UNITED STATES REPORTS

VOLUME 369

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1961

FEBRUARY 26 THROUGH MAY 21, 1962

WALTER WYATT
REPORTER OF DECISIONS

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1962

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington 25, D.C. - Price $6.25 (Buckram)

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.[1]
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice.[2]

RETIRED

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

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

Notes on p. IV.

NOTES.

[1] MR. JUSTICE WHITTAKER retired effective April 1, 1962. See *post*, p. VII.

[2] THE HONORABLE BYRON R. WHITE, formerly Deputy Attorney General of the United States, was nominated by President Kennedy on April 3, 1962, to be an Associate Justice of this Court. He was confirmed by the Senate on April 11, 1962; he was commissioned on April 12, 1962; and he took his oaths and his seat on April 16, 1962. See *post*, p. XI.

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, Tom C. Clark, Associate Justice.

For the Ninth Circuit, William O. Douglas, Associate Justice.

For the Tenth Circuit, William O. Douglas, Associate Justice.

April 2, 1962.

(For next previous allotment, see 368 U. S., p. iv.)
(For next subsequent allotment, see *post*, p. vi.)

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For the Sixth Circuit, Potter Stewart, Associate Justice.

For the Seventh Circuit, Tom C. Clark, Associate Justice.

For the Eighth Circuit, Byron R. White, Associate Justice.

For the Ninth Circuit, William O. Douglas, Associate Justice.

For the Tenth Circuit, Byron R. White, Associate Justice.

April 16, 1962.

(For next previous allotment, see *ante*, p. v.)

RETIREMENT OF MR. JUSTICE WHITTAKER.

SUPREME COURT OF THE UNITED STATES.

MONDAY, APRIL 2, 1962.

Present: MR. CHIEF JUSTICE WARREN, MR. JUSTICE BLACK, MR. JUSTICE FRANKFURTER, MR. JUSTICE DOUGLAS, MR. JUSTICE CLARK, MR. JUSTICE HARLAN, MR. JUSTICE BRENNAN, and MR. JUSTICE STEWART.

THE CHIEF JUSTICE said:

With the concurrence of all my colleagues, I announce with regret the retirement from this Court of Mr. Justice Whittaker, effective April 1, 1962, in accordance with the provisions of Section 372 (a) of Title 28, United States Code.

In the past five years he has worked to the point of physical exhaustion, and his doctors have advised him that continued service on the Court would seriously impair his health. He and we bow to the necessity of the situation in the hope and expectation that complete rest and relaxation will restore his vigor.

Justice Whittaker leaves the Court with the affection of all his colleagues, and I am sure with the satisfaction that flows from the years of diligent and patriotic service he has given to the Nation.

Our appreciation of that service and our friendship for him are more adequately expressed in a letter to him in response to his letter of retirement, both of which will be spread upon the Minutes of the Court.

ORDER.

IT IS ORDERED by the Court that the accompanying correspondence between members of the Court and Mr. Justice Whittaker upon his retirement as an Associate Justice of the Court be this day spread upon the record, and that it also be printed in the reports of this Court.

SUPREME COURT OF THE UNITED STATES,
CHAMBERS OF JUSTICE CHARLES E. WHITTAKER,
Washington 25, D. C., March 29, 1962.

MY DEAR BRETHREN:

This is in confirmation of my retirement from regular active service as an Associate Justice of this Court, pursuant to the provisions of Section 372 (a) of Title 28, United States Code, effective April 1, 1962. I have taken this action with regret but in accordance with competent medical advice and with a desire to serve the best interests of all concerned.

I deeply appreciate the privilege which has been mine of serving the people of the United States upon the Federal Judiciary for nearly eight years, the last five as a member of this Court, to the best of my ability. I also wish to express my most cordial regards and genuine affection for every member of the Court with whom I have served and to thank each of them and all members of the Court staff for uniformly courteous and helpful cooperation.

I will always be warmly interested in the welfare of every member of the Court and shall endeavor in every way possible to serve its best interest.

Very sincerely,

CHARLES E. WHITTAKER

THE CHIEF JUSTICE
MR. JUSTICE BLACK
MR. JUSTICE FRANKFURTER
MR. JUSTICE DOUGLAS
MR. JUSTICE CLARK
MR. JUSTICE HARLAN
MR. JUSTICE BRENNAN
MR. JUSTICE STEWART

SUPREME COURT OF THE UNITED STATES,
CHAMBERS OF THE CHIEF JUSTICE,
Washington 25, D. C., March 30, 1962.

Honorable CHARLES E. WHITTAKER,
Associate Justice of the Supreme Court,
Washington, D. C.

DEAR JUSTICE WHITTAKER:

It is with the utmost reluctance that we bow to the necessity of your retirement as an Associate Justice of this Court.

As you know, we had hoped it could have been otherwise, and that to regain your strength you would permit us to absorb amongst ourselves your work for the remainder of the Term. Your doctors have decided that this would not be consistent with your future well-being, that excessive work is responsible for your physical exhaustion, and that only complete rest and relaxation can restore your

vigor. We submit, as you properly did, to that advice. In fairness to your family, neither you nor we have the right to insist that you continue to do that which would seriously impair your health.

Our five years of association with you have been in the finest traditions of the Court. No Justice could have worked harder or in more complete harmony with his Brethren. We shall miss your kindly advice, but absence from our conference table cannot affect our attachment to you. That we will retain always.

We wish for you a complete restoration of health and the many years of happiness to which your conscientious service to your country so justly entitles you.

Sincerely,

EARL WARREN
HUGO L. BLACK
FELIX FRANKFURTER
W. O. DOUGLAS
TOM C. CLARK
JOHN M. HARLAN
WILLIAM J. BRENNAN, JR.
POTTER STEWART

APPOINTMENT OF MR. JUSTICE WHITE.

SUPREME COURT OF THE UNITED STATES.

MONDAY, APRIL 16, 1962.

Present: MR. CHIEF JUSTICE WARREN, MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE CLARK, MR. JUSTICE HARLAN, MR. JUSTICE BRENNAN and MR. JUSTICE STEWART.

THE CHIEF JUSTICE said:

The President, with the advice and consent of the Senate, has appointed the Honorable Byron R. White of Colorado, Deputy Attorney General of the United States, an Associate Justice of this Court to succeed Justice Whittaker. Justice White has taken the Constitutional Oath administered by The Chief Justice. He is now present in Court. The Clerk will read his commission. He will then take the Judicial Oath, to be administered by the Clerk, after which the Marshal will escort him to his seat on the Bench.

The Clerk then read the commission as follows:

JOHN F. KENNEDY,

PRESIDENT OF THE UNITED STATES OF AMERICA,

To all who shall see these Presents, Greeting:

KNOW YE; That reposing special trust and confidence in the Wisdom, Uprightness, and Learning of Byron R. White of Colorado I have nominated, and, by and with the advice and consent of the Senate, do appoint him Associate Justice of the Supreme Court of the United States, and do authorize and empower him to execute and fulfil the duties of that Office according to the Constitu-

tion and Laws of the said United States, and to Have and to Hold the said Office, with all the powers, privileges and emoluments to the same of right appertaining, unto Him, the said Byron R. White during his good behavior.

IN TESTIMONY WHEREOF, I have caused these Letters to be made patent and the seal of the Department of Justice to be hereunto affixed.

Done at the City of Washington this twelfth day of April, in the year of our Lord one thousand nine hundred and sixty-two, and of the Independence of the United States of America the one hundred and eighty-sixth.

[SEAL] JOHN F. KENNEDY.

By the President:
ROBERT F. KENNEDY
Attorney General.

The oath of office was then administered by the Clerk, and MR. JUSTICE WHITE was escorted by the Marshal to his seat on the bench.

The oaths taken by MR. JUSTICE WHITE are in the following words, viz:

I, Byron R. White, do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter.

So help me God.

BYRON R. WHITE.

Subscribed and sworn to before me this 16th day of April A. D. 1962.

EARL WARREN,
Chief Justice of the United States.

I, Byron R. White, do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as Associate Justice of the Supreme Court of the United States according to the best of my abilities and understanding, agreeably to the Constitution and the laws of the United States.

So help me God.

BYRON R. WHITE.

Subscribed and sworn to before me this 16th day of April A. D. 1962.

JOHN F. DAVIS,
Clerk of the Supreme Court of the United States.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1961.

RICHARDS ET AL. *v.* UNITED STATES ET AL.

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

No. 59. Argued November 15, 1961.—Decided February 26, 1962.

Petitioners are the personal representatives of passengers killed when a commercial airplane crashed in Missouri while en route from Oklahoma to New York. The maximum amount recoverable under the Missouri Wrongful Death Act had either been paid or tendered to them by the airline; but they sued in a Federal District Court in Oklahoma to recover from the United States under the Federal Tort Claims Act additional amounts which they claimed to be due them under the Oklahoma Wrongful Death Act, which contains no limitation on the amount a single person may recover from a tortfeasor. They claimed that the Government, through the Federal Aviation Agency, had negligently failed to enforce the terms of the Civil Aeronautics Act and regulations thereunder which prohibited the practices then being used by the airline in its overhaul depot in Oklahoma. The District Court dismissed the complaint and the Court of Appeals affirmed. *Held:* The judgment is affirmed. Pp. 2–16.

(a) In the Tort Claims Act, Congress has enacted a rule which requires federal courts, in multistate tort actions, to look in the first instance to the law of the State where the acts of negligence took place. Pp. 6–10.

(b) A reading of the statute as a whole, with due regard to its purpose, requires application of the whole law of the State where

the act or omission occurred, including its choice-of-laws rules. Pp. 10–15.

(c) Both the Federal District Court in Oklahoma and the Court of Appeals for the Tenth Circuit have interpreted the pertinent Oklahoma decisions as declaring that an action for wrongful death is based on the statute of the place where the injury occurred that caused the death; that determination of the question of state law is accepted by this Court and is controlling here; the Missouri statute, therefore, controls this case; and petitioners have failed to state claims upon which relief could be granted. Pp. 15–16.

285 F. 2d 521, affirmed.

Truman B. Rucker argued the cause for petitioners. With him on the briefs was *Edward M. O'Brien.*

Richard J. Medalie argued the cause for the United States. With him on the brief were *Solicitor General Cox, Assistant Attorney General Orrick, Alan S. Rosenthal* and *Sherman L. Cohn.*

W. B. Patterson argued the cause for American Airlines, Inc., respondent. With him on the briefs was *Fred M. Mock.*

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

The question to be decided in this case is what law a Federal District Court should apply in an action brought under the Federal Tort Claims Act [1] where an act of negligence occurs in one State and results in an injury and death in another State. The basic provision of the Tort Claims Act states that the Government shall be liable for tortious conduct committed by its employees acting within the scope of their employment "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the

[1] The provisions of the Tort Claims Act are now found in 28 U. S. C. §§ 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, and 2671–2680.

law of the place where the act or omission occurred." [2] The parties urge that the alternatives in selecting the law to determine liability under this statute are: (1) the internal law of the place where the negligence occurred, or (2) the whole law (including choice-of-law rules) of the place where the negligence occurred, or (3) the internal law of the place where the operative effect of the negligence took place.

Although the particular facts of this case are relatively unimportant in deciding the question before us, a brief recitation of them is necessary to set the context for our decision. The petitioners are the personal representatives of passengers killed when an airplane, owned by the respondent American Airlines, crashed in Missouri while en route from Tulsa, Oklahoma, to New York City. Suit was brought by the petitioners against the United States in the Federal District Court for the Northern District of Oklahoma, on the theory that the Government, through the Federal Aviation Agency, had "negligently failed to enforce the terms of the Civil Aeronautics Act and the regulations thereunder which prohibited the practices then being used by American Airlines, Inc., in the overhaul depot of Tulsa, Oklahoma." [3] The petitioners in each case either had already received a $15,000 settlement from the Airlines, the maximum amount recoverable under the Missouri Wrongful Death Act,[4] or had been tendered that amount. They sought additional amounts from the United States under the Oklahoma Wrongful

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[2] 28 U. S. C. § 1346 (b).

[3] Under 72 Stat. 778, 49 U. S. C. § 1425, the Administrator of the Federal Aviation Agency is charged with the responsibility of enforcing rules and regulations controlling inspection, maintenance, overhaul and repair of all equipment used in air transportation.

[4] Mo. Rev. Stat., 1949, § 537.090. Subsequent to the origination of these actions the Missouri Code was amended to provide for maximum damages of $25,000. Mo. Rev. Stat., 1959, § 537.090.

Death Act [5] which contains no limitation on the amount a single person may recover from a tortfeasor. The Government filed a third-party complaint against American Airlines, seeking reimbursement for any amount that the petitioners might recover against the United States.

After a pretrial hearing, the District Court ruled that the complaints failed to state claims upon which relief could be granted under the Oklahoma Act since that statute could not be applied extraterritorially "where an act or omission occurring in Oklahoma results in injury and death in the State of Missouri." [6] Alternatively, the court noted that if Oklahoma law was applicable under the Federal Tort Claims Act, "then the general law of Oklahoma, including its conflicts of law rule, is applicable thereunder," thus precluding further recovery since the Oklahoma conflicts rule would refer the court to the law of Missouri, the place where the negligence had its operative effect.[7] In dismissing the petitioners' complaints against the United States, the court found it unnecessary to pass upon the third-party complaint asserted by the Government against American. On appeal, the Court of Appeals for the Tenth Circuit affirmed the judgment by a divided vote,[8] the majority agreeing with the lower court that the complaints failed to state a cause of action upon which relief could be based under either the Oklahoma or the Missouri Wrongful Death Act. In dissent, the chief judge, believing that Congress intended the internal law of the place where the act or omission occurred to control the rights and liabilities of the parties, stated that he thought it was error to apply the Oklahoma

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[5] Okla. Stat., 1951, Tit. 12, §§ 1051–1054.

[6] The opinion of the District Court is not reported.

[7] *Gochenour* v. *St. Louis-San Francisco R. Co.*, 205 Okla. 594, 239 P. 2d 769.

[8] 285 F. 2d 521.

conflict-of-laws rule, and would have remanded the case for a determination of liability under the Oklahoma Act.

That the question confronting us is an important one and of a recurring nature is made apparent by the conflicting views expressed in its solution by the lower federal courts. In the five circuits in which it has arisen, resolution of the question has been reached by adoption of one or another of the alternatives urged upon us by the parties to this suit. The petitioners' contention, that the reference in Section 1346 (b) to the "place where the act or omission occurred" directs application of only the internal law of that State—here, Oklahoma—is supported by the Seventh Circuit's decision in *Voytas* v. *United States*, 256 F. 2d 786, and by the District of Columbia Circuit in *Eastern Air Lines* v. *Union Trust Co.*, 95 U. S. App. D. C. 189, 221 F. 2d 62, as well as by the dissenting judge of the Tenth Circuit in the instant case. The Government's interpretation of the Act, that in order also to give effect to Section 2674,[9] providing that the United States shall be liable in the same manner as a private individual, a court must refer to the whole law of the State where the act or omission occurred, was adhered to by the Second Circuit in *Landon* v. *United States,* 197 F. 2d 128, as well as by the Tenth Circuit in the case at bar. American Airlines, although willing to abide by the interpretation advanced by the Government, suggests, as an alternative, that the internal law of the place where the negligence had its operative effect—here, Missouri—should control. This construction of the Act is supported by the Ninth Circuit's decision in *United States* v. *Marshall,* 230 F. 2d 183, and by the dissenting opinion in the *Union Trust* case, *supra.* It was to resolve the threefold conflict and to enunciate a rule that can be applied uniformly in Tort Claims Act cases that we granted certiorari. 366 U. S. 916.

[9] 28 U. S. C. § 2674.

I.

The principal provision of the Federal Tort Claims Act, originally enacted as Title IV of the Legislative Reorganization Act of 1946,[10] is Section 1346 (b), reading in pertinent part:

> ". . . the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

Section 2674, also relevant to our decision, provides:

> "The United States shall be liable, respecting . . . tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."

The Tort Claims Act was designed primarily to remove the sovereign immunity of the United States from suits in tort and, with certain specific exceptions, to render the Government liable in tort as a private individual would be under like circumstances.[11] It is evident that the Act was not patterned to operate with complete independence

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[10] 60 Stat. 842 (1946).

[11] See *Feres* v. *United States*, 340 U. S. 135, for a detailed analysis of the purposes of the Federal Tort Claims Act in the context of its legislative history.

from the principles of law developed in the common law and refined by statute and judicial decision in the various States. Rather, it was designed to build upon the legal relationships formulated and characterized by the States, and, to that extent, the statutory scheme is exemplary of the generally interstitial character of federal law. If Congress had meant to alter or supplant the legal relationships developed by the States, it could specifically have done so to further the limited objectives of the Tort Claims Act. That is, notwithstanding the generally interstitial character of the law, Congress, in waiving the immunity of the Government for tortious conduct of its employees, could have imposed restrictions and conditions on the extent and substance of its liability.[12] We must determine whether, and to what extent, Congress exercised this power in selecting a rule for the choice of laws to be applied in suits brought under the Act. And, because the issue of the applicable law is controlled by a formal expression of the will of Congress, we need not pause to consider the question whether the conflict-of-laws rule applied in suits where federal jurisdiction rests upon diversity of citizenship shall be extended to a case such as this, in which jurisdiction is based upon a federal statute.[13] In addition, and even though Congress has left to judicial implication the task of giving content to its will in selecting the controlling law, because of the formal expression found in the Act itself, we are presented with a situation wholly distinguishable from those cases in which our initial inquiry has been whether the appropriate rule should be the simple adoption of state

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[12] *Soriano* v. *United States,* 352 U. S. 270; *United States* v. *Sherwood,* 312 U. S. 584.

[13] *Klaxon Co.* v. *Stentor Electric Mfg. Co.,* 313 U. S. 487. See *Vanston Bondholders Protective Committee* v. *Green,* 329 U. S. 156; *McKenzie* v. *Irving Trust Co.,* 323 U. S. 365; *D'Oench, Duhme & Co.* v. *Federal Deposit Ins. Corp.,* 315 U. S. 447.

law.[14] Here, we must decide, first, to which State the words "where the act or omission occurred" direct us, and, second, whether application of the internal law or the whole law of that State would be most consistent with the legislative purpose in enacting the Tort Claims Act.

II.

The legislative history of the Act, although generally extensive,[15] is not, except in a negative way, helpful in solving the problem of the law to be applied in a multi-state tort action such as is presented by the facts of this case. It has been repeatedly observed that Congress did not consider choice-of-law problems during the long period that the legislation was being prepared for enactment.[16] The concern of Congress, as illustrated by the legislative history,[17] was the problem of a person injured by an employee operating a government vehicle or otherwise acting within the scope of his employment, situations

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[14] See, *e. g.*, *Holmberg* v. *Armbrecht*, 327 U. S. 392; *Clearfield Trust Co.* v. *United States*, 318 U. S. 363; *D'Oench, Duhme & Co.* v. *Federal Deposit Ins. Corp.*, 315 U. S. 447; *Royal Indemnity Co.* v. *United States*, 313 U. S. 289; *Board of Comm'rs* v. *United States*, 308 U. S. 343. See also discussion in Hart and Wechsler, The Federal Courts and the Federal System, 679 *et seq.*

[15] Hearings before House Committee on the Judiciary on H. R. 5373 and H. R. 6463, 77th Cong., 2d Sess.; S. Rep. No. 1196, 77th Cong., 2d Sess.; H. R. Rep. No. 2245, 77th Cong., 2d Sess.; No. 1287, 79th Cong., 1st Sess.

[16] See, *e. g.*, 68 Harv. L. Rev. 1455 (1955); 45 Iowa L. Rev. 125 (1959); 6 N. Y. L. F. 484, 488–490 (1960).

[17] See H. R. Rep. No. 2428, 76th Cong., 3d Sess. 3; Hearings on H. R. 5373 and H. R. 6463, note 15, *supra*, 39, 66; Hearings before a Subcommittee of the House Committee on the Judiciary on H. R. 7236, 76th Cong., 3d Sess. 7, 16; Hearings before a Subcommittee of the Senate Committee on the Judiciary on S. 2690, 76th Cong., 3d Sess. 9; 69 Cong. Rec. 2192, 2193, 3118; 86 Cong. Rec. 12024.

rarely involving a conflict-of-laws question.[18] In these instances, where the negligence and the injury normally occur simultaneously and in a single jurisdiction, the law to be applied is clear, and no solution to the meaning of the words "the law of the place where the act or omission occurred" is required. Here, however, we are faced with events touching more than one "place"—a problem which Congress apparently did not explicitly consider—and, thus, we are compelled to give content to those critical words.

In the Tort Claims Act Congress has expressly stated that the Government's liability is to be determined by the application of a particular law, the law of the place where the act or omission occurred,[19] and we must, of course, start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used. We believe that it would be difficult to conceive of any more precise language Congress could have used to command application of the law of the place where the negligence occurred than the words it did employ in the Tort Claims Act. Thus we first reject the alternative urged by American Airlines. The legislative materials cited to us by American [20] not only lack probative force

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[18] See, *e. g., Knecht* v. *United States,* 242 F. 2d 929; *Irish* v. *United States,* 225 F. 2d 3; *United States* v. *Praylou,* 208 F. 2d 291; *Somerset Seafood Co.* v. *United States,* 193 F. 2d 631; *D'Anna* v. *United States,* 181 F. 2d 335; *Olson* v. *United States,* 175 F. 2d 510; *Modla* v. *United States,* 151 F. Supp. 198; *Irvin* v. *United States,* 148 F. Supp. 25.

[19] 28 U. S. C. § 1346 (b).

[20] Hearings before House Committee on the Judiciary on H. R. 5373 and H. R. 6463, 77th Cong., 2d Sess. 9, 30. American suggests that support for its argument is found in the testimony of Mr. Francis Shea, then Assistant Attorney General of the United States, before the House Committee on the Judiciary, who stated, when asked where a claimant might bring suit under the Act, that the venue

in a judicial sense, but they are completely unpersuasive to support the argument that Congress intended the words "act or omission" to refer to the place where the negligence had its operative effect. The ease of application inherent in the rule urged by American lends a certain attractiveness, but we are bound to operate within the framework of the words chosen by Congress and not to question the wisdom of the latter in the process of construction. We conclude that Congress has, in the Tort Claims Act, enacted a rule which requires federal courts, in multistate tort actions, to look in the first instance to the law of the place where the acts of negligence took place.

III.

However, our task is not completed. Having rejected the third alternative stated initially as inconsistent with the express terminology of the Act, we must now determine the reach of the words "law of the place." Do they embrace the whole law of the place where the negligence occurred, or only the internal law of that place? This problem, unlike the initial question discussed under II, *supra,* has not been dealt with by any formal expression of Congress and we must therefore establish the rule to be applied uniformly by lower federal courts, with due regard to the variant interests and policies expressed by the Tort Claims Act legislation.

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provision allowed suit to be brought either where the claimant resides or where the injury took place. Because the venue provision of the Act also contains the words "wherein the act or omission complained of occurred" (28 U. S. C. § 1402 (b)), American contends that the reference to the place where the injury occurred should control the meaning of the "act or omission" language in Section 1346 (b). In addition to the fact that this testimony bears no relation to the choice-of-laws problems, and that considerations underlying the problem of venue are substantially different from those determining applicable law, we are not persuaded to allow an isolated piece of legislative history to detract from the Act the words Congress expressly employed.

We believe it fundamental that a section of a statute should not be read in isolation from the context of the whole Act,[21] and that in fulfilling our responsibility in interpreting legislation, "we must not be guided by a single sentence or member of a sentence, but [should] look to the provisions of the whole law, and to its object and policy." [22] We should not assume that Congress intended to set the courts completely adrift from state law with regard to questions for which it has not provided a specific and definite answer in an act such as the one before us which, as we have indicated, is so intimately related to state law. Thus, we conclude that a reading of the statute as a whole, with due regard to its purpose, requires application of the whole law of the State where the act or omission occurred.

We are led to our conclusion by other persuasive factors notwithstanding the fact that the very conflict among the lower federal courts that we must here resolve illustrates the also reasonable alternative view expressed by the petitioners. First, our interpretation enables the federal courts to treat the United States as a "private individual under like circumstances," and thus is consistent with the Act considered as a whole.[23] The general conflict-of-laws rule, followed by a vast majority of the States,[24] is to apply the law of the place of injury to the

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[21] *Labor Board* v. *Lion Oil Co.*, 352 U. S. 282, 288; *Cherokee Intermarriage Cases*, 203 U. S. 76, 89; *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 439 (Cardozo, J., dissenting).

[22] *Mastro Plastics Corp.* v. *Labor Board*, 350 U. S. 270, 285, quoting from *United States* v. *Boisdoré's Heirs*, 8 How. 113, 122.

[23] 28 U. S. C. § 2674, quoted in the text, *supra*, as well as 28 U. S. C. § 1346 (b), provides that the United States should be treated as an individual defendant would be under like circumstances.

[24] Restatement, Conflict of Laws, §§ 377, 378 and 391. This rule has been repeated so frequently that a citation of cases here would serve no purpose. For a collection of cases, see Goodrich, Conflict

substantive rights of the parties. Therefore, where the forum State is the same as the one in which the act or omission occurred, our interpretation will enable the federal courts to treat the United States as an individual would be treated under like circumstances.[25] Moreover, this interpretation of the Act provides a degree of flexibility to the law to be applied in federal courts that would not be possible under the view advanced either by the petitioners or by American. Recently there has been a tendency on the part of some States to depart from the general conflicts rule in order to take into account the interests of the State having significant contact with the parties to the litigation.[26] We can see no compelling reason to saddle the Act with an interpretation that would

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of Laws, 263–264; Stumberg, Conflict of Laws, 182–187; 25 C. J. S. *Death* § 28, nn. 27–30.

[25] For example, had the petitioners in the instant case brought suit against American as well as the United States, the petitioners' interpretation of the Act would have the District Court determine American's liability by the law of Missouri and the United States' by the law of Oklahoma. Under our construction of the Act, however, both defendants' liability would be determined by the law of Missouri. However, because of the venue provision in the statute, allowing suit to be brought where all the plaintiffs reside as well as where the act or omission occurred (28 U. S. C. § 1402 (b); see *Knecht* v. *United States*, 242 F. 2d 929; *Olson* v. *United States*, 175 F. 2d 510), a situation may arise where a District Court could not determine the Government's and a private individual's liability in exactly the same manner.

[26] *Grant* v. *McAuliffe*, 41 Cal. 2d 859, 264 P. 2d 944; *Schmidt* v. *Driscoll Hotel, Inc.*, 249 Minn. 376, 82 N. W. 2d 365; *Haumschild* v. *Continental Casualty Co.*, 7 Wis. 2d 130, 95 N. W. 2d 814. See Currie, Survival of Actions: Adjudication versus Automation in the Conflict of Laws, 10 Stan. L. Rev. 205 (1958). Cf. *Vrooman* v. *Beech Aircraft Corp.*, 183 F. 2d 479; *Levy* v. *Daniels' U-Drive Auto Renting Co.*, 108 Conn. 333, 143 A. 163; *Caldwell* v. *Gore*, 175 La. 501, 143 So. 387; *Burkett* v. *Globe Indemnity Co.*, 182 Miss. 423, 181 So. 316.

prevent the federal courts from implementing this policy in choice-of-law rules where the State in which the negligence occurred has adopted it. Should the States continue this rejection of the older rule in those situations where its application might appear inappropriate or inequitable,[27] the flexibility inherent in our interpretation will also be more in step with that judicial approach, as well as with the character of the legislation and with the purpose of the Act considered as a whole.

In the absence of persuasive evidence to the contrary, we do not believe that Congress intended to adopt the inflexible rule urged upon us by the petitioners. Despite the power of Congress to enact for litigation of this type a federal conflict-of-laws rule independent of the States' development of such rules, we should not, particularly in the type of interstitial legislation involved here, assume that it has done so. Nor are we persuaded to require such an independent federal rule by the petitioners' argument that there are other instances, specifically set forth in the Act,[28] where the liability of the United States is not co-ex-

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[27] In addition to the cases cited in note 26, *supra,* see the opinion by MR. JUSTICE BLACK in *Vanston Bondholders Protective Committee* v. *Green,* 329 U. S. 156, 161–162, where it is stated in context to a different but analogous problem:

"In determining which contact is the most significant in a particular transaction, courts can seldom find a complete solution in the mechanical formulae of the conflicts of law. Determination requires the exercise of an informed judgment in the balancing of all the interests of the states with the most significant contacts in order best to accommodate the equities among the parties to the policies of those states."

[28] The Act permits claimants to sue only in the federal courts, and not in the state courts which are available in actions against a private individual, § 1346 (b); the Act prescribes its own period of limitations which may be shorter or longer than that of the State, § 2401 (b); the claimant cannot obtain a trial by jury under the Act, although he could against a private individual, § 2402; the claimant cannot obtain interest prior to judgment in suits under the

tensive with that of a private person under state law. It seems sufficient to note that Congress has been specific in those instances where it intended the federal courts to depart completely from state law and, also, that this list of exceptions contains no direct or indirect modification of the principles controlling application of choice-of-law rules. Certainly there is nothing in the legislative history that even remotely supports the argument that Congress did not intend state conflict rules to apply to multistate tort actions brought against the Government.[29]

Act regardless of the state rule governing private individuals, § 2674; the claimant cannot obtain punitive damages under the Act, even though state law may provide for it as against a private defendant, § 2674; the claimant cannot recover any damages against the United States on any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights, whereas he could recover such damages against a private individual, § 2680 (h); the claimant cannot obtain any recovery against the United States on a claim arising in a foreign country, although he could against a private individual, § 2680 (k); and the Act exempts the Government from liability for claims based on various types of activities, although a private individual would be liable in the same circumstances, § 2680.

[29] In fact, despite the ambiguity that exists in the history due to the fact that Congress did not specifically consider the choice-of-laws problem, the legislative material indicates that Congress thought in terms of state law being applicable. The term "law of the place where the act or omission occurred" was particularized as (1) the law of the situs of the wrongful act or omission. Hearings before House Committee on the Judiciary on H. R. 5373 and H. R. 6463, 77th Cong., 2d Sess. 35; (2) local law, *id.*, at 26, 27, 30, 59 and 61; S. Rep. No. 1196, 77th Cong., 2d Sess. 6; H. R. Rep. No. 2245, 77th Cong., 2d Sess. 9; H. R. Rep. No. 1287, 79th Cong., 1st Sess. 4; S. Rep. No. 1400, 79th Cong., 2d Sess. 32; (3) local tort law. Hearings before House Committee on the Judiciary on H. R. 5373 and H. R. 6463, 77th Cong., 2d Sess. 30; (4) the law of the situs of the alleged tort. Hearings before a Subcommittee of the Senate Committee on

Under our interpretation of the Act we find it unnecessary to judge the effect of the Oklahoma courts' pronouncements that the Oklahoma Wrongful Death Act cannot be given extraterritorial effect.[30]

IV.

Our view of a State's power to adopt an appropriate conflict-of-laws doctrine in a situation touching more than one place has been indicated by our discussion in Part III of this opinion.[31] Where more than one State has sufficiently substantial contact with the activity in question, the forum State, by analysis of the interests possessed by the States involved, could constitutionally apply to the decision of the case the law of one or another state having such an interest in the multistate activity.[32] Thus, an Oklahoma state court would be free to apply either its own law, the law of the place where the negligence occurred, or the law of Missouri, the law of the place where the injury occurred, to an action brought in its courts and involving this factual situation.[33] Both the

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the Judiciary on S. 2690, 76th Cong., 3d Sess. 44; and (5) the locale of the injury or damage. Hearings before the House Committee on the Judiciary on H. R. 5373 and H. R. 6463, 77th Cong., 2d Sess. 9.

[30] *Gochenour* v. *St. Louis-San Francisco R. Co.*, 205 Okla. 594, 239 P. 2d 769. See *Fenton* v. *Sinclair Refining Co.*, 206 Okla. 19, 240 P. 2d 748.

[31] *Supra*, pp. 12–13 and cases cited. See also *Carroll* v. *Lanza*, 349 U. S. 408; *Watson* v. *Employers Liability Corp.*, 348 U. S. 66; *Pacific Employers Ins. Co.* v. *Industrial Accident Comm'n*, 306 U. S. 493. Cf. *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.*, 292 U. S. 143; *Home Insurance Co.* v. *Dick*, 281 U. S. 397.

[32] See, *e. g.*, the cases cited in note 26, *supra*.

[33] *Alabama G. S. R. Co.* v. *Carroll*, 97 Ala. 126, 11 So. 803; *Otey* v. *Midland Valley R. Co.*, 108 Kan. 755, 197 P. 203; *Connecticut Valley Lumber Co.* v. *Maine Central R. Co.*, 78 N. H. 553, 103 A. 263; *El Paso & N. W. R. Co.* v. *McComus*, 36 Tex. Civ. App. 170, 81 S. W. 760 (holding that the law of the place of injury controls) and

Federal District Court sitting in Oklahoma, and the Court of Appeals for the Tenth Circuit, have interpreted the pertinent Oklahoma decisions,[34] which we have held are controlling, to declare that an action for wrongful death is based on the statute of the place where the injury occurred that caused the death.[35] Therefore, Missouri's statute controls the case at bar. It is conceded that each petitioner has received $15,000, the maximum amount recoverable under the Missouri Act, and the petitioners thus have received full compensation for their claims. Accordingly, the courts below were correct in holding that, in accordance with Oklahoma law, petitioners had failed to state claims upon which relief could be granted. The judgment is

Affirmed.

Schmidt v. *Driscoll Hotel, Inc.*, 249 Minn. 376, 82 N. W. 2d 365 (holding that the law of the place of negligence controls). See also *Hunter* v. *Derby Foods*, 110 F. 2d 970; 35 Col. L. Rev. 202.

[34] *Gochenour* v. *St. Louis-San Francisco R. Co.*, 205 Okla. 594, 239 P. 2d 769; *Miller* v. *Tennis*, 140 Okla. 185, 282 P. 345. See *Fenton* v. *Sinclair Refining Co.*, 206 Okla. 19, 240 P. 2d 748.

[35] We are aware that in the Oklahoma cases cited in note 34, *supra*, both the injury and negligence occurred in the same sister State, and that the two courts below relied largely on dictum in those cases to conclude that Oklahoma would follow the general rule that the law of the place of injury would control even had the negligence that caused the injury taken place in Oklahoma. The petitioners here do not contend that this was an erroneous interpretation of state law. We ordinarily accept the determinations of Courts of Appeals on questions of state law and do so here under the circumstances presented. *General Box Co.* v. *United States*, 351 U. S. 159, 165; *Estate of Spiegel* v. *Commissioner*, 335 U. S. 701, 707–708; *Huddleston* v. *Dwyer*, 322 U. S. 232, 237.

Syllabus.

RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL UNIONS NOS. 128 AND 633, *v.* LION DRY GOODS, INC., ET AL.

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

No. 73. Argued January 17, 1962.—Decided February 26, 1962.

1. Section 301 (a) of the Labor Management Relations Act, 1947, which confers on federal district courts jurisdiction over suits "for violation of contracts between an employer and a labor organization representing employees in an industry affecting" interstate commerce, applies to a suit to enforce a strike settlement agreement between an employer in an industry affecting interstate commerce and local labor unions representing some, but not a majority, of its employees. Pp. 18–30.

   (a) The term "contracts," as used in § 301 (a), is not limited to collective bargaining agreements concerning hours, wages and conditions of employment concluded in direct negotiations between employers and unions entitled to recognition as exclusive bargaining representatives of employees; it applies also to agreements, such as that involved here, between employers and labor organizations which importantly and directly affect the employment relationship. Pp. 23–28.

   (b) The term "labor organization representing employees," as used in § 301 (a), is not limited to labor organizations which are entitled to recognition as exclusive bargaining agents of employees. Pp. 28–29.

2. This cause is not rendered moot by the fact that the local unions which commenced this litigation have since merged with another local union to form a new local union of the same international union, and petitioners' motion to add the new local union as a party is granted. P. 19, n. 2.

286 F. 2d 235, reversed.

S. G. Lippman argued the cause for petitioners. With him on the briefs were *Joseph E. Finley* and *Tim L. Bornstein.*

Merritt W. Green argued the cause for respondents. With him on the briefs was *Eugene F. Howard.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Section 301 (a) of the Labor Management Relations Act,[1] provides that "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 controversy or without regard to the citizenship of the parties." The questions presented in this case are: (1) Does the scope of "contracts" within § 301 (a) include the agreement at bar, claimed to be not a "collective bargaining contract" but a "strike settlement agreement"? (2) If otherwise includible, is the "strike settlement agreement" cognizable under § 301 (a), although the petitioners, the labor-organization parties to the agreement, acknowledged that they were not entitled to recognition as exclusive representatives of the employees of the respondents?

The opinions below appear to rest upon alternative holdings, answering in the negative each of these questions. The District Court's conclusion that it lacked jurisdiction over the subject matter, 179 F. Supp. 564, was affirmed in a brief *per curiam* by the Court of Appeals, saying: "The contract here involved is not a collective bargaining agreement between an employer and a labor organization representing its employees. We think that the trial court was correct in reaching the conclusion that collective bargaining contracts between a union and an employer are the only contracts intended to be actionable in a United States District Court under the provisions of section 301 (a)." 286 F. 2d 235. We granted certiorari because of the importance of the questions to the enforce-

[1] 61 Stat. 156, 29 U. S. C. § 185 (a).

ment of the national labor policy as expressed in § 301 (a). 366 U. S. 917. We hold that the lower courts erred and remand the cause for trial and further proceedings consistent with this opinion.[2]

The petitioners, local unions of the Retail Clerks International Association, brought this action on the sole jurisdictional basis of § 301 (a) and (b), seeking to compel respondents' compliance with two allegedly binding arbitration awards. Respondents are two department stores in Toledo, Ohio, covered by the Labor Management Relations Act. For some years prior to 1957, petitioners had been the collective bargaining representatives of respondents' employees and had been parties to collective bargaining agreements with respondents. In November 1957, negotiations for renewal contracts ended in impasse. A strike ensued against one of the respondents, Lasalle's, and continued until December 24, 1958; the dispute with the other respondent, Lion Dry Goods, continued during the whole of those 13 months although no strike occurred. On December 24, 1958, the parties ended their dispute with the aid of the Toledo Labor-Management-Citizens' Committee (hereinafter, L–M–C), a local mediation and arbitration body.[3] Negotiations

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[2] Respondents claim that the cause is moot since, after the commencement of this action, the petitioners merged with Local 954 of the same International Union to form a new Local 954. Petitioners deny mootness and move to add or substitute Local 954 as a party. The facts of the merger make this case indistinguishable from *De Veau* v. *Braisted,* 363 U. S. 144; see also *Labor Board* v. *Insurance Agents' International Union,* 361 U. S. 477. We therefore hold that the case is not moot, and the petitioners' motion to add Local 954 as a party is granted.

