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VOLUME 368

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1961

OCTOBER 2, 1961, THROUGH FEBRUARY 19, 1962

WALTER WYATT
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ERRATA.

359 U. S. 153, note 6, last line: "32" should be "82."

366 U. S. 969, No. 929, Misc.: The citation to the decision below should be "287 F. 2d 212."

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.*
JOHN F. DAVIS, Clerk.*
WALTER WYATT, Reporter of Decisions.
T. PERRY LIPPITT, Marshal.
HELEN NEWMAN, Librarian.

*See *post*, p. v.

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.)

RESIGNATION OF THE CLERK OF THE COURT AND APPOINTMENT OF SUCCESSOR.

Mr. James R. Browning, who had served as Clerk of the Court since August 15, 1958, resigned, effective October 23, 1961, to accept appointment as a Judge of the United States Court of Appeals for the Ninth Circuit.

Mr. John F. Davis, who had served for many years as an Assistant to the Solicitor General and who had argued more than 50 cases before the Court, was appointed to succeed Judge Browning as Clerk of the Court and assumed his duties on October 23, 1961.

For order of appointment of Mr. Davis, see *post,* p. 884.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1961.

HUBBARD *v.* BOARD OF EDUCATION OF NEW YORK CITY.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 307, Misc. Decided October 9, 1961.

Appeal dismissed and certiorari denied.

PER CURIAM.

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

JOHNSON ET AL. *v.* DISTRICT COURT OF IOWA IN AND FOR FAYETTE COUNTY.

APPEAL FROM THE SUPREME COURT OF IOWA.

No. 331, Misc. Decided October 9, 1961.

Appeal dismissed and certiorari denied.

PER CURIAM.

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

SOERGEL ET AL. *v.* ALLEN, COMMISSIONER OF EDUCATION OF NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 117. Decided October 9, 1961.

Appeal dismissed and certiorari denied.
Reported below: 9 N. Y. 2d 633, 172 N. E. 2d 84.

Benjamin E. Shove for appellants.

Charles A. Brind, Jr. 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.

SPENCER, ADMINISTRATRIX, ET AL. *v.* HIBERNIA BANK ET AL.

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

No. 176. Decided October 9, 1961.

Appeal dismissed and certiorari denied.
Reported below: 186 Cal. App. 2d 702, 9 Cal. Rptr. 867.

M. Mitchell Bourquin and *George Olshausen* for appellants.

Moses Lasky and *James Farraher* 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.

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES ET AL. *v.* FRANCHISE TAX BOARD OF CALIFORNIA.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 122. Decided October 9, 1961.

Appeal dismissed and certiorari denied.
Reported below: 55 Cal. 2d 407, 359 P. 2d 625.

Pierce Works, Warren M. Christopher, Hugo A. Steinmeyer, Richard E. Sherwood and *Brenton L. Metzler* for appellants.

Stanley Mosk, Attorney General of California, *James E. Sabine,* Assistant Attorney General, and *Ernest P. Goodman,* Deputy Attorney General, for appellee.

PER CURIAM.

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

ABLEMAN ET AL. *v.* CITY OF CEDAR RAPIDS.

APPEAL FROM THE SUPREME COURT OF IOWA.

No. 246. Decided October 9, 1961.

Appeal dismissed for want of a substantial federal question.
Reported below: 252 Iowa 948, 108 N. W. 2d 253.

Ernest F. Pence and *Roy A. Golden* for appellants.

C. W. Garberson and *William M. Dallas* for appellee.

PER CURIAM.

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

STANDARD DRUG CO., INC., *v.* GENERAL ELECTRIC CO.

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 127. Decided October 9, 1961.

Appeal dismissed for want of a substantial federal question.
Reported below: 202 Va. 367, 117 S. E. 2d 289.

LeRoy R. Cohen, Jr. and *Robert A. Cox, Jr.* for appellant.

Walter E. Rogers for appellee.

PER CURIAM.

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

CRUZ *v.* COLORADO.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO.

No. 66, Misc. Decided October 9, 1961.

Certiorari granted; judgment reversed; and case remanded.

Petitioner *pro se.*

Duke W. Dunbar, Attorney General of Colorado, *Frank E. Hickey,* Deputy Attorney General, and *J. F. Brauer,* Assistant Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. Upon consideration of the entire record and the confession of error of the Attorney General of Colorado, the judgment is reversed and the case is remanded.

MILK TRANSPORT, INC., *v.* UNITED STATES ET AL.

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

No. 95. Decided October 9, 1961.

190 F. Supp. 350, affirmed.

Perry R. Moore for appellant.

Solicitor General Cox, Assistant Attorney General Loevinger, Richard A. Solomon, Robert W. Ginnane and *Fritz R. Kahn* for the United States et al.

Frank B. Hand, Jr. for Alterman Transport Lines, Inc., et al., intervenors, on motions to affirm the judgment.

PER CURIAM.

The motion of W. W. Hughes for leave to file brief, as *amicus curiae,* is denied. The motions to affirm are granted and the judgment is affirmed.

LYNN *v.* McELROY, CIRCUIT COURT JUDGE, ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 104, Misc. Decided October 9, 1961.

Appeal dismissed.

Reported below: 284 F. 2d 299.

PER CURIAM.

The appeal is dismissed.

DILLNER TRANSFER CO. ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

No. 188. Decided October 9, 1961.

193 F. Supp. 823, affirmed.

Ernie Adamson for appellants.

Solicitor General Cox, Assistant Attorney General Loevinger, Richard A. Solomon, Robert W. Ginnane and *Fritz R. Kahn* for the United States et al.

Carl Helmetag, Jr. for the Pennsylvania Railroad Co., and *Herbert Baker, John C. Bradley* and *Roland Rice* for Continental Transportation Lines, Inc., et al., intervenors.

PER CURIAM.

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

GENCO *v.* GENCO.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 277, Misc. Decided October 9, 1961.

Appeal dismissed and certiorari denied.
Reported below: 171 Ohio St. 450, 172 N. E. 2d 9.

PER CURIAM.

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

GOSLIN ET AL. *v.* BEAZLEY ET AL.

APPEAL FROM THE COURT OF CIVIL APPEALS OF TEXAS, FIRST SUPREME JUDICIAL DISTRICT.

No. 215. Decided October 9, 1961.

Appeal dismissed and certiorari denied.
Reported below: 339 S. W. 2d 689.

Levert J. Able for appellants.

Nowlin Randolph 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.

McMAHON ET AL. *v.* MILAM MANUFACTURING CO.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI.

No. 218. Decided October 9, 1961.

Certiorari granted and judgment reversed.
Reported below: —— Miss. ——, 127 So. 2d 647.

Morris P. Glushien for petitioners.

Charles S. Tindall, Jr. for respondent.

PER CURIAM.

The petition for writ of certiorari is granted and the judgment is reversed. *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236.

OREGON EX REL. SMITH *v.* GLADDEN, WARDEN.

APPEAL FROM THE SUPREME COURT OF OREGON.

No. 23, Misc. Decided October 9, 1961.

Appeal dismissed and certiorari denied.

Appellant *pro se.*

Robert Y. Thornton, Attorney General of Oregon, and *Harold W. Adams,* 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.

HAMILTON, ALIAS HAYDEN, *v.* SUPERIOR COURT OF CALIFORNIA, IN AND FOR MARIN COUNTY.

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

No. 105, Misc. Decided October 9, 1961.

Appeal dismissed and certiorari denied.

Appellant *pro se.*

Richard Gladstein and *Norman Leonard* 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.

CEPERO *v.* RINCON DE GAUTIER, CITY MANAGER, SAN JUAN.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 108, Misc. Decided October 9, 1961.

PER CURIAM.

The appeal is dismissed.

CEPERO *v.* PUERTO RICO ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 164, Misc. Decided October 9, 1961.

PER CURIAM.

The appeal is dismissed.

CEPERO *v.* PUERTO RICO ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 382, Misc. Decided October 9, 1961.

PER CURIAM.

The appeal is dismissed.

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LONGORIA *v.* DELAWARE.

APPEAL FROM THE SUPREME COURT OF DELAWARE.

No. 219, Misc. Decided October 9, 1961.

Appeal dismissed and certiorari denied.
Reported below: 53 Del. —, 168 A. 2d 695.

Appellant *pro se.*

Clement C. Wood, Chief Deputy Attorney General of Delaware, 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.

McLAIN *v.* CALIFORNIA.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 129, Misc. Decided October 9, 1961.

Appeal dismissed and certiorari denied.
Reported below: 55 Cal. 2d 78, 357 P. 2d 1080.

PER CURIAM.

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

GREMILLION ET AL. *v.* UNITED STATES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA.

No. 200. Decided October 16, 1961.

194 F. Supp. 182, affirmed.

Jack P. F. Gremillion, Attorney General of Louisiana, *Carroll Buck,* First Assistant Attorney General, and *M. E. Culligan* and *George M. Ponder,* Assistant Attorneys General, 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.

RILEY *v.* PENNSYLVANIA READING SEASHORE LINES.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

No. 427, Misc. Decided October 16, 1961.

Appeal dismissed and certiorari denied.

Appellant *pro se.*

Thomas Raeburn White, Jr. for appellee.

PER CURIAM.

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

ROOSEVELT RACEWAY, INC., *v.* MONAGHAN, COMMISSIONER OF HARNESS RACING.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 299. Decided October 16, 1961.

Appeal dismissed for want of a substantial federal question.
Reported below: 9 N. Y. 2d 293, 174 N. E. 2d 71.

Samuel I. Rosenman, George Morton Levy and *Max Freund* for appellant.

Louis J. Lefkowitz, Attorney General of New York, and *Paxton Blair,* Solicitor General, for appellee.

PER CURIAM.

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

MR. JUSTICE HARLAN would note probable jurisdiction.

CASTLE *v.* UNITED STATES.

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

No. 60, Misc. Decided October 16, 1961.

Certiorari granted; judgment vacated; and case remanded for resentencing, since petitioner was guilty of but a single offense under 18 U. S. C. § 2314.

Reported below: 287 F. 2d 657.

Petitioner *pro se.*

Solicitor General Cox for the United States.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. We are in agreement with the representations of the Solicitor General that, under the principles announced in *Bell* v. *United States,* 349 U. S. 81, the petitioner was guilty of but a single offense under 18 U. S. C. § 2314. In light of such representations and upon consideration of the entire record, the judgment is vacated and the case is remanded to the Court of Appeals with instructions to remit to the District Court for resentencing in accordance with this opinion.

GOODMAN *v.* UNITED STATES ET AL.

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

No. 281, Misc. Decided October 16, 1961.

Certiorari granted; judgment vacated; and case remanded.
Reported below: 289 F. 2d 256.

Kenneth Carroad, Theodore Propp and *Edwin L. Wolf* for petitioner.

Solicitor General Cox for the United States et al.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. In the light of the representations of the Solicitor General and upon consideration of the entire record, the judgment of the Court of Appeals is vacated and the case is remanded to the District Court to permit the United States to file an appropriate motion in that court to withdraw its prior application for an order directing petitioner to testify.

CHOBOT *v.* WISCONSIN.

APPEAL FROM THE SUPREME COURT OF WISCONSIN.

No. 146. Decided October 23, 1961.

Appeal dismissed for want of a substantial federal question.
Reported below: 12 Wis. 2d 110, 106 N. W. 2d 286.

Max Raskin for appellant.

John W. Reynolds, Attorney General of Wisconsin, *William Platz,* Assistant Attorney General, and *William J. McCauley* for appellee.

PER CURIAM.

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

MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS and MR. JUSTICE HARLAN are of the opinion that probable jurisdiction should be noted.

KATZ ET AL. *v.* SINGERMAN ET AL.

APPEAL FROM THE SUPREME COURT OF LOUISIANA.

No. 298. Decided October 23, 1961.

Appeal dismissed and certiorari denied.
Reported below: 241 La. 103, 127 So. 2d 515.

G. Wray Gill and *Gerard H. Schreiber* for appellants.

Robert Weinstein and *Herman L. Midlo* 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.

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE *v.* GALLION, ATTORNEY GENERAL OF ALABAMA, ET AL.

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

No. 303. Decided October 23, 1961.

Certiorari granted; judgment vacated; case remanded to the Court of Appeals with instructions to direct the District Court to proceed with trial of the issues unless within a reasonable time, no later than January 2, 1962, the State of Alabama shall have accorded petitioner an opportunity to be heard on its motion to dissolve the state restraining order of June 1, 1956, and upon the merits of the action in which such order was issued.

Reported below: 290 F. 2d 337.

Robert L. Carter, Fred D. Gray, Arthur D. Shores, Orzell Billingsley, Jr. and *Peter Hall* for petitioner.

MacDonald Gallion, Attorney General of Alabama, and *Willard W. Livingston, Leslie Hall* and *Gordon Madison,* Assistant Attorneys General, for respondents.

PER CURIAM.

The petition for a writ of certiorari is granted. The judgment below is vacated, and the case is remanded to the Court of Appeals with instructions to direct the District Court to proceed with the trial of the issues in this action unless within a reasonable time, no later than January 2, 1962, the State of Alabama shall have accorded to petitioner an opportunity to be heard on its motion to dissolve the state restraining order of June 1, 1956, and upon the merits of the action in which such order was issued. Pending the final determination of all proceedings in the state action, the District Court is authorized to retain jurisdiction over the federal action and to take

such steps as may appear necessary and appropriate to assure a prompt disposition of all issues involved in, or connected with, the state action. *Truax* v. *Corrigan*, 257 U. S. 312, 331–334.

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

AMERICAN CHICLE CO. *v.* STATE TAX COMMISSION OF NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 301. Decided October 23, 1961.

Appeal dismissed for want of a substantial federal question.
Reported below: 9 N. Y. 2d 883, 175 N. E. 2d 829.

Leo A. Diamond for appellant.

Louis J. Lefkowitz, Attorney General of New York, *Paxton Blair*, Solicitor General, and *Robert W. Bush*, Assistant Attorney General, for appellee.

PER CURIAM.

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

TINSLEY *v.* CITY OF RICHMOND.

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 315. Decided October 23, 1961.

Appeal dismissed for want of a substantial federal question.
Reported below: 202 Va. 707, 119 S. E. 2d 488.

Martin A. Martin, Thurgood Marshall, Jack Greenberg, James M. Nabrit III and *Charles L. Black, Jr.* for appellant.

J. E. Drinard for appellee.

PER CURIAM.

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

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

ANDERSON ET AL. *v.* BALL, COUNTY TREASURER.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

No. 326. Decided October 23, 1961.

Appeal dismissed and certiorari denied.
Reported below: 21 Ill. 2d 396, 172 N. E. 2d 760.

Charles R. Holton for appellants.

Guy R. Williams 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.

DEGREGORY *v.* ATTORNEY GENERAL OF NEW HAMPSHIRE.

APPEAL FROM THE SUPREME COURT OF NEW HAMPSHIRE.

No. 237, Misc. Decided October 23, 1961.

103 N. H. 214, 169 A. 2d 1, affirmed.

Howard S. Whiteside for appellant.

Gardner C. Turner, Attorney General of New Hampshire, *pro se.*

PER CURIAM.

The judgment is affirmed.

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

ROPER *v.* UNITED STATES ET AL.

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

No. 16. Argued October 12, 16, 1961.—Decided November 6, 1961.

This libel *in personam* against the United States under the Suits in Admiralty Act was brought by an employee of a stevedoring company to recover damages for injuries sustained while unloading grain from a government-owned ship at a pier. The ship had been deactivated, "mothballed" and rendered unfit for navigation and was being used solely for the storage of grain owned by the Government. Without being prepared or relicensed for navigation, it had been towed to a grain elevator, loaded with grain, towed back to its anchorage and then towed again to the grain elevator for unloading when the grain was sold. The trial court dismissed the libel, holding that, since the vessel was not in navigation, there was no warranty of seaworthiness. The Court of Appeals affirmed. *Held:* The existence of the warranty of seaworthiness depends on whether the vessel is in navigation, which is a question of fact; on the record in this case, this Court cannot hold that the finding of the trial court in this regard was clearly erroneous. Pp. 20–24.

282 F. 2d 413, affirmed.

Sidney H. Kelsey argued the cause and filed briefs for petitioner.

Leavenworth Colby argued the cause for the United States. With him on the briefs were *Solicitor General Cox, Assistant Attorney General Orrick, Morton Hollander* and *David L. Rose.*

MR. JUSTICE CLARK delivered the opinion of the Court.

Petitioner, a longshoreman, brought this libel *in personam* against the United States pursuant to the Suits in Admiralty Act, § 2, 41 Stat. 525, 46 U. S. C. § 742.[1] Claiming injuries suffered while aboard a government ship removing grain to an elevator, petitioner sought recovery

[1] Other parties, not concerned with our disposition, were impleaded.

on the grounds of unseaworthiness and negligence. The District Court dismissed the libel after finding that there was no negligence, and that since the ship in fact was not in navigation there was no warranty of seaworthiness. 170 F. Supp. 763. This dismissal was affirmed by a divided Court of Appeals, 282 F. 2d 413, and a petition for certiorari requesting review of the seaworthiness issue was granted. 365 U. S. 802. We now affirm the judgment below.

The S. S. *Harry Lane* was a liberty ship of World War II origin, which was deactivated from service and "mothballed" in 1945. In this process her supplies, stores, nautical instruments, cargo gear and tackle were removed; her pipes and machinery were drained and prepared for storage; and her rudder, tail shaft and propeller were secured. As a result of such action the ship lost her Coast Guard safety certification as well as her license to operate, both of which were requisite to a vessel in navigation. Indeed, the trial court found that "admittedly" reactivation of the ship would have required a major overhaul.

In 1954 the Government was confronted with an urgent need of storage facilities for the country's surplus grain, and a decision was made to utilize as warehouse space the holds of some of the deactivated liberty ships. The ships were not reactivated for navigation nor used for transportation purposes, but were utilized solely as granaries for the storage of the Government's grain. Pursuant thereto, the use of the S. S. *Harry Lane* was covered by a general storage agreement between the Continental Grain Company and the Commodity Credit Corporation, and it was towed to loading facilities, filled with grain, and returned to the "dead fleet" of some 360 vessels, where it remained for two years.

In September 1956 a sale was made of the grain stored in this ship, and she was towed back to the grain elevator for the unloading operation. As in the earlier movement,

no repairs or structural changes preparatory to activating the ship were made; nor was there any attempt to obtain a safety certificate or a license to operate as a vessel in navigation, and none was issued. The movement was by tug, with a licensed riding master and six linemen stationed aboard the dead vessel. The linemen were discharged from the vessel after she was secured to her berth at the grain elevator, the riding master alone remaining to guard the vessel. The line handlers did not sign on as seamen for the vessel, and the tugboat captain was "in charge of the move from the Fleet down to the berth" with the riding master "subject to the orders of the tugboat captain."

The unloading operation was carried out by Continental Grain Company. The grain was removed by a "marine leg," a large shore-based mechanism containing a conveyor belt which lifts grain from the ship's hold into the adjacent grain elevator leased by Continental. The marine leg was owned and maintained by Continental, and their employee operated it from a control house in response to signals from longshoremen in the hold. When the grain level dropped to a certain depth, the balance was drawn onto the belt by "grain shovels"—plow-like devices attached by rope to winches in the leg. These shovels were operated by longshoremen employed by a stevedoring company, which had contracted with Continental to aid in the unloading. Petitioner, the foreman of the longshoreman crew, was injured when a latently defective part of the marine leg (a block through which one of the shovel ropes ran) broke and struck him. The entire unloading operation was directed and controlled by Continental and the stevedoring company, and the riding master was without power to supervise the work or inspect the equipment.

The test for determining whether a vessel is in navigation is the "status of the ship," *West* v. *United States,*

361 U. S. 118, 122 (1959). This is a question of fact, *Butler* v. *Whiteman,* 356 U. S. 271 (1958), and consequently reversible only upon a showing of clear error. Admittedly the S. S. *Harry Lane* was withdrawn from navigation in 1945. The issue presented is therefore whether events subsequent to 1945 altered this status. In 1954 the function of the ship was modified. However, she was not converted to a self-propelled, self-directed cargo vessel. Nor was she even prepared for use as a barge to transport cargo from one location to another. In point of fact it would be more accurate to note that the ship itself was not converted to any navigational use. While its hold was utilized as a granary or warehouse, the vessel *ipso facto* was not reactivated for service in navigation.

A second aspect of the ship's history since 1954 is the movement between the dead fleet and the grain elevator. This movement was by tug without assistance from the ship's motive or directional equipment which, indeed, was not in the least usable. The men aboard were not signed on as seamen, and the entire operation was directed and controlled by the tug captain. Unlike a barge, the S. S. *Harry Lane* was not moved in order to transport commodities from one location to another. It served as a mobile warehouse which was filled and then moved out of the way to perform its function of storing grain until needed, at which time it was returned and unloaded.

In light of the above circumstances, we cannot say as a matter of law that the S. S. *Harry Lane* had been converted into a vessel in navigation, and that the findings of the trial court were clearly erroneous.[2]

Since we are unwilling to upset the trial court's factual determination that the S. S. *Harry Lane* was not a vessel

[2] For cases involving similar facts and to the same effect see *Hawn* v. *American S. S. Co.,* 107 F. 2d 999 (C. A. 2d Cir. 1939); *Kissinger* v. *United States,* 176 F. Supp. 828 (D. C. E. D. N. Y. 1959); *Krolczyk*

in navigation, it follows that there was no warranty of the ship's seaworthiness. *West* v. *United States, supra; Kissinger* v. *United States,* 176 F. Supp. 828 (1959).[3] This limitation is analogous to that applied in libels under the Jones Act, where it has long been held that recovery is precluded if the ship involved is not a vessel in navigation. *Desper* v. *Starved Rock Ferry Co.,* 342 U. S. 187 (1952); *Hawn* v. *American S. S. Co.,* 107 F. 2d 999 (1939).

This disposition of the case makes it unnecessary for us to pass upon the remaining question, *i. e.,* whether a shore-based marine leg is within the warranty of seaworthiness in the circumstances here disclosed.

Affirmed.

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

For the reasons stated by Judge Sobeloff in the Court of Appeals, I believe this ship at the time of the accident was not a "dead ship" but "a vessel in navigation," because it was "being actually used as a barge, and transporting a cargo." 282 F. 2d 413, 419.

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v. *Waterways Navigation Co.,* 151 F. Supp. 873 (D. C. E. D. Mich. 1957). *Lawlor* v. *Socony-Vacuum Oil Co.,* 275 F. 2d 599 (C. A. 2d Cir. 1960), is not *contra.* There minor repairs were underway on an active ship with a full crew aboard.

[3] The view that a vessel not in navigation extends no warranty has often been expressed in the more familiar context of to whom does the warranty extend. *E. g., Union Carbide Corp.* v. *Goett,* 256 F. 2d 449 (C. A. 4th Cir. 1958). Implicit within such cases is the reasoning that those working on vessels not in navigation are not seamen (or doing seamen's work) and consequently not among those employees protected by the warranty of seaworthiness.

MARTIN *v.* WALTON, PROBATE JUDGE OF JOHNSON COUNTY, KANSAS.

APPEAL FROM THE SUPREME COURT OF KANSAS.

No. 30. Argued October 17, 1961.—Decided November 6, 1961.

Under a Kansas statute and rules promulgated by the Supreme Court of Kansas, a resident of Kansas who was duly licensed to practice law in both Kansas and Missouri and maintained law offices in both States was denied the right to appear in a Kansas court without associating local counsel, solely because he practiced regularly in Missouri. *Held:* The state statute and rules are not beyond the allowable range of state action under the Fourteenth Amendment, and this appeal is dismissed for want of a substantial federal question. Pp. 25–26.

187 Kan. 473, 357 P. 2d 782, appeal dismissed.

Howard E. Payne argued the cause for appellant. With him on the briefs were *F. L. Hagaman* and *John Scurlock.*

J. Donald Lysaught argued the cause for appellee. With him on the brief were *Hugh H. Kreamer, Bernhard W. Alden* and *Kenneth C. McGuiness.*

A brief was filed by *William M. Ferguson,* Attorney General of Kansas, and *A. K. Stavely,* Assistant Attorney General, on behalf of the State of Kansas, as *amicus curiae.*

PER CURIAM.

The appeal is dismissed for want of a substantial federal question. Upon plenary consideration, we are satisfied that, both on their face and as applied to appellant, Kan. Gen. Stat., 1949, § 7–104, and amended Kan. Sup. Ct. Rules 41 and 54 promulgated by the Supreme Court of Kansas, acting within its competence under state law, are not beyond the allowable range of

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state action under the Fourteenth Amendment. See, *e. g., Dent* v. *West Virginia,* 129 U. S. 114; *Graves* v. *Minnesota,* 272 U. S. 425; *Schware* v. *Board of Bar Examiners,* 353 U. S. 232, 239; *Hitchcock* v. *Collenberg,* 353 U. S. 919; *Kovrak* v. *Ginsburg,* 358 U. S. 52. We cannot disregard the reasons given by the Kansas Supreme Court for the Rules in question. 187 Kan. 473, 357 P. 2d 782. Nor does the fact that the Rules may result in "incidental individual inequality" make them offensive to the Fourteenth Amendment. *Phelps* v. *Board of Education,* 300 U. S. 319, 324.

THE CHIEF JUSTICE concurs in the result.

MR. JUSTICE WHITTAKER took no part in the disposition of this case.

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

If this were a case where an attorney, though a member of the Kansas Bar, practiced law only in Missouri, the reasons for Rules 41 and 54,* as declared by the Kansas Supreme Court, would be adequate to sustain them. For

*Rule 41 provides in relevant part:

"*Provided further however,* The authority granted to practice law shall not be exercised except as provided under Rule No. 54 *infra,* when the licensee herein has been admitted to the Bar of another state or territory and is regularly engaged in the practice of law in such other state or territory."

Rule 54 provides:

"An attorney regularly practicing outside of this state and in good standing as a member of the Bar of the place of his regular practice may be recognized as an attorney by the courts, commissions, and agencies of this state, for any action or proceeding, but only if he has associated with him as attorney of record in such action or proceeding a member of the Bar of this state qualified under the provisions of G. S. 1949, 7-104, upon whom service may be had in all matters connected with such action or proceeding proper to be served upon an attorney of record."

we are told by that court that they were designed "to provide litigants in (Kansas) tribunals with the service of a resident attorney familiar with local rules, procedure and practice and upon whom service may be had in all matters connected with actions or proceedings proper to be served upon an attorney of record." 187 Kan. 473, 485, 357 P. 2d 782, 791.

But the facts assumed are not the facts of this case. The facts alleged in the petition for writ of mandamus, which are assumed to be true by the motion to quash, show the following: Petitioner, since 1948, has continuously maintained law offices and had a general practice of law both in Kansas City, Missouri, and in Mission, Kansas, the latter being a suburb of Kansas City, Missouri. Petitioner's home is Mission, Kansas. He is City Attorney for Mission and a member of the Board of Tax Appeals of Kansas. Many of his clients live in one State and work in the other. Their problems involve the laws and procedures of both States. He consults with as many clients in his Kansas office or home as in his Missouri office. About one-half of his earned income is derived from his Kansas practice, a large portion of which consists of practice in the probate court. To use the words of the Kansas Supreme Court, quoted above, petitioner is a "resident attorney familiar with local rules, procedure and practice and upon whom service may be had in all matters."

Four other factors were mentioned by the Kansas Supreme Court in sustaining these Rules:

> 1. Kansas courts and commissions "encountered difficulty in procuring the presence of the Kansas licensed attorneys officed in Missouri at the call of . . . [their] dockets."
>
> 2. there has been an "inability of Kansas officed attorneys to procure service on Missouri officed Kansas attorneys without having to proceed to another state."

3. there has been a "failure of some Kansas licensed attorneys officed in Missouri to answer calls to appear on matters of urgency."

4. there has been a "failure of those attorneys to familiarize themselves with the rules of local practice and procedure by reason of their infrequent appearance before the [Kansas] courts and tribunals." 187 Kan. 473, 482–483, 357 P. 2d 782, 790.

These four factors, applicable perhaps to "Kansas licensed attorneys officed in Missouri" (187 Kan., at 482, 357 P. 2d, at 790), plainly have no relevancy to petitioner who has an active practice in Kansas. This case is therefore quite different from those where "incidental individual inequality" (*Phelps* v. *Board of Education,* 300 U. S. 319, 324) results from putting many into one class, treating them all alike, and disregarding slight or minor differences among them.

If Kansas can deny this lawyer his livelihood, so can Missouri. When Kansas denies him the right to pursue his livelihood, it destroys his competence for reasons that have no relation to competency. States have great leeway in making classifications, in providing general rules, in differentiating evils by broad lines or by narrow ones. Where, however, a State declares what purpose the law has, no room is left to conceive of any other purpose it may serve. See *Allied Stores of Ohio, Inc.,* v. *Bowers,* 358 U. S. 522, 530. A law, fair on its face, may be applied in a way that violates the Equal Protection Clause of the Fourteenth Amendment. *Yick Wo* v. *Hopkins,* 118 U. S. 356, 373–374. Here the law as applied has no relation whatsoever to the declared evil at which the law was aimed. It is, therefore, invidious in its application, striking without reason at a citizen's activities which touch several States, as constitutionally they are entitled to do under our federal regime. Cf. *Edwards* v. *California,* 314 U. S. 160.

As we said in *Schware* v. *Board of Bar Examiners,* 353 U. S. 232, 239:

> "A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law. . . . Obviously an applicant could not be excluded merely because he was a Republican or a Negro or a member of a particular church. Even in applying permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory."

Accordingly, the application of these Rules to petitioner causes him to be singled out for discriminatory treatment, even though he has passed the Kansas Bar and is equally as competent as other Kansas lawyers to practice in that State. The fact that an attorney maintains an office and practices law in two States has no "rational connection" with his "fitness or capacity to practice law" (*Schware* v. *Board of Bar Examiners, supra,* 239) and does not without more give either State the right to deprive him of his livelihood in light of the requirements of the Equal Protection Clause of the Fourteenth Amendment.

DEPARTMENT OF REVENUE OF ILLINOIS ET AL. *v.* UNITED STATES ET AL.

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

No. 245. Decided November 6, 1961.

Judgment vacated and case remanded.

Reported below: 191 F. Supp. 723.

William G. Clark, Attorney General of Illinois, and *William C. Wines, Raymond S. Sarnow* and *A. Zola Groves,* Assistant Attorneys General, for appellants.

Solicitor General Cox and *John H. Caruthers* for the United States et al.

PER CURIAM.

In the light of the representations of the Solicitor General and upon consideration of the entire record, the judgment of the District Court is vacated. The case is remanded to the District Court for further consideration in the light of developments which have occurred since the injunction was issued, without prejudice to consideration by that court of any application by appellees for such temporary equitable relief as they may request pending the further proceedings hereby ordered.

CUMMINGS *v.* HUISKAMP, JUDGE, LEE COUNTY DISTRICT COURT, ET AL.

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

No. 511, Misc. Decided November 6, 1961.

PER CURIAM.

The appeal is dismissed.

PEPE *v.* DELAWARE.

APPEAL FROM THE SUPREME COURT OF DELAWARE.

No. 345. Decided November 6, 1961.

Appeal dismissed and certiorari denied.
Reported below: 53 Del. —, 171 A. 2d 216.

John Merwin Bader for petitioner.

PER CURIAM.

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

PONCA WHOLESALE MERCANTILE CO. *v.* ROCKY MOUNTAIN WHOLESALE CO., INC.

APPEAL FROM THE SUPREME COURT OF NEW MEXICO.

No. 352. Decided November 6, 1961.

Appeal dismissed for want of a substantial federal question.
Reported below: 68 N. M. 228, 360 P. 2d 643.

James T. Paulantis for appellant.

Louis C. Lujan for appellee.

PER CURIAM.

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

SCHROEDER ET AL. *v.* WILLIAMS ET AL.

APPEAL FROM THE SUPREME COURT OF NEBRASKA.

No. 357. Decided November 6, 1961.

Appeal dismissed and certiorari denied.
Reported below: 171 Neb. 792, 107 N. W. 2d 750.

James A. Lake, Sr. and *Roy Harrop* for appellants.

Charles Thone and *Clark O'Hanlon* 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.

MURPHY ET AL. *v.* WATERFRONT COMMISSION OF NEW YORK HARBOR.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

No. 362. Decided November 6, 1961.

Appeal dismissed and certiorari denied.
Reported below: 35 N. J. 62, 171 A. 2d 295.

Harold Krieger for appellants.

William P. Sirignano and *Irving Malchman* 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.

TWENTIETH CENTURY-FOX FILM CORP. *v.* GEROSA, COMPTROLLER OF NEW YORK CITY.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 373. Decided November 6, 1961.

Appeal dismissed and certiorari denied.

William W. Owens for appellant.

Leo A. Larkin, Stanley Buchsbaum and *Morris L. Heath* 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.

OWENS *v.* ELLIS, CORRECTIONS DIRECTOR, ET AL.

APPEAL FROM THE COURT OF CRIMINAL APPEALS OF TEXAS.

No. 506, Misc. Decided November 6, 1961.

PER CURIAM.

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

WINKLE *v.* BANNAN, WARDEN.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN.

No. 93, Misc. Decided November 6, 1961.

Certiorari granted; judgment vacated; case remanded.

Petitioner *pro se.*

Paul L. Adams, Attorney General of Michigan, *Joseph B. Bilitzke,* Solicitor General, and *Robert Weinbaum,* Assistant Solicitor General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and, as suggested by the Attorney General of Michigan, the case is remanded for consideration in light of *Mapp* v. *Ohio,* 367 U. S. 643.

COATES *v.* WALTERS.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 339, Misc. Decided November 6, 1961.

Appeal dismissed for want of a substantial federal question.
Reported below: 9 N. Y. 2d 242, 173 N. E. 2d 797.

Vito J. Cassan for appellant.

Louis J. Lefkowitz, Attorney General of New York, *Paxton Blair,* Solicitor General, and *Jean M. Coon,* Assistant Attorney General, for appellee.

PER CURIAM.

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

STILL *v.* NORFOLK & WESTERN RAILWAY CO.

CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA.

No. 48. Argued October 19, 1961.—Decided November 13, 1961.

1. Under the Federal Employers' Liability Act, a railroad cannot escape liability for personal injuries negligently inflicted upon an employee by proving that he had obtained his job by making false representations upon which the railroad rightfully relied in hiring him. Pp. 35–46.
2. *Minneapolis, St. P. & S. Ste. M. R. Co.* v. *Rock*, 279 U. S. 410, must be limited to its precise facts; and, in each case not involving the precise kind of fraud there involved, the terms "employed" and "employee," as used in the Act, must be interpreted according to their ordinary meaning, even though the employee's misrepresentations may have contributed to the injury or even to the accident upon which his claim is based. Pp. 37–46.

Reversed and remanded.

Sidney S. Sachs argued the cause for petitioner. With him on the briefs was *Lewis Jacobs.*

Joseph M. Sanders argued the cause for respondent. With him on the briefs was *Robert B. Claytor.*

John J. Naughton filed a brief for the Brotherhood of Railroad Trainmen, as *amicus curiae,* urging reversal.

MR. JUSTICE BLACK delivered the opinion of the Court.

The Federal Employers' Liability Act[1] requires railroads to pay damages for personal injuries negligently inflicted upon their employees. The question this case presents is whether a railroad can escape this statutory liability by proving that an employee so injured had obtained his job by making false representations upon which the railroad rightfully relied in hiring him.

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[1] 45 U. S. C. §§ 51–60.

Petitioner brought this action in a West Virginia state court seeking damages for personal injuries from the respondent Norfolk & Western Railway Company, for which, as of the date of his alleged injuries, he had worked continuously, except for a one-year interruption, for some six years. By special plea, the railroad set up as a defense the contention that petitioner was not "employed" by it within the meaning of the Act [2] and alleged in support of this defense: (1) that petitioner had made false and fraudulent representations in his application for employment with regard to his physical condition and other matters pertinent to his eligibility and capacity to serve as a railroad employee; (2) that petitioner would not have been hired but for these misrepresentations and the fact that they misled the railroad's hiring officials; and (3) that the very physical defects which had been fraudulently concealed from the railroad contributed to the injury upon which petitioner's action is based. Petitioner's demurrer to this plea was overruled and evidence by both parties was presented to a jury. When all the evidence was in, however, the trial court directed the jury to bring in a verdict for the defendant on the ground that

[2] "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury *while he is employed by such carrier* in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." 45 U. S. C. § 51. (Emphasis supplied.)

the undisputed evidence showed that the railroad had been deceived into hiring petitioner by petitioner's fraudulent misrepresentations as to his health and that these misrepresentations had a "direct causal connection" with the injuries upon which petitioner's action is based.

Throughout the proceedings in the trial court, petitioner contended that no verdict should be directed against him on the grounds, among others: (1) that the allegations of fraud set up in the railroad's special plea were not sufficient in law to state a defense under the Act; and (2) that even if the plea were sufficient in law, it rested upon questions of fact which should be submitted to the jury. On writ of error, the West Virginia Supreme Court of Appeals refused to overturn the trial court's action on either of these two grounds. Though we recognized that the case might possibly be disposed of on the second of these grounds, we granted certiorari to consider the important question raised by petitioner's first ground concerning the proper interpretation, scope and application of the Federal Employers' Liability Act.[3]

The railroad's primary contention, which was accepted as the principal basis of the action of the trial court, is that the sufficiency in law of its fraud defense was established by this Court's decision in *Minneapolis, St. Paul & S. Ste. Marie R. Co.* v. *Rock*.[4] That case involved the railroad's liability for the negligent injury of one Joe Rock, who had obtained his employment by a whole series of fraudulent misrepresentations. Rock had originally applied for a job in his own name and had been rejected when his physical condition was found to be such that he did not meet the railroad's requirements. Several days later, he reapplied for the same job and, in order to conceal the fact that he had previously been refused employment because of his health, represented himself to be

[3] 365 U. S. 877.

[4] 279 U. S. 410.

"John Rock," an apparently fictitious name he assumed for the purpose. He next arranged to have one Lenhart pose as "John Rock" and take the railroad's physical examination. When Lenhart passed the physical, the railroad hired Joe Rock on the mistaken belief that he was "John Rock" and that he had Lenhart's physical condition. On this unusual combination of facts, this Court held that Rock could not recover damages against the railroad under the Federal Employers' Liability Act, saying: "Right to recover may not justify or reasonably be rested on a foundation so abhorrent to public policy." [5]

The railroad here seeks to bring itself within the *Rock* decision by arguing that *Rock* established the principle that any false representation which deceives the employer and results in a railroad worker's getting a job he would not otherwise have obtained is sufficient to bar the worker from recovering the damages Congress has provided for railroad workers negligently injured in the honest performance of their duties under the Federal Employers' Liability Act. Although there is some language in the *Rock* opinion which might lend itself to such an interpretation, we think it plain that no such rule was ever intended. Certainly that was not the contemporaneous understanding of *Rock* among other courts as is plainly shown by the statements of Judge Nordbye when that interpretation of *Rock* was urged upon him only one year later at the trial of *Minneapolis, St. Paul & S. Ste. Marie R. Co.* v. *Borum:* "It is inconceivable to this court that Justice Butler intended to hold in the Rock case that every fraudulent violation of the rules framed for maintaining a certain standard of safety and efficiency of the employees would render such employment void and deny the defrauding employee any rights under the act. It seems quite clear that any fraud practiced by the plaintiff

[5] *Id.*, at 415.

herein at the most rendered the contract voidable." [6] And when the *Borum* case came here, this Court, although urged to do so, itself refused to extend *Rock* in any such manner.[7] The decision in *Borum,* considered in the light of the facts there involved, reflects clearly the contemporaneously understood limitations upon the *Rock* approach and the reluctance of this Court to extend the vague notions of public policy upon which that case rested to new factual situations.

Borum, who was forty-nine at the time, wanted a job with a railroad that had, in the interest of promoting safety and efficiency in its operations, adopted a rule against hiring men over forty-five. Knowing this, he told the railroad employment officials that he was only thirty-eight and, by this deliberate misrepresentation, obtained a job he would not otherwise have been given. Although Borum took the railroad's required physical examination, it apparently knew nothing of Borum's deception about his age until some seven years later, after he had lost both of his legs in an accident caused by the railroad's negligence and had filed suit against it for damages under the Federal Employers' Liability Act. Just before trial of this case, a last-minute investigation turned up Borum's real age and the railroad sought to rely upon this fact to escape its liability under the Act. This Court unanimously upheld the Minnesota courts' determination that Borum had a right to recover despite his admittedly fraudulent and material misrepresentation

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[6] Judge Nordbye's opinion is not reported but appears in the record in the *Borum* case certified to this Court. See also *Qualls* v. *Atchison, Topeka & Santa Fe R. Co.,* 112 Cal. App. 7, 17, 296 P. 645, 650: "This case [Rock] may be reasonably distinguished from the case at bar. In the Rock case the plaintiff was never really employed by the company. In the present case the plaintiff was employed." But cf. *Fort Worth & Denver City R. Co.* v. *Griffith,* 27 S. W. 2d 351, 354.

[7] 286 U. S. 447.

of his age, brushing aside the railroad's attempted reliance upon *Rock* on the ground "that the facts found, when taken in connection with those shown by uncontradicted evidence, are not sufficient to bring this case within the rule applied in *Minneapolis, St. P. & S. S. M. Ry. Co.* v. *Rock, supra,* or the reasons upon which that decision rests." [8]

In support of this conclusion, the Court in *Borum* pointed to a number of factual differences with the *Rock* case. The first mentioned, and apparently the most important of these in the mind of the Court, was the fact that Rock, unlike Borum, had obtained his employment as an "impostor" by presenting himself to the railroad under an assumed name after his initial application in his own name had been rejected. Secondly, the Court pointed to the fact that Rock, again unlike Borum, had never been approved as physically fit for employment by the railroad's examining surgeon. Finally, the Court made reference to the fact that under the railroad's own rules, it could not have discharged Borum for his misrepresentation because more than thirty days had passed since his original provisional employment and the rules made this action final unless changed within that period. But no one of these facts, as the Court recognized, was sufficient to justify a distinction between *Rock* and *Borum* based upon an acceptable reconciling principle. In both cases, the worker had been guilty of making a material, false and fraudulent representation without which he would not have been employed. And if such a method of obtaining employment was, as intimated in *Rock,* to be considered so "abhorrent to public policy" that the normal distinction between "void" and "voidable" contracts was to be ignored,[9] the mere existence of a rail-

[8] *Id.,* at 451.

[9] "The general rule is that fraud of this character renders a contract voidable rather than void, but that rule has been ignored in the Rock

road rule limiting the time for discharge without cause could not, of course, have overridden that policy. The Court therefore, as shown above, based its decision upholding Borum's right to recover upon all of the factual distinctions between his case and that of Rock and held merely that *Rock* would not be extended to cover these new facts.

This factual distinction of *Rock*, though sufficient to show the non-existence of any broad principle that material misrepresentations relied upon by a railroad in hiring bar recovery under the Act, proved completely unsatisfactory to establish affirmatively an intelligible guide by which lower courts could decide what misrepresentations were so "abhorrent to public policy" as to compel a forfeiture of the worker's right to recover under the Federal Employers' Liability Act. And since *Borum*, the lower federal courts and state courts have been forced to struggle with the baffling problem of how much and what kinds of fraud are sufficiently abhorrent without further guidance from this Court. Consequently, in almost all of such cases, the courts have been faced with a dilemma occasioned by the fact that both parties have been able to argue with considerable force that a decision in their favor is absolutely required by one or the other of the two decisions on the question by this Court. The result in a vast majority of these courts has been an acceptance of *Rock* as laying down a narrow public policy holding to which *Borum* establishes the need for courts to make broad exceptions in appropriate cases. And, perhaps not so surprisingly, most cases have been deemed appropriate ones for avoiding the harsh consequences of *Rock*, with the

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Case by the Supreme Court upon the ground that the safety of the traveling public is involved in a contract of this character, and for reasons of public policy it is held that the contract is void and, in effect, that appellee never became an employee of the appellant." *Fort Worth & Denver City R. Co.* v. *Griffith*, 27 S. W. 2d 351, 354.

courts creating new exceptions to allow recovery whenever a case did not fit within one already established.[10] Occasionally, as here, a worker has been held to be barred from recovery, but these few cases seem entirely

[10] See, *e. g.*, *Qualls* v. *Atchison, Topeka & Santa Fe R. Co.*, 112 Cal. App. 7, 17, 296 P. 645, 650 (misrepresentations as to past employment record held "immaterial"); *Powers* v. *Michigan Central R. Co.*, 268 Ill. App. 493, 498 (misrepresentations as to age and past employment record held insufficient to justify application of *Rock* because *Rock* "involved an unusual state of facts"); *Dawson* v. *Texas & Pacific R. Co.*, 123 Tex. 191, 196, 70 S. W. 2d 392, 394 (misrepresentations as to past employment record and medical history held no bar because they were "in nowise connected with the cause of his injury and not related to his fitness or his ability to discharge the duties required of him"); *Texas & New Orleans R. Co.* v. *Webster*, 123 Tex. 197, 201, 70 S. W. 2d 394, 396 (misrepresentations as to previous injury and litigation arising out of that injury held no bar because "it was not shown that his physical condition was such as to make his employment inconsistent with plaintiff in error's proper policy or its reasonable rules to insure discharge of its duty to select fit employees"); *Carter* v. *Peoria & Pekin Union R. Co.*, 275 Ill. App. 298, 303–304 (misrepresentations as to medical history held no bar because there was no "evidence to the effect that this former injury in any way disqualified or prevented appellant from properly performing his duties as switchman"); *Phillips* v. *Southern Pacific Co.*, 14 Cal. App. 2d 454, 457, 58 P. 2d 688, 690 (misrepresentations as to past employment record held no bar even though facilitated by the use of an assumed name because there was no showing of "a causal connection between the injury and the misstatements in the application for employment"); *Laughter* v. *Powell*, 219 N. C. 689, 698, 14 S. E. 2d 826, 832 (misrepresentations as to age held no bar because there was, despite these misrepresentations, "a contract of employment, even though voidable, by which the relation of master and servant, or employer and employee, was created between defendants and plaintiff"); *Newkirk* v. *Los Angeles Junction R. Co.*, 21 Cal. 2d 308, 320, 131 P. 2d 535, 543 (misrepresentations as to age held no bar because "[w]here employment is induced by fraudulent representations of the employee not going to the *factum* of the contract the employment exists although there may be ground for rescinding the contract, and recovery may be had from the employer for negligent injury to the employee at least where there is no causal connection between the

indistinguishable on any significant grounds from the many in which other courts have found or created exceptions.[11]

In this situation, it seems necessary for this Court, in the interest of the orderly administration of justice, to take a fresh look at this question in an effort to supply

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injury and the misrepresentation"); *Matthews* v. *Atchison, Topeka & Santa Fe R. Co.*, 54 Cal. App. 2d 549, 556, 129 P. 2d 435, 441 (misrepresentations as to age and past employment record held no bar even though these misrepresentations were facilitated by the use of an assumed name and even though they may have contributed to the worker's injury because the rule requiring "'a causal connection between the injury and the misstatements' refers to the happening of the injury, not to its effects"); *Blanton* v. *Northern Pacific R. Co.*, 215 Minn. 442, 446, 10 N. W. 2d 382, 384 (misrepresentations as to medical history and physical condition held no bar because "the jury could have found that there was no causal connection between the misrepresentation and plaintiff's hurt"); *Casso* v. *Pennsylvania R. Co.*, 219 F. 2d 303, 305 (misrepresentations as to medical history and physical condition held no bar because the misrepresentations were not "of such character that it 'substantially affected the examining surgeon's conclusion that he was in good health and acceptable physical condition'"); *Eresafe* v. *New York, New Haven & Hartford R. Co.*, 250 F. 2d 619, 621–622 (misrepresentations as to identity, medical history and physical condition held no bar because "[a] humane and realistic policy in such cases requires substantial proof of a direct causal connection between the misrepresentations made at the time of hiring and the subsequent injury to the employee"); *White* v. *Thompson*, 181 Kan. 485, 497–498, 312 P. 2d 612, 621 (misrepresentations as to medical history and physical condition held no bar because "it is not alleged the misrepresentations had causal relation to plaintiff's fitness to perform his duties and to the injuries he sustained, or that they substantially affected the medical examiner's conclusion that plaintiff was in good health and acceptable physical condition, or that defendant remained unaware of the deception until after plaintiff's injuries").

[11] Only four cases have been brought to the attention of this Court in which the railroad has been permitted to prevail on an issue raised by the defense of fraudulent procurement of employment. One of these, *Fort Worth & Denver City R. Co.* v. *Griffith*, 27 S. W. 2d 351,

an intelligible guide for future decisions. Having done so, we conclude that the *Rock* case, properly interpreted, lays down no general rule at all. In that case, the Court was confronted with an action by a railroad worker who, though undeniably an employee of the railroad in any practical or legal sense, had obtained his employment in what was deemed to be such an outrageous manner that it seemed to the Court at that time to be "abhorrent to public policy" to permit him to recover under the Act Congress had passed.[12] There is no occasion for us here to reconsider the correctness of that decision on the basis of the peculiar combination of facts involved in that case, for no such facts are involved here and, indeed, they may never arise again. We do conclude, however, that *Rock* must be limited to its precise facts. In the face of the legislative policy embodied in the Federal Employers' Liability Act that a railroad should pay damages to its workers and their families for personal injuries inflicted by the railroad's negligence upon those who perform its duties, considerations of public policy of the general kind

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was decided before *Borum* by a court which felt itself entirely bound by *Rock:* "In deference to the holding of the Supreme Court of the United States, which we feel constrained to follow, the judgment is reversed and is here rendered for the appellant." *Id.*, at 354. The other three are: *Clark* v. *Union Pacific R. Co.*, 70 Idaho 70, 211 P. 2d 402 (judgment for plaintiff reversed for failure to instruct the jury with regard to the railroad's fraud defense); *Southern Pac. Co.* v. *Libbey,* 199 F. 2d 341 (judgment for plaintiff reversed for exclusion of evidence relating to railroad's fraud defense); and *Talarowski* v. *Pennsylvania R. Co.*, 135 F. Supp. 503 (motion to strike the railroad's fraud defense denied). All four of these cases involved misrepresentations as to the worker's physical condition. Compare these cases with those cited in note 10, *supra,* especially with *Blanton* v. *Northern Pacific R. Co.; Casso* v. *Pennsylvania R. Co.; Eresafe* v. *New York, New Haven & Hartford R. Co.;* and *White* v. *Thompson.*

[12] For contemporaneous comment on the *Rock* decision, see Merrill, Misrepresentation to Secure Employment, 14 Minn. L. Rev. 646; Comment, 43 Harv. L. Rev. 141; Comment, 28 Mich. L. Rev. 357.

relied upon by the Court in *Rock* cannot be permitted to encroach further upon the special policy expressed by Congress in the Act. To facilitate this congressional policy, the terms "employed" and "employee" as used in the Act must, in all cases not involving the precise kind of fraud involved in *Rock,* be interpreted according to their ordinary meaning, and the status of employees who become such through other kinds of fraud, although possibly subject to termination through rescission of the contract of employment, must be recognized for purposes of suits under the Act. And this conclusion is not affected by the fact that an employee's misrepresentation may have, as is urged here, contributed to the injury or even to the accident upon which his action is based. This argument, which seems to have gained its popularity primarily as an exception by which the application of *Rock* could be avoided,[13] suggests that a railroad worker may be partially "employed" under the Act—that he may be able to recover for some injuries negligently inflicted upon him by the railroad and not be able to recover for others so inflicted, depending upon the circumstances of each particular injury. Even if this suggestion recommended itself to reason—which, other than as an exception to the broad

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[13] "A humane and realistic policy in such cases requires substantial proof of a direct causal connection between the misrepresentations made at the time of hiring and the subsequent injury to the employee, before any defense of fraud can be considered as a bar to a recovery." *Eresafe* v. *New York, New Haven & Hartford R. Co.,* 250 F. 2d 619, 621–622. Mention of a requirement of direct causal connection between the misrepresentations and the injury can be found in cases prior to *Rock,* but there too the requirement was used to permit recovery despite fraud. See, *e. g., St. Louis & San Francisco R. Co.* v. *Brantley,* 168 Ala. 579, 588, 53 So. 305, 307; *Lupher* v. *Atchison, Topeka & Santa Fe R. Co.,* 81 Kan. 585, 589, 106 P. 284, 286; *Galveston, Harrisburg & San Antonio R. Co.* v. *Harris,* 48 Tex. Civ. App. 434, 437, 107 S. W. 108, 110; *Louisville & Nashville R. Co.* v. *Lewis,* 218 Ky. 197, 205, 291 S. W. 401, 404.

principle mistakenly drawn from *Rock*, it plainly does not—we would not be free to accept it. For it finds no support at all in the history, purpose or language of the Act which provides recovery for any "injury or death resulting in whole or in part from the negligence of" the railroad [14] and there is no prior authority of this Court which requires or even permits us to disregard or impair this controlling declaration of public policy.[15]

The petitioner in this case was an employee under the Act and is therefore entitled to recover if he suffered injuries due to the railroad's negligence. It was therefore error to direct a verdict against him on the railroad's plea of fraud. The case is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE FRANKFURTER, concurring in a judgment for a new trial.

The issue before the Court in this case is not the sufficiency of the evidence to sustain a verdict for or against an employee claiming recovery for injuries under the Federal Employers' Liability Act, 45 U. S. C. §§ 51–58.

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[14] We do not, of course, mean to intimate that, in appropriate circumstances, evidence of a pre-existing physical defect might not be relevant on the issue of whether the injury complained of was caused by the railroad's negligence "in whole or in part" by tending to show either that the worker was not injured by the railroad at all, that, if injured, the railroad was not responsible for the full extent of the injury, or that damages should be diminished by the jury because of contributory negligence.

[15] Indeed, if the decisions of this Court can be said to point in either direction, it is toward the conclusion that a causal connection between the injury and the misrepresentations is totally irrelevant. For, as this Court expressly recognized, there was no such connection in *Rock*. "While his [Rock's] physical condition was not a cause of his injuries, it did have direct relation to the propriety of admitting him to such employment." 279 U. S., at 415.

It presents the question whether a misrepresentation by the petitioner regarding his health at the time the railroad hired him, bars recovery as a matter of law in view of our decision in *Minneapolis, St. P. & S. Ste. M. R. Co.* v. *Rock,* 279 U. S. 410. That decision held the statutory remedies unavailable because, as its author pithily stated it on two occasions, Rock "was an impostor." 279 U. S., at 412; *Minneapolis, St. P. & S. Ste. M. R. Co.* v. *Borum,* 286 U. S. 447, 450.

The Court does not now overrule *Rock* but says that it "must be limited to its precise facts." I take it this statement refers to the facts relevant to the result in that case; it does not mean that the plaintiff must be named Rock.

The scope of the *Rock* decision was defined in *Borum,* a case on which the Court's opinion now relies. The latter case came before this Court for review of the state court's refusal to set aside an arbitral finding that the plaintiff had been an employee. The judgment was affirmed on the basis that the evidence did not require a finding that deceit in obtaining employment had materially prejudiced the employer's efforts to select fit employees. The Court did not hold that the question of fraud in obtaining employment was improperly submitted to the trier of fact.

I would similarly dispose of this case; that is, upon a new trial the issue should not be withdrawn from the jury but submitted to it on the principle which governed the *Borum* case, *supra.*

MR. JUSTICE WHITTAKER, dissenting.

Claiming to have suffered injuries to his back by the negligence of fellow servants in the course of his employment by the respondent railroad in interstate commerce, petitioner brought this action against the railroad in a West Virginia court under the beneficent provisions of the Federal Employers' Liability Act. 45 U. S. C. §§ 51–58.

But application of the provisions of that Act is, in terms, made to depend upon, among other things, the existence of an employee status. At the conclusion of the evidence offered on the trial of the case before a jury, the railroad moved for a directed verdict upon the ground, among others, that petitioner did not occupy an employee status with the railroad. Believing that the undisputed evidence so clearly established that petitioner had procured his putative employment relation with the railroad by materially fraudulent misrepresentations to, and concealments from, the railroad and its examining physician of his now admitted congenitally defective back condition that reasonable men could not differ about it, the trial court granted the motion and directed the jury to, and it did, return a verdict for the railroad. The Supreme Court of Appeals of West Virginia declined to review, and we granted certiorari. 365 U. S. 877.

This Court now not only reverses that judgment, but it also—I think quite gratuitously and erroneously—restricts the case of *Minneapolis, St. P. & S. Ste. M. R. Co.* v. *Rock,* 279 U. S. 410, "to its precise facts." While the undisputed evidence of petitioner's fraud upon the railroad in procuring the putative employment relationship seems fairly clear to me, as it did to the two state courts, I concede that reasonable men may differ about it; and therefore, if we must here deal with such fact issues, I am able to say that the issue should not have been determined by the court as a matter of law, but instead should have been submitted to the jury for resolution. But I am unable to agree to what I think is the Court's gratuitous and erroneous restriction of the *Rock* case "to its precise facts," and so I dissent.

The question is not whether one who has obtained an employee status with a railroad by a flagrant fraud may maintain an action to recover for injuries willfully or negligently inflicted upon him under, and subject to the

conditions and defenses imposed by, the laws of the State in which the casualty occurred. Of course he may. His fraud, however flagrant, would not give the railroad a license to injure him. Rather the question is whether, despite his flagrant fraud in procuring the employee status, he may have the special benefits, and freedom from the normal defenses, given by Congress in the Federal Employers' Liability Act to one who has honestly acquired the status of and is truly an employee of a railroad. I think Congress did not intend to give those special benefits to a person who has acquired a putative employment relationship with a railroad by flagrant fraud, whether that fraud falls within the "precise facts" of the *Rock* case or within any of the myriad variations thereof.

While the fraud that induced the putative employment relationship in the *Rock* case was so clear that this Court was able to and did determine the question as one of law, and the somewhat less compelling evidence of fraud in this case does not legally require a like result, that case does stand for the age-old and sound proposition that fraud in the inducement of a contract vitiates the contract. I cannot agree to a repudiation of that principle.

Irrespective of its legally clear fraudulent facts, the fundamental issue in the *Rock* case was "whether, notwithstanding the means by which he got employment . . . [, petitioner] may maintain an action under the Federal Employers' Liability Act." 279 U. S., at 413. The same principle is involved here. Today, much as at the time of the *Rock* case, that "Act abrogates the fellow-servant rule [and] restricts the defenses of contributory negligence and assumption of risk," *id.*, at 413, yet here, as there, petitioner "in this action seeks, in virtue of its provisions and despite the rules of the common law, to hold [the railroad] liable for negligence of his fellow servants and notwithstanding his own negligence may have con-

tributed to cause his injuries." *Ibid.* Quite explicitly, Congress conferred the special remedies of that Act only upon those who occupy the status of employee. Surely that status, within the meaning of the Act, cannot be created by flagrant fraud, whether that fraud does or does not fall within the "precise facts" of the *Rock* case. Today, no less than at the time of the *Rock* case, "[t]he carriers owe a duty to their patrons [and to the public] as well as to those engaged in the operation of their railroads to take care . . . to exclude the unfit from their service. The enforcement of the Act is calculated to stimulate them to proper performance of that duty." 279 U. S., at 413–414. One who fraudulently obstructs the discharge of that duty surely cannot be permitted to profit from his own wrong. These are the underlying principles of the *Rock* case, and I submit that they are sound.

Even though the evidence of petitioner's fraud in procuring the putative employment relationship here may not be sufficiently clear to enable the Court to declare it as a matter of law, and hence the issue must be submitted to the jury, surely the jury could find, on proper and sufficient evidence, that petitioner procured the putative employment relationship by fraud; and, since fraud in the inducement of the contract vitiates the contract, such a finding would establish that petitioner never, in truth, acquired the employment status which Congress intended to protect by the extraordinary provisions of the Act. Otherwise, "[t]he deception by which [petitioner may have] secured employment [would] set at naught the carrier's reasonable rule and practice established to promote the safety of [the public, its patrons and its] employees and to protect commerce." Such fraud would directly oppose "the public interest because calculated to embarrass and hinder the carrier in the performance of

its duties and to defeat important purposes sought to be advanced by the Act." 279 U. S., at 414.

Only a fair measure of simple honesty is involved. Surely, Congress contemplated and expected that such would be necessary to create the status it was surrounding with these extraordinary rights.

Although the principles of the *Rock* case do not legally require a like result in this case, they properly do permit a jury, rightly instructed, to find, upon the aggravated evidence that so warrants, that the putative employment was induced by fraud. And if the jury should so find, it would follow that, in truth, the petitioner never did acquire and occupy an employee status within the meaning of the Act. This is but a simple application of the surely still valid principle that one may not profit from his own wrong. I think there is no call or reason here to tamper with the sound underlying principles of the *Rock* case.

HAMILTON *v.* ALABAMA.

CERTIORARI TO THE SUPREME COURT OF ALABAMA.

No. 32. Argued October 17, 1961.—Decided November 13, 1961.

In Alabama arraignment is a critical stage in a criminal proceeding, because only then may the defense of insanity be pleaded and pleas in abatement or motions challenging the composition of the grand jury be made. Petitioner was arraigned without counsel in Alabama for a capital offense, to which he pleaded not guilty, and subsequently he was convicted and sentenced to death. *Held:* Absence of counsel for petitioner at the time of his arraignment violated his rights under the Due Process Clause of the Fourteenth Amendment. Pp. 52–55.

271 Ala. 88, 122 So. 2d 602, reversed.

Constance B. Motley argued the cause for petitioner. On the brief were *Orzell Billingsley, Jr., Peter A. Hall, Thurgood Marshall, Jack Greenberg* and *James M. Nabrit III.*

George D. Mentz, Assistant Attorney General of Alabama, argued the cause for respondent. With him on the briefs were *MacDonald Gallion,* Attorney General, and *James W. Webb* and *John G. Bookout,* Assistant Attorneys General.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This is a capital case, petitioner having been sentenced to death on a count of an indictment charging breaking and entering a dwelling at night with intent to ravish.[1] Petitioner appealed, claiming he had been denied counsel at the time of arraignment. The Alabama Supreme Court, although stating that the right to counsel under the State and Federal Constitutions included the right to

[1] Another count charged breaking and entering with intent to steal.

counsel at the time of arraignment, did not reach the merits of the claim because to do so would require impeaching the minute entries at the trial,[2] which may not be done in Alabama on an appeal. 270 Ala. 184, 116 So. 2d 906. When petitioner sought certiorari here, Alabama responded saying that his remedy to attack the judgment with extrinsic evidence was by way of *coram nobis.* We denied certiorari. 363 U. S. 852.

Petitioner thereupon proceeded by way of *coram nobis* in the Alabama courts. The Supreme Court of Alabama, while recognizing that petitioner had a right under state law, 15 Ala. Code § 318, to be represented by counsel at the time of his arraignment, denied relief because there was no showing or effort to show that petitioner was "disadvantaged in any way by the absence of counsel [3] when he interposed his plea of not guilty." 271 Ala. 88, 93, 122 So. 2d 602, 607. The case is here on certiorari. 364 U. S. 931.

Arraignment under Alabama law is a critical stage in a criminal proceeding. It is then that the defense of insanity must be pleaded (15 Ala. Code § 423), or the opportunity is lost. *Morrell* v. *State,* 136 Ala. 44, 34 So. 208. Thereafter that plea may not be made except in the discretion of the trial judge, and his refusal to accept it is "not revisable" on appeal. *Rohn* v. *State,* 186 Ala. 5, 8, 65 So. 42, 43. Cf. *Garrett* v. *State,* 248 Ala. 612, 614–615, 29 So. 2d 8, 9. Pleas in abatement must also be made at the time of arraignment. 15 Ala. Code § 279. It is then

[2] The minute entries indicated that petitioner had counsel at the arraignment.

[3] Petitioner was first indicted for burglary and when arraigned had counsel present. Later, the present indictment, relating to the same incident, was returned. His counsel, who had been appointed, was advised that petitioner would be re-arraigned. But no lawyer appeared at this arraignment and we read the Alabama Supreme Court opinion to mean that the earlier appointment did not carry over.

that motions to quash based on systematic exclusion of one race from grand juries (*Reeves* v. *State,* 264 Ala. 476, 88 So. 2d 561), or on the ground that the grand jury was otherwise improperly drawn (*Whitehead* v. *State,* 206 Ala. 288, 90 So. 351), must be made.

Whatever may be the function and importance of arraignment in other jurisdictions,[4] we have said enough to show that in Alabama it is a critical stage in a criminal proceeding. What happens there may affect the whole trial. Available defenses may be as irretrievably lost, if not then and there asserted, as they are when an accused represented by counsel waives a right for strategic purposes. Cf. *Canizio* v. *New York,* 327 U. S. 82, 85–86. In *Powell* v. *Alabama,* 287 U. S. 45, 69, the Court said that an accused in a capital case "requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." The guiding hand of counsel is needed at the trial "lest the unwary concede that which only bewilderment or ignorance could justify or pay a penalty which is greater than the law of the State exacts for the

[4] Arraignment has differing consequences in the various jurisdictions. Under federal law an arraignment is a *sine qua non* to the trial itself—the preliminary stage where the accused is informed of the indictment and pleads to it, thereby formulating the issue to be tried. *Crain* v. *United States,* 162 U. S. 625, 644; Rules 10 and 11, Federal Rules of Criminal Procedure. That view has led some States to hold that arraignment is the first step in a trial (at least in case of felonies) at which the accused is entitled to an attorney. *People* v. *Kurant,* 331 Ill. 470, 163 N. E. 411.

In other States arraignment is not "a part of the trial" but "a mere formal preliminary step to an answer or plea." *Ex parte Jeffcoat,* 109 Fla. 207, 210, 146 So. 827, 828.

An arraignment normally, however, affords an opportunity of the accused to plead, as a condition precedent to a trial. *Fowler* v. *State,* 155 Tex. Cr. R. 35, 230 S. W. 2d 810. N. J. Rules of Practice, Rule 8:4–2.

offense which they in fact and in law committed." *Tomkins* v. *Missouri,* 323 U. S. 485, 489. But the same pitfalls or like ones face an accused in Alabama who is arraigned without having counsel at his side. When one pleads to a capital charge without benefit of counsel, we do not stop to determine whether prejudice resulted. *Williams* v. *Kaiser,* 323 U. S. 471, 475–476; *House* v. *Mayo,* 324 U. S. 42, 45–46; *Uveges* v. *Pennsylvania,* 335 U. S. 437, 442. In this case, as in those, the degree of prejudice can never be known. Only the presence of counsel could have enabled this accused to know all the defenses available to him and to plead intelligently.

Reversed.

OXENBERG *v.* ALASKA.

APPEAL FROM THE SUPREME COURT OF ALASKA.

No. 385. Decided November 13, 1961.

Appeal dismissed and certiorari denied.
Reported below: —— Alaska ——, 362 P. 2d 893.

Lyle L. Iversen 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.

HOYT *v.* FLORIDA.

APPEAL FROM THE SUPREME COURT OF FLORIDA.

No. 31. Argued October 19, 1961.—Decided November 20, 1961.

Appellant, a woman, killed her husband and was convicted in a Florida state court of second-degree murder. She claimed that her trial before an all-male jury violated her rights under the Fourteenth Amendment. A Florida statute provides, in substance, that no woman shall be taken for jury service unless she volunteers for it. *Held:* The Florida statute is not unconstitutional on its face or as applied in this case. Pp. 58–69.

(a) The right to an impartially selected jury assured by the Fourteenth Amendment does not entitle one accused of crime to a jury tailored to the circumstances of the particular case. It requires only that the jury be indiscriminately drawn from among those in the community eligible for jury service, untrammelled by any arbitrary and systematic exclusions. Pp. 58–59.

(b) The Florida statute is not unconstitutional on its face, since it is not constitutionally impermissible for a State to conclude that a woman should be relieved from jury service unless she herself determines that such service is consistent with her own special responsibilities. Pp. 59–65.

(c) It cannot be said that the statute is unconstitutional as applied in this case, since there is no substantial evidence in the record that Florida has arbitrarily undertaken to exclude women from jury service. Pp. 65–69.

119 So. 2d 691, affirmed.

Herbert B. Ehrmann argued the cause for appellant. With him on the brief were *Raya S. Dreben* and *C. J. Hardee, Jr.*

George R. Georgieff, Assistant Attorney General of Florida, argued the cause for appellee. With him on the brief was *Richard W. Ervin,* Attorney General.

Dorothy Kenyon and *Rowland Watts* filed a brief for the Florida Civil Liberties Union et al., as *amici curiae,* urging reversal.

649690 O–62–10

MR. JUSTICE HARLAN delivered the opinion of the Court.

Appellant, a woman, has been convicted in Hillsborough County, Florida, of second degree murder of her husband. On this appeal under 28 U. S. C. § 1257 (2) from the Florida Supreme Court's affirmance of the judgment of conviction, 119 So. 2d 691, we noted probable jurisdiction, 364 U. S. 930, to consider appellant's claim that her trial before an all-male jury violated rights assured by the Fourteenth Amendment. The claim is that such jury was the product of a state jury statute which works an unconstitutional exclusion of women from jury service.

The jury law primarily in question is Fla. Stat., 1959, § 40.01 (1). This Act, which requires that grand and petit jurors be taken from "male and female" citizens of the State possessed of certain qualifications,[1] contains the following proviso:

> "provided, however, that the name of no female person shall be taken for jury service unless said person has registered with the clerk of the circuit court her desire to be placed on the jury list."

Showing that since the enactment of the statute only a minimal number of women have so registered, appellant challenges the constitutionality of the statute both on its face and as applied in this case. For reasons now to follow we decide that both contentions must be rejected.

At the core of appellant's argument is the claim that the nature of the crime of which she was convicted peculiarly demanded the inclusion of persons of her own sex on the jury. She was charged with killing her husband by assaulting him with a baseball bat. An infor-

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[1] Jurors must be: "persons over the age of twenty-one years, who are citizens of this state, and who have resided in the state for one year and in their respective counties for six months, and who are duly qualified electors of their respective counties . . . ."

mation was filed against her under Fla. Stat., 1959, § 782.04, which punishes as murder in the second degree "any act imminently dangerous to another, and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual . . . ." As described by the Florida Supreme Court, the affair occurred in the context of a marital upheaval involving, among other things, the suspected infidelity of appellant's husband, and culminating in the husband's final rejection of his wife's efforts at reconciliation. It is claimed, in substance, that women jurors would have been more understanding or compassionate than men in assessing the quality of appellant's act and her defense of "temporary insanity." No claim is made that the jury as constituted was otherwise afflicted by any elements of supposed unfairness. Cf. *Irvin* v. *Dowd,* 366 U. S. 717.

Of course, these premises misconceive the scope of the right to an impartially selected jury assured by the Fourteenth Amendment. That right does not entitle one accused of crime to a jury tailored to the circumstances of the particular case, whether relating to the sex or other condition of the defendant, or to the nature of the charges to be tried. It requires only that the jury be indiscriminately drawn from among those eligible in the community for jury service, untrammelled by any arbitrary and systematic exclusions. See *Fay* v. *New York,* 332 U. S. 261, 284–285, and the cases cited therein. The result of this appeal must therefore depend on whether such an exclusion of women from jury service has been shown.

I.

We address ourselves first to appellant's challenge to the statute on its face.

Several observations should initially be made. We of course recognize that the Fourteenth Amendment reaches

not only arbitrary class exclusions from jury service based on race or color, but also all other exclusions which "single out" any class of persons "for different treatment not based on some reasonable classification." *Hernandez* v. *Texas,* 347 U. S. 475, 478. We need not, however, accept appellant's invitation to canvass in this case the continuing validity of this Court's dictum in *Strauder* v. *West Virginia,* 100 U. S. 303, 310, to the effect that a State may constitutionally "confine" jury duty "to males." This constitutional proposition has gone unquestioned for more than eighty years in the decisions of the Court, see *Fay* v. *New York, supra,* at 289–290, and had been reflected, until 1957, in congressional policy respecting jury service in the federal courts themselves.[2] Even were it to be assumed that this question is still open to debate, the present case tenders narrower issues.

Manifestly, Florida's § 40.01 (1) does not purport to exclude women from state jury service. Rather, the statute "gives to women the privilege to serve but does not impose service as a duty." *Fay* v. *New York, supra,* at 277. It accords women an absolute exemption from jury service unless they expressly waive that privilege.

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[2] From the First Judiciary Act of 1789, § 29, 1 Stat. 73, 88, to the Civil Rights Act of 1957, 71 Stat. 634, 638, 28 U. S. C. § 1861—a period of 168 years—the inclusion or exclusion of women on federal juries depended upon whether they were eligible for jury service under the law of the State where the federal tribunal sat. See *Ballard* v. *United States,* 329 U. S. 187, 191–192; *Glasser* v. *United States,* 315 U. S. 60, 64–65. By the Civil Rights Act of 1957 Congress made eligible for jury service "Any citizen of the United States," possessed of specified qualifications, 28 U. S. C. § 1861, thereby for the first time making qualifications for federal jury service wholly independent of those prescribed by state law. The effect of that statute was to make women eligible for federal jury service even though ineligible under state law. See *United States* v. *Wilson,* 158 F. Supp. 442, aff'd, 255 F. 2d 686. There is no indication that such congressional action was impelled by constitutional considerations. Cf. *Fay* v. *New York, supra,* at 290.

This is not to say, however, that what in form may be only an exemption of a particular class of persons can in no circumstances be regarded as an exclusion of that class. Where, as here, an exemption of a class in the community is asserted to be in substance an exclusionary device, the relevant inquiry is whether the exemption itself is based on some reasonable classification and whether the manner in which it is exercisable rests on some rational foundation.

In the selection of jurors Florida has differentiated between men and women in two respects. It has given women an absolute exemption from jury duty based solely on their sex, no similar exemption obtaining as to men.[3] And it has provided for its effectuation in a manner less onerous than that governing exemptions exercisable by men: women are not to be put on the jury list unless they have voluntarily registered for such service; men, on the other hand, even if entitled to an exemption, are to be included on the list unless they have filed a written claim of exemption as provided by law.[4] Fla. Stat., 1959, § 40.10.

In neither respect can we conclude that Florida's statute is not "based on some reasonable classification," and that it is thus infected with unconstitutionality. Despite the enlightened emancipation of women from the restrictions

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[3] Men may be exempt because of age, bodily infirmity, or because they are engaged in certain occupations. Fla. Stat., 1959, § 40.08.

[4] Under Fla. Stat., 1959, § 40.12, every person claiming an exemption, other than as provided with respect to women in § 40.01 (1), must file, annually, before December 31 with the clerk of the circuit court an affidavit of exemption and the grounds on which such claim is based. The affidavit is forwarded to the jury commissioners, who, if the affidavit is found sufficient, then omit the affiant from the jury list for the succeeding calendar year. In case exemption is denied, the claim to it may be renewed in any court in which the affiant is summoned as a juror during that year. The exemption for such year is lost, however, by failure to file the required affidavit before the end of the preceding year.

and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life. We cannot say that it is constitutionally impermissible for a State, acting in pursuit of the general welfare, to conclude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities.

Florida is not alone in so concluding. Women are now eligible for jury service in all but three States of the Union.[5] Of the forty-seven States where women are eligible, seventeen besides Florida, as well as the District of Columbia, have accorded women an absolute exemption based solely on their sex, exercisable in one form or another.[6] In two of these States, as in Florida, the

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[5] *Alabama,* Ala. Code, 1940 (Recompiled Vol. 1958), Tit. 30, § 21; *Mississippi,* Miss. Code Ann., 1942 (Recompiled Vol. 1956), § 1762; *South Carolina,* S. C. Code, 1952, § 38–52.

[6] *Alaska,* Alaska Comp. Laws Ann., 1949, § 55–7–24 Eighth; *Arkansas,* Ark. Stat., 1947, § 39–112; *District of Columbia,* D. C. Code, 1961, Tit. 11, § 1418; *Georgia,* Ga. Code Ann., 1933 (Supp. 1958), § 59–124; *Idaho,* Idaho Code, 1948, § 2–411 and (Supp. 1961) § 2–304; *Kansas,* Kan. Gen. Stat., 1949, § 43–116, § 43–117; *Louisiana,* La. Rev. Stat., 1950, § 15:172.1; *Minnesota,* Minn. Stat. Ann., 1947, § 593.04; (Supp. 1960) § 628.49; *Missouri,* Mo. Const., Art. I, § 22 (b); *Nevada,* Nev. Rev. Stat., 1957, § 6.020 (3); *New Hampshire,* N. H. Rev. Stat. Ann., 1955, § 500:1; *New York,* McKinney's N. Y. Laws, Judiciary Law (Supp. 1961), § 507 (7); *North Dakota,* N. D. Cent. Code, 1960, § 27–09–04; *Rhode Island,* R. I. Gen. Laws, 1956, § 9–9–11; *Tennessee,* Tenn. Code Ann., 1955, § 22–101, § 22–108; *Virginia,* Va. Code, 1950 (Replacement Vol. 1957, Supp. 1960), § 8–178 (30); *Washington,* Wash. Rev. Code, 1951, § 2.36.080; *Wisconsin,* Wis. Stat. Ann., 1957, § 6.015 (2).

In twenty-one States women, generally speaking, are eligible for jury service on the same basis and considerations as men: *Arizona,* Ariz. Rev. Stat. Ann., 1956, § 21–202, § 21–336; *California,* Calif. Code Civ. Proc., 1954, § 198, § 200, § 201; *Colorado,* Colo. Rev. Stat., 1953, § 78–1–1 (2), § 78–1–3, § 78–1–7; *Delaware,* Del. Code Ann.,

exemption is automatic, unless a woman volunteers for such service.[7] It is true, of course, that Florida could have limited the exemption, as some other States have done, only to women who have family responsibilities.[8] But we cannot regard it as irrational for a state legislature to consider preferable a broad exemption, whether born of the State's historic public policy or of a determination that it would not be administratively feasible to decide in each individual instance whether the family responsibilities of a prospective female juror were serious enough to warrant an exemption.

1953, Tit. 10, § 4504; *Hawaii,* Hawaii Const., Art. I, § 12; Hawaii Rev. Laws, 1955, § 221–3, § 221–4; *Illinois,* Smith-Hurd's Ill. Ann. Stat., 1935 (Supp. 1960), c. 78, § 4; *Indiana,* Burns' Ind. Ann. Stat., 1933 (Replacement Vol. 1946; Supp. 1961), § 4–3317; *Iowa,* Iowa Code Ann., 1950, § 607.2, § 607.3; *Kentucky,* Ky. Rev. Stat., 1960, § 29.035; *Maine,* Me. Rev. Stat., 1954, c. 116, § 7; *Maryland,* Michie's Md. Ann. Code, 1957, Art. 51, § 3 and (Supp. 1961) Art. 51, § 8 (women still have an absolute exemption in four counties); *Michigan,* Mich. Stat. Ann., 1938 (Supp. 1959), § 27.263, § 27.264; *Montana,* Mont. Rev. Code Ann., 1947, § 93–1304, § 93–1305; *New Jersey,* N. J. Stat. Ann., 1952 (Supp. 1960), § 2A:69–1, § 2A:69–2; *New Mexico,* N. M. Stat. Ann., 1953, § 19–1–2, § 19–1–31; *Ohio,* Page's Ohio Rev. Code Ann., 1954, § 2313.12, § 2313.16; *Oregon,* Ore. Rev. Stat., 1959, § 10.040, § 10.050; *Pennsylvania,* Purdon's Pa. Stat. Ann., 1930, Tit. 17, § 1279, § 1280; *South Dakota,* S. D. Code, 1939 (Supp. 1960), § 32.1001, § 32.1002; *Vermont,* Vt. Stat. Ann., 1958, Tit. 12, § 1410; *West Virginia,* W. Va. Code, 1955 (Supp. 1960), § 5262.

[7] *Louisiana,* La. Rev. Stat., 1950, § 15:172.1; *New Hampshire,* N. H. Rev. Stat. Ann., 1955, § 500:1.

[8] In eight States women may be excused if they have family responsibilities which would make jury service an undue hardship: *Connecticut,* Conn. Gen. Stat. Rev., 1958, c. 884, § 51–218; *Massachusetts,* Mass. Gen. Laws Ann., 1959, c. 234, § 1, § 1A; *Nebraska,* Neb. Rev. Stat., 1943 (Reissue Vol. 1956), § 25–1601.01, § 25–1601.02; *North Carolina,* N. C. Gen. Stat., 1943 (Recompiled Vol. 1953; Supp. 1959), § 9–19; *Oklahoma,* Okla. Stat. Ann., 1951 (Supp. 1960), Tit. 38, § 28; *Texas,* Vernon's Tex. Rev. Civ. Stat., 1926 (Supp. 1960), Art. 2135; *Utah,* Utah Code Ann., 1953, § 78–46–10 (14); *Wyoming,* Wyo. Comp. Stat., 1945 (Supp. 1957), § 12–104.

Likewise we cannot say that Florida could not reasonably conclude that full effectuation of this exemption made it desirable to relieve women of the necessity of affirmatively claiming it, while at the same time requiring of men an assertion of the exemptions available to them. Moreover, from the standpoint of its own administrative concerns the State might well consider that it was "impractical to compel large numbers of women, who have an absolute exemption, to come to the clerk's office for examination since they so generally assert their exemption." *Fay* v. *New York, supra,* at 277; compare 28 U. S. C. § 1862; H. R. Rep. No. 308, 80th Cong., 1st Sess. A156 (1947).[9]

Appellant argues that whatever may have been the design of this Florida enactment, the statute in practical operation results in an exclusion of women from jury service, because women, like men, can be expected to be available for jury service only under compulsion. In this connection she points out that by 1957, when this trial took place, only some 220 women out of approximately 46,000 registered female voters in Hillsborough County—constituting about 40 per cent of the total voting population of that county[10]—had volunteered for jury duty since the limitation of jury service to males, see *Hall* v. *Florida,* 136 Fla. 644, 662–665, 187 So. 392, 400–401, was removed by § 40.01 (1) in 1949. Fla. Laws 1949, c. 25,126.

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[9] 28 U. S. C. § 1862 exempts from federal jury duty those in active service in the armed forces, members of federal or local police and fire departments, and certain actively engaged federal, state and local public officials. The House Report on the bill states:

"This section [§ 1862] makes provision for specific exemption of classes of citizens usually excused from jury service in the interest of the public health, safety, or welfare. The inclusion in the jury list of persons so exempted usually serves only to waste the time of the court."

[10] 114,247, of which some 68,000 were men.

This argument, however, is surely beside the point. Given the reasonableness of the classification involved in § 40.01 (1), the relative paucity of women jurors does not carry the constitutional consequence appellant would have it bear. "Circumstances or chance may well dictate that no persons in a certain class will serve on a particular jury or during some particular period." *Hernandez* v. *Texas, supra,* at 482.

We cannot hold this statute as written offensive to the Fourteenth Amendment.

II.

Appellant's attack on the statute as applied in this case fares no better.

In the year here relevant Fla. Stat., 1955, § 40.10 in conjunction with § 40.02 required the jury commissioners, with the aid of the local circuit court judges and clerk, to compile annually a jury list of 10,000 inhabitants qualified to be jurors. In 1957 the existing Hillsborough County list had become exhausted to the extent of some 3,000 jurors. The new list was constructed by taking over from the old list the remaining some 7,000 jurors, including 10 women, and adding some 3,000 new male jurors to build up the list to the requisite 10,000. At the time some 220 women had registered for jury duty in this county, including those taken over from the earlier list.

The representative of the circuit court clerk's office, a woman, who actually made up the list testified as follows as to her reason for not adding others of the 220 "registered" women to the 1957 list: "Well, the reason I placed ten is I went back two or three, four years, and noticed how many women they had put on before and I put on approximately the same number." She further testified: "Mr. Lockhart [one of the jury commissioners] told me at one time to go back approximately two or three years to get the names because they were recent women that had signed up, because in this book [the female juror

register], there are no dates at the beginning of it, so we can't—I don't know exactly how far back they do go and so I just went back two or three years to get my names." When read in light of Mr. Lockhart's testimony, printed in the margin,[11] it is apparent that the idea was to avoid

[11] Mr. Lockhart testified:

"Q. All right. Now, getting back to March 8, 1957, how many eligible female women were registered in that book?

"A. Well, I don't know how many were qualified, but they have the names on there of about 220.

"Q. Approximately 220?

"A. As I say, from 1952, on, since I went back on the second time, there has only been about 35 that has registered with the Clerk of the Circuit Court.

"Q. All right, sir. Now, were there any eligible female names left off of this jury list which you've prepared?

"A. There probably were.

"Q. On March 8, 1957?

"A. From the last four years, we have been averaging about ten to twelve on each list.

"Q. All right. Why is that, Mr. Lockhart?

"A. Because since 1952, there has only been about 30, 35 that's qualified to, I mean, went down and registered for jury duty. You don't have much to choose from.

"Q. Well, now, how do you select women's names from that registration book?

"A. Well, we just have to take the names on there, that's all.

"Q. Well, you've used some system with reference to that book, do you not?

"A. Well, we try to check them through. They did before this last year. I tried to check them through the City Directory. You'll find that a good many of the women folks now are over 65. In fact, one of them is approximately eighty.

"Q. What I am trying to get at, Mr. Lockhart, is this. If there were only ten women's names, as you testified, went into the present jury list and there were at the time about 220 eligible women who had registered for jury service, why the difference between ten and 220 which were apparently eligible?

"A. Well, they have been put over a spread of years.

"Q. Well, how do you do that?

"A. Well, every year, there is a new jury list and we put on ten or twelve every jury list. In fact, along seven or eight years ago, it was

listing women who though registered might be disqualified because of advanced age or for other reasons.

Appellant's showing falls far short of giving this procedure a sinister complexion. It is true of course that the proportion of women on the jury list (10) to the total of those registered for such duty (some 220) was less than 5%, and not 27% as the trial court mistakenly said and

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pretty hard to see whether—the status changed so rapidly, it was pretty hard to know whether they would be qualified or not.

"Q. Would I be correct, then, in saying that you omitted approximately 210 eligible women's names when you compiled this list?

"A. I wouldn't say they were eligible because we didn't check them. We don't check every name on the registration books.

"Q. I'm talking about this registration book in the Clerk of the Circuit Court's office, Mr. Lockhart, where the women are required to come there and register for jury duty?

"A. You can say it's 220 names on that book. There is.

"Q. All right. If there are 220 eligible women on that book—

"A. I don't know if they are eligible or not.

"Q. What I want to know, then, is why you picked just ten out of that 220 to go into this jury list?

"A. Well, we picked—we have average, for the last four years, ten to twelve on each list.

. . . . .

"Q. Mr. Lockhart, in making up this list, jury list, from which the present panel was drawn, did you attempt to comply with Florida Statute, Section 40.01, sub-section (1), in making up that list?

"A. Would you mind reading it to me?

"Q. Well, that's the Statute, Mr. Lockhart, governing the qualifications for jurors and I will read it, if you like. [§ 40.01 read.] Now, what I am asking, Mr. Lockhart, is, did you purport to comply with that statute when you prepared this jury list?

"A. Yes, sir.

"Q. All right. Did you put in this list on March 8, 1957, any women or female's names who were registered voters but who had not registered with the Clerk of the Circuit Court?

"A. If it was there, we didn't intend to. We checked the registration. The law requires that to be on registration.

"Q. In other words, you would say that you did not?

"A. Yes. That's right. I doubt what, with that small number of names. They were checked with the registration office."

the state appellate court may have thought. But when those listed are compared with the 30 or 35 women who had registered since 1952 (note 11, p. 66) the proportion rises to around 33%, hardly suggestive of an arbitrary, systematic exclusionary purpose. Equally unimpressive is appellant's suggested "male" proportion which we are asked to contrast with the female percentage. The male proportion is derived by comparing the number of males contained on the jury list with the total number of male electors in the county. But surely the resulting proportion is meaningless when the record does not even reveal how many of such electors were qualified for jury service, how many had been granted exemptions (notes 3 and 4, p. 61), and how many on the list had been excused when first called. (*Id.*)

This case in no way resembles those involving race or color in which the circumstances shown were found by this Court to compel a conclusion of purposeful discriminatory exclusions from jury service. *E. g., Hernandez* v. *Texas, supra; Norris* v. *Alabama,* 294 U. S. 587; *Smith* v. *Texas,* 311 U. S. 128; *Hill* v. *Texas,* 316 U. S. 400; *Eubanks* v. *Louisiana,* 356 U. S. 584. There is present here neither the unfortunate atmosphere of ethnic or racial prejudices which underlay the situations depicted in those cases, nor the long course of discriminatory administrative practice which the statistical showing in each of them evinced.

In the circumstances here depicted, it indeed "taxes our credulity," *Hernandez* v. *Texas, supra,* at 482, to attribute to these administrative officials a deliberate design to exclude the very class whose eligibility for jury service the state legislature, after many years of contrary policy, had declared only a few years before. (See p. 64, *supra.*) It is sufficiently evident from the record that the presence on the jury list of no more than ten or twelve women in the earlier years, and the failure to add in 1957 more women to those already on the list, are attributable

not to any discriminatory motive, but to a purpose to put on the list only those women who might be expected to be qualified for service if actually called. Nor is there the slightest suggestion that the list was the product of any plan to place on it only women of a particular economic or other community or organizational group. Cf. *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217; *Glasser* v. *United States*, 315 U. S. 60, 83–87. And see also *Fay* v. *New York*, *supra*, at 287.

Finally, the disproportion of women to men on the list independently carries no constitutional significance. In the administration of the jury laws proportional class representation is not a constitutionally required factor. See *Akins* v. *Texas*, 325 U. S. 398, 403; *Cassell* v. *Texas*, 339 U. S. 282, 286–287; *Fay* v. *New York*, *supra*, at 290–291.

Finding no substantial evidence whatever in this record that Florida has arbitrarily undertaken to exclude women from jury service, a showing which it was incumbent on appellant to make, *Hernandez* v. *Texas*, *supra*, at 479–480; *Fay* v. *New York*, *supra*, at 285, we must sustain the judgment of the Supreme Court of Florida. Cf. *Akins* v. *Texas*, *supra*.

Affirmed.

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

We cannot say from this record that Florida is not making a good faith effort to have women perform jury duty without discrimination on the ground of sex. Hence we concur in the result, for the reasons set forth in Part II of the Court's opinion.

McLEMORE *v.* MISSISSIPPI.

APPEAL FROM THE SUPREME COURT OF MISSISSIPPI.

No. 410. Decided November 20, 1961.

Appeal dismissed and certiorari denied.
Reported below: 241 Miss. 664, 125 So. 2d 86, 126 So. 2d 236.

W. E. Gore, Sr. 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.

FRUHLING *v.* AMALGAMATED HOUSING CORP. ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 419. Decided November 20, 1961.

Appeal dismissed for want of a substantial federal question.
Reported below: 9 N. Y. 2d 541, 175 N. E. 2d 156.

Samuel B. Waterman for appellant.

Louis J. Lefkowitz, Attorney General of New York, *Paxton Blair,* Solicitor General, and *Daniel M. Cohen,* Assistant Attorney General, for appellees.

PER CURIAM.

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

WESTERN UNION TELEGRAPH CO. *v.* PENNSYLVANIA.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

No. 15. Argued October 12, 1961.—
Decided December 4, 1961.

1. Appellant was incorporated under the laws of New York and has its principal place of business there. It transacts a world-wide telegraphic money order business. Pennsylvania sued in a state court and obtained a judgment under a state statute for the escheat to itself of the amount of unclaimed money held by appellant and arising out of money orders bought in Pennsylvania and never cashed by the payees or refunded to the senders. *Held:* Pennsylvania had no power to render a judgment of escheat which would bar New York or any other State from escheating the same property, and, therefore, the judgment was void under the Due Process Clause of the Fourteenth Amendment. Pp. 72–77.

2. The controversy between the States as to which of them is entitled to this money can be settled by a suit in this Court under Art. III, § 2, of the Constitution. Pp. 77–80.

400 Pa. 337, 162 A. 2d 617, reversed.

John G. Buchanan, Jr. argued the cause for appellant. With him on the briefs were *John G. Buchanan* and *John H. Waters.*

A. Jere Creskoff argued the cause for appellee. With him on the brief were *David Stahl,* Attorney General of Pennsylvania, and *Jack M. Cohen,* Deputy Attorney General.

Ruth Kessler Toch, Assistant Solicitor General of New York, argued the cause for the State of New York, as *amicus curiae,* urging reversal. With her on the brief were *Louis J. Lefkowitz,* Attorney General, and *Paxton Blair,* Solicitor General.

MR. JUSTICE BLACK delivered the opinion of the Court.

Pennsylvania law provides that "any real or personal property within or subject to the control of this Commonwealth . . . shall escheat to the Commonwealth" whenever it "shall be without a rightful or lawful owner," "remain unclaimed for the period of seven successive years" or "the whereabouts of such owner . . . shall be and remain unknown for the period of seven successive years." [1] These proceedings were begun under that law in a Pennsylvania state court to escheat certain obligations of the Western Union Telegraph Company—alleged to be "property within" Pennsylvania—to pay sums of money owing to various people who had left the monies unclaimed for more than seven years and whose whereabouts were unknown. The facts were stipulated.

Western Union is a corporation chartered under New York law with its principal place of business in that State. It also does business and has offices in all the other States except Alaska and Hawaii, in the District of Columbia, and in foreign countries, and was from 1916 to 1934 subject to regulation by the I. C. C. and since then by the F. C. C. In addition to sending telegraphic messages throughout its world-wide system, it carries on a telegraphic money order business which commonly works like this. A sender goes to a Western Union office, fills out an application and gives it to the company clerk who waits on him together with the money to be sent and the charges for sending it. A receipt is given the sender and a telegraph message is transmitted to the company's office nearest to the payee directing that office to pay the money order to the payee. The payee is then notified and upon properly identifying himself is given a negotiable draft, which he can either endorse and cash at once or keep for use in the future. If the payee cannot be located for

[1] Act of July 29, 1953, P. L. 986, § 1 (27 Purdon's Statutes § 333).

delivery of the notice, or fails to call for the draft within 72 hours, the office of destination notifies the sending office. This office then notifies the original sender of the failure to deliver and makes a refund, as it makes payments to payees, by way of a negotiable draft which may be either cashed immediately or kept for use in the future.

In the thousands of money order transactions carried on by the company, it sometimes happens that it can neither make payment to the payee nor make a refund to the sender. Similarly payees and senders who accept drafts as payment or refund sometimes fail to cash them. For this reason large sums of money due from Western Union for undelivered money orders and unpaid drafts accumulate over the years in the company's offices and bank accounts throughout the country. It is an accumulation of this kind that Pennsylvania seeks to escheat here—specifically, the amount of undisbursed money held by Western Union arising out of money orders bought in Pennsylvania offices to be transmitted to payees in Pennsylvania and other States, chiefly other States.

Western Union, while not claiming these monies for itself, challenged Pennsylvania's right to take ownership of them for itself.[2] Among other grounds the company urged that a judgment of escheat for Pennsylvania in its courts would not protect the company from multiple liability either in Pennsylvania or in other States. Its argument in this respect was that senders of money orders and holders of drafts would not be bound by the Pennsylvania judgment because the service by publication did not, for two reasons, give the state court jurisdiction: (1) that under the doctrine of *Pennoyer* v. *Neff,* 95 U. S. 714, the presence of property, called a "res," within the State is a prerequisite for service by publication and that these obligations did not constitute such property within Penn-

[2] In its answer Western Union did claim these monies, but it has since abandoned this ground.

sylvania, and (2) that the notice by publication given in this case did not give sufficient information or afford sufficient likelihood of actual notice to meet due process requirements. In addition, Western Union urged that there might be escheats claimed by other States which would not be bound by the Pennsylvania judgment because they were not and could not be made parties to this Pennsylvania proceeding. Western Union's apprehensions that other States might later escheat the same funds were buttressed by the Pennsylvania court's finding that New York had already seized and escheated a part of the very funds here claimed by Pennsylvania. With reference to this the Pennsylvania Court of Common Pleas said: "We take this opportunity of stating that we do not recognize New York's authority to escheat that money, but since it has been done we have no jurisdiction over this sum." 73 Dauphin County Rep. 160, 173. Both the Pennsylvania trial court and the State Supreme Court rejected the contentions of Western Union and declared the unclaimed obligations escheated. 73 Dauphin County Rep. 160; 74 Dauphin County Rep. 49; 400 Pa. 337, 162 A. 2d 617. Since the record showed substantial questions as to the jurisdiction of the Pennsylvania courts over the individual owners of the unclaimed monies and as to the power of the State of Pennsylvania to enter a binding judgment that would protect Western Union against subsequent liability to other States, we noted probable jurisdiction. 365 U. S. 801.

We find it unnecessary to decide any of Western Union's contentions as to the adequacy of notice to and validity of service on the individual claimants by publication. For as we view these proceedings, there is a far more important question raised by this record—whether Pennsylvania had power at all to render a judgment of escheat which would bar New York or any other State from escheating this same property.

Pennsylvania does not claim and could not claim that the same debts or demands could be escheated by two States. See *Standard Oil Co.* v. *New Jersey,* 341 U. S. 428, 443. And our prior opinions have recognized that when a state court's jurisdiction purports to be based, as here, on the presence of property within the State, the holder of such property is deprived of due process of law if he is compelled to relinquish it without assurance that he will not be held liable again in another jurisdiction or in a suit brought by a claimant who is not bound by the first judgment. *Anderson National Bank* v. *Luckett,* 321 U. S. 233, 242–243; *Security Savings Bank* v. *California,* 263 U. S. 282, 286–290. Applying that principle, there can be no doubt that Western Union has been denied due process by the Pennsylvania judgment here unless the Pennsylvania courts had power to protect Western Union from any other claim, including the claim of the State of New York that these obligations are property "within" New York and are therefore subject to escheat under its laws. But New York was not a party to this proceeding and could not have been made a party, and, of course, New York's claims could not be cut off where New York was not heard as a party. Moreover, the potential multi-state claims to the "property" which is the subject of this escheat make it not unlikely that various States will claim *in rem* jurisdiction over it. Therefore, Western Union was not protected by the Pennsylvania judgment, for a state court judgment need not be given full faith and credit by other States as to parties or property not subject to the jurisdiction of the court that rendered it. *Pennoyer* v. *Neff,* 95 U. S. 714; *Riley* v. *New York Trust Co.,* 315 U. S. 343.

It is true that, on the facts there presented, this Court said in *Standard Oil Co.* v. *New Jersey,* 341 U. S. 428, 443, that "The debts or demands . . . having been taken from the appellant company by a valid judgment of New Jer-

sey, the same debts or demands against appellant [Standard Oil] cannot be taken by another state. The Full Faith and Credit Clause bars any such double escheat." But the Court went on to point out that "The claim of no other state to this property is before us and, of course, determination of any right of a claimant state against New Jersey for the property escheated by New Jersey must await presentation here." Here, unlike *Standard Oil,* there is in reality a controversy between States, possibly many of them, over the right to escheat part or all of these funds.

The claims of New York are particularly aggressive, not merely potential, but actual, active and persistent—best shown by the fact that New York has already escheated part of the very funds originally claimed by Pennsylvania. These claims of New York were presented to us in both the brief and oral argument of that State as *amicus curiae.* In presenting its claims New York also called our attention to the potential claims of other States for escheat based on their contacts with the separate phases of the multi-state transactions out of which these unclaimed funds arose, including: the State of residence of the payee, the State of the sender, the State where the money order was delivered, and the State where the fiscal agent on which the money order was drawn is located. Arguments more than merely plausible can doubtless be made to support claims of all these and other States to escheat all or parts of all unclaimed funds held by Western Union. And the large area of the company's business makes it entirely possible that *every State* may now or later claim a right to participate in these funds. But even if, as seems unlikely, no other State will assert such a claim, the active controversy between New York and Pennsylvania is enough in itself to justify Western Union's contention that to require it to pay this money to Pennsylvania before New York has had its full day in court might

force Western Union to pay a single debt more than once and thus take its property without due process of law.

Our Constitution has wisely provided a way in which controversies between States can be settled without subjecting individuals and companies affected by those controversies to a deprivation of their right to due process of law. Article III, § 2 of the Constitution gives this Court original jurisdiction of cases in which a State is a party. The situation here is in all material respects like that which caused us to take jurisdiction in *Texas* v. *Florida,* 306 U. S. 398. There four States sought to collect death taxes out of an estate. The tax depended upon the domicile of the decedent, and this Court said that "By the law of each state a decedent can have only a single domicile for purposes of death taxes . . . ." *Id.,* at 408. Thus, there was only one tax due to only one State. The estate was sufficient to pay the tax of any one State, but the total of the claims of the four States greatly exceeded the net value of the estate. For this reason, as we said, the risk of loss to the State of domicile was real and substantial, unless we exercised our jurisdiction. Under these circumstances we exercised our original jurisdiction to avoid "the risk of loss ensuing from the demands in separate suits of rival claimants to the same debt or legal duty." *Id.,* at 405. The rival state claimants here, as in *Texas* v. *Florida,* can invoke our original jurisdiction.

While we have previously decided some escheat cases where it was apparent that rival state claims were in the offing, we have not in any of them closed the door to the exercise of our jurisdiction. In *Connecticut Mutual Life Ins. Co.* v. *Moore,* 333 U. S. 541, we sustained the power of New York to take custody as a conservator of unclaimed funds due persons insured by that company through policies issued for delivery in New York to persons then resident in New York. In doing so we rejected an argument that the State of domicile of the insurance companies

involved alone had jurisdiction to escheat. But there we were careful to point out that "The problem of what another State than New York may do is not before us. That question is not passed upon." *Id.*, at 548. Even though this reservation was made and New York only took custody of the funds, leaving the way clear for all claimants to bring action to recover them at any time, there were dissents urging that a way should be then found for the conflicting claims of States to be determined. Several years later a divided Court in *Standard Oil Co.* v. *New Jersey*, 341 U. S. 428, upheld the right of New Jersey to escheat certain unclaimed shares of stock and dividends due stockholders and employees of the Standard Oil Company. In that case New Jersey's jurisdiction to escheat was rested, at least in part, on the fact that Standard Oil was a domiciliary of that State. Again, however, the Court justified its conclusion by saying as to claims of other States: "The claim of no other state to this property is before us and, of course, determination of any right of a claimant state against New Jersey for the property escheated by New Jersey must await presentation here." *Id.*, at 443. Later New York sought leave to file an original action here against New Jersey, alleging a controversy between the two States over jurisdiction to take custody of monies arising out of unclaimed travelers checks, outstanding for more than 15 years, issued by American Express Company, a joint stock company organized under New York law with its principal office in New York. Answering, New Jersey pointed out that under New York's then controlling law [3] it disclaimed any purpose to escheat property claimed for escheat by any other State. In this state of the New York law, we refused to take jurisdiction. 358 U. S. 924. By an act effective March 29, 1960,[4] New York amended its law eliminating

[3] McKinney's N. Y. Laws, § 1309, Abandoned Property Law.

[4] N. Y. Laws 1960, c. 307.

the disclaimer and now strongly asserts its claim to these funds under its new law.

The rapidly multiplying state escheat laws, originally applying only to land and other tangible things but recently moving into the elusive and wide-ranging field of intangible transactions have presented problems of great importance to the States and persons whose rights will be adversely affected by escheats.[5] This makes it imperative that controversies between different States over their right to escheat intangibles be settled in a forum where all the States that want to do so can present their claims for consideration and final, authoritative determination. Our Court has jurisdiction to do that. Whether and under what circumstances we will exercise our jurisdiction to hear and decide these controversies ourselves in particular cases, and whether we might under some circumstances refer them to United States District Courts, we need not now determine. Cf. *Massachusetts* v. *Mis-*

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[5] The magnitude of the problem involved is illustrated by the fact that, since 1946, at least 20 States have enacted legislation to bring or enlarge the coverage of intangible transactions under their escheat laws. Florida, 1961; Idaho, 1961; Illinois, 1961; Kentucky, 1960; Virginia, 1960; California, 1959; New Mexico, 1959; Louisiana, 1958; Oregon, 1957; Utah, 1957; Arizona, 1956; Washington, 1955; Pennsylvania, 1953; Massachusetts, 1950; Arkansas, 1949; Connecticut, 1949; New York, 1949; Michigan, 1947; North Carolina, 1947; New Jersey, 1946. Of these, 10—Arizona, California, Florida, Idaho, Illinois, New Mexico, Oregon, Utah, Virginia, and Washington—have adopted in substance the Uniform Disposition of Unclaimed Property Act promulgated by the National Conference of Commissioners on Uniform State Laws in 1955. In addition legislation has been under consideration by other States. For discussion of this and a general description of the growing importance of these laws, see Ely, Escheats: Perils and Precautions, 15 Bus. Law. 791.

The record in this very case shows that Massachusetts is laying claim to funds of Western Union on precisely the same ground that Pennsylvania asserted here, thus bringing Massachusetts into conflict with New York's claims too.

souri, 308 U. S. 1, 18–20. Nor need we, at this time, attempt to decide the difficult legal questions presented when many different States claim power to escheat intangibles involved in transactions taking place in part in many States. It will be time enough to consider those complicated problems when all interested States—along with all other claimants—can be afforded a full hearing and a final, authoritative determination.[6] It is plain that Pennsylvania courts, with no power to bring other States before them, cannot give such hearings. They have not done so here; they have not attempted to do so. As a result, their judgments, which cannot, with the assurance that comes only from a full trial with all necessary parties present, protect Western Union from having to pay the same single obligation twice, cannot stand. When this situation developed, the Pennsylvania courts should have dismissed the case.

Accordingly, the judgment of the Supreme Court of Pennsylvania is reversed, and the cause is remanded to that Court for further proceedings not inconsistent with this opinion.

It is so ordered.

Memorandum of MR. JUSTICE STEWART.

The appellant is a New York corporation with its principal office in that State. The funds representing these unpaid money orders are located there. I think only New York has power to escheat the property involved in this case. For that reason, while disagreeing with the Court's opinion, which for me creates more problems than it solves, I join in the judgment of reversal.

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[6] In *Texas* v. *Florida,* 306 U. S. 398, 405, we held that individual claimants "whose presence is necessary or proper for the determination of the case or controversy between the states are properly made parties . . . ."

Syllabus.

INTERSTATE COMMERCE COMMISSION *v.* J–T TRANSPORT CO., INC., ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI.

No. 17. Argued October 17–18, 1961.—Decided December 4, 1961.*

Under § 209 (b) of the Interstate Commerce Act, as amended in 1957, the Commission denied applications for operating permits filed by contract motor carriers, supported by shippers and opposed by common carriers. In one case the shipper claimed that a contract carrier's operations could be better integrated with its production of parts for airplanes. In the other case the shippers claimed that the services of common carriers were unsatisfactory and that their rates were prohibitive on less-than-truckload shipments of canned goods. Three-judge district courts held that the Commission had incorrectly applied the Act, as amended, set aside the Commission's orders and remanded the cases for further consideration. *Held:* The judgments are affirmed. Pp. 83–93.

(a) Under § 209 (b), as amended, the adequacy of existing services is a criterion to be considered by the Commission in passing upon such an application; but it is not determinative. Under § 203 (a)(15), as amended, the "distinct need" of shippers for the new contract service must be weighed against the adequacy of existing services. P. 88.

(b) By indulging in a presumption that the services which existing common carriers render the public would be adversely affected by a loss of "potential" traffic, even if they had not handled it before, and by assigning to the applicants the burden of proving the inadequacy of existing services, the Commission favored the protestants' interests at the expense of the shippers' in a manner not intended by Congress. Pp. 88–90.

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*Together with No. 18, *U. S. A. C. Transport, Inc., et al.* v. *J–T Transport Co., Inc., et al.*, on appeal from the same Court, argued October 17–18, 1961; No. 49, *Atchison, Topeka & Santa Fe Railway Co. et al.* v. *Reddish et al.*, No. 53, *Interstate Commerce Commission* v. *Reddish et al.*, and No. 54, *Arkansas-Best Freight System, Inc., et al.* v. *Reddish et al.*, on appeal from the United States District Court for the Western District of Arkansas, argued October 18, 1961.

(c) The proper procedure is for the applicant first to demonstrate that the undertaking it proposes is specialized and tailored to a shipper's "distinct need." The protestants then may present evidence to show that they have the ability and the willingness to meet that specialized need. If that is done, the burden then shifts to the applicant to demonstrate that it is better equipped to meet the distinct needs of the shipper than the protestants. P. 90.

(d) Under the Act, as amended in 1957, the standard is not whether existing services are "reasonably adequate." It is whether a shipper has a "distinct need" for a different or a more select or a more specialized service which the protesting carriers cannot fill. Pp. 90–91.

(e) The Commission erred in ruling that the desire for lower rates offered by the applicant was not relevant to the shippers' needs, since the matter of rates is one factor to be weighed in determining whether the shipper has established a "need" for more "economical" service, within the meaning of the National Transportation Policy. Pp. 91–92.

(f) Under the statute, as amended, a shipper is entitled to have his "distinct needs" met. The adequacy of existing services for normal needs and the willingness and ability of an existing carrier to render the service are not conclusive, since the "distinct need" of the shipper may not be served by the existing services, if the new service is better tailored to fit the special requirements of the shipper's business, the length of its purse, or the select nature of the delivery service that is desired. Pp. 92–93.

185 F. Supp. 838; 188 F. Supp. 160, affirmed.

B. Franklin Taylor, Jr. argued the cause for appellant in No. 17. With him on the briefs were *Robert W. Ginnane* and *James Y. Piper.*

Roland Rice argued the cause for appellants in No. 18. With him on the briefs were *John C. Bradley* and *James E. Wilson.*

Richard A. Solomon argued the cause for the United States in all five cases. With him on the briefs were *Solicitor General Cox* and *Assistant Attorney General Loevinger.*

James W. Wrape argued the cause for J–T Transport Co., Inc., appellee in Nos. 17 and 18. With him on the briefs was *Glen M. Elliott.*

Clarence D. Todd filed a brief for Contract Carrier Conference of American Trucking Assns., Inc., appellee in Nos. 17 and 18.

A brief, urging affirmance, was filed in No. 17 by *John S. Burchmore* and *Robert N. Burchmore* for the National Industrial Traffic League, as *amicus curiae.*

Robert W. Ginnane argued the cause for appellant in No. 53. With him on the brief were *B. Franklin Taylor, Jr.* and *Arthur J. Cerra.*

Roland Rice argued the cause for appellants in Nos. 49 and 54. With him on the briefs were *Rollo E. Kidwell, Amos M. Mathews* and *Ed White.*

A. Alvis Layne argued the cause for appellees other than the United States in Nos. 49, 53 and 54. With him on the briefs for Elvin L. Reddish was *John H. Joyce.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

These are appeals from judgments of three-judge district courts, 28 U. S. C. § 1253, which set aside orders of the Interstate Commerce Commission denying applications for permits as contract carriers. 185 F. Supp. 838; 188 F. Supp. 160.

Appellee J–T Transport Company asked to extend its present operations as an irregular-route contract carrier of airplane parts to include carriage of aircraft landing gear bulkheads for Boeing Airplane Co. Boeing supported the application. Common carriers opposed the application, as did another carrier, U. S. A. C. Transport, Inc., appellant in No. 18. Boeing indicated it preferred

the applicant over the other because of its unsatisfactory experience with the latter in other operations. Boeing indicated that contract carriage was more practicable in its experience than common carriage, as a contract carrier's operations could be better integrated with a manufacturer's production. Though the examiner recommended a grant of the permit, the Commission denied it (74 M. C. C. 324, 79 M. C. C. 695) saying that no attempt had been made to ascertain if the existing services were capable of meeting the needs of the shipper. It ruled that "There is, in effect, a presumption that the services of existing carriers will be adversely affected by a loss of 'potential' traffic, even if they may not have handled it before." 79 M. C. C. 695, 705. It held that the applicant had not established a need for this contract service and that the applicant had not shown "the existing service" of the other carrier to be "inadequate." *Id.*, 709. It indicated that a service "not needed" cannot be found consistent with the public interest or the National Transportation Policy, as those terms are used in § 209 (b) of the Interstate Commerce Act as amended, 71 Stat. 411, 49 U. S. C. § 309 (b). It said that the shippers did not require a distinct type of service that could not be provided by the protesting carrier, which was indeed in a position to provide any service needed and which would be adversely affected by a grant of this application, even though it never had had the business in question.

Appellee Reddish made application to carry canned goods as a contract carrier from three points in Arkansas and one in Oklahoma to various points in thirty-three States and to carry other goods on return. His application was supported by his prospective shippers and opposed by motor common carriers, appellants in No. 54, and by rail common carriers, appellants in No. 49.

Reddish showed that he delivered to customers who ordered goods in less-than-truckload amounts. These

customers maintained low inventories and needed expedited deliveries in small quantities and on short notice. Some accepted deliveries only on certain days, a requirement calling for integration and coordination between shipper and customer. The shippers said that common carriage was an inadequate service for these shipments, as they were in such small lots that they often had to be carried in consolidated loads which caused delays in shipments. Moreover, it was shown that not all points would be served by one common carrier, making it necessary to unload the shipments and reload them on another carrier causing delays, misconsignment, and damage to goods. The shippers also testified that the cost of common carriage was prohibitive for less-than-truckload shipments and that if the Reddish application were denied they would use private carriage. The protesting motor common carriers testified they could render adequate service for these shipments and provide multiple pick-up and delivery services to most of the points by transferring the shipments to other carriers. The Examiner recommended that the application be granted. The Commission denied it, saying, *inter alia,* that the services needed by the shippers could be performed by existing common carriers, that they would be injured by the loss of potential traffic, and that the shippers' desire to obtain lower rates for less-than-truckload shipments was the primary reason for their support of the application, but was not a sufficient basis to justify a grant of authority to this contract carrier. 81 M. C. C. 35.

The cases turn on the meaning of language added to the Act in 1957.

Our decision in *United States* v. *Contract Steel Carriers,* 350 U. S. 409, held that a contract carrier, rendering a specialized service in the sense that it hauled only a limited group of commodities over irregular routes, did not become a common carrier because it reached for

new business within the limits of its license. That decision caused concern to the Commission which proposed amendments to the Act.[1] It proposed that § 203 (a)(15) be amended so as to define a contract carrier as one who engages in transportation by motor vehicle "under continuing contracts with one person or a limited number of persons for the furnishing of transportation services of a special and individual nature required by the customer and not provided by common carriers." It also proposed that § 209 (b) be amended by adding an additional requirement for issuance of a contract carrier permit, *viz.*, "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown."

These amendments were vigorously opposed in some quarters.[2] The addition to § 203 (a)(15) was objected to on the ground that many contract carriers would be driven out of business because they could not meet the test of performing a service "not provided by common carriers." The change in § 209 (b) was opposed because it would be impossible for a contract carrier to prove that competing common carriers were "unwilling" to render the service and very difficult for it to prove that common

[1] Hearings, S. 1384, Subcommittee of Committee on Interstate and Foreign Commerce, 85th Cong., 1st Sess., p. 6.

[2] The proposed amendments were objected to by the Department of Justice as being "unduly restrictive" (S. Hearings, Subcommittee of Committee on Interstate and Foreign Commerce, 85th Cong., 1st Sess., p. 11) and in part by the Department of Commerce. *Id.*, 200–203. They were also opposed by the Contract Carrier Conference that stated, *inter alia*, "Since the state of mind of the common carriers concerning their willingness is a matter peculiarly within their own knowledge, it would be absolutely impossible for a contract carrier to ever prove to the contrary. Furthermore, it would be very difficult for a contract carrier or its supporting shipper, having no intimate knowledge of the business of opposing common carriers, to prove that such carriers were unable to perform a given service." *Id.*, p. 303.

carriers were "unable" to render the service, as the applicant would have no intimate knowledge of the business of the opposing carriers.

The Commission bowed to these objections; [3] and the bill as it passed eliminated the proposed changes except the ones that changed the result of our decision in *United States* v. *Contract Steel Carriers, supra.*[4] Section 203 (a)(15), however, was amended, so far as material here, by adding to the description of the term "contract carrier by motor vehicle" one who furnishes "transportation services designed to meet the distinct need of each individual customer." [5] And § 209 (b) was amended by adding a sentence which sets forth five factors the Commission shall consider in determining whether the permit should issue:

"In determining whether issuance of a permit will be consistent with the public interest and the national trans-

[3] The change in the Commission's attitude is summarized as follows in S. Rep. No. 703, 85th Cong., 1st Sess., p. 4: ". . . the Commission, upon reflection, on the objections of contract and private carriers to the bill, concluded that in some respects S. 1384 would provide too rigid a pattern. It decided that the proposed requirement in section 209 (b) that additional permits could be issued only upon a showing that existing common carriers are unwilling or unable to render the required types of service should be withdrawn."

[4] That this change was made is clear. See S. Rep. No. 703, 85th Cong., 1st Sess., pp. 2–3, 6, 7; H. Rep. No. 970, 85th Cong., 1st Sess., p. 3.

[5] Sec. 203 (a)(15) as amended reads as follows:

"The term 'contract carrier by motor vehicle' means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer."

portation policy declared in this Act, the Commission shall consider (1) the number of shippers to be served by the applicant, (2) the nature of the service proposed, (3) the effect which granting the permit would have upon the services of the protesting carriers and (4) the effect which denying the permit would have upon the applicant and/or its shipper and (5) the changing character of that shipper's requirements." (Numerals added.)

It seems clear from these provisions that the adequacy of existing services is a criterion to be considered by the Commission, as it is instructed to consider "the effect which granting the permit would have upon the services of the protesting carriers," as well as the effect of a denial upon the shippers. Or to put the matter otherwise, the question of the need of the shipping public for the proposed service necessarily includes the question whether the extent, nature, character, and suitability of existing, available service makes the proposed service out of line with the requirements of the national transportation policy. But the adequacy of existing facilities or the willingness or ability of existing carriers to render the new service is not determinative. The "effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements" have additional relevance. This is a phase of the problem reflected in the broadened definition of a "contract carrier by motor vehicle"—one who furnishes transportation services "designed to meet the distinct need of each individual customer." § 203 (a)(15). It means, we think, that the "distinct need" of shippers for the new contract carrier service must be weighed against the adequacy of existing services. The Commission indulged in "a presumption that the services of existing carriers will be adversely affected by a loss of 'potential' traffic, even if they may not have handled it before." 79 M. C. C. 695, 705. The effect of the presumption is

in substance to limit competing contract carriage to services "not provided" by existing carriers—a provision that the Commission sought unsuccessfully to have incorporated into the Act. We see no room for a presumption in favor of, or against, any of the five factors on which findings must be made under § 209 (b). The effect on protesting carriers of a grant of the application and the effect on shippers of a denial are factors to be weighed in determining on balance where the public interest lies. The aim of the 1957 amendments, as we read the legislative history, was not to protect the *status quo* of existing carriers but to establish a regime under which new contract carriage could be allowed if the "distinct need" of shippers indicated that it was desirable.

We cannot assume that Congress, in amending the statute, intended to adopt the administrative construction which prevailed prior to the amendment.

By adding the five criteria which it directed the Commission to consider, Congress expressed its will that the Commission should not manifest special solicitude for that criterion which directs attention to the situation of protesting carriers, at the expense of that which directs attention to the situation of supporting shippers, when those criteria have contrary implications. Such a situation doubtless exists in these cases, for granting the permits might well have produced some consequences adverse to the protesting carriers, while denying them may just as certainly prove burdensome to the supporting shippers. Had the Commission, having drawn out and crystallized these competing interests, attempted to judge them with as much delicacy as the prospective nature of the inquiry permits, we should have been cautious about disturbing its conclusion.

But while such a determination is primarily a responsibility of the Commission, we are under no compulsion to accept its reading where, as here, we are convinced that it

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has loaded one of the scales. By indulging in a presumption "that the services of existing carriers will be adversely affected by a loss of 'potential' traffic, even if they may not have handled it before," and by assigning to the applicants the burden of proving the inadequacy of existing services, the Commission favored the protestants' interests at the expense of the shippers' in a manner not countenanced by anything discoverable in Congress' delegation to it of responsibility.

It is argued that the Commission, in holding that U. S. A. C. is willing and able to render the service, did not rely on the presumption. We are, however, not convinced. The Commission seems to have placed the burden of proving inadequacy of existing services on the applicant, for it said that the applicant had not shown that the service of U. S. A. C. was "inadequate." 79 M. C. C. 695, 709. Such a burden is improperly placed on the applicant, as the rejection of the proposed amendment to § 209 (b) suggests. The capabilities of protesting carriers are matters peculiarly within their knowledge. In the *Reddish* case the Commission made the same error, as is evident from its statement that the "shippers have failed to show that they have been unable to obtain reasonably adequate service upon request." 81 M. C. C. 35, 42.

The proper procedure, we conclude, is for the applicant first to demonstrate that the undertaking it proposes is specialized and tailored to a shipper's distinct need. The protestants then may present evidence to show they have the ability as well as the willingness to meet that specialized need. If that is done, then the burden shifts to the applicant to demonstrate that it is better equipped to meet the distinct needs of the shipper than the protestants.

Moreover, as we read the Act, as amended in 1957, the standard is not whether existing services are "reasonably adequate." It is whether a shipper has a "distinct need"

for a different or a more select or a more specialized service. The protesting carriers must show they can fill that "distinct need," not that they can provide a "reasonably adequate service."

In the *Reddish* case the Commission ruled that the desire for lower rates offered by the applicant was irrelevant to a shipper's needs, that if the rates of existing carriers were too high, shippers should seek relief for their reduction. 81 M. C. C. 35, 42–43. We think the matter of rates is one factor to be weighed in determining the need for the new service. In a contest between carriers by motor vehicles and carriers by rail, we held in *Schaffer Transportation Co.* v. *United States,* 355 U. S. 83, that the ability of a particular mode of transportation to operate with a lower rate is one of the "inherent advantages" that one type may have over another within the meaning of the Act. 54 Stat. 899. By analogy, contract carriage may be more "economical" than common carriage by motor or rail within the framework of the national transportation policy, as it is defined in the Act [6]—"the Com-

[6] Congress in 1940 described the national transportation policy:

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy." 54 Stat. 899.

mission's guide" to the public interest. *McLean Trucking Co.* v. *United States,* 321 U. S. 67, 82. It would seem hardly contestable that if denial of the application meant, for example, that a shipper's costs of transportation would be prohibitive, the shipper had established a "need" for the more "economical" service. See *Herman R. Ewell Extension—Philadelphia,* 72 M. C. C. 645. This does not mean that the lawfulness of rates would be injected into certificate proceedings. The issue of whether or not the proposed service offers a rate advantage and if so whether such advantage establishes a "need" for the service that overrides counterbalancing considerations presents issues that fall far short of a rate proceeding.

We agree with the court in the *J–T Transport Co.* case that, while the 1957 amendments changed the result of our decision in *United States* v. *Contract Steel Carriers, supra,* by giving the Commission power to limit the number of contracts which a contract carrier can maintain, the amendments in other respects put the contract carrier on a firmer footing. That court said, "Under the statute a shipper is entitled to have his distinct needs met." 185 F. Supp. 838, 849. We agree. We also agree that though common carrier service is reasonably adequate and though another carrier is willing and able to furnish the service, a permit to a contract carrier to furnish this particular service still might be wholly consistent with the national transportation policy defined in the Act. For it is "the distinct need of each individual customer" that the contract carrier is designed to fill. § 203 (a)(15). And "the changing character" of the shipper's "requirements" is a factor to be weighed before denying the application. § 209 (b). Hence the adequacy of existing services for normal needs and the willingness and ability of an existing carrier to render the service are not the end of the matter. The "distinct need" of the shipper may nonetheless not be served by existing

services, if the new service is better tailored to fit the special requirements of a shipper's business, the length of its purse, or the select nature of the delivery service that is desired. The fact that the protesting carriers do not presently perform the service being tendered and that the grant of the application would not divert business from them does not necessarily mean that the grant would have no effect "upon the services" of the protesting carriers within the meaning of § 209 (b). But where the protesting carriers do not presently have the business, it would seem that the grant of it to a newcomer would have an adverse effect on them only in the unusual case.

We intimate no opinion on the merits, for it is the Commission, not the courts, that brings an *expertise* to bear on the problem, that makes the findings, and that grants or denies the applications. Yet that *expertise* is not sufficient by itself. Findings supported by substantial evidence are required. *Public Service Comm'n* v. *United States,* 356 U. S. 421, 427; *United States* v. *United States Smelting Co.,* 339 U. S. 186, 193.

Since the standards and criteria employed by the Commission were not the proper ones, the causes must be remanded for further consideration and for new findings. *American Trucking Assns.* v. *United States,* 364 U. S. 1, 15–17. Accordingly the judgments below are

Affirmed.

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

These are related appeals from a decree of a District Court setting aside an order of the Interstate Commerce Commission denying an application for a contract-carrier permit under the 1957 amendments to §§ 203 (a)(15) and

*[This opinion applies to No. 17, *Interstate Commerce Commission* v. *J–T Transport Co., Inc.,* and No. 18, *U. S. A. C. Transport, Inc.,* v. *J–T Transport Co., Inc.*]

209 (b) of the Interstate Commerce Act, 49 U. S. C. §§ 303 (a)(15), 309 (b). At issue are the District Court's determinations that the Commission exceeded its authority under those provisions in four particulars. First, by considering the adequacy of existing carriage for the transportation service proposed, the Commission is said to have injected an inadmissible "sixth criterion" into the five factors designated by Congress in the revised § 209 (b). Second, the Commission was held to have imposed on the applicant a burden of proving the inadequacy of existing services that Congress had specifically refused to approve. Third, the court concluded that the Commission's reliance on the capacity of existing carriers to meet the "reasonable transportation needs" of the shipper did not meet the standard of specific needs in amended § 203 (a)(15). Fourth, the Commission is charged with invoking an impermissible presumption that an existing carrier willing and able to perform a transportation service it has not previously undertaken will be adversely affected by the loss of potential traffic.

Disposition of these conclusions turns first on a construction of the 1957 amendments in the context of the Motor Carrier Act of 1935, apart from which they are unintelligible; next upon due consideration of what the Commission has here undertaken to do, as disclosed in a fair reading of its final report denying the application; and, most importantly, on appropriate regard for the limits on judicial review of such Commission action as is now before us.

I.

The Motor Carrier Act, this Court has noted, was passed at a time when "the industry was unstable economically, dominated by ease of competitive entry and a fluid rate picture. And as a result, it became overcrowded with small economic units which proved unable to satisfy even the most minimal standards of safety

or financial responsibility. So Congress felt compelled to require authorization for all interstate operations to preserve the motor transportation system from over-competition . . . ." *American Trucking Assns.* v. *United States,* 344 U. S. 298, 312–313.

These were indeed the conditions that prompted legislative recommendations by the greatly esteemed Federal Coordinator of Transportation, Joseph B. Eastman. See S. Doc. No. 152, 73d Cong., 2d Sess. (1934). One of the prime purposes of the measure he proposed was to control the number and scope of contract-carrier operations in order to preserve and protect common-carrier service:

> "These private and contract carriers might be ignored if they did not have a tendency to demoralize or impair the system of common carriage which undertakes to serve all alike and is of prime importance to the country. . . .
>
> "The contract carrier may differ from the common carrier only in the fact that he undertakes to skim the cream of the traffic and leave the portion which lacks the butterfats to his common-carrier competitor. Obviously such operations can have very unfortunate and undesirable results.
>
> ". . . So far as regulation is directed against private and contract operators, it should be for the chief purpose of protecting the common carriers against unfair and demoralizing competition." Report of the Federal Coordinator of Transportation, 1934, H. R. Doc. No. 89, 74th Cong., 1st Sess. 17 (1935).

Coordinator Eastman's proposal was enacted by Congress into the Motor Carrier Act of 1935 (now Interstate Commerce Act, Part II). See H. R. Rep. No. 1645, 74th Cong., 1st Sess. 5 (1935); S. Rep. No. 482, 74th Cong., 1st Sess. 2 (1935). As enacted, it laid far more stringent controls upon common carriers than on contract carriers.

The former were required to hold themselves out to the general public, §§ 203 (a)(14), 207, under just and nondiscriminatory tariffs, §§ 216 (d), 217, while the latter were uncontrolled in their charges above a reasonable minimum, § 218. Motor carriers owning more than 20 vehicles, which presumably included most common carriers and few if any contract carriers, had to obtain Commission approval before going out of business, Interstate Commerce Act, Part I, § 5, and see 49 CFR §§ 179.2–179.5 (1961). No limitation was laid on the types of traffic for which contract carriers could compete, and indeed there has never developed any inherent difference in the operations performable by common or contract carriers.[1] Instead, Congress chose to protect common carriers from destructive competition by entrusting the Interstate Commerce Commission with the administration of certain generalized qualifications needed to obtain a contract-carrier permit.

As originally enacted, 49 Stat. 543, 544 (1935), § 203 (a)(15) provided:

> "The term 'contract carrier by motor vehicle' means any person, [other than a common carrier] . . . , who or which, under special and individual contracts or agreements, and whether directly or by a lease or any other arrangement, transports passengers or property in interstate or foreign commerce . . . ."

Section 209 (b), as enacted by 49 Stat. 543, 553 (1935), authorized the Commission to issue permits to contract carriers when it appeared, *inter alia,*

> ". . . that the proposed operation, to the extent authorized by the permit, will be consistent with

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[1] The Commission has classified motor carriage by 17 types of commodities, and each one admits of common or contract carriage. 49 CFR § 165.2 (1961).

> the public interest and the policy declared in section 202 (a) of this part [the 1935 forerunner of the National Transportation Policy adopted in 1940] . . . ."

The design of these sections was explicated by the Commission shortly after their passage, in *Contracts of Contract Carriers,* 1 M. C. C. 628 (1937). This was a rule-making proceeding under § 209 (b) to attach limitations to contract-carrier permits in order to forestall transgression upon common carriage. The reasons given for promulgation of the rule afford persuasive evidence of the contemporaneous understanding of the Act:

> "The term 'contract carrier' was coined in State statutes for the regulation of motor carriers. In a number of these statutes, protection of the common carrier was expressly recited as the purpose of regulating the contract carrier. In others, this purpose appeared by necessary implication. . . .
>
> "This principle is inherent in the Motor Carrier Act, 1935. The underlying purpose is plainly to promote and protect adequate and efficient common-carrier service by motor vehicle in the public interest, and the regulation of contract carriers is designed and confined with that end in view. . . .
>
> ". . . . The patent object of Congress is to protect the common carriers against cut-throat competition." 1 M. C. C., at 629. See also *Filing of Contracts by Contract Carriers,* 20 M. C. C. 8, 11 (1939).

After reciting the relative freedom from regulation enjoyed by contract carriers, the Commission concluded, in terms peculiarly appropriate to the present controversy:

> "This inherent and inevitable disadvantage of the common carriers is accentuated and becomes a source of positive peril to them when competitors, claiming to be contract carriers, are promiscuous in their deal-

> ings with shippers [who] . . . may play the contract carrier against the common carrier . . . with the result that the unfair and destructive competition which Congress sought in the act to abate is instead intensified . . . ." 1 M. C. C., at 631.

II.

In acting upon applications for contract-carrier permits, the Commission has from the beginning regarded the adequacy of existing common-carrier facilities to be of crucial importance in determining consistency with the public interest as defined by the history and purposes of the Act. In *C. & D. Oil Co. Contract Carrier Application,* 1 M. C. C. 329, 332 (1936), it early stated a guiding principle that has been reaffirmed many times since:

> "We think that, in order to foster sound economic conditions in the motor-carrier industry, existing motor carriers should normally be accorded the right to transport all traffic which they can handle adequately, efficiently, and economically in the territories served by them, as against any person now seeking to enter the field of motor-carrier transportation in circumstances such as are here disclosed."

A review of Commission action from 1935 to 1957 discloses that this principle has been unwaveringly applied in circumstances identical or nearly so to those in the present case, and that its application has produced consistent rulings exactly akin to those now challenged here.

> *C. & D. Oil Co. Contract Carrier Application, supra.* The desire of a shipper to engage the services of a particular carrier, although based on sound and legitimate business reasons, does not control decision as to transportation needs, and is not, standing alone, enough to require a finding that the proposed service would be consistent with the public interest or national transportation policy.

R. L. Smith Contract Carrier Application, 1 M. C. C. 717 (1937). Applicant proposed to carry only peak-load supplies not presently carried by protestant common carriers, but the permit was denied because the existing carriers "may augment their facilities at will through the purchase or lease of additional equipment and may thereby furnish such emergency service." (At 719.) A loss of potential traffic was thus made determinative.

Eastern Shore Oil Co. Contract Carrier Application, 7 M. C. C. 173, 175–176 (1938). There were several common carriers with authority and facilities to handle the proposed traffic, although none had in fact ever carried any of it. The Commission concluded that no need for the service had been shown, consistent with the public interest and the national transportation policy, and reaffirmed its ruling in *C. & D.* that the desire of a shipper to engage a particular carrier was insufficient ground for the granting of a permit.

William Heim Cartage Co., Extension of Operations—Indianapolis, 20 M. C. C. 329 (1939). Applicant proposed to dedicate three trucks to shipper's exclusive use. There was testimony that existing common carriers had the capacity to undertake the traffic. The shipper sought to overcome this by claiming (1) that because of the variety of goods shipped, common-carrier rates would be prohibitive, and (2) that if the application was denied, the shipper would not use common-carrier service but would probably initiate private carriage. Nevertheless the Commission denied the permit, holding that the burden was on the applicant to show that its proposed service "would tend to correct or substantially improve" a deficiency in existing service. The "mere desire" of a shipper to engage a particular carrier was again rejected as a determining factor.

Horace L. Daum Extension of Operations—Illinois, 22 M. C. C. 366 (1940). Shipper had been using its own trucks, and supported this application by stating that, if refused, it would continue to use its own facilities. The protestant common carrier by motor vehicle had established that its equipment was not being operated to full capacity, and that it was able and willing to purchase additional equipment if needed. Reaffirming *C. & D.*, the Commission denied the permit.

N. S. Craig Contract Carrier Application, 31 M. C. C. 705 (1941). The Commission had before it the amendments introduced by the Transportation Act of 1940, and had to determine whether the lines it had theretofore drawn were altered by the deletion of the word "special" from § 203 (a) (15)[2] or by the adoption of the National Transportation Policy in its present form.[3] It concluded from an examination of the legislative history that, far from there being a change, Congress had approved the distinctions employed by the Commission,[4] which it restated in terms that are now unmistakably entrenched

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[2] 54 Stat. 898, 920 (1940).

[3] The National Transportation Policy, added by 54 Stat. 898, 899 (1940), 49 U. S. C. preceding § 301, provides in relevant part: "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges . . . without . . . unfair or destructive competitive practices . . . — all to the end of developing . . . a national transportation system . . . adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

[4] Senator Truman, a Senate conferee, said in presenting the bill:

"Section 203, paragraphs (14) and (15), have been rewritten for the sole purpose of eliminating carriers performing pick-up, delivery, and transfer service. This change was suggested by the Chairman of the Interstate Commerce Commission.

"The conferees wish to make it plain that it is not their intention, by changing the language of paragraphs (14) and (15) of section 203 to change the legislative intent of the Congress one iota with respect to definition of common and contract carriers other than those performing pick-up, delivery, and transfer service. It is intended that all over-the-road truckers shall whenever possible fall within the description of common carriers.

"It is intended by the definition of contract carriers to limit that group . . . ." 86 Cong. Rec. 11546 (1940).

in the 1957 amendment to § 203 (a) (15): "[T]he statutory definitions as now amended are essentially declaratory of the common law. In other words, the fact or not of a public holding out remains the final or ultimate test of common carriage." (At 710.) Numerous secondary tests had been used to distinguish contract carriage, but each shared a common feature: the criterion of "*specialization*, either in the nature of the physical operation, or in respect of the shippers served, without some showing of which contract carriage cannot be found to exist." (At 711; italics in report.) A carrier might engage in specialized operations and remain a common carrier if it held itself out to perform similar service for any shipper that might want it, but unless it did so specialize it could not be a contract carrier. The specialization the Commission had in mind

> ". . . might take the form of specialized physical operations designed to meet the peculiar needs of particular shippers or might consist in the rigid devotion of an otherwise ordinary physical service to a single shipper or very limited number of shippers." (At 708.)

This, it will be seen, is an almost literal paraphrase of what later emerged as the 1957 amendment to § 203 (a) (15).

Having anticipated explicit congressional purpose in this manner, the Commission continued to adhere to its earlier rulings as consistent with that purpose.

Samuel I. Major Contract Carrier Application, 43 M. C. C. 795, 799–800 (1944). No showing of consistency with public interest when there are common carriers authorized, equipped, and willing to handle the traffic.

Willard J. Hibbard Extension of Operations—Lime, 47 M. C. C. 311 (1947). Shipper emphatic that only a contract carrier will do, and that it will not use the services of a common carrier. The Commission found from the evidence that existing common carriers could satisfactorily perform the job: "The fact that existing carriers have not participated in the traffic, in the absence of any showing that they are unable or unwilling to provide a service as required, does not warrant a grant of authority to a new carrier." (At 314.)

B & F Bus Service, Inc., Contract Carrier Application, 53 M. C. C. 501 (1951). In a situation remarkably like the present one, the Commission devised and applied criteria virtually identical to those adopted by Congress in its 1957 amendment to § 209 (b), and denied the application. The contract carrier there proposed an express bus service for the employees of a plant in Clifton, New Jersey, to carry them back and forth from New York. The protestant common carriers established that one or another of them could carry the passengers within two miles of the plant where they could obtain a transfer on a local crosstown bus to and from the plant. Two protestants offered to run an express service if 30 passengers could be assured. Each protestant was desirous of obtaining the traffic and thought it necessary for his business to do so.

In resolving the issue, the Commission foresaw the essentials of the third and fourth criteria now explicitly commended to their consideration by Congress in § 209 (b):

> "Before the proposed operation may be authorized it must be found consistent with the public interest and the national transportation policy. Among the factors to be considered in making such determination are (1) the manner and extent such service will affect the operations of competing common carriers and their patrons, (2) the nature and extent of the inconvenience prospective patrons of the proposed contract-carrier service will suffer if it is not authorized and, conversely, the benefits such service will afford them, and (3) the ascertainment of the public interest from a weighing of these respective facts." (At 504–505.)

Applying this formula to that case, the Commission determined that the potential damage to the common-carrier protestants from loss of a new service and others like it in the future, outweighed the advantage in convenience offered by the contract-carrier applicant. The terms in which it drew the balance are of especial pertinency to our controversy:

> "[W]here a proposed contract-carrier service would substantially impair the common-carrier service upon

> which the public generally must rely, either immediately or potentially through a weakening of the financial ability of the common carriers to meet the needs of the public, issuance of a permit would be found inconsistent with the public interest." (At 505.)

This mode of adjusting conflicting interests whose accommodation was later explicitly committed to the Commission by Congress furnishes strong evidence of the way in which those factors are appropriately evaluated. Subsequent rulings afford impressive proof of this uniform administrative practice.

Kilmer Transp. Co. Extension—Uniontown, 53 M. C. C. 561 (1951). This is another case very close to the present one on its facts. Shippers of fragile earthenware products, requiring special handling and equipment, desired to use a contract carrier which had designed special trailers, trained experienced drivers, and proposed to dedicate its equipment to the exclusive use of the shippers. There were a number of common carriers authorized and with the capacity to carry this traffic. The shippers had experienced some delays with common carriage and wished the flexibility proposed by the applicant of picking up portions of a load at different factories. The application was denied, the Commission stating that "In the absence of a showing that the proposed service would provide shipper with something substantial in the way of service which existing carriers are unable or unwilling to provide, the application must be denied." (At 571.)

