin with . . . . How could you, with all this pressure? You don't even know what day it is half the time."

[95] In *Rex* v. *Dick*, [1947] 2 D. L. R. 213, certain statements made by a prisoner who had been charged with vagrancy, cautioned concerning that offense (or not at all), and then questioned with the purpose of eliciting information about the murder of which she was suspected, were held inadmissible as involuntary. Robertson, C. J. O., said, at 225:

". . . It seems to me to be an abuse of the process of the criminal law to use the purely formal charge of a trifling offence upon which there is no real intention to proceed, as a cover for putting the person charged under arrest, and obtaining from that person incriminating statements, not in relation to the charge laid and made the subject of a caution, but in relation to a more serious and altogether different offence: . . . It is trifling with the long-established maxim *nemo tenetur seipsum accusare*, and has more than the mere appearance—but, in the intended result it has at times the effect—of a trial by the police *in camera* before even the charge has been laid."

he would be presented in a court of law and would be able to consult counsel. Instead, he was led into a crowded room, penned in a corner, and, without ever being brought before the bench or given a chance to participate in any way, his case was disposed of. Culombe had been convicted of crimes before and presumably was not ignorant of the way in which justice is regularly done. It would deny the impact of experience to believe that the impression which even his limited mind drew from this appearance before a court which did not even hear him, a court which may well have appeared a mere tool in the hands of the police, was not intimidating.

That same evening, by arrangement of the State Police, Culombe's wife and daughter appeared at Headquarters for the interview that left him sobbing in his cell. The next morning, although the mittimus of the New Britain Police Court had committed Culombe to the Hartford Jail until released by due course of law, the police "borrowed" him, and later the questioning resumed. There can be no doubt of its purpose at this time. For Paige then "knew"—if he was ever to know—that Culombe was guilty.[96] Paige opened by telling Culombe to stop lying

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[96] On the basis of the following testimony by Sergeant Paige on cross-examination, it would be difficult to regard Wednesday's questioning of Culombe as anything other than a pile-driving effort to force his conviction from his own lips:

"Q. How long did he continue to say that? A. Well, I started talking to him at one-thirty and it was just a short while afterwards that I took this piece of paper with all the different crimes on it and asked him these questions. Murphy came in and repeated the same thing and we were out of the barracks by half past three that afternoon.

"Q. Well, how long did he keep that up—saying he didn't want to talk about it? A. Everytime we would ask him a question and ask him if he was there and he would say he didn't want to talk about it.

[*Footnote 96 continued on p. 634*]

and to say instead that he did not want to answer. But when Culombe said that he did not want to answer, Detective Murphy took over and repeated the same questions that Paige had asked.

It is clear that this man's will was broken Wednesday afternoon. It is no less clear that his will was broken Wednesday night when, after several hours in a car with four policemen, two interviews with his wife and his apparently ill child, further inquiries made of him in the presence of the Police Commissioner, and a four-and-a-half-hour session which left him (by police testimony) "tired," he agreed to the composition of a statement that was not even cast in his own words. We do not overlook the fact that Culombe told his wife at their apartment that he wanted to cleanse his conscience and make a clean breast of things. This item, in the total context, does not overbalance the significance of all else, particularly since it was his wife who the day before, at the request of

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"Q. How long a period of time did that take to give that answer? A. What answer?

"Q. 'I don't want to talk about it'? A. Three quarters of an hour.

"Q. And he had been doing that in addition to denying it for days up to that point, hadn't he? A. Well, that wasn't a denial, Mr. McDonough.

"Q. Well, he said he had nothing to do with them, didn't he? A. No, he said rather than lie—he said 'I don't want to talk about it,' which was telling me that he was involved in the crimes.

"Q. That was your conclusion? A. That was the conclusion between us.

"Q. He never said any such thing that you just said—that is a conclusion of yours—that is what you are assuming? A. That is what I knew.

"Q. That is what you knew he was involved in—he didn't tell you he was involved in any of those crimes? A. But I knew that was the answer without his actually saying yes.

"Q. Isn't that an assumption you drew? A. That was the knowledge I received from his acts.

"Q. That is what you drew? A. Yes."

Lieutenant Rome, had asked him to confess.[97] Neither the Wednesday-afternoon nor the Wednesday-midnight statement may be proved against Culombe, and he convicted by their use, consistently with the Constitution.

VII.

Regardful as one must be of the problems of crime-detection confronting the States, one does not reach the result here as an easy decision. In the case of such unwitnessed crimes as the Kurp's killings, the trails of detection challenge the most imaginative capacities of law enforcement officers. Often there is little else the police can do than interrogate suspects as an indispensable part of criminal investigation. But when interrogation of a prisoner is so long continued, with such a purpose, and under such circumstances, as to make the whole proceeding an effective instrument for extorting an unwilling admission of guilt, due process precludes the use of the confession thus obtained. Under our accusatorial system, such an exploitation of interrogation, whatever its usefulness, is not a permissible substitute for judicial trial.

Reversed.

MR. CHIEF JUSTICE WARREN, concurring.

It has not been the custom of the Court, in deciding the cases which come before it, to write lengthy and abstract dissertations upon questions which are neither pre-

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[97] We accord small weight, also, to the fact that on Thursday, when Culombe was presented in the Superior Court for murder, he told the presiding judge that he wanted to cooperate with the police and was willing to be released into their custody. Of course, if Culombe's sole claim of coercion were that he had been physically abused at State Police Headquarters, such behavior on his part might ground a reasonable inference that assertions of brutality were not credible. But the pressures of which he complains, and in which we sustain him, are of a subtler sort, and nothing in his willingness to "cooperate"—on the day after he signed a series of confessions—is inconsistent with the conclusion that those pressures broke his resistance.

sented by the record nor necessary to a proper disposition of the issues raised. The opinion which announces the judgment of the Court in the instant case has departed from this custom and is in the nature of an advisory opinion, for it attempts to resolve with finality many difficult problems which are at best only tangentially involved here. The opinion was unquestionably written with the intention of clarifying these problems and of establishing a set of principles which could be easily applied in any coerced-confession situation. However, it is doubtful that such will be the result, for while three members of the Court agree to the general principles enunciated by the opinion, they construe those principles as requiring a result in this case exactly the opposite from that reached by the author of the opinion. This being true, it cannot be assumed that the lower courts and law enforcement agencies will receive better guidance from the treatise for which this case seems to have provided a vehicle. On an abstract level, I find myself in agreement with some portions of the opinion and in disagreement with other portions. However, I would prefer not to write on many of the difficult questions which the opinion discusses until the facts of a particular case make such writing necessary. In my view, the reasons which have compelled the Court to develop the law on a case-by-case approach, to declare legal principles only in the context of specific factual situations, and to avoid expounding more than is necessary for the decision of a given case are persuasive. See *Alabama State Federation of Labor* v. *McAdory,* 325 U. S. 450, 461–462, and cases cited; *Poe* v. *Ullman, ante,* p. 497. I see no reason for making an exception in this case, and I am therefore unable to join the opinion which announces the judgment of the Court. Accordingly, I join the separate concurring opinion of MR. JUSTICE BRENNAN.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK agrees, concurring.

I find this case a simple one. As my Brother BRENNAN states, it is controlled by many of our decisions concerning confessions unlawfully obtained. It is also controlled by the principle some of us have urged upon the Court in several prior cases, including *Crooker* v. *California,* 357 U. S. 433, 441 (dissenting opinion); *Ashdown* v. *Utah,* 357 U. S. 426, 431 (dissenting opinion); *Cicenia* v. *Lagay,* 357 U. S. 504, 511 (dissenting opinion); *Spano* v. *New York,* 360 U. S. 315, 324 (concurring opinion).[1] That principle is that any accused—whether rich or poor—has the right to consult a lawyer before talking with the police; and if he makes the request for a lawyer and it is refused, he is denied "the Assistance of Counsel for his defence" guaranteed by the Sixth and Fourteenth Amendments.

The police first descended on petitioner on a Saturday afternoon. By ten that night—at the latest—he was in "custody." He asked to see an attorney. That request was callously turned aside. The testimony of Officer Rome exposes the critical issue in the case:

> "Q. Up until Monday night Culombe hadn't seen a lawyer, had he? A. No, sir.
>
> "Q. He had asked to see a lawyer, hadn't he?
>
> "A. Yes, sir.
>
> "Q. Didn't you tell him that he could see a lawyer when you got good and ready to let him see him?
>
> "A. No, sir.
>
> "Q. Well, when he asked to see a lawyer did he see a lawyer? A. No, sir.

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[1] Cf. *In re Oliver,* 333 U. S. 257; *In re Groban,* 352 U. S. 330, 337 (dissenting opinion); *Anonymous* v. *Baker,* 360 U. S. 287, 298 (dissenting opinion).

"Q. Did you allow him to go to a telephone to call a lawyer? A. There was a telephone right there. He didn't have the name of an attorney to call.

"Q. Well, there are a large number of Hartford lawyers' names in the Hartford telephone directory.

"A. Yes, sir.

"Q. Did you offer him the use of the directory to find out the name of a lawyer to call?

"A. We were told that he couldn't read.

"Q. Oh, you were told that he couldn't read?

"A. Yes, sir.

"Q. Who told you that? A. He did.

"Q. Well, then, before I asked the question here in the courtroom, you had information that he couldn't read?

"A. After I talked with him.

"Q. So, therefore, a telephone directory would have been of no use to him? That is what you mean by the answer? A. If what he told me was the truth, yes, sir.

"Q. Did you tell him that he could have gotten in touch with Mr. Cosgrove, the Public Defender for this court?

"A. I make it my business never to mention any attorneys. It is up to them to mention their attorney.

"Q. This man was in the hands of the police on a serious investigation. He said that he wanted a lawyer and you did nothing to help him? A. I told him he could have a lawyer if he told me who he wanted me to call.

"Q. Did you tell him that? A. Yes, sir.

"Q. Didn't Culombe tell you on Monday night, 'If that is the way you operate up here I want to get in touch with a lawyer,' and you replied, 'We will

let you get in touch with one at the right time, not until then.'

"A. No, sir.

"Q. But there was talk about a lawyer? A. Yes, sir."

Petitioner is illiterate and mentally defective—a moron or an imbecile. He spent six years in the third grade and left school at the age of sixteen. He has twice been in state institutions for the feeble-minded.

He did not see an attorney until six days after he was first arrested and after he had confessed to the police. During all this time the police questioned him until their questioning produced the confession on which his present conviction is based.

It is said that if we enforced the guarantee of counsel by allowing a person, who is arrested, to obtain legal advice before talking with the police, we "would effectively preclude police questioning" (*Crooker* v. *California, supra,* 441) and "would constrict state police activities in a manner that in many instances might impair their ability to solve difficult cases." *Cicenia* v. *Lagay, supra,* 509. It is said that "any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances." *Watts* v. *Indiana,* 338 U. S. 49, 57, 59 (concurring opinion). In other words, an attorney is likely to inform his client, clearly and unequivocally, that "No person . . . shall be compelled in any criminal case to be a witness against himself," as provided in the Fifth Amendment. This is the "evil" to be feared from contact between a police suspect and his lawyer.

Interrogation of people by the police is an indispensable aspect of criminal investigations. But there is *no* right to interrogate—by the police any more than by the courts—when the privilege against self-incrimination is invoked. Knowing this, the police have set up in its place a system of administrative detention that has no consti-

tutional justification. It is detention *incommunicado*, a system which breeds oppression. See *Haley* v. *Ohio*, 332 U. S. 596. In the present case this illiterate petitioner was not given the modicum of protection afforded in England where a prisoner is warned that statements made may be used against him [2] and where the police are enjoined not to hammer away at a prisoner nor even to cross-examine him when he makes a voluntary statement except to clear up ambiguities. See Devlin, The Criminal Prosecution in England (1958), pp. 137–141. The flow of cases coming here shows that detention *incommunicado* is often accompanied by illegality and brutality. The arrival of an attorney is a specific against these proscribed practices.

If this accused were a son of a wealthy or prominent person, and demanded a lawyer, can there be any doubt that his request would have been heeded? But petitioner has no social status. He comes from a lowly environment. No class or family is his ally. His helplessness before the police when he is without "the guiding hand of counsel" (*Powell* v. *Alabama*, 287 U. S. 45, 69) emphasizes the lack

[2] "The form of caution expresses two things. First, there is the reminder that the accused is not obliged to talk: secondly, there is the warning that, if he does talk, what he says will be taken down in writing and may be given in evidence. From the lawyer's point of view both are statements of the obvious. Just as an accused or suspect is never obliged to talk, so the police are always at liberty to take down what an accused or suspect says and give it in evidence. The real significance of the caution is that it is, so to speak, a declaration of war. By it the police announce that they are no longer representing themselves to the man they are questioning as the neutral inquirer whom the good citizen ought to assist; they are the prosecution and are without right, legal or moral, to further help from the accused; no man, innocent or guilty, need thereafter reproach himself for keeping silent, for that is what they have just told him he may do. The caution, the charge, the arrest—any of these three things show that hostilities have begun and that the suspect has formally become the accused." Devlin, The Criminal Prosecution in England (1958), pp. 36–37.

of equal protection inherent in the dwarfed and twisted construction we have given the constitutional guarantee of the assistance of counsel. Cf. *McNeal* v. *Culver,* 365 U. S. 109, 117 (concurring opinion).

The system of police interrogation under secret detention falls heaviest on the weak and illiterate—the least articulate segments of our society. See American Civil Liberties Union Report, Secret Detention by the Chicago Police (1959), pp. 19–21. The indigent who languishes in jail for want of bail, cf. *Bandy* v. *United States,* 81 S. Ct. 197 (memorandum opinion), or the member of a minority group without status or power [3] is the one who suffers most when we leave the constitutional right to counsel to the discretion of the police. That right can only be protected by a broad guarantee of counsel that applies across the board to rich and poor alike. See *Reck* v. *Pate, ante,* p. 444 (concurring opinion).

I believe that the denial of petitioner's request that he be given the right of counsel was a violation of his constitutional rights. I therefore concur in the judgment of the Court reversing the conviction.

MR. JUSTICE BRENNAN, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACK join, concurring in the result.

It is my view that the facts stated in Part V of the opinion of my Brother FRANKFURTER require the con-

[3] "Police officers are charged with the fair and impartial administration of the law. Yet, in many localities, there are sharp and shocking contrasts in the kind of 'law' administered to different groups of citizens. . . . [P]eople lacking special status or 'pull' may be pushed around, roughed up, arrested on vague and even false charges, and treated generally as second-class citizens. This is especially true of dwellers in slum areas with high crime rates—and even more especially of poverty-ridden Negroes and other minority groups—where police raids on tenement homes are sometimes made on slight suspicion without the benefit of search warrants." Deutsch, The Trouble with Cops (1955), p. 63.

clusion that all and not alone the Wednesday confessions were coerced from the petitioner, and that under our cases none is admissible in evidence against him. See, *e. g., Fikes* v. *Alabama,* 352 U. S. 191, and cases there cited.

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

I agree to what my Brother FRANKFURTER has written in delineation of the general principles governing police interrogation of those suspected of, or under investigation in connection with, the commission of crime, and as to the factors which should guide federal judicial review of state action in this field. I think, however, that upon this record, which contains few of the hallmarks usually found in "coerced confession" cases, such considerations find their proper reflection in affirmance of this judgment.

With due regard to the medical and other evidence as to petitioner's history and subnormal mentality, I am unable to consider that it was constitutionally impermissible for the State to conclude that petitioner's "Wednesday" confessions were the product of a deliberate choice on his part to try to ameliorate his fate by making a clean breast of things, and not the consequence of improper police activity. To me, petitioner's supplemental confession on the following Saturday night, which as depicted by the record bears all the *indicia* of spontaneity, is especially persuasive against this Court's contrary view.

I should also add that I find no constitutional infirmity in the standards used by the Connecticut courts in evaluating the voluntariness of petitioner's confessions. Cf. *Rogers* v. *Richmond,* 365 U. S. 534.

I would affirm.

MAPP *v.* OHIO.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 236. Argued March 29, 1961.—Decided June 19, 1961.

All evidence obtained by searches and seizures in violation of the Federal Constitution is inadmissible in a criminal trial in a state court. *Wolf* v. *Colorado,* 338 U. S. 25, overruled insofar as it holds to the contrary. Pp. 643–660.

170 Ohio St. 427, 166 N. E. 2d 387, reversed.

A. L. Kearns argued the cause for appellant. With him on the brief was *Walter L. Greene.*

Gertrude Bauer Mahon argued the cause for appellee. With her on the brief was *John T. Corrigan.*

Bernard A. Berkman argued the cause for the American Civil Liberties Union et al., as *amici curiae,* urging reversal. With him on the brief was *Rowland Watts.*

MR. JUSTICE CLARK delivered the opinion of the Court.

Appellant stands convicted of knowingly having had in her possession and under her control certain lewd and lascivious books, pictures, and photographs in violation of § 2905.34 of Ohio's Revised Code.[1] As officially stated in the syllabus to its opinion, the Supreme Court of Ohio found that her conviction was valid though "based primarily upon the introduction in evidence of lewd and lascivious books and pictures unlawfully seized during an unlawful search of defendant's home . . . ." 170 Ohio St. 427–428, 166 N. E. 2d 387, 388.

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[1] The statute provides in pertinent part that

"No person shall knowingly . . . have in his possession or under his control an obscene, lewd, or lascivious book [or] . . . picture . . . .

"Whoever violates this section shall be fined not less than two hundred nor more than two thousand dollars or imprisoned not less than one nor more than seven years, or both."

On May 23, 1957, three Cleveland police officers arrived at appellant's residence in that city pursuant to information that "a person [was] hiding out in the home, who was wanted for questioning in connection with a recent bombing, and that there was a large amount of policy paraphernalia being hidden in the home." Miss Mapp and her daughter by a former marriage lived on the top floor of the two-family dwelling. Upon their arrival at that house, the officers knocked on the door and demanded entrance but appellant, after telephoning her attorney, refused to admit them without a search warrant. They advised their headquarters of the situation and undertook a surveillance of the house.

The officers again sought entrance some three hours later when four or more additional officers arrived on the scene. When Miss Mapp did not come to the door immediately, at least one of the several doors to the house was forcibly opened [2] and the policemen gained admittance. Meanwhile Miss Mapp's attorney arrived, but the officers, having secured their own entry, and continuing in their defiance of the law, would permit him neither to see Miss Mapp nor to enter the house. It appears that Miss Mapp was halfway down the stairs from the upper floor to the front door when the officers, in this highhanded manner, broke into the hall. She demanded to see the search warrant. A paper, claimed to be a warrant, was held up by one of the officers. She grabbed the "warrant" and placed it in her bosom. A struggle ensued in which the officers recovered the piece of paper and as a result of which they handcuffed appellant because she had been "belligerent"

[2] A police officer testified that "we did pry the screen door to gain entrance"; the attorney on the scene testified that a policeman "tried . . . to kick in the door" and then "broke the glass in the door and somebody reached in and opened the door and let them in"; the appellant testified that "The back door was broken."

in resisting their official rescue of the "warrant" from her person. Running roughshod over appellant, a policeman "grabbed" her, "twisted [her] hand," and she "yelled [and] pleaded with him" because "it was hurting." Appellant, in handcuffs, was then forcibly taken upstairs to her bedroom where the officers searched a dresser, a chest of drawers, a closet and some suitcases. They also looked into a photo album and through personal papers belonging to the appellant. The search spread to the rest of the second floor including the child's bedroom, the living room, the kitchen and a dinette. The basement of the building and a trunk found therein were also searched. The obscene materials for possession of which she was ultimately convicted were discovered in the course of that widespread search.

At the trial no search warrant was produced by the prosecution, nor was the failure to produce one explained or accounted for. At best, "There is, in the record, considerable doubt as to whether there ever was any warrant for the search of defendant's home." 170 Ohio St., at 430, 166 N. E. 2d, at 389. The Ohio Supreme Court believed a "reasonable argument" could be made that the conviction should be reversed "because the 'methods' employed to obtain the [evidence] . . . were such as to 'offend "a sense of justice," ' " but the court found determinative the fact that the evidence had not been taken "from defendant's person by the use of brutal or offensive physical force against defendant." 170 Ohio St., at 431, 166 N. E. 2d, at 389–390.

The State says that even if the search were made without authority, or otherwise unreasonably, it is not prevented from using the unconstitutionally seized evidence at trial, citing *Wolf* v. *Colorado,* 338 U. S. 25 (1949), in which this Court did indeed hold "that in a prosecution in a State court for a State crime the Fourteenth Amend-

ment does not forbid the admission of evidence obtained by an unreasonable search and seizure." At p. 33. On this appeal, of which we have noted probable jurisdiction, 364 U. S. 868, it is urged once again that we review that holding.[3]

I.

Seventy-five years ago, in *Boyd* v. *United States,* 116 U. S. 616, 630 (1886), considering the Fourth [4] and Fifth Amendments as running "almost into each other" [5] on the facts before it, this Court held that the doctrines of those Amendments

> "apply to all invasions on the part of the government and its employés of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers,

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[3] Other issues have been raised on this appeal but, in the view we have taken of the case, they need not be decided. Although appellant chose to urge what may have appeared to be the surer ground for favorable disposition and did not insist that *Wolf* be overruled, the *amicus curiae,* who was also permitted to participate in the oral argument, did urge the Court to overrule *Wolf.*

[4] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[5] The close connection between the concepts later embodied in these two Amendments had been noted at least as early as 1765 by Lord Camden, on whose opinion in *Entick* v. *Carrington,* 19 Howell's State Trials 1029, the *Boyd* court drew heavily. Lord Camden had noted, at 1073:

"It is very certain, that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it should seem, that search for evidence is disallowed upon the same principle. There too the innocent would be confounded with the guilty."

> that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property . . . . Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation . . . [of those Amendments]."

The Court noted that

> "constitutional provisions for the security of person and property should be liberally construed. . . . It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." At p. 635.

In this jealous regard for maintaining the integrity of individual rights, the Court gave life to Madison's prediction that "independent tribunals of justice . . . will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights." I Annals of Cong. 439 (1789). Concluding, the Court specifically referred to the use of the evidence there seized as "unconstitutional." At p. 638.

Less than 30 years after *Boyd,* this Court, in *Weeks* v. *United States,* 232 U. S. 383 (1914), stated that

> "the Fourth Amendment . . . put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints [and] . . . forever secure[d] the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law . . . 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." At pp. 391–392.

Specifically dealing with the use of the evidence unconstitutionally seized, the Court concluded:

> "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." At p. 393.

Finally, the Court in that case clearly stated that use of the seized evidence involved "a denial of the constitutional rights of the accused." At p. 398. Thus, in the year 1914, in the *Weeks* case, this Court "for the first time" held that "in a federal prosecution the Fourth Amendment barred the use of evidence secured through an illegal search and seizure." *Wolf* v. *Colorado, supra,* at 28. This Court has ever since required of federal law officers a strict adherence to that command which this Court has held to be a clear, specific, and constitutionally required—even if judicially implied—deterrent safeguard without insistence upon which the Fourth Amendment would have been reduced to "a form of words." Holmes, J., *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, 392 (1920). It meant, quite simply, that "conviction by means of unlawful seizures and enforced confessions . . . should find no sanction in the judgments of the courts . . . ," *Weeks* v. *United States, supra,* at 392, and that such evidence "shall not be used at all." *Silverthorne Lumber Co.* v. *United States, supra,* at 392.

There are in the cases of this Court some passing references to the *Weeks* rule as being one of evidence. But the plain and unequivocal language of *Weeks*—and its later paraphrase in *Wolf*—to the effect that the *Weeks* rule is of constitutional origin, remains entirely undisturbed. In *Byars* v. *United States,* 273 U. S. 28 (1927), a unanimous Court declared that "the doctrine [cannot] . . . be tolerated *under our constitutional system,* that evidences of crime discovered by a federal officer in making a search without lawful warrant may be used against the victim of the unlawful search where a timely challenge has been interposed." At pp. 29–30 (emphasis added). The Court, in *Olmstead* v. *United States,* 277 U. S. 438 (1928), in unmistakable language restated the *Weeks* rule:

> "The striking outcome of the *Weeks* case and those which followed it was the sweeping declaration that the Fourth Amendment, although not referring to or limiting the use of evidence in courts, really forbade its introduction if obtained by government officers through a violation of the Amendment." At p. 462.

In *McNabb* v. *United States,* 318 U. S. 332 (1943), we note this statement:

> "[A] conviction in the federal courts, the foundation of which is evidence obtained in disregard of liberties deemed fundamental by the Constitution, cannot stand. *Boyd* v. *United States* . . . *Weeks* v. *United States* . . . . And this Court has, on Constitutional grounds, set aside convictions, both in the federal and state courts, which were based upon confessions 'secured by protracted and repeated questioning of ignorant and untutored persons, in whose minds the power of officers was greatly mag-

> nified' . . . or 'who have been unlawfully held incommunicado without advice of friends or counsel' . . . ." At pp. 339–340.

Significantly, in *McNabb,* the Court did then pass on to formulate a rule of evidence, saying, "[i]n the view we take of the case, however, it becomes unnecessary to reach the Constitutional issue [for] . . . [t]he principles governing the admissibility of evidence in federal criminal trials have not been restricted . . . to those derived solely from the Constitution." At pp. 340–341.

II.

In 1949, 35 years after *Weeks* was announced, this Court, in *Wolf* v. *Colorado, supra,* again for the first time,[6] discussed the effect of the Fourth Amendment upon the States through the operation of the Due Process Clause of the Fourteenth Amendment. It said:

> "[W]e have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment." At p. 28.

Nevertheless, after declaring that 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," cf. *Palko* v. *Connecticut,* 302 U. S. 319 (1937), and announcing that it "stoutly adhere[d]" to the *Weeks* decision, the Court decided that the *Weeks* exclusionary rule would not then be imposed upon the States as "an essential ingredient of the right." 338 U. S., at 27–29. The Court's reasons for not considering essential to the

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[6] See, however, *National Safe Deposit Co.* v. *Stead,* 232 U. S. 58 (1914), and *Adams* v. *New York,* 192 U. S. 585 (1904).

right to privacy, as a curb imposed upon the States by the Due Process Clause, that which decades before had been posited as part and parcel of the Fourth Amendment's limitation upon federal encroachment of individual privacy, were bottomed on factual considerations.

While they are not basically relevant to a decision that the exclusionary rule is an essential ingredient of the Fourth Amendment as the right it embodies is vouchsafed against the States by the Due Process Clause, we will consider the current validity of the factual grounds upon which *Wolf* was based.

The Court in *Wolf* first stated that "[t]he contrariety of views of the States" on the adoption of the exclusionary rule of *Weeks* was "particularly impressive" (at p. 29); and, in this connection, that it could not "brush aside the experience of States which deem the incidence of such conduct by the police too slight to call for a deterrent remedy . . . by overriding the [States'] relevant rules of evidence." At pp. 31–32. While in 1949, prior to the *Wolf* case, almost two-thirds of the States were opposed to the use of the exclusionary rule, now, despite the *Wolf* case, more than half of those since passing upon it, by their own legislative or judicial decision, have wholly or partly adopted or adhered to the *Weeks* rule. See *Elkins* v. *United States,* 364 U. S. 206, Appendix, pp. 224–232 (1960). Significantly, among those now following the rule is California, which, according to its highest court, was "compelled to reach that conclusion because other remedies have completely failed to secure compliance with the constitutional provisions . . . ." *People* v. *Cahan,* 44 Cal. 2d 434, 445, 282 P. 2d 905, 911 (1955). In connection with this California case, we note that the second basis elaborated in *Wolf* in support of its failure to enforce the exclusionary doctrine against the States was that "other means of protection" have been afforded "the

right to privacy." [7] 338 U. S., at 30. The experience of California that such other remedies have been worthless and futile is buttressed by the experience of other States. The obvious futility of relegating the Fourth Amendment to the protection of other remedies has, moreover, been

[7] Less than half of the States have any criminal provisions relating directly to unreasonable searches and seizures. The punitive sanctions of the 23 States attempting to control such invasions of the right of privacy may be classified as follows:

Criminal Liability of Affiant for Malicious Procurement of Search Warrant.—Ala. Code, 1958, Tit. 15, § 99; Alaska Comp. Laws Ann., 1949, § 66–7–15; Ariz. Rev. Stat. Ann., 1956, § 13–1454; Cal. Pen. Code § 170; Fla. Stat., 1959, § 933.16; Ga. Code Ann., 1953, § 27–301; Idaho Code Ann., 1948, § 18–709; Iowa Code Ann., 1950, § 751.38; Minn. Stat. Ann., 1947, § 613.54; Mont. Rev. Codes Ann., 1947, § 94–35–122; Nev. Rev. Stat. §§ 199.130, 199.140; N. J. Stat. Ann., 1940, § 33:1–64; N. Y. Pen. Law § 1786, N. Y. Code Crim. Proc. § 811; N. C. Gen. Stat., 1953, § 15–27 (applies to "officers" only); N. D. Century Code Ann., 1960, §§ 12–17–08, 29–29–18; Okla. Stat., 1951, Tit. 21, § 585, Tit. 22, § 1239; Ore. Rev. Stat. § 141.990; S. D. Code, 1939 (Supp. 1960), § 34.9904; Utah Code Ann., 1953, § 77–54–21.

Criminal Liability of Magistrate Issuing Warrant Without Supporting Affidavit.—N. C. Gen. Stat., 1953, § 15–27; Va. Code Ann., 1960 Replacement Volume, § 19.1–89.

Criminal Liability of Officer Willfully Exceeding Authority of Search Warrant.—Fla. Stat. Ann., 1944, § 933.17; Iowa Code Ann., 1950, § 751.39; Minn. Stat. Ann., 1947, § 613.54; Nev. Rev. Stat. § 199.450; N. Y. Pen. Law § 1847, N. Y. Code Crim. Proc. § 812; N. D. Century Code Ann., 1960, §§ 12–17–07, 29–29–19; Okla. Stat., 1951, Tit. 21, § 536, Tit. 22, § 1240; S. D. Code, 1939 (Supp. 1960), § 34.9905; Tenn. Code Ann., 1955, § 40–510; Utah Code Ann., 1953, § 77–54–22.

Criminal Liability of Officer for Search with Invalid Warrant or no Warrant.—Idaho Code Ann., 1948, § 18–703; Minn. Stat. Ann., 1947, §§ 613.53, 621.17; Mo. Ann. Stat., 1953, § 558.190; Mont. Rev. Codes Ann., 1947, § 94–3506; N. J. Stat. Ann., 1940, § 33:1–65; N. Y. Pen. Law § 1846; N. D. Century Code Ann., 1960, § 12–17–06; Okla. Stat. Ann., 1958, Tit. 21, § 535; Utah Code Ann., 1953, § 76–28–52; Va. Code Ann., 1960 Replacement Volume, § 19.1–88; Wash. Rev. Code §§ 10.79.040, 10.79.045.

recognized by this Court since *Wolf*. See *Irvine* v. *California,* 347 U. S. 128, 137 (1954).

Likewise, time has set its face against what *Wolf* called the "weighty testimony" of *People* v. *Defore,* 242 N. Y. 13, 150 N. E. 585 (1926). There Justice (then Judge) Cardozo, rejecting adoption of the *Weeks* exclusionary rule in New York, had said that "[t]he Federal rule as it stands is either too strict or too lax." 242 N. Y., at 22, 150 N. E., at 588. However, the force of that reasoning has been largely vitiated by later decisions of this Court. These include the recent discarding of the "silver platter" doctrine which allowed federal judicial use of evidence seized in violation of the Constitution by state agents, *Elkins* v. *United States, supra;* the relaxation of the formerly strict requirements as to standing to challenge the use of evidence thus seized, so that now the procedure of exclusion, "ultimately referable to constitutional safeguards," is available to anyone even "legitimately on [the] premises" unlawfully searched, *Jones* v. *United States,* 362 U. S. 257, 266–267 (1960); and, finally, the formulation of a method to prevent state use of evidence unconstitutionally seized by federal agents, *Rea* v. *United States,* 350 U. S. 214 (1956). Because there can be no fixed formula, we are admittedly met with "recurring questions of the reasonableness of searches," but less is not to be expected when dealing with a Constitution, and, at any rate, "[r]easonableness is in the first instance for the [trial court] . . . to determine." *United States* v. *Rabinowitz,* 339 U. S. 56, 63 (1950).

It, therefore, plainly appears that the factual considerations supporting the failure of the *Wolf* Court to include the *Weeks* exclusionary rule when it recognized the enforceability of the right to privacy against the States in 1949, while not basically relevant to the constitutional consideration, could not, in any analysis, now be deemed controlling.

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III.

Some five years after *Wolf*, in answer to a plea made here Term after Term that we overturn its doctrine on applicability of the *Weeks* exclusionary rule, this Court indicated that such should not be done until the States had "adequate opportunity to adopt or reject the [*Weeks*] rule." *Irvine* v. *California, supra,* at 134. There again it was said:

> "Never until June of 1949 did this Court hold the basic search-and-seizure prohibition in any way applicable to the states under the Fourteenth Amendment." *Ibid.*

And only last Term, after again carefully re-examining the *Wolf* doctrine in *Elkins* v. *United States, supra,* the Court pointed out that "the controlling principles" as to search and seizure and the problem of admissibility "seemed clear" (at p. 212) until the announcement in *Wolf* "that the Due Process Clause of the Fourteenth Amendment does not itself require state courts to adopt the exclusionary rule" of the *Weeks* case. At p. 213. At the same time, the Court pointed out, "the underlying constitutional doctrine which *Wolf* established . . . that the Federal Constitution . . . prohibits unreasonable searches and seizures by state officers" had undermined the "foundation upon which the admissibility of state-seized evidence in a federal trial originally rested . . . ." *Ibid.* The Court concluded that it was therefore obliged to hold, although it chose the narrower ground on which to do so, that all evidence obtained by an unconstitutional search and seizure was inadmissible in a federal court regardless of its source. Today we once again examine *Wolf's* constitutional documentation of the right to privacy free from unreasonable state intrusion, and, after its dozen years on our books, are led by it to close the only

courtroom door remaining open to evidence secured by official lawlessness in flagrant abuse of that basic right, reserved to all persons as a specific guarantee against that very same unlawful conduct. We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.

IV.

Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government. Were it otherwise, then just as without the *Weeks* rule the assurance against unreasonable federal searches and seizures would be "a form of words," valueless and undeserving of mention in a perpetual charter of inestimable human liberties, so too, without that rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom "implicit in the concept of ordered liberty." At the time that the Court held in *Wolf* that the Amendment was applicable to the States through the Due Process Clause, the cases of this Court, as we have seen, had steadfastly held that as to federal officers the Fourth Amendment included the exclusion of the evidence seized in violation of its provisions. Even *Wolf* "stoutly adhered" to that proposition. The right to privacy, when conceded operatively enforceable against the States, was not susceptible of destruction by avulsion of the sanction upon which its protection and enjoyment had always been deemed dependent under the *Boyd, Weeks* and *Silverthorne* cases. Therefore, in extending the substantive protections of due process to all constitutionally unreasonable searches—state or federal—it was

logically and constitutionally necessary that the exclusion doctrine—an essential part of the right to privacy—be also insisted upon as an essential ingredient of the right newly recognized by the *Wolf* case. In short, the admission of the new constitutional right by *Wolf* could not consistently tolerate denial of its most important constitutional privilege, namely, the exclusion of the evidence which an accused had been forced to give by reason of the unlawful seizure. To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment. Only last year the Court itself recognized that the purpose of the exclusionary rule "is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Elkins* v. *United States, supra,* at 217.

Indeed, we are aware of no restraint, similar to that rejected today, conditioning the enforcement of any other basic constitutional right. The right to privacy, no less important than any other right carefully and particularly reserved to the people, would stand in marked contrast to all other rights declared as "basic to a free society." *Wolf* v. *Colorado, supra,* at 27. This Court has not hesitated to enforce as strictly against the States as it does against the Federal Government the rights of free speech and of a free press, the rights to notice and to a fair, public trial, including, as it does, the right not to be convicted by use of a coerced confession, however logically relevant it be, and without regard to its reliability. *Rogers* v. *Richmond,* 365 U. S. 534 (1961). And nothing could be more certain than that when a coerced confession is involved, "the relevant rules of evidence" are overridden without regard to "the incidence of such conduct by the police," slight or frequent. Why should not the same rule apply to what is tantamount to coerced testimony by way of unconstitutional seizure of goods, papers, effects, documents, etc.? We find that,

as to the Federal Government, the Fourth and Fifth Amendments and, as to the States, the freedom from unconscionable invasions of privacy and the freedom from convictions based upon coerced confessions do enjoy an "intimate relation" [8] in their perpetuation of "principles of humanity and civil liberty [secured] . . . only after years of struggle," *Bram* v. *United States,* 168 U. S. 532, 543–544 (1897). They express "supplementing phases of the same constitutional purpose—to maintain inviolate large areas of personal privacy." *Feldman* v. *United States,* 322 U. S. 487, 489–490 (1944). The philosophy of each Amendment and of each freedom is complementary to, although not dependent upon, that of the other in its sphere of influence—the very least that together they assure in either sphere is that no man is to be convicted on unconstitutional evidence. Cf. *Rochin* v. *California,* 342 U. S. 165, 173 (1952).

V.

Moreover, our holding that the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments is not only the logical dictate of prior cases, but it also makes very good sense. There is no war between the Constitution and common sense. Presently, a federal prosecutor may make no use of evidence illegally seized, but a State's attorney across the street may, although he supposedly is operating under the enforceable prohibitions of the same Amendment. Thus the State, by admitting evidence unlawfully seized, serves to encourage disobedience to the Federal Constitution which it is bound to uphold. Moreover, as was said in *Elkins,* "[t]he very essence of a healthy federalism depends upon the avoidance of needless conflict between

[8] But compare *Waley* v. *Johnston,* 316 U. S. 101, 104, and *Chambers* v. *Florida,* 309 U. S. 227, 236, with *Weeks* v. *United States,* 232 U. S. 383, and *Wolf* v. *Colorado,* 338 U. S. 25.

state and federal courts." 364 U. S., at 221. Such a conflict, hereafter needless, arose this very Term, in *Wilson* v. *Schnettler,* 365 U. S. 381 (1961), in which, and in spite of the promise made by *Rea,* we gave full recognition to our practice in this regard by refusing to restrain a federal officer from testifying in a state court as to evidence unconstitutionally seized by him in the performance of his duties. Yet the double standard recognized until today hardly put such a thesis into practice. In non-exclusionary States, federal officers, being human, were by it invited to and did, as our cases indicate, step across the street to the State's attorney with their unconstitutionally seized evidence. Prosecution on the basis of that evidence was then had in a state court in utter disregard of the enforceable Fourth Amendment. If the fruits of an unconstitutional search had been inadmissible in both state and federal courts, this inducement to evasion would have been sooner eliminated. There would be no need to reconcile such cases as *Rea* and *Schnettler,* each pointing up the hazardous uncertainties of our heretofore ambivalent approach.

Federal-state cooperation in the solution of crime under constitutional standards will be promoted, if only by recognition of their now mutual obligation to respect the same fundamental criteria in their approaches. "However much in a particular case insistence upon such rules may appear as a technicality that inures to the benefit of a guilty person, the history of the criminal law proves that tolerance of shortcut methods in law enforcement impairs its enduring effectiveness." *Miller* v. *United States,* 357 U. S. 301, 313 (1958). Denying shortcuts to only one of two cooperating law enforcement agencies tends naturally to breed legitimate suspicion of "working arrangements" whose results are equally tainted. *Byars* v. *United States,* 273 U. S. 28 (1927); *Lustig* v. *United States,* 338 U. S. 74 (1949).

There are those who say, as did Justice (then Judge) Cardozo, that under our constitutional exclusionary doctrine "[t]he criminal is to go free because the constable has blundered." *People* v. *Defore,* 242 N. Y., at 21, 150 N. E., at 587. In some cases this will undoubtedly be the result.[9] But, as was said in *Elkins,* "there is another consideration—the imperative of judicial integrity." 364 U. S., at 222. The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence. As Mr. Justice Brandeis, dissenting, said in *Olmstead* v. *United States,* 277 U. S. 438, 485 (1928): "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . . If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." Nor can it lightly be assumed that, as a practical matter, adoption of the exclusionary rule fetters law enforcement. Only last year this Court expressly considered that contention and found that "pragmatic evidence of a sort" to the contrary was not wanting. *Elkins* v. *United States, supra,* at 218. The Court noted that

> "The federal courts themselves have operated under the exclusionary rule of *Weeks* for almost half a cen-

[9] As is always the case, however, state procedural requirements governing assertion and pursuance of direct and collateral constitutional challenges to criminal prosecutions must be respected. We note, moreover, that the class of state convictions possibly affected by this decision is of relatively narrow compass when compared with *Burns* v. *Ohio,* 360 U. S. 252, *Griffin* v. *Illinois,* 351 U. S. 12, and *Herman* v. *Claudy,* 350 U. S. 116. In those cases the same contention was urged and later proved unfounded. In any case, further delay in reaching the present result could have no effect other than to compound the difficulties.

> tury; yet it has not been suggested either that the Federal Bureau of Investigation [10] has thereby been rendered ineffective, or that the administration of criminal justice in the federal courts has thereby been disrupted. Moreover, the experience of the states is impressive. . . . The movement towards the rule of exclusion has been halting but seemingly inexorable." *Id.*, at 218–219.

The ignoble shortcut to conviction left open to the State tends to destroy the entire system of constitutional restraints on which the liberties of the people rest.[11] Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States, and that the right to be secure against rude invasions of privacy by state officers is, therefore, constitutional in origin, we can no longer permit that right to remain an empty promise. Because it is enforceable in the same manner and to like effect as other basic rights secured by the Due Process Clause, we can no longer permit it to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment. Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice.

The judgment of the Supreme Court of Ohio is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

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[10] See the remarks of Mr. Hoover, Director of the Federal Bureau of Investigation, FBI Law Enforcement Bulletin, September, 1952, pp. 1–2, quoted in *Elkins* v. *United States*, 364 U. S. 206, 218–219, note 8.

[11] Cf. *Marcus* v. *Search Warrant*, *post*, p. 717.

MR. JUSTICE BLACK, concurring.

For nearly fifty years, since the decision of this Court in *Weeks* v. *United States*,[1] federal courts have refused to permit the introduction into evidence against an accused of his papers and effects obtained by "unreasonable searches and seizures" in violation of the Fourth Amendment. In *Wolf* v. *Colorado*, decided in 1948, however, this Court held that "in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure." [2] I concurred in that holding on these grounds:

> "For reasons stated in my dissenting opinion in *Adamson* v. *California*, 332 U. S. 46, 68, I agree with the conclusion of the Court that the Fourth Amendment's prohibition of 'unreasonable searches and seizures' is enforceable against the states. Consequently, I should be for reversal of this case if I thought the Fourth Amendment not only prohibited 'unreasonable searches and seizures,' but also, of itself, barred the use of evidence so unlawfully obtained. But I agree with what appears to be a plain implication of the Court's opinion that the federal exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate." [3]

I am still not persuaded that the Fourth Amendment, standing alone, would be enough to bar the introduction into evidence against an accused of papers and effects seized from him in violation of its commands. For the Fourth Amendment does not itself contain any provision expressly precluding the use of such evidence, and I am

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[1] 232 U. S. 383, decided in 1914.

[2] 338 U. S. 25, 33.

[3] *Id.*, at 39–40.

extremely doubtful that such a provision could properly be inferred from nothing more than the basic command against unreasonable searches and seizures. Reflection on the problem, however, in the light of cases coming before the Court since *Wolf*, has led me to conclude that when the Fourth Amendment's ban against unreasonable searches and seizures is considered together with the Fifth Amendment's ban against compelled self-incrimination, a constitutional basis emerges which not only justifies but actually requires the exclusionary rule.

The close interrelationship between the Fourth and Fifth Amendments, as they apply to this problem,[4] has long been recognized and, indeed, was expressly made the ground for this Court's holding in *Boyd* v. *United States*.[5] There the Court fully discussed this relationship and declared itself "unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself."[6] It was upon this ground that Mr. Justice Rutledge largely relied in his dissenting opinion in the *Wolf* case.[7] And, although I rejected the argument at that time, its force has, for me at least, become compelling with the more thorough understanding of the problem brought on by recent cases. In the final analysis, it seems to me that the *Boyd* doctrine, though perhaps not required by the express language of the Constitution strictly construed, is amply justified from an historical standpoint, soundly based in reason,

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[4] The interrelationship between the Fourth and the Fifth Amendments in this area does not, of course, justify a narrowing in the interpretation of either of these Amendments with respect to areas in which they operate separately. See *Feldman* v. *United States*, 322 U. S. 487, 502–503 (dissenting opinion); *Frank* v. *Maryland*, 359 U. S. 360, 374–384 (dissenting opinion).

[5] 116 U. S. 616.

[6] *Id.*, at 633.

[7] 338 U. S., at 47–48.

and entirely consistent with what I regard to be the proper approach to interpretation of our Bill of Rights—an approach well set out by Mr. Justice Bradley in the *Boyd* case:

> "[C]onstitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." [8]

The case of *Rochin* v. *California*,[9] which we decided three years after the *Wolf* case, authenticated, I think, the soundness of Mr. Justice Bradley's and Mr. Justice Rutledge's reliance upon the interrelationship between the Fourth and Fifth Amendments as requiring the exclusion of unconstitutionally seized evidence. In the *Rochin* case, three police officers, acting with neither a judicial warrant nor probable cause, entered Rochin's home for the purpose of conducting a search and broke down the door to a bedroom occupied by Rochin and his wife. Upon their entry into the room, the officers saw Rochin pick up and swallow two small capsules. They immediately seized him and took him in handcuffs to a hospital where the capsules

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[8] 116 U. S., at 635. As the Court points out, Mr. Justice Bradley's approach to interpretation of the Bill of Rights stemmed directly from the spirit in which that great charter of liberty was offered for adoption on the floor of the House of Representatives by its framer, James Madison: "If they [the first ten Amendments] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights." I Annals of Congress 439 (1789).

[9] 342 U. S. 165.

were recovered by use of a stomach pump. Investigation showed that the capsules contained morphine and evidence of that fact was made the basis of his conviction of a crime in a state court.

When the question of the validity of that conviction was brought here, we were presented with an almost perfect example of the interrelationship between the Fourth and Fifth Amendments. Indeed, every member of this Court who participated in the decision of that case recognized this interrelationship and relied on it, to some extent at least, as justifying reversal of Rochin's conviction. The majority, though careful not to mention the Fifth Amendment's provision that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself," showed at least that it was not unaware that such a provision exists, stating: "Coerced confessions offend the community's sense of fair play and decency. . . . It would be a stultification of the responsibility which the course of constitutional history has cast upon this Court to hold that in order to convict a man the police cannot extract by force what is in his mind but can extract what is in his stomach." [10] The methods used by the police thus were, according to the majority, "too close to the rack and the screw to permit of constitutional differentiation," [11] and the case was reversed on the ground that these methods had violated the Due Process Clause of the Fourteenth Amendment in that the treatment accorded Rochin was of a kind that "shocks the conscience," "offend[s] 'a sense of justice' " and fails to "respect certain decencies of civilized conduct." [12]

I concurred in the reversal of the *Rochin* case, but on the ground that the Fourteenth Amendment made the Fifth Amendment's provision against self-incrimination

[10] *Id.*, at 173.

[11] *Id.*, at 172.

[12] *Id.*, at 172, 173.

applicable to the States and that, given a broad rather than a narrow construction, that provision barred the introduction of this "capsule" evidence just as much as it would have forbidden the use of words Rochin might have been coerced to speak.[13] In reaching this conclusion I cited and relied on the *Boyd* case, the constitutional doctrine of which was, of course, necessary to my disposition of the case. At that time, however, these views were very definitely in the minority for only MR. JUSTICE DOUGLAS and I rejected the flexible and uncertain standards of the "shock-the-conscience test" used in the majority opinion.[14]

Two years after *Rochin,* in *Irvine* v. *California,*[15] we were again called upon to consider the validity of a conviction based on evidence which had been obtained in a manner clearly unconstitutional and arguably shocking to the conscience. The five opinions written by this Court in that case demonstrate the utter confusion and uncertainty that had been brought about by the *Wolf* and *Rochin* decisions. In concurring, MR. JUSTICE CLARK emphasized the unsatisfactory nature of the Court's "shock-the-conscience test," saying that this "test" "makes for such uncertainty and unpredictability that it would be impossible to foretell—other than by guesswork—just how brazen the invasion of the intimate privacies of one's home must be in order to shock itself into the protective arms of the Constitution. In truth, the practical result of this *ad hoc* approach is simply that when five Justices are sufficiently revolted by local police action, a conviction is overturned and a guilty man may go free." [16]

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[13] *Id.,* at 174–177.

[14] For the concurring opinion of MR. JUSTICE DOUGLAS see *id.,* at 177–179.

[15] 347 U. S. 128.

[16] *Id.,* at 138.

Only one thing emerged with complete clarity from the *Irvine* case—that is that seven Justices rejected the "shock-the-conscience" constitutional standard enunciated in the *Wolf* and *Rochin* cases. But even this did not lessen the confusion in this area of the law because the continued existence of mutually inconsistent precedents together with the Court's inability to settle upon a majority opinion in the *Irvine* case left the situation at least as uncertain as it had been before.[17] Finally, today, we clear up that uncertainty. As I understand the Court's opinion in this case, we again reject the confusing "shock-the-conscience" standard of the *Wolf* and *Rochin* cases and, instead, set aside this state conviction in reliance upon the precise, intelligible and more predictable constitutional doctrine enunciated in the *Boyd* case. I fully agree with Mr. Justice Bradley's opinion that the two Amendments upon which the *Boyd* doctrine rests are of vital importance in our constitutional scheme of liberty and that both are entitled to a liberal rather than a niggardly interpretation. The courts of the country are entitled to know with as much certainty as possible what scope they cover. The Court's opinion, in my judgment, dissipates the doubt and uncertainty in this field of constitutional law and I am persuaded, for this and other reasons stated, to depart from my prior views, to accept the *Boyd* doctrine as controlling in this state case and to join the Court's judgment and opinion which are in accordance with that constitutional doctrine.

MR. JUSTICE DOUGLAS, concurring.

Though I have joined the opinion of the Court, I add a few words. This criminal proceeding started with a lawless search and seizure. The police entered a home

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[17] See also *United States* v. *Rabinowitz,* 339 U. S. 56, 66–68 (dissenting opinion).

forcefully, and seized documents that were later used to convict the occupant of a crime.

She lived alone with her fifteen-year-old daughter in the second-floor flat of a duplex in Cleveland. At about 1:30 in the afternoon of May 23, 1957, three policemen arrived at this house. They rang the bell, and the appellant, appearing at her window, asked them what they wanted. According to their later testimony, the policemen had come to the house on information from "a confidential source that there was a person hiding out in the home, who was wanted for questioning in connection with a recent bombing." [1] To the appellant's question, however, they replied only that they wanted to question her and would not state the subject about which they wanted to talk.

The appellant, who had retained an attorney in connection with a pending civil matter, told the police she would call him to ask if she should let them in. On her attorney's advice, she told them she would let them in only when they produced a valid search warrant. For the next two and a half hours, the police laid siege to the house. At four o'clock, their number was increased to at least seven. Appellant's lawyer appeared on the scene; and one of the policemen told him that they now had a search warrant, but the officer refused to show it. Instead, going to the back door, the officer first tried to kick it in and, when that proved unsuccessful, he broke the glass in the door and opened it from the inside.

The appellant, who was on the steps going up to her flat, demanded to see the search warrant; but the officer refused to let her see it although he waved a paper in front of her face. She grabbed it and thrust it down the front of her dress. The policemen seized her, took the paper

[1] This "confidential source" told the police, in the same breath, that "there was a large amount of policy paraphernalia being hidden in the home."

from her, and had her handcuffed to another officer. She was taken upstairs, thus bound, and into the larger of the two bedrooms in the apartment; there she was forced to sit on the bed. Meanwhile, the officers entered the house and made a complete search of the four rooms of her flat and of the basement of the house.

The testimony concerning the search is largely nonconflicting. The approach of the officers; their long wait outside the home, watching all its doors; the arrival of reinforcements armed with a paper; [2] breaking into the house; putting their hands on appellant and handcuffing her; numerous officers ransacking through every room and piece of furniture, while the appellant sat, a prisoner in her own bedroom. There is direct conflict in the testimony, however, as to where the evidence which is the basis of this case was found. To understand the meaning of that conflict, one must understand that this case is based on the knowing possession [3] of four little pamphlets, a couple of photographs and a little pencil doodle—all of which are alleged to be pornographic.

According to the police officers who participated in the search, these articles were found, some in appellant's

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[2] The purported warrant has disappeared from the case. The State made no attempt to prove its existence, issuance or contents, either at the trial or on the hearing of a preliminary motion to suppress. The Supreme Court of Ohio said: "There is, in the record, considerable doubt as to whether there ever was *any* warrant for the search of defendant's home. . . . Admittedly . . . there was no warrant authorizing a search . . . for any 'lewd, or lascivious book . . . print, [or] picture.'" 170 Ohio St. 427, 430, 166 N. E. 2d 387, 389. (Emphasis added.)