[3] Before 1957, the respondents and two other downtown Toledo department stores, through an organization, Retail Associates, Inc., recognized the petitioners as representatives of their employees and executed collective bargaining agreements with the petitioners on a multi-employer basis. When the 1957 impasse developed, the peti-

by means of L–M–C mediation had produced a "Statement of Understanding" [4] satisfactory to all parties.

The Statement contained such key points of settlement as the unions' acknowledgment that they were not then

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tioners struck one of those two other stores and it promptly contracted separately with the petitioners. Respondents and the second of the two other stores petitioned the National Labor Relations Board to conduct an election among the employees of the three stores as a single bargaining unit. The petitioners reacted with a demand that each store negotiate separately. Simultaneously, the petitioners called the strike at respondent Lasalle's. The dispute produced considerable litigation. See *Local 128, Retail Clerks* v. *Leedom*, 42 LRR Man. 2031; *Retail Associates, Inc.*, 120 N. L. R. B. 388; *Retail Clerks Assn.* v. *Leedom*, 43 LRR Man. 2004, 2029.

A few days before December 24, 1958, the L–M–C proposed a plan for settling the dispute. Discussions ensued between the Committee and the respondents, and between the Committee and the petitioners. At no time were direct negotiations carried on between petitioners and the respondents. Each side made known to the L–M–C the conditions under which it was willing to resolve the dispute and the L–M–C discussed these conditions with the other side. In this manner a basis for settlement was fashioned which was embodied in the Statement referred to in the text.

[4] The Lasalle's Statement of Understanding (exhibits omitted) reads as follows:

"1. Employees of Lasalle's, who have been absent due to the strike, will be re-instated without discrimination because of any strike activities and without loss of seniority provided they make application for reinstatement in the form and manner provided for by the employer within fifteen days of receipt of notice from the employer.

"2. All such employees who have complied with the provisions of Paragraph 1 above, will be returned to work not later than February 2, 1959, as scheduled by the Company, in their former position classifications if vacant or in positions comparable in duties and earning opportunities.

"3. It is understood that returning strikers will devote their best efforts to their work and to serving the customers of Lasalle's, recognizing that stability of employment depends upon the success of the business.

"4. Lasalle's will warrant to the L–M–C that the Company will not reduce rates of pay presently in effect or withdraw or reduce

entitled to recognition as exclusive representatives, and would not seek such recognition unless and until certified as so entitled in single store unit elections conducted by the National Labor Relations Board, and Lasalle's agree-

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employee benefit programs currently provided. This assurance includes all improvements offered by the Company through the L–M–C on November 15th, 1957, which are already in effect. No employee will be discriminated against, by reason of Union activities, membership or non-membership. All employees will continue to have job security and no employee will be discharged except for just cause. Wage schedules currently in effect are appended as Exhibit A. Copies of hours and working conditions and other existing benefits, as requested by L–M–C are attached as Exhibit B.

"5. Neither the Company nor the Union will interfere with the employee's right to join or not to join a union, as provided and guaranteed by the Labor-Management-Relations Act. Nothing contained herein is to be construed as giving recognition to the union unless at some future time within the discretion of the union, the union is certified as having been chosen by a majority of employees in a single store unit election conducted by the National Labor Relations Board.

"6. The Union agrees that it will not request bargaining rights unless it proves its right to represent the employees as provided in Paragraph 5 above; nor will the employer recognize any union except upon certification by the N. L. R. B.; nor will the Company file a petition for election unless a claim for representation is made upon the employer. Nothing herein shall preclude an employee representative from entering areas of the store which are open to customers; or from communicating with employees, provided such communication is on the employee's non-working time and in no way interferes with the operating of the business.

"7. Any individual employee who may have a grievance involving an interpretation or application of or arising under the terms of this understanding with the L–M–C, and who has presented such grievance to his supervisor and the Personnel Department without reaching a satisfactory solution, may take his case to the chairman of the L–M–C who in turn shall refer the case to a panel of the L–M–C, whose majority decision and order shall be final and binding. The panel shall render its decision and order within fifteen days after the grievance has been submitted to it. The procedure regulating the

ment to reinstate striking employees without discrimination. Both stores also agreed to continue in effect detailed wage and hour schedules and provisions as to working conditions and other benefits, incorporated as exhibits to the Statement. All terms of employment had been in force prior to December 24, 1958, except an agreement by the stores to provide and pay fully for specified insurance coverage. The stores wrote the L–M–C delivering the Statement, calling it "the basis on which the heretofore existing dispute between [the Locals] and our compan[ies] is to be fully and finally resolved," and specifying that "The conditions to be performed and met by us are, of course, subject to and conditioned upon the receipt by your organization of guarantees from the respective

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hearing of the grievance by the L–M–C panel shall be determined by the panel.

"8. The Union will agree that immediately upon receipt of this statement of understanding by the Toledo Labor-Management-Citizens Committee it will cease all picketing, boycotting or other interference with the business of Lasalle's, or R. H. Macy & Co., Inc. wherever located. The Union, the strikers, and the Company shall withdraw forthwith all petitions, unfair labor practice charges and litigation before the National Labor Relations Board and the Courts and further agree not to institute in the future any litigation involving or arising out of the instant dispute. The Union and the Employer shall execute mutually satisfactory releases, releasing and discharging each other, the International Union, the local unions involved, and representatives of the union in their representative or individual capacity, labor papers, and all other labor organizations or their representatives who acted in concert or cooperation in connection with the dispute, from any and all claims, demands, causes of action, of whatever nature or description arising out of the labor dispute, including but not limited to the strikes, picketing, boycotting, and all other activities which may have taken place up to the present date.

"9. This understanding shall become effective in accordance with the letter of transmittal dated December 24, 1958."

The Lion Store's Statement is identical except for the omission of paragraphs 1, 2 and 3.

labor organizations to make the principles enumerated [in the Statement] completely effective." A few days later the Locals wrote the L–M–C that "we herewith agree to the conditions and guarantees of the Statement of Understanding." The conditions to be performed by each side were performed and the dispute was terminated. In a few months, however, new grievances arose, including the two that generated this case. *First.* The unions claimed under the Statement the right of access to the employees' cafeteria in order to communicate with employees during their non-working time. The stores claimed that Statement ¶ 6 gave no right of access to the employees' cafeterias, for those are not "areas of the store which are open to customers." [5] *Second.* Two Lasalle's employees, salesladies in the men's furnishings department, had been fully reinstated except that the saleslady formerly assigned to sell men's shirts was assigned to sell men's sweaters, and the other saleslady, who had been selling sweaters, now was assigned to sell shirts. The Locals submitted these matters to the L–M–C under the procedure of Statement ¶ 7; the stores and the Locals participated fully in the ensuing arbitration proceedings; and the award went to the Locals on both grievances. The stores' refusal to accede to those awards prompted this suit.

The District Court viewed as crucial the question whether the Statement given by the stores to the L–M–C and then concurred in by the Locals, constituted "such a contract as is contemplated by Section 301 (a)." 179 F. Supp., at 567. Although the opinion is somewhat ambiguous, we read it as holding that there was a contract between the Locals and the stores but that only certain kinds of contracts are within the purview of § 301 (a) and

[5] The parties' trial stipulation says, *inter alia:* "[T]he employee cafeterias in the downtown stores of the defendants . . . are located in areas in each of the stores not open to customers; . . ."

this was not one of them.[6] We interpret the District Court as holding that to be within § 301 (a), contracts must be "collective bargaining contracts, or agreements arrived at through collective bargaining," *ibid.;* and fur-

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[6] The District Court relied for its view of the limited meaning of "contracts" under § 301 (a) upon *Schatte* v. *International Alliance,* 84 F. Supp. 669. However, that case decided as to § 301 only that the section did not apply to a cause of action which arose before its enactment. 182 F. 2d 158, 164–165.

Apart from the question of its cognizability under § 301 (a), it is clear that the Statement constitutes a contract between the parties. This is so, although they did not negotiate directly but through a mediator, and did not conjoin their signatures on one document. The record makes obvious that neither the parties nor L–M–C contemplated two independent agreements, one by each side with L–M–C only, unenforceable by either side against the other.

The parties stipulated as to the arbitration proceedings that it was "assumed by all parties in attendance to be a meeting of a panel chosen . . . to perform proper functions delegated to such a panel under the provisions of . . . [the] Statements of Understanding . . . ." They further stipulated that "nothing . . . [herein] is to preclude the Court from finding that the settlement of December 24, 1958, was a collective bargaining agreement." In their answer in the District Court, respondents denied "that there is in existence any contract between the plaintiffs, or either of them, and the defendants, or either of them, or that there is in existence any agreement between the parties, collectively or singly, whereby the [L–M–C] is given any right or authority to arbitrate any grievance which the plaintiffs might claim to have." Petitioners claim and the respondents do not deny that at no time prior to their answer had respondents suggested there was no contract: they complied with the conditions for ending the dispute, they continued following the old wage and hour schedules and other provisions, they participated in the arbitration proceedings and they asked the L–M–C to reconsider their awards on the merits.

Respondents' contention throughout, whether because of the stipulation or otherwise, has been not to negate the existence of any contract at all, but rather to deny that there is a contract of the kind contemplated by § 301 (a). The District Court so construed the defense, 179 F. Supp., at 565. The Court of Appeals appears to have

ther, must be with a union that is the recognized majority representative of the employees. The court found that the Statement of Understanding met neither test.[7] The Court of Appeals' brief affirmance, *supra,* fails to make clear whether it agreed with both of those limitations on § 301 (a), or with only one and if so which one.

It is argued that Congress limited § 301 (a) jurisdiction to contracts that are "collective bargaining contracts," meaning, so runs the argument, only agreements concerning wages, hours, and conditions of employment concluded in direct negotiations between employers and unions entitled to recognition as exclusive representatives of employees.

The words of § 301 (a) require no such narrow construction as is suggested; rather, they negate it. *First.* The Section says "contracts" though Congress knew well the phrase "collective bargaining contracts," see, *e. g.,* § 8 (d), § 9 (a), § 201 (c), § 203 (d), § 204 (a)(2), § 211 (a). Had Congress contemplated a restrictive differentiation, we may assume that it would not have eschewed "collective bargaining contracts" unwittingly. Moreover, Congress provided in § 211 (a) : "For the guidance and information of interested representatives of employers, employees, and the general public, the Bureau of Labor Statistics . . . shall maintain a file of copies of all available collective bargaining agreements and other available agreements and actions thereunder settling or adjusting labor disputes." [8] Whatever the proper construction of that Section, insofar as it reflects upon

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agreed; see *supra.* And at no point in their brief in this Court do respondents argue that no contract exists; they agree that the only issue is jurisdictional.

[7] The court emphasized that the Statement disclaimed the Locals' right to be recognized as exclusive bargaining agent until so certified by the National Labor Relations Board.

[8] 61 Stat. 156, 29 U. S. C. § 181 (a).

§ 301 (a) at all, it supports the inference that "contracts" does include more than "collective bargaining agreements," at least as respondents would define them. *Second.* If "contracts" means only collective bargaining contracts, the subsequent words "or between any such labor organizations" are superfluous, for if there is a collective bargaining agreement between unions it follows that as to that agreement, one union is the employer and the other represents employees. See *Office Employes Union* v. *Labor Board,* 353 U. S. 313. Congress was not indulging in surplusage: A federal forum was provided for actions on other labor contracts besides collective bargaining contracts. See, *e. g., United Textile Workers* v. *Textile Workers Union,* 258 F. 2d 743 (no-raiding agreement). But, it is urged, though Congress meant that labor organizations could sue one another in federal courts on other contracts between themselves, suits between employers and unions were still limited to actions on collective bargaining contracts: The provision for suits between labor organizations was inserted in Conference.[9] Differing House and Senate bills were reconciled in Conference. The House bill spoke of suits involving a violation of "an agreement between an employer and a labor organization or other representative of employees . . . ." The Senate bill read "contracts concluded as the result of collective bargaining between an employer and a labor organization . . . ." [10] It is urged that the Conference compromise upon the word "contracts" reflects a desire to use one word to cover both suits between employers and unions, and suits between unions. But it seems obvious that had Congress intended any limiting differentiation, this would have been accomplished by retaining the Senate bill's phrasing for agreements between employers and

[9] 2 N. L. R. B., Legislative History of the Labor Management Relations Act, 1947, pp. 1535, 1543.

[10] 1, *id.,* at 221, 279.

unions and then providing specifically for the application of the statute to "contracts between any such labor organizations." *Third.* A 1959 enactment, § 8 (f),[11] explicitly contemplates contracts that would not fit respondents' concept of "collective bargaining agreements." It authorizes contracting with unions that represent persons not yet even hired by the employer. Such a contract might cover only hiring procedures and not wages, hours, and conditions of employment. Nothing supports the improbable congressional intent that the federal courts be closed to such contracts.

We find, then, from a reading of the words of § 301 (a), both in isolation and in connection with the statute as a whole, no basis for denying jurisdiction of the action based upon the alleged violation of the "strike settlement agreement."

Furthermore, the statute's purpose would be defeated by excluding such contracts from "contracts" cognizable under § 301 (a). See *Charles Dowd Box Co.* v. *Courtney,* 368 U. S. 502. If this kind of strike settlement were not enforceable under § 301 (a), responsible and stable labor relations would suffer, and the attainment of the labor policy objective of minimizing disruption of interstate commerce would be made more difficult. It is no answer that in a particular case the agreement might be enforceable in state courts: a main goal of § 301 was precisely to end "checkerboard jurisdiction," *Seymour* v. *Schneckloth,* 368 U. S. 351, at 358. See *Charles Dowd Box Co.* v. *Courtney, supra.*

Lastly, legislative history refutes the argument that Congress intended to omit agreements of the kind in suit from "contracts" falling within the purview of § 301 (a).[12]

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[11] 73 Stat. 545, 29 U. S. C. (Supp. II) § 158 (f).

[12] See 1 and 2 N. L. R. B., *supra,* n. 9, at 94, 151, 221, 279, 297, 336–367, 399–400, 409, 421–424, 436, 475 (see *id.,* at 441), 569–570, 873, 927, 993, 1013, 1014, 1037, 1043, 1044, 1065–1066, 1074, 1076,

We need not decide whether or not this strike settlement agreement is a "collective bargaining agreement" to hold, as we do, that it is a "contract" for purposes of § 301 (a). "Contract in labor law is a term the implications of which must be determined from the connection in which it appears." *J. I. Case Co.* v. *Labor Board,* 321 U. S. 332, 334. It is enough that this is clearly an agreement between employers and labor organizations significant to the maintenance of labor peace between them. It came into being as a means satisfactory to both sides for terminating a protracted strike and labor dispute. Its terms affect the working conditions of the employees of both respondents. It effected the end of picketing and resort by the labor organizations to other economic weapons, and restored strikers to their jobs. It resolved a controversy arising out of, and importantly and directly affecting, the employment relationship. Plainly it falls within § 301 (a). "[F]ederal courts should enforce these agreements on behalf of or against labor organizations and . . . industrial peace can be best obtained only in that way." *Textile Workers Union* v. *Lincoln Mills,* 353 U. S. 448, 455.

Only a few words are necessary to dispose of respondents' second contention, that even if this agreement were otherwise within § 301 (a), petitioners' disclaimer of entitlement to recognition as exclusive representatives puts them out of court. This issue does not touch upon whether minority unions may demand that employers enter into particular kinds of contracts or the circumstances under which employers may accord recognition to

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1078, 1118, 1123–1124, 1128, 1133, 1145–1146, 1150, 1166, 1208, 1325, 1342–1343, 1446, 1456, 1461, 1483, 1488, 1497, 1524, 1539, 1543, 1557–1558, 1619, 1626, 1654. None of the many references to "collective bargaining contracts" evinces a consideration of the meaning or scope of that phrase.

unions as exclusive bargaining agents. The question is only whether "labor organization representing employees" in § 301 (a) has a meaning different from "labor organization which represents employees" in § 301 (b). In *United States* v. *Ryan,* 350 U. S. 299, we rejected the argument that § 301 (b) was limited to majority representatives. Neither the words, purpose, nor history of the statute suggests any reason for a different construction of the virtually identical words of subsection (a). Nor can "labor organization representing employees" in § 301 (a) be read as differing from "any such labor organizations" in that subsection's very next phrase, and plainly, in suits between labor organizations, their right to recognition as exclusive representatives *vis-à-vis* employers has no relevance whatever.

"Members only" contracts have long been recognized. See, *e. g., Consolidated Edison Co.* v. *Labor Board,* 305 U. S. 197. Had Congress thought that there was any merit in limiting federal jurisdiction to suits on contracts with exclusive bargaining agents, we might have expected Congress explicitly so to provide, for example, by enacting that § 301 (a) should be read with § 9 (a). Compare § 8 (a)(3), § 8 (a)(5), § 8 (b)(3), § 8 (b)(4), § 8 (d). Moreover, § 8 (f), the 1959 amendment considered *supra,* p. 27, contemplates contracting with unions that would not represent a majority. Lastly, if the federal courts' jurisdiction under § 301 (a) required a preliminary determination of the representative status of the labor organization involved, potential conflict with the National Labor Relations Board would be increased, cf. *La Crosse Telephone Corp.* v. *Wisconsin Employment Relations Board,* 336 U. S. 18; *Amazon Cotton Mill Co.* v. *Textile Workers Union,* 167 F. 2d 183, and litigation would be much hindered.

We conclude that the petitioners' action for alleged violation of the strike settlement agreement was cog-

nizable by the District Court under § 301 (a). The judgment of the Court of Appeals is reversed and the cause is remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE FRANKFURTER, concurring.

I wholly agree with the Court in rejecting the restrictive meaning given by the Court of Appeals to "contracts" in § 301 (a) of the Labor Management Relations Act. I have, however, serious doubt whether the "statement of understanding" on the basis of which the strike was settled was in fact a contract, in the sense of a consensual arrangement between the Retail Clerks and Lion Dry Goods, rather than a formulation of the results of the intercession of a public-spirited intermediary on the basis of which each side was prepared to lay down its arms. However, on a matter of construing a particular document, in light of the surrounding circumstances, I do not desire to dissent.

Syllabus.

BAILEY ET AL. *v.* PATTERSON ET AL.

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

No. 643. Decided February 26, 1962.

Appellants, Negroes living in Jackson, Mississippi, brought this civil rights action in a Federal District Court on behalf of themselves and others similarly situated, seeking injunctions to enforce their constitutional rights to nonsegregated service in interstate and intrastate transportation. They alleged that such rights had been denied them under color of state statutes, municipal ordinances, and state custom and usage. A three-judge District Court convened to consider the case abstained from further proceedings, pending construction of the challenged laws by the state courts, and appellants appealed directly to this Court under 28 U. S. C. § 1253. *Held:*

1. Appellants lack standing to enjoin criminal prosecutions under Mississippi's breach-of-peace statutes, since they do not allege that they have been prosecuted or threatened with prosecution thereunder; but, as passengers using the segregated transportation facilities, they have standing to enforce their rights to nonsegregated treatment. Pp. 32–33.

2. That no State may require racial segregation of interstate or intrastate transportation facilities has been so well settled that it is foreclosed as a litigable issue, and a three-judge court was not required to pass on this case under 28 U. S. C. § 2281. P. 33.

3. Since this case is not one required to be heard and determined by a district court of three judges under 28 U. S. C. § 2281, it cannot be brought to this Court on direct appeal under § 1253; but this Court has jurisdiction to determine the authority of the Court below and to make such corrective order as may be appropriate to the enforcement of the limitation which that section imposes. P. 34.

4. The judgment is vacated and the case is remanded to the District Court for expeditious disposition, in the light of this opinion, of appellants' claims of right to nonsegregated transportation service. P. 34.

199 F. Supp. 595, judgment vacated and case remanded.

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Constance Baker Motley, Jack Greenberg, James M. Nabrit III and *R. Jess Brown* for appellants.

Dugas Shands and *Edward L. Cates,* Assistant Attorneys General of Mississippi, and *Charles Clark,* Special Assistant Attorney General, for Patterson, *Thomas H. Watkins* for the City of Jackson, Mississippi, et al., and *Junior O'Mara* for the Greyhound Corporation et al., appellees.

PER CURIAM.

Appellants, Negroes living in Jackson, Mississippi, brought this civil rights action, 28 U. S. C. § 1343 (3), in the United States District Court for the Southern District of Mississippi, on behalf of themselves and others similarly situated, seeking temporary and permanent injunctions to enforce their constitutional rights to non-segregated service in interstate and intrastate transportation, alleging that such rights had been denied them under color of state statutes, municipal ordinances, and state custom and usage.* A three-judge District Court was convened, 28 U. S. C. § 2281, and, Circuit Judge Rives dissenting, abstained from further proceedings pending construction of the challenged laws by the state courts. 199 F. Supp. 595. Plaintiffs have appealed, 28 U. S. C. § 1253; *N. A. A. C. P.* v. *Bennett,* 360 U. S. 471. We denied a motion to stay the prosecution of a number of criminal cases pending disposition of this appeal. 368 U. S. 346.

Appellants lack standing to enjoin criminal prosecutions under Mississippi's breach-of-peace statutes, since they do not allege that they have been prosecuted or threatened with prosecution under them. They cannot

*The statutes in question are Miss. Code, 1942, Tit. 11, §§ 2351, 2351.5, 2351.7, and Tit. 28, §§ 7784, 7785, 7786, 7786–01, 7787, 7787.5.

represent a class of whom they are not a part. *McCabe* v. *Atchison, T. & S. F. R. Co.,* 235 U. S. 151, 162–163. But as passengers using the segregated transportation facilities they are aggrieved parties and have standing to enforce their rights to nonsegregated treatment. *Mitchell* v. *United States,* 313 U. S. 80, 93; *Evers* v. *Dwyer,* 358 U. S. 202.

We have settled beyond question that no State may require racial segregation of interstate or intrastate transportation facilities. *Morgan* v. *Virginia,* 328 U. S. 373; *Gayle* v. *Browder,* 352 U. S. 903; *Boynton* v. *Virginia,* 364 U. S. 454. The question is no longer open; it is foreclosed as a litigable issue. Section 2281 does not require a three-judge court when the claim that a statute is unconstitutional is wholly insubstantial, legally speaking nonexistent. *Ex parte Poresky,* 290 U. S. 30; *Bell* v. *Waterfront Comm'n,* 279 F. 2d 853, 857–858. We hold that three judges are similarly not required when, as here, prior decisions make frivolous any claim that a state statute on its face is not unconstitutional. *Willis* v. *Walker,* 136 F. Supp. 181; *Bush* v. *Orleans Parish School Board,* 138 F. Supp. 336; *Kelley* v. *Board of Education,* 139 F. Supp. 578. We denied leave to file petitions for mandamus in *Bush,* 351 U. S. 948, and from a similar ruling in *Booker* v. *Tennessee Board of Education,* 351 U. S. 948. The reasons for convening an extraordinary court are inapplicable in such cases, for the policy behind the three-judge requirement—that a single judge ought not to be empowered to invalidate a state statute under a federal claim—does not apply. The three-judge requirement is a technical one to be narrowly construed, *Phillips* v. *United States,* 312 U. S. 246, 251. The statute comes into play only when an injunction is sought "upon the ground of the unconstitutionality" of a statute. There is no such ground when the constitutional issue presented is essentially fictitious.

This case is therefore not one "required . . . to be heard and determined by a district court of three judges," 28 U. S. C. § 1253, and therefore cannot be brought here on direct appeal. However, we have jurisdiction to determine the authority of the court below and "to make such corrective order as may be appropriate to the enforcement of the limitations which that section imposes," *Gully* v. *Interstate Natural Gas Co.,* 292 U. S. 16, 18; *Oklahoma Gas & Elec. Co.* v. *Oklahoma Packing Co.,* 292 U. S. 386, 392; *Phillips* v. *United States,* 312 U. S. 246, 254. Accordingly, we vacate the judgment and remand the case to the District Court for expeditious disposition, in light of this opinion, of the appellants' claims of right to unsegregated transportation service.

Vacated and remanded.

IN RE SHUTTLESWORTH.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF HABEAS CORPUS.

No. 1073, Misc. Decided February 26, 1962.

Certiorari granted; order of Court of Appeals vacated; case remanded to District Court with instructions.

William M. Kunstler for petitioner.

PER CURIAM.

Treating this application for habeas corpus as a petition for certiorari to review the denial by a judge of the Court of Appeals for the Fifth Circuit of a certificate of probable cause for appeal (28 U. S. C. § 2253) from the District Court for the Northern District of Alabama, cf. *In re Burwell,* 350 U. S. 521, 522, we grant it as such, vacate the order of the Court of Appeals, and remand the case to the District Court with instructions to hold the matter while petitioner pursues his state remedies (as indicated in the opinion of Judge Rives denying a certificate of probable cause), including an application for bail to state courts pending disposition of petitioner's application for state relief. In the event of failure to secure such relief, or to secure admission to bail pending such relief within five (5) days from the date of application for bail, petitioner may, upon appropriate showing, proceed on this application in the United States District Court which may then consider all state remedies exhausted and proceed to hear and determine the cause, including any application for bail pending that court's final disposition of the matter. The Clerk is directed to issue the judgment forthwith.

STRELICH *v.* HEINZE, WARDEN, ET AL.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 868, Misc. Decided February 26, 1962.

PER CURIAM.

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

HARPER *v.* BANNAN, WARDEN.

APPEAL FROM THE SUPREME COURT OF MICHIGAN.

No. 884, Misc. Decided February 26, 1962.

PER CURIAM.

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

EASTERN EXPRESS, INC., ET AL. *v.* UNITED STATES ET AL.

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

No. 623. Decided February 26, 1962.

198 F. Supp. 256, affirmed.

Bryce Rea, Jr., Roland Rice and *Homer S. Carpenter* for appellants.

Solicitor General Cox, Assistant Attorney General Loevinger, Richard A. Solomon, Robert W. Ginnane and *B. Franklin Taylor, Jr.* for the United States et al., and *Kenneth F. Burgess, D. Robert Thomas, William E. Jenner, Jack C. Brown, Harry C. Ames, James L. Givan* and *S. S. Eisen* for the Freight Forwarders Institute et al., appellees.

PER CURIAM.

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

SIMONSON, TRUSTEE IN BANKRUPTCY, ET AL. *v.* GRANQUIST, DISTRICT DIRECTOR OF INTERNAL REVENUE, ET AL.

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

No. 83. Argued January 18, 1962.—Decided March 5, 1962.

Section 57j of the Bankruptcy Act bars allowance of a claim against the estate of a bankrupt in favor of the United States for federal statutory tax penalties, even though a lien therefor has been perfected prior to filing of the petition in bankruptcy. Pp. 38–42.

287 F. 2d 489, 491, reversed.

Donald A. Schmechel and *Fred A. Granata* argued the cause for petitioners. With them on the briefs were *Arthur E. Simon* and *John F. Cramer, Jr.*

Richard J. Medalie argued the cause for respondents. With him on the briefs were *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *I. Henry Kutz.*

MR. JUSTICE BLACK delivered the opinion of the Court.

These two cases, consolidated for argument here, involve controversies between the United States and bankruptcy trustees concerning the right of the Government to recover federal tax penalties against the estate of a bankrupt.[1] Because the tax penalties constituted perfected liens on the estate of the bankrupt,[2] the Court of Appeals for the Ninth Circuit, following one of its own prior decisions which subsequently had been supported

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[1] In the first case, *Simonson* v. *Granquist*, there is another point which we need not reach because of the disposition made here.

[2] In *Simonson* v. *Granquist* the liens arose under Int. Rev. Code of 1954, § 6321; in *Harris* v. *United States*, they arose under Int. Rev. Code of 1939, § 3670.

by both the Sixth and the Tenth Circuits,[3] sustained District Court judgments holding the penalty claims allowable. 287 F. 2d 489, 491. Since the Fourth and Fifth Circuits have held to the contrary,[4] we granted certiorari to resolve the conflict. 366 U. S. 943.

Two provisions of the Bankruptcy Act, §§ 57j and 67b, are asserted to have particular relevance to the question. Section 57j provides:

> "Debts owing to the United States or to any State or any subdivision thereof as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose . . . ." [5]

Section 67b provides, however:

> "[S]tatutory liens . . . for taxes and debts owing to the United States . . . may be valid against the trustee, even though arising or perfected . . . within four months prior to the filing of the petition initiating a proceeding under this Act by or against him. . . ." [6]

Despite the fact that the language of § 57j broadly prohibits the allowance of penalty claims in bankruptcy without regard to whether such claims are secured or unsecured, the Government argues that this section should be interpreted to apply to unsecured penalty claims only and that secured claims, even though for penalties, should be allowed under § 67b. Its argu-

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[3] *In re Knox-Powell-Stockton Co.* (C. A. 9th Cir.), 100 F. 2d 979; *Kentucky* v. *Farmers Bank* (C. A. 6th Cir.), 139 F. 2d 266; *United States* v. *Mighell* (C. A. 10th Cir.), 273 F. 2d 682.

[4] *United States* v. *Harrington* (C. A. 4th Cir.), 269 F. 2d 719; *United States* v. *Phillips* (C. A. 5th Cir.), 267 F. 2d 374.

[5] 30 Stat. 561, as amended, 11 U. S. C. § 93 (j).

[6] 52 Stat. 876, as amended, 11 U. S. C. § 107 (b).

ment starts from the fact that the Bankruptcy Act primarily provides a way to gather the unencumbered assets of an insolvent debtor for distribution among his unsecured creditors, but, though containing some provisions applicable to secured creditors, generally leaves those creditors secured by mortgages and liens free to enforce their claims directly against the property by which those claims are secured. From this and a section-by-section analysis of the Act, the Government reasons that the "claims" referred to in § 57, which governs the "Proof and allowance of claims," are not the claims of secured creditors but only the "claims" of unsecured creditors against the fund created by unencumbered assets, with which the Act primarily deals. On this basis the Government contends that § 57j, being a part of § 57, must be read as barring only those penalties that have not yet ripened into a lien so as to become a charge upon the bankrupt's property.

We think, however, that the language of § 57j is itself a more dependable guide to its meaning than this argument from the general structure of the Bankruptcy Act. Unquestionably that language is broad enough to bar all penalties, whether secured by lien or not, and we think the section was designed to do precisely that. For it plainly manifests a congressional purpose to bar all claims of any kind against a bankrupt except those based on a "pecuniary" loss. So understood, this section, which has been a part of the Bankruptcy Act since its enactment in 1898, is in keeping with the broad aim of the Act to provide for the conservation of the estates of insolvents to the end that there may be as equitable a distribution of assets as is consistent with the type of claims involved. Moreover, the prohibition of all tax penalties in bankruptcy is wholly consistent with the policy of the penalty provisions themselves. Tax penalties are imposed at least in part as punitive measures against persons who

have been guilty of some default or wrong.[7] Enforcement of penalties against the estates of bankrupts, however, would serve not to punish the delinquent taxpayers, but rather their entirely innocent creditors.

When we turn to the language of § 67b, we find nothing that indicates a purpose to require the general creditors of a bankrupt to suffer because of penalties designed to be inflicted upon the bankrupt himself. Indeed, there is not a single word in that section regarding penalties, and the plain purpose of the section is merely to prevent certain liens, including statutory tax liens, "arising or perfected . . . within four months prior to the filing of the [bankruptcy] petition," from being set aside and declared invalid under § 60 as preferential.[8] Thus § 67b expressly declares that it is to take precedence over any "provisions of section 60 of this Act to the contrary . . . ." Section 67b cannot therefore be read as showing a congressional purpose to make penalties allowable contrary to the special and specific language of § 57j which makes them not allowable.[9]

The Government argues, however, that the legislative history of the two sections supports the allowance of penalties when they have ripened into liens. Without discussing the varied arguments to this effect in detail, we think the legislative history cited supports no such conclusion.[10] Nor do we think that any inference can be

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[7] See, *e. g.*, *United States* v. *Childs*, 266 U. S. 304, 307.

[8] 30 Stat. 562, as amended, 11 U. S. C. § 96. See Analysis of H. R. 12889, 74th Cong., 2d Sess. 211, note 1; 4 Collier, Bankruptcy 183, particularly note 12.

[9] Cf. *Gardner* v. *New Jersey*, 329 U. S. 565, 580–581.

[10] Indeed what little legislative history there is might well be taken to indicate an intent to bar penalties whether liened or not. Thus, the minority report on the Torrey Bill which eventually became the Bankruptcy Act of 1898 stated as an objection to § 57j the fact that although "penalties and forfeitures, when merged into judg-

drawn from the failure of Congress to amend the Act for although some courts have held liened penalty claims allowable, others have held precisely the opposite.[11]

It is true that the United States has long had an absolute priority for debts due from insolvent debtors and that the Bankruptcy Act generally accords secured creditors a preferred position. But § 57j places penalties in a category quite different from ordinary debts, one not favored in bankruptcy, and the character of a penalty is by no means changed by calling it a lien.

Reversed.

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

Of course one agrees with the Court that an important purpose of the Bankruptcy Act was to ensure an equitable distribution of assets among creditors. I also agree that § 57j, 11 U. S. C. § 93 (j), denying claims for penalties against the estate, reflects a policy against disadvantaging innocent creditors for the wrongs of the bankrupt. If that were the only policy of the Act, § 57j would hold the exclusive field and there would be no problem. As it is, if there be a countervailing policy as a matter of historic bankruptcy law, it can neither be discarded nor disregarded in giving § 57j its proper setting and its resulting scope.

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ment, . . . are liens upon the debtor's estate, this bill treats them as worthless and forbids their payment." H. R. Rep. No. 1674, 52d Cong., 1st Sess., pt. 2, pp. 13–14.

[11] Compare, *e. g., In re Knox-Powell-Stockton Co.*, 100 F. 2d 979, and *Kentucky* v. *Farmers Bank*, 139 F. 2d 266, with *United States* v. *Phillips*, 267 F. 2d 374, and *In re Burch*, 89 F. Supp. 249. In 1960 Congress passed an Act containing a provision applying § 57j to penalties "whether or not secured by lien," but this was vetoed by the President. 106 Cong. Rec. 19168.

In bankruptcy a sharp distinction has always been drawn between secured and unsecured creditors. Secured creditors may not vote at creditors' meetings, § 56b, nor may their claims be allowed against the bankrupt estate, § 57e, except to the extent that these claims exceed the value of the security. Fully secured creditors are not counted in determining the total number of creditors in order to ascertain the number required to initiate involuntary bankruptcy, § 59e. Liens have been held unaffected by a discharge under § 17, *e. g., Prebyl* v. *Prudential Ins. Co.*, 98 F. 2d 199; see 1 Collier, Bankruptcy ¶ 17.29 (14th ed. 1961).

Sections 64, 65, and 67 establish three classes of debts: those which are secured by lien, those which are given priority and all others. Those having neither security nor priority are satisfied on a pro rata basis, § 65. Those with priority, as listed in § 64, are to be paid in full in specified order before the distribution of pro rata dividends to other claimants. Liens, in § 67d of the statute as enacted in 1898, 30 Stat. 544, 564, were declared to be unaffected by the statute—they were entirely without its scope. Consequently they were entitled to precedence over claims granted priority by § 64. *City of Richmond* v. *Bird*, 249 U. S. 174. This section was omitted in the 1938 revision because its wording permitted inferences that by negative implication it disallowed certain liens not otherwise invalidated by the Act, and because the substance of the provision was thought to be preserved in other sections—not because of disapproval in policy. S. Rep. No. 1916, 75th Cong., 3d Sess. 17 (1938); see 4 Collier, *supra,* ¶ 67.20. This Court has held that liens remain immune from and are not displaced by the Act's priorities under the 1938 Act, *Goggin* v. *California Labor Div.*, 336 U. S. 118, 126–127, and liens for federal taxes are expressly preserved by § 67b. A limited exception

to the immunity of liens was made in § 67c, but the extent of the invalidation or subordination of liens to other debts was carefully circumscribed, and the basic lien immunity remains. 4 Collier, *supra,* ¶ 67.20[3]–67.20[7].

Congress has thus treated liens as outside the policy of equal treatment of creditors in bankruptcy. 3 Collier, *supra,* ¶ 57.07. A lienor does not hold simply a first priority; he has "a right to enforcement independent of bankruptcy," *id.,* ¶ 64.02, at 2061. The Bankruptcy Act deals with the distribution of unencumbered assets among unsecured creditors. *Id.,* ¶ 60.01. Lienholders need no Bankruptcy Act. Liens are independent of and essentially unaffected by bankruptcy proceedings. I agree with the court below that liens are unaffected by § 57j; they are outside its scope.

Syllabus.

METLAKATLA INDIAN COMMUNITY, ANNETTE ISLANDS RESERVE, *v.* EGAN, GOVERNOR OF ALASKA, ET AL.

APPEAL FROM THE SUPREME COURT OF ALASKA.

No. 2. Argued December 13–14, 1961.—Decided March 5, 1962.

By the Act of March 3, 1891, the Annette Islands in Alaska were "set apart as a reservation" for the Metlakatlans and other Indians, "to be held and used by them . . . under such rules and regulations . . . as may be prescribed from time to time by the Secretary of the Interior." Relying not upon that Act, but upon the White Act of June 6, 1924, and § 4 of the Alaska Statehood Act, the Secretary of the Interior promulgated the present regulations whereby appellant, the incorporated Metlakatla Indian Community, was accorded the right to erect and operate salmon traps in waters surrounding the Annette Islands. Appellant sued to enjoin threatened enforcement against it of a statute of the State of Alaska forbidding the use of salmon traps. Its suit was dismissed, and the Supreme Court of Alaska affirmed. *Held:*

1. Neither the White Act nor § 4 of the Alaska Statehood Act conferred authority on the Secretary of the Interior to permit Metlakatlans to use salmon traps. *Organized Village of Kake* v. *Egan, post,* p. 60. P. 54.