Beatty Motor Express, Inc., Extension—Soap to Pittsburgh, Pa., 66 M. C. C. 160 (1955). The application was supported by a shipper who had had a satisfactory experience with the applicant and wished to continue its service. In refusing the requested permit, the Commission recapitulated the standards it was applying, clarifying especially the matter of burden of proof:

> "It is clear from the record that existing carriers have the authority, equipment, and facilities necessary to transport all of the considered commodities from and to the points involved. . . . [N]or is there any showing that the proposed service is so unique or so specialized that the existing carriers are unable to

provide the supporting shipper with a reasonably satisfactory service. There is no doubt that a grant of authority to transport the involved soap products and preparations would be convenient to the supporting shipper, but the record is lacking in proof that the shipper will be prejudiced or handicapped unless the authority sought is granted. Past use of a motor-carrier service, coupled with the mere preference for the service of a particular carrier over that of existing carriers, is not sufficient to warrant a grant of authority. We have consistently held that existing carriers should be accorded the right to transport all traffic which, under normal conditions, they can handle adequately, efficiently, and economically in the territory served by them, without the competition of a new operation." (At 162.)

Overland Freight Lines, Inc., Extension—Kentucky, 69 M. C. C. 143, 148 (1956). An application was denied despite evidence that the placement of common carriers at the shipper's platform had involved delays requiring payment of overtime that raised costs on low-sales-value units of merchandise. "[W]e cannot reasonably conclude that their placements, as a whole, have been so unreasonably delayed or so inconveniently made as to merit a finding that the services of these carriers have been inadequate." Past diligence and future willingness to spot equipment at the plant were shown and relied on to deny the application.

Refiners Transport, Inc., Extension—Missouri, 71 M. C. C. 272 (1957). Issuance of a permit was refused despite (1) evidence of three occasions of unsatisfactory shipment by the protestants, and (2) a statement by the consignee that it would do further business with the shipper only if the applicant's transportation service was obtained.

III.

The law and practice governing contract-carrier applications, as it emerged from the language, history, and purposes of the Motor Carrier Act and from consistent administrative construction between 1935 and 1957, may be summarized as follows. Strictly regulated common car-

riage was considered the backbone of the motor transport industry. Contract carriers might be able to perform certain specialized transportation tasks more easily than common carriers, and when this was so they should be allowed to enter the field. In order to preserve the financial and operational capacity of common carriers to perform the variety of tasks required by the public, however, applicants for a contract-carrier permit must not be awarded business that existing common carriers are equipped and obliged in their certificates to handle. Accordingly, the applicant must first demonstrate that he proposes a specialized undertaking. Protestants may then present evidence that they have the capacity and the desire to carry the particular traffic proposed. If that is done, the burden shifts back to the applicant to demonstrate that the protestants are not so well equipped as he to meet the needs of the shipper. Shipper preference is not sufficient. Unless the applicant can show that its service will be substantially superior to that offered by the protestants, the issuance of a permit must be refused, and this although the protestant may never have carried the traffic before and may have no assurance that it will be offered him once the application is denied. Only thus, the Commission had concluded, could the policy of Congress to preserve a viable system of common carriage be satisfied.

It is this body of precedent, conscientiously developed over a period of years to effectuate the policies formulated in the Motor Carrier Act for Commission enforcement, that we are told was overturned by congressional amendment in 1957. And so we must turn to the terms, origin, and purpose of those amendments.

As now amended by 71 Stat. 411 (1957), § 203 (a)(15), 49 U. S. C. § 303 (a)(15) reads as follows:

> "The term 'contract carrier by motor vehicle' means any person which engages in transportation by motor

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> vehicle of passengers or property in interstate or foreign commerce, for compensation [other than as a common carrier] . . . *under continuing contracts with one person or a limited number of persons either* (*a*) *for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or* (*b*) *for the furnishing of transportation services designed to meet the distinct need of each individual customer.*" (Changes italicized.)

71 Stat. 411 (1957) added to § 209 (b), 49 U. S. C. § 309 (b), the following provision:

> "In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider [1] the number of shippers to be served by the applicant, [2] the nature of the service proposed, [3] *the effect which granting the permit would have upon the services of the protesting carriers and* [4] *the effect which denying the permit would have upon the* applicant and/or its *shipper* and [5] the changing character of that shipper's requirements." [5]

From the italicized changes it is said to follow that the Commission may no longer assign due weight, in its judgment, to the ability of existing common carriers to furnish substantially the transportation service proposed. This is so, it is argued, because factors [3] and [4] are placed in conjunctive equipoise, demanding a balance on untilted scales. And the fulcrum, to complete the metaphor, is located by this argument precisely at the "distinct need" of the shipper referred to in amended § 203 (a)(15).

[5] Bracketed numbers added for convenient reference. Only the third factor and so much of the fourth as is italicized are in issue here. The Commission considered the others, and no challenge is made to its disposition of them.

If the issue before us were only whether the language of the amendments could bear this construction, there would be little argument. But even if the suggested interpretation were supported by the plain meaning of the words, this would not advance our inquiry very far. For the "plain meaning" rule as an automatic canon of statutory construction is mischievous and misleading and has been long ago rejected. See *Boston Sand Co.* v. *United States,* 278 U. S. 41, 48; *United States* v. *American Trucking Assns.,* 310 U. S. 534, 542–550. Words are seldom so plain that their context cannot shape them. Once the "tyranny of literalness" is rejected, *United States* v. *Witkovich,* 353 U. S. 194, 199, the real meaning of seemingly plain words must be supplied by a consideration of the statute as a whole as well as by an inquiry into relevant legislative history. Indeed when there is need for aid, we may turn to "all the light relevantly shed upon the words and the clause and the statute that express the purpose of Congress," *United States* v. *Universal Corp.,* 344 U. S. 218, 221.

The starting point for determining legislative purpose is plainly an appreciation of the "mischief" that Congress was seeking to alleviate. In this instance, fortunately, it is not hard to find, for the Court itself exposed it in *United States* v. *Contract Steel Carriers,* 350 U. S. 409. The Commission had there determined that a contract carrier had, through active solicitation of some 69 transportation contracts, so expanded its business as to become indistinguishable in operation from a common carrier, and ordered it to cease and desist. This Court affirmed reversal of that order, relying on § 209 (b) as it was then written [6] to declare that "A contract carrier is free to

[6] Section 209 (b) then excluded from the limitations the Commission could impose, "the right of the carrier to substitute or add contracts within the scope of the permit." As amended after *Contract Steel,* 71 Stat. 411, 412 (1957), the section empowers the Commission to attach "terms, conditions and limitations respecting the person or

aggressively search for new business within the limits of his license." 350 U. S., at 412.

The latitude thus authoritatively recognized in contract carriers to engage essentially in common carriage without at the same time subjecting themselves to regulation as common carriers, was the mischief that prompted the Commission to seek a restrictive rewriting of §§ 203 (a)(15) and 209 (b). 70 I. C. C. Ann. Rep. 162 (1956). Chairman Clarke of the Commission testified in the Senate hearings on the Commission's proposed bill that, as matters then stood, contract-carrier expansion could impair the ability of common carriers to offer service to the general public, particularly to the small shipper who could not afford the services of a contract carrier. The Commission feared that the inherent advantages of contract carriers would permit them to "encroach upon the operations of the common carriers and skim off the cream of the traffic upon which they depend to support their overall service to the public." [7]

This clearly was the apprehended evil that prompted a favorable report of the amendments. S. Rep. No. 703, 85th Cong., 1st Sess. 1, 3, 7 (1957). As phrased in the House Report, the freedom accorded contract carriers in the *Contract Steel* decision "obliterates the distinction which Congress intended to make between common and contract carriers, and opens the door to unjust discrimination among shippers." H. R. Rep. No. 970, 85th Cong., 1st Sess. 3 (1957). In presenting the bill that was

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persons and the number or class thereof for which the contract carrier may perform transportation service, as may be necessary to assure that the business is that of a contract carrier and within the scope of the permit . . . ."

[7] *Surface Transportation—Scope of Authority of I. C. C.*—Hearings before the Subcommittee on Surface Transportation of the Senate Committee on Interstate and Foreign Commerce, 85th Cong., 1st Sess. 23 (1957) (hereinafter cited as Senate Hearings).

adopted by Congress, Senator Smathers, the Senate Subcommittee Chairman, thus stated the need it was designed to fulfill:

> "Unlimited diversion of traffic from common carriers to contract carriers could impair the common carriers' ability to render adequate service to the general public; consequently, a more precise definition of contract carriage in the Interstate Commerce Act is deemed necessary.
>
> . . . . . .
>
> "The decision of the Supreme Court clearly means that the Congress should do something to correct the situation." 103 Cong. Rec. 14035, 14036 (1957).

The "more precise definition of contract carriage" in the resulting § 203 (a)(15) was plainly intended to restrict the opportunities of contract carriers, not to enhance them.

To be sure, the addition of the five criteria for Commission consideration in the amendment to § 209 (b) was not explicitly responsive to the *Contract Steel* decision. Neither the House nor the Senate Report makes any mention of the meaning or purpose of the addition. The criteria were not contained in the bills, S. 1384 and H. R. 5123, 85th Cong., 1st Sess. (1957), as initially proposed by the Commission. They emanated instead from a suggestion by the Contract Carrier Conference, an appellee in this case; and there is language in the testimony of its General Counsel, Clarence D. Todd, before the Senate Subcommittee, from which support is now drawn for the appellees' position:

> "[T]he primary thing that we have always felt the Commission should do in those cases is consider not only the effect of granting this authority on the common carrier—they do that in each and every case—but to consider the effect denial will have on the con-

tract carriers; the public interest is something to be balanced, and we think that both of those matters should be taken into consideration." Senate Hearings 300.

These observations, it will be noted, did not address themselves to the effect of a denial on the shipper, which is at issue here. Consideration of the shipper's needs was not adverted to in the recommendations made by the Contract Carrier Conference, see Senate Hearings 305; it was added by the Subcommittee. In any event, the "balance" to be struck was not defined, nor the process by which it was to be determined. As a matter of fact, the contract carriers appear to have accepted the existing Commission practice; they neither asked for nor anticipated relaxation of it:

> "The amendment suggested by the contract carriers would still require proof that the proposed service is 'consistent with the public interest and the national transportation policy' but it sets forth certain matters which the Commission should consider in determining this question. We do not believe that this amendment would make it any easier for our contract carriers to obtain new authority . . . . All it would do would be to require the Commission to give consideration to factors which, in our opinion, are important to the public interest." Senate Hearings 304.

That this was Congress' understanding of the addition is evidenced by Senator Smathers' explanation in recommending its adoption: "In this, the Committee is proposing to give the Commission more helpful standards than are contained in the present law." 103 Cong. Rec. 14036 (1957). Like evidence is contained in a letter from Chairman Clarke to the House Committee, stating the Commission's belief "that H. R. 8825 [the bill amended by

the Senate as it eventually passed] is an improvement over H. R. 5123, submitted by the Commission in draft form." H. R. Rep. No. 970, 85th Cong., 1st Sess., Appendix (1957). This is hardly the language of a loser. If, in construing legislation, we are to look to the sponsors of a bill to determine its meaning, *Schwegmann Bros.* v. *Calvert Corp.*, 341 U. S. 384, 394–395, these statements should leave no doubt that the addition of the five criteria to § 209 (b) worked no change in the Commission's long-standing practice of preferring available common carriers to contract-carrier applicants.

These particularized indications are confirmed and reinforced by the legislative history as a whole for precluding the view, underlying the District Court's decision, that the 1957 amendments introduced a radical departure in regulatory policy. As we have seen, the Commission had, in advance of the amendments, developed and applied the criteria at issue in this case, and had struck the same balance there as here. *B & F Bus Service, Inc., Contract Carrier Application, supra.* Neither this leading Commission disposition, nor any other to the same effect, was criticized or even mentioned to the subcommittee that drafted the amended bill. Had the Commission, which maintained a representative throughout the Senate hearings, suspected that its practice in this regard was being overturned, it would scarcely have given the unqualified approval that it did to the final bill. See H. R. Rep. No. 970, 85th Cong., 1st Sess. 2 (1957); S. Rep. No. 703, 85th Cong., 1st Sess. 6 (1957); 103 Cong. Rec. 14035 (1957) (remarks of Sen. Smathers). On the contrary, it had good reason for assuming that its practice was being approved. The report that issued from the hearings contained the following endorsement:

> "Your committee is of the opinion that the public interest in a sound transportation system, and particularly in a stable and adequate system of common

carriage, in the light of the objectives of the national transportation policy, require that the bill, as amended, be passed." S. Rep. No. 703, 85th Cong., 1st Sess. 7 (1957).

Furthermore, the very same session of Congress that passed the amendments here in issue also amended § 218 (a), by 71 Stat. 343 (1957), 49 U. S. C. § 318 (a), to require contract carriers to file actual rather than minimum rates or charges. This legislation was requested by the Commission, 70 I. C. C. Ann. Rep. 168–169 (1956), and recommended by Senator Smathers' Subcommittee, S. Rep. No. 335, 85th Cong., 1st Sess. 2 (1957), to eliminate a competitive advantage held by contract carriers. It should be construed *in pari materia* with the amendments to §§ 203 (a)(15) and 209 (b). That the 1957 Congress shared the original understanding of the Motor Carrier Act's purpose is manifested in the Senate Report, at 2:

> "The underlying purpose of the Motor Carrier Act (pt. II of the Interstate Commerce Act) is the promotion and protection of adequate and efficient common-carrier service by motor vehicle in the public interest. The regulation of contract carriers was designed with that end, among others, in view."

IV.

The foregoing distillation of statutory purpose from the legislative history of the amendments is not affected by the deletion from the bill of language initially submitted by the Commission. In its original form, S. 1384 would have amended the definition of a contract carrier in § 203 (a)(15) to make it one engaging in transportation under contracts for the furnishing of special and individual services required by the customer "and not provided by common carriers." The Commission bill would have also amended § 209 (b) to require a showing by a

contract-carrier applicant "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown." [8] The quoted language was objected to by the Justice Department, Senate Hearings 10–11, and deleted by the Senate Subcommittee, S. Rep. No. 703, 85th Cong., 1st Sess. 3 (1957), as "unduly restrictive" of contract carriage. This does not affect construction of the amendments as they emerged in final form, so far as they are relevant to our problem. The fact that the Commission withdrew its initial suggestion for increased restrictions on contract carriage hardly affords the basis for a conclusion that existing restrictions were legislatively disapproved or narrowed.

In truth, the Commission's language was deleted because it was thought to place an impossible burden of proof on an applicant, of demonstrating a state of mind ("unwilling"), or of facilities ("unable"), entirely within the knowledge of the protestant. Thus, very early in the Senate hearings, before any other witness had been heard from, Chairman Clarke withdrew the "unwilling" language from the suggested amendment to § 209 (b) "because of the very difficult burden of proof that would be imposed on applicants . . . ." Senate Hearings 22. Later on, the representative of the Contract Carrier Conference asked for deletion of the "not provided" language, *supra,* from the amendment to § 203 (a)(15) because it presented the very same burden of proof problem. Senate Hearings 294–295. The Commission subsequently recommended this deletion because the language was "not necessary to carry out the purpose of the bill . . . ." Senate Hearings 43–44. See also S. Rep. No. 703, 85th Cong., 1st Sess. 5 (1957).[9]

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[8] S. 1384 is printed at Senate Hearings 6.

[9] The only other light shed on the significance of the deletions is furnished in a colloquy in the course of the hearings:

"Senator SCHOEPPEL. I would like to ask a question right there: Supposing you had a common carrier serving certain territory but

V.

An amendment is not to be read in isolation but as an organic part of the statute it affects. An amendment is not a repeal. Even when plain words are suggestive of a change in policy, they are not to be construed as such if there has been a history of consistent contrary legislative policy. *Boston Sand Co.* v. *United States,* 278 U. S. 41; *Guessefeldt* v. *McGrath,* 342 U. S. 308, 313–315.

The Interstate Commerce Committees that considered these amendments were addressing themselves to a limited problem laid bare by the *Contract Steel* decision. It would be heedless of the practicalities of legislative procedure to assume that these experienced committees chose to use the occasion to overturn a consistent pattern of statutory regulation without inviting the views of the

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wasn't furnishing adequate service. There was common carrier service there, but of a very limited nature, and with the mode and extent of doing business nowadays would you draw the line there that the common carrier had to furnish reasonably adequate and prompt service?"

"Mr. ROTHSCHILD [from the Department of Commerce, deferred specific answer and then replied]. They should not be able to deny the application of a common [*sic*] carrier simply because someone claims that there is common carrier service there." Senate Hearings 200–201, 203.

What weight, if any, should be accorded this exploratory speculation between a single subcommittee member and a representative of a government department having no intimate familiarity with prior administrative practice, is problematical. Even giving it the fullest significance it can bear, however, the most that emerges is this: When a contract carrier applies for a permit, it is not enough for a protestant to show that it has authority to transport the proposed traffic. It must show also that it has the capacity and willingness to do so, and the Commission must be satisfied from all the evidence that, in Senator Schoeppel's words, the service it can perform is "reasonably adequate" to meet the shipper's needs. But this, it will be seen, is precisely the procedure that the Commission had invariably followed from 1935 to 1957.

Commission, without undertaking any review of Commission precedents, and without selecting language plainly evincing a purpose to change the law in this respect. To the contrary, it seems clear that these careful architects of motor-carrier regulation fashioned amendments that fit harmoniously into the prior law. They did not inadvertently add a colonial wing to a gothic cathedral.

VI.

What has been said disposes of the contention that the Commission erroneously imported a "sixth criterion" of the adequacy of existing common-carrier services into its consideration of this application. It did not. That criterion is implicit in the third factor enunciated in amended § 209 (b): "the effect which granting the permit would have upon the services of the protesting carriers." This has always been a crucial consideration in contract-carrier proceedings, and nothing in the amendments intimates a change. The fundamental difficulty with the District Court's judgment in this case is that it rests upon a mistaken apprehension that the 1957 amendments had eliminated preference for existing common-carrier service as a permissible determinant of Commission action. Thus it characterized the criteria in § 209 (b) as designed "to insure that their [applicant's and shipper's] interests would receive the same consideration and be weighed in the same balance as those of opposing carriers." 185 F. Supp. 838, 848 (W. D. Mo. 1960). This was a destructive error.

There remain three further grounds on which the District Court invalidated the Commission's order.

(1) The court held that the Commission had imposed on the applicant the precise burden of proof proposed in the rejected language of its bill, that existing carriers were unable or unwilling to provide the transportation service applied for. Had the Commission done this it would have been in clear error. It did not do so.

The trial examiner's findings and recommended order were first reviewed by Division 1 of the Commission. It held in part that "the burden is upon an applicant seeking contract-carrier authority, as well as one seeking common-carrier authority, to establish, among other things, that there is a need for the service proposed which existing carriers cannot or will not meet. . . . A service not needed cannot be found consistent with the public interest or the national transportation policy." 74 M. C. C. 324, 328 (1958). This statement is perfectly consistent with placing the burden of proving its willingness and ability on the protestant, leaving the applicant to go forward with a demonstration of its superior capacity to meet the transportation needs of the shipper.[10] On reconsideration by the full Commission, a statement of like purport was made: "[W]e cannot find that existing service has been shown to be inadequate." 79 M. C. C. 695, 709 (1959).

The court seems to have feared that the Commission was in fact placing a fuller and impermissible burden on applicants, and turned to later Commission dispositions to confirm its suspicions. In *Roy D. Yiengst Common Carrier Application,* 79 M. C. C. 265, 268 (1959), it found a statement that there had been no "showing that the existing carriers are unwilling or unable" to provide the service. But a possibly careless phrase is not conclusive of what the phraser is deciding. If it were, our own opinions might at times be used to bind our hands in later decisions. Had the District Court looked behind

[10] The statement may be deemed lacking in detail in not explicitly considering the five criteria in § 209 (b), which became effective in its amended form on August 22, 1957, after the application had been heard but before Division 1's order was issued. See *Ziffrin, Inc.*, v. *United States,* 318 U. S. 73, 78. The final order of the full Commission made the detailed findings, however, so that the question need not detain us.

the words employed in the *Yiengst* decision, *supra,* it would have discovered that they were used as a shorthand description of a more complicated allocation of the burden of proof; for the protestants there had come forward and shown their experience and capacity to handle the traffic, and it was the applicant's subsequent assertion of its superiority that was considered insufficient to overcome this showing. The same thing was true in *Carolina Haulers, Inc., Contract Carrier Application,* 76 M. C. C. 254, 256 (1958), likewise improperly relied on by the District Court.

We should judge a challenged order of the Commission by "the report, read as a whole," *United States* v. *Louisiana,* 290 U. S. 70, 80, and by the record as a whole out of which the report arose. When that is done in this case, it becomes apparent that the Commission did not assign a statutorily impermissible burden of proof to the applicant.

The Commission's final report found from the whole record that the protesting carrier was in fact able and willing to perform the proposed transportation service in the following respects, each of which is set forth explicitly in the report. (1) U. S. A. C., the protestant, is a specialized common carrier in the aircraft field, with approximately 60 percent of its present traffic consisting of fragile parts, like the landing-gear bulkheads whose transportation is needed for Boeing Airplane Company, the shipper. (2) U. S. A. C. is accustomed to modifying its equipment to meet specific needs, and can fashion its services to meet the shipper's production schedules. (3) Specifically, as concerns this traffic, 79 M. C. C., at 708,

> "U. S. A. C. holds the operating authority necessary to furnish the needed service. Its drivers have security clearance; it has equipment suitable for transporting aircraft assemblies, parts, and equipment; and, if the supporting shippers will furnish it

> with specifications for the fixtures necessary to handle their particular traffic, it will modify as many pieces of its equipment as is necessary to provide adequate service. Furthermore, it is willing to dedicate certain of its trailers to the exclusive use of each of the shippers."

It is difficult to conceive of more explicit findings, or to quarrel with the Commission's conclusion from them that "U. S. A. C. is in a position to provide any service that is needed . . . ." 79 M. C. C., at 707. The findings, moreover, find ample support in the extensive and detailed testimony of Mr. Decker, in charge of fleet control and operations for U. S. A. C. After the burden of production was placed on the protestant to show in what respects it was capable of handling the disputed traffic, the Commission surely exceeded no statutory prohibition in shifting to the applicant the burden of persuasion of its substantial superiority.

(2) The District Court was persuaded, however, that the Commission had imposed too lenient a burden of production on the protestant, to show merely that "available common-carrier service was reasonably adequate to meet the transportation needs involved." 79 M. C. C., at 701. It concluded that the proper standard was the one enunciated by Congress in amended § 203 (a)(15), of meeting the "distinct need" of each shipper. And it determined that the Commission had not employed that standard: "No consideration was given to the special services which in fact could not be supplied by a common carrier." 185 F. Supp., at 850. A review of the report and the record, judged by the statute's requirements, does not sustain this holding.

In the first place, the Commission made the precise finding required by the court under § 203 (a)(15): "Plainly, there is no warrant on these records for a finding that the supporting shippers require a distinct type

of service that cannot be provided by U. S. A. C. To the contrary, the very business of U. S. A. C. is the transportation of the type of traffic involved." 79 M. C. C., at 709. This finding was itself a conclusion from the detailed enumeration of U. S. A. C. capabilities quoted previously. And there was substantial evidence in the record to support the conclusion that the shipper would be as well served by U. S. A. C. as by the applicant J–T.

The service proposed by J–T was specialized in the following particulars. It had designed a trailer exclusively for Boeing's landing-gear bulkheads at a cost of $3,360 within about two weeks. The trailer was underslung with an adjustable floor and roof in order to permit rear-end loading, a fully enclosed carrier, and the height clearance required by state law on the roads it traveled. The trailer was spotted at Boeing's Wichita plant, available at all times on short notice to leave for the supplier's plant in Indianapolis to pick up another load of bulkheads.

The Traffic Manager for Boeing's Wichita plant testified that the shipper had enjoyed particularly the close coordination with J–T made possible through its near-by Wichita terminal. The bulkheads had to be scheduled into the assembly operation at a predetermined time; constant engineering changes necessitated supply of particular bulkheads for particular planes, and a delay in transportation could prove very expensive. The shipper was disinclined to use U. S. A. C. because it had no Wichita terminal, because its tariffs gave it authority to decide on the type of equipment it would use, and because of an experience of carelessness in 1953, although it was uncertain whether this had been the fault of U. S. A. C. or of the shipper.

U. S. A. C. offered evidence that it maintained a terminal in Indianapolis and one in Topeka, Kansas, which could cover shipments from Wichita. U. S. A. C. would be willing to modify its canvas-topped trailer to install

necessary fixtures and a removable or elevatable roof as needed. The roof would take three days to install, the necessary fixtures ten days to two weeks. Its tariff power to control equipment was used only to prevent overloading.[11] It was willing to dedicate the necessary equipment exclusively to the shipper.

From this evidence it was certainly open to the Commission to find, as it did, that U. S. A. C. could meet the "distinct need" of the shipper. The tariff power was no obstacle. An ambiguous and ancient complaint about service need not control. The absence of a Wichita terminal could be offset, if need be, by the presence of an Indianapolis terminal: The traffic had thus far been entirely one way, from Indianapolis to Wichita, and no reason was given why telephonic consultation with Indianapolis, reaching the supplier and the carrier in the same place, might not be as efficient or more so. Moreover, the shipper on three occasions gave evidence that its preference for J–T was in actuality based on a misunderstanding of common-carrier authority that the Commission was under no obligation to credit.[12]

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[11] The evidence showed that the total weight of the haul was about 5,500 pounds (R. 92), and the trailer proposed by U. S. A. C. had a capacity of 24,000 pounds. (Protestant's exhibit No. 15, R. 147; R. 112.)

[12] J–T's application was supported because ". . . we recognized that the contract carrier can dedicate equipment to our service, the type of equipment that we want, and we feel that on this type of a transportation it is the best thing to have the equipment solely dedicated to our use." (R. 89.)

It did not choose a common carrier "because the common carrier cannot dedicate his equipment exclusively to our service as a contract carrier can." (R. 97.)

Again: "It is my understanding that a common carrier cannot dedicate equipment to a particular shipper, that he holds himself out to furnish that equipment to any shipper that wants it." (R. 103.)

This was of course an erroneous understanding, as Commission precedents demonstrate. A common carrier must hold itself out through

But this does not mean that, as a statutory matter, the Commission was required to find that the protestant could meet the "distinct need" of the shipper. That phrase was inserted in § 203 (a)(15) to restrict the definition of a contract carrier, not to limit the opportunities of a common carrier. It should be noted that a contract carrier may so qualify under that section either by meeting the distinct need of a particular customer or by meeting very ordinary needs through the assignment of vehicles to the shipper's exclusive use. If the latter qualification were controlling in a given case, the consideration of "distinct need" would be irrelevant.

Beyond this parsing of § 203 (a)(15), moreover, there is reason in policy for the Commission to deny an application when the protestant is able to furnish "reasonably adequate" services. The Motor Carrier Act expresses a policy, as we have seen, of preserving existing common carriage against the inroads of contract carriage. One way of putting that policy into effect is to deny a contract-carrier application, as the Commission has always done, unless the applicant can demonstrate that its service will be substantially superior to that afforded by existing carriers. Another way of describing this practice, which the 1957 amendments have in no way affected, is that no permit will issue for traffic that can be handled with reasonable adequacy by a protestant.

(3) The District Court was most emphatic in its conclusion that the Commission had erred in its resolution of the third factor in § 209 (b)—"the effect which granting the permit would have upon the services of the protesting

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its tariffs to serve any shipper who desires the same class of traffic, but it may specialize as much as a contract carrier does and may dedicate equipment to the use of any one such shipper. When U. S. A. C. offered to do so, it was a reasonable conclusion that the shipper's particular needs had been met.

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carriers"—by the aid of an unwarranted presumption. The relevant language of the final report is as follows:

> "The question presented . . . is how we are to determine whether a grant of authority will adversely affect the service of a protestant. It might be argued that where, as here, a protestant is not now enjoying the involved traffic, it cannot be adversely affected by a grant of authority. However, we believe that our past holdings that existing carriers are entitled to transport all the traffic which they can economically and efficiently handle before additional authority is granted are equally valid today as they were prior to the 1957 amendments to the act. There is, in effect, a presumption that the services of existing carriers will be adversely affected by a loss of 'potential' traffic, even if they may not have handled it before." 79 M. C. C., at 705.

How the District Court could be confident that the Commission was blindly applying what it itself called only "in effect" a presumption, in the face of detailed findings that the traffic was one that the protestant "can economically and efficiently handle," it did not explain. Doubtless if the Commission had erected a presumption of adverse effect from evidence simply that the protestant possessed authority in its certificate to carry that traffic, its action would have been inconsistent with congressional deletion of the words "not provided by common carriers" from the amendment to § 203 (a)(15). But, as we have seen, that is plainly not what the Commission did.

The court went further, however, and determined that evidence of the protestant's willingness and ability was by itself insufficient to support the requisite finding of an adverse effect. "Where . . . the protesting carrier is not participating in the traffic involved, there can be no diversion of traffic and hence ordinarily there would be no

adverse effect on the services of the protesting carrier." 185 F. Supp., at 848. It is somewhat difficult to know by what expert insight the District Court achieved this conclusion, at variance with the Commission's deliberate and considered contrary resolution of the same issue. Apparently the court thought that the shipper's expressed preference for the applicant had to be taken into consideration in determining whether the protestant would be injured by a grant of the permit. Even if this were a proper reading of the statute, it would not justify the District Court's conclusion. For the record shows that when the shipper was asked whose services it would use if the permit were denied, it replied that it did not know.

But it is plainly an improper reading of the statute. The Commission has invariably held that the preference of a shipper for a particular carrier, even though based on sound business reasons, is not enough to warrant issuance of a permit. This practice is unaffected by the 1957 amendments. We have ourselves unanimously held, since those amendments went into effect, that legally cognizable injury might accrue to an existing carrier denied potential traffic.

> "[S]urely the statement by General Motors [the shipper] that it would not in any event give the business to any appellant cannot deprive appellants of standing. The interests of these independents cannot be placed in the hands of a shipper to do with as it sees fit through predictions as to whom its business will or will not go. . . . We conclude, then, that appellants had standing to maintain their action to set aside the Commission's order under the 'party in interest' criterion of § 205 (g) of the Interstate Commerce Act, . . . and under the 'person suffering legal wrong . . . or adversely affected or aggrieved'

> criterion of § 10 (a) of the Administrative Procedure Act . . . ." *American Trucking Assns.* v. *United States*, 364 U. S. 1, 18.

If a protestant may be "adversely affected" despite shipper hostility for purposes of seeking judicial review, it seems consistent to permit the Commission to find it so for purposes of ruling upon an application under § 209 (b).

There is persuasive legislative history to the same effect. The amendments to S. 1384 proposed in the Senate hearings by the Contract Carrier Conference, which were substantially adopted as the criteria in § 209 (b), would have erected a presumption in favor of a contract-carrier applicant when the shipper had previously been using private carriage. Senate Hearings 305. This provision was supported on the ground that no adverse effect would normally be visited on a protestant when the shipper had so demonstrated its antipathy to common carriage. It was deleted by the Subcommittee. Thus, if we are to place emphasis on congressional rejections, we must take this deletion as significant that shippers' desires are not to be controlling.

But we need not rely on this episode to prove the point. The whole scheme of statutory regulation points the same way. For we must remember that Congress has chosen in the Motor Carrier Act to regulate motor transportation not by the forces of competition but by impartial administration through an expert body. No doubt contract carriage is frequently preferred by shippers for the advantages, chiefly in flexibility of operations, that it may hold over available common carriage. But the national interest to be safeguarded under the National Transportation Policy is entrusted to the I. C. C. and not to the self-interest of shippers. So long as the Commission does not behave arbitrarily, does not reject the offer of relevant testimony or refuse to "consider" some factor that Congress has commanded to be taken into account, the

weight or value accorded the various factors and the Commission's evaluation of the comparative needs of shipper, applicant, and protestant in a particular situation are conclusive.

A careful reading of the report and record demonstrates the unwisdom of overturning the Commission's exercise of its regulatory functions upon merely apparent surface improprieties. For the Commission found as a fact that the protestant needed the proposed traffic; that U. S. A. C.'s

> "ability to obtain business depends on its ability to satisfy the needs of the shippers having transportation requirements similar to those of these supporting shippers, and it is dependent upon the very kind of traffic that is here considered for the continuance of its operations." 79 M. C. C., at 708.

This is the content of the "presumption" that flows from a protestant's showing of its willingness and ability: a decidedly adverse effect from a loss of "potential" traffic. And the finding rested on a substantial array of record facts. U. S. A. C. had demonstrated its needs by actually soliciting Boeing for the traffic, far in advance of this proceeding. Its record of recent "deadheads," or empty trailers, leaving Indianapolis was impressive: in March of 1957, 92 deadheads as against 61 full loads; in April, 85 against 60. A similar empty-equipment problem existed in Wichita. Aircraft-parts transportation in general had recently decreased. The problem was one of aircraft obsolescence, making the business spotty, with recurrent highs and lows. U. S. A. C. had been engaged in the programs for the building of F–184's, B–47's, and B–36's. Each had ended.

Surely it would have been permissible for the Commission, charged as it is with preserving transportation for the national defense, to conclude that the national interest lay in seeking to keep U. S. A. C.'s excess capacity profit-

ably employed and available for future defense needs. The fact that the Commission did not advert expressly to defense needs in its report does not affect the illustration this evidence affords of the way in which a presumption of adversity may reasonably be drawn from evidence of a protestant's desire and capacity for traffic.

VII.

The appropriate relation between the Commission and the courts was delineated in our treatment of the closely parallel problem in *Secretary of Agriculture* v. *Central Roig Ref. Co.*, 338 U. S. 604. The Sugar Act of 1948, § 205 (a), authorized the Secretary to allocate marketing quotas among particular refineries "in such amounts as to provide a fair, efficient, and equitable distribution" (compare "consistent with the public interest and the national transportation policy"), and directed him to do so "by taking into consideration" three factors—one related to processing of raw sugar from sugar cane, which the Secretary decided was inapplicable, and the other two past marketings and future marketing capacity. The Secretary applied these two by giving them equal weight and referring them to a pre-World War II base period selected as one unaffected by special wartime demands. The resulting allocation order was attacked as exceeding statutory authority and was set aside by the Court of Appeals. This Court reversed, holding that the Secretary had not exceeded the discretion necessarily vested in him by the sugar-quota scheme. We noted that a direction to "consider" certain factors did not control the Secretary's judgment as to what weight should be assigned to each or whether to give weight to all three in each situation. We concluded that so long as the Secretary was not arbitrary in his choice of means to reach an equitable distribution, his decision should stand.

It is a commonplace of administrative law that the evaluation to be given criterial findings, if adequately supported, is left essentially to the administrative agency charged with primary responsibility for interpreting the will of Congress. The extent to which this is so will be misconceived if drawn from abstract conceptions of "fact," "law," or "law-application." For one thing, the permissible scope of administrative discretion may vary from section to section within a single statute. For another, the task of exercising an informed discretion in administrative proceedings extends from testimonial submissions through considerations of regulatory policy to obedience of a statutory command. It is a question of policy, derived from due regard for, and based on understanding of, the regulatory scheme enacted by Congress, at which point a reviewing court should intervene. A conclusion that the agency's determination, resting on findings (where, as is normally true, they are required) appropriately supported by evidence, is within its power to make is a conclusion that the factors calling for intervention are absent. Compare *Interstate Commerce Commission* v. *Union Pacific R. Co.*, 222 U. S. 541, 547–548.

Administrative agencies are not only vested with discretion in sifting evidence and in making findings but may also draw on their specialized competence for ascertaining the reach and meaning of statutory language. Compare *Social Security Board* v. *Nierotko*, 327 U. S. 358, 368–371, with *Labor Board* v. *Hearst Publications*, 322 U. S. 111, 128–131. The factors to be considered on judicial review of such an administrative determination include the precision of the statutory language, the technical complexity of the relevant issues, the need for certainty as against experimentation, and the likelihood that Congress foresaw the precise question at issue and desired to express a foreclosing judgment on it. In assessing these factors, we are guided primarily by an investigation

of the prior law as it sheds light on the "mischief" Congress sought to alleviate, and of the statute itself to see how closely Congress sought to define the balance of competing considerations it addressed.

That investigation here reveals that Congress conferred the power on the Commission to decide as it has done in this case. None of the precedents is to the contrary; each points to this conclusion. See *United States* v. *Pierce Auto Lines,* 327 U. S. 515, 535–536 (not for courts to gauge public interest; so long as requisite findings are made and supported by evidence, the resolution of relevant factors is for the Commission); *Bass* v. *United States,* 163 F. Supp. 1, 4 (W. D. Va. 1958), aff'd *per curiam,* 358 U. S. 333 (same); cf. *United States* v. *Detroit & Cleveland Nav. Co.,* 326 U. S. 236, 240–241. In *Schaffer Transp. Co.* v. *United States,* 355 U. S. 83, 86 n. 3, 90, the Court deliberately refrained from guiding the Commission's discretion in evaluating the relative advantages of competing carriers.[13]

[13] Nor is the holding in the *Schaffer* case of any aid to the appellees. The Court held that a common-carrier applicant could not be denied a certificate on the grounds of existing rail service, without a finding whether the "inherent advantages" of motor transport should warrant the grant. Such a finding was thought necessary to conform to the dictates of the National Transportation Policy, the Court declaring that:

"To reject a motor carrier's application on the bare conclusion that existing rail service can move the available traffic, without regard to the inherent advantages of the proposed service, would give one mode of transportation unwarranted protection from competition from others." 355 U. S., at 90–91.

On 91–92, the Court recognized that these considerations did not necessarily pertain to applications opposed by other motor carriers. The Commission has held in these proceedings that motor common and contract carriers are not different "modes" of transportation, 79 M. C. C., at 710, and its expert conclusion is entitled to great weight. Indeed, the whole history of motor carrier regulation negates any suggestion that Congress has been interested in preserving competition between the different classes of motor carriers.

Determinations by the Commission which Congress has committed to its judgment must be judicially respected because such exercises of administrative discretion are beyond the competence or jurisdiction of courts. Their power of review is confined to correction of Commission action that transcends the authority given it by Congress, including of course disregard by the Commission of procedural proprieties resulting in arbitrary use of its powers.

In the present case, no claim can be made that the Commission's findings are unsupported by substantial evidence. *United States* v. *Pan American Corp.*, 304 U. S. 156, 158; cf. *Universal Camera Corp.* v. *Labor Board,* 340 U. S. 474; see Administrative Procedure Act, § 10 (e), 60 Stat. 237, 243 (1946), 5 U. S. C. § 1009 (e). The Commission's detailed report negatives this, as it would a claim that the Commission neglected to make requisite findings.

Of course the provisions of the National Transportation Policy must be applied by the Commission to each application, see *Schaffer Transp. Co.* v. *United States,* 355 U. S. 83, 88, but they "represent, at best, a compromise between stability and flexibility of industry conditions, each alleged to be in the national interest, and we can only look to see if the Commission has applied its familiarity with transportation problems to these conflicting considerations." *American Trucking Assns.* v. *United States,* 344 U. S. 298, 314; see *Interstate Commerce Commission* v. *Parker,* 326 U. S. 60, 66. The Commission's action here certainly does not fall short of that standard. See 79 M. C. C., at 705–706.

An order of the Commission cannot stand, it is true, if we cannot tell what has been decided or if it leaves unclear the basis for its conclusions. *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 510–511. Findings are no doubt judicially more persuasive the more felicitously they are formulated and the less they require

extraction from a diffuse report. But the Commission is not under statutory duty to set forth its findings in serried array. It is the Court's duty to sustain the Commission's findings if, as here, there is no real difficulty in determining what was decided and on what grounds.

It is not the Court's function to impose our standards of lucidity or elegance in exposition upon the Commission. And we should take due warning from the consequences of our decision in *City of Yonkers* v. *United States,* 320 U. S. 685, of what may follow from exacting overnice requirements of the I. C. C. There the Commission had made no explicit finding that an electric interurban railway was an integral part of a steam railroad system as it had to be before the Commission could allow it to suspend its operations. The facts were so clearly spread upon the record that the point was not argued until one of the parties raised it on appeal. This Court remanded the case for an express finding. The Commission took some more evidence and in due course it entered the inevitable finding. The order was attacked again in the District Court, affirmed again after another lengthy opinion, and eventually affirmed *per curiam,* 323 U. S. 675. That wasteful charade ought not to be repeated here.

I would reverse and allow the Commission's order to stand.

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE HARLAN and MR. JUSTICE STEWART join, concurring in part.*

These are appeals from the judgment of a District Court setting aside an order of the Interstate Commerce Commission denying an application for a contract-carrier permit. The application sought authority to transport canned goods under continuing contracts with three

*[This opinion applies only to No. 49, *Atchison, Topeka & Santa Fe R. Co.* v. *Reddish,* No. 53, *Interstate Commerce Commission* v. *Reddish,* and No. 54, *Arkansas-Best Freight System, Inc.,* v. *Reddish.*]

Arkansas canning companies to points in 33 States and to return from those points with canned goods and canning materials such as cans, lids, and corrugated boxes. It was opposed by two groups of railroads, one motor contract carrier and 25 motor common carriers, authorized to undertake transportation in the territory proposed.

The trial examiner's recitation of facts, as adopted by the Commission, may be briefly summarized. Each of the supporting shippers does a substantial volume of business with small-lot purchasers. These customers maintain low inventories, necessitating a transportation service capable of effecting multiple pickups and deliveries on short notice. Each shipper has engaged in private carriage for this purpose, sending only single-lot full truckloads by common carrier. The Steele Canning Company's private equipment was furnished in part through a lease of the applicant's trucks. When a strike of its drivers occurred, it sought to contract with the applicant for its independent services. The other shippers, who before the strike sold much of their goods through Steele, now wish to expand their sales to individual customers and desire the same type of service from the applicant.

Under its temporary authority, the applicant has been offering several stops in transit at the truckload rate, and assessing no stop-in-transit charge, thus rendering in effect a less-than-truckload service at truckload rates.

Existing motor carriers possess the authority and equipment to provide service to a substantial number of the points involved, either directly or by joint-line operations. Although few have previously participated in this particular transportation, each displays a desire to obtain the traffic; so do the protesting railroads, which have recently experienced a sharp decline in canned-goods tonnage. The motor carriers are willing and able to provide multiple pickups and deliveries where authorized.

The shippers asserted a preference for the applicant's services on two specific grounds. First, they contended that existing carriers were unable to furnish multiple pickup and delivery service with sufficient expedition. Second, they maintained that the less-than-truckload rates charged by common carriers were prohibitive in light of the small profit from a canned-goods shipment allowed by competitive conditions. Accordingly, they asserted that, if the permit were denied, they would resort to private carriage.

On the first point, the Commission concluded that the type of service required by the shippers was not substantially different from that offered by available motor common carriers. Its treatment of the third and fourth criteria in § 209 (b) of Part II of the Interstate Commerce Act, added by 71 Stat. 411 (1957), 49 U. S. C. § 309 (b), a treatment attacked and invalidated in the District Court, was animated by the same policy preference for preserving available common carriage that characterized its disposition of the *J–T Transport* application, reviewed here today, *ante,* p. 81. The pertinent portion of its report is as follows:

> "Aside from evidence pertaining to rates, the record is devoid of any substantial showing of dissatisfaction on the part of the shippers with existing service. Complaints about joint-line service, slow transit time, and inability to arrange multiple pickups and deliveries are of a general nature, and are not substantiated by reference to specific instances. Although protestant motor carriers, especially those operating over regular routes, may be hindered in some instances by their authorities and the nature of their operations from achieving complete flexibility in effecting multiple pickups and deliveries, the supporting shippers have failed to show that they have been unable to obtain reasonably adequate service

> upon request. . . . In the absence of a more positive showing that existing service will not meet shipper's reasonable transportation needs, we are not warranted in finding that a new service should be authorized or that the supporting shippers will be adversely affected by a denial of this application." 81 M. C. C. 35, 41–42 (1959).

This conclusion was attacked and set aside in the District Court on much the same grounds as those leading to a similar result in the *J–T Transport* case, *supra*. Little need be added here to what I said there. Suffice it to say that the Commission made the findings required of it by § 209 (b) and that each was supported by substantial evidence. Although its evaluation of those findings and the conclusion that it drew from them [1] may be different from those we might have reached were we on the Commission, it is not for a reviewing court to upset the Commission's informed judgment on the factors it has been asked by Congress to consider. *United States* v. *Pierce Auto Lines,* 327 U. S. 515, 535–536; *Bass* v. *United States,* 163 F. Supp. 1, 4 (W. D. Va. 1958), aff'd *per curiam,* 358 U. S. 333; and see *Secretary of Agriculture* v. *Central Roig Ref. Co.*, 338 U. S. 604.

There is, however, an additional issue in this case that differentiates it from *J–T Transport, supra*. It is whether the Commission is required in an application proceeding to consider evidence that the rates of available common carriers are so high as to make transportation costs prohibitive for a supporting shipper.

Before reaching that issue, it is necessary to dispose of a contention that prevailed in the District Court and is pressed here, that the Commission must consider in every

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[1] The Commission has consistently ruled that a joint-line transportation service is not inadequate to meet a shipper's needs. See cases collected in Hale & Hale, Competition or Control III: Motor Carriers, 108 U. Pa. L. Rev. 775, 783 n. 24 (1960).

application evidence of mere rate advantages resulting from economies inherent in contract-carrier operations. Section 209 (b) makes no such requirement.

In *Schaffer Transp. Co.* v. *United States,* 355 U. S. 83, 91–92, we recognized and impliedly approved the long-standing Commission practice of ignoring rate advantages offered by an applicant over available motor carriers. The Commission has consistently ruled that a shipper dissatisfied with existing common-carrier rates cannot on that ground alone successfully support an application for a contract-carrier permit, and that its remedy lies in attacking the rates under § 216 of the Act. See, *e. g., Dixon & Koster Contract Carrier Application,* 32 M. C. C. 1, 4 (1942); *James F. Black Extension of Operations—Prefabricated Houses,* 48 M. C. C. 695, 708–709 (1948); *Joseph Pomprowitz Extension—Packing House Products,* 51 M. C. C. 343, 350 (1950). That is what it ruled in this case, see 81 M. C. C., at 42–43.

This consistent Commission practice rests on relevant transportation policy considerations. If rate advantages resulting from inherent economies were made a determining factor, the Commission would have to permit protestants to challenge the cost justification of an applicant's proposed rates. This the Commission has never permitted, see *Omaha & C. B. R. & Bridge Co. Common Carrier Application,* 52 M. C. C. 207, 234–235 (1950), largely because at the application stage there is as yet no revealing record of profit or loss derived from the proposed transportation service,[2] and its refusal has been judicially approved. *Railway Express Agency* v. *United States,* 153 F. Supp. 738, 741 (S. D. N. Y. 1957), aff'd *per curiam,* 355 U. S. 270; see *American Trucking Assns.* v. *United States,* 326 U. S. 77, 86–87.

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[2] Thus in the present case the applicant submitted a balance sheet but no income statement (R. 31).

More fundamentally, it misconceives the object of congressional motor-carrier regulation to maintain that the Commission must in application proceedings respect inherent cost advantages of contract as against common carriers. They are not different "modes" of transportation within the meaning of the National Transportation Policy, and Congress has not been concerned with maintaining competition between them as it has been, for example, between railroad and motor carriers. Compare *Schaffer Transp. Co.* v. *United States,* 355 U. S. 83. The Commission is specifically admonished, in § 218 (b) of the Act, not to prescribe minimum rates that give contract carriers an undue competitive advantage over common carriers.

In rate proceedings, however, the Commission has construed this section as not authorizing it to invalidate cost-justified rates of existing, previously authorized contract carriers even though they may draw away a large volume of traffic from common carriers. *New England Motor Rate Bureau* v. *Lewers,* 30 M. C. C. 651 (1941). Once granted a permit, therefore, a contract carrier may exploit its inherent cost advantages to the great detriment of existing common carriers. In determining to ignore those cost advantages in an application proceeding, the Commission acts well within its authority to effectuate the congressional policy of limiting entrance to contract carriage as a means of preserving the capacity of available common carriers to meet the Nation's transportation needs.

That policy is unaffected by the 1957 amendments to §§ 203 (a)(15) and 209 (b). There is not one reference to rates in the legislative history of those amendments. If anything, the action of the 1957 Congress looks the other way; § 218 (a) was amended, by 71 Stat. 343, 49 U. S. C. § 318 (a), to require the filing of actual rather

than minimum contract-carrier rates, so as to eliminate a competitive disadvantage of common carriers.

The right of the Commission to disregard rate advantages as such in application proceedings does not, however, dispose of this case. For the testimony and arguments presented to the Commission fairly raised the claim that the available common carrier rates, whether or not just and reasonable in relation to transportation costs, were prohibitive for the shippers. If this claim were sustained by the Commission, it is difficult to see how it could avoid the conclusion that a denial of the permit would hobble the shipper without benefiting protestants by potentially augmenting their traffic.

The Commission has in fact recognized what it styles an "embargo" exception to its usual practice of disregarding the level of rates charged by existing carriers. See *H. L. & F. McBride Extension—Ohio,* 62 M. C. C. 779, 790 (1954). In *Herman R. Ewell Extension—Philadelphia,* 72 M. C. C. 645, 648 (1957), the Commission treated a shipper's claim similar to the present one in a manner relevant to our problem.

> "[T]he present record does not show any effort by the carriers to handle with the shipper its claim that their rates are prohibitive. Sugar is a relatively inexpensive commodity which sells at prices which, compared to prewar prices, do not appear to have increased percentagewise to the same extent as most other commodities. It appears not improbable that the margin of profit thereon is so narrow that the traffic will not move except at rates lower than other commodities customarily moved in tank-truck equipment. It may be that protestant's rates, though not intrinsically unreasonable from a standpoint of cost or compared to other bulk liquid rates, are still too high to move this particular traffic. And it may be that protestants are within their rights in the exer-

cise of their managerial discretion in refusing any reduction even at the cost of losing the traffic but, if so, they should at least have negotiated with the shippers to the point of making their positions clear. Their failure to do so indicates either decision to forego the traffic except at their present rates or a lack of interest in it at rates at which it can move.

"Without departing from the general proposition that the reasonableness of rates is not an issue in public convenience and necessity proceedings, and that if rates are too high an adequate remedy is available under section 216 of the Interstate Commerce Act, we conclude that authority should be granted here. . . . [Protestants'] rates have not and will not move the traffic; and to this extent the available motor service is inadequate to meet the shipper's requirements. Protestants, never having handled the traffic, will not be adversely affected by this action."

In the *Ewell* proceeding, there was evidence that the existing rates were two to three times as high as those proposed by the applicant, that the shipper would have to "absorb" about $200 on each 30,000-pound shipment, and that it had asked existing carriers to adjust their rates without result. Similar evidence was presented in the present proceeding. The representative of the Steele Canning Company testified that, in numerous discussions with protestant carriers, it had learned that their less-than-truckload rates were two and three times as high as the truckload rates proposed by the applicant, and that these rates would drive its canned goods out of the competitive market. Whether this testimony was specific and persuasive enough to establish that the traffic would not move at existing rates we do not know, for the Commission made no finding on this issue. Compare *Schirmer Transp. Co., Inc., Extension—Molasses,* 77 M. C. C. 240,

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242 (1958). Until it does, we are unable to exercise our reviewing function of ensuring that the Commission stays within its statutory authority and does not act arbitrarily. Cf. *Florida* v. *United States,* 282 U. S. 194, 214–215.

I would vacate the judgment of the District Court and remand the case to the Commission for a considered determination whether the rates of protestant motor carriers are prohibitive. The scope of inquiry should be strictly limited. The Commission need not engage in a full-dress rate proceeding to determine whether present motor-carrier rates are unjust or unreasonable. It need only find, from the evidence of record or additional evidence that it deems necessary, whether those rates impose an embargo on the shippers' goods.

HODGES *v.* UNITED STATES.

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

No. 58. Argued November 13, 1961.—Decided December 4, 1961.

Certiorari was granted in this case on the understanding that it presented the question whether the District Court should have accorded petitioner a hearing under 28 U. S. C. § 2255 when it appeared that no appeal had been perfected from the original judgment of conviction. A thorough review of the full record revealed that the District Court did in fact conduct such a hearing, though the minutes of such hearing had been lost, and that no hearing was required under the statute, because "the files and records of the case conclusively show" that petitioner was entitled to no relief. *Held:* The writ is dismissed as improvidently granted.

Reported below: 108 U. S. App. D. C. 375, 282 F. 2d 858.

Quinn O'Connell argued the cause for petitioner. With him on the briefs were *Henry B. Weaver, Jr.* and *Hershel Shanks.*

Beatrice Rosenberg argued the cause for the United States. With her on the brief were *Solicitor General Cox, Assistant Attorney General Miller* and *J. F. Bishop.*

PER CURIAM.

We brought this case here upon the understanding that the question it presented was whether the District Court should have accorded petitioner a hearing under 28 U. S. C. § 2255 when it appeared that no appeal had been perfected from the original judgment of conviction. After a thorough review of the full record, made possible after the case was briefed and argued on the merits, we have concluded that the petition for certiorari was improvidently granted. The record shows that the District Court did in fact conduct a hearing upon the petitioner's § 2255 motion, 156 F. Supp. 313, but that the

minutes of such hearing have been lost. Whether or not that hearing was adequate need not, however, be determined, for we are satisfied from the record, which includes the trial transcript, that in any event this was a case where no hearing was required under the statute, because "the files and records of the case conclusively show" that the petitioner was entitled to no relief. Therefore, and necessarily without approving or disapproving the view of the Court of Appeals on what now appears an extraneous issue, 108 U. S. App. D. C. 375, 282 F. 2d 858, we dismiss the writ as improvidently granted.

It is so ordered.

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

The hearing which the District Court gave petitioner under 28 U. S. C. § 2255 is not dispositive of the case. That hearing was held October 25, 1957. The issue with which the Court of Appeals in the present case was concerned was presented in two affidavits, one by petitioner dated August 3, 1959, and the other by petitioner's lawyers dated July 31, 1959. Petitioner swears he did not know that he had only 10 days to appeal. Petitioner's lawyers swear, "We were present at the time that sentence was imposed. Immediately after sentence was imposed, John Hodges was removed from the courtroom by the U. S. Marshal and we did not have an opportunity to talk to him." They also state that they advised petitioner's wife that she should have him prosecute an appeal. Petitioner says that when his wife mentioned an appeal, the 10-day period had passed. No one gave petitioner timely notice of his right to appeal.*

*Had the sentencing court realized petitioner had no effective legal representation at the time, its duty would have been clear. Rule 37 (a) (2) of the Federal Rules of Criminal Procedure pro-

The underlying constitutional issue which petitioner presses is that the confession used against him was coerced. I do not see how we can say that "the files and records of the case conclusively show" that petitioner is entitled to no relief. Following the 1957 hearing the District Court made a finding that petitioner's confession was "voluntary" and was not "the result of coercion, threats or promises." But there is no record of that hearing. The reporter's notes were lost. No court can review the findings. No court has ever reviewed them.

We are not here concerned with the right to appeal out of time, as was the case of *United States* v. *Robinson,* 361 U. S. 220. Indeed, in *Robinson* the Court recognized that relief was, or should be, available under § 2255 in cases such as the one now before us:

> "The allowance of an appeal months or years after expiration of the prescribed time seems unnecessary for the accomplishment of substantial justice, for there are a number of collateral remedies available to redress denial of basic rights. Examples are: The power of a District Court under Rule 35 to correct an illegal sentence at any time, and to reduce a sentence within 60 days after the judgment of conviction becomes final; the power of a District Court to entertain a collateral attack upon a judgment of conviction and to vacate, set aside or correct the sentence under 28 U. S. C. § 2255; and proceedings by way of writ of error *coram nobis.*" *Id.,* at 230, note 14.

If the error now being pressed were a non-constitutional one, relief might be denied, citing *Sunal* v. *Large,* 332 U. S.

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vides: ". . . When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant. An appeal by the government when authorized by statute may be taken within 30 days after entry of the judgment or order appealed from."

174. But in that case, where *habeas corpus* was sought to do service as an appeal, we made clear that we were not dealing with constitutional defects in the trial. *Id.*, at 178, 182. When a constitutional issue was presented, we took the other course and allowed relief by way of § 2255, at least until today. See, *e. g., Jordan* v. *United States,* 352 U. S. 904. In the *Jordan* case, petitioner had not raised the constitutional objection at the trial; and though he had appealed, he had failed to raise it there. 98 U. S. App. D. C. 160, 166, 233 F. 2d 362, 368. Later he tendered it in the § 2255 proceeding. We held that the constitutional issue, though not raised at the trial or on appeal, as could have been done, could be raised in a § 2255 proceeding. The Court of Appeals promptly and properly took the *Jordan* case to mean just that. *Askins* v. *United States,* 102 U. S. App. D. C. 198, 200, 251 F. 2d 909, 911. If the *Jordan* case is the law, I fail to see why relief by way of § 2255 is not available when petitioner, through no fault of his own, was denied the right to appeal.

UNION CARTAGE CO. *v.* UNITED STATES ET AL.

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

No. 448. Decided December 4, 1961.

193 F. Supp. 645, affirmed.

Earl R. Stanley for appellant.

Solicitor General Cox, Assistant Attorney General Loevinger, Richard A. Solomon and *Robert W. Ginnane* for appellees.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

MR. JUSTICE BLACK and MR. JUSTICE BRENNAN are of the opinion that probable jurisdiction should be noted.

LINNABERY ET AL. *v.* IOWA.

APPEAL FROM THE SUPREME COURT OF IOWA.

No. 26, Misc. Decided December 4, 1961.

Appeal dismissed and certiorari denied.

Appellants *pro se.*

Evan Hultman, Attorney General of Iowa, for appellee.

PER CURIAM.

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

BOWNE *v.* UTAH.

APPEAL FROM THE SUPREME COURT OF UTAH.

No. 169, Misc. Decided December 4, 1961.

Appeal dismissed for want of a substantial federal question.
Reported below: 11 Utah 2d 95, 355 P. 2d 689.

George H. Searle for appellant.

Walter L. Budge, Attorney General of Utah, and *Ronald N. Boyce,* Assistant Attorney General, for appellee.

PER CURIAM.

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

POST *v.* BOLES, WARDEN.

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

No. 319, Misc. Decided December 4, 1961.

Certiorari granted; judgment vacated; and case remanded.

Petitioner *pro se.*

C. Donald Robertson, Attorney General of West Virginia, and *Claude A. Joyce* and *George H. Mitchell,* Assistant Attorneys General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded for a hearing in the light of *Uveges* v. *Pennsylvania,* 335 U. S. 437, and *Herman* v. *Claudy,* 350 U. S. 116.

JOHNSON ET AL. *v.* NEW JERSEY.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

No. 347, Misc. Decided December 4, 1961.

Appeal dismissed for want of a substantial federal question.
Reported below: 34 N. J. 212, 168 A. 2d 1.

Stanford Shmukler for appellants.

Norman Heine for appellee.

PER CURIAM.

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

FEDERAL LAND BANK OF WICHITA *v.* BOARD OF COUNTY COMMISSIONERS OF KIOWA COUNTY, KANSAS, ET AL.

CERTIORARI TO THE SUPREME COURT OF KANSAS.

No. 25. Argued October 16, 1961.—Decided December 11, 1961.

Petitioner is a federal land bank organized as a federal instrumentality under the Federal Farm Loan Act, which exempts such banks from all taxation "except taxes upon real estate"; authorizes them to acquire land in satisfaction of debts; but forbids them to hold any such real estate for longer than 5 years, "except with the special approval of the Farm Credit Administration." Petitioner acquired certain farm land in Kansas in satisfaction of a debt, sold it for more than the amount of the debt, retained a half interest in the mineral estate, leased its oil and gas rights and began receiving royalties therefrom. It paid taxes on its interest in the mineral estate, which was "real estate" under Kansas law; but it challenged the right of a county to levy personal property taxes on its oil and gas lease and the royalties derived therefrom under a Kansas statute which declared them to be "personal property." The State Supreme Court held that Congress did not intend to exempt this personal property from taxation, because the mineral estate had been held longer than 5 years and because holding it after the loss had been recouped did not serve the bank's governmental function. *Held:* There is no basis for concluding that Congress did not intend the immunity to apply in this case; and the state personal property tax on petitioner's oil and gas lease and the royalties derived therefrom are unconstitutional by virtue of the Supremacy Clause of the Constitution. Pp. 147–156.

(a) The holding of the mineral estate involved here was in furtherance of the bank's governmental function. Pp. 150–152.

(b) A regulation of the Farm Credit Administration supplied the requisite permission to hold the mineral estate longer than 5 years. Pp. 152–155.

187 Kan. 148, 354 P. 2d 679, reversed.

J. William Doolittle argued the cause for petitioner. With him on the briefs were *Solicitor General Cox, Assistant Attorney General Oberdorfer, I. Henry Kutz, Paul O. Ritter, William G. Plested, Jr.* and *Edward H. Jamison.*

Robert C. Londerholm, Special Assistant Attorney General of Kansas, argued the cause for respondents. With him on the briefs were *William M. Ferguson,* Attorney General, and *A. K. Stavely,* Assistant Attorney General.

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

A political subdivision of a State has levied a personal property tax on a federal instrumentality despite a claim of immunity by virtue of a federal statute.

Petitioner, the Federal Land Bank of Wichita, acquired a mortgage on realty in Kiowa County, Kansas, in the course of its business as a federal instrumentality duly organized under the Federal Farm Loan Act.[1] Upon default, foreclosure, purchase at a sheriff's sale, and confirmation, petitioner became the owner of the land. Subsequently the land was conveyed to a third party, the deed reserving an undivided one-half interest in the mineral estate. By the time of this conveyance petitioner had recovered the entire loss occasioned by the default on the mortgage. Petitioner executed an oil and gas lease on the reserved mineral estate, and the discovery of a gas pool in the area ultimately led to the payment of royalties.

A Kansas statute declared that oil and gas leases and the royalties derived therefrom were personal property and were subject to taxation by the counties.[2] Pursuant

[1] The Act of July 17, 1916, 39 Stat. 360, as amended, currently codified at 12 U. S. C. § 641 *et seq.*

[2] General Statutes of Kansas, 1949, §§ 79–329 to 79–334. Section 79–329 reads as follows:

"Oil and gas property as personalty. That for the purpose of valuation and taxation, all oil and gas leases and all oil and gas wells, producing or capable of producing oil or gas in paying quantities, together with all casing, tubing or other material therein, and all other equipment and material used in operating the oil or gas wells are hereby declared to be personal property and shall be assessed and taxed as such."

to this statute, Kiowa County levied a personal property tax on petitioner's interest in the oil and gas lease and on the royalties for the year 1957.

By the time the tax was levied, petitioner had owned the mineral estate some 14 years. The statute which authorized federal land banks to acquire mortgaged lands limited the period of ownership to five years unless special permission could be obtained from the Farm Credit Administration.[3] That agency had promulgated a regulation granting blanket permission to all land banks to hold mineral rights longer than five years.[4]

Petitioner sought an injunction against collection of the personal property tax in the state court, claiming an exemption under 12 U. S. C. § 931,[5] which provides, in part, that federal land banks "shall be exempt from . . . State, municipal, and local taxation, except taxes upon real estate held . . . under the provisions of [section] . . . 781."[6] The injunction was denied. On appeal, the

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[3] "Fourth. *Acquiring and disposing of property.*—To acquire and dispose of—

"(a) Such property, real or personal, as may be necessary or convenient for the transaction of its business, which, however, may be in part leased to others for revenue purposes.

"(b) Parcels of land acquired in satisfaction of debts or purchased at sales under judgments, decrees, or mortgages held by it. But no such bank shall hold title and possession of any real estate purchased or acquired to secure any debt due to it, for a longer period than five years, except with the special approval of the Farm Credit Administration in writing." 12 U. S. C. § 781 Fourth, 39 Stat. 372, § 13.

[4] 6 CFR § 10.64. See text p. 153, *infra*.

[5] "Every Federal land bank . . . including the capital and reserve or surplus therein and the income derived therefrom, shall be exempt from Federal, State, municipal, and local taxation, except taxes upon real estate held, purchased, or taken by said bank . . . under the provisions of [section] . . . 781 of this title. . . ."

[6] See note 3, *supra*.

Supreme Court of Kansas affirmed,[7] holding that Congress did not intend § 931 to exempt this personal property from taxation because the mineral estate was being held longer than the express time limit established by Congress and because the holding of the mineral estate after the loss had been recouped did not serve the governmental function assigned to the Federal Land Bank. The Court also held that no immunity could be implied. Certiorari was granted in order to determine whether the State had exacted a tax forbidden by the Supremacy Clause of the Constitution.[8] 365 U. S. 841.

The Supreme Court of Kansas correctly concedes that a federal instrumentality is not subject to the plenary power of the States to tax,[9] that the Congress has the power to determine, within the limits of the Constitution, the extent that its instrumentalities shall enjoy immunity from state taxation,[10] that the federal land bank is a constitutionally created federal instrumentality,[11] and that Congress has immunized it from personal property taxes on activities in furtherance of its lending functions.[12]

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[7] 187 Kan. 148, 354 P. 2d 679.

[8] Article VI, cl. 2.

[9] *McCulloch* v. *Maryland*, 4 Wheat. 316; *Osborn* v. *Bank of the United States*, 9 Wheat. 738.

[10] *Carson* v. *Roane-Anderson Co.*, 342 U. S. 232; *Cleveland* v. *United States*, 323 U. S. 329; *Maricopa County* v. *Valley National Bank*, 318 U. S. 357; *Federal Land Bank of St. Paul* v. *Bismarck Lumber Co.*, 314 U. S. 95; *Pittman* v. *Home Owners' Loan Corp.*, 308 U. S. 21; *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466; *Des Moines National Bank* v. *Fairweather*, 263 U. S. 103; *First National Bank* v. *Adams*, 258 U. S. 362; *Owensboro National Bank* v. *Owensboro*, 173 U. S. 664.

[11] *Smith* v. *Kansas City Title Co.*, 255 U. S. 180.

[12] *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U. S. 95. See also *Federal Land Bank* v. *Crosland*, 261 U. S. 374. Cf. *Federal Land Bank* v. *Priddy*, 295 U. S. 229.

The controversy arises over the holding by the Supreme Court of Kansas on alternative grounds that Congress did not intend § 931 to apply to oil and gas leases in the circumstances of this case.[13]

I.

The Court found that the retention of the mineral estate by the petitioner after the loss incurred upon the default on the mortgage had been recovered did not serve the governmental function assigned to the land bank and, as Congress intended immunity to apply only to protect this function, § 931 did not apply here. The Court did not define the type of function that petitioner did perform. Legitimate activities of governments are sometimes classified as "governmental" or "proprietary"; [14] however, our decisions have made it clear that the Federal Government

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[13] Oil and gas leases are personal property under the law of Kansas, a characterization accepted by the Court and all parties below. We do not need to consider the situation when oil and gas leases are characterized as real property under state law. See, *e. g.*, *Stokely* v. *State*, 149 Miss. 435, 115 So. 563; *Terry* v. *Humphreys*, 27 N. M. 564, 203 P. 539; *Stephens County* v. *Mid-Kansas Oil & Gas Co.*, 113 Tex. 160, 254 S. W. 290. Other jurisdictions classify oil and gas leases as profits à prendre or incorporeal interests. See generally 1A Summers, Oil & Gas, §§ 151–170. Cf. Concepts of the nature of mineral interests discussed in footnote 21, *infra*.

[14] These general terms serve as a basis for determining, *inter alia*, whether the doctrine of sovereign immunity protects a municipality from liability for a tort committed by one of its servants, see, *e. g.*, *Dallas* v. *City of St. Louis*, 338 S. W. 2d 39 (Mo.); *Clark* v. *Scheld*, 253 N. C. 732, 117 S. E. 2d 838; *Osborn* v. *City of Akron*, 171 Ohio St. 361, 171 N. E. 2d 492; *Wade* v. *Salt Lake City*, 10 Utah 2d 374, 353 P. 2d 914; *Francke* v. *City of West Bend*, 12 Wis. 2d 574, 107 N. W. 2d 500; 18 McQuillin, Municipal Corporations, §§ 53.01, 53.23, 53.24 (3d ed. 1950). But cf. *New York* v. *United States*, 326 U. S. 572.

performs no "proprietary" functions.[15] If the enabling Act is constitutional and if the instrumentality's activity is within the authority granted by the Act, a governmental function is being performed. Since the Act establishing the federal land banks has been held to be constitutional, *Smith* v. *Kansas City Title Co.*, 255 U. S. 180, we need only to determine whether the challenged ownership comes within the purview of the statute.

The purpose of the Federal Farm Loan Act and its subsequent amendments was to provide loans for agricultural purposes at the lowest possible interest rates.[16] One method of keeping the interest rate low was to authorize the federal land bank to make a profit to be distributed to the shareholders in the form of dividends.[17] Because the associations of farmer-borrowers

[15] "The argument that the lending functions of the federal land banks are proprietary rather than governmental misconceives the nature of the federal government with respect to every function which it performs. The federal government is one of delegated powers, and from that it necessarily follows that any constitutional exercise of its delegated powers is governmental. . . . It also follows that, when Congress constitutionally creates a corporation through which the federal government lawfully acts, the activities of such corporation are governmental [citing cases]." *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U. S. 95, 102. See *Pittman* v. *Home Owners' Loan Corp.*, 308 U. S. 21, 32; *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, 477.

[16] S. Rep. No. 144, 64th Cong., 1st Sess. 1, 2, 4, 7–9; H. R. Rep. No. 630, 64th Cong., 1st Sess. 4, 5; H. Doc. No. 494, 64th Cong., 1st Sess., 8; 53 Cong. Rec. 6696, 7021, 7023, 7024. Nothing in the subsequent amendments has been called to our attention which modifies this purpose. See Faulkner, American Economic History, 388–390 (6th ed. 1949); Bogart and Kemmerer, Economic History of the American People, 698 (1944).

[17] *Federal Land Bank* v. *Priddy*, 295 U. S. 229, 233. The Act of July 17, 1916, 39 Stat. 360, § 23, now 12 U. S. C. § 901 *et seq.*; S. Rep. No. 144, 64th Cong., 1st Sess. 5. H. R. Rep. No. 630, 64th Cong., 1st Sess. 10.

were required by law to be shareholders,[18] the distribution of dividends effectively reduced the interest rates. This profit could be earned in two ways: interest from the loans on mortgaged lands and gains on the sale of lands acquired under the provisions of § 781 Fourth.[19] The Kansas Court construes § 781 Fourth (b) to grant the limited power to sell land acquired in satisfaction of a debt only to recoup the loss incurred upon the default. We find no such limitation expressed or implied. The loans on the mortgages are limited to a percentage of the current value of the lands that is considerably less than full value, but there is no limit on the amount of the sale price. The banks are therefore authorized to sell lands acquired after default at the best possible price, absorbing the losses in the reserve accounts[20] and distributing the profits in dividends. It follows that the land banks are not restricted to a sale price merely sufficient to recoup any losses. The retention of a mineral interest might well be a method of increasing the recovery from lands acquired through mortgage defaults. Consequently, we find that the holding of the mineral estate involved here is in furtherance of the bank's governmental function.

II.

The alternative ground relied upon by the Supreme Court of Kansas for concluding that Congress did not intend to confer immunity here relates to the asserted

[18] Persons engaged in agriculture are the only class authorized to borrow from the federal land banks. To obtain a loan, application is made for membership in an association comprised solely of other borrowers. The prospective borrower is required to subscribe to stock in the association in proportion to the loan he desires to obtain. The association approaches the federal land bank, obtains the loan, and subscribes to stock in the federal land bank in proportion to the loan. See 12 U. S. C. §§ 721, 733. Cf. 12 U. S. C. § 723.

[19] See note 3, *supra*.

[20] 12 U. S. C. § 901.

illegality of petitioner's ownership of the mineral estate. Section 781 Fourth (b) limits the time that a federal land bank may own realty acquired after default on the mortgage to five years unless special permission can be obtained from the Farm Credit Administration. Mineral estates are realty under the state law,[21] and at the time of the tax levy petitioner had owned the mineral estate longer than five years, relying upon the following regulation promulgated by the Farm Credit Administration to supply the requisite special permission:

> "*Holding mineral rights for more than 5 years.* In cases where, in connection with a sale of bank-owned real estate, the bank has retained royalty or other rights in or to minerals, and desires to hold such rights for a period in excess of 5 years, it is not considered that the bank has both 'title and possession' of real estate within the meaning of section 13 Fourth (b) of the Federal Farm Loan Act (12 U. S. C. 781 Fourth (b)). However, retention of such minerals and mineral rights for periods in excess of 5 years, when in the bank's opinion it is in the bank's interest to do so, has the approval of the Administration." [22]

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[21] We take this statement from the opinion below. We note that petitioner has paid real estate taxes on the mineral estate. Mineral interests receive varying characterizations among the States. Some jurisdictions recognize a horizontal severance of the freehold into surface and mineral estates; others treat the mineral interests as incorporeal hereditaments. Compare *Ohio Oil Co.* v. *Indiana,* 177 U. S. 190, with *Stephens County* v. *Mid-Kansas Oil & Gas Co.,* 113 Tex. 160, 166, 254 S. W. 290, 291. Cf. *Wilson* v. *Holm,* 164 Kan. 229, 188 P. 2d 899. See Masterson, A 1952 Survey of Basic Oil and Gas Law, 6 Sw. L. J. 1; Walker, Fee Simple Ownership of Oil and Gas in Texas, 6 Tex. L. Rev. 125.

[22] 6 CFR § 10.64.

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Although the reasons are not altogether clear, the Court found this special permission invalid, concluding that petitioner is, therefore, owning the land without authority.

First, the Court found "much to be said" for the trial court's holding that the regulation was not effective because the Farm Credit Administration could not delegate the power to determine when mineral interests might be retained longer than five years to the federal land banks, so that no "special permission" had been given. Assuming that this is a holding by the highest state court, we are of the opinion that no delegation problem has been presented. Analytically, the power given to the Farm Credit Administration by § 781 Fourth (b) is a licensing power,[23] not a rule-making, an adjudicating, or an investigating power. The regulation states that federal land banks have permission to retain mineral interests longer than five years. This is an exercise of the power to license, not a delegation of it.

The second ground for invalidating the permission given by the Farm Credit Administration was that permission could not be given unless the holding of the land was necessary to recoup the loss on the defaulted mortgage. As we have indicated, the holding of a mineral estate after the bank has recouped its loss is within the authority granted by Congress, and thus the Administration had the power to grant this permission.

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[23] "The word 'license,' means permission, or authority; and a license to do any particular thing, is a permission or authority to do that thing; and if granted by a person having power to grant it, transfers to the grantee the right to do whatever it purports to authorize. It certainly transfers to him all the right which the grantor can transfer, to do what is within the terms of the license." *Gibbons* v. *Ogden*, 9 Wheat. 1, 213–214; see, *e. g.*, *Sinnot* v. *Davenport*, 22 How. 227, 240; *Southern Pac. R. Co.* v. *Olympian Dredging Co.*, 260 U. S. 205; *Pan-Atlantic S. S. Corp.* v. *Atlantic C. L. R. Co.*, 353 U. S. 436; Administrative Procedure Act, § 2 (e), 5 U. S. C. § 1001 (e).

While the court below did challenge the power of the Farm Credit Administration to give the permission required by § 781 Fourth (b), it did not challenge the interpretation placed on that statute when blanket permission was given. The Administration interpreted § 781 Fourth (b) to exclude mineral estates.[24] We, therefore, are not required to review that interpretation [25] or to examine the jurisdiction, if any, of a state court to review the statutory construction made by a federal administrative agency in a collateral attack on the issuance of a license.

While it is not necessary to this decision, it is at least of interest that there have been efforts in successive sessions of Congress to amend the Act to accomplish the result achieved by the Supreme Court of Kansas and that these efforts have failed.[26] The extent of the mineral estates owned by federal land banks is considerable: petitioner owns an interest in approximately 283,000 acres; all land banks own an interest in 9,900,000 acres.[27]

III.

Since there are no infirmities in the holding of the mineral estate by the petitioner, there is no basis for implying that Congress did not intend § 931 to provide immunity

[24] 6 CFR § 10.64 quoted in text at p. 153, *supra*.

[25] See, *e. g.*, *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 139–140; *Unemployment Comp. Comm'n* v. *Aragon*, 329 U. S. 143, 153; Administrative Procedure Act, § 10 (e), 5 U. S. C. § 1009 (e); see also, *e. g*, Witherspoon, Administrative Discretion to Determine Statutory Meaning: "The High Road," 35 Tex. L. Rev. 63; *ibid.*, "The Low Road," 38 Tex. L. Rev. 392, 572; Nathanson, Administrative Discretion in the Interpretation of Statutes, 3 Vand. L. Rev. 470.

[26] See H. R. 9290, 76th Cong., 3d Sess.; H. R. 667, 79th Cong., 1st Sess.; H. R. 583, 80th Cong., 1st Sess. See also H. R. 1721 and H. R. 2358, 80th Cong., 1st Sess.; H. R. 1264, 81st Cong., 1st Sess.; S. 2904, 82d Cong., 2d Sess., and H. R. 428, 82d Cong., 1st Sess.; S. 75, H. R. 102 and H. R. 1313, 83d Cong., 1st Sess.; S. 538, 84th Cong., 1st Sess.

[27] Petition for writ of certiorari, pp. 8, 9.

in this case. As an express immunity has been conferred, there is no need to consider whether the doctrine of implied immunity applies. We conclude that the state personal property tax imposed on petitioner's oil and gas lease and upon the royalties derived therefrom must fall as being unconstitutional by virtue of the Supremacy Clause of the Constitution.

Reversed.

MR. JUSTICE BLACK concurs in the result.

Syllabus.

GARNER ET AL. *v.* LOUISIANA.

CERTIORARI TO THE SUPREME COURT OF LOUISIANA.

No. 26. Argued October 18–19, 1961.—Decided December 11, 1961.*

In Louisiana places of business catering to both white and Negro patrons, petitioners, who are Negroes, took seats at lunch counters where only white persons customarily were served, and they remained quietly in their seats after being told that they could not be served there. They made no speeches, carried no placards and did nothing else to attract attention to themselves, except to sit at the lunch counters. They were not asked to leave by the proprietors or their agents; but they were asked to leave by police officers. Upon failing to do so, they were arrested and charged with "disturbing the peace." They were convicted in a state court under a state statute which defines "disturbing the peace" as the doing of specified violent, boisterous or disruptive acts and "any other act in such a manner as to unreasonably disturb or alarm the public." They were denied relief by the State Supreme Court. The records contained no evidence to support a finding that petitioners had disturbed the peace, either by outwardly boisterous conduct or by passive conduct likely to cause a public disturbance. *Held:* The convictions were so totally devoid of evidentiary support as to violate the Due Process Clause of the Fourteenth Amendment. *Thompson* v. *City of Louisville,* 362 U. S. 199. Pp. 158–174.

(a) There being nothing in the record to indicate that the trial judge took judicial notice of anything, these convictions cannot be sustained on the theory that he took judicial notice of the general situation, including the local custom of racial segregation in eating places, and concluded that petitioners' presence at the lunch counters might cause a disturbance which it was the duty of the police to prevent. P. 173.

(b) In the circumstances of these cases, merely sitting peacefully in places where custom decreed that petitioners should not sit was not evidence of any crime, and it cannot be so considered either by the police or by the courts. P. 174.

Reversed.

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*Together with No. 27, *Briscoe et al.* v. *Louisiana,* and No. 28, *Hoston et al.* v. *Louisiana,* also on certiorari to the same Court.

Jack Greenberg argued the cause for petitioners. With him on the briefs were *A. P. Tureaud, Thurgood Marshall, William T. Coleman, James A. Nabrit III* and *Louis H. Pollak.*

John F. Ward, Jr. argued the cause for respondent. With him on the briefs were *Jack P. F. Gremillion,* Attorney General of Louisiana, and *N. Cleburn Dalton,* Assistant Attorney General.

Briefs of *amici curiae,* urging reversal, were filed by *Solicitor General Cox, Assistant Attorney General Marshall, Bruce J. Terris, Harold H. Greene* and *Howard A. Glickstein* for the United States, and by *John R. Fernbach* and *Murray A. Gordon* for the Committee on the Bill of Rights of the Association of the Bar of the City of New York.

Mr. Chief Justice Warren delivered the opinion of the Court.

These cases come to us from the Supreme Court of Louisiana and draw in question the constitutionality of the petitioners' convictions in the 19th Judicial District Court, Parish of East Baton Rouge, Louisiana, for the crime of disturbing the peace. The petitioners [1] were brought to trial and convicted on informations charging them with violating Title 14, Article 103 (7), of the Louisiana Criminal Code, 1942, in that "they refused to move from a cafe counter seat . . . after having been ordered to do so by the agent [of the establishment]; said conduct being in such manner as to unreasonably and foreseeably disturb the public . . . ." In accordance with state procedure, petitioners sought post-conviction review in the Supreme Court of Louisiana through writs of certiorari, mandamus and prohibition. They contended that the

[1] Unless otherwise indicated, the term "petitioners" refers to the petitioners in all three cases, Nos. 26, 27 and 28.

State had presented no evidence to support the findings of statutory violation, and that their convictions were invalid on other constitutional grounds, both state and federal. Relief was denied. Federal questions were properly raised and preserved throughout the proceedings, and timely petitions for certiorari filed in this Court were granted. 365 U. S. 840. The United States Government appeared as *amicus curiae* urging, on various grounds, that the convictions be reversed. An *amicus* brief also urging reversal was filed by the Committee on the Bill of Rights of the Association of the Bar of the City of New York.

In our view of these cases and for our disposition of them, the slight variance in the facts of the three cases is immaterial. Although the alleged offenses did not occur on the same day or in the same establishment, the petitioners were all arrested by the same officers, charged with commission of the same acts, represented by the same counsel, tried and convicted by the same judge, and given identical sentences. Because of this factual similarity and the identical nature of the problems involved in granting certiorari, we ordered the cases consolidated for argument and now deem it sufficient to file one opinion. In addition, as the facts are simple, we think it sufficient to recite but one of the cases in detail, noting whatever slight variations exist in the others.

In No. 28, *Hoston et al.* v. *Louisiana,* Jannette Hoston, a student at Southern University, and six of her colleagues took seats at a lunch counter in Kress' Department Store in Baton Rouge, Louisiana, on March 29, 1960.[2] In Kress', as in Sitman's Drug Store in No. 26

[2] In No. 26, *Garner et al.* v. *Louisiana,* the petitioners, two Negro students at Southern University, took seats at the lunch counter of Sitman's Drug Store in Baton Rouge, and in No. 27, *Briscoe et al.* v. *Louisiana,* the lunch counter at which the seven Negro students sought service was in the restaurant section of the Greyhound Bus Terminal in Baton Rouge.

where Negroes are considered "very good customers," a segregation policy is maintained only with regard to the service of food.[3] Hence, although both stores solicit business from white and Negro patrons, and the latter as well as the former may make purchases in the general merchandise sections without discrimination,[4] the stores do not provide integrated service at their lunch counters.

The manager at Kress' store, who was also seated at the lunch counter, told the waitress to advise the students that they could be served at the counter across the aisle, which she did. The petitioners made no response and remained quietly in their seats. After the manager had finished his lunch, he telephoned the police and told them that "[some Negroes] were seated at the counter reserved for whites." The police arrived at the store and ordered the students to leave. The arresting officer testified that the petitioners did and said nothing except that one of them stated that she would like a glass of iced tea, but that he believed they were disturbing the peace "by sitting there." When none of the petitioners showed signs of leaving their seats, they were placed under arrest and taken to the police station. They were then charged with violating Title 14, Article 103 (7), of the Louisiana Criminal Code, a section of the Louisiana disturbance of the peace statute.

Before trial, the petitioners moved for a bill of particulars as to the details of their allegedly disruptive behavior and to quash the informations for failure to state any unlawful acts of which they could be constitutionally convicted. The motions were denied, and the

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[3] The same is true, of course, with regard to the bus terminal in No. 27. The terminal itself caters to both races, but separate facilities are maintained for the service of food.

[4] In No. 26, one of the petitioners had purchased an umbrella in the drugstore just prior to taking his seat at the lunch counter, and had encountered no difficulty in making the purchase.

petitioners applied to the Supreme Court of Louisiana for writs of certiorari, prohibition and mandamus to review the rulings. The Supreme Court denied the writs on the ground that an adequate remedy was available through resort to its supervisory jurisdiction in the event of a conviction. The petitioners were then tried and convicted,[5] and sentenced to imprisonment for four months, three months of which would be suspended upon the payment of a fine of $100. Subsequent to their convictions, the Supreme Court, in denying relief on appeal, issued the following oral opinion in each case.

> "Writs refused.
>
> "This court is without jurisdiction to review facts in criminal cases. See Art. 7, Sec. 10, La. Constitution of 1921.
>
> "The rulings of the district judge on matters of law are not erroneous. See *Town of Ponchatoula* vs. *Bates,* 173 La., 824, 138 So., 851." [6]

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[5] Although the problem was exactly the same in all three cases, the trial judge appeared to use different formulae for concluding petitioners' guilt in each opinion. In No. 26, the acts of the petitioners were said to be "an act done in a manner *calculated to, and actually did,* unreasonably disturb and alarm the public." In No. 27, the very same conduct was said to be "an act on their part as would *unreasonably* disturb and alarm the public." In No. 28, it was declared that the conduct "*foreseeably* could alarm and disturb the public." (Emphasis added.)

[6] The opinions of the Supreme Court of Louisiana are not officially reported.

Under Art. 7, Sec. 10, of the Louisiana Constitution, the appellate jurisdiction of the Supreme Court over criminal cases extends only to questions of law, and then only where, *inter alia,* a fine exceeding three hundred dollars or imprisonment exceeding six months has been imposed. See *State* v. *Di Vincenti,* 232 La. 13, 93 So. 2d 676; *State* v. *Gaspard,* 222 La. 222, 62 So. 2d 281; *State* v. *Price,* 164 La. 376, 113 So. 882. The Louisiana Supreme Court has held that a question of law is presented, and that a case is thus reviewable, where the contention is that there is *no* evidence to support an element of the

Before this Court, petitioners and the *amici* have presented a number of questions claiming deprivation of rights guaranteed to petitioners by the First and Fourteenth Amendments to the United States Constitution.[7] The petitioners contend:

> (a) The decision below affirms a criminal conviction based upon no evidence of guilt and, therefore, deprives them of due process of law as defined in *Thompson* v. *City of Louisville,* 362 U. S. 199.
>
> (b) The petitioners were convicted of a crime under the provisions of a state statute which, as applied to their acts, is so vague, indefinite and uncertain as to offend the Due Process Clause of the Fourteenth Amendment.
>
> (c) The decisions below conflict with the Fourteenth Amendment's guarantee of freedom of expression.
>
> (d) The decision below conflicts with prior decisions of this Court which condemn racially discrim-

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crime charged. *State* v. *Daniels,* 236 La. 998, 109 So. 2d 896; *State* v. *Brown,* 224 La. 480, 70 So. 2d 96; *State* v. *Sbisa,* 232 La. 961, 95 So. 2d 619, and cases cited at n. 6, 232 La., at 969–970, 95 So. 2d, at 622. See Comment, 19 La. L. Rev. 843 (1959). Despite the court's purported review of the questions of law in these cases, the degree of punishment inflicted would deprive the court of appellate jurisdiction under Art. 7, Sec. 10. However, the Supreme Court also has a general supervisory jurisdiction, exercised only in the sound discretion of the court (see *State* v. *Morgan,* 204 La. 499, 502, 15 So. 2d 866, 867), over all inferior courts under Art. 7, Sec. 10; it appears that this is the provision which the petitioners attempted to invoke with their extraordinary writs in these cases. See also Art. 7, Sec. 2, of the Louisiana Constitution.

[7] In addition to the petitioners' contentions the United States argues that in No. 27 the petitioners' arrests and convictions deprived them of their rights under the Interstate Commerce Act to service on a nondiscriminatory basis in a restaurant of a bus terminal operated as part of interstate commerce. Cf. *Boynton* v. *Virginia,* 364 U. S. 454.

inatory administration of State criminal laws in contravention of the Equal Protection Clause of the Fourteenth Amendment.

With regard to argument (d), the petitioners and the New York Committee on the Bill of Rights contend that the participation of the police and the judiciary to enforce a state custom of segregation resulted in the use of "state action" and was therefore plainly violative of the Fourteenth Amendment. The petitioners also urge that even if these cases contain a relevant component of "private action," that action is substantially infected with state power and thereby remains state action for purposes of the Fourteenth Amendment.[8]

In the view we take of the cases we find it unnecessary to reach the broader constitutional questions presented, and in accordance with our practice not to formulate a rule of constitutional law broader than is required by the precise facts presented in the record, for the reasons hereinafter stated, we hold that the convictions in these cases are so totally devoid of evidentiary support as to render them unconstitutional under the Due Process Clause of the Fourteenth Amendment.[9] As in *Thompson* v. *City of Louisville,* 362 U. S. 199, our inquiry does not turn on a question of sufficiency of evidence to support a conviction, but on whether these convictions rest upon any evidence which would support a finding that the petitioners'

[8] The Government, as well as petitioners, points out that in addition to state statutes requiring segregation in specific situations in Louisiana, the Louisiana Legislature in 1960 adopted the following preface to a joint resolution concerning the possible integration of any tax-supported facility in the State:

"WHEREAS, Louisiana has always maintained a policy of segregation of the races, and

"WHEREAS, it is the intention of the citizens of this sovereign state that such a policy be continued. . . ." Act No. 630 of 1960, to amend Article X of the Louisiana Constitution.

[9] See *Thompson* v. *City of Louisville,* 362 U. S. 199.

acts caused a disturbance of the peace. In addition, we cannot be concerned with whether the evidence proves the commission of some other crime, for it is as much a denial of due process to send an accused to prison following conviction for a charge that was never made as it is to convict him upon a charge for which there is no evidence to support that conviction.[10]

The respondent, in both its brief and its argument to this Court, implied that the evidence proves the elements of a criminal trespass. In oral argument it contended that the real question here "is whether or not a private property owner and proprietor of a private establishment has the right to serve only those whom he chooses and to refuse to serve those whom he desires not to serve for whatever reason he may determine." [11] That this is not a question presented by the records in these cases seems too apparent for debate. Even assuming it were the question, however, which it clearly is not, these convictions could not stand for the reason stated in *Cole* v. *Arkansas,* 333 U. S. 196.[12]

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[10] Cf. *Cole* v. *Arkansas,* 333 U. S. 196, 201. See *Thompson* v. *City of Louisville,* 362 U. S. 199, 206, and the cases cited at footnote 13.

[11] Counsel for the respondent admitted on oral argument that the Louisiana trespass statute in force at the time of the petitioners' arrests would probably not have applied to these facts. Apparently, the Louisiana Legislature agreed, for, in 1960, subsequent to petitioners' acts, the legislature passed a new criminal trespass statute (La. Rev. Stat., 1950, § 14:63.3 (1960 Supp.)), which reads:

"No person shall without authority of laws go into or upon . . . any structure . . . which belongs to another . . . after having been forbidden to do so . . . by any owner, lessee, or custodian of the property or by any other authorized person. . . ."

We express no opinion whether, on the facts of these cases, the petitioners' conduct would have been unlawful under this statute.

[12] The Supreme Court of Louisiana has also held that an accused may not be convicted on pleadings which fail to state the specific crime with which he is charged. *State* v. *Morgan,* 204 La. 499, 15 So. 2d 866 (1943).

Under our view of these cases, our task is to determine whether there is any evidence in the records to show that the petitioners, by their actions at the lunch counters in the business establishments involved, violated Title 14, Article 103 (7), of the Louisiana Criminal Code. At the time of petitioners' acts, Article 103 provided:

> "Disturbing the peace is the doing of any of the following in such a manner as would foreseeably disturb or alarm the public:
>
> "(1) Engaging in a fistic encounter; or
>
> "(2) Using of any unnecessarily loud, offensive, or insulting language; or
>
> "(3) Appearing in an intoxicated condition; or
>
> "(4) Engaging in any act in a violent and tumultuous manner by any three or more persons; or
>
> "(5) Holding of an unlawful assembly; or
>
> "(6) Interruption of any lawful assembly of people; or
>
> "(7) Commission of any other act in such a manner as to unreasonably disturb or alarm the public."

I.

Our initial inquiry is necessarily to determine the type of conduct proscribed by this statute and the elements of guilt which the evidence must prove to support a criminal conviction thereunder. First, it is evident from a reading of the statute that the accused must conduct himself in a manner that would "foreseeably disturb or alarm the public." In addition, when a person is charged with a violation of Paragraph 7, an earlier version of which was aptly described by the Supreme Court of Louisiana as "the general portion of the statute which does not define the 'conduct or acts' the members of the Legislature had in mind" (*State* v. *Sanford,* 203 La. 961, 967, 14 So. 2d

778, 780),[13] it would also seem apparent from the words of the statute that the acts, whatever they might be, must be done "in such a manner as to [actually] unreasonably disturb or alarm the public." However, because we find the records barren of any evidence that would support a finding that the petitioners' conduct would even "foreseeably" have disturbed the public, we need not consider whether the statute also requires the acts to be done in a manner as actually to disturb the peace.

We of course are bound by a State's interpretation of its own statute and will not substitute our judgment for that of the State's when it becomes necessary to analyze the evidence for the purpose of determining whether that evidence supports the findings of a state court. Hence, we must look to Louisiana for guidance in the meaning of the phrase "foreseeably disturb or alarm the public" in order to determine the type of conduct proscribed by La. Rev. Stat., 1950, § 14:103 (7).

The Supreme Court of Louisiana has had occasion in the past, in interpreting the predecessor of Article 103,[14] to give content to these words, and it is evident from the court's prior treatment of them that they were not

[13] We express no view as to the constitutionality of the petitioners' convictions as attacked by their argument that the statute (§ 103 (7)) is so vague and uncertain, with its resulting lack of notice of what conduct the legislature intended to make criminal, as to violate due process. Cf. *Lanzetta* v. *New Jersey*, 306 U. S. 451; *Musser* v. *Utah*, 333 U. S. 95; *Winters* v. *New York*, 333 U. S. 507.

[14] The predecessor of Title 14, Section 103, was Act No. 227 of 1934, which provided, *inter alia*, "That any person who shall go into any public place, [or] into or near any private house . . . and who shall [shout, swear, expose himself, discharge a firearm] . . . or who shall do any other act, in a manner calculated to disturb or alarm the inhabitants thereof, or persons present . . ." should be adjudged guilty of breaching the peace. In *State* v. *Sanford*, 203 La. 961, 14 So. 2d 778, discussed immediately following in the text, the defendants were charged, as were the petitioners in the cases at bar, under the general, catch-all provision.

intended to embrace peaceful conduct. On the contrary, it is plain that under the court's application of the statute these words encompass only conduct which is violent or boisterous in itself, or which is provocative in the sense that it induces a foreseeable physical disturbance.[15] In *State* v. *Sanford,* 203 La. 961, 14 So. 2d 778, the evidence showed that thirty Jehovah's Witnesses approached a Louisiana town for the purpose of distributing religious tracts and persuading the public to make contributions to their cause. The Witnesses were warned by the mayor and police officers that "their presence and activities would cause trouble among the population and asked them to stay away from the town . . . ." 203 La., at 964, 14 So. 2d, at 779. The Witnesses failed to yield to the warning and proceeded on their mission. The trial court found that the acts of the Witnesses in entering the town and stopping passers-by in the crowded street "might or would tend to incite riotous and disorderly conduct." 203 La., at 965, 14 So. 2d, at 779. The Supreme Court of Louisiana set aside convictions for breach of the peace, holding that the defendants did not commit any unlawful act or pursue any disorderly course of conduct which would tend to disturb the peace, thus, in effect, that peaceful conduct, even though conceivably offensive to another class of the public, is not conduct which may be proscribed by Louisiana's disturbance of the peace statute without evidence that the actor conducted himself in some outwardly unruly manner.

The conclusion of the highest Louisiana court that the breach of the peace statute does not reach peaceful and orderly conduct is substantiated by the conclusion drawn from reading the statute as a whole. The catch-all provision under which the petitioners were tried and con-

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[15] See *Town of Ponchatoula* v. *Bates,* 173 La. 824, 138 So. 851 (dictum).

victed follows an enumeration of six specific offenses, each of which describes overtly tumultuous or disruptive behavior. It would therefore normally be interpreted in the light of the preceding sections as an effort to cover other forms of violence or loud and boisterous conduct not already listed.[16] We do not mean to imply that an *ejusdem generis* reading of the statute is constitutionally compelled to the exclusion of other reasonable interpretations,[17] but we do note that here such a reading is consistent with the Louisiana Supreme Court's application in *Sanford*.[18]

Further evidence that Article 103 (7) was not designed to encompass the petitioners' conduct in these cases has been supplied by the Louisiana Legislature. Shortly after the events for which the petitioners were arrested took place, the legislature amended its disturbance of the peace statute in an obvious attempt to reach the type of activity involved in these cases.[19] The contrast between the language of the present statute and the one under which the petitioners were convicted confirms the inter-

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[16] See 2 Sutherland, Statutes and Statutory Construction, §§ 4909–4910 (Horack ed. 1943).

[17] Such an interpretation has not been made where there was evidence of a contrary legislative intent or judicial reading. *United States* v. *Alpers*, 338 U. S. 680, 682–683; *Gooch* v. *United States*, 297 U. S. 124, 128; *Helvering* v. *Stockholms Enskilda Bank*, 293 U. S. 84, 88–89.

[18] See also *Town of Ponchatoula* v. *Bates*, *supra*, note 15.

[19] La. Rev. Stat., 1950, § 14:103.1 (1960 Supp.), now reads, in pertinent part, as follows:

"A. Whoever with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby:

. . . . . .

"(4) refuses to leave the premises of another when requested so to do by any owner, lessee, or any employee thereof, shall be guilty of disturbing the peace."

pretation given the general terms of the latter by the Supreme Court in *State* v. *Sanford* and the natural meaning of the words used in Article 103.

We are aware that the Louisiana courts have the final authority to interpret and, where they see fit, to reinterpret that State's legislation. However, we have seen no indication that the Louisiana Supreme Court has changed its *Sanford* interpretation of La. Rev. Stat., 1950, § 14:103 (7), and we will not infer that an inferior Louisiana court intended to overrule a long-standing and reasonable interpretation of a state statute by that State's highest court. Our reluctance so to infer is supported, moreover, by the fact that *State* v. *Sanford* was argued by the petitioners to both the trial court and the Supreme Court, and that neither court mentioned in its opinion that *Sanford* was no longer to be the law in Louisiana.

We think that the above discussion would give ample support to a conclusion that Louisiana law requires a finding of outwardly boisterous or unruly conduct in order to charge a defendant with "foreseeably" disturbing or alarming the public. However, because this case comes to us from a state court and necessitates a delicate involvement in federal-state relations, we are willing to assume with the respondent that the Louisiana courts might construe the statute more broadly to encompass the traditional common-law concept of disturbing the peace. Thus construed, it might permit the police to prevent an imminent public commotion even though caused by peaceful and orderly conduct on the part of the accused. Cf. *Cantwell* v. *Connecticut,* 310 U. S. 296, 308. We therefore treat these cases as though evidence of such imminent danger, as well as evidence of a defendant's active conduct which is outwardly provocative, could support a finding that the acts might "foreseeably disturb or alarm the public" under the Louisiana statute.

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II.

Having determined what evidence is necessary to support a finding of disturbing the peace under Louisiana law, the ultimate question, as in *Thompson* v. *City of Louisville, supra,* is whether the records in these cases contain any such evidence. With appropriate notations to the slight differences in testimony in the other two cases, we again turn to the record in No. 28.[20] The manager of the department store in which the lunch counter was located testified that after the students had taken their seats at the "white lunch counter" where he was also occupying a seat, he advised the waitress on duty to offer the petitioners service at the counter across the aisle which served Negroes. The petitioners, however, after being "advised that they would be served at the other counter," remained in their seats, and the manager continued eating his lunch at the same counter. In No. 26, where there were no facilities to serve colored persons, the petitioners were merely told that they couldn't be served, but were never even asked to move. In No. 27, a waitress testified that the petitioners were merely told that they would have to go "to the other side to be served." The petitioners not only made no speeches, they did not even speak to anyone except to order food; they carried no placards, and did nothing, beyond their mere presence at the lunch counter, to attract attention to themselves or to others. In none of the cases was there any testimony that the petitioners were told that their mere presence was causing, or was likely to cause, a disturbance of the peace, nor that the petitioners were ever asked to leave the counters or the establishments by anyone connected with the stores.

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[20] In all three cases the prosecution called as witnesses only the arresting officer and an employee from the restaurant in question. In none of the cases did the petitioners themselves testify or introduce any witnesses in their defense.

The manager in No. 28 testified that after finishing his meal he went to the telephone and called the police department, advising them that Negroes were in his store sitting at the lunch counter reserved for whites. This is the only case in which "the owner or his agent" notified the police of the petitioners' presence at the lunch counter, and even here the manager gave no indication to the officers that he feared any disturbance or that he had received any complaint concerning the petitioners' presence. In No. 27, a waitress testified that a bus driver sitting in the restaurant notified the police that "there were several colored people sitting at the lunch counter." [21] In No. 26, the arresting officers were not summoned to the drugstore by anyone even remotely connected with Sitman's but, rather, by a call from an officer on his "beat" who had observed the petitioners sitting quietly at the lunch counter.

Although the manager of Kress' Department Store testified that the only conduct which he considered disruptive was the petitioners' mere presence at the counter, he did state that he called the police because he "feared that some disturbance might occur." [22] However, his fear is completely unsubstantiated by the record. The manager continued eating his lunch in an apparently leisurely manner at the same counter at which the petitioners were sitting before calling the police. Moreover, not only did he fail to give the petitioners any warning of his alleged

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[21] There is some inconsistency in the record, not material to our disposition of the case (see No. 28), as to who called the police; a police officer made a statement based on hearsay that the desk sergeant was called by "some woman."

[22] As noted previously, this is the only case in which a representative of the restaurant called the police. In addition, this is the only case in which there is anything in the record concerning the possibility of a disturbance, and even here it is limited to the manager's single statement noted above.

"fear," [23] but he specifically testified to the fact that the petitioners were never asked to move or to leave the store. Nor did the witness elaborate on the basis of his fear except to state that "it isn't customary for the two races to sit together and eat together." [24] In addition, there is no evidence that this alleged fear was ever communicated to the arresting officers, either at the time the manager made the initial call to police headquarters or when the police arrived at the store. Under these circumstances, the manager's general statement gives no support for the convictions within the meaning of *Thompson* v. *City of Louisville, supra.*

Subsequent to the manager's notification, the police arrived at the store and, without consulting the manager or anyone else on the premises, went directly to confront the petitioners. An officer asked the petitioners to leave the counter because "they were disturbing the peace and violating the law by sitting there." One of the students stated that she wished to get a glass of iced tea, but she and her friends were told, again by the police, that they were disturbing the peace by sitting at a counter reserved for whites and that they would have to leave. When the petitioners continued to occupy the seats, they were arrested, as the officer testified, for disturbing the peace "[b]y sitting there" "because that place was reserved for white people." The same officer testified that the petitioners had done nothing other than take seats at that particular lunch counter which he considered to be a breach of the peace.[25]

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[23] Of course, even such a warning was not sufficient evidence to support a finding of breach of the peace in *State* v. *Sanford.*

[24] Compare the basis for the state action in *Buchanan* v. *Warley,* 245 U. S. 60, and *Cooper* v. *Aaron,* 358 U. S. 1.

[25] The evidence in the records in Nos. 26 and 27 is similar. Each witness called by the State testified that the petitioners were arrested solely because they were Negroes sitting at a white lunch counter.

The respondent discusses at length the history of race relations and the high degree of racial segregation which exists throughout the South. Although there is no reference to such facts in the records, the respondent argues that the trial court took judicial notice of the general situation, as he may do under Louisiana law,[26] and that it therefore became apparent to the court that the petitioners' presence at the lunch counters might cause a disturbance which it was the duty of the police to prevent. There is nothing in the records to indicate that the trial judge did in fact take judicial notice of anything. To extend the doctrine of judicial notice to the length pressed by the respondent would require us to allow the prosecution to do through argument to this Court what it is required by due process to do at the trial, and would be "to turn the doctrine into a pretext for dispensing with a trial." *Ohio Bell Telephone Co.* v. *Public Utilities Comm'n,* 301 U. S. 292, 302. Furthermore, unless an accused is informed at the trial of the facts of which the court is taking judicial notice, not only does he not know upon what evidence he is being convicted, but, in addition, he is deprived of any opportunity to challenge the deductions drawn from such notice or to dispute the notoriety or truth of the facts allegedly relied upon. Moreover, there is no way by which an appellate court may review the facts and law of a case and intelligently decide whether the findings of the lower court are supported by the evidence where that evidence is unknown. Such an assumption would be a denial of due process. *Ohio Bell, supra.*

Thus, having shown that these records contain no evidence to support a finding that petitioners disturbed the peace, either by outwardly boisterous conduct or by pas-

[26] La. Rev. Stat., 1950, § 15:422 provides that Louisiana courts may take judicial notice of "social and racial conditions prevailing in [the] state." See *State* v. *Bessa et al.,* 115 La. 259, 38 So. 985.

sive conduct likely to cause a public disturbance, we hold that these convictions violated petitioners' rights to due process of law guaranteed them by the Fourteenth Amendment to the United States Constitution. The undisputed evidence shows that the police who arrested the petitioners were left with nothing to support their actions except their own opinions that it was a breach of the peace for the petitioners to sit peacefully in a place where custom decreed they should not sit.[27] Such activity, in the circumstances of these cases, is not evidence of any crime and cannot be so considered either by the police or by the courts.

The judgments are reversed.

MR. JUSTICE FRANKFURTER, concurring in the judgment.

Whether state statutes are to be construed one way or another is a question of state law, final decision of which rests, of course, with the courts of the State. When as here those courts have not spelled out the meaning of a statute, this Court must extrapolate its allowable meaning and attribute that to the highest court of the State. We must do so in a manner that affords the widest latitude to state legislative power consistent with the United States Constitution.

Since La. Rev. Stat., 1950, § 14:103 is concededly a statute aimed at "disturbing the peace," we begin with the breadth of meaning derived from that phrase in *Town of Ponchatoula* v. *Bates,* 173 La. 824, 138 So. 851 (1931). To be sure, that amounted to an abstract discussion and in the limited circumstances considered by the Louisiana Supreme Court in *State* v. *Sanford,* 203 La. 961, 14 So. 2d 778 (1943), the allowable scope of the statutory prohibition was not fully explored. But construction of the statute to prohibit non-violent, non-religious behavior in a private shop when that behavior has a tendency to dis-

[27] Compare the evidence contained in the records in *Terminiello* v. *Chicago,* 337 U. S. 1; and in *Feiner* v. *New York,* 340 U. S. 315.

turb or alarm the public is fairly derivable from a reading of the *Sanford* opinion.

The action of the Louisiana Legislature in amending its statutes after the events now under review took place is not a safe or even relevant guide to the scope of the prior statute. Legislatures not uncommonly seek to make prior law more explicit or reiterate a prohibition by more emphatic concreteness. The rule of evidence that excludes proof of post-injury repairs offers a useful analogy here. See II Wigmore, Evidence, § 283 (Third ed. 1940). It is not our province to limit the meaning of a state statute beyond its confinement by reasonably read state-court rulings.

Assuming for present purposes the constitutionality of a statute prohibiting non-violent activity that tends to provoke public alarm or disturbance, such a tendency, as a crucial element of a criminal offense, must be established by evidence disclosed in the record to sustain a conviction. A judge's private knowledge, or even "knowledge by notoriety," to use Dean Wigmore's phrase, IX Evidence, § 2569 (Third ed. 1940), not presented as part of the prosecution's case capable of being met by a defendant, is not an adequate basis, as a matter of due process, to establish an essential element of what is punished as crime. *Thompson* v. *City of Louisville,* 362 U. S. 199.

It may be unnecessary to require formal proof, even as to an issue crucial in determining guilt in a criminal prosecution, of what is incontestably obvious. But some showing cannot be dispensed with when an inference is at all doubtful. And it begs the whole question on the answer to which the validity of these convictions turns to assume that the "public" tended to be alarmed by the conduct of the petitioners here disclosed. See Devlin, L. J., in *Dingle* v. *Associated Newspapers,* [1961] 2 Q. B. 162, 198. Conviction under this Louisiana statute cannot be sustained by reliance merely upon likely consequences in the generality of cases. Since particular per-

sons are being sent to jail for conduct allegedly having a particular effect on a particular occasion under particular circumstances, it becomes necessary to appraise that conduct and effect by the particularity of evidence adduced.

The records in these cases, whatever variance in unimportant details they may show, contain no evidence of disturbance or alarm in the behavior of the cafe employees or customers or even passers-by, the relevant "public" fairly in contemplation of these charges. What they do show was aptly summarized both in the testimony of the arresting police and in the recitation of the trial judge as the "mere presence" of the petitioners.

Silent persistence in sitting after service is refused could no doubt conceivably exacerbate feelings to the boiling point. It is not fanciful speculation, however, that a proprietor who invites trade in most parts of his establishment and restricts it in another may change his policy when non-violently challenged.* With records as barren as these of evidence from which a tendency to disturb or alarm the public immediately involved can be drawn, there is nothing before us on which to sustain such an inference from what may be hypothetically lodged in the unopened bosom of the local court.

Since the "mere presence" that these records prove has, in any event, not been made a crime by the Louisiana statute under which these petitioners were charged, their convictions must be reversed.

MR. JUSTICE DOUGLAS, concurring.

If these cases had arisen in the Pacific Northwest—the area I know best—I could agree with the opinion of the Court. For while many communities north and south, east and west, at times have racial problems, those areas which have never known segregation would not be

*If it were clear from these records that the proprietors involved had changed their policies and consented to the petitioners' remaining, we would, of course, have an entirely different case.

inflamed or aroused by the presence of a member of a minority race in a restaurant. But in Louisiana racial problems have agitated the people since the days of slavery. The landmark case of *Plessy* v. *Ferguson,* 163 U. S. 537—the decision that announced in 1896 the now-repudiated doctrine of "separate but equal" facilities for whites and blacks—came from Louisiana which had enacted in 1890 a statute requiring segregation of the races on railroad trains. In the environment of a segregated community I can understand how the mere presence of a Negro at a white lunch counter might inflame some people as much as fisticuffs would in other places. For the reasons stated by MR. JUSTICE HARLAN in these cases, I read the Louisiana opinions as meaning that this law includes "peaceful conduct of a kind that foreseeably may lead to public disturbance"—a kind of "generally known condition" that may be "judicially noticed" even in a criminal case.

This does not mean that the police were justified in making these arrests. For the police are supposed to be on the side of the Constitution, not on the side of discrimination. Yet if all constitutional questions are to be put aside and the problem treated merely in terms of disturbing the peace, I would have difficulty in reversing these judgments. I think, however, the constitutional questions must be reached and that they make reversal necessary.

Restaurants, whether in a drugstore, department store, or bus terminal, are a part of the public life of most of our communities. Though they are private enterprises, they are public facilities in which the States may not enforce a policy of racial segregation.

I.

It is, of course, state action that is prohibited by the Fourteenth Amendment, not the actions of individuals. So far as the Fourteenth Amendment is concerned, indi-

viduals can be as prejudiced and intolerant as they like. They may as a consequence subject themselves to suits for assault, battery, or trespass. But those actions have no footing in the Federal Constitution. The line of forbidden conduct marked by the Equal Protection Clause of the Fourteenth Amendment is crossed only when a State makes prejudice or intolerance its policy and enforces it, as held in the *Civil Rights Cases,* 109 U. S. 3. Mr. Justice Bradley, speaking for the Court, said: ". . . civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, *customs,* or judicial or executive proceedings." *Id.,* at 17. (Italics added.)

State policy violative of the Fourteenth Amendment may be expressed in *legislative* enactments that permit or require segregation of the races in public places or public facilities (*Brown* v. *Board of Education,* 347 U. S. 483) or in residential areas. *Buchanan* v. *Warley,* 245 U. S. 60.

It may be expressed through *executive* action, as where the police or other law enforcement officials act pursuant to, or under color of, state law. See, *e. g., Screws* v. *United States,* 325 U. S. 91; *Monroe* v. *Pape,* 365 U. S. 167.

It may be expressed through the *administrative* action of state agencies in leasing public facilities. *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715.

It may result from *judicial action,* as where members of a race are systematically excluded from juries (*Hernandez* v. *Texas,* 347 U. S. 475), or where restrictive covenants based on race are enforced by the judiciary (*Barrows* v. *Jackson,* 346 U. S. 249), or where a state court fines or imprisons a person for asserting his federal right to use the facilities of an interstate bus terminal, *Boynton* v. *Virginia,* 364 U. S. 454.

As noted, Mr. Justice Bradley suggested in the *Civil Rights Cases, supra,* that state policy may be as effectively

expressed in *customs* as in formal legislative, executive, or judicial action.

It was indeed held in *Baldwin* v. *Morgan,* 287 F. 2d 750, 756, that the "custom, practice and usage" of a city and its police in arresting four Negroes for using "white" waiting rooms was state action in violation of the Fourteenth Amendment, even though no ordinance was promulgated and no order issued. In the instant cases such an inference can be drawn from the totality of circumstances permeating the environment where the arrests were made—not an isolated arrest but three arrests; not arrests on account of fisticuffs but arrests because the defendants were Negroes seeking restaurant service at counters and tables reserved for "whites."

There is a deep-seated pattern of segregation of the races in Louisiana,[1] going back at least to *Plessy* v. *Ferguson, supra.* It was restated in 1960—the year in which petitioners were arrested and charged for sitting in white restaurants—by Act No. 630, which in its preamble states:

> "WHEREAS, Louisiana has always maintained a policy of segregation of the races, and

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[1] Article 135 of Louisiana's 1868 Constitution forbade segregation of the races in public schools. But that prohibition was dropped from Louisiana's 1879 Constitution. The latter by Article 231 authorized the establishment of a university for Negroes.

Woodward, Strange Career of Jim Crow (1955), pp. 7–8:

". . . In bulk and detail as well as in effectiveness of enforcement the segregation codes were comparable with the black codes of the old regime, though the laxity that mitigated the harshness of the black codes was replaced by a rigidity that was more typical of the segregation code. That code lent the sanction of law to a racial ostracism that extended to churches and schools, to housing and jobs, to eating and drinking. Whether by law or by custom, that ostracism eventually extended to virtually all forms of public transportation, to sports and recreations, to hospitals, orphanages, prisons, and asylums, and ultimately to funeral homes, morgues, and cemeteries."

"WHEREAS, it is the intention of the citizens of this sovereign state that such a policy be continued." La. Acts 1960, p. 1200.

Louisiana requires that all circuses, shows, and tent exhibitions to which the public is invited have one entrance for whites and one for Negroes. La. Rev. Stat., 1950, § 4:5. No dancing, social functions, entertainment, athletic training, games, sports, contests "and other such activities involving personal and social contacts" may be open to both races. § 4:451 (1960 Supp.). Any public entertainment or athletic contest must provide separate seating arrangements and separate sanitary drinking water and "any other facilities" for the two races. § 4:452 (1960 Supp.). Marriage between members of the two races is banned. § 14:79. Segregation by race is required in prisons. § 15:752. The blind must be segregated. § 17:10. Teachers in public schools are barred from advocating desegregation of the races in the public school system. §§ 17:443, 17:462. So are other state employees. § 17:523. Segregation on trains is required. §§ 45:528–45:532. Common carriers of passengers must provide separate waiting rooms and reception room facilities for the two races (§ 45:1301 (1960 Supp.)) and separate toilets and separate facilities for drinking water as well. § 45:1303 (1960 Supp.). Employers must provide separate sanitary facilities for the two races. § 23:971 (1960 Supp.). Employers must also provide separate eating places in separate rooms and separate eating and drinking utensils for members of the two races. § 23:972 (1960 Supp.). Persons of one race may not establish their residence in a community of another race without approval of the majority of the other race. § 33:5066. Court dockets must reveal the race of the parties in divorce actions. § 13:917. And all public parks, recreation centers, playgrounds, community centers and "other such facilities at which swimming, dancing, golfing, skating or other recreational activities are

conducted" must be segregated. § 33:4558.1 (1960 Supp.).

Though there may have been no state law or municipal ordinance that *in terms* required segregation of the races in restaurants, it is plain that the proprietors in the instant cases were segregating blacks from whites pursuant to Louisiana's custom. Segregation is basic to the structure of Louisiana as a community; the custom that maintains it is at least as powerful as any law. If these proprietors also choose segregation, their preference does not make the action "private," rather than "state," action. If it did, a miniscule of private prejudice would convert state into private action. Moreover, where the segregation policy is the policy of a State, it matters not that the agency to enforce it is a private enterprise. *Baldwin* v. *Morgan, supra; Boman* v. *Birmingham Transit Co.*, 280 F. 2d 531.

II.

It is my view that a State may not constitutionally enforce a policy of segregation in restaurant facilities. Some of the argument assumed that restaurants are "private" property in the sense that one's home is "private" property. They are, of course, "private" property for many purposes of the Constitution. Yet so are street railways, power plants, warehouses, and other types of enterprises which have long been held to be affected with a public interest. Where constitutional rights are involved, the proprietary interests of individuals must give way. Towns, though wholly owned by private interests, perform municipal functions and are held to the same constitutional requirements as ordinary municipalities. *Marsh* v. *Alabama*, 326 U. S. 501. State regulation of private enterprise falls when it discriminates against interstate commerce. *Port Richmond Ferry* v. *Hudson County*, 234 U. S. 317. State regulation of private enterprise that results in impairment of other constitutional

rights should stand on no firmer footing, at least in the area where facilities of a public nature are involved.

Long before Chief Justice Waite wrote the opinion in *Munn* v. *Illinois*, 94 U. S. 113, holding that the prices charged by grain warehouses could be regulated by the State, a long list of businesses had been held to be "affected with a public interest." Among these were ferries, common carriers, hackmen, bakers, millers, wharfingers, and innkeepers. *Id.*, at 125. The test used in *Munn* v. *Illinois* was stated as follows: "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large." *Id.*, at 126. In reply to the charge that price regulation deprived the warehousemen of property, Chief Justice Waite stated, "There is no attempt to compel these owners to grant the public an interest in their property, but to declare their obligations, if they use it in this particular manner." *Id.*, at 133.

There was a long span between *Munn* v. *Illinois* and *Nebbia* v. *New York*, 291 U. S. 502, which upheld the power of a State to fix the price of milk. A business may have a "public interest" even though it is not a "public utility" in the accepted sense, even though it enjoys no franchise from the State, and even though it enjoys no monopoly. *Id.*, at 534. The examples cover a wide range from price control to prohibition of certain types of business. *Id.*, at 525–529. Various systems or devices designed by States or municipalities to protect the wholesomeness of food in the interests of health are deep-seated as any exercise of the police power. *Adams* v. *Milwaukee*, 228 U. S. 572.

Years ago Lord Chief Justice Hale stated in *De Portibus Maris*, 1 Harg. Law Tracts 78, ". . . if a man set out a street in new building on his own land, it is now no longer bare private interest, but is affected with a public interest." Those who run a retail establishment under permit

from a municipality operate, in my view, a public facility in which there can be no more discrimination based on race than is constitutionally permissible in the more customary types of public facility.

Under Louisiana law, restaurants are a form of private property affected with a public interest. Local boards of health are given broad powers. La. Rev. Stat., 1950, §§ 40:35, 33:621. The City of Baton Rouge in its City Code requires all restaurants to have a permit. Tit. 6, c. 7, § 601. The Director of Public Health is given broad powers of inspection and permits issued can be suspended. *Id.* § 603. Permits are not transferable. *Id.* § 606. One who operates without a permit commits a separate offense each day a violation occurs. *Id.* § 604. Moreover, detailed provisions are made concerning the equipment that restaurants must have, the protection of ready-to-eat foods and drink, and the storage of food. *Id.* § 609.

Restaurants, though a species of private property, are in the public domain. Or to paraphrase the opinion in *Nebbia* v. *New York, supra,* restaurants in Louisiana have a "public consequence" and "affect the community at large." 291 U. S. 502, 533.

While the concept of a business "affected with a public interest" normally is used as a measure of a State's police power over it, it also has other consequences. A State may not require segregation of the races in conventional public utilities any more than it can segregate them in ordinary public facilities.[2] As stated by the court in

[2] We have held on numerous occasions that the States may not use their powers to enforce racial segregation in public facilities. *Mayor and City Council of Baltimore City* v. *Dawson,* 350 U. S. 877 (1955) (public beaches and bathhouses); *Holmes* v. *City of Atlanta,* 350 U. S. 879 (1955) (municipal golf courses); *Gayle* v. *Browder,* 352 U. S. 903 (1956) (buses operated on city streets); *New Orleans City Park Improvement Association* v. *Detiege,* 358 U. S. 54 (1958) (golf course and city parks). For decisions of the lower federal courts holding racial segregation unconstitutional as applied to facilities open

Boman v. *Birmingham Transit Co.*, 280 F. 2d 531, 535, a public utility "is doing something the state deems useful for the public necessity or convenience." It was this idea that the first Mr. Justice Harlan, dissenting in *Plessy* v. *Ferguson, supra,* advanced. Though a common carrier is private enterprise, "its work," he maintained, is public. *Id.*, at 554. And there can be no difference, in my view, between one kind of business that is regulated in the public interest and another kind so far as the problem of racial segregation is concerned. I do not believe that a State that licenses a business can license it to serve only whites or only blacks or only yellows or only browns. Race is an impermissible classification when it comes to parks or other municipal facilities by reason of the Equal Protection Clause of the Fourteenth Amendment. By the same token, I do not see how a State can constitutionally exercise its licensing power over business either in terms or in effect to segregate the races in the licensed premises. The authority to license a business for public use is derived from the public. Negroes are as much a part of that public as are whites. A municipality granting a license to operate a business for the public represents Negroes as well as all other races who live there. A license to establish a restaurant is a license to establish a public facility and necessarily imports, in law, equality of use for all members of the public. I see no way whereby licenses issued by a State to serve the public can be distinguished from leases of public facilities (*Burton* v. *Wilmington Parking Authority, supra*) for that end.

One can close the doors of his home to anyone he desires. But one who operates an enterprise under a

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to public enjoyment and patronage, see *Department of Conservation & Development, Division of Parks, of Virginia,* v. *Tate,* 231 F. 2d 615 (state park); *City of St. Petersburg* v. *Alsup,* 238 F. 2d 830 (municipal beach and swimming pool); *Morrison* v. *Davis,* 252 F. 2d 102 (public transportation facilities).

license from the government enjoys a privilege that derives from the people. Whether retail stores, not licensed by the municipality, stand on a different footing is not presented here. But the necessity of a license shows that the public has rights in respect to those premises. The business is not a matter of mere private concern. Those who license enterprises for public use should not have under our Constitution the power to license it for the use of only one race. For there is the overriding constitutional requirement that all state power be exercised so as not to deny equal protection to any group. As the first Mr. Justice Harlan stated in dissent in *Plessy* v. *Ferguson, supra,* at 559, ". . . in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind . . . ."

MR. JUSTICE HARLAN, concurring in the judgment.

I agree that these convictions are unconstitutional, but not for the reasons given by the Court. Relying on *Thompson* v. *City of Louisville,* 362 U. S. 199, the Court strikes down the convictions on the ground that there is no evidence whatever to support them. In my opinion the *Thompson* doctrine does not fit these cases. However, I believe the convictions are vulnerable under the Fourteenth Amendment on other grounds: (1) the kind of conduct revealed in *Garner,* No. 26, and in *Hoston,* No. 28, could not be punished under a generalized breach of the peace provision, such as Art. 103 (7), La. Crim. Code; [1] (2) Art. 103 (7) as applied in *Briscoe,* No. 27 (as

[1] The Louisiana statute, La. Rev. Stat., 1950, § 14:103, then provided:

"Disturbing the peace is the doing of any of the following in such a manner as would foreseeably disturb or alarm the public:

[*Footnote 1 continued on p. 186*]

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well as in the *Garner* and *Hoston* cases) is unconstitutionally vague and uncertain.

The Court's reversal for lack of evidence rests on two different views of Art. 103 (7). First, it is said that the statute, as construed by the Louisiana courts, reaches at most only "violent," "boisterous," or "outwardly provocative" conduct that may foreseeably induce a public disturbance. On this view, these cases are found evidentially wanting because the petitioners' conduct, being entirely peaceful, was not of the character proscribed by the statute so construed. Alternatively, it is recognized that the statute is susceptible of a construction that would embrace as well other kinds of conduct having the above effect. On that view, the convictions are also found evidentially deficient, in that petitioners' conduct, so it is said, could not properly be taken as having any tendency to cause a public disturbance. In my opinion, the first of these holdings cannot withstand analysis with appropriate regard for the limitations upon our powers of review over state criminal cases; the second holding rests on untenable postulates as to the law of evidence.

I.

Turning to the first holding, it goes without saying that we are not at liberty to determine for ourselves the scope

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"(1) Engaging in a fistic encounter; or

"(2) Using of any unnecessarily loud, offensive, or insulting language; or

"(3) Appearing in an intoxicated condition; or

"(4) Engaging in any act in a violent and tumultuous manner by any three or more persons; or

"(5) Holding of an unlawful assembly; or

"(6) Interruption of any lawful assembly of people; or

"(7) Commission of any other act in such a manner as to unreasonably disturb or alarm the public.

"Whoever commits the crime of disturbing the peace shall be fined not more than one hundred dollars, or imprisoned for not more than ninety days, or both."

of this Louisiana statute. That was a function belonging exclusively to the state courts, and their interpretation is binding on us. *E. g., Appleyard* v. *Massachusetts,* 203 U. S. 222, 227; *Hebert* v. *Louisiana,* 272 U. S. 312, 316; *Williams* v. *Oklahoma,* 358 U. S. 576, 583. For me, the Court's view that the statute covers only nonpeaceful conduct is unacceptable, since I believe that the Louisiana Supreme Court decided the opposite in these very cases. I think the State Supreme Court's refusal to review these convictions, taken in light of its assertion that the "rulings of the district judge on matters of law are not erroneous," must be accepted as an authoritative and binding state determination that the petitioners' activities, as revealed in these records, did violate the statute; in other words that, contrary to what this Court now says in Part I of its opinion, the enactment *does* cover peaceful conduct of a kind that foreseeably may lead to public disturbance.[2]

This Court's view of the statute rests primarily, if not entirely, on an earlier Louisiana case, *State* v. *Sanford,* 203 La. 961, 14 So. 2d 778, involving a different, but comparable, breach of the peace statute. That case is regarded as establishing that breaches of the peace under Louisiana law are confined to nonpeaceful conduct. While I do not find the *Sanford* case as "plain" as the Court does (*infra,* pp. 191–192), that earlier holding cannot in any event be deemed controlling on the significance to be attributed to the action of the State Supreme Court in

[2] As Mr. Justice Jackson put it in *Gryger* v. *Burke,* 334 U. S. 728, 731:

"We are not at liberty to conjecture that the trial court acted under an interpretation of the state law different from that which we might adopt and then set up our own interpretation as a basis for declaring that due process has been denied. We cannot treat a mere error of state law, if one occurred, as a denial of due process; otherwise, every erroneous decision by a state court on state law would come here as a federal constitutional question."

these cases. There can be no doubt that Louisiana had to follow the principles of *Sanford* only to the extent that it felt bound by *stare decisis*. A departure from precedent may have been wrong, unwise, or even unjust, but it was not unconstitutional. *Patterson* v. *Colorado*, 205 U. S. 454, 461.[3] See also *Brinkerhoff-Faris Trust Co.* v. *Hill*, 281 U. S. 673, 680, and cases there cited; cf. *Great Northern R. Co.* v. *Sunburst Oil & Refining Co.*, 287 U. S. 358, 364.

More basically, established principles of constitutional adjudication require us to consider that the Louisiana Supreme Court's refusal to review these cases signifies a holding that the breach of the peace statute which controls these cases does embrace the conduct of the petitioners, peaceful though it was.

These state judgments come to us armored with a presumption that they are not founded "otherwise than is required by the fundamental law of the land," *Ex parte Royall*, 117 U. S. 241, 252 (see also *Darr* v. *Burford*, 339 U. S. 200, 205), comparable to the presumption which has always attached to state legislative enactments. See, *e. g.*, *Butler* v. *Pennsylvania*, 10 How. 402, 415. That presumption should render impermissible an interpretation of these judgments as resting on the view that the relevant breach of the peace statute reaches only unruly

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[3] There Mr. Justice Holmes said of a claim that a state court was constitutionally obliged to follow its own precedents: "Even if it be true, as the plaintiff in error says, that the Supreme Court of Colorado departed from earlier and well-established precedents to meet the exigencies of this case, whatever might be thought of the justice or wisdom of such a step, the Constitution of the United States is not infringed. It is unnecessary to lay down an absolute rule beyond the possibility of exception. Exceptions have been held to exist. But in general the decision of a court upon a question of law, however wrong and however contrary to previous decisions, is not an infraction of the Fourteenth Amendment merely because it is wrong or because earlier decisions are reversed."

behavior. For, on the Court's premise that there is no evidence of that kind of behavior, such an interpretation in effect attributes to the Louisiana Supreme Court a deliberately unconstitutional decision, under principles established by *Thompson* v. *City of Louisville, supra,* which had already been decided at the time these cases came before the Louisiana courts.

Moreover, the kind of speculation in which the Court has indulged as to the meaning of the Louisiana statute is surely out of keeping with the principle that federal courts should abstain from constitutional decision involving doubtful state law questions until a clarifying adjudication on them has first been obtained from the state courts. See *Railroad Comm'n* v. *Pullman Co.,* 312 U. S. 496, 500; *Harrison* v. *N. A. A. C. P.,* 360 U. S. 167. Cf. *Glenn* v. *Field Packing Co.,* 290 U. S. 177; *Leiter Minerals, Inc.,* v. *United States,* 352 U. S. 220, 228–229; *Louisiana Power & Light Co.* v. *City of Thibodaux,* 360 U. S. 25. If there be doubt as to how the statute was construed in this respect, the cases should be returned to the Louisiana Supreme Court for clarification of its judgments. See *Herb* v. *Pitcairn,* 324 U. S. 117.

Our recent decision in *Thompson* v. *City of Louisville,* 362 U. S. 199, cannot well be taken as justification for considering the judgments under review as other than a holding by Louisiana's highest court that breach of the peace under then existing state law may include conduct that in itself is peaceful. In *Thompson,* the petitioner was convicted of two offenses defined by ordinances of the City of Louisville. One of these ordinances, prohibiting loitering, expressly enumerated three elements of the offense. The prosecution introduced no evidence to establish any of these definitely prescribed components, which were not suggested to have, by virtue of state judicial interpretation, any other than their plain meaning. We held that "Under the words of the ordinance itself," there was no evidence to support the conviction.

The other offense of which the petitioner in *Thompson* was convicted was "disorderly conduct," not at all defined in the ordinance. The only evidence in the record relating to conduct which might conceivably have come within the prohibited scope indicated was that the petitioner was "argumentative" with the arresting officers. We said of this conviction (362 U. S., at 206): "We assume, for we are justified in assuming, that merely 'arguing' with a policeman is not, because it could not be, 'disorderly conduct' as a matter of the substantive law of Kentucky. See *Lanzetta* v. *New Jersey,* 306 U. S. 451." In other words, we held that the ordinance could not, for want of adequate notice, *constitutionally* be construed by the Kentucky courts to cover the activity for which the city sought to punish the petitioner.

Where, as was true of the disorderly conduct charge in *Thompson,* application of a generally drawn state statute or municipal ordinance to the conduct of a defendant would require a constitutionally impermissible construction of the enactment, we are not bound by the state court's finding that the conduct was criminal. In the cases now before us, however, the Court does not suggest that Louisiana's disturbance of the peace statute was too vague to be constitutionally applied to the conduct of the petitioners. I think we are obliged, because of the state courts' dispositions of these cases, to hold that there was presented at petitioners' trials evidence of criminal conduct under Louisiana law. *Herndon* v. *Lowry,* 301 U. S. 242, 255.

Thompson v. *Louisville* should be recognized for what it is, a case involving a situation which, I think it fair to say, was unique in the annals of the Court. The case is bound to lead us into treacherous territory, unless we apply its teaching with the utmost circumspection, and with due sense of the limitations upon our reviewing authority.

The Court's holding on this phase of the matter also suffers from additional infirmities. I do not think that *State* v. *Sanford,* the cornerstone of this branch of the Court's opinion, is as revealing upon the meaning of breach of the peace under Louisiana law as the Court would make it seem. In that case the Louisiana Supreme Court reversed the convictions, under the then breach of the peace statute, of four Jehovah's Witnesses who had solicited contributions and distributed pamphlets in a Louisiana town, with an opinion which cited, *inter alia, Cantwell* v. *Connecticut,* 310 U. S. 296, and *Martin* v. *Struthers,* 319 U. S. 141. Reference was made to "the provisions of the Constitution of the United States guaranteeing freedom of religion, of the press and of speech." 203 La., at 968, 14 So. 2d, at 780. The court said, most clearly, "The application of the statute by the trial judge to the facts of this case and his construction thereof would render it unconstitutional under the above Federal authorities." 203 La., at 970, 14 So. 2d, at 780–781. In addition, the opinion noted, conviction under the statute might violate the Louisiana Constitution "because it is well-settled that no act or conduct, however reprehensible, is a crime in Louisiana, unless it is defined and made a crime clearly and unmistakably by statute." 203 La., at 970, 14 So. 2d, at 781. In the concluding part of its opinion the Louisiana Supreme Court also said what this Court now considers to be the sole ground of its decision: "It is our opinion that the statute is inapplicable to this case because it appears that the defendants did not commit any unlawful act or pursue an unlawful or disorderly course of conduct which would tend to disturb the peace." 203 La., at 970, 14 So. 2d, at 781.

Thus, a full reading of *Sanford* will disclose that there were at least three considerations which led to the result: (1) the likelihood that a contrary holding would violate provisions of the Federal Constitution relating to religion,

speech, and press under the principles declared in then-recent decisions of this Court; (2) the possibility that the statute was too vague and unclear under the Louisiana Constitution adequately to define the bounds of the conduct being declared criminal; (3) the unfairness of convicting under a general breach of the peace statute persons engaged in such peaceable religious activity.

The Court now isolates this last factor from this multifaceted opinion, and, using it as an immutable measure of what Louisiana law requires, declares that the present convictions must fall because the standard so unclearly set out in *Sanford* has not been met. Apart from other considerations already discussed, I am not prepared to rest a constitutional decision on so insecure a foundation.

It is further significant that the State Supreme Court's order refusing to review the present cases does not cite *State* v. *Sanford,* but rather relies on another earlier case, *Town of Ponchatoula* v. *Bates,* 173 La. 824, 138 So. 851. The *Bates* decision, upholding the constitutionality of an ordinance making it a crime "to engage in a fight or in any manner disturb the Peace," defined disturbance of the peace as "any act or conduct of a person which molests the inhabitants in the enjoyment of that peace and quiet to which they are entitled, or which throws into confusion things settled, or which causes excitement, unrest, disquietude, or fear among persons of ordinary, normal temperament." 173 La., at 828, 138 So., at 852. Such a definition would of course bring within the compass of the statute even peaceful activity, so long as it threw "into confusion things settled," or caused disquietude among ordinary members of the community. I think it was that construction which the Louisiana Supreme Court placed upon the breach of the peace statute involved in the cases now before us.

II.

The alternative holding of the Court in Part II of its opinion also stands on unsolid foundations. Conceding that this breach of the peace statute "might" be construed to cover peaceful conduct carried on "in such a manner as would foreseeably disturb or alarm the public," the Court holds that there was no evidence that petitioners' conduct tended to disturb or alarm those who witnessed their activity.

There is, however, more to these cases than what physically appears in the record. It is an undisputed fact that the "sit-in" program, of which petitioners' demonstrations were a part, had caused considerable racial tension in various States, including Louisiana. Under Louisiana law, La. Rev. Stat., 1950, § 15:422, Louisiana courts may take judicial notice of "the political, social and racial conditions prevailing in this state." *State* v. *Bessa,* 115 La. 259, 38 So. 985. This Court holds, nonetheless, that the Louisiana courts could not, consistently with the procedural guarantees of the Fourteenth Amendment, judicially notice the undisputed fact that there was racial tension in and around Baton Rouge on March 28 and 29, 1960 (the dates of these "sit-ins"), without informing the parties that such notice was being taken, and without spreading the source of the information on the record.

Support for this constitutional proposition is found in *Ohio Bell Telephone Co.* v. *Public Utilities Commission,* 301 U. S. 292, 302–303. The Court there held that it was repugnant to the Fourteenth Amendment for a state agency to deprive the telephone company of property on the basis of rates set by a precise mathematical computation derived from undisclosed statistics. This was because the procedure afforded no opportunity for rebuttal with respect to the underlying data, and for possible demonstra-

tion that the figures should not be judicially noticed, since their source was unknown and the statistics were not disclosed to any reviewing court. See Morgan, Some Problems of Proof (1956), 56.

The situation we have here is quite different. The existence of racial tensions, of which the Louisiana courts must have taken judicial notice in order to find that petitioners' conduct alarmed or disturbed the public, was notorious throughout the community and, indeed, throughout that part of the United States. The truth of that proposition is not challenged, nor is any particular authority required to confirm it. This kind of generally known condition may be judicially noticed by trial and appellate courts without prior warning to the parties, since it does not require any foundation establishing the accuracy of a specific source of information. See Uniform Rules of Evidence, 9 (2)(c); ALI, Model Code of Evidence, Rule 802 (c); 1 Morgan, Basic Problems of Evidence (1954), 9–10. Cf. *Mills* v. *Denver Tramway Corp.*, 155 F. 2d 808 (C. A. 10th Cir.). I perceive no reason why that principle should be considered as applying only in civil cases, and I am not aware of any American authority which so holds.

Indeed, the fact of which I think we must consider judicial notice was taken in this instance was so notorious throughout the country that far from its being unconstitutional for a court to take it into consideration, it would be quite amiss for us not to deem that the Louisiana courts did so on their own initiative. See, *e. g.*, Uniform Rules of Evidence, 9 (1); cf. Note, 12 Va. L. Rev. 154 (1925), and cases there cited. It might have been procedurally preferable had the trial judge announced to the parties that he was taking judicial notice, as is suggested in Model Code of Evidence, Rule 804. But we would be exalting the sheerest of technicalities were we to hold that a conviction is constitutionally

void because of a judge's failure to declare that he has noticed a common proposition when, at no stage in the proceeding, is it suggested that the proposition may be untrue. Whether a trial judge need notify the parties of his intention to take judicial notice of "routine matters of common knowledge which . . . [he] would notice as a matter of course" is best left to his "reasonable discretion." McCormick, Evidence (1954), 708. Appellate courts have always reserved the authority to notice such commonly known propositions as are needed to support the judgment of a lower court, even if no express reference has been made below. See Comment, 42 Mich. L. Rev. 509, 512–513 (1943).