[3] Ohio Rev. Code, § 2905.34: "No person shall knowingly . . . have in his possession or under his control an obscene, lewd, or lascivious book, magazine, pamphlet, paper, writing, advertisement, circular, print, picture . . . or drawing . . . of an indecent or immoral nature . . . . Whoever violates this section shall be fined not less than two hundred nor more than two thousand dollars or imprisoned not less than one nor more than seven years, or both."

dressers and some in a suitcase found by her bed. According to appellant, most of the articles were found in a cardboard box in the basement; one in the suitcase beside her bed. All of this material, appellant—and a friend of hers—said were odds and ends belonging to a recent boarder, a man who had left suddenly for New York and had been detained there. As the Supreme Court of Ohio read the statute under which appellant is charged, she is guilty of the crime whichever story is true.

The Ohio Supreme Court sustained the conviction even though it was based on the documents obtained in the lawless search. For in Ohio evidence obtained by an unlawful search and seizure is admissible in a criminal prosecution at least where it was not taken from the "defendant's person by the use of brutal or offensive force against defendant." *State* v. *Mapp,* 170 Ohio St. 427, 166 N. E. 2d, at 388, syllabus 2; *State* v. *Lindway,* 131 Ohio St. 166, 2 N. E. 2d 490. This evidence would have been inadmissible in a federal prosecution. *Weeks* v. *United States,* 232 U. S. 383; *Elkins* v. *United States,* 364 U. S. 206. For, as stated in the former decision, "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 . . . ." *Id.,* 391–392. It was therefore held that evidence obtained (which in that case was documents and correspondence) from a home without any warrant was not admissible in a federal prosecution.

We held in *Wolf* v. *Colorado,* 338 U. S. 25, that the Fourth Amendment was applicable to the States by reason of the Due Process Clause of the Fourteenth Amendment. But a majority held that the exclusionary rule of the *Weeks* case was not required of the States, that they could apply such sanctions as they chose. That position had the necessary votes to carry the day. But with all respect it was not the voice of reason or principle.

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As stated in the *Weeks* case, if evidence seized in violation of the Fourth Amendment can be used against an accused, "his right to be secure against such searches and seizures is of no value, and . . . might as well be stricken from the Constitution." 232 U. S., at 393.

When we allowed States to give constitutional sanction to the "shabby business" of unlawful entry into a home (to use an expression of Mr. Justice Murphy, *Wolf* v. *Colorado,* at 46), we did indeed rob the Fourth Amendment of much meaningful force. There are, of course, other theoretical remedies. One is disciplinary action within the hierarchy of the police system, including prosecution of the police officer for a crime. Yet as Mr. Justice Murphy said in *Wolf* v. *Colorado,* at 42, "Self-scrutiny is a lofty ideal, but its exaltation reaches new heights if we expect a District Attorney to prosecute himself or his associates for well-meaning violations of the search and seizure clause during a raid the District Attorney or his associates have ordered."

The only remaining remedy, if exclusion of the evidence is not required, is an action of trespass by the homeowner against the offending officer. Mr. Justice Murphy showed how onerous and difficult it would be for the citizen to maintain that action and how meagre the relief even if the citizen prevails. 338 U. S. 42–44. The truth is that trespass actions against officers who make unlawful searches and seizures are mainly illusory remedies.

Without judicial action making the exclusionary rule applicable to the States, *Wolf* v. *Colorado* in practical effect reduced the guarantee against unreasonable searches and seizures to "a dead letter," as Mr. Justice Rutledge said in his dissent. See 338 U. S., at 47.

Wolf v. *Colorado, supra,* was decided in 1949. The immediate result was a storm of constitutional controversy which only today finds its end. I believe that this is an appropriate case in which to put an end to the asymmetry which *Wolf* imported into the law. See

Stefanelli v. *Minard,* 342 U. S. 117; *Rea* v. *United States,* 350 U. S. 214; *Elkins* v. *United States, supra; Monroe* v. *Pape,* 365 U. S. 167. It is an appropriate case because the facts it presents show—as would few other cases—the casual arrogance of those who have the untrammelled power to invade one's home and to seize one's person.

It is also an appropriate case in the narrower and more technical sense. The issues of the illegality of the search and the admissibility of the evidence have been presented to the state court and were duly raised here in accordance with the applicable Rule of Practice.[4] The question was raised in the notice of appeal, the jurisdictional statement and in appellant's brief on the merits.[5] It is true that argument was mostly directed to another issue in the case, but that is often the fact. See *Rogers* v. *Richmond,* 365 U. S. 534, 535–540. Of course, an earnest advocate of a position always believes that, had he only an additional opportunity for argument, his side would win. But, subject to the sound discretion of a court, all argument must at last come to a halt. This is especially so as to an issue about which this Court said last year that "The arguments of its antagonists and of its proponents have been so many times marshalled as to require no lengthy elaboration here." *Elkins* v. *United States, supra,* 216.

Moreover, continuance of *Wolf* v. *Colorado* in its full vigor breeds the unseemly shopping around of the kind revealed in *Wilson* v. *Schnettler,* 365 U. S. 381. Once evidence, inadmissible in a federal court, is admissible in

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[4] "The notice of appeal . . . shall set forth the questions presented by the appeal . . . . Only the questions set forth in the notice of appeal or fairly comprised therein will be considered by the court." Rule 10 (2) (c), Rules of the Supreme Court of the United States.

[5] "Did the conduct of the police in procuring the books, papers and pictures placed in evidence by the Prosecution violate Amendment IV, Amendment V, and Amendment XIV Section 1 of the United States Constitution . . . ?"

a state court a "double standard" exists which, as the Court points out, leads to "working arrangements" that undercut federal policy and reduce some aspects of law enforcement to shabby business. The rule that supports that practice does not have the force of reason behind it.

Memorandum of MR. JUSTICE STEWART.

Agreeing fully with Part I of MR. JUSTICE HARLAN's dissenting opinion, I express no view as to the merits of the constitutional issue which the Court today decides. I would, however, reverse the judgment in this case, because I am persuaded that the provision of § 2905.34 of the Ohio Revised Code, upon which the petitioner's conviction was based, is, in the words of MR. JUSTICE HARLAN, not "consistent with the rights of free thought and expression assured against state action by the Fourteenth Amendment."

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

In overruling the *Wolf* case the Court, in my opinion, has forgotten the sense of judicial restraint which, with due regard for *stare decisis*, is one element that should enter into deciding whether a past decision of this Court should be overruled. Apart from that I also believe that the *Wolf* rule represents sounder Constitutional doctrine than the new rule which now replaces it.

I.

From the Court's statement of the case one would gather that the central, if not controlling, issue on this appeal is whether illegally state-seized evidence is Constitutionally admissible in a state prosecution, an issue which would of course face us with the need for re-examining *Wolf*. However, such is not the situation. For, although that question was indeed raised here and below among appellant's subordinate points, the new and

pivotal issue brought to the Court by this appeal is whether § 2905.34 of the Ohio Revised Code making criminal the *mere* knowing possession or control of obscene material,[1] and under which appellant has been convicted, is consistent with the rights of free thought and expression assured against state action by the Fourteenth Amendment.[2] That was the principal issue which was decided by the Ohio Supreme Court,[3] which was tendered by appellant's Jurisdictional Statement,[4] and which was briefed [5] and argued [6] in this Court.

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[1] The material parts of that law are quoted in note 1 of the Court's opinion. *Ante,* p. 643.

[2] In its note 3, *ante,* p. 646, the Court, it seems to me, has turned upside down the relative importance of appellant's reliance on the various points made by him on this appeal.

[3] See 170 Ohio St. 427, 166 N. E. 2d 387. Because of the unusual provision of the Ohio Constitution requiring "the concurrence of at least all but one of the judges" of the Ohio Supreme Court before a state law is held unconstitutional (except in the case of affirmance of a holding of unconstitutionality by the Ohio Court of Appeals), Ohio Const., Art. IV, § 2, the State Supreme Court was compelled to uphold the constitutionality of § 2905.34, despite the fact that four of its seven judges thought the statute offensive to the Fourteenth Amendment.

[4] Respecting the "substantiality" of the federal questions tendered by this appeal, appellant's Jurisdictional Statement contained the following:

"The Federal questions raised by this appeal are substantial for the following reasons:

"The Ohio Statute under which the defendant was convicted violates one's sacred right to own and hold property, which has been held inviolate by the Federal Constitution. The right of the individual 'to read, to believe or disbelieve, and to think without governmental supervision is one of our basic liberties, but to dictate to the mature adult what books he may have in his own private library seems to be a clear infringement of the constitutional rights of the individual' (Justice Herbert's dissenting Opinion, Appendix 'A'). Many convictions have followed that of the defendant in the State Courts of Ohio based upon this very same statute. Unless this Honorable Court hears this matter and determines once and for all

[*Footnotes 5 and 6 are on p. 674*]

In this posture of things, I think it fair to say that five members of this Court have simply "reached out" to overrule *Wolf*. With all respect for the views of the majority, and recognizing that *stare decisis* carries dif-

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that the Statute is unconstitutional as defendant contends, there will be many such appeals. When Sections 2905.34, 2905.37 and 3767.01 of the Ohio Revised Code [the latter two Sections providing exceptions to the coverage of § 2905.34 and related provisions of Ohio's obscenity statutes] are read together, . . . they obviously contravene the Federal and State constitutional provisions; by being convicted under the Statute involved herein, and in the manner in which she was convicted, Defendant-Appellant has been denied due process of law; a sentence of from one (1) to seven (7) years in a penal institution for alleged violation of this unconstitutional section of the Ohio Revised Code deprives the defendant of her right to liberty and the pursuit of happiness, contrary to the Federal and State constitutional provisions, for circumstances which she herself did not put in motion, and is a cruel and unusual punishment inflicted upon her contrary to the State and Federal Constitutions."

[5] The appellant's brief did not urge the overruling of *Wolf*. Indeed it did not even cite the case. The brief of the appellee merely relied on *Wolf* in support of the State's contention that appellant's conviction was not vitiated by the admission in evidence of the fruits of the alleged unlawful search and seizure by the police. The brief of the American and Ohio Civil Liberties Unions, as *amici*, did in one short concluding paragraph of its argument "request" the Court to re-examine and overrule *Wolf*, but without argumentation. I quote in full this part of their brief:

"This case presents the issue of whether evidence obtained in an illegal search and seizure can constitutionally be used in a State criminal proceeding. We are aware of the view that this Court has taken on this issue in *Wolf* v. *Colorado*, 338 U. S. 25. It is our purpose by this paragraph to respectfully request that this Court re-examine this issue and conclude that the ordered liberty concept guaranteed to persons by the due process clause of the Fourteenth Amendment necessarily requires that evidence illegally obtained in violation thereof, not be admissible in state criminal proceedings."

[6] Counsel for appellant on oral argument, as in his brief, did not urge that *Wolf* be overruled. Indeed, when pressed by questioning from the bench whether he was not in fact urging us to overrule *Wolf*, counsel expressly disavowed any such purpose.

ferent weight in Constitutional adjudication than it does in nonconstitutional decision, I can perceive no justification for regarding this case as an appropriate occasion for re-examining *Wolf*.

The action of the Court finds no support in the rule that decision of Constitutional issues should be avoided wherever possible. For in overruling *Wolf* the Court, instead of passing upon the validity of Ohio's § 2905.34, has simply chosen between two Constitutional questions. Moreover, I submit that it has chosen the more difficult and less appropriate of the two questions. The Ohio statute which, as construed by the State Supreme Court, punishes knowing possession or control of obscene material, irrespective of the purposes of such possession or control (with exceptions not here applicable) [7] and irrespective of whether the accused had any reasonable opportunity to rid himself of the material after discovering that it was obscene,[8] surely presents a Constitutional

[7] "2905.37 LEGITIMATE PUBLICATIONS NOT OBSCENE.

"Sections 2905.33 to 2905.36, inclusive, of the Revised Code do not affect teaching in regularly chartered medical colleges, the publication of standard medical books, or regular practitioners of medicine or druggists in their legitimate business, nor do they affect the publication and distribution of bona fide works of art. No articles specified in sections 2905.33, 2905.34, and 2905.36 of the Revised Code shall be considered a work of art unless such article is made, published, and distributed by a bona fide association of artists or an association for the advancement of art whose demonstrated purpose does not contravene sections 2905.06 to 2905.44, inclusive, of the Revised Code, and which is not organized for profit."

§ 3767.01 (C)

"This section and sections 2905.34, . . . 2905.37 . . . of the Revised Code shall not affect . . . any newspaper, magazine, or other publication entered as second class matter by the post-office department."

[8] The Ohio Supreme Court, in its construction of § 2905.34, controlling upon us here, refused to import into it any other exceptions than those expressly provided by the statute. See note 7, *supra*. Instead it held that "If anyone looks at a book and finds it lewd, he is forthwith, under this legislation, guilty . . . ."

question which is both simpler and less far-reaching than the question which the Court decides today. It seems to me that justice might well have been done in this case without overturning a decision on which the administration of criminal law in many of the States has long justifiably relied.

Since the demands of the case before us do not require us to reach the question of the validity of *Wolf*, I think this case furnishes a singularly inappropriate occasion for reconsideration of that decision, if reconsideration is indeed warranted. Even the most cursory examination will reveal that the doctrine of the *Wolf* case has been of continuing importance in the administration of state criminal law. Indeed, certainly as regards its "non-exclusionary" aspect, *Wolf* did no more than articulate the then existing assumption among the States that the federal cases enforcing the exclusionary rule "do not bind [the States], for they construe provisions of the Federal Constitution, the Fourth and Fifth Amendments, not applicable to the States." *People* v. *Defore*, 242 N. Y. 13, 20, 150 N. E. 585, 587. Though, of course, not reflecting the full measure of this continuing reliance, I find that during the last three Terms, for instance, the issue of the inadmissibility of illegally state-obtained evidence appears on an average of about fifteen times per Term just in the *in forma pauperis* cases summarily disposed of by us. This would indicate both that the issue which is now being decided may well have untoward practical ramifications respecting state cases long since disposed of in reliance on *Wolf*, and that were we determined to re-examine that doctrine we would not lack future opportunity.

The occasion which the Court has taken here is in the context of a case where the question was briefed not at all and argued only extremely tangentially. The unwisdom of overruling *Wolf* without full-dress argu-

ment is aggravated by the circumstance that that decision is a comparatively recent one (1949) to which three members of the present majority have at one time or other expressly subscribed, one to be sure with explicit misgivings.[9] I would think that our obligation to the States, on whom we impose this new rule, as well as the obligation of orderly adherence to our own processes would demand that we seek that aid which adequate briefing and argument lends to the determination of an important issue. It certainly has never been a postulate of judicial power that mere altered disposition, or subsequent membership on the Court, is sufficient warrant for overturning a deliberately decided rule of Constitutional law.

Thus, if the Court were bent on reconsidering *Wolf*, I think that there would soon have presented itself an appropriate opportunity in which we could have had the benefit of full briefing and argument. In any event, at the very least, the present case should have been set down for reargument, in view of the inadequate briefing and argument we have received on the *Wolf* point. To all intents and purposes the Court's present action amounts to a summary reversal of *Wolf*, without argument.

I am bound to say that what has been done is not likely to promote respect either for the Court's adjudicatory process or for the stability of its decisions. Having been unable, however, to persuade any of the majority to a different procedural course, I now turn to the merits of the present decision.

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[9] See *Wolf* v. *Colorado*, 338 U. S., at 39–40; *Irvine* v. *California*, 347 U. S. 128, 133–134, and at 138–139. In the latter case, decided in 1954, Mr. Justice Jackson, writing for the majority, said (at p. 134): "We think that the *Wolf* decision should not be overruled, for the reasons so persuasively stated therein." Compare *Schwartz* v. *Texas*, 344 U. S. 199, and *Stefanelli* v. *Minard*, 342 U. S. 117, in which the *Wolf* case was discussed and in no way disapproved. And see *Pugach* v. *Dollinger*, 365 U. S. 458, which relied on *Schwartz*.

II.

Essential to the majority's argument against *Wolf* is the proposition that the rule of *Weeks* v. *United States,* 232 U. S. 383, excluding in federal criminal trials the use of evidence obtained in violation of the Fourth Amendment, derives not from the "supervisory power" of this Court over the federal judicial system, but from Constitutional requirement. This is so because no one, I suppose, would suggest that this Court possesses any general supervisory power over the state courts. Although I entertain considerable doubt as to the soundness of this foundational proposition of the majority, cf. *Wolf* v. *Colorado,* 338 U. S., at 39–40 (concurring opinion), I shall assume, for present purposes, that the *Weeks* rule "is of constitutional origin."

At the heart of the majority's opinion in this case is the following syllogism: (1) the rule excluding in federal criminal trials evidence which is the product of an illegal search and seizure is "part and parcel" of the Fourth Amendment; (2) *Wolf* held that the "privacy" assured against federal action by the Fourth Amendment is also protected against state action by the Fourteenth Amendment; and (3) it is therefore "logically and constitutionally necessary" that the *Weeks* exclusionary rule should also be enforced against the States.[10]

This reasoning ultimately rests on the unsound premise that because *Wolf* carried into the States, as part of "the concept of ordered liberty" embodied in the Fourteenth Amendment, the principle of "privacy" underlying the Fourth Amendment (338 U. S., at 27), it must follow that whatever configurations of the Fourth Amendment have been developed in the particularizing federal precedents are likewise to be deemed a part of "ordered liberty,"

[10] Actually, only four members of the majority support this reasoning. See pp. 685–686, *infra.*

and as such are enforceable against the States. For me, this does not follow at all.

It cannot be too much emphasized that what was recognized in *Wolf* was not that the Fourth Amendment *as such* is enforceable against the States as a facet of due process, a view of the Fourteenth Amendment which, as *Wolf* itself pointed out (338 U. S., at 26), has long since been discredited, but the principle of privacy "which is at the core of the Fourth Amendment." (*Id.*, at 27.) It would not be proper to expect or impose any precise equivalence, either as regards the scope of the right or the means of its implementation, between the requirements of the Fourth and Fourteenth Amendments. For the Fourth, unlike what was said in *Wolf* of the Fourteenth, does not state a general principle only; it is a particular command, having its setting in a pre-existing legal context on which both interpreting decisions and enabling statutes must at least build.

Thus, even in a case which presented simply the question of whether a particular search and seizure was constitutionally "unreasonable"—say in a tort action against state officers—we would not be true to the Fourteenth Amendment were we merely to stretch the general principle of individual privacy on a Procrustean bed of federal precedents under the Fourth Amendment. But in this instance more than that is involved, for here we are reviewing not a determination that what the state police did was Constitutionally permissible (since the state court quite evidently assumed that it was not), but a determination that appellant was properly found guilty of conduct which, for present purposes, it is to be assumed the State could Constitutionally punish. Since there is not the slightest suggestion that Ohio's policy is "affirmatively to sanction . . . police incursion into privacy" (338 U. S., at 28), compare *Marcus* v. *Search Warrants*, *post*, p. 717, what the Court is now doing is to impose

upon the States not only federal substantive standards of "search and seizure" but also the basic federal remedy for violation of those standards. For I think it entirely clear that the *Weeks* exclusionary rule is but a remedy which, by penalizing past official misconduct, is aimed at deterring such conduct in the future.

I would not impose upon the States this federal exclusionary remedy. The reasons given by the majority for now suddenly turning its back on *Wolf* seem to me notably unconvincing.

First, it is said that "the factual grounds upon which *Wolf* was based" have since changed, in that more States now follow the *Weeks* exclusionary rule than was so at the time *Wolf* was decided. While that is true, a recent survey indicates that at present one-half of the States still adhere to the common-law non-exclusionary rule, and one, Maryland, retains the rule as to felonies. Berman and Oberst, Admissibility of Evidence Obtained by an Unconstitutional Search and Seizure, 55 N. W. L. Rev. 525, 532–533. But in any case surely all this is beside the point, as the majority itself indeed seems to recognize. Our concern here, as it was in *Wolf,* is not with the desirability of that rule but only with the question whether the States are Constitutionally free to follow it or not as they may themselves determine, and the relevance of the disparity of views among the States on this point lies simply in the fact that the judgment involved is a debatable one. Moreover, the very fact on which the majority relies, instead of lending support to what is now being done, points away from the need of replacing voluntary state action with federal compulsion.

The preservation of a proper balance between state and federal responsibility in the administration of criminal justice demands patience on the part of those who might like to see things move faster among the States in this respect. Problems of criminal law enforcement vary

widely from State to State. One State, in considering the totality of its legal picture, may conclude that the need for embracing the *Weeks* rule is pressing because other remedies are unavailable or inadequate to secure compliance with the substantive Constitutional principle involved. Another, though equally solicitous of Constitutional rights, may choose to pursue one purpose at a time, allowing all evidence relevant to guilt to be brought into a criminal trial, and dealing with Constitutional infractions by other means. Still another may consider the exclusionary rule too rough-and-ready a remedy, in that it reaches only unconstitutional intrusions which eventuate in criminal prosecution of the victims. Further, a State after experimenting with the *Weeks* rule for a time may, because of unsatisfactory experience with it, decide to revert to a non-exclusionary rule. And so on. From the standpoint of Constitutional permissibility in pointing a State in one direction or another, I do not see at all why "time has set its face against" the considerations which led Mr. Justice Cardozo, then chief judge of the New York Court of Appeals, to reject for New York in *People* v. *Defore*, 242 N. Y. 13, 150 N. E. 585, the *Weeks* exclusionary rule. For us the question remains, as it has always been, one of state power, not one of passing judgment on the wisdom of one state course or another. In my view this Court should continue to forbear from fettering the States with an adamant rule which may embarrass them in coping with their own peculiar problems in criminal law enforcement.

Further, we are told that imposition of the *Weeks* rule on the States makes "very good sense," in that it will promote recognition by state and federal officials of their "mutual obligation to respect the same fundamental criteria" in their approach to law enforcement, and will avoid "'needless conflict between state and federal courts.'" Indeed the majority now finds an incongruity

in *Wolf's* discriminating perception between the demands of "ordered liberty" as respects the basic right of "privacy" and the means of securing it among the States. That perception, resting both on a sensitive regard for our federal system and a sound recognition of this Court's remoteness from particular state problems, is for me the strength of that decision.

An approach which regards the issue as one of achieving procedural symmetry or of serving administrative convenience surely disfigures the boundaries of this Court's functions in relation to the state and federal courts. Our role in promulgating the *Weeks* rule and its extensions in such cases as *Rea, Elkins,* and *Rios* [11] was quite a different one than it is here. There, in implementing the Fourth Amendment, we occupied the position of a tribunal having the ultimate responsibility for developing the standards and procedures of judicial administration within the judicial system over which it presides. Here we review state procedures whose measure is to be taken not against the specific substantive commands of the Fourth Amendment but under the flexible contours of the Due Process Clause. I do not believe that the Fourteenth Amendment empowers this Court to mould state remedies effectuating the right to freedom from "arbitrary intrusion by the police" to suit its own notions of how things should be done, as, for instance, the California Supreme Court did in *People* v. *Cahan,* 44 Cal. 2d 434, 282 P. 2d 905, with reference to procedures in the California courts or as this Court did in *Weeks* for the lower federal courts.

A state conviction comes to us as the complete product of a sovereign judicial system. Typically a case will have been tried in a trial court, tested in some final appel-

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[11] *Rea* v. *United States,* 350 U. S. 214; *Elkins* v. *United States,* 364 U. S. 206; *Rios* v. *United States,* 364 U. S. 253.

late court, and will go no further. In the comparatively rare instance when a conviction is reviewed by us on due process grounds we deal then with a finished product in the creation of which we are allowed no hand, and our task, far from being one of over-all supervision, is, speaking generally, restricted to a determination of whether the prosecution was Constitutionally fair. The specifics of trial procedure, which in every mature legal system will vary greatly in detail, are within the sole competence of the States. I do not see how it can be said that a trial becomes unfair simply because a State determines that evidence may be considered by the trier of fact, regardless of how it was obtained, if it is relevant to the one issue with which the trial is concerned, the guilt or innocence of the accused. Of course, a court may use its procedures as an incidental means of pursuing other ends than the correct resolution of the controversies before it. Such indeed is the *Weeks* rule, but if a State does not choose to use its courts in this way, I do not believe that this Court is empowered to impose this much-debated procedure on local courts, however efficacious we may consider the *Weeks* rule to be as a means of securing Constitutional rights.

Finally, it is said that the overruling of *Wolf* is supported by the established doctrine that the admission in evidence of an involuntary confession renders a state conviction Constitutionally invalid. Since such a confession may often be entirely reliable, and therefore of the greatest relevance to the issue of the trial, the argument continues, this doctrine is ample warrant in precedent that the way evidence was obtained, and not just its relevance, is Constitutionally significant to the fairness of a trial. I believe this analogy is not a true one. The "coerced confession" rule is certainly not a rule that any illegally obtained statements may not be used in evidence. I would suppose that a statement which is procured during

a period of illegal detention, *McNabb* v. *United States,* 318 U. S. 332, is, as much as unlawfully seized evidence, illegally obtained, but this Court has consistently refused to reverse state convictions resting on the use of such statements. Indeed it would seem the Court laid at rest the very argument now made by the majority when in *Lisenba* v. *California,* 314 U. S. 219, a state-coerced confession case, it said (at 235):

> "It may be assumed [that the] treatment of the petitioner [by the police] . . . deprived him of his liberty without due process and that the petitioner would have been afforded preventive relief if he could have gained access to a court to seek it.
>
> "But illegal acts, as such, committed in the course of obtaining a confession . . . do not furnish an answer to the constitutional question we must decide. . . . The gravamen of his complaint is the unfairness of the *use* of his confessions, and what occurred in their procurement is relevant only as it bears on that issue." (Emphasis supplied.)

The point, then, must be that in requiring exclusion of an involuntary statement of an accused, we are concerned not with an appropriate remedy for what the police have done, but with something which is regarded as going to the heart of our concepts of fairness in judicial procedure. The operative assumption of our procedural system is that "Ours is the accusatorial as opposed to the inquisitorial system. Such has been the characteristic of Anglo-American criminal justice since it freed itself from practices borrowed by the Star Chamber from the Continent whereby the accused was interrogated in secret for hours on end." *Watts* v. *Indiana,* 338 U. S. 49, 54. See *Rogers* v. *Richmond,* 365 U. S. 534, 541. The pressures brought to bear against an accused leading to a confession, unlike an unconstitutional violation of privacy, do not, apart

from the use of the confession at trial, necessarily involve independent Constitutional violations. What is crucial is that the trial defense to which an accused is entitled should not be rendered an empty formality by reason of statements wrung from him, for then "a prisoner . . . [has been] made the deluded instrument of his own conviction." 2 Hawkins, Pleas of the Crown (8th ed., 1824), c. 46, § 34. That this is a *procedural right,* and that its violation occurs at the time his improperly obtained statement is admitted at trial, is manifest. For without this right all the careful safeguards erected around the giving of testimony, whether by an accused or any other witness, would become empty formalities in a procedure where the most compelling possible evidence of guilt, a confession, would have already been obtained at the unsupervised pleasure of the police.

This, and not the disciplining of the police, as with illegally seized evidence, is surely the true basis for excluding a statement of the accused which was unconstitutionally obtained. In sum, I think the coerced confession analogy works strongly *against* what the Court does today.

In conclusion, it should be noted that the majority opinion in this case is in fact an opinion only for the *judgment* overruling *Wolf,* and not for the basic rationale by which four members of the majority have reached that result. For my Brother BLACK is unwilling to subscribe to their view that the *Weeks* exclusionary rule derives from the Fourth Amendment itself (see *ante,* p. 661), but joins the majority opinion on the premise that its end result can be achieved by bringing the Fifth Amendment to the aid of the Fourth (see *ante,* pp. 662–665).[12] On that score I need only say that whatever the validity of

[12] My Brother STEWART concurs in the Court's judgment on grounds which have nothing to do with *Wolf.*

the "Fourth-Fifth Amendment" correlation which the *Boyd* case (116 U. S. 616) found, see 8 Wigmore, Evidence (3d ed. 1940), § 2184, we have only very recently again reiterated the long-established doctrine of this Court that the Fifth Amendment privilege against self-incrimination is not applicable to the States. See *Cohen* v. *Hurley,* 366 U. S. 117.

I regret that I find so unwise in principle and so inexpedient in policy a decision motivated by the high purpose of increasing respect for Constitutional rights. But in the last analysis I think this Court can increase respect for the Constitution only if it rigidly respects the limitations which the Constitution places upon it, and respects as well the principles inherent in its own processes. In the present case I think we exceed both, and that our voice becomes only a voice of power, not of reason.

Syllabus.

AMERICAN AUTOMOBILE ASSOCIATION *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 288. Argued April 17, 1961.—Decided June 19, 1961.

Petitioner keeps its books and makes its income tax returns on a calendar-year accrual basis. For the years 1952 and 1953, it reported as gross income only that portion of the total prepaid annual membership dues actually received or collected in the calendar year which ratably corresponded with the number of membership months covered by those dues occurring during the same taxable year. The balance was reserved for ratable monthly accrual over the remaining membership periods in the following calendar year, as deferred or unearned income reflecting the estimated expense of service to its members. In the exercise of his discretion under § 41 of the Internal Revenue Code of 1939, the Commissioner determined not to accept petitioner's accounting system and assessed deficiencies resulting mainly from petitioner's failure to include in its gross income for each year the total amount of dues received during that year. *Held:* The Commissioner's action is sustained. Pp. 688–698.

(a) The accounting method used by petitioner may present an accurate image of the total financial structure; but it fails to respect the criteria of annual tax accounting, and it may be rejected by the Commissioner. Pp. 690–692.

(b) A different conclusion is not required by the finding of the Court of Claims that petitioner's method of accounting had been used regularly by it since 1931 and was in accord with generally accepted commercial accounting principles and practices. Pp. 692–694.

(c) The conclusion here reached is confirmed by the facts that Congress introduced into the Internal Revenue Code of 1954 provisions which specifically permitted essentially the same practice as that employed by petitioner; it repealed those provisions retroactively one year later; and in 1958 it rejected a proposed amendment which would have specifically permitted this practice with respect to prepaid automobile association membership dues. Pp. 694–698.

—— Ct. Cl. ——, 181 F. Supp. 255, affirmed.

Fleming Bomar argued the cause for petitioner. With him on the brief was *Joseph E. McAndrews.*

Assistant Attorney General Oberdorfer argued the cause for the United States. With him on the briefs were former *Solicitor General Rankin, Solicitor General Cox* and *Harry Baum.*

MR. JUSTICE CLARK delivered the opinion of the Court.

In this suit for refund of federal income taxes the petitioner, American Automobile Association, seeks determination of its tax liability for the years 1952 and 1953. Returns filed for its taxable calendar years were prepared on the basis of the same accrual method of accounting as was used in keeping its books. The Association reported as gross income only that portion of the total prepaid annual membership dues, actually received or collected in the calendar year, which ratably corresponded with the number of membership months covered by those dues and occurring within the same taxable calendar year. The balance was reserved for ratable monthly accrual over the remaining membership period in the following calendar year as deferred or unearned income reflecting an estimated future service expense to members. The Commissioner contends that petitioner should have reported in its gross income for each year the entire amount of membership dues actually received in the taxable calendar year without regard to expected future service expense in the subsequent year. The sole point at issue, therefore, is in what year the prepaid dues are taxable as income.

In auditing the Association's returns for the years 1952 through 1954, the Commissioner, in the exercise of his discretion under § 41 of the Internal Revenue Code of 1939,[1]

[1] A taxpayer's "net income shall be computed . . . in accordance with the method of accounting regularly employed in keeping the

determined not to accept the taxpayer's accounting system. As a result, adjustments were made for those years principally by adding to gross income for each taxable year the amount of prepaid dues which the Association had received but not recognized as income, and subtracting from gross income amounts recognized in the year although actually received in the prior year. A net operating loss claimed for 1954 and corresponding carryback deductions were greatly reduced, and tax deficiencies were assessed for 1952 and 1953. Petitioner paid the deficiencies and its timely claim for refund was denied. Suit to recover was instituted in the Court of Claims, but the court sustained the Commissioner, —— Ct. Cl. ——, 181 F. Supp. 255. Recognizing a conflict between the decision below and that in *Bressner Radio, Inc.*, v. *Commissioner*, 267 F. 2d 520, we granted certiorari. 364 U. S. 813. We have concluded that for tax purposes the dues must be included as income in the calendar year of their actual receipt.

The Association is a national automobile club organized as a nonstock membership corporation with its principal office in Washington, D. C. It provides a variety of services [2] to the members of affiliated local automobile clubs and those of ten clubs which taxpayer itself directly

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books . . . but . . . if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. . . ." 53 Stat. 24, 26 U. S. C. (1952 ed.) § 41. See also the similar provision in the Internal Revenue Code of 1954, 26 U. S. C. (1958 ed.) § 446.

[2] These generally include furnishing road maps, routing, tour books, etc.; emergency road service through contracts with local garages; bail bond protection; personal automobile accident insurance and theft protection; and, in some of its divisions, motor license procurement, brake and headlight adjustment service, notarial duties and advice in the prosecution of small claims.

operates as divisions, but such services are rendered solely upon a member's demand. Its income is derived primarily from dues paid one year in advance by members of the clubs. Memberships may commence or be renewed in any month of the year. For many years, the association has employed an accrual method of accounting and the calendar year as its taxable year. It is admitted that for its purposes the method used is in accord with generally accepted commercial accounting principles. The membership dues, as received, were deposited in the Association's bank accounts without restriction as to their use for any of its corporate purposes. However, for the Association's own accounting purposes, the dues were treated in its books as income received ratably [3] over the 12-month membership period. The portions thereof ratably attributable to membership months occurring beyond the year of receipt, *i. e.*, in a second calendar year, were reflected in the Association's books at the close of the first year as unearned or deferred income. Certain operating expenses were chargeable as prepaid membership cost and deducted ratably over the same periods of time as those over which dues were recognized as income.

The Court of Claims bottomed its opinion on *Automobile Club of Michigan* v. *Commissioner,* 353 U. S. 180 (1957), finding that "the method of treatment of prepaid automobile club membership dues employed [by

[3] In 1952 and 1953 dues collected in any month were accounted as income to the extent of one-twenty-fourth for that month (on the assumption that the mean date of receipt was the middle of the month), one-twelfth for each of the next eleven months, and again one-twenty-fourth in the anniversary month. In 1954, however, guided by its own statistical average experience, the Association changed its system so as to more simply reach almost the same result by charging to year of receipt, without regard to month of receipt, one-half of the entire dues payment and deferring the balance to the following year.

the Association here was,] . . . for Federal income tax purposes, 'purely artificial.' " 181 F. Supp. 255, 258. It accepted that case as "a rejection by the Supreme Court of the accounting method advanced by plaintiff in the case at bar." *Ibid.* The Association does not deny that its accounting system is substantially identical to that used by the petitioner in *Michigan.* It maintains, however, that *Michigan* does not control this case because of a difference in proof, *i. e.,* that in this case the record contains expert accounting testimony indicating that the system used was in accord with generally accepted accounting principles; that its proof of cost of member service was detailed; and that the correlation between that cost and the period of time over which the dues were credited as income was shown and justified by proof of experience. The holding of *Michigan,* however, that the system of accounting was "purely artificial" was based upon the finding that "substantially all services are performed only upon a member's demand and the taxpayer's performance was not related to fixed dates after the tax year." 353 U. S. 180, 189, note 20. That is also true here.[4] As the Association's own accounting expert testified:

> "You are dealing with a group or pool. Any pooling or risk situation, particular members may in a particular year require very little of a specific service that is rendered to certain other members. I wouldn't know what the experience on that would be, but I would think it would be rather irregular between individual members. . . . I am buying the

[4] *Beacon Publishing Co.* v. *Commissioner,* 218 F. 2d 697, and *Schuessler* v. *Commissioner,* 230 F. 2d 722, may be distinguished from the present case on the same grounds which made them distinguishable in *Automobile Club of Michigan* v. *Commissioner,* 353 U. S. 180, 189, note 20.

> availability of services, the protection .... Frankly, the irregularity of the actual furnishing of the maps and helping you out when you run out of gasoline and so on, I frankly don't think that has a blessed thing to do with the over-all accounting."

It may be true that to the accountant the actual incidence of cost in serving an individual member in exchange for his individual dues is inconsequential, or, from the viewpoint of commercial accounting, unessential to determination and disclosure of the overall financial condition of the Association. That "irregularity," however, is highly relevant to the clarity of an accounting system which defers receipt, as earned income, of dues to a taxable period in which no, some, or all the services paid for by those dues may or may not be rendered. The Code exacts its revenue from the individual member's dues which, no one disputes, constitute income. When their receipt as earned income is recognized ratably over two calendar years, without regard to correspondingly fixed individual expense or performance justification, but consistently with overall experience, their accounting doubtless presents a rather accurate image of the total financial structure, but fails to respect the criteria of annual tax accounting and may be rejected by the Commissioner.

The Association further contends that the findings of the court below support its position. We think not. The Court of Claims' only finding as to the accounting system itself is as follows:

> "22. The method of accounting employed by plaintiff during the years in issue has been used regularly by plaintiff since 1931 and is in accord with generally accepted commercial accounting principles and practices and was, prior to the adverse determination by the Commissioner of the Internal Revenue, customarily and generally employed in the motor club field."

This is only to say that in performing the function of business accounting the method employed by the Association "is in accord with generally accepted commercial accounting principles and practices." It is not to hold that for income tax purposes it so clearly reflects income as to be binding on the Treasury.[5] Likewise, other findings merely reflecting statistical computations of average monthly cost per member on a group or pool basis are without determinate significance to our decision that the federal revenue cannot, without legislative consent and over objection of the Commissioner, be made to depend upon average experience in rendering performance and turning a profit. Indeed, such tabulations themselves demonstrate the inadequacy from an income tax standpoint of the *pro rata* method of allocating each year's membership dues in equal monthly installments not in fact related to the expenses incurred. Not only did individually incurred expenses actually vary from month to month, but even the average expense varied—recognition of income nonetheless remaining ratably constant. Although the findings below seem to indicate that it would produce substantially the same result as that of the system of ratable monthly recognition actually employed, we consider similarly unsatisfactory, from an income tax standpoint, allocation of monthly dues to gross monthly income to the extent of actual service expenditures for the same month computed on a group or pool basis. In addition, the Association's election in 1954 to change its monthly recognition formula [6] to one which treats one-half of the dues as income in the year of receipt

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[5] The Hearing Commissioner of the Court of Claims had specifically found as fact that petitioner's "method of accounting . . . clearly reflected its net income for such years." The court, however, did not adopt that finding.

[6] See note 2, *supra*.

and the other half as income received in the subsequent year, without regard to month of payment, only more clearly indicates the artificiality of its method, at least so far as controlling tax purposes are concerned. Moreover, the Association realized that the findings of the Court of Claims were not alone sufficient for its purposes. In its petition for rehearing below, petitioner specifically asked that they be amended and enlarged, especially as to No. 22 set out above. Rehearing and amendment were denied.

Whether or not the Court's judgment in *Michigan* controls our disposition of this case, there are other considerations requiring our affirmance. They concern the action of the Congress with respect to its own positive and express statutory authorization of employment of such sound commercial accounting practices in reporting taxable income. In 1954 the Congress found dissatisfaction in the fact that "as a result of court decisions and rulings, there have developed many divergencies between the computation of income for tax purposes and income for business purposes as computed under generally accepted accounting principles. The areas of difference are confined almost entirely to questions of when certain types of revenue and expenses should be taken into account in arriving at net income." House Ways and Means Committee Report, H. R. Rep. No. 1337, 83d Cong., 2d Sess. 48. As a result, it introduced into the Internal Revenue Code of 1954 § 452 and § 462,[7] which specifically permitted essentially the same practice as was employed by the Association here.[8] Only one year later, however,

[7] 26 U. S. C. (1952 ed., Supp. II) §§ 452, 462, repealed, 69 Stat. 134 (1955).

[8] The Senate Report included this language:

"Under the 1939 Code, regardless of the method of accounting . . . amounts are includible in gross income by the recipient not later than

in June 1955, the Congress repealed these sections retroactively. It appears that in this action Congress first overruled the long administrative practice of the Commissioner and holdings of the courts in disallowing such deferral of income for tax purposes and then within a year reversed its own action. This repeal, we believe, confirms our view that the method used by the Association could be rejected by the Commissioner. While the claim is made that Congress did not "intend to disturb prior law as it affected permissible accrual accounting provisions for tax purposes," H. R. Rep. No. 293, 84th Cong., 1st Sess. 4–5, the cold fact is that it repealed the only law incontestably permitting the practice upon which the Association depends. To say that, as to taxpayers using such systems, Congress was merely declaring existing law when it adopted § 452 in 1954, and that it was merely restoring unaffected the same prior law when it repealed the new section in 1955 for good reason, is a contradiction in itself, "varnishing nonsense with the charm of sound." Instead of constituting a merely duplicative creation, the fact is that § 452 for the first time specifically declared petitioner's system of accounting to be acceptable for income tax purposes, and overruled the long-standing position of the Commissioner and courts to the contrary. And the repeal of the section the following year, upon insistence by the Treasury that the proposed endorsement of such tax accounting would have a disastrous impact on the Government's revenue, was just as clearly a mandate from the Congress that petitioner's system was not acceptable for tax purposes. To interpret its careful consideration of the problem otherwise is to

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the time of receipt if they are subject to free and unrestricted use by the taxpayer even though the payments are for goods or services to be provided by the taxpayer at a future time." S. Rep. No. 1622, 83d Cong., 2d Sess. 301.

accuse the Congress of engaging in sciamachy. We are further confirmed in this view by consideration of the even more recent action of the Congress in 1958, subsequent to the decision in *Michigan, supra.* In that year § 455 [9] was added to the Internal Revenue Code of 1954. It permits publishers to defer receipt as income of prepaid subscriptions of newspapers, magazines and periodicals. An effort was made in the Senate to add a provision in § 455 which would extend its coverage to prepaid automobile club membership dues.[10] However, in conference the House Conferees refused to accept this amendment. Senator Byrd explained the rejection of the amendment to the Senate (104 Cong. Rec., Part 14, p. 17744):

> "It was the position of the House conferees that this matter of prepaid dues and fees received by nonprofit service organizations was a part of the entire subject dealing with the treatment of prepaid income and that such subject should be left for study of this entire problem. . . ." [11]

It appears, therefore, that, pending its own further study, Congress has given publishers but denied auto-

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[9] 26 U. S. C. (1958 ed.) § 455.

[10] An unsuccessful attempt to induce congressional action on this problem was made last year, see H. R. 11266, 86th Cong., 2d Sess., which passed the House August 24, 1960, 106 Cong. Rec. 17482, but failed to draw any action by the Senate before adjournment. An identical bill is currently pending, see H. R. 929, 87th Cong., 1st Sess., and H. R. Rep. No. 381 accompanying the bill and recommending its passage. Under that measure the taxpayer's liability to its members *"shall be deemed to exist ratably* over the period . . . that such services are required to be rendered, or . . . privileges . . . made available." (Emphasis added.)

[11] The Eighty-fourth Congress started the study of "legislation dealing with prepaid income and reserves for estimated expenses . . . ." S. Rep. No. 372, 84th Cong., 1st Sess. 6.

mobile clubs the very relief that the Association seeks in this Court.

To recapitulate, it appears that Congress has long been aware of the problem this case presents. In 1954 it enacted § 452 and § 462, but quickly repealed them. Since that time Congress has authorized the desired accounting only in the instance of prepaid subscription income, which, as was pointed out in *Michigan,* is ratably earned by performance on "publication dates after the tax year." 353 U. S. 180, 189, note 20. It has refused to enlarge § 455 to include prepaid membership dues. At the very least, this background indicates congressional recognition of the complications inherent in the problem and its seriousness to the general revenue. We must leave to the Congress the fashioning of a rule which, in any event, must have wide ramifications. The Committees of the Congress have standing committees expertly grounded in tax problems, with jurisdiction covering the whole field of taxation and facilities for studying considerations of policy as between the various taxpayers and the necessities of the general revenues. The validity of the long-established policy of the Court in deferring, where possible, to congressional procedures in the tax field is clearly indicated in this case.[12] Finding only that, in light of

[12] In 1955 it was estimated that transitional loss of revenue under § 452 and § 462, repealed that year, would total in excess of a billion dollars. H. R. Rep. No. 293, 84th Cong., 1st Sess. 3. That this impact on the revenue continues to be an important factor in congressional consideration of the problem is indicated by the observation of the House Committee on Ways and Means that a "transitional rule" is necessary "to minimize the initial revenue impact" of the measure currently pending. H. R. Rep. No. 381, 87th Cong., 1st Sess. 4. That the system used by petitioner here is, perhaps, presently not uncommon may be indicated by the fact that during this Term alone several cases involving similar systems have reached this Court.

existing provisions not specifically authorizing it, the exercise of the Commissioner's discretion in rejecting the Association's accounting system was not unsound, we need not anticipate what will be the product of further "study of this entire problem."

Affirmed.

MR. JUSTICE STEWART, whom MR. JUSTICE DOUGLAS, MR. JUSTICE HARLAN and MR. JUSTICE WHITTAKER join, dissenting.

In *Automobile Club of Michigan* the Court pointed out that the method of accounting employed by the taxpayer was "purely artificial," so far as the record there showed. 353 U. S., at 189. Here, by contrast, the petitioner proved, and the Court of Claims found, that the method of accounting employed by the petitioner during the years in issue was in accord with generally accepted commercial accounting principles and practice, was customarily employed by similar taxpayers, and, in the opinion of qualified experts in the accounting field, clearly reflected the petitioner's net income. I do not understand that the Court today questions either that proof or those findings.[1]

The Court thus holds that the Commissioner is authorized to disregard and override a method of reporting income under which prepaid dues are deferred in direct

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[1] The Court does not, for example, challenge Finding No. 26 of the Court of Claims:

"Had the plaintiff recognized, assigned and transferred to its gross income account its monthly receipts of dues collected in advance in the proportion to its cost of servicing all of its members each month, instead of ratably over the membership period of 12 months, the proportion of advance dues which would have been recognized and assigned to gross income during the years in issue herein would have been substantially the same as the gross income from dues as determined and reported by the plaintiff under the method of accounting actually employed."

relation to the taxpayer's costs under its membership contracts. The effect of the Court's decision is to allow the Commissioner to prevent an accrual basis taxpayer from making returns in accordance with the accepted and clearly valid accounting practice of excluding from gross income amounts received as advances until the right to such amounts is earned by rendition of the services for which the advances were made. To permit the Commissioner to do this, I think, is to ignore the clear statutory command that a taxpayer must be allowed to make his returns in accord with his regularly employed method of accounting, so long as that method clearly reflects his income.[2] The result, I am afraid, will be to engender far-reaching confusion and injustice in the administration of the Internal Revenue Laws.[3]

I.

The Commissioner's basic argument against the deferred reporting of prepayments has traditionally been that such a method conflicts with a series of decisions of this Court

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[2] Int. Rev. Code of 1939, § 41, 53 Stat. 24; Int. Rev. Code of 1954, § 446, 26 U. S. C. § 446.

[3] The scope of the problem is well illustrated by the reported cases. See, *e. g.*, *South Dade Farms* v. *Commissioner*, 138 F. 2d 818 (rent received in advance); *Clay Sewer Pipe Assn.* v. *Commissioner*, 139 F. 2d 130 (subscriptions for promotion campaign to be consummated in years subsequent to receipt); *Beacon Publishing Co.* v. *Commissioner*, 218 F. 2d 697 (advance newspaper subscription payments); *Bressner Radio, Inc.*, v. *Commissioner*, 267 F. 2d 520 (advance payments in a television servicing contract); *Schlude* v *Commissioner*, 283 F. 2d 234 (fees for dancing lessons paid in advance); *Moritz* v. *Commissioner*, 21 T. C. 622 ("customers' deposits" on undeveloped photographs); *South Tacoma Motor Co.* v. *Commissioner*, 3 T. C. 411 (proceeds from sale of coupons entitling bearer to garage services in later years); *Your Health Club, Inc.* v. *Commissioner*, 4 T. C. 385 (advance payments for use of gym and other facilities); *Northern Illinois College of Optometry* v. *Commissioner*, 2 CCH Tax Ct. Mem. 664 (tuition paid in advance).

which establish the so-called "claim of right doctrine." [4] In this case the Government abandoned that argument, with good reason. As four Circuits have correctly held, the claim of right doctrine furnishes no support for the Government's position. *Bressner Radio, Inc.*, v. *Commissioner*, 267 F. 2d 520, 524, 525–528 (C. A. 2d Cir.); *Schlude* v. *Commissioner*, 283 F. 2d 234 (C. A. 8th Cir.); *Schuessler* v. *Commissioner*, 230 F. 2d 722, 725 (C. A. 5th Cir.); *Beacon Publishing Co.* v. *Commissioner*, 218 F. 2d 697, 699–701 (C. A. 10th Cir.).[5] A claim of right without "restriction on use" may be the crucial factor in determining that particular funds are includable in gross income. See *North American Oil* v. *Burnet*, 286 U. S. 417; *United States* v. *Lewis*, 340 U. S. 590; *Healy* v. *Commissioner*, 345 U. S. 278. But it hardly follows that all such funds must necessarily be reported by an accrual basis taxpayer as income in the year of receipt, whether or not then earned.

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[4] Almost all of the decisions sustaining the Commissioner's disallowance of deferred reporting of advances by accrual basis taxpayers have relied on the claim of right doctrine. See, *e. g.*, *Andrews* v. *Commissioner*, 23 T. C. 1026, 1032–1033; *South Dade Farms* v. *Commissioner*, 138 F. 2d 818 (C. A. 5th Cir.) (but compare *Schuessler* v. *Commissioner*, 230 F. 2d 722 (C. A. 5th Cir.)); *Clay Sewer Pipe Assn.* v. *Commissioner*, 139 F. 2d 130 (C. A. 3d Cir.); *Automobile Club of Michigan* v. *Commissioner*, 230 F. 2d 585, 591 (C. A. 6th Cir.), aff'd on other grounds, 353 U. S. 180. The Tax Court has carried the claim of right doctrine to the point where it was found applicable to advance fees which were due but not yet paid. *Your Health Club, Inc.* v. *Commissioner*, 4 T. C. 385.

[5] The rejection of the applicability of the claim of right doctrine in these cases has been enthusiastically approved by legal commentators. See, *e. g.*, Gelfand, The "Claim of Right" Doctrine, 33 Taxes 726; Wolder, Deduction of Reserves for Future Expenses and Deferring of Prepaid Income, 34 Taxes 524; Note, 59 Col. L. Rev. 942, 946. But cf. Freeman, Tax Accrual Accounting for Contested Items, 56 Mich. L. Rev. 727, 730–732, 747.

The Government shifted its argument in this case to the contention that the "annual accounting requirement" demands that "[n]either income nor deduction items may be accelerated or postponed from one taxable year to another in order to reflect the long-term economic result of a particular transaction or group of transactions." The Government finds a basis for this argument in such cases as *Security Mills Co.* v. *Commissioner,* 321 U. S. 281; *Brown* v. *Helvering,* 291 U. S. 193; *Burnet* v. *Sanford & Brooks Co.,* 282 U. S. 359; *Guaranty Trust Co.* v. *Commissioner,* 303 U. S. 493; and *Heiner* v. *Mellon,* 304 U. S. 271.

The Court today does not base its decision on this theory, presumably because the Court believes, as I do, that the theory is not valid. Putting to one side the point that many of the cases relied on involved cash basis taxpayers,[6] these decisions no more pertain to deferred reporting of totally unearned receipts than do the claim of right decisions. These cases, like the claim of right cases, start from the premise that the income in question

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[6] See, *e. g., Guaranty Trust Co.* v. *Commissioner,* 303 U. S. 493; *Burnet* v. *Sanford & Brooks Co.,* 282 U. S. 359. In the latter case, the Court took special notice of the fact that the taxpayer had not "attempted to avail itself" of the accrual sytem under which "expenses of a transaction incurred in one year might be offset by the amounts actually received from it in another." 282 U. S., at 366. In *Security Mills Co.* v. *Commissioner,* 321 U. S. 281, the taxpayer was attempting to use what the Court described as "a divided and inconsistent method of accounting not properly to be denominated either a cash or an accrual system." 321 U. S., at 287. In *Brown* v. *Helvering,* 291 U. S. 193, the taxpayer was on an accrual basis generally, but its assertion of a right to defer reporting "overriding commissions" constituted a change in accounting procedures as to the acceptance of which the Commissioner was said to have "wide discretion." 291 U. S., at 204. See the discussion in *Bressner Radio, Inc.,* v. *Commissioner,* 267 F. 2d 520, 525–526.