2. The authority to issue regulations governing the Metlakatla Indian Reservation, which was granted to the Secretary of the Interior by the 1891 Act, has not been repealed or impaired, and he has power to issue regulations concerning the fishing rights of these Indians on this reservation which would supersede state law; but the present regulations did not purport to be issued under that authority. They purported to be issued under a misconceived duty wrongly read into the Alaska Statehood Act. Pp. 54–59.

3. The judgment of the Supreme Court of Alaska is vacated and the case is remanded to that Court, there to be held to give ample opportunity for the Secretary of the Interior with all reasonable expedition to determine prior to the 1963 salmon-fishing season what, if any, authority he chooses to exercise in the light of this opinion; and the stay heretofore granted is continued in force until the end of the 1962 salmon-fishing season. P. 59.

—— Alaska ——, 362 P. 2d 901, judgment vacated and cause remanded.

Richard Schifter argued the cause for appellant. With him on the briefs was *Theodore H. Little.*

Ralph E. Moody, Attorney General of Alaska, and, by special leave of Court *pro hac vice, Avrum M. Gross,* Assistant Attorney General, argued the cause and filed briefs for appellees.

Oscar H. Davis, by special leave of Court, argued the cause for the United States, as *amicus curiae,* urging reversal. With him on the brief were *Solicitor General Cox* and *Roger P. Marquis.*

Mr. Justice Frankfurter delivered the opinion of the Court.

This is an appeal from a decision of the Supreme Court of the State of Alaska, — Alaska —, 362 P. 2d 901, affirming the denial of an injunction against interference by the State with appellant's use of fish traps in the Annette Islands of southeastern Alaska. Appellant rests its claim in part on regulations promulgated by the Secretary of the Interior whereby the Metlakatla Indian Community was accorded the right to erect and to operate salmon traps at four locations in waters surrounding the Annette Islands, which Congress set aside for its use in 1891. Alaska challenged this authorization by a state conservation law forbidding the use of salmon traps.

Long before the white man came to Alaska, the annual migrations of salmon from the sea into Alaska's rivers to spawn served as a food supply for the natives. Commercial salmon fishing has become vital for Alaska's economy, but its exploitation seriously threatened the resource even before the turn of the century. See Gruening, The State of Alaska (1954), pp. 75, 97. Congress in 1889, in 1896, in 1906, and again in 1924 enacted conservation measures, prohibiting any obstruction of waters to impede salmon migration, limiting the times and means of taking salmon,

and authorizing the appropriate department to impose further restrictions.[1] When Alaska was established as a State, Congress withheld jurisdiction over her fisheries until she had made adequate provision for their administration.[2]

Equally with Congress, Alaska has been concerned with the evils of overexploitation. In particular she saw a menace in the fish trap, a labor-saving but costly device, which became in her eyes the symbol of exploitation of her resources by "Stateside" colonialism. See Rogers, Alaska in Transition (1960), pp. 4–15; Gruening, *supra,* at pp. 392–407; Gruening, Let Us End American Colonialism (1955), reprinted at 103 Cong. Rec. 470–474. The fish trap, "a formidable structure," *Alaska Pacific Fisheries* v. *United States,* 248 U. S. 78, 87, consists principally of a fence or netting stretched across or partly across a stream to obstruct the upstream progress of the salmon and turn the fish into the "heart" or "pot" of the trap, where they are imprisoned until removed. See Rogers, *supra,* at p. 7; Gruening, The State of Alaska, *supra,* at pp. 169–170. At one time there were about 700 salmon traps in operation in Alaska. The Secretary of the Interior felt that the fish trap's threat to conservation could be adequately dealt with by regulating the number of fish permitted to escape.[3] Alaska vigorously opposed this. The Territorial Legislature several times sent memorials to Congress urging abo-

[1] 25 Stat. 1009; 29 Stat. 316 (Treasury Department); 34 Stat. 478, now 48 U. S. C. §§ 230–239, 241–242 (Commerce Department); 43 Stat. 464, now 48 U. S. C. §§ 221–228 (Commerce Department). The Secretary of the Interior succeeded to these responsibilities in 1939. 1939 Reorganization Plan No. II, § 4 (e), 53 Stat. 1431, 1433.

[2] 72 Stat. 339, 340–341. Alaska adopted a comprehensive fish and game code April 17, 1959, Alaska Laws 1959, c. 94, and received full control over her resources soon afterward.

[3] Letter of Douglas McKay, Secretary of the Interior, to Herbert C. Bonner, Chairman, House Comm. on Merchant Marine & Fisheries, Oct. 7, 1955.

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lition of trap fishing.[4] An ordinance to abolish all commercial traps was approved by Alaska voters along with the proposed State Constitution in 1956, and in early 1959 the first State Legislature turned this ordinance into the statute here under review.[5]

The Metlakatla Indians, some 800, led by a British missionary, moved from British Columbia to Alaska in 1887. In 1891 the Annette Islands, south of Ketchikan at the extreme lower end of the Alaskan archipelago, were "set apart as a reservation" by Congress for the Metlakatlans and other Indians, "to be held and used by them in common, under such rules and regulations, and subject to such restrictions, as may be prescribed from time to time by the Secretary of the Interior." 26 Stat. 1095, 1101, 48 U. S. C. § 358. In 1915 the Secretary issued regulations, 25 CFR (1939 ed.), pt. 1, establishing an elective council to make local ordinances for Metlakatla, and also permitting members of the Community to obtain permits for the use of salmon traps in waters adjacent to the Annette Islands. The next year, in furtherance of the Secretary's plan to establish a salmon

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[4] Alaska Laws 1931, pp. 275–276; 1947, pp. 325–326; 1953, pp. 401–402; 1955, pp. 447–448.

[5] Alaska Laws 1959, c. 17. As amended by *id.*, c. 95, the statute reads as follows:

"Section 1. It shall be unlawful to operate fish traps, including but not limited to floating, pile-driven or hand-driven fish traps, in the State of Alaska on or over any of its lands, tidelands, submerged lands, or waters; provided nothing in this section shall prevent the operation of small hand-driven fish traps of the type ordinarily used on rivers of Alaska which are otherwise legally operated in or above the mouth of any stream or river in Alaska; nor shall this Act be construed so as to violate Sec. 4 of Public Law 85-508, 72 Stat. 339, which constitutes a compact between the United States and Alaska, pursuant to which the State disclaims all right and title to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called Natives) or is held by the United States in trust for said Natives."

cannery at Metlakatla, President Wilson by proclamation declared the waters within 3,000 feet of certain of these islands to be a part of the Metlakatla Reserve, to be used by the Indians as a source of supply for the intended cannery, "under the general fisheries laws and regulations of the United States as administered by the Secretary of Commerce." 39 Stat. 1777.[6] In 1918, without reference to the proclamation, this Court upheld the right of the Metlakatlans to exclude others from the waters surrounding their islands on the ground that these waters were included within the original reservation by Congress. *Alaska Pacific Fisheries* v. *United States,* 248 U. S. 78.

Ever since 1915, Metlakatla has operated fish traps with the consent of the Secretary of the Interior. Following the enactment of the State's fish-trap law in 1959, the Secretary in the exercise of his transitional power over Alaska fisheries banned all fish traps except those operated by Metlakatla and by other Indians involved in the companion case, *Organized Village of Kake* v. *Egan, post,* p. 60. 24 Fed. Reg. 2053, 2056, 2069 (1959). The following year, having relinquished general control of the fisheries, the Secretary again authorized Metlakatla to operate fish traps at four of eight specified locations, citing as authority the White Act, 43 Stat. 464, as amended, 48 U. S. C. §§ 221–228, and § 4 of the Alaska Statehood Act, 72 Stat. 339, as amended by 73 Stat. 141. 25 CFR (1961 Supp.), pt. 88.[7]

With this background we reach the present controversy. In May, 1959, just before the salmon season began, the

[6] In 1934, when the Metlakatlans were made citizens, Congress declared that reservations made for them by statute, order, or proclamation should "continue in full force and effect," 48 Stat. 667.

[7] Since 1944 Metlakatla has been a chartered federal corporation under a constitution adopted pursuant to the Wheeler-Howard Act, 48 Stat. 984, 988, as amended, 49 Stat. 1250, 25 U. S. C. §§ 473a, 476, 477.

State warned Metlakatla and other Indians that she would enforce the fish-trap law against them. The threat was intensified when the State arrested members of other Indian communities and seized one fish trap. Suits were thereupon filed by Metlakatla and by the appellants in the companion case in the interim United States District Court for the District of Alaska, seeking an injunction against interference with their asserted federal rights to fish with traps. All complaints were dismissed, 18 Alaska ——, 174 F. Supp. 500. Appeal was brought to this Court, as the Supreme Court of Alaska had not yet been fully organized. Pending decision, MR. JUSTICE BRENNAN granted a stay of enforcement by the State, 4 L. Ed. 2d 34, 80 S. Ct. 33. The Court assumed jurisdiction and continued the stay but remanded the case to the newly constituted State Supreme Court primarily for its disposition of matters of local law, 363 U. S. 555. That Court affirmed the District Court's dismissal, holding the fish-trap law applicable to Metlakatla and to the other appellants, and upholding its validity as so applied, —— Alaska ——, 362 P. 2d 901. From its judgment, the appeal is properly here under 28 U. S. C. § 1257. We noted probable jurisdiction, 368 U. S. 886.

Several grounds of the decision below are now out of the case on concession of error by Alaska, but she firmly stands on the judgment in her favor. Metlakatla argues that it is immune from the fish-trap law because (1) state law cannot regulate Indian activities on Indian reservations; (2) the State cannot regulate a federal instrumentality; and (3) appellant has been authorized to operate traps by the Secretary of the Interior. The United States has supported Metlakatla as *amicus curiae,* see 362 U. S. 967.

The Indians of southeastern Alaska, who have very substantially adopted and been adopted by the white man's civilization, were never in the hostile and isolated

position of many tribes in other States. As early as 1886 a federal judge, holding Alaskan Indians subject to the Thirteenth Amendment, denied that the principle of Indian national sovereignty enunciated in *Worcester* v. *Georgia,* 6 Pet. 515, applied to them. *In re Sah Quah,* 31 F. 327 (D. Alaska). There were no Indian wars in Alaska, although on at least one occasion, see Gruening, The State of Alaska (1954), pp. 36–37, there were fears of an uprising. There was never an attempt in Alaska to isolate Indians on reservations. Very few were ever created, and the purpose of these, in contrast to many in other States, was not to confine the Indians for the protection of the white settlers but to safeguard the Indians against exploitation. Alaskan Indians are now voting citizens, some of whom occupy prominent public office in the state government. See *United States* v. *Booth,* 17 Alaska 561, 161 F. Supp. 269 (D. Alaska 1958); *United States* v. *Libby, McNeil & Libby,* 14 Alaska 37, 41–42, 107 F. Supp. 697, 699 (D. Alaska 1952). Metlakatlans, the State tells us, have always paid state taxes, in contrast to the practice described and prescribed for other reservations in *The Kansas Indians,* 5 Wall. 737, and it has always been assumed that the reservation is subject to state laws. *United States* v. *Booth,* 17 Alaska, at 563, 161 F. Supp., at 270. Congress in 1936, 49 Stat. 1250, 48 U. S. C. § 358a, by authorizing the Secretary of the Interior to create Indian reservations of land reserved for Indian uses under 48 U. S. C. § 358, seems to have believed that Metlakatla was no ordinary reservation, since Metlakatla alone is covered in § 358. Finally, in *United States* v. *Booth, supra,* the District Court for Alaska held that a crime committed on the Metlakatla Reserve, before the extension of jurisdiction over Indian country to Alaska, see p. 56, *infra,* was punishable under territorial laws, since for the reasons here outlined the

Reserve was not "Indian country" within the meaning of 18 U. S. C. §§ 1151–1153.

The words "set apart as a reservation," appearing in the statute creating the Annette Islands Reserve, are substantially the same as used in numerous other statutory reservations. *E. g.,* 13 Stat. 63 (Uinta Valley, Utah); 13 Stat. 541, 559 (Colorado River); 18 Stat. 28 (Gros Ventre and others); 19 Stat. 28, 29 (Pawnee). None of these statutes made express provision for self-government or for state government. Some treaties, such as that with the Cherokees in 1828, 7 Stat. 311, expressly excluded state laws. Other treaties, however, while sometimes phrased in terms of a gift or assignment rather than a reservation of land, made no mention of state power. *E. g.,* Treaty with the Shawnee Tribe, 1825, 7 Stat. 284; Treaty with the Potawatomies, 1837, 7 Stat. 532; Treaty with the New York Indians, 1838, 7 Stat. 550, 551; Treaty with the Sacs and Foxes, 1842, 7 Stat. 596. Later treaties "set apart for the absolute and undisturbed use and occupation" of the Indians certain lands. *E. g.,* Treaty with the Arapahoes and Cheyennes, 1867, 15 Stat. 593, 594; Treaty with the Crow Indians, 1868, 15 Stat. 649, 650. The 1868 Treaty with the Navajos was similar. 15 Stat. 667, 668. And the 1855 treaty with the Quinault Indian Tribe, 12 Stat. 971, which the Supreme Court of Washington held barred state regulation of reservation fishing, promised only that lands would be "reserved, for the use and occupation of the tribes." It was implemented by an executive order of November 7, 1873, by which certain lands were "withdrawn from sale and set apart for the use" of the tribe. See *Pioneer Packing Co.* v. *Winslow,* 159 Wash. 655, 657–658, 294 P. 557, 558.

The provision creating the Metlakatla Reserve in 1891 was added to a House bill dealing with timber lands on the floor of the Senate by Nebraska's Senator Manderson.

Reciting the unfortunate experience of the Metlakatlans in British Columbia and their emigration to Alaska, Senator Manderson explained that his amendment was designed to dispel fears of expulsion from their new lands as from their old, or of intrusion by outsiders seeking to exploit the resources of the islands. The purpose, he stated, was "simply to allow this band of Indians to remain there under such rules and regulations as the Secretary of the Interior may impose, and give them some recognized footing at that place." Remarks by Senators Dawes and Dolph were to the same effect. 21 Cong. Rec. 10092–10093 (1890). The amendment was agreed to and adopted by both Houses after a conference, with no further discussion.

This provision subjecting Metlakatla to rules and regulations of the Secretary of the Interior is unusual. Since 1849 the Secretary had been the officer of the United States charged with administration of the Indian laws, but none of the treaties or statutes which have come to our attention contained such a provision. The Cheyenne and Crow treaties, *supra,* provided that Congress might regulate matters on the reservations, but this was no delegation of Congress' powers to the Secretary. It was but a recognition by the Indians of powers the Constitution gave to the national legislature.

The regulations issued by the Secretary for the government of the Annette Islands January 28, 1915, appear to be without parallel. No such rules applying to other reservations are to be found in the Code of Federal Regulations. The Secretary vested powers of local government in an elective council, 25 CFR (1939 ed.), § 1.2, which was given authority to pass ordinances required not to conflict with "the laws of the United States, the laws of the Territory of Alaska, or the rules and regulations in this part," § 1.10, and subject to review by the Secretary, § 1.62. As a condition to the right to vote in local elec-

tions, members of the Reserve—limited to Metlakatlans and other natives, § 1.51—were required to swear obedience to local laws, laws of the United States, and laws of the Territory of Alaska, § 1.52. Thus the Secretary, in the exercise of the authority delegated him by Congress, subjected self-government of Metlakatla not only to federal oversight but to territorial laws as well. However, as discussed above, an additional regulation issued by the Secretary in 1915 authorized the use of fish traps at Metlakatla, and this permission has been continued in regulations issued since statehood.

Alaska urges that the regulations are invalid because neither the White Act nor the Statehood Act conferred authority on the Secretary to permit Metlakatlans to use fish traps. The State's premise is correct, *Organized Village of Kake* v. *Egan, post,* p. 60. However, Congress in 1891 gave the Secretary authority to make rules governing the Metlakatla Reservation, and his authority, like the reservation itself, *Alaska Pacific Fisheries* v. *United States,* 248 U. S. 78, extended to the waters surrounding the islands. Does this Act validate the regulations in light of subsequent legislative and executive actions?

The Presidential Proclamation of 1916, 39 Stat. 1777, declared waters within 3,000 feet of Annette and adjacent islands to be a part of the Metlakatla Reservation and provided that the Indians should have the use of these waters "under the general fisheries laws and regulations of the United States as administered by the Secretary of Commerce." Alaska argues that the purpose of this provision was to place Metlakatla fishermen in the same position as all others in Alaska by subjecting them to the same laws. In 1916 the general laws were federal; now they are those of the State. Therefore, the State contends, the policy of the Proclamation requires that the provision be construed as subjecting the Metlakatlans to the laws governing all other fishermen, which now include the state

fish-trap law. The Metlakatlans have the right to exclude others from their waters, Alaska agrees, but not the right to be free from regulation.

Alaska does not argue that the Proclamation deprived the Secretary of the Interior of the authority Congress gave him to prescribe rules governing fishing and other activities on the Annette Islands. Assuming the President had power to do so, he did not purport to exercise it. Quite the contrary. The Proclamation recites that the Secretary has determined to establish a cannery for the Metlakatlans, that the Secretary has been given authority to make regulations for Metlakatla by the statute of 1891, and that protection of the Indians' fishing rights is required to assure a supply of fish for the cannery. Apparently the Proclamation was prompted by the threatened encroachment of non-Indian fishermen into Metlakatla waters and the fear that the reservation of the islands might not protect the Indians against such intrusions. No statutory authority for the Proclamation was cited. It was declared to be issued under authority of "the laws of the United States." It is clear that President Wilson was attempting to assist and promote the plans of the Secretary of the Interior to develop the reserve under his statutory authority, not to limit or destroy that authority. The subjection of Metlakatla to general fisheries laws and to regulations of the Secretary of Commerce thus did not make those laws and regulations superior to regulations of the Secretary of the Interior. Rather the general laws and Commerce regulations were adopted as a part of the Interior regulations, so far as not in conflict with other rules adopted by the Secretary of the Interior and subject to his further modification under the power given him in 1891.

Nor did the White Act impair the Secretary's power. That statute permitted the Secretary for conservation purposes to limit the taking of salmon in areas of his des-

ignation, but prohibited his granting exclusive rights in so doing. This Court in *Hynes* v. *Grimes Packing Co.*, 337 U. S. 86, held that the prohibition bars the Secretary from creating exclusive White Act rights in Indians as well as in non-Indians, but it expressly disclaimed holding that no exclusive Indian rights may exist. 337 U. S., at 118–119, 122–123. The Secretary's regulations did not create exclusivity; that was a part of the reservation as created in 1891 and clarified by the proclamation of 1916, which excluded others from fishing in Metlakatla waters.

In 1958, 72 Stat. 545, Alaska was added to the list of States and Territories permitted to exercise civil and criminal jurisdiction over Indian reservations. The State has not argued that this took away the power of the Secretary of the Interior to make regulations contrary to state law. Appellant has argued, to the contrary, that the statute expressly preserved Indian fishing rights from state laws. The statute granting States civil and criminal jurisdiction was passed in 1953, 67 Stat. 588, 18 U. S. C. § 1162, 28 U. S. C. § 1360. Subsection (b) of 18 U. S. C. § 1162 provides that nothing therein shall authorize alienation, encumbrance, or taxation of Indian property, "or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof."

This statute expressly protects against state invasion all uses of Indian property authorized by federal treaty, agreement, statute, or regulation, but only those fishing rights and privileges given by federal treaty, agreement, or statute. It might plausibly be argued, therefore, that

fishing rights given by regulation are not protected and state jurisdiction is established. Legislative history is silent as to the interpretation of the provision. See H. R. Rep. No. 848, 83d Cong., 1st Sess.; S. Rep. No. 699, 83d Cong., 1st Sess.; 99 Cong. Rec. 9962, 10782, 10928 (1953). The apparent purpose of the proviso was to preserve federally granted fishing rights. It would be sheer speculation to attribute significance to the imperfect parallelism of the provisions protecting property and fishing rights in the absence of any suggested reason for excluding fishing rights based on regulations. The process of statutory drafting and evolution, here veiled from scrutiny, is too imprecise to permit such an inference. Cf. *United States* v. *Mersky,* 361 U. S. 431, 437. In any event, the proviso also protects rights given the Indians by statute respecting the control and regulation of fishing, and the 1891 statute gave the Metlakatlans the right to fish under regulations of the Secretary of the Interior.

Section 6 (e) of the Alaska Statehood Act, 72 Stat. 339, 340–341, providing for the conveyance of United States properties "used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska," contemplated transfer to the State of the same measure of administration and jurisdiction over fisheries and wildlife as possessed by other States, S. Rep. No. 1929, 81st Cong., 2d Sess. 13–14 (1950); H. R. Rep. No. 1731, 80th Cong., 2d Sess. 1 (1948); S. Rep. No. 1028, 83d Cong., 2d Sess. 31 (1954); S. Rep. No. 1163, 85th Cong., 1st Sess. 3 (1957), see *Geer* v. *Connecticut,* 161 U. S. 519, after the transition period during which the State was to establish machinery for this purpose. Section 4, however, as amended by 73 Stat. 141, required Alaska to disclaim all right and title to any United States property not granted her by the statute, and also "to any lands or other property (including fishing rights), the right or title

to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives." Such property was to "be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority, except to such extent as the Congress has prescribed or may hereafter prescribe," with immaterial exceptions, and provided that claims against the United States are neither enlarged, diminished, nor recognized by these provisions. This disclaimer is substantially the same as found in the Acts admitting 13 other States. See S. Rep. No. 315, 82d Cong., 1st Sess. 15 (1951).

Alaska does not expressly argue that the Secretary's power was destroyed by the Statehood Act. She does, however, contend that control of all fishing was transferred to the State with no exception for Indian fishing, and that only the exclusiveness of Metlakatla's fishing rights was preserved. But legislative history makes clear that the transfer of jurisdiction over fishing was subject to rights reserved in § 4. S. Rep. No. 1929, 81st Cong., 2d Sess. 2 (1950).

Clearly this section does not protect only "recognized" Indian rights—those the taking of which would be compensable by the United States. Committee reports demonstrate the aim of Congress to preserve the status quo as to a broader class of "right," including, in the case of land, mere possession or occupancy. Compensation was an issue Congress took pains to avoid. See H. R. Rep. No. 1731, 80th Cong., 2d Sess. 15 (1948); H. R. Rep. No. 255, 81st Cong., 1st Sess. 13 (1949); S. Rep. No. 1028, 83d Cong., 2d Sess. 4, 29–30 (1954); S. Rep. No. 1163, 85th Cong., 1st Sess. 15 (1957). We need not here explore the remoter reaches of this protection. The Metlakatla Reservation was Indian property within § 4. Whether or not the "absolute jurisdiction" retained

by the United States in § 4 is exclusive of state authority, see *Organized Village of Kake* v. *Egan, post,* p. 60, the statute clearly preserves federal authority over the reservation. Federal authority was lodged in the Secretary in 1891, and it was not dislodged by the Statehood Act.

However, in issuing the present regulations the Secretary relied not on the 1891 statute but on the White Act and the Statehood Act, neither of which authorized his action. In a letter to the Solicitor General, filed by the United States as an Appendix to its brief as *amicus curiae,* the Secretary left no doubt that in issuing the regulations he acted under compulsion of what he conceived to be his duty under the Statehood Act to preserve the *status quo.* He deemed himself, as it were, to be a mere automaton. The exercise of any authority that the Secretary has under the reservation statute to allow fish traps necessarily involves his judgment on a complex of facts, his evaluation of the relative weights of the Indians' need for traps and of the impact of traps at Metlakatla on the State's interest in conservation. We cannot make this determination for him.

The appropriate course is to vacate the judgment of the Supreme Court of Alaska and remand the case there to be held to give ample opportunity for the Secretary of the Interior with all reasonable expedition to determine, prior to the 1963 salmon fishing season, what, if any, authority he chooses to exercise in light of this opinion. Should the Secretary fail so to act, the parties may apply to the Alaska court for further proceedings not inconsistent with this opinion. See *Addison* v. *Holly Hill Fruit Products, Inc.,* 322 U. S. 607, 618–619. The stay granted by MR. JUSTICE BRENNAN, and continued by the Court, will remain in force until the end of the 1962 salmon fishing season, as defined in the regulations issued by the Secretary of the Interior.

It is so ordered.

ORGANIZED VILLAGE OF KAKE ET AL. *v.* EGAN, GOVERNOR OF ALASKA.

APPEAL FROM THE SUPREME COURT OF ALASKA.

No. 3. Argued December 14, 1961.—Decided March 5, 1962.

Appellants are incorporated communities of Thlinget Indians in Alaska. No reservation has been established for them. They operate salmon traps under permits issued by the Army Corps of Engineers and the United States Forest Service and regulations issued by the Secretary of the Interior. They sued to enjoin threatened enforcement against them of a statute of the State of Alaska forbidding the use of salmon traps. Their suit was dismissed, and the State Supreme Court affirmed. *Held:*

1. The permits issued by the Corps of Engineers and the Forest Service do not exempt these salmon traps from state law. Pp. 63–64.

2. Congress has neither authorized the use contrary to state law of the salmon traps here involved nor empowered the Secretary of the Interior to do so, and the judgment is affirmed. Pp. 62–76.

3. However, in view of all the circumstances and in order to avoid hardship, the stay heretofore granted will remain in force until the end of the 1962 salmon-fishing season. P. 76.

— Alaska —, 362 P. 2d 901, affirmed.

John W. Cragun argued the cause for appellants. With him on the briefs was *Frances L. Horn.*

Ralph E. Moody, Attorney General of Alaska, and, by special leave of Court *pro hac vice, Avrum M. Gross,* Assistant Attorney General, argued the cause and filed briefs for appellee.

Oscar H. Davis, by special leave of Court, argued the cause for the United States, as *amicus curiae,* urging reversal. With him on the brief were *Solicitor General Cox* and *Roger P. Marquis.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This is a companion case to No. 2, *Metlakatla Indian Community* v. *Egan, ante,* p. 45, but calls for separate treatment. Appellants seek the reversal of a decision of the Supreme Court of Alaska, —— Alaska ——, 362 P. 2d 901, affirming the dismissal of their petitions for injunctions against interference with their operation of fish traps in southeastern Alaska.

The Organized Village of Kake and the Angoon Community Association are corporations chartered under the Wheeler-Howard Act of 1934, 48 Stat. 984, 988, as amended, 49 Stat. 1250 (1936), 25 U. S. C. §§ 473a, 476, 477. Kake is located on Kupreanof Island, 100 miles south of Juneau. Angoon is located on Admiralty Island, 60 miles south of Juneau. They are occupied by Thlinget or Tlinget Indians, native to Alaska.

Both communities are entirely dependent upon salmon fishing. In pursuance of a policy to create a sound fishing economy for the two groups, the United States purchased canneries and related properties for Angoon in 1948 and for Kake in 1950. Since these dates appellants have operated fish traps at specified locations in nearby waters, under permits granted by the Army Engineers to erect traps in navigable waters and by the United States Forest Service to anchor them in the Tongass National Forest. In March 1959 the Secretary of the Interior, by regulations issued under authority of the White Act, 43 Stat. 464, as amended, 48 U. S. C. §§ 221–228, and the Alaska Statehood Act, 72 Stat. 339, permitted Angoon to operate three fish traps during the 1959 season and Kake four. 24 Fed. Reg. 2053, 2069. The following year the Secretary authorized permanent operation of these trap-sites and specified one additional site for Angoon and five

more for Kake for possible future authorization. 25 CFR (1961 Supp.) pt. 88.

The history of this litigation is recited in *Metlakatla Indian Community* v. *Egan, supra.* It is sufficient to note here that Alaska in 1959 threatened to enforce against Kake and Angoon her anti-fish-trap conservation law, Alaska Laws 1959, c. 17, as amended by *id.*, c. 95; that the State seized one fish trap at Kake, arrested the President of the Kake Village Council and the foreman of the crew attempting to moor the trap, and filed informations against them; that suit was filed by both Kake and Angoon in the interim United States District Court for Alaska to enjoin this interference with their claimed fishing rights; and that the dismissal of both complaints was affirmed by the Supreme Court of Alaska.

The situation here differs from that of the Metlakatlans in that neither Kake nor Angoon has been provided with a reservation and in that there is no statutory authority under which the Secretary of the Interior might permit either to operate fish traps contrary to state law. Appellants do not rely heavily on the Secretary's regulations. Neither the White Act nor the Statehood Act, cited by the Secretary, supports a grant of immunity from state law. The White Act was a conservation and anti-monopoly measure. It authorized the Secretary to limit fishing times, places, and equipment in order to conserve fish but forbade him in so doing to create exclusive rights, even in Indians. *Hynes* v. *Grimes Packing Co.,* 337 U. S. 86, 122–123. Because the rights claimed are exclusive in the Kakes and Angoons, they cannot have been created pursuant to the White Act, even though that statute now applies, if at all, only to Indians. Moreover, the White Act gives the Secretary power only to limit fishing, not to grant rights. The Statehood Act retained "absolute jurisdiction and control" of Indian

"property (including fishing rights)" in the United States, but it did not give powers of the nature claimed to the Secretary of the Interior. No other source of authority appears available. The provisions now found in 25 U. S. C. §§ 2 and 9, referring to the President's power to prescribe regulations for effectuating statutes "relating to Indian affairs," to settle accounts of "Indian affairs," and concerning "the management of all Indian affairs and of all matters arising out of Indian relations," derive from statutes of 1832 and 1834, 4 Stat. 564 and 4 Stat. 735, 738. In keeping with the policy of almost total tribal self-government prevailing when these statutes were passed, see pp. 71–72, *infra,* the Interior Department itself is of the opinion that the sole authority conferred by the first of these is that to implement specific laws, and by the second that over relations between the United States and the Indians—not a general power to make rules governing Indian conduct. United States Department of the Interior, Federal Indian Law (1958), pp. 54–55; Cohen, Handbook of Federal Indian Law (1945), p. 102. We agree that they do not support the fish-trap regulations.

Both communities operate their traps under permits granted by the Army Corps of Engineers and by the United States Forest Service. But neither of these permits grants a right to be free of state regulation or prohibition. Like a certification by the Interstate Commerce Commission, each is simply acknowledgment that the activity does not violate federal law, and not an exemption from state licensing or police power requirements. Cf. *Maurer* v. *Hamilton,* 309 U. S. 598; *South Carolina Highway Dept.* v. *Barnwell Bros.,* 303 U. S. 177. The Engineers have no objection under the Rivers and Harbors Act, 30 Stat. 1121, 1151, 33 U. S. C. § 403, to the obstruction of navigable streams incident to the operation of fish traps at Kake and Angoon; the Forest Service has

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no objection to the use of National Forest land to anchor them. Neither attempted to exempt these traps from state law.

As in the companion case, certain grounds relied on by the Alaska court are no longer urged by the State. The principal dispute now concerns the meaning of § 4 of the Statehood Act, in which the State disclaimed all right and title to and the United States retained "absolute jurisdiction and control" over, *inter alia,* "any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives."

The United States in its brief *amicus curiae* contended that the reservation of absolute jurisdiction over Indian "property (including fishing rights)" ousted the State from any regulation of fishing by Indians in Alaska. Appellants urge that Congress intended to protect the Indians in their freedom to continue fishing as they had done before statehood, so that Alaska cannot interfere with the Indian fishing actually practiced at that time. They argue in addition that in using fish traps they were exercising an aboriginal right to fish that was protected by § 4. The court below concluded that aboriginal rights of Alaskan natives have been extinguished, that appellants have no rights not enjoyed in common with all other Alaskans, and that § 4 protects only exclusive rights given Indians by federal law.

The United States wisely abandoned its position that Alaska has disclaimed the power to legislate with respect to any fishing activities of Indians in the State. Legislative history reveals no such intention in Congress, which was concerned with the protection of certain Indian claims in existence at the time of statehood. See, *e. g.,* Hearings Before House Committee on Interior and Insular Affairs on H. R. 2535 and related bills, 84th Cong., 1st Sess.

124–131, 266–267, 381–383 (1955). But we cannot accept Alaska's contention that Indian "property (including fishing rights)" refers only to property owned by or held for Indians under provisions of federal law. Section 4 must be construed in light of the circumstances of its formulation and enactment. See *Alaska Pacific Fisheries* v. *United States,* 248 U. S. 78, 87. Congress was aware that few such rights existed in Alaska. Its concern was to preserve the status quo with respect to aboriginal and possessory Indian claims, so that statehood would neither extinguish them nor recognize them as compensable. See, *e. g.,* House Hearings, *supra,* 130, 384 (1955) (Delegate Bartlett); Hearings Before Senate Committee on Interior and Insular Affairs on S. 50, 83d Cong., 2d Sess. 227 (Senator Jackson), 260–261 (1954).[1]

Discussion during hearings on the 1955 House bill affords further evidence that claims not based on federal law are included. Section 205 of that bill (like § 6 of the bill as enacted) authorized Alaska to select large tracts of United States land for transfer to state ownership. It was understood that the disclaimer provision left the State free to choose Indian "property" if it desired, but that such a taking would leave unimpaired the Indians' right

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[1] In 1948 a statehood bill requiring disclaimer of "all lands . . . owned or held by any . . . natives, the right or title to which shall have been acquired through or from the United States or any prior sovereignty," was favorably reported with this explanation:

"As proposed to be amended, this paragraph would preserve all existing valid native property rights in Alaska, including those derived from use or occupancy, together with all existing authority of the Congress to provide for the determination, perfection or relinquishment of native property rights in Alaska. It would neither add to nor subtract from such rights and such authority, but would simply maintain the status quo." H. R. Rep. No. 1731, 80th Cong., 2d Sess. 15 (1948).

To the same effect, see H. R. Rep. No. 255, 81st Cong., 1st Sess. 13 (1949).

to sue the United States for any compensation that might later be established to be due. See House Hearings, *supra,* 135 (1955) (Delegate Bartlett). Feeling that experience had shown this procedure too slow to give prompt relief to the Indians, Oklahoma's Representative Edmondson proposed to exempt Indian property from the State's selection. *Id.,* at 381. This was rejected as virtually destroying Alaska's right to select lands. For, although Representative Edmondson pointed out that the disclaimer extended only to property owned by Indians or held in trust for them, four representatives clearly stated their belief that the disclaimer included not just the few Alaska reservations but also the aboriginal or other unproved claims in dispute, which covered most if not all of Alaska. *Id.,* at 383 (Representatives Engle, Dawson, Metcalf, Westland).

"Fishing rights" first appeared in a Senate bill reported in 1951, S. Rep. No. 315, 82d Cong., 1st Sess. 2. Earlier bills had mentioned only land. The fishing-rights provision is unique to Alaska, although the disclaimer is in other respects the same as in earlier statutes. See pp. 67–68, *infra.* It was included because fishing rights are of vital importance to Indians in Alaska. House Hearings, *supra,* 125 (1955) (Delegate Bartlett). The existence of aboriginal fishing rights was affirmed by the Interior Department's Solicitor in 1942, 57 I. D. 461. There was almost no discussion of "fishing rights" in Congress. In earlier hearings the Senate Committee was considering a suggestion by Senator Cordon that all Indian property be granted to the State, reserving the right to seek federal compensation, except for property actually occupied by Indians. Asked to describe Indian possessory rights, Governor Heintzleman portrayed a smokehouse beside a stream, 50 miles from the town where they live, visited for fishing purposes perhaps two weeks each year. Senate Hearings, *supra,* 137 (1954).

On a similar basis the Kakes and the Angoons have fished at the disputed locations since 1948 and 1950. It appears to be Alaskan custom that, although traps are taken from the water and replaced each year, one does not "jump" a trap-site. The prior claim of the first trapper is respected. See *United States* v. *Libby, McNeil & Libby,* 14 Alaska 37, 42, 107 F. Supp. 697, 700 (D. Alaska 1952); Gruening, The State of Alaska (1954), p. 171; 57 I. D. 461, 462 (1942). The Statehood Act by no means makes any claim of appellants to fishing rights compensable against the United States; neither does it extinguish such claims. The disclaimer was intended to preserve unimpaired the right of any Indian claimant to assert his claim, whether based on federal law, aboriginal right or simply occupancy, against the Government. Appellants' claims are "property (including fishing rights)" within § 4.

Because § 4 of the Statehood Act provides that Indian "property (including fishing rights)" shall not only be disclaimed by the State as a proprietary matter but also "shall be and remain under the absolute jurisdiction and control of the United States," the parties have proceeded on the assumption that if Kake and Angoon are found to possess "fishing rights" within the meaning of this section the State cannot apply her law. Consequently argument has centered upon whether appellants have any such "rights."

The assumption is erroneous. Although the reference to fishing rights is unique, the retention of "absolute" federal jurisdiction over Indian lands adopts the formula of nine prior statehood Acts. Indian lands in Arizona remained "under the absolute jurisdiction and control" of the United States, 36 Stat. 557, 569; yet in *Williams* v. *Lee,* 358 U. S. 217, 220, 223, we declared that the test of whether a state law could be applied on Indian

reservations there was whether the application of that law would interfere with reservation self-government. The identical language appears in Montana's admission Act, 25 Stat. 676, 677, yet in *Draper* v. *United States,* 164 U. S. 240, the Court held that a non-Indian who was accused of murdering another non-Indian on a Montana reservation could be prosecuted only in the state courts. The Montana statute applies also to North Dakota, South Dakota, and Washington. Identical provisions are found in the Acts admitting New Mexico (36 Stat. 557, 558–559) and Utah (28 Stat. 107, 108), and in the Constitutions of Idaho (1890, Art. 21, § 19) and Wyoming (1890, Art. 21, § 26), which were ratified by Congress (26 Stat. 215 (Idaho); 26 Stat. 222 (Wyoming)).

Draper and *Williams* indicate that "absolute" federal jurisdiction is not invariably exclusive jurisdiction. The momentum of substantially identical past admission legislation touching Indians carries the settled meaning governing the jurisdiction of States over Indian property to the Alaska Statehood Act in light of its legislative history.