Moreover, in this instance, the fact that the trial court had taken judicial notice of the impact of petitioners' conduct, which indeed had obviously been engaged in for the very purpose of producing an impact on others in this field of racial relations, albeit, I shall assume, with the best of motives, could hardly have failed to cross the minds of petitioners' counsel before the trial had ended. They however neither sought to introduce countervailing evidence on that issue, nor have they undertaken at any stage of these proceedings, including that in this Court, to question the availability of judicial notice on this aspect of the State's case.

Were we to follow the reasoning of the majority opinion where it would logically lead, this Court would be violating due process every time it noticed a generally known fact without first calling in the parties to apprise them of its intention. Yet without any such notification this Court has many times taken judicial notice of well-known economic and social facts, *e. g., Atchison, Topeka & S. F. R. Co.* v. *United States,* 284 U. S. 248, 260; *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379, 398–400; *Hoyt* v. *Florida, ante,* p. 57, at p. 62, and even of the tendency of

particular epithets to cause a breach of the peace. *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 574.

It is no answer to say in these cases that while it was permissible for the Louisiana courts to take judicial notice of racial conditions generally, they could not take notice of the particular conditions on the premises involved in these prosecutions. In the absence of contrary evidence, it was certainly not constitutionally impermissible for the Louisiana courts to consider that the racial conditions in Baton Rouge and in the establishments where petitioners sat were not dissimilar to those existing throughout the State. Judicial notice of racial conditions in a State has sufficient probative value in determining what were the racial conditions at a particular location within the State to withstand constitutional attack. Reversing these convictions for want of evidence of racial tension would in effect be putting this Court into the realm of reviewing the *sufficiency* of the evidence to support these convictions, something which both *Thompson* v. *City of Louisville, supra,* at 199, and the Court's opinion in the present cases, *ante,* p. 163, recognize is not properly within our purview.

In my opinion, skimpy though these records are, the convictions do not fall for want of evidence, in the constitutional sense.

III.

Were there no more to these cases, I should have to vote to affirm. But in light of principles established by *Cantwell* v. *Connecticut,* 310 U. S. 296, and consistently since recognized, I think the convictions are subject to other constitutional infirmities.

At the outset it is important to focus on the precise factual situation in each of these cases. Common to all three are the circumstances that petitioners were given the invitation extended to the public at large to patronize

these establishments; that they were told that they could be served food only at the Negro lunch counters; that their conduct was not unruly or offensive; and that none of them was ever asked by the owners or their agents to leave the establishments. While in *Briscoe,* No. 27, there was some very slight, but in my view constitutionally adequate, evidence that those petitioners were expressly asked "to move" from the "white" lunch counter,[4] and undisputed evidence that they did not do so, in *Garner,* No. 26, and *Hoston,* No. 28, there was no evidence whatever of any express request to the petitioners in those cases that they move from the "white" lunch counters where they were sitting.

Nor do I think that any such request is fairly to be implied from the fact that petitioners were told by the management that they could not be served food at such counters. The premises in both instances housed merchandising establishments, a drugstore in *Garner,* a department store in *Hoston,* which solicited business from all comers to the stores. I think the reasonable inference is that the management did not want to risk losing Negro patronage in the stores by requesting these petitioners to leave the "white" lunch counters, preferring to rely on the hope that the irritations of white customers or the

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[4] In *Briscoe,* the waitress who had spoken to the defendants testified at the trial that she told them "they would have to go to the other side to be served." It was only when she responded affirmatively to a leading question, "And you told them you couldn't serve them and asked them to move, is that correct?" that she provided any evidence at all to support a finding that the defendants were even asked by the management to move from the "white" lunch counter. Contrary to what the trial court in *Briscoe* may have meant when it said that the defendants "were requested to leave and they refused to leave" before the police appeared, the waitress' laconic reply furnished no evidence whatever that the defendants were requested to leave the establishments.

force of custom would drive them away from the counters.[5] This view seems the more probable in circumstances when, as here, the "sitters' " behavior was entirely quiet and courteous, and, for all we know, the counters may have been only sparsely, if to any extent, occupied by white persons.[6]

In short, I believe that in the *Garner* and *Hoston* cases the records should be taken as indicating that the petitioners remained at the "white" lunch counters with the

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[5] The owner of the drugstore in *Garner* testified that his store provided eating "facilities for only one race, the white race," and that when petitioners sat down at the lunch counter he "advise[d] them that we couldn't serve them." He admitted that "negroes are very good customers" in the drugstore section of the establishment. In *Hoston,* the manager of the department store repeatedly insisted at the trial that the petitioners had *not* been "requested to move over to the counter reserved for colored people." When asked, "They weren't asked to go over there?" he replied, "They were advised that we would serve them over there." He denied that the petitioners had been "refused" service: "We did not refuse to serve them. I merely did not serve them and told them that they would be served on the other side of the store. . . . As I stated before, we did not refuse to serve them. We merely advised them they would be served on the other side of the store."

In contrast to what appears in *Garner* and *Hoston,* the circumstances in *Briscoe* seem to me quite different. There is little reason to believe that the management of a restaurant in a Greyhound Bus Terminal would be nearly as concerned with offending Negro patrons because of their refusal to sit at the Negro counter as would the management of a merchandising establishment dependent on other trade than that available at its eating facilities. It may well have been assumed that pique at being asked to leave a "white" lunch counter would readily yield to the need of having to use the buses to get to one's destination. Further, for all that appears, the restaurant and bus companies, in this instance, may have been entirely separate enterprises, or these "sitters" may only have been "eaters" and not "travelers" as well.

[6] In *Garner* there was evidence that "a number of customers [were] seated at the counter." In *Hoston* there was no evidence even of that kind.

implied consent of the management,[7] even though a similar conclusion may not be warranted in the *Briscoe* case. Under these circumstances, applying principles announced in *Cantwell,* I would hold all these convictions offensive to the Fourteenth Amendment, in that: (1) in *Garner* and *Hoston* petitioners' conduct, occurring with the managements' implied consent, was a form of expression within the range of protections afforded by the Fourteenth Amendment which could in no event be punished by the State under a *general* breach of the peace statute; and (2) in *Briscoe,* while petitioners' "sitting," over the management's objection, cannot be deemed to be within the reach of such protections, their convictions must nonetheless fall because the Louisiana statute, as there applied (and *a fortiori* as applied in the other two cases), was unconstitutionally vague and uncertain.

In the *Cantwell* case a Jehovah's Witness had been convicted for breach of the peace under a Connecticut statute embracing what was considered to be the common-law concept of that offense.[8] "The facts which were held

[7] The manager of the department store in *Hoston* seemed particularly complacent. Although two Negro girls sat "adjoining" him while he was eating lunch at the counter, he finished his meal before calling the police. He instructed a waitress "to offer service at the counter across the aisle," but never approached the petitioners himself. He testified that his purpose in calling the police was that he "feared that some disturbance might occur."

[8] The Connecticut statute, Conn. Gen. Stat., § 6194 (1930), provided:

"Any person who shall disturb or break the peace by tumultuous and offensive carriage, noise or behavior, or by threatening, traducing, quarreling with, challenging, assaulting or striking another *or shall disturb or break the peace,* or provoke contention, by following or mocking any person, with abusive or indecent language, gestures or noise, or shall, by any writing, with intent to intimidate any person, threaten to commit any crime against him or his property or shall write or print and publicly exhibit or distribute, or shall publicly exhibit, post up or advertise, any offensive, indecent or abusive matter

to support the conviction . . . were that he stopped two men in the street, asked, and received, permission to play a phonograph record, and played the record 'Enemies,' which attacked the religion and church of the two men, who were Catholics. Both were incensed by the contents of the record and were tempted to strike Cantwell [the defendant] unless he went away. On being told to be on his way he left their presence. There was no evidence that he was personally offensive or entered into any argument with those he interviewed." 310 U. S., at 302–303.

Accepting the determination of the state courts that although the defendant himself had not been disorderly or provocative, his conduct under Connecticut law nonetheless constituted a breach of the peace because of its tendency to inflame others, this Court reversed. Starting from the premise that the "fundamental concept of liberty embodied in [the Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment," the Court found that the defendant's activities fell within the protection granted to the "free exercise" of religion. Then recognizing the danger to such liberties of "leaving to the executive and judicial branches too wide a discretion" in the application of a statute "sweeping in a great variety of conduct under a general and indefinite characterization," the Court held that the defendant's activities could not constitutionally be reached under a general breach of the peace statute, but only under one specifically and narrowly aimed at such conduct. 310 U. S., at 307–308. The Court stated:

> "Although the contents of the [phonograph] record not unnaturally aroused animosity, we think that, in

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concerning any person, shall be fined not more than five hundred dollars or imprisoned in jail not more than one year or both." (Emphasis added.)

> the absence of a statute narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State, the petitioner's communication, considered in the light of the constitutional guarantees, raised no such clear and present menace to public peace and order as to render him liable to conviction of the common law offense in question." [Citing to such cases as *Schenck* v. *United States,* 249 U. S. 47.] 310 U. S., at 311.

I think these principles control the *Garner* and *Hoston* cases. There was more to the conduct of those petitioners than a bare desire to remain at the "white" lunch counter and their refusal of a police request to move from the counter. We would surely have to be blind not to recognize that petitioners were sitting at these counters, where they knew they would not be served, in order to demonstrate that their race was being segregated in dining facilities in this part of the country.

Such a demonstration, in the circumstances of these two cases, is as much a part of the "free trade in ideas," *Abrams* v. *United States,* 250 U. S. 616, 630 (Holmes, J., dissenting), as is verbal expression, more commonly thought of as "speech." It, like speech, appeals to good sense and to "the power of reason as applied through public discussion," *Whitney* v. *California,* 274 U. S. 357, 375 (Brandeis, J., concurring), just as much as, if not more than, a public oration delivered from a soapbox at a street corner. This Court has never limited the right to speak, a protected "liberty" under the Fourteenth Amendment, *Gitlow* v. *New York,* 268 U. S. 652, 666, to mere verbal expression. *Stromberg* v. *California,* 283 U. S. 359; *Thornhill* v. *Alabama,* 310 U. S. 88; *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, 633–634. See also *N. A. A. C. P.* v. *Alabama,* 357 U. S. 449, 460.

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If the act of displaying a red flag as a symbol of opposition to organized government is a liberty encompassed within free speech as protected by the Fourteenth Amendment, *Stromberg* v. *California, supra,* the act of sitting at a privately owned lunch counter with the consent of the owner, as a demonstration of opposition to enforced segregation, is surely within the same range of protections. This is not to say, of course, that the Fourteenth Amendment reaches to demonstrations conducted on private property over the objection of the owner (as in *Briscoe*), just as it would surely not encompass verbal expression in a private home if the owner has not consented.

No one can deny the interest that a State has in preserving peace and harmony within its borders. Pursuant to this interest, a state legislature may enact a trespass statute, or a disturbance of the peace statute which either lists in detail the acts condemned by legitimate state policy or proscribes breaches of the peace generally, thus relating the offense to the already developed body of common law defining that crime. Or it may, as Louisiana has done, append to a specific enumeration in a breach of the peace statute a "catch-all" clause to provide for unforeseen but obviously disruptive and offensive behavior which cannot be justified, and which is not within the range of constitutional protection.

But when a State seeks to subject to criminal sanctions conduct which, except for a demonstrated paramount state interest, would be within the range of freedom of expression as assured by the Fourteenth Amendment, it cannot do so by means of a general and all-inclusive breach of the peace prohibition. It must bring the activity sought to be proscribed within the ambit of a statute or clause "narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State." *Cantwell* v. *Connecticut, supra,* at 311; *Thornhill* v. *Alabama,* 310

U. S. 88, 105.[9] And of course that interest must be a legitimate one. A State may not "suppress free communication of views, religious or other, under the guise of conserving desirable conditions." *Cantwell, supra,* at 308.

These limitations exist not because control of such activity is beyond the power of the State, but because sound constitutional principles demand of the state legislature that it focus on the nature of the otherwise "protected" conduct it is prohibiting, and that it then make a legislative judgment as to whether that conduct presents so clear and present a danger to the welfare of the community that it may legitimately be criminally proscribed.[10]

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[9] Compare, for example, the statutes upheld in *Beauharnais* v. *Illinois,* 343 U. S. 250; *Breard* v. *Alexandria,* 341 U. S. 622; *Kovacs* v. *Cooper,* 336 U. S. 77; *Valentine* v. *Chrestensen,* 316 U. S. 52; *Chaplinsky* v. *New Hampshire,* 315 U. S. 568; *Cox* v. *New Hampshire,* 312 U. S. 569.

[10] Mr. Justice Roberts, speaking for a unanimous Court in *Cantwell,* stated (310 U. S., at 307–308):

"Conviction on the fifth count [disorderly conduct] was not pursuant to a statute evincing a legislative judgment that street discussion of religious affairs, because of its tendency to provoke disorder, should be regulated, or a judgment that the playing of a phonograph on the streets should in the interest of comfort or privacy be limited or prevented. Violation of an Act exhibiting such a legislative judgment and narrowly drawn to prevent the supposed evil, would pose a question differing from that we must here answer. Such a declaration of the State's policy would weigh heavily in any challenge of the law as infringing constitutional limitations. Here, however, the judgment is based on a common law concept of the most general and undefined nature. The court below has held that the petitioner's conduct constituted the commission of an offense under the state law, and we accept its decision as binding upon us to that extent.

"The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others. No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical

The Louisiana Legislature made no such judgment before the petitioners in *Garner* and *Hoston* engaged in their "sit-in" activity. In light of the *Cantwell* case, whose reasoning of course cannot be deemed limited to "expression" taking place on the public streets, cf. *Terminiello* v. *Chicago*, 337 U. S. 1, *Niemotko* v. *Maryland*, 340 U. S. 268, 281 (concurring opinion), Louisiana could not, in my opinion, constitutionally reach those petitioners' conduct under subsection (7)—the "catch-all clause"—of its then existing disturbance of the peace statute.[11] In so concluding, I intimate no view as to whether Louisiana could by a specifically drawn statute constitutionally proscribe conduct of the kind evinced in these two cases, or upon the constitutionality of the statute which the State has recently passed.[12] I deal here only with these two cases, and the statute that is before us now.

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attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious. Equally obvious is it that a State may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions. Here we have a situation analogous to a conviction under a statute sweeping in a great variety of conduct under a general and indefinite characterization, and leaving to the executive and judicial branches too wide a discretion in its application."

[11] It follows, of course, that petitioners' refusal to accede to the request to leave made by police officers could also not constitutionally be punished under this general statute. Were it otherwise, the determination whether certain conduct constitutes a clear and present danger would be delegated to a police officer. Simply by ordering a defendant to cease his "protected" activity, the officer could turn a continuation of that activity into a breach of the peace.

[12] After the incidents which gave rise to these cases, the Louisiana Legislature passed a bill adding to the disturbance of the peace statute a second clause, La. Rev. Stat., 1950, § 14:103B (1960 Supp.), which provides:

"B. Any person or persons . . . while in or on the premises of another . . . on which property any store, restaurant, drug store . . . or

IV.

Finally, I believe that the principles of *Cantwell* lead to the conclusion that this general breach of the peace provision must also be deemed unconstitutional for vagueness and uncertainty, *as applied* in the circumstances of all these cases. As to *Garner* and *Hoston* this affords an alternative ground for reversal. As to *Briscoe,* where the evidence falls short of establishing that those petitioners remained at the "white" lunch counter with the express or implied consent of the owner (notes 4, 5, *supra*), I would rest reversal solely on this ground.[13]

While *Cantwell* was not explicitly founded on that premise, it seems to me implicit in the opinion that a statute which leaves the courts in uncertainty as to whether it was intended to reach otherwise constitutionally protected conduct must by the same token be deemed inadequate warning to a defendant that his conduct has

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any other lawful business is operated which engages in selling articles of merchandise or services or accommodation to members of the public, or engages generally in business transactions with members of the public, who shall:

"(1) prevent or seek to prevent, or interfere or seek to interfere with the owner or operator of such place of business, or his agents or employees, serving or selling food and drink . . . or

"(2) prevent or seek to prevent, or interfere or seek to interfere with other persons who are expressly or impliedly invited upon said premises, or with prospective customers coming into or frequenting such premises in the normal course of the operation of the business conducted and carried on upon said premises, shall be guilty of disorderly conduct and disturbing the peace . . . ." 1 La. Acts, 1960, 235–236.

[13] Because of the absence of any evidence in the *Briscoe* record regarding the legal relationship between the restaurant and the Greyhound Bus Terminal in Baton Rouge, on whose premises it was located, I would not pass in this case on the Solicitor General's suggestion, made as *amicus curiae,* that segregated facilities were prohibited by § 216 (d) of Part II of the Interstate Commerce Act, 49 U. S. C. § 316 (d). See *Boynton* v. *Virginia,* 364 U. S. 454.

been condemned by the State. See *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 573–574. Cf. *Winters* v. *New York,* 333 U. S. 507, 509–510; *Smith* v. *California,* 361 U. S. 147, 151; *Thompson* v. *City of Louisville,* 362 U. S. 199, 206. Such warning is, of course, a requirement of the Fourteenth Amendment. *Lanzetta* v. *New Jersey,* 306 U. S. 451, 453.

This conclusion finds added support in the cases requiring of state legislatures more specificity in statutes impinging on freedom of expression than might suffice for other criminal enactments. See *Winters* v. *New York, supra,* at 509–510; *Smith* v. *California, supra,* at 151; cf. *Herndon* v. *Lowry,* 301 U. S. 242, 261–264. To the extent that this Louisiana statute is explicit on the subject of expression it prohibits only that which is "unnecessarily loud, offensive, or insulting" or activity carried on "in a violent or tumultuous manner by any three or more persons" (note 1, *supra*). No charge was made or proved that petitioners' conduct met any of those criteria. Nor has the statute been elucidated in this respect before, or since, petitioners' conviction, by any decision of the Louisiana courts of which we have been advised. Cf. *Winters* v. *New York, supra,* at 514; *Terminiello* v. *Chicago,* 337 U. S. 1, 4. Lastly, it is worth observing that in *State* v. *Sanford* the Louisiana Supreme Court seriously questioned on the score of vagueness the validity of that earlier breach of the peace statute under the State Constitution, as there applied to conduct within the same range of constitutional protection.[14]

In the absence of any Louisiana statute purporting to express the State's overriding interest in prohibiting peti-

[14] I do not intend to suggest that the present Louisiana statute, either on its face or as it might be applied with respect to conduct not within the "liberty" assured by the Fourteenth Amendment, is or would be unconstitutional for vagueness. Cf. *Winters* v. *New York, supra,* at 524–526 (dissenting opinion).

tioners' conduct as a clear and present danger to the welfare of the community, peaceful demonstration on public streets, and on private property with the consent of the owner, was constitutionally protected as a form of expression. Louisiana's breach of the peace statute drew no distinct line between presumably constitutionally protected activity and the conduct of the petitioners in *Briscoe,* as a criminal trespass statute might have done.[15] The fact that in *Briscoe,* unlike *Garner* and *Hoston,* the management did not consent to the petitioners' remaining at the "white" lunch counter does not serve to permit the application of this general breach of the peace statute to the conduct shown in that case. For the statute by its terms appears to be as applicable to "incidents fairly within the protection of the guarantee of free speech," *Winters* v. *New York, supra,* at 509, as to that which is not within the range of such protection. Hence such a law gives no warning as to what may fairly be deemed to be within its compass. See Note, 109 U. of Pa. L. Rev. 67, 75–76, 99–104 (1960).

For the foregoing reasons I dissent from the opinion of the Court, but join in the judgment.

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[15] The criminal trespass statute in force in Louisiana at the time of petitioners' acts prohibited only "unauthorized and intentional taking [of] possession" and "unauthorized and intentional entry" on another's property. La. Rev. Stat., 1950, § 14:63. No attempt was made to prosecute the petitioners under this law. The statute has since been amended to cover "remaining in places after being forbidden," 1 La. Acts, 1960, 245–248, and an anti-trespass provision is now included in the disturbance of the peace statute, 1 La. Acts, 1960, 234.

ST. REGIS PAPER CO. *v.* UNITED STATES.

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

No. 47. Argued November 9, 1961.—Decided December 11, 1961.

This is a civil action by the United States for (1) a mandatory injunction under § 9 of the Federal Trade Commission Act requiring petitioner to comply with orders of the Commission to file special reports containing specified information and documents, and (2) statutory forfeiture of $100 for each day petitioner was in default of those orders. Petitioner had filed only part of the information called for by the Commission in connection with a formal investigation to determine whether petitioner's acquisitions of stock and assets of other corporations violated the antitrust laws. Among other items, it had declined to furnish its own file copies of reports filed with the Census Bureau on the ground that they were confidential. The District Court found that some of the orders were unenforceable because of vagueness and that others had been answered. It directed petitioner to answer the remaining ones, including those calling for copies of census reports; but it did not award the statutory forfeitures, because some of the orders were too vague to be enforced. The Court of Appeals affirmed insofar as the District Court ordered compliance; but it reversed that portion of the decision refusing to award the statutory forfeitures. *Held:*

1. The Federal Trade Commission is entitled to obtain petitioner's own file copies of reports submitted by petitioner to the Census Bureau. Pp. 215–220.

(a) Section 8 (a) of the Census Act, which grants the Secretary of Commerce discretion to furnish to certain authorities data taken from information furnished the Bureau on censuses of population, agriculture and housing, but provides that such data shall not be used by the recipient "to the detriment of the persons to whom such information relates," is inapplicable here, because the Commission has not been furnished any information by the Secretary and the information here involved does not relate to the particular censuses covered by that section. P. 215.

(b) Section 9 (a) of the Census Act, which forbids the use of information contained in census reports for other than statistical

purposes and forbids the improper publication or disclosure of such information, applies only to the Secretary and other officers and employees of the Department of Commerce. It does not generally prohibit the use of such information *per se*. Pp. 215–219.

(c) By voluntarily submitting like data to the Federal Trade Commission during this investigation, petitioner did not waive its claim that its file copies of reports to the Census Bureau are confidential. P. 217.

(d) The assurances of confidentiality by the President and the Census Bureau are not sufficient to extend the coverage of § 9 (a). Pp. 217–219.

(e) The fact that petitioner furnished certain information to the Census Bureau does not relieve it from furnishing the same information to the Federal Trade Commission, since § 132 of the Census Act provides that nothing therein contained "shall be deemed to revoke or impair the authority of any other Federal agency with reference to the collection or release of information." Pp. 219–220.

2. The forfeiture imposed by § 10 of the Federal Trade Commission Act for failure to file "any annual or special report" is applicable, although the requested report is to include "answers in writing to specific questions." Pp. 220–223.

3. Notwithstanding the fact that the District Court held that the Commission's orders were "partially defective" and decreed only partial compliance, forfeiture occurred because petitioner failed to comply with the valid requests; and the single daily penalty under § 10 began to run 30 days after notice of default on the first set of the Commission's orders, and it runs until the date of the stay granted by this Court. Pp. 223–225.

(a) Partial invalidity of the Commission's orders did not prevent application of the forfeiture provision, since petitioner defied large parts of the orders instead of obtaining a separate judicial determination of the validity of the orders. P. 224.

(b) Section 6 (c) of the Administrative Procedure Act authorized the procedure that the District Court followed in ordering partial compliance instead of striking the entire orders and requiring the Commission to issue new ones. Pp. 224–225.

(c) In directing partial compliance, the District Court did not treat those items found enforceable as subpoenas and therefore subject solely to contempt action. P. 225.

(d) Once the Court of Appeals held that the default was within the forfeiture provision of § 10, its penalties accrued, and it was not necessary to remand the case to the District Court for determination of whether the forfeiture should apply. P. 225.

4. The petitioner, not having sought a judicial determination of the validity of the Commission's orders or a stay once this litigation had begun, cannot now say it was denied due process because it had no opportunity to prevent the running of the forfeitures pending a judicial test of the validity of the orders. Pp. 225–227.

285 F. 2d 607, affirmed.

Horace R. Lamb argued the cause and filed briefs for petitioner.

Solicitor General Cox argued the cause for the United States. With him on the briefs were *Assistant Attorney General Loevinger, Acting Assistant Attorney General Kirkpatrick, Daniel M. Friedman, Lionel Kestenbaum* and *Richard A. Solomon.*

MR. JUSTICE CLARK delivered the opinion of the Court.

Pursuant to § 6 (b) of the Federal Trade Commission Act,[1] the Commission issued orders directing the petitioner and corporations acquired by it to submit various

[1] "The commission shall also have power—

"(b) To require, by general or special orders, corporations engaged in commerce, excepting banks, and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the commission may prescribe, and shall be filed with the commission within such reasonable period as the commission may prescribe, unless additional time be granted in any case by the commission." 38 Stat. 721, 15 U. S. C. § 46 (b).

reports. Petitioner failed to furnish all of the requested information, and the United States at the request of the Commission brought the present suit in the District Court seeking (1) a mandatory injunction to compel compliance with all of the orders [2] and (2) statutory forfeiture of $100 for every day petitioner was in default of those orders directed specifically to it.[3]

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[2] Section 9 of the Federal Trade Commission Act provides that "[u]pon the application of the Attorney General of the United States, at the request of the commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of this Act or any order of the commission made in pursuance thereof." 38 Stat. 722, 15 U. S. C. § 49.

[3] Section 10 of the Federal Trade Commission Act provides: "That any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce documentary evidence, if in his power to do so, in obedience to the subpoena or lawful requirement of the commission, shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than $1,000 nor more than $5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment.

"Any person who shall willfully make, or cause to be made, any false entry or statement of fact in any report required to be made under this Act, or who shall willfully make, or cause to be made, any false entry in any account, record, or memorandum kept by any corporation subject to said sections, or who shall willfully neglect or fail to make, or to cause to be made, full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of such corporation, or who shall willfully remove out of the jurisdiction of the United States, or willfully mutilate, alter, or by any other means falsify any documentary evidence of such corporation, or who shall willfully refuse to submit to the commission or to any of its authorized agents, for the purpose of inspection and taking copies, any documentary evidence of such corporation in his possession or within his control, shall be deemed guilty of an offense against the United States, and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than $1,000 nor more than $5,000, or to

The District Court found that some of the requests were unenforceable because of vagueness and that others had been answered either specifically or by reference to materials previously furnished. Petitioner was directed to answer the remaining items, including those calling for file copies of census reports. However, because *some* of the requests were too vague to be enforced, the District Court did not award the statutory forfeitures. 181 F. Supp. 862. The Court of Appeals affirmed insofar as the District Court ordered compliance, but reversed that portion of the decision refusing to award the statutory forfeitures. 285 F. 2d 607. We granted a limited writ of certiorari because of a conflict in the circuits on the question of compulsory production of the copies of census reports and the general importance of certain other questions in the administration of the investigatory pro-

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imprisonment for a term of not more than three years, or to both such fine and imprisonment.

"If any corporation required by this Act to file any annual or special report shall fail so to do within the time fixed by the commission for filing the same, and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of $100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the corporation has its principal office or in any district in which it shall do business. It shall be the duty of the various United States attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

"Any officer or employee of the commission who shall make public any information obtained by the commission without its authority, unless directed by a court, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or by fine and imprisonment, in the discretion of the court." 38 Stat. 723, 15 U. S. C. § 50.

visions of the Federal Trade Commission Act. 365 U. S. 857. On motion of petitioner, we also granted a stay tolling the further running and accumulation of forfeitures awaiting our decision. We now affirm the judgment of the Court of Appeals.

Petitioner contends that it cannot lawfully be required to produce copies of statutory reports made by it to the Census Bureau because of their confidential nature. The remainder of the inquiries found enforceable by the District Court are not now contested by the petitioner. As to the forfeitures, petitioner advances several arguments: (1) The statutory forfeiture of § 10 is not applicable because it applies only to a failure to furnish "reports" while the inquiries directed to petitioner called for answers to specific questions; (2) No forfeitures can be imposed because the orders were only partially enforceable; and (3) It is a denial of due process to assess penalties for failure to obey orders during a time petitioner was without remedy to test their validity.

I.

The controversy culminating in this litigation had its inception in September 1956. At that time the Commission requested petitioner to furnish voluntarily information concerning certain of its corporate acquisitions to enable the Commission to determine whether there had been any violations of the antitrust laws. A year later, having failed to obtain the bulk of the requests, the Commission served a subpoena *duces tecum* on petitioner. It covered somewhat the same information as was previously requested but, in addition, required similar data concerning three more corporate acquisitions effected in the interim. In due time petitioner fully complied with the subpoena, and the hearing before the Examiner was concluded. After reviewing the material, however, the Commission found that it needed additional information and

in June 1958 requested petitioner's counsel to furnish it. A running exchange of correspondence between petitioner's counsel and the Commission's staff followed. Counsel contended, *inter alia,* that no additional information was needed and requested a statement of necessity therefor. Upon counsel's insistence, three separate levels of authority in the Commission, from the local attorney in New York City to the Director of the Bureau of Investigation in Washington, explained the need for the information, advised that the request therefor had been fully authorized and requested petitioner to comply therewith. This discussion continued for over six months during which time petitioner furnished only two documents of the many requested. On January 6, 1959, the Commission instigated a formal investigation of the acquisitions made by petitioner during the preceding five years. Pursuant to this investigation the Commission issued six orders requiring the filing within 30 days of "special reports" which were to contain specified information and documents. On motion of petitioner, the Commission temporarily suspended these orders while it considered petitioner's motion that they be vacated. On May 6, 1959, the motion to vacate was denied, and petitioner was directed to comply by May 28, 1959. On June 4, 1959, the Commission broadened its investigation to cover two corporate acquisitions by petitioner occurring after the instigation of the formal investigation. Accordingly three more orders requiring "special reports" were issued. Upon petitioner's failure to comply with either set of orders, notices of default were served on June 20, 1959, and July 24, 1959, respectively. This complaint was filed on September 15, 1959, three years after the inquiry was opened. The complaint sought a mandatory injunction which would compel petitioner to file with the Commission the "special reports" sought by all nine orders. However, forfeitures were claimed only for petitioner's

failure to respond to orders numbered 1 and 7, which were directed specifically to petitioner. The other seven orders had been directed to corporations acquired by petitioner rather than to it.

II.

Among the items ordered enforced and with which the petitioner still refuses to comply are requests for file copies of certain reports previously made to the Census Bureau. The petitioner claims each of these to be confidential. There is a conflict between the Courts of Appeal on the point.[4] Here both the District Court and the Court of Appeals have held these file copies not restricted, and with this conclusion we agree.

Petitioner's claim is based on §§ 8 and 9 (a) of the Census Act, 13 U. S. C. §§ 8–9 (a), and assurances of confidentiality by the Government. It can be noted immediately that § 8 does not in any way support petitioner's position. This section grants the Secretary of Commerce the discretion to furnish to named authorities data taken from information furnished the Census Bureau on censuses of population, agriculture and housing. Subsection (c) thereof provides that when the Secretary furnishes such data it shall "[i]n no case" be used by the recipient "to the detriment of the persons to whom such information relates." Not only has the Commission not been furnished any information by the Secretary, but the information involved does not relate to the particular censuses covered by the section, and so this section is clearly inapplicable here.

The prohibitions of § 9 (a) apply to the Secretary, and other officers and employees of the Department of Commerce. Each of them is prohibited from using the infor-

[4] Compare *Federal Trade Comm'n* v. *Dilger,* 276 F. 2d 739 (C. A. 7th Cir. 1960), with *United States* v. *St. Regis Paper Co.,* 285 F. 2d 607 (C. A. 2d Cir. 1960).

mation supplied for other than statistical purposes; and from making any publication thereof wherein the name or identity of those furnishing information is revealed; and, finally, from permitting anyone outside of the employ of the Department of Commerce to "examine the individual reports" filed.[5] The form of the report provided by the Census Bureau is marked "Confidential" and in addition states that "[i]t cannot be used for purposes of taxation, investigation or regulation."[6] The Bureau also furnishes the reporting corporations a copy of this form, such as the one involved here. The copies are marked "Keep this copy for your files," and the Bureau is said to have advised reporting companies that they are confidential. It also appears that a Presidential Proclamation admonished reporting companies that "[t]he Census has nothing to do . . . with the enforcement of any national, state, or local law or ordinance. There need be no fear that any disclosure will be made regarding any individual person or his affairs. For the due protection of the rights and interests of the persons furnishing information every

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[5] "*Information as confidential; exception.*

"(a) Neither the Secretary, nor any other officer or employee of the Department of Commerce or bureau or agency thereof, may, except as provided in section 8 of this title—

"(1) use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied; or

"(2) make any publication whereby the data furnished by any particular establishment or individual under this title can be identified; or

"(3) permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports." 13 U. S. C. § 9 (a).

[6] "CONFIDENTIAL.—This report is required by Act of Congress, approved August 31, 1954, (13 U. S. C. 131 and 224). Your report is confidential and only sworn Census employees will have access to it. It cannot be used for purposes of taxation, investigation or regulation."

employee of the Census Bureau is prohibited, under heavy penalty, from disclosing any information which may thus come to his knowledge." [7] Petitioner also relies upon an opinion of the Attorney General, 36 Op. Atty. Gen. 362 (1930).

Similar contentions were considered by the Court of Appeals for the Seventh Circuit in *Federal Trade Comm'n* v. *Dilger,* 276 F. 2d 739 (1960), where it was held that these "assurances of confidentiality and protection constitute a pledge of good faith on the part of the Congress, the President and the Department of Commerce. . . . The United States has given its word and should be permitted to keep it." 276 F. 2d, at 744. It concludes that since the Commission cannot obtain the original it should not be permitted *"to do indirectly that which it cannot do directly." Id.,* at 743.

The Solicitor General contends that for the purposes of this case petitioner has waived the point by voluntarily submitting like data to the Commission during its investigation herein. We cannot agree. Reaching the merits of the issue he points out that the government agencies are at loggerheads on the problem, the Department of Commerce, Census Bureau and the Bureau of the Budget believe that the copies are not subject to legal process, while the Federal Trade Commission and the Antitrust Division of the Department of Justice, which filed this suit, contend to the contrary. The Solicitor General, "fully recognizing the delicate balance of opposing considerations," has concluded "on balance" that the copies are not subject to compulsive production. As has been noted, we do not agree.

As we have seen, the prohibitions against disclosure contained in § 9 run only against the officials receiving such information and do not purport to generally clothe

[7] Proclamation by President Hoover, November 22, 1929, 46 Stat. 3011, 3012.

census information with secrecy. The Solicitor General admits that "literally construed" the restrictions of the statute go no further. But he insists that since the purpose of the statute is to encourage the free and full submission of statistical data to the Bureau, this can be accomplished only through the creation of a confidential relationship which will extend the privilege to the petitioner and like reporting companies. We do not believe that the language of the President, *supra,* gives the statute the meaning claimed for it; nor can the legend on the Census Bureau forms or its advice to reporting companies extend the coverage of the Act. Cf. *United States* v. *California,* 332 U. S. 19, 39–40 (1947); *United States* v. *Stewart,* 311 U. S. 60, 70 (1940); *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 225–227 (1940). We fully realize the importance to the public of the submission of free and full reports to the Census Bureau, but we cannot rewrite the Census Act. It does not require petitioner to keep a copy of its report nor does it grant copies of the report not in the hands of the Census Bureau an immunity from legal process. Ours is the duty to avoid a construction that would suppress otherwise competent evidence unless the statute, strictly construed, requires such a result. That this statute does not do. Congress did not prohibit the use of the reports *per se* but merely restricted their use while in the hands of those persons receiving them, *i. e.,* the government officials. Indeed, when Congress has intended like reports not to be subject to compulsory process it has said so. See 45 U. S. C. § 41,[8] 49 U. S. C. § 320 (f).[9] Moreover, although tax returns, like these

[8] "That neither said report nor any report of said investigation nor any part thereof shall be admitted as evidence or used for any purpose in any suit or action for damages growing out of any matter mentioned in said report or investigation." 36 Stat. 351, 45 U. S. C. § 41.

[9] "(f) No report by any motor carrier of any accident arising in the course of the operations of such carrier, made pursuant to any require-

census reports, are made confidential within the government bureau, Internal Revenue Code of 1954, §§ 6103, 7213 (a), copies in the hands of the taxpayer are held subject to discovery.[10] Likewise the Criminal Code, 18 U. S. C. § 1905,[11] prohibits federal employees generally from disclosing trade secrets and other business data received in the course of their official duties, but the same information is obtainable from the reporting company's files or personnel by judicial process.

This conclusion is buttressed by the fact that though petitioner furnishes the required reports to the Census Bureau it is not relieved from furnishing the same information to the Federal Trade Commission. This is made certain by an Act of Congress specifically providing that nothing in the Census Act "shall be deemed to revoke or

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ment of the Commission, and no report by the Commission of any investigation of any such accident, shall be admitted as evidence, or used for any other purpose, in any suit or action for damages growing out of any matter mentioned in such report or investigation." 49 U. S. C. § 320 (f).

[10] *E. g., United States* v. *O'Mara,* 122 F. Supp. 399 (D. C. D. C. 1954). Contra, *O'Connell* v. *Olsen & Ugelstadt,* 10 F. R. D. 142, 143 (D. C. N. D. Ohio 1949).

[11] "Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment." 18 U. S. C. § 1905.

impair the authority of any other Federal agency with respect to the collection or release of information." 13 U. S. C. § 132. It appears, therefore, that through the use of special reports the Commission could require the petitioner to supply the identical information from its files. Hence by securing the retained file copy the Commission is merely obtaining in a form already prepared that information which it has the power to require petitioner to furnish from its records.

III.

Petitioner next claims that the orders required "answers in writing to specific questions" under § 6 (b) as distinguished from the "special reports" also authorized by that section, but that the forfeiture provision of § 10 penalizing the failure to file "any annual or special reports" does not include the phrase "answers in writing to specific questions" and is, therefore, inapplicable. We do not agree.

The Commission contends that its orders here in fact called for information in the nature of "special reports," and it so designated each of the nine orders at the time of their issuance. Examination of the orders by no means proves the Commission to be in error, for it appears that practically all of the requests called for the furnishing of statistical or like information, details of organization and operation, specific documents, etc. As the Court of Appeals stated, "the cumulative effect of all the questions is substantially that of a request for a report." 285 F. 2d, at 615.

While this is true, it cannot be denied that in many instances specific information was requested and "answers in writing to specific questions" were contemplated. But this does not disqualify the materials from being special reports, for the statutory reference to "answers in writing to specific questions" merely elaborates the power to require special reports.

The source of the Commission's power, as we have noted, is § 6 (b), see note 1, *supra,* which authorizes the Commission to order corporations to file "annual or special, or both annual and special, reports or answers in writing to specific questions." Since the forfeiture provision of § 10, see note 3, *supra,* only refers to "any annual or special report," petitioner argues that forfeiture is inapplicable to a corporation failing to give "answers in writing to specific questions," which it contends is a separate power quite distinct from the power to order reports. But if this is true there would be no penalty where a corporation deliberately refused to comply with a lawful Commission order to answer specific questions, for the only penalty available against *corporations* is the forfeiture provision. Thus a corporation that refused to file an annual or special report would be subject to a $100 per day forfeiture. An individual under subpoena who refused to appear and testify or supply documents would be subject to a fine of $1,000 to $5,000 and/or a jail sentence up to three years. But under petitioner's interpretation of the Act there would be no penalty whatsoever where a corporation deliberately failed to file answers to specific questions. The only remedy would be a mandatory injunction to force it to do so. We cannot attribute such an anomaly to Congress. Rather we would assume that in placing the phrase "answers in writing to specific questions" in § 6 (b) Congress was merely explicating what the Commission might require a corporation to include in an annual or special report.

Moreover, the legislative history of the Act does not support petitioner's theory that the phrase "answers in writing to specific questions" refers to a separate power of the Commission. Both the House and Senate bills dealing with the Federal Trade Commission (or Interstate Trade Commission, as it was called in the House) had provisions enabling the Commission to order annual and

special reports, but neither mentioned answers to specific questions. The House Committee Report on the original House version of the Act stated:

> "The commission, under this section, [later 6 (b)] may also require such special reports as it may deem advisable. By this means, if the ordinary data furnished by a corporation does not adequately disclose its organization, financial condition, business practices, or relation to other corporations, there can be obtained by a special report such additional information as the commission may deem necessary." H. R. Rep. No. 533, 63d Cong., 2d Sess. 4.

The phrase "answers in writing to specific questions" first appeared in the Conference Report, but the report by the House Managers explaining the modifications of the House bill did not mention it (although it discussed some other changes in the annual and special report provisions of the House bill). H. R. Rep. No. 1142, 63d Cong., 2d Sess. Similarly, the explanation of the Conference Report by the Senate Managers in debate makes it clear that the changes made in conference were of the nature of new, clarifying phraseology (with two exceptions not relevant here). 51 Cong. Rec. 14768–14769. If the conference had intended to give the Commission a separate, new power which was not included in either the House or Senate bill, surely there would be some mention of it in the reports by the managers.

Finally, it should be noted that a construction of the statute which empowers the Commission to particularize its requests for annual and special reports with specific questions will tend to avoid objections of vagueness. The requests directed to petitioner which were not particularized—items 1 (h); 3 (j), (k); 5 (j), (k); 6 (j); 7 (j); 8 (j); and 11 (a)–(l) of the first order; and item 5 of the seventh order—were struck down by the District

Court as unenforceable. Such general requests for reports without specificity place the reporting company in a difficult position, leading to expensive and time-consuming litigation as well as frustrating the Commission's attempt to obtain information.

IV.

The District Court held that since the Commission orders were "partially defective," petitioner had a valid reason for challenging them, and therefore no forfeitures accrued. Petitioner supports this holding by asserting that many of the items included in the Commission's orders were held unenforceable by the District Court, and that under *Bowman Dairy Co.* v. *United States,* 341 U. S. 214 (1951), forfeiture should not be imposed for noncompliance with substantially defective orders. The Court of Appeals disagreed, holding that forfeiture had occurred and that the daily penalty began to run 30 days after the notice of default on the first set of the Commission's orders.[12] We agree with the Court of Appeals and conclude that the single daily penalty runs until the date of our stay, February 7, 1961.

Petitioner's figures relative to the percentage of defective inquiries are based on analysis of all nine orders. However, the suit for forfeiture was brought only in respect to the two orders directed to petitioner, and we will restrict our consideration to the 134 inquiries included therein. Prior to the judgment 63 of these items remained unanswered. The trial judge struck 10 of them as unenforceable, leaving 53 which he ordered to be answered. However, whether one takes the above figures, or those of the petitioner asserting that only 37% of the questions were enforced by the trial court, or the Government's claim that two-thirds of the questions were

[12] The second set of orders was merely supplementary, so only a single daily penalty accrued.

valid and unanswered at the time of the suit, this case need not go off on a mathematical formula. The record fully supports the conclusion of the Court of Appeals that this is not "a case involving single oversight or an honest mistake in a good faith attempt to comply with the Commission's order." 285 F. 2d, at 614. Nor, as the concurring opinion found, is it a case of "such extensive invalidity that there is no longer an intelligible requirement" for a report. 285 F. 2d, at 616.

Petitioner asserts that even partial invalidity of the order prevents the application of the forfeiture provision, arguing that the case is controlled by the rule in *Bowman Dairy Co., supra.* In that case the Court concluded that "one should not be held in contempt under a subpoena that is part good and part bad." 341 U. S., at 221. But that rule cannot be considered apart from its facts. There the defendant could not appeal from the contested order, but was able to challenge it only by disobeying and appealing the contempt conviction. It was in review of that conviction—the defendant's first opportunity to review the validity of the order—that this Court held that its partial invalidity barred the punishment. Here petitioner might have delayed accrual of the forfeitures pending determination of the merits or obtained a separate judicial determination of the validity of the orders before the penalties began to accrue, as we point out *infra.* Rather than attempting such procedures it defied large parts of the orders. It cannot now be heard to complain because such defiance was in error.

Petitioner also contends that the trial court, after finding the orders partially invalid, should have stricken them and required the Commission to issue new ones if it wished to proceed with the inquiry. We agree with the trial court and the Court of Appeals that § 6 (c) of the Administrative Procedure Act, 60 Stat. 241, 5 U. S. C. § 1005 (c), authorized the procedure the court followed,

i. e., ordering partial compliance. That section directs the court to sustain "any such subpena or similar process or demand to the extent that it is found to be in accordance with law . . ." Nor do we see any substance to the further contention that in directing partial compliance the trial judge treated those items found enforceable as subpoenas and therefore subject solely to contempt action. The various requests were severable, and the court's order was not in substitution of the Commission's orders but merely an enforcement of them, in accordance with § 9 of the F. T. C. A. authorizing the court to compel obedience to lawful Commission orders. Finally, petitioner argues that the case should have been remanded to the trial court for determination of whether the forfeiture should apply. However, once the Court of Appeals held that the default was within the forfeiture provision of § 10, its penalties accrued, and there was nothing remaining open for decision that required a remand to the District Court.

V.

Petitioner's final point is that to impose the forfeitures will deprive it of property without due process of law. This argument is based on the premise that the orders of the Commission were not judicially reviewable except at the risk of paying daily forfeitures accumulating throughout the period of noncompliance, including the period of judicial review. We need not consider this point at length for it appears that petitioner did not try to obtain judicial review prior to the commencement of this action by the Government, nor did petitioner seek a stay once the litigation had begun. This inaction was in part based upon petitioner's reliance on *Federal Trade Comm'n* v. *Claire Furnace Co.*, 274 U. S. 160 (1927). This reliance was misplaced. In that case an injunction was sought against the Commission restraining it from enforcing certain

orders issued under the same section of the Act involved here. The Commission, however, had not issued any notice of default on the orders, as was done here, nor had the orders been forwarded to the Attorney General for enforcement. This Court properly held an injunction would not lie since the subjects of the reports could not suffer any injury or penalty at that point in the investigation. As Chief Justice Taft said, "Until the Attorney General acts, the defendants can not suffer, and when he does act, they can promptly answer and have full opportunity to contest the legality of any prejudicial proceeding against them." 274 U. S., at 174.

Upon the commencement of the action by the Government, petitioner might have then sought a stay, as it did when the decision went against it in the Court of Appeals.[13] Moreover, after the entry of the notices of default by the Commission, petitioner might have itself sought relief before the § 10 forfeitures began to accrue instead of waiting for the Attorney General to sue for their collection. As was said in *United States* v. *Morton Salt Co.*, 338 U. S. 632, 654 (1950), "we are not prepared to say that courts would be powerless" to act where such orders appear suspect and ruinous penalties would be sustained pending a good faith test of their validity. There the record did not present and the Court did not determine "whether the Declaratory Judgment Act, the Administrative Procedure Act, or general equitable powers of the

[13] Petitioner unsuccessfully moved in the Court of Appeals for a postponement of the effective date of the Commission's orders. Coming when it did, however, we cannot say that such denial was an abuse of discretion. Cf. *Virginian R. Co.* v. *United States,* 272 U. S. 658 (1926). Furthermore, a short while thereafter we stayed the accumulation of further penalties when the petition for writ of certiorari was granted. If petitioner had unsuccessfully sought a stay in the District Court, a different question might have been presented. That action, after final judgment, could have been reviewed both in the Court of Appeals and here.

courts would afford a remedy if there were shown to be a wrong, or what the consequences would be if no chance is given for a test of reasonable objections to such an order." Similarly, as this matter comes here now, the petitioner has pursued none of these remedies, and we could not therefore say that it had "no chance" to prevent the running of the forfeiture pending a test of the validity of the orders. Cf. *United States* v. *L. A. Tucker Truck Lines,* 344 U. S. 33, 37 (1952); *Natural Gas Pipeline Co.* v. *Slattery,* 302 U. S. 300, 310 (1937). We note, however, that the Declaratory Judgment Act, 28 U. S. C. § 2201, provides that "In a case of actual controversy within its jurisdiction . . . any court . . . may declare the rights . . . of any interested party seeking such declaration . . . ." This appears sufficient to meet petitioner's needs.

This Court cannot forgive statutory penalties once they legally attach and, finding no grounds upon which we can strike them down, the judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE BLACK, with whom MR. JUSTICE WHITTAKER and MR. JUSTICE STEWART concur, dissenting.

I dissent from the Court's holdings (1) that petitioner's copies of census reports submitted to the Census Bureau are not privileged from production by § 9 of the Census Act, and (2) that for its refusal to produce these copies and to answer certain of many questions asked it by the Federal Trade Commission, petitioner must pay a penalty of $100 for each day since that refusal up to the time, many months later, when this Court granted a stay as to future penalties.

First. Section 9 (a) of the Census Act, set out in note 5 of the Court's opinion, with exceptions not here material, provides that neither the Secretary of Commerce, nor any other officer or employee of the Department of Commerce or any bureau or agency thereof, may use the information

furnished in census reports except for census purposes, make any publication of the data contained in such reports as coming from the establishment or individual reporting it, or permit any person except officers and employees of the Census Bureau to examine such reports. Moreover, in securing from petitioner the very reports, copies of which are here being held subject to subpoena by the Federal Trade Commission as a step towards government regulation of the petitioner, the form supplied by the Census Bureau told petitioner:

> "Your report is confidential and only sworn census employees will have access to it. It cannot be used for purposes of taxation, investigation or regulation."

The President of the United States backed up these promises of Congress and the Census Bureau with a proclamation in which he stated unequivocally: "No person can be harmed in any way by furnishing the information required." 46 Stat. 3011, 3012. I agree with the Seventh Circuit Court of Appeals that "These assurances of confidentiality and protection constitute a pledge of good faith on the part of the Congress, the President and the Department of Commerce." *Federal Trade Comm'n* v. *Dilger,* 276 F. 2d 739, 744.

It is true, as the Court emphasizes, that although the Census Act, the Census Bureau and the President promised that the Census Bureau would keep census reports purely confidential, neither the Act, the Bureau nor the President literally promised in so many words that other government agencies such as the Federal Trade Commission would never subpoena and use copies of those reports prepared and kept in reliance upon the Government's promise of secrecy. The Court holds that, because the Government did not so expressly bind itself with respect to actions it may take against copies of these reports through the Federal Trade Commission, the

solemn and comprehensive promises of secrecy which it made need not be honored. But surely the Government's promises, fairly construed, do not indicate that the scope of the protection afforded against the use of census reports "for purposes of taxation, investigation or regulation" is limited to the originals of those reports and to the Census Bureau alone. That Bureau does not itself even engage in the activities against which the use of these reports is protected. Quite plainly, the promised protection was against governmental "taxation, investigation or regulation" generally, and, to protect the integrity of that promise, it is of course necessary that all of the particular arms of Government which are engaged in those activities be bound by the Government's pledges. Our Government should not, by picayunish haggling over the scope of its promise, permit one of its arms to do that which, by any fair construction, the Government has given its word that no arm will do. It is no less good morals and good law that the Government should turn square corners in dealing with the people than that the people should turn square corners in dealing with their Government. Cf. *Rock Island, Arkansas & Louisiana R. Co.* v. *United States,* 254 U. S. 141, 143.

Second. The petitioner is being penalized $100 per day for its failure to produce copies of its census reports along with answers to certain of the voluminous questions propounded to it by the Federal Trade Commission. Many questions had already been answered prior to the time penalties began to run. The District Court has held that a very substantial number of the other questions asked need not be answered, and I do not understand that this Court now holds otherwise. So far as the Commission's demand for production of the census reports is concerned, petitioner could quite reasonably have felt that it was under no obligation to comply because of the Government's numerous promises that these reports would be

treated as confidential. Indeed, the very position taken by petitioner as to the privileged nature of its census reports was held to be correct in the *Dilger* case, decided just three weeks before the District Court decision in this case. All of this plainly shows, I think, that, with regard to some of the information sought, indeed a very substantial part of it, there was a serious, good-faith controversy concerning the Commission's power to compel disclosure. Under these circumstances I agree with the District Court's conclusion that these heavy statutory penalties should not have been imposed. It is practically the universal rule that laws imposing penalties of this kind should be strictly, not expansively, construed. Applying that standard, I am by no means sure that the penalty provisions of the statute upon which this judgment rests can be construed so as to justify the penalties here at all.

I would reverse this judgment.

KILLIAN *v.* UNITED STATES.

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

No. 7. Argued October 10, 1961.—Decided December 11, 1961.

Petitioner was convicted in a Federal District Court of violating 18 U. S. C. § 1001 by swearing falsely that he was not a member of, or affiliated with, the Communist Party, in an affidavit filed with the National Labor Relations Board to enable a union of which he was an officer to comply with § 9 (h) of the National Labor Relations Act, as amended by the Taft-Hartley Act. At the trial, petitioner moved under 18 U. S. C. § 3500 for production, for use in cross-examination, of all statements given by two government witnesses relating to their testimony. All narrative statements of both witnesses which related to their direct testimony were produced and made available to petitioner; but notes made by an F. B. I. agent covering oral reports of one witness regarding his expenses and receipts signed by both witnesses for money paid to them for expenses were not produced, and they were not in the record before this Court. In this Court, the Solicitor General represented that the notes covering oral reports of the witness regarding his expenses had been destroyed before the trial, that most of the receipts for expense money signed by the witnesses did not relate to anything mentioned in their direct testimony, and that, although some of the receipts contained information relating to the direct testimony of one of the witnesses, all such information had been made available to petitioner in the narrative statements of that witness. *Held:*

1. The judgment is vacated and the cause is remanded to the District Court for a hearing and findings of fact on the issues raised by the Solicitor General's representations. If the District Court finds that his representations are true in all material respects, it shall enter a new final judgment based upon the record as supplemented by its findings, thereby preserving to petitioner the right to appeal to the Court of Appeals. If the District Court finds that the Solicitor General's representations are untrue in any material respect, it shall grant petitioner a new trial. Pp. 236–244.

(a) If the agent's notes of the oral reports of expenses were made only for the purpose of transferring the data thereon to receipts to be signed by the witness, and if, after having served that purpose, they were destroyed in good faith and in accord with normal practice, their destruction did not constitute an impermissible destruction of evidence nor deprive petitioner of any right. Pp. 241–242.

(b) Petitioner would not be entitled to a new trial because of the nonproduction of those notes, if they were so destroyed and not in existence at the time of the trial. P. 242.

(c) Notwithstanding the fact that the receipts given by the witnesses for expense money were "statements," within the meaning of 18 U. S. C. § 3500, and were demanded under that section, petitioner would not be entitled to a new trial because of their nonproduction, if they did not relate to the direct testimony of those witnesses. Pp. 242–243.

(d) If some of the receipts did relate to the direct testimony of one witness but the information contained in them had already been given to petitioner in the narrative statements of that witness, the District Court could properly find that the error in failing to produce those receipts was harmless. Pp. 243–244.

2. The District Court's instructions to the jury (quoted in the opinion, p. 246, n. 5, and p. 254, n. 13) properly defined "membership in," and "affiliation with," the Communist Party. Pp. 242–258.

(a) Membership in such a secretly operating organization is, to all but the organization and its member or members, necessarily subjective, and, although it must be proved by evidence of objective facts and circumstances having a rational tendency to show, and from which the jury may rationally and logically infer, the ultimate subjective fact of membership, it is, in the very nature of such a case, necessary that the court's instructions define membership in such an organization in subjective terms or not at all. P. 249.

(b) The following definition of "membership" contained in the instructions was not erroneous: "Membership in the Communist Party, the same as membership in any other organization, constitutes the state of being one of those persons who belong to or comprise the Communist Party. It connotes a status of mutuality between the individual and the organization. That is to say, there must be present the desire on the part of the individual to belong

to the Communist Party and a recognition by that Party that it considers him as a member." Pp. 249–251.

(c) The instructions did not fail adequately to state the objective circumstances that might be considered by the jury in determining membership, and the criteria submitted were not too indefinite to give the jury the necessary guidance. Pp. 251–253.

(d) Independently of, and wholly apart from, § 5 of the Communist Control Act of 1954, it was proper to tell the jury, as this instruction did, that, in determining whether the defendant was or was not a member of the Communist Party on the date charged in the indictment, they might consider 12 of the 14 criteria specified by Congress in § 5 of that Act. Pp. 252–253.

(e) The instructions did not allow a finding of membership on a date other than that charged in the indictment. P. 253.

(f) The instructions did not violate the First Amendment or deny due process by permitting the jury to base its finding of membership upon statements and acts that are protected by that Amendment. Pp. 253–254.

(g) The Court's instruction defining "affiliation" was correct. Pp. 254–258.

(h) The instruction was not erroneous for failure to advise the jury that one may not be "affiliated with" the Communist Party, within the meaning of § 9 (h), by any direct relationship with the Party, but only by being a member of another organization that is affiliated with the Party. Pp. 256–257.

(i) The ultimate fact of affiliation, though subjective, may be proved by evidence of objective facts and circumstances having a rational tendency to show, and from which the jury may rationally and logically find, affiliation. P. 257.

(j) Though one paragraph of the instructions was erroneous and conflicted with another paragraph, it could not prejudice petitioner, because it exacted a higher standard of proof of affiliation than the law required. Pp. 257–258.

275 F. 2d 561, judgment vacated and case remanded for further proceedings.

David B. Rothstein and *Basil R. Pollitt* argued the cause for petitioner. With them on the brief was *M. Michael Essin.*

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Kevin T. Maroney argued the cause for the United States. With him on the briefs were *Solicitor General Cox, Assistant Attorney General Yeagley, Bruce J. Terris, George B. Searls* and *Lee B. Anderson.*

Telford Taylor filed a brief for Raymond Dennis et al., as *amici curiae,* urging reversal.

MR. JUSTICE WHITTAKER delivered the opinion of the Court.

For the purpose of enabling a labor union of which he was then an officer to comply with § 9 (h) of the National Labor Relations Act, as amended, 29 U. S. C. § 159 (h), and hence to use the processes of the National Labor Relations Board,[1] petitioner made on December 9, and caused to be filed with the Board on December 11, 1952, an affidavit reciting, *inter alia,* "I am not a member of the Communist Party or affiliated with such Party." Upon receipt of that affidavit and like ones of all other officers of the union, the Board advised the union that it had complied with § 9 (h) and could make use of the Board's processes.

In November 1955, an indictment in two counts was returned against petitioner in the United States District Court for the Northern District of Illinois. The first

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[1] Section 9 (h), 29 U. S. C. § 159 (h), provided in pertinent part that "No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 160 of this title, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization . . . that he is not a member of the Communist Party or affiliated with such party . . . ." This section was repealed by Pub. L. 86–257, 86th Cong., 1st Sess., § 201 (d), 73 Stat. 519, 525.

count charged that, in violation of 18 U. S. C. § 1001,[2] petitioner had falsely sworn, in the affidavit, that he was not a member of the Communist Party, and the second charged that, in violation of the same statute, he had also falsely sworn in that affidavit that he was not affiliated with the Communist Party. A jury trial was had which resulted in a verdict of guilty on both counts, and the court sentenced petitioner to imprisonment. On appeal, the United States Court of Appeals for the Seventh Circuit originally affirmed, but, before the motion for rehearing was ruled, this Court's decision in *Jencks* v. *United States,* 353 U. S. 657, came down, and, on the authority of that case, the court granted the motion for rehearing, reversed the judgment and remanded the case for a new trial. *United States* v. *Killian,* 246 F. 2d 77, 82. A new trial was had. It also resulted in a verdict of guilty on both counts, and petitioner was sentenced to imprisonment for five years on Count I, and for three years on Count II, the sentences to run concurrently. On appeal, the United States Court of Appeals for the Seventh Circuit affirmed, *United States* v. *Killian,* 275 F. 2d 561, and we granted certiorari limited to two questions, namely, (1) whether production of statements submitted by Government informer witnesses for their expenses, and the receipts executed by them for the payments, is required by 18 U. S. C. § 3500 when the Government offers at the trial to produce a list of the dates and amounts of the

[2] 18 U. S. C. § 1001 provides:

"Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

payments, and (2) whether the instructions to the jury properly defined membership in and affiliation with the Communist Party. 365 U. S. 810.

The Government introduced evidence tending to show that petitioner was a member and active in the affairs of the Communist Party from 1949 through August 1953, but, inasmuch as there is not before us any question concerning the sufficiency of the evidence to make a submissible case for the jury, it is not necessary to review the evidence in detail.

I. The Document Production Questions.

Intelligent understanding of the document production questions presented requires a brief statement of their basis. They arose in connection with the testimony of Government witnesses Sullivan and Ondrejka.

On direct examination, Sullivan testified that he joined the Communist Party in 1948 at the request of the Federal Bureau of Investigation, and in October 1949 transferred his membership from Cincinnati, Ohio, to Madison, Wisconsin, where, by secret means, he made contact with local leaders of the Communist Party and became active in its affairs. In those activities, he met petitioner in December 1949. Petitioner was then the section organizer for the Party in Madison. Thereafter, Sullivan attended a number of secret Communist Party group meetings in Madison in 1949 and 1950 at which petitioner was present and acted as the spokesman and leader. Sullivan testified that he gave written reports to the F. B. I. respecting Party meetings and activities soon after they occurred.

At the close of Sullivan's direct testimony, petitioner moved for production, for use in cross-examination, of all statements given by the witness to the F. B. I. relating to his direct testimony. The narrative statements were produced to the judge, *in camera,* who, after excising the

parts that did not relate to the witness' direct testimony, handed them to petitioner's counsel. On cross-examination, Sullivan testified that he was paid stipulated monthly amounts for his services, and was reimbursed for his expenses incurred in Communist Party activities, by the F. B. I., and that when he received the money he signed a receipt for it. His connection with the F. B. I. terminated in 1952.

After completing the cross-examination of the witness, petitioner again moved for production of all statements made by the witness to the F. B. I., without excision. The Government objected to the motion on the grounds that it had produced all of the witness' statements that related to his direct testimony, and that there was no showing that the witness had given any other statements to the Government that related to his direct testimony. Thereupon, the court denied petitioner's motion. Petitioner then moved to strike the testimony of the witness, and that motion, too, was denied.

On direct examination, Ondrejka testified that he joined the Communist Party at the request of the F. B. I. in October 1949 and remained a member of the Party until November 1953. He met petitioner at a Communist Party meeting in Milwaukee, Wisconsin, in January 1951, and thereafter attended many secret Communist Party meetings in Milwaukee where petitioner was present and active, and also participated with petitioner in numerous Party activities, until August 1953, and knew petitioner to be a member of the Communist Party throughout that period. Ondrejka testified that he gave written reports to the F. B. I. respecting Party meetings and activities soon after they occurred.

At the conclusion of Ondrejka's direct testimony, petitioner moved for production, for use in cross-examination, of all statements given by the witness to the F. B. I. The court ordered the Government to produce to the judge,

in camera, "all statements that in any way affect the direct examination of the witness." Accordingly, all of the narrative statements given by the witness to the Government relating to his direct testimony were produced to the judge, who, after excising such parts as did not relate to the witness' direct testimony, delivered them to petitioner's counsel. Petitioner then moved for production of all statements relating to the testimony of the witness, without excision. That motion was denied.

On cross-examination, Ondrejka testified that he was paid stipulated monthly amounts in cash for his services by the F. B. I., and, in addition, was reimbursed by the F. B. I. for his expenses, such as Communist Party dues, literature, contributions and travel, which he orally reported to an F. B. I. agent, who made notes thereof and later reimbursed him in cash. The court sustained the Government's objection to a question asking whether Ondrejka signed receipts for the moneys paid to him in reimbursement for his expenses.

Petitioner then moved for production of all statements given by the witness to the F. B. I., whether written by the witness or by an F. B. I. agent as the result of interviews with the witness, which related to the witness' testimony on cross-examination, including particularly reports by the witness of his reimbursable expenses and the receipts which he signed evidencing reimbursement for those expenses. The Government opposed production of the documents on the ground that they did not relate to the direct testimony of the witness. It further objected to producing Ondrejka's reports of expenses, and the receipts he had signed when reimbursed for those expenses, on the grounds that they were administrative records of the F. B. I. and were immaterial and irrelevant, but the Government offered to produce a list showing the dates and amounts of the payments and whether they were for services or expenses. Petitioner refused to

receive that proffered list. Thereupon, the court denied the motion. Petitioner then moved to strike all of Ondrejka's testimony, and that motion, too, was denied.

Petitioner contends that his general demands for "all statements," as well as his specific demand for the reports and receipts made by Ondrejka, encompassed, and the trial court erred to his prejudice in denying his motion to require the Government to produce, (1) the notes made by the F. B. I. agents covering Ondrejka's oral reports of expenses and (2) the receipts signed by Sullivan and Ondrejka for moneys paid to them in reimbursement for expenses. He supports these contentions with an elaborate argument which we need not delineate because the Solicitor General now concedes that the F. B. I. notes of Ondrejka's oral reports may have been "statements" within the meaning of 18 U. S. C. § 3500 (e)(2),[3] and he flatly concedes that the receipts signed by Sullivan and Ondrejka were "statements" within the meaning of § 3500.

However, the Solicitor General contends that on the actual facts—many of which are not incorporated in the record before us—petitioner is not entitled to, and that we should not on this incomplete and imperfect record order, a new trial, because the true facts are that the F. B. I. agents' notes covering Ondrejka's oral reports of expenses were not in existence at the time of the trial, and the receipts signed by Sullivan and Ondrejka do not "relate to" their direct testimony as required by § 3500, or, if it may be said that any of them do "relate to" their direct testimony, that the same information, in much

[3] The Solicitor General concedes that the F. B. I. notes of Ondrejka's oral reports may have come within the meaning of "statement" as defined by 18 U. S. C. § 3500 (e)(2), namely, "a stenographic . . . recording . . . which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

greater detail, was given to petitioner in the witnesses' narrative statements that were produced and delivered to his counsel at the trial, and hence if there was any error it was harmless.

More specifically, the Solicitor General tells us in his brief that, although the nature of the Government's objections in the courts below implied that the agents' notes were in existence, his interrogation of the F. B. I. agents has disclosed that, after they incorporated the data contained in their notes of Ondrejka's oral reports into the receipts to be signed by him, the agents destroyed the notes in accord with their normal practice, and hence those notes were not in existence at the time of either of petitioner's trials. Although the receipts are not contained in the record before us, the Solicitor General says that there are 124 of them and that a careful examination of them reveals that none of Sullivan's receipts contains any itemization whatever of the nature of the reimbursed expenses, and thus they do not "relate to" anything mentioned in his direct testimony. With respect to Ondrejka's receipts, the Solicitor General says that, although the Government inadvertently represented to the District Court and the Court of Appeals that the list, proffered to petitioner at the trial and showing the dates and amounts of payments made to Ondrejka, gave all of the information that was contained in the receipts, his examination has disclosed that nine of Ondrejka's receipts do contain some itemization of the nature of his reimbursed expenses, but that only two of the nine can be said to "relate to" anything mentioned by Ondrejka on his direct examination, and that the same information, in greater detail, was contained in Ondrejka's narrative statements that were produced and delivered to petitioner's counsel at the trial.

For these reasons, the Solicitor General contends that, viewed upon the now known and readily available actual

facts, no error, at least no prejudicial error, resulted from the nonproduction of the F. B. I. notes and the Sullivan and Ondrejka receipts at the trial. However, the Solicitor General recognizes that petitioner is not bound to accept his statement that the F. B. I. notes of Ondrejka's oral reports of expenses were destroyed in accord with normal practice long prior to the trial, and that petitioner is entitled to an opportunity to examine the F. B. I. agents and other responsible Government officials on these matters which, of course, can be done only in the District Court. He recognizes, too, that his contentions with respect to the receipts signed by Sullivan and Ondrejka necessarily involve a detailed examination and comparison of the lengthy direct testimony of Sullivan and Ondrejka, the 124 receipts, the list showing the dates and amounts of payments to Ondrejka that was proffered to petitioner by the Government at the trial, and the numerous narrative statements by Sullivan and Ondrejka that were produced and delivered to petitioner at the trial, and he submits that this cannot appropriately be done in this Court, especially since neither the receipts nor the proffered list is contained in the present record, but can properly be done only in the District Court. He therefore asks us to vacate the judgment and remand the case to the District Court to hear these issues and to determine whether a new trial should be ordered or the judgment should be reinstated with the right in the petitioner, of course, to appeal from any such judgment to the Court of Appeals.

In opposition, petitioner argues that the claimed destruction of the agents' notes admits the destruction of evidence that may have been helpful to him and deprives him of his rights under § 3500 and to due process of law, and therefore the judgment should be reversed. Alternatively, he argues that only he and his counsel could determine the uses that might have been made of

the receipts had they been produced, and he concludes that it would not be possible for the District Court, on remand, to find that the failure to produce the receipts was nonprejudicial or harmless error, and that therefore he is entitled to a new trial.

As to petitioner's contention that the claimed destruction of the agents' notes admits the destruction of evidence, deprives him of legal rights and requires reversal of the judgment, it seems appropriate to observe that almost everything is evidence of something, but that does not mean that nothing can ever safely be destroyed. If the agents' notes of Ondrejka's oral reports of expenses were made only for the purpose of transferring the data thereon to the receipts to be signed by Ondrejka, and if, after having served that purpose, they were destroyed by the agents in good faith and in accord with their normal practice, it would be clear that their destruction did not constitute an impermissible destruction of evidence nor deprive petitioner of any right. Those are the factual representations made by the Solicitor General. Whether they are true can be determined only upon a hearing in the District Court.

It is entirely clear that petitioner would not be entitled to a new trial because of the nonproduction of the agents' notes if those notes were so destroyed and not in existence at the time of the trial. It is equally clear that, notwithstanding the fact that the Sullivan and Ondrejka receipts were "statements" within the meaning of § 3500 and were demanded under that section, petitioner would not be entitled to a new trial because of the nonproduction of those receipts if in truth they do not relate to the direct testimony of those witnesses inasmuch as § 3500 (c) requires "the court [to] excise the portions of [the] statement which do not relate to the subject matter of the testimony of the witness." The Solicitor General represents that 115 of the 124 receipts signed by Sullivan and

Ondrejka do not contain any itemization of the nature of the reimbursed expenses nor relate to the direct testimony of those witnesses. If those representations are true, petitioner would not be entitled to a new trial because of the nonproduction of those 115 receipts. Inasmuch as the receipts are not contained in the record before us, whether the Solicitor General's representations are true can be determined only upon a hearing in the District Court.

But the Solicitor General finds that two of Ondrejka's receipts may be said to relate to Ondrejka's direct testimony. However, he says that the same information as they contain and much more on the same subjects was contained in Ondrejka's narrative statements that were produced and delivered to petitioner at the trial, and therefore petitioner could not have been prejudiced by the nonproduction of those two receipts and is not entitled to a new trial on that account. It is true, as petitioner argues, that only the defense is in position to determine the precise uses that may be made of demanded documents, *Jencks* v. *United States,* 353 U. S. 657, 668, but that is not to say that the harmless error rule is never applicable in respect to the nonproduction of demanded documents. Upon very similar facts, we recently approved a holding that nonproduction of demanded documents was harmless error. *Rosenberg* v. *United States,* 360 U. S. 367. We there said: "Since the same information that would have been afforded had the document been given to defendant was already in the possession of the defense by way of the witness' admissions while testifying, it would deny reason to entertain the belief that defendant could have been prejudiced by not having had opportunity to inspect the letter." 360 U. S., at 371.

While, as we said in the *Rosenberg* case, *supra,* a "court should not confidently guess what defendant's attorney

might have found useful for impeachment purposes in withheld documents to which the defense is entitled . . . , when the very same information was possessed by defendant's counsel as would have been available were error not committed [a court properly can find that] it would offend common sense and the fair administration of justice to order a new trial." 360 U. S., at 371.

If it is true, as the Solicitor General represents, that the information contained on the two Ondrejka receipts had already been given to petitioner in Ondrejka's narrative statements covering the same subjects, it is clear that the District Court properly could find that the error in failing to produce those two receipts was harmless.

Accordingly, we vacate the judgment and remand the cause to the District Court for a hearing confined to the issues raised by the Solicitor General's representations as stated in this opinion. The District Court shall make findings of fact on those issues. If the District Court finds that the Solicitor General's representations are true in all material respects, it shall enter a new final judgment based upon the record as supplemented by its findings, thereby preserving to petitioner the right to appeal to the Court of Appeals. If, on the other hand, the District Court finds that the Solicitor General's representations are untrue in any material respect, it shall grant petitioner a new trial.

II. The Instructions to the Jury.

Whether the District Court, on remand, grants or denies a new trial, it is obvious that petitioner's contentions respecting the court's instructions to the jury will not be mooted [4] and it seems necessary to decide them.

[4] These instruction questions are not likely to be mooted on remand, because if a new trial is granted it is probable, since the Court of Appeals has already approved them, the District Court would give

Because of the nature of some of petitioner's contentions respecting the instructions, it seems appropriate to make clear just what was the charge upon which petitioner was convicted. He was not charged with criminality for being a member of or affiliated with the Communist Party, nor for participation in any criminal activities of or for the Communist Party. He was not charged with advocating or teaching the overthrow of the Government as was the case in *Yates* v. *United States,* 354 U. S. 298, or with knowing membership in an organization advocating the overthrow of the Government by force and violence as in *Scales* v. *United States,* 367 U. S. 203, and *Noto* v. *United States,* 367 U. S. 290. The charge was that, to enable a labor union of which he was an officer to comply with § 9 (h) of the National Labor Relations Act and thus be permitted to use the processes of the Labor Board, petitioner, on December 11, 1952, knowingly made and caused to be transmitted to the Labor Board a false affidavit, saying he was not then a member of or affiliated with the Communist Party when in fact he was both a member of and affiliated with the Communist Party, and that those acts were made criminal and punishable by 18 U. S. C. § 1001.

Nothing in § 9 (h) or elsewhere in the National Labor Relations Act makes or purports to make criminal either membership in or affiliation with the Communist Party, *American Communications Assn.* v. *Douds,* 339 U. S. 382, 402, but § 1001 provides that "Whoever, in any matter within the jurisdiction of any department or

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the same or similar instructions to the jury on the new trial, and, if petitioner should be convicted, the same question would likely be brought here again. If we then disapproved the instructions, a fourth trial would be necessary. If, on the other hand, the District Court denies a new trial and enters a new judgment, it is likely that the Court of Appeals would again approve these instructions and that the same questions would be brought here again.

agency of the United States knowingly and willfully falsifies . . . a material fact . . . or makes or uses any false writing or document knowing the same to contain any false . . . statement . . . shall be fined not more than $10,000 or imprisoned not more than five years, or both." Petitioner was charged with and convicted for violating that statute—of knowingly making and transmitting to the Labor Board on December 11, 1952, an affidavit falsely swearing that he was not a member of or affiliated with the Communist Party—not for being a member of or affiliated with the Communist Party, nor for participating in any activities, lawful or unlawful, of the Communist Party, although, of course, determination of whether the affidavit was true or false requires a determination of whether petitioner was a member of or affiliated with the Communist Party on December 11, 1952. Neither is there any question here about the fact that the evidence was sufficient to make a submissible case for the jury and to support its verdict—notwithstanding petitioner's tangential implications to the contrary. The questions here are simply whether the court's instructions to the jury properly defined *membership* in and *affiliation* with the Communist Party.

Membership. Petitioner first contends that the instruction respecting membership [5] should have defined "mem-

[5] The instruction respecting membership was as follows:

"The crucial issue of fact in this case is whether on December 11, 1952, John Joseph Killian was or was not then a member of the Communist Party or affiliated with such Party.

"The affidavit does not call upon any person to state whether or not in the past he has ever been a member of the Communist Party or affiliated with it. A person who has been at some time in the past a member of the Communist Party or affiliated with that Party but who has terminated such membership or affiliation prior to the making of the affidavit would be entitled to sign the affidavit under oath without violating the law.

"Since the affidavit speaks in the present tense only, the fundamental issue of fact for you to decide is whether or not at the time

bership" as, and required a finding of, "a definite objective factual phenomenon" or a "specific formal act of joining" rather than, as was done, in the subjective terms of a state of mind. If petitioner is right in this contention it would follow, despite the fact the question is foreclosed against him here, that the evidence did not make a submissible case for the jury on Count I of the indictment and his motion for a directed verdict of acquittal on that count should have been granted, for there was no evidence of "a definite objective factual phenomenon [of joining]" or of "a specific formal act of joining." Indeed, the very nature of the case—claimed membership in an underground or secretly operating organization whose member-

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alleged in the indictment the defendant knowingly and willfully used an affidavit which was false and which he knew to be false at that time.

"Whether or not the defendant was a member of the Communist party at the time alleged in the indictment is a question of fact which you are to determine from all of the evidence in the case. In determining this question you must bear in mind that the burden of proof rests on the Government to prove the defendant guilty beyond a reasonable doubt. Membership or lack of membership in the Communist Party may be established by direct as well as circumstantial evidence.

"Membership in the Communist Party, the same as membership in any other organization, constitutes the state of being one of those persons who belong to or comprise the Communist Party. It connotes a status of mutuality between the individual and the organization. That is to say, there must be present the desire on the part of the individual to belong to the Communist Party and a recognition by that Party that it considers him as a member.

"Intent is a state of mind and can only be determined by what an individual says and what he does. In determining the issue as to whether the defendant was or was not a member of the Communist Party at the time alleged in the indictment you may take into consideration the acts and statements of this defendant, as disclosed by the evidence, bearing in mind that individual and unrelated isolated acts of the defendant showing cooperation with the Communist Party or isolated statements of the defendant showing sympathy with the

ship records, if any, are not available to the Government—precludes the possibility of such evidence, and, if the rule were as petitioner contends, false affidavits of non-Communist Party membership could be made and sub-

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Communist Party are not in themselves conclusive evidence of membership but are circumstances which you may take into consideration along with all the other evidence in this case.

"In determining whether or not the defendant was a member of the Communist Party at the time alleged in the indictment you may take into consideration whether the defendant:

"1. Paid dues or made any financial contributions to the Communist Party or collected any funds on its behalf;

"2. Attended Communist Party meetings, classes, conferences, or any other type of Communist Party gathering;

"3. Had made himself subject to the discipline of the Communist Party in any form whatsoever;

"4. Participated in any recruiting activities on behalf of the Communist Party;

"5. Has executed orders, plans or directives of any kind of the Communist Party;

"6. Has acted as an agent, messenger, correspondent, organizer, or in any other capacity in behalf of the Communist Party;

"7. Has been accepted to his knowledge as an officer or member of the Communist Party, or as one to be called upon for services by other officers or members of the Communist Party;

"8. Has conferred with officers or other members of the Communist Party in behalf of any plan or enterprise of the Communist Party;

"9. Has spoken or in any other way communicated orders, directives or plans of the Communist Party;

"10. Has advised, counseled, or in any other way imparted information, suggestions, or recommendations, to officers or members of the Communist Party, or to anyone else, in behalf of the Communist Party;

"11. Has indicated by word, action, conduct, writing, or in any other way, a willingness to carry out in any manner and to any degree the plans, objectives or designs of the Communist Party;

"12. Has in any other way participated in the activities, planning or actions of the Communist Party;

"These are some of the indicia of Communist Party membership but you are not limited solely to those I have enumerated. As sole

mitted to the Labor Board with impunity. Membership in such a secretly operating organization is, to all but the organization and its member or members, necessarily subjective, and, although it must be proved by evidence of objective facts and circumstances having a rational tendency to show, and from which the jury may rationally and logically infer, the ultimate subjective fact of membership, it is, in the very nature of such a case, necessary that the court's instructions define membership in such an organization in subjective terms or not at all.

A similar question arising under § 9 (h) was presented in *Jencks* v. *United States,* 353 U. S. 657, but the Court's opinion, turning on the document production question, did not reach it. However, Mr. Justice Burton's separate concurring opinion, joined by Mr. Justice Harlan, 353 U. S., at 672, and, on the question here considered, also by Mr. Justice Frankfurter, 353 U. S., at 672, did reach the question. It found the membership defining instruction given in that case to be deficient because it "failed to emphasize to the jury the essential element of membership in an organized group—the desire of an individual to belong to the organization and a recognition by the organization that it considers him as a member."

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arbiters of the facts, it is your duty to consider all the evidence, either direct or circumstantial, which bears upon the question of whether or not the defendant was a member of the Communist Party on the date alleged in the indictment.

"In determining this question, you must bear in mind that the burden of proof rests upon the Government to prove the defendant guilty beyond a reasonable doubt. If you find that the Government has sustained this burden by proving beyond a reasonable doubt that the defendant was a member of the Communist Party on December 11, 1952, as alleged in the indictment, and if you find, also, that the Government has proved beyond a reasonable doubt the other essential elements of the offense charged in the first count of the indictment, as I have outlined them to you, then you must find the defendant guilty as to the first count."

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353 U. S., at 679. In the instant case, the District Court's instruction to the jury defined membership to the jury in almost precisely that language (see note 5, sixth paragraph). Similar instructions in cases arising under § 9(h) have been held proper by every United States Court of Appeals that has passed upon the question. *Fisher* v. *United States,* 231 F. 2d 99, 107 (C. A. 9th Cir.);[6] *Lohman* v. *United States,* 251 F. 2d 951, 954 (C. A. 6th Cir.);[7] *Lohman* v. *United States,* 266 F. 2d 3 (C. A. 6th Cir.);[8] *Travis* v. *United States,* 269 F. 2d 928, 942–943 (C. A. 10th Cir.).[9] From these consistent holdings and

[6] In *Fisher* v. *United States, supra,* the Court of Appeals for the Ninth Circuit said: "Membership is composed of a desire on the part of the person in question to belong to an organization and acceptance by the organization. Moreover, certain actions are usually required such as paying dues, attending meetings and doing some of the work of the group." 231 F. 2d, at 107.

[7] In *Lohman* v. *United States, supra,* the Court of Appeals for the Sixth Circuit, speaking through Judge, now Mr. Justice, Stewart, said: "Membership should be so defined as to emphasize to the jury the necessity of finding that the appellant desired to belong to the Communist Party, and that the Communist Party recognized that it considered him as a member. *Jencks* v. *United States,* 353 U. S. at pages 657, 679, 77 S. Ct. 1007, 1019 (concurring opinion); *Fisher* v. *United States,* 9 Cir., 1956, 231 F. 2d 99, 106–107; *Travis* v. *United States,* 10 Cir., 1957, 247 F. 2d 130, 135–136 . . . ."

[8] On retrial of the *Lohman* case, *supra,* the trial court defined membership for the jury as directed by the Court of Appeals on the first appeal (see note 7) and the defendant was again convicted. On appeal, the Court of Appeals for the Sixth Circuit reapproved that instruction. *Lohman* v. *United States,* 266 F. 2d, at 4.

[9] In *Travis* v. *United States, supra,* the Court of Appeals for the Tenth Circuit said of the membership instruction, precisely like the one here, that "The instructions were meaningful and clear. They included 11 of the 14 indicia of membership outlined by Congress in Section 5 of the Communist Control Act of 1954 (50 U. S. C. A. § 844) and emphasized the primary element of membership as suggested by Mr. Justice Burton in *Jencks* v. *United States,* 353 U. S. 657, 77 S. Ct. 1007, 1019, 1 L. Ed. 2d 1103, that there must be present 'the

upon principle, it seems clear that the instruction's definition of membership was not erroneous under Count I of the indictment.

Petitioner next contends that the court's instruction failed to tell the jury precisely what objective circumstances would be sufficient to justify a finding of membership, and that the criteria which it told the jury they might consider in determining the question of membership were too indefinite to give the jury the necessary guidance. Although the ultimate fact of membership in such a case is almost necessarily a subjective one, it may be proved, as we have said, by objective facts and circumstances having a rational tendency to show, and from which the jury rationally and logically may find, the ultimate fact of membership. But, for the purpose of confining the jury's considerations to the relevant evidence, it was proper for the court to outline the objective acts, shown in the evidence, which they might consider in determining the ultimate subjective fact of membership. Here, the court's instruction, after telling the jury that intent is a state of mind and can only be determined by what an individual says and does, went on to say that in determining the issue as to whether the defendant was or was not a member of the Communist Party at the time alleged in the indictment the jury might take into consideration, as circumstances bearing on that question, the acts and statements of the defendant (see note 5, sixth paragraph), and in this connection they might take into consideration whether the defendant did the things set forth in the 12 numbered paragraphs that followed, which,

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desire of an individual to belong to the organization and a recognition by the organization that it considers him as a member.' This adequately outlined the kind of acts that could be considered evidence of membership and included the idea of the continuing reciprocal relationship necessary for that status." 269 F. 2d, at 942–943.

it said, were some of the indicia of Communist Party membership (see note 5, eighth paragraph).

While the criteria specified in the numbered paragraphs of the challenged instruction were in substance 12 of the 14 criteria specified by Congress in § 5 of the Communist Control Act of 1954 (50 U. S. C. § 844) to be considered by a jury in determining Communist Party membership under that Act, it is unnecessary for us to determine in this case whether that section applies, by force of law, to prosecutions under 18 U. S. C. § 1001 for making a false affidavit to the Labor Board in purported compliance with § 9 (h) of the National Labor Relations Act, for it is obvious that those 12 criteria rationally tend to show, and were sufficient to enable a jury rationally and logically to find, the ultimate fact of membership, though subjective, and hence it was proper, independently of and wholly apart from § 5 of the Communist Control Act of 1954, to tell the jury, as this instruction did, that they might consider those criteria in determining whether the defendant was or was not a member of the Communist Party on the date charged in the indictment.

Similar criteria were contained in the membership instruction given in the *Jencks* case, *supra*,[10] and the opinion of Mr. Justice Burton did not find any error in that aspect of the instruction. Very similar instructions telling the jury that they might consider such or similar criteria in determining the ultimate subjective fact of membership within the meaning of § 9 (h) have been consistently and uniformly approved, *Hupman* v. *United States*, 219 F. 2d 243 (C. A. 6th Cir.); [11] *Fisher* v. *United States*, 231 F.

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[10] Compare the *Jencks* instruction, 353 U. S., at 679, with the 12 numbered paragraphs in note 5.

[11] In *Hupman* v. *United States, supra,* the Court of Appeals for the Sixth Circuit said that a very similar instruction was "fair [and] substantially covered the crucial questions of law, with a careful analysis of the elements of the offense charged." 219 F. 2d, at 249.

2d 99, 107 (C. A. 9th Cir.).[12] In *Travis* v. *United States,* 247 F. 2d 130, 135, the United States Court of Appeals for the Tenth Circuit reversed because the membership instruction failed to specify and require the jury to consider such criteria in determining the question of membership. On retrial, the jury was instructed to consider virtually the same criteria of membership as was the jury in the instant case. The defendants were again convicted, and, on appeal, the Court of Appeals specifically approved the instruction. *Travis* v. *United States,* 269 F. 2d 928, 942–943.

We think there is no merit in petitioner's contention that the instruction failed adequately to state the objective circumstances that might be considered by the jury in determining membership or that the criteria submitted were too indefinite to give the jury the necessary guidance.

Nor is there any merit in petitioner's contention that those criteria allowed a finding of membership on a date other than that charged in the indictment. That contention fails to consider the whole charge, particularly the vital fact that the court repeatedly emphasized to the jury that the issue for them to determine was whether petitioner was or was not a member of the Communist Party on the date that he executed and transmitted the affidavit.

Petitioner, and the *amici curiae,* contend that § 5 of the Communist Control Act of 1954 (50 U. S. C. § 844) is constitutionally invalid in that it violates the First Amendment of the Constitution and denies due process because it permits a jury to base its finding of membership upon statements and acts that are protected by the First Amendment. They then argue that because the chal-

[12] In *Fisher* v. *United States, supra,* the Court of Appeals for the Ninth Circuit, in dealing with a similar question, said: "The jury should have been reminded of the components of the term membership rather than be supplied with synonyms." 231 F. 2d, at 107.

lenged instruction substantially adopted 12 of the 14 criteria mentioned in that section this instruction, too, was violative of the First Amendment and denied due process. We have no occasion here to consider the constitutionality of § 5 of the Communist Control Act of 1954 because, as we have said, the indicia which the challenged instruction told the jury to consider as circumstances bearing upon the issue of membership did rationally tend to show, and were sufficient, if believed, to enable the jury rationally and logically to find, the ultimate subjective fact of membership, wholly apart from and independently of § 5 of the Communist Control Act of 1954. To petitioner's argument that the submitted criteria permitted the jury to find membership from statements and acts that were wholly innocent in themselves or even protected by the First Amendment, it is enough to recall that nothing in § 9 (h) or elsewhere in the National Labor Relations Act makes or purports to make criminal either membership in or affiliation with the Communist Party, *American Communications Assn.* v. *Douds, supra,* 339 U. S., at 402, and that petitioner was not charged with criminality for being a member of or affiliated with the Communist Party, nor with participating in any criminal activities of or for the Communist Party, but only with having made and submitted to the Government an affidavit falsely swearing that he was not a member of or affiliated with the Communist Party in violation of 18 U. S. C. § 1001. It would be strange doctrine, indeed, to say that membership in the Communist Party—when, as here, a lawful status—cannot be proved by evidence of lawful acts and statements, but only by evidence of unlawful acts and statements.

Affiliation. We think the court's instruction defining affiliation [13] was correct under Count II of the indictment

[13] The instruction respecting affiliation was as follows:

"The verb 'affiliated,' as used in the Second Count of the indictment, means a relationship short of and less than membership in the

and in accord with all the precedents. A far less complete and definitive instruction on affiliation was given by the trial court in *Jencks* v. *United States, supra,* and was challenged in this Court. That instruction merely quoted dictionary definitions and then stated that "[a]ffiliation . . . means something less than membership but more than sympathy. Affiliation with the Communist Party may be proved by either circumstantial or direct evidence, or both." See 353 U. S., at 679. The Court's opinion, turning on the document production problem, did not reach that question. However the opinion of Mr. Justice Burton did reach the question. It did not find the instruction erroneous insofar as it went, but found it to be deficient because "It did not require a continuing course of conduct 'on a fairly permanent basis' 'that could not be abruptly ended without giving at least reasonable cause for the charge of a breach of good faith,' " and thus "allowed the jury to convict petitioner on the basis of

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Communist Party, but more than that of mere sympathy for the aims and objectives of the Communist Party.

"A person may be found to be 'affiliated' with an organization, even though not a member, when there is shown to be a close working alliance or association between him and the organization, together with a mutual understanding or recognition that the organization can rely and depend upon him to cooperate with it, and to work for its benefit, for an indefinite future period upon a fairly permanent basis.

"Briefly stated, affiliation as charged in the Second Count of the indictment, means a relationship which is equivalent or equal to that of membership in all but name.

"Whether or not the defendant was affiliated with the Communist Party at the time alleged in the indictment is a question of fact which you are to determine from all the evidence in the case. Affiliation or lack of affiliation in the Communist Party may be established by direct as well as circumstantial evidence.

"In determining the issue as to whether the defendant was or was not affiliated with the Communist Party at the time alleged in the indictment, you may take into consideration any statements made or acts done by the accused, and all other facts and circumstances in evidence which may aid determination of the issue."

acts of intermittent cooperation." 353 U. S., at 679–680. The instruction given in this case contained not only the definition given in the *Jencks* case (see note 13, paragraph one) but went on to embody almost exactly the expanded definition prescribed by Mr. Justice Burton (see note 13, paragraph two). The opinions of the Courts of Appeals have uniformly approved that definition. In *Bryson* v. *United States,* 238 F. 2d 657, 664, the United States Court of Appeals for the Ninth Circuit found an identical instruction to be "full and complete" and said that it "adequately informed the jury of the meaning of the term [affiliated with] and provided an adequate standard for evaluating the evidence." In *Lohman* v. *United States,* 251 F. 2d 951, 954, the United States Court of Appeals for the Sixth Circuit, speaking through Judge, now MR. JUSTICE, STEWART, specifically approved the definition of "affiliated with" prescribed by Mr. Justice Burton's opinion in the *Jencks* case; and in *Travis* v. *United States,* 247 F. 2d 130, 135, the United States Court of Appeals for the Tenth Circuit approved an almost identical instruction.[14]

Petitioner contends that one may not be "affiliated with" the Communist Party, within the meaning of § 9 (h), by any direct relationship with the Party, but only by being a member of another organization that is affiliated with the Party, and that the instruction was erroneous for failure so to advise the jury. If petitioner is right in this contention it would follow, despite the fact the question is foreclosed against him here, that the evidence did not make a submissible case for the jury on Count II of the indictment and his motion for a directed verdict of acquittal on that count should have been granted, for there was no evidence that petitioner was

[14] Compare *United States ex rel. Kettunen* v. *Reimer,* 79 F. 2d 315 (C. A. 2d Cir.), and *Bridges* v. *Wixon,* 326 U. S. 135, defining the term affiliation but as used in the deportation statutes.

affiliated with the Communist Party through membership in some other organization. It is true that one may be "affiliated with" the Communist Party through membership in an organization that is affiliated with the Communist Party, *American Communications Assn.* v. *Douds, supra,* 339 U. S., at 406, 421, 450, but that is not to say one may not do so directly, and every decision that has considered the meaning of "affiliated with," as used in § 9 (h), has held that one may be directly affiliated with the Communist Party. See Mr. Justice Burton's separate concurring opinion in *Jencks* v. *United States, supra,* 353 U. S., at 672, 679; and *Bryson* v. *United States, supra,* 238 F. 2d, at 664; *Lohman* v. *United States, supra,* 251 F. 2d, at 954; *Travis* v. *United States, supra,* 269 F. 2d, at 942.

In a manner similar to his attack upon the court's instruction defining membership, petitioner contends that the instruction in question erroneously defined the phrase "affiliated with" only in subjective terms and without objective criteria. However, just as with regard to membership, affiliation, in relation to Count II in this case, is necessarily subjective. But the ultimate fact of affiliation, though subjective, may be proved by evidence of objective facts and circumstances having a rational tendency to show, and from which the jury may rationally and logically find, the ultimate fact of affiliation. It cannot be disputed here that there was such evidence at the trial. The court's instruction told the jury that "[w]hether or not the defendant was affiliated with the Communist party . . . is a question of fact which you are to determine from all the evidence in the case," and that their determination should be based on the "statements made or acts done by the accused, and all other facts and circumstances in evidence . . . ." We think that instruction was adequate.

Petitioner argues that because the first paragraph of the instruction stated that affiliation "means a relation-

ship short of and less than membership in the Communist Party, but more than that of mere sympathy for the aims and objectives of the Communist Party," and the third paragraph of the instruction stated that "affiliation . . . means a relationship which is equivalent or equal to that of membership in all but name," it was contradictory and confusing. We agree that the third paragraph appears inconsistent with the first. However, it is evident that the erroneous third paragraph could not have prejudiced petitioner for it, though inconsistent with the correct first paragraph, exacted a higher standard of proof of affiliation than the law required.

Petitioner, quite understandably, would require instructions as specific as mathematical formulas. But such specificity often is impossible. The phrases "member of" and "affiliated with," especially when applied to the relationship between persons and organizations that conceal their connection, cannot be defined in absolute terms. The most that is possible, and hence all that can be expected, is that the trial court shall give the jury a fair statement of the issues—*i. e.*, whether petitioner was a member of or affiliated with the Communist Party on the date of his affidavit—give a reasonable definition of the terms and outline the various criteria, shown in the evidence, which the jury may consider in determining the ultimate issues. We believe that the instructions in this case, which are consistent with all the judicial precedents under § 9 (h), adequately met those tests.

Accordingly, the judgment is vacated and the case is remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE BLACK, dissenting.

As a prerequisite to his union's right to seek relief from unfair labor practices before the National Labor Relations Board, petitioner was compelled to subscribe to an oath

which stated: (1) "I am not a member of the Communist Party or affiliated with such Party;" and (2) "I do not believe in, and I am not a member of nor do I support any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods." The Government now claims that in submitting to this compulsion petitioner made false statements as to his membership in and affiliation with the Communist Party, and on the basis of these allegedly false statements it seeks to send petitioner to prison. I agree with MR. JUSTICE DOUGLAS that if the Government is to be allowed to do this sort of thing at all, it should only be upon a showing that petitioner was a member who engaged in illegal activities in connection with his Communist Party membership. But I wish also to reiterate my own belief that our Constitution, properly interpreted and applied, would prohibit this prosecution completely—regardless of the nature of petitioner's connection with the Communist Party. I think the Constitution absolutely prohibits the Government from sending people to jail for "crimes" that arise out of, and indeed are manufactured out of, the imposition of test oaths that invade the freedoms of belief and political association—freedoms which the Founders of our Nation recognized as indispensable to a democratic society.

The test oath is an historic weapon against religious and political minorities, but the fact that this practice has survived the centuries surely cannot be pointed to either as a source of pride or, in my judgment, as evidence that the practice is constitutional. Quite the contrary, I think that history shows test oaths to be one of the most generally and continuously hated and dangerous forms of governmental intrusion upon individual freedom that liberty-loving people have had to contend with. It was squarely in the face of this history of almost universal condemnation that this Court, in *American Communica-*

tions Assn. v. *Douds,* 339 U. S. 382, upheld the test oath requirement upon which this prosecution is based, resting its decision upon the ground that however obnoxious test oaths may be, they must be endured in the interest of interstate commerce. Eleven years have elapsed since that decision and I think it is fair to say that this recent experience with test oaths in this country has done nothing to change the evil reputation they gained throughout previous centuries in other countries. The question before us now is thus no different from that originally presented to us in *Douds:* Can Congress, in the name of regulation of interstate commerce, circumvent the history, language and purpose of our Bill of Rights and impose test oaths designed to penalize political or religious minorities? I would overrule the decision in *Douds* and order this prosecution dismissed. As I said there, "Whether religious, political, or both, test oaths are implacable foes of free thought. By approving their imposition, this Court has injected compromise into a field where the First Amendment forbids compromise." *Id.,* at 448.

MR. JUSTICE DOUGLAS has asked me to add the following: "I deduce from what the Court does today that the *Douds* decision was good for one Monday only and that it is being overruled *sub silentio* on the point now in issue. I did not participate in the *Douds* decision as I was necessarily absent when it was argued. I would, however, be content to decide this case within the framework which the *Douds* case established. Yet since the *Douds* decision is now apparently discarded on the point in issue, and since we face anew the precise question it tendered, I see no constitutional answer to the opinions of MR. JUSTICE BLACK in that case and in the present one that Congress has no power to exact from people affirmations or affidavits of belief, apart from the accepted form of oath of office demanded of all officials."

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

This is a prosecution under 18 U. S. C. § 1001 which penalizes the making of false statements on a matter within the jurisdiction of a federal agency. The false statements charged in the indictment involve 29 U. S. C. § 159 (h), which is § 9 (h) of the National Labor Relations Act—the provision that required[1] the filing of the so-called noncommunist affidavit before the National Labor Relations Board could entertain petitions of a union. See *Leedom* v. *International Union,* 352 U. S. 145. One count charged that petitioner's affidavit, filed under § 9 (h), that he was not "a member of the Communist Party" was false. A second count charged that the affidavit was also false in averring he was not "affiliated" with that party. After a jury trial, petitioner was convicted under both counts and sentenced to terms that run concurrently.

An instruction, offered by defendant and refused by the Court, reads as follows:

> "Whether intermittent or repeated, the act or acts tending to prove membership and that both the defendant and the communist party intended such a relationship to exist on December 11, 1952, must be of that quality which indicates an adherence to or a furtherance of the illegal purposes or objectives of the communist party as distinguished from mere cooperation with it in lawful activities. The act or acts must evidence a working alliance to bring the illegal program to fruition. Unless there is evidence which convinces you beyond a reasonable doubt of some illegal purpose or objective of the communist party on December 11, 1952 and that the relationship

[1] It was repealed by the Act of September 14, 1959, 73 Stat. 519, 525.

between the defendant and the communist party on and after this date was a relationship based on the illegal purpose or objective, you must acquit the defendant on Count I of the indictment."

I do not see how denial of this instruction was consistent with the Court's decision in *Communications Assn.* v. *Douds,* 339 U. S. 382. In that case, as in the present one, the Court dealt with the constitutionality of the "Affidavit of Noncommunist Union Officer." The affidavit now, as then, reads as follows:

"The undersigned, being duly sworn, deposes and says:

"1. I am a responsible officer of the union named below.

"2. I am not a member of the Communist Party or affiliated with such party.

"3. I do not believe in, and I am not a member of nor do I support any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods."

It was this affidavit that petitioner executed.

In *Douds* the Court sustained the constitutionality of the required affidavit by tailoring it to exclude membership that did not include belief in the overthrow of the government by force or other illegal or unconstitutional means. Chief Justice Vinson said for the Court:

"We hold, therefore, that the belief identified in § 9 (h) is a belief in the objective of overthrow by force or by any illegal or unconstitutional methods of the Government of the United States as it now exists under the Constitution and laws thereof." 339 U. S. 382, 407–408.

MR. JUSTICE FRANKFURTER, who joined the Court's opinion, filed a separate opinion in which he pin-pointed one of the objections running to the broad definition now, as well as then, given the term "member":

> "I cannot deem it within the rightful authority of Congress to probe into opinions that involve only an argumentative demonstration of some coincidental parallelism of belief with some of the beliefs of those who direct the policy of the Communist Party, though without any allegiance to it. To require oaths as to matters that open up such possibilities invades the inner life of men whose compassionate thought or doctrinaire hopes may be as far removed from any dangerous kinship with the Communist creed as were those of the founders of the present orthodox political parties in this country.
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> "The offensive provisions of § 9 (h) leave unaffected, however, the valid portions of the section. In § 16, Congress has made express provision for such severance. Since the judgments below were based in part on what I deem unconstitutional requirements, I cannot affirm but would remand to give opportunity to obey merely the valid portions of § 9 (h)." 339 U. S. 382, 422.

Beliefs are as much in issue here as they were in the *Douds* case. If that case means anything, it means that one who was a member only to promote a lawful cause of the party should not be subjected to the legal odium that attaches to full-fledged members. The fact that one believes in peace, disarmament, a ban on nuclear testing, or the disbandment of NATO may put him out of step with the majority. But unless we toss to the winds the tolerance which a Free Society shows for unorthodox, as well as orthodox, views, the fact that a person embraces lawful views of the party should not establish that he is

a "member" of the party within the meaning of the Act. Membership, as that word is used in the Act, should be proved by facts which tie the accused to the illegal aims of the party. If beliefs are used to condemn the individual, we have ourselves gone a long way down the totalitarian path.

Killian's association with the party appears to have been restricted to lawful purposes: he was against this country's policies in Indo-China; he was for the recognition of Red China; he was against colonialism; he was against war; he urged people to subscribe to The Daily Worker. He attended party meetings, promoted a united front, discussed current political events, recruited Negroes for party membership, and the like. If his attendance at the meetings was for an illegal purpose, I have failed to find it in the record. I find no evidence that Killian used his affiliation with the party to promote immediately or even at long range the overthrow of the government. I find no evidence that he organized violence, promoted sabotage, collected arms, or spied for a foreign power. If he lied in his affidavit, he lied about his beliefs. But insofar as the record shows, he had a right to promote those beliefs alone or in association with others. All the beliefs I find espoused by Killian in this record were protected by the First Amendment. He had a right to advocate them alone or in conjunction with others.[2] Some causes

[2] "It is altogether impossible to reason from the opinions which a man professes to his feelings and his actions; and in fact no person is ever such a fool as to reason thus, except when he wants a pretext for persecuting his neighbours. A Christian is commanded, under the strongest sanctions, to be just in all his dealings. Yet to how many of the twenty-four millions of professing Christians in these islands would any man in his senses lend a thousand pounds without security? A man who should act, for one day, on the supposition that all the people about him were influenced by the religion which they profess, would find himself ruined before night; and no man ever does act on that supposition in any of the ordinary concerns of

espoused by the Communist Party may be wholly lawful. Such was the case in *De Jonge* v. *Oregon,* 299 U. S. 353, where speeches were made "against illegal raids on workers' halls and homes and against the shooting of striking longshoremen" by the police and "against conditions in the county jail," *id.,* at 359. That "peaceable assembly" and that "lawful public discussion" (*id.,* at 365) were held not subject to punishment, even though the meeting was under the auspices of an organization that might have been prosecuted for other activities. If the *De Jonge* case means anything, it means there must be a separation of the lawful from the unlawful activities of a party when a "member" is summoned to account for his actions.

In varied situations this Court has refused to bring down on people heavy penalties for being a "Communist" or for being "affiliated" with that party where the acts to prove it were intrinsically innocent.

The Court took that view in cases under the Smith Act. *Scales* v. *United States,* 367 U. S. 203, 222:

> "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 . . . but also for two other reasons: It is not to be lightly inferred that Congress intended to visit upon mere passive mem-

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life, in borrowing, in lending, in buying, or in selling. But when any of our fellow-creatures are to be oppressed, the case is different. Then we represent those motives which we know to be so feeble for good as omnipotent for evil. Then we lay to the charge of our victims all the vices and follies to which their doctrines, however remotely, seem to tend. We forget that the same weakness, the same laxity, the same disposition to prefer the present to the future, which make men worse than a good religion, make them better than a bad one." Macaulay's Essays (N. Y. 1869), p. 668.

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bers the heavy penalties imposed by the Smith Act. 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."

In light of the *Scales* decision and the prior decision in *Yates* v. *United States,* 354 U. S. 298, it is difficult to see why, if membership is to be punished, a different standard should be applied here from that applied in the Smith Act. The constitutional overtones are as pronounced here as they were in *Yates* and *Scales.* Attributing to Congress a purpose to impose punitive measures "upon mere passive members" is as unwarranted here as in those other situations. We should say here what was said in *Scales, supra,* pp. 229–230.

"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,* p. 290. 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." Cf. *Rowoldt* v. *Perfetto,* 355 U. S. 115.

To convict petitioner for membership linked only to the lawful objectives of the party is inconsistent with the

holding in the *De Jonge* case, with what the Court did in *Yates* and *Scales,* and with the definition of "member" spelled out with particularity in the *Douds* case.

It may be that a jury on this record could find that petitioner was a member who adhered to the illegal purposes of the Communist Party. But unless the issues are so restricted, beliefs that were held in the *Douds* case to be immune from the Government's inquiry now become elements of a crime.

MR. JUSTICE BRENNAN, dissenting.

I dissent because I think the instructions to the jury on the crucial definitions of membership and affiliation were fatally defective in light of our decision 12 years ago in *American Communications Assn.* v. *Douds,* 339 U. S. 382. The trial judge refused to give the following instruction requested by the petitioner:

> "The communist party, like other voluntary organizations, sets forth conditions which a person must accept in order to become and remain a member. The burden is on the prosecution to prove beyond a reasonable doubt what the conditions for such membership were on the date in question, whether found in its constitution or elsewhere, and that the defendant accepted these conditions." [1]

In my view such an instruction was required under our decision in *Douds* and it was error to refuse it.

I.

Douds sustained § 9 (h) against constitutional challenge. Its constitutionality was sustained not, as here, within the limited framework of a perjury prosecution

[1] This is the third paragraph of Defendant's Proposed Instruction No. 16–17, found at pp. 606–608 of the trial transcript on file with the Clerk.

but rather in the large—against the broadside challenges arising from denials of recourse to the processes of the National Labor Relations Board to unions whose officers refused to execute the required affidavits. In that context an interpretation of "member" clearly emerges from the *Douds* decision. Yet in this case, which squarely presents an issue as to the correctness of an instruction on the meaning of "member" as used in § 9 (h), the majority makes not a single reference to that interpretation, which is at war with the majority's holding here.

Only six members of the Court participated in *Douds*. Chief Justice Vinson wrote an opinion for himself and Justices Reed and Burton. MR. JUSTICE FRANKFURTER wrote a separate opinion but, as regards the issue immediately to be discussed, Chief Justice Vinson also spoke for him.

The opinion of Chief Justice Vinson is partially a bifurcated one, distinguishing the clause forswearing membership in or affiliation with the Communist Party,[2] which this case implicates, from the "belief" clause[3] under which the Government does not here charge the petitioner with false swearing.

As to the "membership" portion of the oath, the opinion of the Chief Justice held for the majority of the participating Justices that Congress could validly impute to the Communist Party an institutional predilection for political strikes, and could reasonably act on the assumption that members of the Party or its affiliates would partake of that predisposition. As the Chief Justice's opinion saw it, the crucial issue as to this part of the oath was whether, granting the permissibility of the assumptions,

[2] *I. e.*, "that he is not a member of the Communist Party or affiliated with such party."

[3] *I. e.*, "that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods."

§ 9 (h) incorporated an allowable mode of regulation in view of its undoubted inhibiting effect upon participation in legitimate Party activities within the ambit of the First Amendment. The opinion held for constitutionality, concluding that the public interest in preventing political strikes justified the tangential interference with legitimate activity. No definitional problem respecting "member" or "affiliate" was considered in this context.

Coming to the "belief" clause, however, the Chief Justice found it necessary to construe that portion of the oath as referring to belief in violent overthrow "as an objective, not merely a prophecy." [4] His view was that the clause, assisted by this gloss, presented no different problem from that already discussed in connection with membership, with one exception which is crucial for our purposes. The special problem which the Chief Justice perceived was one of proof:

> "Insofar as a distinction between beliefs and political affiliations is based upon absence of any 'overt act' in the former case, it is relevant, if at all, in connection with problems of proof. *In proving that one swore falsely that he is not a Communist, the act of joining the Party is crucial.* Proof that one lied in swearing that he does not believe in overthrow of the Government by force, on the other hand, must consist in proof of his mental state. To that extent they differ.
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> "To state the difference, however, is but to recognize that while objective facts may be proved directly, the state of a man's mind must be inferred from the things he says or does. Of course we agree that the courts cannot 'ascertain the thought that has had no outward manifestation.' But courts and juries every day pass upon knowledge, belief and intent—the state of men's minds—having before them no more

[4] 339 U. S., at 407.

> than evidence of their words and conduct, from which, in ordinary human experience, mental condition may be inferred. . . . False swearing in signing the affidavit must, as in other cases where mental state is in issue, be proved by the outward manifestations of state of mind. In the absence of such manifestations, which are as much 'overt acts' as the act of joining the Communist Party, there can be no successful prosecution for false swearing." [5]

It was, of course, obvious to the Court in *Douds* that the *belief* portion of the oath referred to a subjective phenomenon—the affiant's internal attachment to the goal of violent overthrow—which would have to be provable wholly through his statements and writings—"the outward manifestations of state of mind." But it is equally obvious that the *Douds* Court had no notion that *membership* could be taken as signifying a subjective relationship of mutuality, provable by actions not particularly bespeaking an externally manifested tie. For it is clear beyond cavil that, to the Court in *Douds,* a conviction under the membership clause required evidence from which could be inferred the existence, beyond a reasonable doubt, of an "objective fact"—"the act of joining the Party." That this is so only becomes more apparent from examination of the separate opinions of JUSTICES FRANKFURTER [6] and Jackson.[7] It is evident that the five

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[5] *Id.,* at 410–411. (Emphasis added.)

[6] My Brother FRANKFURTER joined in the opinion of the Chief Justice as it related to the membership portion of the oath. He agreed that the membership clause was constitutional, and that the belief clause would have been constitutional had it been susceptible of the gloss endowed by the Chief Justice. His understanding of the meanings to be attributed to "member" and "affiliate" clearly emerges from the following, read in light of his holding that the membership clause is constitutional:

"If I possibly could, to avoid questions of unconstitutionality I would construe the requirements of § 9 (h) to be restricted to dis-

[*Footnote 7 is on p. 271*]

Justices who sustained the membership clause considered membership to involve an externally manifested act or acts of association and admission, understood as such by the Party and by the member. This is the "*Douds* sense" of membership to which I subsequently refer.

Accordingly, since the Court today authorizes an instruction which permits a jury to convict of false swearing as to membership, conceived as a purely subjective phenomenon, without the jury's having had to conclude that membership in the *Douds* sense existed, it goes beyond *Douds* and repudiates a critical assumption of that decision.[8]

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avowal of *actual membership* in the Communist Party, or in an organization that is in fact a controlled cover for that Party or of active belief, as a matter of present policy, in the overthrow of the Government of the United States by force." 339 U. S., at 421–422. (Emphasis added.)

[7] To Mr. Justice Jackson, writing separately, the belief portion of the oath appeared unconstitutional. He agreed that the membership clause could withstand attack, but only because of certain peculiar characteristics he discerned in the Communist Party and in the condition of membership in it. Underlying his holding was the proposition that the Communist Party was a foreign-controlled organization dedicated to the seizure of power by force; but the final, and crucial, link in the chain of reasoning was his characterization of membership in the party:

"Membership in the Communist Party is totally different [from membership in other political parties]. The Party is a secret conclave. Members are admitted only upon acceptance as reliable and after indoctrination in its policies, to which the member is fully committed. They are provided with cards or credentials, usually issued under false names so that the identification can only be made by officers of the Party who hold the code. Moreover, each pledges unconditional obedience to party authority." *Id.*, at 432.

It was the forswearing of this type of membership—and no other—which Mr. Justice Jackson held that Congress constitutionally could require.

[8] Since *Douds* can be authority for the constitutionality of the membership clause of § 9 (h) only with respect to the Court's clear understanding there of the meaning of "member," today's approval of a

II.

The district judge's instruction concerning membership is most effectively dealt with by considering, first, his definition of "membership," and, second, his enumeration of facts by which membership so defined could be proven. The entire definition of membership was this:

> "Membership in the Communist Party, the same as membership in any other organization, constitutes the state of being one of those persons who belong to or comprise the Communist Party. It connotes a status of mutuality between the individual and the organization. That is to say, there must be present the desire on the part of the individual to belong to the Communist Party and a recognition by that Party that it considers him as a member."

All must agree that it is in the third sentence alone that the definition resides; for the first sentence is mere tautology, while the second is far too vague to be of any help whatever. The most striking thing about the third sentence is that, although it is ambiguous, standing alone

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substantially altered definition appears to make necessary a new piece of constitutional adjudication. To put it another way, there is implicit in the majority's opinion—though unspoken—a holding that § 9 (h) is constitutional with the definition of membership which omits the *Douds* requirement. Because I think that the trial judge's erroneous instruction itself required reversal, I express no view on this constitutional question. Nor is this a matter without real significance. The *Douds* Court found "delicate and difficult," 339 U. S., at 400, the problem whether membership in the narrow sense there used sufficiently justified an inference of the likelihood of political strikes to warrant the resulting inhibition of protected activity. To substitute for the narrow definition of membership a concept the existence of which is provable by the acts enumerated by the district judge, see *infra*, pp. 274–275, quite clearly creates the need for a fresh exercise of judgment.

it might possibly be thought consistent with *Douds*.[9] "Recognition" by the Party that it "considers" one to be a member might suggest the objective manifestation of acceptance—the externalized establishment of the tie—which *Douds* conceived to be necessary to the relationship. The additional element of "desire on the part of the individual to belong" would simply except from "membership" a formal association entered into unwittingly or on account of duress.[10] But, if the definition of membership in question does omit the *Douds* element of objective, outward alliance—as I believe it does, in light of the instructions which followed—then its application in this case raises a grave question of fair warning.

Douds was decided on May 8, 1950. Two and one-half years later, on December 11, 1952, Killian swore that he was not a member of the Communist Party. Why he should have supposed that he was disavowing anything except objectively manifested *Douds*-sense membership—the most natural meaning to impute to the oath, and the one explicitly assumed by the Court in upholding the constitutionality of its exaction—I cannot imagine. To convict him of perjury now, on the assumption that membership may exist without externalized application to and acceptance into the organization, is to trap petitioner in the backlash of an unpredictable shift in construction.

III.

For the reasons above stated, I conclude that the district judge's definition of "membership" could have been correct only if it meant, and reasonably must have been

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[9] For this reason, I do not understand that the brief suggestion of three members of the Court in *Jencks*, 353 U. S., at 679, that membership be defined in language similar to that of the third sentence, lends any support to today's new holding that membership may be conceived for our purposes as a strictly subjective phenomenon.

[10] Compare *Rowoldt* v. *Perfetto*, 355 U. S. 115.

taken to mean, that some objective act of joining and acceptance is a requisite element. The judge did not rest with his definition of membership, but went on to instruct the jury what evidence it could consider in determining the membership issue. I do not reach the question whether the evidence in this case was sufficient to convict under a proper instruction. It is not necessary to hold that direct proof of the act of joining is required, in order to conclude that, because so many of the matters enumerated by the judge are devoid of any rational tendency to show membership in the *Douds* sense, the conviction must be reversed. The effect of this part of the instruction was either to authorize the jury to consider evidence not relevant to membership as properly defined, or to lead it into thinking that it might convict although it never found membership in the *Douds* sense.[11]

Among the indicia of membership which the jury was authorized to consider were the following:

> (a) Whether the petitioner "paid dues *or made any financial contributions to the Communist Party* or collected any funds on its behalf."
>
> (b) Whether the petitioner "attended Communist Party meetings, *classes, conferences, or any other type* of Communist Party gathering."
>
> (c) Whether petitioner "has been accepted to his knowledge as an officer or member of the Communist Party, *or as one to be called upon for services by other officers or members of the Communist Party.*"
>
> (d) Whether petitioner *"has conferred with officers or other members of the Communist Party in*

[11] The effect of the enumerated indicia surely was not sufficiently dispelled by the halting admonition that *"individual* and *unrelated isolated* acts of the defendant showing cooperation with the Communist Party or *isolated* statements of the defendant showing sympathy with the Communist Party are not in themselves *conclusive* evidence of membership . . . ." Transcript, 705. (Emphasis added.)

behalf of any plan or enterprise of the Communist Party."

(e) Whether petitioner "*has advised, counseled, or in any other way imparted information, suggestions, or recommendations, to officers or members of the Communist Party, or to anyone else, in behalf of the Communist Party.*"

(f) Whether petitioner "*has spoken or in any other way communicated orders, directives or plans of the Communist Party.*" (Emphasis added.)

Surely the enumerated italicized indicia are too free-wheeling and open-ended to be permissible descriptions of factual phenomena from which the existence of membership in anything resembling the *Douds* sense might be inferred. And the error was compounded; for the jury were instructed that they might consider whether the petitioner "has indicated by word, action, conduct, writing, or in any other way, a willingness to carry out in any manner and to any degree the plans, objectives or designs of the Communist Party"; or whether he "has in any other way participated in the activities, planning or actions of the Communist Party." Surely it cannot be said that such indicia are probative of membership in any sense of that term which could justify a legislative assumption that membership, so defined, imported a dangerous possibility of resort to political strikes—the very premise of constitutionality in *Douds*.

To sum up: Either the enumerated factual matters recommended to the jury's consideration by the instruction were in significant measure irrelevant, or they betokened a definition of membership which so radically departs from our own previous understanding that (a) the constitutionality of § 9 (h) should be reconsidered in its light and (b) it is grossly unfair to convict Killian of perjury on the basis of this new definition which he cannot be held to have foreseen, swearing, as he did, but

two and one-half years after the *Douds* decision was announced. The District Court should have drafted an instruction which would have required the jury—in order to return a conviction—to have concluded that Killian was a member in the *Douds* sense. This it clearly failed to do. I therefore think that the conviction on Count I must be reversed.

IV.

I think that the same fatal defects inhere in the instruction on "affiliation." My Brother FRANKFURTER in *Douds* expressed the view that to avoid questions of unconstitutionality, affiliation should be construed in § 9 (h) as limited to proof of actual membership "in an organization that is in fact a controlled cover for [the Communist] . . . party," [12] and all who joined the Chief Justice's opinion manifested their understanding that this was what affiliation meant.[13] No instruction in this form was given. However, unlike the case as to "membership," no instruction embodying the *Douds* definition of "affiliation" was requested nor did petitioner's counsel in objecting to the instruction rely on the *Douds* interpretation. I, therefore, can see no basis for a reversal of the conviction under Count II. Fed. Rules Crim. Proc. 30.

V.

Since my views have not prevailed as regards the instructions and the instructions actually given have been sustained, I must say a word as to the Court's disposition of the *Jencks* issue. I agree with the disposition which remands the cause to the District Court for a hearing confined to the issues raised by the Solicitor General's representations. See *Campbell* v. *United States,* 365 U. S. 85. I also agree that if the trial court finds that the infor-

[12] 339 U. S., at 421.

[13] *Id.,* at 406.

mation contained on the two Ondrejka receipts had already been given to petitioner in other statements of Ondrejka earlier turned over to petitioner, the District Court could find that the error in failing to produce those two receipts was harmless. *Rosenberg* v. *United States,* 360 U. S. 367, 377, footnote (dissenting opinion). But if the information on the receipts has not been given to petitioner in other statements of Ondrejka, I think the district judge must order a new trial for the reasons stated in my dissent in *Rosenberg* v. *United States,* 360 U. S. 367, 373.

CRAMP *v.* BOARD OF PUBLIC INSTRUCTION OF ORANGE COUNTY.

APPEAL FROM THE SUPREME COURT OF FLORIDA.

No. 72. Argued October 16, 1961.—Decided December 11, 1961.

A Florida statute requires every employee of the State and its subdivisions to swear in writing that, *inter alia,* he has never lent his "aid, support, advice, counsel or influence to the Communist Party." It requires immediate discharge of any employee failing to subscribe to such an oath. Appellant, a teacher in a public school of the State, refused to file such an oath and sued in a state court for a judgment declaring the statute unconstitutional and enjoining its enforcement. He alleged, in effect, that he had not done any of the things mentioned in the statute, as he understood it, but that its meaning was so vague as to deprive him of liberty or property without due process of law. The State Supreme Court held the statute constitutional and denied relief. *Held:*

1. Notwithstanding his allegation that he had not done any of the things mentioned in the required oath, appellant was not without standing to attack the statute on the ground that it was so vague as to deprive him of liberty or property without due process of law. Pp. 280–285.

2. The meaning of the required oath is so vague and uncertain that the State cannot, consistently with the Due Process Clause of the Fourteenth Amendment, force an employee either to take such an oath, at the risk of subsequent prosecution for perjury, or face immediate dismissal from public service. Pp. 285–288.

125 So. 2d 554, reversed.

Tobias Simon argued the cause and filed briefs for appellant.

J. R. Wells argued the cause and filed briefs for appellee.

Richard W. Ervin, Attorney General of Florida, *Ralph E. Odum,* Assistant Attorney General, and *William J. Roberts,* Special Assistant Attorney General, filed a brief for the State of Florida, as *amicus curiae,* urging affirmance.

MR. JUSTICE STEWART delivered the opinion of the Court.

A Florida statute requires each employee of the State or its subdivisions to execute a written oath in which he must swear that, among other things, he has never lent his "aid, support, advice, counsel or influence to the Communist Party." [1] Failure to subscribe to this oath

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[1] The statute in its entirety provides as follows:

"All persons who now or hereafter are employed by or who now or hereafter are on the payroll of the state, or any of its departments and agencies, subdivisions, counties, cities, school boards and districts of the free public school system of the state or counties, or institutions of higher learning and all candidates for public office, are hereby required to take an oath before any person duly authorized to take acknowledgments of instruments for public record in the state in the following form:

"I, ..., a citizen of the State of Florida and of the United States of America, and being employed by or an officer of ..... and a recipient of public funds as such employee or officer, do hereby solemnly swear or affirm that I will support the Constitution of the United States and of the State of Florida; that I am not a member of the Communist Party; *that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party;* that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence; that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or of Florida by force or violence.

"And said oath shall be filed with the records of the governing official or employing governmental agency prior to the approval of any voucher for the payment of salary, expenses, or other compensation." Fla. Stat. § 876.05. (Italics added.)

The Supreme Court of Florida has construed the portion of the statutory oath printed in italics as follows: "We think the pertinent clause, despite its ungrammatical construction was meant to apply retrospectively and that it should be read as if it had been written 'I have not lent and will not lend' . . . ." *State* v. *Diez*, 97 So. 2d 105, 109.

results under the law in the employee's immediate discharge.[2]

After the appellant had been employed for more than nine years as a public school teacher in Orange County, Florida, it was discovered in 1959 that he had never been required to execute this statutory oath.[3] When requested to do so he refused. He then brought an action in the state circuit court asking for a judgment declaring the oath requirement unconstitutional, and for an injunction forbidding the appellee, the Orange County Board of Public Instruction, from requiring him to execute the oath and from discharging him for his failure to do so. The circuit court held the statute valid and denied the prayer for an injunction. The Supreme Court of Florida affirmed, 125 So. 2d 554, and this is an appeal from the judgment of affirmance. Having doubt as to the jurisdiction of this Court, we postponed decision of that preliminary question until the hearing of the appeal on the merits. 366 U. S. 934.

I.

In his complaint in the state circuit court Cramp alleged that "he has, does and will support the Constitution of the United States and of the State of Florida; he

[2] "If any person required by §§ 876.05–876.10 to take the oath herein provided for fails to execute the same, the governing authority under which such person is employed shall cause said person to be immediately discharged, and his name removed from the payroll, and such person shall not be permitted to receive any payment as an employee or as an officer where he or she was serving." Fla. Stat. § 876.06. See also Fla. Stat. § 876.08, which provides that: "[a]ny governing authority or person, under whom any employee is serving or by whom employed who shall knowingly or carelessly permit any such employee to continue in employment after failing to comply with the provisions of §§ 876.05–876.10" shall be subject to fine, imprisonment, or both.

[3] The statute requiring execution of the oath was enacted in 1949. Laws of Florida, 1949, c. 25046.

is not a member of the Communist Party; that he has not, does not and will not lend aid, support, advice, counsel or influence to the Communist Party; he does not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence; he is not a member of any organization or party which believes in or teaches directly or indirectly the overthrow of the Government of the United States or of Florida by force or violence." He further alleged that he "is a loyal American and does not decline to execute or subscribe to the aforesaid oath for fear of the penalties provided by law for a false oath."

It is these sworn statements in the complaint which raise two related but separate questions as to our jurisdiction of this appeal. First, did the Florida Supreme Court rest its decision, at least alternatively, upon the ground that the appellant, because of these statements, lacked standing to attack the statutory oath? If so, we should have to consider the applicability of "the settled rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment." *Fox Film Corp.* v. *Muller,* 296 U. S. 207, 210. Secondly, do these sworn statements of the appellant deprive him of standing to attack the state statute in this Court, irrespective of what the Florida court may have decided?

The Supreme Court of Florida ruled that "because of the allegations of his own complaint the appellant teacher has unequivocally demonstrated that he has no standing to assault the subject statute on the grounds that it is a bill of attainder, or an ex post facto law." 125 So. 2d, at 560. We may assume that this ruling by the state court would operate to foreclose our consideration of this appeal if the appellant had confined his attack upon the

statute to the two grounds mentioned. But, in addition to asserting that the Florida statute constitutes an *ex post facto* law and a bill of attainder, the appellant has from the beginning also claimed that the statute is constitutionally invalid for two further and quite different reasons—that it impinges upon his constitutionally protected right of free speech and association, and that the language of the required oath is so vague and uncertain as to deny him due process of law. As we read the opinion of the Florida Supreme Court, both of these federal constitutional issues were decided upon their merits, without even implicit reliance upon any doctrine of state law.[4]

Whether the appellant has standing to attack the state statute in this Court is, however, a separate issue, to which we must bring our independent judgment. *Tileston* v. *Ullman,* 318 U. S. 44; *Doremus* v. *Board of Education,* 342 U. S. 429. The controlling question is

[4] The Florida Supreme Court disposed of the claimed violation of the right of free speech and association in the following language:

"It has long been recognized that the First Amendment freedoms are not absolutes in and of themselves. When they are asserted as a barrier to government action we are confronted by the necessity of balancing the asserted private right against the alleged public interest. The private right will certainly not be lightly regarded. However, an indirect adverse effect on the asserted right of the individual will not preclude the exercise of governmental power when the power is shown to exist and its assertion is necessitated by the exigencies of the public wellbeing. Barenblatt v. United States, 360 U. S. 109. . . .

"As we have pointed out in other parts of this opinion, the failure to take the required oath does not work an adjudication of guilt nor does it burden the employee with the responsibility of proving innocence against an assertion of guilt. Statutes of this type have been consistently sustained on the theory that they constitute merely a stipulation of qualifications or disqualifications for public employment. The statute contains no prohibition against the right of a citizen to speak out or to assemble peaceably. It merely provides that when one speaks out to advocate the violent overthrow of the government of the United States, or assembles for that purpose, he cannot simul-

whether the appellant "has sustained or is immediately in danger of sustaining some direct injury as the result of [the statute's] enforcement . . . ." *Massachusetts* v. *Mellon,* 262 U. S. 447, 488.

In the absence of the specific allegations in the complaint to which allusion has been made, there can be no doubt that enforcement of the state law would inflict a direct and serious injury upon the appellant. The statute unequivocally requires the appellant to execute the oath or suffer immediate discharge from public employment. See *United Public Workers* v. *Mitchell,* 330 U. S. 75, 91–92; *Adler* v. *Board of Education,* 342 U. S. 485. The argument is made, however, that the self-exonerating sworn statements in the complaint conclusively show that this appellant could not possibly sustain injury by executing the oath, and that he consequently has undercut his standing to question the constitutional validity of the state law.

Whatever the merits of this argument, it has, we think, no application to the appellant's claim that the statutory oath is unconstitutionally vague. The vices inherent in an unconstitutionally vague statute—the risk of unfair prosecution and the potential deterrence of constitutionally protected conduct—have been repeatedly pointed out in our decisions. See *Connally* v. *General Construction Co.,* 269 U. S. 385, 391; *Cline* v. *Frink Dairy Co.,* 274 U. S. 445, 465; *Stromberg* v. *California,* 283 U. S. 359, 369; *Herndon* v. *Lowry,* 301 U. S. 242, 258–259; *Lanzetta* v.

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taneously work for and draw compensation from the government he seeks to overthrow." 125 So. 2d, at 558–559.

The court disposed of the claim that the oath requirement was unconstitutionally vague as follows:

"Certainly the instant statute is perfectly clear in its requirements. There could be no doubt in the minds of anyone who can read English as to the requirements of the statute and the effect of a failure to comply. Adler v. Board of Education, supra." 125 So. 2d, at 558.

New Jersey, 306 U. S. 451; *Winters* v. *New York,* 333 U. S. 507. See also *Smith* v. *California,* 361 U. S. 147, 151. These are dangers to which all who are compelled to execute an unconstitutionally vague and indefinite oath may be exposed. Cf. *Thornhill* v. *Alabama,* 310 U. S. 88, 96–98.

There is nothing in the allegations of the complaint to indicate that the appellant will not be subjected to these hazards to the same degree as other public employees required to take the oath. The most that can be said of his having subscribed to the allegations in question is that he believes he could truthfully execute the oath, as he understands its language. But the very vice of which he complains is that the language of the oath is so vague and indefinite that others could with reason interpret it differently. He argues, in other words, that he could unconstitutionally be subjected to all the risks of a criminal prosecution *despite* the sworn allegations as to his past conduct which are contained in the complaint.[5] We cannot say that the appellant lacks standing to attack this statutory oath as unconstitutionally vague simply because he now personally believes he could eventually prevail in the event he were prosecuted for perjury. Cf. *Staub* v. *City of Baxley,* 355 U. S. 313, 319; *Jones* v. *Opelika,* 316 U. S. 584, 602, dissenting opinion, adopted *per curiam* on rehearing, 319 U. S. 103, 104; *Smith* v. *Cahoon,* 283 U. S. 553, 562.

We conclude that the appellant is not without standing to attack the Florida statute upon the ground that it is

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[5] "If any person required by the provisions of §§ 876.05–876.10 to execute the oath herein required executes such oath, and it is subsequently proven that at the time of the execution of said oath said individual was guilty of making a false statement in said oath, he shall be guilty of perjury, and shall be prosecuted and punished for the crime of perjury in the event of conviction." Fla. Stat. § 876.10.

so vague as to deprive him of liberty or property without due process of law, and we turn, therefore, to the merits of that claim.

II.

The Florida Supreme Court first considered the provisions of this legislative oath in *State* v. *Diez,* 97 So. 2d 105, a case involving the validity of an indictment for perjury. There the court upheld the constitutionality of the legislation only upon finding it ". . . inherent in the law that when one takes the oath that he has not lent aid, advice, counsel and the like to the Communist Party, he is representing under oath that he has not done so knowingly." 97 So. 2d, at 110. In the present case the Florida court adhered to this construction of the statute, characterizing what had been said in *Diez* as a ruling that "the element of scienter was implicit in each of the requirements of the statute." 125 So. 2d, at 557. We accept without question this view of the statute's meaning, as of course we must. This authoritative interpretation by the Florida Supreme Court "puts these words in the statute as definitely as if it had been so amended by the legislature." *Winters* v. *New York,* 333 U. S. 507, 514. See *Kingsley Pictures Corp.* v. *Regents,* 360 U. S. 684, at 688; *Albertson* v. *Millard,* 345 U. S. 242; *United States* v. *Burnison,* 339 U. S. 87; *Aero Transit Co.* v. *Commissioners,* 332 U. S. 495.

The issue to be decided, then, is whether a State can constitutionally compel those in its service to swear that they have never "knowingly lent their aid, support, advice, counsel, or influence to the Communist Party." More precisely, can Florida consistently with the Due Process Clause of the Fourteenth Amendment force an employee either to take such an oath, at the risk of subsequent prosecution for perjury, or face immediate dismissal from public service?

The provision of the oath here in question, it is to be noted, says nothing of advocacy of violent overthrow of state or federal government. It says nothing of membership or affiliation with the Communist Party, past or present. The provision is completely lacking in these or any other terms susceptible of objective measurement. Those who take this oath must swear, rather, that they have not in the unending past ever knowingly lent their "aid," or "support," or "advice," or "counsel" or "influence" to the Communist Party. What do these phrases mean? In the not too distant past Communist Party candidates appeared regularly and legally on the ballot in many state and local elections. Elsewhere the Communist Party has on occasion endorsed or supported candidates nominated by others. Could one who had ever cast his vote for such a candidate safely subscribe to this legislative oath? Could a lawyer who had ever represented the Communist Party or its members swear with either confidence or honesty that he had never knowingly lent his "counsel" to the Party? Could a journalist who had ever defended the constitutional rights of the Communist Party conscientiously take an oath that he had never lent the Party his "support"? Indeed, could anyone honestly subscribe to this oath who had ever supported any cause with contemporaneous knowledge that the Communist Party also supported it?

The very absurdity of these possibilities brings into focus the extraordinary ambiguity of the statutory language. With such vagaries in mind, it is not unrealistic to suggest that the compulsion of this oath provision might weigh most heavily upon those whose conscientious scruples were the most sensitive. While it is perhaps fanciful to suppose that a perjury prosecution would ever be instituted for past conduct of the kind suggested, it requires no strain of the imagination to envision the possibility of prosecution for other types of equally guiltless knowing behaviour. It would be blinking reality not to

acknowledge that there are some among us always ready to affix a Communist label upon those whose ideas they violently oppose. And experience teaches that prosecutors too are human.

We think this case demonstrably falls within the compass of those decisions of the Court which hold that ". . . a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally* v. *General Construction Co.*, 269 U. S. 385, 391. "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453. "Words which are vague and fluid . . . may be as much of a trap for the innocent as the ancient laws of Caligula." *United States* v. *Cardiff*, 344 U. S. 174, 176. "In the light of our decisions, it appears upon a mere inspection that these general words and phrases are so vague and indefinite that any penalty prescribed for their violation constitutes a denial of due process of law. It is not the penalty itself that is invalid but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all." *Champlin Refining Co.* v. *Corporation Commission of Oklahoma*, 286 U. S. 210, 243.

The vice of unconstitutional vagueness is further aggravated where, as here, the statute in question operates to inhibit the exercise of individual freedoms affirmatively protected by the Constitution. As we said in *Smith* v. *California*, ". . . stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser." 361 U. S. 147, at 151. "The maintenance of the opportunity for free

political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment." *Stromberg* v. *California,* 283 U. S. 359, 369. See also *Herndon* v. *Lowry,* 301 U. S. 242; *Thornhill* v. *Alabama,* 310 U. S. 88; *Winters* v. *New York,* 333 U. S. 507.

As in *Wieman* v. *Updegraff,* we are not concerned here with the question "whether an abstract right to public employment exists." 344 U. S. 183, at 192. Nor do we question the power of a State to safeguard the public service from disloyalty. Cf. *Slochower* v. *Board of Education,* 350 U. S. 551; *Adler* v. *Board of Education,* 342 U. S. 485. It is enough for the present case to reaffirm "that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." *Wieman* v. *Updegraff, supra,* at 192. "The fact . . . that a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by state-imposed criteria forbidden by the Constitution." *Torcaso* v. *Watkins,* 367 U. S. 488, at 495–496.

Reversed.

Mr. Justice Black and Mr. Justice Douglas join the Court's judgment and opinion, but also adhere to the view expressed in their dissents in *Adler* v. *Board of Education,* 342 U. S. 485, 496, 508; *Garner* v. *Los Angeles Board,* 341 U. S. 716, 730, 731; *Barenblatt* v. *United States,* 360 U. S. 109, 134; and to their concurrences in *Wieman* v. *Updegraff,* 344 U. S. 183, 192.

LENOIR FINANCE CO. *v.* JOHNSON, COMMISSIONER OF REVENUE OF NORTH CAROLINA.

APPEAL FROM THE SUPREME COURT OF NORTH CAROLINA.

No. 490. Decided December 11, 1961.

Appeal dismissed for want of a substantial federal question.
Reported below: 254 N. C. 129, 118 S. E. 2d 543.

W. Frank Taylor and *Francis H. Fairley* for appellant.

Thomas Wade Bruton, Attorney General of North Carolina, and *Lucius W. Pullen, Peyton B. Abbott* and *Charles D. Barham, Jr.,* Assistant Attorneys General, for appellee.

PER CURIAM.

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

HERRON *v.* PORTLAND STAGES, INC., ET AL.

APPEAL FROM THE SUPREME COURT OF OREGON.

No. 486. Decided December 11, 1961.

Appeal dismissed and certiorari denied.

Petitioner *pro se.*

Kenneth E. Roberts 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.

STATEN ISLAND MENTAL HEALTH SOCIETY, INC., *v.* RICHMOND COUNTY SOCIETY FOR THE PREVENTION OF CRUELTY TO CHILDREN ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 503. Decided December 11, 1961.

Appeal dismissed and certiorari denied.

Reported below: See 11 App. Div. 2d 236, 204 N. Y. S. 2d 707.

Marland Gale and *Leonard M. Leiman* for appellant.

Mark F. Hughes for the Mission of the Immaculate Virgin for the Protection of Homeless and Destitute Children, and *Sigmund A. Grajewski* for the Children's Aid Society, appellees.

PER CURIAM.

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

UNITED STATES *v.* UNION CENTRAL LIFE INSURANCE CO.

CERTIORARI TO THE SUPREME COURT OF MICHIGAN.

No. 52. Argued November 7, 1961.—Decided December 18, 1961.

Because a Michigan statute then required that a notice of a federal tax lien must contain a description of the land upon which the lien was claimed and it was the practice of county officials to refuse to accept for recording notices of federal tax liens not containing such descriptions, notice of a federal tax lien "upon all property" of certain delinquent taxpayers (not describing the property) was filed instead in the office of the Clerk of the Federal District Court for the judicial district in which certain real estate belonging to them was situated, as provided in § 3672 (a) (2) of the Internal Revenue Code of 1939, as amended. *Held:* No state law "authorized the filing of such notice in an office within the State," within the meaning of § 3672 (a) (1), and the federal tax lien was valid and entitled to priority over a mortgage recorded subsequently in accordance with state law. Pp. 291–296.