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has been fully earned.[7] The underlying premise of the annual accounting requirement is that *otherwise reportable income* derived from a transaction cannot be excluded from gross income in order to let the taxpayer wait to see in a later year how the over-all transaction turns out.[8] That is not the issue in this case. The question here is whether any reportable income has been derived from a transaction when payments are received in advance of performance.

Although wisely rejecting the claim of right and annual accounting arguments, the Court decides this case upon grounds which seem to me equally invalid. I can find nothing in *Automobile Club of Michigan* which controls disposition of this case. And the legislative history upon which the Court alternatively relies seems to me upon examination to be singularly unconvincing.

In *Michigan* there was no offer of proof to show the rate at which the taxpayer fulfilled its obligations under its membership contracts. The deferred reporting of prepaid dues was, therefore, rejected in that case simply because there was no showing of a correlation between the amounts deferred and the costs incurred by the taxpayer in carry-

[7] With the possible exception of contingent related expenditures, which cannot be accurately measured. See *Brown* v. *Helvering*, 291 U. S. 193, 200–201.

[8] This becomes entirely clear upon examination of the cases upon which the Government relies. For example, in *Heiner* v. *Mellon*, 304 U. S. 271, members of partnerships which had been formed to liquidate two corporations attempted to defer reporting income earned during the year until it could be determined in a subsequent year whether the partnerships' over-all liquidation enterprise had been profitable. The Court held that such a postponement was barred by the annual accounting principle. In *Security Mills Co.* v. *Commissioner*, 321 U. S. 281, the taxpayer attempted to reopen a prior year's return so as to deduct amounts which it had subsequently paid out of receipts earned in that year. Again the Court relied on the annual accounting principle in denying the taxpayer's claim.

ing out its obligations to its members. Until today, that case has been recognized as one that simply held that, in the absence of proof that the proration used by the taxpayer reasonably matched actual expenses with the earning of related revenue, the Commissioner was justified in rejecting the taxpayer's proration. I am hardly alone in thinking that *Michigan* was decided upon the very premise that a realistic deferral of income based upon proof of average costs of service during identifiable periods would be entirely permissible. See *Bressner Radio, Inc.*, v. *Commissioner*, 267 F. 2d 520, 526–529.[9] Such proof was concededly adduced in this case.

As to the enactment and repeal of § 452 and § 462, upon which the Court places so much reliance, there are, at the outset, obvious difficulties in relying on what happened in 1954 and 1955 to ascertain the meaning of § 41 of the 1939 Code. See *Fogarty* v. *United States*, 340 U. S. 8, 13–14; *Gemsco, Inc.*, v. *Walling*, 324 U. S. 244, 265; *Cammarano* v. *United States*, 358 U. S. 498, 510. But these problems aside, I think that the enactment and subsequent repeal of § 452 and § 462 give no indication of Congressional approval of the position taken by the Commissioner in this case. If anything, the legislative action leads to the contrary impression.

The statutory provisions in question were passed as part of a general revision of the internal revenue laws in 1954. Section 452 permitted an accrual basis taxpayer to defer the inclusion of advances in gross income until they were earned.[10] Most significantly, a taxpayer could shift to

[9] See also Hoffman, Accounting Treatment Counts in Determining Net Taxable Income, 35 Taxes 918, 921; Behren, Prepaid Income-Accounting Concepts and The Tax Law, 15 Tax L. Rev. 343, 359–360; Note, 67 Yale L. J. 1425, 1439–1440.

[10] There were certain restrictions upon the period over which the advances could be deferred, but these are not relevant for our purposes here. See Proposed Treas. Reg. § 1.452, 20 Fed. Reg. 515;

this method without the consent of the Commissioner. Section 462, which permitted the deduction of anticipated expenses, was not aimed specifically at the problem of reporting advances.[11] The function of the provisions was to bring "[t]ax accounting . . . more nearly in line with accepted business accounting by allowing prepaid income to be taxed as it is earned rather than as it is received, and by allowing reserves to be established for known future expenses." [12]

In seeking to accomplish this objective, Congress recognized that as a result of "court decisions and rulings," the claim of right approach had been used to require reporting for the year of receipt all payments "subject to free and unrestricted use . . . even though the payments are for goods or services to be provided by the taxpayer at a future time." H. R. Rep. No. 1337, 83d Cong., 2d Sess.

Wolder, Deduction of Reserves for Future Expenses and Deferring of Prepaid Income, 34 Taxes 524; Bierman and Helstein, Accounting for Prepaid Income and Estimated Expenses under the Internal Revenue Code of 1954, 10 Tax L. Rev. 83, 93–96. Section 452 specifically envisaged the deferral of club dues. See H. R. Rep. No. 1337, 83d Cong., 2d Sess. 48.

[11] See, *e. g.*, S. Rep. No. 372, 84th Cong., 1st Sess. 2. Section 462 provided that, "In computing taxable income for the taxable year, there shall be taken into account (in the discretion of the Secretary or his delegate) a reasonable addition to each reserve for estimated expenses . . . ." § 462 (a), 68A Stat. 158. "Estimated expense" was defined as a deduction "(A) part or all of which would . . . be required to be taken into account for a subsequent taxable year; (B) which is attributable to the income of the taxable year or prior taxable years for which an election under this section is in effect; and (C) which the Secretary or his delegate is satisfied can be estimated with reasonable accuracy." § 462 (d) (1), 68A Stat. 158. See Bierman and Helstein, Accounting for Prepaid Income and Estimated Expenses under the Internal Revenue Code of 1954, 10 Tax L. Rev. 83, 103–113.

[12] S. Rep. No. 372, 84th Cong., 1st Sess. 3 (quoting from the tax recommendation in the Presidential budget message of 1954).

48, A159.[13] Congressional awareness of administrative and judicial misapplication of the claim of right doctrine clearly did not imply approval of it. For by 1954, "[i]t was long recognized that the difficulty lay, not with the statute, but with administrative and court interpretation."[14] And while the Committee reports contain no express rejection of the Commissioner's interpretation of the 1939 statute, the language used in explaining the need for a change certainly indicates disapproval.[15]

Although § 452 and § 462 were short-lived, the shape of the decisional law with respect to § 41 of the 1939 Code changed considerably during the interval between the passage and repeal of the new sections. In *Beacon Publishing Co.* v. *Commissioner,* 218 F. 2d 697, the Tenth Circuit rejected the Commissioner's reliance on the claim of right rationale and found that the deferment of

[13] There were some exceptions to the rigid application of this rule which had been recognized. See I. T. 3369, 1940–1 Cum. Bull. 46 (permitting deferred reporting of subscriptions for publishers who had consistently followed that practice); I. T. 2080, III–2 Cum. Bull. 48 (1924) (permitting deferment of receipts from sales of tickets for tourist cruises), but compare *National Airlines, Inc.* v. *Commissioner,* 9 T. C. 159. See also *Veenstra & DeHaan Coal Co.* v. *Commissioner,* 11 T. C. 964; *Summit Coal Co.* v. *Commissioner,* 18 B. T. A. 983.

[14] Freeman, Tax Accrual Accounting for Contested Items, 56 Mich. L. Rev. 727, 729, n. 9. See Bierman and Helstein, Accounting for Prepaid Income and Estimated Expenses under the Internal Revenue Code of 1954, 10 Tax L. Rev. 83, 84.

[15] "Present law provides that the net income of a taxpayer shall be computed in accordance with the method of accounting regularly employed by the taxpayer, if such method clearly reflects the income and the regulations state that approved standard methods of accounting will ordinarily be regarded as clearly reflecting taxable income. Nevertheless, as a result of court decisions and rulings, there have developed many divergencies between the computation of income for tax purposes and income for business purposes as computed under generally accepted accounting principles. . . ." H. R. Rep. No. 1337, 83d Cong., 2d Sess. 48.

advances in accord with accrual principles did "clearly reflect . . . income" under § 41. At about the same time a Ninth Circuit decision permitted income received from the sale of goods to be offset by a deduction for the future expense of shipping the goods. *Pacific Grape Products Co.* v. *Commissioner,* 219 F. 2d 862.

When Congress repealed § 452 and § 462, the record shows that it was fully aware of these decisions. Congress recognized that the rationale of these cases would produce a complete reversal of the previous administrative position with respect to the reporting of unearned receipts under § 41 and its counterpart under the 1954 Code, § 446. Congressional intent with respect to this possibility was entirely clear—the trend of judicial decisions should be allowed to run its course *without any inference of disapproval being drawn from the repeal of § 452 and § 462.* This intent was evidenced in the assurances which the House Ways and Means Committee demanded and received from the Secretary of the Treasury, who had sought the repeal of the two sections. In a letter to the Chairman of the Committee, the Secretary stated:

> "My dear Mr. Chairman: This letter will confirm the statements made to you today by Treasury representatives.
>
> . . . . . .
>
> "Furthermore, the Treasury Department will not consider the repeal of section 452 as any indication of congressional intent as to the proper treatment of prepaid subscriptions *and other items of prepaid income, either under prior law or under other provisions of the 1954 code.* In other words, the repeal of section 452 will not be considered by the Department as either the acceptance or the rejection by Congress of the decision in *Beacon Publishing Co. v. Commis-*

sioner (218 F. (2d) 697, C. A. 10, 1955) or any other judicial decisions.

"It is my understanding *that the foregoing is consistent with the desire of your committee, with which I agree,* that the repeal of sections 452 and 462 should operate simply to reestablish the principles of law which would have been applicable if sections 452 and 462 had never been enacted." H. R. Rep. No. 293, 84th Cong., 1st Sess. 5. (Emphasis supplied.)

The same viewpoint was expressed in the Senate Report, which stated:

"Another aspect of the uncertainty with respect to subscription income if section 452 is repealed arises from a recent circuit court decision in *Beacon Publishing Company* v. *Commissioner* (C. C. A. 10th, January 3, 1955). The court in this case held that the deferral of prepaid subscription income was in fact proper under the accrual method of accounting. The Secretary of the Treasury in the letter previously referred to which he sent to the chairman of the House Committee on Ways and Means indicated that the repeal of section 452 would not be taken as an indication by the Treasury Department of congressional intent as to the proper treatment of prepaid subscription income under prior law or under other provisions of the 1954 code. He also indicated that the repeal of section 452 will not be considered by the Department as either acceptance or rejection by Congress of the decision in *Beacon Publishing Company* v. *Commissioner* or in any other judicial decisions. . . .

"Uncertainty will also exist in other areas with the repeal of these two provisions. In *Pacific Grape Products* (C. C. A. 9th, February 10, 1955), for example, the circuit court held that certain freight and

> shipping expenses incurred after the end of the year could be accrued for tax purposes as of the end of the year. An extension of the principles laid down in this case might well lead the courts in the future to permit the accrual of most estimated expenses which would be covered by section 462 even though this section is repealed." S. Rep. No. 372, 84th Cong., 1st Sess. 5–6.[16]

To my mind, this legislative history shows that Congress made every effort to dissuade the courts from doing exactly what the Court is doing in this case—drawing from the repeal of § 452 an inference of Congressional disapproval of deferred reporting of advances.[17] But even if the legislative history on this point were hazy, the same conclusion would have to be reached upon examination of Congressional purpose in repealing § 452 and § 462. Cf. *United States* v. *Benedict,* 338 U. S. 692, 696. For the fact of the matter is, contrary to the impression left by the Court's opinion, that the reasons for rejecting § 452 and § 462 were entirely consistent with accepting the deferred reporting of receipts in a case like this. Sections 452 and 462 were repealed *solely* because of a prospective loss of revenue during the first year in which taxpayers would take advantage of the new sections.[18] Insofar as the reporting of advances was concerned, that

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[16] See also H. R. Rep. No. 293, 84th Cong., 1st Sess. 4–5.

[17] It is to be noted that no such inference was relied upon in the *Michigan* case, although the same arguments with respect to §§ 452 and 462 were pressed upon the Court by the Government. See Brief for Respondent, pp. 62–65, *Automobile Club of Michigan* v. *Commissioner,* 353 U. S. 180.

[18] See H. R. Rep. No. 293, 84th Cong., 1st Sess. 2–5; S. Rep. No. 372, 84th Cong., 1st Sess. 4–5; Hearings Before the Senate Finance Committee on H. R. 4725, 84th Cong., 1st Sess. 6. The prospective loss was more than ten times the original estimate of 47 million. *Ibid.* See Note, 67 Yale L. J. 1425, 1432, n. 25.

loss of revenue would have occurred solely as a consequence of taxpayers changing their method of reporting, without the necessity of securing the Commissioner's consent, to that authorized under § 452 and § 462.[19] The taxpayer who shifted his basis for reporting advances would have been allowed what was commonly termed a "double deduction" during the transitional year.[20] Under § 462, deductions could be taken in the year of change for expenses attributable to advances taxed in prior years under a claim of right theory, as well as for reserves for future expenditures attributable to advances received and reported during that year. Similarly, under § 452, prepayments received during the year of transition would be excluded from gross income while current expenditures attributable to past income would still be deductible.[21]

The Congressional purpose in repealing § 452 and § 462—maintenance of the revenues—does not, however, require disapproval of sound accounting principles in cases of taxpayers who, like the petitioner, have customarily and regularly used a sound accrual accounting method in reporting advance payments. No transition

[19] There was also a problem of expanded use of reserves for estimated expenditures under § 462 for items like vacation pay which were not related to the reporting of advances. See Hearings Before the Senate Finance Committee on H. R. 4725, 84th Cong., 1st Sess. 5, 9; Sporrer, The Past and Future of Deferring Income and Reserving for Expenses, 34 Taxes 45, 55–56; Griswold, Federal Taxation (5th ed. 1960), 497–498.

[20] See S. Rep. No. 372, 84th Cong., 1st Sess. 4; Hearings Before the Senate Finance Committee on H. R. 4725, 84th Cong., 1st Sess., at 7, 8, 10; Dakin, The Change from Cash to Accrual Accounting for Federal Income Tax Purposes—Pyramided Income, Double Deductions and Double Talk, 51 Nw. U. L. Rev. 515, 530–538; Griswold, Federal Taxation (5th ed. 1960), 497–498; Note, 67 Yale L. J. 1425, 1430.

[21] Only one-tenth of the estimated loss during the transitional year was attributable to § 452. See Hearings Before the Senate Finance Committee on H. R. 4725, 84th Cong., 1st Sess. 21.

is involved, and no "double deduction" is possible. Moreover, taxpayers formerly reporting advances as income in the year of receipt can now shift to a true accrual system of reporting only with the approval of the Commissioner. See Treas. Reg. 111, § 29.41–2 (1943); Treas. Reg. 118, § 39.41–2 (c)(1953); Int. Rev. Code of 1954, § 446 (e).[22] Before giving his approval the Commissioner can be expected to insist upon adjustments in the taxpayer's transition year to forestall any revenue loss which would otherwise result from the change in accounting method. See *Kahuku Plantation Co.* v. *Commissioner,* 132 F. 2d 671, 674; 2 Mertens, Law of Federal Income Taxation, §§ 12.21, 12.21a. Cf. *Brown* v. *Helvering,* 291 U. S. 193, 204.

In short, even if the legislative history of the repeal of § 452 and § 462 did not clearly indicate, as it does, that the repeal of those sections should have no bearing upon judicial determination of whether the deferred reporting of advances "clearly reflects income," the purpose of the Congress which repealed those provisions would lead to the same conclusion. It need hardly be added that the subsequent legislative activity cited by the Court in no way alters this conclusion. Contrary to the Court's suggestion, the "relief that the Association seeks in this Court" is far short of what was sought in 1958 in urging that the coverage of § 455 be extended to prepaid automobile club membership dues. As enacted, § 455 was not limited in application to publishers previously reporting prepaid subscriptions on a deferral basis. See I. T. 3369, 1940–1 Cum. Bull. 46. It applied to all publishers using the accrual method and permitted a change

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[22] See also Treas. Reg. § 1.446–1 (e)(2)(1957); *Brown* v. *Helvering,* 291 U. S. 193, 204–205; *Advertisers Exchange, Inc.* v. *Commissioner,* 25 T. C. 1086; 2 Mertens, Law of Federal Income Taxation, §§ 12.19–12.20.

to deferred reporting of subscriptions for the year 1958 *without consent* of the Commissioner. 26 U. S. C. § 455 (c)(3)(B).

II.

I think the Government's position in this case is at odds with the statutes,[23] regulations,[24] and court decisions,[25]

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[23] The Revenue Act of 1913, 38 Stat. 114, provided only for a strict cash receipts and disbursements method of accounting. See *e. g.*, § II B, 38 Stat. 167. In the 1916 Act, the sections dealing with permissible methods of computing income were revised to provide that:

"A corporation . . . keeping accounts upon any basis other than that of actual receipts and disbursements, unless such other basis does not clearly reflect its income, may, subject to regulations made by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, make its return upon the basis upon which its accounts are kept, . . ." § 13 (d), 39 Stat. 771. See also § 8 (g), 39 Stat. 763 (identical provision with respect to returns filed by individuals).

These sections were designed specifically to permit accrual accounting. See H. R. Rep. No. 922, 64th Cong., 1st Sess. 4; *United States* v. *Anderson*, 269 U. S. 422, 439–441. In the Revenue Act of 1918, the necessity of obtaining special permission to use the accrual method was omitted, see § 212 (b), 40 Stat. 1064–1065, and the provision permitting the use of accrual accounting remained substantially the same for the next thirty-six years. See Int. Rev. Code of 1939, § 41, 53 Stat. 24; *Reubel* v. *Commissioner*, 1 B. T. A. 676, 677–678. In 1954 the pertinent provision was again changed, with specific mention of the "accrual method." See Int. Rev. Code of 1954, § 446, 26 U. S. C. § 446. See generally May, Accounting and the Accountant in the Administration of Income Taxation, 47 Col. L. Rev. 377, 380–382.

[24] See, *e. g.*, T. D. 2433, 19 Treas. Dec. 5 (1917); Treas. Reg. 45, Art. 23, Art. 111 (1920); Treas. Reg. 118, § 39.41 (1953); Treas. Reg. § 1.446–1 (1957).

[25] See, *e. g.*, *United States* v. *Anderson*, 269 U. S. 422; *Niles Bement Pond Co.* v. *United States*, 281 U. S. 357; *Aluminum Castings Co.* v. *Routzahn*, 282 U. S. 92; *Spring City Co.* v. *Commissioner*, 292 U. S. 182, 184–185; see also *Weed & Brothers* v. *United States*, 69 Ct. Cl. 246, 251–257, 38 F. 2d 935, 938–940.

which, since 1916, have recognized that realistic accrual accounting does "clearly reflect income." If I am correct, the law did not give the Commissioner any "discretion . . . not to accept the taxpayer's accounting system."

The basic concept of including advances in gross income only as they are earned is but an aspect of accrual accounting principles which have consistently received judicial approval. We have, for example, often recognized that deductions for business expenses must be reported as soon as the obligation to pay becomes "certain." See, *e. g., United States* v. *Anderson,* 269 U. S. 422; *American National Co.* v. *United States,* 274 U. S. 99; *Niles Bement Pond Co.* v. *United States,* 281 U. S. 357, 360; *United States* v. *Olympic Radio & Television,* 349 U. S. 232, 236. This may be before or after cash payment is made,[26] or even before it is due.[27] The controlling factor is not the flow of cash, but the "economic and bookkeeping" principles with which § 41 is concerned. *United States* v. *Anderson, supra,* at 441. See also *American National Co.* v. *United States, supra.* These principles are at the foundation of the so-called "all events" test for determining the accrual of deductions. See *United States* v. *Anderson, supra,* at 441; [28] *United States* v. *Consoli-*

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[26] Compare, *e. g., Aluminum Castings Co.* v. *Routzahn,* 282 U. S. 92 (deduction taken in year prior to cash disbursement) with *Shelby Salesbook Co.* v. *United States,* 104 F. Supp. 237 (deduction taken in later year).

[27] *United States* v. *Anderson,* 269 U. S. 422; *American National Co.* v. *United States,* 274 U. S. 99; *Aluminum Castings Co.* v. *Routzahn,* 282 U. S. 92.

[28] The Court there held that an accrual taxpayer should have deducted a tax expense in 1916 so that it properly could have been offset against the profits from sales in 1916 upon which the tax was levied. The Court rejected the contention that the tax could not accrue in 1916 because it was not due until 1917. It stated:

"In a technical legal sense it may be argued that a tax does not accrue until it has been assessed and becomes due; but it is also true that in advance of the assessment of a tax, all the events may

dated Edison Co., 366 U. S. 380, 384–386. The same principles are applicable to the accrual of income. See *Continental Tie & L. Co.* v. *United States*, 286 U. S. 290. As has been correctly noted, "[i]t is a necessary corollary of this 'economic and bookkeeping' proposition" upon which *Anderson* rested that receipts are not reportable in income until "substantially 'all the events' have occurred, both as to the cost and time of performance, which must occur in order to discharge the liability to perform which was given by [the taxpayer] in return for the receipt." *Bressner Radio, Inc.*, v. *Commissioner*, 267 F. 2d 520, 524. See also *United States* v. *Anderson, supra*, at 440; *Beacon Publishing Co.* v. *Commissioner*, 218 F. 2d 697, 699. Indeed, "accrual" of income has been commonly defined in terms of "earnings" from the sale of goods or the performance of services. See, *e. g.*, *Spring City Co.* v. *Commissioner*, 292 U. S. 182, 184–185; Stanley and Kilcullen, The Federal Income Tax (3d ed. 1955), 190.[29] In reject-

occur which fix the amount of the tax and determine the liability of the taxpayer to pay it. In this respect, for purposes of accounting and of ascertaining true income for a given accounting period, the munitions tax here in question did not stand on any different footing than other accrued expenses appearing on appellee's books. In the economic and bookkeeping sense with which the statute and Treasury decision were concerned, the taxes had accrued. It should be noted that § 13 (d) makes no use of the words 'accrue' or 'accrual' but merely provides for a return upon the basis upon which the taxpayer's accounts are kept, if it reflects income—which is precisely the return insisted upon by the Government." 269 U. S., at 441.

[29] The authors there state:

"In the ordinary case, accrual precedes actual receipt since there is an accrual when there is a *right* to receive. But in some cases items are received before they are earned, and then the receipt precedes the accrual."

See also *Continental Tie & L. Co.* v. *United States*, 286 U. S. 290; *Georgia School-Book Depository, Inc.* v. *Commissioner*, 1 T. C. 463; 1961 C. C. H. Tax Reporter § 2820.025 ("On the accrual basis, income is reported when earned"); Freeman, Tax Accrual Acounting for Contested Items, 56 Mich. L. Rev. 727, 728.

ing petitioner's method of allocating prepaid advances, the Court, I think, disregards these basic principles.

The net effect of compelling the petitioner to include all dues in gross income in the year received is to force the petitioner to utilize a hybrid accounting method—a cash basis for dues and an accrual basis for all other items. *Schlude* v. *Commissioner,* 283 F. 2d 234, 239. Cf. *Commissioner* v. *South Texas Co.,* 333 U. S. 496, 501. For taxpayers generally the enforcement of such a hybrid accounting method may result in a gross distortion of actual income, particularly in the first and last years of doing business. On the return for the first year in which advances are received, a taxpayer will have to report an unrealistically high net income, since he will have to include unearned receipts, without any offsetting deductions for the future cost of earning those receipts. On subsequent tax returns, each year's unearned prepayments will be partially offset by the deduction of current expenses attributable to prepayments taxed in prior years. Even then, however, if the taxpayer is forbidden to correlate earnings with related expenditures, the result will be a distortion of normal fluctuations in the taxpayer's net income. For example, in a year when there are low current expenditures because of fewer advances received in the preceding year, the result may be an inflated adjusted gross income for the current year. Finally, should the taxpayer decide to go out of business upon fulfillment of the contractual obligations already undertaken, in the final year there will be no advances to report and many costs attributable to advances received in prior years. The result will be a grossly unrealistic reportable net loss.

The Court suggests that the application of sound accrual principles cannot be accepted here because deferment is based on an estimated rate of earnings, and because this estimate, in turn, is based on average, not

individual, costs. It is true, of course, that the petitioner cannot know what service an individual member will require or when he will demand it. Accordingly, in determining the portion of its outstanding contractual obligations which have been discharged during a particular period (and hence the portion of receipts earned during that period), the petitioner can only compare the total expenditures for that period against estimated average expenditures for the same number of members over a full contract term. But this use of estimates and averages is in no way inconsistent with long-accepted accounting practices in reflecting and reporting income.

As the Government has pointed out in past litigation, "many business concerns . . . keep accounts on an accrual basis and have to estimate for the tax year the amount to be received on transactions undoubtedly allocable to such year." *Continental Tie & L. Co.* v. *United States,* 286 U. S. 290, 295–296. Similarly, the deduction of future expenditures which have already accrued often requires estimates like those involved here. See, *e. g., Harrold* v. *Commissioner,* 192 F. 2d 1002; *Schuessler* v. *Commissioner,* 230 F. 2d 722; *Denise Coal Co.* v. *Commissioner,* 271 F. 2d 930, 934–937; *Hilinski* v. *Commissioner,* 237 F. 2d 703. Finally, it is to be noted that the regulations under both the 1939 and 1954 Codes permit various methods of reporting income which require the use of estimates.[30] In the absence of any showing that the estimates used here were faulty, I think the law did not

[30] See, *e. g.,* Treas. Reg. 111, § 29.42–4 (1943), Treas. Reg. 118, § 39.42–4 (1953), and Treas. Reg. § 1.451–3 (1957) (providing for the percentage of completion method of reporting income on long-term contracts); Treas. Reg. 111, § 29.42–5 (1943), Treas. Reg. 118, § 39.42–5 (1953), and Treas. Reg. § 1.451–4 (1957) (providing for the deduction for redemption of trading stamps based upon "The rate, in percentage, which the stamps redeemed in each year bear to the total stamps issued in such year"). See generally *Brown & Williamson Tobacco Corp.* v. *Commissioner,* 16 T. C. 432.

permit the Commissioner to forbid the use of standard accrual methods simply upon the ground that estimates were necessary to determine what the rate of deferral should be.

Similarly, it is not relevant that the petitioner "defers receipt . . . of dues to a taxable period in which no, some, or all the services paid for by those dues may or may not be rendered." The fact of the matter is that what the petitioner has an obligation to provide, *i. e.*, the constant readiness of services if needed, will with certainty be provided during the period to which deferment has been made. Averages are frequently utilized in tax reporting. In computing the value of work in process, in distributing overhead to product cost, and in various other areas, the use of averages has long been accepted. See, *e. g., Rookwood Pottery Co.* v. *Commissioner,* 45 F. 2d 43; *Eatonville Lumber Co.* v. *Commissioner,* 10 B. T. A. 232. The use of an "average cost" is particularly appropriate here where the dues are earned by making services continuously available. The cost of doing so must necessarily be based on composite figures.

For these reasons I think that the petitioner's original returns clearly reflected its income, that the Commissioner was therefore without authority under the law to override the petitioner's accounting method, and that the judgment should be reversed.

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.

No. 225. Argued March 30, 1961.—Decided June 19, 1961.

Proceeding under certain Missouri statutes, as supplemented by a rule of the State Supreme Court, a city police officer appeared in a state trial court and filed a sworn complaint that each of the appellants, a wholesale distributor of magazines, newspapers and books and the operators of five retail newsstands, kept "obscene" publications for sale. In an *ex parte* proceeding, without granting appellants a hearing or even seeing any of the publications in question, and without specifying any particular publications, the trial judge issued search warrants authorizing police officers to search appellants' premises and seize all "obscene" material. Different police officers searched appellants' premises and, after hasty examination, seized all copies of all publications which, in their judgment, were obscene. Nearly two weeks later, appellants were given a hearing, at which they moved to quash the search warrants, for return of the seized publications and for suppression of their use in evidence, on the ground that their seizure violated the protection of free speech and press guaranteed by the Fourteenth Amendment. These motions were denied and, over two months after the seizure, the trial court found that 100 of the seized publications were obscene and it ordered their destruction; but it also found that 180 other seized publications were not obscene and it ordered them returned to their owners. The State Supreme Court sustained the validity of these procedures, and an appeal was taken to this Court. *Held:*

1. This Court had jurisdiction of the appeal under 28 U. S. C. § 1257 (2). P. 721.

2. The search and seizure procedures applied in this case lacked the safeguards to nonobscene material which the Due Process Clause of the Fourteenth Amendment requires to prevent erosion of the constitutional guaranties of freedom of speech and press, and the judgment is reversed. Pp. 729–738.

(a) Under the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity

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without regard to the possible consequences for constitutionally protected speech. Pp. 729–731.

(b) As applied in this case, Missouri's procedures confided to law enforcement officials broad discretion to seize allegedly obscene publications without adequate safeguards to assure nonobscene material the constitutional protection to which it is entitled. Pp. 731–733.

(c) *Kingsley Books, Inc.*, v. *Brown*, 354 U. S. 436, distinguished. Pp. 734–738.

334 S. W. 2d 119, reversed.

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

Fred L. Howard, Assistant Attorney General of Missouri, argued the cause for appellees. With him on the brief were *Thomas F. Eagleton,* Attorney General, and *John C. Bauman,* Assistant Attorney General.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This appeal presents the question whether due process under the Fourteenth Amendment was denied the appellants by the application in this case of Missouri's procedures authorizing the search for and seizure of allegedly obscene publications preliminarily to their destruction by burning or otherwise if found by a court to be obscene. The procedures are statutory, but are supplemented by a rule of the Missouri Supreme Court.[1] The warrant for search for and seizure of obscene material issues on a sworn complaint filed with a judge or magis-

[1] These procedures are separate from and in addition to the State's criminal statutes. See *State* v. *Mac Sales Co.*, 263 S. W. 2d 860. The criminal statutes are Mo. Rev. Stat., §§ 563.270, 563.280, 563.290; see also § 563.310.

trate.[2] If the complainant states "positively and not upon information or belief," or states "evidential facts from which such judge or magistrate determines the existence of probable cause" to believe that obscene material "is being held or kept in any place or in any building," "such judge or magistrate shall issue a search warrant directed to any peace officer commanding him to search the place therein described and to seize and bring before such judge or magistrate the personal property therein described." [3] The owner of the property is not afforded a

[2] Mo. Rev. Stat., § 542.380, in pertinent part provides:

"Upon complaint being made, on oath, in writing, to any officer authorized to issue process for the apprehension of offenders, that any of the property or articles herein named are kept within the county of such officer, if he shall be satisfied that there is reasonable ground for such complaint, shall issue a warrant to the sheriff or any constable of the county, directing him to search for and seize any of the following property or articles:

. . . . . .

"(2) Any of the following articles, kept for the purpose of being sold, published, exhibited, given away or otherwise distributed or circulated, viz.: obscene, lewd, licentious, indecent or lascivious books, pamphlets, ballads, papers, drawings, lithographs, engravings, pictures, models, casts, prints or other articles or publications of an indecent, immoral or scandalous character, or any letters, handbills, cards, circulars, books, pamphlets or advertisements or notices of any kind giving information, directly or indirectly, when, where, how or of whom any of such things can be obtained." These procedures also govern seizure and condemnation of gambling paraphernalia, contraceptive devices, and tools and other articles used to manufacture or produce such items. Fraudulent, forged, and counterfeited writings and other articles, and the instruments used to make them, are also declared contraband and subject to seizure. § 542.440.

[3] Missouri Supreme Court Rule 33.01 of the Rules of Criminal Procedure provides:

"(a) If a complaint in writing be filed with the judge or magistrate of any court having original jurisdiction to try criminal offenses stating that personal property . . . the seizure of which under search warrant is now or may hereafter be authorized by any statute of this

hearing before the warrant issues; the proceeding is *ex parte*. However, the judge or magistrate issuing the warrant must fix a date, not less than five nor more than 20 days after the seizure, for a hearing to determine whether the seized material is obscene.[4] The owner of the material may appear at such hearing and defend

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State, is being held or kept at any place or in any building . . . within the territorial jurisdiction of such judge or magistrate, and if such complaint be verified by the oath or affirmation of the complainant and states such facts positively and not upon information or belief; or if the same be supported by written affidavits verified by oath or affirmation stating evidential facts from which such judge or magistrate determines the existence of probable cause, then such judge or magistrate shall issue a search warrant directed to any peace officer commanding him to search the place therein described and to seize and bring before such judge or magistrate the personal property therein described.

"(b) The complainant and the warrant issued thereon must contain a description of the personal property to be searched for and seized and a description of the place to be searched, in sufficient detail and particularity to enable the officer serving the warrant to readily ascertain and identify the same."

[4] Mo. Rev. Stat., § 542.400 provides:

"The judge or magistrate issuing the warrant shall set a day, not less than five days nor more than twenty days after the date of such service and seizure, for determining whether such property is the kind of property mentioned in section 542.380, and shall order the officer having such property in charge to retain possession of the same until after such hearing. Written notice of the date and place of such hearing shall be given, at least five days before such date, by posting a copy of such notice in a conspicuous place upon the premises in which such property is seized, and by delivering a copy of such notice to any person claiming an interest in such property, whose name may be known to the person making the complaint or to the officer issuing or serving such warrant, or leaving the same at the usual place of abode of such person with any member of his family or household above the age of fifteen years. Such notice shall be signed by the magistrate or judge or by the clerk of the court of such judge."

against the charge.[5] No time limit is provided within which the judge must announce his decision. If the judge finds that the material is obscene, he is required to order it to be publicly destroyed, by burning or otherwise; if he finds that it is not obscene, he shall order its return to its owner.[6]

The Missouri Supreme Court sustained the validity of the procedures as applied in this case. 334 S. W. 2d 119. The appellants brought this appeal here under 28 U. S. C. § 1257 (2). We postponed consideration of the question of our jurisdiction to the hearing of the case on the merits. 364 U. S. 811. We hold that the appeal is properly here, see *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282, and turn to the merits.

Appellant, Kansas City News Distributors, managed by appellant, Homer Smay, is a wholesale distributor of magazines, newspapers and books in the Kansas City area. The other appellants operate five retail newsstands

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[5] Mo. Rev. Stat., § 542.410 provides:

"Rights of property owner.—The owner or owners of such property may appear at such hearing and defend against the charges as to the nature and use of the property so seized, and such judge or magistrate shall determine, from the evidence produced at such hearing, whether the property is the kind of property mentioned in section 542.380."

[6] Mo. Rev. Stat., § 542.420 provides:

"Disposition of property.—If the judge or magistrate hearing such cause shall determine that the property or articles are of the kind mentioned in section 542.380, he shall cause the same to be publicly destroyed, by burning or otherwise, and if he find that such property is not of the kind mentioned, he shall order the same returned to its owner. If it appears that it may be necessary to use such articles or property as evidence in any criminal prosecution, the judge or magistrate shall order the officer having possession of them to retain such possession until such necessity no longer exists, and they shall neither be destroyed nor returned to the owner until they are no longer needed as such evidence."

in Kansas City. In October 1957, Police Lieutenant Coughlin of the Kansas City Police Department Vice Squad was conducting an investigation into the distribution of allegedly obscene magazines. On October 8, 1957, he visited Distributors' place of business and showed Smay a list of magazines. Smay admitted that his company distributed all but one of the magazines on the list. The following day, October 9, Lieutenant Coughlin visited the five newsstands and purchased one magazine at each.[7] On October 10 the officer signed and filed six sworn complaints in the Circuit Court of Jackson County, stating in each complaint that "of his own knowledge" the appellant named therein, at its stated place of business, "kept for the purpose of [sale] . . . obscene . . . publications . . . ." No copy of any magazine on Lieutenant Coughlin's list, or purchased by him at the newsstands, was filed with the complaint or shown to the circuit judge. The circuit judge issued six search warrants authorizing, as to the premises of the appellant named in each, "any peace officer in the State of Missouri . . . [to] search the said premises . . . within 10 days after the issuance of this warrant by day or night, and . . . seize . . . [obscene materials] and take same into your possession . . . ."

All of the warrants were executed on October 10, but by different law enforcement officers. Lieutenant Coughlin with two other Kansas City police officers, and an officer of the Jackson County Sheriff's Patrol, executed the warrant against Distributors. Distributors' stock of magazines runs "into hundreds of thousands . . . [p]robably closer to a million copies." The officers examined the publications in the stock on the main floor of the establishment,

[7] He bought a copy of the same magazine at three of the stands, a copy of another edition of this magazine at a fourth stand, and a copy of one other magazine at the fifth stand.

not confining themselves to Lieutenant Coughlin's original list. They seized all magazines which "[i]n our judgment" were obscene; when an officer thought "a magazine . . . ought to be picked up" he seized all copies of it. After three hours the examination was completed and the magazines seized were "hauled away in a truck and put on the 15th floor of the courthouse." A substantially similar procedure was followed at each of the five newsstands. Approximately 11,000 copies of 280 publications, principally magazines but also some books and photographs, were seized at the six places.[8]

The circuit judge fixed October 17 for the hearing, which was later continued to October 23. Timely motions were made by the appellants to quash the search warrants and to suppress as evidence the property seized, and for the immediate return of the property. The motions were rested on a number of grounds but we are concerned only with the challenge to the application of the procedures in the context of the protections for free speech and press assured against state abridgment by the Fourteenth Amendment.[9] Unconstitutionality in violation of the Fourteenth Amendment was asserted because the procedures as applied (1) allowed a seizure by police officers "without notice or any hearing afforded to the movants prior to seizure for the purpose of determining whether or not these . . . publications are ob-

[8] The publications seized included so-called "girlie" magazines, nudist magazines, treatises and manuals on sex, photography magazines, cartoon and joke books and still photographs.

[9] Because of the result which we reach, it is unnecessary to decide other constitutional questions raised by the appellants, (1) whether the Missouri statutes are invalid on their face as authorizing an unconstitutional censorship and previous restraint of publications; (2) whether the Missouri courts applied an unconstitutional test of obscenity; and (3) whether the publications condemned are obscene under the test of *Roth* v. *United States*, 354 U. S. 476.

scene . . . ," and (2) because they "allowed police officers and deputy sheriffs to decide and make a judicial determination after the warrant was issued as to which . . . magazines were . . . obscene . . . and were subject to seizure, impairing movants' freedom of speech and publication." The circuit judge reserved rulings on the motions and heard testimony of the police officers concerning the events surrounding the issuance and execution of the several warrants. On December 12, 1957, the circuit judge filed an unreported opinion in which he overruled the several motions and found that 100 of the 280 seized items were obscene. A judgment thereupon issued directing that the 100 items, and all copies thereof, "shall be retained by the Sheriff of Jackson County . . . as necessary evidence for the purpose of possible criminal prosecution or prosecutions, and, when such necessity no longer exists, said Sheriff . . . shall publicly destroy the same by burning within thirty days thereafter"; it ordered further that the 180 items not found to be obscene, and all copies thereof, "shall be returned forthwith by the Sheriff . . . to the rightful owner or owners . . . ."

I.

The use by government of the power of search and seizure as an adjunct to a system for the suppression of objectionable publications is not new. Historically the struggle for freedom of speech and press in England was bound up with the issue of the scope of the search and seizure power. See generally Siebert, Freedom of the Press in England, 1476–1776; Hanson, Government and the Press, 1695–1763. It was a principal instrument for the enforcement of the Tudor licensing system. The Stationers' Company was incorporated in 1557 to help implement that system and was empowered "to make search whenever it shall please them in any place, shop,

house, chamber, or building or any printer, binder or bookseller whatever within our kingdom of England or the dominions of the same of or for any books or things printed, or to be printed, and to seize, take hold, burn, or turn to the proper use of the foresaid community, all and several those books and things which are or shall be printed contrary to the form of any statute, act, or proclamation, made or to be made . . . ." [10]

An order of council confirmed and expanded the Company's power in 1566,[11] and the Star Chamber reaffirmed it in 1586 by a decree "That it shall be lawful for the wardens of the said Company for the time being or any two of the said Company thereto deputed by the said wardens, to make search in all workhouses, shops, warehouses of printers, booksellers, bookbinders, or where they shall have reasonable cause of suspicion, and all books [etc.] . . . contrary to . . . these present ordinances to stay and take to her Majesty's use . . . ." [12] Books thus seized were taken to Stationers' Hall where they were inspected by ecclesiastical officers, who decided whether they should be burnt. These powers were exercised under the Tudor censorship to suppress both Catholic and Puritan dissenting literature.[13]

Each succeeding regime during turbulent Seventeenth Century England used the search and seizure power to suppress publications. James I commissioned the ecclesiastical judges comprising the Court of High Commission "to enquire and search for . . . all heretical, schismatical and seditious books, libels, and writings, *and all other books, pamphlets and portraitures offensive to the state or set forth without sufficient and lawful authority in that*

[10] 1 Arber, Transcript of the Registers of the Company of Stationers of London, 1554–1640 A. D., p. xxxi.

[11] Elton, The Tudor Constitution, p. 106.

[12] Elton, *supra,* pp. 182–183.

[13] Siebert, *supra,* pp. 83, 85–86, 97.

behalf, . . . and the same books [etc.] and their printing-presses themselves likewise to seize *and so to order and dispose of them . . . as they may not after serve or be employed for any such unlawful use . . . .*" [14] The Star Chamber decree of 1637, re-enacting the requirement that all books be licensed, continued the broad powers of the Stationers' Company to enforce the licensing laws.[15] During the political overturn of the 1640's Parliament on several occasions asserted the necessity of a broad search and seizure power to control printing. Thus an order of 1648 gave power to the searchers "to search in any house or place where there is just cause of suspicion, that Presses are kept and employed in the printing of Scandalous and lying Pamphlets, . . . [and] to seize such scandalous and lying pamphlets as they find upon search . . . ." [16] The Restoration brought a new licensing act in 1662. Under its authority "messengers of the press" operated under the secretaries of state, who issued executive warrants for the seizure of persons and papers. These warrants, while sometimes specific in content, often gave the most general discretionary authority. For example, a warrant to Roger L'Estrange, the Surveyor of the Press, empowered him to "seize all seditious books and libels and to apprehend the authors, contrivers, printers, publishers, and dispersers of them," and to "search any house, shop, printing room, chamber, warehouse, etc. for seditious, scandalous or unlicensed pictures, books, or papers, to bring away or deface the same, and the letter press, taking away all the copies . . . ." [17] Another warrant gave L'Estrange power to "search for

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[14] Siebert, *supra,* p. 139, citing Pat. Roll, 9 Jac. I, Pt. 18; *id.,* II, Pt. 15.

[15] 4 Arber, *supra,* pp. 529–536.

[16] Siebert, *supra,* 214–215, note 72.

[17] Siebert, *supra,* p. 254, citing Minute Entry Book 5, p. 177.

& seize authors, contrivers, printers, . . . publishers, dispensers, & concealers of treasonable, schismaticall, seditious or unlicensed books, libells, pamphlets, or papers . . . together with all copys exemplaryes of such Books, libells, pamphlets or paper as aforesaid." [18]

Although increasingly attacked, the licensing system was continued in effect for a time even after the Revolution of 1688 and executive warrants continued to issue for the search for and seizure of offending books. The Stationers' Company was also ordered "to make often and diligent searches in all such places you or any of you shall know or have any probable reason to suspect, and to seize all unlicensed, scandalous books and pamphlets . . . ." [19] And even when the device of prosecution for seditious libel replaced licensing as the principal governmental control of the press,[20] it too was enforced with the aid of general warrants—authorizing either the arrest of all persons connected with the publication of a particular libel and the search of their premises, or the seizure of all the papers of a named person alleged to be connected with the publication of a libel.[21]

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[18] Siebert, *supra,* p. 256, citing Entry Book, Chas. II, 1664, Vol. 21, p. 21; also Vol. 16, p. 130.

[19] Cal. St. P., Dom. Ser., 1690–1691, p. 74.

[20] One of the primary objections to licensing was its enforcement through search and seizure. The House of Commons' list of reasons why the licensing act should not be renewed included: "Because that Act subjects all Mens Houses, as well Peers as Commoners, to be searched at any Time, either by Day or Night, by a Warrant under the Sign Manual, or under the Hand of One of the Secretaries of State, directed to any Messenger, if such Messenger shall upon probable Reason suspect that there are any unlicensed Books there; and the Houses of all Persons free of the Company of Stationers are subject to the like Search, on a Warrant from the Master and Wardens of the said Company, or any One of them." 15 Journals of the House of Lords, April 18, 1695, p. 546.

[21] Siebert, *supra,* pp. 374–376.

Enforcement through general warrants was finally judicially condemned in England. This was the consequence of the struggle of the 1760's between the Crown and the opposition press led by John Wilkes, author and editor of the North Briton. From this struggle came the great case of *Entick* v. *Carrington,* 19 How. St. Tr. 1029, which this Court has called "one of the landmarks of English liberty." *Boyd* v. *United States,* 116 U. S. 616, 626. A warrant based on a charge of seditious libel issued for the arrest of Entick, writer for an opposition paper, and for the seizure of all his papers. The officers executing the warrant ransacked Entick's home for four hours and carted away great quantities of books and papers. Lord Camden declared the general warrant for the seizure of papers contrary to the common law, despite its long history. Camden said: "This power so assumed by the secretary of state is an execution upon all the party's papers, in the first instance. His house is rifled; his most valuable secrets are taken out of his possession, before the paper for which he is charged is found to be criminal by any competent jurisdiction, and before he is convicted either of writing, publishing, or being concerned in the paper." At 1064. Camden expressly dismissed the contention that such a warrant could be justified on the grounds that it was "necessary for the ends of government to lodge such a power with a state officer; and . . . better to prevent the publication before than to punish the offender afterwards." At 1073. In *Wilkes* v. *Wood,* 19 How. St. Tr. 1153, Camden also condemned the general warrants employed against John Wilkes for his publication of issue No. 45 of the North Briton. He declared that these warrants, calling for the arrest of unnamed persons connected with the alleged libel and seizure of their papers, amounted to a "discretionary power given to messengers to search wherever their suspicions may chance to fall. If such a power is

truly invested in a secretary of state, and he can delegate this power, it certainly may affect the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject." *Id.*, 1167.[22]

This history was, of course, part of the intellectual matrix within which our own constitutional fabric was shaped. The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression. For the serious hazard of suppression of innocent expression inhered in the discretion confided in the officers authorized to exercise the power.

II.

The question here is whether the use by Missouri in this case of the search and seizure power to suppress

[22] A contemporary London pamphlet summed up the widespread indignation against the use of the general warrant for the seizure of papers: "In such a party-crime, as a public libel, who can endure this assumed authority of taking all papers indiscriminately? . . . where there is even a charge against one particular paper, to seize *all*, of every kind, is extravagant, unreasonable and inquisitorial. It is infamous in theory, and downright tyranny and despotism in practice." Father of Candor, A Letter Concerning Libels, Warrants, and the Seizure of Papers, p. 48 (2d ed. 1764, J. Almon printer).

See generally Lasson, The History and Development of the Fourth Amendment, pp. 42–50; Hanson, Government and the Press, 1695–1763, pp. 29–32, 49–50. An even broader form of general warrant was the writ of assistance, which met such vigorous opposition in the American Colonies prior to the Revolution. Unlike the warrants of the North Briton affair and *Entick* v. *Carrington*, which were at least concerned with a particular designated libel, these writs empowered the executing officer to seize any illegally imported goods or merchandise. Moreover, in addition to authorizing search without limit of place, they had no fixed duration. In effect, complete discretion was given to the executing officials; in the words of James Otis, their use placed "the liberty of every man in the hands of every petty officer." Tudor, Life of James Otis (1823), p. 66. See Lasson, *supra*, pp. 51–78.

obscene publications involved abuses inimical to protected expression. We held in *Roth* v. *United States,* 354 U. S. 476, 485,[23] that "obscenity is not within the area of constitutionally protected speech or press." But in *Roth* itself we expressly recognized the complexity of the test of obscenity fashioned in that case, and the vital necessity in its application of safeguards to prevent denial of "the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest." *Id.,* p. 488. We have since held that a State's power to suppress obscenity is limited by the constitutional protections for free expression. In *Smith* v. *California,* 361 U. S. 147, 155, we said, "The existence of the State's power to prevent the distribution of obscene matter does not mean that there can be no constitutional barrier to any form of practical exercise of that power," inasmuch as "our holding in *Roth* does not recognize any state power to restrict the dissemination of books which are not obscene." *Id.,* p. 152. We therefore held that a State may not impose absolute criminal liability on a bookseller for the possession of obscene material, even if it may dispense with the element of *scienter* in dealing with such evils as impure food and drugs. We remarked the distinction between the cases: "There is no specific constitutional inhibition against making the distributors of food the strictest censors of their merchandise, but the constitutional guarantees of the freedom of speech and of the press stand in the way of imposing a similar requirement on the bookseller." *Id.,* pp. 152–153. The Missouri Supreme Court's assimilation of obscene literature to gambling paraphernalia or other contraband for purposes of search and seizure does not therefore answer the appellants' constitutional claim, but merely restates the issue

[23] This holding applied also to the obscenity question raised under the Fourteenth Amendment in *Alberts* v. *California,* decided in the same opinion.

whether obscenity may be treated in the same way. The authority to the police officers under the warrants issued in this case, broadly to seize "obscene . . . publications," poses problems not raised by the warrants to seize "gambling implements" and "all intoxicating liquors" involved in the cases cited by the Missouri Supreme Court. 334 S. W. 2d, at 125. For the use of these warrants implicates questions whether the procedures leading to their issuance and surrounding their execution were adequate to avoid suppression of constitutionally protected publications. ". . . [T]he line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn. . . . The separation of legitimate from illegitimate speech calls for . . . sensitive tools . . . ." *Speiser* v. *Randall,* 357 U. S. 513, 525.[24] It follows that, under the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity as here involved without regard to the possible consequences for constitutionally protected speech.

We believe that Missouri's procedures as applied in this case lacked the safeguards which due process demands to assure nonobscene material the constitutional protection to which it is entitled. Putting to one side the fact that no opportunity was afforded the appellants to elicit and contest the reasons for the officer's belief, or otherwise to argue against the propriety of the seizure to the issuing judge, still the warrants issued on the strength

[24] Lord Camden in *Entick* v. *Carrington* recognized that there was no justification for the abuse of the search and seizure power in suppressing seditious libel, even if the view were accepted that "men ought not to be allowed to have such evil instruments in their keeping." 19 How. St. Tr., at 1072. He said, "If [libels may be seized], I am afraid, that all the inconveniences of a general seizure will follow upon a right allowed to seize a part. The search in such cases will be general, and every house will fall under the power of a secretary of state to be rummaged before proper conviction." *Id.,* at 1071.

of the conclusory assertions of a single police officer, without any scrutiny by the judge of any materials considered by the complainant to be obscene. The warrants gave the broadest discretion to the executing officers; they merely repeated the language of the statute and the complaints, specified no publications, and left to the individual judgment of each of the many police officers involved the selection of such magazines as in his view constituted "obscene . . . publications." So far as appears from the record, none of the officers except Lieutenant Coughlin had previously examined any of the publications which were subsequently seized. It is plain that in many instances, if not in all, each officer actually made *ad hoc* decisions on the spot and, gauged by the number of publications seized and the time spent in executing the warrants, each decision was made with little opportunity for reflection and deliberation. As to publications seized because they appeared on the Lieutenant's list, we know nothing of the basis for the original judgment that they were obscene. It is no reflection on the good faith or judgment of the officers to conclude that the task they were assigned was simply an impossible one to perform with any realistic expectation that the obscene might be accurately separated from the constitutionally protected. They were provided with no guide to the exercise of informed discretion, because there was no step in the procedure before seizure designed to focus searchingly on the question of obscenity. See generally 1 Chafee, Government and Mass Communications, pp. 200–218. In consequence there were suppressed and withheld from the market for over two months 180 publications not found obscene.[25] The fact that only one-third of the

[25] Among the publications ordered returned were such titles as "The Dawn of Rational Sex Ethics," "Sex Symbolism," "Notes on Cases of Sexual Suppression," "Your Affections, Emotions and Feel-

publications seized were finally condemned strengthens the conclusion that discretion to seize allegedly obscene materials cannot be confided to law enforcement officials without greater safeguards than were here operative. Procedures which sweep so broadly and with so little discrimination are obviously deficient in techniques required by the Due Process Clause of the Fourteenth Amendment to prevent erosion of the constitutional guarantees.[26]

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ings," "Sexual Impotence, Its Causes and Treatments," "The Psychology of Sex Life," "Freud on Sleep and Sexual Dreams," "The Determination of Sex," "Sex and Psychoanalysis," "Artificial Insemination," "Syphilis, A Treatise for the American Public," "What You Should Know About Sexual Impotency," "Variations in Sexual Behavior," "Sex Life in Marriage," "Psychopathia Sexualis," "The Sex Technique in Marriage," "Sexual Deviations," "Sex Practice in Later Years," and "Marriage, Sex, and Family Problems."