Section 4 of the Statehood Act contains three provisions relating to Indian property. The State must disclaim right and title to such property; the United States retains "absolute jurisdiction and control" over it; the State may not tax it. On the urging of the Interior Department that Alaska be dealt with as had other States, these provisions replaced an earlier section granting to the State all lands not actually possessed and used by the United States. Hearings Before a Subcommittee of the House Committee on Public Lands on H. R. 206 and H. R. 1808, 80th Cong., 1st Sess. 2, 12, 14 (1947). The first and third provisions have nothing to do with this case; the second does not exclude state conservation laws from appellants' fish traps.

The disclaimer of right and title by the State was a disclaimer of proprietary rather than governmental interest. It was determined, after some debate, to be the best way of ensuring that statehood would neither extinguish nor establish claims by Indians against the United States. If lands subject to the claim of Indian rights were transferred to the State, the Indians were not thereby to lose the right to make claims against the United States for damages. See Senate Hearings, *supra,* 286 (1954).

The provision for "absolute jurisdiction and control" received little attention in Congress. In the 1954 Senate hearings the Committee was considering a provision copied from the Oklahoma statute that Indian lands should remain "subject to the jurisdiction, disposal, and control of the United States." Mr. Barney, on behalf of the Justice Department, urged the inclusion of such a provision in order to avoid the possibility that, under *United States* v. *McBratney,* 104 U. S. 621, federal criminal jurisdiction over Indian reservations might be extinguished by statehood. Senators Barrett and Jackson thereupon expressed the clear desire that federal jurisdiction not be made exclusive over all disclaimed areas. Mr. Barney denied that the provision would deprive the State of "political jurisdiction" over disclaimed properties. Senator Cordon declared:

> "The State may well waive its claim to any right or title to the lands and still have all of its political or police power with respect to the actions of people on those lands, as long as that does not affect the title to the land."

Senator Jackson said: "All that you are doing here is a disclaimer of proprietary interest," and Mr. Barney agreed. Senator Cordon said:

> "The act of admission gives to the State of Alaska political jurisdiction, including all that is meant by

> the term 'police power,' within its boundaries unless there be express or definitely implied, which is the same thing, a reservation of exclusive jurisdiction in the United States."

Senators Barrett and Jackson and Mr. Barney agreed. Mr. Slaughter of the Interior Department pointed out that a later section of the bill, now § 11, provided for "exclusive" federal jurisdiction over Mt. McKinley National Park. Mr. Barney, in answer to a direct question, stated that "jurisdiction" in the Oklahoma statute and in his proposal for Indian property did not mean exclusive jurisdiction. Senate Hearings, *supra,* 283–287 (1954). The bill as reported contained no provision on jurisdiction but only a disclaimer of right and title, a reservation of federal power to extinguish Indian claims as if there had been no statehood Act, and an exemption from state taxation. *Id.,* at 331. Provisions retaining federal "jurisdiction" and "absolute jurisdiction" were considered interchangeable by at least one committee, which reported the disclaimer in an Alaska bill as "almost identical" with those in the preceding 13 admission Acts. S. Rep. No. 315, 82d Cong., 1st Sess. 15 (1951).

Most statehood bills contained the more common phrasing "absolute jurisdiction and control" rather than the Oklahoma phrase. Although this was the usual language employed to retain federal power in statehood acts, the Senate Committee in 1958 out of an abundance of caution deleted the word "jurisdiction" in order that no one might construe the statute as abolishing state power entirely. The Committee declared that it was not its intention by the retention of federal control to make the Alaska situation any different from that prevailing in other States as to state jurisdiction over Indian lands. S. Rep. No. 1163, 85th Cong., 1st Sess. 15 (1957). The House bill, which retained the usual language, was passed

first, 104 Cong. Rec. 9756, and the Senate made no amendments to the House bill because it feared that statehood might be lost once again if the House had to act on a conference report. 104 Cong. Rec. 12009–12010. Senator Jackson stated that "the differences are of wording and language rather than policy . . . designed to define more clearly some of the jurisdictional problems involved . . . . The objective of both bills is identical. There is strong evidence that the end product of both bills would be identical." The Senate amendment was designed simply to make clear what an examination of past statutes and decisions makes clear also: that the words "absolute jurisdiction and control" are not intended to oust the State completely from regulation of Indian "property (including fishing rights)." "Absolute" in § 4 carried the gloss of its predecessor statutes, meaning undiminished, not exclusive. Cf. *Boston Sand & Gravel Co.* v. *United States,* 278 U. S. 41, 47–48. The power of Alaska over Indians, except as granted by Congress in 1958, 72 Stat. 545, is the same as that of many other States.

The relation between the Indians and the States has by no means remained constant since the days of John Marshall. In the early years, as the white man pressed against Indians in the eastern part of the continent, it was the policy of the United States to isolate the tribes on territories of their own beyond the Mississippi, where they were quite free to govern themselves. The 1828 treaty with the Cherokee Nation, 7 Stat. 311, guaranteed the Indians their lands would never be subjected to the jurisdiction of any State or Territory. Even the Federal Government itself asserted its power over these reservations only to punish crimes committed by or against non-Indians. 1 Stat. 469, 470; 2 Stat. 139. See 18 U. S. C. § 1152.

As the United States spread westward, it became evident that there was no place where the Indians could be forever isolated. In recognition of this fact the United States began to consider the Indians less as foreign nations and more as a part of our country. In 1871 the power to make treaties with Indian tribes was abolished, 16 Stat. 544, 566, 25 U. S. C. § 71. In 1887 Congress passed the General Allotment Act, 24 Stat. 388, as amended, 25 U. S. C. §§ 331–358, authorizing the division of reservation land among individual Indians with a view toward their eventual assimilation into our society. In 1885, departing from the decision in *Ex parte Crow Dog,* 109 U. S. 556, Congress intruded upon reservation self-government to extend federal criminal law over several specified crimes committed by one Indian against another on Indian land, 23 Stat. 362, 385, as amended, 18 U. S. C. § 1153; *United States* v. *Kagama,* 118 U. S. 375. Other offenses remained matters for the tribe, *United States* v. *Quiver,* 241 U. S. 602.

The general notion drawn from Chief Justice Marshall's opinion in *Worcester* v. *Georgia,* 6 Pet. 515, 561; *The Kansas Indians,* 5 Wall. 737, 755–757; and *The New York Indians,* 5 Wall. 761, that an Indian reservation is a distinct nation within whose boundaries state law cannot penetrate, has yielded to closer analysis when confronted, in the course of subsequent developments, with diverse concrete situations. By 1880 the Court no longer viewed reservations as distinct nations. On the contrary, it was said that a reservation was in many cases a part of the surrounding State or Territory, and subject to its jurisdiction except as forbidden by federal law, *Utah & Northern R. Co.* v. *Fisher,* 116 U. S. 28, 31. In *Langford* v. *Monteith,* 102 U. S. 145, the Court held that process might be served within a reservation for a suit in territorial court between two non-Indians. In *United States* v. *McBratney,* 104 U. S. 621, and *Draper* v. *United States,* 164 U. S. 240, the

Court held that murder of one non-Indian by another on a reservation was a matter for state law.[2]

The policy of assimilation was reversed abruptly in 1934. A great many allottees of reservation lands had sold them and disposed of the proceeds. Further allotments were prohibited in order to safeguard remaining Indian properties. The Secretary of the Interior was authorized to create new reservations and to add lands to existing ones. Tribes were permitted to become chartered federal corporations with powers to manage their affairs, and to organize and adopt constitutions for their own self-government. 48 Stat. 984, 986, 987, 988. These provisions were soon extended to Alaska, 49 Stat. 1250.

Concurrently the influence of state law increased rather than decreased. As the result of a report making unfavorable comparisons between Indian Service activities and those of the States, Congress in 1929 authorized the States to enforce sanitation and quarantine laws on Indian reservations, to make inspections for health and educational purposes, and to enforce compulsory school attendance. 45 Stat. 1185, as amended, 25 U. S. C. § 231. See Meriam, Problem of Indian Administration (1928); H. R. Rep. No. 2135, 70th Cong., 2d Sess. (1929); Cohen, Handbook of Federal Indian Law (1945), p. 83; United States Department of the Interior, Federal Indian Law (1958), pp. 126–127. In 1934 Congress authorized the Secretary of the Interior to enter into contracts with States for the extension of educational, medical, agricultural, and welfare assistance to reservations, 48 Stat. 596, 25 U. S. C. § 452. During the 1940's several States were permitted to assert criminal jurisdiction, and sometimes civil jurisdiction as

[2] *Fisher* permitted a territorial tax on a railway through Indian country, and one basis for the holding was that here discussed. The alternative ground was that the railway right-of-way had been withdrawn from the reservation, as was held in *Maricopa & Phoenix R. Co.* v. *Arizona Territory,* 156 U. S. 347.

well, over certain Indian reservations. *E. g.,* 62 Stat. 1161; 62 Stat. 1224; 64 Stat. 845; 63 Stat. 705. A new shift in policy toward termination of federal responsibility and assimilation of reservation Indians resulted in the abolition of several reservations during the 1950's. *E. g.,* 68 Stat. 250 (Menominees); 68 Stat. 718 (Klamaths).

In 1953 Congress granted to several States full civil and criminal jurisdiction over Indian reservations, consenting to the assumption of such jurisdiction by any additional States making adequate provision for this in the future. 67 Stat. 588, 18 U. S. C. § 1162, 28 U. S. C. § 1360. Alaska was added to the list of such States in 1958, 72 Stat. 545. This statute disclaims the intention to permit States to interfere with federally granted fishing privileges or uses of property. Finally, the sale of liquor on reservations has been permitted subject to state law, on consent of the tribe itself. 67 Stat. 586, 18 U. S. C. § 1161. Thus Congress has to a substantial degree opened the doors of reservations to state laws, in marked contrast to what prevailed in the time of Chief Justice Marshall.

Decisions of this Court are few as to the power of the States when not granted Congressional authority to regulate matters affecting Indians. In *Thomas* v. *Gay,* 169 U. S. 264, an Oklahoma territorial tax on the cattle of non-Indian lessees of reservation land was upheld on the authority of the *Fisher* and *Maricopa* decisions, *supra,* which permitted taxation of railroad rights-of-way. The Court conceded that because the lands on which the taxed cattle grazed were leased from Indians the tax might, in contrast to the railroad cases, have an indirect effect on Indians, but that effect was declared to be too remote to require a contrary result. In the latest decision, *Williams* v. *Lee,* 358 U. S. 217, we held that Arizona had no jurisdiction over a civil action brought by a non-Indian against an Indian for the price of goods sold the latter on the Navajo Reservation. The applicability

of state law, we there said, depends upon "whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them," 358 U. S., at 220. Another recent statement of the governing principle was made in a decision reaffirming the authority of a State to punish crimes committed by non-Indians against non-Indians on reservations: "[I]n the absence of a limiting treaty obligation or Congressional enactment each state had a right to exercise jurisdiction over Indian reservations within its boundaries," *New York ex rel. Ray* v. *Martin,* 326 U. S. 496, 499.

These decisions indicate that even on reservations state laws may be applied to Indians unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law. Congress has gone even further with respect to Alaska reservations, 72 Stat. 545, 18 U. S. C. § 1162, 28 U. S. C. § 1360. State authority over Indians is yet more extensive over activities, such as in this case, not on any reservation. It has never been doubted that States may punish crimes committed by Indians, even reservation Indians, outside of Indian country. See Cohen, Indian Rights and the Federal Courts, 24 Minn. L. Rev. 145, 153 (1940), citing *Pablo* v. *People,* 23 Colo. 134, 46 P. 636. Even where reserved by federal treaties, off-reservation hunting and fishing rights have been held subject to state regulation, *Ward* v. *Race Horse,* 163 U. S. 504; *Tulee* v. *Washington,* 315 U. S. 681, in contrast to holdings by state and federal courts that Washington could not apply the laws enforced in *Tulee* to fishing within a reservation, *Pioneer Packing Co.* v. *Winslow,* 159 Wash. 655, 294 P. 557; *Moore* v. *United States,* 157 F. 2d 760, 765 (C. A. 9th Cir.). See *State* v. *Cooney,* 77 Minn. 518, 80 N. W. 696.

True, in *Tulee* the right conferred was to fish in common with others, while appellants here claim exclusive rights. But state regulation of off-reservation fishing

certainly does not impinge on treaty-protected reservation self-government, the factor found decisive in *Williams* v. *Lee*. Nor have appellants any fishing rights derived from federal laws. This Court has never held that States lack power to regulate the exercise of aboriginal Indian rights, such as claimed here, or of those based on occupancy. Because of the migratory habits of salmon, fish traps at Kake and Angoon are no merely local matter.

Congress has neither authorized the use of fish traps at Kake and Angoon nor empowered the Secretary of the Interior to do so. The judgment of the Supreme Court of Alaska is affirmed. However, in view of all the circumstances and in order to avoid hardship, the stay granted by MR. JUSTICE BRENNAN, and continued by the Court, will remain in force until the end of the 1962 salmon fishing season, as defined in the regulations issued by the Secretary of the Interior.

It is so ordered.

MR. JUSTICE DOUGLAS, while joining the opinion of the Court, dissents from an extension of the stay for reasons to be stated in an opinion.

MR. JUSTICE DOUGLAS.*

When the decision in this case was announced on March 5, 1962, I noted that while I joined the opinion of the Court, I dissented from the continuation of the stay and would elaborate my views at a later time. As the decision to extend the stay was reached in Conference on March 2, 1962, there was insufficient time to prepare an opinion by the following Monday.

The stay was first granted by MR. JUSTICE BRENNAN, 80 Sup. Ct. 33, to maintain the status quo while this litigation was pending. The stay was then plainly justified, as the questions presented were substantial ones. Now,

*[This opinion was filed March 19, 1962.]

however, the adjudication has been made; and the Court is unanimous in concluding that these Indians have no right to use fish traps. A stay is not needed to protect rights that may arise from future Regulations, as in the *Metlakatla* case, for any administrative power of the Secretary of the Interior to allow the Kake and Angoon Indians to use traps is lacking. And with all deference, a stay is not shown to be justified on any other grounds.

A stay that continues in use for another season a device as nefarious as the fish trap needs potent reasons.

The destruction caused by fish traps is notorious. Mr. Justice Van Devanter, conservationist as well as jurist, described an Alaskan fish trap [1] designed "to catch about 600,000 salmon in a single season," a trap which "will tend materially to reduce the natural supply of fish accessible to the Indians." *Alaska Pacific Fisheries* v. *United States,* 248 U. S. 78, 87. Dr. David Starr Jordan in his 1904 report of the Alaska Salmon Commission stated, "If we consider the ultimate interests of Alaska and the permanence of her salmon fisheries, no traps should be allowed anywhere . . . ." Gruening, The State

[1] The salmon trap is described by the Alaska Supreme Court as follows:

"A trap consists of tall stakes or mechanically driven piling extending from the shore to varying distances seaward, depending on the depth of the water. Wire or webbing is stretched across the stakes or piling from the shore to the seaward end and from the ocean bottom upward to a point above high water. Located at the seaward end is an extended wing or hook and an opening into the heart and pot. When the webbing is on the ocean bottom fish cannot pass around the trap at the shoreward end. One tendency of migrating fish is to parallel the shoreline and travel with the incoming tide. Fish stopped by the webbing of a trap will eventually follow it seaward in an attempt to by-pass the obstruction. The wing or hook is constructed so as to discourage by-passing and divert the fish into the heart and pot where they remain. With some variations in construction, floating traps adapted to deep water are commonly used and are highly productive." *Metlakatla Indian Community* v. *Egan,* — Alaska —, 362 P. 2d 901, 903.

of Alaska (1954), p. 169. Beginning in 1931 the Territorial Legislature memorialized Congress condemning the use of the fish trap because of its adverse effect on salmon and on the salmon industry. See Alaska, Sess. Laws, 1931, p. 275; Alaska, Sess. Laws, 1953, pp. 401–402; Alaska, Sess. Laws, 1955, pp. 447–448. The 1955 Resolution ended by saying:

> "WHEREAS, the vast majority of Alaskans, after many decades of first hand experience and study, are convinced that no salmon conservation program can achieve lasting effect unless salmon fish traps are abolished immediately, forever, from Alaskan waters;
>
> "NOW THEREFORE, your Memorialist, the Legislature of the Territory of Alaska, respectfully urges and requests that immediate legislation be enacted abolishing fish traps from the waters of the Territory of Alaska."

In 1959, the Alaskan Native Brotherhood, organized to speak for the Indians,[2] reiterated its stand "for complete abolition of traps."

Senator Gruening, on March 6, 1962, issued a statement to the Associated Press which emphasized another invidious effect of the use of fish traps by the Indians:

> "The 1945 Alaska Territorial Legislature, at my behest, while I was Governor, passed an Act outlawing discrimination in public establishments based on race, creed, or color. This was designed to safeguard Alaska's Native people who had been subject to such discrimination and it did so safeguard them. Secretary Seaton's action would have created an inverse discrimination against Whites deeply sowing seeds of bitterness and arousing interracial friction and antagonism which has no place in America and had disappeared in Alaska. The performance was an inexcusable pressure play. In a referendum on fish

[2] See Federal Indian Law (Dept. of Interior, 1958), p. 963.

traps in 1948, 88.7% of the people of Alaska voted for trap abolition, and Angoon's vote was 49 to 9 and Kake's 123 to 6 against traps. Yet Secretary Seaton sought to force traps upon them and on the people of Alaska.

"The Court's decision in the Metlakatla case differs in its conclusion from the Kake and Angoon cases only because of Metlakatla's historically different and unique legal status. It leaves the course of action open to the present Secretary of Interior. It is to be hoped that both he and the people of Metlakatla, who in the 1948 referendum—though owning seven traps—voted 112 to 33 for trap abolition, will agree that privilege and discrimination based on race should finally disappear totally from the 49th State."

The devastating effect of fish traps upon Alaska's economy was described by the Alaska Supreme Court:

"It has not been unusual for a single trap to catch as many as 600,000 fish in a single season. The impact of the catch of eleven traps on the fisheries of Southeastern Alaska is considerable from the point of view of conservation. The season's catch of a gill net or purse seine fisherman in the same area might run from 2,000 to 10,000 fish respectively. The discrimination against all fishermen, natives and whites alike, resulting from the Secretary's 1959 regulation, creates social problems for the state which it is powerless to remedy if the Secretary's claimed right is upheld. The intention to retain such a power over the basic industry of the state was not intimated in the wording of the Alaska Statehood Act, much less described. Such a power has never been reserved as to any other state admitted into the Union as far as this court is aware. The fisheries of Alaska, although pitifully depleted, are still its basic industry. The

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economy of the entire state is affected, in one degree or another, by the plentitude of the salmon in a given season. The preservation of this natural resource is vital to the state and of great importance to the nation as a whole." *Metlakatla Indian Community* v. *Egan*, —— Alaska ——, 362 P. 2d 901, 915.

The fish trap is "efficient," [3] an adjective which, by conservation standards, means that it is "destructive." As Senator Gruening has said, "Its economic and social aspects have been under unceasing attack by virtually all fishermen, by cannery men who do not own or control traps and have to depend on other types of gear for their salmon, and by the Alaska public generally." Gruening, The State of Alaska (1954), pp. 170–171.

Moreover, the fish trap is not a selective device, taking only one type of fish. It catches everything that swims; and fish that are not "in season" are as irretrievably lost as are those in which the fishermen have the greatest interest.

We should not allow such a destructive device [4] to be employed, absent a claim of legal right or a showing of

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[3] Those who defend the fish trap rate it as being a degree better than the purse seine. This is because the purse seine is movable and "difficult to keep track of by the inspectors," while the fish trap is stationary and can be readily inspected. See Hearings before Subcommittee, Senate Committee on Fisheries, on S. 5856, 62d Cong., 2d Sess., pp. 458–459.

[4] Those who defend the fish trap are quick to add "provided the trap has no jigger." Hearings, *supra*, note 3, at 458. Senator Gruening describes the "jigger":

"The 'jigger' is a lateral extension of the trap, curved or hooked, extending away from the wall of the outer 'heart' into the direction from which the salmon come. It makes avoidance of the trap toward which at that point the salmon are heading almost impossible." Gruening, The State of Alaska (1954), p. 170.

It is significant that the Regulations under which these Indians are now allowed to fish during the 1962 season do not bar the "jigger" (see 25 CFR § 88.3), though the Territorial Legislature as early as 1913 had banned it. See Gruening, *op. cit.*, *supra*, at 169.

imperative need. As I have said, no such right exists subsequent to our unanimous decision of March 5, 1962. It is, of course, provided in 28 U. S. C. § 2106 that in disposing of cases here for review we may not only "affirm, modify, vacate, set aside or reverse," but also "require such further proceedings to be had as may be just under the circumstances." But we have no reason for concluding that it would be unjust to turn these Indians to fishing with gill nets or hand lines like everyone else. All we have before us is a motion made in October 1961 to expedite a hearing in these cases. In that motion it is said:

> "The 1962 fishing season in Alaska begins in July, 1962. To prepare for this fishing season, Appellants must commit large sums of money for materials and supplies, including wire, netting, and cannery equipment. A large portion of these materials must be ordered not later than January, 1962. If Appellants' right to fish with traps were not to be upheld, their investment would be wasted. Conversely, if Appellants' right to fish with traps is upheld, Appellants will be unable to fish unless substantial sums of money are committed early in 1962."

Whether any sums have in fact been committed to the construction of these nefarious fish traps we do not know. Why these Indians cannot fish in the manner of all other fishermen is not apparent. Since the fishing season starts in July, they have four months from the date of our decision to prepare for it. What problems, if any, they may have in fishing without traps, we do not know. They have asked for no stay at this juncture of the litigation. We act gratuitously and without any knowledge of the actual facts. We in effect dispense to this group who have no legal rights a largesse, as if we sat as a Commission on Indian Affairs, giving a part of the public domain to this favored few.

Those who know the story of the decline of the salmon [5] can only look with concern on any action that further depletes the supply of this choice national asset. Severe human hardship may result from the decision we handed down on March 5, 1962. But if that is true, we should

[5] James Wickersham, delegate in Congress from Alaska, testified in 1914 as to the start of the depletion of the salmon:

"I want to call the attention of the committee to one stream which has been depleted in California, and that is the Sacramento River. The Sacramento River was one of the first rivers upon which canners put up salmon. In 1864 the first canned salmon were packed in California on the Sacramento River. In 1882 there were 200,000 cases of canned salmon put out from the Sacramento River—48 pounds to the case, making a total of 4,800 tons of salmon canned during that year on the Sacramento River.

"Then it began to decrease, and it went down to 123,000; then to 90,000; then to 57,000; then to 31,000; then to 14,000; and finally in 1906 there were none put up on that river. For three or four years there were none put up, but in 1913 there were 950 cases put up on the Sacramento River. In short, that great salmon stream has been utterly destroyed and there are no fish there now, substantially.

"Of course, that situation resulted from several causes. It resulted from overfishing, and from putting barriers across the streams to catch the fish, and it resulted in part from mining. All these things are going to happen in Alaska. There is mining going on there now on many of these streams. All the obstacles that operated to bring about that evil in the Sacramento River will operate in Alaska as soon as they open up that country. As soon as that is done and they get to work in there, the streams there are going to be depleted.

"When the first Russians went to Kadiak Island, more than a century ago, they found the Karluk salmon stream surrounded by Indians. It was a great fishing spot. That stream has probably turned out more canned salmon than any other stream in Alaska. Dr. Evermann and all those who were acquainted with it say it was the greatest salmon stream in the world. I saw the fishing going on there in 1903. I know how it was done. They had at one side a great post set in the ground sufficient to hold the nets. The nets were put into big boats, and they were long nets, some of them half a mile long, I suppose, and they were carried out into the bay, and as they came around they were fastened to a rope on the shore, to which was attached a big engine, and when they got that far along

require that it be shown. The disposition of these cases four months before the 1962 fishing season starts gives ample notice that new ways of earning a livelihood must be found other than the lazy man's device of the fish trap.[6]

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the big engine pulled the nets for them. The number of fish which they caught in there is simply unbelievable, and they were pulled in by machinery. The men themselves were unable to handle big nets of that kind. They were able to handle the small nets, but when they got machinery handling the fish for them they soon destroyed that stream. Every fisherman in that region knows it is destroyed; knows that the greatest salmon stream in Alaska has been destroyed." Hearings before House Committee on the Territories on H. R. 11740, 63d Cong., 2d Sess., pp. 45–46. For later discussions on the plight of the salmon of the Pacific, see Hearings before Merchant Marine and Fisheries Subcommittee, Senate Committee on Interstate and Foreign Commerce, on S. Con. Res. 35, pt. I, and on S. 502, 86th Cong., 1st Sess.; Hearings before Senate Committee on Interstate and Foreign Commerce on S. Con. Res. 35, S. 2586 and S. 1420, pt. II, 86th Cong., 1st Sess.

The depletion of salmon from California to Alaska is notorious. See Dufresne, Troubled River, Field and Stream, July 1959, p. 27; Netboy, Salmon of the Pacific Northwest (1958); 1958, A Year of Surprise in Pacific Salmon Canning, Pacific Fisherman, Jan. 25, 1959, p. 81; *id.*, Jan. 25, 1960, p. 53; *id.*, Jan. 25, 1961, pp. 13, 23; Van Fleet, The Vanishing Salmon, Atlantic, May 1961, pp. 48, 51:
"In my estimation, the former great wealth of the salmon fishery in California is doomed. In Oregon, the main runs are badly crippled but not entirely gone. In Washington, the runs are diminished along the coast and in the waters around Puget Sound, but careful husbandry could even bring about an increase. My advice to Alaska is to heed the lesson so well portrayed in the states to the south of it."

The Hearings on S. 502, *supra,* are replete with examples of the impact on people and on the Alaska economy of the salmon depletion. This depletion also has a serious impact on wildlife. For an account of what a scarcity of salmon means to the brown bear population, see the Hearings on S. 502, *supra,* at 25–26.

[6] "A trap fishes in the night when the man sleeps; it employs less men than other kinds of gear; it is a labor-saving device . . . ." Hearings on S. 5856, *supra,* note 3, at 389.

GRIGGS *v.* ALLEGHENY COUNTY.

CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

No. 81. Argued January 16, 1962.—Decided March 5, 1962.

Allegheny County owns and maintains the Greater Pittsburgh Airport at a site it acquired to provide airport facilities under the Federal Airport Act. In one approach zone or path of glide, the pattern of flight established by the Civil Aeronautics Administrator for aircraft landing at and departing from the Airport requires aircraft to fly regularly and frequently at very low altitudes over petitioner's residential property. The resulting noise, vibrations and danger forced petitioner and his family to move from their home. *Held:* The County has taken an air easement over petitioner's property for which it must pay just compensation as required by the Fourteenth Amendment. Pp. 84–90.

402 Pa. 411, 168 A. 2d 123, reversed.

William A. Blair argued the cause for petitioner. With him on the briefs was *D. Malcolm Anderson.*

Maurice Louik argued the cause for respondent. With him on the briefs were *Francis A. Barry* and *Philip Baskin.*

Briefs of *amici curiae* were filed by *Lyman M. Tondel, Jr., H. Templeton Brown* and *Robert L. Stern* for Allegheny Airlines, Inc., et al.; *Leander I. Shelley* for Airport Operators Council; and *Thomas L. Morrow, Edward G. Dobrin, Stanley B. Long* and *Robert W. Graham* for the Port of Seattle.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This case is here on a petition for a writ of certiorari to the Supreme Court of Pennsylvania which we granted (366 U. S. 943) because its decision (402 Pa. 411, 168 A. 2d 123) seemed to be in conflict with *United States* v. *Causby,* 328 U. S. 256. The question is whether respond-

ent has taken an air easement over petitioner's property for which it must pay just compensation as required by the Fourteenth Amendment. *Chicago, B. & Q. R. Co.* v. *Chicago,* 166 U. S. 226, 241. The Court of Common Pleas, pursuant to customary Pennsylvania procedure, appointed a Board of Viewers to determine whether there had been a "taking" and, if so, the amount of compensation due. The Board of Viewers met upon the property; it held a hearing, and in its report found that there had been a "taking" by respondent of an air easement over petitioner's property and that the compensation payable (damages suffered) was $12,690. The Court of Common Pleas dismissed the exceptions of each party to the Board's report. On appeal, the Supreme Court of Pennsylvania decided, by a divided vote, that if there were a "taking" in the constitutional sense, the respondent was not liable.

Respondent owns and maintains the Greater Pittsburgh Airport on land which it purchased to provide airport and air-transport facilities. The airport was designed for public use in conformity with the rules and regulations of the Civil Aeronautics Administration within the scope of the National Airport Plan provided for in 49 U. S. C. § 1101 *et seq.* By this Act the federal Administrator is authorized and directed to prepare and continually revise a "national plan for the development of public airports." § 1102 (a). For this purpose he is authorized to make grants to "sponsors" for airport development. §§ 1103, 1104. Provision is made for apportionment of grants for this purpose among the States. § 1105. The applications for projects must follow the standards prescribed by the Administrator. § 1108.

It is provided in § 1108 (d) that: "No project shall be approved by the Administrator with respect to any airport unless a public agency holds good title, satisfactory to the Administrator, to the landing area of such airport or the site therefor, or gives assurance satisfactory

to the Administrator that such title will be acquired." The United States agrees to share from 50% to 75% of the "allowable project costs," depending, so far as material here, on the class and location of the airport. § 1109.

Allowable costs payable by the Federal Government include "costs of acquiring land or interests therein or easements through or other interests in air space . . . ." § 1112 (a)(2).

Respondent executed three agreements with the Administrator of Civil Aeronautics in which it agreed, among other things, to abide by and adhere to the Rules and Regulations of C. A. A. and to "maintain a master plan of the airport," including "approach areas." It was provided that the "airport approach standards to be followed in this connection shall be those established by the Administrator"; and it was also agreed that respondent "will acquire such easements or other interests in lands and air space as may be necessary to perform the covenants of this paragraph." The "master plan" laid out and submitted by respondent included the required "approach areas"; and that "master plan" was approved. One "approach area" was to the northeast runway. As designed and approved, it passed over petitioner's home which is 3,250 feet from the end of that runway. The elevation at the end of that runway is 1,150.50 feet above sea level; the door sill at petitioner's residence, 1,183.64 feet; the top of petitioner's chimney, 1,219.64 feet. The slope gradient of the approach area is as 40 is to 3,250 feet or 81 feet, which leaves a clearance of 11.36 feet between the bottom of the glide angle and petitioner's chimney.

The airlines that use the airport are lessees of respondent; and the leases give them, among other things, the right "to land" and "take off." No flights were in violation of the regulations of C. A. A.; nor were any flights

lower than necessary for a safe landing or take-off. The planes taking off from the northeast runway observed regular flight patterns ranging from 30 feet to 300 feet over petitioner's residence; and on let-down they were within 53 feet to 153 feet.

On take-off the noise of the planes is comparable "to the noise of a riveting machine or steam hammer." On the let-down the planes make a noise comparable "to that of a noisy factory." The Board of Viewers found that "The low altitude flights over plaintiff's property caused the plaintiff and occupants of his property to become nervous and distraught, eventually causing their removal therefrom as undesirable and unbearable for their residential use." Judge Bell, dissenting below, accurately summarized the uncontroverted facts as follows:

> "Regular and almost continuous daily flights, often several minutes apart, have been made by a number of airlines directly over and very, very close to plaintiff's residence. During these flights it was often impossible for people in the house to converse or to talk on the telephone. The plaintiff and the members of his household (depending on the flight which in turn sometimes depended on the wind) were frequently unable to sleep even with ear plugs and sleeping pills; they would frequently be awakened by the flight and the noise of the planes; the windows of their home would frequently rattle and at times plaster fell down from the walls and ceilings; their health was affected and impaired, and they sometimes were compelled to sleep elsewhere. Moreover, their house was so close to the runways or path of glide that as the spokesman for the members of the Airlines Pilot Association admitted 'If we had engine failure we would have no course but to plow into your house.' " 402 Pa. 411, 422, 168 A. 2d 123, 128–129.

We start with *United States* v. *Causby, supra,* which held that the United States by low flights of its military planes over a chicken farm made the property unusable for that purpose and that therefore there had been a "taking," in the constitutional sense, of an air easement for which compensation must be made. At the time of the *Causby* case, Congress had placed the navigable airspace in the public domain, defining it as "airspace above the minimum safe altitudes of flight prescribed" by the C. A. A. 44 Stat. 574. We held that the path of the glide or flight for landing or taking off was not the downward reach of the "navigable airspace." 328 U. S., at 264. Following the decision in the *Causby* case, Congress redefined "navigable airspace" to mean "airspace above the minimum altitudes of flight prescribed by regulations issued under this chapter, and shall include airspace needed to insure safety in take-off and landing of aircraft." 72 Stat. 739, 49 U. S. C. § 1301 (24). By the present regulations [1] the "minimum safe altitudes" within the meaning of the statute are defined, so far as relevant here, as heights of 500 feet or 1,000 feet, "[e]xcept where necessary for take-off or landing." But as we said in the *Causby*

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[1] Regulation 60.17, entitled "Minimum safe altitudes," provides:

"*Except when necessary for take-off or landing*, no person shall operate an aircraft below the following altitudes:

"(a) *Anywhere*. An altitude which will permit, in the event of the failure of a power unit, an emergency landing without undue hazard to persons or property on the surface;

"(b) *Over congested areas*. Over the congested areas of cities, towns or settlements, or over an open-air assembly of persons, an altitude of *1,000 feet* above the highest obstacle within a horizontal radius of 2,000 feet from the aircraft. . . .

"(c) *Over other than congested areas*. An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In such event, the aircraft shall not be operated closer than 500 feet to any person, vessel, vehicle, or structure. . . ." (Emphasis supplied except in catch lines.) 14 CFR § 60.17.

case, the use of land presupposes the use of some of the airspace above it. 328 U. S., at 264. Otherwise no home could be built, no tree planted, no fence constructed, no chimney erected. An invasion of the "superadjacent airspace" will often "affect the use of the surface of the land itself." 328 U. S., at 265.

It is argued that though there was a "taking," someone other than respondent was the taker—the airlines or the C. A. A. acting as an authorized representative of the United States. We think, however, that respondent, which was the promoter, owner, and lessor [2] of the airport, was in these circumstances the one who took the air easement in the constitutional sense. Respondent decided, subject to the approval of the C. A. A., where the airport would be built, what runways it would need, their direction and length, and what land and navigation easements would be needed. The Federal Government takes nothing; it is the local authority which decides to build an airport *vel non,* and where it is to be located. We see no difference between its responsibility for the air easements necessary for operation of the airport and its responsibility for the land on which the runways were built. Nor did the Congress when it designed the legislation for a National Airport Plan. For, as we have already noted, Congress provided in 49 U. S. C. § 1109 for the payment to the owners of airports, whose plans were approved by the Administrator, of a share of "the allowable project costs," including the "costs of acquiring land or interests therein or easements through or other interests in air space." § 1112 (a)(2). A county that designed and constructed a bridge would not have a usable facility unless it had at least an easement over the land necessary for the

[2] In circumstances more opaque than this we have held lessors to their constitutional obligations. See *Burton* v. *Wilmington Parking Auth.,* 365 U. S. 715.

approaches to the bridge. Why should one who designs, constructs, and uses an airport be in a more favorable position so far as the Fourteenth Amendment is concerned? That the instant "taking" was "for public use" is not debatable. For respondent agreed with the C. A. A. that it would operate the airport "for the use and benefit of the public," that it would operate it "on fair and reasonable terms and without unjust discrimination," and that it would not allow any carrier to acquire "any exclusive right" to its use.

The glide path for the northeast runway is as necessary for the operation of the airport as is a surface right of way for operation of a bridge, or as is the land for the operation of a dam. See *United States* v. *Virginia Electric Co.*, 365 U. S. 624, 630. As stated by the Supreme Court of Washington in *Ackerman* v. *Port of Seattle*, 55 Wash. 2d 401, 413, 348 P. 2d 664, 671, ". . . an adequate approach way is as necessary a part of an airport as is the ground on which the airstrip, itself, is constructed . . . ." Without the "approach areas," an airport is indeed not operable. Respondent in designing it had to acquire some private property. Our conclusion is that by constitutional standards it did not acquire enough.

Reversed.

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

In *United States* v. *Causby*,[1] the Court held that by flying its military aircraft frequently on low landing and takeoff flights over Causby's chicken farm the United States had so disturbed the peace of the occupants and so frightened the chickens that it had "taken" a flight easement from Causby for which it was required to pay "just compensation" under the Fifth Amendment. Today the

[1] 328 U. S. 256.

Court holds that similar low landing and takeoff flights, making petitioner Griggs' property "undesirable and unbearable for . . . residential use," constitute a "taking" of airspace over Griggs' property—not, however, by the owner and operator of the planes as in *Causby,* but by Allegheny County, the owner and operator of the Greater Pittsburgh Airport to and from which the planes fly. Although I dissented in *Causby* because I did not believe that the individual aircraft flights "took" property in the constitutional sense merely by going over it and because I believed that the complexities of adjusting atmospheric property rights to the air age could best be handled by Congress, I agree with the Court that the noise, vibrations and fear caused by constant and extremely low overflights in this case have so interfered with the use and enjoyment of petitioner's property as to amount to a "taking" of it under the *Causby* holding. I cannot agree, however, that it was the County of Allegheny that did the "taking." I think that the United States, not the Greater Pittsburgh Airport, has "taken" the airspace over Griggs' property necessary for flight.[2] While the County did design the plan for the airport, including the arrangement of its takeoff and approach areas, in order to comply with federal requirements it did so under the supervision of and subject to the approval of the Civil Aeronautics Administrator of the United States.[3]

Congress has over the years adopted a comprehensive plan for national and international air commerce, regulating in minute detail virtually every aspect of air transit—from construction and planning of ground facilities to

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[2] We are not called on to pass on any question of "taking" under the Pennsylvania Constitution or laws.