361 Mich. 283, 105 N. W. 2d 196, reversed.

I. Henry Kutz argued the cause for the United States. With him on the briefs were *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Fred E. Youngman.*

H. William Butler argued the cause and filed briefs for respondent.

Opinion of the Court by MR. JUSTICE BLACK, announced by MR. JUSTICE FRANKFURTER.

Robert G. Peters, Jr., and his wife, of Oakland County, Michigan, failed to pay their 1952 federal income taxes. In January 1954 an assessment for this delinquency was filed in the Internal Revenue Collector's Office at Detroit, Michigan, at which time a lien arose "in favor of the United States upon all property" of the two delinquent

taxpayers.[1] Some 10 months after the Government's tax lien arose, Mr. and Mrs. Peters executed a mortgage on real property they owned in Oakland County to secure an indebtedness to the respondent Union Central Life Insurance Company. They defaulted in payment of the mortgage, and Union Central filed this action to foreclose in the Circuit Court of Oakland County, joining the United States as a party defendant because of its asserted lien.

The company claimed priority for its mortgage over the earlier created federal lien because no notice of the federal lien had been filed with the register of deeds in Oakland County as then required by Michigan law.[2] For this alleged priority the company relied on § 3672 (a) (1) of the 1939 Internal Revenue Code, as amended, providing that a federal tax lien shall not be valid as against any mortgagee until notice has been filed "In the office in which the filing of such notice is authorized by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law authorized the filing of such notice in an office within the State or Territory." The Government, however, claimed that Michigan had not "authorized" filing within the meaning of the statute and that the case should be governed by § 3672 (a) (2) which provides that "whenever the State . . . has not by law authorized the filing of such notice in an office within the State," the notice may be filed in "the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated." Since the federal lien had been filed in the District Court months before the mortgage was executed and filed in the county register of deeds'

[1] Sections 3670 and 3671 of the Internal Revenue Code of 1939, in effect at that time.

[2] Act 104, Public Acts of Michigan of 1923, repealed April 13, 1956, by Act 107, Public Acts of Michigan of 1956.

office, the Government claimed that its lien had priority. The Government's contention that Michigan had not "authorized" a state office for filing the federal tax notice was based on the fact that the Michigan law purporting to authorize such filing expressly required that a federal tax lien notice contain "a description of the land upon which a lien is claimed," even though the form long used for filing federal tax lien notices in the District Courts throughout the United States does not contain a description of any particular property upon which the lien is asserted. In support of its contention the Government pointed to the fact that in 1953 the Michigan Attorney General ruled that federal tax lien notices not containing such a description are not entitled to recordation, and it is stipulated that from the time of that ruling, up to 1956,[3] "it was the policy of the office of the Register of Deeds for said County of Oakland not to accept for recording notices of Federal tax liens which did not contain a legal description of any land."

Because the United States had not filed a notice complying with the Michigan law, the Michigan Circuit and Supreme Courts held the federal lien to be subordinate to the mortgage, 361 Mich. 283, 105 N. W. 2d 196. While this holding is in accord with *Youngblood* v. *United States,* 141 F. 2d 912 (C. A. 6th Cir.), it conflicts with *United States* v. *Rasmuson,* 253 F. 2d 944 (C. A. 8th Cir.). In order to settle this conflict and because of the importance of the question in the administration of the revenue laws, we granted certiorari. 365 U. S. 858.

The Michigan requirement that notice of the federal tax lien be filed in Michigan is, of course, not controlling unless Congress has made it so, for the subject of federal taxes, including "remedies for their collection, has always been conceded to be independent of the legislative action

[3] Act 104 was repealed April 13, 1956.

of the States." *United States* v. *Snyder,* 149 U. S. 210, 214. While § 3672 (a)(1) unquestionably requires notice of a federal lien to be filed in a state office when the State authoritatively designates an office for that purpose, the section does not purport to permit the State to prescribe the form or the contents of that notice. Since such an authorization might well result in radically differing forms of federal tax notices for the various States, it would run counter to the principle of uniformity which has long been the accepted practice in the field of federal taxation. Moreover, a required compliance with Michigan law would mean that the federal tax lien would be superior to all those entitled to notice only as to the property described in the notice even though § 3670 broadly creates a lien "upon all property and rights to property, whether real or personal, belonging to" a taxpayer. This language has been held to include in the lien all property owned by the delinquent taxpayer both at the time the lien arises and thereafter until it is paid.[4] It seems obvious that this expansive protection for the Government would be greatly reduced if to enforce it government agents were compelled to keep aware at all times of all property coming into the hands of its tax delinquents. Imposition of such a task by the Michigan law could seriously cripple the Government in the collection of its taxes, and to attribute to Congress a purpose so to weaken the tax liens it has created would require very clear language. The history of § 3672 belies any such congressional purpose.

In 1893 this Court decided in *United States* v. *Snyder,* 149 U. S. 210, that the federal tax lien could be enforced against bona fide purchasers who had no notice of the lien, despite a state law attempting to defeat the lien unless it has been recorded. In order to grant relief from the *Snyder* rule, Congress in 1913 passed an Act requiring,

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[4] *Glass City Bank* v. *United States,* 326 U. S. 265.

much as the provision here in question did, that the tax liens should not be "valid as against any mortgagee, purchaser, or judgment creditor" until notice was filed with the clerk of an appropriate District Court or, whenever a State authorized such filing, in the office of a county recorder of deeds.[5] This statute was amended in 1928 by adding that the lien would not be valid until notice was filed "*in accordance with the law of the State or Territory* in which the property subject to the lien is situated, whenever the State or Territory has by law provided for the filing of such notice . . . ."[6] (Emphasis supplied.) Following this in *United States* v. *Maniaci,* 36 F. Supp. 293, aff'd, 116 F. 2d 935, both a United States District Court and a Court of Appeals refused to enforce a federal tax lien on Michigan property because the notice of lien, although filed both in a District Court and in the office of the proper Michigan register of deeds, did not contain the description of the property required by Michigan law. In this holding emphasis was placed on the clause added in 1928, requiring notice to be filed "in accordance with the law of the State or Territory in which the property subject to the lien is situated . . . ."

Less than two years after the *Maniaci* holding Congress again amended the lien notice provisions, struck out "in accordance with the law of the State or Territory" and substituted the language in the section here controlling that notice was not valid until filed "In the office in which the filing of such notice is authorized by the law of the State or Territory."[7] The reports of the House and Senate Committees reporting this amendment point strongly to a purpose to get away from the ruling in the *Maniaci* case and make it clear that, while notice of a

[5] 37 Stat. 1016.

[6] 45 Stat. 876.

[7] 56 Stat. 957, § 3672 (a) (1) of the Internal Revenue Code of 1939, as amended.

federal lien must be filed in a state office where authorized by a State, the notice is sufficient if given in the form long used by the Department "without regard to other general requirements with respect to recording prescribed by the law of such State or Territory." [8] The Department never accepted the *Maniaci* case and its practice has been to use forms which do not contain a particular description of any property owned by a delinquent taxpayer. The notice provisions were once more amended in the 1954 Code, this time providing that the notice shall be valid if in the Department form "notwithstanding any law of the State or Territory regarding the form or content of a notice of lien." [9] The House Report stated that this amendment was merely "declaratory of the existing procedure and in accordance with the long-continued practice of the Treasury Department." [10]

The Michigan law authorizing filing only if a description of the property was given placed obstacles to the enforcement of federal tax liens that Congress had not permitted, and consequently no state office was "authorized" for filing within the meaning of the federal statute. It was therefore error for the Michigan courts to fail to give priority to the Government's lien here, notice of which had been filed in the District Court in accordance with federal law.

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

Reversed and remanded.

MR. JUSTICE DOUGLAS dissents.

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[8] H. R. Rep. No. 2333, 77th Cong., 2d Sess. 173. See also S. Rep. No. 1631, 77th Cong., 2d Sess. 248.

[9] Section 6323 (b) of the Internal Revenue Code of 1954.

[10] H. R. Rep. No. 1337, 83d Cong., 2d Sess. A406–A407.

Syllabus.

CAMPBELL, COMMISSIONER OF AGRICULTURE OF GEORGIA, ET AL. *v.* HUSSEY ET AL.

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

No. 42. Argued November 14–15, 1961.—Decided December 18, 1961.

By the Federal Tobacco Inspection Act, Congress provided for the establishment of uniform standards of classification and inspection of tobacco for the protection of interstate commerce and authorized the Secretary of Agriculture "to establish standards for tobacco by which its type, grade, size, condition, or other characteristics may be determined, which standards shall be the official standards of the United States." Pursuant thereto, the Secretary prescribed by regulation that, "Tobacco which has the same characteristics and corresponding qualities, colors, and lengths shall be treated as one type, regardless of any factors of historical or geographical nature which cannot be determined by an examination of the tobacco." The regulations define type 14 as "That type of flue-cured tobacco commonly known as Southern Flue-cured or New Belt of Georgia, Florida, and Alabama, produced principally in the southern section of Georgia and to some extent in Florida and Alabama." When the tobacco is offered for sale, the federal regulations require that it be identified by a blue tag which states the type and grade thereof. A Georgia law requires type 14 tobacco grown in Georgia to be identified by a white tag. *Held:* The federal law pre-empts the field and excludes state regulation, even though the latter does no more than supplement the former. Therefore, the Georgia statute requiring type 14 tobacco to be identified with a white tag when it is grown in Georgia is unconstitutional. Pp. 298–302.

189 F. Supp. 54, affirmed.

G. Hughel Harrison, Assistant Attorney General of Georgia, and *Denmark Groover, Jr.* argued the cause for appellants. With them on the briefs were *Eugene Cook,* Attorney General, *Gordon Knox, Frank S. Twitty* and *Chris B. Conyers,* Deputy Assistant Attorneys General.

Homer S. Durden, Jr. argued the cause for appellees. With him on the brief were *Darius N. Brown* and *William J. Neville.*

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Sherman L. Cohn, by special leave of the Court, argued the cause for the United States, as *amicus curiae,* urging affirmance. With him on the brief were *Solicitor General Cox, Assistant Attorney General Orrick* and *Alan S. Rosenthal.*

Mr. Justice Douglas delivered the opinion of the Court.

This is a suit brought by owners and operators of tobacco warehouses in Georgia to enjoin officials of Georgia from enforcing certain provisions of the Georgia Tobacco Identification Act. Ga. Laws 1960, No. 557, p. 214. A three-judge court was convened, 28 U. S. C. §§ 2281, 2284, and it granted the relief. 189 F. Supp. 54. The case is here by direct appeal.[1] 28 U. S. C. § 1253.

The provisions of the Georgia Act that are challenged concern type 14 flue-cured leaf tobacco. It is defined in § 1 of the Act as "that flue-cured leaf tobacco grown in the traditional loose-leaf area which consists of the State[s] of Georgia, Florida, and Alabama." By § 13 (A) of the Act type 14 tobacco received in a warehouse for sale [2] shall be marked with a "white sheet ticket."

Sales at these warehouses are sales within the competence of Congress to regulate. As stated in *Mulford* v. *Smith,* 307 U. S. 38, 47: "In Georgia nearly one hundred per cent. of the tobacco so sold is purchased by extra-state purchasers. In markets where tobacco is sold to both

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[1] Of the several infirmities which Georgia's law is alleged to have, only one was reached by the lower court, namely, the constitutionality of the law in light of the requirements of the Commerce Clause. The complaint also challenged the constitutionality of the law on the grounds that it violated both the Equal Protection and the Due Process Clauses of the Fourteenth Amendment. Plainly the case was one to be heard by a three-judge court. See *Florida Lime Growers* v. *Jacobsen,* 362 U. S. 73.

[2] The manner of sale is described in *Townsend* v. *Yeomans,* 301 U. S. 441, 445; *Currin* v. *Wallace,* 306 U. S. 1, 7–8; *American Tobacco Co.* v. *United States,* 328 U. S. 781, 800.

interstate and intrastate purchasers it is not known, when the grower places his tobacco on the warehouse floor for sale, whether it is destined for interstate or intrastate commerce. Regulation to be effective, must, and therefore may constitutionally, apply to all sales."

Congress in 1935 enacted the Tobacco Inspection Act, 49 Stat. 731, 7 U. S. C. § 511, and in its declaration of purpose, § 2, 7 U. S. C. § 511a, stated:

> ". . . the classification of tobacco according to type, grade, and other characteristics affects the prices received therefor by producers; without *uniform standards* of classification and inspection the evaluation of tobacco is susceptible to speculation, manipulation, and control, and unreasonable fluctuations in prices and quality determinations occur which are detrimental to producers and persons handling tobacco in commerce; such fluctuations constitute a burden upon commerce and make the use of *uniform standards* of classification and inspection imperative for the protection of producers and others engaged in commerce and the public interest therein." (Italics added.)

By § 511b the Secretary of Agriculture is authorized "to establish standards for tobacco by which its type, grade, size, condition, or other characteristics may be determined, which standards shall be *the official standards of the United States* . . . ." (Italics added.)

Detailed standards have been prescribed by the Secretary. As to the "type" of tobacco, the regulations state: ". . . Tobacco which has the same characteristics and corresponding qualities, colors, and lengths shall be treated as one type, *regardless of any factors of* historical or *geographical nature* which cannot be determined by an examination of the tobacco." 7 CFR, 1961 Cum. Supp., § 29.1096. (Italics added.)

Type 14 is defined as "That type of flue-cured tobacco commonly known as Southern Flue-cured or New Belt

of Georgia, Florida, and Alabama, produced *principally* in the southern section of Georgia and to some extent in Florida and Alabama." 7 CFR, 1961 Cum. Supp., § 29.1100. (Italics added.)

The regulations also provide that the classification of the tobacco by type be placed on a federal inspection certificate and announced at the time the lot is offered in the auction (7 CFR § 29.80, 7 CFR, 1961 Cum. Supp., § 29.1144)—an identification made by a blue ticket.

The question is whether the federal scheme of regulation has left room for Georgia to identify type 14 tobacco with a white tag when it is grown in Georgia, Florida, or Alabama.

It is earnestly argued that there is no conflict between Georgia's regulation and the federal law, as all that Georgia requires is that type 14 tobacco, grown in Georgia, be labeled as such. In that connection it is pointed out that type 14 tobacco as defined by the federal regulations includes tobacco "produced principally" in Georgia, Florida, and Alabama and that labeling it by its geographical origin merely supplements the federal regulation and does not conflict with it.

We do not have here the question whether Georgia's law conflicts with the federal law. Rather we have the question of pre-emption. Under the federal law there can be but one "official" standard—one that is "uniform" and that eliminates all confusion [3] by classifying tobacco

[3] The court below stated:

"The Georgia statute defines Type 14 tobacco on the basis of geographical origin and upon no other basis. If it is grown in Georgia, it would be Type 14 under the Georgia law and be given a white tag; while if it came from the other side of the Savannah River in South Carolina it would not be Type 14 and would be given a blue tag. . . .

"Both the purpose and effect of the Georgia enactment were to make a distinction at the markets, by the color tags, between tobacco grown in Georgia and that grown elsewhere. The effect was to create

not by geographical origin but by its characteristics. In other words, our view is that Congress, in legislating concerning the types of tobacco sold at auction, pre-empted the field and left no room for any supplementary state regulation concerning those same types. As we have seen, the Federal Tobacco Inspection Act in § 2, 7 U. S. C. § 511a, says that "uniform standards of classification and inspection" are "imperative for the protection of producers and others engaged in commerce and the public interest therein." The House Report No. 1102, 74th Cong., 1st Sess., reviewed at length the harm to growers that resulted from the absence of regulations governing the "grades" of tobacco sold on the auction market. "There are between 60 and 100 grades in a single type of tobacco, and it is not practical for a farmer to familiarize himself with the technical factors on which these grades are based . . . ." *Id.*, p. 2. The need for "a definite standard" of grading, *id.*, p. 2, or of "standard grades," *id.*, p. 4, was repeated over and again. The importance of a "standard grade" was emphasized in the debates on the floor of the House. Congressman Hancock stated that this legislation provided that tobacco on the auction market "would be inspected by competent judges of tobacco in Government employ and graded according to United States standards of quality . . . ." 79 Cong. Rec. 11870. Congressman Mitchell added that "Standard grades would serve as a guide to farmers in classifying their tobacco for market." *Id.*, 11878. The Senate Report No. 1211, 74th Cong., 1st Sess., based its approval of the bill on a report made by the Department of Agriculture. After stating that the purpose of the bill was to provide "uniform standards" for the protection of farmers, the report added: "The bill would authorize the Secretary of Agriculture to establish

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a wide disparity of price between the two groups of tobacco, the Carolina growers receiving a much lower amount. This resulted in losses of business to the plaintiff warehousemen." 189 F. Supp. 54, 59.

standards for tobacco by which its type, grade, size, condition, or other characteristics may be determined, and the standards so established would be the official standards of the United States for such purpose." *Id.*, p. 1.

The Act, as we have seen, adopts that view by making the "type, grade, size, condition" given inspected tobacco "the official standards of the United States." § 3, 7 U. S. C. § 511b. The regulations are precise and unequivocal in saying what those "official standards" are. Among other things they say, as already noted, that tobacco "which has the same characteristics and corresponding qualities, colors, and lengths shall be treated as one type, regardless of any factors of historical or geographical nature which cannot be determined by an examination of the tobacco." 7 CFR, 1961 Cum. Supp., § 29.1096. Tobacco is includable in type 14, regardless of where it may have been grown, provided it meets the specifications of that type.

We have then a case where the federal law excludes local regulation, even though the latter does no more than supplement the former. Under the definition of types or grades of tobacco and the labeling which the Federal Government has adopted, complementary state regulation is as fatal as state regulations which conflict with the federal scheme. *Missouri Pacific R. Co.* v. *Porter*, 273 U. S. 341, 346; *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230; *Hood & Sons* v. *Du Mond*, 336 U. S. 525, 543.

Affirmed.

MR. JUSTICE WHITTAKER concurs in the result.

Dissenting opinion of MR. JUSTICE BLACK, joined by MR. JUSTICE FRANKFURTER and MR. JUSTICE HARLAN, announced by MR. JUSTICE FRANKFURTER.

Acting under unchallenged authority granted him by the Federal Tobacco Inspection Act [1] to classify tobacco

[1] 49 Stat. 731, 7 U. S. C. §§ 511–511q.

into "types" and "grades" and to designate "auction markets" at convenient points in "type areas," the Secretary of Agriculture has established a comprehensive tobacco classification system made up of some 27 different types of tobacco—based upon chemical qualities resulting from the geographical factors of soil and climate [2]—which are in turn broken down into some 170 different grades—based upon such visual factors as group, quality and color.[3] The question in this case relates to one of those 27 types, Type 14 flue-cured tobacco, and has nothing whatever to do with the Secretary's grade classification regulations.

Type 14 flue-cured tobacco, as defined in the official Department of Agriculture regulation, is:

> "That type of flue-cured tobacco commonly known as Southern Flue-cured or New Belt of Georgia, Florida, and Alabama, produced principally in the southern section of Georgia and to some extent in Florida and Alabama." [4]

While § 8 of the Federal Act requires tobacco sold at designated auction markets to bear a tag showing the Department of Agriculture's official grade, it contains no such requirement for a tag showing its official type.[5]

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[2] See 7 CFR, 1961 Cum. Supp., § 29.1096. Under the Department of Agriculture's classification system, "type" is a subdivision of "class," which is largely determined by the method used to cure the tobacco. See 7 CFR, 1961 Cum. Supp., § 29.1040.

[3] 7 CFR, 1961 Cum. Supp., § 29.1053.

[4] 7 CFR, 1961 Cum. Supp., § 29.1100.

[5] While the two Department of Agriculture regulations cited by the Court, 7 CFR § 29.80 and 7 CFR, 1961 Cum. Supp., § 29.1144, could arguably be interpreted to impose a federal requirement that type as well as grade be shown on each lot of tobacco sold, the record in this case plainly indicates that this is not the Department's interpretation of its own regulations. In the first place, every witness in this case who was called upon to describe the situation existing prior to 1960 stated unequivocally that the tobacco type did not appear on the

Because of this omission and the fact, established here by expert testimony, that during the last five years Type 14 "tobacco has had the reputation of being the best tobacco produced in the United States," growers and speculators from areas outside Georgia, Florida and Alabama have taken advantage of the general similarity in appearance of all types of flue-cured tobacco in order to sell their tobacco on Georgia markets as Type 14. Acting on complaints that this practice constituted a fraud upon Georgia tobacco growers as well as upon buyers coming into the State, the Georgia Legislature passed a law requiring that warehousemen within the State place a tag on all tobacco sold within the State showing whether it is Type 14 tobacco or not.[6] To accomplish this purpose the Georgia law established the following definition:

> "Type 14 flue-cured leaf tobacco as used herein shall mean that flue-cured leaf tobacco grown in the traditional loose-leaf area which consists of the State[s] of Georgia, Florida, and Alabama." [7]

Despite the variations in their wordings, it is obvious that there is no conflict between this Georgia law and the regulation of the Department of Agriculture and that the definitions of Type 14 tobacco in the Georgia law and the federal regulation mean precisely the same thing—namely, that tobacco grown in Georgia, Florida and Alabama, and that tobacco only, can be classified as Type 14. Whatever doubt might otherwise have existed on this score is completely dispelled by the record in this case. For the parties to this lawsuit, who have lived under and can be presumed to be familiar with the Department of

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government label attached to the tobacco at the time of sale. And the Department's own official said that this was not presently required.

[6] The Georgia Tobacco Identification Act, Ga. Laws 1960, No. 557, p. 214.

[7] § 1.

Agriculture's regulation, themselves stipulated that the Federal Government had "designated as Type 14 tobacco only flue-cured tobacco grown in Georgia, Florida, and Alabama." Two responsible Department of Agriculture officials unequivocally supported the correctness of this stipulation—one testifying that Type 14 was a classification according to "geographical origin" and the other, the then Director of the Tobacco Division of the Commodity Stabilization Service,[8] testifying that only three things went in the Department's Type 14 definition, "geography, soil and climate." There was also in evidence the 1959 official map of the Department showing, as has every other Department map since passage of the Act,[9] that all Type 14 flue-cured tobacco is grown well within the borders of Georgia, Florida and Alabama and that the other "type areas" in which flue-cured tobacco is grown do not even approach the plainly defined limits of the Type 14 area.[10] That the Department of Agriculture did not regard the Georgia law attacked here as inconsistent with its regulations is further, and specifically, shown by the fact that after passage of the Georgia law, the Department itself issued a regulation, 6 CFR, 1961 Cum. Supp., § 464.1211 (b)—which the record shows was designed to protect Florida markets precisely as the Georgia law protects Georgia markets—approving the Georgia defi-

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[8] The Commodity Stabilization Service and the Agricultural Marketing Service are the two branches of the Department of Agriculture most directly involved in the marketing of tobacco.

[9] In addition the definition of Type 14 is exactly the same now as it was under the first Tobacco Inspection Act Regulations. See § 29.156 (vv) of the Rules and Regulations of the Secretary of Agriculture, Aug. 7, 1936.

[10] It seems clear from this that the solicitude of the court below for Type 14 growers in South Carolina, as shown in note 3 of the Court's opinion, is entirely misplaced. The Department's official map, referred to above, shows plainly that all South Carolina flue-cured tobacco is Type 13.

nition by also requiring identifying colored tags for "all tobacco . . . offered for sale at auction which is determined to have been produced in Georgia, Florida, or Alabama." Thus it is clear beyond dispute, as the Department's map and regulation recognized, that neither the Georgia nor the Department definitions of Type 14 conflict with the requirement of Department regulation § 29.1096 that tobacco with the "same characteristics . . . shall be treated as one type, regardless of any factors of historical or geographical nature which cannot be determined by an examination," because there are geographical factors of soil and climate in Georgia, Alabama, and Florida resulting in distinct "characteristics" which are determinable by chemical examination.

The Court is therefore compelled to decide this case, as to me it apparently does, on the premise that the Georgia definition of Type 14 tobacco is not in conflict with, but rather is precisely the same as, the federal definition. Consequently, the Court must accept as an undoubted fact that the full effect of the Georgia law is simply to assure that bidders at Georgia auction markets located in the Type 14 area will be able to distinguish between officially classified Type 14 tobacco, grown only in Georgia, Florida and Alabama, and other types of tobacco grown in other States. Since the conceded basic purpose of the Federal Act itself was to assure that tobacco growers and buyers would have as much information as possible about the commercial qualities of tobacco sold on auction markets, the Court must also admit that this Georgia law is designed to and does help to effectuate the Federal Act and to secure all of the benefits of that Act's official tobacco type classifications. At least as early in the history of this country as 1619, when Virginia passed its first tobacco inspection act, the States have sought to protect honest sellers of tobacco from those who were

willing for a profit to damage the integrity of the product.[11] Yet the Court now holds that Congress, by passing the Federal Tobacco Inspection Act, intended to cover the entire field of tobacco regulation, even to the extent of compelling States to abandon historic laws that are not only completely in harmony with federal type classifications, but are actually necessary to give them full effect.

In so holding it seems to me that the Court departs drastically from its long-continued practice of not striking down state laws as unconstitutional except where such decisions are compelled by considerations which are manifest and clear after careful study and analysis of the issues involved. Here the Court's opinion presents not so much as one fact which indicates that Congress actually intended by the passage of the Federal Act to preclude the States from passing laws which require only that warehousemen place a label on each lot of tobacco offered for sale truthfully showing its official federal type. Indeed, the Court even cites two prior cases in which this Court, in dealing with this very same Federal Act, has explicitly recognized that there is no basis whatever in the Act's language, history or purpose to justify a finding of a congressional intent to pre-empt merely complementary state legislation. In *Townsend* v. *Yeomans*,[12] Mr. Chief Justice Hughes, after a full canvass of the language, history and purpose of the Federal Act and of tobacco inspection laws generally, rejected for the Court the contention that this Act precluded a Georgia law regulating the charges of warehousemen operating under the Act, pointing out that the federal law "had a limited objective," and going on to say:

> "Instead of frustrating the operation of such state laws, the provisions of the Act expressly afforded and

[11] Journal of the House of Burgesses (McIlwaine ed.), Laws, 1619, p. 11.

[12] 301 U. S. 441.

> emphasized the opportunity for coöperation with the States in protecting the farmer's interests. In this view we find no ground for the contention that Congress has taken possession of the field of regulation to the exclusion of state laws which do not conflict with its own requirements." [13]

This statement was reiterated and buttressed when, two years later, the Court was called upon to pass on the constitutionality of the Tobacco Inspection Act in *Currin* v. *Wallace*.[14] Mr. Chief Justice Hughes, again speaking for the Court, expressly adhered to the view the Court had earlier taken of the Act:

> "But [in *Townsend* v. *Yeomans*] we found nothing in the federal Act which undertook to regulate the charges of warehousemen and hence we concluded that Congress had restricted its requirements and left the State free to deal with the matters not covered by the federal legislation and not inconsistent therewith." [15]

I think it plain that the Court was entirely correct in the *Townsend* and *Currin* cases. There is not a word in the Tobacco Inspection Act nor anything that has been cited in its legislative history that indicates a clear and manifest purpose on the part of Congress to preclude the exercise by Georgia of the historic power of States to pass local legislation to protect the integrity of its tobacco on the market and to prevent the commission of fraud upon buyers who come to deal in tobacco within its borders. The purpose of the Federal Act, as plainly disclosed both in its language and legislative history, was to promote the dissemination of information on the tobacco market, not to restrict the availability of such

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[13] *Id.*, at 454.

[14] 306 U. S. 1.

[15] *Id.*, at 13.

information.[16] The failure of the Federal Act itself to require the open disclosure of tobacco types as well as tobacco grades cannot by any stretch of the imagination be taken as evidence of a congressional intent that tobacco types should remain a secret on the market. For the Act itself plainly shows why that omission was made. Congress knew that the various types of tobacco were grown in geographically separate "type areas" and further knew that under the marketing practices then being used in the tobacco industry tobacco was marketed in the "type area" in which it was grown. Consequently, under the conditions then generally prevailing, there was no need to require the disclosure of tobacco types for the simple reason that no two types of tobacco were sold on the same market.[17]

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[16] Section 9 of the Act, 7 U. S. C. § 511h, provides: "The Secretary is authorized to collect, publish, and distribute, by telegraph, mail, or otherwise without cost to the grower, timely information on the market supply and demand, location, disposition, quality, condition, and market prices for tobacco." That this section constituted an important part of the Act is shown by the statement of its sponsor, Representative Flannagan, in introducing his bill on the floor of the House of Representatives: "Simply stated the bill has two objects: First, the grading of the growers' tobacco before sale by a competent grader in order to determine what grades the growers have to offer for sale, and second, furnishing the growers with a daily marketing news service so they will know what the different grades of tobacco are bringing on the other tobacco markets and thus put them in position to intelligently accept or reject a sale. Surely the growers are entitled to know what they are offering for sale—the different grades of tobacco they have to offer—and the prices that the different grades are bringing from day to day upon the different tobacco markets. Deny them these rights and you deny them the opportunity to make a fair and honest sale." 79 Cong. Rec. 11802.

[17] Since the earliest days of the tobacco industry in this country, the marketing of the product has been almost exclusively on a purely local basis. See Wyckoff, Tobacco Regulation in Colonial Maryland, p. 62. That situation persisted substantially at least up to the year 1950. See Department of Agriculture Marketing Research Report No. 101, The Auction Marketing of Flue-cured Tobacco, p. 8.

The record in this case shows, however, that marketing practices in the tobacco industry have changed radically in recent years. An ever-increasing amount of tobacco is being taken from the type area in which it is grown into another type area for sale [18]—particularly into Georgia, where the higher prices which prevail on that market as a result of the commercially superior qualities of Type 14 tobacco constitute a powerful lure to growers and tobacco speculators who want to sell superficially similar tobacco of other types. This tremendous influx of unidentified commercially inferior tobacco threatens literally to destroy the Georgia market for Type 14 tobacco and rob the tobacco growers of that State of the value of their labor. By attempting to eliminate claimed unfairness and outright fraud in the sale of tobacco on the Georgia federal markets, the Georgia Act thus seeks to do no more than prevent a partial frustration through changing commercial practices of the very objective Congress itself sought to attain by the enactment of the Tobacco Inspection Act.

The whole structure of the Federal Act plainly shows, I think, that, far from precluding this sort of state cooperation in the effectuation of the federal purpose, Congress affirmatively intended and, as pointed out by Mr. Chief Justice Hughes in the *Townsend* and *Currin* cases, actually hoped for such cooperation. The Tobacco Inspection Act is not one that forces federal regulation on unwilling local communities. Before the Secretary of Agriculture can designate "auction markets" upon which

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[18] The record shows that this practice, which seems to have begun around 1955, has been growing each year since. Thus, in 1959, more than 22,000,000 pounds of non-Type 14 tobacco, representing some 17% of all the tobacco sold in Georgia that year, was brought into the State for sale to buyers on the implicit assumption that it was Georgia tobacco.

compliance with the provisions of the Act is mandatory, § 5 of the Act requires that a referendum be conducted and the consent of two-thirds of the growers who used the market in the previous season be obtained. That section also expressly denies the Secretary power to "close any market" or "to prevent transactions in tobacco at markets not designated" by him, although it does give him power to provide, on a purely voluntary basis, federal inspection and grading to those growers selling on such markets who wish to avail themselves of those services. Section 6 of the Federal Act expressly recognizes the continued existence of state functions and powers by providing that the Secretary of Agriculture may make agreements with state agencies covering employment of the inspectors, samplers and weighers who perform the tasks of inspecting, grading and typing tobacco, thus making it plain that even as to these most central features of the Federal Act Congress intended no sweeping exclusion of the States.

Insofar as the Court even bothers here to take a fresh look at the specific language and legislative history of the Federal Act, it does so, not for the purpose of re-evaluating the correctness of the understanding of the Act set forth in the *Townsend* and *Currin* cases, but solely for the purpose of showing that the Federal Act was designed to set up "uniform standards of classification and inspection" for tobacco to be sold at federally designated warehouses—a fact which I certainly do not controvert and which, so far as I know, none of the parties to this lawsuit has controverted. The Court makes no attempt to relate this fact to the issue in this case and show just how this congressional purpose supports an inference that Congress intended to preclude the States from requiring that the "uniform standards of classification" so established and applied by official federal inspection be disclosed on each lot of tobacco sold. Instead, the Court

proceeds from the bare fact of congressional legislation to the conclusion of federal pre-emption by application of a mechanistic formula which operates independently of congressional intent. That formula, as stated by the Court, is that "complementary state regulation is as fatal as state regulations which conflict with the federal scheme." I know of no case in which this formula has previously been applied by this Court. Certainly, the three cases which it cites do not support its action here.

Missouri Pacific R. Co. v. *Porter*,[19] the first case cited by the Court, did make the statement that state laws "cannot be applied in coincidence with, as complementary to or as in opposition to, federal enactments which disclose the intention of Congress to enter a field of regulation that is within its jurisdiction." But this statement was made only after the Court had discussed the congressional act involved there in great detail and found Congress to have concluded that "no other regulation is necessary." [20] That the Court in *Missouri Pacific* did not intend to go outside of the facts there before it and lay down a rule of automatic pre-emption by "coincidence" is plainly shown by the authorities relied upon to support its passing reference. The first case cited, *Napier* v. *Atlantic Coast Line R. Co.*,[21] is typical. In *Napier*, Mr. Justice Brandeis, in his usual careful way, declared that in considering the question of pre-emption "The intention of Congress to exclude States from exerting their police power must be clearly manifested . . . ." [22] The *Missouri Pacific* case can therefore support pre-emption only upon the basis of congressional intent and does not lend the slightest support to the mechanistic pre-emption rule which the Court applies here.

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[19] 273 U. S. 341.

[20] *Id.*, at 346.

[21] 272 U. S. 605.

[22] *Id.*, at 611.

The second case relied on by the Court for its mechanical formula is *Rice* v. *Santa Fe Elevator Corp.*[23] The *Santa Fe Elevator* case, however, does not support the Court's mechanical formula any more than the *Missouri Pacific* case. On the very page cited by the Court, it was said:

> "Congress legislated here in a field which the States have traditionally occupied. . . . So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."

More importantly, the Court did not in *Santa Fe Elevator* treat the question of pre-emption as one which could be settled by application of the rigid formula used here to strike down this Georgia law. Quite the contrary, recognizing that pre-emption "is often a perplexing question" the Court analyzed the issue before it at great length and concluded that Congress intended to pre-empt the supplementary state regulation there involved only after demonstrating that the language of the Warehouse Act as amended, "the special and peculiar history" of the amendment to the Act, and the underlying purpose of the Act all manifested a clear congressional purpose to pre-empt all state action in the field. Far from supporting the mechanical formula used by the Court here to declare Georgia's law unconstitutional, *Santa Fe Elevator* stands as a clear refutation of that formula, and contains a very clear statement of the proper rule which before today has governed this Court's holdings on pre-emption—the rule that pre-emption of the historic police powers of the States can be found only where "that was the clear and manifest purpose of Congress."

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[23] 331 U. S. 218, 230.

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The final case relied upon by the Court is *Hood & Sons* v. *Du Mond*.[24] But this was not a pre-emption case at all. There, a majority of the Court decided that a New York law burdened commerce in violation of the Commerce Clause. The Court's opinion did make a casual reference to "decisions that coincidence is as fatal as conflict when Congress acts," but it relied in no way upon this statement for its holding and the only case cited to support that proposition was one in which the Court held a State pre-empted by a federal statute only after carefully showing that Congress had intended to preclude state legislation of the kind there involved.[25]

Just a few weeks after the decision in *Hood & Sons* v. *Du Mond*, however, this Court did, in *California* v. *Zook*,[26] specifically deal with the argument "that when Congress has made specified activity unlawful, 'coincidence is as ineffective as opposition,' and state laws 'aiding' enforcement are invalid." The Court there emphatically rejected the idea that identity of purpose between a federal and a state statute meant "the automatic invalidity of state measures." It treated coincidence as only one factor in the complicated pattern of facts relevant to the question of pre-emption, pointing out, in the words of Mr. Justice Holmes, that this is a question which "must be answered by a judgment upon the particular case." [27] A dissent in the *Zook* case, written by Mr. Justice Burton

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[24] 336 U. S. 525, 543.

[25] *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U. S. 767.

[26] 336 U. S. 725, 729.

[27] *Id.*, at 731. The quotation relied upon from Mr. Justice Holmes is from his opinion for the Court in *Pennsylvania R. Co.* v. *Public Service Comm'n*, 250 U. S. 566, 569. This statement by Mr. Justice Holmes is especially significant in view of the fact that the primary authority often relied upon for a mechanistic rule of pre-emption is an earlier statement of his in *Charleston & Western Carolina R. Co.* v. *Varnville Furniture Co.*, 237 U. S. 597, 604. There, after holding the state statute involved unconstitutional as a burden on interstate

and concurred in by MR. JUSTICE DOUGLAS and Mr. Justice Jackson, took the position, apparently taken by the Court here, that, when Congress passes a law in the interstate commerce field and the State passes one consistent with it, "coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go." [28] That when Congress passes a law regulating interstate commerce, all state laws in any way touching on the subject are obliterated was nothing but a dissenting view before this case was decided today.

The correct test in determining whether a federal act results in pre-emption is that stated in *Rice* v. *Santa Fe Elevator,* which requires that "the historic police powers of the States . . . not . . . be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." [29] Measured by that test, the Georgia law here cannot be invalidated.

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commerce, he said: "When Congress has taken the particular subject-matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go." In view of his later holding, it seems clear that the oft-repeated remark of Mr. Justice Holmes was intended to be nothing more than a judgment of the intent of Congress "upon the particular case." See also *Bethlehem Steel Co.* v. *New York State Labor Relations Board,* 330 U. S. 767, 783 (separate opinion of MR. JUSTICE FRANKFURTER).

[28] 336 U. S., at 752. See n. 27, *supra.*

[29] *Napier* v. *Atlantic Coast Line R. Co.,* 272 U. S. 605, 611; *Missouri Pacific R. Co.* v. *Porter,* 273 U. S. 341, 346; *Kelly* v. *Washington,* 302 U. S. 1; *California* v. *Zook,* 336 U. S. 725; *Huron Portland Cement Co.* v. *City of Detroit,* 362 U. S. 440, 442–443. All these cases and many others that could be cited plainly show that this Court has consistently rejected the idea that every time Congress passes a law all state laws touching on the same subject are automatically destroyed. See also *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236, and the concurring opinion of MR. JUSTICE HARLAN, joined by MR. JUSTICE CLARK, MR. JUSTICE WHITTAKER and MR. JUSTICE STEWART, and cases cited therein.

There can be no doubt that the power upon which this Georgia law was based is one of the powers historically exercised by the States. As pointed out before, the power to regulate tobacco in order to protect the integrity of the product was exercised by Virginia as early as 1619. Indeed, in the midst of a marketing crisis in 1666, Lord Baltimore proposed a law closely similar to the Georgia law here which would have required that all tobacco from his Colony be labeled "Maryland" in order to distinguish it from Virginia tobacco, the only other type of tobacco then being grown in the Colonies.[30] Even this Court, in times past, has recognized the historic powers of the States in this area. In *Turner* v. *Maryland*,[31] the Court rejected the contention that the States are barred by the Commerce Clause from requiring that tobacco grown within their borders be labeled to indicate its origin, saying:

> "The legislature of the State of Maryland, from the earliest history of the colony and since the formation of the State government, has made the inspection of tobacco raised in that State compulsory. That inspection has included many features, and has extended to the form, size, and weight of the packages containing tobacco, as well as to the quality of the article. Fixing the identity and weight of tobacco alleged to have been grown in the State, and thus preserving the reputation of the article in markets outside of the State, is a legitimate part of inspection laws, and the means prescribed therefor in the statutes in question naturally conduce to that end."

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[30] Wyckoff, Tobacco Regulation in Colonial Maryland, p. 76. Contemporary Virginia legislation also sought to protect the reputation of Virginia tobacco in much the same manner. 2 Hening, Laws of Virginia, Act VIII, 1679; 3 Hening, Laws of Virginia, c. V, 1705; 4 Hening, Laws of Virginia, c. VI, 1726.

[31] 107 U. S. 38, 49.

I do not question the doctrine that a purpose of Congress to preclude all state legislation can be implied if the history, purpose, language, and comprehensiveness of an act makes such a congressional purpose clear and manifest. But I do not think that such a purpose can properly be found through use of so mechanically compelling a formula as the Court uses here—particularly when the result is to undercut a state policy of protecting tobacco growers and purchasers which has the experience in this country of almost three and a half centuries behind it.

NATIONAL LABOR RELATIONS BOARD *v.* OCHOA FERTILIZER CORP. ET AL.

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

No. 37. Argued November 16, 1961.—Decided December 18, 1961.

An employer and two labor organizations waived the procedures for adjudgment of the allegations of an unfair labor practice complaint issued against them under the National Labor Relations Act; agreed upon the form of a cease-and-desist order; consented that it be entered by the Board against them; and waived all defenses to the entry of a decree enforcing such order. Upon being petitioned for enforcement of the order under § 10 (e) of the Act, the Court of Appeals, *sua sponte*, modified the order by striking out references to other employers and other labor organizations and decreed enforcement of the order as so modified. *Held:* The Court of Appeals should have decreed enforcement of the Board's order without modification. Pp. 318–323.

283 F. 2d 26, reversed.

Solicitor General Cox argued the cause for petitioner. With him on the brief were *Stuart Rothman, Dominick L. Manoli* and *Norton J. Come.*

No appearance for respondents.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The respondents, an employer and two labor organizations, waived the procedures for adjudgment of the allegations of an unfair labor practice complaint issued against them under the National Labor Relations Act, and agreed upon the form of a cease-and-desist order to be entered by the National Labor Relations Board against them.[1]

[1] The complaint issued on amended charges filed by an individual denied employment. It issued in the name of the Regional Director for the 24th Region, Puerto Rico, acting on behalf of the General Counsel. The settlement agreement was reached following the issuance of the complaint. The respondents stipulated that they expressly waived "a hearing, an Intermediate Report of a Trial

The complaint alleged that the employer violated § 8 (a)(1), (2) and (3), and the labor organizations § 8 (b)(1)(A) and (2), of the Act, as amended, by executing and maintaining a collective bargaining agreement which conditioned employment upon union membership, vested the respondent unions with exclusive control over hiring, and provided for the checkoff of union dues and fees. The prohibitions of the consent order were not limited to the relationship between the employer and the two labor organizations. The respondent employer was directed to refrain from performing, maintaining or giving effect to such an agreement with the respondent unions, "or any other labor organization," and from otherwise unlawfully encouraging membership in the respondent unions, "or any other labor organization," by discrimination as to hire, tenure, or terms or conditions of employment; and the respondent unions were directed to refrain from performing, maintaining, or giving effect to such an agreement with the respondent employer, "or any other employer, over which the Board will assert jurisdiction," and from otherwise causing or attempting to cause the respondent employer, "or any other employer over which the Board will assert jurisdiction" to discharge, refuse to hire, or otherwise discriminate against any employee in violation of § 8 (a)(3) of the Act.[2]

The respondents also agreed that "any United States Court of Appeals for any appropriate circuit may on application by the Board, enter a decree enforcing the Order of the Board . . . ," and that "Respondents waive all defenses to the entry of the decree . . . ." R. 29.

Examiner, the filing of exceptions to such Intermediate Report, oral arguments before the Board, and all further and other proceedings to which [they] . . . may be entitled . . . under the Act or the Rules and Regulations of the Board." R. 23. See 49 Stat. 453, as amended, 29 U. S. C. § 160 (b), (c); 29 CFR, 1961 Cum. Supp., §§ 101.9, 102.46.

[2] The consent order also provided for the posting in English and in Spanish of agreed-upon forms of compliance notices.

The Board petitioned the Court of Appeals for the First Circuit for enforcement of the order pursuant to § 10 (e) of the Act.[3] The enforcement petition submitted the order in the form agreed upon and recited the terms of the settlement stipulation.

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[3] Section 10 (e), 49 Stat. 454, as amended, 29 U. S. C. § 160 (e), is as follows:

"(e) Petition to court for enforcement of order; proceedings; review of judgment.

"The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole 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 and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommenda-

The Court of Appeals, *sua sponte*,[4] and initially without filing an opinion giving reasons supporting its action, entered a decree which excised the phrases "or any other labor organization" and "or any other employer over which the Board will assert jurisdiction" wherever they appeared in the consent order and the compliance notices, and enforced the order as so modified. Subsequently, on the Board's second motion for reconsideration, the Court reconsidered its action in light of the opinion of the Court of Appeals for the Second Circuit in *Labor Board* v. *Combined Century Theatres, Inc.*, 46 LRR Man. 2858. That case held that in the face of a like stipulation "and in the absence of any exception to the order taken before the Board or the showing of any extraordinary circumstances, the Court will not consider respondents' objections." The motion for rehearing was denied in an opinion covering the present case and six others in which the Court of Appeals had similarly modified orders entered by the Board. 283 F. 2d 26.[5] Because we believed the case presented an important question of authority of the Court of Appeals in the premises we granted certiorari. 365 U. S. 833.

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tions, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28."

[4] The respondents honored their agreement not to contest the enforcement of the consent order both in the Court of Appeals and in this Court. Only the Board appeared by the Solicitor General in this Court to brief and argue the cause.

[5] Two of the cases are presently pending in this Court on petition for writ of certiorari. *Labor Board* v. *Las Vegas Sand & Gravel Corp.*, certiorari granted later and judgment reversed, *post*, p. 400; *Labor Board* v. *Local 476, Plumbers*, certiorari granted later and judgment reversed, *post*, p. 401.

The authority of the Court of Appeals to modify Board orders when the Board petitions for their enforcement derives from the provision of § 10 (e) authorizing the court "to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board." However, the immediately following sentence of § 10 (e) provides that "No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." At least when the Board has not "patently traveled outside the orbit of its authority," *Labor Board* v. *Cheney California Lumber Co.*, 327 U. S. 385, 388,[6] our cases have uniformly held that in the absence of a showing within the statutory exception of "extraordinary circumstances" the failure or neglect of the respondent to urge an objection in the Board's proceedings forecloses judicial consideration of the objection in enforcement proceedings. *Marshall Field & Co.* v. *Labor Board,* 318 U. S. 253; *May Department Stores Co.* v. *Labor Board,* 326 U. S. 376, 386, n. 5; *Labor Board* v. *Cheney California Lumber Co., supra; Labor Board* v. *Seven-Up Bottling Co.,* 344 U. S. 344, 350; *Labor Board* v. *District 50,* 355 U. S. 453, 463–464. These cases involved contested proceedings before the Board, as did *Labor Board* v. *Express Publishing Co.,* 312 U. S. 426, and *Communications Workers* v. *Labor Board,* 362 U. S. 479, upon which the Court of Appeals relied. The limitation of § 10 (e) applies *a fortiori* to the consideration of an objection to enforcement made by a respondent who has consented to the terms of the order. See *Labor Board* v. *Combined Century Theatres, Inc., supra.*

[6] The order here consented to would be within the Board's authority under appropriate circumstances. See, *e. g., Labor Board* v. *Springfield Building & Construction Trades Council,* 262 F. 2d 494, 498–499.

We understand the opinion of the Court of Appeals to hold that the limitation of § 10 (e) is inapplicable when the record contains no findings or facts supporting the order—that "affirmative reasons must appear to warrant broad injunctions." 283 F. 2d, at 29–30. The Court noted that there were no such findings or facts in this record—not even a "stipulation disclosing facts which warrant broad relief." *Id.*, at 31. The court reasoned that the limitation of § 10 (e) was therefore no barrier to its *sua sponte* revision of the order and stated that "We do not think that consent makes the difference." *Id.*, at 31. Contrary to the Court of Appeals, we think that consent makes a significant difference; it relieves the Board of the very necessity of making a supporting record. A decree rendered by consent "is always affirmed, without considering the merits of the cause." *Nashville, Chattanooga & St. Louis R. Co.* v. *United States,* 113 U. S. 261, 266. There are not here applicable any of the exceptions, such as a claim of lack of actual consent, or of fraud in the procurement of the order, or of lack of federal jurisdiction. See *Swift & Co.* v. *United States,* 276 U. S. 311, 324.

The judgment of the Court of Appeals is reversed and the case is remanded with directions that a judgment be entered which affirms and enforces the Board's order.

It is so ordered.

Mr. Justice Douglas dissents.

A. L. MECHLING BARGE LINES, INC., ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI.

No. 41. Argued November 8–9, 1961.—Decided December 18, 1961.

Over the protests of competing barge lines and without any hearing, investigation or findings, the Interstate Commerce Commission, basing its action on the first proviso in § 4 (1) of the Interstate Commerce Act, granted certain railroads temporary authority, pending further consideration, to charge less for certain long hauls of grain than for shorter hauls over the same line or route, notwithstanding the general prohibition of § 4 (1). The barge lines sued in a Federal District Court under 28 U. S. C. § 1336, which provides specifically for judicial review of the Commission's orders, and under the Administrative Procedure Act and the Declaratory Judgment Act, to have the order set aside and to have the Commission's practice of issuing such orders in such manner declared to be beyond its powers. The railroads then eliminated the long-haul short-haul rate discrimination; withdrew their applications to the Commission for its authorization; intervened in the suit; and, together with the Commission, moved for dismissal, on the grounds (1) of mootness, and (2) that the District Court lacked jurisdiction to grant a declaratory judgment. The District Court granted the motions to dismiss, and the barge lines appealed to this Court under 28 U. S. C. § 1253. *Held:*

1. The District Court should have vacated the Commission's order which it declined to review on the ground of mootness. Pp. 328–330.

2. In view of the fact that, on this appeal, the Commission has conceded that it is obliged to make findings before issuing such an order and that the order here involved is fatally defective for want of such findings, and the Commission's further representation that it has amended its practice accordingly, a declaratory judgment passing on the challenged Commission practice should be withheld at this time in the exercise of judicial discretion. This Court, therefore, does not decide whether there was an "actual controversy" before the District Court, or whether that Court otherwise had jurisdiction to render a declaratory judgment. Pp. 330–331.

3. The District Court's order dismissing the complaint is modified to provide that the proceedings are remanded to the Commission with direction to vacate and set aside the order here involved. P. 331.

188 F. Supp. 386, judgment modified.

Edward B. Hayes argued the cause and filed briefs for appellants.

Daniel M. Friedman argued the cause for the United States and the Interstate Commerce Commission, appellees. With him on the brief were *Solicitor General Cox, Assistant Attorney General Loevinger, Acting Assistant Attorney General Kirkpatrick, Richard A. Solomon, Lionel Kestenbaum, Robert W. Ginnane* and *H. Neil Garson.*

Donald M. Tolmie argued the cause for intervening railroads. With him on the briefs were *Edward A. Kaier, Robert H. Bierma, James M. Souby, Jr.* and *James E. Steffarud.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

In December 1958 the appellee railroads published and filed with the Interstate Commerce Commission tariffs establishing through combination rates, from grain producing areas in Northern Illinois to certain Eastern destinations, which were lower than local or flat rates for the same commodities from Chicago to the same destinations. Since these tariffs would be in violation of the long- and short-haul provisions of § 4 (1) of the Interstate Commerce Act,[1] the railroads simultaneously applied for the

[1] 24 Stat. 380, as amended, 49 U. S. C. § 4 (1):

"It shall be unlawful for any common carrier subject to this chapter or chapter 12 of this title to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance . . . ."

administrative relief which is authorized by the first proviso to § 4 (1).[2] Timely protests were filed by the appellant barge lines, alleging that the proposed railroad rates threatened the extinction of legitimate competition by water carriers for the traffic from the producing areas into Chicago. On January 9, 1959, Division 2 of the Commission entered Fourth Section Order No. 19059, authorizing the proposed railroad rates—although expressly withholding approval of them—pending further Commission action.[3] The Order was entered before any hearing had been held or investigation completed, and the Division did not set out any findings. On the same day, Division 2 ordered that an investigation be instituted with respect to the lawfulness of the rates.[4]

Pending final Commission determination as to whether permanent Fourth Section relief was warranted, and after Order 19059 had been in effect for 10 months, the appellant barge lines filed the action of which review is presently sought, in the District Court for the Eastern District of Missouri. The complaint was based in part on the statutory procedure for review of Interstate Commerce

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[2] "*Provided,* That upon application to the Commission and after investigation, such carrier, in special cases, may be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property, and the Commission may from time to time prescribe the extent to which such designated carriers may be relieved from the operation of the foregoing provisions of this section, but in exercising the authority conferred upon it in this proviso, the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and no such authorization shall be granted on account of merely potential water competition not actually in existence . . . ."

[3] Fourth Section Order No. 19059, Jan. 9, 1959, Grain and Grain Products from Illinois to the East.

[4] Docket No. 32790, Jan. 9, 1959, Corn, Oats, Soybeans—Illinois to the East.

Commission orders,[5] and it prayed the court to set aside Order 19059 on the ground that the Commission lacked power to grant Fourth Section relief as to protested tariffs without first completing a full investigation, holding an adversary hearing, and making explicit findings that the statutory criteria for the granting of such relief had been met.[6] The complaint also sought relief under the Declaratory Judgment Act [7] and under the judicial review provisions of the Administrative Procedure Act; [8] the complaint alleged that the challenged administrative practice was a continuing one, and prayed for a declaration that that practice was beyond the powers of the Commission.

Pending the determination of the action, the railroads eliminated the long-haul short-haul discrimination from their rates and notified the Commission by letter of their withdrawal of the Fourth Section application respecting which Order 19059 had granted temporary relief. Hav-

[5] Jurisdiction to enjoin and set aside orders of the Interstate Commerce Commission is conferred on the District Courts by 28 U. S. C. § 1336. Section 1398 locates venue in the district of the plaintiff's residence or principal office. Section 2322 makes the United States a nominal defendant, § 2323 authorizes the intervention of the Commission or of any interested party, and § 2325 requires such actions to be heard and determined by a three-judge court.

[6] The complaint alleged that the statutory requirement that the rate for the longer haul be "reasonably compensatory" had, by authoritative administrative gloss, been imbued with four distinct criteria, namely, that a rate so described must

"(1) cover and more than cover the extra or additional expenses incurred in handling the traffic to which it applies; (2) be no lower than necessary to meet existing competition; (3) not be so low as to threaten the extinction of legitimate competition by water carriers; and (4) not impose an undue burden on other traffic or jeopardize the appropriate return on the value of carrier property generally, as contemplated in section 15a of the act."

[7] 28 U. S. C. §§ 2201, 2202.

[8] 60 Stat. 243, 5 U. S. C. § 1009.

ing intervened as defendants in the pending lawsuit, the railroads, together with the Commission, then moved for dismissal of the action on the grounds, *first,* that as to the prayer for annulment of Order 19059 the withdrawal of the Fourth Section application had rendered the cause moot; and, *second,* that the District Court lacked jurisdiction to grant a declaratory judgment.[9] The District Court granted the motions to dismiss. 188 F. Supp. 386. The barge lines then perfected this appeal under 28 U. S. C. § 1253, and we postponed decision as to our jurisdiction until hearing on the merits. 365 U. S. 865.

We are, of course, in any event empowered and obliged to determine the jurisdictional questions in deciding whether the District Court correctly dismissed the case. And that is necessarily our initial inquiry on this appeal. Appellants do not deny that Order 19059 is presently devoid of practical effect, inasmuch as the Fourth Section application to which it relates has been withdrawn. Still, they insist that the case is neither moot nor inappropriate for the granting of declaratory relief.

First, appellants assert in their brief that they "have a continuing interest in having F. S. O. 19059 vacated since it would be a defense to any action by appellants against the railroads for damages suffered from the railroads' fourth section departure rates." Appellants point, in this connection, to certain of our decisions[10] which suggest

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[9] As to lack of jurisdiction to grant a declaratory judgment it was argued not only that there was no "actual controversy" within the meaning of 28 U. S. C. § 2201, but also that the statutory provisions set forth in note 5, *supra,* which incorporate no provision for declaratory relief, provide the exclusive mode of judicial review of Interstate Commerce Commission orders.

[10] *Lambert Run Coal Co.* v. *Baltimore & Ohio R. Co.,* 258 U. S. 377 (shipper's action to compel allotment of cars in contravention of I. C. C. rules must be brought in federal court pursuant to statutory review procedure); *Venner* v. *Michigan Central R. Co.,* 271 U. S. 127 (stockholder's suit to enjoin railroad from acquiring equipment as

to them that they will be precluded from attacking Order 19059 collaterally and that the order must be set aside, if at all, by statutory direct review.

In *United States* v. *Munsingwear, Inc.*, 340 U. S. 36, this Court expressed the view that a party should not be concluded in subsequent litigation by a District Court's resolution of issues, when appellate review of the judgment incorporating that resolution, otherwise available as of right, fails because of intervening mootness. We there held that that principle should be implemented by the reviewing court's vacating the unreviewed judgment below.[11] We think the principle enunciated in *Munsingwear* at least equally applicable to unreviewed administrative orders, and we adopt its procedure here. The District Court should have vacated the order which it declined to review.[12] Since our disposition rests solely

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authorized by I. C. C. order must be brought in federal court pursuant to statutory review procedure); *Callanan Road Co.* v. *United States*, 345 U. S. 507 (authority of I. C. C. to amend certificate cannot be raised collaterally in proceeding to interpret amended certificate).

[11] Such has been the long-standing practice of this Court in civil cases. See *United States* v. *Munsingwear, Inc.*, 340 U. S. 36, 39–40, n. 2; *Cozart* v. *Wilson*, 352 U. S. 884. In *Atchison, T. & S. F. R. Co.* v. *Dixie Carriers, Inc.*, 355 U. S. 179, this Court, having been apprised that the temporary Fourth Section relief order there under attack had been superseded and mooted by a subsequent Commission order, vacated the District Court's judgment and remanded with directions to dismiss the complaint—thus leaving the challenged administrative order unannulled. We do not consider that case to have established any precedent demanding our adherence here, since all the parties there joined in representing to the Court that the challenged order "is now only of academic interest." Memorandum Suggesting That the Cause is Moot, p. 3.

[12] In their letter informing the Commission of the withdrawal of their Fourth Section application, the railroads expressed their understanding that "the temporary Fourth Section Orders issued in response to this Application will be cancelled and the authority discontinued."

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on the mootness occasioned by the railroads' elimination of the long-haul short-haul discrimination, it is not to be taken as foreclosing determination, on any appropriate future occasion, as to (a) whether the Commission was empowered to enter Order 19059 utilizing the procedures it did; (b) whether Order 19059 was effective to authorize the Fourth Section departures to which it related; or (c) whether the pendency of Order 19059 establishes a defense for the railroads if the appellants carry out their intention expressed to us to predicate a damage suit against the railroads on the alleged violation of the statute. Of course, we here intimate no view as to whether there may exist a cause of action for damages in favor of a competing carrier predicated on a Fourth Section departure.

Second, appellants assert in their brief that since "the . . . practice of the Commission in granting 'temporary' authority for Fourth Section departures to the Railroads over the protests of the appellants and without any hearing or findings in the order granting such authority" is a "continuing" one, there is presently an actual controversy within the jurisdiction of the Court to resolve by declaratory judgment.[13]

We think it significant on this aspect of the case that the Commission has, on this appeal, conceded that it is obliged to make findings and that the challenged order is fatally defective because no supporting findings were made. The Commission further represents that it has amended its practice accordingly. It thus appears that one of the "continuing" practices whose validity appel-

[13] Appellants state that on several previous occasions judicial review of the practice which they challenge has failed because of intervening mootness occasioned either by the withdrawal of applications, citing *Coastwise Line* v. *United States,* 157 F. Supp. 305; *American Commercial Barge Line Co.* v. *United States,* Civ. No. 11772 (S. D. Tex. 1959), or by superseding Commission orders, citing *Atchison, T. & S. F. R. Co.* v. *Dixie Carriers, Inc.,* 355 U. S. 179.

lants would have us adjudicate continues no longer. Nor would it be appropriate to decide at this juncture whether the Commission is required to hold an evidentiary hearing prior to granting "temporary Fourth Section relief." Despite the Commission's present insistence that it is not so required, experience with its newly adopted practice of making findings in respect of all protested Fourth Section Orders may lead the Commission to provide for a hearing—at least under some circumstances.

Declaratory judgment is a remedy committed to judicial discretion. Nor need this Court first have the view of a lower court before it may decide that such discretion ought not be exercised. *Public Service Comm'n* v. *Wycoff Co.*, 344 U. S. 237. We think that sound discretion withholds the remedy where it appears that a challenged "continuing practice" is, at the moment adjudication is sought, undergoing significant modification so that its ultimate form cannot be confidently predicted. We do not, therefore, reach the possibly difficult questions whether appellants' challenge to the Commission's "continuing practice" gives rise to an actual controversy, or whether the District Court was on these pleadings otherwise possessed of jurisdiction to render a declaratory judgment.[14]

The order of the District Court dismissing the complaint is modified to provide that the proceedings are remanded to the Interstate Commerce Commission with direction to vacate and set aside Order 19059.

It is so ordered.

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

Believing that an actual controversy still exists in this case, I cannot agree that it is moot. In my opinion, the

[14] See note 9, *supra*.

events occurring subsequent to the filing of this suit have not negated the necessity for a decision on the issues raised by the complaint, and I would vacate the dismissal of the three-judge District Court and remand the case to it with instructions to pass on these issues.

The complaint filed by appellant barge lines sought to set aside, for lack of statutorily required findings, a temporary order of the Commission permitting certain railroads to impose higher tariffs for the transportation of grain "for a shorter than for a longer distance over the same line or route." The complaint also asked for a declaration that it was unlawful under the Act for the Commission and the railroads to engage in a practice whereby such illegal temporary orders in a continuous series were utilized to by-pass the long- and short-haul provisions of § 4 (1) of the Act. The railroads in question intervened in the case shortly after the complaint was filed. The issues raised by the complaint are twofold: (1) the validity of the temporary order, and (2) the validity of the alleged continuing practice used against appellants.

The three-judge District Court thought that the elimination by the railroads of the long-haul short-haul discrimination, accompanied by the withdrawal of the application which had sought permission for such discrimination, left the decision as to the validity of the temporary order a meaningless issue. This overlooks the fact that the validity of this order is still an actual controversy between the appellants and the intervening railroads. Neither the concession of invalidity by the Commission nor the vacation of the order pursuant to the Court's opinion is determinative of the order's validity. Upon the determination of this issue rests the ability of the appellants to collect damages occasioned by the tariffs used by the railroads pursuant to the temporary order, assuming that a plausible theory of liability exists (a

question which I need not now decide). For authority indicating that the validity issue is saved from mootness by the possibility that the order may "be the basis of further proceedings," see *Southern Pacific Terminal Co.* v. *Interstate Commerce Comm'n,* 219 U. S. 498, 515 (1911). Moreover, I note the fact that appellants would not be barred from challenging the order in a later suit—the point relied upon by the majority in affirming—does not render the issue moot in this case.

If the only need for a decision on the validity of this temporary order were to aid a suit for damages which *might* possibly be brought, I might not formally take issue with the decision below and its affirmance by my Brethren. However, because of the second issue raised by the complaint,[1] *i. e.,* an alleged circumvention of the Act by the utilization of a continuous stream of such temporary orders, the validity of this order, as well as the practice which gave birth to it, is presently disputed in this very case.

The continuing practice of which the appellants complain consists of an application by the railroads for an order permitting the imposition of a lower tariff for a long-haul than is charged for a short-haul over the same line; the issuance by the Commission of a temporary order without the necessary findings required by § 4 (1); the maintenance of such temporary order as long as possible by delaying the final disposition of the application; and the withdrawal or vacation of such order whenever a judicial test of its validity appears imminent, thereby frustrating any review on the ground of mootness. It is claimed that by continually repeating this process the railroads and the Commission have kept in effect an

[1] It could be argued that even if the continuing practice was not an issue in the case, its existence could be considered in determining whether the case is moot. See *Southern Pacific Terminal Co.* v. *Interstate Commerce Comm'n,* 219 U. S. 498 (1911).

illegal tariff for transportation by rail to the damage of the competing barge lines.

The lower court, although recognizing that the continuing practice issue was before it, felt that this question did not present a justiciable controversy. The opinion of the Court affirms this result by saying that regardless of whether this question presents an actual controversy, it is sound judicial discretion to withhold any relief because the Commission has renounced *before this Court* the challenged practice. It appears that the Court has placed itself in the dubious position of upholding a discretion that was never exercised on a ground that was never presented. I am mystified by the tactic which in effect exercises a discretion committed initially to the trial court in order to avoid deciding "possibly difficult questions" properly before this Court.

In my view the complaint as interpreted and applied by the court below raises an actual controversy as to the validity of the alleged practice.[2] Even though there is a controversy, the court below in the exercise of its discretion might decide that no relief, either injunctive or declaratory, is called for; however, I do not feel that the intervening partial repentance by the Commission compels the lower court to refuse relief. Rather I would think that the Commission's representation is only one fact to be considered along with all the other circumstances which appellants' affidavits indicate they would

[2] Analysis of the complaint reveals that appellants alleged the Commission "still follows the practice of entering such orders without supporting findings." It was requested that "the absence of any power and authority in the Commission to enter temporary fourth-section orders prior to a hearing, and to enter them without supporting findings, be definitely established." Also, appellants noted that the validity of the Commission's temporary order might become moot by the entry of a final order, "just as other cases in which similar relief has been sought have become moot before the issues could be determined by the Supreme Court."

show if afforded the opportunity.[3] Furthermore, the court below might take note of preceding cases which indicate that the railroads have played hanky-panky with their rates for years in an effort to attract freight away from the waterways.[4]

To sum up, at the time this case was dismissed as moot there was a charge that the Commission and the railroad intervenors were following a practice of using illegal "temporary" orders to frustrate the purpose of Congress to have the Act "so administered as to recognize and preserve the inherent advantages" of "all modes of transportation subject [thereto]. . . ." Based on this practice the appellants prayed that the temporary orders and the continuous practice be declared illegal and enjoined and for other appropriate relief. Under the record here presented, I am convinced that there is a controversy which if heard could be amenable to judicial relief. I would vacate the dismissal and remand the case to the court below for its consideration of the issues raised and for its decision thereon, including whether, in the exercise of *its* discretion, any injunctive or declarative relief is

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[3] Such other factors would include evidence that, in 1958–1959 alone, the water carriers had protested eight other separate and distinct § 4 relief applications in which temporary orders similar to that involved here were sought and obtained; that in over a year only one of these applications had been formally acted upon by the Commission; that two of these applications were withdrawn in the face of pending tests; that five of these applications are still awaiting final decision before the Commission with temporary orders having been in effect for over one and a half years; that these temporary rates were avowedly designed by the railroads to divert freight from the water carriers; and that as a result the water carriers lost thousands of tons of grain shipments per year.

[4] *Interstate Commerce Comm'n* v. *Mechling,* 330 U. S. 567 (1947); *Interstate Commerce Comm'n* v. *Inland Waterways Corp.,* 319 U. S. 671, 692–703 (dissenting opinion) (1943). Also see cases cited note 13 of the Court's opinion.

called for; and with the further instruction, in accordance with the practice utilized in *Bryan* v. *Austin*, 354 U. S. 933 (1957), that upon appellants' request they be granted leave to amend their pleadings to meet the changed condition of the case as brought about by the Commission's intervening concession that its order was void, as well as its renouncement of the challenged practice. Indeed, some of our cases indicate that if appellants at that time chose to assert their cause of action for damages, that too might be included in such amendment, in which event that claim would be heard by a single judge of the three-judge court. Compare *Bryan* v. *Austin, supra; Public Service Comm'n* v. *Brashear Freight Lines*, 312 U. S. 621 (1941).

TURNBOW ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 60. Argued November 15–16, 1961.—Decided December 18, 1961.

In the absence of a "reorganization," as that term is defined in § 112 (g)(1)(B) and used in § 112 (b)(3) of the Internal Revenue Code of 1939, the gain on an exchange of stock for stock *plus cash* is to be recognized in full. The taxpayer is not entitled under § 112 (c)(1) to have it recognized only to the extent of the cash. Pp. 337–344.

286 F. 2d 669, affirmed.

Francis N. Marshall argued the cause for petitioners. With him on the briefs were *Francis R. Kirkham* and *Harry R. Horrow.*

Wayne G. Barnett argued the cause for respondent. With him on the briefs were *Solicitor General Cox, Assistant Attorney General Oberdorfer, Harry Baum, A. F. Prescott* and *Arthur I. Gould.*

MR. JUSTICE WHITTAKER delivered the opinion of the Court.

This case involves and turns on the proper interpretation and interaction of §§ 112 (g)(1)(B), 112 (b)(3) and 112 (c)(1) of the Internal Revenue Code of 1939.[1] Specifically the question presented is whether, in the absence of a "reorganization," as that term is defined in § 112 (g)(1)(B) and used in § 112 (b)(3), the gain on an exchange of stock for stock *plus cash* is to be recognized in full, or, because of the provisions of § 112 (c)(1), is to be recognized only to the extent of the cash.

[1] Unless otherwise stated, all references to Code sections are to the Internal Revenue Code of 1939 (26 U. S. C., 1952 ed.).

The facts are simple and undisputed. Petitioner [2] owned all of the 5,000 shares of outstanding stock of International Dairy Supply Company ("International"), a Nevada corporation. In 1952, petitioner transferred all of the International stock to Foremost Dairies, Inc. ("Foremost"), a New York corporation, in exchange for 82,375 shares (a minor percentage) of Foremost's common (voting) stock of the fair market value of $15 per share or $1,235,625 *plus cash* in the amount of $3,000,000. Petitioner's basis in the International stock was $50,000, and his expenses in connection with the transfer were $21,933.06. Petitioner therefore received for his International stock property and money of a value exceeding his basis and expenses by $4,163,691.94.

In his income tax return for 1952, petitioner treated his gain as recognizable only to the extent of the cash he received. The Commissioner concluded that the whole of the gain was recognizable and accordingly proposed a deficiency. On the taxpayer's petition for redetermination, the Tax Court, following its earlier decision in *Bonham* v. *Commissioner,* 33 B. T. A. 1100, 1104,[3] and the opinion of the Seventh Circuit in *Howard* v. *Commissioner of Internal Revenue,* 238 F. 2d 943, 948,[4] held that the gain

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[2] Grover D. Turnbow will be referred to as though he were the sole petitioner, his wife being a party only because a joint return was filed.

[3] The Tax Court concluded "that *but for* the cash received by petitioner . . . the exchange would have met the 'solely' requirement of section 112 (g)(1)(B) and fallen within section 112 (b)(3). *Howard* v. *Commissioner, supra* at 948. Therefore, under section 112 (c)(1) the gain to petitioner may not be recognized in an amount in excess of [the cash received]." 32 T. C., at 652–653.

[4] In the *Howard* case, *supra,* the acquiring corporation obtained 80.19% of the stock of the acquired corporation by transferring to the holders, including petitioners, a part of its voting stock in exchange for their stock in the acquired corporation, and acquired the remaining 19.81% of the acquired corporation's stock from other holders for

was recognizable only to the extent of the cash. 32 T. C. 646. On the Commissioner's appeal, the Ninth Circuit disagreed with the Tax Court and with the Seventh Circuit's decision in the *Howard* case, *supra,* and reversed. 286 F. 2d 669. To resolve this conflict, on a matter of importance to the proper interpretation and uniform application of the Internal Revenue laws, we granted certiorari. 366 U. S. 923.

Because of the arbitrary and technical character, and of the somewhat "hodgepodge" form, of the statutes involved, the interpretation problem presented is highly complicated; and although both parties rely upon the "plain words" of these statutes, they arrive at diametrically opposed conclusions. That plausible arguments can be and have been made in support of each conclusion must be admitted; and, as might be expected, they have hardly lightened our inescapable burden of decision.

The starting point of our analysis must be the "General rule" stated in § 112 (a). It provides:

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an agreed price in cash. As stated, petitioners received only stock and no cash. The Commissioner determined that the gain realized by petitioners on their exchange solely of stock for stock should be recognized under the general rule of § 112 (a) of the Code. The Seventh Circuit, following this Court's decision in *Helvering* v. *Southwest Consolidated Corp.*, 315 U. S. 194, held "that because of the cash payment, the transaction in question fails to meet the 'solely' requirement of § 112 (g)(1)(B) of the 1939 Code. Hence it does not fall within the ambit of § 112 (b)(3)." 238 F. 2d, at 947. But, turning to and relying on § 112 (c)(1), it also held that "*but for* the cash received [by others than petitioners] in exchange for 19.81% of the common stock of Binkley, the transaction would have met the 'solely' requirement of § 112 (g)(1)(B) and fallen within the scope of § 112 (b)(3). To the extent that 'boot' was received, gain would be recognized under our interpretation of the application of § 112 (c)(1). However, no cash was received by the taxpayers in question, and as a consequence thereof, no gain at the time of the transaction ever arose." 238 F. 2d, at 948.

> "General rule. Upon the sale or exchange of property the entire amount of the gain or loss . . . shall be recognized, except as hereinafter provided in this section."

Various exceptions, dealing with exchanges solely in kind, are stated in subsections (b)(1) through (b)(6).[5] The exception claimed to be relevant here is contained in subsection (b)(3). It provides:

> "Stock for stock on reorganization. No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization."

By definition, contained in § 112 (g)(1)(B), the term "reorganization" means "the acquisition by one corpora-

[5] The various exceptions, respecting exchanges solely in kind, contemplated by § 112 (b), are the following:

§ 112 (b)(1): The exchange of tangible property, held for productive use or investment, "solely" for property "of a like kind."

§ 112 (b)(2): The exchange of stock "solely" for stock in the same corporation.

§ 112 (b)(3): The exchange of stock in a party to a "reorganization," as defined in § 112 (g)(1), "solely" for stock or securities in the same corporation or in another corporation which is a party to the reorganization.

§ 112 (b)(4): The exchange by a corporation, a party to a reorganization, of "property," in pursuance of the plan of reorganization, "solely" for stock or securities in another corporation which is a party to the reorganization.

§ 112 (b)(5): The transfer of property to a controlled corporation in exchange "solely" for stock or securities of that corporation.

§ 112 (b)(6): The receipt by a corporation of property in complete liquidation of another corporation.

See also § 112 (l) which provides a similar exception in respect to: The exchange of stock or securities "solely" for stock or securities of a successor corporation pursuant to a court-approved plan in debtor or insolvency proceedings.

tion, in exchange *solely* for all or a part of its voting stock, of at least 80 per centum of the . . . stock of another corporation." [6] (Emphasis added.) This type of reorganization is commonly called a "(B) reorganization."

There is no dispute between the parties about the fact that the transaction involved was not a "reorganization," as defined in § 112 (g)(1)(B), because "the acquisition by" Foremost was not "in exchange *solely* for . . . its voting stock," but was partly for such stock and partly for cash. *Helvering* v. *Southwest Consolidated Corp.*, 315 U. S. 194. Nor is there any dispute that the transaction was not actually within the terms of § 112 (b)(3), because the exchange was not of "stock . . . in . . . a party to a reorganization," "in pursuance of [a] plan of reorganization," nor "for stock . . . in another corporation [which was] a party to the reorganization."

But petitioner contends that § 112 (c)(1) authorizes the indulging of assumptions, contrary to the actual facts, hypothetically to supply the missing elements that are necessary to make the exchange a "reorganization," as

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[6] Section 112 (g)(1) provides:

"(g) Definition of reorganization. As used in this section . . . —

"(1) The term 'reorganization' means (A) a statutory merger or consolidation, or (B) the acquisition by one corporation, in exchange solely for all or a part of its voting stock, of at least 80 per centum of the voting stock and at least 80 per centum of the total number of shares of all other classes of stock of another corporation, or (C) the acquisition by one corporation, in exchange solely for all or a part of its voting stock, of substantially all the properties of another corporation, but in determining whether the exchange is solely for voting stock the assumption by the acquiring corporation of a liability of the other, or the fact that property acquired is subject to a liability, shall be disregarded, or (D) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its shareholders or both are in control of the corporation to which the assets are transferred, or (E) a recapitalization, or (F) a mere change in identity, form, or place of organization, however effected."

defined in § 112 (g)(1)(B) and as used in § 112 (b)(3), and the case turns on whether that is so. Section 112 (c)(1) provides:

> "Gains from exchanges not solely in kind. (1) If an exchange would be within the provisions of subsection (b)(1), (2), (3), or (5), or within the provisions of subsection (l), of this section if it were not for the fact that the property received in exchange consists not only of property permitted by such paragraph or by subsection (l) to be received without the recognition of gain, but also of other property or money, then the gain, if any, to the recipient shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property."

Centering upon this section, and upon the Seventh Circuit's interpretation of it in the *Howard* case, *supra*,[7] petitioner argues that "if it were not for the fact that the property [he] received in [the] exchange" consisted not only of voting stock—"property permitted [by § 112 (b)(3)] to be received [if in a corporation which is a party to a reorganization] without the recognition of gain"—but also of cash, the exchange *would have been* a "reorganization," as defined in § 112 (g)(1)(B), because, in that case, "the acquisition by" Foremost would have been "in exchange *solely* for . . . its voting stock"; and the exchange also *would have been* within the terms of § 112 (b)(3) because, in that case, the exchange would have been of "stock . . . in . . . a party to a reorganization," "in pursuance of [a] plan of reorganization," and "for stock . . . in another corporation [which was] a party to the reorganization." Petitioner then argues that inasmuch as his transaction *would have been* a "reorganization," as defined in § 112 (g)(1)(B) and

[7] See note 4.

used in § 112 (b)(3), and hence "would [have been] within the provisions of subsection (b) . . . (3)," "if it were not for the fact that the property [he] received" consisted "not only of" voting stock "but also of . . . money," § 112 (c)(1) authorizes the *assumption,* as respects the Foremost stock he received, that the exchange *was* a "reorganization," as defined in § 112 (g)(1)(B) and used in § 112 (b)(3), and hence precludes recognition of his gain "in excess of the . . . money" he received.

But we cannot agree that § 112 (c)(1) authorizes the assumption, contrary to the actual facts, of a "reorganization," as defined in § 112 (g)(1)(B) and used in § 112 (b)(3). To indulge such an assumption would actually be to permit the negation of Congress' carefully composed definition and use of "reorganization" in those subsections, and to permit nonrecognition of gains on what are, in reality, only sales, the full gain from which is immediately recognized and taxed under the general rule of § 112 (a). To the contrary, we think that an actual "reorganization," as defined in § 112 (g)(1) and used in § 112 (b)(3), must exist before § 112 (c)(1) can apply thereto. We are also agreed that § 112 (c)(1) can apply only if the exchange actually consists *both* of "property permitted by [subsection (b)(1), (2), (3), or (5), or subsection (l) of § 112] . . . to be received without the recognition of gain" *and* "other property or money." And we think it is clear that the "property permitted by [§ 112 (b)(3)] . . . to be received without the recognition of gain" is "stock or securities in . . . a party to a reorganization," "in pursuance of [a] plan of reorganization," and "for stock . . . in such corporation or in another corporation [which is] a party to the reorganization." Since, as is admitted, none of the property involved in this exchange actually met that description, none of it was "property permitted by [§ 112 (b)(3)] . . . to be received without the recognition of gain," and there-

fore § 112 (c)(1) does not apply to postpone recognition of petitioner's gain from the Foremost stock.[8]

This, of course, is not to say that § 112 (c)(1) is without purpose or function. It is to say only that it does not apply unless some part, at least, of the property exchanged *actually* meets the particular description contained in the applicable section or subsection of the Code. But, inasmuch as § 112 (g)(1)(B) defines "reorganization" to mean "the acquisition by one corporation, in exchange solely for all or a part of its voting stock, of at least 80 per centum of the . . . stock of another corporation," an exchange of stock *and* cash—approximately 30 per centum in stock and 70 per centum in cash—for "at least 80 per centum of the . . . stock of another corporation" cannot be a "reorganization," as defined in § 112 (g)(1)(B), nor hence of "stock . . . in . . . a party to a reorganization" as required by § 112 (b)(3), and thus § 112 (c)(1) cannot be applicable to petitioner's transaction. That holding determines this case and is all we decide.

Collaterally, petitioner argues that tax "loopholes" will be opened under other sections of the Code unless his interpretation is adopted. The Commissioner answers that "loopholes" will be opened under the sections involved and other sections only if petitioner's interpretation is adopted. Inasmuch as what we have said decides the case, we have no need or occasion to follow the parties into, or to decide, collateral questions.

Affirmed.

MR. JUSTICE HARLAN concurs in the result.

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[8] The legislative history, much of which is set forth in the opinion of the Court of Appeals, though tending to support our decision, is inconclusive, and no more can fairly be said of the Commissioner's Regulations. See Treas. Reg. 118, §§ 39.112 (c)–1 (e), 39.112 (g)–4, 39.112 (g)–1 (c).

VENUS *v.* UNITED STATES.

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

No. 75. Argued December 14, 1961.—Decided December 18, 1961.

Judgment reversed with instructions to dismiss the indictment.

Reported below: 287 F. 2d 304.

Hayden C. Covington argued the cause and filed briefs for petitioner.

Jerome M. Feit argued the cause for the United States. With him on the briefs were *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg.*

PER CURIAM.

The judgment is reversed with instructions to dismiss the indictment. *Ward* v. *United States,* 344 U. S. 924, reversing 195 F. 2d 441 (C. A. 5th Cir.).

DUTTON ET AL. *v.* TAWES, GOVERNOR OF MARYLAND.

APPEAL FROM THE COURT OF APPEALS OF MARYLAND.

No. 533. Decided December 18, 1961.

Appeal dismissed and certiorari denied.

Reported below: 225 Md. 484, 171 A. 2d 688.

Hyman A. Pressman for appellants.

Thomas B. Finan, Attorney General of Maryland, and *Joseph S. Kaufman,* Deputy Attorney General, for appellee.

PER CURIAM.

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

649690 O–62–28

BAILEY ET AL. *v.* PATTERSON ET AL.

ON MOTION FOR STAY INJUNCTION PENDING APPEAL.

No. —. Decided December 18, 1961.

The motion for an injunction to stay the prosecution of a number of criminal cases pending in the state courts of Mississippi, pending an appeal to this Court from the judgment of a three-judge Federal District Court denying such an injunction, is denied.

Reported below: 199 F. Supp. 595.

Constance Baker Motley, Jack Greenberg, James M. Nabrit III and *R. Jess Brown* for movants.

Joe T. Patterson, Attorney General of Mississippi, *Charles Clark* and *Peter M. Stockett,* Special Assistant Attorneys General, and *Dugas Shands* and *Edward L. Cates,* Assistant Attorneys General, for Patterson et al., and *Thomas H. Watkins* for the City of Jackson et al., respondents.

Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene and *Howard A. Glickstein* filed a memorandum for the United States, as *amicus curiae,* in support of the motion.

PER CURIAM.

This is a motion for an injunction to stay the prosecution of a number of criminal cases in the courts of Mississippi pending an appeal to this Court from the judgment of a three-judge Federal District Court. A federal injunction to stay state criminal proceedings is an extraordinary remedy. Cf. *Douglas* v. *City of Jeannette,* 319 U. S. 157; *Ex parte Young,* 209 U. S. 123. In addition to the considerations normally attending an application for such relief, a serious question of standing is presented on this

motion, in that it appears that the movants themselves are not being prosecuted in the Mississippi courts. On the record before us the motion for a stay injunction pending appeal is denied.

MR. JUSTICE BLACK and MR. JUSTICE FRANKFURTER concur in the denial of a stay solely on the ground that the three movants are not themselves being prosecuted or threatened with prosecutions in Mississippi and they therefore reach no other questions.

CREST FINANCE CO., INC., *v.* UNITED STATES.

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

No. 325. Decided December 18, 1961.

Certiorari granted; judgment vacated; and case remanded.
Reported below: 291 F. 2d 1.

Edmund L. Jones for petitioner.

Solicitor General Cox, Assistant Attorney General Oberdorfer, Wayne G. Barnett, Joseph Kovner and *George F. Lynch* for the United States.

Benjamin M. Nathan and *Theodore M. Newman* for National Commercial Finance Conference, Inc., as *amicus curiae,* in support of the petition.

PER CURIAM.

In the light of the Solicitor General's concession that petitioner's lien is choate, and the Court agreeing therewith, certiorari is granted, the judgment is vacated and the case is remanded to the Court of Appeals for further proceedings not inconsistent with this opinion.

MOREHOUSE ET AL. *v.* UNITED STATES ET AL.

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

No. 500. Decided December 18, 1961.

194 F. Supp. 940, affirmed.

Clarence D. Todd, G. Duane Vieth and *Robert N. Burchmore* for appellants.

Solicitor General Cox, Assistant Attorney General Loevinger, Richard A. Solomon, Robert W. Ginnane and *Fritz Kahn* for the United States et al.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

RAFTER *v.* HAYS ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 527. Decided December 18, 1961.

Appeal dismissed and certiorari denied.

Appellant *pro se.*

Louis J. Lefkowitz, Attorney General of New York, *Paxton Blair,* Solicitor General, and *Jean M. Coon,* Assistant Attorney General, for Honorable Aron Steuer, Justice of the New York Supreme Court, 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.

NEW YORK CENTRAL RAILROAD CO. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 482. Decided January 8, 1962.

194 F. Supp. 947, affirmed.

Robert D. Brooks and *Alfred A. Green* for appellant.

Solicitor General Cox, Assistant Attorney General Loevinger, Lionel Kestenbaum, Elliott H. Moyer and *Robert W. Ginnane* for the United States et al., and *Clyde B. Aitchison, John R. Turney, Frederick A. Babson, Jr.* and *John H. Eisenhart, Jr.* for the National Freight Traffic Assn., Inc., et al., appellees.

PER CURIAM.

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

SAVE WAY NORTHERN BOULEVARD, INC., *v.* NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 517. Decided January 8, 1962.

Appeal dismissed for want of a substantial federal question.

Reported below: 10 N. Y. 2d 727, 748, 176 N. E. 2d 839, 177 N. E. 2d 47.

Harold H. Levin and *Larry M. Lavinsky* for appellant.

Leo A. Larkin and *Seymour B. Quel* for appellee.

PER CURIAM.

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

BONNER *v.* CITY OF INDIANAPOLIS.

APPEAL FROM THE SUPREME COURT OF INDIANA.

No. 546. Decided January 8, 1962.*

Appeals dismissed and certiorari denied.

Reported below: 242 Ind. —, 174 N. E. 2d 55; 242 Ind. —, 174 N. E. 2d 54.

William C. Erbecker for appellants.

Patrick J. Smith for appellee.

PER CURIAM.

The motions to dismiss are granted and the appeals are dismissed. Treating the papers whereon the appeals were taken as petitions for writs of certiorari, certiorari is denied.

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*Together with No. 547, *Durham* v. *City of Indianapolis*, also on appeal from the same Court.

SEYMOUR *v.* SUPERINTENDENT OF WASHINGTON STATE PENITENTIARY.

CERTIORARI TO THE SUPREME COURT OF WASHINGTON.

No. 62. Argued December 13, 1961.—Decided January 15, 1962.

Petitioner is imprisoned in the Washington State Penitentiary under a sentence for attempted burglary imposed by a state court. He petitioned the State Supreme Court for habeas corpus, alleging that he is an Indian, that the alleged offense was committed in "Indian country," and that, therefore, exclusive jurisdiction was in the United States under 18 U. S. C. § 1153. The Court found that petitioner was a member of the Colville Tribe; but it denied habeas corpus on the ground that the place where the offense was committed was no longer an Indian reservation, though it had been a part of the Colville Indian Reservation. *Held:* The Colville Indian Reservation is still in existence; the land upon which the offense is alleged to have occurred is within the limits of that Reservation; the state courts had no jurisdiction to try petitioner for that offense; and the judgment denying habeas corpus is reversed. Pp. 352–359.

(a) The Act of March 22, 1906, providing for the disposition of surplus lands remaining in the South Half of the diminished Colville Indian Reservation did not dissolve that Reservation, and it is still in existence. Pp. 354–357.

(b) Even if the land upon which the alleged offense was committed was held by a non-Indian under a patent in fee, a different conclusion would not be required, since 18 U. S. C. § 1151 defines "Indian country" as including "all land within the limits of any Indian reservation . . . , notwithstanding the issuance of any patent." Pp. 357–358.

(c) A different conclusion is not required by the fact that the land on which the offense occurred is located within a governmental townsite laid out by the Federal Government under § 11 of the 1906 Act. Pp. 358–359.

55 Wash. 2d 109, 346 P. 2d 669, reversed.

Glen A. Wilkinson argued the cause and filed briefs for petitioner. *Claron C. Spencer* was with him on the briefs.

Stephen C. Way, Assistant Attorney General of Washington, argued the cause for respondent. With him on the brief was *John J. O'Connell,* Attorney General.

At the request of the Court, *Solicitor General Rankin* filed a memorandum for the United States.

Mr. Justice Black delivered the opinion of the Court.

The petitioner Paul Seymour was charged with burglary by the State of Washington in the Superior Court of Okanogan County and pleaded guilty to the lesser included offense of attempted burglary. Upon this plea he was convicted and sentenced to serve seven and one-half years in the state penitentiary. Later, he commenced this proceeding by filing a petition for writ of habeas corpus in the State Supreme Court urging that his state conviction was void for want of jurisdiction on the grounds that he was an enrolled, unemancipated member of the Colville Indian Tribe and therefore a ward of the United States; that the "purported crime" of burglary for which he had been convicted was committed in "Indian country" as defined in 18 U. S. C. § 1151; [1] and that burglary committed by an Indian in Indian country is an offense "within the exclusive jurisdiction of the United States" under 18 U. S. C. § 1153.[2] Since the petition, return and answer raised issues of fact, the State Supreme Court referred the matter to the original trial court to determine (1) whether petitioner was a member of the Colville Tribe, and (2) whether the offense was

[1] 62 Stat. 757, as amended, 63 Stat. 94.

[2] "Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, rape, incest, assault with intent to kill, assault with a dangerous weapon, arson, burglary, robbery, and larceny within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States." 62 Stat. 758.

committed in Indian country. After hearings, the trial court upheld petitioner's claim of membership in the Colville Tribe, but rejected his contention that the burglary upon which the state conviction was based had occurred in Indian country.

The trial court's conclusion that the crime did not take place in Indian country was not based upon any factual doubt as to the precise place where the burglary occurred for that fact was undisputed. Nor did that conclusion rest upon any uncertainty as to the proper definition of the term "Indian country" for the court expressly recognized the applicability of § 1151 which defines the term to include "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation . . . ." Rather, the trial court's conclusion rested solely upon its holding that, although the land upon which the burglary occurred had once been within the limits of an Indian reservation, that reservation had since been dissolved and the land in question restored to the public domain.

Agreeing with the trial court, the State Supreme Court then denied the petition for habeas corpus,[3] holding as it previously had in *State ex rel. Best* v. *Superior Court*,[4] that "What is still known as the south half of the diminished Colville Indian reservation is no longer an Indian reservation." Since the question of whether the place where the crime occurred is a part of an Indian reservation and therefore Indian country within the meaning of §§ 1151 and 1153 depends upon the interpretation and application of federal law, and since the resolution of that question as presented in this case raises issues of importance pertain-

[3] 55 Wash. 2d 109, 346 P. 2d 669.

[4] 107 Wash. 238, 241, 181 P. 688, 689.

ing to this country's relationship to its Indian wards, we granted certiorari.[5]

The case turns upon the current status of the Colville Indian Reservation—a reservation created in 1872 by Executive Order of President Grant which declared that "the country bounded on the east and south by the Columbia River, on the west by the Okanagan River, and on the north by the British possessions, be, and the same is hereby, set apart as a reservation for" the Colville Indians.[6] In 1892, the size of this reservation was diminished when Congress passed an Act providing that, subject to reservations and allotments made to individual Colville Indians, about one-half of the original Colville reservation, since commonly referred to as the "North Half," should be "vacated and restored to the public domain . . . ." [7] This Act did not, however, purport to affect the status of the remaining part of the reservation, since known as the "South Half" or the "diminished Colville Indian Reservation," but instead expressly reaffirmed that this South Half was "still reserved by the Government for their [the Colville Indians'] use and occupancy." [8] Since the burglary of which petitioner was convicted occurred on land within the South Half, it is clear that state jurisdiction over the offense charged, if it is to be found at all, must be based upon some federal action subsequent to the 1892 Act.

The Washington courts found authority for the assertion of state jurisdiction in a 1906 Act of Congress [9] implemented by a 1916 Presidential Proclamation.[10] The 1906 Act provided for the sale of mineral lands and

[5] 365 U. S. 833.

[6] I Kappler, Indian Affairs, Laws and Treaties (2d ed.), p. 916.

[7] 27 Stat. 62, 63.

[8] 27 Stat., at 64.

[9] 34 Stat. 80.

[10] 39 Stat. 1778.

for the settlement and entry under the homestead laws of other surplus lands remaining on the diminished Colville Reservation after allotments were first made and patents issued for 80 acres of land to "each man, woman, and child" either "belonging to or having tribal relations on said Colville Indian Reservation . . . ." The 1916 Presidential Proclamation issued pursuant to this Act simply prescribed the method for disposal of surplus lands under the homestead laws as the 1906 Act had authorized. The Washington courts viewed this 1906 Act and the 1916 Presidential Proclamation as completely wiping out the South Half of the Colville Reservation in precisely the same manner as the 1892 Act had "vacated and restored" the North Half of the reservation "to the public domain." Upon careful consideration, however, we cannot agree with that conclusion for it has no support in the language of the 1906 Act and ignores important differences between that Act and the provisions of the 1892 Act restoring the North Half of the reservation to the public domain.

Nowhere in the 1906 Act is there to be found any language similar to that in the 1892 Act expressly vacating the South Half of the reservation and restoring that land to the public domain. Quite the contrary, the 1906 Act repeatedly refers to the Colville Reservation in a manner that makes it clear that the intention of Congress was that the reservation should continue to exist as such.[11] Moreover, the 1906 Act, unlike the 1892 Act, provides that the proceeds from the disposition of lands affected by its provisions shall be "deposited in the Treasury of the United States to the credit of the Colville and confederated tribes of Indians belonging and having tribal rights on the Colville Indian Reservation, in the State of Washington . . . ." The 1892 Act had provided for congressional power to appropriate the net proceeds

[11] See §§ 2, 3, 6 and 12, 34 Stat., at 80–82.

from the sale and disposition of lands in the North Half of the original reservation for the general public use. Consequently, it seems clear that the purpose of the 1906 Act was neither to destroy the existence of the diminished Colville Indian Reservation nor to lessen federal responsibility for and jurisdiction over the Indians having tribal rights on that reservation. The Act did no more than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards.

That this is the proper construction of the 1906 Act finds support in subsequent congressional treatment of the reservation. Time and time again in statutes enacted since 1906, Congress has explicitly recognized the continued existence as a federal Indian reservation of this South Half or diminished Colville Indian Reservation.[12] As recently as 1956, Congress enacted a statute which provides that "the undisposed-of lands of the Colville Indian Reservation, Washington, dealt with by the Act of March 22, 1906 (34 Stat. 80), are hereby restored to tribal ownership to be held in trust by the United States to the same extent as all other tribal lands *on the existing reservation,* subject to any existing valid rights." [13]

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[12] See, *e. g.*, 39 Stat. 123, 154–155; 39 Stat. 672; 40 Stat. 449; 41 Stat. 535; 43 Stat. 21; 54 Stat. 703; 69 Stat. 141, 143; 70 Stat. 626–627. Two of these statutes, 40 Stat. 449 passed in 1918 and 41 Stat. 535 passed in 1920, do illustrate that there may have been some congressional confusion on this issue during that short period of time for they referred to the "former Colville Indian Reservation, Washington."

[13] 70 Stat. 626–627. It is also significant that § 5 of this 1956 Act, while recognizing the continued existence of the Colville Reservation, contained a provision looking towards "the termination of Federal supervision over the property and affairs of the Confederated Tribes and their members . . ." within a reasonable time. This Act followed closely a 1953 Act, 67 Stat. 588, 590, § 7 of which provided a way in which the State of Washington could acquire jurisdiction over the

(Emphasis supplied.) This same construction of the 1906 Act has been adopted by the Department of Interior, the agency of government having primary responsibility for Indian affairs.[14] And the Solicitor General has urged this construction upon the Court in this very case. We therefore conclude that the Washington courts erred in holding that the 1906 Act dissolved the Colville Indian Reservation because it seems clear that this reservation is still in existence.

Counsel for the State of Washington present two alternative contentions which, if sound, would sustain the jurisdiction of the State over the land here in question even if the Act of 1906 did not completely dissolve the reservation in the manner held by the Washington courts. The first of these rests upon the assertion that the particular parcel of land upon which this burglary was committed is held under a patent in fee by a non-Indian. The contention is that, even though the reservation was not dissolved completely by the Act permitting non-Indian settlers to come upon it, its limits would be diminished by the actual purchase of land within it by non-Indians because land owned in fee by non-Indians cannot be said to be reserved for Indians. This contention is not entirely implausible on its face and, indeed, at one time had the support of distinguished commentators on Indian Law.[15] But the issue has since been squarely put to rest by congressional enactment of the currently prevailing definition of Indian country in § 1151 to include "all land within the limits of any Indian reservation under the jurisdiction

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reservation by meeting certain conditions prescribed there by Congress. See *Williams* v. *Lee*, 358 U. S. 217, 222, note 10. These conditions have not as yet been met with respect to the Colville Reservation.

[14] See, *e. g.*, 54 I. D. 559; 59 I. D. 147; 60 I. D. 318.

[15] See, *e. g.*, Cohen, Handbook of Federal Indian Law, 359 (1942). Of course this work was compiled before the 1948 amendment which enacted the present definition of Indian country as set out in 18 U. S. C. § 1151.

of the United States Government, notwithstanding the issuance of any patent . . . ."

The State urges that we interpret the words "notwithstanding the issuance of any patent" to mean only notwithstanding the issuance of any patent to an Indian. But the State does not suggest, nor can we find, any adequate justification for such an interpretation. Quite the contrary, it seems to us that the strongest argument against the exclusion of patented lands from an Indian reservation applies with equal force to patents issued to non-Indians and Indians alike. For that argument rests upon the fact that where the existence or nonexistence of an Indian reservation, and therefore the existence or nonexistence of federal jurisdiction, depends upon the ownership of particular parcels of land, law enforcement officers operating in the area will find it necessary to search tract books in order to determine whether criminal jurisdiction over each particular offense, even though committed within the reservation, is in the State or Federal Government.[16] Such an impractical pattern of checkerboard jurisdiction was avoided by the plain language of § 1151 and we see no justification for adopting an unwarranted construction of that language where the result would be merely to recreate confusion Congress specifically sought to avoid.

The second alternative contention pressed by the State of Washington rests upon the fact that the land on which the burglary occurred is located within the governmental townsite of Omak, a town laid out by the Federal Government pursuant to authority granted in § 11 of the 1906 Act. The State contends that when this authorized townsite plot was filed for record in Okanogan County,

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[16] Objection to the possibility of such an administratively unworkable distribution of criminal jurisdiction has been voiced by the Solicitor of the Department of Interior. 61 I. D. 298, 304. And see *United States* v. *Frank Black Spotted Horse*, 282 F. 349, 353–354.

all the lands encompassed within the townsite were thereby dedicated to the public interest and, since this dedication to the public is inconsistent with any reservation for the Indians, all these lands became subject to the exercise of criminal jurisdiction by the courts of Washington. This contention is nothing more than a variation of the State's first alternative contention for it simply attempts to make a special case for excluding from a reservation lands owned by towns as opposed to lands owned by individual non-Indians. The arguments which led us to reject the State's first alternative contention, though present only with somewhat less force here, are nonetheless entirely adequate to require the same answer to this contention. Moreover, the State can point to no language in § 1151's definition of Indian country which lends the slightest support to the idea that by creating a townsite within an Indian reservation the Federal Government lessens the scope of its responsibility for the Indians living on that reservation.

In *United States* v. *Celestine*,[17] this Court said that "when Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress." We are unable to find where Congress has taken away from the Colville Indians any part of the land within the boundaries of the area which has been recognized as their reservation since 1892. Since the burglary with which petitioner was charged occurred on property plainly located within the limits of that reservation, the courts of Washington had no jurisdiction to try him for that offense.

The judgment of the Washington Supreme Court denying petitioner's plea for a writ of habeas corpus is therefore reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

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[17] 215 U. S. 278, 285.

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

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

No. 74. Argued November 16, 1961.—Decided January 15, 1962.

After this Court had sustained, 363 U. S. 166, the finding of the Federal Trade Commission that respondent had violated § 2 (c) of the Clayton Act by reducing its commissions on sales by only one seller to only one buyer, the Court of Appeals, on remand, modified *sua sponte* the Commission's cease-and-desist order so as to eliminate all references to "any other seller principal" and to "any other buyer," thus limiting application of the order to future sales by the same seller to the same buyer. *Held:* In the circumstances of this case, the order should have been affirmed in the form entered by the Commission. Pp. 361–368.

(a) The Commission has a wide discretion to formulate a remedy adequate to prevent respondent's repetition of the violation it was found to have committed, and it cannot be said that, in paragraph (1) of its order, the Commission exceeded its discretion in banning such repetitions in connection with transactions involving *any* seller and buyer, rather than simply forbidding recurrence of the transgression in sales between the same seller and buyer. Pp. 363–364.

(b) In the circumstances of this case and on this record, the attempt of the Court of Appeals to redress the asserted overbroadness of paragraph (2) of the Commission's order by the inapt device of confining that paragraph to sales between the same parties was inappropriate. Pp. 364–367.

285 F. 2d 764, reversed.

Solicitor General Cox argued the cause for petitioner. With him on the briefs were *Assistant Attorney General Loevinger, Daniel M. Friedman, Richard A. Solomon, Irwin A. Seibel, Charles H. Weston, James McI. Henderson, PGad B. Morehouse* and *Alan B. Hobbes.*

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

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The Federal Trade Commission seeks reversal of the action of the Court of Appeals for the Seventh Circuit in modifying the cease-and-desist order which the Commission had issued against the respondent Broch on finding that Broch violated § 2 (c) of the Clayton Act.[1] 285 F. 2d 764. The action of the Court of Appeals was *sua sponte*, and was taken in proceedings on remand which followed our reversal of that Court's earlier action setting aside the order in its entirety because Broch's conduct was thought not to violate § 2 (c).[2] *Federal Trade Comm'n* v. *Broch & Co.*, 363 U. S. 166, reversing 261 F. 2d 725. We granted certiorari, 366 U. S. 923.

Broch is a broker selling food products on commission for some 25 seller principals. One of his principals is

[1] Section 2 (c) as amended by the Robinson-Patman Act, 49 Stat. 1527, 15 U. S. C. § 13 (c), is as follows:

"(c) Payment or acceptance of commission, brokerage or other compensation.

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid."

[2] Following the remand Broch filed a motion which sought, *inter alia*, a modification of the order on the ground of its allegedly "unduly broad scope." In opposing the motion the Commission claimed that Broch had not objected to the scope of the order in the proceedings before the Commission or in the original review proceedings, and was therefore not entitled to have the Court entertain the motion. Broch's motion was denied but the order embodying the denial also included the provision questioned here amending the order "On the Court's own motion."

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Canada Foods, Ltd., a processor of apple concentrate. The Commission found that Broch, to make possible Canada Foods' acceptance of an offer from J. M. Smucker Co. to buy an unusually large quantity of apple concentrate at less than Canada Foods' established price, reduced to 3%, for this sale, the agreed 5% rate of commission ordinarily payable by Canada Foods to Broch.[3] The Commission adjudged, and in our prior opinion we agreed, that this action of Broch was, in the circumstances, a violation of § 2 (c).

The Commission's order was not confined to restraints against repetition of the precise violation of § 2 (c) which Broch was found to have committed, nor was the application of the order limited to future sales from Canada Foods to Smucker.[4] Paragraph (1) did prohibit the

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[3] There was evidence in the proceedings before the Commission that, following the transaction described above, Broch continued to sell apple concentrate to Smucker on behalf of Canada Foods at a reduced price and to receive a reduced commission of 3% on such sales.

[4] The Commission's order was as follows:

"*It is ordered* That respondents Henry Broch and Oscar Adler, copartners trading as Henry Broch & Co., their representatives, agents, or employees, directly or through any corporate or other device, in connection with the sale of food or food products for Canada Foods Ltd., or any other seller principal, in commerce, as 'commerce' is defined in the Clayton Act, as amended, do forthwith cease and desist from:

"(1) Paying, granting or allowing, directly or indirectly, to The J. M. Smucker Co., or to any other buyer, or to anyone acting for or in behalf of or who is subject to the direct or indirect control of such buyer, any allowance or discount in lieu of brokerage, or any part or percentage thereof, by selling any food or food products to such buyer at prices reflecting a reduction from the prices at which sales of such foods are currently being effected by respondents for Canada Foods Ltd. or any other seller principal, as the case may be, where such reduction in price is accompanied by a reduction in the regular rate of commission, brokerage or other compensation cur-

repetition of the particular violation which Broch committed, but in connection with sales for Canada Foods, or for "any other seller principal," to Smucker, or "to any other buyer." Paragraph (2) also extended its prohibitions to sales from all seller principals to all buyers, but went beyond paragraph (1) to prohibit Broch from "In any other manner . . . directly or indirectly" paying, granting or allowing, in the words of § 2 (c), "anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof . . . ." The Court of Appeals excised from the order all references to "any other seller principal" and to "any other buyer," thus limiting the order's application to future sales from Canada Foods to Smucker.

The Commission renews here the argument it made in the Court of Appeals that judicial modification of the order was precluded because Broch failed to object to the scope of the order before the Commission. Broch disputes that he failed to register a proper objection before the Commission. We see no reason to determine the fact. We will assume, without deciding, that the Court of Appeals properly passed upon the scope of the order. We nevertheless think that in the circumstances of this case the order should have been affirmed in the form entered by the Commission.

Broch supports the action of the Court of Appeals as to paragraph (1) of the order with the argument that,

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rently being paid to respondents by such seller principal for brokerage services; or

"(2) In any other manner, paying, granting or allowing, directly or indirectly, to The J. M. Smucker Co., or to any other buyer, or to anyone acting for or in behalf of or who is subject to the direct or indirect control of such buyer, anything of value as a commission, brokerage or other compensation or any allowance or discount in lieu thereof upon, or in connection with, any sale of food or food products to such buyer for its own account."

since the order was based only upon findings limited to an asserted illegal payment respecting a single sale from Canada Foods to Smucker, the Commission's ban was too sweeping in its application to sales from *all* seller principals to *all* buyers. There is no merit in this argument. The Commission has a wide discretion to formulate a remedy adequate to prevent Broch's repetition of the violation he was found to have committed. See *Jacob Siegel Co.* v. *Federal Trade Comm'n,* 327 U. S. 608, 611–612. We cannot say that the Commission exceeded its discretion in banning repetitions of Broch's violation in connection with transactions involving *any* seller and buyer, rather than simply forbidding recurrence of the transgression in sales between Canada and Smucker. *Federal Trade Comm'n* v. *Cement Institute,* 333 U. S. 683, 728–729. Compare *United States* v. *United States Gypsum Co.,* 340 U. S. 76, 90.

Broch further argues that the Commission exceeded its discretion in the prohibitions embodied in paragraph (2). He did not cross-petition this Court for a writ of certiorari and does not here challenge paragraph (2) as modified by the Court of Appeals. Had the only vice claimed in paragraph (2) been its extension to all seller principals and all buyers, the Court of Appeals' *sua sponte* amendment would for reasons already stated have been clearly erroneous. But Broch contends that, before it was restricted to transactions involving Canada and Smucker, this part of the order was so broad as to jeopardize the conduct of his entire business, in that it unqualifiedly prohibited reductions of commissions coupled with lower prices—even uniform reductions, or reductions which are service- or cost-justified, or reductions for the purpose of meeting competition.

In considering Broch's challenge to paragraph (2) it is necessary to observe that the 1959 amendments to § 11 of the Clayton Act—which substitute for the Clayton Act

provisions for enforcement of administrative orders those in § 5 of the Federal Trade Commission Act—do not apply to enforcement of the instant order.[5] In consequence, Broch cannot be subjected to penalties except for violation of an enforcement order yet to be entered by an appropriate Court of Appeals, to be predicated upon a determination that some particular practice of Broch violated the Commission's order. Thus Broch is not, by virtue of that order, presently acting under the risk of incurring any penalty without further administrative and judicial consideration and interpretation, despite the fact that he has already received determination of his petition for review. *Federal Trade Comm'n* v. *Ruberoid Co.*, 343 U. S. 470, 477–480.[6]

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[5] 38 Stat. 734, 15 U. S. C. § 21, as amended July 23, 1959, Pub. L. 86–107, 73 Stat. 243. The order herein was entered by the Commission on December 10, 1957. The procedures enacted by the 1959 amendments therefore do not apply to it. See *Sperry Rand Corp.* v. *Federal Trade Comm'n*, 110 U. S. App. D. C. 1, 288 F. 2d 403.

[6] The 1959 Amendments resulted from a congressional conclusion that the former § 11 procedures were too cumbersome to assure effective enforcement of agency orders. It was said in the House Committee Report accompanying the 1959 amendments:

"The Clayton Act, in its present enforcement procedures, permits a person to engage in the same illegal practices three times before effective legal penalties can be applied as a result of action by the commission or board vested with jurisdiction. First, in order to issue and serve a cease-and-desist order initially, the commission or board must investigate and prove that the respondent has violated the prohibitions of the Clayton Act. No provision of the Clayton Act, however, makes the commission or board's cease-and-desist order final in the absence of an appeal by the respondent for judicial review. At the present time, the Clayton Act contains no procedure by which the commission or board may secure civil penalties for violations of its orders.

"Second, before the commission or board may obtain a court ruling that commands obedience to its cease-and-desist order, it must again investigate and prove that the respondent has violated both the order and the Clayton Act. The jurisdiction of the court of appeals, under

Upon any future enforcement proceeding, the Commission and the Court of Appeals will have ready at hand interpretive tools—the employment of which we have previously sanctioned—for use in tailoring the order, in the setting of a specific asserted violation, so as to meet the legitimate needs of the case. They will be free to construe the order as designed strictly to cope with the threat of future violations identical with or like or related to the violations which Broch was found to have committed,[7] or as forbidding "no activities except those which if continued would directly aid in perpetuating the same old unlawful practices." *Federal Trade Comm'n* v. *Cement Institute,* 333 U. S. 683, 727. They need not—as we have already made clear—read the order as denying

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the present provisions of Clayton Act section 11, cannot be invoked by the commission or board unless a violation of the cease-and-desist order is first shown.

"Third, enforcement of the court's order must be secured in a subsequent contempt proceeding, which requires proof that new activities of the respondent have violated the court's order. This entails a third hearing before the commission and a review thereof by the court of appeals.

"In contrast, the procedures that are contained in the Federal Trade Commission Act for enforcement of cease-and-desist orders issued thereunder are much simpler and more direct. A cease-and-desist order issued pursuant to section 5 of the Federal Trade Commission Act, as amended, becomes final upon the expiration of the time allowed for filing a petition for review, if no such petition is filed within that time." H. R. Rep. No. 580, 86th Cong., 1st Sess. 4. See also S. Rep. No. 83, 86th Cong., 1st Sess. 2–3.

[7] Cf. *Federal Trade Comm'n* v. *Morton Salt Co.,* 334 U. S. 37, 51–53; *Federal Trade Comm'n* v. *National Lead Co.,* 352 U. S. 419, 430–431. "In carrying out [its] function the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity." *Federal Trade Comm'n* v. *Ruberoid Co.,* 343 U. S. 470, 473.

to Broch the benefit of statutory defenses or exceptions. *Federal Trade Comm'n* v. *Ruberoid Co., supra,* at 475–476; *Federal Trade Comm'n* v. *National Lead Co.,* 352 U. S. 419, 426.[8] Nor need the order be construed as prohibiting anything as clearly lawful as a uniform reduction in commissions.[9] And, we repeat, these various interpretive aids will have to be brought to bear by a Court of Appeals upon a particular practice of Broch, and will have to yield the announced result that such practice violates the order, before Broch can be subjected to penalties because of still a second repetition of the violation.

In this situation, and on this record, we hold that the attempt of the Court of Appeals to redress the asserted overbroadness by the inapt device of confining paragraph (2) to Canada's sales to Smucker was inappropriate and, indeed, any attempt to restrict the scope of the order would have been premature.

We do not wish to be understood, however, as holding that the generalized language of paragraph (2) would necessarily withstand scrutiny under the 1959 amendments.[10] The severity of possible penalties prescribed

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[8] Broch complains of the order's omission of any reference to the statutory exception for brokerage "for services rendered in connection with the sale or purchase of goods . . . ." We made it clear in our prior opinion that the order need not be read as prohibiting transactions to which the statutory exception applies. 363 U. S., at 173, 177, n. 19. Nor need the order, when viewed in the context of Broch's violation, be read as prohibiting Broch from reducing commissions competitively to gain a particular buyer's account, if the competitive setting would otherwise have afforded a defense to a charge under § 2 (c).

[9] "Had respondent . . . agreed to accept a 3% commission on all sales to all buyers there plainly would be no room for finding that the price reductions were violations of § 2 (c). Neither the legislative history nor the purposes of the Act would require such an absurd result, and neither the Commission nor the courts have ever suggested it." 363 U. S., at 176.

[10] See notes 5, 6, *supra.*

by the amendments for violations of orders which have become final underlines the necessity for fashioning orders which are, at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application.[11] See *Labor Board* v. *Express Pub. Co.*, 312 U. S. 426, 435–437; *Federal Trade Comm'n* v. *Cement Institute*, 333 U. S. 683, 726; *Federal Trade Comm'n* v. *Morton Salt Co.*, 334 U. S. 37, 54. Compare *New Haven R. Co.* v. *Interstate Commerce Comm'n*, 200 U. S. 361, 404; *Swift & Co.* v. *United States*, 196 U. S. 375, 400–401.

The judgment of the Court of Appeals is reversed and the case is remanded with direction to affirm the order of the Federal Trade Commission.

It is so ordered.

MR. JUSTICE BLACK concurs in the result.

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

On the Court's assumption that the Court of Appeals had power, *sua sponte*, to modify the decree, I would affirm. This Court reversed the judgment of the Court of Appeals on the prior appeal largely on the very narrow ground that petitioner's "reduction in brokerage was made to obtain this particular order and this order only . . . ,"

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[11] The penalties under the 1959 amendments are as follows:

"Any person who violates any order issued by the commission or board under subsection (b) of this section after such order has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation . . . . Each separate violation of any such order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the commission or board each day of continuance of such failure or neglect shall be deemed a separate offense."

363 U. S. 166, 176, and therefore the Court of Appeals was justified in limiting the Commission's order accordingly.

When its attention is focused to the appropriateness of the scope of an order to restrain illegality, the Commission has shown responsible awareness of the difference in shaping its order to a situation like the one presented by this case, to wit: a specific, closely confined illegality as distinguished from a widespread illegal practice inimical to the public interest. See opinion of the Commission in *In re Colgate-Palmolive Co. and Ted Bates & Co.*, Docket No. 7736, December 29, 1961, CCH Trade Reg. Rep., ¶ 15,643, pp. 20,474, 20,485. So, too, has the United States Court of Appeals for the Second Circuit shown responsive awareness and appreciation of that distinctive difference. *Swanee Paper Corp.* v. *Federal Trade Comm'n,* 291 F. 2d 833, 837–838.

UNITED STATES ET AL. *v.* DRUM ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA.

No. 23. Argued October 11–12, 1961.—Decided January 15, 1962.*

Each of the individual appellees owns a truck tractor which he operates under a leasing arrangement with a furniture manufacturer in the interstate transportation of the manufacturer's furniture and in the backhaul of raw materials used in the manufacture of its products. Appellees are compensated for the use of their tractors and for their services as drivers solely on the basis of fixed rates per mile driven. They bear all of the operating costs of the transportation and assume the financial risk of profit or loss thereon. The manufacturer has a collective-bargaining agreement with the union representing appellees and grants them certain benefits of employees, including, *inter alia,* seniority rights, job security, death benefits, vacation pay and social security and workmen's compensation coverage. The Interstate Commerce Commission found that appellees are "contract carriers" within the meaning of § 203 (a) (15) of the Interstate Commerce Act and are subject to the licensing requirements of § 209 (a) (1), and it ordered them to cease and desist from operating without permits. The District Court held that the transportation was by the manufacturer as a "private carrier," within the meaning of § 203 (a) (17), and it set aside the Commission's order. *Held:* The Commission's finding is sustained and the judgment of the District Court is reversed. Pp. 371–386.

(a) The Commission's conclusion that the financial risks of this transportation had been shifted from the manufacturer to the owner-operators to an extent which rendered the sanctioning of the operation as private carriage by the manufacturer a departure from the statutory design was well within the range of the responsibility assigned by Congress to the Commission. Pp. 383–385.

(b) If the District Court intended to hold that the Commission was confined to the "control" test—*i. e.,* whether the manufacturer had any right to control, direct or dominate the transportation—it

*Together with No. 24, *Regular Common Carrier Conference of American Trucking Associations, Inc.,* v. *Drum et al.,* also on appeal from the same Court.

was in error, since a finding of shipper control does not require a resolution of the ultimate issue in the shipper's favor. Pp. 381–383, 385–386.

(c) If the District Court meant to substitute its judgment for that of the Commission on the question of substance on this record, it indulged in an unwarranted incursion into the administrative domain. P. 386.

193 F. Supp. 275, reversed.

Robert W. Ginnane argued the cause for appellants in No. 23. With him on the briefs were *Solicitor General Cox, Assistant Attorney General Loevinger, Richard A. Solomon* and *B. Franklin Taylor, Jr.*

Roland Rice argued the cause and filed briefs for appellant in No. 24.

William L. Peterson, Jr. and *Charles R. Iden* argued the cause for appellees in both cases. With them on the briefs was *Walter D. Hanson.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

In an investigation initiated by it under 49 U. S. C. § 304 (c),[1] the Interstate Commerce Commission held that appellees who leased their motor vehicles and hired

[1] Interstate Commerce Act § 204 (c), 49 Stat. 547, as amended, 49 U. S. C. § 304 (c):

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

their services as drivers to the appellee Oklahoma Furniture Manufacturing Company (hereinafter "Oklahoma") were contract carriers within 49 U. S. C. § 303 (a)(15) [2] and subject to the permit requirements of 49 U. S. C. § 309 (a)(1).[3] 79 M. C. C. 403.

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[2] Interstate Commerce Act § 203 (a)(15), 49 Stat. 544, as amended, 49 U. S. C. § 303 (a)(15):

"The term 'contract carrier by motor vehicle' means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) of this section and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer."

Interstate Commerce Act § 203 (a)(14), 49 Stat. 544, as amended, 49 U. S. C. § 303 (a)(14), defines "common carrier" as follows:

"The term 'common carrier by motor vehicle' means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to chapter 1 of this title, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to chapter 1 of this title."

[3] Interstate Commerce Act § 209 (a)(1), 49 Stat. 552, as amended, 49 U. S. C. § 309 (a)(1):

"Except as otherwise provided in this section and in section 310a of this title [exceptions not here pertinent], no person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway or within any reservation under the exclusive jurisdiction of the United States unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such person to engage in such business . . . ."

See also Interstate Commerce Act § 203 (c), 71 Stat. 411, as amended, 49 U. S. C. § 303 (c):

"Except as provided in section 302 (c) of this title, subsection (b) of this section, in the exception in subsection (a)(14) of this section,

A three-judge court in the District Court for the Western District of Oklahoma, convened under 28 U. S. C. § 2325 in a proceeding commenced by appellees pursuant to 28 U. S. C. §§ 1336 and 1398,[4] set aside the cease-and-desist order by which the Commission required the lessors to refrain from their operations unless and until they received appropriate authority therefor from the Commission. 193 F. Supp. 275. The District Court held that Oklahoma was engaged in private carriage as defined in 49 U. S. C. § 303 (a)(17).[5] We noted probable jurisdiction of the appeals lodged here under 28 U. S. C. § 1253. 365 U. S. 839.

The Motor Carrier Act of 1935[6] subjected many aspects of interstate motor carriage—including entry of

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and in the second proviso in section 306 (a)(1) of this title [none of which exceptions are here pertinent], no person shall engage in any for-hire transportation business by motor vehicle, in interstate or foreign commerce, on any public highway or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such person a certificate or a permit issued by the Commission authorizing such transportation, nor shall any person engaged in any other business enterprise transport property by motor vehicle in interstate or foreign commerce for business purposes unless such transportation is within the scope, and in furtherance, of a primary business enterprise (other than transportation) of such person."

[4] The United States intervened as defendant, 28 U. S. C. § 2322, and appellee Weather-Seal and appellant Regular Common Carrier Conference intervened as plaintiff and defendant respectively, 28 U. S. C. § 2323.

[5] Interstate Commerce Act § 203 (a)(17), 49 Stat. 545, 49 U. S. C. § 303 (a)(17):

"The term 'private carrier of property by motor vehicle' means any person not included in the terms 'common carrier by motor vehicle' or 'contract carrier by motor vehicle', who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise."

[6] 49 Stat. 543–567, as amended, 49 U. S. C. §§ 301–327.

persons into the business of for-hire motor transportation and the oversight of motor carrier rates—to administrative controls, on the premise that the public interest in maintaining a stable transportation industry so required.[7] However, although aware that "Both [contract carriers and common carriers] . . . are continually faced with actual or potential competition from private truck operation . . . ," [8] Congress took cognizance of a shipper's interest in furnishing his own transportation,[9] and limited the application of the licensing requirements to those persons who provide "transportation . . . for compensation" [10] or, under a 1957 Amendment, "for-hire transportation." [11] The Commission, therefore, has had to decide whether a particular arrangement gives rise to that "for-hire" carriage which is subject to economic regulation in the public interest, or whether it is, in fact, private carriage as to which Congress determined that the shipper's interest in carrying his own goods should prevail. This case is a recent instance of the Commission's developing technique of decision.

From the beginning underlying principles have been, and have remained, clear. A primary objective of the scheme of economic regulation is to assure that shippers generally will be provided a healthy system of motor carriage to which they may resort to get their goods to market. This is the goal not only of Commission sur-

[7] See S. Rep. No. 482, 74th Cong., 1st Sess. 2; H. R. Rep. No. 1645, 74th Cong., 1st Sess. 3; S. Doc. No. 152, 73d Cong., 2d Sess. 14–15, 22–23 (Report of Federal Coordinator of Transportation on the Regulation of Transportation Agencies).

[8] *Id.*, at 14.

[9] See S. Rep. No. 482, 74th Cong., 1st Sess. 1; H. R. Rep. No. 1645, 74th Cong., 1st Sess. 4; H. R. Doc. No. 89, 74th Cong., 1st Sess. 17 (Report of Federal Coordinator of Transportation on Transportation Legislation).

[10] See notes 2, 5, *supra*.

[11] See note 3, *supra*.

veillance of licensed motor carriers as to rates and services, but also of the requirement that the persons from whom shippers would purchase a transportation service designed to meet the shippers' distinctive needs must first secure Commission approval. See *Contracts of Contract Carriers*, 1 M. C. C. 628, 629; *Keystone Transportation Co.*, 19 M. C. C. 475, 490–492. The statutory requirement that a certificate or permit be issued before any new for-hire carriage may be undertaken bespeaks congressional concern over diversions of traffic which may harm existing carriers upon whom the bulk of shippers must depend for access to market.[12] Accordingly, the statutory definitions, while confirming that a shipper is free to transport his own goods without utilizing a regulated instrumentality, at the same time deny him the use of "for compensation" or "for-hire" transportation purchased from a person not licensed by the Interstate Commerce Commission. Because the definitions must, if they are to serve their purpose, impose practical limitations upon unregulated competition in a regulated industry, they are to be interpreted in a manner which transcends the merely formal. From the outset the Commission has correctly interpreted them as importing that a purported private carrier who hires the instrumentalities of transportation from another must—if he is not to utilize a licensed carrier—assume in significant measure the characteristic burdens of the transportation business. The problem is one of determining—by reference to

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[12] See S. Doc. No. 152, 73d Cong., 2d Sess. 33 (Report of Federal Coordinator of Transportation on the Regulation of Transportation Agencies). That concern has found recent legislative expression in a 1958 amendment designed to curb so-called "buy-sell" evasions by purported or "pseudo" private carriers. 72 Stat. 568, 574, amending the Interstate Commerce Act § 203 (c), 49 U. S. C. § 303 (c). See S. Rep. No. 1647, 85th Cong., 2d Sess. 23–24; H. R. Rep. No. 1922, 85th Cong., 2d Sess. 17–19.

the clear but broad remedial purpose of a regulatory statute committed to agency administration—the applicability to a narrow fact situation of imprecise definitional language which delineates the coverage of the measure. Private carriers are defined simply as transporters of property who are neither common nor contract carriers; and the statute will yield up no better verbal guide to the reach of its licensing provisions than transportation "for compensation" or "for-hire." Compare *Bates & Guild Co.* v. *Payne,* 194 U. S. 106; *Rochester Tel. Corp.* v. *United States,* 307 U. S. 125, 144–146; *Gray* v. *Powell,* 314 U. S. 402, 412–413; *Labor Board* v. *Hearst Publications,* 322 U. S. 111, 130–131. Because the Commission's resolution of the issue does not seem to us to violate the coherence of the body of administrative and judicial precedents so far developed in this area, we are of the opinion that there was no occasion for the District Court to disturb the conclusion reached by the Commission. We therefore reverse the District Court's judgment.

It was a wish to rid itself of certain burdens of its existing transportation operation which caused Oklahoma to enter into the arrangement here involved. Prior to 1952 Oklahoma, a manufacturer of low-cost furniture, had maintained a full fleet of tractors and trailers in which all its furniture was shipped. A full crew of drivers was employed. Oklahoma absorbed all the expenses, and carried all the risks, of its transportation operation. It utilized a system of delivered pricing which eliminated transportation charges as an identifiable element of the price of its furniture. Its status as a private carrier exempt from licensing requirements was never questioned under the pre-1952 arrangement. But that method of operation was found to incorporate certain burdensome disadvantages. Oklahoma discovered that its employee-drivers were embezzling its funds through the misuse of

credit arrangements which the company had established for the purchasing of fuel and minor repairs on the road. In addition, Oklahoma became convinced that its equipment was too often involved in accidents, and too often in need of repairs and maintenance which could have been avoided by careful operation.

In an effort to eliminate these disadvantages, Oklahoma in 1952 altered its *modus operandi.* It decided to terminate its investment in tractors for long hauls and, instead, to lease them from the drivers. The original lease agreements encountered difficulty when, in 1956, the Supreme Court of Arkansas held that the resultant operation constituted for-hire carriage by the owner-operators which required licensing under the applicable Arkansas statutes.[13] Following this turn of events, Oklahoma revised the leases, and also entered into a collective agreement with the union representing its workers setting forth the terms under which the owner-operators were to be employed as drivers. The current lease and collective agreement provide the factual predicate of the present litigation.

The Company presently owns 26 trailers and 6 tractors. It leases 11 tractors for long-haul use in connection with the trailers which it owns. It is solely in connection with the 11 leased tractors and the services of their owner-operators that the Commission discerned the provision of for-hire transportation. The leases are for renewable terms of one year, but they are terminable by either party on 30 days' notice. Oklahoma is granted the sole right to control the use of the tractor through drivers employed by it; in return, it covenants that such use will be lawful and will be confined to the transportation of the Company's property. Oklahoma pays for its

[13] *Robinson* v. *Woodard,* 227 Ark. 102, 296 S. W. 2d 672.

use of the tractors strictly on a mileage basis. The owner receives weekly rental payments of 10 or 11 cents for each mile the vehicle is driven, plus an extra 3 cents per mile on the backhaul if there is a load of raw materials. Oklahoma does not guarantee any minimum mileage. Operating costs—including gasoline, oil, grease, parts, and registration fees—are paid by the owners. Oklahoma assumes no responsibility for wear and tear or damage to the tractors, nor does it provide collision or fire and theft insurance coverage—although it does pay for public liability and property damage insurance. The owners assume no responsibility to Oklahoma for damage to the cargoes.

Under the collective agreement covering the drivers among its employees, the drivers enjoy certain common employment privileges such as collective bargaining, seniority rights, death benefits, immunity from discharge except for cause, military-service protection, and vacation pay in an amount based on their average weekly pay. Owner-drivers may be discharged for cause.[14] Their remuneration is calculated strictly on a mileage basis, and they are obliged to pay their own living expenses while on the road. No minimum weekly pay or mileage is guaranteed.[15] Drivers are required to maintain their trucks in good running condition at all times.

Oklahoma's actual operations were a generally faithful reflection of the leases and the collective agreement. Certain matters, not explicitly or unambiguously covered by the written instruments, are of significance. Ordinarily the drivers were assigned to their own tractors,

[14] While such a discharge would not automatically terminate the affected driver's truck-lease agreement, it seems obvious that he would immediately exercise his 30-day cancellation privilege and thus remove his truck from Oklahoma's service.

[15] In contrast, the short-haul drivers of company-owned tractors received $50 per week plus two cents per mile.

though there were occasional exceptions. Oklahoma's truck superintendent testified that the owner-operators' services were not utilized each day. The owners were required to pay for all repairs, though Oklahoma conducted safety inspections.[16] The Company closely directed all details of loading and delivery routes. It instructed the drivers as to steps to be taken in emergencies. It administered physical examinations, supervised the preparation of reports required by the Interstate Commerce Commission, paid social security taxes and withheld income taxes, and provided workmen's compensation.

In sum, Oklahoma's operation possessed a number of the hallmarks of a genuine lease of equipment and a genuine employment arrangement.

Still, the Company was able to spare itself—and pass to the owner-operators—certain characteristic burdens of the transportation business. The large capital investment in the tractors and the risk of their premature depreciation or catastrophic loss, was borne by the owner-operators, not by the Company. The owner-operators, rather than Oklahoma, stood the risk of a rise in variable costs such as fuel, repairs and maintenance of the tractors in good operating condition, and living expenses, although the thirty-day cancellation privilege, taken together with the possible bargaining power of the owner-operators *en bloc,* may have affected the degree to which that burden was actually shifted. Finally, Oklahoma was able

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[16] The provision of the collective agreement that the owner-drivers "shall be required to maintain the truck in good running condition" superseded, in the parties' practice, Oklahoma's undertaking in the lease agreement "to keep and maintain said motor vehicle equipment at all times while in operation under this lease agreement, in first class operating condition and in complete compliance with all safety rules and regulations of all State and Federal regulatory bodies." See 79 M. C. C., at 406, 407; 193 F. Supp., at 278.

to divest itself, to a significant extent, of the risk of non-utilization of high-priced equipment. The owner-operators received neither rental payments nor wages when their tractors were not used and they did not drive. Oklahoma did, however, carry the risk of a nonproductive backhaul.[17]

The question before the Commission was whether, under these particular facts, Oklahoma had so far emancipated itself from the burdens of transportation that to permit it, on such terms, to secure a transportation service from these unlicensed owner-operators would be inconsistent with the statutory scheme. The Commission resolved the issue adversely to Oklahoma and the owner-operators. Division 1, one Commissioner dissenting, held that the owner-operators were engaged in contract carriage and ordered them to cease and desist from the activities thus found to be unlawful until such time as they had secured the necessary permits from the Commission. Applications for such permits were invited, the Division's Report observing that the activities presently condemned should not prejudice such applications.[18] This disposition was approved by the full Commission on reconsideration.[19]

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[17] Oklahoma paid an extra three cents per mile rental when there was a load of raw materials in the backhaul. This differential was explained as covering the cost of additional wear and tear and fuel purchases occasioned by the heavier raw materials transported on the return trips. At least to the extent that the differential was in fact absorbed by such incremental costs, it cannot be said to have represented the shifting of any financial risk.

[18] 79 M. C. C., at 415. Appellees assert that there is no presently licensed carrier able or willing to provide the type of service essential to Oklahoma's survival as a competitor. See Brief for Henry E. Drum et al., at 3. That circumstance should be presented to and considered by the I. C. C. in passing on appellees' permit applications; but it is not a reason for bypassing the Commission's licensing power if Oklahoma is not a private carrier.

[19] R. 167.

The Commission dealt with the problem before it by setting out two inquiries which would have to be satisfied before the operations in question could be held to constitute private carriage: *First,* it would have to be found that no person other than Oklahoma had "any right to control, direct, and dominate" the transportation. *Second,* it would have to be found that no person before the Commission was "in substance, engaged in the business of . . . transportation of property . . . for hire." [20] The Commission found against the respondents on both tests. In connection with the first, or "control," test the Commission pointed out that earlier decisions had established a presumption of for-hire transportation whenever equipment was leased by a shipper, which presumption might be defeated by a showing that the shipper had retained the exclusive right to control the operation. Despite the evidence of actual shipper control in this case, the Commission held that the presumption of for-hire transportation remained in effect because "There is present, whenever the owner-operator drives his own equipment, the right and power of the lessor to defeat any supposed right to control that the shipper-lessee may believe exists." [21] The three-judge District Court reversed the Commission's conclusion relative to shipper control,[22] and that action of the District Court is not challenged by the Commission on this appeal.[23]

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[20] 79 M. C. C., at 409–410.

[21] 79 M. C. C., at 411.

[22] 193 F. Supp., at 281–282.

[23] See Brief for the United States and Interstate Commerce Commission at 17, n. 8:

"In this appeal, we do not challenge the district court's conclusion that the evidence did not warrant a finding that Oklahoma lacked full control of the details of the operation. Nor do we argue as to whether the court below gave too narrow a meaning to the Commission's control test. We assume, for present purposes, that the court below correctly applied that test as relating only to the operational aspects of the transportation."

But a finding of shipper control does not require a resolution of the ultimate issue in the shipper's favor.[24] It is true that until recently, "control" has been at the focus of the Commission's efforts to delineate verbally the permissible area of non-licensed leases of transportation equipment. The initial technique of the Commission was to assess the lessee-shipper's assumption of the burdens of transportation in terms of the degree to which he undertook to "control" or "dominate" it.[25] The interest in "control" in turn generated an interest in whether the drivers of leased equipment were in substance treated as the shipper's employees.[26] Throughout, however, Com-

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[24] We need not and we do not now pass on the Commission's view that if the shipper does not direct the details of the operation he cannot be a private carrier.

[25] The leading case is *H. B. Church Truck Service Co.*, 27 M. C. C. 191, 195:

"Essentially the issue is as to who has the right to control, direct, and dominate the performance of the service. If that right remains in the carrier, the carriage is carriage for hire and subject to regulation. If it rests in the shipper, it is private carriage and not subject to regulation . . . ."

It was the *H. B. Church* case which established the presumption that a lease of equipment results in for-hire carriage. The presumption was said to "yield to a showing that the shipper has the exclusive right and privilege of directing and controlling the transportation service, as, for example, if the equipment were operated by the shipper's employee." 27 M. C. C., at 196.

[26] See, *e. g.*, *Watson Mfg. Co.*, 51 M. C. C. 223, 226; *R. N. G. Commercial Auto Renters, Inc.*, 73 M. C. C. 665, 670.

Teamsters Union v. *Oliver*, 358 U. S. 283, did not, as appellees suggest (Brief for Henry E. Drum et al., at 29), hold that owner-operators are in any sense "employees." That case held that a bargaining unit including an overwhelming majority of concededly employed drivers of carrier-owned equipment was entitled, under § 8 (d) of the National Labor Relations Act, 61 Stat. 142, 29 U. S. C. § 158 (d), to bargain to impasse concerning minimum rentals to be received by owner-drivers. It was not necessary to determine

mission reports have taken note of various factors which clearly transcend any narrow concept of physical direction of the details of the operation; and it has always been apparent that the vesting of such physical "control" in the shipper would not in itself suffice to render the transportation private carriage.[27]

Latterly, the Commission has begun to move away from "control" as the verbal embodiment of its manifold inquiry.[28] The Commission thus accords explicit recognition to a premise which has long been implicit in its deci-

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whether the owner-drivers were "employees" protected by the Act, since the establishment of the minimum rental to them was integral to the establishment of a stable wage structure for clearly covered employee-drivers. See *id.*, at 294–295.

[27] See, *e. g.*, *Edward Allen Carroll*, 1 M. C. C. 788; *Centre Trucking Co.*, 32 M. C. C. 313; *William A. Shields*, 41 M. C. C. 100; *John J. Casale, Inc.*, 44 M. C. C. 45; *Motor Haulage Co.*, 46 M. C. C. 107; *Jacobs Transfer Co.*, 46 M. C. C. 265; *John J. Casale, Inc.*, 49 M. C. C. 15; *R. N. G. Commercial Auto Renters, Inc.*, 73 M. C. C. 665.

[28] See *Pacific Diesel Rental Co.*, 78 M. C. C. 161, 172–173:

"The primary question here . . . can be asked in two forms; namely (1) Is the transportation here involved such that any person or persons other than the purported private carriers have any right to control, direct, and dominate it, or (2) Are any persons here, in substance, engaged in the business of interstate or foreign transportation of property on the public highways for hire? . . . We are convinced here that, even if all the responsibilities of an employer with respect to the driver are assumed by a shipper, the service offered . . . is, in substance, for-hire motor carriage subject to regulation under part II of the act. To hold otherwise would be inconsistent with the remedial purpose of part II and would be in contravention of our duty, imposed by Congress . . . . It is evident that, were we to hold that the shipper's assumption (as an employer) of certain responsibilities which more normally fall upon a carrier, transforms an operation which, apart from such assumption, is clearly a for-hire carrier service, into an operation different in substance, we would open the door to unfair and destructive competitive practices contrary to the national transportation policy declared by Congress."

sions: That some indicia of private carriage may be assumed, and detailed surveillance of operations undertaken, without a shipper's having significantly shouldered the burdens of transportation. The test of substance with which the Commission supplemented its "control" inquiry in this case thus betokens no heedless departure from the beaten track of administrative decision which might occasion a judicial curb upon the exercise of administrative discretion.[29] No more so does the inclusion in the arrangement between Oklahoma and its owner-drivers of a number of particulars also discoverable in arrangements found to constitute private carriage in earlier Commission decisions. We deal in totalities; indicia are instruments of decision, not touchstones. The Commission allowably dealt with this novel situation as an integral and unique problem in judgment, rather than simply as an exercise in counting commonplaces. Nor did it leave the basis for its decision unarticulated.

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[29] The courts have commonly articulated their plotting of the boundary between private and regulated carriage in leased equipment cases in terms of over-all substance, rather than simply in terms of "control." See *Georgia Truck System, Inc.*, v. *I. C. C.*, 123 F. 2d 210, 212 ("[A]ppellant, in substance and in reality, operates a transportation business."); *A. W. Stickle & Co.* v. *I. C. C.*, 128 F. 2d 155, 160, 161 (test of "substance and reality"); *Lamb* v. *I. C. C.*, 259 F. 2d 358, 360 ("Simply stated [the issue] . . . is who was transporting the goods in question."); *B & C Truck Leasing, Inc.*, v. *I. C. C.*, 283 F. 2d 163, 165 (test of "substance and effect"); *I. C. C.* v. *Isner*, 92 F. Supp. 582; *United States* v. *La Tuff Transfer Service*, 95 F. Supp. 375; *I. C. C.* v. *Werner*, 106 F. Supp. 497; cf. *Bridge Auto Renting Corp.* v. *Pedrick*, 174 F. 2d 733; *John J. Casale, Inc.*, v. *United States*, 114 Ct. Cl. 599, 86 F. Supp. 167. But cf. *Earle* v. *Babler*, 180 F. 2d 1016; *Vincze* v. *I. C. C.*, 267 F. 2d 577; *Motor Haulage Co.* v. *United States*, 70 F. Supp. 17, *affirmed*, 331 U. S. 784; *I. C. C.* v. *Gannoe*, 100 F. Supp. 790; *Allen* v. *United States*, 187 F. Supp. 625.