[26] English practice in such cases has placed greater restraint on the seizure power. Seizure of obscene material, as a prelude to condemnation, was authorized there by Lord Campbell's Obscene Publications Act of 1857, 20 & 21 Vict., c. 83. As originally proposed, that statute would have allowed search for and seizure of obscene matter either under authority granted by magistrates or on warrants granted by the Chief Commissioner of Police. Moreover, the affidavit for obtaining a warrant would have been required to contain merely the statement that the person making it had reasonable ground for suspicion that obscene publications were kept on the premises to be searched. See 146 Hansard's Parliamentary Debates, 3d Series, p. 866. These provisions met vigorous opposition in Parliament. A number of members emphasized that the difficulty of defining obscenity made broad search powers in police hands extremely dangerous. See *id.*, pp. 330–332, 1360–1362, 147 Hansard, *supra*, pp. 1863–1864. As a result, amendments were adopted removing the grant of authority to the police commissioner to authorize a search and seizure, requiring greater specificity in the allegations before a warrant could be issued, and providing that warrants could issue only for the seizure of books the publication of which would constitute a common-law misdemeanor. Lord Lyndhurst, draftsman of these amendments, explained: "I have now provided that the person shall swear that he has reason to believe, and that he does believe, that there are such publications in

III.

The reliance of the Missouri Supreme Court upon *Kingsley Books, Inc.*, v. *Brown*, 354 U. S. 436, is misplaced. The differences in the procedures under the New York statute upheld in that case and the Missouri procedures as applied here are marked. They amount to the distinction between "a 'limited injunctive remedy,' under closely defined procedural safeguards, against the sale and distribution of written and printed matter found after due trial to be obscene," *Kingsley Books, supra*, at 437, and a scheme which in operation inhibited the circulation of publications indiscriminately because of the

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such a place, and shall further state to the magistrate the reasons which lead to that belief. Nor does it stop there. The most material Amendment is, that he must state what the publications are, and that they are of such a nature that, if published, the party publishing them will be guilty of a misdemeanour. The magistrate must also be satisfied that the case is a proper one for a prosecution . . . ." 146 Hansard, *supra*, at p. 1360. The Lord Chancellor summarized the effect of the changes: "As the Bill now stood, these search-warrants would only be granted after great precautions . . . ." *Id.*, p. 1362.

According to a recent summary of procedures to obtain a warrant under that Act, a police officer would ordinarily buy copies of a work he suspected of obscenity. They would be examined by the police and sent to the Director of Public Prosecutions. The latter would return them with advice as to whether a warrant should be applied for. If a decision were made to seek a warrant, the publications would be laid before a magistrate with the sworn affidavit of the officer, in order that he might be satisfied that they were of the character necessary to justify seizure. See Memorandum of the Association of Chief Police Officers of England and Wales, Minutes of Evidence Taken Before the Select Committee of the House of Commons on the Obscene Publications Bill, 1956–1957, pp. 132–136. See also, *id.*, p. 23.

The Act was replaced by the Obscene Publications Act of 1959, 7 & 8 Eliz. II, c. 66. See 23 Mod. L. Rev. 285.

absence of any such safeguards. *First,* the New York injunctive proceeding was initiated by a complaint filed with the court which charged that a particular named obscene publication had been displayed, and to which were annexed copies of the publication alleged to be obscene.[27] The court, in restraining distribution pending final judicial determination of the claim, thus had the allegedly obscene material before it and could exercise an independent check on the judgment of the prosecuting authority at a point before any restraint took place. *Second,* the restraints in *Kingsley Books,* both temporary and permanent, ran only against the named publication; no catchall restraint against the distribution of all "obscene" material was imposed on the defendants there, comparable to the warrants here which authorized a mass seizure and the removal of a broad range of items from circulation.[28] *Third, Kingsley Books* does not support the proposition that the State may impose the extensive

[27] The feasibility of particularization in complaint and warrant in a case such as the present is apparent, since the publications were sold on newsstands distributing to the public. Compare Lord Camden's remark in *Entick* v. *Carrington,* directed to the contention that a general warrant might be justifiable as a means of uncovering evidence of crime: "If . . . a right of search for the sake of discovering evidence ought in any case to be allowed, this crime [seditious libel] above all others ought to be excepted, as wanting such a discovery less than any other. It is committed in open daylight, and in the face of the world; . . ." 19 How. St. Tr., at 1074.

[28] The trial judge in *Kingsley Books* refused to enjoin the distribution of future issues of the publication in question, stating: "[u]nless the work be before the court at the time of the hearing at which the injunction is sought, it is inappropriate to make a judicial determination with respect to it. In respect of this feature of the case, the plaintiff seeks a likely trespass upon a constitutionally protected area, and the court must reject that prayer." 208 Misc. 150, 168–169, 142 N. Y. S. 2d 735, 751. Cf. *Near* v. *Minnesota ex rel. Olson,* 283 U. S. 697.

restraints imposed here on the distribution of these publications prior to an adversary proceeding on the issue of obscenity, irrespective of whether or not the material is legally obscene. This Court expressly noted there that the State was not attempting to punish the distributors for disobedience of any interim order entered before hearing. The Court pointed out that New York might well construe its own law as not imposing any punishment for violation of an interim order were the book found not obscene after due trial. 354 U. S., at 443, n. 2. But there is no doubt that an effective restraint—indeed the most effective restraint possible—was imposed prior to hearing on the circulation of the publications in this case, because all copies on which the police could lay their hands were physically removed from the newsstands and from the premises of the wholesale distributor. An opportunity comparable to that which the distributor in *Kingsley Books* might have had to circulate the publication despite the interim restraint and then raise the claim of nonobscenity by way of defense to a prosecution for doing so was never afforded these appellants because the copies they possessed were taken away. Their ability to circulate their publications was left to the chance of securing other copies, themselves subject to mass seizure under other such warrants. The public's opportunity to obtain the publications was thus determined by the distributor's readiness and ability to outwit the police by obtaining and selling other copies before they in turn could be seized. In addition to its unseemliness, we do not believe that this kind of enforced competition affords a reasonable likelihood that nonobscene publications, entitled to constitutional protection, will reach the public. A distributor may have every reason to believe that a publication is constitutionally protected and will be so held after judicial hearing, but his belief is unavailing as against the contrary judgment of

the police officer who seizes it from him.[29] Finally, a subdivision of the New York statute in *Kingsley Books* required that a judicial decision on the merits of obscenity be made within two days of trial, which in turn was required to be within one day of the joinder of issue on the request for an injunction.[30] In contrast, the Missouri statutory scheme drawn in question here has no limitation on the time within which decision must be made, only a provision for rapid trial of the issue of obscenity. And in fact over two months elapsed between seizure and decision.[31] In these circumstances the restraint on the circu-

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[29] Cf. Freund, The Supreme Court and Civil Liberties, 4 Vand. L. Rev. 533, 539.

Blackstone's often-quoted formulation of the principle of freedom of the press, though restricted to the prohibition of "*previous* restraints upon publications," nevertheless acknowledged the importance of an adjudicatory procedure as a protection against the suppression of inoffensive publications. He wrote: "to punish (as the law does at present) any dangerous or offensive writings, which, when published, shall *on a fair and impartial trial be adjudged of a pernicious tendency*, is necessary for the preservation of peace and good order . . . ." 4 Commentaries, pp. 151–152. (Emphasis added.) Compare Butler, J., dissenting in *Near* v. *Minnesota ex rel. Olson*, *supra*, p. 723: "The decision of the Court in this case declares Minnesota and every other State powerless to restrain by injunction the business of publishing and circulating among the people malicious, scandalous and defamatory periodicals that *in due course of judicial procedure has been adjudged to be a public nuisance*." (Emphasis added.)

[30] This provision was not directly implicated in *Kingsley Books* because the parties had waived the provision for immediate trial.

[31] Compare the objection of the House of Commons to renewal of licensing: "Because that Act appoints no Time wherein the Archbishop, or Bishop of London, shall appoint a learned Man, or that One or more of the Company of Stationers shall go to the Custom-house, to view imported Books; so that they or either of them may delay it till the Importer may be undone, by having so great a Part of his Stock lie dead . . . ." 15 Journals of the House of Lords, April 18, 1695, p. 546.

lation of publications was far more thoroughgoing and drastic than any restraint upheld by this Court in *Kingsley Books.*

Mass seizure in the fashion of this case was thus effected without any safeguards to protect legitimate expression. The judgment of the Missouri Supreme Court sustaining the condemnation of the 100 publications therefore cannot be sustained. We have no occasion to reach the question of the correctness of the finding that the publications are obscene. Nor is it necessary for us to decide in this case whether Missouri lacks all power under its statutory scheme to seize and condemn obscene material. Since a violation of the Fourteenth Amendment infected the proceedings, in order to vindicate appellants' constitutional rights the judgment is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

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

The warrant used to search appellants' premises made no attempt specifically to describe the "things to be seized," as the Fourth Amendment requires. As the historical summary in the Court's opinion demonstrates, a major purpose of adopting that Amendment was to bar the Federal Government from using precisely this kind of general warrant to support "unreasonable searches and seizures" of the "papers" and "effects" of persons having possession of them. See especially *Entick* v. *Carrington,* 19 Howell's State Trials 1029, at 1073–1076; *Boyd* v. *United States,* 116 U. S. 616, 624–630; *Frank* v. *Maryland,* 359 U. S. 360, 374 (dissenting opinion). It is my view that the Fourteenth Amendment makes the Fourth Amendment applicable to the States to the full extent of its terms, just as it applies to the Federal Government. See *Adamson* v. *California,* 332 U. S. 46, 68

(dissenting opinion). Only last Term we said that in *Wolf* v. *Colorado,* 338 U. S. 25, "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." *Elkins* v. *United States,* 364 U. S. 206, 213. And in *Mapp* v. *Ohio, ante,* p. 643, it is said that "[s]ince the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government." Since the State has used a general warrant in this case in violation of the prohibitions of the Fourth and Fourteenth Amendments, I concur in reversal of the judgment.

INTERNATIONAL ASSOCIATION OF MACHINISTS ET AL. *v.* STREET ET AL.

APPEAL FROM THE SUPREME COURT OF GEORGIA.

No. 4. Argued April 21, 1960. Set for reargument June 20, 1960. Reargued January 17–18, 1961.—Decided June 19, 1961.

A group of railroad employees sued in a Georgia State Court to enjoin enforcement of a union-shop agreement entered into between a group of railroads and labor unions of their employees under § 2, Eleventh, of the Railway Labor Act which required all employees to join the union and to pay initiation fees, assessments and dues, in order to keep their jobs. The complaint alleged that a substantial part of the money each of these employes was thus compelled to pay was used over his protest to finance the campaigns of political candidates whom he opposed and to promote the propagation of political and economic doctrines, concepts, and ideologies with which he disagreed. The trial court found that the allegations were fully proved and that, in these circumstances, the union-shop agreement violated the complaining employees' rights under the First Amendment. It enjoined enforcement of the union-shop agreement and awarded some of the employees judgments for the money they had been required to pay. The Supreme Court of Georgia affirmed. *Held:* The judgment is reversed and the case is remanded for further proceedings. Pp. 742–775.

1. In *Railway Employes' Dept.* v. *Hanson,* 351 U. S. 225, this Court held that enactment of the provision of § 2, Eleventh, which authorizes union-shop agreements between interstate railroads and unions of their employees, was a valid exercise by Congress of its powers under the Commerce Clause and did not, on its face, violate the First Amendment or the Due Process Clause of the Fifth Amendment; but it reserved decision on the constitutional questions presented in this case by the actual application of that section and the union-shop agreements entered into thereunder. Pp. 746–749.

2. Though the record in this case adequately presents those constitutional questions, it is not necessary for this Court to decide the correctness of the constitutional determinations made by the Georgia Courts, because § 2, Eleventh, denies authority to a union,

over the employee's objection, to spend his money for political causes which he opposes. Pp. 749–770.

(a) A review of the legislative history of the Railway Labor Act leads to the conclusion that the purpose of § 2, Eleventh, is to force employees to share the costs of negotiating and administering collective agreements and adjusting and settling disputes. Pp. 750–764.

(b) Section 2, Eleventh, denies the unions the power, over an employee's objection, to use his exacted funds to support political causes which he opposes. Pp. 765–770.

3. The judgment is reversed and the case is remanded for further proceedings, including the fashioning of a more appropriate remedy. Pp. 771–775.

(a) The union-shop agreement itself is not unlawful and the employees here involved remain obligated, as a condition of continued employment, to make the payments to their respective unions called for by the agreement. P. 771.

(b) The injunction restraining enforcement of the union-shop agreement is not a remedy appropriate to the violation of the Act's restrictions on expenditures. Pp. 771–772.

(c) A blanket injunction against all expenditures of funds for the disputed purposes, even one conditioned on cessation of improper expenditures, would not be a proper exercise of equitable discretion. Pp. 772–773.

(d) Any remedy should be granted only to employees who have made known to the union officials that they do not desire their funds to be used for political causes to which they object. P. 774.

(e) The present action is not a true class action, since there was no attempt to prove the existence of a class of workers who had specifically objected to the exaction of dues for political purposes. Therefore, only those who have identified themselves as opposed to political uses of their funds are entitled to relief in this action. P. 774.

(f) One possible remedy would be an injunction against expenditure for political causes opposed by each complaining employee of a sum, from those moneys to be spent by the union for political purposes, which is so much of the moneys exacted from him as is the proportion of the union's total expenditures made for such political activities to the union's total budget. Pp. 774–775.

(g) Another possible remedy would be restitution to each individual employee of that portion of his money which the union expended, despite his notification, for the political causes to which he advised the union he was opposed. P. 775.

215 Ga. 27, 108 S. E. 2d 796, judgment reversed and case remanded.

Lester P. Schoene and *Milton Kramer* reargued the cause and filed a brief for appellants. *Cleburne E. Gregory, Jr.* was with them on the jurisdictional statement.

E. Smythe Gambrell reargued the cause for appellees. With him on the briefs were *W. Glen Harlan, Charles J. Bloch* and *Ellsworth Hall, Jr.*

Solicitor General Rankin argued the cause for the United States as intervenor. With him on the brief were *Assistant Attorney General Doub, Morton Hollander* and *David L. Rose.*

Briefs of *amici curiae,* urging reversal, were filed by *Clarence M. Mulholland, Edward J. Hickey, Jr.* and *James L. Highsaw, Jr.* for the Railway Labor Executives' Association, and by *J. Albert Woll, Theodore J. St. Antoine* and *Thomas E. Harris* for the American Federation of Labor and Congress of Industrial Organizations.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

A group of labor organizations, appellants here, and the carriers comprising the Southern Railway System, entered into a union-shop agreement pursuant to the authority of § 2, Eleventh of the Railway Labor Act.[1] The agree-

[1] 64 Stat. 1238, 45 U. S. C. § 152, Eleventh. The section provides: "Eleventh. Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly desig-

ment requires each of the appellees, employees of the carriers, as a condition of continued employment, to pay the appellant union representing his particular class or craft the dues, initiation fees and assessments uni-

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nated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

"(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided,* That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

"(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: *Provided,* That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

"(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in the First Division of paragraph (h) of section 153 of this title, defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with

formly required as a condition of acquiring or retaining union membership. The appellees, in behalf of themselves and of employees similarly situated, brought this action in the Superior Court of Bibb County, Georgia, alleging that the money each was thus compelled to pay to hold his job was in substantial part used to finance the campaigns of candidates for federal and state offices whom he opposed, and to promote the propagation of political and economic doctrines, concepts and ideologies with which he disagreed. The Superior Court found that the allegations were fully proved [2] and entered a judg-

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this chapter and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: *Provided, however,* That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further,* That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

"(d) Any provisions in paragraphs Fourth and Fifth of this section in conflict herewith are to the extent of such conflict amended."

[2] The pertinent findings of the trial court are:

"(5) The funds so exacted from plaintiffs and the class they represent by the labor union defendants have been, and are being, used in substantial amounts by the latter to support the political campaigns of candidates for the offices of President and Vice President of the United States, and for the Senate and House of Representatives of the United States, opposed by plaintiffs and the class they represent, and also to support by direct and indirect financial contributions and expenditures the political campaigns of candidates for State

ment and decree enjoining the enforcement of the union-shop agreement on the ground that § 2, Eleventh violates the Federal Constitution to the extent that it permits such use by the appellants of the funds exacted from employees.[3] The Supreme Court of Georgia affirmed, 215

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and local public offices, opposed by plaintiffs and the class they represent. The said funds are so used both by each of the labor union defendants separately and by all of the labor union defendants collectively and in concert among themselves and with other organizations not parties to this action through associations, leagues, or committees formed for that purpose.

"(6) Those funds have been and are being used in substantial amounts to propagate political and economic doctrines, concepts and ideologies and to promote legislative programs opposed by plaintiffs and the class they represent. Those funds have also been and are being used in substantial amounts to impose upon plaintiffs and the class they represent, as well as upon the general public, conformity to those doctrines, concepts, ideologies and programs.

"(7) The exaction of moneys from plaintiffs and the class they represent for the purposes and activities described above is not reasonably necessary to collective bargaining or to maintaining the existence and position of said union defendants as effective bargaining agents or to inform the employees whom said defendants represent of developments of mutual interest.

"(8) The exaction of said money from plaintiffs and the class they represent, in the fashion set forth above by the labor union defendants, is pursuant to the union shop agreements and in accordance with the terms and conditions of those agreements."

[3] The trial judge concluded:

"Said exaction and use of money, said union shop agreements and Section 2 (eleventh) of the Railway Labor Act and their enforcement violate the United States Constitution which in the First, Fifth, Ninth and Tenth Amendments thereto guarantees to individuals protection from such unwarranted invasion of their personal and property rights, (including freedom of association, freedom of thought, freedom of speech, freedom of press, freedom to work and their political freedom and rights) under the cloak of federal authority."

The judgment and decree provided that the appellants and the carriers "be and they hereby are perpetually enjoined from enforcing the said union shop agreements . . . and from discharging petitioners, or any member of the class they represent, for refusing to

Ga. 27, 108 S. E. 2d 796.[4] On appeal to this Court under 28 U. S. C. § 1257 (1), we noted probable jurisdiction, 361 U. S. 807.

I.

The Hanson Decision.

We held in *Railway Employes' Dept.* v. *Hanson*, 351 U. S. 225, that enactment of the provision of § 2, Eleventh authorizing union-shop agreements between interstate railroads and unions of their employees was a valid exercise by Congress of its powers under the Commerce Clause and did not violate the First Amendment or the Due Process Clause of the Fifth Amendment. It is argued that our disposition of the First Amendment claims in *Hanson* disposes of appellees' constitutional claims in this case adversely to their contentions. We disagree. As appears from its history, that case decided only that § 2, Eleventh, in authorizing collective agreements conditioning em-

become or remain members of, or pay periodic dues, fees, or assessments to, any of the labor union defendants, provided, however, that said defendants may at any time petition the court to dissolve said injunction upon a showing that they no longer are engaging in the improper and unlawful activities described above." Judgment was also entered in favor of three of the named appellees for the amounts of dues, initiation fees and assessments paid by them.

[4] The Supreme Court of Georgia viewed the constitutional question presented for its decision as follows:

"The fundamental constitutional question is: Does the contract between the employers of the plaintiffs and the union defendants, which compels these plaintiffs, if they continue to work for the employers, to join the unions of their respective crafts, and pay dues, fees, and assessments to the unions, where a part of the same will be used to support political and economic programs and candidates for public office, which the plaintiffs not only do not approve but oppose, violate their rights of freedom of speech and deprive them of their property without due process of law under the First and Fifth Amendments to the Federal Constitution?" 215 Ga., at 43–44, 108 S. E. 2d, at 807.

ployees' continued employment on payment of union dues, initiation fees and assessments, did not on its face impinge upon protected rights of association. The Nebraska Supreme Court in *Hanson,* upholding the employees' contention that the union shop could not constitutionally be enforced against them, stated that the union shop "improperly burdens their right to work and infringes upon their freedoms. This is particularly true as to the latter because it is apparent that some of these labor organizations advocate political ideas, support political candidates, and advance national economic concepts which may or may not be of an employee's choice." 160 Neb. 669, 697, 71 N. W. 2d 526, 546. That statement was made in the context of the argument that compelling an individual to become a member of an organization with political aspects is an infringement of the constitutional freedom of association, whatever may be the constitutionality of compulsory financial support of group activities outside the political process. The Nebraska court's reference to the support of political ideas, candidates, and economic concepts "which may or may not be of an employee's choice" indicates that it was considering at most the question of compelled membership in an organization with political facets. In their brief in this Court the appellees in *Hanson* argued that First Amendment rights would be infringed by the enforcement of an agreement which would enable compulsorily collected funds to be used for political purposes. But there was nothing concrete in the record to show the extent to which the unions were actually spending money for political purposes and what these purposes were, nothing to show the extent to which union funds collected from members were being used to meet the costs of political activity and the mechanism by which this was done, and nothing to show that the employees there involved opposed the use of their

money for any particular political objective.[5] In contrast, the present record contains detailed information on all these points, and specific findings were made in the courts below as to all of them. When it is recalled that the action in *Hanson* was brought before the union-shop agreement became effective and that the appellees never thereafter showed that the unions were actually engaged in furthering political causes with which they disagreed and that their money would be used to support such activities, it becomes obvious that this Court passed merely on the constitutional validity of § 2, Eleventh of the Railway Labor Act on its face, and not as applied to infringe the particularized constitutional rights of any individual. On such a record, the Court could not have done more, consistently with the restraints that govern us in the adjudication of constitutional questions and warn against their premature decision. We therefore reserved decision of the constitutional questions which the appellees present in this case. We said: "It is argued that compulsory membership will be used to impair freedom of expression. But that problem is not presented by this record. . . . if the exaction of dues, initiation fees, or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment, this

[5] The record contained one union constitution with a statement of political objectives and various other union constitutions authorizing political education activity, lobbying before legislative bodies, and publication of union views. There was an indication that *Labor* was furnished to members of some unions. There was also material taken from the hearings on § 2, Eleventh which included statements of management opponents of the Act that union dues were used for political activities and employees should not be forced to join unions if they did not like the purposes for which their funds would be spent. And there were statements by Rep. Hoffman of Michigan during the debate on the bill, warning union leaders not to levy "political assessments" and use the Act to force their members to meet those assessments.

judgment will not prejudice the decision in that case. For we pass narrowly on § 2, Eleventh of the Railway Labor Act. We only hold that the requirements for financial support of the collective-bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate either the First or the Fifth Amendments." *Id.*, p. 238. See also p. 242 (concurring opinion). Thus all that was held in *Hanson* was that § 2, Eleventh was constitutional in its bare authorization of union-shop contracts requiring workers to give "financial support" to unions legally authorized to act as their collective bargaining agents. We sustained this requirement—and only this requirement—embodied in the statutory authorization of agreements under which "all employees shall become members of the labor organization representing their craft or class." Clearly we passed neither upon forced association in any other aspect nor upon the issue of the use of exacted money for political causes which were opposed by the employees.

The record in this case is adequate squarely to present the constitutional questions reserved in *Hanson*. These are questions of the utmost gravity. However, the restraints against unnecessary constitutional decisions counsel against their determination unless we must conclude that Congress, in authorizing a union shop under § 2, Eleventh, also meant that the labor organization receiving an employee's money should be free, despite that employee's objection, to spend his money for political causes which he opposes. Federal statutes are to be so construed as to avoid serious doubt of their constitutionality. "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell*

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v. *Benson,* 285 U. S. 22, 62. Each named appellee in this action has made known to the union representing his craft or class his dissent from the use of his money for political causes which he opposes. We have therefore examined the legislative history of § 2, Eleventh in the context of the development of unionism in the railroad industry under the regulatory scheme created by the Railway Labor Act to determine whether a construction is "fairly possible" which denies the authority to a union, over the employee's objection, to spend his money for political causes which he opposes. We conclude that such a construction is not only "fairly possible" but entirely reasonable, and we therefore find it unnecessary to decide the correctness of the constitutional determinations made by the Georgia courts.

II.

The Rail Unions and Union Security.

The history of union security in the railway industry is marked *first,* by a strong and long-standing tradition of voluntary unionism on the part of the standard rail unions; [6] *second,* by the declaration in 1934 of a congressional policy of complete freedom of choice of employees to join or not to join a union; *third,* by the modification

[6] "[T]hese railroad labor organizations in the past have refrained from advocating the union shop agreement, or any other type of union security. It has always been our philosophy that the strongest and most militant type of labor organization was the one whose members were carefully selected and who joined conviction and a desire to assist their fellows in promoting objects of labor unionism . . . ." Statement of Charles J. MacGowan, vice president of the International Brotherhood of Boilermakers, Transcript of Proceedings, Presidential Board, appointed Feb. 20, 1943, p. 5358. See also Transcript of Proceedings, Presidential Emergency Board No. 98, appointed pursuant to Exec. Order No. 10306, Nov. 15, 1951, pp. 835–845, Carriers' Exhibit W–28. For an analysis of the reasons for the long-time absence of pressure for union security agreements in the railway industry, see Toner, The Closed Shop, pp. 93–114.

of the firm legislative policy against compulsion, but only as a specific response to the recognition of the expenses and burdens incurred by the unions in the administration of the complex scheme of the Railway Labor Act.

When the question of union security in the rail industry was first given detailed consideration by Congress in 1934 [7] only one of the standard unions had security provisions in any of its contracts. The Brotherhood of Railroad Trainmen maintained a number of so-called "percentage" contracts, requiring that in certain classes of employees represented by the Brotherhood, a specified percentage of employees had to belong to the union. These contracts applied only to yard conductors, yard brakemen and switchmen, and covered no more than 10,000 workers, about 1% of all rail employees. See letter from Joseph B. Eastman, Federal Coordinator of Transportation, to Chairman of the House Committee on Interstate and Foreign Commerce, June 7, 1934, H. R. Rep. No. 1944, 73d Cong., 2d Sess., pp. 14–16; testimony of James A. Farquharson, legislative representative of the Brotherhood of Railroad Trainmen, Hearings on H. R. 7650, House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess., pp. 94–105.

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[7] The principle of freedom of choice had been incorporated in two earlier pieces of legislation governing railroads. The Bankruptcy Act of March 3, 1933, 47 Stat. 1481, § 77 (p) and (q), provided that no judge, trustee, or receiver of a carrier should interfere with employee organization, influence or coerce employees to join a company union, or require employees to join or refrain from joining a labor organization. The Emergency Railroad Transportation Act of June 16, 1933, 48 Stat. 214, § 7 (e), required all carriers to abide by these provisions of the Bankruptcy Act. The latter provision was temporary, with a maximum duration of two years. See testimony of Joseph B. Eastman, Federal Coordinator of Transportation, House Hearings on H. R. 7650, 73d Cong., 2d Sess., pp. 22–23, and his official interpretation of this legislation, 7 Interstate Commerce Acts Ann., 1934 Supp., pp. 5972–5973.

During congressional consideration of the 1934 legislation, the rail unions attempted to persuade Congress not to preclude them from negotiating security arrangements. By amendments to the original proposal, they sought to assure that the provision which became § 2, Fifth should prevent the carriers from conditioning employment on membership in a company union but should exempt the standard unions from its prohibitions. The Trainmen, the only union which stood to lose existing contracts if the section was not limited to company unions, especially urged such a limitation. See statement of A. F. Whitney, president, S. Rep. No. 1065, 73d Cong., 2d Sess., pt. 2, p. 2; see also 78 Cong. Rec. 12372, 12376.

The unions succeeded in having the House incorporate such a limitation in the bill it passed. See H. R. Rep. No. 1944, 73d Cong., 2d Sess. 2, 6; 78 Cong. Rec. 11710–11720. But the Senate did not acquiesce. Eastman, a firm believer in complete freedom of employees in their choice of representatives, strongly opposed the limitation. He characterized it as "vicious, because it strikes at the principle of freedom of choice which the bill is designed to protect. The prohibited practices acquire no virtue by being confined to so-called 'standard unions.' . . . Within recent years, the practice of tying up men's jobs with labor-union membership has crept into the railroad industry which theretofore was singularly clean in this respect. The practice has been largely in connection with company unions but not entirely. If genuine freedom of choice is to be the basis of labor relations under the Railway Labor Act, as it should be, then the yellow-dog contract, and its corollary, the closed shop, and the so-called 'percentage contract' have no place in the picture." Hearings on S. 3266, Senate Committee on Inter-

state Commerce, 73d Cong., 2d Sess., p. 157.[8] Eastman's views prevailed in the Senate, and the House concurred in a final version of § 2, Fifth, providing that "[n]o carrier . . . shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization." See 78 Cong. Rec. 12369–12376, 12382–12388, 12389–12398, 12400–12402, 12549–12555.

During World War II, the nonoperating unions made an unsuccessful attempt to obtain union security, incidental to an effort to secure a wage increase. Following the failure of negotiations and mediation, a Presidential Emergency Board was appointed. Two principal reasons were advanced by the unions. They urged that in view of their pledge not to strike for the duration and their responsibilities to assure uninterrupted operation of the railroads, they were justified in seeking to maintain their positions by union security arrangements. They also maintained that since they secured benefits through collective bargaining for all employees they represented, it was fair that the costs of their operations be

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[8] Eastman further emphasized that only the Trainmen were immediately affected by the broader prohibition he supported. "I am confident that the only real support for the proposed amendments is from a single organization. None of the other standard organizations has anything to gain from such changes in the bill." Eastman letter, *supra*, p. 16. For other expressions of Eastman's views, see House Hearings, *supra*, pp. 28–29; Hearings on H. R. 9861, House Rules Committee, 73d Cong., 2d Sess., pp. 22–24. That other rail unions were still committed at this time to the principle of voluntarism, despite their support of the Trainmen's position, is indicated by the statement of George H. Harrison, representing the Railway Labor Executives' Association: "Now, I hope the committee will not get the thought from these statements that the railroad labor unions that I speak for want to force these men into our unions, because that is not our purpose; . . . ." House Hearings on H. R. 7650, *supra*, p. 86.

shared by all workers. The Board recommended withdrawal of the request, concluding that the union shop was plainly forbidden by the Railway Labor Act and that in any event the unions had failed to show its necessity or utility. Presidential Emergency Board, appointed Feb. 20, 1943, Report of May 24, 1943; Supplemental Report, May 29, 1943. The Report said: "[T]he Board is convinced that the essential elements of the union shop as defined in the employees' request are prohibited by section 2 of the Railway Labor Act. The intent of Congress in this respect is made evident, with unusual clarity." Supplemental Report, *supra*, p. 29.[9] On the merits of the issue, the Board expressly rejected the claim that union security was necessary to protect the bargaining position of the unions: "[T]he unions are not suffering from a falling off in members. On the contrary, . . . membership has been growing and at the present time appears to be the largest in railroad history, with less than 10 percent nonmembership among the employees here represented." Supplemental Report, p. 31. "[T]he evidence presented with respect to danger from predatory rivals seemed to the Board lacking in sufficiency; especially so in the light of the evidence concerning membership growth." *Ibid.* "[N]o evidence was presented indicating that the unions stand in jeopardy by reason of carrier opposition. A few railroads were mentioned on which some of the unions do not represent a majority of their craft or class, and do not have bargaining relationships with the carrier. But the exhibits show that these unions are the chosen representatives of the employees on the overwhelming majority of the railroads,

[9] The Board's view as to the illegality of a union shop was supported by an opinion of the Attorney General, 40 Op. Atty. Gen., No. 59, p. 254 (Dec. 29, 1942).

and that recognition of the unions is general. The Board does not find therefore that a sufficient case has been made for the necessity of additional protection of union status on the railroads." *Id.*, p. 32. The unions acceded to the Board's recommendation.

The question of union security was reopened in 1950.[10] Congress then evaluated the proposal for authorizing the union shop primarily in terms of its relationship to the financing of the unions' participation in the machinery created by the Railway Labor Act to achieve its goals. The framework for fostering voluntary adjustments between the carriers and their employees in the interest of the efficient discharge by the carriers of their important functions with minimum disruption from labor strife has no statutory parallel in other industry. That machinery, the product of a long legislative evolution, is more complex than that of any other industry. The labor relations of interstate carriers have been a subject of congressional

[10] At the time of the congressional deliberations which preceded the enactment of the Labor Management Relations Act, 1947, the Trainmen, through their president, A. F. Whitney, advocated the closed shop, and urged the repeal of the provisions which prohibited it. Hearings on Amendments to the National Labor Relations Act, House Committee on Education and Labor, 80th Cong., 1st Sess., pp. 1549–1552, 1561. However, the Railway Labor Executives' Association opposed amendment of the 1934 Act. A. E. Lyon, executive secretary of the Association, said: "We want to make it very clear that we are proposing no amendments to the Railway Labor Act. We believe that none is necessary, and we are opposed to those which Mr. Whitney suggested." Hearings, p. 3722. Lyon added: "We are not asking you to amend the Railway Labor Act and provide a closed shop as Mr. Whitney did. We do not think it is necessary." P. 3724. In response to the query, "By the services you have performed for your members you have attracted people voluntarily to join. Is that not correct?" Lyon replied: "I think that is true. And many of our union people believe they would rather have members that belong because they want to, rather than because they have to." P. 3732.

enactments since 1888.[11] For a time, after World War I, Congress experimented with a form of compulsory arbi-

[11] The Act of 1888, 25 Stat. 501, authorized the creation of boards of voluntary arbitration to settle controversies between carriers and their employees which threatened to disrupt transportation. § 1. The Act also provided for a temporary presidential commission to investigate the causes of a controversy and the best means of adjusting it; the commission was to report the results of its investigation to the President and Congress. § 6.

In 1898 Congress repealed the Act of 1888 and passed the Erdman Act, 30 Stat. 424, providing that "whenever a controversy concerning wages, hours of labor, or conditions of employment shall arise between a carrier subject to this Act and the employees of such carrier, seriously interrupting or threatening to interrupt the business of said carrier," the Chairman of the Interstate Commerce Commission and the Commissioner of Labor should attempt to resolve the dispute, at the request of either party, by conciliation and mediation. § 2. If these methods failed, a board of voluntary arbitration could be set up with representatives on it of the carrier and the "labor organization to which the employees directly interested belong . . . ." § 3. Section 10 of the Act also made it criminal for an employer to require an employee to promise not to become or remain a member of a labor organization or to discriminate against an employee for such membership, a provision which was held unconstitutional in *Adair* v. *United States*, 208 U. S. 161.

The Erdman Act was superseded in 1913 by the passage of the Newlands Act, 38 Stat. 103. It created a Board of Mediation and Conciliation to which either party to a controversy could refer the dispute and which could proffer its services even without request if an interruption of traffic was imminent and seriously jeopardized the public interest. The Board also was authorized to give opinions as to the meaning or application of agreements reached through mediation. § 2. The arbitration procedures set up by the Erdman Act were further elaborated. §§ 3–8.

In 1916 Congress imposed the 8-hour day on the railroads, 39 Stat. 721. During the period of federal operation of the railroads in World War I and afterwards the Federal Government executed agreements with many of the national labor organizations as representatives of the railroad employees. Boards of adjustment were also set up to handle disputes concerning the interpretation and applica-

tration.[12] The experiment was unsuccessful. Congress has since that time consistently adhered to a regulatory policy which places the responsibility squarely upon the carriers and the unions mutually to work out settlements of all aspects of the labor relationship. That policy was embodied in the Railway Labor Act of 1926, 44 Stat. 577,

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tion of agreements. See Hearings on S. 3295, Subcommittee of Senate Committee on Labor and Public Welfare, 81st Cong., 2d Sess., pp. 216, 305. By the Transportation Act of 1920, 41 Stat. 456, Congress terminated federal control and established an extensive new regulatory scheme. See n. 12, *infra*. See generally Hearings on S. 3463, Subcommittee of the Senate Committee on Labor and Public Welfare, 81st Cong., 2d Sess., pp. 124–131.

[12] The Transportation Act of 1920 provided for a Railroad Labor Board, with power to render a decision in disputes between carriers and their employees over wages, grievances, rules, or working conditions not resolved through conference and adjustment procedures. § 307. In rendering a decision on wages or working conditions, the Board had a duty to establish wages and conditions which in its opinion were "just and reasonable." § 307 (d). It was held, however, that the decisions of the Board could not be enforced by legal process. See *Pennsylvania R. Co.* v. *United States Railroad Labor Board,* 261 U. S. 72; *Pennsylvania R. System* v. *Pennsylvania R. Co.,* 267 U. S. 203. By 1926 the Board had lost the confidence of both the unions and many of the railroads. Commented the Senate Committee which considered the Railway Labor Act of 1926: "In view of the fact that the employees absolutely refuse to appear before the labor board and that many of the important railroads are themselves opposed to it, that it has been held by the Supreme Court to have no power to enforce its judgments, that its authority is not recognized or respected by the employees and by a number of important railroads, that the President has suggested that it would be wise to seek a substitute for it, and that the party platforms of both the Republican and Democratic Parties in 1924 clearly indicated dissatisfaction with the provisions of the transportation act relating to labor, the committee concluded that the time had arrived when the labor board should be abolished and the provisions relating to labor in the transportation act, 1920, should be repealed." S. Rep. No. 606, 69th Cong., 1st Sess., pp. 3–4.

which remains the basic regulatory enactment. As the Senate Report on the bill which became that law stated: "The question was . . . presented whether the substitute [for the Act of 1920] should consist of a compulsory system with adequate means provided for its enforcement, or whether it was in the public interest to create the machinery for amicable adjustment of labor disputes agreed upon by the parties and to the success of which both parties were committed. . . . The committee is of opinion that it is in the public interest to permit a fair trial of the method of amicable adjustment agreed upon by the parties, rather than to attempt under existing conditions to use the entire power of the Government to deal with these labor disputes." S. Rep. No. 606, 69th Cong., 1st Sess., p. 4. The reference to the plan "agreed upon by the parties" was to "the fact that the Railway Labor Act of 1926 came on the statute books through agreement between the railroads and the railroad unions on the need for such legislation. It is accurate to say that the railroads and the railroad unions between them wrote the Railway Labor Act of 1926 and Congress formally enacted their agreement." *Railway Employes' Dept.* v. *Hanson, supra,* p. 240 (concurring opinion). See generally Murphy, Agreement on the Railroads—The Joint Railway Conference of 1926, 11 Lab. L. J. 823.

"All through the [1926] act is the theory that the agreement is the vital thing in life." Statement of Donald R. Richberg, Hearings on H. R. 7180, House Committee on Interstate and Foreign Commerce, 69th Cong., 1st Sess., pp. 15–16. The Act created affirmative legal duties on the part of the carriers and their employees "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise . . . ." § 2, First. See *Texas & N. O. R. Co.* v. *Brotherhood of*

Railway & Steamship Clerks, 281 U. S. 548. The Act also established a comprehensive administrative apparatus for the adjustment of disputes, in conferences between the parties, § 2, Second, Third and Fourth (now Sixth), and if not so settled, in submissions to boards of adjustment, § 3, or the National Mediation Board, § 4. And the legislation expanded the already existing voluntary arbitration machinery, §§ 7, 8, 9.

A primary purpose of the major revisions made in 1934 was to strengthen the position of the labor organizations *vis-à-vis* the carriers, to the end of furthering the success of the basic congressional policy of self-adjustment of the industry's labor problems between carrier organizations and effective labor organizations. The unions claimed that the carriers interfered with the employees' freedom of choice of representatives by creating company unions, and otherwise attempting to undermine the employees' participation in the process of collective bargaining. Congress amended § 2, Third to reinforce the prohibitions against interference with the choice of representatives, and to permit the employees to select nonemployee representatives. A new § 2, Fourth was added guaranteeing employees the right to organize and bargain collectively, and Congress made it the enforceable duty of the carriers "to treat with" the representatives of the employees, § 2, Ninth. See *Virginian R. Co.* v. *System Federation,* 300 U. S. 515. It was made explicit that the representative selected by a majority of any class or craft of employees should be the exclusive bargaining representative of all the employees of that craft or class. "The minority members of a craft are thus deprived by the statute of the right, which they would otherwise possess, to choose a representative of their own, and its members cannot bargain individually on behalf of themselves as to matters which are properly the subject of collective bargaining." *Steele* v. *Louisville*

& N. R. Co., 323 U. S. 192, 200. "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents . . . ." *Id.*, p. 202. In addition to thus strengthening the unions' status in relation to both the carriers and the employees, the 1934 Act created the National Railroad Adjustment Board and provided that the 18 employee representatives were to be chosen by the labor organizations national in scope. § 3. This Board was given jurisdiction to settle what are termed minor disputes in the railroad industry, primarily grievances arising from the application of collective bargaining agreements to particular situations. See *Union Pacific R. Co.* v. *Price*, 360 U. S. 601.

In sum, in prescribing collective bargaining as the method of settling railway disputes, in conferring upon the unions the status of exclusive representatives in the negotiation and administration of collective agreements, and in giving them representation on the statutory board to adjudicate grievances, Congress has given the unions a clearly defined and delineated role to play in effectuating the basic congressional policy of stabilizing labor relations in the industry. "It is fair to say that every stage in the evolution of this railroad labor code was progressively infused with the purpose of securing self-adjustment between the effectively organized railroads and the equally effective railroad unions and, to that end, of establishing facilities for such self-adjustment by the railroad community of its own industrial controversies. . . . The assumption as well as the aim of that Act [of 1934] is a process of permanent conference and negotiation between the carriers on the one hand and the employees through their unions on the other." *Elgin, J. & E. R. Co.* v. *Burley*, 325 U. S. 711, 752–753 (dissenting opinion).

Performance of these functions entails the expenditure of considerable funds. Moreover, this Court has

held that under the statutory scheme, a union's status as exclusive bargaining representative carries with it the duty fairly and equitably to represent all employees of the craft or class, union and nonunion. *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192; *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U. S. 210. The principal argument made by the unions in 1950 was based on their role in this regulatory framework. They maintained that because of the expense of performing their duties in the congressional scheme, fairness justified the spreading of the costs to all employees who benefited. They thus advanced as their purpose the elimination of the "free riders"—those employees who obtained the benefits of the unions' participation in the machinery of the Act without financially supporting the unions.

George M. Harrison, spokesman for the Railway Labor Executives' Association, stated the unions' case in this fashion:

> "Activities of labor organizations resulting in the procurement of employee benefits are costly, and the only source of funds with which to carry on these activities is the dues received from members of the organization. We believe that it is essentially unfair for nonmembers to participate in the benefits of those activities without contributing anything to the cost. This is especially true when the collective bargaining representative is one from whose existence and activities he derives most important benefits and one which is obligated by law to extend these advantages to him.
>
> "Furthermore, collective bargaining to the railroad industry is more costly from a monetary standpoint than that carried on in any other industry. The administrative machinery is more complete and more complex. The mediation, arbitration, and Presidential Emergency Board provisions of the act, while greatly in the public interest, are very costly to the

unions. The handling of agreement disputes through the National Railroad Adjustment Board also requires expense which is not known to unions in outside industry." Hearings on H. R. 7789, House Committee on Interstate and Foreign Commerce, 81st Cong., 2d Sess., p. 10.

This argument was decisive with Congress. The House Committee Report traced the history of previous legislation in the industry and pointed out the duty of the union acting as exclusive bargaining representative to represent equally all members of the class. "Under the act, the collective-bargaining representative is required to represent the entire membership of the craft or class, including nonunion members, fairly, equitably, and in good faith. Benefits resulting from collective bargaining may not be withheld from employees because they are not members of the union." H. R. Rep. No. 2811, 81st Cong., 2d Sess., p. 4. Observing that about 75% or 80% of all railroad employees were believed to belong to a union, the report continued: "Nonunion members, nevertheless, share in the benefits derived from collective agreements negotiated by the railway labor unions but bear no share of the cost of obtaining such benefits." *Ibid.*[13]

[13] For reiteration by various union spokesmen of this purpose of eliminating the problems created by the "free rider," see Hearings on S. 3295, *supra,* pp. 6, 32–33, 36, 40, 66, 130, 236–237; Hearings on H. R. 7789, *supra,* pp. 9, 19, 25–26, 29, 37–38, 49–50, 79, 81, 85, 87, 89, 228, 240–241, 250, 253, 255, 275. For other statements by members of Congress indicating their acceptance of this justification for the legislation, see Senate Hearings, *supra,* pp. 169–171; House Hearings, *supra,* pp. 25, 87, 106, 110, 139; 96 Cong. Rec. 16279, 17050–17051, 17055, 17057, 17058.

Mr. Harrison expressly disclaimed that the union shop was sought in order to strengthen the bargaining power of the unions. He said:

"I do not think it would affect the power of bargaining one way or the other . . . . If I get a majority of the employees to vote for my union as the bargaining agent, I have got as much economic

These considerations overbore the arguments in favor of the earlier policy of complete individual freedom of choice. As we said in *Railway Employes' Dept.* v. *Hanson, supra,* p. 235, "[t]o require, rather than to induce, the beneficiaries of trade unionism to contribute to its costs may not be the wisest course. But Congress might well believe that it would help insure the right to work in and along the arteries of interstate commerce. No more has been attempted here. . . . The financial support required relates . . . to the work of the union in the realm of collective bargaining." [14] The conclusion to which this history clearly

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power at that stage of development as I will ever have. The man that is going to scab—he will scab whether he is in or out of the union, and it does not make any difference." House Hearings, *supra,* pp. 20–21.

Nor was any claim seriously advanced that the union shop was necessary to hold or increase union membership. The prohibition against union security in the 1934 Act had not interfered with the growth of union membership or caused the unions to lose their positions as exclusive bargaining agents. See *A. F. of L.* v. *American Sash Co.,* 335 U. S. 538, 548–549, n. 4 (concurring opinion); see also Transcript of Proceedings, Presidential Emergency Board No. 98, appointed pursuant to Exec. Order No. 10306, Nov. 15, 1951, Carriers' Exhibits W–23, W–28, pp. 38–51.

[14] The unions continued to urge the elimination of the problems created by the "free rider" as the justification for the union shop in the proceedings before the Presidential Emergency Board, which recommended that the carriers make the agreements involved in this case. Mr. Harrison said: ". . . the railroad unions' primary purpose in seeking and obtaining the amendment to the Railway Labor Act in 1951 to permit the check-off for payment of dues, was to eliminate the 'free rider,' the guy who drags his feet, a term which is applied by unions to non-members who obtain, without cost to themselves, the benefits of collective bargaining procured through the efforts of the dues-paying members." Transcript of Proceedings, Presidential Emergency Board No. 98, appointed pursuant to Exec. Order No. 10306, Nov. 15, 1951, p. 150. See also Transcript, pp. 40–44, 144–156, 182–183, 186–188, 202–203, 268, 283–286, 289, 545,

points is that § 2, Eleventh contemplated compulsory unionism to force employees to share the costs of negotiating and administering collective agreements, and the costs of the adjustment and settlement of disputes.[15] One looks in vain for any suggestion that Congress also meant in § 2, Eleventh to provide the unions with a means for forcing employees, over their objection, to support political causes which they oppose.

608–611, 1893, 1901, 2136, 2495–2497, 2795, 2839, 2930, 3014–3015, 3018–3019.

[15] Section 2, Eleventh (c), which gives scope for intercraft mobility in the rail industry, is consistent with the view that the primary union and congressional concern was with the elimination of the "free rider" who did not support his representative's performance of its functions under the Act. The section provides that an operating employee cannot be required to become a member of his craft or class representative if "said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services . . . ." This Court held in *Pennsylvania R. Co.* v. *Rychlik*, 352 U. S. 480, that the unions "national in scope" contemplated by this provision are those which have already qualified as electors under § 3 of the Act to participate in the National Railroad Adjustment Board. As the court said in *Pigott* v. *Detroit, T. & I. R. Co.*, 116 F. Supp. 949, 955, n. 11, aff'd, 221 F. 2d 736: "Each union participating in the agencies of the Act must itself pay for the salaries and expenses of its officials who serve in such agencies. This constitutes a considerable financial burden which must be reflected in the dues charged the employees. Unless a labor organization were obliged to participate in the judgment board machinery before it could qualify for the union shop exception, it would place the bargaining representative in an unfair competitive position with respect to a rival union. Employees would be tempted to desert the organization of a bargaining representative which was assuming its responsibilities under the Act in favor of another union which was not contributing to its operation and which could thereby offer cheaper dues. This would defeat the very purpose of the union amendment which is to compel each employee to contribute his part to the bargaining representative's activities on his behalf, including its participation in the administrative machinery of the Act."

III.

The Safeguarding of Rights of Dissent.

To the contrary, Congress incorporated safeguards in the statute to protect dissenters' interests. Congress became concerned during the hearings and debates that the union shop might be used to abridge freedom of speech and beliefs. The original proposal for authorization of the union shop was qualified in only one respect. It provided "That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member . . . ." This was primarily designed to prevent discharge of employees for nonmembership where the union did not admit the employee to membership on racial grounds. See House Hearings, p. 68; Senate Hearings, pp. 22–25. But it was strenuously protested that the proposal provided no protection for an employee who disagreed with union policies or leadership. It was argued, for example, that "the right of free speech is at stake. . . . A man could feel that he was no longer able freely to express himself because he could be dismissed on account of criticism of the union . . . ." House Hearings, p. 115; see also Senate Hearings, pp. 167–169, 320. Objections of this kind led the rail unions to propose an addition to the proviso to § 2, Eleventh to prevent loss of job for lack of union membership "with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, fees, and assessments uniformly required as a condition of acquiring or retaining membership." House Hearings, p. 247. Mr. Harrison presented this text and stated, "It is submitted that this bill with the amendment as suggested in this state-

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ment remedies the alleged abuses of compulsory union membership as claimed by the opposing witnesses, yet makes possible the elimination of the 'free rider' and the sharing of the burden of maintenance by all of the beneficiaries of union activity." House Hearings, p. 253. Mr. Harrison also sought to reassure Committee members as to the possible implications of other language of the proposed bill; he explained that "fees" meant "initiation fees," and "assessments" was intended primarily to cover the situation of a union which had only nominal dues, so that its members paid "an assessment to finance the activities of the general negotiating committee . . . it will vary month by month, based on the expenses and work of that committee." P. 257. Or, he explained, an assessment might cover convention expenses. "So we had to use the word 'assessment' in addition to dues and fees because some of the unions collect a nominal amount of dues and an assessment month after month to finance part of the activities, although in total it perhaps is no different than the dues paid in the first instance which comprehended all of those expenses." P. 258. In reporting the bill, the Senate Committee expressly noted the protective proviso, S. Rep. No. 2262, 81st Cong., 2d Sess., pp. 3–4, and affixed the Senate additional limitations. The words "not including fines and penalties" were added, to make it clear that termination of union membership for their nonpayment would not be grounds for discharge. It was also made explicit that "fees" meant "initiation fees." See 96 Cong. Rec. 16267–16268.

A congressional concern over possible impingements on the interests of individual dissenters from union policies is therefore discernible. It is true that opponents of the union shop urged that Congress should not allow it without explicitly regulating the amount of dues which might be exacted or prescribing the uses for

which the dues might be expended.[16] We may assume that Congress was also fully conversant with the long history of intensive involvement of the railroad unions in political activities. But it does not follow that § 2, Eleventh places no restriction on the use of an employee's money, over his objection, to support political causes he opposes merely because Congress did not enact a comprehensive regulatory scheme governing expenditures. For it is abundantly clear that Congress did not completely abandon the policy of full freedom of choice embodied in the 1934 Act, but rather made inroads on it for the limited purpose of eliminating the problems created by the "free rider." That policy survives in § 2, Eleventh in the safeguards intended to protect freedom of dissent. Congress was aware of the conflicting interests involved in the question of the union shop and sought to achieve their accommodation. As was said by the Presidential Emergency Board which recommended the making of the union-shop agreement involved in this case:

> "It is not as though Congress had believed it was merely removing some abstract legal barrier and not passing on the merits. It was made fully aware that it was deciding these critical issues of individual right versus collective interests which have been stressed in this proceeding.
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> "Indeed, Congress gave very concrete evidence that it carefully considered the claims of the individual to be free of arbitrary or unreasonable restrictions resulting from compulsory unionism. It did not give a blanket approval to union-shop agreements. Instead it enacted a precise and carefully

[16] See Senate Hearings, pp. 173–174, 316–317; House Hearings, pp. 160, 172–173. See also 96 Cong. Rec. 17049–17050.

> drawn limitation on the kind of union-shop agreements which might be made. The obvious purpose of this careful prescription was to strike a balance between the interests pressed by the unions and the considerations which the Carriers have urged. By providing that a worker should not be discharged if he was denied or if he lost his union membership for any reason other than nonpayment of dues, initiation fees or assessments, Congress definitely indicated that it had weighed carefully and given effect to the policy of the arguments against the union shop." Report of Presidential Emergency Board No. 98, appointed pursuant to Exec. Order No. 10306, Nov. 15, 1951, p. 6.