[3] 60 Stat. 174–176, as amended, 49 U. S. C. §§ 1108, 1110. The duties of the Civil Aeronautics Administrator have since been transferred to the Federal Aviation Agency Administrator. 72 Stat. 806–807.

safety and methods of flight operations.[4] As part of this overall scheme of development, Congress in 1938 declared that the United States has "complete and exclusive national sovereignty in the air space above the United States" [5] and that every citizen has "a public right of freedom of transit in air commerce through the navigable air space of the United States." [6] Although in *Causby* the Court held that under the then existing laws and regulations the airspace used in landing and takeoff was not part of the "navigable airspace" as to which all have a right of free transit, Congress has since, in 1958, enacted a new law, as part of a regulatory scheme even more comprehensive than those before it, making it clear that the "airspace needed to insure safety in take-off and landing of aircraft" is "navigable airspace." [7] Thus Congress has not only appropriated the airspace necessary for planes to fly at high altitudes throughout the country but has also provided the low altitude airspace essential for those same planes to approach and take off from airports. These airspaces are so much under the control of the Federal Government that every takeoff from and every landing at

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[4] The Federal Aviation Agency Administrator is directed to prepare and maintain a "national plan for the development of public airports in the United States" taking "into account the needs of both air commerce and private flying, the probable technological developments in the science of aeronautics, [and] the probable growth and requirements of civil aeronautics." 49 U. S. C. § 1102. The detailed features of the federal regulatory and development scheme are found in 49 U. S. C. cc. 14 (Federal-Aid for Public Airport Development), 15 (International Aviation Facilities) and 20 (Federal Aviation Program).

[5] 52 Stat. 1028, 49 U. S. C. § 1508.

[6] 52 Stat. 980, 49 U. S. C. § 1304.

[7] Section 101 (24) of the Federal Aviation Act of 1958 provides: "'Navigable airspace' means airspace above the minimum altitudes of flight prescribed by regulations issued under this Act, and shall include airspace needed to insure safety in take-off and landing of aircraft." 72 Stat. 739, 49 U. S. C. § 1301 (24).

airports such as the Greater Pittsburgh Airport is made under the direct signal and supervisory control of some federal agent.[8]

In reaching its conclusion, however, the Court emphasizes the fact that highway bridges require approaches. Of course they do. But if the United States Highway Department purchases the approaches to a bridge, the bridge owner need not. The same is true where Congress has, as here, appropriated the airspace necessary to approach the Pittsburgh airport as well as all the other airports in the country. Despite this, however, the Court somehow finds a congressional intent to shift the burden of acquiring flight airspace to the local communities in 49 U. S. C. § 1112, which authorizes reimbursement to local communities for "necessary" acquisitions of "easements through or other interests in air space." But this is no different from the bridge-approach argument. Merely because local communities might eventually be reimbursed for the acquisition of necessary easements does not mean that local communities must acquire easements that the United States has already acquired. And where Congress has already declared airspace *free* to all—a fact not denied by the Court—pretty clearly it need not again be acquired by an airport. The "necessary" easements for which Congress authorized reimbursement in § 1112 were those "easements through or other interests in air space" necessary for the clearing and protecting of "aerial approaches" from physical "airport hazards" [9]—a duty explicitly placed on the local communities by the statute (§ 1110) and by their contract with the Government.

[8] 14 CFR § 60.18. The Administrator of the Federal Aviation Agency is directed to control "the use of the navigable airspace of the United States." 49 U. S. C. § 1303 (c).

[9] The term "airport hazard" means "any structure or object of natural growth . . . or any use of land . . . which obstructs the air space . . . or is otherwise hazardous to . . . landing or taking off of aircraft." 49 U. S. C. § 1101 (a)(4).

There is no such duty on the local community to acquire flight airspace. Having taken the airspace over Griggs' private property for a public use, it is the United States which owes just compensation.

The construction of the Greater Pittsburgh Airport was financed in large part by funds supplied by the United States as part of its plan to induce localities like Allegheny County to assist in setting up a national and international air-transportation system. The Court's imposition of liability on Allegheny County, however, goes a long way toward defeating that plan because of the greatly increased financial burdens (how great one can only guess) which will hereafter fall on all the cities and counties which till now have given or may hereafter give support to the national program. I do not believe that Congress ever intended any such frustration of its own purpose.

Nor do I believe that Congress intended the wholly inequitable and unjust saddling of the entire financial burden of this part of the national program on the people of local communities like Allegheny County. The planes that take off and land at the Greater Pittsburgh Airport wind their rapid way through space not for the peculiar benefit of the citizens of Allegheny County but as part of a great, reliable transportation system of immense advantage to the whole Nation in time of peace and war. Just as it would be unfair to require petitioner and others who suffer serious and peculiar injuries by reason of these transportation flights to bear an unfair proportion of the burdens of air commerce, so it would be unfair to make Allegheny County bear expenses wholly out of proportion to the advantages it can receive from the national transportation system. I can see no justification at all for throwing this monkey wrench into Congress' finely tuned national transit mechanism. I would affirm the state court's judgment holding that the County of Allegheny has not "taken" petitioner's property.

Syllabus.

LOCAL 174, TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, *v.* LUCAS FLOUR CO.

CERTIORARI TO THE SUPREME COURT OF WASHINGTON.

No. 50. Argued November 7–8, 1961.—
Decided March 5, 1962.

A collective bargaining contract between an employer in a business affecting interstate commerce and a union of its employees reserved to the employer the right to discharge any employee for unsatisfactory work and provided for compulsory, final and binding settlement by arbitration of any dispute between the employer and any employee; but it did not contain an explicit no-strike clause applicable to such disputes. The employer discharged an employee for unsatisfactory work, and the union called a strike to force the employer to rehire him. The employer sued the union in a Washington State Court for damages for business losses caused by the strike. The trial court awarded a judgment in favor of the employer and a Department of the Supreme Court of Washington affirmed. Without petitioning that Court for a rehearing *en banc*, the union petitioned this Court for certiorari, which was granted. *Held:*

1. Under Washington law, the judgment below was a final judgment of the State's highest court, and this Court has jurisdiction of this case under 28 U. S. C. § 1257. *Gorman* v. *Washington University,* 316 U. S. 98, distinguished. Pp. 98–101.

2. Section 301 (a) of the Labor Management Relations Act, 1947, did not deprive the state courts of jurisdiction over this case. *Charles Dowd Box Co.* v. *Courtney,* 368 U. S. 502. P. 101.

3. In a case such as this, incompatible doctrines of local law must give way to principles of federal labor law. Pp. 102–104.

4. Under federal labor law, a strike to settle a dispute which a collective bargaining agreement provides shall be settled exclusively and finally by compulsory arbitration constitutes a violation of the agreement, even when the agreement does not contain an explicit no-strike clause. Pp. 104–106.

57 Wash. 2d 95, 356 P. 2d 1, affirmed.

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Francis Hoague argued the cause and filed briefs for petitioner.

Stuart G. Oles argued the cause for respondent. With him on the briefs was *Seth W. Morrison.*

Mr. Justice Stewart delivered the opinion of the Court.

The petitioner and the respondent (which we shall call the union and the employer) were parties to a collective bargaining contract within the purview of the National Labor Relations Act. The contract contained the following provisions, among others:

"Article II

"The Employer reserves the right to discharge any man in his employ if his work is not satisfactory.

. . . . . .

"Article XIV

"Should any difference as to the true interpretation of this agreement arise, same shall be submitted to a Board of Arbitration of two members, one representing the firm, and one representing the Union. If said members cannot agree, a third member, who must be a disinterested party shall be selected, and the decision of the said Board of Arbitration shall be binding. It is further agreed by both parties hereto that during such arbitration, there shall be no suspension of work.

"Should any difference arise between the employer and the employee, same shall be submitted to arbitration by both parties. Failing to agree, they shall mutually appoint a third person whose decision shall be final and binding."

In May of 1958 an employee named Welsch was discharged by the employer after he had damaged a new fork-lift truck by running it off a loading platform and onto some railroad tracks. When a business agent of the union protested, he was told by a representative of the employer that Welsch had been discharged because of unsatisfactory work. The union thereupon called a strike to force the employer to rehire Welsch. The strike lasted eight days.[1] After the strike was over, the issue of Welsch's discharge was submitted to arbitration. Some five months later the Board of Arbitration rendered a decision, ruling that Welsch's work had been unsatisfactory, that his unsatisfactory work had been the reason for his discharge, and that he was not entitled to reinstatement as an employee.

In the meantime, the employer had brought this suit against the union in the Superior Court of King County, Washington, asking damages for business losses caused by the strike. After a trial that court entered a judgment in favor of the employer in the amount of $6,501.60.[2] On appeal the judgment was affirmed by Department One of the Supreme Court of Washington. 57 Wash. 2d 95, 356 P. 2d 1. The reviewing court held that the pre-emption doctrine of *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236, did not deprive it of jurisdiction over the controversy. The court further held that § 301 of the Labor Management Relations Act of 1947, 29 U. S. C. § 185, could not "reasonably be interpreted as pre-empting state jurisdiction, or as affecting it by limiting the substantive law to be applied." 57 Wash. 2d, at 102, 356 P. 2d, at 5. Expressly applying principles of state law, the court reasoned that the strike was a viola-

[1] The strike was terminated by a temporary injunction issued by the state court.

[2] The amount of damages is not in issue here.

tion of the collective bargaining contract, because it was an attempt to coerce the employer to forego his contractual right to discharge an employee for unsatisfactory work.[3] We granted certiorari to consider questions of federal labor law which this case presents. 365 U. S. 868.

We note at the outset a question as to our jurisdiction. Although the judgment before us has been certified as that of the Supreme Court of Washington, this case was actually heard and decided by Department One of that court, consisting of five of the nine members of the full court. Since the union could have filed a petition for rehearing *en banc* but did not do so, the argument is made that the judgment before us was not "rendered by the highest court of a State in which a decision could be had," and that the judgment is one we therefore have no power to review. 28 U. S. C. § 1257. This argument primarily rests upon *Gorman* v. *Washington University,* 316 U. S. 98, which held that, in view of the structure of Missouri's judicial system, a separate division of the Supreme Court of that State was not the highest state court in which a decision of a federal question could be had.[4] It is evident, however, that the law governing rehearings in the Supreme Court of Washington is quite unlike the particularized provisions of Missouri law which led this Court to dismiss the writ in *Gorman.*

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[3] The court noted that the unreported memorandum opinion of the trial judge indicated a theory of liability based upon tort, rather than contract, liability. The appellate court said, however: "From the pleadings, the theory is established that the respondent was injured by the appellant's breach of contract and this theory is clearly supported by the record. Therefore, the rule that the judgment of the trial court will be sustained on any theory established by the pleadings and supported by the proof is applicable." 57 Wash. 2d, at 103, 356 P. 2d, at 6.

[4] See also *Osment* v. *Pitcairn,* 317 U. S. 587.

As the opinion in *Gorman* pointed out, the Constitution of the State of Missouri expressly conferred the *right* to an *en banc* rehearing by the Supreme Court of Missouri in any case originally decided by a division of the court in which a federal question was involved. It was this provision of the state constitution which was the basis for the conclusion in *Gorman* that the State of Missouri did not regard a decision by a division of the court as the final step in the state appellate process in a case involving a federal question. "[T]he constitution of Missouri," it was said, "has thus provided in this class of cases for review of the judgment of a division . . . ." 316 U. S., at 100.

By contrast, a rehearing *en banc* before the Supreme Court of Washington is not granted as a matter of right. The Constitution and statutes of the State of Washington authorize its Supreme Court to sit in two Departments, each of which is empowered "to hear and determine causes, and all questions arising therein." [5] Cases coming before

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[5] Article IV, § 2 of the state constitution provides, in pertinent part, "The legislature may increase the number of judges of the supreme court from time to time and may provide for separate departments of said court."

Revised Code of Washington, § 2.04.120, provides:

"*Two departments—Quorum.* There shall be two departments of the supreme court, denominated respectively department one and department two. The chief justice shall assign four of the associate judges to each department and such assignment may be changed by him from time to time: *Provided,* That the associate judges shall be competent to sit in either department and may interchange with one another by agreement among themselves, or if no such agreement be made, as ordered by the chief justice. The chief justice may sit in either department and shall preside when so sitting, but the judges assigned to each department shall select one of their number as presiding judge. Each of the departments shall have the power to hear and determine causes, and all questions arising therein, subject to the provisions in relation to the court en banc. The presence of three judges shall be necessary to transact any business in either of

the court may be assigned to a Department or to the court *en banc* at the discretion of the Chief Justice and a specified number of other members of the court.[6] The state law further provides that the decision of a Department becomes a final judgment of the Supreme Court of Washington, unless within 30 days a petition for rehearing has been filed, or a rehearing has been ordered on the court's own initiative.[7]

We can discern in Washington's system no indication that the decision in the present case, rendered unani-

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the departments, except such as may be done at chambers, but one or more of the judges may from time to time adjourn to the same effect as if all were present, and a concurrence of three judges shall be necessary to pronounce a decision in each department: *Provided*, That if three do not concur, the cause shall be reheard in the same department or transmitted to the other department, or to the court en banc."

[6] Revised Code of Washington, § 2.04.150, provides:

"*Apportionment of business—En banc hearings.* The chief justice shall from time to time apportion the business to the departments, and may, in his discretion, before a decision is pronounced, order any cause pending before the court to be heard and determined by the court en banc. When a cause has been allotted to one of the departments and a decision pronounced therein, the chief justice, together with any two associate judges, may order such cause to be heard and decided by the court en banc. Any four judges may, either before or after decision by a department, order a cause to be heard en banc."

[7] Revised Code of Washington, § 2.04.160, provides:

"*Finality of departmental decision—Rehearings.* The decision of a department, except in cases otherwise ordered as hereinafter provided, shall not become final until thirty days after the filing thereof, during which period a petition for rehearing, or for a hearing en banc, may be filed, the filing of either of which, except as hereinafter otherwise provided, shall have the effect of suspending such decision until the same shall have been disposed of. If no such petition be filed the decision of a department shall become final thirty days from the date of its filing, unless during such thirty-day period an order for a hearing en banc shall have been made: . . . . Whenever a decision shall become final, as herein provided, a judgment shall issue thereon."

mously by a majority of the judges of the Supreme Court of Washington, was other than the final word of the State's final court.[8] This case is thus properly before us, and we turn to the issues which it presents.

One of those issues—whether § 301 (a) of the Labor Management Relations Act of 1947 deprives state courts of jurisdiction over litigation such as this—we have decided this Term in *Charles Dowd Box Co.* v. *Courtney,* 368 U. S. 502. For the reasons stated in our opinion in that case, we hold that the Washington Supreme Court was correct in ruling that it had jurisdiction over this controversy.[9]

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[8] See *Market Street R. Co.* v. *Comm'n,* 324 U. S. 548, 551–552. In recent years we have, without challenge, reviewed on their merits several cases decided by a Department of the Washington Supreme Court in which no petition for rehearing *en banc* had been filed. See, *e. g., McGrath* v. *Rhay,* 364 U. S. 279; *Ross* v. *Schneckloth,* 357 U. S. 575; *United States* v. *Carroll Construction Co.,* 346 U. S. 802.

[9] Since this was a suit for violation of a collective bargaining contract within the purview of § 301 (a) of the Labor Management Relations Act of 1947, the pre-emptive doctrine of cases such as *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236, based upon the exclusive jurisdiction of the National Labor Relations Board, is not relevant. See *Local 4264, United Steelworkers* v. *New Park Mining Co.,* 273 F. 2d 352 (C. A. 10th Cir.); *Independent Petroleum Workers* v. *Esso Standard Oil Co.,* 235 F. 2d 401 (C. A. 3d Cir.); see generally *Lodge No. 12, District No. 37, Int'l Assn. of Machinists* v. *Cameron Iron Works, Inc.,* 257 F. 2d 467 (C. A. 5th Cir.); *Local 598, Plumbers & Steamfitters Union* v. *Dillion,* 255 F. 2d 820 (C. A. 9th Cir.); *Local 181, Int'l Union of Operating Engineers* v. *Dahlem Constr. Co.,* 193 F. 2d 470 (C. A. 6th Cir.). As pointed out in *Charles Dowd Box Co.* v. *Courtney,* 368 U. S., at 513, Congress "deliberately chose to leave the enforcement of collective agreements 'to the usual processes of the law.' " See also H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess. p. 52. It is, of course, true that conduct which is a violation of a contractual obligation may also be conduct constituting an unfair labor practice, and what has been said is not to imply that enforcement by a court of a contract obligation affects the jurisdiction of the N. L. R. B. to remedy unfair labor practices, as such. See generally Dunau, Contractual Prohibition of Unfair Labor Practices: Jurisdictional Problems, 57 Col. L. Rev. 52.

There remain for consideration two other issues, one of them implicated but not specifically decided in *Dowd Box*. Was the Washington court free, as it thought, to decide this controversy within the limited horizon of its local law? If not, does applicable federal law require a result in this case different from that reached by the state court?

In *Dowd Box* we proceeded upon the hypothesis that state courts would apply federal law in exercising jurisdiction over litigation within the purview of § 301 (a), although in that case there was no claim of any variance in relevant legal principles as between the federal law and that of Massachusetts. In the present case, by contrast, the Washington court held that there was nothing in § 301 "limiting the substantive law to be applied," and the court accordingly proceeded to dispose of this litigation exclusively in terms of local contract law. The union insists that the case was one to be decided by reference to federal law, and that under applicable principles of national labor law the strike was not a violation of the collective bargaining contract. We hold that in a case such as this, incompatible doctrines of local law must give way to principles of federal labor law.[10] We

[10] Of the many state courts which have assumed jurisdiction over suits involving contracts subject to § 301, few have explicitly considered the problem of state *versus* federal law. *McCarroll* v. *Los Angeles County Dist. Council of Carpenters*, 49 Cal. 2d 45, 60, 315 P. 2d 322, 330, held that federal law must govern. Accord: *Local Lodge No. 774, Int'l Assn. of Machinists* v. *Cessna Aircraft Co.*, 186 Kan. 569, 352 P. 2d 420; *Harbison-Walker Refractories Co.* v. *Local 702, United Brick & Clay Workers*, 339 S. W. 2d 933, 935–936 (Ky. Ct. App.). Other courts have found it unnecessary to decide the question, because they found no conflict between state and federal law on the issues presented. *Karcz* v. *Luther Mfg. Co.*, 338 Mass. 313, 317, 155 N. E. 2d 441, 444; *Springer* v. *Powder Power Tool Corp.*, 220 Ore. 102, 106–107, 348 P. 2d 1112, 1114; *Clark* v. *Hein-Werner Corp.*, 8 Wis. 2d 264, 277, 100 N. W. 2d 317, 318 (on motion for rehearing). It bears noting, however, that these courts and others, *e. g.*, *Con-*

further hold, however, that application of such principles to this case leads to affirmance of the judgment before us.

It was apparently the theory of the Washington court that, although *Textile Workers Union* v. *Lincoln Mills,* 353 U. S. 448, requires the federal courts to fashion, from the policy of our national labor laws, a body of federal law for the enforcement of collective bargaining agreements, nonetheless, the courts of the States remain free to apply individualized local rules when called upon to enforce such agreements. This view cannot be accepted. The dimensions of § 301 require the conclusion that substantive principles of federal labor law must be paramount in the area covered by the statute. Comprehensiveness is inherent in the process by which the law is to be formulated under the mandate of *Lincoln Mills,* requiring issues raised in suits of a kind covered by § 301 to be decided according to the precepts of federal labor policy.

More important, the subject matter of § 301 (a) "is peculiarly one that calls for uniform law." *Pennsylvania R. Co.* v. *Public Service Comm'n,* 250 U. S. 566, 569; see *Cloverleaf Butter Co.* v. *Patterson,* 315 U. S. 148, 167–169. The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. Because neither party could be certain of the rights which it had obtained or conceded, the process of negotiating an agreement would be made immeasurably more difficult by the necessity of trying to formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might someday be invoked in enforcing the contract. Once the collective bargain was

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necticut Co. v. *Division 425, Street & Electric Railway Employees,* 147 Conn. 608, 622–623, 164 A. 2d 413, 420, have carefully considered applicable federal precedents in resolving the litigation before them.

made, the possibility of conflicting substantive interpretation under competing legal systems would tend to stimulate and prolong disputes as to its interpretation.[11] Indeed, the existence of possibly conflicting legal concepts might substantially impede the parties' willingness to agree to contract terms providing for final arbitral or judicial resolution of disputes.

The importance of the area which would be affected by separate systems of substantive law makes the need for a single body of federal law particularly compelling. The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace. State law which frustrates the effort of Congress to stimulate the smooth functioning of that process thus strikes at the very core of federal labor policy. With due regard to the many factors which bear upon competing state and federal interests in this area, *California* v. *Zook*, 336 U. S. 725, 730–731; *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230–231, we cannot but conclude that in enacting § 301 Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules.

Whether, as a matter of federal law, the strike which the union called was a violation of the collective bargaining contract is thus the ultimate issue which this case presents. It is argued that there could be no violation in the absence of a no-strike clause in the contract

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[11] As one commentator has said: "Words in any legal document are ambiguous, but the body of law which grows up in an area through decision helps to dispel this ambiguity. The existence of two bodies of law which cannot be accommodated by any conflict-of-laws rule, however, is calculated to aggravate rather than to alleviate the situation." Wellington, Labor and the Federal System, 26 U. of Chi. L. Rev. 542, 557.

explicitly covering the subject of the dispute over which the strike was called. We disagree.

The collective bargaining contract expressly imposed upon both parties the duty of submitting the dispute in question to final and binding arbitration.[12] In a consistent course of decisions the Courts of Appeals of at least five Federal Circuits have held that a strike to settle a dispute which a collective bargaining agreement provides shall be settled exclusively and finally by compulsory arbitration constitutes a violation of the agreement.[13] The National Labor Relations Board has reached the same conclusion. *W. L. Mead, Inc.*, 113 N. L. R. B. 1040. We approve that doctrine.[14] To hold otherwise would obviously do violence to accepted principles of traditional contract law. Even more in point, a contrary view would be completely at odds with the basic policy of national labor legislation to promote the arbitral process as a substitute for economic warfare. See *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U. S. 574.

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[12] It appears that this would be true whether the dispute be considered as a "difference as to the true interpretation of this agreement" or as a difference "between the employer and the employee" under Article XIV of the contract. See p. 96, *supra*. The union not only now concedes that the dispute as to Welsch's discharge was subject to final and binding arbitration, but, indeed, after the strike, the dispute was so arbitrated.

[13] See *Local 25, Teamsters Union* v. *W. L. Mead, Inc.*, 230 F. 2d 576, 583–584 (C. A. 1st Cir.); *United Construction Workers* v. *Haislip Baking Co.*, 223 F. 2d 872, 876–877 (C. A. 4th Cir.); *Labor Board* v. *Dorsey Trailers, Inc.*, 179 F. 2d 589, 592 (C. A. 5th Cir.); *Lewis* v. *Benedict Coal Corp.*, 259 F. 2d 346, 351 (C. A. 6th Cir.); *Labor Board* v. *Sunset Minerals*, 211 F. 2d 224, 226 (C. A. 9th Cir.).

[14] Deciding the case as we do upon this explicit ground, we do not adopt the reasoning of the Washington court. Insofar as the language of that court's opinion is susceptible to the construction that a strike during the term of a collective bargaining agreement is *ipso facto* a violation of the agreement, we expressly reject it.

What has been said is not to suggest that a no-strike agreement is to be implied beyond the area which it has been agreed will be exclusively covered by compulsory terminal arbitration. Nor is it to suggest that there may not arise problems in specific cases as to whether compulsory and binding arbitration has been agreed upon, and, if so, as to what disputes have been made arbitrable.[15] But no such problems are present in this case. The grievance over which the union struck was, as it concedes, one which it had expressly agreed to settle by submission to final and binding arbitration proceedings. The strike which it called was a violation of that contractual obligation.

Affirmed.

MR. JUSTICE BLACK, dissenting.

The petitioner local union and the respondent company entered into a written collective bargaining agreement containing an express provision for the arbitration of disputes growing out of differences as to the proper application of the agreement in the following terms:

> "Should any difference arise between the employer and the employee, same shall be submitted to arbitration by both parties. Failing to agree, they shall mutually appoint a third person whose decision shall be final and binding."

The Court now finds—out of clear air, so far as I can see—that the union, without saying so in the agreement, not only agreed to arbitrate such differences, but also promised that there would be no strike while arbitration of a dispute was pending under this provision. And on the

[15] With respect to such problems, compare *United Mine Workers* v. *Labor Board,* 103 U. S. App. D. C. 207, 257 F. 2d 211, with *Lewis* v. *Benedict Coal Corp.,* 259 F. 2d 346 (affirmed on this question by an equally divided Court, 361 U. S. 459), for differing interpretations of an identical contract.

basis of its "discovery" of this additional unwritten promise by the union, the Court upholds a judgment awarding the company substantial damages for a strike in breach of contract.

That the Court's decision actually vacates and amends the contract that the parties themselves had made and signed is shown, I think, by the very face of that original contract. The arbitration provision covering disputes growing out of the application of the contract immediately follows another quite different arbitration provision—one covering disputes "as to the true interpretation of this agreement" in the following terms:

> "Should any difference as to the true interpretation of this agreement arise, same shall be submitted to a Board of Arbitration of two members, one representing the firm, and one representing the Union. If said members cannot agree, a third member, who must be a disinterested party shall be selected, and the decision of the said Board of Arbitration shall be binding. *It is further agreed by both parties hereto that during such arbitration, there shall be no suspension of work.*" (Emphasis supplied.)

In view of the fact that this latter provision contains an explicit promise by the union "that during such arbitration, there shall be no suspension of work," it seems to me plain that the parties to this contract, knowing how to write a provision binding a union not to strike, deliberately included a no-strike clause with regard to disputes over broad questions of contractual interpretation and deliberately excluded such a clause with regard to the essentially factual disputes arising out of the application of the contract in particular instances. And there is not a word anywhere else in this agreement which indicates that this perfectly sensible contractual framework for handling these two different kinds of disputes was not

intended to operate in the precise manner dictated by the express language of the two arbitration provisions.

The defense offered for the Court's rewriting of the contract which the parties themselves made is that to allow the parties' own contract to stand "would obviously do violence to accepted principles of traditional contract law" and "be completely at odds with the basic policy of national labor legislation to promote the arbitral process." I had supposed, however—though evidently the Court thinks otherwise—that the job of courts enforcing contracts was to give legal effect to what the contracting parties actually agree to do, not to what courts think they ought to do. In any case, I have been unable to find any accepted principle of contract law—traditional or otherwise—that permits courts to change completely the nature of a contract by adding new promises that the parties themselves refused to make in order that the new court-made contract might better fit into whatever social, economic, or legal policies the courts believe to be so important that they should have been taken out of the realm of voluntary contract by the legislative body and furthered by compulsory legislation.

The mere fact that the dispute which brought about this strike was subject to "final and binding" arbitration under this contract certainly does not justify the conclusion that the union relinquished its right to strike in support of its position on that dispute. The issue here involves, not the nature of the arbitration proceeding, but the question of whether the union, by agreeing to arbitrate, has given up all other separate and distinct methods of getting its way. Surely, no one would suggest that a provision for final and binding arbitration would preclude a union from attempting to persuade an employer to forego action the union was against, even where that action was fully within the employer's rights under the contract. The same principle supports the right of the

union to strike in such a situation for historically, and as was recognized in both the Wagner and Taft-Hartley Acts, the strike has been the unions' most important weapon of persuasion. To say that the right to strike is inconsistent with the contractual duty to arbitrate sounds like a dull echo of the argument which used to be so popular that the right to strike was inconsistent with the contractual duty to work—an argument which frequently went so far as to say that strikes are inconsistent with both the common law and the Constitution.

The additional burden placed upon the union by the Court's writing into the agreement here a promise not to strike is certainly not a matter of minor interest to this employer or to the union. The history of industrial relations in this country emphasizes the great importance to unions of the right to strike as well as an understandable desire on the part of employers to avoid such work stoppages. Both parties to collective bargaining discussions have much at stake as to whether there will be a no-strike clause in any resulting agreement. It is difficult to believe that the desire of employers to get such a promise and the desire of the union to avoid giving it are matters which are not constantly in the minds of those who negotiate these contracts. In such a setting, to hold—on the basis of no evidence whatever—that a union, without knowing it, impliedly surrendered the right to strike by virtue of "traditional contract law" or anything else is to me just fiction. It took more than 50 years for unions to have written into federal legislation the principle that they have a right to strike. I cannot understand how anyone familiar with that history can allow that legislatively recognized right to be undercut on the basis of the attenuated implications the Court uses here.

I do not mean to suggest that an implied contractual promise cannot sometimes be found where there are facts and circumstances sufficient to warrant the conclusion

that such was the intention of the parties. But there is no factual basis for such a conclusion in this case and the Court does not even claim to the contrary. The implication of a no-strike clause which the Court purports to find here—an implication completely at war with the language the parties used in making this contract as well as with the normal understanding of the negotiation process by which such contracts are made—has not been supported by so much as one scrap of evidence in this record. The implication found by the Court thus flows neither from the contract itself nor, so far as this record shows, from the intention of the parties. In my judgment, an "implication" of that nature would better be described as a rigid rule of law that an agreement to arbitrate has precisely the same effect as an agreement not to strike—a rule of law which introduces revolutionary doctrine into the field of collective bargaining.

I agree that the Taft-Hartley Act shows a congressional purpose to treat collective bargaining contracts and agreements for arbitration in them as one important way of insuring stability in industrial production and labor relations. But the fact that we may agree, as I do, that these settlements by arbitration are desirable is no excuse whatever for imposing such "contracts," either to compel arbitration or to forbid striking, upon unwilling parties. That approach is certainly contrary to the industrial and labor philosophy of the Taft-Hartley Act. Whatever else may be said about that Act, it seems plain that it was enacted on the view that the best way to bring about industrial peace was through voluntary, not compelled, labor agreements. Section 301 is torn from its roots when it is held to require the sort of compulsory arbitration imposed by this decision. I would reverse this case and relegate this controversy to the forum in which it belongs—the collective bargaining table.

Per Curiam.

PUBLIC AFFAIRS ASSOCIATES, INC., TRADING AS PUBLIC AFFAIRS PRESS, *v.* RICKOVER.

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

No. 36. Argued November 6–7, 1961.—Decided March 5, 1962.*

In this action under the Declaratory Judgment Act for a determination of the rights of Vice Admiral Rickover with respect to his speeches, the record, consisting mainly of a sketchy agreed statement of facts, is not a satisfactory basis for a discretionary grant of declaratory relief relating to claims to intellectual property arising out of public employment. Pp. 111–114.

109 U. S. App. D. C. 128, 284 F. 2d 262, judgment vacated and cause remanded.

Harry N. Rosenfield argued the cause for Public Affairs Associates, Inc. With him on the briefs was *Stanley B. Frosh.*

Joseph A. McDonald argued the cause for Vice Admiral Rickover. With him on the briefs were *Edwin S. Nail* and *Harry Buchman.*

PER CURIAM.

These two cases arose under the Declaratory Judgment Act of June 14, 1934, 48 Stat. 955, as amended, now 28 U. S. C. (1958 ed.) §§ 2201 and 2202. The plaintiff, an educational publishing corporation, asked defendant, Vice Admiral Rickover, for leave to publish, to an undefined extent, uncopyrighted speeches he had theretofore delivered. He refused on the ground that what he claimed to be exclusive publishing rights had been sold

*Together with No. 55, *Rickover* v. *Public Affairs Associates, Inc., Trading as Public Affairs Press*, also on certiorari to the same Court.

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to another publisher, and he gave notice of copyright on speeches subsequent to the plaintiff's demand. Since the defendant threatened restraint of plaintiff's use of his speeches, the plaintiff sought this declaratory relief. The District Court dismissed the complaint on the merits, 177 F. Supp. 601. The Court of Appeals (one judge dissenting), agreeing with the District Court that the defendant had, as to his uncopyrighted speeches, the common-law rights of an author, held that he had forfeited his rights by reason of their "publication"; as to his copyrighted speeches, that court remanded the case to the District Court for determination of the extent to which "fair use" was open to the plaintiff. 109 U. S. App. D. C. 128, 284 F. 2d 262. By petition for certiorari and cross-petition both parties sought review and because serious public questions were in issue we brought the cases here. 365 U. S. 841.

The Declaratory Judgment Act was an authorization, not a command. It gave the federal courts competence to make a declaration of rights; it did not impose a duty to do so. *Brillhart* v. *Excess Ins. Co.,* 316 U. S. 491, 494, 499; *Great Lakes Co.* v. *Huffman,* 319 U. S. 293, 299–300; *Federation of Labor* v. *McAdory,* 325 U. S. 450, 462; *Mechling Barge Lines* v. *United States,* 368 U. S. 324, 331. Of course a District Court cannot decline to entertain such an action as a matter of whim or personal disinclination. "A declaratory judgment, like other forms of equitable relief, should be granted only as a matter of judicial discretion, exercised in the public interest." *Eccles* v. *Peoples Bank,* 333 U. S. 426, 431. We have cautioned against declaratory judgments on issues of public moment, even falling short of constitutionality, in speculative situations. *Eccles* v. *Peoples Bank, supra,* at 432.

In these cases we are asked to determine matters of serious public concern. They relate to claims to intel-

lectual property arising out of public employment. They thus raise questions touching the responsibilities and immunities of those engaged in the public service, particularly high officers, and the rightful demands of the Government and the public upon those serving it. These are delicate problems; their solution is bound to have far-reaching import. Adjudication of such problems, certainly by way of resort to a discretionary declaratory judgment, should rest on an adequate and full-bodied record. The record before us is woefully lacking in these requirements.

The decisions of the courts below rested on an Agreed Statement of Facts which sketchily summarized the circumstances of the preparation and of the delivery of the speeches in controversy in relation to the Vice Admiral's official duties. The nature and scope of his duties were not clearly defined and less than an adequate exposition of the use by him of government facilities and government personnel in the preparation of these speeches was given. Administrative practice, insofar as it may relevantly shed light, was not explored. The Agreed Statement of Facts was in part phrased, modified and interpreted in the course of a running exchange between trial judge and counsel. The extent of the agreement of counsel to the Agreed Statement of Facts was in part explained in the course of oral argument in the District Court. None of the undetailed and loose, if not ambiguous, statements in the Agreed Statement of Facts was subject to the safeguards of critical probing through examination and cross-examination. This is all the more disturbing where vital public interests are implicated in a requested declaration and the Government asserted no claim (indeed obliquely may be deemed not to have disapproved of the defendant's claim) although the Government was invited to appear in the litigation as *amicus curiae* and chose not

to do so. So fragile a record is an unsatisfactory basis on which to entertain this action for declaratory relief.

Accordingly, the judgment of the Court of Appeals is vacated, with direction to return the case to the District Court for disposition not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE DOUGLAS, concurring.

It is conceded that the Declaratory Judgment Act is an authorization, not a command—a conclusion as well settled as is the proposition that the jurisdiction of federal courts is confined to "cases" or "controversies." *Aetna Life Ins. Co.* v. *Haworth,* 300 U. S. 227. The requirements of a "case" or "controversy" and the propriety of the use of the declaratory judgment are at times closely enmeshed. In resolving those issues the Court has on the whole been niggardly in the exercise of its authority. Thus, in *Doremus* v. *Board of Education,* 342 U. S. 429, a taxpayer's suit to declare that a public school system could not be used for religious instruction was dismissed because there was not "the requisite financial interest." *Id.,* at 435. *Frothingham* v. *Mellon,* 262 U. S. 447—a decision with which I have great difficulty—was given new dimensions. That case held that a taxpayer of the United States had no standing to challenge a federal appropriation, since the question was essentially a matter of public, not private, concern.[1]

[1] "Back in 1923, the Court went further and held that the mere fact that a person could show he paid federal taxes made no difference in this respect and gave him no standing to challenge an act of Congress appropriating public funds. The Court recognized that an unconstitutional spending of public money might conceivably necessitate a rise in subsequent tax levies. Nevertheless it held that the causal connection between any specific expenditure and future tax rates would be too remote and uncertain to constitute an immediate

Id., at 487. This ruling was projected into the state field by the *Doremus* case, barring relief to those legitimately concerned with the operation of the public school system.

At times the question of the "ripeness" of an issue for judicial review is brigaded with the appropriateness of declaratory relief. In *Public Service Comm'n* v. *Wycoff Co.*, 344 U. S. 237, 244, relief was denied though a carrier's certificate to do an interstate business was placed in jeopardy by threatened state action. That principle was extended in *Eccles* v. *Peoples Bank*, 333 U. S. 426, to deny relief in a situation comparable to a suit to remove a cloud from one's title. For a bank was being saddled with conditions by the Federal Reserve System that crippled its activities and restricted the market for its stock. On other occasions, "mootness" has been used as the rubric to deny relief through the route of a declaratory judgment, even though the litigant was still insecure and in peril as a result of administrative action. *Mechling Barge Lines* v. *United States*, 368 U. S. 324.

At other times the issue is said to be "abstract" because of the lack of immediacy in the threatened enforcement of a law. Thus, a person must risk going to jail or losing his job to get relief. That was true in *Poe* v. *Ullman*, 367 U. S. 497, a case involving Connecticut's birth-con-

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personal injury to a taxpayer. Hence he would have no more to complain about than others.

"Rulings of this kind, designed to keep peace among the departments of government, are eminently sensible as over-all policies. Yet they also provide a way to immunize a bad law from attack in the courts: one need only frame the law in such a way as to violate the basic rights of nobody in particular but everybody in general, that is, of the *entire* American people. Then, since no one can point to an injury that is distinguishable from his neighbors', no one can come into court and challenge the legislation!" Edmond Cahn, How to Destroy the Churches, Harper's Magazine, Nov. 1961, p. 36.

trol law, and in *United Public Workers* v. *Mitchell,* 330 U. S. 75, involving Civil Service Rules restricting the political rights of federal employees.

The list is not complete. But these cases illustrate the restrictive nature of the judge-made rules which have made the federal courts so inhospitable to litigation to vindicate private rights. At no time has the Court been wholly consistent; nor have I. Compare *Connecticut Ins. Co.* v. *Moore,* 333 U. S. 541, 556 (dissenting opinion), with *Western Union Co.* v. *Pennsylvania,* 368 U. S. 71. But my maturing view is that courts do law and justice a disservice when they close their doors to people who, though not in jail nor yet penalized, live under a regime of peril and insecurity. What are courts for, if not for removing clouds on title, as well as adjudicating the rights of those against whom the law is aimed, though not immediately applied?