The Commission's meaning in applying the test of substance in this case is clearly told in the following language in its report:

> "Here each owner-operator assigns his motor vehicle for a continuing period of time to the exclusive use of the company, furnishing a service designed to meet the distinct need of the company. He provides a service in which the equipment is furnished, maintained, and driven by the owners thereof to transport property in interstate commerce. He guarantees a fixed and definite cost for the transportation, bears the risk of profit or loss from such transportation hazards as delays in transit, breakdowns of equipment, and highway detours, and meets all of the cost of operation including appropriate licenses and trip expenses." 79 M. C. C., at 412.

It is evident that the Commission here refused to allow Oklahoma the status of a private carrier because of its belief that financial risks are a significant burden of transportation, and its belief that such risks had been shifted by Oklahoma to the owner-operators to an extent which rendered the sanctioning of the operation as private carriage a departure from the statutory design. We think that such conclusions were well within the range of the responsibility Congress assigned to the Commission. The District Court explicitly recognized the propriety of the Commission's inquiring into the substance of the arrangements. Yet the court's conclusion that "what is involved here is private carriage on the part of the Company, rather than transportation for-hire by the owner-operators," 193 F. Supp., at 281, rests on no articulated premise other than that Oklahoma did have control. If the court intended to hold that the Commission is confined to the "control" test, we think it clearly in error in view of the

statutory objectives which we have set forth above. If, on the other hand, the court meant to substitute its judgment for the Commission's on the question of substance, we think that, on this record, it indulged in an unwarranted incursion into the administrative domain.

Reversed.

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

If I read the Court's opinion as my Brother HARLAN reads it, I would dissent from the disposition that is made of the case. The Commission is not a free-wheeling agency that can impose its ideas on this industry by *fiat.* Congress has provided the standard by which the Commission must adjudicate each case. And it is required to make not only findings that support its decision (*Interstate Commerce Comm'n* v. *J–T Transport Co.,* 368 U. S. 81), but also findings that are intelligible and complete. *United States* v. *Carolina Carriers Corp.,* 315 U. S. 475, 488–489. The case is for me a marginal one on which commissioners as well as judges might differ.* But I do not believe the Commission distorted the statutory standard nor made findings out of conformity with the facts.

Hence I join the opinion of the Court.

MR. JUSTICE HARLAN, whom MR. JUSTICE WHITTAKER joins, dissenting.

Were this an instance of a District Court substituting its judgment for that of the Interstate Commerce Commission on a matter which Congress had reserved for agency determination, I would be among the first to maintain that the Commission's action should be respected. Cf. *I. C. C.* v. *J–T Transport Co.,* 368 U. S. 81, 126–130

*Three judges in the District Court disagreed with the Commission (193 F. Supp. 275) and one of the three Commissioners dissented. 79 M. C. C. 403.

(dissenting opinion). But the order entered by the Commission in the cases now before us is so utterly lacking in evidentiary support, so inconsistent with the uniform course of agency and court decisions, and so contrary to the regulatory plan embodied in the Motor Carrier Act of 1935 and its later amendments, that I cannot join in the judgment which reinstates that order. As I view this record what the Commission has done here amounts in effect to an exercise of power which it does not possess.

Under the Motor Carrier Act two things are indisputably clear: (1) Congress, in subjecting "private" motor carriage only to safety regulation, did not mean otherwise to regulate interstate transportation by persons of "their own goods in their own vehicles for commercial purposes" (79 Cong. Rec. 5651 (1935), remarks of Senator Wheeler, Chairman of the Senate Committee on Interstate Commerce); [1] (2) one engaged in the business of leasing motor vehicles for commercial carriage is not by that fact alone made a "contract carrier," subject to full Commission regulation; in other words, equipment rentals *as such* are not reached by the statute.[2] Under the plain terms of the Act and Commission rulings, economic regulation of such rentals comes into play only where "for-hire" motor carriage has been shown.[3]

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[1] See also S. Doc. No. 152, 73d Cong., 2d Sess. 33 (1934); H. R. Doc. No. 89, 74th Cong., 1st Sess. 17 (1935); S. Rep. No. 482, 74th Cong., 1st Sess. 1 (1935); H. R. Rep. No. 1645, 74th Cong., 1st Sess. 4 (1935).

[2] There has been some equipment rental regulation by the States; whether it is also desirable as a matter of federal policy has yet to be determined by Congress. See Nutting and Kuhn, Motor Carrier Regulation—The Third Phase, 10 U. of Pitt. L. Rev. 477, 487–491 (1949); Note, 39 Ky. L. J. 338 (1951).

[3] The relevant statutory provisions are set forth in footnotes 1, 2, 3 and 5 of the Court's opinion. See also *U-Drive-It Co. of Pennsylvania,* 23 M. C. C. 799; *Scott Bros., Inc.,* 32 M. C. C. 253. In *Lease and Interchange of Vehicles by Motor Carriers,* 51 M. C. C. 461, 521,

This then is not a case like *Labor Board* v. *Hearst Publications, Inc.*, 322 U. S. 111, where the construction of an inexplicitly defined term in a statute which was broadly remedial was left to the agency enforcing the law. Despite strong suggestions to the contrary,[4] Congress saw fit to exempt private carriers from economic regulation under the Motor Carrier Act. If we were to permit the Commission to exercise its discretion to sweep in a variety of arrangements which legitimately constitute private carriage, we would be authorizing disobedience of the legislative mandate as surely as if we allowed the agency to remove from regulation what clearly amounts to "for-hire" carriage.

Until late 1952, Oklahoma Furniture Company, a manufacturer of low-priced furniture, shipped its product to retail purchasers throughout the United States in company-owned tractors and trailers, driven by its own full-time salaried employees. Discovering that some of its drivers were misusing company credit cards, given them to enable their charging against the Company operating and living expenses while on the road, Oklahoma revamped its long-haul transportation system in such a way as to remove these temptations.[5] In essence the new

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the Commission did not premise its authority to regulate lease and interchange practices among common and contract carriers on any authority generally to control vehicles engaged in interstate commerce. The Commission rather inferred from its authority to regulate the transportation offered by common and contract carriers the power to regulate, as well, "the procurement of transportation." This conclusion in no way suggests its authority to regulate the rental of vehicles by noncarriers from companies engaged solely in rental activities.

[4] See S. Doc. No. 152, 73d Cong., 2d Sess. 26 (1934); Hearings before Senate Committee on Interstate Commerce on the Motor Carrier Act of 1935, 74th Cong., 1st Sess. 333, 345, 347–350 (1935).

[5] Short hauls of company products in company-owned and driven equipment remained unaffected by the new arrangement, presumably because there was less opportunity for the misuse of company credit cards in connection with such hauls.

arrangement involved, on the one hand, leasing from each of 11 of the Company's employee-drivers one of the tractors used in long-haul service,[6] and shifting to the driver the economic incidents of its maintenance and operation; and, on the other hand, preserving to the Company the exclusive use of the tractor in the conduct of its business, and keeping, in every practical sense, the employee relationship between the driver and the Company. The details of the arrangement and its operation are accurately summarized in the District Court's opinion.[7]

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[6] The record does not show the terms on which the drivers acquired the tractors, whether they were bought from the Company or others, and if from the Company, what, if any, consideration was paid. The trailers drawn by these tractors continued to be owned by the Company.

[7] "The leases provide in substance as follows: (1) the Company shall pay the owner-operator 10¢ a mile for hauling single-axle trailers and 11¢ a mile for hauling tandem-axle trailers, plus an additional 3¢ a mile for back-haul of the Company's raw materials, (2) payments under the agreement shall be made weekly, (3) motor vehicles covered by the agreement shall be operated by an employee of the Company who shall be properly qualified and physically fit in accordance with state and federal regulations, (4) the owner-operator shall pay all operating costs arising from operation of said equipment (gasoline, oil, grease and parts) and shall pay cost of license plates, (5) the Company shall keep and maintain said equipment in first-class operating condition and in compliance with all safety rules and regulations of state and federal regulatory bodies, (6) if owner-operator fails to pay operating cost of equipment, the Company may cancel the agreement or at its option pay the necessary operating costs and charge same to owner-operator's account with the Company, (7) the Company shall have sole control, right of direction, and use of the leased equipment, all property transported by the leased vehicles shall belong to the Company and the Company will not sublease the equipment to any other person, firm or corporation, (8) the Company shall not be liable for wear, tear and depreciation nor for any damage caused to the leased equipment by accident, theft, fire or any other hazard or casualty, (9) the owner-operator shall not be responsible for loss to company equipment, property and cargo, (10) the Company will have the name of the owner-operator endorsed as an additional assured upon its policies of property damage and

The process of reasoning by which the Commission reached the conclusion that this rearrangement changed to fully regulatable activity that which had theretofore been subject to Commission jurisdiction only from the standpoint of safety, is at best obscure. However, the true measure of what the Court now sanctions is revealed

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public liability insurance covering the operation of motor vehicles, (11) either party may cancel the lease upon giving 30 days' written notice to the other party, (12) the agreement shall remain in full force and effect for one year from date of execution and shall be automatically renewed for further periods of one year unless cancelled in accordance with provisions of the agreement, or terminated by operation of law.

"The Company also entered into a union contract as employer of its drivers. The contract covers both drivers of company-owned vehicles and the owner-operators who usually drive their own tractors and who are also treated by the Company as employees. Although all the drivers do not belong to the union, the terms of the contract apply equally to non-union employees. This contract provides, in pertinent part, as follows: (1) the Company may discharge any employee for cause, (2) the owner-operators shall be paid at the rate of 4.5 cents a mile for driving, 0.25 cents a mile for living expenses, and 0.25 cents a mile for labor in the maintenance of the truck, or a total of 5 cents a mile, and shall be paid 6 cents a mile for back-hauls of raw materials, (3) drivers of company-owned tractors shall receive a basic salary of $50 a week plus 2 cents a mile for driving, (4) owner-operators having driven 75,000 miles during a year in which the contract is in effect shall be entitled to vacation pay computed upon the rate of pay for driving and the average weekly mileage in the preceding year, (5) owner-operators shall maintain their trucks in good running condition at all times, (6) owner-operators shall pay their own living expenses while on the road, (7) the provision of the union contract which guarantees employees 6 hours work or pay if they report for work at their usual or regular time shall not apply to owner-operators.

"The record made before the Commission shows that the operations of the Company and the owner-operators are in substance carried on in accordance with the provisions of the lease agreements and the union contract, with one exception. The lease agreements provide that the Company shall maintain the tractors of the owner-operators and the union contract provides that the owner-operators shall main-

by laying bare the extent to which the agency's conclusion involved a departure from the common-sense criteria that have heretofore entered into Commission determinations as to whether particular arrangements reflected "private" or "for-hire" motor carriage.[8]

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tain them. The testimony in the record supports the Commission's finding that the owner-operators in fact maintain their vehicles.

"The record also reveals the following: The owner-operators are not authorized by the Interstate Commerce Commission to engage in the transportation of property either as contract carriers or common carriers by motor vehicle in interstate commerce. The Company uses the 6 tractors which it owns chiefly for short hauls and these are usually driven by the salaried company drivers. The tractors leased by the Company are utilized chiefly for long hauls and are usually operated by the owner-operators, each driving his own tractor. It is the practice of the Company to assign the same driver to the same equipment, regardless of whether it is company-owned or leased. However, when necessity or convenience make it more feasible to do so, drivers who usually drive company-owned tractors are assigned to leased tractors and owner-operators to company-owned tractors. All trailers used in the Company's operations are owned by it. A supervisor employed by the Company oversees all drivers, assigns trips and checks to see that all equipment is properly maintained and repaired. Detailed routing instructions are issued to all drivers and compliance therewith is insured by manner of loading, e. g., last goods to come off are loaded first and the first to come off are loaded last. Prior to departure drivers are handed a truck bill manifest which differs from a bill of lading in that the drivers are not required to sign a receipt for the freight they transport. Each owner-operator receives two weekly paychecks, one for rental of his tractor and the other for his service as a driver. The Company deducts from the paychecks of the owner-operators social security and withholding taxes, pays the employer's share of social security and provides workmen's compensation benefits for them. The Company maintains on file drivers' logs, physicians' certificates and vehicle inspection reports. Both company-owned tractors and leased tractors are garaged at the homes of their respective drivers. The Company has the right to hire and fire drivers independently of the lease agreement." 193 F. Supp., at 277–278.

[8] See generally O'Brien, Twenty-Five Years of Federal Motor Carrier Licensing—The Private Versus For-Hire Carrier Problem, 35

The Court holds that the shifting of three economic burdens from the Company to the drivers justified the Commission's determination: (1) the substantial capital investments in the tractors, along with the risk of premature loss, were borne by the drivers; [9] (2) they undertook the costs of maintaining the vehicles and their own living expenses on the road; and (3) they bore the risk, as the Court envisages it, of "non-utilization of high-priced equipment" and of their own unemployment. These factors, either singly or in combination, do not, in my view, suffice to warrant the Commission's ruling. The first of them is the normal concomitant of any equipment rental; its presence cannot serve to change the character of a relationship which is not of itself subject to Commission regulation, except from the standpoint of safety (*supra*, p. 387, note 1). The costs of gas, repairs, and garaging are commonly also assumed by those leasing out motor vehicles for private use.[10] See, *e. g., R. N. G. Commercial Auto Renters, Inc.*, 73 M. C. C. 665; *Scott Bros., Inc.*, 32 M. C. C. 253; *U-Drive-It Co. of Pennsylvania*, 23 M. C. C. 799. The third factor, whatever may be its weight when supported by actuality, is, in the circumstances depicted in this record, no more than a pure abstraction (pp. 394–395, *infra*).

As the Court appears to recognize, the other provisions of the arrangement, relating to the cost of maintaining the leased equipment, all point to "private" carriage. Past

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N. Y. U. L. Rev. 1150 (1960); Matthews, Truck Leasing By Shippers and the Problem of the Dangling Instrumentalities, 27 I. C. C. Prac. J. 370 (1960); Porter, Federal Regulation of Private Carriers, 64 Harv. L. Rev. 896 (1951).

[9] But see note 6, *supra*.

[10] To the extent that this second "risk" concerns personal living expenses on the road, it would be unrealistic to consider it a "risk" at all, since the cost of it was assumed, albeit at a flat rate of one-fourth cent per mile, by the Company under the terms of a collective-bargaining agreement with the labor union representing the drivers.

cases in the Commission where "for-hire" carriage has been found, in the face of similar provisions, all involved other factors not present here. Under this arrangement, the Company was entitled to exclusive use of the tractors during the rental period (cf. *Joseph A. Bisceglia,* 34 M. C. C. 233); it loaded, dispatched, and routed the trucks (cf. *William A. Shields,* 41 M. C. C. 100); [11] it instructed the drivers as to details of service (cf. *McKeown Transportation Co.,* 42 M. C. C. 792); it assumed the risk of loss or damage to the cargo (cf. *Edward Allen Carroll,* 1 M. C. C. 788); it paid for liability and property damage insurance (cf. *Centre Trucking Co.,* 32 M. C. C. 313); [12] it undertook to inspect the tractors to insure compliance with safety regulations (cf. *Driver Service, Inc.,* 77 M. C. C. 243); and it shipped the goods without bills of lading (cf. *Jacobs Transfer Co.,* 46 M. C. C. 265).

Nor is the Commission's case strengthened by the circumstance that the appellees, in addition to supplying the vehicles, provided their own services as drivers. That factor would be significant only if the appellees furnished these services as independent contractors, for it is only then that the arrangement differs from an equipment rental in which the lessee mans the leased vehicle with his *own* employees. It would be strange indeed to attribute to Congress a purpose to classify as a "for-hire" carrier any employee who, as a condition of employment, is required to purchase a vehicle in which his employer's goods are to be transported.

All the standards by which the Commission has previously tested a purported "employment" relationship

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[11] Compare *Consolidated Trucking, Inc.,* 41 M. C. C. 737; *Jacobs Transfer Co.,* 46 M. C. C. 265 (shippers' control over routing and dispatching held insufficient to constitute private carriage).

[12] Since some equipment rental firms pay for liability insurance, the financial burden assumed by the appellees here may even have been less than that assumed by equipment rental firms.

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prove the existence of such a relationship here. The Company paid the drivers' wages (cf. *Columbia Terminals Co.*, 18 M. C. C. 662);[13] deducted social security and federal income taxes (cf. *Motor Haulage Co.*, 46 M. C. C. 107); retained drivers' trip logs and medical certificates (cf. *Watson Mfg. Co.*, 51 M. C. C. 223); bargained with the drivers' labor union over conditions of employment (cf. *R. N. G. Commercial Auto Renters, Inc.*, 73 M. C. C. 665); and reserved the right to engage and discharge (cf. *John J. Casale, Inc.*, 49 M. C. C. 15). In *Teamsters Union* v. *Oliver*, 358 U. S. 283, we held that an agreement setting a minimum rental and other terms for the use of a lessor-driver's equipment was "within the scope of collective bargaining as defined by federal law." *Id.*, at 293. In light of the dissenting opinion, *id.*, at 297–298, it seems clear that the Court concluded that the lessor-drivers were employees, not independent contractors, for purposes of the National Labor Relations Act.

Despite the total supervision thus exercised by the Company, if the record revealed that these drivers really risked having no work at all, thus earning no wage, over any period of time, there might be room for argument that they were, in fact, independent contractors. Under the terms of their employment such a theoretical possibility exists, but the facts prove it could not happen.

The appellees were paid rental for their vehicles and wages for their services on a per-mile basis. But the testimony of the Company's truck superintendent shows that the Company deliberately attempted to distribute the work so as to assure to each driver weekly wages which were within limits acceptable both to the individual concerned and his labor union. Six tractors continued to be

[13] The Commission does not consider itself bound by the form in which wage payments are made and occasionally considers who it is who actually bears the wage burden. See *Roy Rittenhouse*, 78 M. C. C. 389. But even this factor is not always determinative. *Pacific Diesel Rental Co.*, 78 M. C. C. 161.

owned by the Company, and individual employees were assigned to these tractors, one to a vehicle, just as the appellees were in effect assigned by the Company to the tractors they owned. Those assigned to company-owned tractors were paid $50 a week plus two cents a mile, and they were dispatched on short hauls. The appellees were sent on long hauls, so that their total mileage would make up for the absence of any fixed wage.[14] In addition, if one of the appellees was sick, a driver usually assigned to a company-owned vehicle would be directed to operate the tractor belonging to the incapacitated man in order to assure him of at least the rental payment for his equipment. In short, there is nothing in the record which warrants a finding that the status of the appellees was anything other than that of *bona fide* employees, or that they *in fact* shouldered, or anticipated that they might have to bear, any of the economic burdens undertaken by independent contractors.

I am not unmindful that the Interstate Commerce Commission has, of late, been much concerned with the problem of drawing the line between legitimate equipment rentals, which it concedes to be "private carriage," and what it has come to call "pseudo-private carriage," *i. e.*, contract carriage disguised as lease of equipment.[15]

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[14] The reasons for differentiating between long and short hauls, as respects the ownership of the tractors used in each type of service, have already been given. *Supra*, note 5.

[15] *E. g.*, 69 I. C. C. Ann. Rep. 99; 72 I. C. C. Ann. Rep. 43; 73 I. C. C. Ann. Rep. 51; 74 I. C. C. Ann. Rep. 57–58. A thorough study of the "gray area"—defined as "transport operations which lie between legitimate private carriage and the transportation authorized by Government regulatory bodies"—was recently submitted to the Senate Committee on Interstate and Foreign Commerce by the Commission's Bureau of Transport Economics and Statistics. It recognized that one major type of operation conducted in order to avoid regulation was the "shipper lease of vehicle with driver." I. C. C., Bureau of Transport Economics and Statistics, Gray Area of Transportation Operations (1960), 27–37.

Obviously the Commission must have the power to deal with schemes that have been devised to avoid regulation. No one would suppose that the Commission was acting beyond its authority if it pierced through the form assumed by a business enterprise purportedly engaged in providing equipment for "private" carriage and disclosed that it was really supplying "for-hire" carriage. Decisions of District Courts and Courts of Appeals have uniformly approved the application of the test of "substance" in such circumstances. *E. g., Lamb* v. *I. C. C.*, 259 F. 2d 358; *I. C. C.* v. *Isner,* 92 F. Supp. 582; *I. C. C.* v. *Gannoe,* 100 F. Supp. 790. I disagree with the result reached here by the Court, not because the Commission has supplemented its earlier test of "control" with one of "substance," [16] but because the application of the very test that is now urged persuades me that this was in reality an employment relationship with an employer engaged in private carriage, and not a "for-hire" carriage arrangement.

In sum, this is a case in which there is no allegation of subterfuge and no basis in the record for attributing a devious motive to the lessee; in which the economic risks transferred by the arrangement to the lessor are no more,

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[16] In a leading decision the Commission set down a rule whereby "in cases in which the question of the status created by a lease of equipment with drivers by a carrier to a shipper is presented, in the absence of a showing to the contrary, the presumption arises that the transportation is performed by the carrier for compensation, in other words is for-hire transportation and as such is subject to regulation." *H. B. Church Truck Service,* 27 M. C. C. 191, 196. I do not quarrel with the general validity of this presumption, although, until the present case, even the Commission thought it applicable only to leases by those who were otherwise "for-hire" carriers. *John J. Casale, Inc.*, 44 M. C. C. 45, 52–53. It is only because the "showing to the contrary" in this instance is so overwhelming that I think it was impermissible for the Commission to apply that rule here.

and possibly even less, substantial[17] than those in the ordinary rental of equipment; and in which the actual conditions of hire disclose that the drivers are *bona fide* employees of the lessor and are protected by their union representatives against overreaching by the employer. The Commission's order is not saved by the "totality" test which the Court now brings to its aid. For however viewed, this record adds up to nothing more than a mere rearrangement of Oklahoma's private carriage activities in such a way as, and for no other purpose than, to protect the Company against being cheated by its long-haul driver-employees.

If it is within the range of the Commission's permissible discretion to classify these appellees as contract carriers—and thus subject them to the rigorous standards of financial fitness and suitability that the Commission's regulations require of such carriers—what has been thought of as the "gray" area becomes black, and, in truth, much of what has heretofore been taken for white is now gray. What, for example, would have been the result had title to these tractors remained with the Company under an arrangement whereby they were leased to the drivers and then subleased back to the Company, with the Company assuming the risk of catastrophic loss or destruction? Or what if the drivers had been guaranteed $50 a week in

[17] The Company here assumed the full cost of an unproductive backhaul, since it paid its drivers for their tractors and their services whether the trailer returned empty or full. If the backhaul was productive, four cents per mile was added to the total payment, possibly as compensation for increased wear-and-tear and more rigorous duties. Although a lease of equipment may, under certain circumstances, require a lessee to return the vehicle to the location where it was first taken, large rental firms do provide for one-way leases at slightly increased rates. The Company might, therefore, well have been able to reduce its loss on an unproductive backhaul by leasing equipment on terms which would have permitted it to return the equipment at the destination.

total rental and wages? Would either of these changed circumstances have ousted the Commission of authority to hold the contracts to be "for-hire" carriage?

Indeed, the Court's decision goes far to encourage the Commission to obliterate entirely the congressionally drawn distinction between private and contract carriage. It will be interesting to see as time goes on whether there will be an aftermath to this decision similar to that which followed the blurring of the line between common and contract motor carriers effected by the Court's decision in *United States* v. *Contract Steel Carriers,* 350 U. S. 409. See *I. C. C.* v. *J–T Transport Co., supra,* at 107–109 (dissenting opinion).

I would affirm.

NATIONAL LABOR RELATIONS BOARD *v.* BRANDMAN IRON CO.

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

No. 35. Decided January 15, 1962.

Certiorari granted; judgment reversed and case remanded to the Court of Appeals to enter judgment affirming and enforcing a cease-and-desist order of the National Labor Relations Board as consented to by respondent—without deletion of references to other labor organizations.

Reported below: 281 F. 2d 797.

Former *Solicitor General Rankin, Solicitor General Cox, Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* for petitioner.

PER CURIAM.

The petition for a writ of certiorari is granted. The respondent consented to the entry by the National Labor Relations Board of an order directing it to cease and desist from certain practices as regards membership of its employees in a named labor organization "or any other labor organization of its employees." The respondent further waived all defenses to the entry by the Court of Appeals of a decree enforcing said order. The Court of Appeals, *sua sponte,* struck the words "or any other labor organization of its employees" wherever they appeared in the Board's order. 281 F. 2d 797. The judgment of the Court of Appeals is reversed and the case is remanded with directions that a judgment be entered which affirms and enforces the Board order. *Labor Board* v. *Ochoa Fertilizer Corp., ante,* p. 318.

MR. JUSTICE DOUGLAS dissents.

NATIONAL LABOR RELATIONS BOARD *v.* LAS VEGAS SAND & GRAVEL CORP.

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

No. 38. Decided January 15, 1962.

Certiorari granted; judgment reversed and case remanded to the Court of Appeals to enter judgment affirming and enforcing a cease-and-desist order of the National Labor Relations Board as consented to by respondent—without deletion of references to other labor organizations.

Reported below: 283 F. 2d 26.

Solicitor General Rankin, Stuart Rothman, Dominick L. Manoli and *Norton J. Come* for petitioner.

PER CURIAM.

The petition for a writ of certiorari is granted. The respondent consented to the entry by the National Labor Relations Board of an order directing it to cease and desist from interfering with activities of its employees on behalf of a named labor organization "or of any other labor organization." The respondent further waived all defenses to the entry by the Court of Appeals of a decree enforcing said order. The Court of Appeals, *sua sponte,* struck the references to "any other labor organization" wherever they appeared in the Board's order. 283 F. 2d 26. The judgment of the Court of Appeals is reversed and the case is remanded with directions that a judgment be entered which affirms and enforces the Board order. *Labor Board* v. *Ochoa Fertilizer Corp., ante,* p. 318.

MR. JUSTICE DOUGLAS dissents.

NATIONAL LABOR RELATIONS BOARD *v.* LOCAL 476, UNITED ASSOCIATION OF JOURNEYMEN OF THE PLUMBING AND PIPEFITTING INDUSTRY, AFL–CIO, ET AL.

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

No. 39. Decided January 15, 1962.

Certiorari granted; judgment reversed and case remanded to the Court of Appeals to enter judgment affirming and enforcing a cease-and-desist order of the National Labor Relations Board—without deletion of references to other employers and other persons.

Reported below: 280 F. 2d 441; 283 F. 2d 26.

Solicitor General Rankin, Stuart Rothman, Dominick L. Manoli and *Norton J. Come* for petitioner.

Martin F. O'Donoghue for respondents.

PER CURIAM.

The petition for a writ of certiorari is granted. In unfair labor practice proceedings before the National Labor Relations Board respondents did not except to the terms of an order directing them to cease and desist from certain practices found to violate § 8 (b)(4)(A) of the National Labor Relations Act, 29 U. S. C. § 158 (b)(4)(A), as regards the employees of a named employer "or any other employer" where an object is to force or require the named employer "or any other employer or person" to cease doing business with a named primary contractor. The Court of Appeals in enforcement proceedings modified the order, among other ways, by striking the references to "any other employer" and to "any other employer or person." 283 F. 2d 26. The judgment of the Court of Appeals is reversed and the case is remanded with directions that a judgment be entered

which affirms and enforces the Board order after restoring these deleted provisions. *Labor Board* v. *Cheney California Lumber Co.*, 327 U. S. 385; § 10 (e), 49 Stat. 454, as amended, 29 U. S. C. § 160 (e). See also *Labor Board* v. *Ochoa Fertilizer Corp.*, *ante*, p. 318.

HODGE *v.* IOWA.

APPEAL FROM THE SUPREME COURT OF IOWA.

No. 149, Misc. Decided January 15, 1962.

Appeal dismissed and certiorari denied.

Reported below: 252 Iowa 449, 105 N. W. 2d 613.

Appellant *pro se*.

Evan Hultman, Attorney General of Iowa, 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 certiorari should be granted.

BLAU *v.* LEHMAN ET AL.

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

No. 66. Argued December 12–13, 1961.—Decided January 22, 1962.

Petitioner, a stockholder in a corporation with stock registered on a national securities exchange, sued under § 16 (b) of the Securities Exchange Act of 1934 to recover on behalf of the corporation from one of its directors and a partnership of which he was a member "short-swing" profits realized by them on the purchase and sale by the partnership of stock of the corporation within a period of less than six months. Petitioner alleged that the partnership had "deputed" the director to represent its interests on the corporation's board of directors and that, by reason of his inside information, he had caused the partnership to purchase the stock of the corporation. The District Court found that these allegations were not supported by the evidence and that the partnership had bought the stock solely on the basis of the corporation's public announcements and without consulting the director. Accordingly, it denied a judgment against the partnership and the director for the full amount of the resulting profits and awarded a judgment against the director for only his proportionate share of the partnership's profits on these transactions, without interest. The Court of Appeals affirmed in all respects. *Held:* The judgment is affirmed. Pp. 404–414.

(1) The findings of the courts below on the disputed factual issues were not clearly erroneous; they were not conclusions of law; and they are sustained. Pp. 408–409.

(2) The partnership was neither an officer nor a 10% stockholder of the corporation, and it cannot be held liable as a director under § 16 (b). Pp. 409–413.

(a) The findings of the courts below, which are accepted by this Court, preclude a finding that the partnership actually functioned as a director of the corporation through a partner who had been deputized by the partnership to perform a director's duties, not for himself but for the partnership. Pp. 409–410.

(b) The fact that § 3 (a) (9) defines "person" as including a partnership does not require that the entire partnership be held liable as an "insider" under § 16 (b) merely because one of its members was a director of the corporation. P. 410.

(c) This Court cannot extend the coverage of § 16 (b) so as to include a partnership of which a director is a member. Pp. 410–413.

(3) The courts below properly held that the director was liable only for any profit realized by himself and not for all the profits earned by the partnership on these transactions. Pp. 413–414.

(4) Denial by the two courts below of interest on the amount for which the director was held liable was neither so unfair nor so inequitable as to require this Court to upset it. P. 414.

286 F. 2d 786, affirmed.

Morris J. Levy argued the cause and filed briefs for petitioner.

Whitney North Seymour argued the cause for respondents other than Tide Water Associated Oil Company. With him on the briefs were *Benjamin C. Milner* and *Robert S. Carlson.*

Allan F. Conwill, by special leave of Court, argued the cause for the Securities and Exchange Commission, as *amicus curiae,* urging reversal. With him on the briefs were *Solicitor General Cox, John F. Davis, Walter P. North, Ellwood L. Englander* and *David Ferber.*

Bruce Bromley filed a brief for the American Society of Corporate Secretaries, Inc., as *amicus curiae,* urging affirmance.

MR. JUSTICE BLACK delivered the opinion of the Court.

The petitioner Blau, a stockholder in Tide Water Associated Oil Company, brought this action in a United States District Court on behalf of the company under § 16 (b) [1] of the Securities Exchange Act of 1934 to

[1] "For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) within any period of less than six months, unless such security was acquired in good faith in connection with a debt previously con-

recover with interest "short swing" profits, that is, profits earned within a six months' period by the purchase and sale of securities, alleged to have been "realized" by respondents in Tide Water securities dealings. Respondents are Lehman Brothers, a partnership engaged in investment banking, securities brokerage and in securities trading for its own account, and Joseph A. Thomas, a member of Lehman Brothers and a director of Tide Water. The complaint alleged that Lehman Brothers "deputed . . . Thomas, to represent its interests as a director on the Tide Water Board of Directors," and that within a period of six months in 1954 and 1955 Thomas, while representing the interests of Lehman Brothers as a director of Tide Water and "by reason of his special and inside knowledge of the affairs of Tide Water, advised and caused the defendants, Lehman Brothers, to purchase and sell 50,000 shares of . . . stock of Tide Water, realizing profits thereon which did not inure to and [were] not recovered by Tide Water."

The case was tried before a district judge without a jury. The evidence showed that Lehman Brothers had in

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tracted, shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months. Suit to recover such profit may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter; but no such suit shall be brought more than two years after the date such profit was realized. This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security involved, or any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection." 48 Stat. 896, 15 U. S. C. § 78p (b).

fact earned profits out of short-swing transactions in Tide Water securities while Thomas was a director of that company. But as to the charges of deputization and wrongful use of "inside" information by Lehman Brothers, the evidence was in conflict.

First, there was testimony that respondent Thomas had succeeded Hertz, another Lehman partner, on the board of Tide Water; that Hertz had "joined Tidewater Company thinking it was going to be in the interests of Lehman Brothers"; and that he had suggested Thomas as his successor partly because it was in the interest of Lehman. There was also testimony, however, that Thomas, aside from having mentioned from time to time to some of his partners and other people that he thought Tide Water was "an attractive investment" and under "good" management, had never discussed the operating details of Tide Water affairs with any member of Lehman Brothers; [2] that Lehman had bought the Tide Water securities without consulting Thomas and wholly on the basis of public announcements by Tide Water that common shareholders could thereafter convert their shares to a new cumulative preferred issue; that Thomas did not know of Lehman's intent to buy Tide Water stock until after the initial purchases had been made; that upon learning about the purchases he immediately notified Lehman that he must be excluded from "any risk of the purchase or any profit or loss from the subsequent sale"; and that this disclaimer was accepted by the firm.[3]

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[2] In 1956, after the purchase and sale in question, Lehman Brothers participated in the underwriting of some Tide Water bonds. Thomas handled this for Lehman and during the course of the matter discussed Tide Water affairs with the other members of Lehman.

[3] In compliance with § 16 (a) and the rules and forms thereunder, see note 14, *infra,* Thomas filed with the SEC reports of the Lehman transactions in Tide Water stock and his disclaimer of those transactions.

From the foregoing and other testimony the District Court found that "there was no evidence that the firm of Lehman Brothers deputed Thomas to represent its interests as director on the board of Tide Water" and that there had been no actual use of inside information, Lehman Brothers having bought its Tide Water stock "solely on the basis of Tide Water's public announcements and without consulting Thomas."

On the basis of these findings the District Court refused to render a judgment, either against the partnership or against Thomas individually, for the $98,686.77 profits which it determined that Lehman Brothers had realized,[4] holding:

> "The law is now well settled that the mere fact that a partner in Lehman Brothers was a director of Tide Water, at the time that Lehman Brothers had this short swing transaction in the stock of Tide Water, is not sufficient to make the partnership liable for the profits thereon, and that Thomas could not be held liable for the profits realized by the other partners from the firm's short swing transactions. Rattner v. Lehman, 2 Cir., 1952, 193 F. 2d 564, 565, 567. This precise question was passed upon in the Rattner decision." 173 F. Supp. 590, 593.

Despite its recognition that Thomas had specifically waived his share of the Tide Water transaction profits, the trial court nevertheless held that within the meaning of § 16 (b) Thomas had "realized" $3,893.41, his proportionate share of the profits of Lehman Brothers. The court consequently entered judgment against Thomas for that amount but refused to allow interest against him.

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[4] In both courts below defendants claimed that Lehman's profits should have been found to be much less than they were. Since the determination below has not been complained of here, it is not necessary to pass on those contentions.

On appeal, taken by both sides, the Court of Appeals for the Second Circuit adhered to the view it had taken in *Rattner* v. *Lehman,* 193 F. 2d 564, and affirmed the District Court's judgment in all respects, Judge Clark dissenting. 286 F. 2d 786. The Securities and Exchange Commission then sought leave from the Court of Appeals *en banc* to file an *amicus curiae* petition for rehearing urging the overruling of the *Rattner* case. The Commission's motion was denied, Judges Clark and Smith dissenting. We granted certiorari on the petition of Blau, filed on behalf of himself, other stockholders and Tide Water, and supported by the Commission. 366 U. S. 902. The questions presented by the petition are whether the courts below erred: (1) in refusing to render a judgment against the Lehman partnership for the $98,686.77 profits they were found to have "realized" from their "short-swing" transactions in Tide Water stock, (2) in refusing to render judgment against Thomas for the full $98,686.77 profits, and (3) in refusing to allow interest on the $3,893.41 recovery allowed against Thomas.[5]

Petitioner apparently seeks to have us decide the questions presented as though he had proven the allegations of his complaint that Lehman Brothers actually deputized Thomas to represent its interests as a director of Tide Water, and that it was his advice and counsel based on his special and inside knowledge of Tide Water's affairs that caused Lehman Brothers to buy and sell Tide Water's stock. But the trial court found otherwise and the Court of Appeals affirmed these findings. Inferences could per-

[5] In the two courts below it was contended both that Thomas, because of his disclaimer of all participation in these partnership transactions, had realized no profits at all, and also that, even if he did realize some profits the amount was less than that found. See the opinion of Judge Swan dissenting in part below. 286 F. 2d, at 793. We express no view on these questions since the Thomas judgment is not challenged here.

haps have been drawn from the evidence to support petitioner's charges, but examination of the record makes it clear to us that the findings of the two courts below were not clearly erroneous. Moreover, we cannot agree with the Commission that the courts' determinations of the disputed factual issues were conclusions of law rather than findings of fact. We must therefore decide whether Lehman Brothers, Thomas or both have an absolute liability under § 16 (b) to pay over all profits made on Lehman's Tide Water stock dealings even though Thomas was not sitting on Tide Water's board to represent Lehman and even though the profits made by the partnership were on its own initiative, independently of any advice or "inside" knowledge given it by director Thomas.

First. The language of § 16 does not purport to impose its extraordinary liability on any "person," "fiduciary" or not, unless he or it is a "director," "officer" or "beneficial owner of more than 10 percentum of any class of any equity security . . . which is registered on a national securities exchange." [6] Lehman Brothers was neither an officer nor a 10% stockholder of Tide Water, but petitioner and the Commission contend that the Lehman partnership is or should be treated as a director under § 16 (b).

(a) Although admittedly not "literally designated" as one, it is contended that Lehman is a director. No doubt Lehman Brothers, though a partnership, could for purposes of § 16 be a "director" of Tide Water and function through a deputy, since § 3 (a)(9) of the Act [7] provides that " 'person' means . . . partnership" and § 3 (a)(7) [8] that " 'director' means any director of a corporation or any person performing similar functions with respect to any organization, whether incorporated or unincorporated."

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[6] See § 16 (a), 48 Stat. 896, 15 U. S. C. § 78p (a).

[7] 48 Stat. 883, 15 U. S. C. § 78c (a)(9).

[8] 48 Stat. 883, 15 U. S. C. § 78c (a)(7).

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Consequently, Lehman Brothers would be a "director" of Tide Water, if as petitioner's complaint charged Lehman actually functioned as a director through Thomas, who had been deputized by Lehman to perform a director's duties not for himself but for Lehman. But the findings of the two courts below, which we have accepted, preclude such a holding. It was Thomas, not Lehman Brothers as an entity, that was the director of Tide Water.

(b) It is next argued that the intent of § 3 (a)(9) in defining "person" as including a partnership is to treat a partnership as an inseparable entity.[9] Because Thomas, one member of this inseparable entity, is an "insider," [10] it is contended that the whole partnership should be considered the "insider." But the obvious intent of § 3 (a)(9), as the Commission apparently realizes, is merely to make it clear that a partnership can be treated as an entity under the statute, not that it must be. This affords no reason at all for construing the word "director" in § 16 (b) as though it read "partnership of which the director is a member." And the fact that Congress provided in § 3 (a)(9) for a partnership to be treated as an entity in its own right likewise offers no support for the argument that Congress wanted a partnership to be subject to all the responsibilities and financial burdens of its members in carrying on their other individual business activities.

(c) Both the petitioner and the Commission contend on policy grounds that the Lehman partnership should be held liable even though it is neither a director, officer, nor

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[9] The Commission's brief says: "Therefore, when a member of a partnership holds a directorship with the knowledge and consent of his firm, it is entirely reasonable to consider the partnership as the 'director' for the purposes of Section 16 (b)."

[10] An "insider" for purposes of § 16 is an officer, director or 10% stockholder. See Cook and Feldman, Insider Trading Under the Securities Exchange Act, 66 Harv. L. Rev. 385, 399–404.

a 10% stockholder. Conceding that such an interpretation is not justified by the literal language of § 16 (b) which plainly limits liability to directors, officers, and 10% stockholders, it is argued that we should expand § 16 (b) to cover partnerships of which a director is a member in order to carry out the congressionally declared purpose "of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer . . . ." Failure to do so, it is argued, will leave a large and unintended loophole in the statute—one "substantially eliminating the great Wall Street trading firms from the statute's operation." 286 F. 2d, at 799. These firms it is claimed will be able to evade the Act and take advantage of the "inside" information available to their members as insiders of countless corporations merely by trading "inside" information among the various partners.

The argument of petitioner and the Commission seems to go so far as to suggest that § 16 (b)'s forfeiture of profits should be extended to include all persons realizing "short swing" profits who either act on the basis of "inside" information or have the possibility of "inside" information. One may agree that petitioner and the Commission present persuasive policy arguments that the Act should be broadened in this way to prevent "the unfair use of information" more effectively than can be accomplished by leaving the Act so as to require forfeiture of profits only by those specifically designated by Congress to suffer those losses.[11] But this very broadening of the categories of persons on whom these liabilities are imposed by the

[11] *Mosser* v. *Darrow*, 341 U. S. 267, and *Lehman* v. *Civil Aeronautics Board*, 93 U. S. App. D. C. 81, 209 F. 2d 289, cited by the Commission as comparable situations throw little if any light on the issues in this case. Those cases involved different facts and different statutes, statutes which themselves have different language, purpose and history from the statute here.

language of § 16 (b) was considered and rejected by Congress when it passed the Act. Drafts of provisions that eventually became § 16 (b) not only would have made it unlawful for any director, officer or 10% stockholder to disclose any confidential information regarding registered securities, but also would have made all profits received by *anyone,* "insider" or not, "to whom such unlawful disclosure" had been made recoverable by the company.[12]

Not only did Congress refuse to give § 16 (b) the content we are now urged to put into it by interpretation, but with knowledge that in 1952 the Second Circuit Court of Appeals refused, in the *Rattner* case, to apply § 16 (b) to Lehman Brothers in circumstances substantially like

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[12] Thus, § 15 (b) of both H. R. 7852, and S. 2693, 73d Cong., 2d Sess. provided:

"(b) *It shall be unlawful for any director,* officer, or owner of securities, owning as of record and/or beneficially more than 5 per centum of any class of stock of any issuer, and security of which is registered on a national securities exchange . . . (*3*) *To disclose, directly or indirectly, any confidential information regarding or affecting any such registered security* not necessary or proper to be disclosed as a part of his corporate duties. *Any profit made by any person, to whom such unlawful disclosure shall have been made,* in respect of any transaction or transactions in such registered security within a period not exceeding six months after such disclosure *shall inure to and be recoverable by the issuer* unless such person shall have had no reasonable ground to believe that the disclosure was confidential or was made not in the performance of corporate duties. . . ." (Emphasis added.)

As to the meaning ascribed to this provision, see Hearings before the Committee on Banking and Currency on S. Res. No. 84, 72d Cong., 2d Sess., and S. Res. Nos. 56 and 97, 73d Cong., 1st and 2d Sess. 6555, 6558, 6560–6561; Hearings before Committee on Interstate and Foreign Commerce on H. R. 7852 and H. R. 8720, 73d Cong., 2d Sess. 135–137. These hearings seem to indicate that the provision was omitted from the final act because of anticipated problems of administration. See also *Smolowe* v. *Delendo Corp.,* 136 F. 2d 231, 236; *Rattner* v. *Lehman,* 193 F. 2d 564.

those here, Congress has left the Act as it was.[13] And so far as the record shows this interpretation of § 16 (b) was the view of the Commission until it intervened last year in this case. Indeed in the *Rattner* case the Court of Appeals relied in part on Commission Rule X–16A–3 (b) which required insider-partners to report only the amount of their own holdings and not the amount of holdings by the partnership. While the Commission has since changed this rule to require disclosure of partnership holdings too, its official release explaining the change stated that the new rule was "not intended as a modification of the principles governing liability for short-swing transactions under Section 16 (b) as set forth in the case of *Rattner* v. *Lehman* . . . ." [14] Congress can and might amend § 16 (b) if the Commission would present to it the policy arguments it has presented to us, but we think that Congress is the proper agency to change an interpretation of the Act unbroken since its passage, if the change is to be made.

Second. The petitioner and the Commission contend that Thomas should be required individually to pay to Tide Water the entire $98,686.77 profit Lehman Brothers realized on the ground that under partnership law he is co-owner of the entire undivided amount and has therefore "realized" it all. "[O]nly by holding the partner-director liable for the *entire* short-swing profits realized by his firm," it is urged, can "an effective prophylactic to the stated statutory policy . . . be fully enforced." But

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[13] See Seventeenth Annual Report of the Securities and Exchange Commission, p. 62 (1952); Eighteenth Annual Report, p. 79 (1953). These reports were submitted to Congress.

[14] Securities and Exchange Commission Release No. 4754 (September 24, 1952). Rule X–16A–3 was again amended, effective March 9, 1961, to delete any requirements that a partner report the amount of the issuer's securities held by the partnership but the substance of the rule is still contained in the Commission's instructions to its Forms 3 and 4 which are used for making the reports required under § 16 (a).

liability under § 16 (b) is to be determined neither by general partnership law nor by adding to the "prophylactic" effect Congress itself clearly prescribed in § 16 (b). That section leaves no room for judicial doubt that a director is to pay to his company only "any profit realized *by him*" from short-swing transactions. (Emphasis added.) It would be nothing but a fiction to say that Thomas "realized" all the profits earned by the partnership of which he was a member. It was not error to refuse to hold Thomas liable for profits he did not make.

Third. It is contended that both courts below erred in failing to allow interest on the recovery of Thomas' share of the partnership profits. Section 16 (b) says nothing about interest one way or the other. This Court has said in a kindred situation that "interest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness. It is denied when its exaction would be inequitable." *Board of Commissioners* v. *United States*, 308 U. S. 343, 352. Both courts below denied interest here and we cannot say that the denial was either so unfair or so inequitable as to require us to upset it.

Affirmed.

MR. JUSTICE STEWART took no part in the disposition of this case.

MR. JUSTICE DOUGLAS, with whom THE CHIEF JUSTICE concurs, dissenting.

What the Court does today is substantially to eliminate "the great Wall Street trading firms" from the operation of § 16 (b), as Judge Clark stated in his dissent in the Court of Appeals. 286 F. 2d 786, 799. This result follows because of the wide dispersion of partners of investment banking firms among our major corporations. Lehman Bros. has partners on 100 boards. Under today's

ruling that firm can make a rich harvest on the "inside information" which § 16 of the Act covers because each partner need account only for his distributive share of the firm's profits on "inside information," the other partners keeping the balance. This is a mutilation of the Act.

If a partnership can be a "director" within the meaning of § 16 (a), then "any profit realized by him," as those words are used in § 16 (b), includes all the profits, not merely a portion of them, which the partnership realized on the "inside information." There is no basis in reason for saying a partnership cannot be a "director" for purposes of the Act. In *Rattner* v. *Lehman,* 193 F. 2d 564, 567,[1] Judge Learned Hand said he was "not prepared to say" that a partnership could not be considered a "director," adding "for some purposes the common law does treat a firm as a jural person." In his view a partnership might be a "director" within the meaning of § 16 if it "deputed a partner" to represent its interests. Yet formal designation is no more significant than informal approval. Everyone knows that the investment banking-corporation alliances are consciously constructed so as to increase the profits of the bankers. In partnership law a debate has long raged over whether a partnership is an

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[1] The *Rattner* decision was rendered at a time when the Securities and Exchange Commission, pursuant to its regulatory power, provided a reporting requirement for § 16 (a) which allowed a partner-director to disclose only that amount of the equity securities of the corporation in question held by his partnership and representing his proportionate interest in the partnership. Rule X–16A–3. After the *Rattner* decision that Rule was amended to read:

"A partner who is required under § 240.16a–1 to report in respect of any equity security owned by the partnership shall include in his report the entire amount of such equity security owned by the partnership. He may, if he so elects, disclose the extent of his interest in the partnership and the partnership transactions." 17 CFR, 1961 Cum. Supp., § 240.16a–3 (b). See Loss, Securities Regulation, Vol. 2, pp. 1102–1104 (1961).

entity or an aggregate. Pursuit of that will-o'-the-wisp is not profitable. For even New York with its aggregate theory recognizes that a partnership is or may be considered an entity for some purposes.[2] It is easier to make this partnership a "director" for purposes of § 16 than to hold the opposite. Section 16 (a) speaks of every "person" who is a "director." In § 3 (a)(9) "person" is defined to include, *inter alia*, "a partnership." [3] Thus, the purpose to subject a partnership to the provisions of § 16 need not turn on a strained reading of that section.

At the root of the present problem are the scope and degree of liability arising out of fiduciary relations. In modern times that liability has been strictly construed. The New York Court of Appeals, speaking through Chief Judge Cardozo in *Meinhard* v. *Salmon*, 249 N. Y. 458, 164 N. E. 545, held a joint adventurer to a higher standard than we insist upon today:

> "Many forms of conduct permissible in a work-aday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee

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[2] *Matter of Schwartzman*, 262 App. Div. 635, 636–637, 30 N. Y. S. 2d 882, 884, aff'd 288 N. Y. 568, 42 N. E. 2d 22, holding a partnership to be a legal entity for purposes of the Unemployment Insurance Law; *Mendelsohn* v. *Equitable Life Assurance Soc.*, 178 Misc. 152, 154, 33 N. Y. S. 2d 733, 735, holding "attorneys as partners are but one person" for purposes of the Rules of Civil Practice; *Travelers Ind. Co.* v. *Unger*, 4 Misc. 2d 955, 959, 158 N. Y. S. 2d 892, 896, holding a partnership "is to be regarded as a legal entity for the purposes of pleading." And see *Bernard* v. *Ratner*, 7 N. Y. S. 2d 717.

[3] In *United States* v. *A & P Trucking Co.*, 358 U. S. 121—a case far more severe in its impact than the result I urge here, as it held a partnership could be criminally liable under the Motor Carrier Act—the Court said, "Congress has specifically included partnerships within the definition of 'person' in a large number of regulatory Acts, thus showing its intent to treat partnerships as entities." *Id.*, p. 124, note 3.

> is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions (*Wendt* v. *Fischer,* 243 N. Y. 439, 444). Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court." 249 N. Y., at 464, 164 N. E., at 546.

In *Mosser* v. *Darrow,* 341 U. S. 267, we allowed a reorganization trustee to be surcharged $43,447.46 for profits made by his employees through trading in securities of subsidiaries of a bankrupt company. We made this ruling even though there was "no hint or proof that he has been corrupt or that he has any interest, present or future, in the profits he has permitted these employees to make." *Id.,* at 275. We said:

> "These strict prohibitions would serve little purpose if the trustee were free to authorize others to do what he is forbidden. While there is no charge of it here, it is obvious that this would open up opportunities for devious dealings in the name of others that the trustee could not conduct in his own. The motives of man are too complex for equity to separate in the case of its trustees the motive of acquiring efficient help from motives of favoring help, for any reason at all or from anticipation of counterfavors later to come. We think that which the trustee had no right to do he had no right to authorize, and that

> the transactions were as forbidden for benefit of others as they would have been on behalf of the trustee himself.
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> . . . . . .
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> ". . . equity has sought to limit difficult and delicate fact-finding tasks concerning its own trustee by precluding such transactions for the reason that their effect is often difficult to trace, and the prohibition is not merely against injuring the estate—it is against profiting out of the position of trust. That this has occurred, so far as the employees are concerned, is undenied." *Id.*, at 271–273.

It is said that the failure of Congress to take action to remedy the consequences of the *Rattner* case somehow or other shows a purpose on the part of Congress to infuse § 16 with the meaning that *Rattner* gave it. We took that course in *Toolson* v. *New York Yankees*, 346 U. S. 356, and adhered to a ruling the Court made in 1922 that baseball was not within the scope of the antitrust laws, because the business had been "left for thirty years to develop, on the understanding that it was not subject to" those laws. *Id.*, p. 357. Even then we had qualms and two Justices dissented. For what we said in *Girouard* v. *United States*, 328 U. S. 61, 69, represents our usual attitude: "It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." [4]

[4] We said in *Toucey* v. *New York Life Ins. Co.*, 314 U. S. 118, 140–141:

"It is indulging in the merest fiction to suggest that the doctrine which for the first time we are asked to pronounce with our eyes open and in the light of full consideration, was so obviously and firmly part of the texture of our law that Congress in effect enacted it through its silence. There is no occasion here to regard the silence of Congress as more commanding than its own plainly and unmistakably spoken words. This is not a situation where Congress has failed to act after having been requested to act or where the circum-

It is ironic to apply the *Toolson* principle here and thus sanction, as vested, a practice so notoriously unethical as profiting on inside information.

We forget much history when we give § 16 a strict and narrow construction. Brandeis in *Other People's Money* spoke of the office of "director" as "a happy hunting ground" for investment bankers. He said that "The goose that lays golden eggs has been considered a most valuable possession. But even more profitable is the privilege of taking the golden eggs laid by somebody else's goose. The investment bankers and their associates now enjoy that privilege." *Id.*, at 12.

The hearings that led to the Securities Exchange Act of 1934 are replete with episodes showing how insiders exploited for their personal gain "inside information" which came to them as fiduciaries and was therefore an asset of the entire body of security holders. The Senate Report labeled those practices as "predatory operations." S. Rep. No. 1455, 73d Cong., 2d Sess., p. 68. It said:

> "Among the most vicious practices unearthed at the hearings before the subcommittee was the flagrant betrayal of their fiduciary duties by directors and officers of corporations who used their positions of trust and the confidential information which came to them in such positions, to aid them in their market activities. Closely allied to this type of abuse was the unscrupulous employment of inside information by large stockholders who, while not

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stances are such that Congress would ordinarily be expected to act. The provisions of § 265 have never been the subject of comprehensive legislative reëxamination. Even the exceptions referable to legislation have been incidental features of other statutory schemes, such as the Removal and Interpleader Acts. The explicit and comprehensive policy of the Act of 1793 has been left intact. To find significance in Congressional nonaction under these circumstances is to find significance where there is none."

directors and officers, exercised sufficient control over the destinies of their companies to enable them to acquire and profit by information not available to others." *Id.*, at 55. See also S. Rep. No. 792, 73d Cong., 2d Sess., p. 9.

The theory embodied in § 16 was the one Brandeis espoused. It was stated by Sam Rayburn as follows: "Men charged with the administration of other people's money must not use inside information for their own advantage." H. R. Rep. No. 1383, 73d Cong., 2d Sess. 13.

What we do today allows all but one partner to share in the feast which the one places on the partnership table. They in turn can offer feasts to him in the 99 other companies of which they are directors.[5] 14 Stan. L. Rev. 192, 198. This result is a dilution of the fiduciary principle that Congress wrote into § 16 of the Act. It is, with all respect, a dilution that is possible only by a strained reading of the law. Until now, the courts have given this fiduciary principle a cordial reception. We should not leave to Congress the task of restoring the edifice that it erected and that we tear down.

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[5] The proper approach to the problem of interlocking directorates through the agency of an investment banking house was expressed by Judge Fahy in *Lehman* v. *Civil Aeronautics Board,* 93 U. S. App. D. C. 81, 209 F. 2d 289, a case involving this same firm. See Appendix to this opinion.

APPENDIX TO OPINION OF MR. JUSTICE DOUGLAS.

Lehman v. *Civil Aeronautics Board, supra,* 93 U. S. App. D. C., at 85–87, 209 F. 2d, at 292–294.

"Petitioner Lehman is a director of Pan American; petitioner Joseph A. Thomas is a director of National Airlines, Inc., and of American Export Lines, Inc.; petitioner Frederick L. Ehrman is a director of Continental Air Lines, Inc., and Mr. John D. Hertz is a director of Consolidated Vultee Aircraft Corporation. All the companies referred to are in the aeronautic field and so must have Board approval of the kind of interlocking relationships which are made unlawful unless approved. Messrs. Lehman, Thomas, Ehrman, Hertz, and others, are also members of Lehman Brothers, a partnership which, as previously pointed out, conducts an investment banking business.

"The Board held that an individual Lehman Brothers partner who is a director of a Section 409 (a) company is a representative of another partner who is a director of another such company. The relationships thus found to exist were disapproved as to those involving Pan American and National; Pan American and American Export Lines; Pan American and Consolidated Vultee; National and Pan American; National and Consolidated Vultee; and Continental Air Lines and Consolidated Vultee. . . .

"More precisely the Board concluded that a Lehman Brothers partner who is director of an air carrier has a representative 'who represents such . . . director as . . . a director' in another Section 409 (a) company if another Lehman Brothers partner is a director of the latter, coupled with the circumstances that he seeks on behalf of Lehman Brothers the security underwriting and merger negotiation services used by the company of which he is director. The underwriting of security issues and the

conduct of merger negotiations constitute a substantial part of the business of Lehman Brothers, who have been employed for these purposes not infrequently by Section 409 (a) companies. The partners feel free to solicit this business for their firm.

". . . But we must consider the facts of the case in the light of the purpose of Congress to keep the developing aviation industry free of unhealthy interlocking relationships, though this purpose must be carried out only as the statute provides. The relevant findings which point up the problem are not in dispute. The underwriting activities of Lehman Brothers is a substantial part of its business; substantial fees are also obtained by Lehman Brothers from merger negotiations. Profits from the fees are shared by the partners. Section 409 (a) companies, with Lehman Brothers partners as directors, need and use both types of services, and the partner directors seek such business for the partnership. In doing so they act as representatives of the partnership. It follows that they act as representatives of fellow partners, some of whom are directors of air carriers. Is this representation within the meaning of the statute? Does Mr. Thomas, to use his case as illustrative, who is a Lehman Brothers partner and also a director of National Airlines, represent, as director of National Airlines, Mr. Lehman, another Lehman Brothers partner and director of Pan American? We think that the affirmative answer of the Board should not be disturbed. For the situation comes to more than some community of interest and some sharing of common benefits as partners. The particular common interest and benefits are among directors of the regulated industry with respect to industry matters. The partnership link does not extend merely to a type of business remote from the aeronautical industry in which the partners are directors; it is with respect to business activities of air carriers and other aeronautical companies enumerated in

Section 409 (a). In these activities there is not only literal representation by one partner of another in partnership business but the particular partnership business is as well the business of aeronautical enterprises of which the partners are directors. When Mr. Thomas, again to illustrate, as director of National seeks to guide that company's underwriting business to Lehman Brothers he acts in the interest of and for the benefit of Mr. Lehman who is not only his underwriting partner but is also a director of an air carrier, Pan American. Mr. Lehman the partner is the same Mr. Lehman the director. The Board is not required to separate him into two personalities, as it were, and to say that Mr. Thomas represents him as a partner but not as a director, if, as is the case here, the representation is in regard to the carrying on of the affairs of Section 409 (a) companies. The undoubted representation which grows out of the partnership we think follows into the directorships when the transactions engaged in are not only by the partners but concern companies regulated by the statute, of which the partners are directors. This is representation within not only the language but the meaning of the statute."

HILL *v.* UNITED STATES.

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

No. 68. Argued December 5, 1961.—Decided January 22, 1962.

In a Federal District Court, petitioner was convicted of two federal crimes and sentenced to imprisonment. He was represented by counsel both at the trial and when sentence was imposed; but, before imposing sentence, the judge failed to comply with the requirement of Rule 32 (a) of the Federal Rules of Criminal Procedure that he afford petitioner an opportunity to make a statement in his own behalf. Petitioner took no appeal; but five years later he moved under 28 U. S. C. § 2255 to vacate the sentence because of the judge's failure to comply with Rule 32 (a). *Held:*

1. Failure to follow the formal requirements of Rule 32 (a) is not of itself an error that can be raised by collateral attack under 28 U. S. C. § 2255. Pp. 425–429.

2. Though petitioner denominated his motion as one brought under 28 U. S. C. § 2255, it may be considered as a motion to correct an illegal sentence under Rule 35 of the Federal Rules of Criminal Procedure; but the narrow function of that Rule is to permit correction of an illegal sentence, not to re-examine errors occurring at the trial or other proceedings prior to the imposition of sentence. P. 430.

282 F. 2d 352, affirmed.

Curtis R. Reitz, by appointment of the Court, 365 U. S. 841, argued the cause and filed a brief for petitioner.

Julia P. Cooper argued the cause for the United States. With her on the briefs were *Solicitor General Cox, Assistant Attorney General Miller, Richard J. Medalie* and *Beatrice Rosenberg.*

MR. JUSTICE STEWART delivered the opinion of the Court.

In 1954 a jury in a Federal District Court found the petitioner guilty of transporting a kidnapped person in interstate commerce in violation of 18 U. S. C. § 1201, and

of transporting a stolen automobile in interstate commerce in violation of 18 U. S. C. § 2312. The petitioner was represented by court-appointed counsel at his trial. When, with counsel, he appeared before the District Judge for sentencing, the petitioner was not asked whether he wished to make a statement in his own behalf. The District Judge, after noting his familiarity with the petitioner's character and history, imposed consecutive prison sentences of twenty years and three years for the two offenses of which the jury had found the petitioner guilty. There was no appeal.[1]

The present litigation began in 1959 with the filing of a motion to vacate sentence under 28 U. S. C. § 2255. Among various grounds for relief asserted, the motion alleged that the petitioner at the time of sentencing had been "denied the right under Rule 32 (a) of Federal Rules of Criminal Procedure, Title 18 U. S. C. to have the opportunity to make a statement in his own behalf and to present any information in mitigation of punishment." The District Court denied the motion without explicitly discussing the Rule 32 (a) claim. 186 F. Supp. 441. The Court of Appeals affirmed, *per curiam,* 282 F. 2d 352. We granted certiorari "limited to the question of whether petitioner may raise his claim under Federal Criminal Rule 32 (a) in the proceeding which he has now brought." 365 U. S. 841.

Rule 32 (a) in pertinent part provides: "Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to

[1] In an earlier motion filed under 28 U. S. C. § 2255 the petitioner claimed that he had been prevented by government agents from appealing the judgment of conviction. The District Court denied the motion. The Court of Appeals set aside the District Court's order and directed that a hearing be had on the motion. 256 F. 2d 957. After a hearing before a different district judge, the motion was again denied. The Court of Appeals affirmed. 268 F. 2d 203.

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present any information in mitigation of punishment." The meaning of this Rule was before the Court last Term in *Green* v. *United States,* 365 U. S. 301. Although there was no Court opinion in the *Green* case, eight members of the Court concurred in the view that Rule 32 (a) requires a district judge before imposing sentence to afford every convicted defendant an opportunity personally to speak in his own behalf. There thus remains no doubt as to what the Rule commands. Moreover, the present record makes clear that this petitioner was not given an express opportunity to make a personal statement at the time he was sentenced. This case, therefore, is totally unembarrassed by any such factual controversy as divided the Court in *Green.* The only issue presented is whether a district court's failure explicitly to afford a defendant an opportunity to make a statement at the time of sentencing furnishes, without more, grounds for a successful collateral attack upon the judgment and sentence.[2] We hold that the failure to follow the formal requirements of Rule 32 (a) is not of itself an error that can be raised by collateral attack, and we accordingly affirm the judgment of the Court of Appeals.

Section 2255 of Title 28, U. S. C., provides that a prisoner in custody under sentence of a federal court may file a motion in the "court which imposed the sentence to vacate, set aside or correct the sentence." The statute states four grounds upon which such relief may be claimed: (1) "that the sentence was imposed in violation of the Constitution or laws of the United States;" (2) "that the court was without jurisdiction to impose such sentence;" (3) "that the sentence was in excess of the

[2] The majority of the Court in the *Green* case did not decide whether the issue of a Rule 32 (a) violation could be raised on collateral attack, or whether such a violation "would constitute an error *per se* rendering the sentence illegal." 365 U. S., at 303.

maximum authorized by law;" and (4) that the sentence "is otherwise subject to collateral attack." [3]

The circumstances which led Congress in 1948 to enact this legislation were reviewed in detail by Chief Justice Vinson, writing for the Court in *United States* v. *Hayman*, 342 U. S. 205. It is unnecessary to review again here this legislative history, with which Chief Justice Vinson, as Chairman of the Judicial Conference of the United States, was particularly familiar. Suffice it to say that it conclusively appears from the historic context in which § 2255 was enacted that the legislation was intended simply to provide in the sentencing court a remedy exactly commensurate with that which had previously been available by habeas corpus in the court of the district where the prisoner was confined.[4] See *Heflin* v. *United States*, 358 U. S. 415, 421 (concurring opinion).

> "[A] review of the history of Section 2255 shows that it was passed at the instance of the Judicial Conference to meet practical difficulties that had arisen in administering the habeas corpus jurisdiction of the federal courts. Nowhere in the history of Section 2255 do we find any purpose to impinge upon prisoners' rights of collateral attack upon their convictions. On the contrary, the sole purpose was to minimize the difficulties encountered in habeas corpus hearings by affording the *same rights* in

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[3] "A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence." 28 U. S. C. § 2255.

[4] See Parker, Limiting the Abuse of Habeas Corpus, 8 F. R. D. 171.

another and more convenient forum." *United States* v. *Hayman,* 342 U. S., at 219. (Emphasis added.) [5]

The failure of a trial court to ask a defendant represented by an attorney whether he has anything to say before sentence is imposed is not of itself an error of the character or magnitude cognizable under a writ of habeas corpus. It is an error which is neither jurisdictional nor constitutional. It is not a fundamental defect which inherently results in a complete miscarriage of justice, nor an omission inconsistent with the rudimentary demands of fair procedure. It does not present "exceptional circumstances where the need for the remedy afforded by the writ of *habeas corpus* is apparent." *Bowen* v. *Johnston,* 306 U. S. 19, 27. See *Escoe* v. *Zerbst,* 295 U. S. 490; *Johnson* v. *Zerbst,* 304 U. S. 458; *Walker* v. *Johnston,* 312 U. S. 275; *Waley* v. *Johnston,* 316 U. S. 101.

In *Sunal* v. *Large,* 332 U. S. 174, the Court held that the remedy of habeas corpus was unavailable in circumstances far more compelling than are presented here. There the petitioners at their criminal trial had been denied an opportunity to present a defense which subsequent decisions of this Court had held should clearly have been available to them. What was said in that case is apposite here:

> "We are dealing here with a problem which has radiations far beyond the present cases. The courts which tried the defendants had jurisdiction over their persons and over the offense. They committed an error of law . . . . That error did not go to the jurisdiction of the trial court. Congress, moreover,

[5] The Courts of Appeals, at least since the *Hayman* decision, appear to have consistently understood the substantive scope of § 2255 to be the same as that of habeas corpus. See, *e. g., Larson* v. *United States,* 275 F. 2d 673 (C. A. 5th Cir.); *Black* v. *United States,* 269 F. 2d 38 (C. A. 9th Cir.); *Taylor* v. *United States,* 229 F. 2d 826, 832 (C. A. 8th Cir.); *Kreuter* v. *United States,* 201 F. 2d 33, 35 (C. A. 10th Cir.).

> has provided a regular, orderly method for correction of all such errors by granting an appeal to the Circuit Court of Appeals and by vesting us with certiorari jurisdiction. It is not uncommon after a trial is ended and the time for appeal has passed to discover that a shift in the law or the impact of a new decision has given increased relevance to a point made at the trial but not pursued on appeal. . . . If in such circumstances, *habeas corpus* could be used to correct the error, the writ would become a delayed motion for a new trial, renewed from time to time as the legal climate changed. Error which was not deemed sufficiently adequate to warrant an appeal would acquire new implications. . . . Wise judicial administration of the federal courts counsels against such course, at least where the error does not trench on any constitutional rights of defendants nor involve the jurisdiction of the trial court." 332 U. S., at 181–182.

It is to be noted that we are not dealing here with a case where the defendant was affirmatively denied an opportunity to speak during the hearing at which his sentence was imposed. Nor is it suggested that in imposing the sentence the District Judge was either misinformed or uninformed as to any relevant circumstances. Indeed, there is no claim that the defendant would have had anything at all to say if he had been formally invited to speak. Whether § 2255 relief would be available if a violation of Rule 32 (a) occurred in the context of other aggravating circumstances is a question we therefore do not consider. We decide only that such collateral relief is not available when all that is shown is a failure to comply with the formal requirements of the Rule.[6]

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[6] See *Van Hook* v. *United States,* 365 U. S. 609, for the relief afforded on direct appeal in a case where the sentencing judge disregarded the mandate of Rule 32 (a).

It is suggested that although the petitioner denominated his motion as one brought under 28 U. S. C. § 2255, we may consider it as a motion to correct an illegal sentence under Rule 35 of the Federal Rules of Criminal Procedure.[7] This is correct. *Heflin* v. *United States,* 358 U. S. 415, 418, 422. But, as the Rule's language and history make clear, the narrow function of Rule 35 is to permit correction at any time of an illegal *sentence,* not to re-examine errors occurring at the trial or other proceedings prior to the imposition of sentence.[8] The sentence in this case was not illegal. The punishment meted out was not in excess of that prescribed by the relevant statutes, multiple terms were not imposed for the same offense, nor were the terms of the sentence itself legally or constitutionally invalid in any other respect.[9]

Affirmed.

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

The petitioner James Hill brought this proceeding to vacate two sentences under which he is imprisoned in a federal penitentiary, alleging that the sentences are

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[7] Rule 35 provides in pertinent part: "The court may correct an illegal sentence at any time."

[8] As has been pointed out, Rule 35 "was a codification of existing law and was intended to remove any doubt created by the decision in *United States* v. *Mayer,* 235 U. S. 55, 67, as to the jurisdiction of a District Court to correct an illegal sentence after the expiration of the term at which it was entered." *Heflin* v. *United States,* 358 U. S., at 422 (concurring opinion).

[9] Compare *Heflin* v. *United States, supra.* In that case Rule 35 was invoked in a situation where we unanimously recognized that the only issue was whether "the sentence imposed was illegal on its face." 358 U. S., at 418 (Court opinion), 422 (concurring opinion). *Heflin* involved the imposition of separate consecutive sentences for a single offense.

illegal because the trial judge who imposed them had not given him the opportunity required by Rule 32 (a) of the Federal Rules of Criminal Procedure "to make a statement in his own behalf and to present any information in mitigation of punishment." Conceding that the sentences thus challenged were imposed without according petitioner his right to speak, the Court nonetheless denies relief under Rule 35's provision for the correction of "illegal" sentences on the ground that the sentences though imposed in flat violation of Rule 32 (a), were not "illegal" within the special meaning which the majority now ascribes to that word for the purposes of Rule 35.[1] The basic explanation offered for this drastic contraction of the ordinary meaning of the word "illegal" is this single statement in the Court's opinion:

> "The punishment meted out was not in excess of that prescribed by the relevant statutes, multiple terms were not imposed for the same offense, nor were the terms of the sentence itself legally or constitutionally invalid in any other respect."

That statement to me amounts to something less than an entirely satisfactory justification for such a begrudging interpretation of Rule 35.

The Court's holding certainly finds no support in the language of Rule 35. That Rule, although painstakingly drawn by lawyers and approved both by Judges and by the Congress, simply provides for the correction of an "illegal sentence" without regard to the reasons why that sentence is illegal and contains not a single word to sup-

[1] Petitioner's attack upon his sentences was originally brought as a motion under 28 U. S. C. § 2255. Since I agree with the Court that a motion under § 2255 must, where appropriate, also be considered as a motion under Rule 35, and because I think petitioner is plainly entitled to relief under that Rule, I find it unnecessary to consider the question discussed by the Court as to whether petitioner is also entitled to relief under § 2255.

port the Court's conclusion that only a sentence illegal by reason of the punishment it imposes is "illegal" within the meaning of the Rule. I would have thought that a sentence imposed in an illegal manner—whether the amount or form of the punishment meted out constitutes an additional violation of law or not—would be recognized as an "illegal sentence" under any normal reading of the English language.[2] And precisely this sort of common-sense understanding of the language of Rule 35 has prevailed generally among the lower federal courts that deal with questions of the proper interpretation and application of these Rules as an everyday matter. Those courts have expressed their belief that, even where the punishment imposed upon a defendant is entirely within the limits prescribed for the crime of which he was convicted, a sentence imposed in a prohibited manner—as, for example, a sentence imposed upon an absent defendant in violation of the command of Rule 43 that a defendant be present at sentencing[3]—is an "illegal sentence" subject to correction under Rule 35.[4]

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[2] This does not of course mean that Rule 35 permits attack upon a sentence based upon mere trial errors. Rule 35 applies to any "illegal sentence," not to any illegal conviction, and thus by its terms the Rule protects only those rights which a defendant retains even if the judgment of guilt against him is proper. See *Cook* v. *United States*, 171 F. 2d 567, 570–571.

[3] Rule 43 provides: "The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules. . . ."

[4] See *Cook* v. *United States*, 171 F. 2d 567; *Crowe* v. *United States*, 200 F. 2d 526. Cf. *Williamson* v. *United States*, 265 F. 2d 236, 239. Similarly, it has also been held that Rule 35's corrective force extends to a sentence illegal by reason of the fact that the defendant upon whom it was imposed was insane at the time of sentencing. *Byrd* v. *Pescor*, 163 F. 2d 775. See also *Duggins* v. *United States*, 240 F. 2d 479, 483–484.

The Court's contrary decision today, however, was perhaps foreshadowed last Term by the narrow scope given to Rule 32 (a) when the issue of the meaning of that Rule came before us for the first time in *Green* v. *United States*.[5] That case, like this one, involved an attempt to vacate a sentence as "illegal" under Rule 35 on the ground that the trial judge had failed to accord the defendant his right to make a statement before sentencing. The record there showed merely that the trial judge, in the presence of both the defendant and his counsel, had asked generally, "Did you want to say something?" and that, in response to this question, the attorney rather than the defendant had spoken. Recognizing that the right accorded by Rule 32 (a) is a personal right which must be extended to the defendant himself, the Court nonetheless denied relief, largely upon the view expressed by four members of the Court that: "A record, certainly this record, unlike a play, is unaccompanied with stage directions which may tell the significant cast of the eye or the nod of the head. It may well be that the defendant himself was recognized and sufficiently apprised of his right to speak and chose to exercise this right through his counsel." [6] This conclusion was reached in spite of the fact that the Government's brief before this Court expressly conceded that Green had not been personally afforded an opportunity to speak.

But even in *Green*, not one member of the Court went so far as even to intimate—unless such an intimation was implicit in the concurring opinion of MR. JUSTICE STEWART [7]—that a sentence undeniably imposed in disre-

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[5] 365 U. S. 301.

[6] *Id.*, at 304–305.

[7] But cf. MR. JUSTICE STEWART's concurring opinion in *Heflin* v. *United States*, 358 U. S. 415, 420, in which the four other members of the present majority concurred.

gard of the legal right of a defendant to speak for himself would not be an "illegal sentence." Four members of the Court—THE CHIEF JUSTICE, MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN and I—expressly stated the view that such a sentence could be corrected under Rule 35's provision for the correction of "illegal" sentences. And four other members of the Court, in an opinion written by MR. JUSTICE FRANKFURTER, emphasized the importance of the right of the defendant to speak for himself, saying: "The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself." [8] Although it is true that these latter four members of the Court joined in refusing to set aside the sentence in that case, their stated ground was: "The defendant has failed to meet his burden of showing that he was not accorded the personal right which Rule 32 (a) guarantees, and we therefore find that his sentence was not illegal." [9] In the light of all these statements, it is not surprising that the Courts of Appeals for both the First and the Fifth Circuits have regarded the combined opinions in *Green* as requiring the correction of sentences as illegal when the defendant is able "to meet his burden of showing that he was not accorded the personal right which Rule 32 (a) guarantees." [10]

I think that a due observance of the requirements of Rule 32 (a), resting as they do upon the anciently recognized right of a defendant to speak to the court before sentence is imposed, is important to the proper administration of justice in the federal courts. And it seems to me that the Court is mistaken in thinking that the importance of that right is not reflected in this very case, for I cannot agree with the Court's conclusion that "there is

[8] 365 U. S., at 304.

[9] *Id.*, at 305.

[10] *Domenica* v. *United States*, 292 F. 2d 483; *Jenkins* v. *United States*, 293 F. 2d 96.

no claim that the defendant would have had anything at all to say if he had been formally invited to speak." According to the petitioner's brief, the denial of his right to speak was particularly injurious to him here because he had several previous convictions which presumably were known to the sentencing judge.[11] In this connection, he says: "Petitioner has been and is presently seeking collateral relief from those judgments and, indeed, has already had one set aside. This mitigating evidence, if known to the sentencing court, might have a profound impact upon the sentence imposed."

More importantly, however, whether the right to speak before sentence would have been of value to petitioner in this particular case or not, the right is one recognized by a rule which has the force of law and a sentence imposed in violation of law is plainly "illegal." If the Court is unhappy with the wording of Rule 35—a wording adopted by the Court itself and submitted to Congress for approval as required by law—whatever change is necessary to bring the Rule into conformity with the Court's present preferences should be incorporated into the explicit language of the Rule and submitted to Congress for its approval. I would reverse this case and remand it to allow the District Court to resentence petitioner after granting him his right to speak under Rule 32 (a).

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[11] Rule 32 (c) provides for a presentence investigation and report to the trial judge for use in imposing sentence which "shall contain any prior criminal record of the defendant . . . ." Since this is not the sort of information which normally finds its way into the record at the trial itself, a defendant's only chance to explain or rebut such evidence will often be by exercise of his right under 32 (a).

NOSTRAND ET AL. *v.* LITTLE ET AL.

APPEAL FROM THE SUPREME COURT OF WASHINGTON.

No. 571. Decided January 22, 1962.

After this Court's remand of this case, 362 U. S. 474, the State Supreme Court held that appellants, who are professors at the State University, are entitled to hearings before they can be discharged for refusal to swear that they are not members of the Communist Party or any other subversive organization, as required by a state statute. They again appealed from the judgment of that court sustaining the constitutionality of the statute against their claim, in a declaratory-judgment proceeding, that it violates the First and Fourteenth Amendments. *Held:* The appeal is dismissed for want of a substantial federal question.

Reported below: 58 Wash. 2d 111, 361 P. 2d 551.

Francis Hoague for appellants.

John J. O'Connell, Attorney General of Washington, *Herbert H. Fuller,* Deputy Attorney General, and *Timothy R. Malone,* Assistant Attorney General, for appellees.

PER CURIAM.

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

MR. JUSTICE DOUGLAS, dissenting.

The disposition that the Court makes of the case resolves one of the questions presented by the appeal, *viz.,* that appellants are entitled to a hearing before they can be discharged for refusing to take the oath. This was the holding below on the remand.[1] 58 Wash. 2d 111, 132, 361 P. 2d 551, 564.

[1] The purpose of our remand when the case was here earlier was to have that question of local law resolved. *Nostrand* v. *Little,* 362 U. S. 474.

Yet a remand for that purpose does not answer the other questions tendered, which concern the oath in question and First and Fourteenth Amendment rights.

The oath Washington demands of a teacher (Wash. Rev. Code, 1951, § 9.81.070) requires him to swear he is not a "subversive person," who is defined as

> ". . . any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or *alter,* or to assist in the overthrow, destruction or *alteration of,* the constitutional form of the government of the United States, or of the state of Washington, or any political subdivision of either of them *by revolution,* force, or violence; or who with knowledge that the organization is an organization as described in subsections (2) and (3) hereof, becomes or remains a member of a subversive organization or a foreign subversive organization." (Italics added.) Wash. Rev. Code, 1951, § 9.81.010 (5), as amended in 1953.

One aspect of the question the Court does not answer is akin to the one we had in *Cramp* v. *Board of Public Instruction, ante,* p. 278. There we held that an oath which required a teacher to say he had never knowingly lent his "aid" or "support" or "advice" or "counsel" or "influence" to the Communist Party was unconstitutional, because it brought or might bring into its net people who, by parallelism of conduct, might be said to have given "aid" to the Communist Party though the cause they espoused was wholly lawful.

This oath presents the question whether one who plans to "alter" the Government of the United States by "revolution" or who knowingly belongs to a group that spon-

sors that idea can be disqualified as a teacher. To "alter" has been the objective of many who have proposed constitutional amendments. The idea of "revolution" is an American concept [2] that at least until recently has been greatly revered. A "revolution" that operates through the route of constitutional amendments would, at least arguably, be in keeping with our ideas of freedom of belief and expression. I mention this matter not to decide it but to indicate its gravity and importance.

The judgment below dismissed the complaint. That action, together with what we do today, deprives appellants of their right to declaratory relief on questions we have never decided. They are remitted to the administrative relief afforded by a hearing—a relief they can get only if they refuse to take the oath. Whether they can preserve in an administrative proceeding the full array of constitutional questions which they now tender is at least debatable, since the judgment that dismisses their complaint decides all the constitutional questions, except the right to a hearing, against them.

For these reasons I dissent from the disposal made of the case and vote to note jurisdiction.

For the reasons stated by MR. JUSTICE DOUGLAS in his dissent, and others, MR. JUSTICE BLACK also dissents from the dismissal of this case.

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[2] See *Scales* v. *United States*, 367 U. S. 203, 262, 275 (dissenting opinion and Appendix).

MITCHELL *v.* UNITED STATES.

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

No. 448, Misc. Decided January 22, 1962.

In a Federal District Court, petitioner was convicted of robbery in the District of Columbia and sentenced to imprisonment. He subsequently filed in that court a paper entitled "Motion for Dismissal of Sentence and Reversal of Verdict," claiming, *inter alia,* that materially false testimony had been used against him at the trial. That court treated that motion as one to vacate sentence under 28 U. S. C. § 2255 and denied it. The Court of Appeals affirmed, though petitioner had produced in that court, for the first time, an affidavit of a police captain which contradicted the testimony of a prosecution witness. *Held:* Certiorari granted; judgment vacated; and case remanded to the District Court for a hearing upon petitioner's motion, treated as a motion for a new trial on the ground of newly discovered evidence.

Reported below: 110 U. S. App. D. C. 322, 293 F. 2d 161.

John Bodner, Jr. for petitioner.

Solicitor General Cox, Assistant Attorney General Miller and *Beatrice Rosenberg* for the United States.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari, which presents the question whether materially false testimony was used against petitioner at the trial, are granted, the judgment of the Court of Appeals is vacated, and the case is remanded to the District Court for a hearing upon petitioner's motion, treated as a motion for a new trial on the

ground of newly discovered evidence. Cf. *Mesarosh* v. *United States*, 352 U. S. 1. We, of course, intimate no view upon the merits of the motion.

MR. JUSTICE CLARK, with whom MR. JUSTICE HARLAN and MR. JUSTICE STEWART join, dissenting.

The Court *sua sponte* summarily vacates this judgment affirming the denial of a § 2255 application and remands the matter for a hearing, treating the case as one involving a motion for a new trial on the ground of newly discovered evidence. I characterize the application below, titled a "Motion for Reversal of Verdict and Dismissal of Sentence," as one under 28 U. S. C. § 2255 not only because of its wording but also because the petitioner, the Government, the trial court, and the Court of Appeals (including the dissenting judge) so styled it. Although petitioner in the alternative contends that the wording of this application could serve as "notice of appeal," he never suggests it should be treated as a motion for a new trial. If petitioner had intended the application in question to serve as a motion for a new trial, he would have so labeled it as he did the motion filed four days after the verdict. The Court, despite this treatment by all the parties and judges below, tags the application as a motion for a new trial on the ground of newly discovered evidence in order to escape the limitations of § 2255. I cannot give this pleading such a twist, but even if I could I would have to find the allegations insufficient to meet the requirements of Rule 33, which governs motions for new trials.

The newly discovered evidence consists of an affidavit by Police Captain Brown which merely corroborates the testimony of petitioner and another witness. It appears that during the investigation of the robbery in question the petitioner and one Adcock were placed in a police line-up supervised by Police Captain Brown. From this

line-up Ellis, one of the victims, identified Adcock as the robber. On trial Ellis testified that his identification was not positive and that he only picked Adcock as one who resembled the robber. Both Adcock and petitioner, however, testified that Ellis had positively identified Adcock in the line-up. There is no contention or showing that the Government knew that Ellis' testimony was false. Brown's affidavit was obtained while the case was pending in the Court of Appeals.

The affidavit, of course, was not newly discovered evidence. Both Adcock and the petitioner were in the line-up, and both knew that Police Captain Brown was likewise present and saw and heard Ellis' identification. In such a situation petitioner's motion for a new trial would be untimely because Rule 33, Fed. Rules Crim. Proc., permits such a motion to be made more than five days after a verdict of guilty *only* in the case of newly discovered evidence. However, even if the facts in the affidavit were newly discovered, it would still not be sufficient under Rule 33. As was said in *Mesarosh* v. *United States,* 352 U. S. 1, 9, "new evidence which is 'merely cumulative or impeaching' is not, according to the often-repeated statement of the courts, an adequate basis for the grant of a new trial. [Citing cases.]"

On the other hand, if the Court treats the application as one under § 2255, it is insufficient. Under that section the application would be a collateral attack on the conviction. In such a case it is essential for the moving party to establish not only that perjury existed but also that the prosecution used the testimony knowingly and wilfully to obtain a conviction. *E. g., Griffin* v. *United States,* 103 U. S. App. D. C. 317, 258 F. 2d 411 (1958); *Tilghman* v. *Hunter,* 167 F. 2d 661 (C. A. 10th Cir. 1948).

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This long-standing limitation was not erased by *Mesarosh* v. *United States, supra,* which involved a direct attack on the conviction rather than a collateral attack.

I regret that the Court, in an effort to avoid the requirements of § 2255, treats an application thereunder as a motion for a new trial. In my view this is a new approach to § 2255 cases. It extends that section far beyond its intended scope and can only plague us in future cases. I therefore dissent.

CHEWNING *v.* CUNNINGHAM, PENITENTIARY SUPERINTENDENT.

CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 63. Argued December 4–5, 1961.—Decided February 19, 1962.

In a trial in a Virginia court at which he requested but was denied counsel, petitioner was convicted of having been three times convicted and sentenced for felonies, and he was sentenced to 10 years' additional imprisonment. The applicable statute provides that, when it appears that a person convicted of an offense has been previously sentenced "to a like punishment," he may be tried on an information that alleges "the existence of records of prior convictions and the identity of the prisoner named in each," and it leaves to the trial court's discretion the length of the sentence which may be imposed for three or more convictions. Under Virginia law, not only the identity of the prisoner and the existence of the records but also the validity of the prior convictions may be at issue in such a proceeding. *Held:* Trial on a charge of being a habitual criminal is such a serious one, the issues presented under Virginia's statute are so complex, and the potential prejudice resulting from the absence of counsel is so great that petitioner's trial and conviction without counsel violated the Due Process Clause of the Fourteenth Amendment. Pp. 443–447.

Reversed.

Daniel J. Meador, acting under appointment by the Court, 365 U. S. 875, argued the cause for petitioner. With him on the briefs was *F. D. G. Ribble.*

Reno S. Harp III, Assistant Attorney General of Virginia, argued the cause for respondent. With him on the brief was *Frederick T. Gray,* Attorney General.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioner was sentenced to 10 years in prison under Virginia's recidivist statute. Va. Code, 1950, § 53–296. This statute provides that when it appears that a person convicted of an offense has been previously sentenced "to

a like punishment," he may be tried on an information that alleges "the existence of records of prior convictions and the identity of the prisoner with the person named in each." The statute goes on to provide that the prisoner may deny the existence of any such records, or that he is the same person named therein, or both.

If the existence of the records is denied, the court determines whether they exist. If the court so finds and the prisoner denies he is the person mentioned in the records or remains silent, a jury is impaneled to try that issue. If the jury finds he is the same person and if he has one prior conviction, the court may sentence him for an additional term not to exceed five years. If he has been twice sentenced, the court may impose such additional sentence as it "may deem proper."

Petitioner, then imprisoned in Virginia, was charged with having been three times convicted of and sentenced for a felony. He was accordingly tried under the recidivist statute; and he is now serving the sentence imposed at that trial. He brought this habeas corpus proceeding in the Virginia courts to challenge the legality of that sentence. The crux of his complaint was that he was tried and convicted without having had the benefit and aid of counsel, though he had requested one.[1] The Law and Equity Court of Richmond denied relief; and the Supreme Court of Appeals of Virginia refused a writ of error. While the grounds for the action of the Supreme Court of Appeals are not disclosed, the Law and Equity Court wrote an opinion, making clear that it ruled on the federal constitutional claim:

> "As to the mandate of the Fourteenth Amendment to the Constitution of the United States, here relied upon, the converse has been adjudicated. In Gryger

[1] He apparently did not appeal from the conviction. *Fitzgerald* v. *Smyth*, 194 Va. 681, 74 S. E. 2d 810, however, allows the deprivation of a constitutional right to be raised by habeas corpus.

> v. Burke, 334 U. S. 728, where release [on] habeas corpus was sought on the ground that petitioner was without counsel at his recidivist hearing, Mr. Justice Jackson said, in part, as follows (at p. 731):
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> "'. . . the State's failure to provide counsel for this petitioner on his plea to the fourth offender charge did not render his conviction and sentence invalid.'
>
> "This holding was adhered to in Chandler v. Fretag, 348 U. S. 3, where it was decided that, while a State is not required under the Fourteenth Amendment to furnish counsel, it cannot deny the defendant in a repeater hearing of the right to be heard by counsel of his own choice."

The Law and Equity Court, while conceding that a proceeding under the recidivist statute was "criminal" and that in that proceeding the accused was entitled to most of the protections afforded defendants in criminal trials, concluded that petitioner was not entitled to have counsel appointed to assist him, since the proceeding was "only connected with the measure of punishment for the last-committed crime." Cf. *Fitzgerald* v. *Smyth,* 194 Va. 681, 689–690, 74 S. E. 2d 810, 816.

We put to one side *Gryger* v. *Burke,* 334 U. S. 728, on which the Virginia court relied. In that case, identity was the only issue and the specialized circumstances seemed to a majority not to require the appointment of counsel. Under the present recidivist statute, the situation is quite different. As we have seen, the "existence" of records of prior convictions of the kind described in the statute is an issue tendered in Virginia. We said of a like issue in *Reynolds* v. *Cochran,* 365 U. S. 525, 531, ". . . if petitioner had been allowed the assistance of his counsel when he first asked for it, we cannot know that counsel could not have found defects in the 1934 conviction that would have precluded its admission in a mul-

tiple-offender proceeding." In that case we also pointed out that the issue of "identity" may at times present difficult local law issues, as for example "whether the second-offender statute may be applied to reimprison a person who has completely satisfied the sentence imposed upon his second conviction and has been discharged from custody." *Id.*, p. 532.

In *Reynolds* v. *Cochran, supra,* the accused had his own lawyer and only asked for a continuance. But the holding in the case applies equally to an accused faced with an information under Virginia's recidivist statute and who has no lawyer. It is "The nature of the charge" (*Tomkins* v. *Missouri,* 323 U. S. 485, 488) that underlines the need for counsel. In trials of this kind the labyrinth of the law is, or may be, too intricate for the layman to master. *Id.*, pp. 488–489; *Williams* v. *Kaiser,* 323 U. S. 471, 474. Virginia has held that the validity of any of the prior convictions, used to bring the multiple-offender statute into play, may be inquired into. See, *e. g., Wesley* v. *Commonwealth,* 190 Va. 268, 272–274, 56 S. E. 2d 362, 364. These may involve judgments of conviction in any state or federal court in the Nation. Counsel, whom we appointed to represent petitioner here, has shown the wide variety of problems that may be tendered. In Virginia, a trial under this statute may present questions such as whether the courts rendering the prior judgments had jurisdiction over the offenses and over the defendant and whether these offenses were punishable by a penitentiary sentence. *Wesley* v. *Commonwealth, supra,* 190 Va., at 273, 56 S. E. 2d, at 364. In Virginia, a sentence in excess of the one the court rendering it had power to impose is "void for the excess only." See *Royster* v. *Smith,* 195 Va. 228, 235, 77 S. E. 2d 855, 858–859. In Virginia, a court in considering whether the prior convictions afforded a proper basis on which to invoke the recidivist statute has considered whether, in a prior trial,

the defendant was represented by counsel and whether it was a fair and impartial trial. *Willoughby* v. *Smyth,* 194 Va. 267, 271, 72 S. E. 2d 636, 639. In Virginia, a prior conviction that is on appeal may not be the proper basis for a recidivist charge. *White* v. *Commonwealth,* 79 Va. 611. And there appears to be a question whether two prior convictions rendered the same day or at the same term could both be used in a Virginia multiple-offender prosecution. *Commonwealth* v. *Welsh,* 4 Va. 57. See *Dye* v. *Skeen,* 135 W. Va. 90, 102–103, 62 S. E. 2d 681, 688–689.

Double jeopardy and *ex post facto* application of a law are also questions which, as indicated in *Reynolds* v. *Cochran, supra,* p. 529, may well be considered by an imaginative lawyer, who looks critically at the layer of prior convictions on which the recidivist charge rests. We intimate no opinion on whether any of the problems mentioned would arise on petitioner's trial nor, if so, whether any would have merit. We only conclude that a trial on a charge of being a habitual criminal is such a serious one (*Chandler* v. *Fretag,* 348 U. S. 3), the issues presented under Virginia's statute so complex, and the potential prejudice resulting from the absence of counsel so great that the rule we have followed concerning the appointment of counsel in other types of criminal trials [2] is equally applicable here.

Reversed.

[For opinion of Mr. Justice Harlan, concurring in the result, see Nos. 56 and 57, *Oyler* v. *Boles* and *Crabtree* v. *Boles, post,* p. 457.]

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[2] *Williams* v. *Kaiser, supra; Tomkins* v. *Missouri, supra; Townsend* v. *Burke,* 334 U. S. 736; *Hudson* v. *North Carolina,* 363 U. S. 697; *McNeal* v. *Culver,* 365 U. S. 109.

OYLER *v.* BOLES, WARDEN.

CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA.

No. 56. Argued December 4, 1961.—Decided February 19, 1962.*

West Virginia's habitual criminal statute provides for a mandatory life sentence upon the third conviction "of a crime punishable by confinement in a penitentiary." The increased penalty is to be invoked by an information filed by the prosecuting attorney "immediately upon conviction and before sentence." In such proceedings, in which they were represented by counsel and did not request continuances or raise any matters in defense but did concede the applicability of the statute to the circumstances of their cases, petitioners were sentenced to life imprisonment. Subsequently they petitioned the State Supreme Court for writs of habeas corpus, alleging that the Act had been applied without advance notice and to only a minority of those subject to its provisions, in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Their petitions were denied. *Held:*

1. Due process does not require advance notice that the trial on the substantive offense will be followed by an habitual criminal accusation. It does require a reasonable opportunity to defend against such an accusation; but the records show that petitioners were not denied such an opportunity. Pp. 451–454.

2. The failure to proceed against other offenders because of a lack of knowledge of prior offenses or because of the exercise of reasonable selectivity in enforcement does not deny equal protection to persons who are prosecuted, and petitioners did not allege that the failure to prosecute others was due to any other reason. Pp. 454–456.

Affirmed.

David Ginsburg, acting under appointment by the Court, 365 U. S. 826, argued the cause and filed a brief for petitioners.

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*Together with No. 57, *Crabtree* v. *Boles, Warden,* also on certiorari to the same Court.

George H. Mitchell, Assistant Attorney General of West Virginia, argued the cause for respondent. With him on the brief was *C. Donald Robertson,* Attorney General. *Fred H. Caplan* entered an appearance for respondent.

MR. JUSTICE CLARK delivered the opinion of the Court.

The petitioners in these consolidated cases are serving life sentences imposed under West Virginia's habitual criminal statute. This Act provides for a mandatory life sentence upon the third conviction "of a crime punishable by confinement in a penitentiary." [1] The increased penalty is to be invoked by an information filed by the prosecuting attorney "immediately upon conviction and before sentence." [2] Alleging that this Act had been applied without advance notice and to only a minority of those subject to its provisions, in violation respectively of the Due Process and Equal Protection Clauses of the Fourteenth Amendment, the petitioners filed separate petitions for writs of habeas corpus in the Supreme Court of Appeals of West Virginia. Both of their petitions were denied without opinion. Unlike *Chewning* v. *Cunningham, ante,* p. 443, here each of the petitioners was represented by counsel at the time he was sentenced. Finding the cases representative of the many recidivist cases that have been docketed in this Court the past few Terms, we granted certiorari. 365 U. S. 810. We now affirm the judgment in each case.

William Oyler, the petitioner in No. 56, was convicted of murder in the second degree on February 5, 1953, which offense carried a penalty of from 5 to 18 years' imprisonment. Sentence was deferred, and on February 11 his motion for a new trial was overruled. On that same date

[1] W. Va. Code, 1961, § 6130.

[2] W. Va. Code, 1961, § 6131.

the Prosecuting Attorney requested and was granted leave to file an information in writing alleging that Oyler was the same person who had suffered three prior convictions in Pennsylvania which were punishable by confinement in a penitentiary. After being cautioned as to the effect of such information, Oyler, accompanied by his counsel, acknowledged in open court that he was the person named in the information. The court then determined that the defendant had thrice been convicted of crimes punishable by confinement in a penitentiary and sentenced him to life imprisonment. In so doing the court indicated that the life sentence was mandatory under the statute and recommended that Oyler be paroled as soon as he was eligible. In 1960 Oyler filed a habeas corpus application in the Supreme Court of Appeals alleging a denial of due process under the Fourteenth Amendment in that he had not been given advance notice of his prosecution as a recidivist which prevented him from showing the inapplicability of the habitual criminal law. The statute was alleged to be inapplicable because he had never been *sentenced* to imprisonment in a penitentiary although he had been convicted of crimes subjecting him to the possibility of such sentence.[3] He also attacked his sentence on the equal protection ground previously set forth.

In 1957 Paul Crabtree, the petitioner in No. 57, pleaded guilty to forging a $35 check, which offense carried a penalty of from 2 to 10 years' imprisonment. Sentence was deferred, and a week later the Prosecuting Attorney informed the court that Crabtree had suffered two previous felony convictions, one in the State of Washington and one in West Virginia. The trial judge, after cautioning Crabtree of the effect of the information and

[3] The statute has been interpreted as requiring only that the previous convictions be such that imprisonment in a penitentiary *could have been* imposed. *State ex rel. Johnson* v. *Skeen,* 140 W. Va. 896, 87 S. E. 2d 521 (1955).

his rights under it, inquired if he was in fact the accused person. Crabtree, who had been represented by counsel throughout, admitted in open court that he was such person. Upon this admission and the accused's further statement that he had nothing more to say, the court proceeded to sentence him to life imprisonment. In 1960 Crabtree sought habeas corpus relief in the Supreme Court of Appeals claiming denial of due process because of the absence of notice which prevented him from showing he had never been convicted in Walla Walla County, Washington, as had been alleged in the information.[4] Like Oyler, he also raised the equal protection ground.

I.

Petitioners recognize that the constitutionality of the practice of inflicting severer criminal penalties upon habitual offenders is no longer open to serious challenge; [5] however, they contend that in West Virginia such penalties are being invoked in an unconstitutional manner. It is petitioners' position that procedural due process under the Fourteenth Amendment requires notice of the habitual criminal accusation *before* the trial on the third

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[4] The record indicates that instead of in Walla Walla Crabtree was convicted in Yakima County, Washington. At the time he was sentenced as a habitual criminal, he admitted that he had previously been sentenced to imprisonment in the State of Washington for a term of 20 years.

[5] *E. g., Moore* v. *Missouri,* 159 U. S. 673 (1895). West Virginia's statute is a carryover from the laws of Virginia, Va. Code, 1860, c. 199, §§ 25–26, and became its law when West Virginia was organized as a separate State. Since that time it has remained basically the same, save for a 1943 procedural amendment which provided that the statute should be invoked by information filed after conviction rather than by allegation in the indictment upon which the subject was being prosecuted for a substantive offense. In 1912 this Court upheld the constitutionality of the statute. *Graham* v. *West Virginia,* 224 U. S. 616 (1912).

offense or at least in time to afford a reasonable opportunity to meet the recidivist charge.

Even though an habitual criminal charge does not state a separate offense, the determination of whether one is an habitual criminal is "essentially independent" of the determination of guilt on the underlying substantive offense. *Chandler* v. *Fretag,* 348 U. S. 3, 8 (1954). Thus, although the habitual criminal issue may be combined with the trial of the felony charge, "it is a distinct issue, and it may appropriately be the subject of separate determination." *Graham* v. *West Virginia,* 224 U. S. 616, 625 (1912). If West Virginia chooses to handle the matter as two separate proceedings, due process does not require advance notice that the trial on the substantive offense will be followed by an habitual criminal proceeding.[6] See *Graham* v. *West Virginia, supra.*

Nevertheless, a defendant must receive reasonable notice and an opportunity to be heard relative to the recidivist charge even if due process does not require that notice be given prior to the trial on the substantive offense. Such requirements are implicit within our decisions in *Chewning* v. *Cunningham, supra; Reynolds* v. *Cochran,* 365 U. S. 525 (1961); *Chandler* v. *Fretag, supra.* Although these cases were specifically concerned with the right to assistance of counsel, it would have been an idle accomplishment to say that due process requires counsel but not the right to reasonable notice and opportunity to be heard.

As interpreted by its highest court, West Virginia's recidivist statute does not require the State to notify the

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[6] Any other rule would place a difficult burden on the imposition of a recidivist penalty. Although the fact of prior conviction is within the knowledge of the defendant, often this knowledge does not come home to the prosecutor until after the trial, and in many cases the prior convictions are not discovered until the defendant reaches the penitentiary.

defendant prior to trial on the substantive offense that information of his prior convictions will be presented in the event he is found guilty.[7] Thus notice of the State's invocation of the statute is first brought home to the accused when, after conviction on the substantive offense but before sentencing, the information is read to him in open court as was done here. At this point petitioners were required to plead to the information. The statute expressly provides for a jury trial on the issue of identity if the accused either denies he is the person named in the information or just remains silent.[8]

But the petitioners, who were represented by counsel, neither denied they were the persons named nor remained silent. Nor did they object or seek a continuance on the ground that they had not received adequate notice and needed more time to determine how to respond with respect to the issue of their identity. Rather, both petitioners rendered further inquiry along this line unnecessary by their acknowledgments in open court that they were the same persons who had previously been convicted. In such circumstances the petitioners are in no position now to assert that they were not given a fair opportunity to respond to the allegations as to their identity.

They assert, however, that they would have raised other defenses if they had been given adequate notice of the recidivist charges. It is, of course, true that identity is not the only issue presented in a recidivist proceeding, for, as pointed out by Mr. Justice Hughes (later Chief Justice) when this Court first reviewed West Virginia's habitual criminal law, this statute contemplates valid convictions which have not been subsequently nullified. *Graham* v. *West Virginia, supra.* A list of the more obvious issues

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[7] *West Virginia* v. *Blankenship,* 137 W. Va. 1, 69 S. E. 2d 398 (1952).

[8] W. Va. Code, 1961, § 6131.

would also include such matters as whether the previous convictions are of the character contemplated by West Virginia's statute and whether the required procedure has been followed in invoking it. Indeed, we may assume that any infirmities in the prior convictions open to collateral attack could have been reached in the recidivist proceedings, either because the state law so permits [9] or due process so requires. But this is a question we need not and do not decide, for neither the petitioners nor their counsel attempted during the recidivist proceedings to raise the issues which they now seek to raise or, indeed, any other issues. They were not, therefore, denied the right to do so. The petitioners' claim that they were deprived of due process because of inadequate opportunity to contest the habitual criminal accusation must be rejected in these cases. Each of the petitioners had a lawyer at his side, and neither the petitioners nor their counsel sought in any way to raise any matters in defense or intimated that a continuance was needed to investigate the existence of any possible defense. On the contrary, the record clearly shows that both petitioners personally and through their lawyers conceded the applicability of the law's sanctions to the circumstances of their cases.

II.

Petitioners also claim they were denied the equal protection of law guaranteed by the Fourteenth Amendment. In his petition for a writ of habeas corpus to the Supreme Court of Appeals of West Virginia, Oyler stated:

> "Petitioner was discriminated against as an Habitual Criminal in that from January, 1940, to

[9] The fact that the statute expressly provides for a jury trial on the issue of identity and is silent as to how other issues are to be determined does not foreclose the raising of issues other than identity. This is especially clear in the case of legal issues, such as the petitioners now raise, where a jury trial would be inappropriate.

> June, 1955, there were six men sentenced in the Taylor County Circuit Court who were subject to prosecution as Habitual offenders, Petitioner was the only man thus sentenced during this period. It is a matter of record that the five men who were not prosecuted as Habitual Criminals during this period, all had three or more felony convictions and sentences as adults, and Petitioner's former convictions were a result of Juvenile Court actions.
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> . . . . .
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> "#5. The Petitioner was discriminated against by selective use of a mandatory State Statute, in that 904 men who were known offenders throughout the State of West Virginia were not sentenced as required by the mandatory Statutes, Chapter 61, Article 11, Sections 18 and 19 of the Code. Equal Protection and Equal Justice was [*sic*] denied."

Statistical data based on prison records were appended to the petition to support the latter allegation. Crabtree in his petition included similar statistical support and alleged:

> "The said Statute are [*sic*] administered and applied in such a manner as to be in violation of Equal Protection and Equal Justice therefor in conflict with the Fourteenth Amendment to the Constitution of the United States."

Thus petitioners' contention is that the habitual criminal statute imposes a mandatory duty on the prosecuting authorities to seek the severer penalty against all persons coming within the statutory standards but that it is done only in a minority of cases.[10] This, petitioners

[10] The denial of relief by West Virginia's highest court may have involved the determination that the statute, like its counterpart § 6260, *infra,* note 11, is not mandatory. Such an interpretation would be binding upon this Court. However, we need not inquire into this point.

argue, denies equal protection to those persons against whom the heavier penalty is enforced. We note that it is not stated whether the failure to proceed against other three-time offenders was due to lack of knowledge of the prior offenses on the part of the prosecutors or was the result of a deliberate policy of proceeding only in a certain class of cases or against specific persons. The statistics merely show that according to penitentiary records a high percentage of those subject to the law have not been proceeded against. There is no indication that these records of previous convictions, which may not have been compiled until after the three-time offenders had reached the penitentiary, were available to the prosecutors.[11] Hence the allegations set out no more than a failure to prosecute others because of a lack of knowledge of their prior offenses. This does not deny equal protection due petitioners under the Fourteenth Amendment. See *Sanders* v. *Waters,* 199 F. 2d 317 (C. A. 10th Cir. 1952); *Oregon* v. *Hicks,* 213 Ore. 619, 325 P. 2d 794 (1958).

Moreover, the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation. Even though the statistics in this case might imply a policy of selective enforcement, it was not stated that the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification. Therefore grounds supporting a finding of a denial of equal protection were not alleged. *Oregon* v. *Hicks, supra;* cf. *Snowden* v. *Hughes,* 321 U. S. 1 (1944); *Yick Wo* v. *Hopkins,* 118 U. S. 356 (1886) (by implication).

The other points raised by petitioners, such as the misstatement of the Washington county in which Crabtree

[11] After prisoners are confined in the penitentiary, the warden is granted discretion as to the invocation of the severer penalty. W. Va. Code, 1961, § 6260. Thus the failure to invoke the penalty in the cases cited by petitioners may reflect the exercise of such discretion.

was convicted and the fact that Oyler actually served in a Pennsylvania correctional home rather than a penitentiary, all involve state questions with which we are not concerned. Since the highest court of West Virginia handed down no opinion, we do not know what questions its judgment foreclosed. If any remain open, our judgment would not affect a test of them in appropriate state proceedings.

Affirmed.

MR. JUSTICE HARLAN, concurring.

I join the Court's opinion in *Oyler* v. *Boles* and *Crabtree* v. *Boles*, Nos. 56 and 57, and concur in the result in *Chewning* v. *Cunningham*, No. 63, *ante*, p. 443.

In my view, the issues decided in *Oyler* and *Crabtree*, on the one hand, and in *Chewning*, on the other, represent opposite sides of the same coin. Since their interrelationship does not appear from the opinions of the Court, and since I cannot agree with the grounds of decision stated in *Chewning*, I file this separate opinion.

The statutes of both Virginia and West Virginia provide for enhanced punishment of multiple offenders. Apparently under the practice of neither State is the alleged recidivist given advance notice, either before the trial for his latest offense or after that trial but before sentencing, of the charges that are made in the multiple-offense accusation. It is not until he appears in open court and hears the prosecutor's information read to him that the accused learns on which convictions it is that the State relies in support of its demand for an increased sentence. And it is then and there that he must plead and state what his defense is, if he has any. This procedure was followed in each of the present cases.

For an individual unrepresented by counsel, this is surely too precipitous a procedure to satisfy the standards of fairness required of state courts by the Due Process

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Clause of the Fourteenth Amendment. *In re Oliver,* 333 U. S. 257, 273; see *Williams* v. *New York,* 337 U. S. 241, 245; *Cole* v. *Arkansas,* 333 U. S. 196, 201. One who is untutored in the law cannot help but be bewildered by this sudden presentation of the charges against him and the demand for an immediate response. Without suggesting that advance notice of any particular duration must be afforded, still less that such notice must be given before trial or sentencing on the latest offense, had the petitioners in *Oyler* and *Crabtree* been without the aid of counsel at their multiple-offender hearings, I would entertain grave doubts as to the constitutionality of the procedure from which their increased sentences resulted.

But the records in these cases reveal that both Oyler and Crabtree had counsel at hand when the multiple-offender hearing was held and when they were asked to plead. Counsel could have requested a continuance in order to look into the validity of the previous convictions or other possible defenses to the recidivist charges, or, if there was any doubt, to establish the identities of the previous offenders. They chose not to do so, and I think this choice forecloses the petitioners' claims that they were not given adequate notice and opportunity to prepare a defense.

In *Chewning,* however, the petitioner had no counsel. He was taken from the state penitentiary without any warning of what was in store for him, and was accused in open court of having been convicted on three prior occasions. His allegations that he requested the assignment of counsel, and that such request was denied, are not controverted.[1]

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[1] Although petitioner did not allege in his habeas corpus petition that he was indigent at the time of the recidivist hearing, the state court apparently proceeded on the assumption that he had met the necessary poverty standard.

The Court strikes down the enhanced sentence, despite the apparent similarity between this claim and the one rejected in *Gryger* v. *Burke,* 334 U. S. 728, because it holds that various defenses that were available to Chewning under Virginia law could not have been known to or presented by a layman. To me, the bare possibility that any of these improbable claims could have been asserted does not amount to the "exceptional circumstances" which, under existing law, *e. g., Betts* v. *Brady,* 316 U. S. 455, must be present before the Fourteenth Amendment imposes on the State a duty to provide counsel for an indigent accused in a noncapital case. Nor do I think that a decision on these grounds can be reconciled with the holding in *Gryger,* in which the Court rejected the proposition, made by able appointed counsel, that certain contentions, much like those here suggested by the Court, could have been offered had the petitioner in that case been provided with counsel for his multiple-offender hearing.

What does distinguish this case from *Gryger,* however, and persuades me that the failure to supply assistance of counsel amounted to a denial of the procedural fairness assured by the Fourteenth Amendment, is the want of adequate notice in advance of the hearing. In *Gryger,* a copy of the information listing the prior occasions on which the accused had been convicted was served upon him more than six and a half months before he was brought into court and asked to plead. This was more than ample time for him to engage an attorney, request assignment of counsel, or decide for himself what line of defense to take.[2] In the case before us now, Chewning

[2] It is true that a subsidiary claim in *Gryger* was that the petitioner had been denied access to legal materials which were necessary in the preparation of his defense. But he was at least able to reflect calmly on the factual accusation being made against him and was able to plan in advance what plea to enter and how best to present his case.

was given no such opportunity. Hence I agree that the least that fairness required was that he be provided with counsel so as to be advised of the courses available to him. With no opportunity to get such advice, I do not think that his own failure to ask for a continuance has any legal significance.

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

When this Court, years ago, sustained an application of West Virginia's habitual criminal law, it said:

> "Full opportunity was accorded to the prisoner to meet the allegation of former conviction. Plainly, the statute contemplated a valid conviction which had not been set aside or the consequences of which had not been removed by absolute pardon. No question as to this can be raised here, for the prisoner in no way sought to contest the validity or unimpaired character of the former judgments, but pleaded that he was not the person who had thus been convicted. On this issue he had due hearing before a jury." *Graham* v. *West Virginia,* 224 U. S. 616, 625.

The issue now presented is broader. It is what procedure used in making a charge that a person is an habitual criminal is necessary to satisfy the requirements of due process.

It is said that the record fails to show that this precise point was raised at the trial. If so, West Virginia might make that an adequate state ground, though it should be noted in passing that the court in *Rhea* v. *Edwards,* 136 F. Supp. 671, aff'd, 238 F. 2d 850, held that Tennessee's former procedure in habitual-offender cases violated due process where inadequate notice was given, even though

the accused apparently had not made this an issue at the trial. Cf. *Terminiello* v. *Chicago,* 337 U. S. 1. In these cases, however, West Virginia nowhere suggests that the issue of due process is not properly here. Rather the argument is that the requirements of due process are satisfied though the issue to be tried is restricted to the identity of the accused.

A hearing under these habitual-offender statutes requires "a judicial hearing" in order to comport with due process. *Chandler* v. *Fretag,* 348 U. S. 3, 8. The *Chandler* case held that denial of an opportunity for an accused to retain a lawyer to represent him deprives him of due process. And see *Chewning* v. *Cunningham, ante,* p. 443. If due process is to be satisfied, the full procedural panoply of the Bill of Rights, so far as notice and an opportunity to defend are concerned, must be afforded the accused. The charge of being an habitual offender is as effectively refuted by proof that there was no prior conviction or that the prior convictions were not penitentiary offenses as by proof that the accused is not the person charged with the new offense. The charge of being an habitual offender is also effectively refuted by proof that the prior convictions were not constitutionally valid as, for example, where one went to trial without a lawyer under circumstances where the appointment of someone to represent him was a requirement of due process. Denial or absence of counsel is an issue raisable on collateral attack of state judgments. *Williams* v. *Kaiser,* 323 U. S. 471. That is an inquiry that should also be permitted in these habitual-offender cases, if the procedure employed is to satisfy due process.

I mention the right of counsel merely to underline the gravity of these accusations. Unless any infirmities in the prior convictions that can be reached on collateral

attack [1] can be reached in these proceedings, the wrong done is seriously compounded.

As I understand it, the opinion of the Court concedes as much. But it affirms the convictions, even though no prior notice of the habitual-offender charge was given. Without any advance warning the present informations were filed at times when petitioners were in court in connection with their most recent convictions. The omission of formal notice has been held fatal in proceedings under recidivist statutes. *United States* v. *Claudy,* 204 F. 2d 624; *Edwards* v. *Rhea,* 238 F. 2d 850. I think reasonable prior notice is necessary to satisfy due process—notice given far enough in advance to allow for an opportunity to defend. A 9-day notice was deemed adequate in *Johnson* v. *Kansas,* 284 F. 2d 344, 345, the court saying:

> "The fundamental requisites of due process, when the statute is to be invoked, are reasonable notice and an opportunity for a full and complete hearing, with the right to the aid of competent counsel."

Respondent concedes that the notice necessary for a criminal trial was not given. Respondent indeed maintains that no notice is necessary:

> "The primary purpose for affording a defendant notice is to inform him of the charge against him, and to give him a reasonable time in which to prepare his defense. Such reason for notice does not exist in the instant cases pertaining to the application of the West Virginia habitual criminal act." Brief, p. 5.

Adequate notice of the charge under these habitual-offender statutes is as important as adequate notice

[1] Constitutional infirmities in criminal convictions in federal courts were declared to be "a jurisdictional bar to a valid conviction" and assertable by habeas corpus in *Johnson* v. *Zerbst,* 304 U. S. 458, 468, decided in 1938.

of the charge in an ordinary criminal trial. The notice required must be commensurate with the range and complexity of issues that concededly may be tendered. The requirements of notice, like those for a fair hearing, are basic. As we stated in *In re Oliver*, 333 U. S. 257, 273: "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence . . . ." That case was one in which a "one-man grand jury" charged a witness with giving false and evasive testimony and summarily convicted him. Its principle is equally applicable here. Until there is a charge fairly made and fairly tried, procedural due process has not been satisfied.[2]

Unless this principle is adhered to in proceedings under these recidivist statutes, serious penalties may be imposed without any real opportunity to defend.

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[2] Any contrary implications from *Graham* v. *West Virginia, supra,* must be read in light of the fact that the broadening reach of constitutional issues raisable by state habeas corpus followed our decision in *Johnson* v. *Zerbst, supra,* note 1. *Graham* v. *West Virginia* was decided in 1912; *Johnson* v. *Zerbst* in 1938; and the broadening attack on state court judgments on constitutional grounds in collateral proceedings started with *Chambers* v. *Florida*, 309 U. S. 227. And see *Smith* v. *O'Grady*, 312 U. S. 329; *Williams* v. *Kaiser, supra.*

POLLER *v.* COLUMBIA BROADCASTING SYSTEM, INC., ET AL.

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

No. 45. Argued November 13–14, 1961.—Decided February 19, 1962.

This action under § 4 of the Clayton Act to recover treble damages for losses allegedly resulting from violations of §§ 1 and 2 of the Sherman Act was brought by petitioner, who is the assignee of a dissolved corporation which formerly owned and operated WCAN, an ultra high frequency (UHF) television broadcasting station in Milwaukee, which was affiliated with the Columbia Broadcasting System (CBS) network. He alleged that, pursuant to a conspiracy to restrain and monopolize trade in the television broadcasting business, CBS purchased WOKY, a competing UHF station in Milwaukee, cancelled WCAN's network affiliation, thereby forced petitioner to sell WCAN to CBS at much less than its true value, and eliminated him from the broadcasting business in Milwaukee. He also alleged that a purpose of the conspiracy was to eliminate UHF broadcasting in Milwaukee and possibly throughout the United States. On the basis of pleadings, affidavits, depositions and interrogatories filed in the case, the District Court granted respondents' motion for a summary judgment, on the ground that the injury suffered by petitioner was *damnum absque injuria*, since CBS had a right to purchase WOKY, subject to approval by the Federal Communications Commission, and to cancel its affiliation contract with WCAN. *Held:* On this record, it cannot be said that "there is no genuine issue as to any material fact," within the meaning of Federal Rule of Civil Procedure 56 (c), and the motion for summary judgment should not have been granted. Pp. 465–474.

(a) If the cancellation of WCAN's network affiliation and the purchase of WOKY by CBS were part and parcel of unlawful conduct or agreement with others or were conceived in a purpose to unreasonably restrain trade, control a market, or monopolize, as alleged in the complaint, then such conduct might well violate the Sherman Act, and the record indicates that on a trial petitioner might be able to substantiate his claim of conspiracy. Pp. 467–473.

(b) Summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. P. 473.

(c) It cannot be said that no restraint of trade resulted from termination by CBS of its affiliation with WCAN because the public would still receive the same service from another source. *Klor's* v. *Broadway-Hale Stores,* 359 U. S. 207. P. 473.

109 U. S. App. D. C. 170, 284 F. 2d 599, reversed.

Morris Wolf argued the cause for petitioner. With him on the briefs was *Abraham L. Freedman.*

Samuel I. Rosenman argued the cause for respondents. With him on the briefs was *Ambrose Doskow. Leon Brooks* entered an appearance.

MR. JUSTICE CLARK delivered the opinion of the Court.

The question involved here is whether this treble damage action based on alleged violations of the restraint of trade and monopoly sections of the Sherman Law [1] was rightly terminated by a summary judgment of dismissal. The petitioner, Lou Poller, is the assignee of the Midwest Broadcasting Company, a dissolved corporation. In 1954 Midwest was the owner and operator of WCAN, an ultra high frequency (UHF) [2] broadcasting station

[1] Section 1 of the Sherman Act provides that: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal . . . ." 26 Stat. 209, as amended, 15 U. S. C. § 1.

Section 2 of the Sherman Act provides that: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . . ." 26 Stat. 209, as amended, 15 U. S. C. § 2.

[2] The terms ultra high frequency (UHF) and very high frequency (VHF) refer to the wave lengths of the electrical impulses which are projected by broadcasting stations to carry programs to receiving sets. Prior to 1952 only the VHF portion of the spectrum was authorized. Generally TV receivers are manufactured only to receive VHF signals and must be modified by an owner to receive UHF.

located in Milwaukee. The station was affiliated with the Columbia Broadcasting System network and was of the alleged value of $2,000,000. Poller charged that the respondents in 1954 entered into an unlawful conspiracy to eliminate WCAN from the broadcast field in Milwaukee.[3] It was a part of the conspiracy that respondent Holt was to secure in his name an option to purchase WOKY, a competing but inferior UHF broadcaster in Milwaukee. When and if the Federal Communications Commission amended its multiple ownership rules, then under consideration, so as to permit CBS to own UHF stations in addition to its VHF ones, Holt was to assign his option to CBS if it so elected. In that event, it was agreed CBS would cancel its affiliation agreement with WCAN pursuant to its option in that contract and in due course consummate its purchase of WOKY. This would place WCAN in the precarious position of competing with the two major national networks with stations in Milwaukee. Being unable to survive such competition, its only course would be to liquidate at distressed prices its valuable equipment and facilities only recently acquired. CBS might then acquire them at its own price for use in its new operation which was necessary because of the inferior quality of those of WOKY. CBS would then have Midwest's superior facilities and equipment which with the WOKY license would enable it to start broadcasting at a minimum expense and the least possible delay. Poller further claimed that the overall purpose of CBS was to destroy UHF broadcasting, which had only been permitted to enter the field in 1952, in order to protect its vast interest in VHF stations throughout the United States. Finally, he alleged the conspiracy was so successful that CBS not only acquired WCAN at a loss of

[3] The conspirators were alleged to be Columbia Broadcasting System, Inc.; CBS–TV; J. L. Van Volkenburg, President of CBS–TV; H. K. Akerberg, Vice President of CBS–TV; Bartell Broadcasters, Inc., owners of WOKY; and Thad Holt, a management consultant.

$1,450,000 to Midwest but that the latter was obliged to buy the facilities and equipment of WOKY at exorbitant prices and to agree to continue broadcasting from the latter's premises—which was done "in order to pretend that there was no restraint of trade or elimination of competition . . . ." However, WCAN continued in business only 10 days after CBS started its broadcasts on February 17, 1955. CBS discontinued UHF broadcasting in 1959 when it became affiliated with a Milwaukee VHF station.

At the hearing on the motion for summary judgment the trial judge held that the injury suffered was *damnum absque injuria,* stating that CBS had a right to purchase WOKY, subject to Federal Communications Commission approval, and to cancel its affiliation contract with WCAN. 174 F. Supp. 802. The Court of Appeals affirmed with Judge Washington dissenting, 109 U. S. App. D. C. 170, 284 F. 2d 599, and we granted certiorari, 365 U. S. 840. We now conclude that there was a genuine issue as to material facts and that summary judgment was not therefore in order.

I.

Summary judgment should be entered only when the pleadings, depositions, affidavits, and admissions filed in the case "show that [except as to the amount of damages] there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56 (c), Fed. Rules Civ. Proc. This rule authorizes summary judgment "only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, . . . [and where] no genuine issue remains for trial . . . [for] the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try." *Sartor* v. *Arkansas Natural Gas Corp.,* 321 U. S. 620, 627 (1944). We now examine the contentions of the parties to determine whether under the rule summary judgment was proper.

II.

The respondents in their motion for summary judgment depended upon the affidavits of four persons. The first is Richard Salant, Vice President of CBS; another, Jay Eliasberg, Director of its Research Division; a third, Lee Bartell, who made the sale of WOKY to CBS at a $50,000 profit; finally, Thad Holt, a codefendant who received $10,000 from the transaction. These were supplemented by material taken from petitioner's depositions of Salant and CBS President Stanton. It is readily apparent that each of these persons was an interested party.

Respondents appear to place most reliance on the Salant testimony, and we shall, therefore, take it up in some detail. It projects three defenses, the first being that there was no conspiracy for the following reasons: CBS–TV was not a separate entity but only a division of CBS, and therefore there could be no conspiracy between the two; Holt, the cover man in securing the option and purchase of WOKY, "had been given the particular job" by CBS and therefore was not a conspirator; and Bartell never shared in any illegal purpose that would bring him into the conspiracy. Secondly, in any event, the only issue in the case is the legality of the cancellation of the affiliation agreement by CBS which was merely the legal exercise by CBS of "the normal right of a producer to select the outlet for its product." And, finally, the monopoly charges are entirely "frivolous." The trial judge accepted the second defense.

III.

It may be that CBS by independent action could have exercised its granted right to cancel WCAN's affiliation upon six months' notice and independently purchased its own outlet in Milwaukee. However, if such a cancellation and purchase were part and parcel of unlaw-

ful conduct or agreement with others or were conceived in a purpose to unreasonably restrain trade, control a market, or monopolize, then such conduct might well run afoul of the Sherman Law. See *Times-Picayune Pub. Co.* v. *United States,* 345 U. S. 594, 624–625 (1953); *Eastman Kodak Co.* v. *Southern Materials Co.,* 273 U. S. 359, 375 (1927). Poller alleges and the affidavits, depositions, and exhibits indicate much more than the free exercise by CBS of the granted right of cancellation. A conspiracy is alleged to restrain trade in the Milwaukee television market; to eliminate WCAN from that market; to secure its facilities at depressed prices; and to occupy the UHF band in that market exclusively. The right of cancellation was merely one of the means used to effectuate this conspiracy. Moreover, "in its wider sense" Poller claims that a part of their conspiracy was "to wipe out the most outstanding UHF operator in the country [WCAN] and by wiping him out they destroyed the UHF industry, which was a threat to them, despite their protestations, because of the enormous economic investment they had in VHF."

It is argued that CBS cannot conspire with itself. However, this begs the question for the allegation is that independent parties, *i. e.,* Holt and Bartell, conspired with CBS and its officers.[4] While respondents' affidavits assert that Holt acted in good faith as a special agent or employee for CBS and that Bartell was completely free of any evil motives directed toward WCAN, the trial judge indicated a belief that Holt was "an independent actor" and would have submitted the question of his status to the jury had he not disposed of the case on other grounds. Furthermore, Poller submitted a deposition of Holt, an exhibit to which showed CBS had furnished Holt

[4] We do not pass upon the point urged by Poller that under the CBS corporate arrangement of divisions, with separate officers and autonomy in each, the divisions came within the rule as to corporate subsidiaries.

a complete analysis in writing of the Milwaukee market and the ownership and affiliation of the TV stations there, including WCAN. The deposition revealed that Holt had knowledge that the obvious purpose and necessary effect of the plan would be to eliminate independent UHF in Milwaukee and that he had a personal stake in its success. This included, *inter alia,* Holt's statements that he met with top CBS officials in New York for a briefing on his role, that he was a close friend of these officials, and that he would have retained the option for himself if unused by CBS. The latter admissions, when coupled with the uncertainty at that time of a Federal Communications Commission rule permitting CBS to purchase WCAN, suggest that the alternative plan was to let Holt exercise the option and take the affiliation if CBS could not. Likewise, Bartell's affidavit, barely a page and a half in the record, does not negative the allegations of conspiracy. Unquestionably, after knowing that Holt had in truth been acting for CBS and that the sale would prove disastrous to WCAN, he did file certain papers with the Federal Communications Commission requesting approval of the sale of WOKY. Poller had no opportunity to cross-examine him although he was a key witness to respondents' theory of the case. And it is noted that even though the transfer was uncontested before the Federal Communications Commission it received approval by a vote of only three Commissioners with the remaining two strongly dissenting.[5] It might be that on a trial Poller could substantiate his claims of conspiracy even against Bartell, although this would not be necessary to his case.

Respondents' answer to the charge that one of the purposes of the alleged conspiracy was to exert a restraining effect upon the development of UHF is that this is a

[5] 11 Pike and Fischer Radio Reg. 913, 914.

"fantastic assumption—for which there is not a shred of evidence." An analysis of the record seems to indicate that in 1954 prior to the purchase of WOKY there were three UHF channels assigned to Milwaukee by the Federal Communications Commission, two of which (WCAN and WOKY) were operating; that since December 1953 CBS had been studying UHF markets preparatory to an expected change in Commission rules that would allow it to purchase two UHF stations in addition to its five VHF ones; that its staff rated Pittsburgh, St. Louis, New Haven-Hartford, and Milwaukee, in that order, as the most attractive; that CBS chose to enter the latter market and buy WOKY rather than to operate in Milwaukee on the third available channel; that WCAN's profitable operation in 1954, even with lower rates and competition from WOKY, was "immediately converted to a losing" one, although in 1955 WOKY was out of business; and that this reported loss of about $130,000 under CBS operation in 1955 contrasted sharply with the 66% increase in its profits nationally. Furthermore, reports in the record from CBS itself show that it always had recognized "a VHF station . . . would be preferable to a UHF . . ." but that the latter had "specially good *short-term* prospects" (emphasis supplied) in Milwaukee because it had "the characteristic of being at present" (1954) a "single station" market. CBS further recognized that since its programing was "already working to build up UHF set population . . . [through WCAN] [t]here would be no short-term loss to the network in continuing to give the support of CBS programing to the buildup of a UHF population . . . *at least until more VHF stations come in.*" (Emphasis supplied.)

The record indicates that Poller had built up a profitable UHF operation, which was recognized as "the most successful" in the United States. Even CBS officials pointed to it as an example of how "a vigorously and

aggressively managed new UHF station in that community can do well." In the short period of a year its public acceptance in Milwaukee was so great that 90% of the 260,000 TV sets in the area had been modified, at an expense of some $20 to each owner, so as to be able to receive UHF signals. While CBS had refused to enlarge the six-month cancellation clause, at no time prior to the alleged conspiracy did it indicate an intention to cancel the WCAN affiliation.[6] It was, Poller claims, only pursuant to the conspiracy that CBS came into the Milwaukee market and eliminated both WCAN and WOKY. Since that time the total number of commercial UHF stations in the United States has steadily declined from 121 at the end of 1953 to 94 by midyear 1956. At the close of 1957 the number was only 88. In 1958 CBS itself abandoned a UHF station in Hartford, and in 1959 the very station in controversy here was likewise abandoned, leaving Milwaukee with no commercial UHF service. Instead, CBS has switched to VHF, affiliating with a Storer Broadcasting Company station which was authorized there the same year. It will be remembered that Mr. Storer is the same prospect who, Poller claims, indicated he would pay $2,000,000 for WCAN when the multiple rule was adopted but who cooled after a CBS warning. All of this may not be sufficient to warrant the finding that Poller contends for on this charge, but it does indicate more than fantasy, particularly in the light of the testimony of CBS Vice President Salant in his deposition that "it would be the kiss of death to UHF if either NBC or CBS abandoned a UHF station."

It may be that upon all of the evidence a jury would be with the respondents. But we cannot say on this record that "it is quite clear what the truth is." Cer-

[6] Indeed, such action would be unreasonable in light of the success of Midwest's initial operation and its highly favorable prospects with the expanded facilities and new equipment.

tainly there is no conclusive evidence supporting the respondents' theory. We look at the record on summary judgment in the light most favorable to Poller, the party opposing the motion, and conclude here that it should not have been granted. We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot.[7] It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of "even handed justice."

IV.

Other contentions of respondents are subject to ready disposition. They say that no restraint of trade resulted from CBS' termination of its affiliation with WCAN for this enabled it to support WOKY, the other UHF station in the Milwaukee area, which based upon Poller's own allegations was doomed without an affiliation. To the extent that this argument suggests that there is no violation of the antitrust laws because the public will still receive the same service, it has been foreclosed by this Court's decision in *Klor's* v. *Broadway-Hale Stores,* 359 U. S. 207 (1959). And if it is meant to say that there was no restraint because CBS in canceling its affiliation with WCAN was merely doing what it had a right to do and the resulting demise of WCAN followed from normal market conditions, it erroneously assumes that CBS had an absolute right despite violations of the antitrust laws to exercise its contractual privilege. See Part III, *supra.* A further answer to the respondents' conten-

[7] Compare *Kennedy* v. *Silas Mason Co.,* 334 U. S. 249, 256–257 (1948); *Arenas* v. *United States,* 322 U. S. 419, 434 (1944).

tion in this regard is that Poller has an additional claim that part of the conspiracy was the destruction of UHF broadcasting entirely. The sole answer of CBS to that is "there is not a shred of evidence" to support such a charge. However, there has been no trial as yet, and the issue remains a factual one disputed under the pleadings and still undetermined.

CBS contends that the monopolization charges are frivolous. We find the record unclear on these claims. In view of our remand for a trial on the merits, we forego any comment thereon. The complaint does not allege the relevant market involved. In the trial court it was argued that UHF broadcasting in Milwaukee was the market, but on the record here we are unable to determine that issue. It may well be that on a trial appropriate allegations and proof can be adduced showing violations of § 2. See generally *International Boxing Club* v. *United States,* 358 U. S. 242, 249–252 (1959); *United States* v. *E. I. du Pont de Nemours & Co.,* 353 U. S. 586, 648–654 (1957) (dissenting opinion). We believe it to be good judicial administration to withhold decision on these issues.

Reversed and remanded.

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

As I see it, this is one of those cases, not unfamiliar in treble-damage litigation, where injury resulting from normal business hazards is sought to be made redressable by casting the affair in antitrust terms. I think that the antitrust laws do not fit this case, and that the courts below were quite correct in holding that the respondents were entitled to judgment as a matter of law.

The litigation arises out of CBS' cancellation of an affiliation arrangement with WCAN, a UHF television broadcasting station in Milwaukee, owned by Midwest

Broadcasting Company of whose property Poller is assignee. CBS maintains that such cancellation was but the legitimate exercise of a contractual right. Poller says that it was part of a conspiracy to restrain and monopolize trade in the television broadcasting business, violative of §§ 1 and 2 of the Sherman Act. Suing under § 4 of the Clayton Act,[1] Poller seeks to recover as damages the trebled fair value of the WCAN station and equipment, whose sale to CBS at a distress price he claims was forced upon him in consequence of CBS' cancellation of the WCAN affiliation contract.

Poller asserts that CBS, joined by others as conspirators, wanted to put him out of business as the first step in a grand design to destroy UHF broadcasting in Milwaukee, if not indeed throughout the United States. It is said that CBS looked with disfavor upon the growth of UHF broadcasting, being itself already heavily committed to VHF. As subsidiary steps towards the effectuation of this plan, it is charged that CBS chilled prospective purchasers of WCAN; acquired the only then competing UHF station in Milwaukee, WOKY; and later closed that station down.[2] CBS' co-conspirators are said to have been CBS-Television, an unincorporated division of CBS; certain officers of CBS; Bartell, the then owner of WOKY; and Holt, a management consultant, who at CBS' behest obtained from Bartell an option to purchase WOKY.

I assume that Poller would be entitled to proceed to trial if the record before the District Court had left open

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[1] Under 15 U. S. C. § 15 "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws is given a private right of action."

[2] The last of these allegations was not included in the complaint since the station acquired by CBS did not cease operations until after this suit was brought. It was alleged, however, in petitioner's supplemental affidavit in response to the motion for summary judgment.

a genuine question of fact as to whether the alleged conspiracy had as its object the elimination of all UHF stations in the Milwaukee area, or even if it appeared that petitioner might prove that the respondents entered upon this course in order to reduce the number of UHF stations in Milwaukee from two to one, which was to be owned outright by CBS.[3] But, for reasons given below, I think that the depositions and affidavits which were before the District Court disclosed to a practical certainty that such proof could not be made.

What did remain open to proof was an alleged arrangement among CBS, its television division, and its officers and agents whereby CBS canceled an affiliation with one UHF station and purchased the facilities of a competing station. Even if somewhere among those sought to be drawn into petitioner's net there can be found two independent actors whose meeting of minds would satisfy the usual conspiracy requirement of "plurality of parties,"[4] their agreement to carry out that design would not, in my

[3] If such issues of fact were open and petitioner could prove at the trial that respondents' motives were unlawful, I think it would still be incumbent upon him to prove that the disaffiliation of WCAN was part of the illegal scheme. There is evidence in the record, not contradicted, tending to show that CBS would have canceled that affiliation without regard to its purchase of the Bartell station. If so, much, if not all, of petitioner's alleged loss would have been incurred because of this unilateral act, and not "by reason of anything forbidden in the antitrust laws."

[4] While I do not reach respondents' contention that no consensual arrangement of any kind was shown, I must say that the Court has stretched very far in suggesting that Holt may have been a "conspirator." The record shows, beyond any real possibility of contradiction, that Holt was simply engaged by CBS to act for it, as undisclosed principal, in procuring from Bartell an option to purchase WOKY. So far as Bartell is concerned, it stands uncontroverted in the record that he never knew of CBS' interest in Holt's option until it was exercised by CBS.

view, of itself offend anything proscribed by §§ 1 or 2 of the Sherman Act.

I.

In passing on the motion for summary judgment, the District Court had before it more than the four affidavits of interested parties to which the Court's opinion seems especially to refer (*ante*, pp. 468, 473). In the record was the testimony of four key witnesses taken by pretrial depositions. Petitioner's counsel had examined Frank Stanton, President of CBS; Richard Salant, a Vice-President of CBS; and Thad Holt, who acted for CBS in procuring the option on the Bartell station.[5] Petitioner's testimony was also in the record in the form of a deposition taken by respondents' counsel, and two affidavits submitted in opposition to the motion for summary judgment. In addition, the record contained the respondents' answers to written interrogatories put by the petitioner. It is in light of this far from meager pretrial discovery that the appropriateness of summary judgment must be evaluated.

Federal Rule of Civil Procedure 56 (c) authorizes a District Court to enter summary judgment

> "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

In so providing, the draftsmen of the Rule of course did not intend to cut off a litigant's right to a trial before the appropriate fact-finder if triable issues remained unresolved after the pleadings were closed and pretrial dis-

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[5] The record shows that the undisclosed employment of Holt was due to CBS' desire to keep its competitors, particularly the National Broadcasting Company, from knowledge of its intentions respecting WOKY. This is, of course, a perfectly normal business phenomenon.

covery had. *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U. S. 620, 627; *Fountain* v. *Filson*, 336 U. S. 681. On the other hand, it is equally clear that their purpose was to obviate trials which would serve no useful purpose. In administering the Rule, the availability of pretrial discovery, as well as matter actually discovered, is a factor to be considered in determining whether a "genuine issue as to any material fact" is open. *E. g., Schneider* v. *McKesson & Robbins, Inc.*, 254 F. 2d 827, 831. Further, the Rule does not indicate that it is to be used any more "sparingly" in antitrust litigation (*ante*, p. 473) than in other kinds of litigation, or that its employment in antitrust cases is subject to more stringent criteria than in others. On the contrary, without reflecting in any way upon the good faith of this particular lawsuit, having regard for the special temptations that the statutory private antitrust remedy affords for the institution of vexatious litigation, and the inordinate amount of time that such cases sometimes demand of the trial courts, there is good reason for giving the summary judgment rule its full legitimate sweep in this field.