We respect this congressional purpose when we construe § 2, Eleventh as not vesting the unions with unlimited power to spend exacted money. We are not called upon to delineate the precise limits of that power in this case. We have before us only the question whether the power is restricted to the extent of denying the unions the right, over the employee's objection, to use his money to support political causes which he opposes. Its use to support candidates for public office, and advance political programs, is not a use which helps defray the expenses of the negotiation or administration of collective agreements, or the expenses entailed in the adjustment of grievances and disputes. In other words, it is a use which falls clearly outside the reasons advanced by the unions and accepted by Congress why authority to make union-shop agreements was justified. On the other hand, it is equally clear that it is a use to support activities within the area of dissenters' interests which Congress enacted the proviso to protect. We give § 2, Eleventh the construction which achieves both congressional purposes when we hold, as we do, that § 2, Eleventh is to be construed to deny the unions, over an

employee's objection, the power to use his exacted funds to support political causes which he opposes.[17]

We express no view as to other union expenditures objected to by an employee and not made to meet the costs of negotiation and administration of collective agreements, or the adjustment and settlement of grievances and disputes. We do not understand, in view of the findings of the Georgia courts and the question decided by the Georgia Supreme Court, that there is before us the matter of expenditures for activities in the area between the costs which led directly to the complaint as to "free riders," and the expenditures to support

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[17] A distinction between the use of union funds for political purposes and their expenditure for nonpolitical purposes is implicit in other congressional enactments. Thus the Treasury has adopted this regulation under § 162 of the Internal Revenue Code of 1954 to govern the deductibility for income-tax purposes of payments by union members to their union:

"Dues and other payments to an organization, such as a labor union or a trade association, which otherwise meet the requirements of the regulations under section 162, are deductible in full unless a substantial part of the organization's activities consists of [expenditures for lobbying purposes, for the promotion or defeat of legislation, for political campaign purposes (including the support of or opposition to any candidate for public office), or for carrying on propaganda (including advertising) related to any of the foregoing purposes] . . . . If a substantial part of the activities of the organization consists of one or more of those specified, deduction will be allowed only for such portion of such dues and other payments as the taxpayer can clearly establish is attributable to activities other than those so specified. The determination as to whether such specified activities constitute a substantial part of an organization's activities shall be based on all the facts and circumstances. In no event shall special assessments or similar payments (including an increase in dues) made to any organization for any of such specified purposes be deductible." 26 CFR § 1.162–15 (c)(2); see also Rev. Proc. 61–10, 1961–16 Int. Rev. Bull. 49, April 17, 1961. Cf. *Cammarano* v. *United States*, 358 U. S. 498.

union political activities.[18] We are satisfied, however, that § 2, Eleventh is to be interpreted to deny the unions the power claimed in this case. The appellant unions, in insisting that § 2, Eleventh contemplates their use of exacted funds to support political causes objected to by the employee, would have us hold that Congress sanctioned an expansion of historical practices in the political area by the rail unions. This we decline to do. Both by tradition and, from 1934 to 1951, by force of law, the rail unions did not rely upon the compulsion of union security agreements to exact money to support the political activities in which they engage. Our construction therefore involves no curtailment of the traditional political activities of the railroad unions. It means only that those unions must not support those activities, against the expressed wishes of a dissenting employee, with his exacted money.[19]

[18] For example, many of the national labor unions maintain death benefit funds from the dues of individual members transmitted by the locals.

[19] In 1958 Senator Potter proposed an amendment to pending labor legislation that would have given employees subject to a union-shop agreement the right to have their dues used only for collective bargaining and related purposes and would have required the Secretary of Labor, if he determined that the dues were not so expended, to bring an action in behalf of the dissenter for the recovery of all the money paid by the dissenter to the union during the life of the agreement and for such other appropriate and injunctive relief as the court deemed just and proper. See 104 Cong. Rec. 11330. Senator Potter advanced this proposal to implement principles which he believed to be already implicit in the labor laws. He said, "I know that when Congress enacted legislation providing for labor and management to enter into contracts for union shops it was intended, under the union shop principle, that labor would use the dues for collective-bargaining purposes." 104 Cong. Rec. 11215; see also *id.*, p. 11331. The failure of the amendment to be adopted reflected disagreement in the Senate over the scope of its coverage and doubts as to the propriety of the breadth of the remedy. See 104 Cong. Rec. 11214–11224, 11330–11347.

IV.

The Appropriate Remedy.

Under our view of the statute, however, the decision of the court below was erroneous and cannot stand. The appellees who have participated in this action have in the course of it made known to their respective unions their objection to the use of their money for the support of political causes. In that circumstance, the respective unions were without power to use payments thereafter tendered by them for such political causes. However, the union-shop agreement itself is not unlawful. *Railway Employes' Dept.* v. *Hanson, supra.* The appellees therefore remain obliged, as a condition of continued employment, to make the payments to their respective unions called for by the agreement. Their right of action stems not from constitutional limitations on Congress' power to authorize the union shop, but from § 2, Eleventh itself. In other words, appellees' grievance stems from the spending of their funds for purposes not authorized by the Act in the face of their objection, not from the enforcement of the union-shop agreement by the mere collection of funds. If their money were used for purposes contemplated by § 2, Eleventh, the appellees would have no grievance at all. We think that an injunction restraining enforcement of the union-shop agreement is therefore plainly not a remedy appropriate to the violation of the Act's restriction on expenditures. Restraining the collection of all funds from the appellees sweeps too broadly, since their objection is only to the uses to which some of their money is put. Moreover, restraining collection of the funds as the Georgia courts have done might well interfere with the appellant unions' performance of those functions and duties which the Railway Labor Act places upon them to attain its goal of stability in the industry. Even though the lower court decree is subject to modifi-

cation upon proof by the appellants of cessation of improper expenditures, in the interim the prohibition is absolute against the collection of all funds from anyone who can show that he is opposed to the expenditure of any of his money for political purposes which he disapproves. The complete shutoff of this source of income defeats the congressional plan to have all employees benefited share costs "in the realm of collective bargaining," *Hanson,* 351 U. S., at p. 235, and threatens the basic congressional policy of the Railway Labor Act for self-adjustments between effective carrier organizations and effective labor organizations.[20]

Since the case must therefore be remanded to the court below for consideration of a proper remedy, we think that it is appropriate to suggest the limits within which remedial discretion may be exercised consistently with the Railway Labor Act and other relevant public policies. As indicated, an injunction against enforcement of the union shop itself through the collection of funds is unwarranted. We also think that a blanket injunction against all expenditures of funds for the disputed purposes, even one conditioned on cessation of improper expenditures, would not be a proper exercise of equitable discretion. Nor would it be proper to issue an interim or temporary blanket injunction of this character pending a final adjudication. The Norris-LaGuardia Act, 47 Stat. 70, 29 U. S. C. §§ 101–115, expresses a basic policy against the injunction of activities of labor unions. We have held that the Act does not deprive the federal courts of jurisdiction to enjoin compliance with various mandates of the Railway Labor Act. *Virginian R. Co.* v. *System Federation,* 300 U. S. 515; *Graham* v. *Brotherhood of Locomotive*

[20] Compare Senator Kennedy's objection to the remedy for recovery of all dues contemplated by the Potter amendment. 104 Cong. Rec. 11346.

Firemen & Enginemen, 338 U. S. 232. However, the policy of the Act suggests that the courts should hesitate to fix upon the injunctive remedy for breaches of duty owing under the labor laws unless that remedy alone can effectively guard the plaintiff's right. In *Graham* this Court found an injunction necessary to prevent the breach of the duty of fair representation, in order that Congress might not seem to have held out to the petitioners there "an illusory right for which it was denying them a remedy." 338 U. S., at p. 240. No such necessity for a blanket injunctive remedy because of the absence of reasonable alternatives appears here. Moreover, the fact that these expenditures are made for political activities is an additional reason for reluctance to impose such an injunctive remedy. Whatever may be the powers of Congress or the States to forbid unions altogether to make various types of political expenditures, as to which we express no opinion here,[21] many of the expenditures involved in the present case are made for the purpose of disseminating information as to candidates and programs and publicizing the positions of the unions on them. As to such expenditures an injunction would work a restraint on the expression of political ideas which might be offensive to the First Amendment. For the majority also has an interest in stating its views without being silenced by the dissenters. To attain the appropriate reconciliation between majority and dissenting interests in the area of political expression, we think the courts in administering the Act should select remedies which protect both interests to the maximum extent possible without undue impingement of one on the other.

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[21] No contention was made below or here that any of the expenditures involved in this case were made in violation of the Federal Corrupt Practices Act, 18 U. S. C. § 610, or any state corrupt practices legislation.

Among possible remedies which would appear appropriate to the injury complained of, two may be enforced with a minimum of administrative difficulty [22] and with little danger of encroachment on the legitimate activities or necessary functions of the unions. Any remedies, however, would properly be granted only to employees who have made known to the union officials that they do not desire their funds to be used for political causes to which they object. The safeguards of § 2, Eleventh were added for the protection of dissenters' interest, but dissent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee. The union receiving money exacted from an employee under a union-shop agreement should not in fairness be subjected to sanctions in favor of an employee who makes no complaint of the use of his money for such activities. From these considerations, it follows that the present action is not a true class action, for there is no attempt to prove the existence of a class of workers who had specifically objected to the exaction of dues for political purposes. See *Hansberry* v. *Lee,* 311 U. S. 32, 44. Thus we think that only those who have identified themselves as opposed to political uses of their funds are entitled to relief in this action.

One remedy would be an injunction against expenditure for political causes opposed by each complaining employee of a sum, from those moneys to be spent by the

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[22] We note that the Labor-Management Reporting and Disclosure Act of 1959 requires every labor organization subject to the federal labor laws to file annually with the Secretary of Labor a financial report as to certain specified disbursements and also "other disbursements made by it including the purposes thereof . . . ." § 201 (b) (6). Each union is also required to maintain records in sufficient detail to supply the necessary basic information and data from which the report may be verified. § 206. The information required to be contained in such report must be available to all union members. § 201 (c).

union for political purposes, which is so much of the moneys exacted from him as is the proportion of the union's total expenditures made for such political activities to the union's total budget. The union should not be in a position to make up such sum from money paid by a nondissenter, for this would shift a disproportionate share of the costs of collective bargaining to the dissenter and have the same effect of applying his money to support such political activities. A second remedy would be restitution to each individual employee of that portion of his money which the union expended, despite his notification, for the political causes to which he had advised the union he was opposed. There should be no necessity, however, for the employee to trace his money up to and including its expenditure; if the money goes into general funds and no separate accounts of receipts and expenditures of the funds of individual employees are maintained, the portion of his money the employee would be entitled to recover would be in the same proportion that the expenditures for political purposes which he had advised the union he disapproved bore to the total union budget.

The judgment is reversed and the case is remanded to the court below for proceedings not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE DOUGLAS, concurring.

Some forced associations are inevitable in an industrial society. One who of necessity rides busses and street cars does not have the freedom that John Muir and Walt Whitman extolled. The very existence of a factory brings into being human colonies. Public housing in some areas may of necessity take the form of apartment buildings which to some may be as repulsive as ant hills. Yet people in teeming communities often have no other choice.

Legislatures have some leeway in dealing with the problems created by these modern phenomena.

Collective bargaining is a remedy for some of the problems created by modern factory conditions. The beneficiaries are all the members of the laboring force. We therefore concluded in *Railway Employes' Dept.* v. *Hanson*, 351 U. S. 225, that it was permissible for the legislature to require all who gain from collective bargaining to contribute to its cost.[1] That is the narrow and precise holding of the *Hanson* case, as MR. JUSTICE BLACK shows.

Once an association with others is compelled by the facts of life, special safeguards are necessary lest the spirit of the First, Fourth, and Fifth Amendments be lost and we all succumb to regimentation. I expressed this concern in *Public Utilities Comm'n* v. *Pollak*, 343 U. S. 451, 467 (dissenting opinion), where a "captive audience" was forced to listen to special radio broadcasts. If an association is compelled, the individual should not be forced to surrender any matters of conscience, belief, or expression. He should be allowed to enter the group with his own flag flying, whether it be religious, political, or philosophical; nothing that the group does should deprive him of the privilege of preserving and expressing his agreement, disagreement, or dissent, whether it coincides with the view of the group, or conflicts with it in minor or major ways; and he should not be required to finance the promotion of causes with which he disagrees.

In a debate on the Universal Declaration of Human Rights, later adopted by the General Assembly of the United Nations on December 10, 1948, Mr. Malik of

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[1] The problem of employees who receive benefits of union representation but who are unwilling to give financial support to the union has received much attention from Congress (see S. Rep. No. 105, 80th Cong., 1st Sess., pp. 5–7; H. R. Rep. No. 510, 80th Cong., 1st Sess., pp. 42–43) and from the courts. See *Radio Officers* v. *Labor Board*, 347 U. S. 17.

Lebanon stated what I think is the controlling principle in cases of the character now before us:

> "The social group to which the individual belongs, may, like the human person himself, be wrong or right: the person alone is the judge." [2]

This means that membership in a group cannot be conditioned on the individual's acceptance of the group's philosophy.[3] Otherwise, First Amendment rights are required to be exchanged for the group's attitude, philosophy, or politics. I do not see how that is permissible under the Constitution. Since neither Congress nor the state legislatures can abridge those rights, they cannot grant the power to private groups to abridge them. As I read the First Amendment, it forbids any abridgment by government whether directly or indirectly.

The collection of dues for paying the costs of collective bargaining of which each member is a beneficiary is one thing. If, however, dues are used, or assessments are made, to promote or oppose birth control, to repeal or increase the taxes on cosmetics, to promote or oppose the admission of Red China into the United Nations, and the like, then the group compels an individual to support with his money causes beyond what gave rise to the need for group action.

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[2] Commission on Human Rights, Summary Record of the Fourteenth Meeting, February 4, 1947, U. N. Doc. E/CN.4/SR.14, p. 4.

[3] We noted in the *Hanson* case, 351 U. S. 236–237, n. 8, various restrictions placed by union constitutions and by-laws on individual members. Some disqualified persons from membership for their political views or associations. Certainly government could not prescribe standards of that character.

Some restrained members from certain kinds of speech or activity. Certainly government could not impose these restraints.

Some required the use of portions of union funds for purposes other than collective bargaining. Plainly those conditions could not be imposed by the state or federal government or enforced by the judicial branch of government. See *Shelley* v. *Kraemer*, 334 U. S. 1; *Barrows* v. *Jackson*, 346 U. S. 249.

I think the same must be said when union dues or assessments are used to elect a Governor, a Congressman, a Senator, or a President. It may be said that the election of a Franklin D. Roosevelt rather than a Calvin Coolidge might be the best possible way to serve the cause of collective bargaining. But even such a selective use of union funds for political purposes subordinates the individual's First Amendment rights to the views of the majority. I do not see how that can be done, even though the objector retains his rights to campaign, to speak, to vote as he chooses. For when union funds are used for that purpose, the individual is required to finance political projects against which he may be in rebellion.[4] The furtherance of the common cause leaves some leeway for the leadership of the group. As long as they act to promote the cause which justified bringing the group together, the individual cannot withdraw his financial support merely because he disagrees with the group's strategy. If that were allowed, we would be reversing the *Hanson* case, *sub silentio*. But since the funds here in issue are used for causes other than defraying the costs of collective bargaining, I would affirm the judgment below with modifications. Although I recognize the strength of the arguments advanced by my Brothers BLACK and WHITTAKER against giving a "proportional" relief to appellees in this case, there is the practical prob-

[4] Hostility to such compulsion was expressed early in our history. Madison, in his Memorial and Remonstrance Against Religious Assessments, wrote, "Who does not see . . . that the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?" II Writings of James Madison (Hunt ed. 1901), p. 186.

Jefferson in his 1779 Bill for Religious Liberty wrote "that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical." See 12 Hening's Va. Stat. 85; Brant, Madison, The Nationalist (1948), p. 354.

lem of mustering five Justices for a judgment in this case. Cf. *Screws* v. *United States,* 325 U. S. 91, 134. So I have concluded *dubitante* to agree to the one suggested by MR. JUSTICE BRENNAN, on the understanding that all relief granted will be confined to the six protesting employees. This suit, though called a "class" action, does not meet the requirements as the use or nonuse of any dues or assessments depends on the choice of each individual, not the group. See *Hansberry* v. *Lee,* 311 U. S. 32, 44.

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

Understanding the Court's opinion to hold—put in my own words—that, in enacting § 2, Eleventh of the Railway Labor Act, Congress intended to, and impliedly did, limit the use that railway labor unions may make of dues, fees and assessments, collected from those of its members who were or are required to become or remain its members by force of union shop contracts negotiated as permitted by that section, only to defray the costs of negotiating and administering collective bargaining agreements—including the adjustment and settlement of disputes—and that the *Hanson* case, rightly construed, upholds no more than that, I join Points I, II and III of the Court's opinion.

But I dissent from Point IV of the Court's opinion. In respect to that point, it seems appropriate to make the following observations. When many members pay the same amount of monthly dues into the treasury of the union which dispenses the fund for what are, under the Court's opinion, both permitted and proscribed activities, how can it be told whose dues paid for what? Let us suppose a union with two members, each paying monthly dues of three dollars, and that one does but the other does not object to his dues being expended for "proscribed

activity"—whatever that phrase may mean. Of the dues for a given month, the union expends four dollars for admittedly proper activity and two dollars for "proscribed activity," answering to the objector that the two dollars spent for "proscribed activity" were not from his, but from the other's, dues. Would not the result be that the objector was thus required to pay not his one-half but three-fourths of the union's legitimate expenses? Or, has not the objector nevertheless paid a ratable part of the cost of the "proscribed activity"?

The Court suggests that a proper decree might require "restitution" to the objector of that part of his dues that is equal to the ratio of dues spent for "proscribed activity" to total dues collected by the union. But even if the Court could draw a clear line between what is and what is not "proscribed activity," the accounting and proof problems involved would make the remedy most onerous and impractical. But when there is added to this a full recognition of the practical impossibility of judicially drawing the clear line mentioned and also of the fact that the local unions which collect the dues promptly pay a part of them to the national union which, in turn, also engages in "proscribed activity," it becomes plain that the suggested restitution remedy is impossible of practical performance.

It would seem to follow that the only practical remedy possible is the one formulated by the Georgia courts, and I would approve it.

MR. JUSTICE BLACK, dissenting.

This action was brought in a Georgia state court by six railroad employees [1] in behalf of themselves "and others similarly situated" against railroads making up the

[1] Although there were more complainants when the suit was brought, there were only six when the trial was completed.

Southern Railway System, labor organizations representing employees of that system in collective bargaining, and a number of individuals, to enjoin enforcement and application to them of a union-shop agreement entered into between the railroads and the labor organizations as authorized by § 2, Eleventh of the Railway Labor Act.[2] The agreement's terms required all employees, in order to keep their railroad jobs, to join the union and remain members, at least to the extent of tendering periodic dues, initiation fees and assessments, not including fines and penalties.[3] The complaint, as amended, charged that the agreement was void because it conflicted with the laws and Constitution of Georgia and the First, Fifth, Ninth and Fourteenth Amendments to the Federal Constitution. Section 2, Eleventh provides that such union shops are valid "[n]otwithstanding any other . . . statute or law of the United States . . . or of any State." Relying on our decision in *Railway Employes' Dept.* v. *Hanson,* 351 U. S. 225, which upheld contracts made pursuant to that section, the Georgia trial court dismissed the complaint as amended. The State Supreme Court reversed and remanded the case for trial, distinguishing our *Hanson* decision as follows:

> "It is alleged that the union dues and other payments they will be required to make to the union

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[2] 64 Stat. 1238, 45 U. S. C. § 152, Eleventh.

[3] In accordance with the requirements of the statute, the agreement provided, in language almost identical to that of the statute, that no employee would be required to become or remain a member of the union "if such membership is not available to such employe upon the same terms and conditions as are generally applicable to any other member, or if the membership of such employe is denied or terminated for any reason other than the failure of the employe to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership."

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> will be used to 'support ideological and political doctrines and candidates' which they are unwilling to support and in which they do not believe, and that this will violate the First, Fifth and Ninth Amendments of the Constitution. While Railway Emp. Dept. *v.* Hanson, 351 U. S. 225, supra, upheld the validity of a closed shop contract executed under § 2, Eleventh, that opinion clearly indicates that that court would not approve a requirement that one join the union if his contributions thereto were used as this petition alleges. It is there said (headnote 3c): 'Judgment is *reserved* [italics in Georgia Supreme Court opinion] as to the validity or enforceability of a union or closed shop agreement if other conditions of union membership are imposed or if the exaction of dues, initiation fees or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First or the Fifth Amendment.' We must render judgment now upon this precise question. We do not believe one can constitutionally be compelled to contribute money to support ideas, politics and candidates which he opposes. . . ." [4]

On remand, testimony, admissions and stipulations showed without dispute that union funds collected from dues, fees and assessments were regularly used to support and oppose various political and economic programs, candidates, parties and ideological causes, and that the complaining employees were opposed to many of the positions the unions took in these matters. The trial court made lengthy findings, one crucial here being:

> "Those funds have been and are being used in substantial amounts to propagate political and

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[4] *Looper* v. *Georgia Southern & F. R. Co.*, 213 Ga. 279, 284, 99 S. E. 2d 101, 104–105.

> economic doctrines, concepts and ideologies and to promote legislative programs opposed by plaintiffs and the class they represent."

The trial court then found and declared § 2, Eleventh "unconstitutional to the extent that it permits, or is applied to permit, the exaction of funds from plaintiffs and the class they represent for the complained of purposes and activities set forth above." Compulsory membership under these circumstances was held to abridge First Amendment freedoms of association, thought, speech, press and political expression.[5] On the basis of this holding the trial court enjoined all the defendants "from enforcing the said union shop agreements . . . and from discharging petitioners, or any member of the class they represent, for refusing to become or remain members of, or pay periodic dues, fees, or assessments to, any of the labor union defendants, provided, however, that said defendants may at any time petition the court to dissolve said injunction upon a showing that they no longer are engaging in the improper and unlawful activities described above." Again, the activities referred to were the use of union funds collected from fees, dues and assessments to support candidates, parties, or ideological, economic or political views contrary to the wishes of the complaining employees. The trial court also decreed that the three employees who had been compelled under protest to pay dues, fees and assessments because of the union-shop agreement were entitled to have those payments returned.

The Supreme Court of Georgia affirmed, holding that "[o]ne who is compelled to contribute the fruits of his

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[5] The trial court also held that the section as enforced violated the Fifth, Ninth and Tenth Amendments. My view as to the First Amendment makes it unnecessary for me to consider the claims under the other Amendments.

labor to support or promote political or economic programs or support candidates for public office is just as much deprived of his freedom of speech as if he were compelled to give his vocal support to doctrines he opposes." [6] I fully agree with this holding of the Georgia Supreme Court and would affirm its judgment with certain modifications of the relief granted.

I.

Section 2, Eleventh of the Railway Labor Act authorizes unions and railroads to make union-shop agreements notwithstanding any other provision of state or federal law. Such a contract simply means that no person can keep a job with the contracting railroad unless he becomes a member of and pays dues to the contracting union. Neither § 2, Eleventh nor any other part of the Act contains any implication or even a hint that Congress wanted to limit the purposes for which a contracting union's dues should or could be spent. All the parties to this litigation have agreed from its beginning, and still agree, that there is no such limitation in the Act. The Court nevertheless, in order to avoid constitutional questions, interprets the Act itself as barring use of dues for political purposes. In doing this I think the Court is once more "carrying the doctine of avoiding constitutional questions to a wholly unjustifiable extreme." [7] In fact, I think the Court is actually rewriting § 2, Eleventh to make it mean exactly what Congress refused to make it mean. The very legislative history relied on by the Court appears to me to prove that its interpretation of § 2, Eleventh is without justification. For that history shows that Congress with its eyes wide open passed that section, knowing that its broad language would permit the use of union dues

[6] 215 Ga. 27, 46, 108 S. E. 2d 796, 808.

[7] *Clay* v. *Sun Insurance Office,* 363 U. S. 207, 213 (dissenting opinion).

to advocate causes, doctrines, laws, candidates and parties, whether individual members objected or not.[8] Under such circumstances I think Congress has a right to a determination of the constitutionality of the statute it passed, rather than to have the Court rewrite the statute in the name of avoiding decision of constitutional questions.

The end result of what the Court is doing is to distort this statute so as to deprive unions of rights I think Congress tried to give them and at the same time, in the companion case of *Lathrop* v. *Donohue,* decided today, *post,* p. 820, leave itself free later to hold that integrated bar associations can constitutionally exercise the powers now denied to labor unions for fear of unconstitutionality. The constitutional question raised alike in this case and in *Lathrop* is bound to come back here soon with a record so meticulously perfect that the Court cannot escape deciding it. Should the Court then hold that lawyers and workers can constitutionally be compelled to pay for the support of views they are against, the result would be that the labor unions would have lost their case this

[8] The specific problem of use of the compelled dues for political purposes was raised during both the hearings and the floor debates. Hearings on S. 3295, Subcommittee of the Senate Committee on Labor and Public Welfare, 81st Cong., 2d Sess., pp. 316–317; Hearings on H. R. 7789, House Committee on Interstate and Foreign Commerce, 81st Cong., 2d Sess., p. 160; 96 Cong. Rec. 17049–17050.

Again, in 1958, when Senator Potter introduced his amendment to limit the use of compelled dues to collective bargaining and related purposes, he pointed out on the floor of the Senate that "the fact is that under current practices in some of our labor organizations, dissenters are being denied the freedom not to support financially political or ideological or other activities which they may oppose." 104 Cong. Rec. 11214. It could hardly be contended that the debate on his proposal, which was defeated, indicated any generally held belief that such use of compelled dues was already proscribed under § 2, Eleventh or any other existing statute. See 104 Cong. Rec. 11214–11224, 11330–11347.

year on a statutory-constitutional basis while the integrated bar would win its case next year or the year after on the ground that the constitutional part of the basis for the holding against the unions today was groundless. Yet no one has suggested that the Court's statutory construction of § 2, Eleventh could possibly be supported without the crutch of its fear of unconstitutionality. This is why I think the Court's avoidance of the constitutional issue in both cases today is wholly unfair to the unions as well as to Congress. I must consider this case on the basis of my belief as to the constitutionality of § 2, Eleventh, interpreted so as to authorize compulsion of workers to pay dues to a union for use in advocating causes and political candidates that the protesting workers are against.

II.

It is contended by the unions that precisely the same First Amendment question presented here was considered and decided in *Railway Employes' Dept.* v. *Hanson,* 351 U. S. 225. I agree that it clearly was not. Section 2, Eleventh was challenged there before it became effective and the main grounds of attack, as our opinion noted, were that the union-shop agreement would deprive employees of their freedom of association under the First Amendment and of their property rights under the Fifth. There were not in the *Hanson* case, as there are here, allegations, proof and findings that union funds regularly were being used to support political parties, candidates and economic and ideological causes to which the complaining employees were hostile. Our opinion in *Hanson* carefully pointed to the fact that only general "[w]ide-ranged problems" were tendered under the First Amendment and that imposition of "assessments . . . not germane to collective bargaining" would present "a different problem." The Court went on further to emphasize

that if at another time "the exaction of dues, initiation fees, or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment, this judgment will not prejudice the decision in that case. . . . We only hold that the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate either the First or the Fifth Amendments." [9]

Thus the *Hanson* case held only that workers could be required to pay their part of the cost of actual bargaining carried on by a union selected as bargaining agent under authority of Congress, just as Congress doubtless could have required workers to pay the cost of such bargaining had it chosen to have the bargaining carried on by the Secretary of Labor or any other appropriately selected bargaining agent. The *Hanson* case did not hold that railroad workers could be compelled by law to forego their constitutionally protected freedom of association by participating as union "members" against their will. That case cannot, therefore, properly be read to rest on a principle which would permit government—in furtherance of some public interest, be that interest actual or imaginary—to compel membership in Rotary Clubs, fraternal organizations, religious groups, chambers of commerce, bar associations, labor unions, or any other private organizations Government may decide it wants to subsidize, support or control. In a word, the *Hanson* case did not hold that the existence of union-shop contracts could be used as an excuse to force workers to associate with people they do not want to associate with, or to pay their money to support causes they detest.

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[9] 351 U. S., at 235, 236, 238. See also *id.*, at 242 (concurring opinion).

III.

The First Amendment provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Probably no one would suggest that Congress could, without violating this Amendment, pass a law taxing workers, or any persons for that matter (even lawyers), to create a fund to be used in helping certain political parties or groups favored by the Government to elect their candidates or promote their controversial causes. Compelling a man by law to pay his money to elect candidates or advocate laws or doctrines he is against differs only in degree, if at all, from compelling him by law to speak for a candidate, a party, or a cause he is against. The very reason for the First Amendment is to make the people of this country free to think, speak, write and worship as they wish, not as the Government commands.

There is, of course, no constitutional reason why a union or other private group may not spend its funds for political or ideological causes if its members voluntarily join it and can voluntarily get out of it.[10] Labor unions made up of voluntary members free to get in or out of the unions when they please have played important and useful roles in politics and economic affairs.[11] How to spend its money is a question for each voluntary group to decide for itself in the absence of some valid law for-

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[10] See *DeMille* v. *American Federation of Radio Artists*, 175 P. 2d 851, 854 (Cal. Dist. Ct. App.), aff'd, 31 Cal. 2d 139, 147–149, 187 P. 2d 769, 775–776, cert. denied, 333 U. S. 876.

[11] *United States* v. *C. I. O.*, 335 U. S. 106, 144 (concurring opinion).

bidding activities for which the money is spent.[12] But a different situation arises when a federal law steps in and authorizes such a group to carry on activities at the expense of persons who do not choose to be members of the group as well as those who do. Such a law, even though validly passed by Congress, cannot be used in a way that abridges the specifically defined freedoms of the First Amendment. And whether there is such abridgment depends not only on how the law is written but also on how it works.[13]

There can be no doubt that the federally sanctioned union-shop contract here, as it actually works, takes a part of the earnings of some men and turns it over to others, who spend a substantial part of the funds so received in efforts to thwart the political, economic and ideological hopes of those whose money has been forced from them under authority of law. This injects federal compulsion into the political and ideological processes, a result which I have supposed everyone would agree the First Amendment was particularly intended to prevent. And it makes no difference if, as is urged, political and legislative activities are helpful adjuncts of collective bargaining. Doubtless employers could make the same

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[12] See, *e. g.*, *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490.

[13] We held in the *Hanson* case, with respect to this very same § 2, Eleventh, that even though the statutory provision authorizing union shops is only permissive, that provision, "which expressly declares that state law is superseded," is "the source of the power and authority by which any private rights are lost or sacrificed" and therefore is "the governmental action on which the Constitution operates." 351 U. S., at 232. Even though § 2, Eleventh is permissive in form, Congress was fully aware when enacting it that the almost certain result would be the establishment of union shops throughout the railroad industry. Witness after witness so testified during the hearings on the bill, and this testimony was never seriously disputed. See Hearings on S. 3295, *supra*, note 8, *passim;* Hearings on H. R. 7789, *supra*, note 8, *passim*.

arguments in favor of compulsory contributions to an association of employers for use in political and economic programs calculated to help collective bargaining on their side. But the argument is equally unappealing whoever makes it. The stark fact is that this Act of Congress is being used as a means to exact money from these employees to help get votes to win elections for parties and candidates and to support doctrines they are against. If this is constitutional the First Amendment is not the charter of political and religious liberty its sponsors believed it to be. James Madison, who wrote the Amendment, said in arguing for religious liberty that "the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever." [14] And Thomas Jefferson said that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." [15] These views of Madison and Jefferson authentically represent the philosophy embodied in the safeguards of the First Amendment. That Amendment leaves the Federal Government no power whatever to compel one man to expend his energy, his time or his money to advance the fortunes of candidates he would like to see defeated or to urge ideologies and causes he believes would be hurtful to the country.

The Court holds that § 2, Eleventh denies "unions, over an employee's objection, the power to use his exacted funds to support political causes which he opposes." While I do not so construe § 2, Eleventh, I want to make clear that I believe the First Amendment bars use of dues extorted from an employee by law for the promotion of causes, doctrines and laws that unions generally favor to

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[14] 1 Stokes, Church and State in the United States, 391 (1950).

[15] Brant, James Madison: The Nationalist, 354 (1948).

help the unions, as well as any other political purposes. I think workers have as much right to their own views about matters affecting unions as they have to views about other matters in the fields of politics and economics. Indeed, some of their most strongly held views are apt to be precisely on the subject of unions, just as questions of law reform, court procedure, selection of judges and other aspects of the "administration of justice" give rise to some of the deepest and most irreconcilable differences among lawyers. In my view, § 2, Eleventh can constitutionally authorize no more than to make a worker pay dues to a union for the sole purpose of defraying the cost of acting as his bargaining agent. Our Government has no more power to compel individuals to support union programs or union publications than it has to compel the support of political programs, employer programs or church programs. And the First Amendment, fairly construed, deprives the Government of all power to make any person pay out one single penny against his will to be used in any way to advocate doctrines or views he is against, whether economic, scientific, political, religious or any other.[16]

I would therefore hold that § 2, Eleventh of the Railway Labor Act, in authorizing application of the union-shop contract to the named protesting employees who are appellees here, violates the freedom of speech guarantee of the First Amendment.

IV.

The remedy:

The Georgia court enjoined the unions and the railroads from certain future activities under the contract and also required repayment of dues paid by three employees who had protested use of union funds to support

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[16] Cf. *Everson* v. *Board of Education,* 330 U. S. 1, 16.

candidates or advocate views the protesting employees were against.

I am not so sure as the Court that the injunction bars "the collection of all funds from anyone who can show that he is opposed to the expenditure of any of his money for political purposes which he disapproves." So construed the injunction would take away the First Amendment right of employees to contribute their money voluntarily to a collective fund to be used to support and oppose candidates and causes even though individual contributors might disagree with particular choices of the group. So far as it may be ambiguous in this respect, I think the injunction should be modified to make sure that it does not interfere with the valuable rights of citizens to make their individual voices heard through voluntary collective action.

For much the same basic reasons I think the injunction is too broad in that it runs not only in favor of the six protesting employees but also in favor of the "class they represent." No one of that "class" is shown to have protested at all. The State Supreme Court nevertheless rejected the unions' contention that the so-called class was so indefinite, and its members so lacking in common, identifiable interests and mental attitudes, that a decree purporting to bind all of them, the railroads, the individual defendants and the unions, would not comport with the due process requirements of the Fifth and Fourteenth Amendments. For reasons to be stated, I agree with this contention of the unions and consequently would hold that the judgment here cannot stand insofar as it purports finally to adjudicate rights as between the party defendants and railroad employees who were neither named party plaintiffs nor intervenors in the suit.

The trial court defined the "class" as composed of "all non-operating employees of the railroad defendants affected by, and opposed to, the . . . union shop agree-

ments, who also are opposed to the collection and use of periodic dues, fees and assessments for support of ideological and political doctrines and candidates and legislative programs . . . ." [17] As applied to the facts here, this class, as defined, could include employees not only from Georgia, but also from Florida, Alabama, North Carolina, South Carolina, Tennessee, Louisiana, Illinois, Virginia, Ohio, Indiana, Missouri, Mississippi, Kentucky and the District of Columbia. Genuine class actions result in binding judgments either for or against each member of the class.[18] Obviously, to make a judgment binding, the parties for or against whom it is to operate must be identifiable when the judgment is rendered. That would not be possible here since the only employees included in the class would be those who personally oppose the views they allege the union is using their dues to promote. This would make the "class" depend on the views entertained by each member, views which may change from day to day or year to year. Under these circumstances, when this decree was rendered neither the court nor the adverse parties nor anyone else could know, with certainty, to what individuals the unions owed a duty under the decree. In *Hansberry* v. *Lee,* 311 U. S.

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[17] The trial court went on to include in the class other employees who opposed the use of union funds for any purposes "other than the negotiation, maintenance and administration of agreements concerning rates of pay, rules and working conditions, or wages, hours, terms or other conditions of employment or the handling of disputes relating to the above." I read the two opinions of the Georgia Supreme Court, however, as limiting its holding to the precise question of whether the First Amendment is violated by the compulsory legal requirement that employees pay dues and other fees which are partly used to propagate political and ideological views obnoxious to the employees. I consequently do not reach or consider the different question lurking in this part of the trial court's definition of class.

[18] See, *e. g., Supreme Tribe of Ben-Hur* v. *Cauble,* 255 U. S. 356, 367.

32, 44, this Court pointed out the insuperable obstacles in attempting to treat as members of the same class parties to a contract such as the one here, some of whom might prefer to have the contract enforced and some of whom might not. Notice to persons whose rights are to be adjudicated is too important an element of our system of justice to permit a holding that this Georgia action has finally determined the issues for all the unidentifiable members of this "class" of plaintiffs spread territorially all the way from Florida to Illinois and from the District of Columbia to Missouri. After all the class suit doctrine is only a narrow judicially created exception to the rule that a case or controversy involves litigants who have been duly notified and given an opportunity to be present in court either in person or by counsel.[19] I would hold that there was no known common interest among the members of the described class here which justified this class action. From the very nature of the rights asserted, which depended on the unknown, perhaps fluctuating mental attitudes of employees, the rights of each employee were the basis for separable claims, in which the relief for each might vary as it did here as to the amount of damages awarded. Under these circumstances the class judgment should not stand.

The decree, modified to eliminate its class aspect, does not unconditionally forbid the application of the contract to all people under all circumstances, as did the one we struck down in the *Hanson* case. The decree so modified would simply forbid use of the union-shop contract to bar employment of the six protesting employees so long as the unions do not discontinue the practice of spending union funds to support any causes or doctrines, political, economic or other, over the expressed objection of the six particular employees. Other employees who have not

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[19] Cf. *Hansberry* v. *Lee*, 311 U. S., at 41–42.

protested are of course in the entirely different position of voluntary or acquiescing dues payers, which they have every right to be, and since they have asked for no relief the decree in this case should not affect them. Thus modified I think the relief afforded by the decree is justified.

The decree requires the union to refund dues, fees and assessments paid under protest by three of the complaining employees and exempts the six complaining employees from the payment of any union dues, fees or assessments so long as funds so received are used by the union to promote causes they are against. The state court found that these payments had been and would be made by these employees only because they had been compelled to join the union to save their jobs, despite their objections to paying the union so long as it used its funds for candidates, parties and ideologies contrary to these employees' wishes. The Court does not challenge this finding but nevertheless holds that relieving protesting workers of all payment of dues would somehow interfere with the union's statutory duty to act as a bargaining agent. In the first place, this would interfere with the union's activities only to the extent that it bars compulsion of dues payments from protesting workers to be used in some unknown part for unconstitutional purposes, and I think it perfectly proper to hold that such payments cannot be compelled. Furthermore, I think the remedy suggested by the Court will work a far greater interference with the union's bargaining activities because it will impose much greater trial and accounting burdens on both unions and workers. The Court's remedy is to give the wronged employees a right to a refund limited either to "the proportion of the union's total expenditures made for such political activities" or to the "proportion . . . [of] expenditures for political purposes which he had advised the union he disapproved." It may be that courts and lawyers with

sufficient skill in accounting, algebra, geometry, trigonometry and calculus will be able to extract the proper microscopic answer from the voluminous and complex accounting records of the local, national and international unions involved. It seems to me, however, that while the Court's remedy may prove very lucrative to special masters, accountants and lawyers, this formula, with its attendant trial burdens, promises little hope for financial recompense to the individual workers whose First Amendment freedoms have been flagrantly violated. Undoubtedly, at the conclusion of this long exploration of accounting intricacies, many courts could with plausibility dismiss the workers' claims as *de minimis* when measured only in dollars and cents.

I cannot agree to treat so lightly the value of a man's constitutional right to be wholly free from any sort of governmental compulsion in the expression of opinions. It should not be forgotten that many men have left their native lands, languished in prison, and even lost their lives, rather than give support to ideas they were conscientiously against. The three workers who paid under protest here were forced under authority of a federal statute to pay *all* current dues or lose their jobs. They should get back *all* they paid with interest.

Unions composed of a voluntary membership, like all other voluntary groups, should be free in this country to fight in the public forum to advance their own causes, to promote their choice of candidates and parties and to work for the doctrines or the laws they favor. But to the extent that Government steps in to force people to help espouse the particular causes of a group, that group—whether composed of railroad workers or lawyers—loses its status as a voluntary group. The reason our Constitution endowed individuals with freedom to think and speak and advocate was to free people from the blighting effect of either a partial or a complete governmental

monopoly of ideas. Labor unions have been peculiar beneficiaries of that salutary constitutional principle, and lawyers, I think, are charged with a peculiar responsibility to preserve and protect this principle of constitutional freedom, even for themselves. A violation of it, however small, is, in my judgment, prohibited by the First Amendment and should be stopped dead in its tracks on its first appearance. With so vital a principle at stake, I cannot agree to the imposition of parsimonious limitations on the kind of decree the courts below can fashion in their efforts to afford effective protection to these priceless constitutional rights.

I would affirm the judgment of the Georgia Supreme Court, with the modifications I have suggested.

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

Appellant unions were the collective bargaining representatives of the "non-operating" employees of the Southern Railway. Appellees, six individual railway employees, commenced this action in the Superior Court of Bibb County, Georgia, seeking a declaration of invalidity and an injunction to prevent enforcement of a union-shop agreement, made under the authority of § 2, Eleventh of the Railway Labor Act, as amended in 1951, on the ground that the contract was in violation of Georgia law and rights secured by the First, Fifth, Ninth, and Tenth Amendments of the United States Constitution. The suit was brought as a class action on behalf of "all those employees or former employees of the railroad defendants affected by and opposed to the union-shop agreement who are also opposed to the use of the periodic dues, fees and assessments which they have been, are and will be required to pay to support ideological and political doctrines and candidates and legislative programs. . . ." The monthly dues ranged from $2.25 to

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$3. The petition alleged that the plaintiffs opposed and were unwilling voluntarily to support the "ideological and political doctrines and candidates" for which union dues and assessments were collected under the union-shop agreement and would be used "in substantial part . . . to support."

The Georgia trial court's decision dismissing the complaint for failure to state a cause of action was reversed by the Supreme Court of Georgia. 213 Ga. 279, 99 S. E. 2d 101. Upon remand, the parties stipulated the above allegations, and the plaintiffs offered proof of the amount of union funds which went to the legislative, political, and educational departments of the unions and the controlling organs of the AFL–CIO. The trial court made, *inter alia,* the following findings: the unions' funds had been expended in "substantial amounts" to promote political doctrines and legislative programs which the plaintiffs opposed; these funds had been used in "substantial amounts to impose upon plaintiffs . . . conformity to those doctrines"; such use of funds was "not reasonably necessary to collective bargaining or to maintaining the existence and position of said union defendants as effective bargaining agents." The need of unions to engage in what are loosely described as political activities as means of promoting—if not to achieving—the purposes of their existence, the extent to which this practice has become an essential part of the American labor movement and more particularly of railroad labor unions, the relation of these means to the ends of collective bargaining, were matters not canvassed at trial nor judicially noticed. Nor was it claimed that the slightest barrier had been interposed against the fullest exercise by the plaintiffs of their freedom of speech in any form or in any forum. Since these matters were not canvassed, no findings upon them were made.

The trial court permanently enjoined enforcement of the agreement so long as the unions continued to engage "in the improper and unlawful activities described." It declared § 2, Eleventh of the Railway Labor Act unconstitutional insofar as it permitted the exaction of dues utilized in promoting so-called political activities from union members disapproving such expenditures. The unions were also ordered to repay the dues and assessments previously paid by the individual plaintiffs. The Georgia Supreme Court affirmed this judgment, 215 Ga. 27, 108 S. E. 2d 796, and on appeal to this Court, under 28 U. S. C. § 1257 (1), probable jurisdiction was noted. 361 U. S. 807.

I completely defer to the guiding principle that this Court will abstain from entertaining a serious constitutional question when a statute may fairly be construed so as to avoid the issue, but am unable to accept the restrictive interpretation that the Court gives to § 2, Eleventh of the Railway Labor Act. After quoting the relevant canon for constitutional adjudication from *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 401,[1] Mr. Justice Cardozo for the whole Court enunciated the complementary principle:

> "But avoidance of a difficulty will not be pressed to the point of disingenuous evasion. Here the intention of the Congress is revealed too distinctly to permit us to ignore it because of mere misgivings as to power. The problem must be faced and answered." *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, 379.

The Court-devised precept against avoidable conflict with Congress through unnecessary constitutional adjudication

[1] "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score."

is not a requirement to distort an enactment in order to escape such adjudication. Respect for the doctrine demands and only permits that we extract an interpretation which shies off constitutional controversy, *provided* such interpretation is consonant with a fair reading of a statute.

And so the question before us is whether § 2, Eleventh of the Railway Labor Act can untorturingly be read to bar activities of railway unions, which have bargained in accordance with federal law for a union shop, whereby they are forbidden to spend union dues for purposes that have uniformly and extensively been so long pursued as to have become commonplace, settled, conventional trade-union practices. No consideration relevant to construction sustains such a restrictive reading.

The statutory provision cannot be meaningfully construed except against the background and presupposition of what is loosely called political activity of American trade unions in general and railroad unions in particular—activity indissolubly relating to the immediate economic and social concerns that are the *raison d'être* of unions. It would be pedantic heavily to document this familiar truth of industrial history and commonplace of trade-union life. To write the history of the Brotherhoods, the United Mine Workers, the Steel Workers, the Amalgamated Clothing Workers, the International Ladies Garment Workers, the United Auto Workers, and leave out their so-called political activities and expenditures for them, would be sheer mutilation. Suffice it to recall a few illustrative manifestations. The AFL, surely the conservative labor group, sponsored as early as 1893 an extensive program of political demands calling for compulsory education, an eight-hour day, employer tort liability, and other social reforms.[2] The fiercely contested

[2] Taft, The A. F. of L. in the Time of Gompers, p. 71 (1957).

Adamson Act of 1916, see *Wilson* v. *New,* 243 U. S. 332, was a direct result of railway union pressures exerted upon both the Congress and the President.[3] More specifically, the weekly publication "Labor"—an expenditure under attack in this case—has since 1919 been the organ of the railroad brotherhoods which finance it. Its files through the years show its preoccupation with legislative measures that touch the vitals of labor's interests and with the men and parties who effectuate them. This aspect—call it the political side—is as organic, as inured a part of the philosophy and practice of railway unions as their immediate bread-and-butter concerns.

Viewed in this light, there is a total absence in the text, the context, the history and the purpose of the legislation under review of any indication that Congress, in authorizing union-shop agreements, attributed to unions and restricted them to an artificial, non-prevalent scope of activities in the expenditure of their funds. An inference that Congress legislated regarding expenditure control in contradiction to prevailing practices ought to be better founded than on complete silence. The aim of the 1951 legislation, clearly stated in the congressional reports, was to eliminate "free riders" in the industry [4]—to make possible "the sharing of the burden of maintenance by all of the beneficiaries of union activity." [5] To suggest that this language covertly meant to encompass any less than the maintenance of those activities normally engaged in by unions is to withdraw life from law and to say that Congress dealt with artificialities and not with railway unions as they were and as they functioned.

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[3] Perlman and Taft, History of Labor in the United States, 1896–1932, pp. 380–385.

[4] S. Rep. No. 2262, 81st Cong., 2d Sess. 2–3.

[5] Remarks of Mr. Harrison, Hearings, House Committee on Interstate and Foreign Commerce, 81st Cong., 2d Sess., p. 253.

The hearings and debates lend not the slightest support to a construction of the amendment which would restrict the uses to which union funds had, at the time of the union-shop amendment, been conventionally put. To be sure, the legislative record does not spell out the obvious. The absence of any showing of concern about unions' expenditures in "political" areas—especially when the issue was briefly raised [6]—only buttresses the conclusion that Congress intended to leave unions free to do that which unions had been and were doing. It is surely fanciful to conclude that this verbal vacuity implies that Congress meant its amendment to be read as providing that members of the union may restrict their dues solely for financing the technical process of collective bargaining.

There were specific safeguards protective of minority rights. These safeguards were directed solely toward the protection of those who might otherwise find themselves barred from union membership—*viz.*, Negroes and those who had been long-time opponents of the unions. The only reference to free speech in the record of the enactment was made by the President of the Norfolk & Western Railroad Company during the hearings before the House Subcommittee. His remarks were related to restrictive provisions in some union constitutions which suppressed the right of a dissatisfied member to voice his criticism upon pain of expulsion.[7] No such claim is remotely before us.[8] The sole reason for clarifying the proviso to the amendment so that payment

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[6] 96 Cong. Rec. 17049–17050; Hearings, Subcommittee of the Senate Committee on Labor and Public Welfare on S. 3295, 81st Cong., 2d Sess., pp. 173–174.

[7] Remarks of Mr. Smith, Hearings, House Committee on Interstate and Foreign Commerce, 81st Cong., 2d Sess., pp. 115–116.

[8] Compare *Railway Employes' Dept.* v. *Hanson*, 351 U. S. 225, 236–237, n. 8.

of dues was explicitly declared to be the only legitimate condition of union membership was the continuing fear of lack of protection for unpopular minorities. There is no mention of political expenditures in any of the references. From this wasteland of material it is strange to find not only that "A congressional concern over possible impingements on the interests of individual dissenters from union policies is therefore discernible," but so discernible that a construction must be placed upon the statute that neither its terms nor the accustomed habits of union life remotely justify.

None of the parties in interest at any time suggested the possibility that the statute be construed in the manner now suggested. Neither the United States, the individual dissident members, the railroad unions, the railroads, the AFL–CIO, the Railway Labor Executives' Association, nor any other *amicus curiae* suggested that the statute could be emasculated in the manner now proposed. Of course we are not confined by the absence of such a claim, but it is significant that a construction now found to be reasonable never occurred to the litigants in the two arguments here.

I cannot attribute to Congress that *sub silentio* it meant to bar railway unions under a union-shop agreement from expending their funds in their traditional manner. How easy it would have been to give at least a hint that such was its purpose. The claim that these expenditures infringe the appellees' constitutional rights under the First Amendment must therefore be faced.

In *Railway Employes' Dept.* v. *Hanson,* 351 U. S. 225, this Court had to pass on the validity of § 2, Eleventh of the Railway Labor Act, which provided that union-shop agreements entered into between a carrier and a duly designated labor organization shall be valid notwithstanding any other "statute or law of the United States, or

Territory thereof, or of any State." [9] We held that in its exercise of the power to regulate commerce, "the choice by the Congress of the union shop as a stabilizing force [in industrial disputes] seems to us to be an allowable one," and that the plaintiffs' claims under the First and Fifth Amendments were without merit.

The record before the Court in *Hanson* clearly indicated that dues would be used to further what are normally described as political and legislative ends. And it surely can be said that the Court was not ignorant of a fact that everyone else knew. Union constitutions were in evidence which authorized the use of union funds for political magazines, for support of lobbying groups, and for urging union members to vote for union-approved candidates.[10] The contention now raised by plaintiffs

[9] The pertinent portion of the section follows:

"Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

"(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided,* That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership." 64 Stat. 1238, 45 U. S. C. § 152, Eleventh.

[10] See the provisions of the constitutions of the Brotherhood of Maintenance of Way Employees, the Brotherhood of Railway Carmen of America, and the International Association of Machinists before the Court in the *Hanson* record, pp. 103–143.

was succinctly stated by the *Hanson* plaintiffs in their brief.[11] We indicated that we were deciding the merits of the complaint on all the allegations and proof before us. "On the present record, there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar." 351 U. S., at 238.

One would suppose that *Hanson's* reasoning disposed of the present suit. The Georgia Supreme Court, however, in reversing the initial dismissal of the action by the lower court, relied upon the following reservation in our opinion: "if the exaction of dues, initiation fees, or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment, this judgment will not prejudice the decision in that case." 351 U. S., at 238. The use of union dues to promote relevant and effective means of realizing the purposes for which unions exist does not constitute a utilization of dues "as a cover for forcing ideological conformity" in any fair reading of those words. It will come as startling and fanciful news to the railroad unions and the whole labor movement that in using union funds for promoting and opposing legislative measures of concern to their members they were engaged in under-cover operations. "Cover" implies a disguise, some sham; "forcing . . . conformity" means coercing avowal of a belief not entertained. Plaintiffs here are in no way subjected to such suppression of their true beliefs or sponsorship of views they do not hold. Nor are they forced to join a sham organization which does not participate in collective bargaining functions, but only serves as a conduit of funds for ideological propaganda. A totally different problem than the one before the Court would be presented by provisions of union constitutions which in fact prohibited

[11] Appellees' brief, pp. 16–17, 65.

members from sponsoring views which the union opposed,[12] or which enabled officers to sponsor views not representative of the union.

Nevertheless, we unanimously held that the plaintiffs in *Hanson* had not been denied any right protected by the First Amendment. Despite our holding, the gist of the complaint here is that the expenditure of a portion of mandatory funds for political objectives denies free speech—the right to speak or to remain silent—to members who oppose, against the constituted authority of union desires, this use of their union dues. No one's desire or power to speak his mind is checked or curbed. The individual member may express his views in any public or private forum as freely as he could before the union collected his dues. Federal taxes also may diminish the vigor with which a citizen can give partisan support to a political belief, but as yet no one would place such an impediment to making one's views effective within the reach of constitutionally protected "free speech."