Evers v. *Dwyer,* 358 U. S. 202, is illustrative of what I deem to be the important role served by the declaratory judgment. A Negro who had not been arrested for riding a segregated bus brought a class action to have his rights and those of his class adjudicated. We held there was an "actual controversy," because it was clear that the local authorities were bent on enforcing the segregation law, though they had not enforced it against this plaintiff.[2]

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[2] And see *Mitchell* v. *United States,* 313 U. S. 80, where we held that a Negro who filed a complaint with the Interstate Commerce Commission against an interstate carrier for discriminating against him had standing to complain, though it did not appear that he intended to make a similar railroad journey:

"He is an American citizen free to travel, and he is entitled to go by this particular route whenever he chooses to take it and in that event to have facilities for his journey without any discrimination against him which the Interstate Commerce Act forbids." *Id.,* at 93.

The opinion of the Court in this case seems to set declaratory relief apart as suspect; it leaves the *innuendo* that if the case were here under a different complaint, the result might be different. I share none of these disparaging thoughts. I agree, however, that no matter what the cause of action might be, the present record leaves gaps which make an adjudication impossible. The lack of evidence as to the extent to which Rickover's literary works were products of his office is fatal for me, though, of course, it would not be to one who considers those facts irrelevant to the legal issue. The approach we take today has often been used to abdicate the judicial function under resounding utterances concerning the importance of judicial self-denial. See, *e. g., United States* v. *Auto. Workers,* 352 U. S. 567, 590–592. It has also served to place undue emphasis upon the clarity and precision of the questions presented, as in *Rescue Army* v. *Municipal Court,* 331 U. S. 549, where the Court subjected the appellant "to the burden of undergoing a third trial" in order that the issues might be in a more "clean-cut and concrete form." *Id.,* at 584. But on the present record I have no other choice, for without additional facts I must withhold decision.

MR. CHIEF JUSTICE WARREN, with whom MR. JUSTICE WHITTAKER concurs, dissenting.

With respect to those of Admiral Rickover's speeches written and delivered prior to December 1, 1958, I would affirm. The record made below and filed here is, I believe, adequate to support the judgment of the Court of Appeals that the Admiral's practice of distributing numerous copies of his speeches, without limitations as to the persons who would receive them or the purposes to which they would be put by the recipients, and without

so much as a suggestion of a copyright claim, amounted to a dedication of those works to the public domain. At the same time, I recognize the inadequacy of the present record for determining now whether speeches on which a copyright notice had been placed were effectively protected by that notice from other than "fair use," and whether Public Affairs intended to make only "fair use" of those works. I would, therefore, also affirm the remand to the District Court ordered by the Court of Appeals as to such speeches.

In the light of these views, I find it unnecessary to pass now on the questions raised in No. 36, and would dismiss that case as premature.

MR. JUSTICE HARLAN, dissenting.

The basic issue which brought these cases here was whether Admiral Rickover's speeches were copyrightable in light of the following provision of the Copyright Act: "No copyright shall subsist in . . . any publication of the United States Government." (17 U. S. C. § 8.) As I see it, decision of that issue turns not merely on whether such speeches were made by the Admiral in the "line of duty," but also, and in my view more fundamentally, on whether such speeches were in any event "publication[s] of the United States Government." In my opinion the record is sufficient to require adjudication on both aspects of that issue, and on this phase of the controversy I agree with the result reached by the Court of Appeals. I also agree with its determination as to the adequacy of the copyright notice affixed to speeches delivered after December 1, 1958.

However, I consider the record inadequate to justify adjudication as to whether Admiral Rickover's right to copyright was lost with respect to speeches delivered

before December 1, 1958, by reason of their alleged entry into "the public domain."* As to that issue I would vacate the judgment of the Court of Appeals and remand the case to the District Court for further proceedings. In all other respects I would affirm the judgment below.

*The stipulation states that with respect to 20 of the 22 speeches made before December 1, 1958, "Admiral Rickover mailed *some* to individuals who had requested copies or who Admiral Rickover believed would be interested in the subject. *Some* were sent by Admiral Rickover . . . to the sponsor of the speech to be made available to the press *and others* at the place where the speech was to be delivered." (Emphasis added.) It appears from the stipulation that no further distribution other than for press use was ever made. Whether the foregoing publications were general enough to amount to a dedication to the public of all or any of these speeches depends on more precise information than is afforded by the stipulation.

ILLINOIS CENTRAL RAILROAD CO. *v.* CITY OF SHIVELY.

APPEAL FROM THE COURT OF APPEALS OF KENTUCKY.

No. 654. Decided March 5, 1962.

Appeal dismissed for want of a substantial federal question.
Reported below: 349 S. W. 2d 682.

James W. Stites, Joseph H. Wright and *John W. Freels* for appellant.

PER CURIAM.

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

DiBELLA *v.* UNITED STATES.

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

No. 21. Argued January 16–17, 1962.—Decided March 19, 1962.*

An order of a Federal District Court granting or denying a pre-indictment motion under Federal Rule of Criminal Procedure 41 (e) to suppress the evidentiary use in a federal criminal trial of property allegedly procured through an unlawful search and seizure is not appealable—even when rendered in a different district from that of trial. Pp. 121–133.

284 F. 2d 897, judgment vacated with instructions to dismiss the appeal.

290 F. 2d 166, affirmed.

Jerome Lewis argued the cause and filed briefs for petitioner in No. 21.

Bruce J. Terris argued the causes for the United States. With him on the briefs were *Solicitor General Cox, Assistant Attorney General Miller, Acting Assistant Attorney General Foley, Beatrice Rosenberg, Jerome M. Feit* and *Marshall Tamor Golding.*

Joseph P. Manners argued the cause and filed briefs for respondent in No. 93.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

These two cases present variants of the same problem: the appealability of an order granting or denying a pretrial motion to suppress the evidentiary use in a federal criminal trial of material allegedly procured through

*Together with No. 93, *United States* v. *Koenig*, certiorari to the United States Court of Appeals for the Fifth Circuit, argued January 17, 1962.

an unreasonable search and seizure.[1] A brief recital of the procedural history of each will place our problem in context.

On October 15, 1958, a warrant was issued by a United States Commissioner in the Eastern District of New York for the arrest of Mario DiBella upon a complaint charging unlawful sales of narcotics. The warrant was executed on March 9, 1959, in DiBella's apartment, and was followed by seizure of the drugs, equipment, and cash now in question. DiBella was arraigned and released under bail the next day. On June 17, 1959, a motion to suppress was filed on his behalf with the District Court for the Eastern District of New York, and hearing was scheduled for July 6. Several continuances followed, and before the hearing was held, on August 25, an indictment against DiBella was returned in the same district. The motion was ultimately denied, without prejudice to renewal at trial. 178 F. Supp. 5. The Court of Appeals

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[1] Rule 41 (e) of the Federal Rules of Criminal Procedure provides:

"A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing."

for the Second Circuit held the order appealable, in accordance with its prior decisions, because the motion was filed before return of the indictment. 284 F. 2d 897.

The motion in the companion case, on behalf of Daniel Koenig, was likewise filed before indictment, and this time in a district other than that of trial. Koenig had been arrested on September 22, 1959, in the Southern District of Florida on the basis of a complaint charging robbery of a federally insured bank in the Southern District of Ohio. His motion to suppress and for return of property seized during that arrest was filed in the Florida federal court on October 12, three days after the local United States Commissioner had held a final hearing on the Ohio complaint and two days before he recommended a warrant of removal. On October 16, an indictment against Koenig was returned in the Southern District of Ohio. After three hearings on the motion, the Florida District Court entered its order on December 18, granting suppression but denying return without prejudice to renewal of the motion in the trial court. The Government's appeal to the Court of Appeals for the Fifth Circuit was dismissed for lack of jurisdiction on the ground that, following recent decisions of that court, the order was interlocutory in a criminal case. 290 F. 2d 166. We granted certiorari in the two cases, 365 U. S. 809 and 368 U. S. 812, respectively, to resolve a conflict among the circuits.

The settled view of the Second Circuit, that a ruling on a pre-indictment motion invariably lays the basis for immediate appellate review, in that it constitutes a "final decision" under 28 U. S. C. § 1291, even though an indictment intervenes, has not been squarely passed upon by this Court. We have denied appealability from orders on post-indictment motions to both the Government, *Carroll* v. *United States,* 354 U. S. 394, and the defend-

ant, *Cogen* v. *United States,* 278 U. S. 221. The Court has, however, in fact allowed appeals from orders granting and denying pre-indictment motions,[2] and these dispositions have given rise to explanatory dicta that lend support to the rule developed in the Second Circuit.[3] Not only disagreement among the circuits but dubieties within them demand an adjudication based upon searching consideration of such conflicting and confused views regarding a problem of considerable importance in the proper administration of criminal justice.

The general principle of federal appellate jurisdiction, derived from the common law and enacted by the First Congress, requires that review of *nisi prius* proceedings await their termination by final judgment. First Judiciary Act, §§ 21, 22, 25, 1 Stat. 73, 83, 84, 85 (1789); see *McLish* v. *Roff,* 141 U. S. 661. This insistence on finality and prohibition of piecemeal review discourage undue litigiousness and leaden-footed administration of justice, particularly damaging to the conduct of criminal cases. See *Cobbledick* v. *United States,* 309 U. S. 323, 324–326.

Since the procedural aspects of law deal with the practical affairs of men and do not constitute an abstract system of doctrinaire notions, Congress has recognized the need of exceptions for interlocutory orders in certain types of proceedings where the damage of error unreviewed before the judgment is definitive and complete, see *Collins* v. *Miller,* 252 U. S. 364, 370, has been deemed greater than the disruption caused by intermediate appeal.

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[2] *Perlman* v. *United States,* 247 U. S. 7; *Burdeau* v. *McDowell,* 256 U. S. 465. See also *Go-Bart Co.* v. *United States,* 282 U. S. 344, 356.

[3] See *Cogen* v. *United States,* 278 U. S. 221, 225; *Cobbledick* v. *United States,* 309 U. S. 323, 328–329 and n. 6; *Carroll* v. *United States,* 354 U. S. 394, 403.

See 30 Stat. 544, 553 (1898), as amended, 11 U. S. C. § 47 (bankruptcy proceedings); 28 U. S. C. § 1252 (orders invalidating federal statutes); 28 U. S. C. § 1253 (injunctions issued or refused by statutory three-judge courts); 28 U. S. C. § 1292 (a)(1)–(4) (injunctions, receivership, admiralty, patent infringement). Most recently, in the Interlocutory Appeals Act of 1958, 72 Stat. 1770, 28 U. S. C. § 1292 (b), Congress expanded the latitude for intermediate appeals in civil actions through the device of discretionary certification of controlling questions of law. See Note, 75 Harv. L. Rev. 351, 378–379.[4]

Moreover, the concept of finality as a condition of review has encountered situations which make clear that it need not invite self-defeating judicial construction. Thus, acceptance of appeal from orders definitively directing an immediate transfer of property, although an accounting remains, *Forgay* v. *Conrad,* 6 How. 201, has been justified as "review of the adjudication which is concluded because it is independent of, and unaffected by, another litigation with which it happens to be entangled." *Radio Station WOW* v. *Johnson,* 326 U. S. 120, 126.[5] Similarly, so as not to frustrate the right

[4] In addition to careful specification of these particular orders, Congress has since 1789 declared the existence of authority in the federal courts to issue "all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law," 28 U. S. C. § 1651, derived from First Judiciary Act, §§ 13, 14, 1 Stat. 73, 80, 81; but the authority has been most sparingly exercised, when no other remedy will suffice, "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Roche* v. *Evaporated Milk Assn.,* 319 U. S. 21, 26.

[5] In eminent-domain proceedings, however, where the issue of reasonable compensation cannot be thus separated from the lawfulness of the taking, the Court has denied independent review to transfer orders. *Catlin* v. *United States,* 324 U. S. 229; cf. *Republic Natural Gas Co.* v. *Oklahoma,* 334 U. S. 62, 71–72.

of appellate review, immediate appeal has been allowed from an order recognized as collateral to the principal litigation because touching matters that will not "affect, or . . . be affected by, decision of the merits of [the] . . . case," *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 546, when the practical effect of the order will be irreparable by any subsequent appeal. *E. g., Stack* v. *Boyle,* 342 U. S. 1; *Swift & Co.* v. *Compania Caribe,* 339 U. S. 684, 688–689. To like effect is Rule 54 (b) of the Federal Rules of Civil Procedure which, as amended in 1961, 368 U. S., at 1015, allows appeals in multiple litigation from an express entry of "final judgment as to one or more but fewer than all of the claims or parties," but only when the trial judge certifies that "there is no just reason for delay."

Despite these statutory exceptions to, and judicial construction of, the requirement of finality, "the final judgment rule is the dominant rule in federal appellate practice." 6 Moore, Federal Practice (2d ed. 1953), 113. Particularly is this true of criminal prosecutions. See, *e. g., Parr* v. *United States,* 351 U. S. 513, 518–521. Every statutory exception is addressed either in terms or by necessary operation solely to civil actions. Moreover, the delays and disruptions attendant upon intermediate appeal are especially inimical to the effective and fair administration of the criminal law. The Sixth Amendment guarantees a speedy trial. Rule 2 of the Federal Rules of Criminal Procedure counsels construction of the Rules "to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay"; Rules 39 (d) and 50 assign preference to criminal cases on both trial and appellate dockets.

Again, the decisions according finality to civil orders in advance of an ultimately concluding judgment have rested on finding a particular claim to be independent, because

"fairly severable from the context of a larger litigious process." *Swift & Co.* v. *Compania Caribe, supra,* 339 U. S., at 689. No such severability inheres in a motion seeking the suppression of evidence at a forthcoming trial; its disposition, as the Court recognized in *Cogen* v. *United States, supra,* 278 U. S., at 223, "will necessarily determine the conduct of the trial and may vitally affect the result." No less when it precedes indictment, the motion presents an issue that is involved in and will be part of a criminal prosecution in process at the time the order is issued.

The precise question before us has been much canvassed in the lower courts. It has not only produced a conflict among the circuits, but has provoked practical difficulties in the administration of criminal justice and caused expressions of dissatisfaction even in courts that have sustained an appeal. Although only the Fourth and Fifth Circuits have clearly departed from the Second Circuit's view,[6] the consensus in the others is far from unwavering.[7]

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[6] Fourth Circuit: *United States* v. *Williams,* 227 F. 2d 149 (1955).

Fifth Circuit: *Zacarias* v. *United States,* 261 F. 2d 416 (1958); *Saba* v. *United States,* 282 F. 2d 255 (1960).

In the District of Columbia Circuit, the decisions appear to have inverted the Second Circuit rule: pre-indictment motions have been held interlocutory, *Nelson* v. *United States,* 93 U. S. App. D. C. 14, 24–26, 208 F. 2d 505, 515–517 (1953), while post-indictment motions have been treated as independent, *United States* v. *Cefaratti,* 91 U. S. App. D. C. 297, 202 F. 2d 13 (1952). But see *United States* v. *Stephenson,* 96 U. S. App. D. C. 44, 223 F. 2d 336 (1955).

[7] First Circuit: *Centracchio* v. *Garrity,* 198 F. 2d 382, 385 (1952); *Chieftain Pontiac Corp.* v. *Julian,* 209 F. 2d 657, 659 (1954) (by implication).

Second Circuit: *United States* v. *Poller,* 43 F. 2d 911 (1930); *In re Milburne,* 77 F. 2d 310 (1935); *United States* v. *Edelson,* 83 F. 2d 404 (1936); *Cheng Wai* v. *United States,* 125 F. 2d 915 (1942); *Lagow* v. *United States,* 159 F. 2d 245 (1946); *In re Fried,* 161 F. 2d 453 (1947); *Lapides* v. *United States,* 215 F. 2d 253 (1954);

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The First Circuit, for example, has declined to permit pretrial entertainment of any suppression motions other than those explicitly authorized by the language of Rule 41 (e). *Centracchio* v. *Garrity,* 198 F. 2d 382, 386–389 (1952); accord, *e. g., Benes* v. *Canary,* 224 F. 2d 470, 472 (C. A. 6th Cir. 1955). And see *In re Fried,* 161 F. 2d 453, 465–466 (C. A. 2d Cir. 1947) (opinions of L. Hand and A. Hand, JJ.). These opinions manifest a disinclination to treat as separate and final rulings on the admissibility of evidence which depend on factual contentions that may be more appropriately resolved at a plenary trial. Similarly, a California District Court has recently dismissed for want of equity a pre-indictment bill to suppress, on the ground that, at the time relief would issue, there was an adequate remedy at law by motion in the criminal trial; and the Ninth Circuit refused an application for prerogative writs. *Rodgers* v. *United States,* 158 F. Supp. 670 (1958); *id.,* at 684 note. See also *Eastus* v. *Bradshaw,* 94 F. 2d 788 (C. A. 5th Cir. 1938). In the Third Circuit, which up to now has agreed with the Second, the latest opinion on the subject expresses doubts as to the validity

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Russo v. *United States,* 241 F. 2d 285 (1957); *Carlo* v. *United States,* 286 F. 2d 841 (1961); *Grant* v. *United States,* 291 F. 2d 227 (1961); *Greene* v. *United States,* 296 F. 2d 841 (1961).

Third Circuit: *In re Sana Laboratories,* 115 F. 2d 717 (1940); *United States* v. *Bianco,* 189 F. 2d 716, 717 n. 2 (1951); *United States* v. *Sineiro,* 190 F. 2d 397 (1951); *United States* v. *Murphy,* 290 F. 2d 573 (1961).

Sixth Circuit: *Benes* v. *Canary,* 224 F. 2d 470 (1955).

Seventh Circuit: *Socony Mobil Oil Co.* v. *United States,* 275 F. 2d 227 (1960) (by implication) (semble).

Eighth Circuit: *Goodman* v. *Lane,* 48 F. 2d 32 (1931).

Ninth Circuit: *Freeman* v. *United States,* 160 F. 2d 69 (1946); *Weldon* v. *United States,* 196 F. 2d 874, 875 (1952); *Hoffritz* v. *United States,* 240 F. 2d 109 (1956). But see *Rodgers* v. *United States,* 158 F. Supp. 670 (D. C. S. D. Cal.), mandamus and prohibition denied in *id.,* at 684 note (C. A. 9th Cir. 1958).

of its precedents. *United States* v. *Murphy,* 290 F. 2d 573, 575 n. 2 (1961).

We should decide the question here—we are free to do so—with due regard to historic principle and to the practicalities in the administration of criminal justice. An order granting or denying a pre-indictment motion to suppress does not fall within any class of independent proceedings otherwise recognized by this Court, and there is every practical reason for denying it such recognition. To regard such a disjointed ruling on the admissibility of a potential item of evidence in a forthcoming trial as the termination of an independent proceeding, with full panoply of appeal and attendant stay, entails serious disruption to the conduct of a criminal trial.[8] The fortuity of a pre-indictment motion may make of appeal an instrument of harassment, jeopardizing by delay the availability of other essential evidence. See *Rodgers* v. *United States, supra,* 158 F. Supp., at 673 n. 1. Furthermore, as cases in the Second Circuit make clear, appellate intervention makes for truncated presentation of the issue of admissibility, because the legality of the search too often cannot truly be determined until the evidence at the trial has brought all circumstances to light. See *In re Milburne,* 77 F. 2d 310, 311 (1935); *Grant* v. *United States,* 291 F. 2d 227, 229 (1961).[9]

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[8] It is evident, for example, that the form of independence has been availed of on occasion to seek advantages conferred by the rules governing civil procedure, to the prejudice of proper administration of criminal proceedings. *E. g., Greene* v. *United States,* 296 F. 2d 841, 843–844 (C. A. 2d Cir. 1961) (extended time for appeal); *Russo* v. *United States,* 241 F. 2d 285, 287–288 (C. A. 2d Cir. 1957) (expanded discovery).

[9] Although Rule 41 (e), *supra,* note 1, codifies prior practice in preferring that the motion be raised before trial, and provides for the taking of evidence on disputed factual issues, the usual procedure followed at this early stage is to decide the question on affidavits

Nor are the considerations against appealability made less compelling as to orders granting motions to suppress, by the fact that the Government has no later right to appeal when and if the loss of evidence forces dismissal of its case. *United States* v. *Pack,* 247 F. 2d 168 (C. A. 3d Cir. 1957); *Umbriaco* v. *United States,* 258 F. 2d 625, 626 (C. A. 9th Cir. 1958). As the Ninth Circuit said of this circumstance, the Government is no more disadvantaged than in the case of an adverse ruling on the evidence during trial. *United States* v. *Rosenwasser,* 145 F. 2d 1015, 1018 (1944). What disadvantage there be springs from the historic policy, over and above the constitutional protection against double jeopardy, that denies the Government the right of appeal in criminal cases save as expressly authorized by statute. *United States* v. *Sanges,* 144 U. S. 310; *United States* v. *Dickinson,* 213 U. S. 92, 102–103; *Carroll* v. *United States,* 354 U. S. 394, 400–403 and n. 9–12. No such expression appears in 28 U. S. C. § 1291, and the Government's only right of appeal, given by the Criminal Appeals Act of 1907, 34 Stat. 1246, now 18 U. S. C. § 3731, is confined to narrowly defined situations not relevant to our problem. Allowance of any further right must be sought from Congress and not this Court. *Carroll* v. *United States, supra,* 354 U. S., at 407–408.

In the Narcotic Control Act of 1956, § 201, 70 Stat. 567, 573, 18 U. S. C. § 1404, Congress did grant the Government the right to appeal from orders granting pretrial motions to suppress the use of seized narcotics as

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alone; in addition, it has long been accepted that the point can, and on occasion must, be renewed at the trial to preserve it for ultimate appeal. *Gouled* v. *United States,* 255 U. S. 298, 312–313; *Lawn* v. *United States,* 355 U. S. 339, 353–354. We do no more than recognize that ordinarily the District Courts will wish to reserve final ruling until the criminal trial.

evidence; but, though invited to do so,[10] it declined to extend this right to all suppression orders. Since then, each Congress has had before it bills to accomplish that extension,[11] at least one of which has been reported favorably.[12] As yet, however, none has been adopted.

We hold, accordingly, that the mere circumstance of a pre-indictment motion does not transmute the ensuing evidentiary ruling into an independent proceeding begetting finality even for purposes of appealability. Presentations before a United States Commissioner, *Go-Bart Co.* v. *United States,* 282 U. S. 344, 352–354, as well as before a grand jury, *Cobbledick* v. *United States,* 309 U. S. 323, 327, are parts of the federal prosecutorial system leading to a criminal trial. Orders granting or denying suppression in the wake of such proceedings are truly interlocutory, for the criminal trial is then fairly in train. When at the time of ruling there is outstanding a complaint, or a detention or release on bail following arrest, or an arraignment, information, or indictment—in each such case the order on a suppression motion must be treated as "but a step in the criminal case preliminary to the trial thereof." *Cogen* v. *United States,* 278 U. S. 221, 227. Only if the motion is solely for return of prop-

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[10] *Illicit Narcotics Traffic*—Hearings before the Subcommittee on Improvements in the Federal Criminal Code of the Senate Committee on the Judiciary, 84th Cong., 1st Sess. 725–726 (1955); *Narcotic Control Act of 1956—id.*, 2d Sess. 9 (1956).

[11] H. R. 9364 and S. 3423, 84th Cong., 2d Sess. (1956); H. R. 263 and H. R. 4753, 85th Cong., 1st Sess. (1957); S. 1721, 86th Cong., 1st Sess. (1959); see 105 Cong. Rec. 6190 (remarks of Senator Keating).

[12] S. Rep. No. 1478, 85th Cong., 2d Sess. 14–17 (1958). As in 18 U. S. C. §§ 1404 and 3731, the Subcommittee's proposed bill would have provided safeguards against the taking of harassing or frivolous appeals and would have ensured expeditious review.

erty and is in no way tied to a criminal prosecution *in esse* against the movant can the proceedings be regarded as independent. *Ibid.;* see *Carroll* v. *United States,* 354 U. S. 394, 404 n. 17; *In re Brenner,* 6 F. 2d 425 (C. A. 2d Cir. 1925).

An alternative ground for appealability in the *Koenig* case, likewise culled from dicta in some of our decisions, would assign independence to the suppression order because rendered in a different district from that of trial. *Dier* v. *Banton,* 262 U. S. 147, the only holding pointed to, is clearly inapposite; it allowed an appeal from an order by a federal bankruptcy court permitting delivery of a bankrupt's papers to state prosecuting officials. Cf. *Rea* v. *United States,* 350 U. S. 214; *Wilson* v. *Schnettler,* 365 U. S. 381. There is a decision in the Second Circuit, *United States* v. *Klapholz,* 230 F. 2d 494 (1956), allowing the Government an appeal from an order granting a post-indictment motion to suppress, apparently for the single reason that the motion was filed in the district of seizure rather than of trial; but the case was soon thereafter taken by a District Court to have counseled declining jurisdiction of such motions for reasons persuasive against allowing the appeal: "This course will avoid a needless duplication of effort by two courts and provide a more expeditious resolution of the controversy besides avoiding the risk of determining prematurely and inadequately the admissibility of evidence at the trial. . . . A piecemeal adjudication such as that which would necessarily follow from a disposition of the motion here might conceivably result in prejudice either to the Government or the defendants, or both." *United States* v. *Lester,* 21 F. R. D. 30, 31 (D. C. S. D. N. Y. 1957). Rule 41 (e), of course, specifically provides for making of the motion in the district of seizure. On a summary hearing, however, the ruling there is likely always to be tentative.

We think it accords most satisfactorily with sound administration of the Rules to treat such rulings as interlocutory.

The judgment of the Court of Appeals in No. 21 is vacated and the cause is remanded with instructions to dismiss the appeal. In No. 93, the judgment is affirmed.

It is so ordered.

THE CHIEF JUSTICE, MR. JUSTICE BLACK and MR. JUSTICE STEWART concur in the result.

MR. JUSTICE WHITTAKER took no part in the disposition of these cases.

UNITED GAS PIPE LINE CO. *v.* IDEAL CEMENT CO. ET AL.

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

No. 61. Argued December 13, 1961.—Decided March 19, 1962.

On appeal from a judgment of a Federal District Court in a suit based on diversity of citizenship, the Court of Appeals held that taxes collected by the City of Mobile, Ala., relative to sales of natural gas were invalid under the Commerce Clause. In doing so, it relied upon its own interpretation of the City's License Code and relevant provisions of state statutes, though there had been no relevant interpretation of them by the state courts and declaratory judgment proceedings were available in the state courts. On appeal to this Court, *held:*

1. This Court has jurisdiction of this appeal under 28 U. S. C. § 1254 (2). P. 135.

2. The judgment of the Court of Appeals is vacated to permit a construction of the License Code of Mobile, so far as relevant to this litigation, to be sought with every expedition in the state courts. Pp. 135–136.

Reported below: 282 F. 2d 574.

E. Dixie Beggs argued the cause and filed briefs for appellant.

James Lawrence White argued the cause for Ideal Cement Co., appellee. With him on the briefs were *Marion R. Vickers, Stephen H. Hart* and *John Fleming Kelly*. *S. P. Gaillard, Jr.* filed a brief for Scott Paper Co., appellee.

Charles S. Rhyne, by special leave of Court, 368 U. S. 805, argued the cause for the City of Mobile, Alabama, as *amicus curiae,* urging reversal. With him on the brief was *Herzel H. E. Plaine.*

PER CURIAM.

This is an appeal from the Court of Appeals' reversal of a summary judgment entered for the appellant in the United States District Court for the Southern District of Alabama. The suit, based on diversity of citizenship, sought contractual reimbursement of taxes paid to the City of Mobile relative to sales of natural gas to the appellees. They defended on the ground that the contracts contemplated reimbursement only of valid tax payments, and that the License Code of the City of Mobile, § 1, par. 193 (1955), under which the tax was exacted and paid, was invalid under the Commerce Clause of the United States Constitution. The Court of Appeals sustained this contention, by interpreting both the primary and enforcement provisions of the License Code and its surrounding state legislation as operating not to tax a separable local portion of interstate commerce but as a means of licensing appellant's right of entry into the City from without the State. 282 F. 2d 574, 580. We postponed determination of our jurisdiction to consideration of the merits, 366 U. S. 916, and now find that the case is properly here under 28 U. S. C. § 1254 (2).

The interpretation of state law by the Court of Appeals, in an opinion by its Alabama member, was rendered in advance of construction of the License Code by the courts of the State, which alone, of course, can define its authoritative meaning. We ought not, certainly on this record, either accept the Court of Appeals' construction or, on an independent consideration, reject what the Alabama Supreme Court may later definitively approve. The availability of appropriate declaratory-judgment proceedings under Ala. Code, Tit. 7, §§ 156–168 (1940), avoids this unsatisfactory dilemma. Wise judicial administration in this case counsels that decision of the federal

question be deferred until the potentially controlling state-law issue is authoritatively put to rest. See *Leiter Minerals, Inc.*, v. *United States*, 352 U. S. 220, 228–229. Accordingly, the judgment of the Court of Appeals is vacated to permit a construction of the License Code of the City of Mobile, so far as relevant to this litigation, to be sought with every expedition in the state courts.

It is so ordered.

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

MR. JUSTICE DOUGLAS.

This case should be disposed of here; the long-drawn-out litigation* foisted on the parties by the Court is needless. No matter how the local ordinance is construed the tax is constitutional.

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*The practice of remitting parties who sue in court to an administrative remedy (see, *e. g.*, *Pennsylvania R. Co.* v. *United States*, 363 U. S. 202) or of remitting those who sue in a federal court to a state court (*Clay* v. *Sun Insurance Office*, 363 U. S. 207; Clark, Federal Procedural Reform and States' Rights, 40 Tex. L. Rev. 211) places a financial burden on litigants, which can be afforded only by those who can take the cost as a tax deduction or get reimbursement through increased rates. For a case where the parties at the end of 14 years were still litigating a $7,000 (approx.) claim after starting in one court, being shunted to an agency, and then ending in a different court, see *Pennsylvania R. Co.* v. *United States*, *supra*.

In Gardner, The Administrative Process, Legal Institutions Today and Tomorrow (1959), pp. 139–140, it was said:

"Anyone who considers judicial review of agency action must allow about a year if he has access to direct review by a court of appeals and about two years if he must file in a district court and then carry the controversy to the court of appeals. If a certiorari question should develop which would warrant Supreme Court review, another year should be added. If the result of the review should be to require further agency proceedings, yet another year or so must be added. Except for the litigant who advantages by delay, not many adminis-

Congress under the Natural Gas Act, as amended, would have the authority to prevent interstate pipelines from delivering any gas for industrial use. *Federal Power Comm'n* v. *Transcontinental Gas Pipe Line Corp.*, 365 U. S. 1. Yet once the interstate movement commences, the line between permissible and impermissible local regulation is no longer a puzzle.

United is an interstate pipeline company that brings natural gas into Alabama and supplies it in the City of Mobile to a distributor, Mobile Gas. United delivers gas to Mobile Gas at three stations not for resale, but for delivery to appellees under contracts between appellant and appellees. The gas, when delivered to Mobile Gas, is at a lower pressure than when it enters the State. When Mobile Gas delivers it to the industrial customers here involved, the gas is at a still lower pressure. The case is therefore on all fours with *East Ohio Gas Co.* v. *Tax Comm'n*, 283 U. S. 465. In speaking of the delivery of gas at a reduced pressure within Ohio by an interstate carrier, the Court said that the gas was then

> "divided into the many thousand relatively tiny streams that enter the small service lines connecting such mains with the pipes on the consumers' premises. So segregated the gas in such service lines and

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trative issues warrant an investment of time such as this. In probably a majority of the circumstances, it would be sounder business practice to adjust at once to the agency decision and go on from there, rather than to endure several years of uncertainty in order to try to improve the result.

"The matter of expense is closely related to that of delay. It is not possible to be precise, and surely it is not polite to mention money. Yet none can discuss realistically judicial review unless he recognizes that an issue of average complexity cannot adequately be carried to the courts except at a cost which will range upward from $5,000." See also Landis, Report on Regulatory Agencies to the President-Elect (1960), pp. 5–13.

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> pipes remains in readiness or moves forward to serve as needed. The treatment and division of the large compressed volume of gas is like the breaking of an original package, after shipment in interstate commerce, in order that its contents may be treated, prepared for sale and sold at retail. . . . It follows that the furnishing of gas to consumers in Ohio municipalities by means of distribution plants to supply the gas suitably for the service for which it is intended is not interstate commerce but a business of purely local concern exclusively within the jurisdiction of the State." *Id.*, at 471.

Here too the package is broken on delivery of the gas intrastate to Mobile Gas, the distributor, at a reduced pressure.

It matters not that the City of Mobile calls the tax levied here a "license tax." In *Interstate Pipe Line Co.* v. *Stone,* 337 U. S. 662, Mississippi levied a "privilege" tax on the gross receipts of a pipeline that was bringing oil from Mississippi fields to loading racks in that State, where the oil was pumped into railroad cars for shipment out of state.

Mr. Justice Rutledge, speaking for himself and three others, said:

> "Since all the activities upon which the tax is imposed are carried on in Mississippi, there is no due process objection to the tax. The tax does not discriminate against interstate commerce in favor of competing intrastate commerce of like character. The nature of the subject of taxation makes apportionment unnecessary; there is no attempt to tax interstate activity carried on outside Mississippi's borders. No other state can repeat the tax. For these reasons the commerce clause does not invalidate this tax." *Id.*, at 667–668.

Mr. Justice Burton, who also joined in the judgment, approved the tax for the following reason: "I concur in the judgment solely on the ground that the tax imposed by the State of Mississippi was a tax on the privilege of operating a pipe line for transporting oil in Mississippi in intrastate commerce and that, as such, it was a valid tax." *Id.*, at 668.

In *Southern Natural Gas Corp.* v. *Alabama*, 301 U. S. 148, an interstate pipeline company made deliveries in Alabama to three distributors and one industrial user. These activities were held to be local, on which a nondiscriminatory franchise tax could be levied. In *Panhandle Eastern Pipe Line Co.* v. *Public Service Comm'n*, 332 U. S. 507, 514, direct sales by interstate pipelines to local consumers (as distinguished from deliveries to local distributing companies for resale) were held to be subject to state regulation. Speaking of the Natural Gas Act, we said:

> "Congress, it is true, occupied a field. But it was meticulous to take in only territory which this Court had held the states could not reach. That area did not include direct consumer sales, whether for industrial or other uses. Those sales had been regulated by the states and the regulation had been repeatedly sustained. In no instance reaching this Court had it been stricken down." *Id.*, at 519.

The "license tax" in the present case, if it be such, is only a tax on a wholly intrastate activity, *to wit*—the delivery of gas to the local distributor for delivery to local consumers.

This conclusion is more in the tradition of our cases than was *Panhandle Eastern Pipe Line Co.* v. *Public Service Comm'n*, 341 U. S. 329, where a State was allowed to exact from an interstate pipeline company a certificate of public convenience and necessity to make direct deliveries of gas to industrial consumers. The Court said that "the

sale and distribution of gas to local consumers" was a transaction "essentially local" and was "subject to state regulation without infringement of the Commerce Clause." *Id.*, at 333. The sales there proposed were to be made directly from the pipeline to the industrial users. Here the gas first goes to the local distributor, which in turn reduces the pressure and makes delivery to the industrial customers. The local nature of the transaction is more apparent and less complicated than it was in the *Panhandle* case.

I would reverse the judgment below and hold the tax valid.

MR. JUSTICE HARLAN, dissenting.

In my opinion none of the considerations underlying the doctrine of federal judicial abstention (see *Harrison* v. *N. A. A. C. P.*, 360 U. S. 167, 176–177) call for its application here. There is no reasonable likelihood that a prior state construction of this License Code would either change the complexion of the constitutional issue or avoid the necessity of its eventual adjudication by this Court.

Even were this local enactment to be construed by the state courts to require a license of the appellant as a precondition of engaging in the distribution of natural gas within the City of Mobile, that of itself would not ordain the answer to the constitutional question. See *Southern Natural Gas Corp.* v. *Alabama*, 301 U. S. 148; *East Ohio Gas Co.* v. *Tax Comm'n*, 283 U. S. 465; see also *Illinois Natural Gas Co.* v. *Central Illinois Pub. Serv. Co.*, 314 U. S. 498, 506. Cf. *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U. S. 450. Nor can I see how such a state adjudication would serve to illumine the nature of United's activities in Mobile.

As I view matters, nothing useful is to be accomplished by remitting the parties to the state courts, and I would adjudicate the constitutional issue now.

FONG FOO ET AL. *v.* UNITED STATES.

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

No. 64. Argued January 16, 1962.—Decided March 19, 1962.*

Petitioners were brought to trial under a valid indictment in a Federal District Court which had jurisdiction over them and over the subject matter. After the Government had introduced part, but not all, of its evidence, the District Judge directed the jury to return verdicts of acquittal, and a formal judgment of acquittal was entered. The Government petitioned the Court of Appeals for a writ of mandamus, praying that the judgment of acquittal be vacated and the case reassigned for trial. The Court of Appeals granted the petition on the ground that, under the circumstances revealed by the record, the District Court was without power to direct the judgment of acquittal. *Held:* The judgment of the Court of Appeals was contrary to the guaranty of the Fifth Amendment against double jeopardy. Pp. 141–143.

286 F. 2d 556, reversed.

Arthur Richenthal argued the causes for petitioners and filed briefs for petitioner in No. 65. *David E. Feller* filed briefs for petitioners in No. 64.

Solicitor General Cox argued the causes for the United States. With him on the briefs were *Assistant Attorney General Miller, Stephen J. Pollak, Beatrice Rosenberg, Philip R. Monahan* and *J. F. Bishop.*

PER CURIAM.