In this case petitioner, the party opposing the motion, had complete access by means of pretrial discovery to all the evidence he could marshal at a trial on the merits.[6] Neither his cross-examination of hostile witnesses nor his own direct testimony by way of deposition and affidavit produced any evidence which would indicate that the respondents sought to accomplish anything more than to purchase for CBS a UHF station in Milwaukee. As the Court's opinion seems to recognize, such a purchase (accompanied by a cancellation of petitioner's station affiliation) would be unlawful only if "*conceived in a purpose* to unreasonably restrain trade, control a market, or

[6] There is no suggestion that petitioner was not afforded opportunity to examine any witness he wanted, either before or after respondents made their motion for summary judgment.

monopolize." (*Ante,* p. 469.) (Emphasis added.) In other words, unless a purpose to cancel petitioner's affiliation and purchase the Bartell station would, by itself, be unlawful, petitioner could prevail in this suit only if he proved that the respondents *intended* to stifle competition in, or monopolize, television broadcasting, either by closing down his station or, more broadly, by destroying the UHF business in whole or in part.[7]

This crucial issue, therefore, turns on proof of the respondents' motives. Had petitioner proceeded to trial and introduced no more evidence of motive than was

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[7] The assertion that respondents sought to destroy "the UHF industry . . . because of the enormous economic investment they had in VHF," upon which the Court relies (*ante,* p. 469), was not made in any of the papers filed with the District Court. It was first raised during oral argument on the motion for summary judgment. There is nothing in the record to support this charge except the hindsight inference arising from the fact that after *four* years of operating the UHF station in Milwaukee, CBS discontinued it, claiming that the VHF competition was too powerful.

The Court's opinion takes out of context certain statements in a CBS report and infers from them that CBS was intending to make only a short-term venture out of its UHF purchase. But a full reading of the report in question, which was appended to petitioner's affidavit in opposition to the motion for summary judgment, reveals that CBS rejected the suggestion that it purchase a UHF station in a market that was primarily VHF, for the very reason that it would have only short-term advantages. Moreover, the Court's construction of the passage on which it relies hardly reflects its real meaning. The central question on which the report focused was "the degree of short-term cost and inconvenience that is to be undergone in order to obtain the eventual gain" in the purchase of a UHF station. In this context, the report noted that CBS television programs, broadcast by a CBS affiliate in the area (*i. e.,* WCAN), had already built up a UHF viewing market, so that the losses that might be expected at the outset of any such venture would be minimized. The inference is that it would be wise for CBS to capitalize on this headstart before it was cut into by more VHF stations, not that CBS should purchase the station and abandon it as soon as other VHF stations entered the market.

revealed by the pretrial depositions and affidavits, the case, in my opinion, could not well have been permitted to go to the jury. There being no extrinsic evidence of an unlawful purpose, and CBS' executives having unequivocally denied any purpose to eliminate petitioner as a competitor, the jury would be left with no affirmative evidence of any intent to restrain trade. The possibility that the jury might disbelieve the respondents' assertions of innocence is not enough to forestall the entry of summary judgment in their favor. *Dyer* v. *MacDougall,* 201 F. 2d 265.

Despite the ample opportunity afforded him by the availability of pretrial discovery procedures, petitioner, as will be shown, was able to produce no evidence to support his charges that a conspiracy, narrow or far-reaching, had been hatched. He should not be permitted to proceed to trial just on the hope that in the more formal atmosphere of the courtroom witnesses will revise their testimony or that a clever trial tactic will produce helpful evidence. Courts do not exist to afford opportunities for such litigating gambles. See *Radio City Music Hall Corp.* v. *United States,* 135 F. 2d 715; *Schneider* v. *McKesson & Robbins, Inc., supra;* cf. *Orvis* v. *Brickman,* 90 U. S. App. D. C. 266, 270, 196 F. 2d 762, 765–766; *Lavine* v. *Shapiro,* 257 F. 2d 14, 20–21.

II.

I find nothing in this record to support a claim that CBS, in proceeding as it did, was actuated by a desire to restrain or monopolize trade.

It appears from questions asked of Stanton and Salant, two CBS officers, that petitioner sought to imply an unlawful motive to destroy competition from CBS' failure to negotiate with him in the first instance for the purchase of WCAN. Were it shown that respondents refused to consider purchasing petitioner's instead of Bartell's station, although the former was available on satisfactory

terms, such a showing might be some evidence of an intent to eliminate petitioner as a competitor of the other station bought by CBS. But the record shows that respondents throughout insisted that their refusal to deal with petitioner was the result of information that he had placed an exorbitant price on his station. That insistence, which Poller did not controvert or himself impugn, is confirmed by his own computation of damages in this case, as well as by his deposition testimony which reveals that he valued the WCAN property at $2,000,000 and demanded that price of all interested purchasers. CBS bought the Bartell station, although to be sure it had substantially inferior facilities, for $335,000.

Nor is there any evidence in the record to indicate that the respondents anticipated petitioner's offer to sell his facilities to CBS. It is clear from the affidavits and depositions, and is, in fact, conceded in petitioner's brief before this Court, that it was petitioner who initiated the negotiations and "importuned CBS to take his equipment off his hands." Petitioner contends that the respondents knew he would have no use for the recently enlarged plant once his CBS affiliation was canceled, so that his offer of sale was a necessary consequence of the disaffiliation. But this proves only that petitioner's injury may as readily have been the result of CBS' lawful program of expansion as of an invidious scheme to restrain competition. It buttresses the conclusion reached by the Court of Appeals (109 U. S. App. D. C. 170, 173, 176, 284 F. 2d 599, 602, 605) that the diminution in the value of petitioner's property was attributable to petitioner's imprudent investment [8] rather than to any antitrust con-

[8] The record shows that Poller from the beginning had unsuccessfully tried to persuade CBS to enlarge the term of his affiliation contract cancellation clause from six months to two years, and that, with eyes thus open, he nonetheless proceeded with his substantial equipment investment.

spiracy by the respondents. In addition, petitioner's surmise that the respondents must have known that the cancellation of Poller's affiliation would result in his offering his equipment to CBS is hardly consistent with the fact, sworn to by Salant and never traversed, that CBS had its engineering department draw up complete plans as to how the Bartell facilities could be expanded to make them suitable for CBS' intended use.

Finally, it is entirely clear from the record that petitioner was unable to prove that the respondents' motive was to eliminate his station. It is undisputed that at the time Holt obtained the option on the Bartell station both the American Broadcasting and DuMont networks had no primary affiliates in the Milwaukee market. There is nothing to indicate that respondents should have anticipated at the birth of their alleged conspiracy that such affiliations would be unavailable to petitioner if the CBS tie were broken. Moreover, it is patent from the terms of the contract under which CBS purchased petitioner's equipment that petitioner represented to the respondents that he would continue broadcasting operations as an independent from the studio formerly occupied by Bartell.[9] It was only after this representation was made, albeit, as petitioner now claims, with only "about a 5 per

[9] One of the introductory clauses of the contract provided:

"WHEREAS, Midwest [petitioner] has represented to CBS that Midwest intends to continue the operation of WCAN and all business incidental thereto, and for that purpose CBS proposes to make the sale and transfers hereinafter set forth; . . ."

I find no persuasive basis in the record for petitioner's assertion that this was designed as a self-serving declaration to cloak CBS' alleged antitrust malefactions. By that same contract CBS sold to Poller the WOKY equipment, in part consideration for the purchase of his equipment, the thought quite evidently being that such equipment would suffice for his continued operations, while the superior WCAN equipment would relieve CBS from the necessity of completely re-equipping WOKY.

cent hope" that he would be able to continue, that the exchange of facilities was consummated. The transaction was in all ways consistent with the parties' written intention to maintain *two* operating UHF stations in Milwaukee. For it was surely much more likely that petitioner could survive as an independent by using the smaller Bartell plant than by remaining in his enlarged studio, which had absorbed a large amount of capital that could not, at least immediately, be put to fruitful use.

In sum, the District Court had before it on this motion for summary judgment a record on which it was apparent that petitioner could prove only that CBS had undertaken to cancel its affiliation with petitioner's station and, with Holt's assistance, to purchase a competing UHF station. Only if such a "conspiracy" is prohibited by § 1 or § 2 of the Sherman Act should the petitioner have been permitted to proceed to trial.

III.

Respondents freely admit that the purchase of the Bartell station and the cancellation of petitioner's affiliation were parts of one course of action. They maintain, however, that their intention was to purchase a UHF station in Milwaukee as the first step in an incipient program of expansion into the UHF market, made possible by the Federal Communications Commission's then recently adopted "5-and-2" amendment to its multiple-ownership rule. By reason of this amendment, a single licensee was permitted to own two UHF stations in addition to the maximum five VHF stations theretofore allowed. I would hold that an arrangement to attain this objective did not, of itself, violate § 1 of the Sherman Act.

It must be obvious that the cancellation of an affiliation agreement by one network, not acting in concert with any other, does not alone give rise to a cause of action under the antitrust laws. *Federal Broadcasting System, Inc.,*

v. *American Broadcasting Co.*, 167 F. 2d 349. A network is surely free to cut its ties to one station and affiliate with another in the same market. Such an act is analogous to a manufacturer's transfer of an exclusive distributorship from one dealer in the market to another. This freedom to choose with whom one deals is preserved under the antitrust laws not only because it is a unilateral decision, but because it does not amount to an unreasonable restraint of trade in any meaningful sense of the term, cf. *Packard Motor Car Co.* v. *Webster Motor Car Co.*, 100 U. S. App. D. C. 161, 243 F. 2d 418; *Fargo Glass & Paint Co.* v. *Globe American Corp.*, 201 F. 2d 534.

To overcome these apparent barriers to any holding that § 1 of the Sherman Act was here violated, petitioner suggests two theories under which respondents' conduct might constitute a forbidden restraint of trade: (1) That by reason of the "leverage of its network power" CBS was able to restrain trade among the independently owned UHF stations in the Milwaukee area; and (2) that CBS' purchase of a television station amounted, *per se*, to an unreasonable restraint of trade. How either of these alleged restraints, assuming they are unlawful, caused petitioner's alleged loss is left a mystery. Regardless of any question of causation, however, petitioner can prevail on neither theory.

To the extent that the "leverage" complained of charges CBS with monopolizing a market, petitioner's claim falls under § 2, a matter to which I will revert in a moment. *Infra*, pp. 485–486. Apart from monopoly power, the respondents could have violated the antitrust laws only by conspiring in some manner to use CBS' "leverage" to restrain trade. Clearly, the disaffiliation alone was not an unlawful use of the network's power. Having built up the value of his station substantially because of its CBS affiliation, petitioner is hardly in a position to claim that by depriving him, in the exercise of a contract right, of

the benefit of such an affiliation CBS was unreasonably exercising its superior power to restrain trade. And there is no indication in the record that this "leverage" in any way affected the purchase price of petitioner's equipment, even were it to be assumed that the respondents foresaw that petitioner would be willing to sell. The charges here are unlike those in *United States* v. *Radio Corporation of America,* 158 F. Supp. 333, reversed, 358 U. S. 334, in which the Government sought to enjoin, as violating § 1, a network's attempt to coerce an independent owner into selling his station to the network under threat of canceling the network's affiliation with other stations under the same ownership. In this case there is no claim made that CBS conditioned the continuation of some network service upon petitioner's consent to sell his equipment, or on his willingness to reduce his price.

Nor can I agree that the contract whereby CBS became a station owner in the Milwaukee market was, in and of itself, a contract in restraint of trade. Petitioner is unable to point to any convincing differences between the vertical integration that is accomplished when a network purchases a station and that which results from an affiliation contract. Moreover, the very contention now being made here by the petitioner has repeatedly been presented to the Federal Communications Commission, and that agency has consistently adhered to the view that network ownership of stations, subject, of course, to the maximum-ownership limitation, is not contrary to the public interest. *E. g., ABC–Paramount Merger,* 8 Pike and Fischer Radio Reg. 541; *St. Louis Telecast, Inc.,* 12 Pike and Fischer Radio Reg. 1289, 1372; *National Broadcasting Co.,* 20 Pike and Fischer Radio Reg. 411, 419.

This Court has also been reluctant to hold that vertical expansion alone can amount to an unreasonable restraint prohibited by § 1 of the Sherman Act. *United States* v. *Paramount Pictures, Inc.,* 334 U. S. 131, 173–174; *United*

States v. *Columbia Steel Co.*, 334 U. S. 495, 525. Without of course suggesting that the Federal Communications Commission has authority to alleviate an applicant for a station license from the requirements of the antitrust laws, *United States* v. *Radio Corporation of America*, 358 U. S. 334, in light of the uniform course of decisions by the agency familiar with the field, and in the absence of any indication that this particular purchase *in fact* restrained trade, I think it is clear that petitioner's injury, even if it be assumed partially attributable to CBS' purchase, may not be made the basis of a treble-damage action.

Petitioner's § 2 claim is if anything even more insubstantial. He contends that respondents conspired to monopolize the UHF market in Milwaukee, and perhaps across the country, and that they succeeded in their attempt, at least in Milwaukee. But it is undisputed that the television sets being produced and sold in the Milwaukee area at the time of the alleged conspiracy were all equipped to receive VHF broadcasts and could be adapted to receive UHF signals as well. Thus, any UHF station was necessarily in competition with all VHF stations in the market with respect to both the viewing and the advertising public. Indeed, as the record uncontrovertedly shows, the CBS station ultimately succumbed because the VHF competition was too strong. Since CBS was patently not a monopolist in the Milwaukee market (which included both UHF and VHF), and since there was no allegation that it approached monopoly power in any other market in which petitioner was a competitor, the entry of summary judgment in favor of the respondents on this claim too was eminently correct.

I have gone into this matter at some length because in my opinion the Court's encouragement of this sort of antitrust "enforcement" does disservice to the healthy observance of these laws. I would affirm.

MACHIBRODA *v.* UNITED STATES.

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

No. 69. Argued December 5, 1961.—Decided February 19, 1962.

In a Federal District Court, petitioner pleaded guilty to two charges of bank robbery. Before sentencing, the Judge inquired whether counsel desired to make any statement; but he did not direct any similar inquiry to petitioner personally. He sentenced petitioner to imprisonment for 25 years on one charge and 15 years on the other, the sentences to run consecutively. Several years later, petitioner filed in the same Court a motion under 28 U. S. C. § 2255 to vacate and set aside the sentence on the grounds that the Judge had not asked petitioner whether he wished to speak in his own behalf before sentence was imposed, as required by Federal Rule of Criminal Procedure 32 (a), that he had accepted the guilty pleas without first determining that they had been made voluntarily, as required by Rule 11, and that the pleas of guilty had not been voluntary but had been induced by promises and threats made by the prosecuting attorney. In support of the last ground, petitioner filed an affidavit setting out detailed and specific allegations. The prosecuting attorney filed an affidavit denying any promises or coercion. Without a hearing, the District Judge determined that petitioner's allegations concerning an agreement were false and denied the motion. *Held:*

1. Failure of the Judge specifically to inquire at the time of sentencing whether petitioner personally wished to make a statement in his own behalf is not of itself an error that can be raised by motion under 28 U. S. C. § 2255 or Rule 35. P. 489.

2. The District Court did not proceed in conformity with 28 U. S. C. § 2255 when it made findings on controverted issues of fact without notice to petitioner and without a hearing, since this was not a case where "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." Pp. 489–496.

280 F. 2d 379, judgment vacated and cause remanded.

By appointment of the Court, 365 U. S. 842, *Curtis R. Reitz* argued the cause and filed a brief for petitioner.

Julia P. Cooper argued the cause for the United States. With her on the briefs were *Solicitor General Cox, Assistant Attorney General Miller, Richard J. Medalie* and *Beatrice Rosenberg.*

MR. JUSTICE STEWART delivered the opinion of the Court.

In 1956 two informations were filed in the United States District Court for the Northern District of Ohio charging the petitioner with having robbed banks in Waterville, Ohio, and Forest, Ohio. Represented by counsel of his own choice, the petitioner waived indictment and pleaded guilty to both charges. Sentence was deferred pending a presentence investigation, and in the interim petitioner appeared as a defense witness at the jury trial of Marvin Breaton, charged with participation in the Waterville bank robbery. At that trial the petitioner testified that he had robbed the Waterville bank, but denied that Breaton had been with him. Breaton was convicted by the jury. Three weeks later the petitioner appeared with counsel before the District Judge for sentencing. During the course of the proceedings the judge inquired if counsel had any statement to make, but did not direct any similar inquiry to the petitioner personally. The court imposed sentence of twenty-five years imprisonment on the first information and fifteen years on the second, the sentences to run consecutively.

In 1959 the petitioner instituted the present litigation by filing in the sentencing court a motion under 28 U. S. C. § 2255, to vacate and set aside the sentence he was serving. The motion alleged three grounds upon which it was claimed relief should be granted: that the petitioner's pleas of guilty had not been voluntary, but had been induced by promises made by the Assistant United States Attorney in charge of the prosecution; that in violation of Rule 11 of the Federal Rules of Criminal Procedure the

court had accepted the guilty pleas without first determining that they had been made voluntarily; and that in violation of Rule 32 (a) of the Federal Rules of Criminal Procedure the court had not inquired if the defendant wished to speak in his own behalf before sentence was imposed. The motion was denied by the District Court without a hearing, 184 F. Supp. 881. The Court of Appeals affirmed, *per curiam,* 280 F. 2d 379. We granted certiorari to consider seemingly significant questions as to the scope of relief under 28 U. S. C. § 2255. 365 U. S. 842.

I.

For the reasons stated in *Hill* v. *United States, ante,* p. 424, we hold that the failure of the District Court specifically to inquire at the time of sentencing whether the petitioner personally wished to make a statement in his own behalf is not of itself an error that can be raised by motion under 28 U. S. C. § 2255 or Rule 35 of the Federal Rules of Criminal Procedure.

II.

In support of his claim that his pleas of guilty had been involuntarily made, the petitioner's motion and supporting affidavit set out detailed factual allegations. Specifically, the motion and affidavit alleged that on three separate occasions, identified as to time and place, an Assistant United States Attorney had promised the petitioner that he would receive a total prison sentence of not more than twenty years if he pleaded guilty to both informations. These promises were said to have been made upon the authority of the United States Attorney and to be agreeable to the District Judge. It was alleged that the petitioner had been cautioned not to tell his own lawyer about the conversations. It was further alleged that when the petitioner threatened to advise his lawyer and the court of what had transpired, the Assistant

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United States Attorney had told him that if he "insisted in making a scene," certain unsettled matters concerning two other robberies would be added to the petitioner's difficulties. Finally, the motion and affidavit alleged that the petitioner had written two letters to the sentencing court and two letters to the Attorney General of the United States "relative to the misrepresentations" by the Assistant United States Attorney, to which he had received no reply.[1]

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[1] The affidavit filed with the petitioner's motion was as follows:

"John Machibroda, having been duly sworn according to law deposes and says that he is the petitioner in an action filed in this Court entitled 'Motion To Vacate sentence' and this affidavit is made in support thereof:

"1. That affiant was interviewed in the County Jail on or about February 21, 1956, by one Clarence M. Condon who represented himself to be as Assistant United States Attorney in charge of the prosecution of alleged bank robberies committed at the Waterville and Forest Banks. (Later designated as Cases 10345 and 10348). The County Jail where the interview took place is situated in Toledo, Ohio.

"2. That the said Clarence M. Condon represented to the Affiant that he had the authority to speak for the United States Attorney and the United States District Judge in the matter of the amount of sentence that would be imposed in Cases Nos. 10345 and 10348.

"3. That the said Clarence M. Condon represented to the Affiant that if the Affiant would waive indictment in case no. 10348 and plead guilty in cases Nos. 10345 and 10348 the Court would not impose a sentence in the excess of twenty (20) years in Case No. 10345 and that any sentence imposed in Case No. 10348 would not be in the excess of ten (10) years and would be ordered served concurrently with the term imposed in case No. 10345.

"4. That on the assurance of the said Clarence M. Condon that the sentences would be imposed as heretofore set out in paragraph 3, above, the Affiant agreed to waive indictment in case no. 10348 and plead guilty to both cases.* (This interview was held on or about February 21, 1956.)

" *At that time the Affiant had already waived indictment in case No. 10345.

[*Footnote 1 continued on p. 491*]

The Government filed a memorandum in opposition to the petitioner's motion, attaching an affidavit of the Assistant United States Attorney. The affidavit emphatically denied any promises or coercion with respect to the petitioner's pleas of guilty, but did admit that the Assistant United States Attorney had had a conversation with the petitioner in the county jail the day before Breaton's trial, at which time the petitioner was told

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"5. That the said Clarence M. Condon instructed the Affiant to advise his Attorney, John Schuchmann, that he would waive indictment in case no. 10348 and plead guilty to both cases.

"6. That the said Clarence M. Condon cautioned the Affiant to refrain from advising the said John Schuchmann of his interviews with Mr. Condon and that an agreement had been reached between the government as represented by Mr. Condon, and the Affiant in the matter of waiver, pleas and sentences.

"7. That on February 24, 1956, Affiant acting on the promises and representations of the said Clarence M. Condon waived indictment in case no. 10348.

"8. That on February 24, 1956, the Affiant acting on the promises and representations of the said Clarence M. Condon pleaded guilty in Cases Nos. 10345 and 10348.

"9. That on or about May 22, 1956, the said Clarence M. Condon again interviewed the Affiant at the County Jail and informed Affiant that because of Affiant's unfavorable testimony at the trial of a co-defendant the Court was vexed and there might be some difficulty in regards to the promised twenty (20) year sentence.

"10. That the said Clarence M. Condon admonished the Affiant that he had tried to warn him during the trial of the co-defendant that Affiant would shortly appear before this Court for sentence.*

" *The exact words Mr. Condon used to warn the Affiant are to be found in the transcript of the trial of Marvin Ferris Breaton.

"11. That at no time did the Affiant ever represent to Mr. Condon or anyone else that he would testify one way or the other at the trial of the co-defendant. The promise of the maximum sentence of twenty (20) years was predicated solely on the Affiant's agreement to waive indictment and plead guilty to both informations.

"12. That the Affiant immediately became agitated and hotly informed Mr. Condon that he was going to tell his Attorney the

he was about to be given his last opportunity to tell the truth and that the court, in sentencing, might well take into consideration the petitioner's refusal to talk.

Without a hearing the District Judge determined that the petitioner's allegations as to an agreement with the Assistant United States Attorney were false. The court noted that it had never received either of the two letters

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whole story and demand that the Court be informed of the agreement.

"13. That the said Clarence M. Condon assured the Affiant that in the event a sentence in the excess of twenty (20) years was imposed the United States Attorney, himself, would move within sixty (60) days for a reduction of the portion of the sentence in excess of twenty (20) years; that the Affiant had nothing to worry about if he kept his mouth shut; that on the other hand, if Affiant insisted in making a scene in a matter of his own making, there were the unsettled matters of the robberies of the Trotwood and Canal Fulton Banks which would be added to the Affiant's present difficulties.

"14. That on May 23, 1956, the Affiant was sentenced by the Honorable Frank L. Kloeb to twenty-five (25) years in Case No. 10345 and fifteen (15) years in case no. 10348.

"15. That immediately after sentence in an interview with the said Clarence M. Condon, the Affiant was informed he had no reason to worry for as soon as the Judge 'cooled off' the United States Attorney would have the sentence reduced to twenty (20) years as had been promised.

"16. That within a few hours after sentence, the Affiant was on his way to the Federal Penitentiary, Leavenworth, Kansas.

"17. That the sentence was not reduced in sixty (60) days and has not been reduced to date.

"18. That the petitioner wrote two (2) letters to the Honorable Frank L. Kloeb and two (2) letters to the Attorney General of the United States relative to the misrepresentations by the said Clarence M. Condon. These letters were posted in the official prisoner's mail box and the Affiant has failed to receive a reply to any of them.

"19. That the Affiant's previous experience with Court officials has been with the authorities representing the Canadian Government and he found them to honor their commitments. He had no reason to believe that the officials of the United States Courts would do otherwise. His naivete has cost him an extra twenty (20) years in prison."

referred to by the petitioner, but had received a letter purportedly from him six months after sentencing, which did not mention any agreement, but simply requested that the sentences be made concurrent, rather than consecutive. The court further noted that the petitioner had not complained when no request for a reduction of sentence was made by the United States Attorney within sixty days after sentencing, and that instead, the petitioner had waited almost two and a half years to file the present motion.

There can be no doubt that, if the allegations contained in the petitioner's motion and affidavit are true, he is entitled to have his sentence vacated. A guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void. A conviction based upon such a plea is open to collateral attack. See *Walker* v. *Johnston,* 312 U. S. 275; *Waley* v. *Johnston,* 316 U. S. 101; *Shelton* v. *United States,* 356 U. S. 26, reversing, 246 F. 2d 571.[2] "A plea of guilty differs in purpose and effect from a mere admission or an extra-judicial confession; it is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sentence. Out of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences." *Kercheval* v. *United States,* 274 U. S. 220, 223.

The District Court recognized that the "charges of an agreement between a former Assistant United States Attorney and the defendant are serious," and stated that

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[2] See also *Daniel* v. *United States,* 107 U. S. App. D. C. 110, 274 F. 2d 768; *Teller* v. *United States,* 263 F. 2d 871; *Watson* v. *United States,* 104 U. S. App. D. C. 321, 262 F. 2d 33; *Euziere* v. *United States,* 249 F. 2d 293; *Motley* v. *United States,* 230 F. 2d 110; *United States* v. *Paglia,* 190 F. 2d 445.

if "this Court had any doubt as to their falsity it would require a hearing." The court determined, however, that the combination of factual inferences already mentioned "conclusively indicates the falsity of the defendant's allegations." 184 F. Supp., at 883.

We think the District Court did not proceed in conformity with the provisions of 28 U. S. C. § 2255, when it made findings on controverted issues of fact without notice to the petitioner and without a hearing. *United States* v. *Hayman,* 342 U. S. 205, 220. The statute requires a District Court to "grant a prompt hearing" when such a motion is filed, and to "determine the issues and make findings of fact and conclusions of law with respect thereto" unless "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." [3] This was not a case where the issues raised by the motion were conclusively determined either by the motion itself or by the "files and records" in the trial court. The factual allegations contained in the petitioner's motion and affidavit, and put in issue by the affidavit filed with the Government's response, related primarily to purported occurrences outside the courtroom and upon which the record could, therefore, cast no real

[3] Section 2255 of Title 28, United States Code, provides in part: "Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate."

light. Nor were the circumstances alleged of a kind that the District Judge could completely resolve by drawing upon his own personal knowledge or recollection.

We cannot agree with the Government that a hearing in this case would be futile because of the apparent lack of any eyewitnesses to the occurrences alleged, other than the petitioner himself and the Assistant United States Attorney. The petitioner's motion and affidavit contain charges which are detailed and specific. It is not unreasonable to suppose that many of the material allegations can either be corroborated or disproved by the visitors' records of the county jail where the petitioner was confined, the mail records of the penitentiary to which he was sent, and other such sources. "Not by the pleadings and the affidavits, but by the whole of the testimony, must it be determined whether the petitioner has carried his burden of proof and shown his right to a discharge. The Government's contention that his allegations are improbable and unbelievable cannot serve to deny him an opportunity to support them by evidence. On this record it is his right to be heard." *Walker* v. *Johnston,* 312 U. S. 275, at 287.

What has been said is not to imply that a movant must always be allowed to appear in a district court for a full hearing if the record does not conclusively and expressly belie his claim, no matter how vague, conclusory, or palpably incredible his allegations may be. The language of the statute does not strip the district courts of all discretion to exercise their common sense. Indeed, the statute itself recognizes that there are times when allegations of facts outside the record can be fully investigated without requiring the personal presence of the prisoner.[4] Whether the petition in the present case can

[4] Section 2255 of Title 28, United States Code, also provides, in part: "A court may entertain and determine such motion without requiring the production of the prisoner at the hearing."

appropriately be disposed of without the presence of the petitioner at the hearing is a question to be resolved in the further proceedings in the District Court.

There will always be marginal cases, and this case is not far from the line. But the specific and detailed factual assertions of the petitioner, while improbable, cannot at this juncture be said to be incredible. If the allegations are true, the petitioner is clearly entitled to relief. Accordingly, we think the function of 28 U. S. C. § 2255 can be served in this case only by affording the hearing which its provisions require.

Vacated and remanded.

THE CHIEF JUSTICE, MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN concur in the Court's judgment and opinion except as to Part I, from which they dissent for the reasons set out in their dissent in *Hill* v. *United States, ante,* p. 430.

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

The Court awards petitioner, a bank robber serving sentences in Alcatraz, a hearing on a § 2255 petition which it admits is "not far from the line" marking those applications the trial judge may ordinarily deny. If this be true, the doubt should be resolved in support of the decision below, not in the destruction of it. The experienced trial judge, who had been with this case from the very beginning, found the files and records conclusively show to be false petitioner's contention that his pleas of guilty were induced by promises of leniency. Accordingly, petitioner's application under § 2255 was dismissed without a hearing in exact compliance with that section. The Court of Appeals affirmed this dismissal. This Court now rejects the inferences drawn from the files and records by the courts below and substitutes its own find-

ing that these materials do not conclusively belie petitioner's story and that it is necessary to go outside the files and records to discover the truth of the matter. With this conclusion I cannot agree.[1] It represents not only a failure to give due deference to the inferences drawn by the two lower courts but an unwarranted restriction of the summary disposition provision of § 2255. The opinion is an invitation to prisoners, always seeking a sojourn from their keepers, to swear to "Munchausen" tales when self-interest readily leads to self-deception in § 2255 applications. Once the opinion goes the rounds of our prisons, we will likely be plagued with a rash of such spurious applications.[2]

The record shows that petitioner, who had previously been convicted of armed robbery, participated in four bank robberies in Ohio, which at the point of a sawed-off shotgun netted over $169,000. After the last of these robberies, the Waterville State Savings Bank, he escaped to Canada. He was arrested there and upon waiver of extradition was returned to Ohio. An information was filed charging petitioner and one Breaton with the robbery of the Waterville Bank. Both signed in open court waivers of indictment on the charges. A week later another information was filed against the petitioner alone charging him with the robbery of the First National Bank of Forest. Petitioner, who was accompanied by counsel throughout, again filed a waiver of indictment, and at this time he pleaded guilty to both informations. The trial judge called for a presentence report, and petitioner was returned to jail.

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[1] I concur in Part I of the Court's opinion.

[2] Section 2255 cases have been steadily on the increase. The fiscal year 1961 saw a new high of 560 applications filed under this section, an increase of 15% over the previous year. The frivolous nature of these applications is indicated by the fact that less than 3% were granted by the District Courts.

In the interim between pleading and sentencing, petitioner pursuant to a subpoena testified on behalf of the defense at the trial of his codefendant Breaton. He admitted that he had committed the Waterville robbery but denied that Breaton was in anywise connected with it. He claimed that another person, presently unknown to him, whom he had picked up in a bar in Canada was his accomplice. He testified that they had driven together from Canada to Waterville, but he insisted that he not only did not know his accomplice's name but could not describe him. State witnesses testified that petitioner had stated in their presence that Breaton was the accomplice. The jury disbelieved petitioner and found Breaton guilty. Shortly thereafter petitioner appeared for sentencing before the same judge who had presided over Breaton's trial and was given a total of 40 years, 25 in the Waterville and 15 in the Forest robbery.

Three years later petitioner filed this application before the same trial judge claiming that an Assistant United States Attorney, with full authority of his superior and with the implied consent of the judge, promised him a total sentence of 20 years, rather than the 40 which he had received, in return for a waiver of indictment in the second case and a plea of guilty in each case. He alleged that the Assistant had contacted him in the local jail twice before sentencing and once immediately afterwards. The latter occasion was to reassure him that the sentence would be reduced to 20 years within 60 days. The Government contested these allegations and filed a detailed affidavit by the Assistant specifically denying each of the charges.

An examination of the files and records in this case reveals that petitioner clearly outspoke himself. If a deal had been made, it borders on the incredible that petitioner would sit quietly in prison for over two and one-

half years after the prosecutor had reneged on his promise.[3] To my mind it is preposterous to think that the prosecutor would make the trade alleged when *before* any promises were allegedly made not only had petitioner waived indictment on the Waterville robbery, which was the more serious of the two charges, but his attorney in his presence had mentioned to the judge in open court the "possibility of another information being filed" and had indicated a clear intention to waive indictment on "both informations" and to plead guilty to at least one. Moreover, experienced criminals such as petitioner know that judges, not prosecutors, control sentences. Petitioner says the Assistant had the "implied" consent of the judge. Certainly this would have not been sufficient for one so experienced as petitioner. The pledge he alleges the Assistant exacted as to silence with reference to his attorney did not include the judge. Despite this and even though he appeared before the judge on three occasions subsequent to the alleged "deal," he never mentioned the same nor asked for any conference with the judge *in camera*. Finally, it is inconceivable that credence could be given to a story of an agreement of leniency told by a hardened criminal who before the alleged agreement was performed had testified against the Government and favorable to a codefendant. Prosecutors make deals, if at all, for testimony to *support* their prosecutions, not to *destroy* them.

In addition to being unbelievable in light of the files and records, petitioner's claim is inconsistent therewith. To explain his tardiness in seeking formal relief, petitioner alleges several previous informal attempts by letter to prod the Government into fulfilling its obligations. Yet

[3] For a case in which this factor alone was considered sufficient to summarily deny an application, see *United States* v. *Lowe*, 173 F. 2d 346 (C. A. 2d Cir. 1949).

the protest letters supposedly sent to the trial judge were not received by him and were not in the files where under departmental routine they would have been deposited had they been received. But petitioner's file is not barren of letters for it contains one written by petitioner to the trial judge several months after the Assistant United States Attorney had failed to perform the purported bargain. This letter, however, did not even remotely suggest an agreement but merely sought a reduction of sentence based upon repentance. Then, of course, there is petitioner's own admission at the time his guilty pleas were entered that such action was voluntarily taken.

For the Court to say that an application so inconsistent and incredible cannot be dispatched without a hearing leaves the summary dismissal exception of § 2255 meaningless.[4] As pointed out by the Government, to require a hearing in this case means "that the number of hearings held on motions under Section 2255 would be limited only by the imagination and ingenuity of the prisoners involved." An ingenious prisoner can deliberately bait his application with claims beyond independent proof or disproof and then demand that he be brought to court to tell the story known only to him, no matter how inconsistent and incredible it may be in light of the files and records. The Court "supposes" that in the present case "many of the material allegations can either be corroborated or disproved by the visitors' records of the county jail where the petitioner was confined, the mail records of the penitentiary to which he was sent, and such other sources." If such independent proof is available, which

[4] In evaluating the inferences to be drawn from the files and records some weight must be accorded the personal recollection of the trial judge. *E. g., Dario Sanchez* v. *United States*, 256 F. 2d 73 (C. A. 1st Cir. 1958). Judge Kloeb observed petitioner at the time he entered his pleas of guilt and again when he was sentenced. He had also listened to petitioner's blatant lies at the trial of his codefendant.

I doubt,[5] then these avenues should be explored before permitting the petitioner to make a trip into town.[6] Why not ask for a response in this regard, as we often do, before ordering a hearing with the attendant expense and hazards. The Court implies that a *full* hearing may not be required in a given case if the allegations are sufficiently "vague, conclusory, or palpably incredible." Although I would not require *any* hearing under the circumstances of this case, I submit that if upon remand it develops that no letters were mailed and that the Assistant United States Attorney did not visit the jail as claimed, then even the rationale of the Court's opinion would not require that petitioner be summoned to tell his story in court.[7]

Alcatraz is a maximum security institution housing dangerous incorrigibles, and petitioner wants a change of scenery. The Court has left the door ajar for a trip from California to Ohio along with the accompanying hazards. I would deny it.

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[5] Although prisons keep records of letters which actually go out, no record is made of every letter dropped in the mailbox. Jails likewise keep some records of visitors but do not necessarily record which prisoners are interviewed by police investigators and prosecutors, who are there regularly.

[6] It could be argued that the visitor and mailing records are part of the "files and records of the case" within the meaning of § 2255 and that therefore such records could be examined by the trial judge in determining whether a hearing is necessary.

[7] 28 U. S. C. § 2255 provides in part that: "A court may entertain and determine such motion without requiring the production of the prisoner at the hearing."

CHARLES DOWD BOX CO., INC., *v.* COURTNEY ET AL.

CERTIORARI TO THE SUPERIOR COURT OF MASSACHUSETTS.

No. 33. Argued November 7, 1961.—Decided February 19, 1962.

Section 301 (a) of the Labor Management Relations Act, 1947, which confers on federal district courts jurisdiction over suits for violation of contracts between employers and labor organizations representing employees in industries affecting interstate commerce, does not divest state courts of jurisdiction over such suits. Pp. 502–514.

341 Mass. 337, 169 N. E. 2d 885, affirmed.

George H. Mason argued the cause and filed briefs for petitioner.

David E. Feller argued the cause for respondents. With him on the briefs was *Elliot Bredhoff*.

John W. Reynolds, Attorney General of Wisconsin, and *Beatrice Lampert,* Assistant Attorney General, filed a brief for the Wisconsin Employment Relations Board, as *amicus curiae,* urging affirmance.

MR. JUSTICE STEWART delivered the opinion of the Court.

Section 301 (a) of the Labor Management Relations Act of 1947 provides:

> "(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in contro-

versy or without regard to the citizenship of the parties." [1]

The sole question presented by this case is whether this federal statute operates to divest a state court of jurisdiction over a suit for violation of a contract between an employer and a labor organization.

The petitioner is an employer engaged in an industry affecting commerce as defined in the Labor Management Relations Act of 1947. The United Steelworkers of America, an international union, was the collective bargaining representative of the petitioner's production and maintenance employees, organized in Local 5158. A few

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[1] The remaining provisions of § 301 are as follows:

"(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

"(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

"(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

"(e) For the purposes of this section, in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." 29 U. S. C. § 185, 61 Stat. 156–157.

weeks before the expiration of a collective bargaining agreement in 1957, negotiations were initiated between representatives of the union and of the petitioner with respect to proposals which the union had submitted for a new agreement. After a number of negotiating sessions, a "Stipulation" was signed by representatives of each party, continuing in effect many provisions of the old agreement, but providing for wage increases and making other changes with respect to holidays and vacations. The terms of the "Stipulation" were later embodied in a draft of a proposed new agreement. The petitioner originally announced to its employees that it would put into effect the wage changes and other provisions covered by the "Stipulation" and draft agreement, but a few weeks later notified its employees of its intention to terminate these changes and return "to the rates in effect as of May 18, 1957." It was the petitioner's position that its bargaining representatives had acted without authority in negotiating the new agreement, and that the union had been so advised before any contract had actually been concluded.

The present action was then brought in the Superior Court of Massachusetts for Worcester County by the respondents, local union officers and a staff representative of the International Union. The complaint alleged that the plaintiffs "fairly and adequately represent the interests of the entire membership" of the union and Local 5158, and asked for a judgment declaring that there existed a valid and binding collective bargaining agreement, for an order enjoining the company from terminating or violating it, and for an accounting and damages. Responding to the complaint, the petitioner interposed several defenses, among them the contention that, by reason of § 301 (a) of the Labor Management Relations Act, the state court had no jurisdiction over the controversy.

The trial court rejected this attack upon its jurisdiction, determined on the merits that the collective bargaining agreement was "valid and binding on the parties thereto," and entered a money judgment in conformity with the wage provisions of the agreement.

The Supreme Judicial Court of Massachusetts affirmed, expressly ruling that § 301 (a) has not made the federal courts the exclusive arbiters of suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce. As Chief Justice Wilkins put it, "We do not accept the contention that State courts are without jurisdiction. The statute does not so declare. The conferring of jurisdiction in actions at law upon the appropriate District Courts of the United States is not, in and of itself, a deprivation of an existing jurisdiction both at law and in equity in State courts. The case principally relied upon by the defendant, *Textile Wkrs. Union of America* v. *Lincoln Mills,* 353 U. S. 448, does not so state. In the absence of a clear holding by the Supreme Court of the United States that Federal jurisdiction has been made exclusive, we shall not make what would be tantamount to an abdication of the hitherto undoubted jurisdiction of our own courts." [2] Certiorari was granted to consider

[2] 341 Mass. 337, 338–339, 169 N. E. 2d 885, 887. As pointed out by the Massachusetts court, its view is in accord with other state court decisions. *McCarroll* v. *Los Angeles County Dist. Council of Carpenters,* 49 Cal. 2d 45, 57–60, 315 P. 2d 322, 328–330; *Connecticut Co.* v. *Division 425, Street & Electric Railway Employees,* 147 Conn. 608, 164 A. 2d 413; *Harbison-Walker Refractories Co.* v. *Local 702, United Brick & Clay Workers,* 339 S. W. 2d 933 (Ky. Ct. App.); *Miller* v. *Kansas City Power & Light Co.,* 332 S. W. 2d 18 (Mo. App.); *Anchor Motor Freight N. Y. Corp.* v. *Local 445, Teamsters Union,* 5 App. Div. 2d 869, 171 N. Y. S. 2d 511; *Steinberg* v. *Mendel Rosenzweig Fine Furs,* 9 Misc. 2d 611, 167 N. Y. S. 2d 685; *General Electric Co.* v. *United Automobile Workers,* 93 Ohio App. 139, 153–156, 108 N. E. 2d

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the important question of federal law thus presented. 365 U. S. 809. We agree with the Supreme Judicial Court of Massachusetts that the courts of that Commonwealth had jurisdiction in this case, and we accordingly affirm the judgment before us.

It has not been argued, nor could it be, that § 301 (a) speaks in terms of exclusivity of federal court jurisdiction over controversies within the statute's purview. On its face § 301 (a) simply gives the federal district courts jurisdiction over suits for violation of certain specified types of contracts. The statute does not state nor even suggest that such jurisdiction shall be exclusive. It provides that suits of the kind described "may" be brought in the federal district courts, not that they must be.

The petitioner points out, however, that this Court held in *Textile Workers Union* v. *Lincoln Mills,* 353 U. S. 448, that § 301 (a) is more than jurisdictional—that it authorizes federal courts to fashion, from the policy of our national labor laws, a body of federal law for the enforcement of agreements within its ambit. The Court recognized in that case that "state law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy," but

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211, 220–222; *Local Lodge No. 774, Int'l Assn. of Machinists* v. *Cessna Aircraft Co.,* 186 Kan. 569, 352 P. 2d 420; *Local 8, Longshoremen's Union* v. *Harvey Aluminum,* 226 Ore. 94, 359 P. 2d 112; *Springer* v. *Powder Power Tool Corp.,* 220 Ore. 102, 348 P. 2d 1112; *Philadelphia Marine Trade Assn.* v. *Local 1291, Longshoremen's Assn.,* 382 Pa. 326, 115 A. 2d 733; *Lucas Flour Co.* v. *Local 174, Teamsters Union,* 57 Wash. 2d 95, 356 P. 2d 1; *Clark* v. *Hein-Werner Corp.,* 8 Wis. 2d 264, 99 N. W. 2d 132, 100 N. W. 2d 317. But at least two federal courts have expressed the view that their jurisdiction under § 301 (a) might be exclusive. *Association of Westinghouse Employees* v. *Westinghouse Elec. Corp.,* 210 F. 2d 623, 629–630, note 16, aff'd 348 U. S. 437; *International Plainfield Motor Co.* v. *Local 343, United Automobile Workers,* 123 F. Supp. 683, 692 (D. N. J.).

emphasized that "[a]ny state law applied . . . will be absorbed as federal law . . . ." 353 U. S., at 457.

It is argued that the rationale of *Lincoln Mills* would be frustrated if state courts were allowed to exercise concurrent jurisdiction over suits within the purview of § 301 (a). The task of formulating federal common law in this area of labor management relations must be entrusted exclusively to the federal courts, it is said, because participation by the state courts would lead to a disharmony incompatible with the *Lincoln Mills* concept of an all-embracing body of federal law. Only the federal judiciary, the argument goes, possesses both the familiarity with federal labor legislation and the monolithic judicial system necessary for the proper achievement of the creative task envisioned by *Lincoln Mills*. An analogy is drawn to our decisions which have recognized the necessity of withdrawing from the state courts jurisdiction over controversies arguably subject to the jurisdiction of the National Labor Relations Board.[3]

Whatever the merits of this argument as a matter of policy, we find nothing to indicate that Congress adopted such a policy in enacting § 301. The legislative history of the enactment nowhere suggests that, contrary to the clear import of the statutory language, Congress intended in enacting § 301 (a) to deprive a party to a collective bargaining contract of the right to seek redress for its violation in an appropriate state tribunal.

We start with the premise that nothing in the concept of our federal system prevents state courts from enforcing rights created by federal law. Concurrent jurisdiction has been a common phenomenon in our judicial history, and exclusive federal court jurisdiction over cases arising under federal law has been the exception rather than the

[3] See, *e. g.*, *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236.

rule.[4] This Court's approach to the question of whether Congress has ousted state courts of jurisdiction was enunciated by Mr. Justice Bradley in *Claflin* v. *Houseman,* 93 U. S. 130, and has remained unmodified through the years. "The general question, whether State courts can exercise concurrent jurisdiction with the Federal courts in cases arising under the Constitution, laws, and treaties of the United States, has been elaborately discussed, both on the bench and in published treatises . . . [and] the result of these discussions has, in our judgment, been . . . to affirm the jurisdiction, where it is not excluded by express provision, or by incompatibility in its exercise arising from the nature of the particular case." 93 U. S., at 136. See *Robb* v. *Connolly,* 111 U. S. 624; *Second Employers' Liability Cases,* 223 U. S. 1, 56–59; *St. Louis, B. & M. R. Co.* v. *Taylor,* 266 U. S. 200; *Garrett* v. *Moore-McCormack Co.,* 317 U. S. 239, 245; *Brown* v. *Gerdes,* 321 U. S. 178, 188 (concurring opinion).[5] To hold that § 301 (a) operates to deprive the state courts of a substantial segment of their established jurisdiction over contract actions would thus be to disregard this consistent history of hospitable acceptance of concurrent jurisdiction.

Such a construction of § 301 (a) would also disregard the particularized history behind the enactment of that provision of the federal labor law. The legislative history makes clear that the basic purpose of § 301 (a) was not to limit, but to expand, the availability of forums for the enforcement of contracts made by labor organiza-

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[4] Indeed, Congress has so arranged the limited jurisdiction of federal courts that some federal laws can be enforced only in the state courts. See, *e. g.,* 28 U. S. C. § 1331, conferring jurisdiction upon federal courts of civil actions arising under the Constitution, laws, or treaties of the United States only if the matter in controversy exceeds the sum or value of $10,000.

[5] See also *Houston* v. *Moore,* 5 Wheat. 1, 25–27, and see generally The Federalist No. 82 (Hamilton).

tions. Moreover, there is explicit evidence that Congress expressly intended not to encroach upon the existing jurisdiction of the state courts.

The Labor Management Relations Act of 1947 represented a far-reaching and many-faceted legislative effort to promote the achievement of industrial peace through encouragement and refinement of the collective bargaining process. It was recognized from the outset that such an effort would be purposeless unless both parties to a collective bargaining agreement could have reasonable assurance that the contract they had negotiated would be honored. Section 301 (a) reflects congressional recognition of the vital importance of assuring the enforceability of such agreements.

The direct antecedent of § 301 was § 10 of the Case bill, H. R. 4908, 79th Cong., 2d Sess., which was passed by both Houses of the Congress, but vetoed by the President in 1946. In conferring upon the federal district courts jurisdiction over suits upon contracts made by labor organizations, that section of the Case bill contained provisions substantially the same for present purposes as the provisions of § 301 at issue in this case.[6]

[6] "SEC. 10. (a) Suits for violation of a contract concluded as the result of collective bargaining between an employer and a labor organization if such contract affects commerce as defined in this Act may be brought in any district court of the United States having jurisdiction of the parties.

"(b) Any labor organization whose activities affect commerce as defined in this Act shall be bound by the acts of its duly authorized agents acting within the scope of their authority from the said labor organization and may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States: *Provided,* That any money judgment against such labor organization shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

"(c) For the purposes of this section district courts shall be deemed to have jurisdiction of a labor organization (1) in the district

In considering these provisions of the proposed legislation in 1946, Congress manifested its complete awareness of both the existence and the limitations of state court remedies for violation of collective agreements. A principal motive behind the creation of federal jurisdiction in this field was the belief that the courts of many States could provide only imperfect relief because of rules of local law which made suits against labor organizations difficult or impossible, by reason of their status as unincorporated associations. The discussion between the supporters and opponents of this provision of the Case bill centered primarily on the nature and availability of existing state remedies. As a result, both factions collected and presented comprehensive data respecting the laws of the various States as to the status of labor organizations as legal entities. See, *e. g.*, S. Rep. No. 1177, 79th Cong., 2d Sess., Minority Report, pp. 10–14; 92 Cong. Rec. 5412–5415.

The bill which the Senate originally passed the following year contained a provision making a breach of a collective bargaining agreement an unfair labor practice subject to the jurisdiction of the National Labor Relations Board, S. 1126, 80th Cong., 1st Sess., §§ 8 (a)(6),

in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of summons, subpena, or other legal process upon such officer or agent shall constitute service upon the labor organization.

"(d) Any employee who participates in a strike or other interference with the performance of an existing collective bargaining agreement, in violation of such agreement, if such strike or interference is not ratified or approved by the labor organization party to such agreement and having exclusive bargaining rights for such employee, shall lose his status as an employee of the employer party to such agreement for the purposes of sections 8, 9, and 10 of the National Labor Relations Act: *Provided,* That such loss of status for such employee shall cease if and when he is reemployed by such employer."

8 (b)(5), as well as a provision conferring jurisdiction upon the federal courts over suits for violation of collective agreements. In conference, however, it was decided to make collective bargaining agreements enforceable only in the courts. "Once parties have made a collective bargaining contract," the conference report stated, "the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board." H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 42.

The report which accompanied the bill passed by the House of Representatives in 1947 explicitly acknowledged that the proposed § 301 was a slightly recast version of § 10 of the Case bill. H. R. Rep. No. 245, 80th Cong., 1st Sess., p. 45. The record of the congressional debates on § 301 of the 1947 Act reflects the same concern with the adequacy of the laws of the various States as had been expressed the previous year in the discussion of § 10 of the Case bill. The Minority Report in the House in 1947 again discussed the availability of relief, the alternative means of recovery, and the scope of remedy in suits against labor organizations under the laws of the various States. H. R. Rep. No. 245, 80th Cong., 1st Sess., pp. 108–109. The Senate Report reproduced verbatim the detailed analysis of state procedural law which had been contained in the Senate Minority Report on the 1946 legislation. S. Rep. No. 105, 80th Cong., 1st Sess., pp. 15–18.

The clear implication of the entire record of the congressional debates in both 1946 and 1947 is that the purpose of conferring jurisdiction upon the federal district courts was not to displace, but to supplement, the thoroughly considered jurisdiction of the courts of the various States over contracts made by labor organizations. There seems to have been explicit mention of the question only once—in the Senate debate over § 10 of the

1946 bill. A spokesman for the bill, Senator Ferguson, stated unequivocally that state court jurisdiction would not be ousted by enactment of the federal law:

> "Mr. FERGUSON. Mr. President, there is nothing whatever in the now-being-considered amendment which takes away from the State courts all the present rights of the State courts to adjudicate the rights between parties in relation to labor agreements. The amendment merely says that the Federal courts shall have jurisdiction. It does not attempt to take away the jurisdiction of the State courts, and the mere fact that the Senator and I disagree does not change the effect of the amendment.
>
> "Mr. MURRAY. But it authorizes the employers to bring suit in the Federal courts, if they so desire.
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> "Mr. FERGUSON. That is correct. That is all it does. It takes away no jurisdiction of the State courts." 92 Cong. Rec. 5708.

Although the record of the 1947 debates contains no explicit statement of such precise relevance as Senator Ferguson's remarks in 1946, the entire tenor of the 1947 legislative history confirms that the purpose of § 301, like its counterpart in the Case bill, was to fill the gaps in the jurisdictional law of some of the States, not to abolish existing state court jurisdiction. For example, Senator Ball, one of the Floor Leaders for the bill, stated:

> "[W]e give to employers the right to sue a union in interstate commerce, in a Federal court, for violation of contract. It does not go beyond that. As a matter of law, I think they have that right, now, but because unions are voluntary associations, the common law in a great many States requires service on every member of the union, which is very difficult; . . ." 93 Cong. Rec. 5014.[7]

[7] See also the remarks of Senator Smith, 93 Cong. Rec. 4281.

This basic purpose of § 301 is epitomized in the Senate Report: "It is apparent that until all jurisdictions, and particularly the Federal Government, authorize actions against labor unions as legal entities, there will not be the mutual responsibility necessary to vitalize collective-bargaining agreements." S. Rep. No. 105, 80th Cong., 1st Sess., p. 17. It is obvious that Congress did not intend this remedial measure to destroy the foundation upon which it was built.

This Court, in holding that the Labor Management Relations Act of 1947 operates to withdraw from the jurisdiction of the States controversies arguably subject to the jurisdiction of the National Labor Relations Board, has delineated the specific considerations which led to that conclusion:

> "Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies." *Garner* v. *Teamsters Union,* 346 U. S. 485, 490.

By contrast, Congress expressly rejected that policy with respect to violations of collective bargaining agreements by rejecting the proposal that such violations be made unfair labor practices. Instead, Congress deliberately chose to leave the enforcement of collective agreements "to the usual processes of the law."

It is implicit in the choice Congress made that "diversities and conflicts" may occur, no less among the courts of the eleven federal circuits, than among the courts of the several States, as there evolves in this field of labor management relations that body of federal common law of which *Lincoln Mills* spoke. But this not necessarily unhealthy prospect is no more than the usual consequence of the historic acceptance of concurrent state and federal jurisdiction over cases arising under federal law. To resolve and accommodate such diversities and conflicts is one of the traditional functions of this Court.[8]

Affirmed.

Mr. Justice Black concurs in the result.

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[8] In the course of argument at the Bar two questions were discussed which are not involved in this case, and upon which we expressly refrain from intimating any view—whether the Norris-LaGuardia Act might be applicable to a suit brought in a state court for violation of a contract made by a labor organization, and whether there might be impediments to the free removal to a federal court of such a suit. The relation of the Norris-LaGuardia Act to state courts applying federal labor law has never been decided by this Court. See *McCarroll* v. *Los Angeles County Dist. Council of Carpenters*, 49 Cal. 2d 45, 315 P. 2d 322. For that matter, we have not yet ruled on the effect of Norris-LaGuardia upon the jurisdiction of *federal* courts in this area. Compare *Local 795, Teamsters Union* v. *Yellow Transit Freight Lines, Inc.*, 282 F. 2d 345, certiorari granted, 364 U. S. 931, with *Sinclair Ref. Co.* v. *Atkinson*, 290 F. 2d 312, certiorari granted, 368 U. S. 937. And quite obviously we have not yet considered the various problems concerning removal under 28 U. S. C. § 1441. See *Swift & Co.* v. *United Packinghouse Workers*, 177 F. Supp. 511; *Fay* v. *American Cystoscope Makers, Inc.*, 98 F. Supp. 278.

ST. HELENA PARISH SCHOOL BOARD ET AL. *v.* HALL ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA.

No. 586. Decided February 19, 1962.

197 F. Supp. 649, affirmed.

Jack P. F. Gremillion, Attorney General of Louisiana, *W. Scott Wilkinson* and *Victor A. Sachse,* Special Assistant Attorneys General, *Carroll Buck, M. E. Culligan, George M. Ponder, John E. Jackson, Jr., William P. Schuler, Dorothy Wolbrette, L. K. Clement, Jr.* and *Harry J. Kron, Jr.,* Assistant Attorneys General, *Albin P. Lassiter* and *Thompson L. Clarke* for appellants.

Jack Greenberg, James M. Nabrit III and *A. P. Tureaud* for appellees.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

JOHNSON *v.* HORTON.

APPEAL FROM THE SUPREME COURT OF MISSOURI.

No. 700, Misc. Decided February 19, 1962.

Appeal dismissed and certiorari denied.
Reported below: See 343 S. W. 2d 653.

PER CURIAM.

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

KAVANAGH *v.* STENHOUSE.

APPEAL FROM THE SUPREME COURT OF RHODE ISLAND.

No. 615. Decided February 19, 1962.

Appeal dismissed for want of a substantial federal question.
Reported below: —— R. I. ——, 174 A. 2d 560.

Aram K. Berberian for appellant.

J. Joseph Nugent, Attorney General of Rhode Island, for appellee.

PER CURIAM.

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

MR. JUSTICE DOUGLAS is of the opinion that further consideration of the question of jurisdiction should be postponed to a hearing of the case on the merits.

RAINSBERGER *v.* LEYPOLDT, SHERIFF.

APPEAL FROM THE SUPREME COURT OF NEVADA.

No. 835, Misc. Decided February 19, 1962.

Appeal dismissed and certiorari denied.
Reported below: 77 Nev. 399, 365 P. 2d 489.

Samuel S. Lionel for appellant.

John F. Mendoza and *Charles L. Garner* 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.

IN RE KELLEY.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA.

No. 733, Misc. Decided February 19, 1962.

PER CURIAM.

The appeal is dismissed.

QUINTON ET AL. *v.* MATTHEWS ET AL.

APPEAL FROM THE SUPREME COURT OF ALASKA.

No. 762, Misc. Decided February 19, 1962.

Appeal dismissed and certiorari denied.
Reported below: —— Alaska ——, 362 P. 2d 932.

George M. Yeager 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.

SHAPIRO *v.* JOSEPHSON ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 805, Misc. Decided February 19, 1962.

Appeal dismissed and certiorari denied.

PER CURIAM.

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

REPORTER'S NOTE.

The next page is purposely numbered 801. The numbers between 517 and 801 were purposely omitted, in order to make it possible to publish the orders in the current advance sheets or "preliminary prints" of the United States Reports with *permanent* page numbers, thus making the official citations available immediately.

ORDERS FROM END OF OCTOBER TERM, 1960, THROUGH FEBRUARY 19, 1962.

Cases Dismissed in Vacation.

No. 42, Misc. Antipas *v.* United States. On petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. June 23, 1961. Dismissed pursuant to Rule 60 of the Rules of this Court. Petitioner *pro se*. *Solicitor General Cox* for the United States. Reported below: 110 U. S. App. D. C. 143, 289 F. 2d 884.

No. 35, Misc. Green *v.* Ellis, Corrections Director, et al. On petition for writ of certiorari to the Court of Criminal Appeals of Texas. June 30, 1961. Dismissed pursuant to Rule 60 of the Rules of this Court. Petitioner *pro se*. *Will Wilson,* Attorney General of Texas, and *Riley Eugene Fletcher,* Assistant Attorney General, for respondent.

No. 183. Columbia Broadcasting System, Inc., et al. *v.* Bradbury. On petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit. August 7, 1961. Dismissed pursuant to Rule 60 of the Rules of this Court. *William A. C. Roethke* for petitioners. *Sanford I. Carter* for respondent. Reported below: 287 F. 2d 478.

No. 183, Misc. Jones *v.* United States. On petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. September 14, 1961. Dismissed pursuant to Rule 60 of the Rules of this Court. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 163, Misc. SHAPIRO *v.* ELBAR REALTY, INC. Appeal from the Supreme Judicial Court of Massachusetts. August 23, 1961. Dismissed pursuant to Rule 60 of the Rules of this Court. Appellant *pro se*. *Edward C. Park* for appellee.

No. 1. SABINE PILOTS ASSN. ET AL. *v.* BLOOMFIELD STEAMSHIP CO. ET AL. On petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit. September 5, 1961. Dismissed pursuant to Rule 60 of the Rules of this Court. *Clarence S. Eastham* for petitioners. *Robert Eikel* for respondents. Reported below: 262 F. 2d 345.

No. 252. IN RE LOWER, ALIAS LOWE. On petition for writ of certiorari to the Supreme Court of Michigan. September 19, 1961. Dismissed pursuant to Rule 60 of the Rules of this Court. *H. Clifford Allder* for petitioner. *Paul L. Adams,* Attorney General of Michigan, and *Joseph B. Bilitzke,* Solicitor General, for the State of Michigan.

OCTOBER 2, 1961.

Assignment Orders.

An order of THE CHIEF JUSTICE designating and assigning MR. JUSTICE REED (retired) to perform judicial duties in the United States Court of Appeals for the District of Columbia Circuit beginning October 4, 1961, and ending June 30, 1962, and for such further time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

An order of THE CHIEF JUSTICE designating and assigning MR. JUSTICE REED (retired) to perform judicial duties in the United States Court of Claims beginning October 2, 1961, and ending June 30, 1962, and for such further time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

An order of THE CHIEF JUSTICE designating and assigning MR. JUSTICE BURTON (retired) to perform judicial duties in the United States Court of Appeals for the District of Columbia Circuit beginning October 12, 1961, and ending June 30, 1962, and for such further time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

Amendment of Rules.

IT IS ORDERED that paragraph 1 of Rule 4 of the Rules of this Court be amended to read as follows:

"Open sessions of the Court will be held at ten a. m. on the first Monday in October of each year, and thereafter as announced by the Court. When the Court is in session to hear arguments, it sits from ten until noon; recesses until half-past twelve; and adjourns for the day at half-past two."

IT IS FURTHER ORDERED that this amendment to Rule 4 shall take effect on October 9, 1961.

Dismissal Under Rule 60.

No. 957, October Term, 1960. HOOVER *v.* OKLAHOMA TURNPIKE AUTHORITY. (Certiorari denied, 366 U. S. 962.) Petition for rehearing dismissed pursuant to Rule 60 of the Rules of this Court. *Charles R. Nesbitt* for petitioner.

OCTOBER 9, 1961.

Miscellaneous Orders.

No. 5. ARISTEGUIETA *v.* FIRST NATIONAL CITY BANK OF NEW YORK ET AL. Certiorari, 365 U. S. 840, to the United States Court of Appeals for the Fifth Circuit; and

No. 43. ARISTEGUIETA *v.* FIRST NATIONAL CITY BANK OF NEW YORK ET AL. Certiorari, 365 U. S. 840, to the United States Court of Appeals for the Second Circuit. Oral argument postponed. Reported below: 274 F. 2d 206; 287 F. 2d 219.

No. 6. BAKER ET AL. *v.* CARR ET AL. Appeal from the United States District Court for the Middle District of Tennessee. (Probable jurisdiction noted, 364 U. S. 898.) The motions of J. Howard Edmondson, Governor of Oklahoma, and August Scholle for leave to file briefs, as *amici curiae,* are granted. The motion of J. P. Harris et al. for leave to file brief, as *amici curiae,* is denied. *J. Howard Edmondson pro se* and *Norman E. Reynolds* on the Governor's motion. *Theodore Sachs* on the motion for August Scholle. Reported below: 179 F. Supp. 824.

No. 48. STILL *v.* NORFOLK & WESTERN RAILWAY CO. Certiorari, 365 U. S. 877, to the Supreme Court of Appeals of West Virginia. The motion of the Brotherhood of Railroad Trainmen for leave to file brief, as *amicus curiae,* is granted. *John J. Naughton* on the motion.

No. 11. LIVERIGHT *v.* UNITED STATES. Certiorari, 366 U. S. 960, to the United States Court of Appeals for the District of Columbia Circuit. The motion of petitioner to dispense with printing the record is granted. *Harry I. Rand* for petitioner. Reported below: 108 U. S. App. D. C. 160, 280 F. 2d 708.

No. 12. PRICE *v.* UNITED STATES. Certiorari, 366 U. S. 959, to the United States Court of Appeals for the District of Columbia Circuit. The motions of petitioner to dispense with printing the record and for leave to proceed further herein *in forma pauperis* are granted. *Harry I. Rand* and *Leonard B. Boudin* for petitioner. Reported below: 108 U. S. App. D. C. 167, 280 F. 2d 715.

No. 10. WHITMAN *v.* UNITED STATES. Certiorari, 366 U. S. 959, to the United States Court of Appeals for the District of Columbia Circuit. The motion of petitioner to dispense with printing the record is granted. The motion of *Thurman Arnold* for leave to withdraw his appearance as counsel for petitioner is granted. MR. JUSTICE BRENNAN took no part in the consideration or decision of these motions. *Gerhard Van Arkel* for petitioner. Reported below: 108 U. S. App. D. C. 226, 281 F. 2d 59.

No. 13. CHAUFFEURS, TEAMSTERS & HELPERS LOCAL UNION NO. 795 ET AL. *v.* YELLOW TRANSIT FREIGHT LINES, INC., ET AL. Certiorari, 364 U. S. 931, to the United States Court of Appeals for the Tenth Circuit. The motion of the American Federation of Labor et al. for leave to file brief, as *amici curiae,* is granted. *J. Albert Woll, Theodore J. St. Antoine* and *Thomas E. Harris* on the motion. Reported below: 282 F. 2d 345.

No. 61. UNITED GAS PIPE LINE CO. *v.* IDEAL CEMENT CO. ET AL. Appeal from the United States Court of Appeals for the Fifth Circuit. (Question of jurisdiction postponed to hearing on the merits, 366 U. S. 916.) The motion of the City of Mobile for leave to participate in oral argument is granted. *Charles S. Rhyne* and *Herzel H. E. Plaine* on the motion. Reported below: 282 F. 2d 574.

No. 26. GARNER ET AL. *v.* LOUISIANA;

No. 27. BRISCOE ET AL. *v.* LOUISIANA; and

No. 28. HOSTON ET AL. *v.* LOUISIANA. Certiorari, 365 U. S. 840, to the Supreme Court of Louisiana. The motion of the Committee on the Bill of Rights of the Association of the Bar of the City of New York for leave to file brief, as *amicus curiae,* is granted. *John R. Fernbach* and *Murray A. Gordon* on the motion. Reported below: —— La. ——, —— So. 2d ——.

No. 79. LEHIGH VALLEY COOPERATIVE FARMERS, INC., ET AL. *v.* UNITED STATES ET AL. Certiorari, 366 U. S. 957, to the United States Court of Appeals for the Third Circuit. The motion of petitioners to substitute Orville L. Freeman in the place of Ezra Taft Benson as a party respondent is granted. *Donn L. Snyder* on the motion. Reported below: 287 F. 2d 726.

No. 158. CARNLEY *v.* COCHRAN, CORRECTIONS DIRECTOR. Certiorari, 366 U. S. 958, to the Supreme Court of Florida. It is ordered that *Harold A. Ward, Esquire,* of Winter Park, Florida, be, and he is hereby, appointed to serve as counsel for petitioner in this case. Reported below: 123 So. 2d 249.

No. 33, Misc. DEAN *v.* FLORIDA. Motion for leave to file petition for writ of certiorari denied. Petitioner *pro se.* *Richard W. Ervin,* Attorney General of Florida, and *Joe E. McClung,* Assistant Attorney General, for respondent.

No. 418, Misc. COPENHAVER *v.* IOWA. Motion for leave to file petition for writ of certiorari denied.

No. 401, Misc. IN RE DEL CAMPO. Motion for leave to file petition for writ of certiorari and for other relief denied.

No. 202, Misc. PHILLIPS *v.* UNITED STATES ATTORNEY GENERAL ET AL.;

No. 215, Misc. SCHLETTE *v.* HEINZE, WARDEN;

No. 232, Misc. MONA *v.* GOODMAN, PRISON KEEPER;

No. 274, Misc. LAVERGNE *v.* FOGLIANI, WARDEN;

No. 297, Misc. WEBB *v.* NEW MEXICO;

No. 312, Misc. VITORATOS, ALIAS VICTOR, *v.* SACKS, WARDEN, ET AL.;

No. 314, Misc. BROOKS *v.* TEXAS;

No. 326, Misc. HACKWORTH *v.* PENITENTIARY WARDEN;

No. 342, Misc. SMITH *v.* SETTLE, WARDEN;

No. 359, Misc. CHAVEZ ET AL. *v.* UTAH;

No. 408, Misc. GAMBINO *v.* RANDOLPH, WARDEN;

No. 426, Misc. SMITH *v.* SETTLE, WARDEN; and

No. 428, Misc. MCCARY *v.* HAND, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 371, Misc. CHERETON *v.* UNITED STATES. Motion for leave to file petition for writ of habeas corpus denied. *Louis M. Hopping* for petitioner.

No. 90, Misc. RETAIL CLERKS UNION LOCAL 324 ET AL. *v.* YANKWICH, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus denied. *Robert W. Gilbert, Louis A. Nissen, Jerome Smith* and *S. G. Lippman* for petitioners. *Solicitor General Cox, Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* for the National Labor Relations Board, and *George R. Richter* for Barker Bros. Corp. et al., in opposition. Reported below: —— F. Supp. ——.

No. 200, Misc. DANDY *v.* BANMILLER, WARDEN; and

No. 375, Misc. COAKLEY *v.* O'SULLIVAN, CIRCUIT JUDGE, ET AL. Motions for leave to file petitions for writs of mandamus denied.

No. 25, Misc. McCoy *v.* Crawford, Sheriff;

No. 268, Misc. Hogge *v.* Cunningham, Penitentiary Superintendent;

No. 290, Misc. Hayes *v.* California et al.;

No. 397, Misc. Burleson *v.* New Mexico et al.; and

No. 415, Misc. Ex parte Hill. Motions for leave to file petitions for writs of habeas corpus denied. Treating the papers submitted as petitions for writs of certiorari, certiorari is denied. Petitioners *pro se*. *C. Donald Robertson,* Attorney General of West Virginia, and *George H. Mitchell* and *Simon M. Bailey,* Assistant Attorneys General, for respondent in No. 25, Misc.

No. 109, Misc. Adams *v.* United States Penitentiary, Leavenworth, Kansas, et al. Motion for leave to file petition for writ of mandamus and for other relief denied.

Probable Jurisdiction Noted or Question Postponed.

No. 84. Turner *v.* City of Memphis et al. Appeal from the United States District Court for the Western District of Tennessee. Further consideration of the question of jurisdiction postponed to the hearing of the case on the merits. *Constance Baker Motley* and *Thurgood Marshall* for appellant. *Frank B. Gianotti, Jr.* for the City of Memphis, and *Edward P. A. Smith* for Dobbs Houses, Inc., et al., appellees. Reported below: 199 F. Supp. 585.

No. 173. United States *v.* National Dairy Products Corp. et al. Appeal from the United States District Court for the Western District of Missouri. Probable jurisdiction noted. *Solicitor General Cox, Assistant Attorney General Loevinger* and *Richard A. Solomon* for the United States. *John T. Chadwell, Martin J. Purcell* and *John H. Lashly* for appellees.

No. 264. Halliburton Oil Well Cementing Co. *v.* Reily, Collector of Revenue of Louisiana. Appeal from the Supreme Court of Louisiana. Probable jurisdiction noted. *Robert O. Brown, Robert E. Rice, C. Vernon Porter, Benjamin B. Taylor, Jr.* and *Laurance W. Brooks* for appellant. *John B. Smullin* for appellee. Briefs of *amici curiae,* urging reversal, were filed by *Charles D. Marshall* for Thomas Jordon, Inc.; *Cicero C. Sessions* for Sperry Rand Corp.; *Albert L. Hopkins* for Chicago Bridge & Iron Co.; *Ben R. Miller* for American Can Co.; *Forrest M. Darrough* for Humble Oil & Refining Co.; and *Robert E. Leake, Jr.* for Bosson-Richards Processing Co. et al. Reported below: 241 La. 67, 127 So. 2d 502.

No. 90. Mercantile National Bank at Dallas *v.* Langdeau, Receiver; and

No. 91. Republic National Bank of Dallas *v.* Langdeau, Receiver. Appeals from the Supreme Court of Texas. Further consideration of the question of jurisdiction postponed to the hearing of the cases on the merits. Mr. Justice Clark took no part in the consideration or decision of these cases. *Marvin S. Sloman* for appellant in No. 90. *Neth L. Leachman* for appellant in No. 91. *Quentin Keith* and *Cecil C. Rotsch* for appellee. Reported below: 161 Tex. 349, 341 S. W. 2d 161.

Certiorari Granted. (See also No. 218, ante, p. 7, and No. 66, Misc., ante, p. 4.)

No. 123. Manual Enterprises, Inc., et al. *v.* Day, Postmaster General. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Stanley M. Dietz* for petitioners. *Solicitor General Cox, Assistant Attorney General Orrick* and *John G. Laughlin, Jr.* for respondent. Reported below: 110 U. S. App. D. C. 78, 289 F. 2d 455.

No. 101. GOLDLAWR, INC., *v.* HEIMAN ET AL. C. A. 2d Cir. Certiorari granted. *Edwin P. Rome* for petitioner. *Aaron Lipper* and *Richard B. Dannenberg* for Morgan Guaranty Trust Co. of N. Y., Executor, and *C. Russell Phillips, Gerald Schoenfeld, Bernard B. Jacobs, Aaron Lipper* and *C. Brewster Rhoads* for Select Operating Corp. et al., respondents. Reported below: 288 F. 2d 579.

No. 77. NATIONAL LABOR RELATIONS BOARD *v.* WALTON MANUFACTURING CO. ET AL. C. A. 5th Cir. Certiorari granted. *Solicitor General Cox, Stuart Rothman, Dominick L. Manoli, Norton J. Come* and *Frederick U. Reel* for petitioner. *Alexander E. Wilson, Jr.* and *Robert T. Thompson* for respondents. Reported below: 286 F. 2d 16.

No. 144. STATE BOARD OF INSURANCE ET AL. *v.* TODD SHIPYARDS CORP. Court of Civil Appeals of Texas, Third Supreme Judicial District. Certiorari granted. *Will Wilson,* Attorney General of Texas, and *C. K. Richards, Fred B. Werkenthin* and *Bob E. Shannon,* Assistant Attorneys General, for petitioners. *Frank A. Liddell* for respondent. Reported below: 340 S. W. 2d 339; —— Tex. ——, 344 S. W. 241.

No. 187. CALIFORNIA *v.* FEDERAL POWER COMMISSION ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *William M. Bennett* for petitioner. *Solicitor General Cox, Assistant Attorney General Orrick, John G. Laughlin, Jr., John C. Mason, Howard E. Wahrenbrock, Robert L. Russell* and *Arthur H. Fribourg* for the Federal Power Commission, and *Charles V. Shannon, Stanley M. Morley, Arthur H. Dean,* and *Stephen Rackow Kaye* for El Paso Natural Gas Co., respondents. Reported below: 111 U. S. App. D. C. 226, 296 F. 2d 348.

No. 222. National Labor Relations Board *v.* Katz et al. C. A. 2d Cir. Certiorari granted. *Solicitor General Cox, Stuart Rothman, Dominick L. Manoli, Norton J. Come* and *Frederick U. Reel* for petitioner. *Sidney O. Raphael* and *Leo M. Drachsler* for respondents. Reported below: 289 F. 2d 700.

No. 124. Creek Nation *v.* United States. Court of Claims. Certiorari granted. *Paul M. Niebell* for petitioner. *Solicitor General Cox* and *Roger P. Marquis* for the United States. Reported below: —— Ct. Cl. ——, —— F. 2d ——.

No. 113. Malone *v.* Bowdoin et al. C. A. 5th Cir. Certiorari granted. *Solicitor General Cox* and *Roger P. Marquis* for petitioner. Reported below: 284 F. 2d 95; 287 F. 2d 282.

No. 166. Marine Engineers Beneficial Association et al. *v.* Interlake Steamship Co. et al. Supreme Court of Minnesota. Certiorari granted. *Lee Pressman* and *Richard H. Markowitz* for petitioners. *Raymond T. Jackson* for respondents. Reported below: 260 Minn. 1, 108 N. W. 2d 627.

No. 205. Free *v.* Bland. Supreme Court of Texas. Certiorari granted. *Gerhard A. Gesell* and *Edwin M. Fulton* for petitioner. *Royal H. Brin, Jr.* for respondent. *Solicitor General Cox* and *Assistant Attorney General Orrick* for the United States, as *amicus curiae,* in support of the petition. Reported below: 162 Tex. ——, 344 S. W. 2d 435.

No. 283. Salem *v.* United States Lines Co. C. A. 2d Cir. Certiorari granted. *Philip F. DiCostanzo* for petitioner. *Walter X. Connor* for respondent. Reported below: 293 F. 2d 121.

No. 224. Hanover Bank, Executor, et al. *v.* Commissioner of Internal Revenue. C. A. 2d Cir. Certiorari granted. *Horace S. Manges* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Meyer Rothwacks* for respondent. Reported below: 289 F. 2d 69.

No. 288. In re Zipkin. Supreme Court of Missouri. Certiorari granted. *William J. Burrell* for petitioner. *Richmond C. Coburn* and *Alan C. Kohn* for respondent. Reported below: — S. W. 2d —.

No. 93. United States *v.* Koenig. C. A. 5th Cir. Certiorari granted. *Solicitor General Cox, Assistant Attorney General Miller, Bruce J. Terris, Beatrice Rosenberg* and *Marshall Tamor Golding* for the United States. Reported below: 290 F. 2d 166.

No. 94. National Labor Relations Board *v.* Florida Citrus Canners Cooperative. C. A. 5th Cir. Certiorari granted. *Solicitor General Cox, Stuart Rothman, Dominick L. Manoli, Norton J. Come* and *Frederick U. Reel* for petitioner. *O. R. T. Bowden* for respondent. Reported below: 288 F. 2d 630.

No. 138. Idlewild Bon Voyage Liquor Corp. *v.* Epstein [formerly Rohan] et al.; and

No. 180, Misc. Idlewild Bon Voyage Liquor Corp. *v.* Bicks et al., U. S. District Court Judges. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit granted in No. 138, and motion for leave to file petition for writ of mandamus granted in No. 180, Misc. *Charles H. Tuttle* for petitioner. *Louis J. Lefkowitz,* Attorney General of New York, *Paxton Blair,* Solicitor General, and *Julius L. Sackman* for respondents in No. 138. Reported below: 289 F. 2d 426.

No. 190. UNITED STATES *v.* DAVIS ET UX.; and

No. 268. DAVIS ET UX. *v.* UNITED STATES. Court of Claims. Certiorari granted. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *I. Henry Kutz* for the United States in No. 190, and *Solicitor General Cox, Assistant Attorney General Oberdorfer, Meyer Rothwacks* and *Harold C. Wilkenfeld* for the United States in No. 268. *Converse Murdoch* for Davis et ux. Reported below: —— Ct. Cl. ——, 287 F. 2d 168.

No. 241. SUNKIST GROWERS, INC., ET AL. *v.* WINCKLER & SMITH CITRUS PRODUCTS CO. ET AL. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit granted limited to Question 1 presented by the petition, which reads as follows:

"1. Where a group of citrus fruit growers form a cooperative organization for the purpose of collectively processing and marketing their fruit, and carry out those functions through the agency of three cooperative agricultural associations, each of which is basically wholly owned and governed by those growers, and each of which is admittedly entitled to the exemption from the antitrust laws accorded to agricultural cooperatives by the Capper-Volstead Act (7 U. S. C. A., sec. 291)—is an unlawful conspiracy, combination or agreement established under Sections 1 and 2 of the Sherman Act upon proof only that these growers, through the agency of these three cooperatives, agreed among only themselves with respect to the extent of the division of the function of processing between them or with respect to the price they would charge in the open market for the fruit and the by-products thereof processed and marketed by them?"

Ross C. Fisher and *Herman F. Selvin* for petitioners. *William C. Dixon* for respondents. Reported below: 284 F. 2d 1.

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No. 242. GLIDDEN COMPANY *v.* ZDANOK ET AL. Motions of California Manufacturers Association; National Paint, Varnish and Lacquer Association, Inc.; National Association of Margarine Manufacturers; Ohio Chamber of Commerce; Illinois State Chamber of Commerce; Institute of Shortening and Edible Oils, Inc.; American Spice Trade Association; Georgia State Chamber of Commerce; Chamber of Commerce of Cleveland, Ohio; and Chamber of Commerce of the United States for leave to file briefs, as *amici curiae*, granted. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit granted limited to question (d) presented by the petition, which reads as follows:

"(d) Does participation by a Court of Claims judge vitiate the judgment of the Court of Appeals?"

In all other respects the petition for writ of certiorari is denied.

Pursuant to 28 U. S. C. § 2403, the Court hereby certifies to the Attorney General that there is drawn in question in this case the constitutionality of the Act of July 28, 1953, 67 Stat. 226 (28 U. S. C. § 171).

Chester Bordeau for petitioner. *Morris Shapiro* and *Harry Katz* for respondents.

Carl M. Gould for California Manufacturers Association; *Daniel S. Ring* for National Paint, Varnish and Lacquer Association, Inc.; *Ashley Sellers* and *Jesse E. Baskette* for National Association of Margarine Manufacturers; *Clarence D. Laylin* and *John Eckler* for Ohio Chamber of Commerce; *Henry E. Seyfarth* for Illinois State Chamber of Commerce; *Jerome Ackerman* for the Institute of Shortening and Edible Oils, Inc.; *Charles H. Tuttle* for American Spice Trade Association; *John E. Branch* for the Georgia State Chamber of Commerce; *Frank C. Heath* for the Chamber of Commerce of Cleveland, Ohio; and *William B. Barton* for the Chamber of Commerce of the United States, as *amici curiae*.

Briefs of *amici curiae,* in support of the petition, were filed by *Francis M. Shea* and *Richard T. Conway* for the Judges of the United States Court of Claims, and by *Edward C. First, Jr.* and *Gilbert Nurick* for the Pennsylvania State Chamber of Commerce. Reported below: 288 F. 2d 99.

No. 341, Misc. LURK *v.* UNITED STATES. Motion to use the record in No. 669, October Term, 1960, granted. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit granted. Case transferred to appellate docket. *Eugene Gressman* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Robert S. Erdahl* and *Philip R. Monahan* for the United States. Reported below: 111 U. S. App. D. C. 238, 296 F. 2d 360.

No. 41, Misc. GALLEGOS *v.* COLORADO. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the Supreme Court of Colorado granted. Case transferred to appellate docket. *Charles S. Vigil* for petitioner. *Duke W. Dunbar,* Attorney General of Colorado, *Frank E. Hickey,* Deputy Attorney General, and *J. F. Brauer,* Assistant Attorney General, for respondent. Reported below: See 145 Colo. 53, 358 P. 2d 1028.

No. 50, Misc. DOUGLAS ET AL. *v.* CALIFORNIA. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the Supreme Court of California granted. Case transferred to appellate docket. *Burton Marks* for petitioners. *Stanley Mosk,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Jack E. Goertzen,* Deputy Attorney General, for respondent. Reported below: See 187 Cal. App. 2d 802, 10 Cal. Rptr. 188.

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No. 154, Misc. YELLIN *v.* UNITED STATES. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit granted. Case transferred to appellate docket. *Victor Rabinowitz* and *Leonard B. Boudin* for petitioner. *Solicitor General Cox, Assistant Attorney General Yeagley, George B. Searls* and *Lee B. Anderson* for the United States. Reported below: 287 F. 2d 292.

No. 216, Misc. GILBERT *v.* UNITED STATES. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit granted. Case transferred to appellate docket. *Albert A. Dorn* and *Fred Okrand* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 291 F. 2d 586.

No. 291, Misc. MORALES ET AL. *v.* CITY OF GALVESTON ET AL. Motion to use the record in No. 167, Misc., October Term, 1960, granted. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit granted. Case transferred to appellate docket. *Arthur J. Mandell* for petitioners. *Preston Shirley* for the City of Galveston, and *Clarence S. Eastham* for Cardigan Shipping Co., respondents. Reported below: 291 F. 2d 97.

No. 255. UNITED STATES *v.* GILMORE ET UX. Court of Claims. Certiorari granted. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Melva M. Graney* and *Harold C. Wilkenfeld* for the United States. *Eli Freed* for respondents. Reported below: —— Ct. Cl. ——, 290 F. 2d 942.

No. 82, Misc. Wong Sun et al. *v.* United States. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit granted. Case transferred to appellate docket. *Sol A. Abrams* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 288 F. 2d 366.

No. 256. United States *v.* Patrick et al. C. A. 4th Cir. Certiorari granted. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Melva M. Graney* and *Harold C. Wilkenfeld* for the United States. Reported below: 288 F. 2d 292.

Certiorari Denied. (See also Misc. Nos. 25, 268, 290, 397, and 415, supra; No. 117, ante, p. 2; No. 122, ante, p. 3; No. 176, ante, p. 2; No. 215, ante, p. 7; No. 23, Misc., ante, p. 8; No. 105, Misc., ante, p. 8; No. 129, Misc., ante, p. 10; No. 219, Misc., ante, p. 10; No. 277, Misc., ante, p. 6; No. 307, Misc., ante, p. 1; and No. 331, Misc., ante, p. 1.)

No. 88. Terminal Construction Co., Inc., et al. *v.* Metro Industrial Painting Corp. et al. C. A. 2d Cir. Certiorari denied. *Sidney O. Raphael* and *Leo M. Drachsler* for petitioners. *David Morgulas* for respondents. Reported below: 287 F. 2d 382.

No. 99. Morrison-Knudsen Co., Inc., *v.* O'Leary, Deputy Commissioner, et al. C. A. 9th Cir. Certiorari denied. *Kenneth E. Roberts* for petitioner. *Solicitor General Cox, Assistant Attorney General Orrick* and *Alan S. Rosenthal* for respondents. Reported below: 288 F. 2d 542.

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No. 97. Carver Progressive Club *v.* Miriani et al. C. A. 6th Cir. Certiorari denied. *Milton R. Henry* for petitioner. *Nathaniel H. Goldstick* and *John H. Witherspoon* for respondents. Reported below: 288 F. 2d 889.

No. 100. Twentieth Century-Fox Film Corp. *v.* Teas et al. C. A. 5th Cir. Certiorari denied. *Neth L. Leachman, Irving M. Walker, William F. Koegel* and *Howard I. Friedman* for petitioner. *Ira Butler* and *Gillis A. Johnson* for respondents. Reported below: 286 F. 2d 373.

No. 102. District of Columbia *v.* Lewis, Executrix. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Chester H. Gray, Milton D. Korman, Henry E. Wixon* and *Harrison S. Howes* for petitioner. *Hugh C. Bickford* for respondent. Reported below: 109 U. S. App. D. C. 353, 288 F. 2d 137.

No. 104. Reliance Picture Frame Co. *v.* Coventry Ware, Inc. C. A. 2d Cir. Certiorari denied. *Raymond A. Werchen* for petitioner. *Albert H. Oldham* for respondent. Reported below: 288 F. 2d 193.

No. 106. Lauer *v.* United States. C. A. 7th Cir. Certiorari denied. *Theodore Lockyear, Jr.* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 287 F. 2d 633.

No. 110. Lovett *v.* United States. C. A. 5th Cir. Certiorari denied. *Zach H. Douglas* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 287 F. 2d 810.

No. 107. PENNSYLVANIA RAILROAD CO. *v.* WOOTEN. C. A. 7th Cir. Certiorari denied. *William A. Wick* for petitioner. *Richard L. Gilliom* for respondent. Reported below: 288 F. 2d 220.

No. 108. BOARD OF EDUCATION OF LOS ANGELES ET AL. *v.* AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA ET AL. Supreme Court of California. Certiorari denied. *Harold W. Kennedy* and *Henry A. Dietz* for petitioners. *A. L. Wirin* and *Fred Okrand* for respondents. Reported below: 55 Cal. 2d 167, 359 P. 2d 45.

No. 111. HOLT ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Wesley R. Asinof* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 288 F. 2d 447.

No. 112. CENAC *v.* STATE BOARD OF LAW EXAMINERS OF ARKANSAS. Supreme Court of Arkansas. Certiorari denied. *Tilghman E. Dixon* for petitioner. *John H. Haley* for respondent.

No. 115. PASSERO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Jerome Lewis* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 290 F. 2d 238.

No. 121. BAUER-SMITH DREDGING CO., INC., *v.* UNITED STATES. Court of Claims. Certiorari denied. *T. G. Schirmeyer* for petitioner. *Solicitor General Cox, Assistant Attorney General Orrick, John G. Laughlin, Jr.* and *Kathryn H. Baldwin* for the United States. Reported below: —— Ct. Cl. ——, 283 F. 2d 877.

No. 116. POLAROID CORP. *v.* POLARAD ELECTRONICS CORP. C. A. 2d Cir. Certiorari denied. *Donald L. Brown, Isaac M. Barnett* and *Tracy R. V. Fike* for petitioner. *Morris Relson* for respondent. Reported below: 287 F. 2d 492.

No. 119. LOCAL 19, INTERNATIONAL BROTHERHOOD OF LONGSHOREMEN, AFL-CIO *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. *Harold A. Katz* and *Irving M. Friedman* for petitioner. *Solicitor General Cox, Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 286 F. 2d 661.

No. 120. CHAMBERLIN ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. *Harvey W. Peters* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *A. F. Prescott* for the United States. Reported below: 286 F. 2d 850.

No. 126. MOHAMMED *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *William R. Ming, Jr.* and *George N. Leighton* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 288 F. 2d 236.

No. 132. HARRIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *O. B. Cline, Jr.* for petitioner. *Solicitor General Cox* for the United States. Reported below: 285 F. 2d 85.

No. 129. DELAY ET AL. *v.* MANES. Court of Appeals of Franklin County, Ohio. Certiorari denied. *George E. Tyack* for petitioners. *Paul Tague* and *J. Paul McNamara* for respondent.

No. 133. VULCANIZED RUBBER & PLASTICS CO. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Donald E. Van Koughnet* and *William F. Heefner* for petitioner. *Solicitor General Cox, Assistant Attorney General Loevinger, Richard A. Solomon, Patrick M. Ryan, James McI. Henderson* and *PGad B. Morehouse* for the United States. Reported below: 288 F. 2d 257.

No. 130. APEX DISTRIBUTING CO., INC., ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Daniel H. Greenberg* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Marie L. McCann* for the United States. Reported below: 288 F. 2d 796.

No. 131. TOOMER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Gilbert S. Bachmann* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 290 F. 2d 195.

No. 135. MOVIECOLOR, LIMITED, *v.* EASTMAN KODAK CO. ET AL. C. A. 2d Cir. Certiorari denied. *Herman E. Cooper* for petitioner. *Roy W. McDonald* for Eastman Kodak Co., and *Hugh Fulton* for Technicolor, Inc., et al., respondents. Reported below: 288 F. 2d 80.

No. 136. PUEBLO DE PECOS ET AL. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Arthur T. Hannett* for petitioners. *Solicitor General Cox* and *Roger P. Marquis* for the United States. Reported below: —— Ct. Cl. ——, —— F. 2d ——.

No. 141. WEED ET AL. *v.* EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES. C. A. 5th Cir. Certiorari denied. *Walter Warren* for petitioners. Reported below: 288 F. 2d 463.

No. 137. PUEBLO DE ISLETA *v.* UNITED STATES. Court of Claims. Certiorari denied. *Arthur T. Hannett* for petitioner. *Solicitor General Cox* and *Roger P. Marquis* for the United States. Reported below: —— Ct. Cl. ——, —— F. 2d ——.

No. 139. ROCHESTER & GODDELL ENGINEERS, INC., ET AL. *v.* FLORIDA STATE TURNPIKE AUTHORITY. District Court of Appeal of Florida, Second Appellate District. Certiorari denied. *Walter Warren* for petitioners. *Gilbert A. Smith* for respondent. Reported below: 128 So. 2d 202.

No. 143. GRANNIS & SLOAN, INC., ET AL. *v.* RENEGOTIATION BOARD. C. A. 4th Cir. Certiorari denied. *Cyril Granville Wyche* and *Alfred F. Burgess* for petitioners. *Solicitor General Cox, Assistant Attorney General Orrick* and *John G. Laughlin, Jr.* for respondent. Reported below: 285 F. 2d 908.

No. 145. PACIFIC EMPLOYERS INSURANCE CO. ET AL. *v.* BANKERS TRUST CO. C. A. 9th Cir. Certiorari denied. *Bert W. Levit* for petitioners. Reported below: 282 F. 2d 106.

No. 147. BERKLEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Marvin A. Koblentz* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 288 F. 2d 713.

No. 148. D'ALESSIO *v.* PEDERSON, DISTRICT DIRECTOR, IMMIGRATION & NATURALIZATION SERVICE. C. A. 6th Cir. Certiorari denied. *Henry C. Lavine* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for respondent. Reported below: 289 F. 2d 317.

No. 149. Sun Oil Co. *v.* United Gas Improvement Co. et al. C. A. 5th Cir. Certiorari denied. *Martin A. Row, Robert E. May* and *Omar L. Crook* for petitioner. *J. David Mann, Jr., William W. Ross* and *John E. Holtzinger, Jr.* for United Gas Improvement Co., and *Kent H. Brown* and *Barbara M. Suchow* for New York Public Service Commission, respondents. Reported below: 290 F. 2d 133.

No. 150. Thomas E. Snyder Sons Co. *v.* Commissioner of Internal Revenue. C. A. 7th Cir. Certiorari denied. *John W. Hughes* and *Harold R. Burnstein* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer, A. F. Prescott* and *Kenneth E. Levin* for respondent. Reported below: 288 F. 2d 36.

No. 152. Lucas County Farm Bureau Cooperative Assn. *v.* National Labor Relations Board. C. A. 6th Cir. Certiorari denied. *Ralph S. Boggs* for petitioner. *Solicitor General Cox, Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 289 F. 2d 844.

No. 155. Vapor Blast Manufacturing Co. *v.* National Labor Relations Board. C. A. 7th Cir. Certiorari denied. *Max Raskin* and *Philip L. Padden* for petitioner. *Solicitor General Cox, Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 287 F. 2d 402.

No. 156. Morrow Radio Manufacturing Co. *v.* United States. C. A. 9th Cir. Certiorari denied. *Fred S. Gilbert, Jr.* and *Allen A. Bowden* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Robert N. Anderson* and *Norman H. Wolfe* for the United States. Reported below: 287 F. 2d 502.

No. 151. Local 164, International Brotherhood of Painters, Decorators and Paperhangers of America, AFL–CIO, et al. *v.* National Labor Relations Board. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Herbert S. Thatcher* and *James F. Carroll* for petitioners. *Solicitor General Cox, Stuart Rothman, Dominick L. Manoli, Norton J. Come* and *Frederick U. Reel* for respondent. *John P. Frank* for Associated Plumbing, Heating & Piping Contractors of America, as *amicus curiae,* in support of the petition. Reported below: 110 U. S. App. D. C. 294, 293 F. 2d 133.

No. 153. Travis et al. *v.* United States. Court of Claims. Certiorari denied. Lewis S. Travis, petitioner, *pro se*. *Ernest N. Hudgins* for Jean S. Travis, petitioner. *Solicitor General Cox* and *Roger P. Marquis* for the United States. Reported below: —— Ct. Cl. ——, 287 F. 2d 916.

No. 160. Deauville *v.* Hall et al. Supreme Court of California. Certiorari denied. *Lionel T. Campbell* for petitioner. *Thomas P. Menzies* for respondents. Reported below: See 188 Cal. App. 2d 535, 10 Cal. Rptr. 511.

No. 161. Federal Trade Commission *v.* Evis Manufacturing Co. et al. C. A. 9th Cir. Certiorari denied. *Solicitor General Cox, Assistant Attorney General Loevinger, Richard A. Solomon, James McI. Henderson* and *Alan B. Hobbes* for petitioner. *Francis R. Kirkham* for respondents. Reported below: 287 F. 2d 831.

No. 162. Roe et al. *v.* United States. C. A. 5th Cir. Certiorari denied. *Leo Brewster* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *David Ferber* for the United States. Reported below: 287 F. 2d 435.

No. 163. MOOK ET AL. *v.* BERGER ET AL. Court of Appeals of New York. Certiorari denied. *Jay Leo Rothschild* for petitioners. *David J. Shivitz* for respondents. Reported below: 9 N. Y. 2d 805, 175 N. E. 2d 339.

No. 164. CHICOPEE MANUFACTURING CORP. *v.* KENDALL COMPANY. C. A. 4th Cir. Certiorari denied. *Floyd H. Crews* and *Alfred F. Burgess* for petitioner. *Hector M. Holmes* and *F. Dean Rainey* for respondent. Reported below: 288 F. 2d 719.

No. 165. DORSEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *William Earl Badgett* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 290 F. 2d 893.

No. 168. PARTENREEDEREI WALLSCHIFF ET AL. *v.* THE PIONEER ET AL. C. A. 6th Cir. Certiorari denied. *MacDonald Deming* and *Richard F. Shaw* for petitioners. *Lee C. Hinslea* and *Lucian Y. Ray* for respondents. Reported below: 287 F. 2d 886.

No. 170. E. F. DREW & CO., INC., *v.* HARTFORD NATIONAL BANK & TRUST CO., TRUSTEE, ET AL. C. A. 3d Cir. Certiorari denied. *William J. Barnes* and *James M. Tunnell, Jr.* for petitioner. *Arthur G. Connolly* and *Januar D. Bove, Jr.* for respondents. Reported below: 290 F. 2d 589.

No. 175. BILTMORE HOMES, INC., ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. *Edward W. Mullins* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *A. F. Prescott* for respondent. Reported below: 288 F. 2d 336.

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No. 174. O. Henry Tent & Awning Co. *v.* Commonwealth Insurance Co. of New York et al. C. A. 7th Cir. Certiorari denied. *Morris A. Haft* for petitioner. *Donald N. Clausen, Herbert W. Hirsh* and *John P. Gorman* for respondents. Reported below: 287 F. 2d 316.

No. 169. Pacific Electric Railway Co. *v.* Thayer. Supreme Court of California. Certiorari denied. *George L. Buland, Albert T. Suter* and *Walt A. Steiger* for petitioner. Reported below: 55 Cal. 2d 430, 360 P. 2d 56.

No. 171. City of Miami Beach et al. *v.* Dade County. Supreme Court of Florida. Certiorari denied. *Harry Zukernick* for petitioners. Reported below: 129 So. 2d 413.

No. 172. Quality Molding Co. *v.* American National Fire Insurance Co. et al. C. A. 7th Cir. Certiorari denied. *Alvin G. Hubbard* and *Reese Hubbard* for petitioner. *John P. Gorman* for respondents. Reported below: 287 F. 2d 313.

No. 177. Plum *v.* Tampax, Inc. Supreme Court of Pennsylvania. Certiorari denied. *Wallace D. Newcomb* for petitioner. *Henry W. Sawyer III* for respondent. Reported below: 402 Pa. 616, 168 A. 2d 315.

No. 182. Geuder, Paeschke & Frey Co. *v.* Clark et al. C. A. 7th Cir. Certiorari denied. *Maxwell H. Herriott* for petitioner. *Andrew E. Carlsen* for respondents. Reported below: 288 F. 2d 1.

No. 181. Finn Equipment Co. *v.* Tracy. C. A. 6th Cir. Certiorari denied. *J. H. Doughty* for petitioner. *Foster D. Arnett* for respondent. Reported below: 290 F. 2d 498.

No. 179. NASTA ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Jacob Rassner* for petitioners. *Solicitor General Cox, Assistant Attorney General Orrick, Alan S. Rosenthal* and *David L. Rose* for the United States. Reported below: 288 F. 2d 186.

No. 180. GARFIELD *v.* PALMIERI, U. S. DISTRICT JUDGE. C. A. 2d Cir. Certiorari denied. *Gustave B. Garfield pro se. Solicitor General Cox, Assistant Attorney General Orrick, Alan S. Rosenthal* and *Anthony L. Mondello* for respondent. Reported below: 290 F. 2d 821.

No. 185. MIDESSA TELEVISION CO., INC., *v.* MOTION PICTURES FOR TELEVISION, INC. C. A. 5th Cir. Certiorari denied. *W. B. Browder, Jr.* for petitioner. *Frank Bezoni* and *Thomas O. McWhorter* for respondent. Reported below: 290 F. 2d 203.

No. 186. BANKERS LIFE & CASUALTY CO. *v.* BELLANCA CORP. C. A. 7th Cir. Certiorari denied. *Charles F. Short, Jr.* for petitioner. *John Paul Stevens, George N. Craig* and *William G. Myers* for respondent. Reported below: 288 F. 2d 784.

No. 189. RAPPAPORT ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Petitioners *pro se. Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 292 F. 2d 261.

No. 193. BAXTER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *William Earl Badgett* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 289 F. 2d 487.

No. 192. GOLDBERG *v.* TRACY. C. A. 3d Cir. Certiorari denied. *Samuel Kagle* for petitioner. *David F. Maxwell* for respondent. Reported below: 289 F. 2d 467.

No. 194. MYERS ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. *Charles H. Smith* for petitioners. *Solicitor General Cox, Acting Assistant Attorney General Jones* and *A. F. Prescott* for respondent. Reported below: 287 F. 2d 400.

No. 195. WILLINGHAM *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *William O. Turney* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Meyer Rothwacks* and *Kenneth E. Levin* for the United States. Reported below: 289 F. 2d 283.

No. 197. JAY STREET CONNECTING RAILROAD ET AL. *v.* MEYERS ET AL. C. A. 2d Cir. Certiorari denied. *Whitney North Seymour, Richard Hawkins* and *Robert S. Carlson* for petitioners. *Richard Swan Buell* for respondents. Reported below: 288 F. 2d 356.

No. 198. GULF, COLORADO & SANTA FE RAILWAY CO. *v.* PITTMAN. Court of Civil Appeals of Texas, Eleventh Supreme Judicial District. Certiorari denied. *Luther Hudson* for petitioner. *Davis Scarborough* for respondent. Reported below: 338 S. W. 2d 774.

No. 199. JONES & LAUGHLIN STEEL CORP. *v.* J. R. CLARK CO. ET AL. C. A. 7th Cir. Certiorari denied. *H. Parker Sharp* for petitioner. *Andrew E. Carlsen* for respondents. Reported below: 288 F. 2d 279.

No. 203. SCHLICHTER *v.* PORT ARTHUR TOWING CO. C. A. 5th Cir. Certiorari denied. *Donald V. Organ* for petitioner. *John W. Sims* for respondent. Reported below: 288 F. 2d 801.

No. 201. CENTRAL ICE CREAM CO. *v.* GOLDENROD ICE CREAM CO. C. A. 7th Cir. Certiorari denied. *William C. Wines* and *Daniel J. Ryan* for petitioner. *Philip A. Rose* and *Claude A. Roth* for respondent. Reported below: 287 F. 2d 265.

No. 202. VON KALINOWSKI *v.* UNITED STATES. Court of Claims. Certiorari denied. *Julian O. von Kalinowski* for petitioner. *Solicitor General Cox, Assistant Attorney General Orrick* and *John G. Laughlin, Jr.* for the United States. Reported below: —— Ct. Cl. ——, —— F. 2d ——.

No. 204. CHRISOS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Morris A. Shenker, Bernard J. Mellman* and *Murry L. Randall* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Robert S. Erdahl* and *Kirby W. Patterson* for the United States. Reported below: 291 F. 2d 535.

No. 207. MILLER *v.* WELLER ET AL. C. A. 3d Cir. Certiorari denied. *Abraham E. Freedman* for petitioner. *Arlin M. Adams* and *Samuel D. Slade* for respondents. Reported below: 288 F. 2d 438.

No. 208. GENERAL DRIVERS ALLIED AUTOMOTIVE & PETROLEUM LOCAL UNION NO. 498 ET AL. *v.* HIGGINS ET AL. Supreme Court of Kansas. Certiorari denied. *Herbert S. Thatcher, David Previant* and *John Manning* for petitioners. *J. E. Schroeder, Jay W. Scovel, Charles R. Kaufman* and *Kenneth C. McGuiness* for respondents. Reported below: 188 Kan. 11, 360 P. 2d 456.

No. 211. LOCAL NO. 11, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & ORNAMENTAL IRONWORKERS, AFL–CIO *v.* HUGHES. C. A. 3d Cir. Certiorari denied. *Mozart G. Ratner* for petitioner. *John J. Bracken* for respondent. Reported below: 287 F. 2d 810.

No. 212. WHITESIDE *v.* CONNECTICUT. Supreme Court of Errors of Connecticut. Certiorari denied. *Loring J. Whiteside pro se. George R. Tiernan* for respondent. Reported below: 148 Conn. 208, 169 A. 2d 260.

No. 216. ST. HELENA PARISH SCHOOL BOARD ET AL. *v.* HALL ET AL. C. A. 5th Cir. Certiorari denied. *Jack P. F. Gremillion,* Attorney General of Louisiana, *Carroll Buck,* First Assistant Attorney General, and *William P. Schuler,* Assistant Attorney General, for petitioners. *Constance Baker Motley* for respondents. Reported below: 287 F. 2d 376.

No. 217. LOUISIANA STATE BOARD OF EDUCATION ET AL. *v.* ALLEN ET AL. C. A. 5th Cir. Certiorari denied. *Jack P. F. Gremillion,* Attorney General of Louisiana, *Carroll Buck,* First Assistant Attorney General, and *George M. Ponder* and *William P. Schuler,* Assistant Attorneys General, for petitioners. *Constance Baker Motley* for respondents. Reported below: 287 F. 2d 32.

No. 219. DENVER & RIO GRANDE WESTERN RAILROAD CO. *v.* STATE TAX COMMISSION OF UTAH. Supreme Court of Utah. Certiorari denied. *Dennis McCarthy* for petitioner. Reported below: 11 Utah 2d 301, 358 P. 2d 352.

No. 220. SCHNAUDER ET AL. *v.* PEERLESS INSURANCE CO. C. A. 5th Cir. Certiorari denied. *A. H. Reed* for petitioners. *William A. Porteous, Jr.* for respondent. Reported below: 290 F. 2d 607.

No. 225. WETHERED, TRUSTEE, *v.* ALBAN TRACTOR CO., INC., ET AL. Court of Appeals of Maryland. Certiorari denied. *Herbert M. Brune* for petitioner. *Nathan Patz* for respondents. Reported below: 224 Md. 408, 168 A. 2d 358.

No. 223. Allied Reserve Life Insurance Co. *v.* Cragg. Supreme Court of Oklahoma. Certiorari denied. *Laidler B. Mackall* for petitioner. *John Ladner* for respondent. Reported below: 360 P. 2d 707.

No. 221. Filene's *v.* Alamance Industries, Inc., et al. C. A. 1st Cir. Certiorari denied. *W. R. Hulbert* for petitioner. *Charles F. Choate* for respondents. Reported below: 291 F. 2d 142.

No. 226. East Baton Rouge Parish School Board et al. *v.* Davis et al. C. A. 5th Cir. Certiorari denied. *Jack P. F. Gremillion,* Attorney General of Louisiana, *William P. Schuler,* Assistant Attorney General, and *John F. Ward, Jr.* for petitioners. Reported below: 287 F. 2d 380.

No. 231. United States Lines Co. *v.* Diniero. C. A. 2d Cir. Certiorari denied. *Joseph M. Cunningham, Charles N. Fiddler* and *Joseph P. Ritorto* for petitioner. *Lee Pressman* and *Louis R. Harolds* for respondent. Reported below: 288 F. 2d 595.

No. 229. Daly *v.* United States et al. C. A. 7th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Loevinger, Richard A. Solomon, Max D. Paglin, Daniel R. Ohlbaum* and *Ruth V. Reel* for respondents. Reported below: 286 F. 2d 146.

No. 230. 40 Cases, More or Less, of Six One-Gallon Cans et al. *v.* United States. C. A. 2d Cir. Certiorari denied. *Bernard Reswick* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Robert S. Erdahl* and *William W. Goodrich* for the United States. Reported below: 289 F. 2d 343.

No. 228. National Union Fire Insurance Co. of Pittsburgh et al. *v.* Britton, Deputy Commissioner, et al. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *John Flather Ellis* for petitioners. *Solicitor General Cox, Assistant Attorney General Orrick* and *Alan S. Rosenthal* for respondents. Reported below: 110 U. S. App. D. C. 77, 289 F. 2d 454.

No. 233. Posegate et ux. *v.* United States. C. A. 9th Cir. Certiorari denied. *Jack G. Marks* for petitioners. *Solicitor General Cox, Assistant Attorney General Orrick* and *Alan S. Rosenthal* for the United States. Reported below: 288 F. 2d 11.

No. 247. Falkner, Banking Commissioner, *v.* National Bank of Commerce of San Antonio, Texas, et al. C. A. 5th Cir. Certiorari denied. *Will Wilson,* Attorney General of Texas, and *C. K. Richards,* Assistant Attorney General, for petitioner. *G. W. Parker, Jr., Ireland Graves* and *Robert J. Hearon, Jr.* for respondents. *Solicitor General Cox, Assistant Attorney General Orrick* and *John G. Laughlin* for the United States, as *amicus curiae,* in opposition to the petition. Reported below: 290 F. 2d 229.

No. 240. Local 483, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers of America, AFL–CIO, et al. *v.* National Labor Relations Board et al. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Mozart G. Ratner* for petitioners. *Solicitor General Cox, Stuart Rothman, Dominick L. Manoli, Norton J. Come, Frederick U. Reel* and *Herman M. Levy* for respondents. Reported below: 109 U. S. App. D. C. 382, 288 F. 2d 166.

No. 235. EDWARD VALVES, INC., ET AL. *v.* CAMERON IRON WORKS ET AL. C. A. 5th Cir. Certiorari denied. *Garrett B. Tucker, Jr., William A. Strauch, John D. Nies* and *Frank B. Pugsley* for petitioners. *James B. Simms* for respondents. Reported below: 286 F. 2d 933; 289 F. 2d 355.

No. 249. UNION RAILROAD CO. *v.* IMM. C. A. 3d Cir. Certiorari denied. *Elder W. Marshall* for petitioner. Reported below: 289 F. 2d 858.

No. 251. O'CONNELL ET AL. *v.* ALLEN, COMMISSIONER OF EDUCATION OF NEW YORK, ET AL. Court of Appeals of New York. Certiorari denied. *Louis Mansdorf* and *Emanuel N. Frankel* for petitioners. *Charles A. Brind* for respondents. *Mathias F. Correa* and *Irwin Schneiderman* for the New York State Society of Certified Public Accountants, as *amicus curiae*. Reported below: 9 N. Y. 2d 612, 174 N. E. 2d 925.

No. 253. DURGIN ET AL. *v.* STOFFEL ET AL. Supreme Court of Florida. Certiorari denied. *Franklin W. Durgin* for petitioners. Reported below: 131 So. 2d 202.

No. 259. TINNERMAN PRODUCTS, INC., *v.* GEORGE K. GARRETT CO., INC. C. A. 3d Cir. Certiorari denied. *Albert R. Teare* for petitioner. Reported below: 292 F. 2d 137.

No. 260. LOCAL 239, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. *Charles R. Katz* for petitioner. *Solicitor General Cox, Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 289 F. 2d 41.

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No. 254. CANNATELLA *v.* VIRGINIA. Supreme Court of Appeals of Virginia. Certiorari denied. *James K. Hughes* and *T. Emmett McKenzie* for petitioner.

No. 258. LE DANS, LTD., ET AL. *v.* LANVIN PARFUMS, INC. Court of Appeals of New York. Certiorari denied. *Robert Goldstein* for petitioners. *Jay Leo Rothschild* for respondent. Reported below: 9 N. Y. 2d 516, 174 N. E. 2d 920.

No. 261. SMITH ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Harry E. Claiborne* and *Jacob Kossman* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 291 F. 2d 220.

No. 262. DECKER ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Ralph H. Logan* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Robert S. Erdahl* and *Sidney M. Glazer* for the United States. Reported below: 292 F. 2d 89.

No. 265. JAMES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *George M. Snellings, Jr.* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Robert S. Erdahl* and *Sidney M. Glazer* for the United States. Reported below: 290 F. 2d 866.

No. 274. CAFFERATA *v.* OHIO. Supreme Court of Ohio. Certiorari denied. Petitioner *pro se*. *C. Watson Hover* for respondent.

No. 267. BAGDASIAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *James B. Murphy* and *Eugene Gressman* for petitioner. Reported below: 291 F. 2d 163.

No. 266. MERRITT-CHAPMAN & SCOTT CORP. *v.* FRAZIER. C. A. 9th Cir. Certiorari denied. *Richard G. Kleindienst* for petitioner. *Samuel Langerman* for respondent. Reported below: 289 F. 2d 849.

No. 269. LIPP, TRADING AS MIDWEST POSTER EXCHANGE, ET AL. *v.* NATIONAL SCREEN SERVICE CORP. ET AL. C. A. 3d Cir. Certiorari denied. *Francis T. Anderson* for petitioners. *Louis Nizer, Louis J. Goffman, W. Bradley Ward* and *Edward W. Mullinix* for respondents. Reported below: 290 F. 2d 321.

No. 270. HULSON ET AL. *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY CO. C. A. 7th Cir. Certiorari denied. *Robert A. Sprecher* for petitioners. *Floyd J. Stuppi* and *William J. O'Brien* for respondent. Reported below: 289 F. 2d 726.

No. 276. GRAY *v.* JOHANSSON ET AL.; and

No. 277. G. & H. TOWING CO. *v.* JOHANSSON ET AL. C. A. 5th Cir. Certiorari denied. *Robert Eikel* for petitioners. *Preston Shirley* for Johansson et al., and *Clarence S. Eastham* for Maritime Overseas Corp., respondents. Reported below: 287 F. 2d 852.

No. 280. HARRISON, TRUSTEE, *v.* PHILLIPS. C. A. 5th Cir. Certiorari denied. *Fentress Bracewell* for petitioner. Reported below: 289 F. 2d 927.

No. 285. SHOYER ET UX. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Kenneth W. Gemmill* and *Gordon W. Gerber* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Meyer Rothwacks* and *Morton K. Rothschild* for the United States. Reported below: 290 F. 2d 817.

No. 281. ARTHUR MURRAY, INC., *v.* RICCIARDI. Court of Appeals of New York. Certiorari denied. *Harry Krauss* for petitioner. Reported below: 10 N. Y. 2d 733, 176 N. E. 2d 841.

No. 98. BLIER *v.* UNITED STATES LINES CO. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted. *Milton Garber* for petitioner. *Louis J. Gusmano* for respondent. Reported below: 286 F. 2d 920.

No. 374. LANCASTER *v.* GARDINER ET AL., TRUSTEES. Court of Appeals of Maryland. Certiorari denied. Reported below: 225 Md. 260, 170 A. 2d 181.

No. 92. VAN ALLEN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted. *Jesse Climenko* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Joseph M. Howard* and *Lloyd J. Keno* for the United States. Reported below: 288 F. 2d 825.

No. 96. MORGAN ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted. *William R. Spofford* and *Andrew B. Young* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Harry Baum* for respondent. Reported below: 288 F. 2d 676.

No. 105. HACKLER *v.* SAIN, SHERIFF. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted. *Henry H. Koven* and *Richard F. Levy* for petitioner. *Daniel P. Ward* and *Edward J. Hladis* for respondent. Reported below: 287 F. 2d 286.

No. 329. WISEMAN *v.* SINCLAIR REFINING CO. C. A. 2d Cir. Certiorari denied. *Jacob Rassner* for petitioner. *Edmund F. Lamb* for respondent. Reported below: 290 F. 2d 818.

No. 109. THOMAS ET UX. *v.* PATTERSON, DISTRICT DIRECTOR OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted. *Frank P. Samford, Jr., John W. Gillon* and *Ira L. Burleson* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer, I. Henry Kutz* and *Norman H. Wolfe* for respondent. Reported below: 289 F. 2d 108.

No. 125. FINAZZO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certoriari should be granted. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 288 F. 2d 175.

No. 196. MOORE ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted. *Eugene Gressman* and *George Becker* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 290 F. 2d 501.

No. 209. EL HOSS ENGINEERING & TRANSPORT CO., LTD., *v.* AMERICAN INDEPENDENT OIL CO. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted. *Telford Taylor, David E. Scoll* and *Kenneth Simon* for petitioner. *Walter C. Lundgren* for respondent. Reported below: 289 F. 2d 346.

No. 114. MID-SOUTH DISTRIBUTORS ET AL. *v.* FEDERAL TRADE COMMISSION. Motion of Southwest Automotive Distributors, Inc., et al. for leave to file brief, as *amici curiae*, denied. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied. *David C. Murchison* and *Robert L. Wald* for petitioners. *Solicitor General Cox, Assistant Attorney General Loevinger, Richard A. Solomon, James McI. Henderson* and *Alan B. Hobbes* for respondent. Reported below: 287 F. 2d 512.

No. 140. DAMON ET AL. *v.* HAWAII. Supreme Court of Hawaii. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted. *Harriet Bouslog* for petitioners. *Shiro Kashiwa*, Attorney General of Hawaii, *Andrew S. O. Lee*, Deputy Attorney General, and *Wilbur K. Watkins, Jr.*, Special Deputy Attorney General, for respondent. Reported below: 44 Haw. 557, 356 P. 2d 386.

No. 134. PORGES *v.* SCHIELE, TAX COMMISSIONER. Supreme Court of Ohio. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted.

No. 103. TRIVETTE *v.* NEW YORK LIFE INSURANCE CO. C. A. 6th Cir. Certiorari denied. MR. JUSTICE BLACK is of the opinion certiorari should be granted. *L. D. May* for petitioner. *R. Lee Blackwell* and *Thomas W. Bullitt* for respondent. Reported below: 283 F. 2d 441.

No. 178. TUSKEGEE INSTITUTE *v.* BANK OF NEW YORK, TRUSTEE, ET AL. Petitioner's motion for leave to file lower court briefs granted. Petition for writ of certiorari to the Court of Appeals of New York denied. *Basil O'Connor, John C. Farber* and *Clendon H. Lee* for petitioner. *William Eldred Jackson* and *Andrew Y. Rogers* for respondents. Reported below: 9 N. Y. 2d 808, 175 N. E. 2d 340.

No. 263. PATTERSON, WARDEN, ET AL. *v.* MEDBERRY. The respondent's motion for leave to proceed *in forma pauperis* is granted. Petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit denied.

Memorandum of MR. JUSTICE HARLAN.

The denial of certiorari in this federal *habeas corpus* proceeding, which involves the conditional release of a state prisoner from a life sentence imposed upon him more than twenty-one years ago, justifies a brief comment. The action taken below was predicated on Colorado's alleged unconstitutional denial to petitioner, an asserted indigent, of a free transcript of the trial proceedings in connection with a 1940 appeal from his conviction.

I find in this situation two important issues which, in my view, are or may be deserving of this Court's plenary consideration: (1) Was the Federal District Court entitled to re-examine the determination of the Colorado Supreme Court that petitioner was not indigent at the time a trial transcript was denied him, see *Medberry* v. *Patterson,* 142 Colo. 180, 186–187, 350 P. 2d 571, 575, and to make new findings that petitioner was then indigent? See *Brown* v. *Allen,* 344 U. S. 443, at 458, 463–464, 506; (2) Does the decision of this Court in *Eskridge* v. *Washington State Board,* 357 U. S. 214, require or justify retrospective application of the rule of *Griffin* v. *Illinois,* 351 U. S. 12, in circumstances where the State, without fault on its part, is now unable to supply petitioner with a trial transcript, or otherwise to satisfy the *Griffin* rule?

Although the first of these questions is presently ripe for consideration by this Court, it can be said that the second question is prematurely tendered, in that, while it is not disputed that the State for reasons beyond its control is no longer able to furnish petitioner with a trial transcript, it does not yet appear that the State is unable to furnish petitioner with other means of perfecting an

adequate appeal record. In these circumstances I acquiesce in the Court's denial of certiorari because such action will not, of course, preclude the State from showing below, if it can, that, without fault on its part, it is now unable to afford petitioner other adequate means of appeal, and from further recourse to this Court if necessary, with respect to either or both of the above questions. See *Brown* v. *Allen, supra,* at 456–457, 488–497.

Duke W. Dunbar, Attorney General of Colorado, *Frank E. Hickey,* Deputy Attorney General, and *J. F. Brauer,* Assistant Attorney General, for petitioners. Reported below: 290 F. 2d 275.

No. 279. HIGHLANDER FOLK SCHOOL ET AL. *v.* TENNESSEE EX REL. SLOAN, DISTRICT ATTORNEY GENERAL. Supreme Court of Tennessee. Certiorari denied. MR. JUSTICE BLACK took no part in the consideration or decision of this application. *Cecil D. Branstetter* and *George E. Barrett* for petitioners. *George F. McCanless,* Attorney General of Tennessee, *Jack Wilson,* Assistant Attorney General, and *Albert F. Sloan,* District Attorney General, for respondent. Reported below: 208 Tenn. 234, 345 S. W. 2d 667.

No. 14, Misc. PIASCIK *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied. Petitioner *pro se. Stanley Mosk,* Attorney General of California, *Doris H. Maier,* Assistant Attorney General, and *Raymond M. Momboisse,* Deputy Attorney General, for respondent.

No. 15, Misc. O'NEAL *v.* MCGEE, CORRECTIONS DIRECTOR, ET AL. Supreme Court of California. Certiorari denied. Petitioner *pro se. Stanley Mosk,* Attorney General of California, *Doris H. Maier,* Assistant Attorney General, and *Edsel W. Haws,* Deputy Attorney General, for respondents.

No. 13, Misc. McAllister *v.* New Jersey. Supreme Court of New Jersey. Certiorari denied.

No. 289. Public Service Television, Inc., *v.* Federal Communications Commission et al. Motion for damages and petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit denied. *Norman E. Jorgensen* and *William I. Denning* for petitioner. *Solicitor General Cox, Assistant Attorney General Loevinger, Richard A. Solomon, Max Paglin, Daniel R. Ohlbaum* and *Ruth V. Reel* for the Federal Communications Commission, and *Robert A. Marmet* for L. B. Wilson, Inc., respondents. Reported below: —— U. S. App. D. C. ——, 296 F. 2d 375.

No. 16, Misc. Creighton *v.* North Carolina. Supreme Court of North Carolina. Certiorari denied. Petitioner *pro se*. *Thomas Wade Bruton,* Attorney General of North Carolina, and *Ralph Moody,* Assistant Attorney General, for respondent.

No. 18, Misc. Robinson *v.* Smyth, Penitentiary Superintendent. Supreme Court of Appeals of Virginia. Certiorari denied. Petitioner *pro se*. *Reno S. Harp III,* Assistant Attorney General of Virginia, for respondent.

No. 24, Misc. Wigand *v.* Taylor, Warden. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall* and *Harold H. Greene* for respondent. Reported below: 285 F. 2d 594.

No. 22, Misc. Gatewood *v.* California. Supreme Court of California. Certiorari denied. Petitioner *pro se*. *Stanley Mosk,* Attorney General of California, and *Doris H. Maier,* Assistant Attorney General, for respondent.

No. 31, Misc. JAVOR *v.* MCGEE, CORRECTIONS DIRECTOR, ET AL. Supreme Court of California. Certiorari denied. Petitioner *pro se.* *Stanley Mosk,* Attorney General of California, and *Arlo E. Smith,* Deputy Attorney General, for respondents.

No. 32, Misc. DOTSON *v.* BOLES, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied. Petitioner *pro se.* *C. Donald Robertson,* Attorney General of West Virginia, and *George H. Mitchell,* Assistant Attorney General, for respondent.

No. 34, Misc. DUNCAN *v.* MAINE. Supreme Judicial Court of Maine. Certiorari denied. Petitioner *pro se.* *Frank E. Hancock,* Attorney General of Maine, for respondent.

No. 40, Misc. JACKSON *v.* MCGEE, CORRECTIONS DIRECTOR, ET AL. Supreme Court of California. Certiorari denied. Petitioner *pro se.* *Stanley Mosk,* Attorney General of California, *Doris H. Maier,* Assistant Attorney General, and *Raymond M. Momboisse,* Deputy Attorney General, for respondents.

No. 43, Misc. JACKSON *v.* KENTUCKY. Court of Appeals of Kentucky. Certiorari denied. Petitioner *pro se.* *John B. Breckinridge,* Attorney General of Kentucky, and *Troy D. Savage,* Assistant Attorney General, for respondent. Reported below: 344 S. W. 2d 381.

No. 44, Misc. HARRIS *v.* ELLIS, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Petitioner *pro se.* *Will Wilson,* Attorney General of Texas, and *Riley Eugene Fletcher* and *W. V. Geppert,* Assistant Attorneys General, for respondent.

No. 19, Misc. O'LEARY *v.* CITY OF AKRON. Supreme Court of Ohio. Certiorari denied. Reported below: 170 Ohio St. 366, 165 N. E. 2d 10.

No. 45, Misc. HURST *v.* MCGEE, CORRECTIONS DIRECTOR, ET AL. Supreme Court of California. Certiorari denied. Petitioner *pro se*. *Stanley Mosk,* Attorney General of California, and *Doris H. Maier,* Assistant Attorney General, for respondents.

No. 46, Misc. WELLS *v.* SACKS, WARDEN. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Mark McElroy,* Attorney General of Ohio, and *Aubrey A. Wendt,* Assistant Attorney General, for respondent. Reported below: 286 F. 2d 431.

No. 48, Misc. FERNANDEZ ET AL. *v.* FLINT BOARD OF EDUCATION ET AL. C. A. 6th Cir. Certiorari denied. *James A. Jameson* and *Joseph Kadans* for petitioners. *Ralph E. Gault* for Flint Board of Education, and *L. J. Carey* for George Odien, Inc., respondents. Reported below: 283 F. 2d 906.

No. 49, Misc. HUNTINGTON *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied. Petitioner *pro se*. *Paul L. Adams,* Attorney General of Michigan, *Joseph B. Bilitzke,* Solicitor General, and *Robert Weinbaum* and *George Mason,* Assistant Attorneys General, for respondent.

No. 54, Misc. SPRATT *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied. Petitioner *pro se*. *Paul L. Adams,* Attorney General of Michigan, *Joseph B. Bilitzke,* Solicitor General, and *Robert Weinbaum* and *George Mason,* Assistant Attorneys General, for respondent.

No. 47, Misc. RANKINS *v.* RANDOLPH, WARDEN. Circuit Court of Randolph County, Illinois. Certiorari denied. Petitioner *pro se.* *William G. Clark,* Attorney General of Illinois, for respondent.

No. 55, Misc. POLLOCK *v.* BOLES, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied. Petitioner *pro se.* *C. Donald Robertson,* Attorney General of West Virginia, and *George H. Mitchell* and *Simon M. Bailey,* Assistant Attorneys General, for respondent.

No. 56, Misc. FULLER *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se.* *Isidore Dollinger* and *Walter E. Dillon* for respondent. Reported below: 8 N. Y. 2d 866, 168 N. E. 2d 716.

No. 57, Misc. DEMARRIAS *v.* SOUTH DAKOTA. Supreme Court of South Dakota. Certiorari denied. Petitioner *pro se.* *A. C. Miller,* Attorney General of South Dakota, and *Ernest W. Stephens* for respondent. Reported below: 79 S. D. 1, 107 N. W. 2d 255.

No. 58, Misc. BRADLEY *v.* BANNAN, WARDEN. C. A. 6th Cir. Certiorari denied. Petitioner *pro se.* *Paul L. Adams,* Attorney General of Michigan, *Joseph B. Bilitzke,* Solicitor General, and *Robert Weinbaum* and *George Mason,* Assistant Attorneys General, for respondent.

No. 62, Misc. BROWN *v.* NEW YORK. C. A. 2d Cir. Certiorari denied. Petitioner *pro se.* *Louis J. Lefkowitz,* Attorney General of New York, and *Joseph J. Rose,* Assistant Attorney General, for respondent.

No. 67, Misc. WILLIAMS *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se.* *William I. Siegel* for respondent.

No. 59, Misc. LARSEN *v.* MCGEE, CORRECTIONS DIRECTOR, ET AL. Supreme Court of California. Certiorari denied. Petitioner *pro se*. *Stanley Mosk*, Attorney General of California, and *Arlo E. Smith*, Deputy Attorney General, for respondents.

No. 61, Misc. WALTERS *v.* CUNNINGHAM, PENITENTIARY SUPERINTENDENT. Supreme Court of Appeals of Virginia. Certiorari denied. Petitioner *pro se*. *Reno S. Harp III*, Assistant Attorney General of Virginia, for respondent.

No. 63, Misc. DAVIDSON *v.* KENTUCKY ET AL. Court of Appeals of Kentucky. Certiorari denied. Petitioner *pro se*. *John B. Breckinridge*, Attorney General of Kentucky, and *David B. Sebree*, Assistant Attorney General, for respondents. Reported below: 344 S. W. 2d 814.

No. 65, Misc. RINE *v.* BOLES, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied. Petitioner *pro se*. *C. Donald Robertson*, Attorney General of West Virginia, and *George H. Mitchell* and *Simon M. Bailey*, Assistant Attorneys General, for respondent.

No. 70, Misc. MUNSEY *v.* SMYTH, PENITENTIARY SUPERINTENDENT. Supreme Court of Appeals of Virginia. Certiorari denied. Petitioner *pro se*. *Reno S. Harp III*, Assistant Attorney General of Virginia, for respondent.

No. 72, Misc. JOHNSON *v.* TAYLOR, WARDEN. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox*, *Assistant Attorney General Marshall* and *Harold H. Greene* for respondent. Reported below: 289 F. 2d 743.

No. 73, Misc. GARNER *v.* MURPHY, WARDEN. Court of Appeals of New York. Certiorari denied.

No. 76, Misc. CHEESEBORO *v.* WARDEN, MARYLAND PENITENTIARY, ET AL. Court of Appeals of Maryland. Certiorari denied. Reported below: 224 Md. 660, 168 A. 2d 181.

No. 77, Misc. ALLEN *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 78, Misc. DELANE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Marshall, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States.

No. 80, Misc. BUONO *v.* KENTON, WARDEN. C. A. 2d Cir. Certiorari denied. *Macgregor Kilpatrick, Richard W. Kahl* and *Stanley D. Josephson* for petitioner. *Solicitor General Cox, Assistant Attorney General Marshall* and *Harold H. Greene* for respondent. Reported below: 287 F. 2d 534.

No. 81, Misc. DENNIS *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 84, Misc. HORN *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. Reported below: See 187 Cal. App. 2d 68, 9 Cal. Rptr. 578.

No. 98, Misc. SMITH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 287 F. 2d 164.

No. 85, Misc. TAYLOR *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied.

No. 86, Misc. MURPHY *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. *Bernard H. Sokol* for petitioner. Reported below: 21 Ill. 2d 149, 171 N. E. 2d 618.

No. 87, Misc. UTT *v.* BOLES, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 88, Misc. HARVELL ET AL. *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 91, Misc. DEGENNARO *v.* DENNO, WARDEN. Court of Appeals of New York. Certiorari denied. *Frances Kahn* for petitioner. *Louis J. Lefkowitz,* Attorney General of New York, *Paxton Blair,* Solicitor General, and *Winifred C. Stanley,* Assistant Attorney General, for respondent.

No. 94, Misc. BUCKLES *v.* SIGLER, WARDEN. Supreme Court of Nebraska. Certiorari denied.

No. 95, Misc. WASHINGTON *v.* BOLES, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 96, Misc. GAILES ET AL. *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 101, Misc. CAPECE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Sidney W. Rothstein, Louis G. Greenfield* and *Jules E. Yarnell* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 287 F. 2d 537.

No. 97, Misc. HARDT *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied.

No. 99, Misc. JOHNSTON *v.* COCHRAN, CORRECTIONS DIRECTOR. Supreme Court of Florida. Certiorari denied.

No. 100, Misc. PITTS *v.* FAY, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 102, Misc. HAMMOND ET AL. *v.* KIRBY, JUDGE. Supreme Court of Arkansas. Certiorari denied. *Thad D. Williams* for petitioners. Reported below: —— Ark. ——, 345 S. W. 2d 910.

No. 106, Misc. SANCHEZ *v.* HERITAGE, WARDEN. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *Isabel L. Blair* for respondent.

No. 111, Misc. LUCERO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

No. 114, Misc. NARUM *v.* UNITED STATES. Court of Claims. Certiorari denied. *Robert H. Reiter* for petitioner. *Solicitor General Cox, Assistant Attorney General Orrick* and *John G. Laughlin, Jr.* for the United States. Reported below: —— Ct. Cl. ——, 287 F. 2d 897.

No. 115, Misc. HOOVER *v.* RHAY, PENITENTIARY SUPERINTENDENT. Supreme Court of Washington. Certiorari denied.

No. 116, Misc. LUZZI *v.* BANMILLER, WARDEN. Supreme Court of Pennsylvania. Certiorari denied.

No. 117, Misc. EDELL *v.* NICHOLAS, TRUSTEE. C. A. 5th Cir. Certiorari denied. Reported below: 285 F. 2d 430.

No. 118, Misc. MILLER *v.* THORN. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Charles William Freeman* for petitioner.

No. 119, Misc. WYATT *v.* CUNNINGHAM, PENITENTIARY SUPERINTENDENT. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 121, Misc. MILLER *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States.

No. 122, Misc. SCOTT *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied.

No. 124, Misc. ALFORD ET AL. *v.* GEORGIA. Supreme Court of Georgia. Certiorari denied. *James E. Weldon* and *L. M. Wyatt* for petitioners. *Eugene Cook*, Attorney General of Georgia, *Wright Lipford* and *E. W. Fleming* for respondent. Reported below: 216 Ga. 606, 118 S. E. 2d 574.

No. 126, Misc. BOROWY *v.* CITY OF DETROIT ET AL. Supreme Court of Michigan. Certiorari denied.

No. 127, Misc. CORNES *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 128, Misc. RITCHIE *v.* ILLINOIS. Circuit Court of Will County, Illinois. Certiorari denied.

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No. 130, Misc. PARKER *v.* O'BOYLE, ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, D. C., ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *William B. Jones* for respondents.

No. 131, Misc. CARPENTER *v.* ARIZONA. Supreme Court of Arizona. Certiorari denied.

No. 132, Misc. CHICK *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied.

No. 134, Misc. BRANUM *v.* WIMAN, WARDEN. Circuit Court of Alabama, Montgomery County. Certiorari denied. Petitioner *pro se*. *MacDonald Gallion,* Attorney General of Alabama, and *Bernard F. Sykes* and *Robert M. Hill,* Assistant Attorneys General, for respondent.

No. 136, Misc. OLIVER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 290 F. 2d 255.

No. 139, Misc. DOERFLEIN *v.* IOWA. Supreme Court of Iowa. Certiorari denied. Reported below: 252 Iowa 947, 107 N. W. 2d 439.

No. 140, Misc. CUMMINGS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 289 F. 2d 904.

No. 142, Misc. COLLINS *v.* DICKSON, WARDEN. Supreme Court of California. Certiorari denied.

No. 143, Misc. SOLOMON *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 145, Misc. THOMASTON *v.* GLADDEN, WARDEN. Supreme Court of Oregon. Certiorari denied.

No. 146, Misc. ADAMSON *v.* NEW YORK. Appellate Division, Supreme Court of New York, Second Judicial Department. Certiorari denied. Petitioner *pro se.* *Edward S. Silver* and *William I. Siegel* for respondent. Reported below: 12 App. Div. 2d 654, 210 N. Y. S. 2d 795.

No. 148, Misc. HELWIG *v.* MARONEY, CORRECTIONAL SUPERINTENDENT. Supreme Court of Pennsylvania. Certiorari denied.

No. 155, Misc. TINSLEY *v.* SIGLER, WARDEN. Supreme Court of Nebraska. Certiorari denied.

No. 157, Misc. FAUST *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari denied. Petitioner *pro se.* *T. W. Bruton,* Attorney General of North Carolina, and *Ralph Moody* and *Harry W. McGalliard,* Assistant Attorneys General, for respondent. Reported below: 254 N. C. 101, 118 S. E. 2d 769.

No. 158, Misc. SMITH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Cox, Assistant Attorney General Miller, Robert G. Maysack* and *Beatrice Rosenberg* for the United States.

No. 161, Misc. RADER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 288 F. 2d 452.

No. 159, Misc. BANDY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 234, Misc. BANDY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States. Reported below: —— F. 2d ——.

No. 235, Misc. BANDY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: —— F. 2d ——.

No. 160, Misc. ANTHONY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

No. 162, Misc. LARSON *v.* BOLES, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 165, Misc. DANIELS *v.* BANNAN, WARDEN. Supreme Court of Michigan. Certiorari denied.

No. 167, Misc. TRUMBLAY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

No. 168, Misc. GEORGE *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 175, Misc. ODELL *v.* BURKE. Supreme Court of Wisconsin. Certiorari denied.

No. 171, Misc. HINES *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 170, Misc. UNITED STATES EX REL. STEVENS *v.* WILKINS, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 287 F. 2d 865.

No. 172, Misc. LEWIS *v.* DISTRICT COURT OF LINN COUNTY, IOWA. Supreme Court of Iowa. Certiorari denied.

No. 176, Misc. BRINSON *v.* SACKS, WARDEN. Supreme Court of Ohio. Certiorari denied. Reported below: 172 Ohio St. 256, 175 N. E. 2d 85.

No. 177, Misc. BURD *v.* WILKINS, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 178, Misc. BLEDSOE *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied.

No. 179, Misc. BRINKLEY *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 224 Md. 391, 168 A. 2d 191.

No. 182, Misc. FINK *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 194, Misc. MOORE *v.* TAYLOR, WARDEN. C. A. 10th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *Howard A. Glickstein* for respondent. Reported below: 289 F. 2d 450.

No. 185, Misc. BUTLER *v.* REID, JAIL SUPERINTENDENT. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *Howard A. Glickstein* for respondent.

No. 184, Misc. COULTON *v.* SACKS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: —— F. 2d ——.

No. 186, Misc. ALLEN *v.* ADAMS, ATTORNEY GENERAL OF MICHIGAN, ET AL. C. A. 6th Cir. Certiorari denied.

No. 189, Misc. OVERSTREET *v.* ELLIS, CORRECTIONS DIRECTOR. Court of Criminal Appeals of Texas. Certiorari denied.

No. 190, Misc. HOLLEY *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. Reported below: 34 N. J. 9, 166 A. 2d 758.

No. 195, Misc. MALDONADO *v.* SUPERIOR COURT, LOS ANGELES COUNTY, CALIFORNIA, ET AL. Supreme Court of California. Certiorari denied.

No. 201, Misc. BAKER *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall* and *Beatrice Rosenberg* for the United States. Reported below: —— U. S. App. D. C. ——, —— F. 2d ——.

No. 203, Misc. RICH *v.* MITCHELL, SECRETARY OF LABOR. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Orrick* and *Alan S. Rosenthal* for respondent.

No. 207, Misc. GERNIE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 287 F. 2d 637.

No. 204, Misc. COOPER *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied. Reported below: 344 S. W. 2d 72.

No. 208, Misc. FERRELL *v.* ELLIS, CORRECTIONS DIRECTOR. Court of Criminal Appeals of Texas. Certiorari denied.

No. 209, Misc. DEAN *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 210, Misc. DEUTSCHMANN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States.

No. 211, Misc. COPPEDGE *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States.

No. 213, Misc. GOODLET ET AL. *v.* GOODMAN, WARDEN. Supreme Court of New Jersey. Certiorari denied. Reported below: 34 N. J. 358, 169 A. 2d 140.

No. 214, Misc. RENTERIA *v.* SUPERIOR COURT, LOS ANGELES COUNTY, ET AL. Supreme Court of California. Certiorari denied.

No. 218, Misc. ELLIS *v.* PATE, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 225, Misc. TURPIN *v.* SACKS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 291 F. 2d 223.

No. 221, Misc. SHARP *v.* ECKLE, PRISON FARM SUPERINTENDENT. Supreme Court of Ohio. Certiorari denied. Reported below: 172 Ohio St. 279, 175 N. E. 2d 76.