This is too fine-spun a claim for constitutional recognition. The framers of the Bill of Rights lived in an era when overhanging threats to conduct deemed "seditious" and *lettres de cachet* were current issues. Their concern was in protecting the right of the individual freely to express himself—especially his political beliefs—in a public forum, untrammeled by fear of punishment or of governmental censure.

But were we to assume, *arguendo*, that the plaintiffs have alleged a valid constitutional objection if Congress had specifically ordered the result, we must con-

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[12] "B. The Grand Lodge Constitution of the Brotherhood Railway Carmen of America prohibits members from 'interfering with legislative matters affecting national, state, territorial, dominion or provincial legislation, adversely affecting the interests of our members.' § 64." 351 U. S., at 237, n. 8.

sider the difference between such compulsion and the absence of compulsion when Congress acts as platonically as it did, in a wholly non-coercive way. Congress has not commanded that the railroads shall employ only those workers who are members of authorized unions. Congress has only given leave to a bargaining representative, democratically elected by a majority of workers, to enter into a particular contractual provision arrived at under the give-and-take of duly safeguarded bargaining procedures. (The statute forbids distortion of these procedures as, for instance, through racial discrimination. *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192.) Congress itself emphasized this vital distinction between authorization and compulsion. S. Rep. No. 2262, 81st Cong., 2d Sess. 2. And this Court in *Hanson* noted that "The union shop provision of the Railway Labor Act is only permissive. Congress has not . . . required carriers and employees to enter into union shop agreements." 351 U. S., at 231. When we speak of the Government "acting" in permitting the union shop, the scope and force of what Congress has done must be heeded. There is not a trace of compulsion involved—no exercise of restriction by Congress on the freedom of the carriers and the unions. On the contrary, Congress expanded their freedom of action. Congress lifted limitations upon free action by parties bargaining at arm's length.[13]

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[13] To ignore this distinction would be to go far beyond the severely criticized, indeed rather discredited, case of *United States* v. *Butler*, 297 U. S. 1, which found coercive implications in the processing tax of the Agricultural Adjustment Act. The dissenting views of Mr. Justice Stone, concurred in by Brandeis and Cardozo, JJ., may surely be said to have won the day: "Although the farmer is placed under no legal compulsion to reduce acreage, it is said that the mere offer of compensation for so doing is a species of economic coercion which operates with the same legal force and effect as though the

The plaintiffs have not been deprived of the right to participate in determining union policies or to assert their respective weight in defining the purposes for which union dues may be expended. Responsive to the actualities of our industrial society, in which unions as such play the role that they do, the law regards a union as a self-contained, legal personality exercising rights and subject to responsibilities wholly distinct from its individual members. See *United Mine Workers of America* v. *Coronado Coal Co.*, 259 U. S. 344. It is a commonplace of all organizations that a minority of a legally recognized group may at times see an organization's funds used for promotion of ideas opposed by the minority. The analogies are numerous. On the largest scale, the Federal Government expends revenue collected from individual taxpayers to propagandize ideas which many taxpayers oppose. Or, as this Court noted in *Hanson,* many state laws compel membership in the integrated bar as a prerequisite to practicing law,[14] and the bar association

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curtailment were made mandatory by Act of Congress." 297 U. S., at 81.

For an analysis of the 1951 Amendment leading to a narrow scope of its constitutional implications, see Wellington, The Constitution, the Labor Union, and "Governmental Action," 70 Yale L. J. 345, 352–360, 363–371.

[14] The following States have integrated bars: Alabama (Ala. Code, Tit. 46, § 30); Alaska (Alaska Laws Ann. § 35–2–77a to § 35–2–77o); Arizona (Ariz. Code Ann. § 32–302); California (Cal. Bus. & Prof. Code § 6002); Florida (Fla. Stat. Ann., Vol. 31, pp. 699–713 (court rule)); Idaho (Idaho Code § 3–408 to § 3–417); Kentucky (Ky. Rev. Stat. § 30.170); Louisiana (La. Rev. Stat. 37:211; Art. IV, Articles of Incorporation, La. State Bar Assn., 4 Dart, Annotations to La. Stat. 1950, p. 29); Michigan (Mich. Stat. Ann. § 27–101); Mississippi (Miss. Code § 8696); Missouri (Mo. Supreme Court Rule 6, 352 Mo. xxix); Nebraska (Neb. Supreme Court Rule IV, *In re Integration of Nebraska State Bar Assn.*, 133 Neb. 283, 275 N. W. 265); Nevada (Nev. Rev. Stat. 7.270–7.600); New Mexico (N. Mex. Stat. Ann. § 18–1–2 to § 18–1–24); North Carolina (N. C. Gen. Stat. § 84–16); North Dakota (N. D. Rev. Code § 27–1202); Oklahoma

uses its funds to urge legislation of which individual members often disapprove. The present case is, as the Court in *Hanson* asserted, indistinguishable from the issues raised by those who find constitutional difficulties with the integrated bar.[15] If our statement in *Hanson* carried any meaning, it was an unqualified recognition that legislation providing for an integrated bar, exercising familiar functions, is subject to no infirmity derived from the First Amendment. Again, under the Securities Exchange Act of 1934, Congress specifically authorized the formation of "national securities associations," membership in which is of practical necessity to many brokers and dealers.[16] The Association has urged the passage of

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(*In re Integration of the Bar of Oklahoma*, 185 Okla. 505, 95 P. 2d 113, amended by Okla. Supreme Court rules approved October 6, 1958, Okla. Stat. Ann., 1960 Cum. Ann. Pocket Part, Tit. 5, c. 1, App. 1); Oregon (Ore. Rev. Stat. §§ 9.010–9.210); South Dakota (S. D. Code § 32.1114); Texas (Vern. Civ. Stat., Art. 320a–1, § 3); Utah (Utah Code Ann. § 78–51–1 to § 78–51–25); Virginia (Va. Code § 54–49); Washington (Wash. Rev. Code § 2.48.020); West Virginia (W. Va. Code Ann. 51–1–4a); Wisconsin (Wis. Stat. § 256.31, 5 Wis. 2d 618, 627, 93 N. W. 2d 601, 605); Wyoming (Wyo. Stat. § 5–22; Wyo. Supreme Court Rules for State Bar, Rule 5).

[15] So far as reported, all decisions have upheld the integrated bar against constitutional attack. *Carpenter* v. *State Bar of California*, 211 Cal. 358, 295 P. 23; *Herron* v. *State Bar of California*, 24 Cal. 2d 53, 147 P. 2d 543; *Petition of Florida State Bar Assn.*, 40 So. 2d 902; *In re Mundy*, 202 La. 41, 11 So. 2d 398; *Ayres* v. *Hadaway*, 303 Mich. 589, 6 N. W. 2d 905; *In re Scott*, 53 Nev. 24, 292 P. 291; *In re Platz*, 60 Nev. 296, 108 P. 2d 858; *In re Gibson*, 35 N. Mex. 550, 4 P. 2d 643; *Kelley* v. *State Bar of Oklahoma*, 148 Okla. 282, 298 P. 623; *Lathrop* v. *Donohue*, 10 Wis. 2d 230, 102 N. W. 2d 404, affirmed, *post*, p. 820.

[16] The Maloney Act of 1938 added § 15A to the Securities Exchange Act of 1934. 52 Stat. 1070, 15 U. S. C. § 78*o*–3. In order to be registered, a number of statutory standards must be met. The statute specifically requires that an association's rules provide for democratic representation of the membership and that dues be equitably allocated. See § 15A (b)(5) and (6). Only one association, the National Association of Securities Dealers, Inc., has ever applied

several legislative reforms [17] which one can confidently assume did not represent the convictions of all members. To come closer to the heart of the immediate matter, is the union's choice of when to picket or to go out on strike unconstitutional? Picketing is still deemed also a form of speech,[18] but surely the union's decision to strike under its statutory aegis as a bargaining unit is not an unconstitutional compulsion forced upon members who strongly oppose a strike, as minorities not infrequently do. Indeed, legislative reform intended to insure the fair representation of the minority workers in internal union politics [19] would be redundant if, despite all precautions, the union were constitutionally forbidden because of minority opposition to spend money in accordance with the majority's desires.

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for or been granted registration. NASD membership comprises roughly three-quarters of all brokers and dealers registered with the Securities and Exchange Commission. Loss, Securities Regulation 766–67 (1951, Supp. 1955). Sections 15A (i) and (n) of the Act authorize the NASD to formulate rules which stipulate that members shall refuse to deal with non-members with immunity from the anti-trust laws. See S. Rep. No. 1455, 75th Cong., 3d Sess. 8–9 (1938); Loss, *op. cit., supra,* 769–770. The Commission has stated that it is "virtually impossible for a dealer who is not a member of the NASD to participate in a distribution of important size." *National Association of Securities Dealers, Inc.,* 19 S. E. C. 424, 441.

[17] In 1949 Senator Frear introduced a bill which would have greatly expanded the applicability of the registration, proxy, and insider trading provisions of the Securities Exchange Act to small corporations. S. 2408, 81st Cong., 1st Sess. The NASD supported the passage of the proposed legislation, and testified on its behalf before the Senate subcommittee. Hearings Before Subcommittee of Senate Committee on Banking and Currency on S. 2408, 81st Cong., 2d Sess. 53–62 (1950); Loss, *op. cit., supra,* 620, 621.

[18] To this extent *Thornhill* v. *Alabama,* 310 U. S. 88, 101–106, has survived and was applied in *Chauffeurs Union* v. *Newell,* 356 U. S. 341.

[19] See Cox, Internal Affairs of Labor Unions Under the Labor Reform Act of 1959, 58 Mich. L. Rev. 819, 829–851.

How unrealistic the views of plaintiffs are becomes manifest in light of the purpose of the legislative scheme in authorizing the union shop and the practical necessity for unions to participate in what as a matter of analytical fragmentation may be called political activities. The 1951 Amendment of the Railway Labor Act, which enacted § 2, Eleventh, was passed in an effort to make more equitable the sharing of costs of collective bargaining among all the workers whom the bargaining agent represented. H. R. Rep. No. 2811, 81st Cong., 2d Sess. 4; Hearings, House Committee on Interstate and Foreign Commerce on H. R. 7789, 81st Cong., 2d Sess. 10, 11, 29, 49–50; Hearings, Subcommittee of the Senate Committee on Labor and Public Welfare on S. 3295, 81st Cong., 2d Sess. 15–16, 130, 154, 170. Prior to the passage of this Amendment, there was no way in which the union could compel non-union members in the bargaining unit to contribute to the expenses incurred in seeking contractual provisions from the carrier that would redound to the advantage of all its employees. The main reason why prior law had forbidden union shops in the railroad industry is stated in the Senate Report to the 1951 Amendment:

> "The present prohibitions against all forms of union security agreements and the check-off were made part of the Railway Labor Act in 1934. They were enacted into law against the background of employer use of these agreements as devices for establishing and maintaining company unions, thus effectively depriving a substantial number of employees of their right to bargain collectively. It is estimated that in 1934 there were over 700 agreements between the carriers and unions alleged to be company unions. These agreements represented over 20 percent of the total number of agreements in the industry.

> "It was because of this situation that labor organizations agreed to the present statutory prohibitions against union security agreements. An effort was made to limit the prohibition to company unions. This, however, proved unsuccessful; and in order to reach the problem of company control over unions, labor organizations accepted the more general prohibitions which also deprived the national organizations of seeking union security agreements and check-off provisions. . . .
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> "Since the enactment of the 1934 amendments, company unions have practically disappeared." S. Rep. No. 2262, 81st Cong., 2d Sess. 2–3. See also H. R. Rep. No. 2811, 81st Cong., 2d Sess. 3.

Nothing was further from congressional purpose than to be concerned with restrictions upon the right to speak. Its purpose was to eliminate "free riders" in the bargaining unit. Inroads on free speech were not remotely involved in the legislative process. They were in nobody's mind. Congress legislated to correct what it found to be abuses in the domain of promoting industrial peace. This Court would stray beyond its powers were it to erect a far-fetched claim, derived from some ultimate relation between an obviously valid aim of legislation and an abstract conception of freedom, into a constitutional right.

For us to hold that these defendant unions may not expend their moneys for political and legislative purposes would be completely to ignore the long history of union conduct and its pervasive acceptance in our political life. American labor's initial role in shaping legislation dates back 130 years.[20] With the coming of the AFL in 1886, labor on a national scale was committed not to act as a

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[20] 1 Commons, History of Labor in the United States, 318–325 (1918).

class party but to maintain a program of political action in furtherance of its industrial standards.[21] British trade unions were supporting members of the House of Commons as early as 1867.[22] The Canadian Trades Congress in 1894 debated whether political action should be the main objective of the labor force.[23] And in a recent Australian case, the High Court upheld the right of a union to expel a member who refused to pay a political levy.[24] That Britain, Canada and Australia have no explicit First Amendment is beside the point. For one thing, the freedoms safeguarded in terms in the First Amendment are deeply rooted and respected in the British tradition, and are part of legal presuppositions in Canada and Australia. And in relation to our immediate concern, the British Commonwealth experience establishes the pertinence of political means for realizing basic trade-union interests.

The expenditures revealed by the AFL–CIO Executive Council Reports emphasize that labor's participation in urging legislation and candidacies is a major one. In the last three fiscal years, the Committee on Political Education (COPE) expended a total of $1,681,990.42; the AFL–CIO News cost $756,591.99; the Legislative Department reported total expenses of $741,918.24.[25] Yet the Georgia trial court has found that these funds were not reasonably related to the unions' role as collective bargaining agents. One could scarcely call this a finding of fact by which this Court is bound, or even one

[21] Taft, The A. F. of L. in the Time of Gompers, 289–292 (1957); Bakke and Kerr, Unions, Management and the Public, 215 (1948).

[22] 3 Cole, A Short History of the British Working Class Movement, 56 (2d ed. 1937).

[23] Logan, Trade Unions in Canada, 59–60 (1948).

[24] *William* v. *Hursey*, 33 A. L. J. R. 269 (1959).

[25] These are the totals of the figures for 1957, 1958, and 1959 reported in Proceedings of the AFL–CIO Constitutional Convention, Vol. II, pp. 17–19 (1959) and *id.*, pp. 17–19 (1957).

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of law. It is a baseless dogmatic assertion that flies in the face of fact. It rests on a mere listing of unions' expenditures and an exhibit of labor publications. The passage of the Adamson Act [26] in 1916, establishing the eight-hour day for the railroad industry, affords positive proof that labor may achieve its desired result through legislation after bargaining techniques fail. See *Wilson* v. *New*, *supra*, at 340–343. If higher wages and shorter hours are prime ends of a union in bargaining collectively, these goals may often be more effectively achieved by lobbying and the support of sympathetic candidates. In 1960 there were at least eighteen railway labor organizations registered as congressional lobby groups.[27]

When one runs down the detailed list of national and international problems on which the AFL–CIO speaks, it seems rather naive for a court to conclude—as did the trial court—that the union expenditures were "not reasonably necessary to collective bargaining or to maintaining the existence and position of said union defendants as effective bargaining agents." The notion that economic and political concerns are separable is pre-Victorian. Presidents of the United States and Committees of Congress invite views of labor on matters not immediately concerned with wages, hours, and conditions of employment.[28] And this Court accepts briefs as *amici* from the AFL–CIO on issues that cannot be called industrial, in any circumscribed sense. It is not true in life that political protection is irrelevant to, and insulated from, economic interests. It is not true for

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[26] 39 Stat. 721, 45 U. S. C. §§ 65–66.

[27] Letters from Clerk of House of Representatives to Supreme Court Librarian, May 5, 1960; May 10, 1961.

[28] For a recent example, see the statement of Stanley H. Ruttenberg, Director of Research for the AFL–CIO, on pending tax legislation before the House Ways and Means Committee, reported in part in the New York Times, May 12, 1961, p. 14, col. 3.

industry or finance.[29] Neither is it true for labor. It disrespects the wise, hardheaded men who were the authors of our Constitution and our Bill of Rights to conclude that their scheme of government requires what the facts of life reject. As Mr. Justice Rutledge stated: "To say that labor unions as such have nothing of value to contribute to that process [the electoral process] and no vital or legitimate interest in it is to ignore the obvious facts of political and economic life and of their increasing interrelationship in modern society." *United States* v. *CIO,* 335 U. S. 106, 129, 144 (concurring opinion joined in by Black, Douglas, and Murphy, JJ). Fifty years ago this Court held that there was no connection between outlawry of "yellow dog contracts" on interstate railroads and interstate commerce, and therefore found unconstitutional legislation directed against the evils of these agreements. Is it any more consonant with the facts of life today, than was this holding in *Adair* v. *United States,* 208 U. S. 161, to say that the tax policies of the National Government—the scheme of rates and exemptions—have no close relation to the wages of workers; that legislative developments like the Tennessee Valley Authority do not intimately touch the lives of workers within their respective regions; that national measures furthering health and education do not directly bear on the lives of industrial workers; that candidates who sup-

[29] A contested question in the corporate field is the legitimacy of corporate charitable contributions. This presents a not dissimilar problem whether the Government may authorize an organization to expend money for a purpose outside the corporate business to which an individual stockholder is opposed. A shareholder who joined prior to the authorization and who therefore cannot be said to have impliedly consented surely is as directly affected as is the member of a union shop. See *A. P. Smith Mfg. Co.* v. *Barlow,* 13 N. J. 145, 98 A. 2d 581, which upheld against federal constitutional attack a state statute which authorized New Jersey corporations to make contributions to charity. The amounts involved were substantial.

port these movements do not stand in different relation to labor's narrowest economic interests than avowed opponents of these measures? Is it respectful of the modes of thought of Madison and Jefferson projected into our day to attribute to them the view that the First Amendment must be construed to bar unions from concluding, by due procedural steps, that civil-rights legislation conduces to their interest, thereby prohibiting union funds to be expended to promote passage of such measures? [30]

Congress was not unaware that railroad unions might use these mandatory contributions for furthering their economic interests through political channels. See 96 Cong. Rec. 17049–17050. That such consequences from authorizing compulsory union membership were to be foreseen had been indicated to committees of Congress less than four years earlier when the union-shop provisions of the Taft-Hartley Act were being debated. Hearings, Senate Committee on Labor and Public Welfare on S. 55, 80th Cong., 1st Sess., pp. 726, 1452, 1455–1456, 1687, 2065, 2146, 2150; Hearings, House Committee on Education and Labor on H. R. 8, 80th Cong., 1st Sess., pp. 350, 2260. The failure of the Railway Labor Act amendments to exempt the member who did not choose to have his contributions put to such uses may have reflected difficulties in drafting an exempting clause. See Hearings, Subcommittee of the Senate Committee on Labor and Public Welfare on S. 3295, 81st Cong., 2d Sess., pp. 173–174. But in 1958, the Senate voted down a proposal to enable an

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[30] See Proceedings of the AFL–CIO Constitutional Convention, Vol. II, pp. 183–192 (1959).

A recent leader of the London Times which reviewed the annual report of the British Trade Unions Council noted that the document concerned itself with "Few . . . political subjects . . . which have not their industrial sides." The London Times, Aug. 23, 1960, p. 9, col. 2.

individual union member to recover any portion of his dues not expended for "collective bargaining purposes." 104 Cong. Rec. 11330–11347.

Congress is, of course, free to enact legislation along lines adopted in Great Britain, whereby dissenting members may contract out of any levies to be used for political purposes.[31] "At the point where the mutual advantage of association demands too much individual disadvantage, a compromise must be struck. . . . When that point has been reached—where the intersection should fall—is plainly a question within the special province of the legislature. . . . Even where the social undesirability of a law may be convincingly urged, invalidation of the law by a court debilitates popular democratic government. Most laws dealing with economic and social problems are matters of trial and error. . . . But even if a law is found wanting on trial, it is better that its defects should be demonstrated and removed than that the law should be aborted by judicial fiat. Such an assertion of judicial power deflects responsibility from

[31] The course of legislation in Great Britain illustrates the various methods open to Congress for exempting union members from political levies. As a consequence of a restrictive interpretation of the Trade Union Act of 1876, 39 & 40 Vict., c. 22, by the House of Lords in *Amalgamated Society of Ry. Servants* v. *Osborne*, [1910] A. C. 87, Parliament in 1913 passed legislation which allowed a union member to exempt himself from political contributions by giving specific notice. Trade Union Act of 1913, 2 & 3 Geo. V, c. 30. The fear instilled by the general strike in 1926 caused the Conservative Parliament to amend the "contracting out" procedure by a "contracting in" scheme, the net effect of which was to require that each individual give notice of his consent to contribute before his dues could be used for political purposes. Trade Disputes and Trade Unions Act of 1927, 17 & 18 Geo. V, c. 22. When the Labor Party came to power, Parliament returned to the 1913 method. Trade Disputes and Trade Unions Act of 1946, 9 & 10 Geo. VI, c. 52. The Conservative Party, when it came back, retained the legislation of its opponents.

those on whom in a democratic society it ultimately rests—the people." *American Federation of Labor* v. *American Sash & Door Co.*, 335 U. S. 538, 546, 553 (concurring opinion).

In conclusion, then, we are asked by union members who oppose these expenditures to protect their right to free speech—although they are as free to speak as ever—against governmental action which has permitted a union elected by democratic process to bargain for a union shop and to expend the funds thereby collected for purposes which are controlled by internal union choice. To do so would be to mutilate a scheme designed by Congress for the purpose of equitably sharing the cost of securing the benefits of union exertions; it would greatly embarrass if not frustrate conventional labor activities which have become institutionalized through time. To do so is to give constitutional sanction to doctrinaire views and to grant a miniscule claim constitutional recognition.

In *Everson* v. *Board of Education*, 330 U. S. 1, the legislative power of a State to subsidize bus service to parochial schools was sustained, although the Court recognized that because of the subsidy some parents were undoubtedly enabled to send their children to church schools who otherwise would not. It makes little difference whether the conclusion is phrased so that no establishment of religion was found, or whether it be more forthrightly stated that the merely incidental "establishment" was too insignificant. Figures of the Department of Health, Education and Welfare show that the yearly cost of transportation to non-public schools in Massachusetts totals approximately $659,749; in Illinois $1,807,740.[32] These are scarcely what would be termed negligible expenditures. Some might consider the resulting "establishment" more

[32] Statistics of State School Systems, 1955–1956: Organization, Staff, Pupils, and Finances, c. 2, p. 70 (U. S. Department of Health, Education, and Welfare, 1959).

substantial than the loss of free speech through the payment of $3 per month for union dues, whereby a dissident member feels identified in his own mind with the union's position.

The words of Mr. Justice Cardozo, used in a different context, are applicable here: "[C]ountless claims of right can be discovered to have their source or their operative limits in the provisions of a federal statute or in the Constitution itself with its circumambient restrictions upon legislative power. To set bounds to the pursuit, the courts have formulated the distinction between controversies that are basic and those that are collateral, between disputes that are necessary and those that are merely possible. We shall be lost in a maze if we put that compass by." *Gully* v. *First National Bank,* 299 U. S. 109, 118.

I would reverse and remand the case for dismissal in the Georgia courts.

LATHROP *v.* DONOHUE.

APPEAL FROM THE SUPREME COURT OF WISCONSIN.

No. 200. Argued January 18, 1961.—Decided June 19, 1961.

Acting in accordance with an Act of the State Legislature, the Supreme Court of Wisconsin promulgated rules and bylaws creating an integrated State Bar and requiring all lawyers practicing in the State to be members thereof and to pay annual dues of $15. Appellant paid his dues under protest and sued for a refund, claiming that the State Bar engaged in political activities which he opposed, and that by coercing him to support it, such rules and bylaws violated his rights under the Fourteenth Amendment. The State Supreme Court held that compulsory enrollment in the State Bar imposed only the duty to pay dues; sustained the constitutionality of the rules and bylaws; and affirmed a judgment dismissing the complaint. On appeal to this Court, *held:*

1. This appeal is cognizable by this Court under 28 U. S. C. § 1257 (2), which authorizes it to review on appeal a final judgment rendered by the highest court of a State "where is drawn in question the validity of a [state] statute." Pp. 824–827.

2. Insofar as the rules and bylaws merely require lawyers practicing in the State to become members of the integrated State Bar and to pay reasonable annual dues, they do not violate the Fourteenth Amendment. *Railway Employes' Department* v. *Hanson,* 351 U. S. 225. Pp. 827–843, 849–850, 865.

3. The judgment is affirmed without passing on the conclusion of the Wisconsin Supreme Court that appellant may constitutionally be compelled to contribute his financial support to political activities which he opposes. Pp. 843–848.

10 Wis. 2d 230, 102 N. W. 2d 404, affirmed.

Trayton L. Lathrop and *Leon E. Isaksen* argued the cause and filed a brief for appellant.

John W. Reynolds, Attorney General of Wisconsin, and *Gordon Sinykin* argued the cause for appellee. With them on the brief was *Warren H. Resh,* Assistant Attorney General.

Briefs of *amici curiae,* urging affirmance, were filed by *Herbert D. Sledd, William H. King* and *Edward R. Baird* for the Kentucky State Bar Association and the Virginia State Bar; *Albert E. Blashfield* and *J. Cameron Hall* for the State Bar of Michigan; *Herman F. Selvin, Eugene M. Prince* and *Burnham Enersen* for the State Bar of California; *John M. Dalton,* Attorney General, for the State of Missouri; *Charles B. Blackmar* for the Missouri Bar; *Clyde Atkins, Charles B. Fulton* and *J. Lewis Hall* for the Florida Bar; *Wade Church,* Attorney General, for the State of Arizona; *J. Blaine Anderson* for the State of Idaho; *Robert Y. Thornton,* Attorney General, and *Dean F. Bryson* for the State of Oregon; *Walter L. Budge,* Attorney General, and *George S. Ballif* for the State of Utah; *Norman B. Gray,* Attorney General, and *John P. Ilsley* for the State of Wyoming; *W. W. Barron,* Attorney General, *Fred H. Caplan,* Assistant Attorney General, *Stanley E. Dadisman, C. E. Goodwin* and *Charles C. Wise, Jr.* for the State of West Virginia; and *Cecil E. Burney, Bernard G. Segal, James C. Dezendorf, Philip C. Ebeling, Erwin N. Griswold* and *Edward W. Kuhn* for the American Judicature Society.

Leo Rattay and *Edwin F. Woodle* filed a brief for the Cuyahoga County Bar Association, as *amicus curiae,* urging reversal.

MR. JUSTICE BRENNAN announced the judgment of the Court and an opinion in which THE CHIEF JUSTICE, MR. JUSTICE CLARK and MR. JUSTICE STEWART join.

The Wisconsin Supreme Court integrated the Wisconsin Bar by an order which created "The State Bar of Wisconsin" on January 1, 1957, under Rules and Bylaws promulgated by the court. *In re Integration of the Bar,* 273 Wis. 281; *id.,* p. vii; 77 N. W. 2d 602. The order originally was effective for a two-year trial period, but

in 1958 was continued indefinitely. *In re Integration of the Bar,* 5 Wis. 2d 618, 93 N. W. 2d 601. Alleging that the "rules and by-laws required the plaintiff to enroll in the State Bar of Wisconsin and to pay dues to the treasurer of the State Bar of Wisconsin on the penalty of being deprived of his livelihood as a practicing lawyer, if he should fail to do so," the appellant, a Wisconsin lawyer, brought this action in the Circuit Court of Dane County for the refund of $15 annual dues for 1959 paid by him under protest to appellee, the Treasurer of the State Bar. He attached to his complaint a copy of the letter with which he had enclosed his check for the dues. He stated in the letter that he paid under protest because "I do not like to be coerced to support an organization which is authorized and directed to engage in political and propaganda activities. . . . A major portion of the activities of the State Bar as prescribed by the Supreme Court of Wisconsin are of a political and propaganda nature." His complaint alleges more specifically that the State Bar promotes "law reform" and "makes and opposes proposals for changes in . . . laws and constitutional provisions and argues to legislative bodies and their committees and to the lawyers and to the people with respect to the adoption of changes in . . . codes, laws and constitutional provisions." He alleges further that in the course of this activity "the State Bar of Wisconsin has used its employees, property and funds in active, unsolicited opposition to the adoption of legislation by the Legislature of the State of Wisconsin, which was favored by the plaintiff, all contrary to plaintiff's convictions and beliefs." His complaint concludes: "The plaintiff bases this action on his claim that the defendant has unjustly received, held, and disposed of funds of the plaintiff in the amount of $15.00, which to the knowledge of the

defendant were paid to the defendant by the plaintiff unwillingly and under coercion, and that such coercion was and is entailed in the rules and by-laws of the State Bar of Wisconsin continued in effect by the aforesaid order of the Supreme Court of the State of Wisconsin . . . ; and the said order insofar as it coerces the plaintiff to support the State Bar of Wisconsin, is unconstitutional and in violation of the Fourteenth Amendment of the Constitution of the United States . . . ."

The appellee demurred to the complaint on the ground, among others,[1] that it failed to state a cause of action. The demurrer was sustained and the complaint was dismissed. The Supreme Court of Wisconsin, on appeal, stated that the Circuit Court was without jurisdiction to determine the questions raised by the complaint. However, treating the case as if originally and properly brought in the Supreme Court, the court considered appellant's constitutional claims, not only on the allegations of the complaint, but also upon the facts, of which it took judicial notice, as to its own actions leading up to the challenged order, and as to all activities, including legislative activities, of the State Bar since its creation.[2] The judgment of the Circuit Court dismissing the complaint was affirmed. 10 Wis. 2d 230, 102 N. W. 2d 404. The Supreme Court held that the requirement that appellant be an enrolled dues-paying member of the State Bar did not abridge his rights of freedom of association, and also that his rights to free speech were not violated because the State Bar used his money to support legislation with which he disagreed.

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[1] He also demurred on grounds that the Circuit Court had no jurisdiction of the subject matter because exclusive jurisdiction was vested in the Supreme Court and that there was a defect of parties because the State Bar was not made a defendant.

[2] We also consider the case on this expanded record. Appellant raises no objection, and indeed urges us to do so.

An appeal was brought here by appellant under 28 U. S. C. § 1257 (2), which authorizes our review of a final judgment rendered by the highest court of a State "By appeal, where is drawn in question the validity of a [state] statute . . . ." We postponed to the hearing on the merits the question whether the order continuing the State Bar indefinitely under the Rules and Bylaws is a "statute" for the purposes of appeal under § 1257 (2). 364 U. S. 810.

We think that the order is a "statute" for the purposes of § 1257 (2). Under that section, the legislative character of challenged state action, rather than the nature of the agency of the State performing the act, is decisive of the question of jurisdiction. It is not necessary that the state legislature itself should have taken the action drawn in question. In construing the similar jurisdictional provision in the Judiciary Act of 1867, 14 Stat. 385, we said: "Any enactment, from whatever source originating, to which a State gives the force of law is a statute of the State, within the meaning of the clause cited relating to the jurisdiction of this court." *Williams* v. *Bruffy,* 96 U. S. 176, 183. We likewise said of the provision of the Act of 1925, 43 Stat. 936, which is the present § 1257 (2): ". . . the jurisdictional provision uses the words 'a statute of any State' in their larger sense and is not intended to make a distinction between acts of a state legislature and other exertions of the State's law-making power, but rather to include every act legislative in character to which the State gives its sanction." *King Manufacturing Co.* v. *City Council,* 277 U. S. 100, 104–105. Thus this Court has upheld jurisdiction on appeal of challenges to municipal ordinances, *e. g., King Manufacturing Co.* v. *City Council, supra; Jamison* v. *Texas,* 318 U. S. 413; certain types of orders of state regulatory commissions, *e. g., Lake Erie & Western R. Co.* v. *State Public Utilities Comm'n,* 249 U. S. 422; and some

orders of other state agencies, *e. g., Hamilton* v. *Regents,* 293 U. S. 245, 257–258. It is true that in these cases the state agency the action of which was called in question was exercising authority delegated to it by the legislature. However, this fact was not determinative, but was merely relevant to the character of the State's action. The absence of such a delegation does not preclude consideration of the exercise of authority as a statute.

We are satisfied that this appeal is from an act legislative in nature and within § 1257 (2). Integration of the Bar was effected through an interplay of action by the legislature and the court directed to fashioning a policy for the organization of the legal profession. The Wisconsin Legislature initiated the movement for integration of the Bar in 1943 when it passed the statute, chapter 315 of the Wisconsin Laws for that year, now Wis. Rev. Stat. § 256.31, providing:

> "(1) There shall be an association to be known as the 'State Bar of Wisconsin' composed of persons licensed to practice law in this state, and membership in such association shall be a condition precedent to the right to practice law in Wisconsin.
>
> "(2) The supreme court by appropriate orders shall provide for the organization and government of the association and shall define the rights, obligations and conditions of membership therein, to the end that such association shall promote the public interest by maintaining high standards of conduct in the legal profession and by aiding in the efficient administration of justice."

The State Supreme Court held that this statute was not binding upon it because "[t]he power to integrate the bar is an incident to the exercise of the judicial power . . . ." *Integration of Bar Case,* 244 Wis. 8, 40, 11 N. W. 2d 604, 619. The court twice refused to order integration, 244

Wis. 8, 11 N. W. 2d 604, 249 Wis. 523, 25 N. W. 2d 500, before taking the actions called in question on this appeal, 273 Wis. 281, 77 N. W. 2d 602, 5 Wis. 2d 618, 93 N. W. 2d 601. Nevertheless, the court in rejecting the first petition, 244 Wis., at pp. 51–52, 11 N. W. 2d, at pp. 623–624, recognized that its exercise of the power to order integration of the Bar would not be adjudicatory, but an action in accord with and in implementation of the legislative declaration of public policy.[3] The court said:

> "It is obvious that whether the general welfare requires that the bar be treated as a corporate body is a matter for the consideration of the legislature. . . . While the legislature has no constitutional power to compel the court to act or, if it acts, to act in a particular way in the discharge of the judicial function, it may nevertheless with propriety, and in the exercise of its power and the discharge of its duty, declare itself upon questions relating to the general welfare which includes the integration of the bar. The court, as has been exemplified during the entire history of the state, will respect such decla-

[3] The court's action was in response to a petition for "integration . . . in the manner described" in Wis. Rev. Stats. § 256.31. Wis. Bar Bull., Apr. 1956, p. 21. The resolution of the House of Governors of the Wisconsin Bar Association leading to the filing of the petition referred to "integration . . . pursuant to the provisions of Section 256.31 of the Wisconsin Statutes." *Id.*, p. 52. In many other States integration was initially accomplished either entirely by the legislature or by a combination of legislative and judicial action. See N. D. Laws 1921, c. 25; Ala. Laws 1923, No. 133; Idaho Laws 1923, c. 211; N. M. Laws 1925, c. 100; Cal. Stat. 1927, c. 34; Nev. Stat. 1928, c. 13; Okla. Laws 1929, c. 264; Utah Laws 1931, c. 48; S. D. Laws 1931, c. 84; Ariz. Laws 1933, c. 66; Wash. Laws 1933, c. 94; N. C. Laws 1933, c. 210; La. Acts 1934, 2d Extra Sess., No. 10; Ky. Acts 1934, c. 3; Ore. Laws 1935, c. 28; Mich. Acts 1935, No. 58; Va. Acts 1938, c. 410; Tex. Gen. Laws 1939, p. 64; W. Va. Acts 1945, c. 44; Alaska Laws 1955, c. 196.

> rations and, as already indicated, adopt them so far as they do not embarrass the court or impair its constitutional functions."

Integration of the Bar in Wisconsin bore no resemblance to adjudication. The State Supreme Court's action disposed of no litigation between parties. Rather the court sought to regulate the profession by applying its orders to all present members of the Bar and to all persons coming within the described class in the future. Cf. *Hamilton* v. *Regents, supra,* p. 258; *King Manufacturing Co.* v. *City Council, supra,* p. 104. As such, the action had the characteristics of legislation. We conclude that the appeal is cognizable under § 1257 (2). We therefore proceed to the consideration of the merits.

The core of appellant's argument is that he cannot constitutionally be compelled to join and give support to an organization which has among its functions the expression of opinion on legislative matters and which utilizes its property, funds and employees for the purposes of influencing legislation and public opinion toward legislation.[4] But his compulsory enrollment imposes only

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[4] Appellant's notice of appeal presents the following question for our review:

"Do the orders and rules of the Supreme Court of the State of Wisconsin . . . and the rules and by-laws which were promulgated thereby deprive the appellant . . . of his rights of freedom of association, assembly, speech, press, conscience and thought, or of his liberty or property without due process of law or deny to him equal protection of the law or otherwise deprive him of rights under the Fourteenth Amendment of the Constitution of the United States by compelling him, as a condition to his right to continue to practice law in the State of Wisconsin, to be a member of and financially support an association of attorneys known as the State Bar of Wisconsin, which association . . . among other things, uses its property, funds and employees for the purpose of influencing a broad range of legislation and public opinion; and, therefore, are said orders,

the duty to pay dues.[5] The Supreme Court of Wisconsin so interpreted its order and its interpretation is of course binding on us. The court said: "The rules and by-laws of the State Bar, as approved by this court, do not compel the plaintiff to associate with anyone. He is free to attend or not attend its meetings or vote in its elections as he chooses. The only compulsion to which he has been subjected by the integration of the bar is the payment of the annual dues of $15 per year." 10 Wis. 2d, at p. 237, 102 N. W. 2d, at p. 408.[6] We therefore are confronted, as we were in *Railway Employes' Department* v. *Hanson,* 351 U. S. 225, only with a question of compelled financial support of group activities, not with involuntary membership in any other aspect. Cf. *International Association of Machinists* v. *Street,* decided today, *ante,* p. 740, at pp. 748–749.

A review of the activities of the State Bar authorized under the Rules and Bylaws is necessary to decision. The purposes of the organization are stated as follows in Rule 1, § 2: "to aid the courts in carrying on and improv-

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rules and by-laws, insofar as they coerce the appellant to be a member of and support said association, invalid on the ground that they are repugnant to the Constitution of the United States?"

[5] The rules limit the maximum permissible dues to $20 a year.

[6] A member suspended for nonpayment of dues may secure automatic reinstatement, so long as his dues are not in arrearage for three or more years, by making full payment of the amount and paying an additional $5 as a penalty. No other condition on acquiring or retaining membership is imposed by the rules or bylaws. Although the State Bar participates in the investigation of complaints of misconduct, see pp. 829–832, *infra,* final power to disbar or otherwise discipline any member resides in the Supreme Court.

The rules also make the canons of ethics of the American Bar Association, as modified or supplemented by the Supreme Court of Wisconsin, "the standards governing the practice of law in this state." But appellant makes no claim that the State lacks power to impose on him a duty to abide by these canons.

ing the administration of justice; to foster and maintain on the part of those engaged in the practice of law high ideals of integrity, learning, competence and public service and high standards of conduct; to safeguard the proper professional interests of the members of the bar; to encourage the formation and activities of local bar associations; to provide a forum for the discussion of subjects pertaining to the practice of law, the science of jurisprudence and law reform, and the relations of the bar to the public, and to publish information relating thereto; to the end that the public responsibilities of the legal profession may be more effectively discharged." To achieve these purposes standing committees and sections are established.[7] The Rules also assign the organization

[7] The committees and their assigned functions are as follows:

"*Legal education and bar admissions.*—This committee shall make continuing studies of the curricula and teaching methods employed in law schools, and of standards and methods employed in determining the qualifications of applicants for admission to the bar; and whenever requested by the State Bar commissioners shall assist in the investigation of the qualifications of persons seeking admission to the bar.

"*Post-graduate education.*—This committee shall formulate and promote programs designed to afford to the members of the State Bar suitable opportunities for acquiring additional professional knowledge, training, and skill, through publications, lectures, and discussions at regional meetings of association members and law institutes, and through correspondence course study.

"*Administration of justice.*—This committee shall study the organization and operation of the Wisconsin judicial system and shall recommend from time to time appropriate changes in practice and procedure for improving the efficiency thereof; and in that connection shall examine all legislative proposals for changes in the judicial system.

"*Judicial selection.*—This committee shall study and collect information pertaining to judicial selection, tenure, and compensation, including retirement pensions, and shall report from time to time to the association with respect thereto.

"*Professional ethics.*—This committee shall formulate and recommend standards and methods for the effective enforcement of high

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a major role in the State's procedures for the discipline of members of the bar for unethical conduct. A Committee on Grievances is provided for each of the nine districts into which the State is divided. Each

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standards of ethics and conduct in the practice of law; shall consider the Canons of Ethics of the legal profession and the observance thereof, and shall make recommendations for appropriate amendments thereto. The committee shall have authority to express opinions regarding proper professional conduct, upon written request of any member or officer of the State Bar.

"*Public services.*—This committee shall prepare and present to the board of governors plans for advancing public acceptance of the objects and purposes of the association; and shall have responsibility for the execution of such plans as are approved by the board of governors. Such plans shall include arrangements for disseminating information of interest to the public in relation to the functions of the departments of government, the judicial system and the bar; and to that end the committee may operate a speakers' bureau and employ the facilities of the public press and other channels of public communications.

"*Interprofessional and business relations.*—It shall be the duty of this committee to serve as a liaison agency between the legal profession and other professions and groups with whom the bar is in contact in order to interpret to such professions and groups the proper scope of the practice of law.

"*Legislation.*—This committee shall study all proposals submitted to the Wisconsin legislature or the congress of the United States for changes in the statutes relating to the courts or the practice of law, and shall report thereon to the board of governors; and with the approval of the board of governors may represent the State Bar in supporting or opposing any such proposals.

"*Legal aid.*—This committee shall promote the establishment and efficient maintenance of legal aid organizations equipped to provide free legal services to those unable to pay for such service; shall study the administration of justice as it affects persons in the low income groups; and shall study and report on methods of making legal service more readily available to persons of moderate means, and shall encourage and assist local bar associations in accomplishing this purpose.

"*Unauthorized practice of the law.*—This committee shall keep itself and the association informed with respect to the unauthorized

committee receives and investigates complaints of alleged misconduct of lawyers within its district. Each committee also investigates and processes petitions for reinstatement of lawyers and petitions for late enrollment in the State Bar of lawyers who fail to enroll within a designated period after becoming eligible to enroll.

The State Legislature and the State Supreme Court have informed us of the public interest sought to be served by the integration of the bar. The statute states its desirability "to the end that such association shall promote the public interest by maintaining high stand-

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practice of law by laymen and by agencies, and the participation of members of the bar in such activities, and concerning methods for the prevention thereof. The committee shall seek the elimination of such unauthorized practice and participation therein on the part of members of the bar, by such action and methods as may be appropriate for that purpose.

"*State Bar Bulletin.*—This committee shall assist and advise the officers of the association and the board of governors in matters pertaining to the production and publication of the *Wisconsin State Bar Bulletin,* the *Wisbar Letter,* the *Supreme Court Calendar Service* and such other periodical publications of the State Bar as may be authorized by the board of governors from time to time.

"*State Grievance Committee.*—This committee shall consist of the chairmen of the district grievance committees, who shall meet at least quarterly and whose duties shall be to exchange information as to problems arising under the grievance procedure, to discuss and adopt uniform procedures and standards under Rule 10 [relating to grievances] and to make recommendations to the Board of Governors for improvements in the procedures under Rule 10 and for other matters consistent with their organization." Article IV, Sections 2–13, 273 Wis. xxxiii-xxxv; Supplement, Wis. Bar Bull., Aug. 1960, pp. 21–23.

Sections have been created in the areas of corporation and business law, family law, role of house counsel, insurance, negligence and workmen's compensation law, labor relations law, military law, real property, probate and trust law, taxation, government law, protection of individual rights against misuse of powers of government, patent, trademark and copyright law, and criminal law.

ards of conduct in the legal profession and by aiding in the efficient administration of justice." This theme is echoed in the several Supreme Court opinions. The first opinion after the passage of the statute noted the "widespread general recognition of the fact that the conduct of the bar is a matter of general public interest and concern." 244 Wis. 8, 16, 11 N. W. 2d 604, 608. But the court's examination at that time of existing procedures governing admission and discipline of lawyers and the prevention of the unauthorized practice of the law persuaded the court that the public interest was being adequately served without integration. The same conclusion was reached when the matter was reviewed again in 1946. At that time, in addition to reviewing the desirability of integration in the context of the problems of admission and discipline, the court considered its utility in other fields. The matter of post-law school or post-admission education of lawyers was one of these. The court believed, however, that while an educational program was a proper objective, the one proposed was "nebulous in outline and probably expensive in execution." 249 Wis. 523, 530, 25 N. W. 2d 500, 503. The court also observed, "There are doubtless many other useful activities for which dues might properly be used, but what they are does not occur to us and no particular one seems to press for action." 249 Wis. 523, 530, 25 N. W. 2d 500, 503.

The court concluded in 1956, however, that integration might serve the public interest and should be given a two-year trial.[8] It decided to "require the bar to act as

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[8] The court said: "We feel . . . that integration of the bar should be tried. The results thereof will be what the bar and the court make of it. If integration does not work, this court can change the rules to meet any situation that arises or it can abandon the plan." *In re Integration of the Bar*, 273 Wis. 281, 285, 77 N. W. 2d 602, 604. "[The rules and by-laws] cannot be taken as the last word, and . . . experience in operating under them may disclose imperfections, and

a unit to promote high standards of practice and the economical and speedy enforcement of legal rights," 273 Wis. 281, 283, 77 N. W. 2d 602, 603, because it had come to the conclusion that efforts to accomplish these ends in the public interest through voluntary association had not been effective. "[T]oo many lawyers have refrained or refused to join, . . . membership in the voluntary association has become static, and . . . a substantial minority of the lawyers in the state are not associated with the State Bar Association." 273 Wis. 281, 283, 77 N. W. 2d 602, 603. When the order was extended indefinitely in 1958 the action was expressly grounded on the finding that, "Members of the legal profession by their admission to the bar become an important part of [the] process [of administering justice] . . . . An independent, active, and intelligent bar is necessary to the efficient administration of justice by the courts." 5 Wis. 2d 618, 622, 93 N. W. 2d 601, 603.

The appellant attacks the power of the State to achieve these goals through integration on the ground that because of its legislative activities, the State Bar partakes of the character of a political party. But on their face the purposes and the designated activities of the State Bar hardly justify this characterization. The inclusion among its purposes that it be a forum for a "discussion of . . . law reform" and active in safeguarding the "proper professional interests of, the members of the bar," in unspecified ways, does not support it. Only two of the 12 committees, Administration of Justice, and Legislation, are expressly directed to concern themselves in a substantial way with legislation. Authority granted the other committees directs them to deal largely with matters

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particulars in which they should be changed. The integrated bar itself is an experiment in Wisconsin, and like all new enterprises may be expected to need adaptation to conditions and circumstances not yet clearly foreseen." 273 Wis. ix.

which appear to be wholly outside the political process and to concern the internal affairs of the profession.

We do not understand the appellant to contend that the State Bar is a sham organization deliberately designed to further a program of political action. Nor would such a contention find support in this record. Legislative activity is carried on under a statement of policy which followed the recommendations of a former president of the voluntary Wisconsin Bar Association, Alfred LaFrance. He recommended that the legislative activity of the State Bar should have two distinct aspects: (1) "the field of legislative reporting or the dissemination of information concerning legislative proposals. . . . This is a service-information function that is both useful to the general membership and to the local bar associations"; and (2) "promotional or positive legislative activity." As to the latter he advised that "the rule of substantial unanimity should be observed. Unless the lawyers of Wisconsin are substantially for or against a proposal, the State Bar should neither support nor oppose the proposal." Wis. Bar Bull., Aug. 1957, pp. 41–42. "We must remember that we are an integrated Bar, that the views of the minority must be given along with the views of the majority where unanimity does not appear. The State Bar represents all of the lawyers of this state and in that capacity we must safeguard the interests of all." *Id.*, p. 44. The rules of policy and procedure for legislative activity follow these recommendations.[9]

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[9] The policy provides:

1. "The State Bar, through action of its Board of Governors, will initiate legislation only on such matters as it believes to be of general professional interest. No legislation will be sponsored unless and until the Board is satisfied that the recommendation represents the consensus and the best composite judgment of the legal profession of this state, and that the proposed legislation is meritorious and in the public interest. The text of all proposed legislation shall be

Under its charter of legislative action, the State Bar has participated in political activities in these principal categories:

(1) its executive director is registered as a lobbyist in accordance with state law. For the legis-

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carefully prepared and considered and the counsel of the experts in the field involved will be sought wherever possible."

2. Power to make the final determination of the policy of the State Bar toward specific legislative proposals is lodged in the Board of Governors.

3. "Where it is obvious that the membership of the Bar is of a substantially divided opinion, the Board of Governors shall take no definite position"; but in any such case the Board is empowered to report its vote to the Legislature as a reflection of the diverse views of the members.

4. The Board may delegate its power to take a position on legislative matters to the Committee on Legislation, the president of the State Bar, or the legislative counsel.

5. Between Board meetings, the Executive Committee may exercise all of the Board's powers with respect to legislation.

6. The Board shall designate a legislative counsel, to be registered as a lobbyist in accordance with Wisconsin law. His task is to manage legislative activities, coordinating the work of sections and committees interested in legislative proposals with the activities of the Board, Executive Committee, and Committee on Legislation; he is also directed to screen all legislative proposals and refer those of special interest to the appropriate section or committee for study and recommendation.

7. The Committee on Legislation is empowered to designate persons to appear before legislative committees and arrange for their appearance.

8. When a section or committee sponsors legislation with the aproval of the Board, section officers or the committee chairman may appear before the legislature in its name, or request the legislative counsel to appear.

9. "During the session of the Legislature all sections and committees of the State Bar are expected to stand ready to: (a) Participate in explaining the bills recommended or opposed by the State Bar to the committees of the Legislature to whom they are referred; (b) Prepare explanatory material relative to any bill about which

lative session 1959–1960, the State Bar listed a $1,400 lobbying expense; this was a percentage of the salary of the executive director, based on an estimate of the time he spent in seeking to influence legislation, amounting to 5% of his salary for the two years. The registration statement signed by the then president of the State Bar added the explanatory note: "His activities as a lobbyist on behalf of the State Bar are incidental to his general work and occupy only a small portion of his time."

(2) The State Bar, through its Board of Governors or Executive Committee, has taken a formal

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a question has arisen since its introduction; (c) Examine all bills advocated by others that would affect the courts, the judiciary, the legal profession, or the administration of justice in any particular, or that would make any changes in the substantive law, and keep the Board of Governors and the Executive Committee fully informed so that ill-advised bills can be opposed and meritorious bills can be supported. Committees of the Legislature should be encouraged to request the State Bar to study and to report its recommendations concerning all bills of this category."

10. The State Bar staff is directed to cooperate with all sections, committees, individual members, and local bar associations desiring to have bills drafted for introduction into the legislature.

11. To facilitate widespread study of legislative proposals, the State Bar shall issue a weekly legislative bulletin to officers, members of the Board of Governors and the Executive Committee, section and committee chairmen, presidents and secretaries of all local bar associations, judges, and other persons as directed by the Executive Committee.

12. Local bar associations are encouraged to take such action on legislation as they deem appropriate and forward their recommendations to the State Bar for consideration. Board of Governors Minutes, June 12, 1957.

By resolution in 1959 it was further provided that a committee or section may present its views on legislation without approval of the Board of Governors. But in so doing it must state that the position is that of the group or its officers, not that of the State Bar. Board of Governors Minutes, Feb. 18, 1959.

position with respect to a number of questions of legislative policy. These have included such subjects as an increase in the salaries of State Supreme Court justices; making attorneys notaries public; amending the Federal Career Compensation Act to apply to attorneys employed with the Armed Forces the same provisions for special pay and promotion available to members of other professions; improving pay scales of attorneys in state service; court reorganization; extending personal jurisdiction over nonresidents; allowing the recording of unwitnessed conveyances; use of deceased partners' names in firm names; revision of the law governing federal tax liens; law clerks for State Supreme Court justices; curtesy and dower; securities transfers by fiduciaries; jurisdiction of county courts over the administration of *inter vivos* trusts; special appropriations for research for the State Legislative Council.

(3) The standing committees, particularly the Committees on Legislation and Administration of Justice, and the sections have devoted considerable time to the study of legislation, the formulation of recommendations, and the support of various proposals. For example, the president reported in 1960 that the Committee on Legislation "has been extremely busy, and through its efforts in cooperation with other interested agencies has been instrumental in securing the passage of the Court Reorganization bill, the bill of the Judicial Council expanding personal jurisdiction, and at this recently resumed session a bill providing clerks for our Supreme Court, and other bills of importance to the administration of justice." Wis. Bar Bull., Aug. 1960, p. 41. See also *id.*, June 1959, pp. 64–65. A new subcommittee, on federal legislation, was set up by this committee following a study which found need for such a group

"to deal with federal legislation affecting the practice of law, or lawyers as a class, or the jurisdiction, procedure and practice of the Federal courts and other Federal tribunals, or creation of new Federal courts or judgeships affecting this state, and comparable subjects . . . ." Board of Governors Minutes, Dec. 11, 1959. Furthermore, legislative recommendations and activities have not been confined to those standing committees with the express function in the by-laws of considering legislative proposals. See, *e. g.*, Report of the Committee on Legal Aid, Wis. Bar Bull., June 1960, p. 61; Report of the Committee on Legal Aid, *id.*, June 1959, pp. 61–62. Many of the positions on legislation taken on behalf of the State Bar by the Board of Governors or the Executive Committee have also followed studies and recommendations by the sections. See, *e. g.*, Report of the Real Property, Probate and Trust Law Section, Wis. Bar Bull., June 1960, p. 51; Report of the Corporation and Business Law Section, *id.*, p. 56.