The petitioners, a corporation and two of its employees, were brought to trial before a jury in a federal district court upon an indictment charging a conspiracy and the substantive offense of concealing material facts in a matter within the jurisdiction of an agency of the United States, in violation of 18 U. S. C. §§ 371 and 1001. After seven

*Together with No. 65, *Standard Coil Products Co., Inc.*, v. *United States*, also on certiorari to the same Court.

days of what promised to be a long and complicated trial, three government witnesses had appeared and a fourth was in the process of testifying. At that point the district judge directed the jury to return verdicts of acquittal as to all the defendants, and a formal judgment of acquittal was subsequently entered.

The record shows that the district judge's action was based upon one or both of two grounds: supposed improper conduct on the part of the Assistant United States Attorney who was prosecuting the case, and a supposed lack of credibility in the testimony of the witnesses for the prosecution who had testified up to that point.

The Government filed a petition for a writ of mandamus in the Court of Appeals for the First Circuit, praying that the judgment of acquittal be vacated and the case reassigned for trial. The court granted the petition, upon the ground that under the circumstances revealed by the record the trial court was without power to direct the judgment in question. Judge Aldrich concurred separately, finding that the directed judgment of acquittal had been based solely on the supposed improper conduct of the prosecutor, and agreeing with his colleagues that the district judge was without power to direct an acquittal on that ground. 286 F. 2d 556. We granted certiorari to consider a question of importance in the administration of justice in the federal courts. 366 U. S. 959.

In holding that the District Court was without power to direct acquittals under the circumstances disclosed by the record, the Court of Appeals relied primarily upon two decisions of this Court, *Ex parte United States,* 242 U. S. 27, and *Ex parte United States,* 287 U. S. 241. In the first of these cases it was held that a district judge had no power to suspend a mandatory prison sentence, and that a writ of mandamus would lie to require the judge to vacate his erroneous order of suspension. In the second case the Court issued a writ of mandamus ordering a dis-

trict judge to issue a bench warrant which he had refused to do, in the purported exercise of his discretion, for a person under an indictment returned by a properly constituted grand jury.

Neither of those decisions involved the guaranty of the Fifth Amendment that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." That constitutional provision is at the very root of the present case, and we cannot but conclude that the guaranty was violated when the Court of Appeals set aside the judgment of acquittal and directed that the petitioners be tried again for the same offense.

The petitioners were tried under a valid indictment in a federal court which had jurisdiction over them and over the subject matter. The trial did not terminate prior to the entry of judgment, as in *Gori* v. *United States,* 367 U. S. 364. It terminated with the entry of a final judgment of acquittal as to each petitioner. The Court of Appeals thought, not without reason, that the acquittal was based upon an egregiously erroneous foundation. Nevertheless, "[t]he verdict of acquittal was final, and could not be reviewed . . . without putting [the petitioners] twice in jeopardy, and thereby violating the Constitution." *United States* v. *Ball,* 163 U. S. 662, 671.

Reversed.

MR. JUSTICE WHITTAKER took no part in the consideration or decision of these cases.

MR. JUSTICE HARLAN, concurring.

Were I able to find, as Judge Aldrich did, that the District Court's judgment of acquittal was based solely on the Assistant United States Attorney's *alleged* misconduct, I would think that a retrial of the petitioners would not be prevented by the Double Jeopardy Clause of the

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Fifth Amendment. Even assuming that a trial court may have power, in extreme circumstances, to direct a judgment of acquittal, instead of declaring a mistrial, because of a prosecutor's misconduct—a proposition which I seriously doubt—I do not think that such power existed in the circumstances of this case. But since an examination of the record leaves me unable, as it did the majority of the Court of Appeals, to attribute the action of the District Court to this factor alone, I concur in the judgment of reversal.

MR. JUSTICE CLARK, dissenting.

The Court speaks with such expanse that I am obliged to dissent. It says that because "a final judgment of acquittal" was entered pursuant to a directed verdict the propriety of such "acquittal" cannot be reviewed even though the Government had not concluded its main case at the time the verdict was directed. The District Court under the circumstances here clearly had no power to direct a verdict of acquittal or to enter a judgment thereon. In my view when a trial court has no power to direct such a verdict, the judgment based thereon is a nullity. The word "acquittal" in this context is no magic open sesame freeing in this case two persons and absolving a corporation from serious grand jury charges of fraud upon the Government.

On the record before us it matters not whether the so-called acquittal was pursuant to the trial court's conclusion that the Government's witnesses up to that point lacked credibility or was based on the alleged misconduct of the prosecution.

On the first point, the Government had only examined three of its witnesses and was in the process of examining a fourth when the acquittal was entered. The first and third witnesses were merely preliminary, offered to iden-

tify documents and explain the functions performed by the individual defendants for the corporate defendant. The second was offered to give the jury an explanation of radiosondes, devices for gathering weather data, which petitioners were furnishing the Government under contracts totaling several million dollars. It was during the latter's testimony—entirely explanatory—that the court called a recess for the stated purpose of requiring the United States Attorney to "consider whether the public interest is served by a further prosecution of this case." Upon the vigorous insistence of the United States Attorney himself, the trial was resumed and the Government called its third and fourth witnesses. The fourth witness was the first to testify as to the fraud upon the Government which related to a deliberate scheme to conceal from government inspectors defects in the devices. During direct examination the fourth witness was "not sure" as to the date of a certain conference at which representatives of the corporate defendant were present. Thereafter at a recess period his memory was refreshed during a conversation with one of the Assistant United States Attorneys. Upon resuming the stand he corrected his previous testimony as to the date, placing it a few months earlier. On cross-examination he admitted that the error had been called to his attention by the Assistant. The court then excused the jury and after excoriating the Assistant called the jury back into session and directed the verdict of acquittal.

It is fundamental in our criminal jurisprudence that the public has a right to have a person who stands legally indicted by a grand jury publicly tried on the charge. No judge has the power before hearing the testimony proffered by the Government or at least canvassing the same to enter a judgment of acquittal and thus frustrate the Government in the performance of its duty to prosecute those who violate its law.

Here, as the United States Attorney advised the court, only three witnesses of the "many . . . to be heard from . . ." had testified. The court had only begun to hear what promised to be a protracted conspiracy case involving many witnesses. The Government had not rested. As the majority of the Court of Appeals observed, the District Court:

> "abruptly terminated the Government's case . . . long before the Government had had an opportunity to show whether or not it had a case; and, moreover, he did so in ignorance of either the exact nature or the cogency of the specific evidence of guilt which Government's counsel said he had available and was ready to present." 286 F. 2d, at 562–563.

At such a stage of the case the District Court had no power to prejudge the Government's proof—find it insufficient or unconvincing—and set the petitioners free.

On the second point, even if there were misconduct, the court still had no power to punish the Government because of the indiscretion of its lawyer. As this Court said in *McGuire* v. *United States,* 273 U. S. 95, 99 (1927), "A criminal prosecution is more than a game in which the Government may be checkmated and the game lost merely because its officers have not played according to rule." At most, if there had been misconduct, the remedy would have been to declare a mistrial and impose appropriate punishment upon the Assistant United States Attorney, rather than upon the public. In my view the judgment of the Court of Appeals should, therefore, be affirmed.

BENZ *v.* NEW YORK STATE THRUWAY AUTHORITY.

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK.

No. 234. Argued February 28–March 1, 1962.—
Decided March 19, 1962.

Since it now appears that this case presents no substantial federal question, the writ of certiorari is dismissed as improvidently granted.

Reported below: 9 N. Y. 2d 486, 174 N. E. 2d 727.

Lauren D. Rachlin argued the cause and filed briefs for petitioner.

Julius L. Sackman argued the cause for respondent. With him on the briefs were *Louis J. Lefkowitz,* Attorney General of New York, and *Paxton Blair,* Solicitor General.

PER CURIAM.

We granted certiorari in this case, 368 U. S. 886, to decide whether the State of New York could, consistently with the Fourteenth Amendment, assert sovereign immunity in a suit brought by petitioner to reform on grounds of mutual mistake, or to rescind for fraud in the inducement, an agreement fixing compensation for land taken under the power of eminent domain. Contrary to our initial impression of the case on the basis of the petition for certiorari, plenary consideration has satisfied us that the New York Court of Appeals decided no more than that this suit could not be maintained in the Supreme Court of the State of New York because exclusive jurisdiction over litigation of this character had been vested in the New York Court of Claims. The case then involves only a matter relating to "the distribution of jurisdiction in the state courts," and presents no substantial federal question. *E. g., Honeyman* v. *Hanan,* 302 U. S. 375.

Since the representative of the State Attorney General advised us on oral argument that the Attorney General will recommend passage of a bill by the State Legislature relieving petitioner from the operation of the statute of limitations governing proceedings in the New York Court of Claims, [*] we assume that she will be free to present her claims in the appropriate state forum.

The writ is dismissed as improvidently granted.

MR. JUSTICE BLACK dissents.

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

[*REPORTER'S NOTE: Such a bill became a law on April 29, 1962, N. Y. Laws 1962, c. 940.]

McNEILL, HOSPITAL SUPERINTENDENT, *v.* CARROLL.

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

No. 513. Decided March 19, 1962.

Judgment vacated and case remanded with directions to dismiss as moot.

Reported below: 294 F. 2d 117.

Louis J. Lefkowitz, Attorney General of New York, *Paxton Blair,* Solicitor General, and *Isadore Siegal* and *Joseph J. Rose*, Assistant Attorneys General, for appellant.

Melvin L. Wulf for appellee.

PER CURIAM.

Upon the suggestion of mootness submitted by counsel for the appellee by reason of the death of the appellee and of the appellant's motion to vacate the judgment of the Court of Appeals, said judgment is vacated and the case remanded to the District Court with directions to dismiss the cause as moot.

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

NEW YORK MOBILE HOMES ASSN. ET AL. *v.* STECKEL, SUPERVISOR OF THE TOWN OF CHILI, ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 609. Decided March 19, 1962.

Appeal dismissed for want of a substantial federal question.
Reported below: 9 N. Y. 2d 533, 175 N. E. 2d 151.

William L. Clay for appellants.

Louis J. Lefkowitz, Attorney General of New York, *Paxton Blair,* Solicitor General, and *Ruth Kessler Toch,* Assistant Solicitor 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 WHITTAKER took no part in the consideration or decision of this case.

HARDING *v.* HAND, WARDEN.

APPEAL FROM THE SUPREME COURT OF KANSAS.

No. 5, Misc. Decided March 19, 1962.

Appeal dismissed and certiorari denied.

Appellant *pro se.*

John Anderson, Jr., Attorney General of Kansas, and *J. Richard Foth,* 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.

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

HARVEY, ALIAS McCARGO, *v.* SMYTH, PENITENTIARY SUPERINTENDENT.

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

No. 7, Misc. Decided March 19, 1962.

Certiorari granted; judgment reversed.

Petitioner *pro se.*

Reno S. Harp III, Assistant Attorney General of Virginia, for respondent.

PER CURIAM.

The motion to substitute W. K. Cunningham, Jr., in the place of W. Frank Smyth, Jr., as the party respondent is granted. The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are also granted. The judgment is reversed. *Chewning* v. *Cunningham,* 368 U. S. 443.

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

KESLER *v.* DEPARTMENT OF PUBLIC SAFETY OF UTAH.

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

No. 14. Argued October 10, 1961.—Decided March 26, 1962.

Under Utah's Motor Vehicle Safety Responsibility Act, which gives judgment creditors control over the initiation and duration of suspensions, appellant's automobile registration and operator's license were suspended because of his failure to satisfy judgments based on his negligent operation of an automobile. After being granted a voluntary discharge in bankruptcy releasing him from the judgment debts, he applied to state authorities for restoration of his automobile registration and operator's license. This was denied, because the state statute requires satisfaction of the judgments as a condition of reinstatement and provides specifically that a discharge in bankruptcy shall not relieve a judgment debtor from this requirement. He sued in a Federal District Court to enjoin state officials from enforcing this provision, on the ground that it conflicted with § 17 of the Bankruptcy Act and, therefore, was void under the Supremacy Clause of the Constitution. A three-judge District Court denied relief, and he appealed directly to this Court. *Held:*

1. Under 28 U. S. C. § 2281, this case was required to be heard and determined by a three-judge District Court, and this Court has jurisdiction of this direct appeal under § 1253. Pp. 155–158.

2. This state statute is not unconstitutional under the Supremacy Clause because of conflict with § 17 of the Bankruptcy Act. Pp. 158–174.

187 F. Supp. 277, affirmed.

E. J. Skeen argued the cause for appellant. With him on the briefs was *J. D. Skeen.*

Gordon A. Madsen, Assistant Attorney General of Utah, argued the cause for appellee. With him on the brief was *Walter L. Budge,* Attorney General.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This case presents the rather rare claim of conflict between an otherwise valid exercise of a State's so-called police power and the overriding authority of the Bankruptcy Act.[1] The statute before us is Utah's Motor Vehicle Safety Responsibility Act [2]—a measure directed towards promoting safety in automobile traffic by administrative and compensatory remedies calculated to restrain careless driving. Its purpose is wholly unrelated to the purposes of the Bankruptcy Act.

In June 1957, a Utah court entered judgments in damages against appellant, based on his allegedly negli-

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[1] This Court has a number of times considered alleged conflicts between the Bankruptcy Act and state insolvency laws, or other laws designed to affect the debtor-creditor relationship as such. *E. g., Pobreslo* v. *Joseph M. Boyd Co.*, 287 U. S. 518 (1933); *International Shoe Co.* v. *Pinkus*, 278 U. S. 261 (1929). See Williston, The Effect of a National Bankruptcy Law Upon State Laws, 22 Harv. L. Rev. 547 (1909). In addition, several courts have been confronted with possible conflicts between the Bankruptcy Act and other laws. *E. g., Spalding* v. *New York ex rel. Backus*, 4 How. 21 (1846) (contempt for defying injunction in aid of debt later discharged); *In re Hicks*, 133 F. 739 (N. D. N. Y. 1905) (fireman suspended for nonpayment of discharged debt); *Public Finance Corp.* v. *Londeree*, 200 Va. 607, 106 S. E. 2d 760 (1959) (financial statement from borrower to lender inadmissible in bankruptcy proceeding). But there are relatively few reported cases in this Court or any other in which such a conflict was asserted with state laws designed to protect health, safety, or the public peace, and all those found deal with automobile financial security laws. *Reitz* v. *Mealey*, 314 U. S. 33 (1941); *In re Locker*, 30 F. Supp. 642 (S. D. N. Y. 1939); *Munz* v. *Harnett*, 6 F. Supp. 158 (S. D. N. Y. 1933); *In re Perkins*, 3 F. Supp. 697 (N. D. N. Y. 1933); *Doyle* v. *Kahl*, 242 Iowa 153, 46 N. W. 2d 52 (1951); *Ellis* v. *Rudy*, 171 Md. 280, 189 A. 281 (1937); *DeVries* v. *Secretary of State*, 329 Mich. 68, 44 N. W. 2d 872 (1950); *Smith* v. *Hayes*, 133 N. E. 2d 443 (Ohio C. P. 1955).

[2] Utah Laws 1951, c. 71, as amended, Utah Code Ann., 1953, Tit. 41, c. 12.

gent operation of an automobile. On appeal to the State's Supreme Court the judgments were affirmed. After the judgments had remained unpaid for sixty days or more, the judgment creditors requested the court clerk to forward to the Department of Public Safety certified copies of the judgments, as provided by the Safety Responsibility Act. Thereupon the Department suspended appellant's automobile registration and his operator's license. On December 31, 1959, appellant was granted a voluntary discharge in bankruptcy, releasing him from the judgment debts. He then sought restoration of his license and registration. This was denied. The Safety Responsibility Act requires satisfaction of judgments due to auto accidents as a condition of reinstatement and specifically provides that a discharge in bankruptcy shall not relieve the judgment debtor from this requirement. Appellant initiated this ancillary bankruptcy proceeding, *Local Loan Co.* v. *Hunt,* 292 U. S. 234, 239, in the United States District Court for Utah, seeking an order requiring restoration of his privileges and a declaration that the Utah law was invalid insofar as it disrespected the discharge of the judgment debt by virtue of § 17 of the Bankruptcy Act, 11 U. S. C. § 35. A three-judge District Court, 28 U. S. C. § 2281, upheld the statute and denied relief, 187 F. Supp. 277 (1960). The case was brought here on direct appeal, 28 U. S. C. § 1253, and we noted probable jurisdiction, 364 U. S. 940.

A preliminary point of jurisdiction is noted though it was not adverted to either by the District Court or by the parties. Was this a proper case for convening a three-judge court, as it must have been to justify direct appeal to this Court? The present suit asks that state officials be "restrained and enjoined" from enforcing designated sections of the Utah Motor Vehicle Safety Responsibility Act because they "are unconstitutional and void," in that they are in conflict with § 17 of the

Bankruptcy Act and therefore necessarily violative of the Supremacy Clause of the Constitution of the United States, Art. VI. It would seem to be compellingly clear that this case falls within § 2281 of Title 28 of the United States Code, which bars a suit for an injunction "upon the ground of the unconstitutionality" of a state statute "unless the application therefor is heard and determined by a district court of three judges." This was so heard and appeal was properly brought directly here, unless invalidation of a state statute by virtue of the Supremacy Clause rests on a different constitutional basis than such invalidation because of conflict with any other clause of the Constitution, at least to the extent of reading such an implied exception into the procedure devised by § 2281. Neither the language of § 2281 nor the purpose which gave rise to it affords the remotest reason for carving out an unfrivolous claim of unconstitutionality because of the Supremacy Clause from the comprehensive language of § 2281.

Bearing in mind that the requirement for District Court litigation of three judges, of whom one must be a Justice of this Court or a circuit judge, involves a serious drain upon the federal judicial manpower, "particularly in regions where, despite modern facilities, distance still plays an important part in the effective administration of justice . . . ," this Court has been led by a long series of decisions, in a variety of situations, to generalize that this procedural device was not to be viewed "as a measure of broad social policy to be construed with great liberality, but as an enactment technical in the strict sense of the term and to be applied as such." *Phillips* v. *United States,* 312 U. S. 246, 250–251. The Court had already held that the three-judge requirement is not to be invoked on a contingent constitutional question. *International Ladies' Garment Workers* v. *Donnelly Co.,* 304 U. S. 243, 251. The Court has been consistent in this view in deal-

ing with claims of conflict between a state statute and a federal statute which has the constitutional right of way.

Bearing in mind that due regard for the healthy working of the federal judicial system demands that the three-judge court requirement be treated as "an enactment technical in the strict sense of the term," we must examine the basis of the plaintiff's claim to determine whether it must come before a single judge or three judges. If in immediate controversy is not the unconstitutionality of a state law but merely the construction of a state law or the federal law, the three-judge requirement does not become operative. Such was the ruling in *Ex parte Buder,* 271 U. S. 461, where the Supremacy Clause was not invoked and therefore the three-judge court was not required. In *Ex parte Bransford,* 310 U. S. 354, *Buder* was followed. A three-judge court was not required because the issue was "merely the construction of an act of Congress, not the constitutionality of the state enactment." 310 U. S., at 359. Contrariwise, in *Query* v. *United States,* 316 U. S. 486, the complainant sought to restrain the state officers from enforcing a state statute on the score of unconstitutionality of its threatened application. 316 U. S., at 489. Accordingly, the requirement of a three-judge court applied. *Query* v. *United States* and *Ex parte Bransford* were clearly differentiated from one another in *Case* v. *Bowles,* 327 U. S. 92, where, as in *Bransford,* "the complaint did not challenge the constitutionality of the state statute but alleged merely that its enforcement would violate the Emergency Price Control Act. Consequently a three-judge court is not required." 327 U. S., at 97.

Here, no question of statutory construction, either of a state or a federal enactment, is in controversy. We are confronted at once with the constitutional question whether the discharge in bankruptcy of a debt ousts the police power of a State from a relevant safety measure,

the indirect and episodic consequence of which may have some bearing on a discharged debt but which in no wise resuscitates it as an obligation. The general principle elucidated by Mr. Justice Cardozo in differentiating between different stages of adjudication at which issues are reached, *Gully* v. *First National Bank*, 299 U. S. 109, 117–118, serves to guide disposition of this case as it differently did *Phillips* v. *United States, supra.* This case presents a sole, immediate constitutional question, differing from *Buder, Bransford,* and *Case,* which presented issues of statutory construction even though perhaps eventually leading to a constitutional question.

The problem of highway safety has concerned legislatures since the early years of the century. Utah, like other States, has responded to this problem by requiring the registration [3] and inspection [4] of vehicles and prescribing certain necessary equipment; [5] by requiring examination and licensing of operators and excluding unqualified persons from driving; [6] by providing comprehensive regulations of speed and other traffic conditions; [7] and by authorizing extraterritorial service of process on nonresident motorists involved in accidents within the State.[8] And, like every other State, Utah has responded by enacting a financial-responsibility law.

Financial-responsibility laws are intended to discourage careless driving or to mitigate its consequences by requiring as a condition of licensing or registration the satisfaction of outstanding accident judgments, the posting of security to cover possible liability for a past accident, or the filing of an insurance policy or other proof of ability

[3] Utah Code Ann., 1953, Tit. 41, c. 1, Art. 3.
[4] *Id.*, 41–6–158.
[5] *Id.*, Tit. 41, c. 6, Art. 16.
[6] *Id.*, Tit. 41, c. 2.
[7] *Id.*, Tit. 41, c. 6, Arts. 1–15.
[8] *Id.*, 41–12–8.

to respond in damages in the future. By 1915 a San Francisco ordinance required a bond or liability insurance for all buses; [9] a number of other cities and States early enacted similar provisions.[10] In 1925 Massachusetts forbade the registration of any motor vehicle without proof of adequate liability insurance or other evidence of ability to satisfy a judgment. Mass. Laws 1925, c. 346. That same year the Commissioners on Uniform Laws appointed a committee to consider a uniform compulsory insurance law. Handbook of the National Conference on Uniform State Laws (1932), p. 261.

Unwilling to require insurance or its equivalent from all highway users, six other States—five of them in New England—adopted within the next two years laws with the same design but limited to careless drivers. The first of these, Connecticut Acts 1925, c. 183, provided for suspension of the registration of those convicted of certain infractions relating to motor vehicles and of those causing accidents of specified gravity, requiring proof of financial responsibility as a condition to restoration. Vermont enacted a similar provision, Acts 1927, No. 81. Maine's law, Laws 1927, c. 210, and Minnesota's, Laws 1927, c. 412, § 61 (b), applied only to violations.[11] Rhode Island, Acts 1927, c. 1040, originally required proof only after accidents resulting from violations; Acts 1929, c. 1429, required proof in addition not only of persons violating certain laws but of all minors as well. In New Hampshire, Laws 1927, c. 54, security to cover a potential judgment was required on request of the plaintiff

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[9] Sustained in *In re Cardinal,* 170 Cal. 519, 150 P. 348 (1915).

[10] *E. g.,* N. J. Laws 1916, c. 136; N. Y. Laws 1922, c. 612. See *Packard* v. *Banton,* 264 U. S. 140 (1924); *Willis* v. *City of Fort Smith,* 121 Ark. 606, 611, 182 S. W. 275 (1916); *Opinion of the Justices,* 81 N. H. 566, 568, 129 A. 117, 118–119 (1925), and cases cited; Annot., 22 A. L. R. 230 (1923).

[11] North Dakota (Laws 1929, c. 163) adopted a similar law.

in an accident case, if fault appeared after preliminary inquiry.

In 1929 seven States enacted laws providing for the first time that driving privileges be suspended following an adverse judgment in damages. Vermont added to her earlier statute a provision suspending privileges of anyone against whom there was an outstanding judgment based on a traffic violation until proof was made of financial responsibility. Vt. Acts 1929, No. 76. Connecticut, Maine, and Wisconsin suspended the privileges of the judgment debtor until the judgment was satisfied. Conn. Acts 1929, c. 297, § 25;[12] Me. Laws 1929, c. 209; Wis. Laws 1929, c. 76. In Connecticut, however, suspension was only to occur if the judgment remained unpaid for sixty days, and then only "[u]pon complaint . . . by any prevailing party" in the lawsuit. Iowa's law was substantially similar, giving the creditor control by providing that "a transcript of such judgment . . . may be filed" to initiate suspension. Iowa Laws 1929, c. 118.[13] California required court clerks to transmit to the vehicle administrator notice of judgments unpaid for fifteen days; the debtor's license and registration were thereupon to be suspended until both the debt was discharged and proof of financial responsibility was given. Cal. Stat. 1929, c. 258, § 4. New York adopted a law materially the same as California's, providing in addition that a discharge in bankruptcy should not relieve the judgment debtor of these requirements and also suspending privileges pending proof after conviction for certain violations. N. Y. Laws 1929, c. 695.

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[12] This Act was repealed by Conn. Acts 1931, c. 82, § 294a, and the 1925 provision for proof following certain accidents was not re-enacted. *Id.*, § 295a.

[13] South Dakota (Laws 1933, c. 144) adopted a similar law.

Abandoning the drive for a uniform compulsory-insurance law as not then feasible, the Commissioners on Uniform Laws in 1929 began work on a more limited financial-responsibility act. As finally approved by the Conference in 1932, the Uniform Automobile Liability Security Act combined features from several of the statutes already in force. Proof of financial responsibility was required to be maintained for a minimum of three years by four classes of persons: (1) those convicted of certain violations; (2) those wishing to obtain or renew driving privileges, and who had been at fault in two accidents of specified gravity during the preceding year; (3) minors; (4) those against whom a judgment of a certain magnitude had remained unsatisfied for fifteen days. The provisions regarding judgments followed those of California and New York: the court or clerk was to forward notice of all unsatisfied judgments, and the debtor's privileges were to be suspended until both satisfaction of the obligation, to the extent of the minimum required insurance amount, and proof of future responsibility. 11 U. L. A. 125 (1938).

The Uniform Act as such was adopted only in Hawaii, Pennsylvania, and Washington; [14] its provisions regarding accidents and minors found little favor. Yet during the two decades following 1929 a large majority of States enacted one or another form of financial-responsibility law. Utah's first such statute, enacted in 1943, was typical of the most common enactment. Twelve other States and the District of Columbia adopted this same basic law; [15] and, with relatively minor modifications, it was

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[14] Hawaii Laws 1933, c. 166; Pa. Laws 1933, No. 110; Wash. Laws 1939, c. 158.

[15] Alabama (Laws 1947, No. 276); District of Columbia (49 Stat. 167 (1935)); Idaho (Laws 1939, c. 117); Illinois (Laws 1938 (1st sp. sess.), p. 51); Indiana (Acts 1935, c. 113); Kentucky (Acts

paralleled by five more [16] in addition to the earlier California and New York laws. This law provided for suspension of privileges following certain convictions and after a judgment remained unpaid a specified time. Restoration in either case was conditioned on proof of future responsibility; in the case of a judgment, the debt must be discharged as well. The unpaid judgment was required to be forwarded on the initiative of the court or clerk. Six States adopted laws differing from Utah's principally in that proof of future responsibility, without satisfaction of the debt, was sufficient to terminate suspension.[17] In addition, most of these statutes provided

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1936, c. 70); Michigan (Acts 1933, No. 203); Missouri (Laws 1945, p. 1207); Montana (Laws 1937, c. 129); Nebraska (Laws 1931, c. 108); North Dakota (Laws 1939, c. 167); Oregon (Laws 1935, c. 434); Utah (Laws 1943, c. 68); West Virginia (Acts 1935, c. 61). The ultimate source of these laws seems to have been a bill sponsored by the American Automobile Association as early as 1928. See Association of Casualty & Surety Executives, Comments on "Report by the Committee to Study Compensation for Automobile Accidents to the Columbia University Council for Research in the Social Sciences" (1932), pp. 14–15.

[16] Arizona (Laws 1935, c. 45) limited suspension to a maximum of five years, and Kansas (Laws 1939, c. 86) to three. Virginia (Acts 1932, c. 272) required satisfaction of the debt before reinstatement, but after one year proof alone was sufficient. Virginia did not provide for suspension and proof following violations. New Jersey (Laws 1929, c. 116, as amended, Laws 1931, c. 169) and New Mexico (Laws 1947, c. 201) required proof after certain accidents as well. Arizona did not require the clerk to give notice of unpaid judgments; suspension was ordained "on report" of failure to pay.

[17] Georgia (Laws 1945, No. 332), North Carolina (Laws 1931, c. 116), and apparently Colorado (Laws 1935, c. 163. The section title reads "and," but the text "or"), restored privileges on either proof or satisfaction rather than both; Minnesota (Laws 1933, c. 351), Ohio (Laws 1935, p. 218), and Wisconsin (Laws 1941, c. 206) on proof without more. In Ohio and Wisconsin, suspension terminated automatically after one year. Ohio after 1943 (p. 658) required satisfaction but not proof and extended suspension to five years. Georgia and North Carolina did not require proof after violations.

that a discharge in bankruptcy should not relieve the judgment debtor from suspension.[18]

Indiana and Maryland in 1931, like Connecticut and Iowa before, placed control of suspension for unpaid judgments in the hands of the creditor by requiring that notice be forwarded to the administrator only on the creditor's request. Ind. Acts 1931, c. 179, § 2; Md. Laws 1931, c. 498. Neither specified the effect of a discharge. Maryland's law was in other respects like that of Utah; Indiana's, which required only proof of future responsibility and not discharge for reinstatement, was replaced in 1935 by a statute on the Utah model. In Massachusetts suspension followed when the registrar was "satisfied by such evidence as he may require" that the judgment was sixty days unpaid. Mass. Acts 1932, c. 304.[19] Delaware's law was similar in this respect. Del. Laws 1931, c. 14. New Hampshire's 1937 law required proof of future responsibility following certain convictions and certain accidents but not after unpaid judgments; it required those involved in accidents not only to provide proof for the future but to deposit security to cover the past accident as well. N. H. Laws 1937, c. 161.[20] Provisions requiring security after accidents, but without the need of proof for the future, were adopted by a number of other States in the next few years.[21]

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[18] Alabama, Arizona, California (Stat. 1937, c. 840), Colorado, District of Columbia, Idaho, Illinois, Indiana, Kansas, Kentucky, Michigan, Missouri, Montana, New Jersey (Laws 1941, c. 296), New Mexico, New York, Oregon, Utah, and West Virginia.

[19] This law extended only to property judgments, and only satisfaction of the debt, not proof of future ability to respond, was required.

[20] Maine (Laws 1941, c. 255), Michigan (Acts 1943, No. 248), and New York (Laws 1941, c. 872), enacted comparable accident provisions. Maine at the same time repealed its requirements pertaining to unpaid judgments.

[21] Colorado (Laws 1947, c. 124); Florida (Laws 1947, c. 23626); Illinois (Laws 1945, p. 1078); Indiana (Acts 1943, c. 175); Mary-

New York's law, one source of most of this early legislation, underwent a gradual evolution after its enactment. In 1936 the legislature provided that if proof of future responsibility was given the maximum period of suspension should be three years.[22] The same year the statute was further amended to add a novel provision. If the judgment creditor consented, and if proof of future responsibility was given, a defaulting judgment debtor might continue to enjoy driving privileges for six months, and thereafter so long as consent was not withdrawn.[23] In 1937 it was made clear the requirement of judgment payment did not apply to insured owners or drivers.[24] In 1939 report of the unpaid judgment was made dependent upon request by the creditor.[25] Finally, in 1941, New York adopted the New Hampshire requirement of proof and security for damages arising out of certain accidents.[26] The 1941 law also provided, as a number of States had done before,[27] for payment in installments, with suspension upon default of payments.

It was against this background that the Uniform Act of 1932 was withdrawn for further study in light of the States' extensive experience. Handbook of the National Conference of Commissioners on Uniform State Laws (1943), p. 69. The result of this study was an entirely revised model act, indorsed by the National Con-

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land (Laws 1945, c. 456); Minnesota (Laws 1945, c. 285); Nevada (Laws 1949, c. 127); Tennessee (Acts 1949, c. 75); Wisconsin (Laws 1945, c. 375).

[22] N. Y. Laws 1936, c. 293.

[23] N. Y. Laws 1936, c. 448.

[24] N. Y. Laws 1937, c. 463.

[25] N. Y. Laws 1939, c. 618.

[26] N. Y. Laws 1941, c. 872.

[27] Arizona, California (Stat. 1935, c. 591; see *id.*, p. 159), Colorado, District of Columbia, Idaho, Illinois, Indiana (1935), Kansas, Kentucky, Maryland, Michigan, Montana, Nebraska, New Jersey, North Dakota (1939), Ohio, Oregon, and West Virginia.

ference, which now appears as Chapter 7 of the Uniform Vehicle Code of 1956.[28]

The new Uniform Code reflects most of the changes wrought in New York's law from 1929 to 1941. It requires persons involved in certain accidents to deposit security to cover the past if they were not insured. It requires proof of future responsibility from those convicted of certain violations and from those owing judgments unsatisfied after thirty days. In addition, unless insured, the judgment debtor must satisfy the obligation, to the extent of the minimum amounts of financial responsibility required, before his privileges are restored. Installment payments, until default, are allowed. Bankruptcy is no release; unpaid judgments are to be reported only on request by the judgment creditor; with the creditor's consent the debtor may be permitted to drive for six months, if he shows financial responsibility, and longer until consent is revoked.

The material provisions of the new Uniform Code with respect to financial responsibility are currently in effect in twenty-one States, including Utah, and in the District of Columbia.[29] Fifteen other States have enacted

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[28] National Committee on Uniform Traffic Laws and Ordinances, Uniform Vehicle Code (1956), §§ 7–101 to 7–505; see Handbook of the National Conference of Commissioners on Uniform Laws (1946), p. 131.

[29] Alabama (Laws 1951, No. 704, as amended, Ala. Code, 1940, as recompiled 1958, Tit. 36, §§ 74 (42)–74 (83). The 1959 amendment (Laws, No. 72) limited suspension to a maximum of three years); Arkansas (Acts 1953, No. 347, Ark. Stat., 1947 (1957 replacement), Tit. 75, c. 14); District of Columbia (68 Stat. 120 (1954), as amended 72 Stat. 957 (1958), D. C. Code, 1961, Tit. 40, c. 4); Florida (Laws 1957, c. 57–147, Fla. Stat., 1959, c. 324. No specific provision is made regarding bankruptcy); Georgia (Laws 1956, No. 362, Ga. Code Ann., 1958, c. 92A–6. Georgia requires only payment and not proof for restoration after judgment and requires no proof to reinstate with creditor consent. There is no provision regard-

statutes substantially similar except that unpaid judgments are reported by the court or clerk without request by the creditor.[30] Nine more retain statutes differing from the last foregoing principally in the absence of pro-

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ing bankruptcy. From 1951 (Laws, No. 386) to 1956, Georgia's financial-responsibility provision required security after accidents and proof after certain violations.); Hawaii (Laws 1949, c. 393, Hawaii Rev. Laws, 1955, c. 160, part III); Kansas (Laws 1957, c. 68, Kan. Gen. Stat., 1949 (Supp. 1959), c. 8, Art. 7); Louisiana (Acts 1952, No. 52, La. Rev. Stat., 1950 (1960 Pocket Part), Tit. 32, c. 5); Maryland (Laws 1931, c. 498, as amended, Md. Ann. Code, 1957, Art. 66½, §§ 116–149. No provision is made for creditor consent to restoration before payment.); Mississippi (Laws 1952, c. 359, Miss. Code Ann., 1942, as recompiled 1956, Tit. 30, §§ 8285–01 to 8285–41); Montana (Laws 1951, c. 204, Mont. Rev. Code, 1947 (1954 replacement), Tit. 53, c. 4); Nevada (Laws 1957, c. 384, Nev. Rev. Stat., 1957, c. 485); New Mexico (Laws 1955, c. 182, N. M. Stat., 1953 (1960 replacement), Tit. 64, Art. 24); North Carolina (Laws 1953, c. 1300, N. C. Gen. Stat., 1959 Supp., c. 20, Art. 9A. From Laws 1947, c. 1006, to 1953, North Carolina's law was substantially the same as now except that report of unpaid judgments was mandatory, and that proof rather than security was required in accident cases, but only as to unlicensed operators.); Ohio (Laws 1951, p. 563, as amended, Page's Ohio Rev. Code Ann., 1954 and 1961 Supp., c. 4509); Oklahoma (Laws 1949, p. 347, Okla. Stat., 1951, Tit. 47, c. 14); Oregon (Laws 1955, c. 429, as amended, Ore. Rev. Stat., 1953 (1961 replacement part), c. 486. Proof as well as security is required after accident; the maximum suspension is five years.); Rhode Island (Laws 1952, c. 3002, R. I. Gen. Laws, 1956, Tit. 31, c. 32); South Dakota (Laws 1957, c. 212, S. D. Code, 1939 (Supp. 1960), c. 44.03A. In 1953, c. 251, South Dakota had suspended licenses on notice from the creditor until the judgment was paid, or the creditor's consent was given.); Texas (Laws 1951, c. 498, Vernon's Tex. Civ. Stat. Ann., 1960, Art. 6701h.); Utah (Laws 1951, c. 71, as amended, Utah Code Ann., 1953, 41–12–1 to 41–12–41. Utah has only recently provided for proof after convictions, Laws 1961, c. 95.); West Virginia (Acts 1951, c. 130, W. Va. Code Ann., 1955, c. 17D).