No. 222, Misc. WILLIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 289 F. 2d 581.

No. 224, Misc. ROBINSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

No. 226, Misc. SCHREINER *v.* COLORADO. Supreme Court of Colorado. Certiorari denied. Petitioner *pro se. J. F. Brauer,* Assistant Attorney General of Colorado, for respondent. Reported below: 146 Colo. 19, 360 P. 2d 443.

No. 228, Misc. HERNANDEZ *v.* SUPERIOR COURT, LOS ANGELES COUNTY, ET AL. Supreme Court of California. Certiorari denied.

No. 230, Misc. CALITRI *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 233, Misc. JOHNSON *v.* ECKLE, PRISON FARM SUPERINTENDENT. Supreme Court of Ohio. Certiorari denied. Reported below: 172 Ohio St. 291, 175 N. E. 2d 173.

No. 236, Misc. MCCOWN *v.* TEXAS ET AL. Court of Criminal Appeals of Texas. Certiorari denied. Reported below: —— Tex. Cr. R. ——, —— S. W. 2d ——.

No. 231, Misc. PINCKNEY *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied.

No. 239, Misc. GEORGES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 288 F. 2d 889.

No. 241, Misc. GHOLSTON *v.* BOLES, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 242, Misc. MASON *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 110 U. S. App. D. C. 199, 290 F. 2d 742.

No. 244, Misc. REED *v.* WASHINGTON. Supreme Court of Washington. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 56 Wash. 2d 668, 354 P. 2d 935.

No. 249, Misc. GEORGE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

No. 250, Misc. WRIGHT *v.* SUPERIOR COURT, TRINITY COUNTY, ET AL. Supreme Court of California. Certiorari denied.

No. 251, Misc. ROBINSON *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 252, Misc. JASSO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 290 F. 2d 671.

No. 253, Misc. LEE *v.* LANE, WARDEN. Supreme Court of Indiana. Certiorari denied.

No. 256, Misc. BENFORD *v.* SUPERIOR COURT, LOS ANGELES COUNTY, ET AL. Supreme Court of California. Certiorari denied.

No. 257, Misc. FLEISCHER *v.* SUPERIOR COURT, LOS ANGELES COUNTY, ET AL. Supreme Court of California. Certiorari denied.

No. 259, Misc. MONTOS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 291 F. 2d 855.

No. 260, Misc. ODY *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se*. *Louis J. Lefkowitz,* Attorney General of New York, *Paxton Blair,* Solicitor General, and *Winifred C. Stanley,* Assistant Attorney General, for respondent. Reported below: — N. Y. 2d —, — N. E. 2d —.

No. 269, Misc. MOORE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Leon Silverman* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 290 F. 2d 436.

No. 263, Misc. JOHNSON *v.* BRITTON, DEPUTY COMMISSIONER, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Philip J. Lesser* and *I. Irwin Volotin* for petitioner. *Solicitor General Cox, Assistant Attorney General Orrick* and *Alan S. Rosenthal* for respondents. Reported below: 110 U. S. App. D. C. 164, 290 F. 2d 355.

No. 265, Misc. BRADLEY *v.* KENTUCKY. Court of Appeals of Kentucky. Certiorari denied. Reported below: 347 S. W. 2d 532.

No. 270, Misc. SMITH *v.* INDUSTRIAL ACCIDENT COMMISSION ET AL. District Court of Appeal of California, First Appellate District. Certiorari denied.

No. 271, Misc. ZAVALA *v.* SUPERIOR COURT, LOS ANGELES COUNTY, ET AL. Supreme Court of California. Certiorari denied.

No. 272, Misc. CIEHALA *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *Rebecca M. Cutter* for petitioner.

No. 273, Misc. COVARRUBIAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 290 F. 2d 157.

No. 280, Misc. KESSLER, ADMINISTRATOR, *v.* NATIONAL AIRLINES, INC. C. A. 2d Cir. Certiorari denied. *Theodore E. Wolcutt* for petitioner. *John L. Quinlan* for respondent. Reported below: 288 F. 2d 621.

No. 278, Misc. GORDON *v.* LAVALLEE, WARDEN. Court of Appeals of New York. Certiorari denied.

No. 276, Misc. ESLINGER *v.* ELLIS, CORRECTIONS DIRECTOR, ET AL. Court of Criminal Appeals of Texas. Certiorari denied.

No. 282, Misc. JOHNSON *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 283, Misc. LOCKHART *v.* MYERS, CORRECTIONAL SUPERINTENDENT. Supreme Court of Pennsylvania. Certiorari denied.

No. 284, Misc. WEBER *v.* SUPERIOR COURT, SOLANO COUNTY, CALIFORNIA, ET AL. Supreme Court of California. Certiorari denied.

No. 285, Misc. TUTTLE *v.* SUPERIOR COURT, HUMBOLDT COUNTY, CALIFORNIA, ET AL. Supreme Court of California. Certiorari denied.

No. 286, Misc. MOKUS *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

No. 287, Misc. CHAPMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Joseph H. Davis* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Robert S. Erdahl* for the United States. Reported below: 289 F. 2d 539.

No. 293, Misc. ANTIPAS *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Robert S. Erdahl* and *J. F. Bishop* for the United States. Reported below: 110 U. S. App. D. C. 143, 289 F. 2d 884.

No. 288, Misc. TAYLOR *v.* BANMILLER, WARDEN. Supreme Court of Pennsylvania. Certiorari denied. Petitioner *pro se*. *William H. Wolf* and *James C. Crumlish* for respondent. Reported below: See 194 Pa. Super. 609, 169 A. 2d 574.

No. 295, Misc. HILL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Robert S. Erdahl* and *Julia P. Cooper* for the United States. Reported below: 291 F. 2d 627.

No. 296, Misc. MASSENGALE *v.* CINCINNATI BAR ASSN. Supreme Court of Ohio. Certiorari denied. Petitioner *pro se*. *Joseph E. Rosen* and *Robert M. Dennis* for respondent. Reported below: 171 Ohio St. 442, 171 N. E. 2d 713.

No. 298, Misc. HOLLOWAY *v.* WARDEN, MARYLAND PENITENTIARY. Court of Appeals of Maryland. Certiorari denied. Reported below: 225 Md. 626, 169 A. 2d 681.

No. 299, Misc. WASHINGTON *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: See 106 U. S. App. D. C. 140, 270 F. 2d 333.

No. 300, Misc. GREEN *v.* SUPERIOR COURT OF CALIFORNIA, IN AND FOR LOS ANGELES COUNTY, APPELLATE DEPARTMENT, ET AL. District Court of Appeal of California, Second Appellate District. Certiorari denied. *Samuel Carter McMorris* for petitioner. *Harold W. Kennedy* and *William E. Lamoreaux* for respondents. Reported below: 191 Cal. App. 2d 484, 12 Cal. Rptr. 796.

No. 301, Misc. GIBBS *v.* GLADDEN, WARDEN. Supreme Court of Oregon. Certiorari denied.

No. 302, Misc. BAILLEAUX ET AL. *v.* HATFIELD, GOVERNOR OF OREGON, ET AL. C. A. 9th Cir. Certiorari denied. *Rowland Watts* for petitioners. *Robert Y. Thornton,* Attorney General of Oregon, and *Peter S. Herman,* Assistant Attorney General, for respondents. Reported below: 290 F. 2d 632.

No. 303, Misc. WORTH *v.* MICHIGAN. C. A. 6th Cir. Certiorari denied. Reported below: 291 F. 2d 621.

No. 304, Misc. GLASS *v.* TINSLEY, WARDEN. Supreme Court of Colorado. Certiorari denied. Petitioner *pro se.* *Duke W. Dunbar,* Attorney General of Colorado, *Frank E. Hickey,* Deputy Attorney General, and *J. F. Brauer,* Assistant Attorney General, for respondent.

No. 306, Misc. MATLOCK *v.* DICKSON, WARDEN. Supreme Court of California. Certiorari denied.

No. 308, Misc. STRASBURG *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *Frances Kahn* for petitioner. *Edward J. Silver* and *William I. Siegel* for respondent.

No. 309, Misc. MCLAUGHLIN *v.* VIRGINIA. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 310, Misc. ENGLISH *v.* WILKINS, WARDEN. Court of Appeals of New York. Certiorari denied.

No. 315, Misc. SWINGLE *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied. *Lawrence Goldberg* and *A. Harry Levitan* for petitioner. Reported below: 403 Pa. 293, 169 A. 2d 871.

No. 316, Misc. DeGroat *v.* New York. Court of Appeals of New York. Certiorari denied.

No. 318, Misc. Tompa *v.* Cunningham, Penitentiary Superintendent. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 320, Misc. Green *v.* Ellis, Corrections Director. Court of Criminal Appeals of Texas. Certiorari denied.

No. 322, Misc. Slechta *v.* Illinois. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 324, Misc. Braun *v.* Rhay, Penitentiary Superintendent. Supreme Court of Washington. Certiorari denied.

No. 327, Misc. Williams *v.* Nash, Warden. Supreme Court of Missouri. Certiorari denied.

No. 328, Misc. Martinez *v.* Cox, Warden. Supreme Court of New Mexico. Certiorari denied.

No. 329, Misc. Roberts *v.* United States. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: See 109 U. S. App. D. C. 75, 284 F. 2d 209.

No. 332, Misc. Hanovich *v.* Sacks, Warden, et al. C. A. 6th Cir. Certiorari denied. Reported below: 290 F. 2d 798.

No. 334, Misc. Moses *v.* Hand, Warden. Supreme Court of Kansas. Certiorari denied.

No. 330, Misc. JACKSON ET UX. *v.* CALIFORNIA. District Court of Appeal of California, Second Appellate District. Certiorari denied. *Samuel Carter McMorris* for petitioners.

No. 333, Misc. STURDIVANT *v.* NEW JERSEY. C. A. 3d Cir. Certiorari denied. *Gregory J. Castano* for petitioner. Reported below: 289 F. 2d 846.

No. 335, Misc. KENT *v.* TINSLEY, WARDEN. Supreme Court of Colorado. Certiorari denied.

No. 337, Misc. POWERS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 338, Misc. CARTER *v.* NEW YORK. Appellate Division, Supreme Court of New York, Fourth Judicial Department. Certiorari denied.

No. 343, Misc. MILLER *v.* NASH, WARDEN. Supreme Court of Missouri. Certiorari denied.

No. 348, Misc. FERGUSON ET AL. *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

No. 349, Misc. GRAHAM *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 353, Misc. BURGE *v.* MARONEY, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 354, Misc. WALKER *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 355, Misc. SOSTRE *v.* NEW YORK. Appellate Division, Supreme Court of New York, Fourth Judicial Department. Certiorari denied.

No. 357, Misc. DOERFLEIN *v.* IOWA ET AL. Supreme Court of Iowa. Certiorari denied.

No. 358, Misc. LEVY *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. *Clyde W. Woody* for petitioner. Reported below: 225 Md. 201, 170 A. 2d 216.

No. 360, Misc. FREY *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. Reported below: 171 Tex. Cr. R. ——, 345 S. W. 2d 416.

No. 361, Misc. REEVES *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 224 Md. 436, 168 A. 2d 353.

No. 362, Misc. LYNCH *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 366, Misc. WRIGHT *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. Reported below: 55 Cal. 2d 560, 360 P. 2d 325.

No. 369, Misc. LARK *v.* WEST, CHAIRMAN, ET AL., COMMITTEE ON ADMISSIONS AND GRIEVANCES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *James J. Laughlin* for petitioner. *Roger Robb* for respondents. Reported below: 110 U. S. App. D. C. 157, 289 F. 2d 898.

No. 372, Misc. COCHRAN *v.* HENDRICK, PRISONS SUPERINTENDENT. Supreme Court of Pennsylvania. Certiorari denied.

No. 374, Misc. ROOT *v.* MCGEE, CORRECTIONS DIRECTOR, ET AL. Supreme Court of California. Certiorari denied.

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No. 373, Misc. CUMMINGS *v.* BENNETT, WARDEN. District Court of Lee County, Iowa. Certiorari denied.

No. 376, Misc. ELLIOTT *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied.

No. 425, Misc. ROBINSON *v.* NEW YORK CENTRAL RAILROAD CO. Court of Appeals of New York. Certiorari denied. Reported below: 9 N. Y. 2d 836, 175 N. E. 2d 455.

No. 381, Misc. SCHOEL *v.* WASHINGTON. Supreme Court of Washington. Certiorari denied.

No. 385, Misc. MCGUIRE *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 386, Misc. BALES *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied.

No. 389, Misc. KIYAMA ET UX. *v.* RUSK, SECRETARY OF STATE. C. A. 9th Cir. Certiorari denied. *A. L. Wirin* and *Fred Okrand* for petitioners. *Solicitor General Cox, Assistant Attorney General Orrick* and *Morton Hollander* for respondent. Reported below: 291 F. 2d 10.

No. 404, Misc. ROSARIO *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 407, Misc. PINEIRO-LOPEZ *v.* KENNEDY, ATTORNEY GENERAL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *J. J. Kilimnik* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for respondent. Reported below: 110 U. S. App. D. C. 352, 293 F. 2d 540.

No. 377, Misc. McGINTY *v.* UNITED STATES. Court of Claims. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Orrick, Alan S. Rosenthal* and *Pauline B. Heller* for the United States. Reported below: —— Ct. Cl. ——, —— F. 2d ——.

No. 446, Misc. SINGLETON *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. Reported below: 171 Tex. Cr. R. ——, 346 S. W. 2d 328.

No. 21, Misc. FRENCH *v.* DOWNIE, PRISON SUPERINTENDENT. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied in light of the representations of the State Attorney General as to the adequacy of state remedies. Petitioner *pro se*. *Eugene Cook*, Attorney General of Georgia, *Earl Hickman*, Assistant Attorney General, and *Paul Rodgers*, Deputy Attorney General, for respondent. Reported below: 283 F. 2d 303.

No. 30, Misc. VITORATOS, ALIAS VICTOR, *v.* OHIO. Petition for writ of certiorari and for other relief to the Supreme Court of Ohio denied.

No. 262, Misc. MORRISON *v.* HERITAGE, WARDEN. Petition for writ of certiorari and for other relief to the United States Court of Appeals for the Fifth Circuit denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *Howard A. Glickstein* for respondent.

No. 107, Misc. HALL *v.* WARDEN, MARYLAND PENITENTIARY. Court of Appeals of Maryland. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted. *William F. Mosner* for petitioner. Reported below: 224 Md. 662, 168 A. 2d 373.

No. 112, Misc. ANDREWS *v.* KANSAS. Supreme Court of Kansas. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted. Petitioner *pro se*. *William M. Ferguson,* Attorney General of Kansas, and *J. Richard Foth* and *Robert E. Hoffman,* Assistant Attorneys General, for respondent. Reported below: 187 Kan. 458, 357 P. 2d 739.

No. 206, Misc. RUCKER *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted. Petitioner *pro se*. *James C. Crumlish* for respondent. Reported below: 403 Pa. 262, 168 A. 2d 732.

No. 240, Misc. FULCHER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted. *William R. Willis* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 289 F. 2d 331.

No. 254, Misc. MOSS *v.* JONES, WARDEN. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted. Reported below: 288 F. 2d 342.

No. 258, Misc. BLOETH *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted. Reported below: 9 N. Y. 2d 211, 173 N. E. 2d 782.

No. 279, Misc. YOUNG *v.* SOUTH CAROLINA. Supreme Court of South Carolina. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted.

No. 346, Misc. NEWTON *v.* LOUISIANA. Supreme Court of Louisiana. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted. *C. F. Gravel, Jr.* for petitioner. Reported below: 241 La. 261, 128 So. 2d 651.

No. 344, Misc. KENNARD *v.* MISSISSIPPI. Supreme Court of Mississippi. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted. *Thurgood Marshall, Constance Baker Motley* and *R. Jess Brown* for petitioner. Reported below: —— Miss. ——, 128 So. 2d 572.

Rehearing Denied.

No. 28, October Term, 1960. KONIGSBERG *v.* STATE BAR OF CALIFORNIA ET AL., 366 U. S. 36;

No. 36, October Term, 1960. TWO GUYS FROM HARRISON-ALLENTOWN, INC., *v.* MCGINLEY, DISTRICT ATTORNEY, LEHIGH COUNTY, PENNSYLVANIA, ET AL., 366 U. S. 582;

No. 58, October Term, 1960. IN RE ANASTAPLO, 366 U. S. 82;

No. 60, October Term, 1960. POE ET AL. *v.* ULLMAN, STATE'S ATTORNEY, 367 U. S. 497;

No. 61, October Term, 1960. BUXTON *v.* ULLMAN, STATE'S ATTORNEY, 367 U. S. 497;

No. 67, October Term, 1960. BRAUNFELD ET AL. *v.* BROWN, COMMISSIONER OF POLICE OF PHILADELPHIA, ET AL., 366 U. S. 599;

No. 97, October Term, 1960. CAFETERIA & RESTAURANT WORKERS UNION, LOCAL 473, AFL–CIO, ET AL. *v.* MCELROY ET AL., 367 U. S. 886; and

No. 257, October Term, 1960. H. K. PORTER CO., INC., ET AL. *v.* CENTRAL VERMONT RAILWAY, INC., ET AL., 366 U. S. 272. Petitions for rehearing denied.

No. 258, October Term, 1960. INTERSTATE COMMERCE COMMISSION *v.* CENTRAL VERMONT RAILWAY, INC., ET AL., 366 U. S. 272;

No. 266, October Term, 1960. UNITED STATES *v.* CENTRAL VERMONT RAILWAY, INC., ET AL., 366 U. S. 272;

No. 288, October Term, 1960. AMERICAN AUTOMOBILE ASSOCIATION *v.* UNITED STATES, 367 U. S. 687;

No. 329, October Term, 1960. UNITED STATES, TRUSTEE, *v.* OREGON, 366 U. S. 643;

No. 478, October Term, 1960. HORTON *v.* LIBERTY MUTUAL INSURANCE CO., 367 U. S. 348;

No. 486, October Term, 1960. GORI *v.* UNITED STATES, 367 U. S. 364;

No. 552, October Term, 1960. ESTATE OF CUNHA *v.* COMMISSIONER OF INTERNAL REVENUE, 364 U. S. 942;

No. 724, October Term, 1960. HAZELTON, ADMINISTRATOR, *v.* CITY OF SAN DIEGO ET AL., 366 U. S. 910;

No. 868, October Term, 1960. DENNY ET AL. *v.* BUSH ET AL., 367 U. S. 908;

No. 870, October Term, 1960. HOLEKAMP ET AL. *v.* HOLEKAMP LUMBER CO. ET AL., 366 U. S. 715;

No. 893, October Term, 1960. LICAVOLI *v.* UNITED STATES, 366 U. S. 936;

No. 920, October Term, 1960. MILLET ET AL. *v.* UNITED STATES, 366 U. S. 944;

No. 927, October Term, 1960. ROGERS ET AL. *v.* UNITED STATES, 366 U. S. 951;

No. 928, October Term, 1960. MILWAUKEE & SUBURBAN TRANSPORT CORP. *v.* COMMISSIONER OF INTERNAL REVENUE, 366 U. S. 965;

No. 948, October Term, 1960. CLIETT *v.* HAMMONDS ET AL., 366 U. S. 960; and

No. 959, October Term, 1960. AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, ET AL. *v.* QUESADA, ADMINISTRATOR, FEDERAL AVIATION AGENCY, 366 U. S. 962. Petitions for rehearing denied.

No. 12, October Term, 1960. COMMUNIST PARTY OF THE UNITED STATES *v.* SUBVERSIVE ACTIVITIES CONTROL BOARD, 367 U. S. 1. The motion for issuance of mandate in addition to certified copy of judgment is granted. Petition for rehearing denied.

No. 180, October Term, 1960. PAYNE *v.* MADIGAN, WARDEN, 366 U. S. 761; and

No. 184, October Term, 1960. YOUNG *v.* UNITED STATES, 366 U. S. 761. Petitions for rehearing denied. MR. JUSTICE FRANKFURTER took no part in the consideration or decision of these applications.

No. 200, October Term, 1960. LATHROP *v.* DONOHUE, 367 U. S. 820. Petition for rehearing and for other relief denied.

No. 236, October Term, 1960. MAPP *v.* OHIO, 367 U. S. 643. Motion of National District Attorneys' Association for leave to file brief, as *amicus curiae*, granted. Petition for rehearing denied.

No. 731, October Term, 1960. CARMINATI *v.* UNITED STATES, 366 U. S. 960. Motions to dispense with printing the petition for rehearing and for leave to supplement the petition for rehearing granted. Petition for rehearing denied.

No. 325, Misc., October Term, 1960. HORNBECK *v.* WILKINS, WARDEN, 365 U. S. 845;

No. 666, Misc., October Term, 1960. WALKER *v.* MCGINNIS, COMMISSIONER, ET AL., 366 U. S. 966; and

No. 925, Misc., October Term, 1960. ADAMES *v.* UNITED STATES, 366 U. S. 939. Motions for leave to file petitions for rehearing denied.

No. 736, Misc., October Term, 1960. HARTFORD *v.* WICK, STATE HOSPITAL DIRECTOR, ET AL., 365 U. S. 839;

No. 874, Misc., October Term, 1960. MEDRANO *v.* UNITED STATES, 366 U. S. 968;

No. 929, Misc., October Term, 1960. KILLILEA ET AL. *v.* UNITED STATES, 366 U. S. 969;

No. 930, Misc., October Term, 1960. NICOL *v.* NATIONAL SAVINGS & TRUST CO., 366 U. S. 914;

No. 949, Misc., October Term, 1960. HILDERBRAND *v.* UNITED STATES, 366 U. S. 932;

No. 984, Misc., October Term, 1960. BYARS *v.* UNITED STATES, 366 U. S. 946;

No. 1002, Misc., October Term, 1960. BAYLESS *v.* UNITED STATES, 366 U. S. 971;

No. 1110, Misc., October Term, 1960. SHORTER *v.* UNITED STATES, 366 U. S. 975;

No. 1111, Misc., October Term, 1960. GENCO *v.* GENCO, 366 U. S. 976;

No. 1113, Misc., October Term, 1960. HARDEN *v.* UNITED STATES, 366 U. S. 976;

No. 1138, Misc., October Term, 1960. BENSINGER *v.* STEINER, WARDEN, 366 U. S. 957;

No. 1158, Misc., October Term, 1960. DEFINO *v.* MCNAMARA, SECRETARY OF DEFENSE, ET AL., 366 U. S. 976; and

No. 1194, Misc., October Term, 1960. TAYLOR *v.* FLOETE, DIRECTOR, GENERAL SERVICES ADMINISTRATION, ET AL., 366 U. S. 955. Petitions for rehearing denied.

No. 918, October Term, 1960. GREAT LAKES AIRLINES, INC., ET AL. *v.* CIVIL AERONAUTICS BOARD, 366 U. S. 965. Petition for rehearing denied. MR. JUSTICE BRENNAN took no part in the consideration or decision of this application.

No. 629, October Term, 1960. COMMISSIONER OF INTERNAL REVENUE *v.* SCHLUDE ET UX., 367 U. S. 911. Petition for rehearing denied. The *per curiam* order heretofore entered herein is amended to read as follows: "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."

No. 979, October Term, 1960. BROTHERHOOD OF RAILROAD TRAINMEN ET AL. *v.* DENVER & RIO GRANDE WESTERN RAILROAD CO., 366 U. S. 966. Motion of Railway Labor Executives' Association for leave to file brief, as *amicus curiae,* granted. Petition for rehearing denied.

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Miscellaneous Orders.

No. 66. BLAU *v.* LEHMAN ET AL. Certiorari, 366 U. S. 902, to the United States Court of Appeals for the Second Circuit. Motion of the Solicitor General for leave to participate in oral argument granted. *Solicitor General Cox* for the Securities and Exchange Commission, as *amicus curiae.*

No. 468, Misc. RILEY *v.* OHIO ET AL. Motion for leave to file petition for writ of certiorari denied.

No. 87. MANAGED FUNDS, INC., *v.* BROUK ET AL. Certiorari, 366 U. S. 958, to the United States Court of Appeals for the Eighth Circuit. Motion of the Solicitor General for leave to participate in oral argument granted. *Solicitor General Cox* for the Securities and Exchange Commission, as *amicus curiae.*

No. 205, Misc. LLOYD *v.* DICKSON, WARDEN;

No. 470, Misc. MILLER *v.* OBERHAUSER, SUPERINTENDENT, INSTITUTION FOR MEN; and

No. 477, Misc. MALLONEE *v.* LANIER, WARDEN, ET AL. Motions for leave to file petitions for writs of habeas corpus denied.

No. 305, Misc. EX PARTE JACKSON. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for writ of certiorari, certiorari is denied.

Certiorari Granted. (*See also No. 60, Misc., ante, p. 13, and No. 281, Misc., ante, p. 14.*)

No. 282. ATLANTIC & GULF STEVEDORES, INC., *v.* ELLERMAN LINES, LTD., ET AL. C. A. 3d Cir. Certiorari granted. *James J. Davis, Jr.* for petitioner. *T. E. Byrne, Jr.* for respondents. Reported below: 289 F. 2d 201.

No. 244. DAIRY QUEEN, INC., *v.* WOOD, U. S. DISTRICT JUDGE, ET AL. C. A. 3d Cir. Certiorari granted. *Donald M. Bowman* for petitioner. *Mark D. Alspach* for respondents.

Certiorari Denied. (*See also No. 305, Misc., supra, and No. 427, Misc., ante, p. 11.*)

No. 206. CALLAWAY ET AL. *v.* GARBER ET AL. C. A. 9th Cir. Certiorari denied. *Myles J. Thomas* for petitioners. *Solicitor General Cox, Assistant Attorney General Orrick* and *Morton Hollander* for respondents. Reported below: 289 F. 2d 171.

No. 284. ELLERMAN LINES, LTD., ET AL. *v.* BEARD. C. A. 3d Cir. Certiorari denied. *T. E. Byrne, Jr.* for petitioners. *Abraham E. Freedman* and *Milton M. Borowsky* for respondent. Reported below: 289 F. 2d 201.

No. 213. UNITED MINE WORKERS OF AMERICA *v.* GILCHRIST ET AL. C. A. 6th Cir. Certiorari denied. *Willard P. Owens* and *E. H. Rayson* for petitioner. *Howard H. Baker, Jr.* for respondents. Reported below: 290 F. 2d 36.

No. 232. MARKOS *v.* OHIO. Supreme Court of Ohio. Certiorari denied. *William Patrick Clyne* and *Ian Bruce Hart* for petitioner. *Mark McElroy,* Attorney General of Ohio, and *Theodore R. Saker,* First Assistant Attorney General, for respondent. Reported below: 172 Ohio St. 134, 173 N. E. 2d 686.

No. 238. KOWALSKY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Ben F. Foster* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Meyer Rothwacks* for the United States. Reported below: 290 F. 2d 161.

No. 271. PAGE *v.* WORK ET AL.; and

No. 272. C. A. PAGE PUBLISHING CO. *v.* WORK ET AL. C. A. 9th Cir. Certiorari denied. *Dudley K. Wright* for petitioners. *Rollin L. McNitt* and *Edythe Jacobs* for respondents. Reported below: 290 F. 2d 334.

No. 293. ALEXANDER ET AL. *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. *George N. Leighton* for petitioners. *William G. Clark,* Attorney General of Illinois, for respondent. Reported below: 21 Ill. 2d 347, 172 N. E. 2d 785.

No. 294. ROBBINS COAL CO., INC., *v.* FIREMEN'S INSURANCE COMPANY OF NEWARK, NEW JERSEY. C. A. 5th Cir. Certiorari denied. *Douglass P. Wingo* for petitioner. *George W. Yancey* for respondent. Reported below: 288 F. 2d 349.

No. 292. PORT ANGELES & WESTERN RAILWAY CO. ET AL. *v.* ARNHOLD ET AL. C. A. 9th Cir. Certiorari denied. *Donald A. Schmechel* for petitioners. Reported below: 284 F. 2d 326; 289 F. 2d 924.

No. 295. RUTLAND RAILWAY CORP. *v.* DEBEVOISE, ATTORNEY GENERAL OF VERMONT, ET AL. C. A. 2d Cir. Certiorari denied. *Donald L. Wallace* for petitioner. *Thomas M. Debevoise* and *John D. Carbine* for respondents. Reported below: 291 F. 2d 379.

No. 296. CHRYSLER CORPORATION *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. *Theodore Pearson* and *John J. Costello* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Melva M. Graney* for respondent. Reported below: 289 F. 2d 643.

No. 302. HYLAND ET AL. *v.* WATSON ET AL. C. A. 6th Cir. Certiorari denied. *William R. Coen* for petitioners. *Solicitor General Cox, Assistant Attorney General Orrick* and *Morton Hollander* for respondents. Reported below: 287 F. 2d 884.

No. 305. MISSISSIPPI VALLEY BARGE LINE CO. *v.* INLAND WATERWAYS SHIPPERS ASSN. ET AL. C. A. 8th Cir. Certiorari denied. *James M. Douglas, Robert Neill, Charles Kohlmeyer, Jr.* and *George B. Matthews* for petitioner. *Wilder Lucas* for respondents. Reported below: 289 F. 2d 374.

No. 307. LEWIS, ALIAS ERLICH, *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. *Charles A. Bellows* for petitioner. *William G. Clark,* Attorney General of Illinois, for respondent. Reported below: 22 Ill. 2d 68, 174 N. E. 2d 197.

No. 308. EISTRAT *v.* NORTHERN LUMBER CO. ET AL. District Court of Appeal of California, Second Appellate District. Certiorari denied. Petitioner *pro se*. *Vincent Scott* for respondents. Reported below: 190 Cal. App. 2d 267, 12 Cal. Rptr. 194.

No. 227. ZIEMER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted. *Edward S. Grodin* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 291 F. 2d 100.

No. 250. ELLIS, CORRECTIONS DIRECTOR, *v.* MACKENNA. Motion of respondent for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied. *Will Wilson,* Attorney General of Texas, and *John L. Estes,* Assistant Attorney General, for petitioner. Respondent *pro se*. Reported below: 280 F. 2d 592; 289 F. 2d 928.

No. 273. HENSLEE, PENITENTIARY SUPERINTENDENT, *v.* BAILEY. Motion of respondent for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied. *Frank Holt,* Attorney General of Arkansas, and *Thorp Thomas,* Assistant Attorney General, for petitioner. Respondent *pro se*. Reported below: 287 F. 2d 936.

No. 199, Misc. CLINTON *v.* BENNETT, DIRECTOR, BUREAU OF PRISONS, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall* and *Harold H. Greene* for respondents.

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No. 306. STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. *v.* MORRIS ET AL. Motion of petitioner for leave to add to the record granted. Petition for writ of certiorari to the Appellate Court of Illinois, Second District, denied. *Edward F. Streit* and *Russell H. Matthias* for petitioner. *Thomas P. O'Malley* for some of the respondents. Reported below: 29 Ill. App. 2d 451, 173 N. E. 2d 590.

No. 38, Misc. KRUPNICK *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall* and *Harold H. Greene* for the United States. Reported below: 286 F. 2d 45.

No. 120, Misc. SCHWERTFEGER *v.* CUNNINGHAM, PENITENTIARY SUPERINTENDENT. Supreme Court of Appeals of Virginia. Certiorari denied. Petitioner *pro se*. *Reno S. Harp III,* Assistant Attorney General of Virginia, for respondent.

No. 133, Misc. BISHOP *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 144, Misc. STIGLER *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Reported below: 9 N. Y. 2d 717, 174 N. E. 2d 324.

No. 156, Misc. GALLAGHER *v.* SACKS, WARDEN, ET AL. Supreme Court of Ohio. Certiorari denied. Reported below: 172 Ohio St. 37, 172 N. E. 2d 913.

No. 191, Misc. WRIGHT *v.* MCGINNIS, CORRECTION COMMISSIONER. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall* and *Harold H. Greene* for respondent.

No. 229, Misc. KUHN *v.* BOLES, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 261, Misc. OWENS *v.* ELLIS, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 289, Misc. DEGROAT *v.* MINO, DISTRICT ATTORNEY OF ULSTER COUNTY, ET AL. Court of Appeals of New York. Certiorari denied. Petitioner *pro se*. *Louis J. Lefkowitz,* Attorney General of New York, *Paxton Blair,* Solicitor General, and *Winifred C. Stanley,* Assistant Attorney General, for respondents.

No. 325, Misc. BURGER *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied. Reported below: 55 Cal. 2d 663, 361 P. 2d 417.

No. 336, Misc. SCOTT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 292 F. 2d 49.

No. 370, Misc. RAMSOUR *v.* UNITED STATES ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

No. 367, Misc. PEARSON *v.* LAVALLEE, WARDEN. Appellate Division, Supreme Court of New York, Third Judicial Department. Certiorari denied. Petitioner *pro se*. *Louis J. Lefkowitz,* Attorney General of New York, *Paxton Blair,* Solicitor General, and *Winifred C. Stanley,* Assistant Attorney General, for respondent. Reported below: 13 App. Div. 2d 560, 211 N. Y. S. 2d 738.

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No. 352, Misc. THOMPSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 378, Misc. SCARNATO *v.* NEW YORK. Appellate Division, Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 383, Misc. SAVAGE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Edward Q. Carr, Jr.* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 292 F. 2d 264.

No. 393, Misc. RICHER *v.* MINNESOTA. Supreme Court of Minnesota. Certiorari denied.

No. 394, Misc. DIPAOLO *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. Reported below: 34 N. J. 279, 168 A. 2d 401.

No. 398, Misc. CARPENTER *v.* SHUTZER, STATE HOSPITAL DIRECTOR. C. A. 2d Cir. Certiorari denied.

No. 399, Misc. JOHNSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *William M. Howard* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 291 F. 2d 150.

No. 403, Misc. ARNOLD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Edward Q. Carr, Jr.* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 292 F. 2d 500.

No. 412, Misc. COHEN *v.* WARDEN, BALTIMORE CITY JAIL. Baltimore City Court. Certiorari denied.

No. 414, Misc. HUNTER *v.* PENNSYLVANIA ET AL. Supreme Court of Pennsylvania. Certiorari denied.

No. 416, Misc. HART *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied. *H. David Rothman* for petitioner. Reported below: 403 Pa. 652, 170 A. 2d 850.

No. 419, Misc. CAMP *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. Reported below: 35 N. J. 57, 171 A. 2d 97.

No. 420, Misc. NICKERSON *v.* NEW YORK. Appellate Division, Supreme Court of New York, Fourth Judicial Department. Certiorari denied. Reported below: 13 App. Div. 2d 890, 217 N. Y. S. 2d 574.

No. 422, Misc. GARNETT *v.* CUNNINGHAM, PENITENTIARY SUPERINTENDENT. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 432, Misc. MILLER *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 434, Misc. OBLATORE *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. *Harvey Goldstein* for petitioner. *Solicitor General Cox, Assistant Attorney General Orrick* and *John G. Laughlin, Jr.* for the United States, and *George J. Conway* for American Stevedores, Inc., respondents. Reported below: 289 F. 2d 400.

No. 435, Misc. GRUBBS *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Reported below: —— N. Y. 2d ——, —— N. E. 2d ——.

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No. 436, Misc. WELLS *v.* PATE, WARDEN. Circuit Court of Will County, Illinois. Certiorari denied.

No. 437, Misc. CONVERSE *v.* JOSLIN. Appellate Department, Superior Court of California, Los Angeles County. Certiorari denied.

No. 438, Misc. PENNSYLVANIA EX REL. WHALEN *v.* CAVELL, WARDEN. Supreme Court of Pennsylvania. Certiorari denied.

No. 445, Misc. DULBERG *v.* SCOVILL MANUFACTURING CO. ET AL. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Nichol M. Sandoe, Thomas F. Reddy, Jr.* and *George B. Finnegan, Jr.* for respondents. Reported below: 290 F. 2d 821.

No. 455, Misc. FINLEY *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied.

No. 463, Misc. SEPULVEDA *v.* COLORADO. Supreme Court of Colorado. Certiorari denied. Petitioner *pro se*. *J. F. Brauer,* Assistant Attorney General of Colorado, for respondent.

No. 464, Misc. RUSSELL *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 469, Misc. AZERIA *v.* DICKSON, WARDEN. Supreme Court of California. Certiorari denied.

No. 471, Misc. FREEMAN *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 442, Misc. WELDON *v.* IOWA ET AL. Petition for writ of certiorari and for other relief to the Supreme Court of Iowa denied.

No. 519, Misc. SIDES *v.* COLORADO. Supreme Court of Colorado. Certiorari denied. Petitioner *pro se*. *Duke W. Dunbar,* Attorney General of Colorado, *Frank E. Hickey,* Deputy Attorney General, and *J. F. Brauer,* Assistant Attorney General, for respondent.

No. 527, Misc. HABLE *v.* LEE, CORRECTIONS COMMISSIONER, ET AL. Court of Appeals of Alabama. Certiorari denied. Petitioner *pro se*. *MacDonald Gallion,* Attorney General of Alabama, and *George D. Mentz,* Assistant Attorney General, for respondents. Reported below: —— Ala. App. ——, 132 So. 2d 271.

No. 220, Misc. SMITH *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted. *J. E. Winfree, Jr.* for petitioner. *Will Wilson,* Attorney General of Texas, and *Sam R. Wilson* and *Houghton Brownlee, Jr.,* Assistant Attorneys General, for respondent. Reported below: —— Tex. Cr. R. ——, —— S. W. 2d ——.

No. 246, Misc. REYNOLDS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 288 F. 2d 78.

No. 424, Misc. PAYNE *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted. *S. White Rhyne, Jr.* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 111 U. S. App. D. C. 94, 294 F. 2d 723.

No. 255, Misc. SULLIVAN *v.* DICKSON, WARDEN. Petition for writ of certiorari and for other relief to the United States Court of Appeals for the Ninth Circuit denied.

No. 481, Misc. GREEN *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

Rehearing Denied.

No. 76, October Term, 1960. BARGAINTOWN, U. S. A., INC., ET AL. *v.* WHITMAN, DISTRICT ATTORNEY OF LEBANON COUNTY, PA., ET AL., 367 U. S. 903; and

No. 955, October Term, 1960. THOMAS *v.* UNITED STATES, 366 U. S. 961. Petitions for rehearing denied.

OCTOBER 20, 1961.

Certiorari Denied.

No. 629, Misc. SCHUCK *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied.

OCTOBER 23, 1961.

Order Appointing Clerk.

IT IS ORDERED that John F. Davis be appointed Clerk of this Court to succeed James R. Browning effective at the commencement of business October 23, 1961, and that he take the oath of office and give bond as required by statute and the order of this Court entered November 22, 1948.

Miscellaneous Orders.

No. 357, October Term, 1960. UNITED STATES *v.* CONSOLIDATED EDISON CO. OF NEW YORK, INC., 366 U. S. 380. Motion of *A. Chauncey Newlin* for leave to file petition for rehearing, as *amicus curiae,* denied. *James K. Polk, Richard Joyce Smith* and *Julius M. Jacobs,* for respondent, in opposition.

No. 42. CAMPBELL, COMMISSIONER OF AGRICULTURE OF GEORGIA, ET AL. *v.* HUSSEY ET AL. Appeal from the United States District Court for the Southern District of Georgia. (Probable jurisdiction noted, 365 U. S. 866.) Motion of the Solicitor General for leave to participate in oral argument, as *amicus curiae,* granted. *Solicitor General Cox* on the motion.

No. 46. HUTCHESON *v.* UNITED STATES. Certiorari, 365 U. S. 866, to the United States Court of Appeals for the District of Columbia Circuit. Motion of *M. Joseph Matan* for leave to withdraw his appearance as counsel for petitioner granted.

No. 66. BLAU *v.* LEHMAN ET AL. Certiorari, 366 U. S. 902, to the United States Court of Appeals for the Second Circuit. Motion of the Society of Corporate Secretaries for leave to file brief, as *amicus curiae,* granted. *Bruce Bromley* on the motion.

No. 74. FEDERAL TRADE COMMISSION *v.* HENRY BROCH & Co. Certiorari, 366 U. S. 923, to the United States Court of Appeals for the Seventh Circuit. Motion of respondent to remove this case from the summary calendar granted. *Frederick M. Rowe, Joseph DuCoeur* and *Harold Orlinsky* on the motion.

No. 242. GLIDDEN COMPANY *v.* ZDANOK ET AL. Certiorari, *ante,* p. 814, to the United States Court of Appeals for the Second Circuit. Motion of the United States for leave to intervene granted. *Solicitor General Cox* on the motion.

No. 461, Misc. CRISAFI *v.* MCGEE, CORRECTIONS DIRECTOR, ET AL. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for writ of certiorari, certiorari denied.

Probable Jurisdiction Noted.

No. 2. METLAKATLA INDIAN COMMUNITY, ANNETTE ISLAND RESERVE, *v.* EGAN, GOVERNOR OF ALASKA, ET AL.; and

No. 3. ORGANIZED VILLAGE OF KAKE ET AL. *v.* EGAN, GOVERNOR OF ALASKA. Appeals from the Supreme Court of Alaska. (See 363 U. S. 555.) Probable jurisdiction noted. *Richard Schifter* and *Theodore H. Little* for appellant in No. 2. *John H. Cragun* and *Frances L. Horn* for appellants in No. 3. *Ralph E. Moody,* Attorney General of Alaska, for appellees. Reported below: —— Alaska ——, 362 P. 2d 901.

Certiorari Granted. (*See also No. 303, ante, p. 16.*)

No. 234. BENZ *v.* NEW YORK STATE THRUWAY AUTHORITY. Court of Appeals of New York. Certiorari granted. *Lauren D. Rachlin* for petitioner. *Louis J. Lefkowitz,* Attorney General of New York, *Paxton Blair,* Solicitor General, and *Julius L. Sackman* for respondent. Reported below: 9 N. Y. 2d 486, 174 N. E. 2d 727.

No. 278. PRESSER *v.* UNITED STATES. C. A. 6th Cir. Certiorari granted. *Edwin Knachel* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 292 F. 2d 171.

No. 304. CONTINENTAL ORE CO. ET AL. *v.* UNION CARBIDE & CARBON CORP. ET AL. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit granted limited to Questions 2, 5, and 6 presented by the petition, which read as follows:

"2. Whether an Appellate Court can take away from a jury the question of causal effect concerning an injury by

a 100% two-company monopoly (admittedly achieved pursuant to an intent to monopolize) when the question of violation is confessed and the issue of measurement of damages is more than sufficiently supported by relevant economic data and where the destruction of the plaintiff company (petitioners herein) was admitted to be, by a chief executive officer of a defendant, an important goal of the monopolist?"

"5. Whether petitioners, an American company, can claim damages under the anti-trust laws for injury caused by their elimination from the Canadian market when it was shown that two other American companies had entered into a conspiracy to eliminate all competition and to monopolize the industry and when it is shown that as part of this conspiracy one of the American companies utilized its domination and control over a wholly owned Canadian subsidiary, which had been given a discretionary power by the Canadian government to allocate the importation of vanadium into Canada during the war, to exclude the exports of petitioners (competitors) from entering Canada for sale to petitioners' Canadian customers and when it is shown that the refusal of the Canadian subsidiary to allocate vanadium to petitioners' Canadian customers was directed by its American parent company pursuant to the overall conspiracy to eliminate all competition and specifically to eliminate petitioners. This issue was erroneously decided against petitioners on the Court of Appeals' manifest misapplication of this Court's recent opinion in *Eastern Railroad Pres. Conf.* v. *Noerr Motor Frgt., Inc.* (1961), 365 U. S. 127, 81 S. Ct. 523."

"6. Whether petitioners, against whom a directed verdict was ordered by the Appellate Court, were deprived of a trial by jury by the Appellate Court below which weighed the evidence, made factual rulings on the suffi-

ciency of evidence of causation, did not view the evidence as a whole, did not allow petitioners the benefit of all their evidence, did not allow petitioners the benefit of all inferences and presumptions to be drawn from the evidence and did not resolve all conflicts in the evidence in favor of petitioners in direct conflict with this Court's opinion in *Beacon Theatres, Inc.*, v. *Westover*, 359 U. S. 500 (1959)."

Joseph L. Alioto and *Maxwell Keith* for petitioners. *Herbert W. Clark, Richard J. Archer* and *Girvan Peck* for Union Carbide Corp. and United States Vanadium Corp., and *Edward R. Neaher* and *Francis N. Marshall* for Vanadium Corporation of America, respondents. Reported below: 289 F. 2d 86.

No. 323. VAUGHAN *v.* ATKINSON ET AL. Motion to dispense with printing petition for writ of certiorari granted. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit granted. *Jacob L. Morewitz* for petitioner. *Barron F. Black* for respondents. Reported below: 291 F. 2d 813.

Certiorari Denied. (*See also No. 461, Misc., supra; No. 298, ante, p. 15; and No. 326, ante, p. 18.*)

No. 167. OAKLEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *O. John Rogge* and *Josiah Lyman* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Robert S. Erdahl* and *Jerome M. Feit* for the United States. Reported below: 290 F. 2d 517.

No. 210. FOLEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Morris A. Shenker* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Meyer Rothwacks* and *Jack M. Cotton* for the United States. Reported below: 290 F. 2d 562.

No. 291. DUNLAP ET AL. *v.* SPILKA, TRUSTEE IN BANKRUPTCY. Supreme Court of Ohio. Certiorari denied. *Joseph E. Finley* and *Mortimer Riemer* for petitioners. *Welles K. Stanley* for respondent. Reported below: 172 Ohio St. 341, 175 N. E. 2d 516.

No. 319. WOLFIES REST, INC., *v.* LINCOLN RESTAURANT CORP. ET AL. C. A. 2d Cir. Certiorari denied. *Theodore R. Kupferman* and *Sidney O. Raphael* for petitioner. *Irving Sonnenschein* for respondents. Reported below: 291 F. 2d 302.

No. 310. VIRGINIA METAL PRODUCTS, INC., *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. *James A. Cuddihy* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Meyer Rothwacks* and *Kenneth E. Levin* for respondent. Reported below: 290 F. 2d 675.

No. 311. SAMUEL B. FRANKLIN & Co. *v.* SECURITIES & EXCHANGE COMMISSION. C. A. 9th Cir. Certiorari denied. *Solicitor General Cox, Peter Dammann* and *David Ferber* for respondent. Reported below: 290 F. 2d 719.

No. 313. KIRKLAND ET AL. *v.* JOHNSON ET AL. C. A. 5th Cir. Certiorari denied. *Sander W. Shapiro* for petitioners. *Solicitor General Cox, Assistant Attorney General Orrick, John G. Laughlin, Jr.* and *Herbert E. Morris* for respondents. Reported below: 290 F. 2d 440.

No. 309. MAYER ET AL. *v.* ZIM ISRAEL NAVIGATION CO., LTD. C. A. 2d Cir. Certiorari denied. *Silas B. Axtell* and *Charles A. Ellis* for petitioners. *Matthew L. Danahar* for respondent. Reported below: 289 F. 2d 562.

No. 184. FIRESTONE *v.* ALUMINUM COMPANY OF AMERICA ET AL.; and

No. 316. ALUMINUM COMPANY OF AMERICA ET AL. *v.* SPERRY PRODUCTS, INC., ET AL. C. A. 6th Cir. Certiorari denied. *Albert R. Teare* for petitioner in No. 184 and for respondent Firestone in No. 316. *Carlton Hill* for petitioners in No. 316 and for respondents in No. 184. *R. Morton Adams* for respondent Sperry Products, Inc., in No. 316. Reported below: 285 F. 2d 911.

No. 314. KINNEAR-WEED CORP. *v.* HUMBLE OIL & REFINING CO. C. A. 5th Cir. Certiorari denied. *William E. Kinnear* for petitioner. Reported below: 296 F. 2d 215.

No. 103, Misc. KINNEAR-WEED CORP. *v.* UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ET AL. Motion for leave to file petition for writ of certiorari and/or mandamus and/or prohibition denied. *William E. Kinnear* for petitioner.

No. 318. GREAT LAKES AIRLINES, INC., ET AL. *v.* CIVIL AERONAUTICS BOARD. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted. *Abe Krash* and *Roland E. Ginsburg* for petitioners. *Solicitor General Cox, Assistant Attorney General Loevinger, Richard A. Solomon, Joseph B. Goldman, O. D. Ozment* and *William F. Becker* for respondent. Reported below: 291 F. 2d 354.

No. 321. LUX *v.* ILLINOIS EX REL. MILLER. Supreme Court of Illinois. Certiorari denied. *Andrew J. O'Conor* for petitioner. *William Zwanzig* for respondent. Reported below: 22 Ill. 2d 211, 174 N. E. 2d 830.

No. 320. GREENBERG *v.* PANAMA TRANSPORT CO. ET AL. C. A. 1st Cir. Certiorari denied. *Francis H. Farrell* for petitioner. *Walter X. Connor, James P. O'Neill* and *Joseph F. Dolan* for respondents. Reported below: 290 F. 2d 125.

No. 327. NEW YORK CENTRAL RAILROAD CO. *v.* INTERSTATE COMMODITIES, INC. C. A. 2d Cir. Certiorari denied. MR. JUSTICE BLACK is of the opinion certiorari should be granted. *Charles E. Nichols* for petitioner. *Samuel Gottesman* for respondent. Reported below: 291 F. 2d 548.

No. 324. ELGIN, JOLIET & EASTERN RAILWAY CO. *v.* BORRERO ET AL. Appellate Court of Illinois, First District. Certiorari denied. *Harlan L. Hackbert* for petitioner. *Fred Lambruschi* for respondents. Reported below: 28 Ill. App. 2d 362, 171 N. E. 2d 673.

No. 418. TEGARDEN *v.* CRIMINAL COURT OF MARION COUNTY ET AL. The application for stay presented to MR. JUSTICE CLARK, and by him referred to the Court, is denied. Petition for writ of certiorari to the Supreme Court of Indiana denied. *Thomas M. Lofton* for petitioner. Reported below: 242 Ind. ——, 173 N. E. 2d 308.

No. 323, Misc. ALEXANDER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 290 F. 2d 252.

No. 417, Misc. WILLIAMS *v.* BELL, SHERIFF. C. A. 6th Cir. Certiorari denied. *Max Dean* for petitioner. Reported below: 291 F. 2d 627.

OCTOBER 31, 1961.

Dismissal Under Rule 60.

No. 328. WALLACH *v.* UNITED STATES. On petition for writ of certiorari to the United States Court of Appeals for the Second Circuit. Petition dismissed pursuant to Rule 60 of the Rules of this Court. *Jacob Rassner* for petitioner. *Solicitor General Cox* for the United States. Reported below: 291 F. 2d 69.

NOVEMBER 6, 1961.

Miscellaneous Orders.

No. 26. GARNER ET AL. *v.* LOUISIANA,

No. 27. BRISCOE ET AL. *v.* LOUISIANA, and

No. 28. HOSTON ET AL. *v.* LOUISIANA, certiorari, 365 U. S. 840, to the Supreme Court of Louisiana;

No. 32. HAMILTON *v.* ALABAMA, certiorari, 364 U. S. 931, to the Supreme Court of Alabama;

No. 85. AVENT ET AL. *v.* NORTH CAROLINA, and

No. 86. FOX ET AL. *v.* NORTH CAROLINA, on petitions for writs of certiorari to the Supreme Court of North Carolina; and

No. 248. RANDOLPH ET AL. *v.* VIRGINIA, on petition for writ of certiorari to the Supreme Court of Appeals of Virginia. Motions of *Thurgood Marshall* for leave to withdraw appearances as counsel for petitioners granted.

No. 78. GOLDBLATT ET AL. *v.* TOWN OF HEMPSTEAD. Appeal from the Court of Appeals of New York. (Probable jurisdiction noted, 366 U. S. 942.) Motion of the National Crushed Stone Association for leave to file brief, as *amicus curiae,* granted. *John F. Lane* and *Jerome Powell* for movants. *Richard P. Charles, John A. Morhous, William C. Mattison* and *Mario Matthew Cuomo* for appellee, in opposition. Reported below: 9 N. Y. 2d 101, 172 N. E. 2d 562.

No. 8, Original. ARIZONA *v.* CALIFORNIA ET AL. The joint request for allotment of and division of time for oral argument is approved. The case is set for argument on Monday, January 8, 1962, and a total of sixteen hours is allotted for that purpose to be apportioned as follows:

California.—Five and one-half hours for opening and rebuttal.

Arizona.—Five and one-half hours.

United States.—Three hours.

Nevada.—One and one-quarter hours.

Utah.—Fifteen minutes.

New Mexico.—Thirty minutes.

THE CHIEF JUSTICE took no part in the consideration or decision of this case. [For earlier orders herein, see 344 U. S. 806, 919; 345 U. S. 914, 968; 347 U. S. 985, 986; 348 U. S. 947; 350 U. S. 114, 812, 880, 955; 351 U. S. 977; 354 U. S. 918; 357 U. S. 902; 364 U. S. 940.]

No. 2. METLAKATLA INDIAN COMMUNITY, ANNETTE ISLAND RESERVE, *v.* EGAN, GOVERNOR OF ALASKA, ET AL.; and

No. 3. ORGANIZED VILLAGE OF KAKE ET AL. *v.* EGAN, GOVERNOR OF ALASKA. Appeals from the Supreme Court of Alaska. (Probable jurisdiction noted, *ante,* p. 886.) The motion of appellants to dispense with printing the record is granted. The motions to accelerate the filing of briefs and to set the cases for early hearing are granted and the cases are set for argument on Wednesday, December 13, 1961. The briefs of the appellants and the brief of the United States, as *amicus curiae,* are to be filed on or before November 17, 1961, and the briefs of the appellees are to be filed on or before December 6, 1961. *Richard Schifter* for appellant in No. 2. *John H. Cragun* for appellants in No. 3. *Ralph E. Moody,* Attorney General of Alaska, for appellees. Reported below: —— Alaska ——, 362 P. 2d 901.

No. 71. DREWS ET AL. *v.* MARYLAND, on appeal from the Court of Appeals of Maryland;

No. 84. TURNER *v.* CITY OF MEMPHIS ET AL., on appeal from the United States District Court for the Western District of Tennessee (question of jurisdiction postponed, *ante,* p. 808); and

No. 315. TINSLEY *v.* CITY OF RICHMOND (appeal dismissed, *ante,* p. 18). Motions of *Thurgood Marshall* for leave to withdraw appearances as counsel for appellants granted.

Probable Jurisdiction Noted.

No. 286. UNITED STATES *v.* DIEBOLD, INC. Appeal from the United States District Court for the Southern District of Ohio. Probable jurisdiction noted. *Solicitor General Cox, Assistant Attorney General Loevinger, Richard A. Solomon* and *Irwin A. Seibel* for the United States. *Thurman Arnold, Abe Fortas, William L. McGovern, Victor H. Kramer* and *Abe Krash* for appellee. Reported below: 197 F. Supp. 902.

Certiorari Granted. (*See also No. 93, Misc., ante, p. 34.*)

No. 312. IN RE GREEN. Supreme Court of Ohio. Certiorari granted. *Fred A. Smith* and *Merritt W. Green* for petitioner. *Harry Friberg* for respondent. Reported below: 172 Ohio St. 269, 175 N. E. 2d 59.

No. 369. WOOD *v.* GEORGIA. Court of Appeals of Georgia. Certiorari granted. *Milton Kramer* for petitioner. *Eugene Cook,* Attorney General of Georgia, *E. Freeman Leverett,* Deputy Assistant Attorney General, *William M. West,* Solicitor General, and *Jack J. Gautier,* Assistant Solicitor General, for respondent. Reported below: 103 Ga. App. 305, 119 S. E. 2d 261.

No. 358. GUZMAN *v.* RUIZ PICHIRILO. C. A. 1st Cir. Certiorari granted. *Max Goldman* for petitioner. *Seymour P. Edgerton* for respondent. Reported below: 290 F. 2d 812.

Certiorari Denied. (*See also No. 345, ante, p. 31; No. 357, ante, p. 32; No. 362, ante, p. 32; and No. 373, ante, p. 33.*)

No. 290. AMERICAN-FOREIGN STEAMSHIP CORP. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Arthur M. Becker, Eugene Gressman* and *Gerald B. Greenwald* for petitioner. *Solicitor General Cox, Assistant Attorney General Orrick, Alan S. Rosenthal, Leavenworth Colby* and *Herbert E. Morris* for the United States. Reported below: 291 F. 2d 598.

No. 332. STOCKARD STEAMSHIP CORP. ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *J. Franklin Fort, John Cunningham* and *Israel Convisser* for petitioners. *Solicitor General Cox, Assistant Attorney General Orrick, Alan S. Rosenthal, Leavenworth Colby* and *Herbert E. Morris* for the United States. Reported below: 291 F. 2d 598.

No. 438. UNITED STATES *v.* STOCKARD STEAMSHIP CORP. ET AL. C. A. 2d Cir. Certiorari denied. *Solicitor General Cox, Assistant Attorney General Orrick, Alan S. Rosenthal, Leavenworth Colby* and *Herbert E. Morris* for the United States. *J. Franklin Fort, John Cunningham* and *Israel Convisser* for respondents. Reported below: 291 F. 2d 598.

No. 335. CIA. DE NAV. SAN GEORGE, S. A., ET AL. *v.* KOUFOPANTELIS ET AL. C. A. 2d Cir. Certiorari denied. *Robert C. Thompson, Jr.* for petitioners. *Edward B. Joachim* for respondents. Reported below: 291 F. 2d 709.

No. 322. U. S. Health Club, Inc., *v.* Major, Postmaster, Bergenfield, New Jersey. C. A. 3d Cir. Certiorari denied. *Milton A. Bass, Solomon H. Friend* and *Harold Friedman* for petitioner. *Solicitor General Cox, Assistant Attorney General Orrick* and *John G. Laughlin, Jr.* for respondent. Reported below: 292 F. 2d 665.

No. 330. Sheet Metal Workers' International Assn., AFL–CIO, et al. *v.* National Labor Relations Board. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Donald W. Fisher* and *Mortimer Riemer* for petitioners. *Solicitor General Cox, Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 110 U. S. App. D. C. 302, 293 F. 2d 141.

No. 347. Fine Fashions, Inc., *v.* Gross, District Director of Internal Revenue, et al. C. A. 3d Cir. Certiorari denied. *Leonard M. Wallstein, Jr.* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Robert N. Anderson* for respondents. Reported below: 290 F. 2d 871.

No. 338. AAA Motor Lines, Inc., *v.* Alabama Public Service Commission et al. Supreme Court of Alabama. Certiorari denied. *Truman Hobbs* for petitioner. *McDonald Gallion,* Attorney General of Alabama, and *J. Taylor Hardin,* Assistant Attorney General, for respondents. Reported below: 272 Ala. 362, 131 So. 2d 172.

No. 340. Burgermeister Brewing Corp. *v.* Lindstrom et al. Superior Court of California, San Francisco County. Certiorari denied. *William French Smith* for petitioner. *Herbert S. Thatcher* for respondents.

No. 333. COLLE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *O. B. Cline, Jr.* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 283 F. 2d 306; 292 F. 2d 392.

No. 339. AMERICAN PRESIDENT LINES, LTD., *v.* LEVET, U. S. DISTRICT JUDGE. C. A. 2d Cir. Certiorari denied. *William Garth Symmers* for petitioner. *John J. Greaney* for respondent. Reported below: —— F. 2d ——.

No. 341. HERMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Irving M. Wolff* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 289 F. 2d 362.

No. 343. DANA ET AL. *v.* WILLIAM GOLDMAN THEATRES, INC., ET AL. Supreme Court of Pennsylvania. Certiorari denied. *Anne X. Alpern,* Attorney General of Pennsylvania, and *Alan Miles Ruben,* Assistant Attorney General, for petitioners. *Edwin P. Rome* for William Goldman Theatres, Inc., et al., and *William A. Schnader, Bernard G. Segal, Arlin M. Adams* and *Samuel D. Slade* for Twentieth Century-Fox Film Corp., respondents. Reported below: 405 Pa. 83, 173 A. 2d 59.

No. 368. MICHIGAN GAS & ELECTRIC CO. *v.* FEDERAL POWER COMMISSION ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Reuben Goldberg* and *Melvin Richter* for petitioner. *Solicitor General Cox, Assistant Attorney General Orrick, Alan S. Rosenthal, Ralph S. Spritzer, Arthur H. Fribourg* and *David J. Bardin* for the Federal Power Commission, and *Charles V. Shannon* and *Louis Flax* for Wisconsin Pipe Line Co., respondents. Reported below: 110 U. S. App. D. C. 183, 290 F. 2d 374.

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No. 344. RADIO CORPORATION OF AMERICA *v.* ASSOCIATION OF PROFESSIONAL ENGINEERING PERSONNEL ET AL. C. A. 3d Cir. Certiorari denied. *Bernard G. Segal* and *Samuel D. Slade* for petitioner. *Arthur S. Keyser* for respondents. Reported below: 291 F. 2d 105.

No. 348. MARSHALL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *George J. Francis* and *Frances De Lost* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 293 F. 2d 561.

No. 350. FIAT MOTOR CO. *v.* ALABAMA IMPORTED CARS, INC. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Oscar Cox* and *Elliott Solomon* for petitioner. Reported below: 110 U. S. App. D. C. 252, 292 F. 2d 745.

No. 351. COOK *v.* STATE FARM INSURANCE CO. Supreme Court of Mississippi. Certiorari denied. *W. E. Morse* for petitioner. Reported below: 241 Miss. 371, 128 So. 2d 363.

No. 363. O LIQUIDATING CORP. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. *John S. Chapman* for petitioner. *Solicitor General Cox. Assistant Attorney General Oberdorfer, Melva M. Graney* and *Douglas A. Kahn* for respondent. Reported below: 292 F. 2d 225.

No. 356. BURKS *v.* CALIFORNIA. District Court of Appeal of California, First Appellate District. Certiorari denied. *George Olshausen* for petitioner. *Stanley Mosk,* Attorney General of California, and *Arlo E. Smith, John S. McInerny* and *Robert R. Granucci,* Deputy Attorneys General, for respondent. Reported below: 189 Cal. App. 2d 313, 11 Cal. Rptr. 200.

No. 355. GOLDBERG *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Arnold Bauman* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 290 F. 2d 729.

No. 364. RAMSEY ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioners *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 291 F. 2d 737.

No. 354. LOS ANGELES COUNTY ET AL. *v.* SCANDINAVIAN AIRLINES SYSTEM, INC. Supreme Court of California. Certiorari denied. *Harold W. Kennedy* for petitioners. *Roderick M. Hills* for respondent. Reported below: 56 Cal. 2d 11, 363 P. 2d 25.

No. 371. BLAISE D'ANTONI & ASSOCIATES, INC., ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 5th Cir. Certiorari denied. *Eberhard P. Deutsch* for petitioners. *Solicitor General Cox, Peter A. Dammann* and *David Ferber* for respondent. Reported below: 289 F. 2d 276; 290 F. 2d 688.

No. 372. HART *v.* UNITED STATES FIDELITY & GUARANTY CO. C. A. 5th Cir. Certiorari denied. *William VanDercreek* and *Marvin Jones* for petitioner. *Reo Knowles* for respondent. Reported below: —— F. 2d ——.

No. 380. ELOF HANSSON, INC., *v.* UNITED STATES. United States Court of Customs and Patent Appeals. Certiorari denied. *James R. Sharp* for petitioner. *Solicitor General Cox, Assistant Attorney General Orrick* and *Alan S. Rosenthal* for the United States. Reported below: 48 C. C. P. A. (Cust.) 91, 296 F. 2d 779.

No. 375. Great American Indemnity Co. et al. *v.* Britton, Deputy Commissioner, Bureau of Employees' Compensation. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Paul Sedgwick* and *Philip J. Lesser* for petitioners. *Solicitor General Cox, Assistant Attorney General Orrick* and *Morton Hollander* for respondent. Reported below: 110 U. S. App. D. C. 190, 290 F. 2d 381.

No. 376. Five Boro Construction Corp. *v.* Goldberg, Secretary of Labor. C. A. 1st Cir. Certiorari denied. *Joseph N. Friedman* for petitioner. *Solicitor General Cox, Morton Liftin* and *Beate Bloch* for respondent. Reported below: 291 F. 2d 371.

No. 353. Hilbert et al. *v.* Pennsylvania Railroad Co. C. A. 7th Cir. Certiorari denied. The Chief Justice, Mr. Justice Black and Mr. Justice Brennan are of the opinion certiorari should be granted. *Edward J. Fillenwarth* and *Harold N. McLaughlin* for petitioners. *John B. Prizer* and *Richard N. Clattenburg* for respondent. Reported below: 290 F. 2d 881.

No. 331. Shell Petroleum Co., Ltd., *v.* Peschken. Motion of American Waterways Operators, Inc., for leave to file brief, as *amicus curiae,* granted. Motion of Seaway Excursion Lines, Inc., for leave to file brief, as *amicus curiae,* denied. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied. *Robert M. Julian* for petitioner. *David D. Furman,* Attorney General of New Jersey, *Theodore I. Botter,* Assistant Attorney General, and *Elias Abelson,* Deputy Attorney General, for respondent. *John H. Eisenhart, Jr.* for American Waterways Operators, Inc., as *amicus curiae,* in opposition to the petition. Reported below: 290 F. 2d 685.

No. 334. HEINECKE *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion certiorari should be granted. *Stanley M. Dietz* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 111 U. S. App. D. C. 98, 294 F. 2d 727.

No. 342. HILLIARD *v.* TENNESSEE. Motion of respondent for leave to supplement the record granted. Petition for writ of certiorari to the Supreme Court of Tennessee denied. *Robert C. Boyce, Jr.* and *E. C. Yokley* for petitioner. *George F. McCanless,* Attorney General of Tennessee, and *Walker T. Tipton,* Assistant Attorney General, for respondent.

No. 367. CITY OF LONG BEACH ET AL. *v.* NATIONAL DEVELOPMENT CO. ET AL. C. A. 9th Cir. Certiorari denied. *Arch E. Ekdale* for petitioners. *William A. C. Roethke* for respondents. Reported below: 289 F. 2d 586.

No. 377. ROGERS ET AL. *v.* ALASKA STEAMSHIP CO. ET AL. C. A. 9th Cir. Certiorari denied. *Allan Brotsky* for petitioners. *William R. Wallace, Jr., Edward D. Ranson, Alvin J. Rockwell, Richard Ernst, Richard G. Logan* and *George D. Wick, Jr.* for respondents. Reported below: 290 F. 2d 116; 291 F. 2d 740.

No. 365. NOLAN, ADMINISTRATOR, ET AL. *v.* TRANSOCEAN AIR LINES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE BLACK is of the opinion certiorari should be granted. *Edward M. O'Brien* for petitioners. *William J. Junkerman* for respondent. Reported below: 290 F. 2d 904.

No. 359. GOLDBERG, SECRETARY OF LABOR, *v.* WADE LAHAR CONSTRUCTION CO. C. A. 8th Cir. Certiorari denied. THE CHIEF JUSTICE, MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion certiorari should be granted. *Solicitor General Cox, Bessie Margolin* and *Beate Bloch* for petitioner. *Herschel H. Friday, Jr.* for respondent. Reported below: 290 F. 2d 408.

No. 69, Misc. BRIONES ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioners *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

No. 370. POSS *v.* RIBICOFF, SECRETARY OF HEALTH, EDUCATION AND WELFARE. Motion to dispense with printing the petition for certiorari granted. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Orrick* and *Alan S. Rosenthal* for respondent. Reported below: 289 F. 2d 10.

No. 17, Misc. IN RE WILSON. Superior Court of New Jersey, Appellate Division. Certiorari denied. Petitioner *pro se*. *Stanley E. Rutkowski* for respondent.

No. 27, Misc. WALDEN *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. *George N. Leighton* for petitioner. *William G. Clark,* Attorney General of Illinois, for respondent. Reported below: 19 Ill. 2d 602, 169 N. E. 2d 241.

No. 137, Misc. MORROW *v.* DAVIS, WARDEN. Court of Appeals of Kentucky. Certiorari denied. Petitioner *pro se*. *John B. Breckinridge,* Attorney General of Kentucky, and *Ray Corns,* Assistant Attorney General, for respondent.

No. 52, Misc. SMITH ET AL. *v.* DOUGHERTY, CHIEF JUSTICE, COOK COUNTY CRIMINAL COURT, ET AL. C. A. 7th Cir. Certiorari denied. Petitioners *pro se*. *Harold Marovitz* for Hon. Charles A. Dougherty, and *Charles D. Snewind* for John Gretknecht, respondents. Reported below: 286 F. 2d 777.

No. 123, Misc. MULLIGAN *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se*. *Louis M. Greenblott* for respondent.

No. 51, Misc. GILES *v.* OHIO ET AL. Supreme Court of Ohio. Certiorari denied. Petitioner *pro se*. *John T. Corrigan* for respondents.

No. 138, Misc. DUNLAP *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 166, Misc. WARREN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

No. 173, Misc. RUBLE *v.* SACKS, WARDEN. Supreme Court of Ohio. Certiorari denied. Petitioner *pro se*. *Mark McElroy,* Attorney General of Ohio, and *Aubrey A. Wendt,* Assistant Attorney General, for respondent.

No. 192, Misc. HAMMIL *v.* COLORADO. Supreme Court of Colorado. Certiorari denied. *Samuel D. Menin* for petitioner. *Duke W. Dunbar,* Attorney General of Colorado, *Frank E. Hickey,* Deputy Attorney General, and *J. F. Brauer,* Assistant Attorney General, for respondent. Reported below: 145 Colo. 577, 361 P. 2d 117.

No. 340, Misc. PITCHCUSKIE *v.* BANMILLER, WARDEN. Supreme Court of Pennsylvania. Certiorari denied.

No. 174, Misc. McGann *v.* Taylor, Warden. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall* and *Harold H. Greene* for respondent. Reported below: 289 F. 2d 820.

No. 181, Misc. Lamos *v.* Sacks, Warden. Supreme Court of Ohio. Certiorari denied. Petitioner *pro se*. *Mark McElroy,* Attorney General of Ohio, and *Aubrey A. Wendt,* Assistant Attorney General, for respondent. Reported below: 172 Ohio St. 295, 175 N. E. 2d 177.

No. 188, Misc. Ross *v.* Pennsylvania. Supreme Court of Pennsylvania. Certiorari denied. Reported below: 403 Pa. 358, 169 A. 2d 780.

No. 198, Misc. Benavidez *v.* California. Supreme Court of California. Certiorari denied. Petitioner *pro se*. *Stanley Mosk,* Attorney General of California, and *John S. McInerny* and *Albert W. Harris, Jr.,* Deputy Attorneys General, for respondent.

No. 245, Misc. Wagner *v.* United States. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall* and *Harold H. Greene* for the United States.

No. 313, Misc. Hills *v.* Taylor, Warden. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall* and *Harold H. Greene* for respondent. Reported below: 291 F. 2d 755.

No. 317, Misc. Davis *v.* Montana. Supreme Court of Montana. Certiorari denied. Petitioner *pro se*. *Forrest H. Anderson,* Attorney General of Montana, and *M. James Sorte,* Assistant Attorney General, for respondent.

No. 321, Misc. LINDSEY *v.* MYERS, CORRECTIONAL SUPERINTENDENT. Supreme Court of Pennsylvania. Certiorari denied. Petitioner *pro se*. *Louis F. McCabe* for respondent.

No. 350, Misc. STERLING *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied. Petitioner *pro se*. *Stanley Mosk*, Attorney General of California, *Doris H. Maier*, Assistant Attorney General, and *Edsel W. Haws*, Deputy Attorney General, for respondents.

No. 351, Misc. DUNCAN *v.* MADIGAN, WARDEN. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *David Rubin* for respondent.

No. 363, Misc. PALUMBO *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 380, Misc. VELA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Harry D. Lewis* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 287 F. 2d 680.

No. 384, Misc. BYARS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 290 F. 2d 515.

No. 387, Misc. MORRIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States.

No. 391, Misc. RUSH *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore G. Gilinsky* for the United States.

No. 409, Misc. JOHNSTON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 292 F. 2d 51.

No. 410, Misc. BLOCK *v.* BLOCK. Supreme Court of Wisconsin. Certiorari denied.

No. 421, Misc. CONNOR *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 225 Md. 543, 171 A. 2d 699.

No. 429, Misc. AUTH *v.* MURPHY, WARDEN. Appellate Division, Supreme Court of New York, Fourth Judicial Department. Certiorari denied.

No. 453, Misc. PERRY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 292 F. 2d 476.

No. 456, Misc. O'LEARY *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 22 Ill. 2d 52, 174 N. E. 2d 191.

No. 486, Misc. ISLE *v.* TAHASH, WARDEN. Supreme Court of Minnesota. Certiorari denied. Reported below: 260 Minn. 156, 109 N. W. 2d 54.

No. 457, Misc. REED *v.* MARONEY, WARDEN. Supreme Court of Pennsylvania. Certiorari denied.

No. 467, Misc. RICKERSON *v.* WILKINS, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 484, Misc. WASHINGTON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 292 F. 2d 452.

No. 485, Misc. NORRIS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 488, Misc. BARTON *v.* IOWA. Supreme Court of Iowa. Certiorari denied.

No. 674, Misc. BARNARD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 494, Misc. WOLFE *v.* MISSOURI ET AL. Petition for writ of certiorari to the Supreme Court of Missouri denied without prejudice to the petitioner's habeas corpus proceeding now pending in the United States District Court for the Western District of Missouri. *Bernard J. Mellman* for petitioner. *Thomas F. Eagleton,* Attorney General of Missouri, and *Ben Ely, Jr.,* Assistant Attorney General, for respondents.

Rehearing Denied.

No. 902, October Term, 1960. MOHEGAN INTERNATIONAL CORP. *v.* CITY OF NEW YORK ET AL., 366 U. S. 764. Motion for leave to file petition for rehearing denied.

No. 92. VAN ALLEN *v.* UNITED STATES, *ante*, p. 836;

No. 104. RELIANCE PICTURE FRAME CO. *v.* COVENTRY WARE, INC., *ante*, p. 818;

No. 108, Misc. CEPERO *v.* RINCON DE GAUTIER, CITY MANAGER, SAN JUAN, *ante*, p. 9;

No. 164, Misc. CEPERO *v.* PUERTO RICO ET AL., *ante*, p. 9;

No. 194, Misc. MOORE *v.* TAYLOR, WARDEN, *ante*, p. 853;

No. 203, Misc. RICH *v.* MITCHELL, SECRETARY OF LABOR, *ante*, p. 854;

No. 224, Misc. ROBINSON *v.* UNITED STATES, *ante*, p. 856; and

No. 382, Misc. CEPERO *v.* PUERTO RICO ET AL., *ante*, p. 9. Petitions for rehearing denied.

NOVEMBER 13, 1961.

Miscellaneous Orders.

No. 80. LYNUM *v.* ILLINOIS. On petition for writ of certiorari to the Supreme Court of Illinois. Consideration of the petition for certiorari is deferred to accord counsel for petitioner opportunity to secure a certificate from the Supreme Court of Illinois as to whether the judgment herein was intended to rest on an adequate and independent state ground, or whether decision of the federal claim, identified in respondent's second response as having been asserted by the petitioner at pages 66–67 in her brief in the Supreme Court of Illinois, was necessary to the judgment rendered. Cf. *Loftus* v. *Illinois*, 334 U. S. 804; *Herb* v. *Pitcairn*, 324 U. S. 117.

MR. JUSTICE FRANKFURTER, dissenting.

Petitioner was tried and convicted for the unlawful sale, dispensing and possession of narcotics, and her conviction was affirmed, 21 Ill. 2d 63, 171 N. E. 2d 17. She seeks certiorari to review the judgment of the Illinois

Supreme Court, on the ground that incriminating statements drawn from her by threats and promises were used against her at trial in contravention of the Due Process Clause of the Fourteenth Amendment. 28 U. S. C. § 1257.

Rule 23 (1)(f) of this Court requires that a petitioner seeking review of a state court decision shall "specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised . . . ." There is no such specification in the present petition; it is merely asserted that the Supreme Court of Illinois "overlooked the fact" that involuntary admissions are not competent evidence.

Respondent argues that certiorari should be denied for failure to comply with this Rule. Discovering that petitioner had invoked the Due Process Clause in her brief before the Illinois Supreme Court, this Court requested a response to this from Illinois. Respondent now urges that the Due Process Clause was not cited until appeal, that the Illinois Supreme Court does not determine constitutional questions unless they have been specifically raised at trial, and that the judgment was accordingly based on an adequate and independent ground of state law.

The opinion of the Illinois Court does not mention the claim of involuntary admissions. It expressly rejects a claim that petitioner was surprised by their introduction without proper statutory notice and concludes with an omnium-gatherum clause, "We have examined numerous other allegations of error and find that they are of insufficient merit to justify further discussion. Suffice it to say that, on the entire record, the defendant received a fair trial and was proved guilty beyond a reasonable doubt." A petition for rehearing, assigning the admission of the statements as error and citing *Brown* v. *Mississippi*, 297

U. S. 278, was denied without opinion. An abstract of the trial court record indicates that the admissions were objected to at trial but does not show whether the Due Process Clause was invoked. This Court today defers consideration of the petition pending clarification by the Illinois Court whether its disposition of the due process issue was based on its merits or on an independent state ground.

The constitutional basis for this Court's review of state court judgments derives from the Supremacy Clause of Article VI, statutorily enforced by the famous § 25 of the First Judiciary Act, 1 Stat. 73, 85 (1789), now 28 U. S. C. § 1257. Accordingly, if a state judgment rests on an adequate, independent ground of state law, this Court is without power to review the judgment, since its decision of the federal issue could not affect the result. *Murdock* v. *Memphis,* 20 Wall. 590, 632, 634–635; *Herb* v. *Pitcairn,* 324 U. S. 117, 125–126. Since judicial opinions are not mathematically formulated and the dubieties of language are what they are, a particular opinion of a state court sometimes raises a solid doubt whether a judgment does rest on an adequate, independent state ground and whether the disposition of a federal claim was not necessary to the challenged judgment. Lest a federal right properly reviewable here be lost through such ambiguity, this Court has utilized the procedure of holding a case here until opportunity has been afforded for an appropriate certificate by the state court for clarification of the ambiguity, *i. e.,* to make unambiguously clear that its judgment has not adjudicated a federal claim but rests on an independent state ground. See *Herb* v. *Pitcairn, supra,* 324 U. S., at 128; *Loftus* v. *Illinois,* 334 U. S. 804. Instead of awaiting this Court's initiation of such a procedure, in some jurisdictions counsel on their own initiative secure a certificate from their state tribunal, in order to leave no doubt before the case is brought here that it

does turn on a claim of a federal right. See *Herb* v. *Pitcairn, supra,* 324 U. S., at 127; *Honeyman* v. *Hanan,* 300 U. S. 14, 18; *Whitney* v. *California,* 274 U. S. 357, 360–361.

In either case, however, such a procedure for clarification does not come into play when the state court opinion in the case sought to be reviewed does not mention the federal ground, when counsel make no assertion that the judgment was based on a determination of the federal issue, and when state law affords an adequate ground for the disposition below. On full canvass of our jurisdiction in this class of cases, the Court not so long ago made this authoritative pronouncement:

> "Before we may undertake to review a decision of the court of a State it must appear affirmatively from the record, not only that the federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause." *Honeyman* v. *Hanan,* 300 U. S. 14, 18 (1937).

Thus, when the state court writes no opinion and from the record it cannot be said that its judgment was not based on an adequate non-federal ground, this Court will not take jurisdiction. *Woods* v. *Nierstheimer,* 328 U. S. 211, 214–216; *White* v. *Ragen,* 324 U. S. 760, 765–767. In this case the Supreme Court of Illinois wrote an opinion, but it did not so much as advert to the issue raised by the petition. It cited only Illinois cases; nowhere in the opinion was there a reference to the Federal Constitution or to any decision of this Court. It is not evident from the papers filed here that the issue was raised in the trial court. There is not the faintest indication that the judgment was not based on the Illinois rule that in order that an issue be reviewable by the State Supreme Court, it must have been explicitly tendered at trial. *Orton Crane & Shovel Co.* v. *Federal Reserve*

Bank, 409 Ill. 285, 288–289, 99 N. E. 2d 14, 15–16; *People* v. *Cosper,* 405 Ill. 543, 92 N. E. 2d 173.

It is not our business—indeed it interferes with the effective use of our time for the conduct of our business—to be excavating records in order to find out whether a federal question somehow or other lurks in a record although counsel, as required by our own Rule, has not called our attention to the place in the record where it is unequivocally set forth. In these circumstances, I see no reason for asking the Supreme Court of Illinois to clarify something that does not call for clarification. This constrains me not to join in the Court's order.

Jewel Stradford Rogers for petitioner. *William G. Clark,* Attorney General of Illinois, for respondent. Reported below: 21 Ill. 2d 63, 171 N. E. 2d 17.

No. 476. Douglas et al. *v.* California. Certiorari, *ante,* p. 815, to the Supreme Court of California. Motion for appointment of counsel denied.

Question as to Jurisdiction Postponed.

No. 400. Central Railroad Company of Pennsylvania *v.* Pennsylvania. Appeal from the Supreme Court of Pennsylvania. Further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits. *Roy J. Keefer* for appellant. *David Stahl,* Attorney General of Pennsylvania, and *George W. Keitel,* Deputy Attorney General, for appellee. Reported below: 403 Pa. 419, 169 A. 2d 878.

Certiorari Granted.

No. 384. Commissioner of Internal Revenue *v.* Bilder, Executrix. C. A. 3d Cir. Certiorari granted. *Solicitor General Cox, Assistant Attorney General Oberdorfer, I. Henry Kutz* and *Joseph Kovner* for petitioner. Reported below: 289 F. 2d 291.

No. 396. RUDOLPH ET UX. *v.* UNITED STATES. C. A. 5th Cir. Certiorari granted. *Felix Atwood* for petitioners. *Solicitor General Cox, Acting Assistant Attorney General Jones, I. Henry Kutz* and *Norman H. Wolfe* for the United States. Reported below: 291 F. 2d 841.

Certiorari Denied. (*See also No. 385, ante, p. 56.*)

No. 67. MCKNIGHT *v.* N. M. PATERSON & SONS, LTD. C. A. 6th Cir. Certiorari denied. *S. Eldridge Sampliner, William H. Thompson* and *Jacob Rassner* for petitioner. *Gilbert R. Johnson* for respondent. Reported below: 286 F. 2d 250.

No. 389. SIMMONS *v.* UNION TERMINAL CO. C. A. 5th Cir. Certiorari denied. *J. O. Bean* for petitioner. *D. L. Case* and *Jack Pew, Jr.* for respondent. Reported below: 290 F. 2d 453.

No. 390. MORRIS, COMMISSIONER OF PARKS OF NEW YORK CITY, *v.* ROCKWELL. Court of Appeals of New York. Certiorari denied. *Leo A. Larkin* and *Seymour B. Quel* for petitioner. *Emanuel Redfield* for respondent. Reported below: 10 N. Y. 2d 721, 176 N. E. 2d 836.

No. 386. MCCLANAHAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Irving L. Goldberg* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Meyer Rothwacks* for the United States. Reported below: 292 F. 2d 630.

No. 387. KHURI *v.* UNITED STATES. Court of Claims. Certiorari denied. *Walter E. Barton* for petitioner. *Solicitor General Cox, Assistant Attorney General Orrick* and *John G. Laughlin, Jr.* for the United States. Reported below: — Ct. Cl. —, — F. 2d —.

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No. 379. SHARE ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Morris A. Shenker* and *Murry L. Randall* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 291 F. 2d 689.

No. 383. YING ET AL. *v.* KENNEDY, ATTORNEY GENERAL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *David Carliner* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer* for respondent. Reported below: 110 U. S. App. D. C. 247, 292 F. 2d 740.

No. 393. BAKER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted. *Albert A. Fiok* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 293 F. 2d 613.

No. 360. NAMROW ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted. *Bennett Boskey* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Melva M. Graney* and *Fred E. Youngman* for respondent. Reported below: 288 F. 2d 648.

No. 391. LEGGETT ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Joseph I. Bulger* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 292 F. 2d 423.

No. 399. Shell Oil Co. *v.* Federal Power Commission et al. C. A. 3d Cir. Certiorari denied. *Oliver L. Stone, George C. Schoenberger, Jr.* and *William F. Kenney* for petitioner. *Solicitor General Cox, Assistant Attorney General Orrick, John G. Laughlin, Jr., Ralph S. Spritzer, Howard E. Wahrenbrock* and *Luke R. Lamb* for the Federal Power Commission, *Mathias F. Correa* for Texas Gas Transmission Corp., and *Gavin H. Cochran* for Louisville Gas & Electric Co., respondents. Reported below: 292 F. 2d 149.

No. 388. Village of Espanola, New Mexico, *v.* Your Food Stores, Inc. Supreme Court of New Mexico. Certiorari denied. *Fred M. Standley* and *Walter R. Kegel* for petitioner. *John S. Catron* and *Sumner S. Koch* for respondent. Reported below: 68 N. M. 327, 361 P. 2d 950.

No. 378. Shaffer et al. *v.* United States. C. A. 7th Cir. Certiorari denied. *Richard E. Gorman* and *Myer H. Gladstone* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 291 F. 2d 689.

No. 381. Abbott *v.* United States. Court of Claims. Certiorari denied. *Leonard J. Calhoun* for petitioner. *Solicitor General Cox, Assistant Attorney General Orrick* and *John G. Laughlin, Jr.* for the United States. Reported below: —— Ct. Cl. ——, 287 F. 2d 573.

No. 392. Bell *v.* F. W. Woolworth Co. C. A. 5th Cir. Certiorari denied. *Robert L. Ivy* for petitioner. *William L. Kerr* for respondent. Reported below: 291 F. 2d 912.

No. 403. SAWYER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Albert S. Lewis* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 294 F. 2d 24.

No. 402. BROWN TELECASTERS, INC., *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Henry B. Weaver, Jr.* and *Quinn O'Connell* for petitioner. *Solicitor General Cox, Assistant Attorney General Loevinger, Irwin A. Seibel, Max D. Paglin, Daniel R. Ohlbaum* and *Ruth V. Reel* for the Federal Communications Commission, respondent. Reported below: 110 U. S. App. D. C. 127, 289 F. 2d 868.

No. 397. BAXTER, EXECUTRIX, *v.* ROGERS. District Court of Appeal of California, Second Appellate District. Certiorari denied. Petitioner *pro se*. *Henry F. Walker* for respondent. Reported below: 191 Cal. App. 2d 358, 12 Cal. Rptr. 635.

No. 398. RANDOLPH *v.* MISSOURI BAR ADVISORY COMMITTEE. Supreme Court of Missouri. Certiorari denied. MR. JUSTICE WHITTAKER took no part in the consideration or decision of this application. *Walter A. Raymond* for petitioner. *Gene Thompson* for respondent. Reported below: 347 S. W. 2d 91.

No. 669, Misc. LINDSEY *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. *Lawrence Speiser* for petitioner. *Stanley Mosk,* Attorney General of California, and *Williams E. James,* Assistant Attorney General, for respondent. Reported below: 56 Cal. 2d 324, 363 P. 2d 910.

No. 592, Misc. In re Ernst. C. A. 3d Cir. Certiorari denied. Petitioner *pro se*. *Norman Heine* for respondent. Reported below: 294 F. 2d 556.

Rehearing Denied.

No. 171. City of Miami Beach et al. *v.* Dade County, *ante*, p. 826;

No. 98, Misc. Smith *v.* United States, *ante*, p. 846;

No. 239, Misc. Georges *v.* United States, *ante*, p. 857;

No. 246, Misc. Reynolds *v.* United States, *ante*, p. 883;

No. 286, Misc. Mokus *v.* United States, *ante*, p. 860;

No. 296, Misc. Massengale *v.* Cincinnati Bar Assn., *ante*, p. 861;

No. 320, Misc. Green *v.* Ellis, Corrections Director, *ante*, p. 863; and

No. 425, Misc. Robinson *v.* New York Central Railroad Co., *ante*, p. 866. Petitions for rehearing denied.

November 20, 1961.

Miscellaneous Orders.

No. 8, Original. Arizona *v.* California et al. The motion of the Navajo Tribe of Indians of the Navajo Reservation of Arizona, New Mexico and Utah for leave to intervene is denied. The Chief Justice took no part in the consideration or decision of this motion. [For preceding order herein, see *ante*, p. 893.]

No. 740, Misc. In re Disbarment of Birrell. It is ordered that Lowell M. Birrell of New York, New York, be suspended from the practice of the law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of the law in this Court.

Probable Jurisdiction Noted.

No. 444, Misc. ROBINSON *v.* CALIFORNIA. Appeal from the Appellate Department, Superior Court of California, Los Angeles County. Motion for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted and case transferred to appellate docket. *Samuel Carter McMorris* for appellant. *Roger Arnebergh* and *Philip E. Grey* for respondent.

Certiorari Granted.

No. 236. LANZA *v.* NEW YORK. Court of Appeals of New York. Certiorari granted. *Leo Pfeffer* and *Jacob D. Fuchsberg* for petitioner. Reported below: 9 N. Y. 2d 895, 175 N. E. 2d 833.

No. 422. LINK *v.* WABASH RAILROAD CO. C. A. 7th Cir. Certiorari granted. *Jay E. Darlington* for petitioner. *Roger D. Branigin* for respondent. Reported below: 291 F. 2d 542.

Certiorari Denied. (*See also No. 410, ante, p. 70.*)

No. 118. FOOD MACHINERY & CHEMICAL CORP. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Harry R. Horrow* and *Robert W. Morrison* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Harry Baum* and *Harold M. Seidel* for the United States. Reported below: —— Ct. Cl. ——, 286 F. 2d 177.

No. 382. HUDSON ET AL. *v.* ESPERDY, DISTRICT DIRECTOR, IMMIGRATION & NATURALIZATION SERVICE. C. A. 2d Cir. Certiorari denied. *David I. Shapiro* and *Joseph J. Allen* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for respondent. Reported below: 290 F. 2d 879.

No. 243. ALBERT ET AL. *v.* LOUISIANA. Supreme Court of Louisiana. Certiorari denied. *J. Minos Simon* for petitioners. *Jack P. F. Gremillion,* Attorney General of Louisiana, for respondent.

No. 404. ANNUNZIATO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Morton Dimenstein* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Philip R. Monahan* for the United States. Reported below: 293 F. 2d 373.

No. 405. FASSOULIS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *William F. Hamilton* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 293 F. 2d 243.

No. 406. MCDOWELL *v.* RIBICOFF, SECRETARY OF HEALTH, EDUCATION AND WELFARE. C. A. 3d Cir. Certiorari denied. *Bernard V. Lentz* for petitioner. *Solicitor General Cox, Assistant Attorney General Orrick* and *Morton Hollander* for respondent. Reported below: 292 F. 2d 174.

No. 407. BINION *v.* U. S. MARSHAL FOR THE DISTRICT OF NEVADA. C. A. 9th Cir. Certiorari denied. *Jacob Kossman* for petitioner. *Solicitor General Cox, Assistant Attorney General Marshall* and *Harold H. Greene* for respondent. Reported below: 292 F. 2d 494.

No. 409. ESTATE OF COOPER ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. *Edward W. Mullins* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Meyer Rothwacks* for respondent. Reported below: 291 F. 2d 831.

No. 420. TURNER, ADMINISTRATRIX, ET AL. *v.* TIDMORE CONSTRUCTION CO. C. A. 5th Cir. Certiorari denied. *William E. Chandler, Jr.* for petitioners. Reported below: 290 F. 2d 191.

No. 411. TWEEDY, ADMINISTRATRIX, *v.* ESSO STANDARD OIL CO. C. A. 2d Cir. Certiorari denied. *Maurice A. Krisel* for petitioner. *Walter X. Connor* for respondent. Reported below: 290 F. 2d 921.

No. 412. INCISO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *George F. Callaghan* and *Melvin F. Wingersky* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 292 F. 2d 374.

No. 413. CARLYON *v.* CALIFORNIA. District Court of Appeal of California, Fourth Appellate District. Certiorari denied. *Robert William Stanley* for petitioner. Reported below: 191 Cal. App. 2d 617, 12 Cal. Rptr. 813.

No. 415. EKBERG ET UX. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Hubbard Fremont Fellows* for petitioners. *Solicitor General Cox, Acting Assistant Attorney General Jones, Melva M. Graney* and *Kenneth E. Levin* for the United States. Reported below: 291 F. 2d 913.

No. 416. AMERICAN NEWS CO. ET AL. *v.* KING-SIZE PUBLICATIONS, INC. C. A. 3d Cir. Certiorari denied. *Cornelius E. Gallagher* and *Eugene Frederick Roth* for petitioners. *Thurman Arnold, Lewis M. Dabney, Jr.* and *Jay E. Bailey* for respondent. Reported below: —— F. 2d ——.

No. 423. Firedoor Corporation of America *v.* National Labor Relations Board. C. A. 2d Cir. Certiorari denied. *Sidney O. Raphael* and *Leo M. Drachsler* for petitioner. *Solicitor General Cox, Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 291 F. 2d 328.

No. 408. Wagoner et al., doing business as Style Wagoner Construction Co., *v.* Consolidated Fairview School District No. 5 et al. C. A. 10th Cir. Certiorari denied. *Robert W. Fraser* for petitioners. Reported below: 289 F. 2d 480.

No. 424. Cherry et al. *v.* Brazier. C. A. 5th Cir. Certiorari denied. *Charles J. Bloch* and *Ellsworth Hall, Jr.* for petitioners. *Jack Greenberg* for respondent. Reported below: 293 F. 2d 401.

No. 426. Koninklijke Luchtvaart Maatschappij N. V. et al. *v.* Tuller et al. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *William J. Junkerman* for petitioners. *Murdaugh Stuart Madden, Theodore E. Wolcott* and *John S. Chapman* for respondents. Reported below: 110 U. S. App. D. C. 282, 292 F. 2d 775.

No. 428. Narcisse *v.* American Sugar Refining Co. Supreme Court of Louisiana. Certiorari denied. *Benjamin E. Smith* for petitioner. *Leon Sarpy* for respondent. Reported below: See 128 So. 2d 689.

No. 238, Misc. Nelson *v.* Sacks, Warden. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Mark McElroy,* Attorney General of Ohio, and *Aubrey A. Wendt,* Assistant Attorney General, for respondent. Reported below: 290 F. 2d 604.

No. 598, Misc. RIVENBURGH *v.* UTAH. Supreme Court of Utah. Certiorari denied. *George H. Searle* for petitioner.

No. 608, Misc. AUGUSTINE *v.* LOUISIANA. Supreme Court of Louisiana. Certiorari denied. *Eugene Stanley* for petitioner. Reported below: 241 La. 761, 131 So. 2d 56.

No. 593, Misc. AGRON *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *Shad Polier* and *Charles A. Reich* for petitioner. *Frank S. Hogan* and *H. Richard Uviller* for respondent. Reported below: 10 N. Y. 2d 130, 176 N. E. 2d 556.

Rehearing Denied.

No. 126. MOHAMMED *v.* UNITED STATES, *ante*, p. 820;

No. 178. TUSKEGEE INSTITUTE *v.* BANK OF NEW YORK, TRUSTEE, ET AL., *ante*, p. 838;

No. 263. PATTERSON, WARDEN, ET AL. *v.* MEDBERRY, *ante*, p. 839;

No. 276. GRAY *v.* JOHANSSON ET AL., *ante*, p. 835;

No. 277. G. & H. TOWING CO. *v.* JOHANSSON ET AL., *ante*, p. 835;

No. 19, Misc. O'LEARY *v.* CITY OF AKRON, *ante*, p. 843;

No. 48, Misc. FERNANDEZ ET AL. *v.* FLINT BOARD OF EDUCATION ET AL., *ante*, p. 843;

No. 254, Misc. MOSS *v.* JONES, WARDEN, *ante*, p. 868;

No. 262, Misc. MORRISON *v.* HERITAGE, WARDEN, *ante*, p. 867;

No. 307, Misc. HUBBARD *v.* BOARD OF EDUCATION OF NEW YORK CITY, *ante*, p. 1;

No. 427, Misc. RILEY *v.* PENNSYLVANIA READING SEASHORE LINES, *ante*, p. 11; and

No. 428, Misc. MCCARY *v.* HAND, WARDEN, *ante*, p. 807. Petitions for rehearing denied.

No. 21, Misc. FRENCH *v.* DOWNIE, PRISON SUPERINTENDENT, *ante,* p. 867. Motion for leave to file petition for rehearing and for other relief denied.

No. 965, October Term, 1960. SING ET AL. *v.* FLORIDA, 366 U. S. 964. Motion to supplement the record granted. Petition for rehearing denied.

DECEMBER 4, 1961.

Miscellaneous Orders.

No. 79. LEHIGH VALLEY COOPERATIVE FARMERS, INC., ET AL. *v.* UNITED STATES ET AL. Certiorari, 366 U. S. 957, to the United States Court of Appeals for the Third Circuit. Motion of the Dairymen's League Cooperative Association, Inc., et al. for leave to file brief, as *amici curiae*, granted. *Frederic P. Lee, John A. Cardon, Leslie H. Deming, Frederick U. Conard, Jr., Thomas O. Berryhill, Reuben Hall* and *George M. St. Peter* on the motion. *Willis F. Daniels* and *Donn L. Snyder* for petitioners, in opposition.

No. 93. UNITED STATES *v.* KOENIG. Certiorari, *ante,* p. 812, to the United States Court of Appeals for the Fifth Circuit. Motion of respondent for leave to proceed *in forma pauperis* granted.

No. 150, Misc. EDGERTON *v.* NORTH CAROLINA. Motion for leave to file petition for writ of habeas corpus denied. Petitioner *pro se. Thomas Wade Bruton,* Attorney General of North Carolina, and *Ralph Moody,* Assistant Attorney General, for respondent.

No. 406, Misc. LOTZ *v.* SACKS, WARDEN, ET AL. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for writ of certiorari, certiorari denied.

Probable Jurisdiction Noted.

No. 439. UNITED STATES *v.* BORDEN COMPANY ET AL. Appeal from the United States District Court for the Northern District of Illinois. Probable jurisdiction noted. *Solicitor General Cox, Assistant Attorney General Loevinger* and *Richard A. Solomon* for the United States. *Stuart S. Ball* for Borden Company, and *L. Edward Hart* and *John Paul Stevens* for Bowman Dairy Co., appellees. Reported below: —— F. Supp. ——.

Certiorari Granted. (*See also No. 319, Misc., ante, p. 144.*)

No. 468. ENGEL ET AL. *v.* VITALE ET AL. Court of Appeals of New York. Certiorari granted. *William J. Butler* and *Stanley Geller* for petitioners. *Bertram B. Daiker, Wilford E. Neier, Thomas J. Ford* and *Porter R. Chandler* for respondents. *Charles A. Brind* for the Board of Regents of the University of the State of New York, as *amicus curiae,* in opposition to the petition. Reported below: 10 N. Y. 2d 174, 176 N. E. 2d 579.

No. 469. INCRES STEAMSHIP CO., LTD., *v.* INTERNATIONAL MARITIME WORKERS UNION ET AL. Court of Appeals of New York. Certiorari granted. *George S. Leisure* and *Breck P. McAllister* for petitioner. *Herman E. Cooper* and *H. Howard Ostrin* for respondents. Reported below: 10 N. Y. 2d 218, 176 N. E. 2d 719.

No. 464. NATIONAL LABOR RELATIONS BOARD *v.* WASHINGTON ALUMINUM CO. C. A. 4th Cir. Certiorari granted. *Solicitor General Cox, Stuart Rothman, Dominick L. Manoli, Norton J. Come* and *Samuel M. Singer* for petitioner. *Robert R. Bair* for respondent. Reported below: 291 F. 2d 869.

No. 436. GRUMMAN *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *David Rein, Joseph Forer* and *Victor Rabinowitz* for petitioner. *Solicitor General Cox, Assistant Attorney General Yeagley* and *George B. Searls* for the United States. Reported below: 111 U. S. App. D. C. 79, 294 F. 2d 708.

No. 454. SILBER *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Victor Rabinowitz* and *Leonard B. Boudin* for petitioner. *Solicitor General Cox, Assistant Attorney General Yeagley* and *George B. Searls* for the United States. Reported below: 111 U. S. App. D. C. 331, 296 F. 2d 588.

Certiorari Denied. (*See also No. 406, Misc., supra, and No. 26, Misc., ante, p. 143.*)

No. 401. NATIONAL LABOR RELATIONS BOARD *v.* CELANESE CORP. OF AMERICA. C. A. 7th Cir. Certiorari denied. *Solicitor General Cox, Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* for petitioner. *Gerard D. Reilly* and *Joseph C. Wells* for respondent. Reported below: 291 F. 2d 224.

No. 414. CONFORTE *v.* NEVADA. Supreme Court of Nevada. Certiorari denied. *A. L. Wirin* and *Fred Okrand* for petitioner. *Roger D. Foley,* Attorney General of Nevada, and *William J. Raggio* for respondent. Reported below: 77 Nev. 269, 362 P. 2d 274.

No. 429. GIBRALTOR AMUSEMENTS, LTD., *v.* WURLITZER COMPANY ET AL. C. A. 2d Cir. Certiorari denied. *Eugene Gressman* and *George Becker* for petitioner. *Edward R. Neaher* for respondents. Reported below: 291 F. 2d 22.

No. 417. NATIONAL LABOR RELATIONS BOARD *v.* SYLVANIA ELECTRIC PRODUCTS, INC. C. A. 1st Cir. Certiorari denied. *Solicitor General Cox, Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* for petitioner. *Gerard D. Reilly* for respondent. Reported below: 291 F. 2d 128.

No. 433. CAMERON IRON WORKS, INC., *v.* LODGE No. 12, DISTRICT No. 37, INTERNATIONAL ASSOCIATION OF MACHINISTS. C. A. 5th Cir. Certiorari denied. *John Leroy Jeffers* for petitioner. *Plato E. Papps* and *Chris Dixie* for respondent. Reported below: 292 F. 2d 112.

No. 440. BORUM *v.* INDUSTRIAL COMMISSION OF WISCONSIN ET AL. Supreme Court of Wisconsin. Certiorari denied. *Max Raskin* for petitioner. *John W. Reynolds,* Attorney General of Wisconsin, and *Mortimer Levitan,* Assistant Attorney General, for Industrial Comm'n of Wisconsin, and *Alfred E. LaFrance* for American Motors Corp., respondents. Reported below: 13 Wis. 2d 570, 108 N. W. 2d 918.

No. 441. WYNGAARD *v.* KENNEDY, ATTORNEY GENERAL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Jack Wasserman* and *David Carliner* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for respondent. Reported below: 111 U. S. App. D. C. 197, 295 F. 2d 184.

No. 442. LEE ET AL. *v.* KENNEDY, ATTORNEY GENERAL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Jack Wasserman* and *David Carliner* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for respondent. Reported below: 111 U. S. App. D. C. 35, 294 F. 2d 231.

No. 435. In re Union Leader Corp. C. A. 1st Cir. Certiorari denied. *James M. Malloy* and *Ralph Warren Sullivan* for petitioner. *Frank Goldman* for the Haverhill Gazette Co., respondent and intervenor. Reported below: 292 F. 2d 381.

No. 437. Goduto et al. *v.* Illinois. Supreme Court of Illinois. Certiorari denied. *S. G. Lippman* and *Tim L. Bornstein* for petitioners. Reported below: 21 Ill. 2d 605, 174 N. E. 2d 385.

No. 443. Wilson, Attorney General of Texas, et al. *v.* Stuart et al. C. A. 5th Cir. Certiorari denied. *Will Wilson,* Attorney General of Texas, and *Tom I. McFarling, Sam R. Wilson* and *Leon F. Pesek,* Assistant Attorneys General, for petitioners. *James L. McNees, Jr.* for respondents. Reported below: 293 F. 2d 914.

No. 444. Massey *v.* Koster & Wythe. C. A. 9th Cir. Certiorari denied. *Roy C. Hall* for petitioner. Reported below: 293 F. 2d 922.

No. 445. Davis *v.* National Bank of Mattoon et al. Circuit Court of Coles County, Illinois. Certiorari denied.

No. 450. Eastern Air Lines, Inc., *v.* Civil Aeronautics Board et al. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *E. Smythe Gambrell* and *Harold L. Russell* for petitioner. *Solicitor General Cox, Assistant Attorney General Loevinger, Richard A. Solomon, John H. Wanner, Joseph B. Goldman* and *O. D. Ozment* for Civil Aeronautics Board, and *Howard C. Westwood, Alfred V. J. Prather* and *William H. Allen* for American Airlines, Inc., et al., respondents. Reported below: 111 U. S. App. D. C. 39, 294 F. 2d 235.

No. 446. DAYAN *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied. *Nathan Newby, Jr.* and *A. L. Wirin* for petitioner. *Roger Arnebergh* and *Philip E. Grey* for respondent. Reported below: 293 F. 2d 46.

No. 449. IRIZARRY *v.* ARMOUR. Supreme Court of Pennsylvania. Certiorari denied. *Charles E. Rankin* for petitioner. Reported below: See 195 Pa. Super. 104, 169 A. 2d 307.

No. 451. PERKINS, ADMINISTRATOR, *v.* WAUKESHA NATIONAL BANK ET AL. C. A. 7th Cir. Certiorari denied. *Carl Hoppe* for petitioner. *Floyd A. Brynelson* for respondents. Reported below: 290 F. 2d 912.

No. 452. GOLDSTEIN ET AL. *v.* DABANIAN ET AL. C. A. 3d Cir. Certiorari denied. *M. Stuart Goldin* for petitioners. *Morris M. Wexler* for respondents. Reported below: 291 F. 2d 208.

No. 453. CHAPMAN ET AL. *v.* LEHIGH VALLEY RAILROAD CO. Supreme Court of New Jersey. Certiorari denied. *Philip L. Strong* for petitioners. *Charles W. Hutchinson* for respondent. Reported below: 35 N. J. 177, 171 A. 2d 653.

No. 456. UNITED STATES COLD STORAGE CORP. *v.* MINUTE MAID CORP. C. A. 5th Cir. Certiorari denied. *H. Bascom Thomas, Jr.* and *Hubard T. Bowyer* for petitioner. *Leland E. Fiske* for respondent. Reported below: 291 F. 2d 577.

No. 457. ZILKY ET AL. *v.* LAKE SUPERIOR COURT ET AL. Supreme Court of Indiana. Certiorari denied. *C. Severin Buschmann* for petitioners. *Owen W. Crumpacker* for respondents. Reported below: 242 Ind. ——, ——, 175 N. E. 2d 3, 9.

No. 459. SEARS ET AL. *v.* AUSTIN. C. A. 9th Cir. Certiorari denied. *Jack K. Berman* for petitioners. Reported below: 292 F. 2d 690.

No. 460. NEW YORK ET AL. *v.* ANDREWS ET AL. Court of Claims of New York. Certiorari denied. *Louis J. Lefkowitz,* Attorney General of New York, and *Thomas F. Moore, Jr.* for petitioners. *George J. Skivington, Jr.* for respondents. Reported below: See 9 N. Y. 2d 606, 176 N. E. 2d 42.

No. 461. POLICE BENEVOLENT ASSOCIATION OF THE NEW YORK STATE POLICE, INC., ET AL. *v.* TRAINOR, DISTRICT ATTORNEY OF WESTCHESTER COUNTY, ET AL. Court of Appeals of New York. Certiorari denied. *Arthur L. Reuter* for petitioners. *Robert J. Trainor* and *Warren J. Schneider* for respondents. Reported below: 9 N. Y. 2d 803, 175 N. E. 2d 170.

No. 463. SOLOMON DEHYDRATING CO., INC., *v.* GUYTON ET AL. C. A. 8th Cir. Certiorari denied. *Joseph T. Votava* for petitioner. *James J. Fitzgerald, Jr.* for respondents. Reported below: 294 F. 2d 439.

No. 465. GRAHAM, DOING BUSINESS AS MAINE CHANCE FARM, *v.* HERTZ. C. A. 2d Cir. Certiorari denied. *Andrew L. Hughes* for petitioner. *Edwin L. Weisl, William J. Manning* and *Rolon W. Reed* for respondent. Reported below: 292 F. 2d 443.

No. 474. AKOPIANTZ *v.* BOARD OF MEDICAL EXAMINERS OF CALIFORNIA. Supreme Court of California. Certiorari denied. *John Wattawa* and *Charles J. Miller* for petitioner. *Stanley Mosk,* Attorney General of California, and *Eimo G. Funke* and *Charles A. Barrett,* Assistant Attorneys General, for respondent.

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No. 466. BROWDER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Richard R. Booth* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 292 F. 2d 44.

No. 467. SCHMIDT *v.* UNITED STATES. Court of Claims. Certiorari denied. *Frank L. Nikolay* for petitioner. *Solicitor General Cox* for the United States. Reported below: — Ct. Cl. —, — F. 2d —.

No. 470. HALQUIST ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. *Herman E. Friedrich* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Melva M. Graney* for respondent. Reported below: 291 F. 2d 49.

No. 471. BURKE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *Solomon Sandler* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Joseph M. Howard* for the United States. Reported below: 293 F. 2d 398.

No. 473. MARGOLES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Charles A. Bellows* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 294 F. 2d 371.

No. 485. ALABAMA STATE BOARD OF EDUCATION ET AL. *v.* DIXON ET AL. C. A. 5th Cir. Certiorari denied. *MacDonald Gallion,* Attorney General of Alabama, *Willard W. Livingston, Leslie Hall* and *Gordon Madison,* Assistant Attorneys General, and *Robert P. Bradley* for petitioners. *Fred D. Gray, Jack Greenberg* and *James M. Nabrit III* for respondents. Reported below: 294 F. 2d 150.

No. 483. ANDERSON ET AL. *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. *Russell E. Parsons* for petitioners. Reported below: 55 Cal. 2d 655, 361 P. 2d 32.

No. 484. BLAUNER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Roberts P. Elam* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Joseph M. Howard* for the United States. Reported below: 293 F. 2d 723.

No. 487. DEHYDRATING PROCESS CO. *v.* A. O. SMITH CORP. C. A. 1st Cir. Certiorari denied. *James M. Malloy, Richard A. Sullivan* and *Ralph Warren Sullivan* for petitioner. *Warren F. Farr* and *William D. Andrews* for respondent. Reported below: 292 F. 2d 653.

No. 432. EMPIRE STATE HIGHWAY TRANSPORTATION ASSN., INC., *v.* UNITED STATES ET AL. Motion of American Export Lines, Inc., et al. to be named parties respondent granted. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit denied. *Herbert Burstein* for petitioner. *Solicitor General Cox, Assistant Attorney General Loevinger, Richard A. Solomon, Robert E. Mitchell* and *Edward Aptaker* for the United States et al., and *Mark P. Schlefer* and *T. S. L. Perlman* for American Export Lines, Inc., et al., respondents. Reported below: 110 U. S. App. D. C. 208, 291 F. 2d 336.

No. 458. EMPIRE STATE EXPRESS, INC., *v.* TRUCK DRIVERS & HELPERS LOCAL UNION No. 728. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BLACK is of the opinion certiorari should be granted. *W. Edward Swinson* for petitioner. *Edwin M. Pearce, William B. Paul* and *John S. Patton* for respondent. Reported below: 293 F. 2d 414.

No. 361. KEMP *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS are of the opinion certiorari should be granted on Question 3. *Russell E. Parsons* for petitioner. *Stanley Mosk,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Philip C. Griffin,* Deputy Attorney General, for respondent. Reported below: 55 Cal. 2d 458, 359 P. 2d 913.

No. 53, Misc. BROWN *v.* MONTANA. Supreme Court of Montana. Certiorari denied. Petitioner *pro se.* *Forrest H. Anderson,* Attorney General of Montana, and *Donald A. Garrity,* Assistant Attorney General, for respondent.

No. 79, Misc. BONOMI *v.* MASSACHUSETTS ET AL. C. A. 1st Cir. Certiorari denied. Petitioner *pro se.* *Edward J. McCormack, Jr.,* Attorney General of Massachusetts, and *Joseph T. Doyle,* Assistant Attorney General, for respondents.

No. 83, Misc. WILLIAMS *v.* BOLES, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied. Petitioner *pro se.* *C. Donald Robertson,* Attorney General of West Virginia, and *George H. Mitchell* and *Simon M. Bailey,* Assistant Attorneys General, for respondent.

No. 113, Misc. ELLIS *v.* ALABAMA. Supreme Court of Alabama. Certiorari denied. Petitioner *pro se.* *MacDonald Gallion,* Attorney General of Alabama, and *Jerry L. Coe,* Assistant Attorney General, for respondent.

No. 135, Misc. HOGUE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 287 F. 2d 99.

No. 462. SEIDENBACH'S *v.* BLAND TERRY SHOE CORP. Motion to supplement the petition granted. Petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit denied. *Morrison Shafroth, John F. Shafroth, Robert J. Woolsey* and *Frank Settle* for petitioner. Reported below: 292 F. 2d 206.

No. 147, Misc. JOHNSON ET AL. *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. *Stanford Shmukler* for petitioners. *Norman Heine* for respondent. Reported below: 34 N. J. 212, 168 A. 2d 1.

No. 197, Misc. CUNNINGHAM *v.* CALIFORNIA. District Court of Appeal of California, Second Appellate District. Certiorari denied. Petitioner *pro se*. *Stanley Mosk,* Attorney General of California, *Doris H. Maier,* Assistant Attorney General, and *Raymond M. Momboisse,* Deputy Attorney General, for respondent. Reported below: 188 Cal. App. 2d 606, 10 Cal. Rptr. 604.

No. 356, Misc. SZOPENSKE *v.* HAND, WARDEN. Supreme Court of Kansas. Certiorari denied. Petitioner *pro se*. *William M. Ferguson,* Attorney General of Kansas, and *J. Richard Foth,* Assistant Attorney General, for respondent. Reported below: 188 Kan. 590, 363 P. 2d 410.

No. 364, Misc. PETILLO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

No. 433, Misc. SHIELDS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 431, Misc. LLOYD *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. *Clyde W. Woody* for petitioner.

No. 390, Misc. MACON *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 439, Misc. GRESSETTE *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

No. 440, Misc. GILMER *v.* CUNNINGHAM, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 441, Misc. PREIS *v.* ARIZONA. Supreme Court of Arizona. Certiorari denied. Petitioner *pro se. Robert W. Pickrell,* Attorney General of Arizona, and *Alvin E. Larsen,* Assistant Attorney General, for respondent. Reported below: 89 Ariz. 336, 362 P. 2d 660.

No. 443, Misc. WATSON *v.* BANMILLER, WARDEN. Supreme Court of Pennsylvania. Certiorari denied. Petitioner *pro se. Glenn R. Toothman, Jr.* for respondent.

No. 451, Misc. BLAIR *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied.

No. 452, Misc. SERRA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Donald T. Dorsey* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 291 F. 2d 625.

No. 450, Misc. CALHOUN *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 22 Ill. 2d 31, 174 N. E. 2d 166.

No. 458, Misc. CLARK *v.* WARDEN, MARYLAND PENITENTIARY. Court of Appeals of Maryland. Certiorari denied.

No. 459, Misc. WALLACH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Orrick* and *Alan S. Rosenthal* for the United States. Reported below: 291 F. 2d 69.

No. 462, Misc. DOYLE *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 465, Misc. VAUGHN *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 487, Misc. WHITE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States.

No. 498, Misc. TIMMONS *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 413, Misc. STEWART *v.* ARKANSAS. Supreme Court of Arkansas. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted. *Harold B. Anderson* and *Thaddeus D. Williams* for petitioner. *Frank Holt,* Attorney General of Arkansas, and *Thorp Thomas,* Assistant Attorney General, for respondent. Reported below: 233 Ark. 458, 345 S. W. 2d 472.

Rehearing Denied.

No. 110. LOVETT *v.* UNITED STATES, *ante,* p. 818;

No. 146. CHOBOT *v.* WISCONSIN, *ante,* p. 15;

No. 167. OAKLEY *v.* UNITED STATES, *ante,* p. 888;

No. 274. CAFFERATA *v.* OHIO, *ante,* p. 834;

No. 314. KINNEAR-WEED CORP. *v.* HUMBLE OIL & REFINING CO., *ante,* p. 890;

No. 318. GREAT LAKES AIRLINES, INC., ET AL. *v.* CIVIL AERONAUTICS BOARD, *ante,* p. 890;

No. 324. ELGIN, JOLIET & EASTERN RAILWAY CO. *v.* BORRERO ET AL., *ante,* p. 891;

No. 445, Misc. DULBERG *v.* SCOVILL MANUFACTURING CO. ET AL., *ante,* p. 882;

No. 463, Misc. SEPULVEDA *v.* COLORADO, *ante,* p. 882; and

No. 506, Misc. OWENS *v.* ELLIS, CORRECTIONS DIRECTOR, ET AL., *ante,* p. 33. Petitions for rehearing denied.

DECEMBER 11, 1961.

Order Appointing Chief Deputy Clerk.

It is ordered that Edmund P. Cullinan be, and he hereby is, appointed Chief Deputy Clerk of this Court.

Miscellaneous Order.

No. 244. DAIRY QUEEN, INC., *v.* WOOD, U. S. DISTRICT JUDGE, ET AL. Certiorari, *ante,* p. 874, to the United States Circuit Court of Appeals for the Third Circuit. Motion of *Donald M. Bowman* for leave to withdraw his appearance as counsel for petitioner granted.

Certiorari Granted.

No. 498. IN RE MCCONNELL. C. A. 7th Cir. Certiorari granted. Reported below: 294 F. 2d 310.

No. 430. ATKINSON ET AL. *v.* SINCLAIR REFINING CO.; and

No. 434. SINCLAIR REFINING CO. *v.* ATKINSON ET AL. C. A. 7th Cir. Certiorari granted. *William E. Rentfro* for petitioners in No. 430 and respondents in No. 434. *George B. Christensen* for petitioner in No. 434 and respondent in No. 430. Reported below: 290 F. 2d 312.

No. 493. ENOCHS, DISTRICT DIRECTOR OF INTERNAL REVENUE, *v.* WILLIAMS PACKING & NAVIGATION CO., INC. C. A. 5th Cir. Certiorari granted. *Solicitor General Cox, Acting Assistant Attorney General Jones, Meyer Rothwacks* and *George F. Lynch* for petitioner. *W. E. Morse* and *George E. Morse* for respondent. Reported below: 291 F. 2d 402.

No. 549, Misc. PORTER *v.* AETNA CASUALTY & SURETY CO. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit granted. Case transferred to appellate docket. *Ethelbert B. Frey* for petitioner. *John L. Laskey* for respondent. *Solicitor General Cox* and *Assistant Attorney General Orrick* filed a memorandum for the United States, as *amicus curiae*, in support of the petition. Reported below: 111 U. S. App. D. C. 267, 296 F. 2d 389.

Certiorari Denied. (*See also No. 486, ante, p. 289, and No. 503, ante, p. 290.*)

No. 492. ADELMAN ET AL. *v.* ST. LOUIS FIRE & MARINE INSURANCE CO. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Mark P. Friedlander* and *Charles Walker* for petitioners. *Andrew D. Sharpe* for respondent. Reported below: 110 U. S. App. D. C. 392, 293 F. 2d 869.

No. 494. MANDEL ET VIR *v.* PENNSYLVANIA RAILROAD CO. C. A. 2d Cir. Certiorari denied. *Conrad B. Duberstein* for petitioners. *James S. Rowen* for respondent. Reported below: 291 F. 2d 433.

No. 489. TAK TRAK, INC., *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. *George R. Richter, Jr.* for petitioner. *Solicitor General Cox, Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 293 F. 2d 270.

No. 495. TRUCK DRIVERS LOCAL UNION No. 299 ET AL. *v.* GOLDBERG, SECRETARY OF LABOR. C. A. 6th Cir. Certiorari denied. *Jacob Kossman* for petitioners. *Solicitor General Cox, Assistant Attorney General Orrick, Alan S. Rosenthal* and *Charles Donahue* for respondent. *Herbert S. Thatcher* filed a brief for International Brotherhood of Boilermakers et al., as *amici curiae,* in support of the petition. Reported below: 293 F. 2d 807.

No. 499. CHUNG WING PING ET AL. *v.* KENNEDY, ATTORNEY GENERAL, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Abraham Lebenkoff* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for respondents. Reported below: 111 U. S. App. D. C. 106, 294 F. 2d 735.

No. 502. WISCONSIN BANKERS ASSN. ET AL. *v.* ROBERTSON ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Harvey W. Peters* and *Percy W. Phillips* for petitioners. *Solicitor General Cox, Assistant Attorney General Orrick* and *John G. Laughlin, Jr.* for respondents. Reported below: 111 U. S. App. D. C. 85, 294 F. 2d 714.

No. 497. ESTATE OF DAVISON *v.* UNITED STATES. Court of Claims. Certiorari denied. *W. Lee McLane, Jr.* and *Nola McLane* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Melva M. Graney* and *George F. Lynch* for the United States. Reported below: —— Ct. Cl. ——, 292 F. 2d 937.

No. 501. DYKE WATER CO. *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA. Supreme Court of California. Certiorari denied. *Arlyne Lansdale* and *Edgar P. Boyko* for petitioner. *William M. Bennett* and *J. Thomason Phelps* for respondent. Reported below: 56 Cal. 2d 105, 363 P. 2d 326.

No. 507. MARYLAND CASUALTY CO. *v.* FIRST NATIONAL BANK IN YONKERS ET AL. C. A. 2d Cir. Certiorari denied. *Franklin Nevius* and *J. Edward Davey, Jr.* for petitioner. *Samuel Gottesman* for First National Bank in Yonkers, respondent. Reported below: 290 F. 2d 246.

No. 509. BORG-WARNER CORP. *v.* YORK-SHIPLEY, INC. C. A. 7th Cir. Certiorari denied. *Edward A. Haight* and *Stuart S. Ball* for petitioner. *Beverly W. Pattishall* for respondent. Reported below: 293 F. 2d 88.

No. 510. SACHS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Hosea Alexander Stephens* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 293 F. 2d 623.

No. 516. BORNE CHEMICAL CO., INC., ET AL. *v.* MCCLURE ET AL. C. A. 3d Cir. Certiorari denied. *William T. Coleman, Jr.* for petitioners. *Arnold R. Ginsburg* for respondents. Reported below: 292 F. 2d 824.

No. 508. Woodland Terrace, Inc., *v.* United States. C. A. 4th Cir. Certiorari denied. *Frederick Bernays Wiener, J. C. Long, W. Turner Logan* and *Louis M. Shimel* for petitioner. *Solicitor General Cox, Assistant Attorney General Orrick* and *Alan S. Rosenthal* for the United States. Reported below: 293 F. 2d 505.

No. 512. Scott Publishing Co., Inc., *v.* Columbia Basin Publishers, Inc., et al. C. A. 9th Cir. Certiorari denied. *Herbert W. Clark* and *Robert D. Raven* for petitioner. *Alfred J. Schweppe, Sidney Dickstein* and *David I. Shapiro* for respondents. Reported below: 293 F. 2d 15.

No. 515. Root *v.* United States. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Oberdorfer, A. F. Prescott* and *Norman H. Wolfe* for the United States. Reported below: 294 F. 2d 484.

No. 518. Board of Education of New Rochelle et al. *v.* Taylor et al. C. A. 2d Cir. Certiorari denied. *Julius Weiss* and *Murray C. Fuerst* for petitioners. *Constance Baker Motley* and *Jack Greenberg* for respondents. Reported below: 294 F. 2d 36.

No. 427. Virginia Petroleum Jobbers Assn. *v.* Federal Power Commission et al. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

Mr. Justice Black, with whom Mr. Justice Douglas concurs, dissenting from denial of certiorari.

This case raises a very important question which I think we should grant certiorari to settle. That question is whether the Federal Power Commission has authority

to refuse to summon a witness to testify to relevant facts in a hearing before it on the ground that the party summoning that witness refuses to compensate him as an expert witness over and above the amount authorized to be paid witnesses in courts under 28 U. S. C. § 1821.

The issue before the Federal Power Commission was the economic feasibility of a project of the Blue Ridge Gas Company to supply natural gas to Harrisonburg, Virginia. The witness desired was an engineer who had previously prepared a study of the project for Blue Ridge [1] and who had reported to it that the economic feasibility of the project was highly doubtful. The subpoena requested was for the engineer to appear and bring the papers and documents he had already prepared and used in his previous report. This would have been offered to rebut the evidence of Blue Ridge, favorable to the project, given by a second engineer who had been hired by Blue Ridge after the first engineer had given his unfavorable report. Since this evidence was heavily relied on by the Commission in finding that the project was feasible, there can be no doubt that the witness desired, the first engineer, could have given evidence highly relevant to a proper decision of the question before the Commission. Nevertheless, and in spite of the fact that § 6 (c) of the Administrative Procedure Act, 5 U. S. C. § 1005 (c), provides that agency subpoenas "shall be issued to any party upon request . . . upon a statement or showing of general relevance and reasonable scope of the evidence sought," the Commission refused to summon the witness on the ground that petitioner "should arrange for compensation to be paid to him as an expert witness, and for his voluntary attendance at the hearing." 21 F. P. C. 901, 902. This petition seeks certiorari to review the decision of the

[1] At that time Blue Ridge was known as Consumers Utility Company.

Court of Appeals, 110 U. S. App. D. C. 339, 293 F. 2d 527, upholding the Commission.

Since petitioner was willing to pay the fees prescribed for witnesses by Congress in 28 U. S. C. § 1821, the issue presented here seems to be substantially the same as that in *Henkel* v. *Chicago, St. P., M. & O. R. Co.*, 284 U. S. 444. There the plaintiff, Henkel, who had recovered a judgment against the railroad under the FELA, asked the court for an order allowing fees above the amounts provided in 28 U. S. C. § 1821 for ordinary witnesses in order to give extra compensation to expert witnesses who had testified in his behalf. This Court, in an opinion by Mr. Chief Justice Hughes, unanimously held that the only fees to expert witnesses allowable as costs in the federal courts were those provided for in § 1821. Since that time this Court has never modified or criticized in any way its statement that:

> "The Congress has dealt with the subject comprehensively and has made no exception of the fees of expert witnesses. Its legislation must be deemed controlling and excludes the application in the federal courts of any different state practice." *Id.*, at 447.[2]

Even so the Government seeks to justify enforced payment of extra fees by petitioner on two grounds: (1) that the Federal Power Commission acted within a discretion allowed it, and (2) that the error of the Commission, if any, in refusing to subpoena the witness was harmless. But administrative agencies, no more than courts, have inherent powers of discretion to nullify the mandatory provisions of 28 U. S. C. § 1821, and the Commission has pointed to no statute which gives it power to compel the payment of greater fees to expert witnesses than are paid

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[2] See *In re Hayes*, 200 N. C. 133, 156 S. E. 791, for a general discussion of compelled testimony of expert witnesses.

to witnesses who testify in the courts. As for the Commission's argument that the error was harmless, I can find nothing in this record to justify such a contention. The witness the Commission refused to summon had a broad knowledge of the economic feasibility of the gas project under consideration—his unfavorable report apparently being chiefly responsible for the dropping of the project once before. To sustain the Commission's contention of harmless error in this case would be to assume that no evidence could possibly have been introduced that would have changed the Commission's mind or altered the result on judicial review of the Commission's order by the Court of Appeals. I am not willing to make any such assumption, nor am I willing to leave unchallenged the decision in this case which suggests that administrative agencies have a broad discretion in matters involving large public interests such as here to force parties before administrative agencies to pay burdensome expert witness fees in order to present admittedly relevant evidence to them. It is for that reason that I am expressing my objection to the denial of certiorari in this case.

Bryce Rea, Jr. for petitioner. *Solicitor General Cox, Assistant Attorney General Orrick, Morton Hollander, Ralph S. Spritzer* and *Howard E. Wahrenbrock* for the Federal Power Commission, and *Donald E. Van Koughnet* for the Blue Ridge Gas Company, respondents. Reported below: 110 U. S. App. D. C. 339, 293 F. 2d 527.

No. 496. FIANO *v.* UNITED STATES. Motion to dispense with printing the petition for writ of certiorari granted. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied. *Nathan Kestnbaum* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 291 F. 2d 113.

No. 431. PARMELEE TRANSPORTATION CO. *v.* KEESHIN ET AL. C. A. 7th Cir. Certiorari denied. THE CHIEF JUSTICE, MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. *Lee A. Freeman, Thomas C. McConnell, Herbert B. Lazarus* and *John Paul Stevens* for petitioner. *Edward R. Johnston, Albert E. Jenner, Jr., Philip W. Tone, Albert J. Meserow* and *Amos M. Mathews* for respondents. Reported below: 292 F. 2d 794.

No. 455. ALLEN ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. MR. JUSTICE WHITTAKER is of the opinion that certiorari should be granted. *John D. M. Hamilton* and *Ben S. Wendelken* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer, I. Henry Kutz* and *L. W. Post* for the United States. Reported below: 293 F. 2d 916.

No. 379, Misc. TORRES *v.* DELGADO, WARDEN. C. A. 1st Cir. Certiorari denied. *Santos P. Amadeo* and *Gerardo Ortiz del Rivero* for petitioner. *J. B. Fernandez Badillo,* Solicitor General of Puerto Rico, and *Arturo Estrella,* Deputy Solicitor General, for respondent.

No. 466, Misc. GLASS *v.* MISSOURI PACIFIC RAILROAD CO. Court of Civil Appeals of Texas, Fourth Supreme Judicial District. Certiorari denied. *Floyd McGowan, Jr.* and *John P. Spiller* for petitioner. *Josh H. Groce* for respondent. Reported below: 343 S. W. 2d 288.

No. 89, Misc. ESTELLE *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 287 F. 2d 888.

No. 449, Misc. JAMES *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 625, Misc. BUTLER *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied. *Marjorie Hanson Matson* for petitioner. Reported below: 405 Pa. 36, 173 A. 2d 468.

Rehearing Denied.

No. 30. MARTIN *v.* WALTON, PROBATE JUDGE OF JOHNSON COUNTY, KANSAS, *ante*, p. 25. Petition for rehearing denied. MR. JUSTICE WHITTAKER took no part in the consideration or decision of this application.

No. 117, Misc. EDELL *v.* NICHOLAS, TRUSTEE, *ante*, p. 849; and

No. 410, Misc. BLOCK *v.* BLOCK, *ante*, p. 906. Petitions for rehearing denied.

DECEMBER 18, 1961.

Miscellaneous Order.

No. 79. LEHIGH VALLEY COOPERATIVE FARMERS, INC., ET AL. *v.* UNITED STATES ET AL. Certiorari, 366 U. S. 957, to the United States Court of Appeals for the Third Circuit. Motion of the Lawson Milk Company for leave to file brief, as *amicus curiae*, granted. *Landon Gerald Dowdey* on the motion.

Probable Jurisdiction Noted.

No. 488. UNITED STATES *v.* WISE. Appeal from the United States District Court for the Western District of Missouri. Probable jurisdiction noted. *Solicitor General Cox, Assistant Attorney General Loevinger* and *Richard A. Solomon* for the United States. *John T. Chadwell, Martin J. Purcell* and *John H. Lashly* for appellee. Reported below: 196 F. Supp. 155.

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Certiorari Granted. (*See also No. 325, ante, p. 347.*)

No. 142. Shotwell Manufacturing Co. et al. *v.* United States. C. A. 7th Cir. Certiorari granted. *George B. Christensen, Harold A. Smith* and *William T. Kirby* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Joseph M. Howard, Vincent P. Russo* and *Charles A. McNelis* for the United States. Reported below: 287 F. 2d 667.

No. 532. Calbeck, Deputy Commissioner, Bureau of Employees' Compensation, *v.* Travelers Insurance Co. et al. C. A. 5th Cir. Certiorari granted. *Solicitor General Cox, Assistant Attorney General Orrick, Morton Hollander* and *David L. Rose* for petitioner. *Ewell Strong* for respondents. *Herman Wright* for McGuyer et al., as *amici curiae,* in support of the petition. Reported below: 293 F. 2d 51, 52.

Certiorari Denied. (*See also No. 527, ante, p. 348, and No. 533, ante, p. 345.*)

No. 521. Powell *v.* National Savings & Trust Co. et al. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Diana Kearny Powell pro se.* Reported below: 111 U. S. App. D. C. 290, 296 F. 2d 412.

No. 522. American Employers Insurance Co. *v.* Zablosky. C. A. 5th Cir. Certiorari denied. *James A. Williams* for petitioner. *Irving L. Goldberg* for respondent. Reported below: 292 F. 2d 412.

No. 535. Moore *v.* Jack P. Hennessy Co., Inc., et al. C. A. 3d Cir. Certiorari denied. Petitioner *pro se. Albert M. Parker* for respondents. Reported below: 293 F. 2d 44.

No. 300. GOMEZ *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. *Bernard A. Golding* for petitioner. *Will Wilson,* Attorney General of Texas, and *Leon F. Pesek, Frank J. Maloney* and *Sam Wilson,* Assistant Attorneys General, for respondent. Reported below: 171 Tex. Cr. R. ——, 346 S. W. 2d 847.

No. 525. SAIER *v.* STATE BAR OF MICHIGAN ET AL. C. A. 6th Cir. Certiorari denied. Petitioner *pro se. Paul L. Adams,* Attorney General of Michigan, and *Joseph B. Bilitzke,* Solicitor General, for the Supreme Court of Michigan, and *J. Cameron Hall* for the State Bar of Michigan et al., respondents. Reported below: 293 F. 2d 756.

No. 534. AMERICAN RESEARCH COUNCIL, INC., ET AL. *v.* ATTORNEY GENERAL OF NEW YORK. Court of Appeals of New York. Certiorari denied. *Milton A. Bass, Solomon H. Friend* and *Harold Friedman* for petitioners. *Louis J. Lefkowitz,* Attorney General of New York, *Paxton Blair,* Solicitor General, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Daniel M. Cohen,* Assistant Attorney General, for respondent. Reported below: 10 N. Y. 2d 108, 176 N. E. 2d 402.

No. 536. MOSS, ALIAS MARTINE, *v.* CALIFORNIA. Appellate Department, Superior Court of California, Los Angeles County. Certiorari denied. *Rex H. Minter* for petitioner. *Roger Arnebergh* and *Philip E. Grey* for respondent.

No. 528. BRUNER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 293 F. 2d 621.

No. 524. Raymond I. Smith, Inc., *v.* Commissioner of Internal Revenue. C. A. 9th Cir. Certiorari denied. *Valentine Brookes* and *Paul E. Anderson* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Melva M. Graney* for respondent. Reported below: 292 F. 2d 470.

No. 526. Shell Oil Co. *v.* Public Service Commission of New York. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Oliver L. Stone* and *William F. Kenney* for petitioner. *Kent H. Brown* and *Barbara M. Suchow* for respondent. Reported below: 111 U. S. App. D. C. 153, 295 F. 2d 140.

No. 539. Peoples Bank of Haverstraw *v.* Feldman, Trustee in Bankruptcy. C. A. 2d Cir. Certiorari denied. *John M. Friedman* for petitioner. *Harold Harper* and *Arthur R. Gaetjens* for respondent. Reported below: 293 F. 2d 889.

No. 707, Misc. Reid *v.* Richmond, Warden. C. A. 2d Cir. Certiorari denied. Mr. Justice Douglas is of the opinion certiorari should be granted. *Louis H. Pollak, William D. Graham, Jack Greenberg* and *James M. Nabrit III* for petitioner. *John D. LaBelle* for respondent. Reported below: 295 F. 2d 83.

No. 529. Loffland Brothers Co. et al. *v.* Teichman et al. C. A. 5th Cir. Certiorari denied. *Bryan F. Williams, Jr.* for petitioners. *Solicitor General Cox, Assistant Attorney General Orrick, Morton Hollander* and *David L. Rose* for Calbeck, Deputy Commissioner, Bureau of Employees' Compensation, and *Herman Wright* for Teichman, respondents. Reported below: 294 F. 2d 175.

No. 243, Misc. LEWIS ET AL. *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Alfred V. J. Prather* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 111 U. S. App. D. C. 13, 294 F. 2d 209.

No. 584. ANDERSON *v.* GLADDEN, WARDEN. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Robert Y. Thornton,* Attorney General of Oregon, and *Harold W. Adams,* Assistant Attorney General, for respondent. Reported below: 293 F. 2d 463.

No. 694, Misc. JACKSON *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *Nathan Kestnbaum* for petitioner. *Edward S. Silver* and *William I. Siegel* for respondent. Reported below: 10 N. Y. 2d 780, 177 N. E. 2d 59.

Rehearing Denied.

No. 302. HYLAND ET AL. *v.* WATSON ET AL., *ante,* p. 876;

No. 348. MARSHALL *v.* UNITED STATES, *ante,* p. 898; and

No. 353. HILBERT ET AL. *v.* PENNSYLVANIA RAILROAD CO., *ante,* p. 900. Petitions for rehearing denied.

No. 229. DALY *v.* UNITED STATES ET AL., *ante,* p. 831. Motion to dispense with printing petition granted. Motion for leave to file petition for rehearing denied.

No. 470, Misc. MILLER *v.* OBERHAUSER, SUPERINTENDENT, INSTITUTION FOR MEN, *ante,* p. 874. Motion for leave to file petition for rehearing denied.

JANUARY 8, 1962.

Miscellaneous Orders.

No. 8, Original. ARIZONA *v.* CALIFORNIA ET AL. The motion of the Navajo Indian Tribe for reconsideration of its motion for leave to intervene and for order to the United States to show cause why it should not be ordered to account to the Court as to the adequacy of its representation of Navajo interests is denied. THE CHIEF JUSTICE took no part in the consideration or decision of this motion.

No. 61. UNITED GAS PIPE LINE CO. *v.* IDEAL CEMENT CO. ET AL. Appeal from the United States Court of Appeals for the Fifth Circuit. (Question of jurisdiction postponed to hearing on the merits, 366 U. S. 916.) Motion of Stone Container Corporation for leave to file brief, as *amicus curiae,* granted. *Robert B. Wilkins* on the motion. *E. Dixie Beggs, George E. Stone, Jr.* and *Saunders Gregg* for appellant, in opposition. Reported below: 282 F. 2d 574.

No. 138. IDLEWILD BON VOYAGE LIQUOR CORP. *v.* EPSTEIN [FORMERLY ROHAN] ET AL. Certiorari, *ante,* p. 812, to the United States Court of Appeals for the Second Circuit. Motion to substitute Robert E. Doyle, John C. Hart and Benjamin H. Balcom in the place of Grant F. Daniels, Thomas E. Rohan and Samuel M. Birnbaum as parties respondent granted. *Charles H. Tuttle* for movant. Reported below: 289 F. 2d 426.

No. 282. ATLANTIC AND GULF STEVEDORES, INC., *v.* ELLERMAN LINES, LTD., ET AL. Certiorari, *ante,* p. 874, to the United States Court of Appeals for the Third Circuit. Motion of the National Association of Stevedores for leave to file brief, as *amicus curiae,* granted. *Martin J. McHugh* on the motion. *T. E. Byrne, Jr.* for respondents, in opposition. Reported below: 289 F. 2d 201.

Probable Jurisdiction Noted.

No. 513. McNeill, State Hospital Superintendent, *v.* Carroll. Appeal from the United States Court of Appeals for the Second Circuit. Probable jurisdiction noted. *Louis J. Lefkowitz,* Attorney General of New York, *Paxton Blair,* Solicitor General, and *Isadore Siegel,* Assistant Attorney General, for appellant. *Melvin L. Wulf* for appellee. Reported below: 294 F. 2d 117.