(4) A number of special committees have been constituted, either *ad hoc* to consider particular legislative proposals, or to perform continuing functions which may involve the consideration of legislation. Thus special committees have considered such subjects as extension of personal jurisdiction over nonresidents, law clerks for State Supreme Court justices, and revision of the federal tax lien laws. The Special Committee on World Peace through Law, which has encouraged the formation of similar committees on the local level, has sponsored debates on subjects such as the repeal of the Connally reservation, believing that "the general knowledge of laymen as well as of lawyers concerning the possibility of world peace through law is limited and requires a

constant program of education and discussion." Wis. Bar Bull., June 1960, p. 54.

(5) The Wisconsin Bar Bulletin, sent to each member, prints articles suggesting changes in state and federal law. And other publications of the State Bar deal with the progress of legislation.

But it seems plain that legislative activity is not the major activity of the State Bar. The activities without apparent political coloration are many. The Supreme Court provided in an appendix to the opinion below, "an analysis of [State Bar] . . . activities and the public purpose served thereby." 10 Wis. 2d, at p. 246, 102 N. W. 2d, at p. 412. The court found that "The most extensive activities of the State Bar are those directed toward postgraduate education of lawyers," and that "Postgraduate education of lawyers is in the public interest because it promotes the competency of lawyers to handle the legal matters entrusted to them by those of the general public who employ them." 10 Wis. 2d, at p. 246, 102 N. W. 2d, at pp. 412–413.[10] It found that the State Bar's partic-

[10] The statewide and regional meetings, the court found, are largely devoted "to the delivery of papers on technical legal subjects of an instructive nature." 10 Wis. 2d, at p. 246, 102 N. W. 2d, at pp. 412–413. The sections are particularly active in this regard. As a former president of the State Bar described their role: "The sections provide a special place where members with interest in particular fields of law may serve on committees and receive assistance and training in such fields. Moreover, the sections provide their own programs at each Annual and Midwinter meeting largely of a very practical and educational nature." Wis. Bar Bull., Aug. 1958, p. 71. See, *e. g.*, Report of Corporation and Business Law Section, *id.*, June 1960, p. 56; Report of Labor Law Section, *id.*, p. 60. For example, the Taxation Section has sponsored an annual tax institute for practicing lawyers. See Report of Taxation Section, Wis. Bar Bull., June 1959, pp. 53–54. Many of the papers delivered at such sessions are later given wider circulation to the Bar by publication in the Bar Bulletin. In addition, the State Bar has undertaken the sponsorship of numerous special

ipation in the handling of grievances improved the efficiency and effectiveness of this work.[11] It found that the public interest was furthered by the Committee on Unauthorized Practice of Law which was carrying on "a constant program since numerous trades and occupations keep expanding their services and frequently start offering services which constitute the practice of the law." 10 Wis. 2d, at p. 248, 102 N. W. 2d, at p. 413.[12] The court

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seminars and symposia, see, *e. g.*, Wis. Bar Bull., Aug. 1960, p. 41. And it has made funds available to the University of Wisconsin Law School to compensate students for assisting in the preparation of materials for post-graduate programs. See Board of Governors Minutes, Apr. 25, 1958; Wis. Bar Bull., Aug. 1958, pp. 69–70.

[11] Prior to integration the Board of State Bar Commissioners conducted and paid for the investigation of grievances. Since then the grievance committees have performed most of that work, with a resulting diminution in the financial needs of the bar commissioners. A former president of the State Bar commented on these committees' performance of their functions: "The result is that a majority of complaints are adjusted or explained to the satisfaction of the complainant, and the State Bar Commissioners are saved considerable time and effort . . . ." Wis. Bar Bull., Aug. 1958, p. 68. See also *id.*, Aug. 1960, p. 41.

[12] Revenues from integration enabled the State Bar to employ a lawyer whose principal task is the investigation of complaints of unauthorized practice and the effort to achieve its discontinuance. A number of legal actions to prevent unauthorized practice have been instituted. See, *e. g.*, Wis. Bar Bull., Aug. 1960, p. 45; *id.*, June 1960, pp. 49–50; *id.*, June 1958, pp. 48–49. The Committee on Unauthorized Practice has also worked with the Committee on Interprofessional and Business Relations in conferring with other professional groups to establish demarcation lines between their activities and those of the bar. Thus an agreement was negotiated with the Association of Certified Public Accountants and a joint committee provided to police it. See Board of Governors Minutes, Dec. 9, 1960. The Committee on Interprofessional and Business Relations has also participated in projects for the formulation of agreements with the Association of Real Estate Brokers and the Association of Collection Agencies, and its program includes conferences with other profes-

also concluded that the Legal Aid Committee had "done effective and noteworthy work to encourage the local bar associations of the state to set up legal-aid systems in their local communities. . . . Such committee has also outlined recommended procedures for establishing and carrying through such systems of providing legal aid." 10 Wis. 2d, at p. 249, 102 N. W. 2d, at p. 414.[13] In the field of public relations the court found that the "chief activity" of the State Bar was the "preparation, publication, and distribution to the general public of pamphlets dealing with various transactions and happenings with which laymen are frequently confronted, which embody legal problems." 10 Wis. 2d, at p. 247, 102 N. W. 2d, at p. 413.[14]

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sional groups. See Executive Committee Minutes, July 22, 1960. Legal ethics is another concern of the State Bar. Its Committee on Professional Ethics has given opinions on a number of questions of ethical practice. See, *e. g.*, Wis. Bar Bull., June 1960, pp. 46–49.

[13] The number of lawyers in Wisconsin participating in legal aid has steadily increased. The committee reported in 1960 that it would "continue to vigorously carry on its program of rendering prompt and efficient legal aid services to all those who require the same; to continue to work diligently to the realization of the goal that every county bar association within our State have an effective legal aid bureau or legal aid society as soon as possible; to continue our policy of bringing into our open forum meetings on legal aid, the most outstanding authorities on the subject, to the end that we here in the State of Wisconsin will at all times have the fullest, up-to-date information on every phase of legal aid . . . ." Wis. Bar Bull., June 1960, p. 64. See also *id.*, June 1959, p. 63.

[14] The State Bar has also prepared articles on legal subjects for distribution to newspapers throughout the State. It has been concerned with the promotion of the annual Law Day. See, *e. g.*, Wis. Bar Bull., Aug. 1958, p. 67. The Bar Bulletin, in addition to publishing articles on legal subjects, has issued special supplements explaining and annotating new laws and has printed checklists for attorneys suggesting how to proceed with various legal problems. Its avowed aim is to make the Bulletin "a very practical means for all practicing lawyers to keep posted on the ever-changing requirements in the practice. . . . We believe that one of the great justifications for integration is found

Moreover, a number of studies have been made of programs, not involving political action, to further the economic well-being of the profession.[15]

This examination of the purposes and functions of the State Bar shows its multifaceted character, in fact as well as in conception. In our view the case presents a claim of impingement upon freedom of association no different from that which we decided in *Railway Employes' Dept.* v. *Hanson,* 351 U. S. 225. We there held that § 2, Eleventh of the Railway Labor Act, 45 U. S. C. § 152, Eleventh, did not on its face abridge protected rights of association in authorizing union-shop agreements between interstate railroads and unions of their employees conditioning the employees' continued employment on payment of union dues, initiation fees and assessments.

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in the means of publication and communication from the Bar to the member through these vehicles." Wis. Bar Bull., June 1960, p. 67.

[15] The stated functions of the Special Committee on Economics of the Bar are: "[t]he committee will engage itself in the general study of the economics of the Bar to determine a fair fee schedule from time to time; seek its uniform adoption and recognition throughout the state; study the encroachment of lay agencies on the fields of law; make suggestions for proper office management, and make such recommendations from time to time as it considers proper in the general field." Wis. Bar Bull., June 1959, p. 58. One of the principal products of such activity has been a recommended schedule of minimum fees for Wisconsin lawyers; this schedule was published and distributed at a cost of over $10,000 to the State Bar. See Wis. Bar Bull., Aug. 1960, p. 40; also *id.,* pp. 10–11. Another project authorized by the Board of Governors is a comprehensive statistical study of the economic status of Wisconsin lawyers. See Board of Governors Minutes, Sept. 23, 1960, Dec. 9, 1960. Other special committees have considered such matters as group insurance for State Bar members and creation of a client security plan to insure against attorneys' defalcations. See, *e. g.,* Wis. Bar Bull., Aug. 1960, p. 41; Board of Governors Minutes, Feb. 18, 1959; Executive Committee Minutes, Sept. 23, 1960.

There too the record indicated that the organizations engaged in some activities similar to the legislative activities of which the appellant complains. See *International Association of Machinists* v. *Street, ante,* p. 748, note 5. In rejecting Hanson's claim of abridgment of his rights of freedom of association, we said, "On the present record, there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar." 351 U. S., at 238. Both in purport and in practice the bulk of State Bar activities serve the function, or at least so Wisconsin might reasonably believe, of elevating the educational and ethical standards of the Bar to the end of improving the quality of the legal service available to the people of the State, without any reference to the political process. It cannot be denied that this is a legitimate end of state policy.[16] We think that the Supreme Court of Wisconsin, in order to further the State's legitimate interests in raising the quality of professional services, may constitutionally require that the costs of improving the profession in this fashion should be shared by the subjects and beneficiaries of the regulatory program, the lawyers, even though the organization created to attain the objective also engages in some legislative activity. Given the character of the integrated bar shown on this record, in the light of the limitation of the membership requirement to the compulsory payment of reasonable annual dues, we are unable to find any impingement upon protected rights of association.

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[16] On the subject of integration of the bar in the United States, see generally Glaser, The Organization of the Integrated Bar, The Debate Over the Integrated Bar, and Bibliography on the Integrated Bar (Columbia University Bureau of Applied Social Research). Comprehensive discussions of integration of the Bar in the various States are contained in briefs *amici curiae* filed with the Court in this case.

However, appellant would have us go farther and decide whether his constitutional rights of free speech are infringed if his dues money is used to support the political activities of the State Bar. The State Supreme Court treated the case as raising the question whether First Amendment rights were violated "because part of his dues money is used to support causes to which he is opposed." 10 Wis. 2d, at p. 238, 102 N. W. 2d, at p. 409. The Court in rejecting appellant's argument reasoned that "[t]he right to practice law is not a right but is a privilege subject to regulation. . . . The only limitation upon the state's power to regulate the privilege of the practice of law is that the regulations adopted do not impose an unconstitutional burden or deny due process." 10 Wis. 2d, at pp. 237–238, 102 N. W. 2d, at p. 408. The Court found no such burden because ". . . the public welfare will be promoted by securing and publicizing the composite judgment of the members of the bar of the state on measures directly affecting the administration of justice and the practice of law. The general public and the legislature are entitled to know how the profession as a whole stands on such type of proposed legislation. . . . The only challenged interference with his liberty is the exaction of annual dues to the State Bar, in the nature of the imposition of an annual license fee, not unreasonable or unduly burdensome in amount, part of which is used to advocate causes to which he is opposed. However, this court, in which is vested the power of the state to regulate the practice of law, has determined that it promotes the public interest to have public expression of the views of a majority of the lawyers of the state, with respect to legislation affecting the administration of justice and the practice of law, the same to be voiced through their own democratically chosen representatives comprising the board of governors of the State Bar. The public interest so promoted far outweighs the slight inconvenience to the plaintiff result-

ing from his required payment of the annual dues." 10 Wis. 2d, at pp. 239, 242, 102 N. W. 2d, at pp. 409, 411.[17]

We are persuaded that on this record we have no sound basis for deciding appellant's constitutional claim insofar as it rests on the assertion that his rights of free speech are violated by the use of his money for causes which he opposes. Even if the demurrer is taken as admitting all the factual allegations of the complaint, even if these allegations are construed most expansively, and even if, like the Wisconsin Supreme Court, we take judicial notice of the political activities of the State Bar, still we think that the issue of impingement upon rights of free speech through the use of exacted dues is no more concretely presented for adjudication than it was in *Hanson*. Compare *International Association of Machinists* v. *Street, ante,* p. 740, at pp. 747–749. Nowhere are we clearly

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[17] The Wisconsin Supreme Court originally declined to order integration partly because of misgivings whether possible political activities of the integrated Bar would be consistent with the public interest sought to be served. See *In re Integration of the Bar,* 249 Wis. 523, 25 N. W. 2d 500. It indicated that integration would "require it to censor the budgets and activities of the bar after integration" and said: "It requires a very short look at some of the possible activities of the bar to make it clear that this court would have to insist upon scrutinizing every activity for which it is proposed to expend funds derived from dues, and that a series of situations would arise that would be embarrassing to the relations of bench and bar." 249 Wis., at pp. 528, 529–530, 25 N. W. 2d, at pp. 502, 503. These reservations were expressly disclaimed when the court continued integration in 1958, 5 Wis. 2d 618, 626–627, 93 N. W. 2d 601, 605. The court said: "The integrated State Bar of Wisconsin is independent and free to conduct its activities within the framework of such rules and by-laws." 5 Wis. 2d, at p. 626, 93 N. W. 2d, at p. 605. The court reiterated this position in the present case: "In so far as it confines such activities to those authorized by the rules and by-laws, this court will not interfere or in any manner seek to control or censor the action taken, or to substitute its judgment for that of the membership of the State Bar." 10 Wis. 2d, at p. 240, 102 N. W. 2d, at p. 410.

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apprised as to the views of the appellant on any particular legislative issues on which the State Bar has taken a position, or as to the way in which and the degree to which funds compulsorily exacted from its members are used to support the organization's political activities. There is an allegation in the complaint that the State Bar had "used its employees, property and funds in active, unsolicited opposition to the adoption of legislation by the Legislature of the State of Wisconsin, which was favored by the plaintiff, all contrary to the plaintiff's convictions and beliefs," but there is no indication of the nature of this legislation, nor of appellant's views on particular proposals, nor of whether any of his dues were used to support the State Bar's positions. There is an allegation that the State Bar's revenues amount to about $90,000 a year, of which $80,000 is derived from dues, but there is no indication in the record as to how political expenditures are financed and how much has been expended for political causes to which appellant objects. The facts of which the Supreme Court took judicial notice do not enlighten us on these gaps in the record. The minutes of the Board of Governors and Executive Committee of the State Bar show that the organization has taken one position or another on a wide variety of issues, but those minutes give no indication of appellant's views as to any of such issues or of what portions of the expenditure of funds to propagate the State Bar's views may be properly apportioned to his dues payments. Nor do the other publications of the State Bar. The Supreme Court assumed, as apparently the trial court did in passing on the demurrer, that the appellant was personally opposed to some of the legislation supported by the State Bar. But its opinion still gave no description of any specific measures he opposed, or the extent to which the State Bar actually utilized dues funds for specific purposes to which he had objected. Appellant's phrasing of the question presented on appeal in this

Court is not responsive to any of these inquiries as to facts which may be relevant to the determination of constitutional questions surrounding the political expenditures. It merely asks whether a requirement of financial support of an association which, "among other things, uses its property, funds and employees for the purpose of influencing a broad range of legislation and public opinion" can be constitutionally imposed on him. This statement of the question, just as does his complaint, appears more a claim of the right to be free from compelled financial support of the organization because of its political activities, than a challenge by appellant to the use of his dues money for particular political causes of which he disapproves. Moreover, although the court below purported to decide as against all Fourteenth Amendment claims that the appellant could be compelled to pay his annual dues, even though "part . . . is used to support causes to which he is opposed," on oral argument here appellant disclaimed any necessity to show that he had opposed the position of the State Bar on any particular issue and asserted that it was sufficient that he opposed the use of his money for any political purposes at all. In view of the state of the record and this disclaimer, we think that we would not be justified in passing on the constitutional question considered below. "[T]he questions involving the power of . . . [the State] come here not so shaped by the record and by the proceedings below as to bring those powers before this Court as leanly and as sharply as judicial judgment upon an exercise of . . . [state] power requires." *United States* v. *C. I. O.*, 335 U. S. 106, 126 (concurring opinion). Cf. *United States* v. *U. A. W.–C. I. O.*, 352 U. S. 567, 589–592.

We, therefore, intimate no view as to the correctness of the conclusion of the Wisconsin Supreme Court that the appellant may constitutionally be compelled to contribute his financial support to political activities which

he opposes. That issue is reserved, just as it was in *Hanson*, see *International Association of Machinists* v. *Street*, *ante*, p. 740, at 746–749. Upon this understanding we four vote to affirm. Since three of our colleagues are of the view that the claim which we do not decide is properly here and has no merit, and on that ground vote to affirm, the judgment of the Wisconsin Supreme Court is

Affirmed.

MR. JUSTICE HARLAN, with whom MR. JUSTICE FRANKFURTER joins, concurring in the judgment.

I think it most unfortunate that the right of the Wisconsin Integrated Bar to use, in whole or in part, the dues of dissident members to carry on legislative and other programs of law reform—doubtless among the most useful and significant branches of its authorized activities—should be left in such disquieting Constitutional uncertainty. The effect of that uncertainty is compounded by the circumstance that it will doubtless also reach into the Integrated Bars of twenty-five other States.[1]

I must say, with all respect, that the reasons stated in the plurality opinion for avoiding decision of this Constitutional issue can hardly be regarded as anything but trivial. For, given the unquestioned fact that the Wisconsin Bar uses or threatens to use, over appellant's protest, some part of its receipts to further or oppose legislation on matters of law reform and the administration of

[1] Alabama, Alaska, Arizona, California, Florida, Idaho, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Virginia, Washington, West Virginia, Wyoming. See note 14, dissenting opinion of MR. JUSTICE FRANKFURTER in *International Machinists* v. *Street*, *ante*, p. 808. Arkansas has a Bar which is integrated only with respect to disciplinary matters. 207 Ark. xxxiv–xxxvii.

justice, I am at a loss to understand how it can be thought that this record affords "no sound basis" for adjudicating the issue simply because we are not "clearly apprised as to the views of the appellant on any particular legislative issues on which the State Bar has taken a position, or as to the way in which and the degree to which funds compulsorily exacted from its members are used to support the organization's political activities" (*ante,* pp. 845-846). I agree with my Brother BLACK that the Constitutional issue is inescapably before us.

Unless one is ready to fall prey to what are at best but alluring abstractions on rights of free speech and association, I think he will be hard put to it to find any solid basis for the Constitutional qualms which, though unexpressed, so obviously underlie the plurality opinion, or for the views of my two dissenting Brothers, one of whom finds unconstitutional the entire Integrated Bar concept (*post,* pp. 877–885), and the other of whom holds the operations of such a Bar unconstitutional to the extent that they involve taking "the money of protesting lawyers" and using "it to support causes they are against" (*post,* p. 871).

For me, there is a short and simple answer to all of this. The *Hanson* case, 351 U. S. 225, decided by a unanimous Court, surely lays at rest all doubt that a State may Constitutionally condition the right to practice law upon membership in an integrated bar association, a condition fully as justified by state needs as the union shop is by federal needs. Indeed the conclusion reached in *Hanson* with respect to compulsory union membership seems to me *a fortiori* true here, in light of the supervisory powers which the State, through its courts, has traditionally exercised over admission to the practice of law, see *Konigsberg* v. *State Bar of California,* 366 U. S. 36; *In re Anastaplo,* 366 U. S. 82, and over the conduct of lawyers after admission, see *Cohen* v. *Hurley,* 366 U. S. 117. The Integrated Bar was in fact treated as such an *a fortiori* case in the

Hanson opinion itself. *Supra,* at 238. So much, indeed, is recognized by the plurality opinion which rejects the contention that Wisconsin could not Constitutionally require appellant, a lawyer, to become and remain a dues-paying member of the State Bar.

That being so, I do not understand why it should become unconstitutional for the State Bar to use appellant's dues to fulfill some of the very purposes for which it was established. I am wholly unable to follow the force of reasoning which, on the one hand, denies that compulsory dues-paying membership in an Integrated Bar infringes "freedom of association," and, on the other, in effect affirms that such membership, to the extent it entails the use of a dissident member's dues for legitimate Bar purposes, infringes "freedom of speech." This is a refinement between two aspects of what, in circumstances like these, is essentially but a single facet of the "liberty" assured by the Fourteenth Amendment, see *N. A. A. C. P.* v. *Alabama,* 357 U. S. 449, 460, that is too subtle for me to grasp.

Nevertheless, since a majority of the Court here, as in the *Street* case, *ante,* p. 740, has deemed the "free speech" issue to be distinct from that of "free association," I shall also treat the case on that basis. From a Constitutional standpoint, I think that there can be no doubt about Wisconsin's right to use appellant's dues in furtherance of any of the purposes now drawn in question.[2] Orderly analysis

[2] Among other things, the Integrated Bar of the State of Wisconsin is authorized by the State Supreme Court, acting under its inherent rule-making powers, to publish information relating to "the practice of law, the science of jurisprudence and law reform, and the relations of the bar to the public." Rule 1, 273 Wis. xi. Rule 4, § 4, provides for standing committees including, *inter alia,* Committees on Administration of Justice and on Legislation. 273 Wis. xvi. The function of the former, as set out in Art. IV, § 4, of the by-laws, 273 Wis. xxxiii, is to "study the organization and operation of the Wisconsin judicial

requires that there be considered, *first,* the respects in which it may be thought that the use of a member's dues for causes he is against impinges on his right of free speech, and *second,* the nature of the state interest offered to justify such use of the dues exacted from him. I shall also add some further observations as to the over-all Constitutionality of the Integrated Bar concept.

I.

To avoid the pitfall of disarming, and usually obscuring, generalization which too often characterizes discussions in this Constitutional field, I see no alternative (even at the risk of being thought to labor the obvious) but to deal in turn with each of the various specific impingements on "free speech" which have been suggested or intimated to flow from the State Bar's use of an objecting member's dues for the purposes involved in this case. As I understand things, it is said that the operation of the Integrated Bar tends (1) to reduce a dissident member's "economic capacity" to espouse causes in which he believes; (2) to further governmental "establishment" of political views; (3) to threaten development of a "guild

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system and . . . recommend from time to time appropriate changes in practice and procedure for improving the efficiency thereof . . . ." The function of the Committee on Legislation is to study and, in certain circumstances, support or oppose "proposals submitted to the Wisconsin legislature or the congress of the United States for changes in the statutes relating to the courts or the practice of law . . . ." Art. IV, § 9, 273 Wis. xxxiv. The enabling court rules indicate authorization for further study and comment on proposed legislation, for the board of governors is directed to establish sections on corporation and business law; family law; house counsel; insurance, negligence and workmen's compensation law; labor relations law; military law; real property, probate, and trust law; and taxation. 273 Wis. xvii. The plurality opinion of this Court sets out the nature and scope of the activities bearing on prospective legislation actually engaged in by this Integrated Bar. *Ante,* pp. 835–839.

system" of closed, self-regulating professions and businesses; (4) to "drown out" the voice of dissent by requiring all members of the Bar to lend financial support to the views of the majority; and (5) to interfere with freedom of belief by causing "compelled affirmation" of majority-held views. With deference, I am bound to say that, in my view, all of these arguments border on the chimerical.

1. REDUCTION IN "ECONOMIC CAPACITY" TO ESPOUSE VIEWS.

This argument which, if indeed suggested at all, is intimated only obliquely, is that the mere exaction of dues money works a Constitutionally cognizable inhibition of speech by reducing the resources otherwise available to a dissident member for the espousal of causes in which he believes. The untenability of such a proposition becomes immediately apparent when it is recognized that this rationale would make every governmental exaction the material of a "free speech" issue. Even the federal income tax would be suspect. And certainly this source of inhibition is as great if the Integrated Bar wastes its dues on dinners as if it spends them on recommendations to the legislature. Yet I suppose that no one would be willing to contend that every waste of money exacted by some form of compulsion is an abridgment of free speech.

2. "ESTABLISHMENT" OF POLITICAL VIEWS.

The suggestion that a state-created Integrated Bar amounts to a governmental "establishment" of political belief is hardly worthy of more serious consideration. Even those who would treat the Fourteenth Amendment as embracing the identical protections afforded by the First would have to recognize the clear distinction in the wording of the First Amendment between the protections of speech and religion, only the latter providing a protection against "establishment." And as to the Four-

teenth, viewed independently of the First, one can surely agree that a State could not "create a fund to be used in helping certain political parties or groups favored" by it "to elect their candidates or promote their controversial causes" (*ante,* p. 788), any more than could Congress do so, without agreeing that this is in any way analogous to what Wisconsin has done in creating its Integrated Bar, or to what Congress has provided in the Railway Labor Act, considered in the *Street* case, *ante,* p. 740.

In establishing the Integrated Bar Wisconsin has, I assume all would agree, shown no interest at all in favoring particular candidates for judicial or legal office or particular types of legislation. Even if Wisconsin had such an interest, the Integrated Bar does not provide a fixed, predictable conduit for governmental encouragement of particular views, for the Bar makes its own decisions on legislative recommendations and appears to take no action at all with regard to candidates. By the same token the weight lent to one side of a controversial issue by the prestige of government is wholly lacking here.

In short, it seems to me fanciful in the extreme to find in the limited functions of the Wisconsin State Bar those risks of governmental self-perpetuation that might justify the recognition of a Constitutional protection against the "establishment" of political beliefs. A contrary conclusion would, it seems to me, as well embrace within its rationale the operations of the Judicial Conference of the United States, and the legislative recommendations of independent agencies such as the Interstate Commerce Commission and the Bureau of the Budget.

3. DEVELOPMENT OF A "GUILD SYSTEM."

It is said that the Integrated Bar concept tends towards the development of some sort of a "guild system." But there are no requirements of action or inaction connected

with the Wisconsin Integrated Bar, as contrasted with any unintegrated bar, except for the requirement of payment of $15 annual dues. I would agree that the requirement of payment of dues could not be made the basis of limiting the profession of law to the comparatively wealthy. Cf. *Griffin* v. *Illinois,* 351 U. S. 12. Nor, doubtless, could admission to the profession be restricted to relatives of those already admitted. But there is no such "guild" threat presented in this situation.

True, the Wisconsin Bar makes recommendations to the State Supreme Court for regulatory canons of legal ethics, and it may be supposed that the Bar is not forbidden to address the State Legislature for measures regulating in some respects the conduct of lawyers. But neither activity is the kind of direct self-regulation that was stricken down in *Schechter Corp.* v. *United States,* 295 U. S. 495. The Wisconsin Supreme Court has retained *all* of the traditional powers of a court to supervise the activities of practicing lawyers. It has delegated *none* of these to the Integrated Bar. As put by the State Supreme Court:

> "The integrated bar has no power to discipline or to disbar any member. That power has been reserved to and not delegated by this court. The procedure under sec. 256.28, Stats., for filing complaints for discipline or disbarment in this court is unaffected by these rules. Rule 11 and Rule 7 provide an orderly and easy method by which proposals to amend or abrogate the rules of the State Bar may be brought before this court for hearing on petition. Rule 9 provides the rules of professional conduct set forth from time to time in the Canons of the Professional Ethics of the American Bar Association, as supplemented or modified by pronouncement of this court, shall be the standard governing the practice of law in this state. Prior to the adoption of the rules

this court has not expressly adopted such Canons of Professional Ethics *in toto*.

"The by-laws of the State Bar provide for the internal workings of the organization and by Rule 11, sec. 2, may be amended or abrogated by resolution adopted by a vote of two-thirds of the members of the board of governors or by the members of the association themselves through the referendum procedure. As a further protection to the minority a petition for review of any change in the by-laws made by the board of governors will be entertained by the court if signed by 25 or more active members.

"Independently of the provisions in the rules for invoking our supervisory jurisdiction, this court has inherent power to take remedial action, on a sufficient showing that the activities or policies of the State Bar are not in harmony with the objectives for which integration was ordered or are otherwise contrary to the public interest." *In re Integration of Bar,* 5 Wis. 2d 618, 624–625, 93 N. W. 2d 601, 604.

Moreover, it is by no means clear to me in what part of the Federal Constitution we are to find the prohibition of *state-authorized* self-regulation of and by an economic group that the *Schechter* case found in Article I as respects the Federal Government. Is state-authorized self-regulation of lawyers to be the occasion for judicial enforcement of Art. IV, § 4, which provides that "The United States shall guarantee to every state in this union a Republican form of government . . ."? Cf. *Luther* v. *Borden,* 7 How. 1; *Pacific States Tel. & Tel. Co.* v. *Oregon,* 223 U. S. 118.

4. "DROWNING OUT" THE VOICE OF DISSENT.

This objection can be stated in either of two ways. First: The requirement of dues payments to be spent to further views to which the payor is opposed tends to

increase the volume of the arguments he opposes and thereby to drown out his own voice in opposition, in violation of his Constitutional right to be heard. Second: The United States Constitution creates a scheme of federal and state governments each of which is to be elected on a one-man-one-vote basis and on a one-man-one-political-voice basis. Of course several persons may voluntarily cumulate their political voices, but no governmental force can require a single individual to contribute money to support views to be adopted by a democratically organized group even if the individual is also free to say what he pleases separately.

It seems to me these arguments have little force. In the first place, their supposition is that the voice of a dissenter is less effective if he speaks it first in an attempt to influence the action of a democratically organized group and then, if necessary, in dissent to the recommendations of that group. This is not at all convincing. The dissenter is not being made to contribute funds to the furtherance of views he opposes but is rather being made to contribute funds to a group expenditure about which he will have something to say. To the extent that his voice of dissent can convince his lawyer associates, it will later be heard by the State Legislature with a magnified voice. In short, I think it begs the question to approach the Constitutional issue with the assumption that the majority of the Bar has a permanently formulated position which the dissenting dues payor is being required to support, thus increasing the difficulty of effective opposition to it.

Moreover, I do not think it can be said with any assurance that being required to contribute to the dispersion of views one opposes has a substantial limiting effect on one's right to speak and be heard. Certainly these rights would be limited if state action substantially reduced one's ability to reach his audience. But are these rights substantially affected by increasing the opposition's ability

to reach the same audience? I can conceive of instances involving limited facilities, such as television time, which may go to the highest bidder, wherein increasing the resources of the opposition may tend to reduce a dissident's access to his audience. But before the Constitution comes into play, there should surely be some showing of a relationship between required financial support of the opposition and reduced ability to communicate, a showing I think hardly possible in the case of the legislative recommendations of the Wisconsin Bar. And, aside from the considerations of freedom from compelled affirmations of belief to be discussed later, I can find little basis for a right not to have one's opposition heard.

Beyond all this, the argument under discussion is contradicted in the everyday operation of our society. Of course it is disagreeable to see a group, to which one has been required to contribute, decide to spend its money for purposes the contributor opposes. But the Constitution does not protect against the mere play of personal emotions. We recognized in *Hanson* that an employee can be required to contribute to the propagation of personally repugnant views on working conditions or retirement benefits that are expressed on union picket signs or in union handbills. A federal taxpayer obtains no refund if he is offended by what is put out by the United States Information Agency. Such examples could be multiplied.

For me, this "drowning out" argument falls apart upon analysis.

5. "COMPELLED AFFIRMATION" OF BELIEF.

It is argued that the requirement of Bar dues payments which may be spent for legislative recommendations which the payor opposes amounts to a compelled affirmation of belief of the sort this Court struck down in *West Virginia Board of Education* v. *Barnette,* 319 U. S. 624. While I agree that the rationale of *Barnette* is relevant,

I do not think that it is in any sense controlling in the present case.

Mr. Justice Jackson, writing for the Court in *Barnette*, did not view the issue as turning merely "on one's possession of particular religious views or the sincerity with which they are held." 319 U. S., at 634. The holding of *Barnette* was that, no matter how strong or weak such beliefs might be, the Legislature of West Virginia was not free to require as concrete and intimate an expression of belief in any cause as that involved in a compulsory pledge of allegiance. It is in this light that one must assess the contention that, "Compelling a man by law to pay his money to elect candidates or advocate laws or doctrines he is against differs only in degree, if at all, from compelling him by law to speak for a candidate, a party, or a cause he is against" (*ante*, p. 788). One could as well say that the same mere difference in degree distinguishes the *Barnette* flag salute situation from a taxpayer's objections to the views a government agency presents, at public expense, to Congress. What seems to me obvious is the large difference in degree between, on the one hand, being compelled to raise one's hand and recite a belief as one's own, and, on the other, being compelled to contribute dues to a bar association fund which is to be used in part to promote the expression of views in the name of the organization (not in the name of the dues payor), which views when adopted may turn out to be contrary to the views of the dues payor. I think this is a situation where the difference in degree is so great as to amount to a difference in substance.

In *Barnette* there was a governmental purpose of requiring expression of a view in order to encourage adoption of that view, much the same as when a school teacher requires a student to write a message of self-correction on the blackboard one hundred times. In the present case there is no indication of a governmental purpose to fur-

ther the expression of any particular view. More than that, the State Bar's purpose of furthering expression of views is unconnected with any desire to induce belief or conviction by the device of forcing a person to identify himself with the expression of such views. True, purpose may not be controlling when the identification is intimate between the person who wishes to remain silent and the beliefs foisted upon him. But no such situation exists here where the connection between the payment of an individual's dues and the views to which he objects is factually so remote. Surely the Wisconsin Supreme Court is right when it says that petitioner can be expected to realize that "everyone understands or should understand" that the views expressed are those "of the State Bar as an entity separate and distinct from each individual." 5 Wis. 2d, at 623, 93 N. W. 2d, at 603.

Indeed, I think the extreme difficulty the Court encounters in the *Street* case (*ante,* p. 740) in finding a mechanism for reimbursing dissident union members for their share of "political" expenditures is wholly occasioned by, and is indicative of, the many steps of changed possession, ownership, and control of dues receipts and the multiple stages of decision making which separate the dues payor from the political expenditure of some part of his dues. I think these many steps and stages reflect as well upon whether there is an identification of dues payor and expenditure so intimate as to amount to a "compelled affirmation." Surely if this Court in *Street* can only with great difficulty—if at all—identify the contributions of particular union members with the union's political expenditures, we should pause before assuming that particular Bar members can sensibly hear their own voices when the State Bar speaks as an organization.

Mr. Justice Cardozo, writing for himself, Mr. Justice Brandeis, and Mr. Justice Stone in *Hamilton* v. *Regents,* 293 U. S. 245, 265, thought that the remoteness of the

connection between a conscientious objection to war and the study of military science was in itself sufficient to make untenable a claim that requiring this study in state universities amounted to a state establishment of religion. These Justices thought the case even clearer when all that was involved was a contribution of money:

> "Manifestly a different doctrine would carry us to lengths that have never yet been dreamed of. The conscientious objector, if his liberties were to be thus extended, might refuse to contribute taxes in furtherance of a war . . . or in furtherance of any other end condemned by his conscience as irreligious or immoral. The right of private judgment has never yet been so exalted above the powers and the compulsion of the agencies of government." *Hamilton* v. *Regents,* 293 U. S. 245, 268.

Nor do I now believe that a state taxpayer could object on Fourteenth Amendment grounds to the use of his money for school textbooks or instruction which he finds intellectually repulsive, nor for the mere purchase of a flag for the school. In the present case appellant is simply required to pay dues into the general funds of the State Bar. I do not think a subsequent decision by the representatives of the majority of the bar members to devote some part of the organization's funds to the furtherance of a legislative proposal so identifies the individual payor of dues with the belief expressed that we are in the *Barnette* realm of "asserted power to force an American citizen publicly to profess any statement of belief or to engage in any ceremony of assent to one. . . ." 319 U. S., at 634.

It seems to me evident that the actual core of appellant's complaint as to "compelled affirmation" is not the identification with causes to which he objects that might arise from some conceivable tracing of the use of his dues in their support, but is his forced association with the

Integrated Bar. That, however, is a bridge which, beyond all doubt and any protestations now made to the contrary, we crossed in the *Hanson* case. I can see no way to uncross it without overruling *Hanson*. Certainly it cannot be done by declaring as a rule of law that lawyers feel more strongly about the identification of their names with proposals for law reform than union members feel about the identification of their names with collective bargaining demands declared on the radio, in picket signs, and on handbills.

II.

While I think that what has been said might well dispose of this case without more, in that Wisconsin lawyers retain "full freedom to think their own thoughts, speak their own minds, support their own causes and wholeheartedly fight whatever they are against" (*post,* p. 874), I shall pass on to consider the state interest involved in the establishment of the Integrated Bar, the other ingredient of adjudication which arises whenever incidental impingement upon such freedoms may fairly be said to draw in question governmental action. See, *e. g., Barenblatt* v. *United States,* 360 U. S. 109; *Konigsberg* v. *State Bar of California, supra.*

In this instance it can hardly be doubted that it was Constitutionally permissible for Wisconsin to regard the functions of an Integrated Bar as sufficiently important to justify whatever incursions on these individual freedoms may be thought to arise from the operations of the organization. The Wisconsin Supreme Court has described the fields of the State Bar's legislative activities and has asserted its readiness to restrict legislative recommendations to those fields:

> "This court takes judicial notice of the activities of the State Bar in the legislative field since its creation by this court in 1956. In every instance the

> legislative measures advocated or opposed have dealt with the administration of justice, court reform, and legal practice. Neither the above-quoted by-laws nor the stated purposes set forth in section 2 of Rule 1 for which the bar was integrated would permit the State Bar to be engaged in legislative activities unrelated to these three subjects. . . . However, as we pointed out in our opinion in the 1958 *In re Integration of the Bar Case,* this court will exercise its inherent power to take remedial action should the State Bar engage in an activity not authorized by the rules and by-laws and not in keeping with the stated objectives for which it was created. If the lawyers of the state wish by group action to engage in legislative activities not so authorized they will have to do so within the framework of some voluntary association, and not the State Bar." 10 Wis. 2d 230, 239–240, 102 N. W. 2d 404, 409–410.

Further, the same court has declared its belief that the lawyers of the State possess an expertise useful to the public interest within these fields:

> "We are of the opinion that the public welfare will be promoted by securing and publicizing the composite judgment of the members of the bar of the state on measures directly affecting the administration of justice and the practice of law. The general public and the legislature are entitled to know how the profession as a whole stands on such type of proposed legislation. This is a function an integrated bar, which is as democratically governed and administered as the State Bar, can perform much more effectively than can a voluntary bar association." *Ibid.*

I do not think that the State Court's view in this respect can be considered in any way unreasonable.

"[T]he composite judgment of the members of the bar of the state on measures directly affecting the administration of justice and the practice of law" may well be as helpful and informative to a state legislature as the work of individual legal scholars and of such organizations as the American Law Institute, for example, is to state and federal courts. State and federal courts are, of course, indifferent to the personal beliefs and predilections of any of such groups. The function such groups serve is a rationalizing one and their power flows from and is limited to their ability to convince by arguments from generally agreed upon premises. They are exercising the techniques and knowledge which lawyers are trained to possess in the task of solving problems with which the legal profession is most familiar. The numberless judicial citations to their work is proof enough of their usefulness in the judicial decision-making process.[3]

Legislatures too have found that they can benefit from a legal "expert's effort to improve the law in technical and non-controversial areas." *Dulles* v. *Johnson,* 273 F. 2d 362, 367. In the words of the Executive Secretary of the New York Law Revision Commission, there are areas in which "lawyers as lawyers have more to offer, to solve a given question, than other skilled persons or groups." 40 Cornell L. Q. 641, 644. See also Cardozo, A Ministry of Justice, 35 Harv. L. Rev. 113. The Acts recommended by the Commissioners on Uniform State Laws have been adopted on over 1,300 occasions by the legislatures of the fifty States, Puerto Rico, and the District of Columbia. Handbook of the National Conference of Commissioners on Uniform State Laws (1960), at p. 207. There is no way of counting the number of occasions on which state legislatures have utilized the assistance of

[3] The nine Restatements of the law alone have been cited well over 27,000 times. 36th Annual Meeting, The American Law Institute, at p. 63.

legal advisory groups. Some indication may be obtained by noting that thirty-one jurisdictions have permanent legislative service agencies which recommend "substantive" legislative programs and forty-two jurisdictions utilize such permanent agencies in recommending statutory revision.[4]

In this light I can only regard as entirely gratuitous a contention that there is anything less than a most substantial state interest in Wisconsin having the views of the members of its Bar "on measures directly affecting the administration of justice and the practice of law." Nor can I take seriously a suggestion that the lawyers of Wisconsin are merely being polled on matters of their own personal belief or predilection, any more than Congress had in mind such a poll when it made it the duty of federal circuit judges summoned to attend the Judicial Conference of the United States "to advise . . . as to any matters in respect of which the administration of justice in the courts of the United States may be improved." 42 Stat. 837, 838.

III.

Beyond this conjunction of a highly significant state need and the chimerical nature of the claims of abridgment of individual freedom, there is still a further approach to the entire problem that combines both of these aspects and reinforces my belief in the Constitutionality of the Integrated Bar.

I had supposed it beyond doubt that a state legislature could set up a staff or commission to recommend changes in the more or less technical areas of the law into which no well-advised laymen would venture without the assistance of counsel. A state legislature could certainly appoint a commission to make recommendations to it on the desirability of passing or modifying any of the count-

[4] "Permanent Legislative Service Agencies," published by the Council of State Governments.

less uniform laws dealing with all kinds of legal subjects, running all the way from the Uniform Commercial Code to the Uniform Simultaneous Death Law.[5] It seems no less clear to me that a reasonable license tax can be imposed on the profession of being a lawyer, doctor, dentist, etc. See *Royall* v. *Virginia,* 116 U. S. 572. In these circumstances, wherein lies the unconstitutionality of what Wisconsin has done? Does the Constitution forbid the payment of some part of the Constitutional license fee directly to the equally Constitutional state law revision commission? Or is it that such a commission cannot be chosen by a majority vote of all the members of the state bar? Or could it be that the Federal Constitution requires a separation of state powers according to which a state legislature can tax and set up commissions but a state judiciary cannot do these things?

I end as I began. It is exceedingly regrettable that such specious contentions as appellant makes in this case should have resulted in putting the Integrated Bar under this cloud of partial unconstitutionality.

MR. JUSTICE WHITTAKER, concurring in result.

Believing that the State's requirement that a lawyer pay to its designee an annual fee of $15 as a condition of its grant, or of continuing its grant, to him of the *special privilege* (which is what it is) of practicing law in the State—which is really all that is involved here—does not violate any provision of the United States Constitution, I concur in the judgment.

MR. JUSTICE BLACK, dissenting.

I do not believe that either the bench, the bar or the litigants will know what has been decided in this case—certainly I do not. Two members of the Court, saying

[5] In thirty-three States the legislature appoints Commissioners on Uniform State Laws. Handbook of the National Conference of Commissioners on Uniform State Laws (1960), at p. 211.

that "the Constitutional issue is inescapably before us," vote to affirm the holding of the Wisconsin Supreme Court that a State can, without violating the Federal Constitution, compel lawyers over their protest to pay dues to be used in part for the support of legislation and causes they detest. Another member, apparently agreeing that the constitutional question is properly here, votes to affirm the holding of the Wisconsin Supreme Court because he believes that a State may constitutionally require a lawyer to pay a fee to its "designee" as a condition to granting him the *"special privilege"* of practicing law, even though that "designee," over the lawyer's protest, uses part of the fee to support causes the lawyer detests. Two other members of the Court vote to reverse the judgment of the Wisconsin court on the ground that the constitutional question is properly here and the powers conferred on the Wisconsin State Bar by the laws of that State violate the First and Fourteenth Amendments. Finally, four members of the Court vote to affirm on the ground that the constitutional question is actually not here for decision at all. Thus the only proposition in this case for which there is a majority is that the constitutional question is properly here, and the five members of the Court who make up that majority express their views on this constitutional question. Yet a minority of four refuses to pass on the question and it is therefore left completely up in the air—the Court decides nothing. If ever there were two cases that should be set over for reargument in order for the Court to decide—or at least to make an orderly attempt to decide—the basic constitutional question involved in both of them, it is this case and the companion case of *International Association of Machinists* v. *Street*.[1] In this state of affairs, I find it necessary to set out my views on the questions which I think are properly presented and argued by the parties.

[1] *Ante*, p. 740.

In my judgment, this Court cannot properly avoid decision of the single, sharply defined constitutional issue which this case presents. The appellant filed a complaint in a Wisconsin Circuit Court, charging that he is being compelled by the State of Wisconsin, as a prerequisite to maintaining his status as a lawyer in good standing, to be a member of an association known as the State Bar of Wisconsin and to pay dues to that association; that he has paid these dues only under protest; that the State Bar of Wisconsin is using his money along with the moneys it has collected from other Wisconsin lawyers to engage in activities of a political and propagandistic nature in favor of objectives to which he is opposed and against objectives which he favors; and that, as a consequence of this compelled financial support of political views to which he is personally antagonistic, he is being deprived of rights guaranteed to him by the First and Fourteenth Amendments of the Federal Constitution. Upon demurrer to this complaint, the Circuit Court held that it must be dismissed without leave to amend because, in the opinion of that court, "it would be impossible to frame a complaint so as to state facts sufficient to constitute a cause of action against either the State Bar of Wisconsin or the defendant Donohue." [2]

On appeal, the Supreme Court of Wisconsin, relying upon its powers of judicial notice, found as a fact that the State Bar does expend some of the moneys it collects as dues to further and oppose legislation [3] and that court

[2] The Circuit Court also found jurisdictional difficulties with appellant's complaint but it expressly declined to rest its decision upon the jurisdictional defects alone.

[3] "This court takes judicial notice of the activities of the State Bar in the legislative field since its creation by this court in 1956. In every instance the legislative measures advocated or opposed have dealt with the administration of justice, court reform, and legal practice." *Lathrop* v. *Donohue,* 10 Wis. 2d 230, 239, 102 N. W. 2d 404, 409. The scope of this finding is shown by the court's further

also accepted, at its full face value, the allegation of the complaint that many of these expenditures furthered views directly contrary to those held by the appellant.[4] The Wisconsin Supreme Court nevertheless affirmed the judgment of the trial court on the ground that the public interest in having "public expression of the views of a majority of the lawyers of the state, with respect to legislation affecting the administration of justice and the practice of law . . . far outweighs the slight inconvenience to," and hence any abridgment of the constitutional rights of, those who disagree with the views advocated by the State Bar.[5]

The plurality decision to affirm the judgment of the Wisconsin courts on the ground that the issue in the case is not "shaped . . . as leanly and as sharply as judicial judgment upon an exercise of . . . [state] power requires" is, in my judgment, wrong on at least two grounds. First of all, it completely denies the appellant an oppor-

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statement in answer to appellant's contention that the State Bar also took positions on strictly substantive legislation: "We do not deem that the State Bar should be compelled to refrain from taking a stand on a measure which does substantially deal with legal practice and the administration of justice merely because it also makes some changes in substantive law." *Ibid.*

[4] Thus, the Wisconsin court correctly stated the issue in this case: "The only challenged interference with his liberty is the exaction of annual dues to the State Bar . . . part of which is used to advocate causes to which he is opposed." 10 Wis. 2d 230, 242, 102 N. W. 2d 404, 411.

[5] *Ibid.* The Wisconsin Supreme Court agreed with the Circuit Court that there were jurisdictional difficulties with the suit as it was brought. But the Supreme Court, like the Circuit Court, did not rest its decision on these jurisdictional grounds. Even though it agreed that the Circuit Court did not properly have jurisdiction, it expressly affirmed the judgment of the Circuit Court which, as pointed out above, dismissed the complaint without leave to amend on the ground that no amendment would cure the defects in the merits of appellant's case.

tunity to amend his complaint so as to "shape" the issue in a manner that would be acceptable to this Court. Appellant's complaint was dismissed by the Wisconsin courts, without giving him a chance to amend it and before he had an opportunity to bring out the facts in the case, solely because those courts believed that it would be impossible for him to allege any facts sufficient to entitle him to relief. The plurality now suggests, by implication, that the Wisconsin courts were wrong on this point and that appellant could possibly make out a case under his complaint. Why then is the case not remanded to the Wisconsin courts in order that the appellant will have at least one opportunity to meet this Court's fastidious pleading demands? The opinions of the Wisconsin courts in this case indicate that the laws of that State—as do the laws in most civilized jurisdictions—permit amendments and clarifications of complaints where defects exist in the original complaint which can be cured. And even if Wisconsin law were to the contrary, it is settled by the decisions of this Court that a federal right cannot be defeated merely on the ground that the original complaint contained a curable defect.[6] On this point, the judgment of the Court affirming the dismissal of appellant's suit, insofar as that judgment rests upon the plurality opinion, seems to me to be totally without justification, either in reason, in precedent or in justice.[7]

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[6] See, *e. g., Brown* v. *Western R. of Alabama,* 338 U. S. 294, especially at 296.

[7] The authorities relied upon by the plurality opinion certainly do not support its position. The concurring opinion in *United States* v. *C. I. O.,* 335 U. S. 106, 124–129, does not suggest that a litigant who fails properly to "shape" constitutional issues should be thrown out of court completely for his failure. And the decision of the Court in *United States* v. *International Union, U. A. W.-C. I. O.,* 352 U. S. 567, plainly cannot be taken to justify such a disposition since that case was remanded for further proceedings.

My second ground of disagreement with the plurality opinion is that I think we should consider and decide now the constitutional issue raised in this case. No one has suggested that this is a contrived or hypothetical lawsuit. Indeed, we have it on no less authority than that of the Supreme Court of Wisconsin that the Wisconsin State Bar does in fact use money extracted from this appellant under color of law to engage in activities intended to influence legislation. The appellant has alleged, in a complaint sworn to under oath, that many of these activities are in opposition to the adoption of legislation which he favors. In such a situation, it seems to me to be nothing more than the emptiest formalism to suggest that the case cannot be decided because the appellant failed to allege, as precisely as four members of this Court think he should, what it is that the Bar does with which he disagrees. And it certainly seems unjust for the appellant to be thrown out of court completely without being given a chance to amend his complaint and for a judgment against him to be affirmed without consideration of the merits of his cause even though that judgment may later be held to constitute a complete bar to assertion of his First Amendment rights. Even if the complaint in this case had been drawn in rigid conformity to the meticulous requirements of the plurality, we would be presented with nothing but the very same question now before us: Can a State, consistently with the First and Fourteenth Amendments, force a person to support financially the activities of an organization in support of views to which he is opposed? Thus, the best, if not the only, reason I can think of for not resolving that question now is that a decision on the constitutional question in this case would make it impossible for the Court to rely upon the doctrine of avoidance with respect to that same constitutional

question to justify its strained interpretation of the Railway Labor Act in the *Street* case.[8]

On the merits, the question posed in this case is, in my judgment, identical to that posed to but avoided by the Court in the *Street* case. Thus, the same reasons that led me to conclude that it violates the First Amendment for a union to use dues compelled under a union-shop agreement to advocate views contrary to those advocated by the workers paying the dues under protest lead me to the conclusion that an integrated bar cannot take the money of protesting lawyers and use it to support causes they are against. What I have said in the *Street* case would be enough for me to dispose of the issues in this case were it not for the contention which has been urged by the appellee throughout this case that there are distinguishing features that would justify the affirmance of this case even if the statute in the *Street* case were struck down as unconstitutional.

The appellee's contention in this respect rests upon two different arguments. The first of these is that the use of compelled dues by an integrated bar to further legislative ends contrary to the wishes of some of its members can be upheld under the so-called "balancing test," which permits abridgment of First Amendment rights so long as that abridgment furthers some legitimate purpose of the State.[9] Under this theory, the appellee contends,

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[8] As I have indicated in my dissenting opinion in that case, I also think the Court went to extravagant lengths to avoid the constitutional issue in that case. *Ante*, at 784–786. And I think it clear that the Court would have no choice but to meet and decide the constitutional issue in *Street* if a decision on that issue were made in this case. See *id.*, at 785.

[9] A complete statement of the arguments underlying the "balancing test" is set out in *American Communications Assn.* v. *Douds*, 339 U. S. 382, in which this Court held that the freedoms of speech, press,

abridgments of speech "incidental" to an integrated bar must be upheld because the integrated bar performs many valuable services for the public. As pointed out above, the Wisconsin Supreme Court embraced this theory in express terms. And the concurring opinion of MR. JUSTICE HARLAN, though not purporting to distinguish the *Street* case, also adopts the case-by-case "balancing" approach under which such a distinction as, indeed, any desired distinction is possible.

The "balancing" argument here is identical to that which has recently produced a long line of liberty-stifling decisions in the name of "self-preservation." [10] The interest of the State in having "public expression of the views of a majority of the lawyers" by compelling dissenters to pay money against their will to advocate views they detest is magnified to the point where it assumes overpowering proportions and appears to become almost as necessary a part of the fabric of our society as the need for "self-preservation." On the other side of the "scales," the interest of lawyers in being free from such state compulsion is first fragmentized into abstract, imaginary parts, then minimized part by part almost to the point of extinction, and finally characterized as being of a purely "chimerical nature." As is too often the case, when the cherished freedoms of the First Amendment emerge from this process, they are too weightless to have any substantial effect upon the constitutional scales and must therefore be sacrificed in order not to disturb what are conceived to be the more important interests of society.

I cannot agree that a contention arising from the abridgment of First Amendment freedoms which results

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petition and assembly guaranteed by the First Amendment are outweighed by the power of Congress to regulate interstate commerce.

[10] See, *e. g.*, *Dennis* v. *United States*, 341 U. S. 494, 509–511; *Barenblatt* v. *United States*, 360 U. S. 109, 127–128; *Wilkinson* v. *United States*, 365 U. S. 399, 411.

from compelled support of detested views can properly be characterized as of a "chimerical nature" or, in the words of the Wisconsin Supreme Court, as involving nothing more than a "slight inconvenience." [11] Quite the contrary, I can think of few plainer, more direct abridgments of the freedoms of the First Amendment than to compel persons to support candidates, parties, ideologies or causes that they are against. And, as stated many times before, I do not subscribe to the theory that abridgments of First Amendment freedoms can ever be permitted on a "balancing" basis.[12] I reiterate my belief that the unequivocal language of the First Amendment was intended to mean and does mean that the Framers of the Bill of Rights did all of the "balancing" that was to be done in this area. It is my firm belief that, in the long run, the continued existence of liberty in this country depends upon the abandonment of the constitutional doctrine that permits this Court to reweigh the values weighed by the Framers and thus to weaken the protections of the Bill of Rights. This case reaffirms that belief for it shows that the balancing test cannot be and will not be contained to apply only to those "hard" cases which at least some members of this Court have regarded as involving the question of the power of this country to

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[11] 10 Wis. 2d, at 242, 102 N. W. 2d 404, 411.

[12] See, *e. g., Scales* v. *United States, ante,* pp. 203, 259 (dissenting opinion); *Communist Party* v. *Subversive Activities Control Board, ante,* pp. 1, 137 (dissenting opinion); *In re Anastaplo,* 366 U. S. 82, 110–112 (dissenting opinion); *Konigsberg* v. *State Bar of California,* 366 U. S. 36, 62–71 (dissenting opinion); *Braden* v. *United States,* 365 U. S. 431, 441–446 (dissenting opinion); *Wilkinson* v. *United States,* 365 U. S. 399, 422–423 (dissenting opinion); *Uphaus* v. *Wyman,* 364 U. S. 388, 392–393 (dissenting opinion); *Barenblatt* v. *United States,* 360 U. S. 109, 140–144 (dissenting opinion); *American Communications Assn.* v. *Douds,* 339 U. S. 382, 445–453 (dissenting opinion).

preserve itself. For I assume that no one would argue that the power at stake here is necessary to that end.

Moreover, if I felt that I had the power to reweigh the "competing" values involved, I would have no difficulty reaching the conclusion that the loss inflicted upon our free way of life by invasion of First Amendment freedoms brought about by the powers conferred upon the Wisconsin integrated bar far outweighs any state interest served by the exercise of those powers by that association. At stake here is the interest of the individual lawyers of Wisconsin in having full freedom to think their own thoughts, speak their own minds, support their own causes and wholeheartedly fight whatever they are against, as well as the interest of the people of Wisconsin and, to a lesser extent, the people of the entire country in maintaining the political independence of Wisconsin lawyers.[13] How is it possible that such formidable interests so vital to our free way of life can be said to be outweighed by any interest—much less the wholly imaginary interest urged here by the State which would have us believe that it will never know what its lawyers think about certain political questions if it cannot compel them to pay their money to support views they abhor? Certainly, I feel entirely confident in saying that the Framers of the First Amendment would never have struck the balance against freedom on the basis of such a demonstrably specious expediency.

In saying all this, I do not mean to suggest that the Wisconsin State Bar does not provide many useful and entirely lawful services. Quite the contrary, the record indicates that this integrated bar association, like other

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[13] Cf. *Cohen* v. *Hurley*, 366 U. S. 117, 138–150 (dissenting opinion); *In re Anastaplo*, 366 U. S. 82, 114–116 (dissenting opinion); *Konigsberg* v. *State Bar of California*, 366 U. S. 36, 73–74, 77–80 (dissenting opinion).

bar associations both integrated and voluntary, does provide such services. But I think it clear that these aspects of the Wisconsin State Bar are quite beside the point so far as this case is concerned. For a State can certainly insure that the members of its bar will provide any useful and proper services it desires without creating an association with power to compel members of the bar to pay money to support views to which they are opposed or to fight views they favor. Thus, the power of a bar association to advocate legislation at the expense of those who oppose such legislation is wholly separable from any legitimate function of an involuntary bar association and, therefore, even for those who subscribe to the balancing test, there is nothing to balance against this invasion of constitutionally protected rights.

The second ground upon which the appellee would have us distinguish compelled support of hated views as practiced by an integrated bar from compelled support of such views as practiced by the unions involved in the *Street* case is that lawyers are somehow different from other people. This argument, though phrased in various ways, amounts to nothing more than the contention that the practice of law is a high office in our society which is conferred by the State as a privilege and that the State can, in return for this privilege, impose obligations upon lawyers that it could not impose upon those not given "so high a privilege." Were it not for this Court's recent decision in *Cohen* v. *Hurley*,[14] I would regard this

[14] 366 U. S. 117. The decision of the New York Court of Appeals in that case was expressly rested in part upon the notion that the practice of law is a "special privilege." See *id.*, at 132–133 (dissenting opinion). And I thought then, as I think now, that the decision of this Court upholding the judgment of the New York court placed "the stamp of approval upon a doctrine that, if permitted to grow, as doctrines have a habit of doing, can go far toward destroying the independence of the legal profession and thus toward rendering that pro-

contention as utterly frivolous. But, it is true that the Court did hold in the *Cohen* case that lawyers could be treated differently from other people, at least insofar as a constitutional privilege against self-incrimination is concerned. As I pointed out in my dissenting opinion in that case, it is a short step from that position to the position now urged in the concurring opinion of MR. JUSTICE WHITTAKER—that lawyers must also give up their constitutional rights under the First Amendment in return for the "privilege" that the State has conferred upon them.[15]

I do not believe that the practice of law is a "privilege" which empowers Government to deny lawyers their constitutional rights. The mere fact that a lawyer has important responsibilities in society does not require or even permit the State to deprive him of those protections of freedom set out in the Bill of Rights for the precise purpose of insuring the independence of the individual against the Government and those acting for the Government. What I said in the *Cohen* case is, in my judgment, equally applicable here:

> ". . . [O]ne of the great purposes underlying the grant of those freedoms was to give independence to those who must discharge important public responsibilities. The legal profession, with responsibilities as great as those placed upon any group in our society, must have that independence. If it is denied them, they are likely to become nothing more than parrots of the views of whatever group wields governmental power at the moment. Wherever that has happened in the world, the lawyer, as properly so called and respected, has ceased to perform the highest duty of

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fession largely incapable of performing the very kinds of services for the public that most justify its existence." *Id.*, at 135 (dissenting opinion).

[15] *Id.*, at 142–143 (dissenting opinion).

his calling and has lost the affection and even the respect of the people." [16]

As I see it, the single, sharply defined constitutional issue presented in this case does not raise a difficult problem. This appellant is not denying the power of the State of Wisconsin to provide that its bar shall engage in non-political and non-controversial activities or even the power of the State to provide that all lawyers shall pay a fee to support such activities. What he does argue, and properly I think, is that the State cannot compel him to pay his money to further the views of a majority or any other controlling percentage of the Wisconsin State Bar when that controlling group is trying to pass laws or advance political causes that he is against. If the "privilege" of being a lawyer renders that argument unsound, it is certainly one of the more burdensome privileges Government can confer upon one of its citizens. And lawyers might be well advised to reconsider the wisdom of encouraging the use of a slogan which, though high-sounding and noble in its outward appearance, apparently imposes heavy burdens upon their First Amendment freedoms.

I would reverse this case and direct the Supreme Court of Wisconsin to require refund of the dues exacted under protest from the appellant in order to permit the Wisconsin State Bar to advocate measures he is against and to oppose measures he favors. I think it plain that lawyers have at least as much protection from such compulsion under the Constitution as the Court is holding railroad workers have under the Railway Labor Act.

MR. JUSTICE DOUGLAS, dissenting.

The question in the present case concerns the power of a State to compel lawyers to belong to a statewide

[16] *Id.*, at 138–139 (dissenting opinion).

bar association, the organization commonly referred to in this country as the "integrated bar." There can be no doubt that lawyers, like doctors and dentists, can be required to pass examinations that test their character and their fitness to practice the profession. No question of that nature is presented. There is also no doubt that a State for cause shown can deprive a lawyer of his license. No question of that kind is involved in the present case.[1] The sole question is the extent of the power of a State over a lawyer who rebels at becoming a member of the integrated bar and paying dues to support activities that are offensive to him. Thus the First Amendment, made applicable to the States by the Fourteenth, is brought into play. And for the reasons stated by MR. JUSTICE BLACK, I think all issues in the case are ripe for decision.

If the State can compel all lawyers to join a guild, I see no reason why it cannot make the same requirement of doctors, dentists, and nurses. They too have responsibilities to the public; and they also have interests beyond making a living. The groups whose activities are or may be deemed affected with a public interest are indeed numerous. Teachers are an obvious example. Insurance agents, brokers, and pharmacists have long been under licensing requirements or supervisory regimes. As the interdependency of each person on the other increases with the complexities of modern society, the circle of people performing vital services increases. Precedents once established often gain momentum by the force of their existence. Doctrine has a habit of following the path of inexorable logic.

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[1] A self-policing provision whereby lawyers were given the power to investigate and disbar their associates would raise under most, if not all, state constitutions the type of problem presented in *Schechter Corp.* v. *United States,* 295 U. S. 495. See 1 Davis, Administrative Law Treatise, § 2.14.

We established no such precedent in *Railway Employes' Dept.* v. *Hanson,* 351 U. S. 225. We dealt there only with a problem in collective bargaining, *viz.,* is it beyond legislative competence to require all who benefit from the process of collective bargaining and enjoy its fruits to contribute to its costs? We held that the evil of those who are "free riders" may be so disruptive of labor relations and therefore so fraught with danger to the movement of commerce that Congress has the power to permit a union-shop agreement that exacts from each beneficiary his share of the cost of getting increased wages and improved working conditions. The power of a State to manage its internal affairs by requiring a union-shop agreement would seem to be as great.

In the *Hanson* case we said, to be sure, that if a lawyer could be required to join an integrated bar, an employee could be compelled to join a union shop. But on reflection the analogy fails.

Of course any group purports to serve a group cause. A medical association that fights socialized medicine protects the fees of the profession. Yet not even an immediate cause of that character is served by the integrated bar. Its contribution is in policing the members of the legal profession and in promoting what the majority of the Bar thinks is desirable legislation.

The Supreme Court of Wisconsin said that the integrated bar, unlike a voluntary bar association, was confined in its legislative activities. Though the Wisconsin Bar was active in the legislative field, it was restricted to administration of justice, court reform, and legal practice. The court however added:

> "The plaintiff complains that certain proposed legislation, upon which the State Bar has taken a stand, embody changes in substantive law, and points to the recently enacted Family Code. Among other things, such measure made many changes in divorce

> procedure, and, therefore, legal practice. We do not deem that the State Bar should be compelled to refrain from taking a stand on a measure which does substantially deal with legal practice and the administration of justice merely because it also makes some changes in substantive law." 10 Wis. 2d 230, 239, 102 N. W. 2d 404, 409.

It is difficult for me to see how the State can compel even that degree of subservience of the individual to the group.

It is true that one of the purposes of the State Bar Association is "to safeguard the proper professional interests of the members of the bar." State Bar of Wisconsin, Rule 1, § 2. In this connection, the association has been active in exploiting the monopoly position given by the licensed character of the profession. Thus, the Bar has compiled and published a schedule of recommended minimum fees. See Wis. Bar Bull., Aug. 1960, p. 40. Along the same line, the Committee on Unauthorized Practice of the Law, along with a Committee on Inter-professional and Business Relations, has been set up to police activities by nonprofessionals within "the proper scope of the practice of law." State Bar of Wisconsin, By-Laws, Art. IV, §§ 8, 11.

Yet this is a far cry from the history which stood behind the decision of Congress to foster the well-established institution of collective bargaining as one of the means of preserving industrial peace. That history is partially crystallized in the language of the Wagner and Taft-Hartley Acts: "Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce . . . by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and em-

ployees." National Labor Relations Act, as amended by the Taft-Hartley Act, 61 Stat. 136, 137, 29 U. S. C. § 151. It was with this history in mind that we spoke when we said that "One would have to be blind to history to assert that trade unionism did not enhance and strengthen the right to work." *Railway Employes' Dept.* v. *Hanson, supra,* 235.

Nor can the present association be defended on grounds that it renders only public services.

If we had here a law which required lawyers to contribute to a fund out of which clients would be paid in case attorneys turned out to be embezzlers,[2] the present objection might not be relevant. In that case, one risk of the profession would be distributed among all members of the group. The fact that a dissident member did not feel he had within him the seeds of an embezzler might not bar a levy on the whole profession for one sad but notorious risk of the profession. We would also have a different case if lawyers were assessed to raise money to finance the defense of indigents. Cf. *In re Florida Bar,* 62 So. 2d 20, 24. That would be an imposition of a duty on the calling which partook of service to the public. Here the objection strikes deeper. An attorney objects to a forced association with a group that demands his money for the promotion of causes with which he disagrees, from which he obtains no gain, and which is not part and parcel of service owing litigants or courts.

The right of association is an important incident of First Amendment rights. The right to belong—or not to

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[2] See 84 Rep. Am. Bar Assn., pp. 365–367, 513–515, 604–606 (1959); Voorhees, A Progress Report: The Clients' Security Fund Program, 46 Am. Bar Assn. Jour., 496 (1960); Voorhees, Should The Bar Adopt Client Security Funds?, 28 Jour. Bar Assn. Kan. 5 (1959). As of May 1961, Arizona, Colorado, Connecticut, New Hampshire, New Mexico, Ohio, Pennsylvania, and Washington have such funds.

belong—is deep in the American tradition. Joining is one method of expression. This freedom of association is not an absolute. For as I have noted in my opinion in *International Assn. of Machinists* v. *Street, ante*, p. 775, decided this day, the necessities of life put us into relations with others that may be undesirable or even abhorrent, if individual standards were to obtain. Yet if this right is to be curtailed by law, if the individual is to be compelled to associate with others in a common cause, then I think exceptional circumstances should be shown. I would treat laws of this character like any that touch on First Amendment rights. Congestion of traffic, street fights, riots and such may justify curtailment of opportunities or occasions to speak freely. Cf. *Chaplinsky* v. *New Hampshire*, 315 U. S. 568. But when those laws are sustained, we require them to be "narrowly drawn" (*Cantwell* v. *Connecticut*, 310 U. S. 296, 311) so as to be confined to the precise evil within the competence of the legislature. See *Shelton* v. *Tucker*, 364 U. S. 479; *Louisiana* v. *N. A. A. C. P.*, 366 U. S. 293. There is here no evil shown. It has the mark of "a lawyer class or caste"—the system of "a self-governing and self-disciplining bar" such as England has.[3] The pattern of this legislation is regimentation. The inroads of an integrated bar on the liberty and freedom of lawyers to espouse such causes as they choose was emphasized by William D. Guthrie[4] of the New York Bar:[5]

> "The idea seems to be, contrary to all human experience, that if power be vested in this at present unknown and untried as well as indifferent outside body, holding themselves aloof from their profession, they will somehow become inspired with a high pro-

[3] Guthrie, The Proposed Compulsory Incorporation of the Bar, 4 N. Y. L. Rev. 223, 231 (1926).

[4] See Swaine, The Cravath Firm (1946), Vol. I, pp. 359, 518.

[5] Guthrie, *supra*, note 3, 234–235.

fessional sentiment or sense of duty and cooperation and will unselfishly exercise their majority power for the good of their profession and the public, that they can be trusted to choose as their officers and leaders lawyers of the type who are now leaders, that the responsibility of power will necessarily sober and elevate their minds, and finally that democracy calls for the rule of the majority.

"Thus, the traditions and ethics of our great profession would be left to the mercy of mere numbers officially authorized to speak for us! This would be adopting all the vices of democracy without the reasonable hope in common sense of securing any of its virtues. It would be forcing the democratic dogma of mass or majority rule to a dangerous and pernicious extreme.

"Although in political democracy the rule of the majority is necessary, the American system of democracy is based upon the recognition of the imperative necessity of limitations upon the will of the majority. In the proposed compulsory or involuntary incorporation of the bar, there would be no limitation whatever, and the best sentiments and traditions of the profession, of the public-spirited and high-minded lawyers who are now active in the voluntary bar associations of the state, could be wholly and wantonly disregarded and overruled." [6]

This regimentation appears in humble form today. Yet we know that the Bar and Bench do not move to a single

[6] Compare with this the language of the court below in this case: "[I]t promotes the public interest to have public expression of the views of a majority of the lawyers of the state, with respect to legislation affecting the administration of justice and the practice of law, the same to be voiced through their own democratically chosen representatives comprising the board of governors of the [Integrated] State Bar." 10 Wis. 2d 230, 242, 102 N. W. 2d 404.

"nonpartisan" objective. The obvious fact that they are not so motivated is plain from *Cohen* v. *Hurley,* 366 U. S. 117, which we decided only the other day. Once we approve this measure, we sanction a device where men and women in almost any profession or calling can be at least partially regimented behind causes which they oppose. I look on the *Hanson* case as a narrow exception to be closely confined. Unless we so treat it, we practically give *carte blanche* to any legislature to put at least professional people into goose-stepping brigades.[7]

[7] A current observer has commented on the results of the regimented Bar in England:

"Britain is moving towards a dangerous dictatorship not only in journalism, wireless, and television, but in finance and law. The immense groups controlling financial operations are becoming more and more interlocked and have an increasing tendency to cover up each other's errors.

"The great firms of solicitors are less and less inclined to offend the powerful financial houses which place the biggest business; and if dishonesty is alleged they all too often refuse 'to act' if this should involve one of the great interests upon which the big and profitable business of our times depends.

"Slowly, dangerously, and without the public fully realising what is happening, a nation of great power bottled up in a tiny geographical area is being brought within the grip of a minority of extremely powerful men whose genius is to deny the smallest pretension to power, but who, in fact, are wholly ruthless in a persistent search for power.

"In this search, although money is vital, they are ready to be Radical in many ways—particularly in the destruction of all rivalry for influence which might spring from a widespread continuity of wealth in the hands of proprietors of family businesses or land.

. . . . .

"To destroy this movement towards Press monopoly and financial 'cover-up,' it will be necessary for individuals still preserved from 'take-over' to support every form of independent journalism and finance. Unhappily, in the field of journalism the smaller groups are so afraid of worse than already threatens, that the tendency is towards surrender. This must be stopped." The Weekly Review, Feb. 3, 1961, pp. 1, 2.

Those brigades are not compatible with the First Amendment. While the legislature has few limits where strictly social legislation is concerned (*Giboney* v. *Empire Storage Co.*, 336 U. S. 490; *Tot* v. *United States*, 319 U. S. 463), the First Amendment applies strictures designed to keep our society from becoming moulded into patterns of conformity which satisfy the majority.

CAFETERIA & RESTAURANT WORKERS UNION, LOCAL 473, AFL–CIO, ET AL. *v.* McELROY ET AL.

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

No. 97. Argued January 12, 1961.—
Decided June 19, 1961.

The individual petitioner was a cook at a cafeteria operated by a private concessionaire on the premises of the Naval Gun Factory in Washington, D. C., which was engaged in the development of secret weapons and access to which was limited to persons having badges issued by the Factory's Security Officer. The contract between the Gun Factory and the concessionaire forbade the employment on the premises of any person who failed to meet the security requirements of the Gun Factory, as determined by the Security Officer. On the ground that the cook had failed to meet the security requirements of the Gun Factory, the Security Officer required her to turn in her badge and thereafter she was unable to work at the Gun Factory. After a request for a hearing before officials of the Gun Factory had been denied, the cook sued in a Federal District Court for restoration of her badge, so that she might be permitted to enter the Gun Factory and resume her former employment. *Held:* The District Court properly denied relief. Pp. 887–899.

(a) Under the explicit authority of Article 0734 of the Navy Regulations, and in the light of the historically unquestioned power of a commanding officer summarily to exclude civilians from the area of his command, there can be no doubt that the Superintendent of the Gun Factory had authority to exclude the cook from the Gun Factory upon the Security Officer's determination that she failed to meet the security requirements. Pp. 889–894.

(b) The summary exclusion of the cook from the premises of the Gun Factory, without a hearing and without advice as to the specific grounds for her exclusion, did not violate the Due Process Clause of the Fifth Amendment. Pp. 894–899.

109 U. S. App. D. C. 39, 284 F. 2d 173, affirmed.

Bernard Dunau argued the cause and filed a brief for petitioners.

John F. Davis argued the cause for respondents. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Yeagley, Bruce J. Terris, Kevin T. Maroney* and *Lee B. Anderson.*

J. Albert Woll, Theodore J. St. Antoine and *Thomas E. Harris* filed a brief for the American Federation of Labor and Congress of Industrial Organizations, as *amicus curiae,* urging reversal.

MR. JUSTICE STEWART delivered the opinion of the Court.

In 1956 the petitioner Rachel Brawner was a short-order cook at a cafeteria operated by her employer, M & M Restaurants, Inc., on the premises of the Naval Gun Factory [1] in the city of Washington. She had worked there for more than six years, and from her employer's point of view her record was entirely satisfactory.

The Gun Factory was engaged in designing, producing, and inspecting naval ordnance, including the development of weapons systems of a highly classified nature. Located on property owned by the United States, the installation was under the command of Rear Admiral D. M. Tyree, Superintendent. Access to it was restricted, and guards were posted at all points of entry. Identification badges were issued to persons authorized to enter the premises by the Security Officer, a naval officer subordinate to the Superintendent. In 1956 the Security Officer was Lieutenant Commander H. C. Williams. Rachel Brawner had been issued such a badge.

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[1] The name of the Naval Gun Factory has now been officially changed to Naval Weapons Plant. It will be referred to as the "Gun Factory" in this opinion.

The cafeteria where she worked was operated by M & M under a contract with the Board of Governors of the Gun Factory. Section 5 (b) of the contract provided:

> ". . . In no event shall the Concessionaire engage, or continue to engage, for operations under this Agreement, personnel who
>
> . . . . .
>
> "(iii) fail to meet the security requirements or other requirements under applicable regulations of the Activity, as determined by the Security Officer of the Activity."

On November 15, 1956, Mrs. Brawner was required to turn in her identification badge because of Lieutenant Commander Williams' determination that she had failed to meet the security requirements of the installation. The Security Officer's determination was subsequently approved by Admiral Tyree, who cited § 5 (b)(iii) of the contract as the basis for his action. At the request of the petitioner Union, which represented the employees at the cafeteria, M & M sought to arrange a meeting with officials of the Gun Factory "for the purpose of a hearing regarding the denial of admittance to the Naval Gun Factory of Rachel Brawner." This request was denied by Admiral Tyree on the ground that such a meeting would "serve no useful purpose."

Since the day her identification badge was withdrawn Mrs. Brawner has not been permitted to enter the Gun Factory. M & M offered to employ her in another restaurant which the company operated in the suburban Washington area, but she refused on the ground that the location was inconvenient.

The petitioners brought this action in the District Court against the Secretary of Defense, Admiral Tyree, and Lieutenant Commander Williams, in their individual and official capacities, seeking, among other things, to

compel the return to Mrs. Brawner of her identification badge, so that she might be permitted to enter the Gun Factory and resume her former employment. The defendants filed a motion for summary judgment, supported by various affidavits and exhibits. The motion was granted and the complaint dismissed by the District Court. This judgment was affirmed by the Court of Appeals for the District of Columbia, sitting *en banc*. Four judges dissented.[2] We granted certiorari because of an alleged conflict between the Court of Appeals' decision and *Greene* v. *McElroy,* 360 U. S. 474. 364 U. S. 813.

As the case comes here, two basic questions are presented. Was the commanding officer of the Gun Factory authorized to deny Rachel Brawner access to the installation in the way he did? If he was so authorized, did his action in excluding her operate to deprive her of any right secured to her by the Constitution?

I.

In *Greene* v. *McElroy, supra,* the Court was unwilling to find, in the absence of explicit authorization, that an aeronautical engineer, employed by a private contractor on private property, could be barred from following his profession by governmental revocation of his security clearance without according him the right to confront and cross-examine hostile witnesses. The Court in that case found that neither the Congress nor the President had explicitly authorized the procedure which had been followed in denying Greene access to classified information. Accordingly we did not reach the constitutional issues

[2] The appeal was originally heard by a panel of three judges, and the District Court's judgment was reversed, one judge dissenting. After rehearing *en banc,* the original opinion was withdrawn, and the District Court's judgment was affirmed. 109 U. S. App. D. C. 39, 284 F. 2d 173.

which that case otherwise would have presented. We proceed on the premise that the explicit authorization found wanting in *Greene* must be shown in the present case, putting to one side the Government's argument that the differing circumstances here justify less rigorous standards for measuring delegation of authority.

It cannot be doubted that both the legislative and executive branches are wholly legitimate potential sources of such explicit authority. The control of access to a military base is clearly within the constitutional powers granted to both Congress and the President. Article I, § 8, of the Constitution gives Congress the power to "provide and maintain a navy;" to "make rules for the government and regulation of the land and naval forces;" to "exercise exclusive legislation . . . over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings;" and to "make all laws which shall be necessary and proper for carrying into execution the foregoing powers . . . ." Broad power in this same area is also vested in the President by Article II, § 2, which makes him the Commander in Chief of the Armed Forces.

Congress has provided that the Secretary of the Navy "shall administer the Department of the Navy" and shall have "custody and charge of all . . . property of the Department." 10 U. S. C. § 5031 (a) and (c). In administering his Department, the Secretary has been given statutory power to "prescribe regulations, not inconsistent with law, for the government of his department, . . . and the custody, use, and preservation of the . . . property appertaining to it." 5 U. S. C. § 22. The law explicitly requires that United States Navy Regulations shall be approved by the President, 10 U. S. C. § 6011, and the pertinent regulations in effect when Rachel Brawner's identification badge was revoked had, in fact, been

expressly approved by President Truman on August 9, 1948.

The requirement of presidential approval of Navy regulations is of ancient vintage.[3] The significance of such presidential approval has often been recognized by this Court. *Smith* v. *Whitney,* 116 U. S. 167, 181; *Johnson* v. *Sayre,* 158 U. S. 109, 117; *United States Grain Corp.* v. *Phillips,* 261 U. S. 106, 109; *Denby* v. *Berry,* 263 U. S. 29, 37.[4] We may take it as settled that Navy Regulations approved by the President are, in the words of Chief Justice Marshall, endowed with "the sanction of the law." *United States* v. *Maurice,* 2 Brock. 96, 105.[5] And we find no room for substantial doubt that the Navy Regulations in effect on November 15, 1956, explicitly conferred upon Admiral Tyree the power summarily to deny Rachel Brawner access to the Gun Factory.

Article 0701 of the Regulations delineates the traditional responsibilities and duties of a commanding officer. It provides in part as follows:

> "The responsibility of the commanding officer for his command is absolute, except when, and to the extent, relieved therefrom by competent authority, or as provided otherwise in these regulations. The authority of the commanding officer is commensurate with his responsibility, subject to the limitations prescribed by law and these regulations. . . ."

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[3] See R. S. § 1547 (1875) which was derived from the Act of July 14, 1862, c. 164, § 5, 12 Stat. 565. See also the Act of April 24, 1816, c. 69, § 9, 3 Stat. 298; the Act of March 3, 1813, c. 52, § 5, 2 Stat. 819.

[4] See also 25 Op. Atty. Gen. 270.

[5] The absence of presidential approval was relied upon in one case as a basis for finding certain administrative action unauthorized. See *Phillips* v. *United States Grain Corp.,* 279 F. 244, 248–249, rev'd on other grounds, 261 U. S. 106. See also 25 Op. Atty. Gen. 270, 275.

Article 0734 of the Regulations provides:

> "In general, dealers or tradesmen or their agents shall not be admitted within a command, except as authorized by the commanding officer:
>
> "1. To conduct public business.
>
> "2. To transact specific private business with individuals at the request of the latter.
>
> "3. To furnish services and supplies which are necessary and are not otherwise, or are insufficiently, available to the personnel of the command."

It would be difficult to conceive of a more specific conferral of power upon a commanding officer, in the exercise of his traditional command responsibility, to exclude from the area of his command a person in Rachel Brawner's status. Even without the benefit of the illuminating gloss of history, it could hardly be doubted that the phrase "tradesmen or their agents" covered her status as an employee of M & M with explicit precision.[6] But the meaning of the regulation need not be determined *in vacuo*. It is the verbalization of the unquestioned authority which commanding officers of military installations have exercised throughout our history.[7]

An opinion by Attorney General Butler in 1837 discloses that the power of a military commanding officer to exclude at will persons who earned their living by working on military bases was even then of long standing.

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[6] A tradesman has been defined by Webster as "a shopkeeper; also, one of his employees." Webster, New International Dictionary (Second Edition, Unabridged, 1958), 2684.

[7] The contrast with the history of the security program involved in *Greene* v. *McElroy* is striking. There it was pointed out that "[p]rior to World War II, only sporadic efforts were made to control the clearance of persons who worked in private establishments which manufactured materials for national defense." 360 U. S., at 493.

Speaking of the Superintendent of the Military Academy, the Attorney General's opinion stated:

> "[H]e has always regarded the citizens resident within the public limits—such as the sutler, keeper of the commons, tailor, shoemaker, artificers, etc., even though they own houses on the public grounds, or occupy buildings belonging to the United States . . . —as *tenants at will,* and liable to be removed whenever, in the opinion of the superintendent, the interests of the academy require it. 'This,' he observes, 'has been the practice since I have been in command; and such, I am told, was the usage under the administration of my predecessors.' " 3 Op. Atty. Gen. 268, 269.

This power has been expressly recognized many times. "The power of a military commandant over a reservation is necessarily extensive and practically exclusive, forbidding entrance and controlling residence as the public interest may demand." 26 Op. Atty. Gen. 91, 92. "[I]t is well settled that a post commander can, in his discretion, exclude all persons other than those belonging to his post from post and reservation grounds." JAGA 1904/16272, 6 May 1904. "It is well settled that a Post Commander can, under the authority conferred on him by statutes and regulations, in his discretion, exclude private persons and property therefrom, or admit them under such restrictions as he may prescribe in the interest of good order and military discipline (1918 Dig. Op. J. A. G. 267 and cases cited)." JAGA 1925/680.44, 6 October 1925.

Under the explicit authority of Article 0734 of the Navy Regulations, and in the light of the historically unquestioned power of a commanding officer summarily to exclude civilians from the area of his command, there can

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remain no serious doubt of Admiral Tyree's authority to exclude Rachel Brawner from the Gun Factory upon the Security Officer's determination that she failed to meet the "security requirements . . . of the Activity." Her admittance to the installation in the first place was permissible, in the commanding officer's discretion, only because she came within the exception to the general rule of exclusion contained in the third paragraph of Article 0734 of the Regulations. And the plain words of Article 0734 made absolute the commanding officer's power to withdraw her permission to enter the Gun Factory at any time.

II.

The question remains whether Admiral Tyree's action in summarily denying Rachel Brawner access to the site of her former employment violated the requirements of the Due Process Clause of the Fifth Amendment. This question cannot be answered by easy assertion that, because she had no constitutional right to be there in the first place, she was not deprived of liberty or property by the Superintendent's action. "One may not have a constitutional right to go to Baghdad, but the Government may not prohibit one from going there unless by means consonant with due process of law." *Homer* v. *Richmond,* 110 U. S. App. D. C. 226, 229, 292 F. 2d 719, 722. It is the petitioners' claim that due process in this case required that Rachel Brawner be advised of the specific grounds for her exclusion and be accorded a hearing at which she might refute them. We are satisfied, however, that under the circumstances of this case such a procedure was not constitutionally required.

The Fifth Amendment does not require a trial-type hearing in every conceivable case of government impairment of private interest. "For, though 'due process of

law' generally implies and includes *actor, reus, judex,* regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings, . . . yet, this is not universally true." *Murray's Lessee* v. *Hoboken Land and Improvement Co.,* 18 How. 272, 280. The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. *Communications Comm'n* v. *WJR,* 337 U. S. 265, 275–276; *Hannah* v. *Larche,* 363 U. S. 420, 440, 442; *Hagar* v. *Reclamation District No. 108,* 111 U. S. 701, 708–709. " '[D]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." It is "compounded of history, reason, the past course of decisions . . . ." *Joint Anti-Fascist Comm.* v. *McGrath,* 341 U. S. 123, 162–163 (concurring opinion).

As these and other cases make clear, consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action. Where it has been possible to characterize that private interest (perhaps in oversimplification) [8] as a mere privilege subject to the Executive's plenary power, it has traditionally been held that notice and hearing are not constitutionally required. *Oceanic Navigation Co.* v. *Stranahan,* 214 U. S. 320, 340–343; *Knauff* v. *Shaughnessy,* 338 U. S. 537; *Jay* v. *Boyd,* 351 U. S. 345, 354–358; cf. *Buttfield* v. *Stranahan,* 192 U. S. 470, 497.

What, then, was the private interest affected by Admiral Tyree's action in the present case? It most assuredly was not the right to follow a chosen trade or

[8] See Davis, The Requirement of a Trial-Type Hearing, 70 Harv. L. Rev. 193, 222–224.

profession. Cf. *Dent* v. *West Virginia,* 129 U. S. 114; *Schware* v. *Board of Bar Examiners,* 353 U. S. 232; *Truax* v. *Raich,* 239 U. S. 33. Rachel Brawner remained entirely free to obtain employment as a short-order cook or to get any other job, either with M & M or with any other employer. All that was denied her was the opportunity to work at one isolated and specific military installation.

Moreover, the governmental function operating here was not the power to regulate or license, as lawmaker, an entire trade or profession, or to control an entire branch of private business, but, rather, as proprietor, to manage the internal operation of an important federal military establishment. See *People* v. *Crane,* 214 N. Y. 154, 167–169, 108 N. E. 427, 431–432 (per Cardozo, J.); cf. *Perkins* v. *Lukens Steel Co.,* 310 U. S. 113, 129. In that proprietary military capacity, the Federal Government, as has been pointed out, has traditionally exercised unfettered control.

Thus, the nature both of the private interest which has been impaired and the governmental power which has been exercised makes this case quite different from that of the lawyer in *Schware, supra,* the physician in *Dent, supra,* and the cook in *Raich, supra.* This case, like *Perkins* v. *Lukens Steel Co.,* 310 U. S. 113, involves the Federal Government's dispatch of its own internal affairs. The Court has consistently recognized that an interest closely analogous to Rachel Brawner's, the interest of a government employee in retaining his job, can be summarily denied. It has become a settled principle that government employment, in the absence of legislation, can be revoked at the will of the appointing officer. *In the Matter of Hennen,* 13 Pet. 230, 246, 259; *Crenshaw* v. *United States,* 134 U. S. 99, 108; *Parsons* v. *United States,* 167 U. S. 324, 331–334; *Keim* v. *United States,* 177 U. S. 290, 293–294; *Taylor and Marshall* v. *Beckham* (*No. 1*), 178 U. S. 548, 575–578. This principle was

reaffirmed quite recently in *Vitarelli* v. *Seaton,* 359 U. S. 535. There we pointed out that Vitarelli, an Interior Department employee who had not qualified for statutory protection under the Civil Service Act, "could have been summarily discharged by the Secretary at any time without the giving of a reason . . . ." 359 U. S., at 539.

It is argued that this view of Rachel Brawner's interest is inconsistent with our decisions in *United Public Workers* v. *Mitchell,* 330 U. S. 75, and *Wieman* v. *Updegraff,* 344 U. S. 183. In those two cases an individual's interest in government employment was recognized as entitled to constitutional protection, and it is contended that what the Court said in deciding them would require us to hold that Rachel Brawner was entitled to notice and hearing in this case. In *United Public Workers* the Court observed that "[n]one would deny" that "Congress may not 'enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work.' " 330 U. S., at 100. In *Wieman* the Court held unconstitutional a statute which excluded persons from state employment solely on the basis of membership in alleged "Communist-front" or "subversive" organizations, regardless of their knowledge concerning the activities and purposes of the organizations to which they had belonged. In the course of its decision the Court said, "We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." 344 U. S., at 192.

Nothing that was said or decided in *United Public Workers* or *Wieman* would lead to the conclusion that Rachel Brawner could not be denied access to the Gun Factory without notice and an opportunity to be heard. Those cases demonstrate only that the state and federal

governments, even in the exercise of their internal operations, do not constitutionally have the complete freedom of action enjoyed by a private employer. But to acknowledge that there exist constitutional restraints upon state and federal governments in dealing with their employees is not to say that all such employees have a constitutional right to notice and a hearing before they can be removed. We may assume that Rachel Brawner could not constitutionally have been excluded from the Gun Factory if the announced grounds for her exclusion had been patently arbitrary or discriminatory—that she could not have been kept out because she was a Democrat or a Methodist. It does not follow, however, that she was entitled to notice and a hearing when the reason advanced for her exclusion was, as here, entirely rational and in accord with the contract with M & M.

Finally, it is to be noted that this is not a case where government action has operated to bestow a badge of disloyalty or infamy, with an attendant foreclosure from other employment opportunity. See *Wieman* v. *Updegraff,* 344 U. S. 183, 190–191; *Joint Anti-Fascist Comm.* v. *McGrath,* 341 U. S. 123, 140–141; cf. *Bailey* v. *Richardson,* 86 U. S. App. D. C. 248, 182 F. 2d 46, aff'd by an equally divided Court, 341 U. S. 918.[9] All this record shows is that, in the opinion of the Security Officer of the Gun Factory, concurred in by the Superintendent, Rachel Brawner failed to meet the particular security requirements of that specific military installation. There is nothing to indicate that this determination would in any way impair Rachel Brawner's employment opportunities

[9] Compare Davis, The Requirement of a Trial-Type Hearing, 70 Harv. L. Rev. 193, 229–230, and Note, The Supreme Court, 1950 Term, 65 Harv. L. Rev. 107, 156–158, with Richardson, Problems in the Removal of Federal Civil Servants, 54 Mich. L. Rev. 219, 240–241.

anywhere else.[10] As pointed out by Judge Prettyman, speaking for the Court of Appeals, "Nobody has said that Brawner is disloyal or is suspected of the slightest shadow of intentional wrongdoing. 'Security requirements' at such an installation, like such requirements under many other circumstances, cover many matters other than loyalty." 109 U. S. App. D. C., at 49, 284 F. 2d, at 183. For all that appears, the Security Officer and the Superintendent may have simply thought that Rachel Brawner was garrulous, or careless with her identification badge.

For these reasons, we conclude that the Due Process Clause of the Fifth Amendment was not violated in this case.

Affirmed.

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

I have grave doubts whether the removal of petitioner's identification badge for "security reasons" without notice of charges or opportunity to refute them was authorized by statute or executive order. See *Greene* v. *McElroy,* 360 U. S. 474 (1959). But under compulsion of the Court's determination that there was authority, I pass to a consideration of the more important constitutional issue, whether petitioner has been deprived of liberty or property without due process of law in violation of the Fifth Amendment.

I read the Court's opinion to acknowledge that petitioner's status as an employee at the Gun Factory was an interest of sufficient definiteness to be protected by the

[10] In oral argument government counsel emphatically represented that denial of access to the Gun Factory would not "by law or in fact" prevent Rachel Brawner from obtaining employment on any other federal property.

Federal Constitution from some kinds of governmental injury. Indeed, this acknowledgment seems compelled by our cases. *Wieman* v. *Updegraff,* 344 U. S. 183, (1952); *United Public Workers* v. *Mitchell,* 330 U. S. 75, 100 (1947) (*dictum*); *Torcaso* v. *Watkins, ante,* p. 488, decided today. In other words, if petitioner Brawner's badge had been lifted avowedly on grounds of her race, religion, or political opinions, the Court would concede that some constitutionally protected interest—whether "liberty" or "property" it is unnecessary to state—had been injured. But, as the Court says, there has been no such open discrimination here. The expressed ground of exclusion was the obscuring formulation that petitioner failed to meet the "security requirements" of the naval installation where she worked. I assume for present purposes that separation as a "security risk," if the charge is properly established, is not unconstitutional. But the Court goes beyond that. It holds that the mere assertion by government that exclusion is for a valid reason forecloses further inquiry. That is, unless the government official is foolish enough to admit what he is doing—and few will be so foolish after today's decision—he may employ "security requirements" as a blind behind which to dismiss at will for the most discriminatory of causes.

Such a result in effect nullifies the substantive right—not to be arbitrarily injured by Government—which the Court purports to recognize. What sort of right is it which enjoys absolutely no procedural protection? I do not mean to imply that petitioner could not have been excluded from the installation without the full procedural panoply of first having been subjected to a trial, with cross-examination and confrontation of accusers, and proof of guilt beyond a reasonable doubt. I need not go so far in this case. For under today's holding petitioner is entitled to no process at all. She is not told what she

did wrong; she is not given a chance to defend herself. She may be the victim of the basest calumny, perhaps even the caprice of the government officials in whose power her status rested completely. In such a case, I cannot believe that she is not entitled to some procedures. "[T]he right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." *Joint Anti-Fascist Refugee Comm.* v. *McGrath,* 341 U. S. 123, 168 (1951) (concurring opinion.) See also *Homer* v. *Richmond,* 110 U. S. App. D. C. 226, 292 F. 2d 719 (1961); *Parker* v. *Lester,* 227 F. 2d 708 (C. A. 9th Cir. 1955). In sum, the Court holds that petitioner has a right not to have her identification badge taken away for an "arbitrary" reason, but no right to be told in detail what the reason is, or to defend her own innocence, in order to show, perhaps, that the true reason for deprivation was one forbidden by the Constitution. That is an internal contradiction to which I cannot subscribe.

One further circumstance makes this particularly a case where procedural requirements of fairness are essential. Petitioner was not simply excluded from the base summarily, without a notice and chance to defend herself. She was excluded as a "security risk," that designation most odious in our times. The Court consoles itself with the speculation that she may have been merely garrulous, or careless with her identification badge, and indeed she might, although she will never find out. But, in the common understanding of the public with whom petitioner must hereafter live and work, the term "security risk" carries a much more sinister meaning. See *Beilan* v. *Board of Public Education,* 357 U. S. 399, 421–423 (1958) (dissenting opinion). It is far more likely to be taken as an accusation of communism or disloyalty than impu-

tation of some small personal fault. Perhaps the Government has reasons for lumping such a multitude of sins under a misleading term. But it ought not to affix a "badge of infamy," *Wieman* v. *Updegraff, supra,* at 191, to a person without some statement of charges, and some opportunity to speak in reply.

It may be, of course, that petitioner was justly excluded from the Gun Factory. But, in my view, it is fundamentally unfair, and therefore violative of the Due Process Clause of the Fifth Amendment, to deprive her of a valuable relationship so summarily.

BARGAINTOWN, U. S. A., INC., ET AL. *v.* WHITMAN, DISTRICT ATTORNEY OF LEBANON COUNTY, PA., ET AL.

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

No. 76. Decided June 19, 1961.

— F. Supp. —, affirmed.

David G. Bress and *Leonard Braman* for appellants.

Anne X. Alpern, Attorney General of Pennsylvania, and *Harry J. Rubin* for appellees.

PER CURIAM.

The judgment is affirmed. *McGowan* v. *Maryland,* 366 U. S. 420, and *Two Guys from Harrison-Allentown, Inc.,* v. *McGinley,* 366 U. S. 582.

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

BECK *v.* MAINE.

APPEAL FROM THE SUPREME JUDICIAL COURT OF MAINE.

No. 899. Decided June 19, 1961.

Appeal dismissed for want of a substantial federal question.

Reported below: 156 Me. 403, 165 A. 2d 433.

A. Raymond Rogers for appellant.

Frank E. Hancock, Attorney General of Maine, for appellee.

PER CURIAM.

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

CAROLINA AMUSEMENT CO. ET AL. *v.* MARTIN, SHERIFF, ET AL.

APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA.

No. 424. Decided June 19, 1961.

Appeal dismissed and certiorari denied.
Reported below: 236 S. C. 558, 115 S. E. 2d 273.

J. D. Todd, Jr. and *Chester D. Ward, Jr.* for appellants.

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 and MR. JUSTICE BRENNAN are of the opinion that probable jurisdiction should be noted.

BIRDWELL ET AL. *v.* KIRKLAND ET AL.

APPEAL FROM THE COURT OF CIVIL APPEALS OF TEXAS, SECOND SUPREME JUDICIAL DISTRICT.

No. 914. Decided June 19, 1961.

Appeal dismissed and certiorari denied.
Reported below: 337 S. W. 2d 120.

Sidney E. Dawson and *Townes Loring Dawson* for appellants.

G. D. Hinson 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.

BROUGHTON *v.* OHIO.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 554. Decided June 19, 1961.

Appeal dismissed and certiorari denied.
Reported below: 171 Ohio St. 261, 168 N. E. 2d 744.

Robert L. Merritt for appellant.

Jack G. Day filed a brief for Ohio Civil Liberties Union, as *amicus curiae,* in support of appellant.

PER CURIAM.

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

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

WEISBERG *v.* OHIO.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 808. Decided June 19, 1961.

Appeal dismissed and certiorari denied.
Reported below: 171 Ohio St. 302, 170 N. E. 2d 432.

H. H. Felsman for appellant.

PER CURIAM.

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

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

COMMISSIONER OF INTERNAL REVENUE *v.* MILWAUKEE & SUBURBAN TRANSPORT CORP.

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

No. 843. Decided June 19, 1961.

Certiorari granted; judgment vacated; and case remanded.
Reported below: 283 F. 2d 279.

Solicitor General Cox, Assistant Attorney General Oberdorfer, Harry Baum and *Joseph Kovner* for petitioner.

Richard R. Teschner and *Warren W. Browning* for respondent.

PER CURIAM.

The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded in light of *American Automobile Association* v. *United States, ante,* p. 687, and *United States* v. *Consolidated Edison Company of New York, Inc.,* 366 U. S. 380.

MR. JUSTICE DOUGLAS dissents.

HARPER *v.* BANNAN, WARDEN.

APPEAL FROM THE SUPREME COURT OF MICHIGAN.

No. 1119, Misc. Decided June 19, 1961.

PER CURIAM.

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

TRUBEK ET AL. *v.* ULLMAN, STATE'S ATTORNEY.

APPEAL FROM THE SUPREME COURT OF ERRORS OF CONNECTICUT.

No. 847. Decided June 19, 1961.

Appeal dismissed and certiorari denied.

Reported below: 147 Conn. 633, 165 A. 2d 158.

Fowler V. Harper for appellants.

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, MR. JUSTICE HARLAN and MR. JUSTICE STEWART are of the opinion that probable jurisdiction should be noted.

TUGWELL, TREASURER OF LOUISIANA, ET AL. *v.* BUSH ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA.

No. 1037. Decided June 19, 1961.

194 F. Supp. 182, affirmed.

Jack P. F. Gremillion, Attorney General of Louisiana, *Carroll Buck,* First Assistant Attorney General, and *M. E. Culligan, George M. Ponder, Weldon A. Cousins, L. K. Clement, John M. Currier, George S. Hesni, Robert S. Link, Jr., Dorothy N. Wolbrette, John E. Jackson, Jr., William P. Schuler* and *Henry J. Roberts, Jr.,* Assistant Attorneys General, for appellants.

Thurgood Marshall for appellees.

PER CURIAM.

The judgment is affirmed.

DENNY ET AL. *v.* BUSH ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA.

No. 868. Decided June 19, 1961.

191 F. Supp. 871, affirmed.

Gerard A. Rault for appellants.

Solicitor General Cox, Assistant Attorney General Marshall and *Harold H. Greene* for the United States, as *amicus curiae,* urging affirmance.

PER CURIAM.

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

LEGISLATURE OF LOUISIANA ET AL. *v.* UNITED STATES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA.

No. 967. Decided June 19, 1961.

191 F. Supp. 871, affirmed.

W. Scott Wilkinson and *Thompson L. Clarke* for appellants.

Solicitor General Cox, Assistant Attorney General Marshall and *Harold H. Greene* for the United States.

PER CURIAM.

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

SWIFT & CO. ET AL. *v.* UNITED STATES.

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

No. 875. Decided June 19, 1961.

189 F. Supp. 885, affirmed.

John T. Chadwell, Richard S. Rhodes, Arthur C. O'Meara, John C. Berghoff, Weymouth Kirkland, E. Houston Harsha, George E. Leonard, Jr., John P. Doyle, Frederick T. Barrett and *Howard Ellis* for appellants.

Solicitor General Cox, Assistant Attorney General Loevinger and *Richard A. Solomon* for the United States.

Howard J. Trienens for Western States Meat Packers Association, Inc., et al., as *amici curiae*.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed. The motion of Western States Meat Packers Association, Inc., et al. for leave to file brief as *amici curiae* is granted.

HOBBS *v.* ALASKA.

APPEAL FROM THE SUPREME COURT OF ALASKA.

No. 954. Decided June 19, 1961.

Appeal dismissed and certiorari denied.

Reported below: — Alaska —, 359 P. 2d 956.

Fred D. Crane for appellant.

PER CURIAM.

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

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VIRGINIA ELECTRIC & POWER CO. *v.* JOHNSON, COMMISSIONER OF REVENUE OF NORTH CAROLINA.

APPEAL FROM THE SUPREME COURT OF NORTH CAROLINA.

No. 906. Decided June 19, 1961.

Appeal dismissed and certiorari denied.
Reported below: 254 N. C. 17, 118 S. E. 2d 155.

George D. Gibson and *John W. Riely* for appellant.

Thomas Wade Bruton, Attorney General of North Carolina, and *Peyton B. Abbott, Lucius W. Pullen* and *Thomas L. Young,* Assistant Attorneys 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.

LOCAL 1422, INTERNATIONAL LONGSHOREMEN'S UNION, AFL–CIO, ET AL. *v.* SOUTH CAROLINA STATE PORTS AUTHORITY.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA.

No. 922. Decided June 19, 1961.

Appeal dismissed. Reported below: 191 F. Supp. 156.

Wm. McG. Morrison, Jr. for appellants. *Coming B. Gibbs* and *William H. Grimball, Jr.* for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed.

COMMISSIONER OF INTERNAL REVENUE *v.* SCHLUDE ET UX.

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

No. 629. Decided June 19, 1961.

Certiorari granted; judgment vacated; and case remanded.
Reported below: 283 F. 2d 234.

Solicitor General Rankin, Assistant Attorney General Rice, Harry Baum and *George F. Lynch* for petitioner.

Robert Ash and *Carl F. Bauersfeld* for respondents.

PER CURIAM.

The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded for further consideration in the light of *American Automobile Association* v. *United States, ante,* p. 687.

MR. JUSTICE DOUGLAS dissents.

FAMILY FAIR, INC., ET AL. *v.* OHIO.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 754. Decided June 19, 1961.

Appeal dismissed and certiorari denied.
Reported below: 171 Ohio St. 322, 170 N. E. 2d 731.

J. H. Nathanson for appellants.

Fred A. Smith for appellee.

PER CURIAM.

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

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

STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF, AND REMAINING ON DOCKETS, AT CONCLUSION OF OCTOBER TERMS—1958, 1959, AND 1960

	ORIGINAL			APPELLATE			MISCELLANEOUS			TOTALS		
Terms	1958	1959	1960	1958	1959	1960	1958	1959	1960	1958	1959	1960
Number of cases on dockets	15	12	12	1, 041	1, 047	1, 046	1, 006	1, 119	1, 255	2, 062	2, 178	2, 313
Number disposed of during terms	3	0	1	886	860	887	892	962	1, 040	1, 781	1, 822	1, 928
Number remaining on dockets	12	12	11	155	187	159	114	157	215	281	356	385

	TERMS				TERMS		
	1958	1959	1960		1958	1959	1960
Distribution of cases disposed of during terms:				Distribution of cases remaining on dockets:			
Original cases	3	0	1	Original cases	12	12	11
Appellate cases on merits	245	215	259	Appellate cases on merits	84	116	85
Petitions for certiorari	641	645	628	Petitions for certiorari	71	71	74
Miscellaneous docket applications	892	962	1, 040	Miscellaneous docket applications	114	157	215

JUNE 20, 1961

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