No. 336. Burlington Truck Lines, Inc., et al. *v.* United States et al.; and

No. 337. General Drivers & Helpers Union, Local 554, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, *v.* United States et al. Appeals from the United States District Court for the Southern District of Illinois. Probable jurisdiction noted. *David Axelrod, Jack Goodman, Carl L. Steiner* and *Russell B. James* for Burlington Truck Lines, Inc., et al., and *Starr Thomas* and *Roland J. Lehman* for Santa Fe Trail Transportation Co., appellants in No. 336. *David D. Weinberg* for appellant in No. 337. *Robert W. Ginnane* and *I. K. Hay* for the United States et al., and *Robert A. Nelson* for Nebraska Short Line Carriers, Inc., appellees. Reported below: 194 F. Supp. 31.

Certiorari Granted.

No. 491. Hewitt-Robins Incorporated *v.* Eastern Freight-Ways, Inc. C. A. 2d Cir. Certiorari granted. *Harry Teichner* for petitioner. *Milton D. Goldman* and *Wilfred R. Caron* for respondent. Reported below: 293 F. 2d 205.

No. 548. Foman *v.* Davis, Executrix. C. A. 1st Cir. Certiorari granted. *Milton Bordwin* for petitioner. *Roland E. Shaine* and *Richard R. Caples* for respondent. Reported below: 292 F. 2d 85.

Certiorari Denied. (*See also Nos. 546 and 547, ante, p. 350.*)

No. 505. WIRIN *v.* OSTLY, COUNTY CLERK OF LOS ANGELES COUNTY, CALIFORNIA. District Court of Appeal of California, Second Appellate District. Certiorari denied. *A. L. Wirin* and *Fred Okrand* for petitioner. *Harold W. Kennedy* for respondent. Reported below: 191 Cal. App. 2d 710, 13 Cal. Rptr. 31.

No. 519. BEBRY BEDDING CORP. ET AL. *v.* CASTRO CONVERTIBLE CORP. C. A. 2d Cir. Certiorari denied. *A. Robert Theibault* for petitioners. *Daniel L. Morris* for respondent. Reported below: 291 F. 2d 306.

No. 523. UNION EQUITY COOPERATIVE EXCHANGE, INC., *v.* OKLAHOMA STATE BOARD OF EQUALIZATION. Supreme Court of Oklahoma. Certiorari denied. *Frank Carter* for petitioner. *Mac Q. Williamson,* Attorney General of Oklahoma, *Fred Hansen,* First Assistant Attorney General, and *R. O. Ingle,* Assistant Attorney General, for respondent. Reported below: —— P. 2d ——.

No. 530. INDEPENDENT ICE & COLD STORAGE CO., INC., ET AL. *v.* GOLDBERG, SECRETARY OF LABOR. C. A. 5th Cir. Certiorari denied. *Arthur A. Simpson* for petitioners. *Solicitor General Cox, Charles Donahue, Morton Liftin* and *Jacob I. Karro* for respondent. Reported below: 294 F. 2d 186.

No. 538. CLINTON WATCH CO. ET AL. *v.* FEDERAL TRADE COMMISSION. C. A. 7th Cir. Certiorari denied. *Paul G. Annes, Frank E. Gettleman, Arthur Gettleman* and *Franklin M. Lazarus* for petitioners. *Solicitor General Cox, Assistant Attorney General Loevinger, Richard A. Solomon* and *James McI. Henderson* for respondent. Reported below: 291 F. 2d 838.

No. 537. MONFRED ET AL. *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. *Stanley Fleishman* and *Sam Rosenwein* for petitioners. *Thomas B. Finan,* Attorney General of Maryland, and *Clayton A. Dietrich,* Assistant Attorney General, for respondent. Reported below: 226 Md. 312, 173 A. 2d 173.

No. 540. WES CHAPTER, FLIGHT ENGINEERS' INTERNATIONAL ASSN., AFL–CIO, *v.* NATIONAL MEDIATION BOARD ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *I. J. Gromfine, Herman Sternstein* and *Isaac N. Groner* for petitioner. *I. Welch Pogue* and *Hugh W. Darling* for Western Air Lines, Inc., respondent.

No. 543. MONICA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Allen S. Stim* and *Menahem Stim* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 295 F. 2d 400.

No. 549. DRIVERS & CHAUFFEURS LOCAL UNION No. 816, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. *Samuel J. Cohen* for petitioner. *Solicitor General Cox, Stuart Rothman, Dominick L. Manoli, Norton J. Come* and *Allan I. Mendelsohn* for respondent. Reported below: 292 F. 2d 329.

No. 551. FETZER TELEVISION, INC., *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. *John C. Howard* for petitioner. *Solicitor General Cox, Stuart Rothman, Dominick L. Manoli, Norton J. Come* and *Melvin Pollack* for respondent. Reported below: 295 F. 2d 244.

No. 545. McClure *v.* McCausland Motors, Inc. Supreme Court of Pennsylvania. Certiorari denied.

No. 550. Marchitto *v.* Waterfront Commission of New York Harbor. Court of Appeals of New York. Certiorari denied. *Leonard B. Boudin* and *Victor Rabinowitz* for petitioner. *William P. Sirignano* and *Irving Malchman* for respondent.

No. 552. Estate of Gartland *v.* Commissioner of Internal Revenue. C. A. 7th Cir. Certiorari denied. *Sol Goodman* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Meyer Rothwacks* and *Joseph Kovner* for respondent. Reported below: 293 F. 2d 575.

No. 558. Levenson *v.* Mills, U. S. Attorney. C. A. 1st Cir. Certiorari denied. *Harold Rosenwald* for petitioner. *Solicitor General Cox, Assistant Attorney General Orrick* and *Morton Hollander* for respondent. Reported below: 294 F. 2d 397.

No. 560. Traher et ux. *v.* De Havilland Aircraft of Canada, Ltd. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Philip J. Lesser* and *I. Irwin Bolotin* for petitioners. *Frank F. Roberson* and *E. Barrett Prettyman, Jr.* for respondent. Reported below: 111 U. S. App. D. C. 33, 294 F. 2d 229.

No. 565. Aris Gloves, Inc., *v.* United States. United States Court of Customs and Patent Appeals. Certiorari denied. *Raoul Berger* for petitioner. *Solicitor General Cox, Assistant Attorney General Orrick* and *Alan S. Rosenthal* for the United States. Reported below: 48 C. C. P. A. (Cust.) 126, —— F. 2d ——.

No. 561. HOSTETLER ET AL. *v.* BROTHERHOOD OF RAILROAD TRAINMEN ET AL. C. A. 4th Cir. Certiorari denied. *Herbert M. Brune* and *Meyer Fix* for petitioners. *Bernard M. Savage* and *Wayland K. Sullivan* for respondents. Reported below: 287 F. 2d 457.

No. 563. CEDILLO ET AL. *v.* STANDARD OIL CO. C. A. 5th Cir. Certiorari denied. *Ernest Guinn* for petitioners. *J. F. Hulse* for respondent. Reported below: 291 F. 2d 246.

No. 566. FULTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Francis Heisler* and *Jerome Rotenberg* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 295 F. 2d 280.

No. 568. BERRY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Merle L. Silverstein* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 295 F. 2d 192.

No. 570. MCRAE ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. *Jerome B. Rosenthal* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Harry Baum* and *Norman H. Wolfe* for respondent. Reported below: 294 F. 2d 56.

No. 572. COPELAND *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Albert S. Lewis* and *Gerald F. White* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 295 F. 2d 635.

No. 578. HEARST CONSOLIDATED PUBLICATIONS, INC., ET AL. *v.* HOPE. C. A. 2d Cir. Certiorari denied. *James M. McInerney* and *Frederick Bernays Wiener* for petitioners. *Morris K. Siegel* for respondent. Reported below: 294 F. 2d 681.

No. 531. UNA CHAPTER, FLIGHT ENGINEERS' INTERNATIONAL ASSN., AFL–CIO, *v.* NATIONAL MEDIATION BOARD ET AL. Motion of the Railway Labor Executives' Assn. for leave to file brief, as *amicus curiae,* granted. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit denied. *I. J. Gromfine, Herman Sternstein* and *Isaac N. Groner* for petitioner. *Solicitor General Cox, Assistant Attorney General Orrick* and *Morton Hollander* for the National Mediation Board; *Clarence M. Mulholland, Richard R. Lyman* and *Edward J. Hickey, Jr.* for the Railway Labor Executives' Assn.; *Robert L. Stern* for United Air Lines, Inc.; *Samuel J. Cohen* and *Benedict F. Fitzgerald, Jr.* for Air Line Pilots Assn., International; and *Andrew G. Haley* and *J. Roger Wollenberg* for Richard L. Keller et al., respondents. Reported below: 111 U. S. App. D. C. 121, 294 F. 2d 905.

No. 544. SHAFFER ET AL., INDENTURE TRUSTEES, *v.* ANDERSON, TRUSTEE IN REORGANIZATION. Motion to correct and amend title to show the Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc., as a party respondent granted. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied. *M. James Spitzer* for petitioners. *Harry N. Boureau* for respondent. *Solicitor General Cox, Peter A. Dammann* and *David Ferber* for the Securities and Exchange Commission. *Malcolm S. Mason* and *Irwin L. Langbein* for the Protective Committee. Reported below: 292 F. 2d 455.

No. 514. GUESS, ADMINISTRATRIX, *v.* READ. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BLACK is of the opinion certiorari should be granted. *Donald V. Organ* for petitioner. Reported below: 290 F. 2d 622.

No. 28, Misc. BURNS *v.* OHIO. Supreme Court of Ohio. Certiorari denied. Petitioner *pro se*. *C. Watson Hover* and *Harry C. Schoettmer* for respondent.

No. 217, Misc. PRESLEY *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. *George B. Cavanagh* for petitioner. *Thomas B. Finan*, Attorney General of Maryland, and *Robert F. Sweeney*, Assistant Attorney General, for respondent. Reported below: 224 Md. 550, 168 A. 2d 510.

No. 275, Misc. AGNELLO *v.* BRYANT ET AL. Supreme Court of Illinois. Certiorari denied. Petitioner *pro se*. *William G. Clark*, Attorney General of Illinois, for respondents.

No. 365, Misc. MARTIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 292 F. 2d 702.

No. 411, Misc. MILES *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

No. 478, Misc. DREW *v.* MYERS, CORRECTIONAL SUPERINTENDENT. Supreme Court of Pennsylvania. Certiorari denied. Petitioner *pro se*. *Louis F. McCabe* and *James C. Crumlish, Jr.* for respondent.

No. 400, Misc. LAMPE *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Monroe H. Freedman, Alvin Newmyer* and *Lawrence Speiser* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 110 U. S. App. D. C. 69, 288 F. 2d 881.

No. 479, Misc. CAMPISI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Daniel H. Greenberg* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 292 F. 2d 811.

No. 483, Misc. JACKOVICK *v.* RHAY, PENITENTIARY SUPERINTENDENT. Supreme Court of Washington. Certiorari denied.

No. 489, Misc. OREBO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Roderick M. Hills* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 293 F. 2d 747.

No. 490, Misc. GORE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 293 F. 2d 747.

No. 492, Misc. REED *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 225 Md. 566, 171 A. 2d 464.

No. 493, Misc. ALBANESE *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 495, Misc. SHUTTLESWORTH *v.* CITY OF BIRMINGHAM. Court of Appeals of Alabama. Certiorari denied. *Arthur D. Shores* and *Orzell Billingsley, Jr.* for petitioner. *Earl McBee* for respondent. Reported below: —— Ala. App. ——, 130 So. 2d 236.

No. 497, Misc. BISNO ET UX. *v.* HYDE. C. A. 9th Cir. Certiorari denied. Reported below: 290 F. 2d 560.

No. 500, Misc. PHIFER *v.* CITY OF BIRMINGHAM. Court of Appeals of Alabama. Certiorari denied. *Arthur D. Shores* and *Orzell Billingsley, Jr.* for petitioner. *Earl McBee* for respondent. Reported below: —— Ala. App. ——, 130 So. 2d 237.

No. 501, Misc. MCLAIN *v.* CAROLINA POWER & LIGHT CO. C. A. 4th Cir. Certiorari denied. *William E. Chandler* for petitioner. *A. Y. Arledge* and *David W. Robinson* for respondent. Reported below: 286 F. 2d 816.

No. 502, Misc. HOLLEY *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 503, Misc. PLAYER *v.* STEINER, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 292 F. 2d 1.

No. 507, Misc. HOPKINS *v.* ELLIS, CORRECTIONS DIRECTOR. Court of Criminal Appeals of Texas. Certiorari denied.

No. 508, Misc. MURDAUGH *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 512, Misc. KASEY *v.* GOODWYN, WARDEN. C. A. 4th Cir. Certiorari denied. *Alfred Avins* for petitioner. *Solicitor General Cox, Assistant Attorney General Marshall* and *Harold H. Greene* for respondent. Reported below: 291 F. 2d 174.

No. 513, Misc. CHANDLER ET AL. *v.* MARKLEY, WARDEN. C. A. 7th Cir. Certiorari denied. *Alfred Avins* for petitioners. *Solicitor General Cox, Assistant Attorney General Marshall* and *Harold H. Greene* for respondent. Reported below: 291 F. 2d 157.

No. 514, Misc. WALKER *v.* WARDEN, MARYLAND PENITENTIARY. Court of Appeals of Maryland. Certiorari denied.

No. 516, Misc. HENSLER *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 517, Misc. JOHNSON *v.* MYERS, CORRECTIONAL SUPERINTENDENT. Supreme Court of Pennsylvania. Certiorari denied.

No. 518, Misc. KEHL *v.* MYERS, CORRECTIONAL SUPERINTENDENT. Supreme Court of Pennsylvania. Certiorari denied.

No. 520, Misc. LEWIS *v.* ELLIS, CORRECTIONS DIRECTOR. Court of Criminal Appeals of Texas. Certiorari denied.

No. 543, Misc. ERVING *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. *Rex H. Minter* for petitioner. Reported below: See 189 Cal. App. 2d 283, 11 Cal. Rptr. 203.

No. 567, Misc. PONS *v.* REPUBLIC OF CUBA. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Thomas A. Ziebarth* for petitioner. *Victor Rabinowitz* and *Leonard B. Boudin* for respondent. *William Harvey Reeves, Chauncey B. Garver* and *Isadore G. Alk* for the First National City Bank of New York, as *amicus curiae,* in support of petitioner. Reported below: 111 U. S. App. D. C. 141, 294 F. 2d 925.

No. 560, Misc. McAbee *v.* United States. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Raymond W. Bergan* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 111 U. S. App. D. C. 74, 294 F. 2d 703.

No. 600, Misc. Laurelli *v.* United States. C. A. 3d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 293 F. 2d 830.

No. 618, Misc. Poindexter *v.* United States. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 293 F. 2d 329.

No. 619, Misc. Carrell *v.* United States. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 293 F. 2d 329.

No. 620, Misc. Martin *v.* United States. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 293 F. 2d 329.

No. 641, Misc. Branson *v.* United States. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Arthur J. Hilland* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States.

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No. 187, Misc. BAUMGART *v.* MARTIN, WARDEN. Court of Appeals of New York. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted. Petitioner *pro se*. *Louis J. Lefkowitz,* Attorney General of New York, *Paxton Blair,* Solicitor General, and *Winifred C. Stanley,* Assistant Attorney General, for respondent. Reported below: 9 N. Y. 2d 351, 174 N. E. 2d 475.

No. 292, Misc. TREAT *v.* SACHS, WARDEN. Supreme Court of Ohio. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted. Petitioner *pro se*. *Mark McElroy,* Attorney General of Ohio, and *Aubrey A. Wendt,* Assistant Attorney General, for respondent. Reported below: 172 Ohio St. 246, 175 N. E. 2d 86.

Rehearing Denied.

No. 378. SHAFFER ET AL. *v.* UNITED STATES, *ante,* p. 915;

No. 379. SHARE ET AL. *v.* UNITED STATES, *ante,* p. 914;

No. 433, Misc. SHIELDS *v.* UNITED STATES, *ante,* p. 933; and

No. 466, Misc. GLASS *v.* MISSOURI PACIFIC RAILROAD CO., *ante,* p. 944. Petitions for rehearing denied.

No. 551, October Term, 1960. GINSBURG *v.* GINSBURG ET AL., 364 U. S. 934. Motion for leave to file supplemental brief granted. Petition for rehearing of motion to vacate order denying certiorari denied.

No. 15, Misc. O'NEAL *v.* MCGEE, CORRECTIONS DIRECTOR, ET AL., *ante,* p. 840; and

No. 255, Misc. SULLIVAN *v.* DICKSON, WARDEN, *ante,* p. 884. Motions for leave to file petitions for rehearing denied.

No. 370. Poss *v.* Ribicoff, Secretary of Health, Education, and Welfare, *ante*, p. 902. Motion to dispense with printing petition for rehearing granted. Petition for rehearing denied.

January 11, 1962.

Dismissal Under Rule 60.

No. 648, Misc. Winefield *v.* New York et al. On petition for writ of certiorari to the United States Court of Appeals for the Second Circuit. Petition dismissed pursuant to Rule 60 of the Rules of this Court.

January 15, 1962.

Miscellaneous Orders.

No. 439. United States *v.* Borden Company et al. Appeal from the United States District Court for the Northern District of Illinois. (Probable jurisdiction noted, *ante*, p. 924.) The motions of the Borden Company and the Bowman Dairy Company that separate records be printed are denied. In so far as the motions request the filing of separate briefs and separate hearings on the merits, the motions are granted. *Stuart S. Ball* for the Borden Company, and *L. Edward Hart* and *John Paul Stevens* for the Bowman Dairy Company, movants. Reported below: —— F. Supp. ——.

No. 643. Bailey et al. *v.* Patterson, Attorney General of Mississippi, et al. Appeal from the United States District Court for the Southern District of Mississippi. Motion for order limiting the time permitted to file motion to dismiss or affirm, advancing the argument on appeal, etc., denied. *Constance Baker Motley, Jack Greenberg, James M. Nabrit III* and *R. Jess Brown* on the motion. *Thomas H. Watkins* for the City of Jackson et al., appellees, in opposition. Reported below: 199 F. Supp. 595.

No. 552, Misc. THOMAS *v.* UNITED STATES. Motion for leave to file petition for writ of certiorari denied.

No. 550, Misc. LUNSFORD *v.* SHERIFF, HANSFORD COUNTY, TEXAS, ET AL. Motion for leave to file petition for writ of habeas corpus denied.

No. 499, Misc. FITZGERALD *v.* UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, ET AL. Motion for leave to file petition for writ of mandamus denied. *John O'C. FitzGerald pro se. Solicitor General Cox* for respondents.

No. 778, Misc. AN-SON OFFSHORE DRILLING CO. *v.* LEVET, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus and/or prohibition denied. *Eberhard P. Deutsch, Malcolm W. Monroe* and *Eugene Underwood* on the motion.

Probable Jurisdiction Noted or Question Postponed.

No. 257. PAN AMERICAN WORLD AIRWAYS, INC., *v.* UNITED STATES. Appeal from the United States District Court for the Southern District of New York. Further consideration of the question of jurisdiction postponed to the hearing of the case on the merits. *David W. Peck* for appellant. Reported below: 193 F. Supp. 18.

No. 557. FLORIDA LIME & AVOCADO GROWERS, INC., ET AL. *v.* PAUL, DIRECTOR OF DEPARTMENT OF AGRICULTURE OF CALIFORNIA, ET AL. Appeal from the United States District Court for the Northern District of California. Probable jurisdiction noted. *Isaac E. Ferguson* for appellants. *Stanley Mosk,* Attorney General of California, *Walter S. Rountree,* Assistant Attorney General, and *Lawrence E. Doxsee* and *John Fourt,* Deputy Attorneys General, for appellees. Reported below: 197 F. Supp. 780; —— F. Supp. ——.

No. 511. Los Angeles Meat & Provision Drivers Union et al. *v.* United States. Appeal from the United States District Court for the Southern District of California. Probable jurisdiction noted. *David Previant* for appellants. *Solicitor General Cox, Assistant Attorney General Loevinger* and *Richard A. Solomon* for the United States. Reported below: 196 F. Supp. 12.

No. 599. Paul, Director of Department of Agriculture of California, et al. *v.* Florida Lime & Avocado Growers, Inc., et al. Appeal from the United States District Court for the Northern District of California. Probable jurisdiction noted. *Stanley Mosk,* Attorney General of California, *Walter S. Rountree,* Assistant Attorney General, and *Lawrence E. Doxsee* and *John Fourt,* Deputy Attorneys General, for appellants. *Isaac E. Ferguson* for appellees. Reported below: 197 F. Supp. 780; —— F. Supp. ——.

No. 239. Paul, Director of Department of Agriculture of California, et al. *v.* United States. Appeal from the United States District Court for the Northern District of California. Further consideration of the question of jurisdiction is postponed until a hearing of the case on the merits. Counsel are requested to brief and argue, in addition to the merits, the question of this Court's jurisdiction on direct appeal under 28 U. S. C. § 1253; see 28 U. S. C. § 2281. Mr. Justice Black and Mr. Justice Douglas would note jurisdiction since none of the parties has raised the question concerning the propriety of convening a three-judge court in this case and since the convening of a three-judge court was not palpably erroneous. *Stanley Mosk,* Attorney General of California, *Walter S. Rountree,* Assistant Attorney General, *Lawrence E. Doxsee* and *John Fourt,* Deputy Attorneys General, and *Roger Kent* for appellants. *Solicitor General Cox* for the

United States. Briefs of *amici curiae* in support of appellants were filed for the State of Virginia by *Frederick T. Gray,* Attorney General, and *M. Harris Parker,* Assistant Attorney General; for the State of Montana by *Forrest H. Anderson,* Attorney General, and *Geoffrey L. Brazier,* Special Assistant Attorney General; for the State of Maine by *Frank E. Hancock,* Attorney General, and *Thomas W. Tavenner,* Assistant Attorney General; for the State of Mississippi et al. by *Joe T. Patterson,* Attorney General, and *John L. Hatcher;* for the State of Nevada by *Roger D. Foley,* Attorney General, and *Joseph J. Kay, Jr.,* Special Deputy Attorney General; for the State of North Carolina by *T. Wade Bruton,* Attorney General; for the State of Oregon by *Robert Y. Thornton,* Attorney General; for the State of Louisiana by *Jack P. F. Gremillion,* Attorney General; for Consolidated Milk Producers of San Francisco, Inc., by *Gerald D. Marcus;* for the Dairy Institute of California et al. by *Thomas G. Baggot* and *Jesse E. Baskette;* and for Petaluma Cooperative Creamery by *Joseph A. Rattigan.* Reported below: 190 F. Supp. 645.

No. 583. UNITED STATES *v.* PAN AMERICAN WORLD AIRWAYS, INC., ET AL. Appeal from the United States District Court for the Southern District of New York. Further consideration of the question of jurisdiction postponed to the hearing of the case on the merits. *Solicitor General Cox, Assistant Attorney General Loevinger* and *Lionel Kestenbaum* for the United States. Reported below: 193 F. Supp. 18.

Certiorari Granted. (*See also No. 35, ante, p. 399; No. 38, ante, p. 400; and No. 39, ante, p. 401.*)

No. 639. SIMLER *v.* CONNER. C. A. 10th Cir. Certiorari granted. *John B. Ogden* for petitioner. *Peyton Ford* for respondent. Reported below: 295 F. 2d 534.

Certiorari Denied. (*See also No. 149, Misc., ante, p. 402.*)

No. 447. ESTATE OF SMITH ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. *Samuel J. Foosaner* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Harry Baum* for respondent. Reported below: 292 F. 2d 478.

No. 472. FITZGERALD *v.* IGOE, U. S. DISTRICT JUDGE, ET AL. C. A. 7th Cir. Certiorari denied. *John O'C. FitzGerald pro se. Solicitor General Cox* for respondents. Reported below: —— F. 2d ——.

No. 541. SPARTON CORPORATION *v.* EVANS PRODUCTS CO. C. A. 6th Cir. Certiorari denied. *Townsend F. Beaman* and *Raymond J. Patch* for petitioner. *Arthur W. Dickey* and *Cyrus G. Minkler* for respondent. Reported below: 293 F. 2d 699.

No. 577. HAITH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *W. A. Hall, Jr.* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 295 F. 2d 489.

No. 580. FIORELLO *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. *Joseph F. Walsh* for petitioner. Reported below: 36 N. J. 80, 174 A. 2d 900.

No. 581. AN-SON OFFSHORE DRILLING CO. *v.* LEVET, U. S. DISTRICT JUDGE. C. A. 2d Cir. Certiorari denied. *Eberhard P. Deutsch, Malcolm W. Monroe* and *Eugene Underwood* for petitioner. *Edward C. Kalaidjian* for Texas San Juan Oil Corp.

No. 74, Misc. SAMMARCO *v.* NEW YORK. Appellate Division of the Supreme Court of New York, First Judicial Department. Certiorari denied.

No. 585. N. Sims Organ & Co., Inc., et al. *v.* Securities & Exchange Commission. C. A. 2d Cir. Certiorari denied. *Harold Unterberg* for petitioners. Reported below: 293 F. 2d 78.

No. 75, Misc. Willis *v.* United States. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

No. 141, Misc. Crawford *v.* United States et al. C. A. 6th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Marshall* and *Harold H. Greene* for the United States et al.

No. 264, Misc. Beggs *v.* Ellis, Corrections Director. Court of Criminal Appeals of Texas. Certiorari denied. Petitioner *pro se. Will Wilson,* Attorney General of Texas, and *F. J. Maloney, Jr., Leon F. Pesek* and *Marvin F. Sentell,* Assistant Attorneys General, for respondent. Reported below: See 170 Tex. Cr. R. 162, 339 S. W. 2d 527.

No. 475, Misc. Grace *v.* Cunningham, Penitentiary Superintendent. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 476, Misc. Bugely *v.* Riley, District Court Justice, et al. Superior Court of Massachusetts, Suffolk County. Certiorari denied.

No. 522, Misc. Dyson *v.* Maryland. Court of Appeals of Maryland. Certiorari denied. Reported below: 226 Md. 18, 171 A. 2d 505.

No. 402, Misc. CHAPMAN *v.* MOORE, WARDEN, ET AL. Court of Criminal Appeals of Texas. Certiorari denied. Petitioner *pro se*. *Will Wilson,* Attorney General of Texas, and *Irwin R. Salmanson* and *Houghton Brownlee, Jr.,* Assistant Attorneys General, for respondents.

No. 504, Misc. SILIA *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied.

No. 505, Misc. JOHNSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Acting Assistant Attorney General Jones* and *I. Henry Kutz* for the United States. Reported below: 291 F. 2d 908.

No. 515, Misc. KERN *v.* PRUDENTIAL INSURANCE CO. OF AMERICA. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Walter R. Mayne* for respondent. Reported below: 293 F. 2d 251.

No. 523, Misc. KEYS *v.* MCGEE, CORRECTIONS DIRECTOR, ET AL. Supreme Court of California. Certiorari denied.

No. 524, Misc. HANZ *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 525, Misc. MARSHALL *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States.

No. 526, Misc. AURIGEMMA *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 528, Misc. GIVENS *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 529, Misc. BOLAND *v.* MURPHY, WARDEN. Court of Appeals of New York. Certiorari denied.

No. 532, Misc. COOK *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 225 Md. 603, 171 A. 2d 460.

No. 534, Misc. MILLER *v.* NEW MEXICO. Supreme Court of New Mexico. Certiorari denied.

No. 536, Misc. BECKER *v.* WEBCOR, INC. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *William A. Snow* for respondent. Reported below: 289 F. 2d 357.

No. 537, Misc. MORGAN, ALIAS HARRIS, *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *King David* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

No. 551, Misc. WISSENFELD *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 553, Misc. WHITE *v.* INDIANA. Supreme Court of Indiana. Certiorari denied.

No. 555, Misc. MANSFIELD *v.* ELLIS, CORRECTIONS DIRECTOR. Court of Criminal Appeals of Texas. Certiorari denied.

No. 556, Misc. TALBERT *v.* BANNAN ET AL. Supreme Court of Michigan. Certiorari denied.

No. 558, Misc. DEC *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 559, Misc. MCDONALD *v.* IOWA. Supreme Court of Iowa. Certiorari denied.

No. 561, Misc. MARTIN *v.* WARDEN, MARYLAND PENITENTIARY. Court of Appeals of Maryland. Certiorari denied. Reported below: 226 Md. 658, 172 A. 2d 412.

No. 563, Misc. IN RE JOHNSON. C. A. 8th Cir. Certiorari denied. Reported below: 291 F. 2d 910.

No. 564, Misc. BUTCHER *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 565, Misc. JACKSON *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 566, Misc. MILLER *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 571, Misc. RAY *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

No. 572, Misc. GARLOCK *v.* UNITED STATES. Court of Claims. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Orrick* and *John G. Laughlin, Jr.* for the United States.

No. 573, Misc. SNEBOLD *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 575, Misc. ADMIRE *v.* GLADDEN, WARDEN. Supreme Court of Oregon. Certiorari denied.

No. 576, Misc. MONROE *v.* CALIFORNIA STATE LEGISLATURE ET AL. Supreme Court of California. Certiorari denied.

No. 577, Misc. HUNT *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 578, Misc. MAHURIN *v.* SWINK, CIRCUIT COURT JUDGE, ET AL. Supreme Court of Missouri. Certiorari denied.

No. 580, Misc. ABNEY *v.* SACKS, WARDEN. Supreme Court of Ohio. Certiorari denied.

No. 125, Misc. BILOCHE *v.* UNITED STATES. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied without prejudice to future certiorari proceedings to review the further actions of the courts below on petitioner's application to appeal his conviction *in forma pauperis* as suggested by the Solicitor General. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

Rehearing Denied.

No. 47. ST. REGIS PAPER CO. *v.* UNITED STATES, *ante*, p. 208;

No. 431. PARMELEE TRANSPORTATION CO. *v.* KEESHIN ET AL., *ante*, p. 944;

No. 135, Misc. HOGUE *v.* UNITED STATES, *ante*, p. 932;

No. 459, Misc. WALLACH *v.* UNITED STATES, *ante*, p. 935; and

No. 625, Misc. BUTLER *v.* PENNSYLVANIA, *ante*, p. 945. Petitions for rehearing denied.

JANUARY 22, 1962.

Miscellaneous Orders.

No. 242. GLIDDEN COMPANY *v.* ZDANOK ET AL. Certiorari, *ante,* p. 814, to the United States Court of Appeals for the Second Circuit. The motion of *Francis M. Shea, Esquire,* for leave to participate in oral argument on behalf of the United States Court of Claims, as *amicus curiae,* is granted. Reported below: 288 F. 2d 99.

No. 479. WONG SUN ET AL. *v.* UNITED STATES. Certiorari, *ante,* p. 817, to the United States Court of Appeals for the Ninth Circuit. It is ordered that *Edward Bennett Williams, Esquire,* of Washington, D. C., a member of the bar of this Court, be, and he is hereby, appointed to serve as counsel for the petitioners in this case. Reported below: 288 F. 2d 366.

No. 612, Misc. FEATHERINGHAM *v.* OHIO ET AL. Motion for leave to file petition for writ of certiorari denied.

No. 606, Misc. EASTER *v.* ILLINOIS. Motion for leave to file petition for writ of habeas corpus denied.

No. 609, Misc. SAYAD *v.* SCHAEFER, CHIEF JUSTICE, ILLINOIS SUPREME COURT, ET AL. Motion for leave to file petition for writ of prohibition and/or mandamus denied.

Probable Jurisdiction Noted.

No. 553. UNITED STATES *v.* LOEW'S INCORPORATED ET AL.;

No. 555. LOEW'S INCORPORATED ET AL. *v.* UNITED STATES; and

No. 556. C & C SUPER CORP. *v.* UNITED STATES. Appeals from the United States District Court for the

Southern District of New York. Probable jurisdiction noted. *Solicitor General Cox, Assistant Attorney General Loevinger, Lionel Kestenbaum* and *Richard A. Solomon* for the United States. *Louis Nizer, Myles J. Lane* and *Benjamin Melniker* for appellees in No. 553 and appellants in No. 555. *Mervin C. Pollak* for appellant in No. 556. Reported below: 189 F. Supp. 373.

Certiorari Granted. (*See also No. 448, Misc., ante, p. 439.*)

No. 617. KER ET UX. *v.* CALIFORNIA. District Court of Appeal of California, Second Appellate District. Certiorari granted. *Al Matthews* and *Robert W. Stanley* for petitioners. *Stanley Mosk,* Attorney General of California, *William E. James,* Assistant Attorney General, and *George W. Kell,* Deputy Attorney General, for respondent. Reported below: 195 Cal. App. 2d 246, 15 Cal. Rptr. 767.

No. 591. FEDERAL POWER COMMISSION *v.* TENNESSEE GAS TRANSMISSION CO. ET AL.; and

No. 605. CITY OF PITTSBURGH *v.* TENNESSEE GAS TRANSMISSION CO. ET AL. C. A. 5th Cir. Certiorari granted. *Solicitor General Cox, Assistant Attorney General Orrick, Morton Hollander, Ralph S. Spritzer, Howard E. Wahrenbrock, Luke R. Lamb* and *Peter H. Schiff* for petitioner in No. 591. *Charles S. Rhyne* and *Herzel H. E. Plaine* for petitioner in No. 605. *Harry S. Littman, William C. Braden, Jr., Jack Werner, Harold L. Talisman, Brooks E. Smith* and *Herbert W. Bryan* for respondents. *David Stahl,* Attorney General of Pennsylvania, and *Herbert E. Squires* for the Commonwealth of Pennsylvania and the Pennsylvania Public Utility Commission, respectively, as *amici curiae,* in support of petitioners. Reported below: 293 F. 2d 761.

No. 574. Southern Construction Co., Inc., et al. *v.* Pickard, doing business as Pickard Engineering Co. C. A. 6th Cir. Certiorari granted. *Charles C. Trabue, Jr.* and *Harry S. McCowen* for petitioners. Reported below: 293 F. 2d 493.

No. 598. Drake Bakeries Incorporated *v.* Local 50, American Bakery & Confectionery Workers International, AFL–CIO, et al. C. A. 2d Cir. Certiorari granted. *Horace S. Manges* and *Marshall C. Berger* for petitioner. *Paul O'Dwyer* and *Howard N. Meyer* for respondents. Reported below: 294 F. 2d 399.

Certiorari Denied.

No. 506. Willmut Gas & Oil Co. *v.* Federal Power Commission et al. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Bryce Rea, Jr.* for petitioner. *Solicitor General Cox, Assistant Attorney General Orrick, John G. Laughlin, Jr., Kathryn H. Baldwin, Ralph S. Spritzer, Howard E. Wahrenbrock, Luke R. Lamb* and *Peter H. Schiff* for the Federal Power Commission, and *Thomas Fletcher* and *C. Huffman Lewis* for the United Gas Pipe Line Company, respondents. Reported below: 111 U. S. App. D. C. 49, 294 F. 2d 245.

No. 579. United States *v.* McCrory Holding Co. et al. C. A. 5th Cir. Certiorari denied. *Solicitor General Cox* and *Roger P. Marquis* for the United States. *J. R. Wells* for respondents. Reported below: 294 F. 2d 812.

No. 592. Jordan *v.* United States. C. A. 10th Cir. Certiorari denied. *Edward L. Carey* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 295 F. 2d 355.

No. 564. AMERADA PETROLEUM CORP. *v.* FEDERAL POWER COMMISSION. C. A. 10th Cir. Certiorari denied. *Robert E. May* for petitioner. *Solicitor General Cox, Assistant Attorney General Orrick, John G. Laughlin, Jr., Kathryn H. Baldwin, Ralph S. Spritzer, Howard E. Wahrenbrock, Luke R. Lamb* and *Peter H. Schiff* for respondent. Reported below: 293 F. 2d 572.

No. 590. CHESAPEAKE & OHIO RAILWAY CO. *v.* LOUISVILLE & NASHVILLE RAILROAD CO. C. A. 6th Cir. Certiorari denied. *Louis Seelbach* for petitioner. *R. P. Hobson, J. P. Sandidge, H. G. Breetz, W. L. Grubbs* and *Joseph L. Lenihan* for respondent. Reported below: 295 F. 2d 308.

No. 597. RUBBER CORPORATION OF CALIFORNIA *v.* NATIONAL SPONGE CUSHION CO., INC. C. A. 9th Cir. Certiorari denied. *Allan D. Mockabee* for petitioner. *Richard P. Schulze, Louis M. Welsh* and *Robert L. Harrington* for respondent. Reported below: 286 F. 2d 731.

No. 603. MILWAUKEE & SUBURBAN TRANSPORT CORP. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. *Richard R. Teschner* for petitioner. *Solicitor General Cox, Acting Assistant Attorney General Jones* and *Joseph Kovner* for respondent. Reported below: See 283 F. 2d 279.

No. 593. DEGILLIO ET AL. *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied. MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN are of the opinion certiorari should be granted. *Alan J. Stone* for petitioners. *Paul L. Adams,* Attorney General of Michigan, *Joseph B. Bilitzke,* Solicitor General, and *Robert Weinbaum* and *George Mason,* Assistant Attorneys General, for respondent.

No. 573. LEWIS ET AL. *v.* LOWRY, DOING BUSINESS AS LOWRY COAL CO. C. A. 4th Cir. Certiorari denied. THE CHIEF JUSTICE, MR. JUSTICE BLACK and MR. JUSTICE BRENNAN are of the opinion certiorari should be granted. *Val J. Mitch, Harold H. Bacon* and *M. E. Boiarsky* for petitioners. *Robert T. Winston* for respondent. Reported below: 295 F. 2d 197.

No. 392, Misc. BROWN *v.* ARIZONA. Supreme Court of Arizona. Certiorari denied. Petitioner *pro se*. *Robert W. Pickrell,* Attorney General of Arizona, and *Stirley Newell,* Assistant Attorney General, for respondent.

No. 472, Misc. TYSON *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied.

No. 473, Misc. KIMBLE *v.* KEENAN, WORKHOUSE SUPERINTENDENT. Supreme Court of Pennsylvania. Certiorari denied.

No. 589, Misc. KOURY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States.

No. 579, Misc. ARGO *v.* WIMAN, WARDEN. Supreme Court of Alabama. Certiorari denied. Petitioner *pro se*. *MacDonald Gallion,* Attorney General of Alabama, and *John C. Tyson III,* Assistant Attorney General, for respondent.

No. 587, Misc. WILLIAMS *v.* SAHLI, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 6th Cir. Certiorari denied. *George W. Crockett, Jr.* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for respondent. Reported below: 292 F. 2d 249.

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No. 539, Misc. CASTLE *v.* MINNESOTA. Supreme Court of Minnesota. Certiorari denied.

No. 591, Misc. MORELOS *v.* CALIFORNIA STATE LEGISLATURE ET AL. Supreme Court of California. Certiorari denied.

No. 594, Misc. MORGAN *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 111 U. S. App. D. C. 127, 294 F. 2d 911.

No. 597, Misc. WRIGHT *v.* WARDEN, MARYLAND PENITENTIARY. C. A. 4th Cir. Certiorari denied.

No. 599, Misc. WILSON *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 601, Misc. RAU *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 603, Misc. CRUZ *v.* COLORADO. Supreme Court of Colorado. Certiorari denied.

No. 604, Misc. HARRIS *v.* MYERS, CORRECTIONAL SUPERINTENDENT. Supreme Court of Pennsylvania. Certiorari denied.

No. 605, Misc. TRANOWSKI *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 611, Misc. LOPER *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied.

No. 706, Misc. YOUNG *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 294 F. 2d 517.

No. 800, Misc. THORNE *v.* SOUTH CAROLINA. Supreme Court of South Carolina. Certiorari denied. Reported below: 239 S. C. 164, 121 S. E. 2d 623.

Rehearing Denied.

No. 391. LEGGETT ET AL. *v.* UNITED STATES, *ante*, p. 914;

No. 427. VIRGINIA PETROLEUM JOBBERS ASSN. *v.* FEDERAL POWER COMMISSION ET AL., *ante*, p. 940;

No. 502. WISCONSIN BANKERS ASSN. ET AL. *v.* ROBERTSON ET AL., *ante*, p. 938;

No. 536. MOSS, ALIAS MARTINE, *v.* CALIFORNIA, *ante*, p. 947; and

No. 707, Misc. REID *v.* RICHMOND, WARDEN, *ante*, p. 948. Petitions for rehearing denied.

No. 7. KILLIAN *v.* UNITED STATES, *ante*, p. 231. Petition for rehearing and motion for leave to file petition for rehearing from limitation on order granting certiorari denied.

Dismissals Under Rule 60.

No. 620. SICILIANO *v.* DENVER & RIO GRANDE WESTERN RAILROAD CO. On petition for writ of certiorari to the Supreme Court of Utah. Petition dismissed pursuant to Rule 60 of the Rules of this Court. *Clarence M. Beck* and *George M. McMillan* for petitioner. *Dennis McCarthy* and *Grant MacFarlane, Jr.* for respondent. Reported below: 12 Utah 2d 183, 364 P. 2d 413.

No. 650, Misc. WHITLEY *v.* STEINER, WARDEN. On petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit. Petition dismissed pursuant to Rule 60 of the Rules of this Court. *David B. Isbell* and *Stephen J. Pollak* for petitioner. Reported below: 293 F. 2d 895.

FEBRUARY 19, 1962.

Order Appointing Deputy Clerk.

It is ordered that Rodolph deB. Waggaman be, and he hereby is, appointed a Deputy Clerk of this Court.

Miscellaneous Orders.

No. 663, October Term, 1959. GINSBURG *v.* GOURLEY, CHIEF JUDGE, U. S. DISTRICT COURT, 362 U. S. 917. The motion for leave to file supplemental appendix is denied. *Paul Ginsburg* on the motion.

No. 257. PAN AMERICAN WORLD AIRWAYS, INC., *v.* UNITED STATES; and

No. 583. UNITED STATES *v.* PAN AMERICAN WORLD AIRWAYS, INC., ET AL. Appeals from the United States District Court for the Southern District of New York. The motion to advance is denied. *Thomas Kiernan,* for Pan American-Grace Airways, Inc., on the motion. *Lawrence J. McKay* and *Raymond L. Falls, Jr.,* for W. R. Grace & Co., in support of the motion. *David W. Peck,* for Pan American World Airways, Inc., in opposition.

No. 740, Misc. IN RE DISBARMENT OF BIRRELL. Lowell M. Birrell, Esquire, of New York, New York, having resigned as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice in this Court. The rule to show cause heretofore issued is discharged.

No. 652, Misc. MUHLENBROICH *v.* HEINZE, WARDEN;
No. 655, Misc. O'ROURKE *v.* NEW YORK;
No. 673, Misc. EX PARTE SCHLETTE;
No. 690, Misc. JACKSON *v.* HEINZE, WARDEN;
No. 696, Misc. BARNES *v.* MAXWELL, WARDEN;
No. 708, Misc. YARBOROUGH *v.* OHIO ET AL.;
No. 777, Misc. JUSTUS *v.* NEW MEXICO;
No. 803, Misc. ANTIPAS *v.* OVERHOLSER, HOSPITAL SUPERINTENDENT;
No. 808, Misc. PHILLIPS *v.* TAYLOR, WARDEN;
No. 813, Misc. RAYMOND *v.* RANDOLPH ET AL.;
No. 823, Misc. HARRELL *v.* REID, JAIL SUPERINTENDENT;
No. 845, Misc. FURMAN *v.* DEPARTMENT OF PUBLIC SAFETY OF ILLINOIS ET AL.;
No. 865, Misc. RINKES *v.* RHAY, PENITENTIARY SUPERINTENDENT, ET AL.;
No. 904, Misc. SCHMITT *v.* WISCONSIN ET AL.; and
No. 946, Misc. SMITH *v.* NEW MEXICO. Motions for leave to file petitions for writs of habeas corpus denied.

No. 614, Misc. BISHOP *v.* COOPER, SUPERINTENDENT. The motion to substitute Dr. A. A. Birzgalis in the place of Dr. R. E. Cooper as the party respondent is granted. The motion for leave to file petition for writ of habeas corpus is denied.

No. 544, Misc. TAYLOR *v.* CUNNINGHAM, PENITENTIARY SUPERINTENDENT;
No. 636, Misc. SAULSBURY *v.* OHIO;
No. 639, Misc. DRAPER *v.* RHAY, PENITENTIARY SUPERINTENDENT, ET AL.; and
No. 647, Misc. LORENTZEN *v.* RHAY, PENITENTIARY SUPERINTENDENT. Motions for leave to file petitions for writs of habeas corpus denied. Treating the papers submitted as petitions for writs of certiorari, certiorari is denied.

No. 22. SCHOLLE *v.* HARE, SECRETARY OF STATE OF MICHIGAN, ET AL. Appeal from the Supreme Court of Michigan. The motion of Melvin Nord et al. for leave to file brief, as *amici curiae,* is granted. *Harold Norris* on the motion.

No. 468. ENGEL ET AL. *v.* VITALE ET AL. Certiorari, *ante,* p. 924, to the Court of Appeals of New York. The motion of the American Jewish Committee et al. for leave to file brief, as *amici curiae,* is granted. *Theodore Leskes, Sol Rabkin* and *Paul Hartman* on the motion.

No. 616, Misc. CLAYTON *v.* CALIFORNIA. Motion for leave to file petition for writ of certiorari and for other relief denied.

No. 656, Misc. GLENN *v.* KENNEDY. Motion for leave to file petition for writ of habeas corpus and for other relief denied.

No. 731, Misc. INTERNATIONAL ASSOCIATION OF MACHINISTS ET AL. *v.* DUCKWORTH ET AL.;

No. 754, Misc. BRADLEY *v.* KAESS, U. S. DISTRICT JUDGE;

No. 787, Misc. JOHNSON *v.* COURT OF COMMON PLEAS OF CUYAHOGA COUNTY, OHIO, ET AL.;

No. 793, Misc. YOUNG *v.* SMITH, U. S. DISTRICT JUDGE; and

No. 810, Misc. SNEBOLD *v.* HALBERT, U. S. DISTRICT JUDGE. Motions for leave to file petitions for writs of mandamus denied. *Milton Kramer* and *Lester P. Schoene* for petitioners in No. 731, Misc. *E. Smythe Gambrell, W. Glen Harlan* and *Charles A. Moye, Jr.* for Street et al., respondents in No. 731, Misc. Reported below: No. 731, Misc., 217 Ga. 351, 122 S. E. 2d 220.

No. 628, Misc. PENDLETON *v.* ELLIS, CORRECTIONS DIRECTOR, ET AL. The motion to substitute Jack F. Heard in the place of O. B. Ellis as a party respondent is granted. The motion for leave to file petition for writ of habeas corpus is denied.

No. 718, Misc. FERGUSON *v.* MAXWELL, WARDEN. Motions for leave to file petition and supplemental petition for writ of habeas corpus denied. Petitioner *pro se. Mark McElroy,* Attorney General of Ohio, and *Aubrey A. Wendt,* Assistant Attorney General, for respondent.

No. 821, Misc. LUNDBERG *v.* BUCHKOE, WARDEN, ET AL. Motion for leave to file petition for writ of habeas corpus and for other relief denied. Treating the papers submitted as a petition for writ of certiorari, certiorari is denied.

Probable Jurisdiction Noted.

No. 542. GILBERTVILLE TRUCKING CO., INC., ET AL. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the District of Massachusetts. Probable jurisdiction noted. *Henry E. Foley* for appellants. *Solicitor General Cox, Assistant Attorney General Loevinger, Lionel Kestenbaum, Robert W. Ginnane* and *James Y. Piper* for the United States and the Interstate Commerce Commission, respondents. Reported below: 196 F. Supp. 351.

Certiorari Granted.

No. 611. BEST ET AL. *v.* HUMBOLDT PLACER MINING CO. ET AL. C. A. 9th Cir. Certiorari granted. *Solicitor General Cox, Roger P. Marquis* and *A. Donald Mileur* for petitioners. *Charles L. Gilmore* for respondents. Reported below: 293 F. 2d 553.

No. 629. FEDERAL TRADE COMMISSION *v.* SUN OIL CO. C. A. 5th Cir. Certiorari granted. *Solicitor General Cox, Assistant Attorney General Loevinger, Richard A. Solomon, Elliott Moyer* and *James McI. Henderson* for petitioner. *Leonard J. Emmerglick, Henry A. Frye* and *Richard L. Freeman* for respondent. Reported below: 294 F. 2d 465.

No. 632. CLEARY *v.* BOLGER. Motion of respondent for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit granted. *William P. Sirignano* and *Irving Malchman* for petitioner. Reported below: 293 F. 2d 368.

Certiorari Denied. (*See also Misc. Nos. 544, 636, 639, 647 and 821, supra; No. 700, Misc., ante, p. 515; No. 762, Misc., ante, p. 517; No. 805, Misc., ante, p. 517; and No. 835, Misc., ante, p. 516.*)

No. 191. LOWY *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Maurice V. Seligson* and *Myer I. Kleinberg* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Meyer Rothwacks* and *Carolyn R. Just* for respondent. Reported below: 288 F. 2d 517.

No. 587. MITTELMAN *v.* UNITED STATES;

No. 588. PETTIT *v.* UNITED STATES; and

No. 589. MEREDITH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Osmond K. Fraenkel* for petitioner in No. 587. *Frederick W. Scholem* for petitioners in Nos. 588 and 589. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore G. Gilinsky* for the United States. Reported below: 294 F. 2d 928.

No. 504. SCRIPTURE PRESS FOUNDATION *v.* UNITED STATES. Court of Claims. Certiorari denied. *Robert V. Smith* and *Eugene Gressman* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer, John B. Jones, Jr., Harry Baum* and *Harold M. Seidel* for the United States. Reported below: —— Ct. Cl. ——, 285 F. 2d 800.

No. 562. SCHROEDER ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. *Daniel L. Brenner* and *Bert B. Rand* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Robert N. Anderson* for respondent. Reported below: 291 F. 2d 649.

No. 596. JOHNINA, INC., *v.* SPACH, TRUSTEE IN BANKRUPTCY. C. A. 5th Cir. Certiorari denied. *Irving M. Wolff* for petitioner. *Robert R. Frank* for respondent. Reported below: 291 F. 2d 619.

No. 607. GREATER BATON ROUGE PORT COMMISSION ET AL. *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. *George Mathews* for Greater Baton Rouge Port Commission, and *Weston B. Grimes* for Cargill, Incorporated, petitioners. *Solicitor General Cox, Assistant Attorney General Loevinger, Richard A. Solomon, James L. Pimper* and *Robert E. Mitchell* for the United States et al. Reported below: 287 F. 2d 86.

No. 610. SOULE *v.* SOULE. Supreme Court of California. Certiorari denied. *A. M. Mull, Jr.* and *Cecil J. Bishop* for petitioner. *David G. McInnes* for respondent.

No. 613. JACKSON *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 22 Ill. 2d 382, 176 N. E. 2d 803.

No. 616. SINCLAIR ET AL. *v.* CALIFORNIA ET AL. District Court of Appeal of California, Fourth Appellate District. Certiorari denied. *Phill Silver* for petitioners. *Stanley Mosk,* Attorney General, *Howard S. Goldin,* Assistant Attorney General, *Robert E. Reed, R. B. Pegram, N. B. Peek* and *Paul E. Overton* for respondents. Reported below: 194 Cal. App. 2d 397, 15 Cal. Rptr. 493.

No. 618. QUARLES *v.* STATE BAR OF TEXAS ET AL. Supreme Court of Texas. Certiorari denied. *Harry P. Jarvis* for petitioner. *Davis Grant* for respondents. Reported below: — Tex. —, — S. W. 2d —.

No. 622. ABERNATHY ET AL. *v.* PATTERSON, GOVERNOR OF ALABAMA, ET AL. C. A. 5th Cir. Certiorari denied. *Charles S. Conley, Eugene Cotton* and *Richard F. Watt* for petitioners. *Robert E. Steiner III, Sam Rice Baker* and *M. Roland Nachman, Jr.* for respondents. Reported below: 295 F. 2d 452.

No. 624. HENDRICKSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Hiram W. Kwan* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 295 F. 2d 63.

No. 625. DAWSON, U. S. DISTRICT JUDGE, *v.* LUMMUS COMPANY. C. A. 2d Cir. Certiorari denied. *David W. Peck, Ruben Rodriguez-Antongiorgi, Richard deY. Manning* and *Milton Pollack* for petitioner. *John T. Cahill, Lawrence J. McKay* and *Raymond L. Falls, Jr.* for respondent. Reported below: 297 F. 2d 80.

No. 630. SPIERS *v.* CONSOLIDATED COMPANIES, INC., ET AL. Supreme Court of Louisiana. Certiorari denied. *Fred G. Benton* for petitioner. Reported below: 241 La. 1012, 132 So. 2d 879.

No. 626. UNITED STATES EX REL. CARTER-SCHNEIDER-NELSON, INC., *v.* CAMPBELL, DOING BUSINESS AS CAMPBELL CONSTRUCTION & EQUIPMENT CO., ET AL. C. A. 9th Cir. Certiorari denied. *Kenneth E. Lewis* for petitioner. *Arthur M. Bohnert, Jr.* and *George H. Hauerken* for respondents. Reported below: 293 F. 2d 816.

No. 631. MCINTOSH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Orrick, John G. Laughlin, Jr.* and *Sherman L. Cohn* for the United States. Reported below: 295 F. 2d 504.

No. 634. GINSBURG *v.* STERN ET AL. C. A. 3d Cir. Certiorari denied. *Paul Ginsburg pro se*. *Elder W. Marshall* for respondents. Reported below: 295 F. 2d 698.

No. 636. TEITELBAUM *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. *Abraham Teitelbaum pro se*. *Solicitor General Cox, Assistant Attorney General Oberdorfer, I. Henry Kutz* and *Norman H. Wolfe* for respondent. Reported below: 294 F. 2d 541.

No. 640. SWANEE PAPER CORP. *v.* FEDERAL TRADE COMMISSION. C. A. 2d Cir. Certiorari denied. *Henry B. Singer* for petitioner. *Solicitor General Cox, Assistant Attorney General Loevinger, Richard A. Solomon, Irwin A. Seibel* and *James McI. Henderson* for respondent. Reported below: 291 F. 2d 833.

No. 641. LUCAS ET AL. *v.* HAMM ET AL. Supreme Court of California. Certiorari denied. *Reginald G. Hearn* for petitioners. *Robert M. Adams, Jr.* and *Mose Silverman* for Hamm, respondent. Reported below: 56 Cal. 2d 583, 364 P. 2d 685.

No. 637. UNDERWRITERS AT LLOYD'S, LONDON, ET AL. *v.* RAND. C. A. 2d Cir. Certiorari denied. *Frank A. Bull* and *Joseph P. Sullivan* for petitioners. *Leo T. Kissam* for respondent. Reported below: 295 F. 2d 342.

No. 642. WESTERN CONFERENCE OF TEAMSTERS *v.* DAIRY DISTRIBUTORS, INC. C. A. 10th Cir. Certiorari denied. *Clarence M. Beck* and *Herbert S. Thatcher* for petitioner. *Rex J. Hanson* and *Arthur A. Allen, Jr.* for respondent. Reported below: 294 F. 2d 348.

No. 644. CASEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Albert A. Goldfarb* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 295 F. 2d 470.

No. 645. KEMMEL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Stanford Shmukler* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 295 F. 2d 712.

No. 646. GALLEGOS ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *J. B. Tietz* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 295 F. 2d 879.

No. 647. GULLO *v.* GULLO. Circuit Court of Fairfax County, Virginia. Certiorari denied. *Joseph Samuel Gullo* for petitioner. *Bruce E. Lambert* for respondent.

No. 658. IN RE ESTATE OF OVERMYER. Court of Appeals of Ohio, Lucas County. Certiorari denied. *John W. Kitchen* for petitioner.

No. 662. WOERNER ET AL. *v.* CITY OF INDIANAPOLIS. Supreme Court of Indiana. Certiorari denied. *Freeman Bradford* and *James W. Ingles* for petitioners. *Charles S. Rhyne* and *John J. Dillon* for respondent. Reported below: 242 Ind. ——, 177 N. E. 2d 34.

No. 664. KELLY ET AL. *v.* HARTFORD ACCIDENT & INDEMNITY CO. C. A. 5th Cir. Certiorari denied. *Raymond H. Kierr* for petitioners. *Stanley E. Loeb* for respondent. Reported below: 294 F. 2d 400.

No. 667. RICHARDSON, EXECUTRIX, ET AL. *v.* MOORE-MCCORMACK LINES, INC. C. A. 2d Cir. Certiorari denied. *Henry N. Longley, Benjamin H. Siff, Bernard Rolnick* and *Louis R. Harolds* for petitioners. *Eugene Underwood* for respondent. Reported below: 295 F. 2d 583.

No. 575. AMERICAN SURETY CO. OF NEW YORK *v.* SUNDBERG & SONS ET AL. Supreme Court of Washington. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE WHITTAKER are of the opinion that certiorari should be granted. *Edward Gallagher* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer, I. Henry Kutz* and *Harold M. Seidel* for the United States, respondent. Reported below: 58 Wash. 2d 337, 363 P. 2d 99.

No. 627. TODISCO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Maurice J. Hindin* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. *A. L. Wirin* and *Fred Okrand* filed a brief for the American Civil Liberties Union of Southern California, as *amicus curiae,* in support of the petition. Reported below: 298 F. 2d 208.

No. 576. WILLIAMS ET AL. *v.* BALL, DISTRICT ATTORNEY OF ERIE COUNTY. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Peter L. Parrino* for petitioners. Respondent *pro se*. Reported below: 294 F. 2d 94.

No. 649. LAYNE, EXECUTRIX, *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Ralph Hamill* and *John P. Price* for petitioner. *Solicitor General Cox, Assistant Attorney General Orrick* and *Alan S. Rosenthal* for the United States. Reported below: 295 F. 2d 433.

No. 248, Misc. REED *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Petitioner *pro se*. *William G. Clark,* Attorney General of Illinois, for respondent.

No. 395, Misc. DRYMAN, ALIAS VALENTINE, *v.* MONTANA ET AL. Supreme Court of Montana. Certiorari denied. Petitioner *pro se*. *Forrest H. Anderson,* Attorney General of Montana, and *James J. Sinclair,* Assistant Attorney General, for respondents. Reported below: 139 Mont. 141, 361 P. 2d 959.

No. 430, Misc. ORLANDO *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se*. *William I. Siegel* for respondent.

No. 454, Misc. BUCHANAN *v.* MCGEE, CORRECTIONS DIRECTOR, ET AL. C. A. 9th Cir. Certiorari denied.

No. 460, Misc. STOCKMAN *v.* RHAY, PENITENTIARY SUPERINTENDENT. Supreme Court of Washington. Certiorari denied. Petitioner *pro se*. *John J. O'Connell,* Attorney General of Washington, and *Stephen C. Way,* Assistant Attorney General, for respondent.

No. 538, Misc. NUNLEY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 294 F. 2d 579.

No. 541, Misc. BAERCHUS *v.* MYERS, CORRECTIONAL SUPERINTENDENT. Supreme Court of Pennsylvania. Certiorari denied.

No. 542, Misc. CURRY *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall* and *Harold H. Greene* for the United States.

No. 545, Misc. HECTOR *v.* DICKSON, WARDEN, ET AL. Supreme Court of California. Certiorari denied.

No. 546, Misc. SCHAMING *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 547, Misc. HAZEL *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 548, Misc. TORZILLO *v.* GOLDMANN, JUDGE, ET AL. C. A. 3d Cir. Certiorari denied. Petitioner *pro se*. *David D. Furman,* Attorney General of New Jersey, and *Theodore I. Botter,* Assistant Attorney General, for respondents. Reported below: 293 F. 2d 273.

No. 615, Misc. BROOKS *v.* ALABAMA. Supreme Court of Alabama. Certiorari denied. Petitioner *pro se*. *MacDonald Gallion,* Attorney General of Alabama, and *Jerry L. Coe,* Assistant Attorney General, for respondent. Reported below: 272 Ala. 561, 133 So. 2d 198.

No. 617, Misc. CRAIG *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 293 F. 2d 272.

No. 621, Misc. LAYTHAM *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 622, Misc. JONES *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

No. 623, Misc. RUSSELL *v.* MADIGAN, WARDEN. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Harold H. Greene* for respondent.

No. 626, Misc. BELL *v.* WARDEN, MARYLAND PENITENTIARY. C. A. 4th Cir. Certiorari denied.

No. 630, Misc. WHITE ET AL. *v.* CLEMMER, CORRECTIONS DIRECTOR, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioners *pro se*. *Chester H. Gray, Milton D. Korman* and *Hubert P. Pair* for respondents. Reported below: 111 U. S. App. D. C. 145, 295 F. 2d 132.

No. 637, Misc. JOHNSON *v.* CUNNINGHAM, PENITENTIARY SUPERINTENDENT. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 633, Misc. LYLES *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *J. F. Bishop* for the United States.

No. 631, Misc. LANE *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied.

No. 635, Misc. STANMORE *v.* COLORADO. Supreme Court of Colorado. Certiorari denied.

No. 642, Misc. GLASS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States.

No. 643, Misc. OVERMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 645, Misc. WILSON *v.* LEE COUNTY DISTRICT COURT OF IOWA ET AL. Supreme Court of Iowa. Certiorari denied.

No. 646, Misc. FOSTER *v.* KENTUCKY. Court of Appeals of Kentucky. Certiorari denied.

No. 649, Misc. STEWART *v.* ELLIS, CORRECTIONS DIRECTOR. Court of Criminal Appeals of Texas. Certiorari denied.

No. 651, Misc. FLETCHER *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Gerhard P. Van Arkel* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 111 U. S. App. D. C. 192, 295 F. 2d 179.

No. 664, Misc. HERR *v.* RHAY, PENITENTIARY SUPERINTENDENT. Supreme Court of Washington. Certiorari denied.

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No. 657, Misc. TROIANI *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 659, Misc. SLIVA *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied.

No. 661, Misc. FERRAN *v.* ILLINOIS CENTRAL RAILROAD CO. ET AL. C. A. 5th Cir. Certiorari denied. *Felicien Y. Lozes* for petitioner. *Harry B. Kelleher, Stanley E. Loeb* and *J. W. Freels* for respondents. Reported below: 293 F. 2d 487.

No. 662, Misc. CARTER *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 665, Misc. FORTE *v.* WALKER, WARDEN, ET AL. Supreme Court of Louisiana. Certiorari denied.

No. 666, Misc. SMITH *v.* RHAY, PENITENTIARY SUPERINTENDENT. Supreme Court of Washington. Certiorari denied.

No. 667, Misc. NAYLOR *v.* WALKER, WARDEN, ET AL. Supreme Court of Louisiana. Certiorari denied.

No. 668, Misc. MITCHELL *v.* ELLIS, CORRECTIONS DIRECTOR, ET AL. Court of Criminal Appeals of Texas. Certiorari denied.

No. 670, Misc. SMITH *v.* SETTLE, WARDEN. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall* and *Harold H. Greene* for respondent.

No. 672, Misc. OSTER *v.* COLORADO. Supreme Court of Colorado. Certiorari denied.

No. 676, Misc. ELLINGTON *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 677, Misc. BURKETT *v.* HAND, WARDEN, ET AL. Supreme Court of Kansas. Certiorari denied.

No. 679, Misc. BURTON *v.* CALIFORNIA STATE LEGISLATURE ET AL. Supreme Court of California. Certiorari denied.

No. 680, Misc. BUNKLEY *v.* BENNETT, WARDEN. Supreme Court of Iowa. Certiorari denied.

No. 681, Misc. SHARPE *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. Petitioner *pro se*. *Augustine A. Repetto* and *Morgan E. Thomas* for respondent.

No. 683, Misc. KIRSCH *v.* PATE, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied.

No. 684, Misc. HILL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *J. F. Bishop* for the United States.

No. 685, Misc. ROBINSON *v.* PATE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 689, Misc. NEAL *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 693, Misc. RABURN *v.* NEW MEXICO. Supreme Court of New Mexico. Certiorari denied.

No. 695, Misc. DARLING *v.* WILKINS, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 692, Misc. WASHINGTON *v.* CALIFORNIA ADULT AUTHORITY. Supreme Court of California. Certiorari denied.

No. 697, Misc. BAXTER *v.* RHAY, PENITENTIARY SUPERINTENDENT. Supreme Court of Washington. Certiorari denied.

No. 698, Misc. BRYANT *v.* CUNNINGHAM, PENITENTIARY SUPERINTENDENT. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 699, Misc. SCOTT *v.* SUPERIOR COURT OF LOS ANGELES COUNTY. Supreme Court of California. Certiorari denied.

No. 701, Misc. HOWARD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States.

No. 702, Misc. NANCE *v.* WARDEN, MARYLAND PENITENTIARY. Baltimore City Court, Maryland. Certiorari denied.

No. 703, Misc. WALKER ET AL. *v.* WALKER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 295 F. 2d 35.

No. 710, Misc. CAINS *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 711, Misc. BARDE *v.* MICHIGAN ET AL. C. A. 6th Cir. Certiorari denied.

No. 717, Misc. HAWKINS *v.* CALIFORNIA STATE LEGISLATURE ET AL. Supreme Court of California. Certiorari denied.

No. 720, Misc. WILLIAMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 296 F. 2d 216.

No. 723, Misc. BLY *v.* McGEE, CORRECTIONS DIRECTOR, ET AL. Supreme Court of California. Certiorari denied.

No. 724, Misc. SCHNEIDER *v.* SOUTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied.

No. 726, Misc. JAVOR *v.* DUNBAR, CORRECTIONS DIRECTOR. Supreme Court of California. Certiorari denied.

No. 727, Misc. BURNETT *v.* PATE, WARDEN. Supreme Court of Illinois. Certiorari denied. *John R. Snively* for petitioner.

No. 730, Misc. MITCHELL *v.* McGEE, CORRECTIONS DIRECTOR, ET AL. Supreme Court of California. Certiorari denied.

No. 732, Misc. DEVORÉ *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 734, Misc. JONES *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Reported below: 110 U. S. App. D. C. 68, 288 F. 2d 880.

No. 736, Misc. BROWN *v.* DAVIS, WARDEN, ET AL. Court of Appeals of Kentucky. Certiorari denied. Petitioner *pro se*. *John B. Breckinridge,* Attorney General of Kentucky, and *Ray Corns,* Assistant Attorney General, for respondent. Reported below: 351 S. W. 2d 183.

No. 735, Misc. GAITO ET AL. *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied.

No. 739, Misc. BENNETT *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 742, Misc. WILLIAMS *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 744, Misc. DUNCAN *v.* MAINE ET AL. C. A. 1st Cir. Certiorari denied. Petitioner *pro se*. *Frank E. Hancock,* Attorney General of Maine, and *Richard A. Foley,* Assistant Attorney General, for respondents. Reported below: 295 F. 2d 528.

No. 746, Misc. HENSLEY *v.* BOLES, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 747, Misc. BUTLER *v.* YEAGER, PRISON KEEPER. Supreme Court of New Jersey. Certiorari denied.

No. 748, Misc. FREDERICKS *v.* HEINZE, WARDEN, ET AL. Supreme Court of California. Certiorari denied.

No. 749, Misc. DUSKY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *James W. Benjamin* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 295 F. 2d 743.

No. 750, Misc. DAVIS *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied.

No. 759, Misc. JOHNSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States.

No. 752, Misc. IN RE DISBARMENT OF SANTANA. Supreme Court of Puerto Rico. Certiorari denied.

No. 753, Misc. CAMBIANO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 295 F. 2d 13.

No. 755, Misc. BAILEY *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 756, Misc. KNOWLES *v.* GLADDEN, WARDEN. Supreme Court of Oregon. Certiorari denied. Reported below: 227 Ore. 408, 362 P. 2d 763.

No. 757, Misc. WARD *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 758, Misc. LLOYD *v.* COCHRAN, CORRECTIONS DIRECTOR. Supreme Court of Florida. Certiorari denied.

No. 761, Misc. GRANT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox* for the United States. Reported below: 291 F. 2d 746.

No. 764, Misc. JACKSON *v.* WARDEN, MARYLAND PENITENTIARY. Court of Appeals of Maryland. Certiorari denied.

No. 765, Misc. NEWLON *v.* DISTRICT COURT OF POTTAWATTAMIE COUNTY, IOWA. Supreme Court of Iowa. Certiorari denied.

No. 767, Misc. JAMES *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 768, Misc. ELLIS *v.* RAINES, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 294 F. 2d 414.

No. 769, Misc. KIRSCH *v.* PATE, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied.

No. 770, Misc. KRZYWOSZ *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Fourth Judicial Department. Certiorari denied.

No. 771, Misc. JORDAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

No. 772, Misc. MORRIS *v.* JOHNSON. Supreme Court of Texas. Certiorari denied.

No. 774, Misc. BARNETT *v.* JUDGE, MARION COUNTY CRIMINAL COURT. Supreme Court of Indiana. Certiorari denied.

No. 775, Misc. POTTER *v.* LAVALLEE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 776, Misc. CORSO *v.* MURPHY, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 779, Misc. MUMMIANI *v.* NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 781, Misc. SAUNDERS *v.* RICHMOND, WARDEN. Supreme Court of Errors of Connecticut. Certiorari denied.

No. 783, Misc. PELKE *v.* MONTANA ET AL. Supreme Court of Montana. Certiorari denied.

No. 788, Misc. HENSON *v.* WARDEN, MARYLAND PENITENTIARY. Court of Appeals of Maryland. Certiorari denied.

No. 789, Misc. BATEMAN *v.* TINSLEY, WARDEN. Supreme Court of Colorado. Certiorari denied. Petitioner *pro se*. *Duke W. Dunbar*, Attorney General of Colorado, *Frank E. Hickey*, Deputy Attorney General, and *J. F. Brauer*, Assistant Attorney General, for respondent.

No. 790, Misc. ALLEN *v.* ALABAMA ET AL. Supreme Court of Alabama. Certiorari denied. Petitioner *pro se*. *MacDonald Gallion*, Attorney General of Alabama, and *John C. Tyson III*, Assistant Attorney General, for respondents. Reported below: See —— Ala. App. ——, 132 So. 2d 327.

No. 791, Misc. HALE *v.* BOLES, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 794, Misc. RODRIGUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

No. 795, Misc. SNYDER *v.* WARDEN, MARYLAND PENITENTIARY. Court of Appeals of Maryland. Certiorari denied.

No. 796, Misc. KALEC *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 804, Misc. DANIELS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States.

No. 798, Misc. HANLEY *v.* LANGLOIS, WARDEN. Supreme Court of Rhode Island. Certiorari denied.

No. 799, Misc. LIPARI *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 809, Misc. STEELE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States.

No. 816, Misc. ENRIQUEZ ET AL. *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 819, Misc. SCOTT *v.* CITIZENS NATIONAL TRUST & SAVINGS BANK OF LOS ANGELES ET AL. Supreme Court of California. Certiorari denied.

No. 820, Misc. DAVENPORT *v.* SUPERIOR COURT OF CALIFORNIA, FOR LOS ANGELES COUNTY, ET AL. Supreme Court of California. Certiorari denied.

No. 822, Misc. KIRBY *v.* WARDEN, MARYLAND PENITENTIARY. C. A. 4th Cir. Certiorari denied. Reported below: 296 F. 2d 151.

No. 824, Misc. WILLIAMS *v.* MARYLAND. Circuit Court for Prince Georges County, Maryland. Certiorari denied.

No. 826, Misc. SATTERFIELD *v.* COCHRAN, CORRECTIONS DIRECTOR. Supreme Court of Florida. Certiorari denied.

No. 827, Misc. TAYLOR *v.* WARDEN, MARYLAND PENITENTIARY. Circuit Court of Baltimore County, Maryland. Certiorari denied.

No. 829, Misc. HAYNES *v.* VIRGINIA. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 830, Misc. LOCKHART *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 293 F. 2d 314.

No. 831, Misc. TROIANI *v.* FAY, WARDEN. Court of Appeals of New York. Certiorari denied. Petitioner *pro se*. *Louis J. Lefkowitz*, Attorney General of New York, *Paxton Blair*, Solicitor General, *Irving Galt*, Assistant Solicitor General, and *John J. O'Grady*, Assistant Attorney General, for respondent.

No. 833, Misc. LEE *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 838, Misc. BEADLE *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 839, Misc. DIXON *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 846, Misc. FINLEY *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 842, Misc. SORENSEN *v.* ALASKA. Supreme Court of Alaska. Certiorari denied.

No. 847, Misc. LINK *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 295 F. 2d 259.

No. 840, Misc. BARNES *v.* DIRECTOR OF THE PATUXENT INSTITUTION. Court of Appeals of Maryland. Certiorari denied.

No. 850, Misc. HAZEL *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied.

No. 852, Misc. ROTH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Roy Cook* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 295 F. 2d 364.

No. 892, Misc. MORRIS *v.* WILSON ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 295 F. 2d 36.

No. 715, Misc. HAMMONDS *v.* ELLIS, CORRECTIONS DIRECTOR. The motion to substitute Jack Heard in the place of O. B. Ellis as the party respondent is granted. The petition for writ of certiorari to the Court of Criminal Appeals of Texas is denied.

No. 737, Misc. ANDERTEN *v.* UNITED STATES. The motion for leave to amend petition is granted. Petition for writ of certiorari to the Court of Claims denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Orrick* and *John G. Laughlin, Jr.* for the United States.

No. 751, Misc. LANKFORD *v.* INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL–CIO, ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BLACK took no part in the consideration or decision of this application. *Frontis H. Moore* for petitioner. *Louis Sherman* and *Jerome A. Cooper* for respondents. Reported below: 293 F. 2d 928.

No. 825, Misc. LEACH ET AL. *v.* FLORIDA. Supreme Court of Florida. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Thomas A. Larkin* for petitioners. Reported below: 132 So. 2d 329.

No. 934, Misc. CIUCCI *v.* SAIN, SHERIFF OF COOK COUNTY, ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *George N. Leighton* for petitioner. *Daniel P. Ward* and *John T. Gallagher* for respondents.

Rehearing Denied.

No. 42. CAMPBELL, COMMISSIONER OF AGRICULTURE OF GEORGIA, ET AL. *v.* HUSSEY ET AL., *ante,* p. 297;

No. 521. POWELL *v.* NATIONAL SAVINGS & TRUST CO. ET AL., *ante,* p. 946;

No. 552. ESTATE OF GARTLAND *v.* COMMISSIONER OF INTERNAL REVENUE, *ante,* p. 954;

No. 568. BERRY *v.* UNITED STATES, *ante,* p. 955;

No. 570. MACRAE ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE, *ante,* p. 955;

No. 558, Misc. DEC *v.* NEW YORK, *ante,* p. 971; and

No. 567, Misc. PONS *v.* REPUBLIC OF CUBA, *ante,* p. 960. Petitions for rehearing denied.

APPENDIX
CONTAINING AMENDMENTS TO

RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS

RULES OF PRACTICE IN ADMIRALTY AND MARITIME CASES

AND

GENERAL ORDERS IN BANKRUPTCY AND THE OFFICIAL FORMS

PRESCRIBED BY THE
SUPREME COURT OF THE UNITED STATES
EFFECTIVE JULY 19, 1961

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AMENDMENTS TO
RULES OF CIVIL PROCEDURE
FOR THE
UNITED STATES DISTRICT COURTS

Effective July 19, 1961

The following amendments to the Rules of Civil Procedure for the United States District Courts were prescribed by the Supreme Court of the United States on April 17, 1961, pursuant to 28 U. S. C. § 2072. They were reported to Congress by THE CHIEF JUSTICE on April 18, 1961, *post*, p. 1011.

They became effective on July 19, 1961, as provided in amended Rule 86 (d), *post*, p. 1016.

For earlier publications of the Rules of Civil Procedure and the amendments thereto, see 308 U. S. 645, 308 U. S. 642, 329 U. S. 839, 335 U. S. 919, 341 U. S. 959.

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LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 18, 1961.

To the Senate and House of Representatives of the United States of America in Congress assembled:

By direction of the Supreme Court I have the honor to report to the Congress the attached amendments to the Rules of Civil Procedure for the United States District Courts, which have been adopted by the Supreme Court, pursuant to Title 28, U. S. C., Sec. 2072.

Accompanying these amendments is the Report of the Judicial Conference of the United States, submitted to the Court for its consideration pursuant to Title 28, U. S. C., Sec. 331.

MR. JUSTICE DOUGLAS has filed the attached statement.

I am requested to state that MR. JUSTICE BLACK does not join in approval of the Rules because he believes that it would be better for Congress to act directly by legislation on the matters treated by the Rules.

Respectfully,

(Signed) EARL WARREN,
Chief Justice of the United States.

SUPREME COURT OF THE UNITED STATES

MONDAY, APRIL 17, 1961.

ORDERED:

1. That Rules 25, 54, 62, and 86 of the Rules of Civil Procedure and Forms Nos. 2 and 19, be, and they hereby are, amended as hereinafter set forth.

2. That THE CHIEF JUSTICE be authorized to transmit these amendments to Congress in accordance with the provisions of Title 28, U. S. C., Sec. 2072.

MR. JUSTICE BLACK does not join in approval of the Rules because he believes that it would be better for Congress to act directly by legislation on the matters treated by the Rules.

MR. JUSTICE DOUGLAS filed the following statement:

Most of the proposed changes in the *Rules of Civil Procedure* are picayune and harmless, yet hardly worth making apart from any overall revision of the Rules. The change in Rule 25 of the *Rules of Civil Procedure* is, however, a major one; and it seems to me unwise. The policy that a cabinet officer under one administration pursues is often not the policy of the next administration. I would not make the contrary assumption, as does the proposed change. I think the ends served by *Snyder* v. *Buck*, 340 U. S. 15, are proper ones. The Rule in its present form leaves the burden on the claimant who challenges a particular government policy to re-establish that the controversy he had with a predecessor is a live one as respects the successor. The burden should rest there, not with the newcomer to office.

The critical language in Rule 25 (d) that is changed by the proposed amendment derived from 28 U. S. C. (1946 ed.) § 780 which the Revised Code dropped in 1948 because it had been incorporated in Rule 25 (d). See 28

U. S. C. A., p. XXIX. The history of § 780 is reviewed in *Snyder* v. *Buck, supra,* pp. 18–19.

Congress dealt with the matter beginning with the Act of February 8, 1899, 30 Stat. 822. The care with which it approached the problem is shown in H. R. Rep. No. 960, 55th Cong., 2d Sess., p. 2, where it is said:

> "A mandamus proceeding against an officer is based upon the claim that he is personally refusing to perform some duty which the law requires of him in his official character, and if decided against him he is properly liable, personally, for all cost of the proceeding, but if he vacates the office before a decision, it might seem harsh to compel his successor to become a party to the suit and to the costs already accrued without having been guilty of any personal neglect of the official duty involved in the proceeding; but to provide against this seeming harshness your committee propose to amend the bill so as to give the succeeding official an opportunity to perform the official act involved in the proceeding and thereby prevent the survival of the action against himself, and if he fails to do so, he can not then complain of being mulct in costs accruing against his predecessor."

The provision of § 780 that the action might be continued against the successor in office on the requisite showing within the stated period was added by § 11 of the Judiciary Act of 1925. 43 Stat. 936, 941. The last word Congress spoke on the matter reflected the views in a Report submitted by Chief Justice Taft dated March 11, 1922, which explained § 11 in the following words:

> "It will be noted . . . that the provision for substitution is not mandatory, but leaves it to the sound discretion of the court to determine whether there is a substantial need for continuing the cause and obtaining an adjudication of the questions involved. This will tend to restrict the exercise of the right to cases which have a sound basis."

This language was repeated in the Senate Committee Print, 68th Cong., 1st Sess., of an analysis of S. 2060, to Amend the Judicial Code, etc., p. 16. The language so carefully tailored by Congress is now rejected by the professional group who constitute our advisors in these matters. I do not think we should allow a known and established congressional policy to be so readily abrogated.

We said in *Snyder* v. *Buck, supra,* p. 20, that if Rule 25 (d) is to be amended in the manner then urged and now adopted "the amending process is available." Where we have a matter so heavily encrusted with legislative policy, I think any change should be left to Congress.

I, therefore, dissent from the submission to Congress of the proposed amendments to Rule 25 of the *Rules of Civil Procedure* under 28 U. S. C. § 2072. For under that Act the Rules submitted become effective at the expiration of a 90-day period, unless Congress takes contrary action. This machinery seems therefore inappropriate to me for effecting such a basic change in congressional policy as the proposed Rule 25 (d) achieves.

AMENDMENTS TO RULES OF CIVIL PROCEDURE

FOR THE

UNITED STATES DISTRICT COURTS

Rule 25. Substitution of Parties.

(d) Public Officers; Death or Separation from Office.

(1) When a public officer is a party to an action in his official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

(2) When a public officer sues or is sued in his official capacity, he may be described as a party by his official title rather than by name; but the court may require his name to be added.

Rule 54. Judgments; Costs.

(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such

determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

RULE 62. STAY OF PROCEEDINGS TO ENFORCE A JUDGMENT.

(h) STAY OF JUDGMENT AS TO MULTIPLE CLAIMS OR MULTIPLE PARTIES. When a court has ordered a final judgment under the conditions stated in Rule 54 (b), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

RULE 86. EFFECTIVE DATE.

(d) EFFECTIVE DATE OF AMENDMENTS. The amendments adopted by the Supreme Court on April 17, 1961, and transmitted to the Congress on April 18, 1961, shall take effect on July 19, 1961. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.

FORM 2. ALLEGATION OF JURISDICTION.

(a) Jurisdiction founded on diversity of citizenship and amount.

Plaintiff is a [citizen of the State of Connecticut] [2] [corporation incorporated under the laws of the State of Connecticut having its principal place of business in the State of Connecticut] and defendant is a corporation incorporated under the laws of the State of New York—having its principal place of business in a State other than the State of Connecticut. The matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars.

(b) Jurisdiction founded on the existence of a Federal question and amount in controversy.

The action arises under [the Constitution of the United States, Article ...., Section ....]; [the .... Amendment to the Constitution of the United States, Section ....]; [the Act of ....., ... Stat. ....; U. S. C., Title ...., § ....]; [the Treaty of the United States (here describe the treaty)],[3] as hereinafter more fully appears. The matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars.

(c) Jurisdiction founded on the existence of a question arising under particular statutes.

The action arises under the Act of ....., ... Stat. ....; U. S. C., Title ...., § ...., as hereinafter more fully appears.

EXPLANATORY NOTES

1. *Diversity of Citizenship.* U. S. C., Title 28, § 1332 (Diversity of citizenship; amount in controversy; costs), as amended by P. L. 85–554, 72 Stat. 415, July 25, 1958, states in subsection (c) that "For the purposes of this section and section 1441 of this title [removable actions], a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business." Thus if the defendant corporation in Form 2 (a) had its principal place of business in Connecticut, diversity of citizenship would not exist. An allegation regarding the principal place of business of each corporate party must be made in addition to an allegation regarding its place of incorporation.

2. *Jurisdictional Amount.* U. S. C., Title 28, § 1331 (Federal question; amount in controversy; costs) and § 1332 (Diversity of citizenship; amount in controversy; costs), as amended by P. L. 85–554, 72 Stat. 415, July 25, 1958, require that the amount in controversy,

[2] Form for natural person.

[3] Use the appropriate phrase or phrases. The general allegation of the existence of a Federal question is ineffective unless the matters constituting the claim for relief as set forth in the complaint raise a Federal question.

exclusive of interest and costs, be in excess of $10,000. The allegation as to the amount in controversy may be omitted in any case where by law no jurisdictional amount is required. See, for example, U. S. C., Title 28, § 1338 (Patents, copyrights, trade-marks, and unfair competition), § 1343 (Civil rights and elective franchise).

3. *Pleading Venue.* Since improper venue is a matter of defense, it is not necessary for plaintiff to include allegations showing the venue to be proper. See 1 Moore's Federal Practice, par. 0.140 [1.—4] (2d ed. 1959).

FORM 19. MOTION TO DISMISS, PRESENTING DEFENSES OF FAILURE TO STATE A CLAIM, OF LACK OF SERVICE OF PROCESS, OF IMPROPER VENUE, AND OF LACK OF JURISDICTION UNDER RULE 12 (b).

3. To dismiss the action on the ground that it is in the wrong district because (a) the jurisdiction of this court is invoked solely on the ground that the action arises under the Constitution and laws of the United States and (b) the defendant is a corporation incorporated under the laws of the State of Delaware and is not licensed to do or doing business in the Southern District of New York, all of which more clearly appears in the affidavits of K. L. and V. W. hereto annexed as Exhibits C and D, respectively.

4. To dismiss the action on the ground that the court lacks jurisdiction because the amount actually in controversy is less than ten thousand dollars exclusive of interest and costs.

EXPLANATORY NOTES

1. The above motion and notice of motion may be combined and denominated Notice of Motion. See Rule 7 (b).

2. As to paragraph 3, see U. S. C., Title 28, § 1391 (Venue generally), subsections (b) and (c).

3. As to paragraph 4, see U. S. C., Title 28, § 1331 (Federal question; amount in controversy; costs), as amended by P. L. 85–554, 72 Stat. 415, July 25, 1958, requiring that the amount in controversy, exclusive of interest and costs, be in excess of $10,000.

AMENDMENTS TO RULES OF PRACTICE IN ADMIRALTY AND MARITIME CASES

Effective July 19, 1961

The following amendments to the Rules of Practice in Admiralty and Maritime Cases were prescribed by the Supreme Court of the United States on April 17, 1961, pursuant to 28 U. S. C. § 2073, which provides, in part, that "Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first of May, and until the expiration of ninety days after they have been thus reported." They were reported to Congress by THE CHIEF JUSTICE on April 18, 1961, *post*, p. 1020, and they became effective on July 19, 1961.

For earlier publications of the Rules of Practice in Admiralty and Maritime Cases and the amendments thereto, see 3 How. iii, 10 How. v, 13 How. vi, 17 How. vi, 21 How. iv, 1 Black 6, 7 Wall. v, 13 Wall. xii, 103 U. S. xiii, 112 U. S. 743, 130 U. S. 705, 160 U. S. 693, 210 U. S. 544, 254 U. S. 671, 281 U. S. 773, 286 U. S. 572, 307 U. S. 653, 316 U. S. 716, 316 U. S. 717, 328 U. S. 882, 334 U. S. 864.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES

WASHINGTON, D. C.

APRIL 18, 1961.

To the Senate and House of Representatives of the United States of America in Congress assembled:

By direction of the Supreme Court, I have the honor to report to the Congress the attached amendments to the Rules of Practice in Admiralty and Maritime Cases for the Courts of the United States which have been adopted by the Supreme Court, pursuant to Title 28, U. S. C., Sec. 2073.

Accompanying these amendments is the Report of the Judicial Conference of the United States, submitted to the Court for its consideration pursuant to Title 28, U. S. C., Sec. 331.

MR. JUSTICE DOUGLAS has filed the attached statement.

I am requested to state that JUSTICE BLACK does not join in approval of the Rules because he believes that it would be better for Congress to act directly by legislation on the matters treated by the Rules.

Respectfully,

(Signed) EARL WARREN,
Chief Justice of the United States.

SUPREME COURT OF THE UNITED STATES

MONDAY, APRIL 17, 1961

ORDERED:

1. That the Rules of Practice in Admiralty and Maritime Cases be, and they hereby are, amended by including therein Rules 30A, 30B, 30C, 30D, 30E, 30F, 30G, 32D, 58, 59, and 60, and amendments to Rules 32, 32B, and 32C (e), as hereinafter set forth.

2. That THE CHIEF JUSTICE be authorized to transmit these amendments to Congress in accordance with the provisions of Title 28, U. S. C., Sec. 2073.

MR. JUSTICE BLACK does not join in approval of the Rules because he believes that it would be better for Congress to act directly by legislation on the matters treated by the Rules.

MR. JUSTICE DOUGLAS has filed the following statement:

I concur in the amendments proposed to the *Rules of Practice in Admiralty and Maritime Cases.* These amendments reflect a continuing need for discovery which the Court in *Miner* v. *Atlass,* 363 U. S. 641, found absent from existing admiralty procedures. The Rules, as proposed, seem to me to be admirably suited for the purposes stated.

AMENDMENTS TO RULES OF PRACTICE IN ADMIRALTY AND MARITIME CASES

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AMENDMENTS TO RULES OF PRACTICE IN ADMIRALTY AND MARITIME CASES

Rule 30A

DEPOSITIONS PENDING ACTION

(a) WHEN DEPOSITIONS MAY BE TAKEN. Any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes. After commencement of the action the deposition may be taken without leave of court, except that leave, granted with or without notice, must be obtained if notice of the taking is served by the plaintiff within 20 days after commencement of the action. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 32D. Depositions shall be taken only in accordance with these rules, except that depositions may also be taken under and used in accordance with sections 863, 864, and 865 of the Revised Statutes (see note preceding 28 U. S. C. § 1781). The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

(b) SCOPE OF EXAMINATION. Unless otherwise ordered by the court as provided by Rule 30E (b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any

books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.

(c) EXAMINATION AND CROSS-EXAMINATION. Examination and cross-examination of deponents may proceed as permitted at the trial under the provisions of Rule 46A.

(d) USE OF DEPOSITIONS. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(2) The deposition of a party or of any one who at the time of taking the deposition was an officer, director, or managing agent of a public or private corporation, partnership, or association which is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: 1, that the witness is dead; or 2, that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or 3, that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or 4, that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or 5, upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts.

Substitution of parties does not affect the right to use depositions previously taken; and, when an action in any court of the United States or of any state has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor.

(e) OBJECTIONS TO ADMISSIBILITY. Subject to the provisions of Rule 30G (c), objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(f) EFFECT OF TAKING OR USING DEPOSITIONS. A party shall not be deemed to make a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use by an adverse party of a deposition as described in paragraph (2) of subdivision (d) of this rule. At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party.

Rule 30B

DEPOSITIONS BEFORE ACTION OR PENDING APPEAL

(a) BEFORE ACTION.

(1) PETITION. A person who desires to perpetuate his own testimony or that of another person regarding any matter that may be cognizable in any court of the United

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States may file a verified petition in the United States district court in the district of the residence of any expected adverse party.

The petition shall be entitled in the name of the petitioner and shall show: 1, that the petitioner expects to be a party to an action cognizable in a court of the United States but is presently unable to bring it or cause it to be brought, 2, the subject matter of the expected action and his interest therein, 3, the facts which he desires to establish by the proposed testimony and his reasons for desiring to perpetuate it, 4, the names or a description of the persons he expects will be adverse parties and their addresses so far as known, and 5, the names and addresses of the persons to be examined and the substance of the testimony which he expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

(2) Notice and Service. The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least 20 days before the date of hearing the notice shall be served either within or without the district or state in the manner provided in Rule 4 (d) of the Federal Rules of Civil Procedure for service of summons; but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served in the manner provided in Rule 4 (d) of the Federal Rules of Civil Procedure, an attorney who shall represent them, and, in case they are not otherwise represented, shall cross-examine the deponent. If any expected adverse party is a minor or incompetent the provisions of Rule 17 (c) of the Federal Rules of Civil Procedure apply.

(3) ORDER AND EXAMINATION. If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. The depositions may then be taken in accordance with these rules, and the court may make orders of the character provided for by Rules 32 and 32A. For the purpose of applying these rules to depositions for perpetuating testimony, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.

(4) USE OF DEPOSITION. If a deposition to perpetuate testimony is taken under these rules or if, although not so taken, it would be admissible in evidence in the courts of the state in which it is taken, it may be used in any action involving the same subject matter subsequently brought in a United States district court, in accordance with the provisions of Rule 30A (d).

(b) PENDING APPEAL. If an appeal has been taken from a judgment of a district court or before the taking of an appeal if the time therefor has not expired, the district court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in the district court. In such case the party who desires to perpetuate the testimony may make a motion in the district court for leave to take the depositions, upon the same notice and service thereof as if the action was pending in the district court. The motion shall show (1) the names and addresses of persons to be examined and the substance of the testimony which he expects to elicit from each; (2) the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken and may

make orders of the character provided for by Rules 32 and 32A, and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in these rules for depositions taken in actions pending in the district court.

(c) PERPETUATION BY ACTION. This rule does not limit the power of a court to entertain an action to perpetuate testimony.

Rule 30C

PERSONS BEFORE WHOM DEPOSITIONS MAY BE TAKEN

(a) WITHIN THE UNITED STATES. Within the United States or within a territory or insular possession subject to the dominion of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held, or before a person appointed by the court in which the action is pending. A person so appointed has power to administer oaths and take testimony.

(b) IN FOREIGN COUNTRIES. In a foreign state or country depositions shall be taken (1) on notice before a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or (2) before such person or officer as may be appointed by commission or under letters rogatory. A commission or letters rogatory shall be issued only when necessary or convenient, on application and notice, and on such terms and with such directions as are just and appropriate. Officers may be designated in notices or commissions either by name or descriptive title and letters rogatory may be addressed "To the Appropriate Judicial Authority in [here name the country]".

(c) DISQUALIFICATION FOR INTEREST. No deposition shall be taken before a person who is a relative or employee

or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action.

Rule 30D

STIPULATIONS REGARDING THE TAKING OF DEPOSITIONS

If the parties so stipulate in writing, depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions.

Rule 30E

DEPOSITIONS UPON ORAL EXAMINATION

(a) Notice of Examination: Time and Place. A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. On motion of any party upon whom the notice is served, the court may for cause shown enlarge or shorten the time.

(b) Orders for the Protection of Parties and Deponents. After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the action is pending may make an order that the deposition shall not be taken, or that it may be taken only at some designated place other than that stated in the notice, or that it may be taken only on written interrogatories, or that certain matters shall not be inquired into, or that the

scope of the examination shall be limited to certain matters, or that the examination shall be held with no one present except the parties to the action and their officers or counsel, or that after being sealed the deposition shall be opened only by order of the court, or that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression.

(c) RECORD OF EXAMINATION; OATH; OBJECTIONS. The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by some one acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically and transcribed unless the parties agree otherwise. All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties served with notice of taking a deposition may transmit written interrogatories to the officer, who shall propound them to the witness and record the answers verbatim.

(d) MOTION TO TERMINATE OR LIMIT EXAMINATION. At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the dep-

osition as provided in subdivision (b). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. In granting or refusing such order the court may impose upon either party or upon the witness the requirement to pay such costs or expenses as the court may deem reasonable.

(e) Submission To Witness; Changes; Signing. When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed, unless on a motion to suppress under Rule 30G (d) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(f) Certification and Filing by Officer; Copies; Notice of Filing.

(1) The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. He shall then securely seal the deposition in an envelope indorsed with the title of the action and marked "Deposition of [here insert name of witness]" and shall promptly

file it with the court in which the action is pending or send it by registered mail to the clerk thereof for filing.

(2) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

(3) The party taking the deposition shall give prompt notice of its filing to all other parties.

(g) FAILURE TO ATTEND OR TO SERVE SUBPOENA; EXPENSES.

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

Rule 30F

DEPOSITIONS OF WITNESSES UPON WRITTEN INTERROGATORIES

(a) SERVING INTERROGATORIES; NOTICE. A party desiring to take the deposition of any person upon written interrogatories shall serve them upon every other party with a notice stating the name and address of the person who is to answer them and the name or descriptive title and address of the officer before whom the deposition is to be taken. Within 10 days thereafter a party so served may serve cross interrogatories upon the party proposing to take the deposition. Within 5 days thereafter the

latter may serve redirect interrogatories upon a party who has served cross interrogatories. Within 3 days after being served with redirect interrogatories, a party may serve recross interrogatories upon the party proposing to take the deposition.

(b) OFFICER TO TAKE RESPONSES AND PREPARE RECORD. A copy of the notice and copies of all interrogatories served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Rule 30E (c), (e), and (f), to take the testimony of the witness in response to the interrogatories and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the interrogatories received by him.

(c) NOTICE OF FILING. When the deposition is filed the party taking it shall promptly give notice thereof to all other parties.

(d) ORDERS FOR THE PROTECTION OF PARTIES AND DEPONENTS. After the service of interrogatories and prior to the taking of the testimony of the deponent, the court in which the action is pending, on motion promptly made by a party or a deponent, upon notice and good cause shown, may make any order specified in Rule 30E which is appropriate and just or an order that the deposition shall not be taken before the officer designated in the notice or that it shall not be taken except upon oral examination.

Rule 30G

EFFECT OF ERRORS AND IRREGULARITIES IN DEPOSITIONS

(a) AS TO NOTICE. All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(b) AS TO DISQUALIFICATION OF OFFICER. Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the depositions begins or as soon

thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(c) As to Taking of Deposition.

(1) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(2) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(3) Objections to the form of written interrogatories submitted under Rule 30F are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other interrogatories and within 3 days after service of the last interrogatories authorized.

(d) As to Completion and Return of Deposition. Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 30E and 30F are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

Rule 32

DISCOVERY AND PRODUCTION OF DOCUMENTS AND THINGS FOR INSPECTION, COPYING, OR PHOTOGRAPHING

Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the

provisions of Rule 30E (b), the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 30A (b) and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated relevant object or operation thereon within the scope of the examination permitted by Rule 30A (b). The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just.

Rule 32B

ADMISSION OF FACTS AND OF GENUINENESS OF DOCUMENTS

(a) Request for Admission. After commencement of an action a party may serve upon any other party a written request for the admission by the latter of the genuineness of any relevant documents described in and exhibited with the request or of the truth of any relevant matters of fact set forth in the request. If a plaintiff desires to serve a request within 10 days after commencement of the action leave of court, granted with or without notice, must be obtained. Copies of the documents shall be served with the request unless copies have already been furnished. Each of the matters of which an admission is requested shall be deemed admitted unless, within a period designated in the request, not less than 10 days after service thereof or within such shorter or longer time as the court may allow on motion and notice, the party to whom the request is directed serves upon the party requesting

the admission either (1) a sworn statement denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully admit or deny those matters or (2) written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part, together with a notice of hearing the objections at the earliest practicable time. If written objections to a part of the request are made, the remainder of the request shall be answered within the period designated in the request. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party deny only a part or a qualification of a matter of which an admission is requested, he shall specify so much of it as is true and deny only the remainder.

(b) EFFECT OF ADMISSION. Any admission made by a party pursuant to such request is for the purpose of the pending action only and neither constitutes an admission by him for any other purpose nor may be used against him in any other proceeding.

Rule 32C

REFUSAL TO MAKE DISCOVERY: CONSEQUENCES

* * * * *

(e) FAILURE TO RESPOND TO LETTERS ROGATORY. A subpoena may be issued as provided in Title 28 U. S. C., § 1783, under the circumstances and conditions therein stated.

* * * * *

Rule 32D

SUBPOENA

(a) FOR ATTENDANCE OF WITNESSES; FORM; ISSUANCE. Every subpoena shall be issued by the clerk under the seal of the court, shall state the name of the court and the title

of the action, and shall command each person to whom it is directed to attend and give testimony at a time and place therein specified. The clerk shall issue a subpoena, or a subpoena for the production of documentary evidence, signed and sealed but otherwise in blank, to a party requesting it, who shall fill it in before service.

(b) For Production of Documentary Evidence. A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

(c) Service. A subpoena may be served by the marshal, by his deputy, or by any other person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and by tendering to him the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the United States or an officer or agency thereof, fees and mileage need not be tendered.

(d) Subpoena for Taking Depositions; Place of Examination.

(1) Proof of service of a notice to take a deposition as provided in Rules 30E (a) and 30F (a) constitutes a sufficient authorization for the issuance by the clerk of the district court for the district in which the deposition is to be taken of subpoenas for the persons named or described therein. The subpoena may command the person to whom it is directed to produce designated books, papers, documents, or tangible things which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 30A (b), but in that

event the subpoena will be subject to the provisions of subdivision (b) of Rule 30E and subdivision (b) of this Rule 32D.

(2) A resident of the district in which the deposition is to be taken may be required to attend an examination only in the county wherein he resides or is employed or transacts his business in person, or at such other convenient place as is fixed by an order of court. A nonresident of the district may be required to attend only in the county wherein he is served with a subpoena, or within 40 miles from the place of service, or at such other convenient place as is fixed by an order of court.

(e) SUBPOENA FOR A HEARING OR TRIAL.

(1) At the request of any party subpoenas for attendance at a hearing or trial shall be issued by the clerk of the district court for the district in which the hearing or trial is held. A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the district, or at any place without the district that is within 100 miles of the place of the hearing or trial specified in the subpoena; and, when a statute of the United States provides therefor, the court upon proper application and cause shown may authorize the service of a subpoena at any other place.

(2) A subpoena directed to a witness in a foreign country shall issue under the circumstances and in the manner and be served as provided in Title 28, U. S. C., § 1783.

(f) CONTEMPT. Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued.

Rule 58

SUMMARY JUDGMENT

(a) FOR CLAIMANT. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of

20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Rule 59

DECLARATORY JUDGMENTS

The procedure for obtaining a declaratory judgment pursuant to Title 28 U. S. C., § 2201, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39 of the Federal Rules of Civil Procedure. The existence of another adequate remedy

does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.

Rule 60

EFFECTIVE DATE OF AMENDMENTS

(a) The amendments adopted by the Supreme Court on April 17, 1961, and reported to the Congress on April 18, 1961, shall take effect on July 19, 1961. They are applicable to all proceedings in suits brought after they take effect and also to all further proceedings in suits then pending, except to the extent that in the opinion of the court their application in a particular suit pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.

(b) Depositions taken prior to July 20, 1960, which would have been authorized if Rules 30A through 30G had been in force at the time such depositions were taken, and any depositions heretofore taken by consent of the parties, may be used for any of the purposes specified in Rule 30A (d).

649690 O–62–54

AMENDMENTS TO GENERAL ORDERS IN BANKRUPTCY AND THE OFFICIAL FORMS

Effective July 19, 1961

The following amendments to the General Orders and Official Forms in Bankruptcy were prescribed by the Supreme Court of the United States on May 29, 1961. They became effective on July 19, 1961, as provided in paragraph 3 of the Court's order, *post*, p. 1044.

For earlier publications of the General Orders and Official Forms in Bankruptcy and amendments thereto, see 172 U. S. 653, 199 U. S. 618, 210 U. S. 567, 239 U. S. 623, 244 U. S. 641, 267 U. S. 613, 268 U. S. 712, 280 U. S. 617, 283 U. S. 870, 286 U. S. 573, 288 U. S. 619, 288 U. S. 655, 295 U. S. 771, 297 U. S. 735, 298 U. S. 695, 300 U. S. 689, 302 U. S. 787, 302 U. S. 788, 303 U. S. 671, 303 U. S. 626, 305 U. S. 677, 310 U. S. 661, 331 U. S. 871, 355 U. S. 969.

SUPREME COURT OF THE UNITED STATES

MAY 29, 1961

ORDERED:

1. That Official Forms in Bankruptcy Nos. 14, 21, 63, 64, 65, 66, 67, 68 and 69, be, and they hereby are, abrogated.

2. That General Orders 1, 5, 9, 24, 48, 49, 51, 52, 53, 54, 55 and 56, and Forms Nos. 7, 17A, 17B, 20, 22, 28, 29, 30, 31, 35, 37, 40, 41, 42A, 42B, 43A, 43B, 44, 48, 49, 50, 51, 52, 55, 58 and 60 of the Official Forms in Bankruptcy be, and they hereby are, amended and established to read as hereinafter set forth.

3. That this order shall take effect on Wednesday, July 19, 1961, and shall govern all proceedings then pending to which its provisions are applicable, except to the extent that in the opinion of the court its application to such proceedings would not be practicable or would work injustice, in which event the General Orders and Forms in Bankruptcy heretofore established shall apply.

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AMENDMENTS TO GENERAL ORDERS IN BANKRUPTCY

1

Docket

The clerk of the district court shall keep a docket, in which the cases shall be entered and numbered in the order in which they are commenced. It shall contain an entry of the filing of the petition and of the action of the judge or clerk of the district court thereon; of the reference of the case, if any reference is made, to a referee; of the transmission of the referee's certified record of the proceedings; and of all proceedings in the case except those duly entered on the referee's docket. The clerk's docket shall be arranged in a manner convenient for reference, and shall at all times be open to public inspection. If the proceeding is brought under section 77, or under chapter IX, X, XI, XII, or XIII, of the Act, the docket shall so indicate.

The referee, in each case referred to him, shall keep a docket sheet of all proceedings before him substantially in the manner indicated by Form No. 70. The referee's docket shall at all times be open to public inspection. The original referee's docket sheet shall be transmitted to the clerk of the district court for preservation by him when the case is closed.

5

Form of Petitions and Other Papers

Paragraphs 2, 4, and 5

(2) Petitioners in involuntary proceedings for adjudication, whose claims rest upon assignment or transfer from other persons, shall annex to each of the triplicate

petitions a copy of all instruments of assignment or transfer, and an affidavit setting forth the true consideration paid for the assignment or transfer of such claims and stating that the petitioners are the bona fide holders and legal and beneficial owners thereof and whether or not they were purchased for the purpose of instituting bankruptcy proceedings.

(4) Proceedings shall be entitled "In Bankruptcy," "In Proceedings for the Reorganization of a Railroad," "In Proceedings for a Composition by a Public Debtor," "In Proceedings for the Reorganization of a Corporation," "In Proceedings for an Arrangement," "In Proceedings for a Real Property Arrangement," or "In Proceedings for a Wage Earner Plan," as the case may be.

(5) In proceedings under chapter X, XI, XII, or XIII of the Act, unless and until the debtor is adjudicated a bankrupt, he shall be referred to as a "debtor." In proceedings under chapter IX, the debtor shall be referred to as the "petitioner."

9

LIST OF CREDITORS IN INVOLUNTARY BANKRUPTCY

In all cases of involuntary bankruptcy in which the bankrupt is absent or cannot be found, it shall be the duty of the petitioning creditor or creditors to file, within five days after the date of the adjudication or within such additional time as may be allowed by the court, a list of the names and places of residence or business of all the creditors of the bankrupt, according to the best information of the petitioning creditor or creditors.

24

LIST OF PROVED CLAIMS AND INTERESTS

The person with whom proofs of claim or of interest are filed shall maintain open to inspection a list of the claims and interests proved against the estate, with the names and addresses of the owners thereof, as given by them. The list of claims or of interests shall be maintained sub-

stantially in the manner indicated by Form No. 71. The original list shall be transmitted to the clerk of the district court for preservation by him when the case is closed.

48

PROCEEDINGS UNDER CHAPTER XI OF THE ACT

PARAGRAPH 3

(3) The clerk of the district court or, in the case of a petition filed after a reference, the referee after such reference, shall forthwith transmit to the District Director of Internal Revenue for the district in which the proceedings are brought a copy of each petition filed under section 321 or 322 of the Act.

49

PROCEEDINGS UNDER SECTION 77 OF THE ACT

PARAGRAPH 6

(6) The clerk of the district court in which proceedings under section 77 are brought shall forthwith transmit to the Secretary of the Treasury copies of (a) any petition filed under subsection (a) of section 77; (b) the answer, if any, of the railroad corporation; (c) the order approving or dismissing the petition; (d) any order appointing or removing a trustee; (e) any application by a trustee for authority to issue certificates, and any order authorizing or refusing to authorize such issuance; (f) any order determining the time within which, and the manner in which, claims may be filed or evidenced and allowed, and the division of creditors and stockholders into classes; (g) any plan of reorganization filed with the court; (h) any order approving a plan, or referring the proceedings back to the commission for further action; (i) the order confirming a plan; (j) any application for allowances of compensation and expenses, and any order making or refusing to make such allowances; (k) the order dismissing the proceedings; (l) the final decree; (m) any opinion of the court, or report of a special master, with respect to the

matters above enumerated; and (n) such other papers filed in the proceedings as the Secretary of the Treasury may request or the court may direct to be transmitted to him: *Provided*, That if the Secretary of the Treasury shall determine that the transmission of any such papers is unnecessary, he shall so notify the clerk, whereupon the clerk may dispense with the transmittal of further papers.

The clerk shall also transmit to the District Director of Internal Revenue for the district in which the proceedings are pending a copy of any petition filed under subsection (a) of section 77.

51

ANCILLARY RECEIVERSHIPS LIMITED

No ancillary receiver shall be appointed in any district court of the United States in any bankruptcy proceeding pending in any other district of the United States except (1) upon the application of the primary receiver, or (2) upon the application of any party in interest with the consent of the primary receiver, or by leave of a judge of the court of original jurisdiction. No application for the appointment of such ancillary receiver shall be granted unless the application contains a detailed statement of the facts showing the necessity for such appointment. The application shall be signed by the party in interest, or the primary receiver, or by an agent of the party in interest or primary receiver specifically authorized in writing for that purpose and having knowledge of the facts. Such authorization shall be attached to the application.

52

PROCEEDINGS UNDER CHAPTER X OF THE ACT

PARAGRAPH 3

(3) The clerk of the district court shall forthwith transmit to the District Director of Internal Revenue for the district in which the proceedings are brought a copy of each petition filed under section 127 or 128 of the Act.

53

BOND OF DESIGNATED DEPOSITORY UNDER SECTION 61

PARAGRAPHS 1 AND 2

(1) The bond required of a banking institution designated as a depository shall be given with an authorized fidelity or bonding company as surety, or with approved individual sureties who are residents of the judicial district in which the court of bankruptcy or the banking institution is located, and two of whom are neither officers nor directors of the institution designated as a depository: *Provided,* That the judge may, in accordance with the provisions of and the authority conferred in Title 6, United States Code, section 15, accept the deposit of the securities therein designated, in lieu of a surety or sureties upon such bond.

(2) The condition of bonds hereafter given shall be substantially to the effect that the banking institution, so designated, shall well and truly account for and pay over all moneys deposited with it as such depository, and shall pay out such moneys only as provided by the Act and applicable general orders and court rules, and shall abide by all orders of the court in respect of such moneys, and shall otherwise faithfully perform all duties pertaining to it as such depository: *Provided,* That no security in the form of a bond or otherwise shall be required in the case of such part of the deposits as are insured under Title 12, United States Code, section 1821.

54

PROCEEDINGS UNDER CHAPTER XII OF THE ACT

PARAGRAPH 3

(3) The clerk of the district court shall forthwith transmit to the District Director of Internal Revenue for the district in which the proceedings are brought a copy of each petition filed under section 421 or 422 of the Act.

55

PROCEEDINGS UNDER CHAPTER XIII OF THE ACT

(1) This general order shall apply to proceedings under chapter XIII of the Act.

(2) The general orders in bankruptcy shall, insofar as they are not inconsistent with the provisions of chapter XIII or of this general order, apply to proceedings under chapter XIII: *Provided,* That General Orders 14, 18 and 28 shall not apply to such proceedings unless an order shall be entered directing that bankruptcy be proceeded with pursuant to the provisions of the Act.

(3) All papers filed shall be accompanied by such copies as the clerk or referee may require to enable him to comply with the provisions of the Act and of this general order.

(4) Each proof of claim shall, unless the court is satisfied from its other allegations that the claim is not based upon money loaned or upon any bond, note or other obligation, contain proof that the claim is free from usury as defined by the laws of the place where the debt was contracted.

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RULES BY COURTS OF BANKRUPTCY

Each court of bankruptcy, by action of a majority of the judges thereof, may from time to time make and amend rules governing its practice in proceedings under the Act not inconsistent with the Act or with these general orders. Copies of rules and amendments so made by any court of bankruptcy shall, upon their promulgation, be distributed by the clerk of the district court as follows: Two copies to the Library of the Supreme Court of the United States, Washington 25, D. C.; two copies to the Director of Libraries, Department of Justice, Washington 25, D. C.; two copies to the Comptroller General, General Accounting Office, Washington 25, D. C.; and four copies to the Administrative Office of the United States Courts, Washington 25, D. C.

AMENDMENTS TO
OFFICIAL FORMS IN BANKRUPTCY

Form No. 7

Answer of Alleged Bankrupt

A petition having been filed in the above court on the ..... day of ....., 19..., praying that your respondent, the alleged bankrupt above named, be adjudged a bankrupt, your respondent now appears and answers the petition as follows:

1. Respondent admits the allegations contained in paragraphs ..... of the petition.

2. Respondent denies each and every allegation contained in paragraphs ..... of the petition.

Wherefore your respondent prays that a hearing may be had on the petition and this answer, and that the issues presented thereby may be determined by the court [*or* by a jury].

Dated at ....., this ..... day of ....., 19...

Signed: .....,
Respondent [or *Attorney for Respondent*].
Address: .....

Form No. 14

Order of Reference in Judge's Absence

(Abrogated)

Form No. 17A

Order for First Meeting of Creditors

[*To be used in cases where the filing fees are to be paid in installments*]

At ....., in this district, on the ..... day of ....., 19...

It is ordered that the first meeting of creditors herein be held at ....., in ....., on ....., 19..., at ..... o'clock ... m., ... time.

It is further ordered that the above-named bankrupt [*or, in proceedings under chapter XIII*, debtor] be and appear before a referee of this court at the time and place appointed for the first meeting of creditors for the purpose of being examined as provided by the Bankruptcy Act.

.....,
Referee in Bankruptcy.

FORM No. 17B

NOTICE OF FIRST MEETING OF CREDITORS

[*To be used in cases where the filing fees are to be paid in installments*]

To the creditors of ....., of ....., a bankrupt:

Notice is hereby given that ..... has been duly adjudged a bankrupt on a petition filed by him on ....., 19..., and that the first meeting of his creditors will be held at ....., in ....., on ....., 19..., at ..... o'clock .... m., ... time, at which place and time the creditors may attend, prove their claims, appoint a trustee, appoint a committee of creditors, examine the bankrupt, and transact such other business as may properly come before the meeting.

Dated at ....., ..., 19...

....., *Referee in Bankruptcy.*

FORM No. 20

ORDER APPROVING APPOINTMENT OF TRUSTEE

OR

APPOINTMENT OF TRUSTEE BY REFEREE

At ....., in this district, on the ..... day of ....., 19...

[*If the creditors elect a trustee, use paragraph (1) and strike paragraph (2); if the creditors fail to elect a trustee, use paragraph (2) and strike paragraph (1).*]

(1) ....., of ....., having been appointed trustee of the estate of the above-named bankrupt by his creditors, as provided in the Bankruptcy Act,

It is ordered that the appointment of ....., as trustee be, and it hereby is, approved, and the amount of his bond is fixed at ..... dollars.

(2) The creditors of the above-named bankrupt having failed to appoint a trustee as provided in the Bankruptcy Act, ..., of ....., is hereby appointed trustee of the estate of the bankrupt, and the amount of his bond is fixed at ..... dollars.

....., *Referee in Bankruptcy.*

FORM No. 21

APPOINTMENT OF TRUSTEE BY REFEREE

(Abrogated)

FORM No. 22

NOTICE TO TRUSTEE OF HIS APPOINTMENT AND, IF FIXED, NOTICE OF TIME FIXED FOR FILING OBJECTIONS TO DISCHARGE

To ....., of .....:

I hereby notify you that you were duly appointed trustee of the estate of the above-named bankrupt at the first meeting of creditors, on the ..... day of ....., 19..., and I have approved the appointment. The amount of your bond as such trustee has been fixed at ..... dollars. You are required to notify me forthwith of your acceptance or rejection of the trust.

[*If the time for the filing of objections to the bankrupt's discharge has been fixed, add the following paragraph; if the time has not been fixed, strike out the paragraph.*]

You are further notified that the ..... day of ....., 19..., has been fixed as the last day for the filing of objections to the discharge of the bankrupt.

Dated at ....., the ..... day of ....., 19...

.....,
Referee in Bankruptcy.

FORM No. 28

PROOF OF CLAIM BY INDIVIDUAL

....., of No. ..... Street, in ....., County of ....., State of ....., says:

1. That ....., the above-named bankrupt, was at and before the filing by [*or* against] him of the petition for adjudication of bankruptcy, and still is, justly and truly indebted [*or* liable] to the undersigned in the sum of ..... dollars.

2. That the consideration of this debt [*or* liability] is as follows:
.....
.....

3. That no part of the debt [*or* liability] has been paid, except
.....
.....

4. That there are no set-offs or counterclaims to the debt [*or* liability] except .....
.....

5. That this creditor does not hold, and has not, nor has any person by his order, or to his knowledge or belief, for his use, had or received, any security or securities for the debt [*or* liability] except .....
.....

6. [*If the debt or liability is founded upon an instrument of writing*] That the instrument upon which the debt [*or* liability] is

founded is attached hereto [*or* is lost or destroyed, as set forth in the affidavit attached hereto].

7. [*If the debt is founded upon an open account*] That the debt was [*or* will become] due on ..... [*or* that the average due date thereof is .....]; that no note or other negotiable instrument has been received for such account or any part thereof [*or* that the debt is evidenced by a note [*or* other negotiable instrument], which is attached hereto]; and that no judgment has been rendered thereon, except .....

.....

Dated at ....., this ..... day of ....., 19...

....., *Creditor.*

Penalty For Presenting Fraudulent Claim.—Fine of not more than $5,000 or imprisonment for not more than five years or both—Title 18, U. S. C., § 152.

FORM No. 29

PROOF OF CLAIM BY CORPORATION

....., of ....., in the County of ....., State of ....., says:

1. That he is the ..... of ....., a corporation organized and existing under the laws of the State of ....., and carrying on business at No. ..... Street, in ....., County of ....., State of ....., and is duly authorized to make this proof of claim on its behalf.

2. That ....., the above-named bankrupt, was at and before the filing by [*or* against] him of the petition for adjudication of bankruptcy, and still is, justly and truly indebted [*or* liable] to this corporation in the sum of ..... dollars.

3. That the consideration of this debt [*or* liability] is as follows:

.....

.....

4. That no part of the debt [*or* liability] has been paid, except

.....

.....

5. That there are no set-offs or counterclaims to the debt [*or* liability], except .....

.....

6. That the corporation does not hold, and has not, nor has any person by its order, or to the knowledge or belief of the undersigned, for its use, had or received, any security or securities for the debt [*or* liability] except .....

.....

7. [*If the debt or liability is founded upon an instrument of writing*] That the instrument upon which the debt [*or* liability] is founded is attached hereto [*or* is lost or destroyed, as set forth in the affidavit attached hereto].

8. [*If the debt is founded upon an open account*] That the debt was [*or* will become] due on ..... [*or* that the average due date thereof is .....]; that no note or other negotiable instrument has been received for such account or any part thereof [*or* that the debt is evidenced by a note [*or* other negotiable instrument], which is attached hereto]; and that no judgment has been rendered thereon, except .....

.....

Dated at ....., this ..... day of ....., 19...

.....,

as .....,

of or for the corporation.

Penalty For Presenting Fraudulent Claim.—Fine of not more than $5,000 or imprisonment for not more than five years or both—Title 18, U. S. C., § 152.

FORM No. 30

PROOF OF CLAIM BY PARTNERSHIP

....., of ....., in the County of ....., State of ....., says:

1. That he is a member of ....., a copartnership composed of the undersigned and ....., of ....., in the County of ....., State of ....., and carrying on business at No. ..... Street, in ....., County of ....., State of .....

2. That ....., the above-named bankrupt, was at and before the filing by [*or* against] him of the petition for adjudication of bankruptcy, and still is, justly and truly indebted [*or* liable] to this copartnership in the sum of ..... dollars.

3. That the consideration of this debt [*or* liability] is as follows:

.....

.....

4. That no part of the debt [*or* liability] has been paid, except

.....

.....

5. That there are no set-offs or counterclaims to the debt [*or* liability], except .....

.....

6. That the copartnership does not hold, and has not, nor has any person by its order, or to the knowledge or belief of the undersigned,

for its use, had or received, any security or securities for the debt [*or* liability], except .....

.....

7. [*If the debt or liability is founded upon an instrument of writing*] That the instrument upon which the debt [*or* liability] is founded is attached hereto [*or* is lost or destroyed, as set forth in the affidavit attached hereto].

8. [*If the debt is founded upon an open account*] That the debt was [*or* will become] due on ..... [*or* that the average due date thereof is .....]; that no note or other negotiable instrument has been received for such account or any part thereof [*or* that the debt is evidenced by a note [*or* other negotiable instrument], which is attached hereto]; and that no judgment has been rendered thereon, except .....

.....

.....

Dated at ....., this ..... day of ....., 19...

.....

Penalty For Presenting Fraudulent Claim.—Fine of not more than $5,000 or imprisonment for not more than five years or both—Title 18, U. S. C., § 152.

FORM No. 31

PROOF OF CLAIM BY AGENT OR ATTORNEY

....., of ....., in the County of ....., State of ....., says:

1. That he is the attorney [*or* agent] of ....., of No. ..... Street, in ....., County of ....., State of .....; that the undersigned is duly authorized by .... to make this proof of claim in his behalf; and that proof cannot be made by ..... in person because .....

.....

.....

.....

2. That ....., the above-named bankrupt, was at and before the filing by [*or* against] him of the petition for adjudication of bankruptcy, and still is, justly and truly indebted [*or* liable] to ..... in the sum of ..... dollars.

3. That the consideration of this debt [*or* liability] is as follows:

.....

.....

4. That no part of the debt [*or* liability] has been paid, except

.....

.....

5. That there are no set-offs or counterclaims to the debt [*or* liability], except .....

.....

6. That ..... does not hold, and has not, nor has any person by his order, or to the knowledge or belief of the undersigned, for his use, had or received, any security or securities for the debt [*or* liability], except .....

.....

7. [*If the debt or liability is founded upon an instrument of writing*] That the instrument upon which the debt [*or* liability] is founded is attached hereto [*or* is lost or destroyed, as set forth in the affidavit attached hereto].

8. [*If the debt is founded upon an open account*] That the debt was [*or* will become] due on ..... [*or* that the average due date thereof is .....]; that no note or other negotiable instrument has been received for such account or any part thereof [*or* that the debt is evidenced by a note [*or* other negotiable instrument], which is attached hereto]; and that no judgment has been rendered thereon, except .....

.....

Dated at ....., this ..... day of ....., 19...

.....

Penalty For Presenting Fraudulent Claim.—Fine of not more than $5,000 or imprisonment for not more than five years or both—Title 18, U. S. C., § 152.

FORM NO. 35

APPLICATION FOR SALE OF REAL ESTATE

This application of ....., trustee of the estate of the above-named bankrupt, respectfully represents:

1. A portion of the bankrupt's estate consists of the following described real estate: [*Here describe the property and any mortgages or liens thereon, and give its appraised or estimated value.*]

2. In the judgment of this applicant it will be for the benefit of the estate to sell this property at public auction, upon the following terms and conditions: .....

.....

Wherefore this applicant prays that he may be authorized to make sale at public auction of the real estate as aforesaid.

Dated at ....., this ..... day of ....., 19...

Signed: .....,

Trustee [or *Attorney for Trustee*].

Address: .....

FORM No. 37

APPLICATION FOR REDEMPTION OF PROPERTY

This application of ....., trustee of the estate of the above-named bankrupt, respectfully represents:

1. A portion of the bankrupt's estate consists of the following described property: [*Here describe the property and give its appraised or estimated value.*]

2. This property is subject to the following described mortgage [*or* lien *or* pledge]: .....
.....

3. In the judgment of this applicant it will be for the benefit of the estate to redeem this property from this mortgage [*or* lien *or* pledge], for the following reasons: .....
.....

Wherefore this applicant prays that he may be authorized to pay out of the assets of the estate the sum of ..... dollars, being the amount of the mortgage [*or* lien *or* pledge], to redeem the property therefrom.

Dated at ....., this ..... day of ....., 19...

Signed: .....,
Trustee [or *Attorney for Trustee*].
Address: .....

FORM No. 40

REPORT OF TRUSTEE IN NO ASSET CASE

To ....., Referee in Bankruptcy:

....., of ....., in the County of ....., State of ....., trustee of the estate of the above-named bankrupt, respectfully reports that he has neither received any property nor paid any moneys on account of this estate; that he has made diligent inquiry into the whereabouts of property belonging to the estate; and that there are no assets in the estate over and above the exemptions claimed by, and by him set aside to, the bankrupt.

Wherefore he prays that this report be approved, and that he be discharged of his trust.

Dated at ....., this ..... day of ....., 19...

Signed: .....,
Trustee [or *Attorney for Trustee*].
Address: .....

FORM No. 41

APPLICATION FOR DISCHARGE

This application of ....., the bankrupt above-named, a corporation organized and existing under the laws of the State of ....., respectfully represents that on the ..... day of ....., 19..., a petition was filed by [*or* against] it, praying that it be adjudged a bankrupt under the Bankruptcy Act; that on the ..... day of ....., 19..., it was duly adjudged a bankrupt under the Act; that it has duly surrendered all its property and rights of property, and has fully complied with all the requirements of the Act, and with all the orders of the court pertaining to its bankruptcy.

Wherefore this applicant prays that it may be decreed by this court to have a discharge from all debts provable against its estate under the Act, except such debts as are excepted by the Act from such discharge.

Dated at ....., this ..... day of ....., 19...

Signed: .....,
as .....,
of or for the corporation.
Address: .....

FORM No. 42A

ORDER FIXING TIME FOR FILING OBJECTIONS TO DISCHARGE

[*To be used in cases where the filing fees have been paid in installments*]

At ....., in this district, on the ..... day of ....., 19...

It is ordered that the ..... day of ....., 19..., be, and it hereby is, fixed as the last day for the filing of objections to the discharge of the bankrupt.

.....,
Referee in Bankruptcy.

FORM No. 42B

ORDER FOR FIRST MEETING OF CREDITORS

AND

ORDER FIXING TIME FOR FILING OBJECTIONS TO DISCHARGE

[*To be used in cases where the filing fees were paid in full at the time of filing*]

At ....., in this district, on the ..... day of ....., 19...

It is ordered that the first meeting of creditors herein be held at ....., in ....., on ....., 19..., at ..... o'clock ... m., ... time.

It is further ordered that the above-named bankrupt be and appear before a referee of this court at the time and place appointed for the first meeting of creditors for the purpose of being examined as provided by the Bankruptcy Act.

And it is further ordered that the ..... day of ....., 19..., be, and it hereby is, fixed as the last day for the filing of objections to the discharge of the bankrupt.

....., *Referee in Bankruptcy.*

FORM No. 43A

NOTICE OF ORDER FIXING TIME FOR FILING OBJECTIONS TO DISCHARGE

[*To be used in cases where the filing fees have been paid in installments*]

To the creditors of the above-named bankrupt and other parties in interest:

Notice is hereby given that on the ..... day of ....., 19..., an order was made in the above-entitled proceeding, fixing the ..... day of ....., 19..., as the last day for the filing of objections to the discharge of the bankrupt.

Dated this ..... day of ....., 19...

....., *Referee in Bankruptcy.*

FORM No. 43B

NOTICE OF FIRST MEETING OF CREDITORS AND NOTICE OF ORDER FIXING TIME FOR FILING OBJECTIONS TO DISCHARGE

[*To be used in cases where the filing fees were paid in full at the time of filing*]

To the creditors of ....., of ....., a bankrupt, and to other parties in interest:

Notice is hereby given that ..... has been duly adjudged a bankrupt on a petition filed by [*or* against] him on ....., 19..., and that the first meeting of his creditors will be held at ....., in ....., on ....., 19..., at ..... o'clock ... m., ... time, at which place and time the creditors may attend, prove their claims, appoint a trustee, appoint a committee of creditors, examine the bankrupt, and transact such other business as may properly come before the meeting.

Notice is also hereby given that on the ..... day of ....., 19..., an order was made in the above-entitled proceeding, fixing the

..... day of ....., 19..., as the last day for the filing of objections to the discharge of the bankrupt.

Dated this ..... day of ....., 19...

....., *Referee in Bankruptcy.*

FORM No. 44

SPECIFICATION OF OBJECTIONS TO DISCHARGE

....., of ....., in the County of ....., State of ....., the trustee of the estate [*or* a creditor] of the above-named bankrupt [*or* the United States attorney for this district [*or* the attorney designated by the Attorney General of the United States], having examined into the acts and conduct of the bankrupt and being satisfied that probable grounds exist for the denial of the discharge of the bankrupt and that the public interest so warrants], does hereby oppose the granting to the bankrupt of a discharge from his debts, and specifies the following as grounds of objection: [*Here specify in separately numbered paragraphs the grounds of objection.*]

Dated at ....., this ..... day of ....., 19...

Signed: .....,
Trustee [or *creditor* or *attorney*].
Address: .....

FORM No. 48

ORIGINAL PETITION IN PROCEEDINGS UNDER CHAPTER XI

To the Honorable ....., Judge of the District Court of the United States for the ..... District of .....:

The petition of ....., of ....., in the County of ....., State of ....., by occupation a ..... [*or* engaged in the business of .....], respectfully represents:

1. Your petitioner has had his principal place of business [*or* has resided, *or* has had his domicile] at ....., within the above judicial district, for the six months immediately preceding the filing of this petition [*or* for a longer portion of the six months immediately preceding the filing of this petition than in any other judicial district].

2. No bankruptcy proceeding, initiated by a petition by or against your petitioner, is now pending.

3. Your petitioner is insolvent [*or* unable to pay his debts as they mature], and proposes the following arrangement with his unsecured creditors: .....
.....

[*or* intends to propose an arrangement pursuant to the provisions of chapter XI of the Bankruptcy Act.]

4. The schedule hereto annexed, marked Schedule A, and verified by your petitioner's oath, contains a full and true statement of all his debts, and, so far as it is possible to ascertain, the names and places of residence or of business of his creditors, and such further statements concerning his debts as are required by the provisions of the Bankruptcy Act.

5. The schedule hereto annexed, marked Schedule B, and verified by your petitioner's oath, contains an accurate inventory of all his property, real and personal, and such further statements concerning his property as are required by the provisions of the Act.

6. The statement hereto annexed, marked Exhibit 1, and verified by your petitioner's oath, contains a full and true statement of all his executory contracts, as required by the provisions of the Act.

7. The statement hereto annexed, marked Exhibit 2, and verified by your petitioner's oath, contains a full and true statement of his affairs, as required by the provisions of the Act.

Wherefore your petitioner prays that proceedings may be had upon this petition in accordance with the provisions of chapter XI of the Bankruptcy Act.

....., *Petitioner.*

Address: .....

....., *Attorney.*

Address: .....

State of .....
County of ..... } *ss.*

I, ..., the petitioner named in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

....., *Petitioner.*

Subscribed and sworn to before me this ..... day of ....., 19...

.....,

.....

[*Official character.*]

[Schedules to be annexed corresponding with schedules under Form No. 1.]

FORM NO. 49

NOTICE OF MEETING OF CREDITORS IN PROCEEDINGS UNDER CHAPTER XI

To ....., of ....., his creditors, and to other parties in interest:

Notice is hereby given that on the ..... day of ....., 19..., ... filed a petition in this court proposing [*or* stating that he intends to propose] an arrangement with his unsecured creditors under the provisions of chapter XI of the Bankruptcy Act, and that a meeting of his creditors will be held at ....., in ....., on the ..... day of ....., 19..., at ..... o'clock ... m., ... time, at which place and time the creditors may attend, prove their claims, nominate a trustee, appoint a committee of creditors, examine the debtor, present written acceptances of the proposed arrangement, if filed, and transact such other business as may properly come before the meeting.

Annexed hereto are, if filed, a copy of the proposed arrangement, a summary of the liabilities of the debtor as shown by his schedules, and a summary of the appraisal of the property of the debtor [*or* a summary of the assets of the debtor as shown by his schedules].

[*If appropriate, the following may be added:*]

Notice is also hereby given that the application to confirm the arrangement shall be filed with this court on or before the ..... day of ....., 19...; and that the hearing on the confirmation and objections thereto, if any, will be held at ....., in ....., on the ..... day of ....., 19..., at ..... o'clock ... m., ... time.

Dated this ..... day of ....., 19...

.....,
Referee in Bankruptcy.

FORM NO. 50

APPLICATION FOR CONFIRMATION OF AN ARRANGEMENT UNDER CHAPTER XI

To ....., Referee in Bankruptcy:

....., the above-named debtor, respectfully represents that the arrangement under chapter XI of the Bankruptcy Act proposed on the ..... day of ....., 19..., has been duly accepted, in accordance with the provisions of this chapter, and that the deposit required by the provisions of the chapter and by the arrangement, amounting to the sum of ..... dollars, has been deposited, subject to the order of the court, in ....., of ....., the depository designated by the court.

Wherefore the debtor prays that the arrangement be confirmed by the court.

Dated at ....., this ..... day of ....., 19...

Signed: .....,

Debtor [or *Attorney for Debtor*].

Address: .....

FORM NO. 51

ORDER CONFIRMING AN ARRANGEMENT UNDER CHAPTER XI (WHERE ALL AFFECTED CREDITORS HAVE ACCEPTED)

At ....., in this district, on the ..... day of ....., 19...

A petition having been filed herein on the ..... day of ....., 19..., by the above-named debtor, and an arrangement under chapter XI of the Bankruptcy Act having been proposed and thereafter accepted in writing by all creditors affected thereby at a meeting of creditors held on the ..... day of ....., 19..., of which meeting ..... days' notice by mail was given to the debtor, to his creditors, and to other parties in interest; and

It appearing that the deposit required by the provisions of this chapter and by the arrangement, amounting to the sum of ..... dollars, has been deposited, subject to the order of the court, in ....., of ....., the depository designated by the court, and that the arrangement and its acceptance are in good faith and have not been made or procured by any means, promises, or acts forbidden by the Act;

It is ordered that the arrangement be, and it hereby is, confirmed.

.....,

Referee in Bankruptcy.

FORM NO. 52

ORDER CONFIRMING AN ARRANGEMENT UNDER CHAPTER XI (WHERE LESS THAN ALL AFFECTED CREDITORS HAVE ACCEPTED)

At ....., in this district, on the ..... day of ....., 19...

The application of ....., the above-named debtor, for confirmation of the arrangement under chapter XI of the Bankruptcy Act proposed by the debtor having been heard and duly considered; and due notice of the hearing having been given [*here state the manner of notice*]; and [*here state the proceedings, whether there was no opposition, or if opposed, what proceedings were had*]; and

It appearing that the arrangement has been duly accepted in accordance with the provisions of this chapter, and that the deposit required by the provisions of the chapter and by the arrangement, amounting to the sum of ..... dollars, has been deposited, subject to the order of the court, in ....., of ....., the depository designated by the court; and

It further appearing that the provisions of the chapter have been complied with; that the arrangement is for the best interests of the creditors of said debtor; that the arrangement is fair and equitable, and feasible; that the debtor has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to the discharge of a bankrupt; and that the proposal and its acceptance are in good faith and have not been made or procured by any means, promises, or acts forbidden by the Act.

It is ordered that the arrangement be, and it hereby is, confirmed.

....,
Referee in Bankruptcy.

FORM No. 55

APPLICATION FOR CONFIRMATION OF AN ARRANGEMENT UNDER CHAPTER XII

To ....., Referee in Bankruptcy:

....., the above-named debtor, respectfully represents that the arrangement under chapter XII of the Bankruptcy Act, proposed in the petition filed by him on the ..... day of ....., 19..., has been duly accepted, in accordance with the provisions of this chapter, and that the deposit required by the provisions of the chapter and by the arrangement, amounting to the sum of ..... dollars, has been deposited, subject to the order of the court, in ....., of ....., the depository designated by the court.

Wherefore the debtor prays that the arrangement be confirmed by the court.

Dated at ....., this ..... day of ....., 19...

Signed: .....,
Debtor [or *Attorney for Debtor*].
Address: .....

FORM No. 58

ORIGINAL PETITION IN PROCEEDINGS UNDER CHAPTER XIII

To the Honorable ....., Judge of the District Court of the United States for the ..... District of .....:

The petition of ....., of ....., in the County of ....., State of ....., by occupation a ....., and employed by ....., respectfully represents:

1. Your petitioner has resided [*or* has had his domicile] at ....., within the above judicial district, for the six months immediately preceding the filing of this petition [*or* for a longer portion of the six months immediately preceding the filing of this petition than in any other judicial district].

2. Your petitioner is an individual whose principal income is derived from wages, salary or commissions.

3. No bankruptcy proceeding, initiated by a petition by or against your petitioner, is now pending.

4. Your petitioner is insolvent [*or* unable to pay his debts as they mature], and desires to effect a composition [*or* an extension of time to pay his debts, *or* a composition and an extension of time to pay his debts] out of his future earnings.

5. The schedule hereto annexed, marked Schedule A, and verified by your petitioner's oath, contains a full and true statement of all his debts, and, so far as it is possible to ascertain, the names and places of residence or of business of his creditors, and such further statements concerning said debts as are required by the provisions of the Bankruptcy Act.

6. The schedule hereto annexed, marked Schedule B, and verified by your petitioner's oath, contains an accurate inventory of all his property, real and personal, and such further statements concerning said property as are required by the provisions of the Act.

7. The statement hereto annexed, marked Exhibit 1, and verified by your petitioner's oath, contains a full and true statement of all his executory contracts, as required by the provisions of the Act.

8. The statement hereto annexed, marked Exhibit 2, and verified by your petitioner's oath, contains a full and true statement of his affairs, as required by the provisions of the Act.

Wherefore your petitioner prays that proceedings may be had upon this petition in accordance with the provisions of chapter XIII of the Bankruptcy Act.

....., *Petitioner.*

Address: .....

....., *Attorney.*

Address: .....

State of .....
County of ..... } *ss.*

I, ..., the petitioner named in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

....., *Petitioner.*

Subscribed and sworn to before me this ..... day of ....., 19...

.....,

.....

[*Official character.*]

[Schedules to be annexed corresponding with schedules under Form No. 1.]

FORM No. 60

APPLICATION FOR CONFIRMATION OF AN ARRANGEMENT UNDER CHAPTER XIII

To ....., Referee in Bankruptcy:

....., the above-named debtor, respectfully represents that the plan under chapter XIII of the Bankruptcy Act, submitted by him at a meeting of his creditors on the ..... day of ....., 19..., has been duly accepted, in accordance with the provisions of this chapter, and that he has made the deposit of moneys required by the provisions of the chapter [*If it be the fact, add:* and that the deposit required by the provisions of the plan, amounting to the sum of ..... dollars, has been deposited, subject to the order of the court, in ....., of ....., the depository designated by the court].

Wherefore the debtor prays that the plan be confirmed by the court.

Dated at ....., this ..... day of ....., 19...

Signed: .....,

Debtor [or *Attorney for Debtor*].

Address: .....

FORM No. 63

DEBTOR'S PETITION IN PROCEEDINGS UNDER SECTION 75 OF THE BANKRUPTCY ACT

(Abrogated)

FORM No. 64

ORDER APPROVING DEBTOR'S PETITION IN PROCEEDINGS UNDER SECTION 75

(Abrogated)

FORM No. 65

ORDER OF REFERENCE IN PROCEEDINGS UNDER SECTION 75

(Abrogated)

FORM No. 66

BOND OF CONCILIATION COMMISSIONER

(Abrogated)

FORM No. 67

NOTICE OF FIRST MEETING OF CREDITORS IN PROCEEDINGS UNDER SECTION 75

(Abrogated)

FORM No. 68

APPLICATION FOR CONFIRMATION OF A COMPOSITION OR EXTENSION PROPOSAL UNDER SECTION 75

(Abrogated)

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