[30] Alaska (Laws 1959, c. 163, Alaska Comp. Laws Ann., 1949 (Supp. 1959), Tit. 50, c. 8. Both a deposit and future proof are required

visions for restoration of privileges without payment on the consent of the creditor; these are in substance the same as the common statute earlier in force in Utah, except that security is usually required in the event of accident.[31] Vermont's statute, requiring only proof and

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in some accident cases.); Arizona (Laws 1951, c. 122, Ariz. Rev. Stat. Ann., 1956, Tit. 28, c. 7); Delaware (Laws 1951, c. 359, Del. Code Ann., 1953, Tit. 21, c. 29); Idaho (Laws 1947, c. 256, Idaho Code, 1947 (1957 replacement), Tit. 49, c. 15); Iowa (Laws 1947, c. 172, Iowa Code, 1958, c. 321A); Kentucky (Acts 1946, c. 118, Ky. Rev. Stat., 1960, c. 187); Minnesota (Laws 1945, c. 285, as amended, Minn. Stat., 1953, c. 170); Missouri (Laws 1953, p. 569, Vernon's Ann. Mo. Stat., 1952 (Supp. 1960), c. 303); Nebraska (Laws 1949, c. 178, Neb. Rev. Stat., 1943 (1960 reissue), c. 60, Art. 5); North Dakota (Laws 1947, c. 256, as amended, N. D. Century Code, 1960, c. 39–16); Pennsylvania (Laws 1945, No. 433, superseded by Laws 1959, No. 32, Art. XIV, Purdon's Pa. Stat. Ann., 1960, Tit. 75, c. 1, Art. XIV); South Carolina (Acts 1952, No. 723, S. C. Code, 1952 (Supp. 1960), Tit. 46, c. 3.1); Virginia (Acts 1944, c. 384, in addition required both proof and security after accidents, and proof after suspensions authorized "on any reasonable ground" and after release from institutions for insanity, drug addiction, etc. These provisions were dropped before the revision of 1958, c. 541, now Va. Code, 1950 (1958 replacement), Tit. 46.1, c. 6); Wisconsin (Laws 1957, c. 260, p. 302, Wis. Stat. Ann., 1958, c. 344); Wyoming (Laws 1947, c. 160, as amended, Wyo. Stat., 1957, Tit. 31, c. 6).

[31] California (Cal. Vehicle Code, 1960, Div. 7. No proof is required after convictions.); Colorado (Colo. Rev. Stat., 1953, c. 13, Art. 7); Connecticut (Acts 1951, No. 179, as amended, Conn. Gen. Stat., 1958, Tit. 14, c. 246, part VI. Privileges are suspended on entry of any judgment, until satisfied; after violations, until proof of future responsibility; and after accidents, unless security is deposited. There is no provision for notification by court or by creditor.); Illinois (Smith-Hurd's Ill. Ann. Stat., 1958, c. 95–½, c. 7); Indiana (Burns' Ind. Ann. Stat., 1952, Tit. 47, c. 10. Proof may be required after accidents in addition to security.); Michigan (Mich. Stat. Ann., 1960, §§ 9.2201 to 9.2232. Both deposit and proof are required after suspension for accidents.); New Jersey (N. J. Stat. Ann., 1961, Tit. 39, c. 6); Tennessee (Acts 1959, c. 277, Tenn. Code Ann., 1955 (Supp. 1961), Tit. 59, c. 12. No provision is made for report of judgments

not payment to reinstate privileges after judgment, differs in other particulars as well.[32] Maine and New Hampshire make no provisions for judgments, suspending only after accidents and violations.[33] In Massachusetts and New York insurance or its equivalent is compulsory.[34]

Twenty years ago, the Court had before it the New York variant of this legislation. This provided for suspension of license and registration whenever a judgment remained unpaid for fifteen days, as certified by the county clerk on his initiative. Proof of future responsibility was required for reinstatement; unless three years had elapsed, so was satisfaction of the judgment other than by discharge in bankruptcy. In 1936 the statute was amended to terminate the suspension with creditor consent on proof of responsibility, and in

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by either court or creditor. Tennessee's first responsibility law, Acts 1949, c. 75, required security after accidents; Acts 1951, c. 206, added suspension until overdue judgments were discharged other than in bankruptcy.); Washington (Wash. Rev. Code, 1951 & 1959 Supp., c. 46.24).

[32] Vt. Stat. Ann., 1959, Tit. 23, §§ 801–809. Proof is required after certain violations or unsatisfied judgments based on violations, and after certain accidents. When an accident is caused by a violation, a deposit is also required. No provision is made for reporting judgments.

[33] Maine (Me. Rev. Stat., 1954 and Supp. 1959, c. 22, §§ 75–82. Suspension is authorized after violations and accidents, or on "any reasonable ground"; proof is required in all such cases, and security also in accidents.); New Hampshire (N. H. Rev. Stat. Ann., 1955, c. 268. Proof is required after violations, proof and security after accidents.).

[34] Massachusetts (Mass. Gen. Laws Ann., 1958, c. 90, §§ 34A–34J. Suspension is also ordained when the registrar is "satisfied by such evidence as he may require" that a property judgment is unpaid. *Id.*, § 22A.); New York (N. Y. Vehicle & Traffic Law, 1960, Art. 6, §§ 310–321. New York's earlier law, similar to the 1956 Uniform Code, is still in the books, *id.*, §§ 330–368, although no one has been required to maintain proof under its provisions since 1957, *id.*, § 346.).

1939 to require certification of the judgment only on request by the creditor or his attorney. The Court held that this statute, as it stood before 1936, was an appropriate measure to promote highway safety and did not violate the Due Process Clause of the Fourteenth Amendment. Because the statute was not designed to aid collection of debts but to enforce a policy against irresponsible driving, and because this policy would be frustrated if negligent drivers could avoid the statute by "the simple expedient of voluntary bankruptcy," no conflict with the Bankruptcy Act was found. The Court expressly left unanswered the claim that the amendments giving the creditor control over initiation and duration of the suspension were contrary to the Bankruptcy Act. *Reitz* v. *Mealey,* 314 U. S. 33 (1941).

The Utah law here challenged is in substance that which the Court did not have to pass on in *Reitz* v. *Mealey,* with two exceptions. Not only is the creditor permitted to initiate, lift, and restore suspension as under the New York amendments; he is also given power to restore suspension for default on payment of installments, and, if the judgment is not satisfied, the suspension is permanent rather than limited to three years. Appellant urges that the Utah creditor's added control over the license and registration procedures demonstrates that the State is acting as a collecting agent for the creditor rather than furthering an interest in highway safety, and that to make suspension perpetual rather than for three years only renders the collection pressure more effective. Do these differences make a constitutional difference, in light of the considerations that underlay the decision in the *Reitz* case?

Section 17 of the Bankruptcy Act, 11 U. S. C. § 35, provides that "A discharge in bankruptcy shall release a bankrupt from all of his provable debts," with exceptions not here material. See also 11 U. S. C. § 1 (15). A

discharge relieves the bankrupt "from legal liability to pay a debt that was provable," *Zavelo* v. *Reeves,* 227 U. S. 625, 629 (1913); it is a valid defense in an action brought in a state court to recover the debt. A State cannot deal with the debtor-creditor relationship as such and circumvent the aim of the Bankruptcy Act in lifting the burden of debt from a worthy debtor and affording him a new start. The limitations imposed upon the States by the Act raise constitutional questions under the Supremacy Clause, Art. VI. Thus, a discharge does not free the bankrupt from all traces of the debt, as though it had never been incurred. This Court has held that a moral obligation to pay the debt survives discharge and is sufficient to permit a State to grant recovery to the creditor on the basis of a promise subsequent to discharge, even though the promise is not supported by new consideration. *Zavelo* v. *Reeves, supra.* The theory, the Court declared, is that "the discharge destroys the remedy but not the indebtedness," 227 U. S., at 629.[35] And in *Spalding* v. *New York ex rel. Backus,* 4 How. 21 (1846), under an earlier bankruptcy law,[36] the Court held that a discharge did not prevent the State from collecting a fine for contempt in violation of an injunction issued to aid in the execution of a judgment debt, although the fine was turned over to the creditor. States are not free to impose whatever sanctions they wish, other than an action of debt or assumpsit, to enforce collection of a discharged debt. But the lesson *Zavelo* and *Spalding* teach

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[35] See 1 Collier, Bankruptcy (14th ed. 1956), ¶ 17.27; 8 Remington, Bankruptcy (6th ed. 1955), § 3225; and cases cited.

[36] Act of Aug. 19, 1841, c. 9, § 4, 5 Stat. 440, 444: a discharge and its certificate "shall, in all courts of justice, be deemed a full and complete discharge of all debts, contracts, and other engagements of such bankrupt, which are proveable under this act, and shall be and may be pleaded as a full and complete bar to all suits brought in any court of judicature whatever . . . ."

is that the Bankruptcy Act does not forbid a State to attach any consequence whatsoever to a debt which has been discharged.[37]

The Utah Safety Responsibility Act leaves the bankrupt to some extent burdened by the discharged debt. Certainly some inroad is made on the consequences of bankruptcy if the creditor can exert pressure to recoup a discharged debt, or part of it, through the leverage of the State's licensing and registration power. But the exercise of this power is deemed vital to the State's well-being, and, from the point of view of its interests, is wholly unrelated to the considerations which propelled Congress to enact a national bankruptcy law. There are here overlapping interests which cannot be uncritically resolved by exclusive regard to the money consequences of enforcing a widely adopted measure for safeguarding life and safety.

When *Reitz* v. *Mealey* was in the District Court, 34 F. Supp. 532 (N. D. N. Y. 1940), Judge Learned Hand upheld the statute, as did this Court, without deciding the validity of the creditor-control amendments; but in passing he dealt with the realities of the situation and demonstrated the thin difference they made. As for the 1936 amendment, "The original statute in fact gave the creditor power at any time to restore the license by a complete satisfaction of the judgment; and the amend-

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[37] A Georgia court held that a discharge does not destroy a landlord's right to evict for non-payment of rent, *Carter* v. *Sutton*, 147 Ga. 496, 94 S. E. 760 (1917). In Minnesota it was held that land equitably charged with the payment of a judgment debt was not released by the debt's discharge in bankruptcy, *Evans* v. *Staalle*, 88 Minn. 253, 92 N. W. 951 (1903). In Missouri a discharged debt was held chargeable to diminish an heir's share in the equitable accounting of an estate, *Leach* v. *Armstrong*, 236 Mo. App. 382, 156 S. W. 2d 959 (1941). We intimate no opinion on the correctness of these decisions.

ment merely added to this by enabling him to withdraw his consent, once given, after six months." The 1939 amendment

> "merely relieved the clerk of an irksome duty. He had been obliged to find out whenever a judgment had remained unpaid for fifteen days, whether it was for damages due to negligent driving. Instead of this the amendment set up an automatic system depending upon the creditor's interest in starting the clerk into action. This distinction is, however, more apparent than real because under the section as it stood before 1939, the creditor had the same incentive and he was as likely as thereafter to advise the clerk of the judgment . . . . [T]he chance that the clerk would have acted without being prodded by the creditor must have been very remote." 34 F. Supp., at 535.

This Court was of course aware of the practical pressures of the New York statute as a device to collect debts discharged in bankruptcy; the argument was pressed upon it in the dissent. Yet the statute was upheld. Why? Because the "police power" of a State, especially when exerted for the protection of life and limb, is as pervasive as any of the reserved powers of the States and should be respected unless there is a clear collision with a national law which has the right of way under the Supremacy Clause of Article VI. The fact that the consequences of the New York Safety Act may in fact have subjected a debtor to the payment of money of which as an obligation in the creditor-debtor relation he was quit did not lead this Court to hold that the State had intruded into the bankruptcy domain or subverted the purpose of the bankruptcy law. Why? At the heart of the matter are the complicated demands of our federalism.

Are the differences between the Utah statute and that of New York so significant as to make a constitutionally decisive difference? A State may properly decide, as forty-five have done, that the prospect of a judgment that must be paid in order to regain driving privileges serves as a substantial deterrent to unsafe driving. We held in *Reitz* that it might impose this requirement despite a discharge, in order not to exempt some drivers from appropriate protection of public safety by easy refuge in bankruptcy.[38] To make suspension of privileges dependent upon the creditor's request, as twenty-one have done, and as Congress has done for the District of Columbia, is nothing more than to make explicit what happens in the real world regardless of the statutory language. Even if the creditor-request provision makes suspension more likely, we see no reason why a State may not so provide in order that the deterrent be made more effective by authorizing the party most likely to be interested in the enforcement of the sanction to set it in motion. Nor do we think in excess of their power the action of thirty-five States that have attempted, as Congress has done, to authorize the creditor to lift and restore the suspension, or the forty-three that, again as Congress, have provided that in the absence of creditor consent the suspension shall last forever unless the judgment is extinguished. To whatever extent these provisions make it more probable that the debt will be paid despite the discharge, each no less reflects the State's important deterrent interest. Congress had no thought of amending the

[38] There has been an enormous increase in nonbusiness bankruptcy cases in recent years. In 1946, 8,566 such petitions were filed; in 1960, 97,750. Nonbusiness petitions were 74.7% of the total in 1940 and 88.8% in 1960. Hearings before Subcommittee of House Committee on Appropriations, on the Judiciary, 87th Cong., 1st Sess. 204. The tendency thus reflected has not slackened with time.

Bankruptcy Act when it adopted this law for the District of Columbia; we do not believe Utah's identical statute conflicts with it either.

Utah is not using its police power as a devious collecting agency under the pressure of organized creditors. Victims of careless car drivers are a wholly diffused group of shifting and uncertain composition, not even remotely united by a common financial interest. The Safety Responsibility Act is not an Act for the Relief of Mulcted Creditors. It is not directed to bankrupts as such. Though in a particular case a discharged bankrupt who wants to have his rightfully suspended license and registration restored may have to pay the amount of a discharged debt, or part of it, the bearing of the statute on the purposes served by bankruptcy legislation is essentially tangential.

There are no apothecary's scales by which the differences between the Utah and New York statutes can be constitutionally weighed. The matter rests in judgment. That organon of adjudication leads us to conclude that the differences are too insubstantial, too tenuous as a matter of practical reality, to reach constitutional solidity.

Affirmed.

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

MR. JUSTICE STEWART, concurring in part.

For the reasons convincingly set forth in the dissenting opinion of THE CHIEF JUSTICE, I agree with him that a three-judge court should not have been convened in this case, and that consequently this appeal is not properly before us. I would therefore dismiss the appeal. *Thompson* v. *Whittier,* 365 U. S. 465. The Court, however, holds that this appeal is properly here, and on the merits of the litigation I agree with the Court's conclusion.

MR. CHIEF JUSTICE WARREN, dissenting.

We are confronted here with a threshold question of jurisdiction which should, in my opinion, be dispositive of the case. The question is whether a three-judge court was properly convened for the trial of this case.[1] Although the issue was not considered by the courts below, and has not been raised by the parties here, it is our duty to take independent notice of such matters and to vacate and remand any decree entered by an improperly constituted court.[2] I cannot agree with the test formulated by the opinion of the Court because I believe that for both lower federal courts and for ourselves, it will raise more problems than it will solve, and because I do not see any basis for it either in the statute or in our prior decisions.

When to convene a three-judge court has always been a troublesome problem of federal jurisdiction and a review of the cases involving that question illustrates the difficulties the lower federal courts have had in applying the principles formulated by this Court.[3] However, one rule has been clear: where a state statute is attacked as violating directly some provision of the Federal Constitution, a three-judge court must be convened.[4] Equally clear has been the principle that where the state statute is alleged to be inoperative because of the presence of a

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[1] Pursuant to 28 U. S. C. § 2281, providing for a three-judge court where an injunction is sought against the enforcement of a state statute upon the ground of its alleged unconstitutionality.

[2] *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co.*, 292 U. S. 386; *Gully* v. *Interstate Gas Co.*, 292 U. S. 16. Direct appeal from a three-judge court is governed by 28 U. S. C. § 1253.

[3] See the cases collected in Hart and Wechsler, The Federal Courts and the Federal System, 843 *et seq.* See also Ann., Three-Judge Court, 4 L. Ed. 2d 1931 *et seq.*

[4] *Query* v. *United States*, 316 U. S. 486; *Stratton* v. *St. Louis Southwestern R. Co.*, 282 U. S. 10; *Ex parte Northern Pac. R. Co.*, 280 U. S. 142.

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federal statute which the Supremacy Clause of the Constitution declares pre-emptive of the state law, a single judge may dispose of the case.[5] That, I submit, is precisely the situation here. A case essentially similar to ours is *Case* v. *Bowles,* 327 U. S. 92. There the State had enacted a provision regulating the minimum price at which certain state-owned land had to be sold when disposed of by the State. When the State attempted to sell timber located on such land at a price permitted by the state enactment, the sale was sought to be enjoined on the ground that the price required by the state law exceeded the limits of the Federal Emergency Price Control Act and was therefore invalid under the Supremacy Clause. To the State's contention that the complaint stated a cause of action required to be heard by a three-judge court, this Court, speaking through MR. JUSTICE BLACK, stated:

> ". . . here the complaint did not challenge the constitutionality of the state statute but alleged merely that its enforcement would violate the Emergency Price Control Act. Consequently a three-judge court is not required. . . ." [6]

So in the case before us, "the complaint did not challenge the constitutionality of the . . . [Utah Financial Responsibility Act] but alleged that its enforcement would violate the . . . [Bankruptcy Act]. Consequently, a three-judge court . . . [was] not required."

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[5] *Florida Lime & Avocado Growers, Inc.,* v. *Jacobsen,* 362 U. S. 73 (by implication); *Case* v. *Bowles,* 327 U. S. 92; *Ex parte Buder,* 271 U. S. 461; *Lemke* v. *Farmers Grain Co.,* 258 U. S. 50. The lower federal courts have also been unanimous in so holding. *E. g., Bell* v. *Waterfront Commission,* 279 F. 2d 853; *Penagaricano* v. *Allen Corp.,* 267 F. 2d 550; *Cloverleaf Butter Co.* v. *Patterson,* 116 F. 2d 227, rev'd on other grounds, 315 U. S. 148; *Pennsylvania Greyhound Lines, Inc.,* v. *Board of Public Utility Comm'rs,* 107 F. Supp. 521.

[6] 327 U. S., at 97.

However, the Court's opinion adds an additional distinction. Its reasoning is that if there is a preliminary question of statutory construction, either of the state or federal statute alleged to be in conflict, only one judge is required. On the other hand, if the court is able to go "directly" to the constitutional question (*i. e.,* whether the state statute must fall under the Supremacy Clause), three judges are required. I do not believe that there was any greater need for interpretation of the statute or of congressional purpose in *Bowles* than there is in determining the scope of the Bankruptcy Act in providing for the discharge of debts in the case before us. I can find no real distinction between the two cases and do not believe that one can be found in the statutes [7] or any place else. It would, in fact, be difficult to conceive of any case which would not call for an initial interpretation of the legislation or an inquiry into its purpose or policy before a court could determine if the state and federal statutes are in conflict.[8] The instant case is no exception, and, in my opinion, the Court's opinion refutes the very test which it establishes.[9] The difference of opinion

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[7] The sole determination for convening a three-judge court is whether the state statute is being attacked on the grounds of its unconstitutionality. 28 U. S. C. § 2281. The statute makes no distinction based on the absence of preliminary questions of interpretation. Moreover, this Court has, in the past, attempted to construe this statute rigidly because of our reluctance to enlarge our own mandatory duties of review and because of the serious drain that "the requirement of three judges . . . entails . . . upon the federal judicial system. . . ." *Phillips* v. *United States,* 312 U. S. 246, 250.

[8] See note 13, *infra.*

[9] A great portion of the Court's opinion is devoted to a review of the purpose and intent of state-highway financial-responsibility laws. In addition, the Court considers, as it must, the scope of § 17 of the Bankruptcy Act. See *ante,* pp. 169–171. The Court concludes that there are "overlapping interests" between the two pieces of legislation that need resolution. See *ante,* p. 171.

on the merits in this case among the members of the Court stems from the meaning and purpose of § 17 of the Bankruptcy Act,[10] and it is evident that the Court's holding in *Reitz* v. *Mealey*,[11] referred to by the Court in the instant case, considered the purposes of both the state legislation and the federal bankruptcy scheme. Indeed, the effect of the discharge in bankruptcy affords considerable latitude for construction, as noted by this and other courts on numerous occasions.[12]

Moreover, I believe that it is tacit in the Supremacy Clause itself that a preliminary inquiry must always be made into the policy behind the legislation alleged to be in conflict before a final analysis of whether the federal legislation is pre-emptive can be made.[13] But perhaps the most practical objection to the test formulated by the Court is that it is plainly unworkable. Application of that test by lower federal courts will, in my opinion, create additional confusion to an already difficult area of federal jurisdiction. Because I think that we should

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[10] As amended, 52 Stat. 851, 11 U. S. C. § 35. This Section provides in part, "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part . . . ."

[11] 314 U. S. 33.

[12] See *Zavelo* v. *Reeves*, 227 U. S. 625; *Spalding* v. *New York ex rel. Backus*, 4 How. 21 (1846) (decided under an earlier bankruptcy law); *Parker* v. *United States*, 153 F. 2d 66; *In re Koronsky*, 170 F. 719; cf. *Crawford* v. *Burke*, 195 U. S. 176; *Tinker* v. *Colwell*, 193 U. S. 473.

[13] The application of the Supremacy Clause is increasingly becoming a matter of statutory interpretation—a determination of whether state regulation can be reconciled with the language and policy of federal legislation. See, *e. g.*, *United States* v. *Burnison*, 339 U. S. 87; *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218; *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761. Cf. *Auto Workers* v. *Wisconsin Employment Relations Board*, 336 U. S. 245. Thus, the answers to questions put under the Supremacy Clause must largely be derived from the statute and the policy behind the federal legislation. See note 18, *infra*.

follow our past decisions,[14] and not impose technical and unworkable distinctions upon them, I would dismiss this case for lack of jurisdiction in this Court.[15] However, because the Court has held otherwise and has decided the merits of the alleged conflict, I believe it is my duty also to reach the substantive questions.

On the merits, I find myself in agreement with most of MR. JUSTICE FRANKFURTER'S opinion for the Court. State drivers' financial-responsibility laws intended to discourage careless driving and to promote safety in automobile traffic for the protection of its citizens are essential to the State's well-being and wide latitude should be allowed in the formulation of such laws. Accordingly, I am reluctant to say that a State has exceeded its powers in this area. I cannot, however, agree with the Court's treatment of that portion of the Utah Act which gives to a creditor the discretion of determining if and when driving privileges may be restored by the State to a person whose license has been revoked due to his failure to satisfy a judgment incurred as a result of a previous automobile accident.[16]

The essential inquiry in a case such as this is not only whether the State has acted in a field in which it has a legitimate interest to achieve goals inherent in its police power. Rather, our task is also to ascertain whether the provisions of the state act are compatible with the policy expressed in the federal legislation with which the state law is alleged to be in conflict.[17] If there is no escape

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[14] See note 5, *supra*.

[15] 28 U. S. C. § 1253. See *Phillips* v. *United States*, 312 U. S. 246.

[16] Thus, I believe that without the "subject to" clause of Utah Code Ann., 1953, § 41–12–15, referring to the creditor-control provision of § 41–12–14 (b), that Section would be valid.

[17] Certainly the "complicated demands of federalism" cannot prevent us from fulfilling this duty. In fact, the Constitution expressly provides that in this area of federal-state relations these complicated demands shall play no part. U. S. Const., Art. VI.

from a finding of incompatibility, the Supremacy Clause of the United States Constitution demands that the conflicting state law and policy must yield to the federal statute.[18] This demand is made no less apparent by a determination that the state statute has been enacted pursuant to an otherwise valid exercise of state power.[19]

In *Reitz* v. *Mealey,* 314 U. S. 33, this Court upheld the New York variant of this legislation, according to the Court's opinion in the instant case, "[b]ecause the statute was not designed to aid collection of debts but to enforce a policy against irresponsible driving, and because this policy would be frustrated if negligent drivers could avoid the statute by 'the simple expedient of voluntary bankruptcy' . . . ." Here, however, the Court decides a question that was deliberately not canvassed in *Reitz,* namely, the validity of the provision authorizing creditor control over restoration of the license.

In my view, the reasons expressed for upholding the New York legislation in *Reitz* do not apply to this authorization.[20] The State has a legitimate interest in requiring proof of financial responsibility from drivers

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[18] *Sola Electric Co.* v. *Jefferson Electric Co.,* 317 U. S. 173, 176; *Hill* v. *Florida,* 325 U. S. 538.

[19] See, *e. g., Rice* v. *Santa Fe Elevator Corp.,* 331 U. S. 218, 230–231; *Case* v. *Bowles,* 327 U. S. 92, 101–102; *Napier* v. *Atlantic Coast Line R. Co.,* 272 U. S. 605, 610–611. See also *Munn* v. *Illinois,* 94 U. S. 113. Cf. *Southern Pacific Co.* v. *Arizona,* 325 U. S. 761.

[20] The creditor controls in the revocation and restoration provisions are completely distinguishable, and I find no fault with that portion of the Act permitting the creditor to give notice of default in payment so as to initiate the revocation procedure. As to this strictly "procedural" provision, Judge Hand's pronouncement in the lower court's opinion in *Reitz* v. *Mealey,* 34 F. Supp. 532 (D. C. N. D. N. Y. 1940), is dispositive. However, for the reasons next stated in the text, the creditor control over restoration does not serve a procedural purpose; it is directly a matter of substance and, as such, it changes the whole purpose of the legislation.

who have not responded in damages for an accident; and inherent in that interest is the right to demand as a requisite to restoration of driving privileges, that all prior judgments for automobile accidents be paid.[21] To this extent the State advances an interest independent of the purposes of the bankruptcy laws; the interests of the federal and state governments are compatible and hence no conflict with the Federal Act exists. However, where the State relinquishes its right to demand that prior judgments be paid, and in its place authorizes the creditor, through giving or withholding his consent to determine whether the judgment debtor may be restored to his driving privileges, the purposes of the financial-responsibility laws are no longer being served. Instead of the legitimate determination to keep all negligent financially irresponsible drivers off the highways, the State is, ostensibly through its police power, giving the creditor a powerful collection device for recovery of a discharged debt.[22] The emphasis has been shifted to an entirely different purpose and, in my opinion, this change is crucial. The effect of the law is to authorize a private individual, for his own financial interest, to determine whether and when a bankrupt may drive on the State's highways. In departing from its legitimate interest in promoting high-

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[21] See note 16, *supra*. See also, *e. g.*, Cal. Vehicle Code, 1959, Div. 7, § 16371.

[22] This aid is being given solely for the creditor's benefit. The State is in effect saying that it does not have an interest in preventing drivers who have been unable to meet their financial obligations from using the highways—as far as the State is concerned some may and others may not. The choice is delegated to the creditors. Hence, creditor X may have two outstanding judgments owing from two different individuals who have caused him damage in a highway accident. Although the State unquestionably has an equal interest in either allowing or disallowing use of the highway by these two debtors, X has the sole discretion to say to the State "Debtor A may have his license back, but debtor B may not."

way safety and thus substituting the interests of individual creditors, the State brings its law into direct conflict with the policy of the federal statute which is designed to relieve bankrupt debtors from their prior financial obligations. In these circumstances I believe it is our duty to declare that portion of the state law invalid under the Supremacy Clause of the United States Constitution.

This does not mean that I would strike the entire statute; the Utah Act incorporates a separability clause [23] which has never been interpreted by the Supreme Court of Utah. How it would view this situation cannot be foretold, and it is not within our province to undertake to do so. At all events, no great burden would be placed on the State. All it need do is to assume in its own way its responsibilities for determining which drivers should be entrusted to use its highways rather than to delegate that power to a private judgment creditor whose debtor has been discharged of his debt by federal law.

For the reasons stated, I must dissent.

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

I agree that this case was properly heard by a three-judge District Court but dissent from the Court's holding that Utah may, through its Motor Vehicle Safety Responsibility Act, enforce the payment of a judgment already discharged under the Federal Bankruptcy Act. Section 17 of the Bankruptcy Act provides that "discharge in bankruptcy shall release a bankrupt from all of his provable debts" [1] and this Court has held that a tort judgment, such as that against appellant, arising out of an automobile accident, is a provable debt within the meaning

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[23] Utah Code Ann., 1953, § 41–12–40.

[1] 11 U. S. C. § 35.

of that section.[2] Despite this provision, however, the Court upholds a Utah law which expressly provides that "A discharge in bankruptcy following the rendering of any . . . judgment [arising out of an automobile accident] shall not relieve the judgment debtor" of his obligation to pay that judgment as a condition of avoiding permanent cancellation of his driving license.[3] The effect of enforcement of the Utah law against this appellant is to deny him the federal immunity given by § 17 of the Bankruptcy Act—an effect which makes the law of Utah rather than the law of Congress "the supreme Law of the Land." This is true because the plain and inevitable effect of the Utah statutory scheme is to create a powerful weapon for collection of a debt from which this bankrupt has been released by federal law. And particularly where, as here, the bankrupt's very livelihood depends upon his retaining a driver's license, he has no real choice under this Utah statute but to make arrangements to pay his judgment creditor to avoid permanent loss of his license. That, of course, means that he must agree to pay the very debt from which he was discharged by the bankruptcy proceeding, and that he must forego the very benefits for which Congress passed the Bankruptcy Act. It also means that a Utah automobile-accident judgment creditor will be given a decided advantage over all other creditors suffering loss from the bankruptcy in that only he can prove his claim, share in the distribution of the bankrupt's estate and still, at the same time, retain the power to force the bankrupt to pay the rest of his claim.

This action of the State, which takes away the benefits conferred on the bankrupt by Congress in § 17 of the

[2] *Lewis* v. *Roberts*, 267 U. S. 467.

[3] Section 41–12–15 of the Utah Motor Vehicle Safety Responsibility Act, Utah Code Ann., 1953.

Bankruptcy Act and gives special privileges to one class of creditors, cannot, in my judgment, be justified by reference to any "complicated demands of our federalism." There are plenty of ways for the States to protect their highways from reckless and irresponsible drivers without running roughshod over immunities that the United States, acting through a specifically granted, exclusive federal power, has chosen to give its citizens. But even if there were not such ways, I see no reason why the Court is not required to settle this conflict between Utah law and federal law in the way that the Constitution requires all such conflicts to be decided—that is, by a simple application of the Supremacy Clause of the Federal Constitution. The Court chooses instead to uphold the law of Utah on the basis of its previous decision in *Reitz* v. *Mealey*,[4] a decision which I thought then and still think now to be wrong even on the much narrower statute which was sustained on much narrower grounds in that case. If this case involved the same kind of limited statute upheld in *Reitz* I could acquiesce on the ground that the settled construction of a federal statute should not ordinarily be disturbed.[5] I can see no justification, however, for expanding the holding in that case so as to uphold this statute which makes a far more serious state encroachment upon immunities granted by discharge in federal bankruptcy proceedings.[6]

The Bankruptcy Act serves a highly important purpose in American life. Without the privileges it bestows on helplessly insolvent debtors to make a new start in life, many individuals would find themselves permanently

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[4] 314 U. S. 33.

[5] *Toolson* v. *New York Yankees*, 346 U. S. 356. See also *James* v. *United States*, 366 U. S. 213, 230–235 (separate opinion concurring in part and dissenting in part).

[6] Cf. *United States* v. *International Boxing Club*, 348 U. S. 236; *Still* v. *Norfolk & Western R. Co.*, 368 U. S. 35.

crushed by the weight of obligations from which they could never hope to remove themselves and the country might, therefore, be deprived of the value of the endeavors of many otherwise useful citizens who simply would have lost their incentive for constructive work. I cannot agree with a decision which leaves the States free—subject only to this Court's veto power—to impair such an important and historic policy of this Nation as is embodied in its bankruptcy laws. I therefore respectfully dissent.

BAKER ET AL. *v.* CARR ET AL.

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

No. 6. Argued April 19–20, 1961.—Set for reargument May 1, 1961.—Reargued October 9, 1961.—Decided March 26, 1962.

Appellants are persons allegedly qualified to vote for members of the General Assembly of Tennessee representing the counties in which they reside. They brought suit in a Federal District Court in Tennessee under 42 U. S. C. §§ 1983 and 1988, on behalf of themselves and others similarly situated, to redress the alleged deprivation of their federal constitutional rights by legislation classifying voters with respect to representation in the General Assembly. They alleged that, by means of a 1901 statute of Tennessee arbitrarily and capriciously apportioning the seats in the General Assembly among the State's 95 counties, and a failure to reapportion them subsequently notwithstanding substantial growth and redistribution of the State's population, they suffer a "debasement of their votes" and were thereby denied the equal protection of the laws guaranteed them by the Fourteenth Amendment. They sought, *inter alia*, a declaratory judgment that the 1901 statute is unconstitutional and an injunction restraining certain state officers from conducting any further elections under it. The District Court dismissed the complaint on the grounds that it lacked jurisdiction of the subject matter and that no claim was stated upon which relief could be granted. *Held:*

1. The District Court had jurisdiction of the subject matter of the federal constitutional claim asserted in the complaint. Pp. 198–204.

2. Appellants had standing to maintain this suit. Pp. 204–208.

3. The complaint's allegations of a denial of equal protection presented a justiciable constitutional cause of action upon which appellants are entitled to a trial and a decision. Pp. 208–237.

179 F. Supp. 824, reversed and cause remanded.

Charles S. Rhyne and *Z. T. Osborn, Jr.* reargued the cause for appellants. With them on the briefs were *Hobart F. Atkins, Robert H. Jennings, Jr., J. W. Anderson, C. R. McClain, Walter Chandler, Harris A. Gilbert, E. K. Meacham* and *Herzel H. E. Plaine.*

Jack Wilson, Assistant Attorney General of Tennessee, reargued the cause for appellees. With him on the briefs were *George F. McCanless,* Attorney General, and *Milton P. Rice* and *James M. Glasgow,* Assistant Attorneys General.

Solicitor General Cox, by special leave of Court, 365 U. S. 864, reargued the cause for the United States, as *amicus curiae,* urging reversal. With him on the briefs were *Assistant Attorney General Marshall, Acting Assistant Attorney General Doar, Bruce J. Terris, Harold H. Greene, David Rubin* and *Howard A. Glickstein.*

Briefs of *amici curiae,* in support of appellants, were filed by *J. Howard Edmondson,* Governor of Oklahoma, and *Norman E. Reynolds, Jr.* for the Governor; *W. Scott Miller, Jr.* and *George J. Long* for the City of St. Matthews, Kentucky; *Roger Arnebergh, Henry P. Kucera, J. Elliott Drinard, Barnett I. Shur, Alexander G. Brown, Nathaniel H. Goldstick* and *Charles S. Rhyne* for the National Institute of Municipal Law Officers; *Eugene H. Nickerson* and *David M. Levitan* for John F. English et al.; *Upton Sisson, Clare S. Hornsby, Walter L. Nixon, Jr.* and *John Sekul* for Marvin Fortner et al.; and *Theodore Sachs* for August Scholle.

Mr. Justice Brennan delivered the opinion of the Court.

This civil action was brought under 42 U. S. C. §§ 1983 and 1988 to redress the alleged deprivation of federal constitutional rights. The complaint, alleging that by means of a 1901 statute of Tennessee apportioning the members of the General Assembly among the State's 95 counties,[1] "these plaintiffs and others similarly situated,

[1] Public Acts of Tennessee, c. 122 (1901), now Tenn. Code Ann. §§ 3–101 to 3–107. The full text of the 1901 Act as amended appears in an Appendix to this opinion, *post,* p. 237.

are denied the equal protection of the laws accorded them by the Fourteenth Amendment to the Constitution of the United States by virtue of the debasement of their votes," was dismissed by a three-judge court convened under 28 U. S. C. § 2281 in the Middle District of Tennessee.[2] The court held that it lacked jurisdiction of the subject matter and also that no claim was stated upon which relief could be granted. 179 F. Supp. 824. We noted probable jurisdiction of the appeal. 364 U. S. 898.[3] We hold that the dismissal was error, and remand the cause to the District Court for trial and further proceedings consistent with this opinion.

The General Assembly of Tennessee consists of the Senate with 33 members and the House of Representatives with 99 members. The Tennessee Constitution provides in Art. II as follows:

> "Sec. 3. Legislative authority—Term of office.—The Legislative authority of this State shall be vested in a General Assembly, which shall consist of a Senate and House of Representatives, both dependent on the people; who shall hold their offices for two years from the day of the general election.
>
> "Sec. 4. Census.—An enumeration of the qualified voters, and an apportionment of the Representatives in the General Assembly, shall be made in the year one thousand eight hundred and seventy-one, and within every subsequent term of ten years.
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> "Sec. 5. Apportionment of representatives.—The number of Representatives shall, at the several

[2] The three-judge court was convened pursuant to the order of a single district judge, who, after he had reviewed certain decisions of this Court and found them distinguishable in features "that may ultimately prove to be significant," held that the complaint was not so obviously without merit that he would be justified in refusing to convene a three-judge court. 175 F. Supp. 649, 652.

[3] We heard argument first at the 1960 Term and again at this Term when the case was set over for reargument. 366 U. S. 907.

periods of making the enumeration, be apportioned among the several counties or districts, according to the number of qualified voters in each; and shall not exceed seventy-five, until the population of the State shall be one million and a half, and shall never exceed ninety-nine; Provided, that any county having two-thirds of the ratio shall be entitled to one member.

"Sec. 6. Apportionment of senators.—The number of Senators shall, at the several periods of making the enumeration, be apportioned among the several counties or districts according to the number of qualified electors in each, and shall not exceed one-third the number of representatives. In apportioning the Senators among the different counties, the fraction that may be lost by any county or counties, in the apportionment of members to the House of Representatives, shall be made up to such county or counties in the Senate, as near as may be practicable. When a district is composed of two or more counties, they shall be adjoining; and no county shall be divided in forming a district."

Thus, Tennessee's standard for allocating legislative representation among her counties is the total number of qualified voters resident in the respective counties, subject only to minor qualifications.[4] Decennial reapportionment

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[4] A county having less than, but at least two-thirds of, the population required to choose a Representative is allocated one Representative. See also Tenn. Const., Art. II, § 6. A common and much more substantial departure from the number-of-voters or total-population standard is the guaranty of at least one seat to each county. See, *e. g.*, Kansas Const., Art. 2, § 2; N. J. Const., Art. 4, § 3, ¶ 1.

While the Tennessee Constitution speaks of the number of "qualified voters," the exhibits attached to the complaint use figures based on the number of persons 21 years of age and over. This basis seems to have been employed by the General Assembly in apportioning legislative seats from the outset. The 1870 statute providing for the first enumeration, Acts of 1870 (1st Sess.), c. 107, directed the courts of

in compliance with the constitutional scheme was effected by the General Assembly each decade from 1871 to 1901. The 1871 apportionment [5] was preceded by an 1870 statute requiring an enumeration.[6] The 1881 apportionment involved three statutes, the first authorizing an enumeration, the second enlarging the Senate from 25 to

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the several counties to select a Commissioner to enumerate "all the male inhabitants of their respective counties, who are twenty-one years of age and upward, who shall be resident citizens of their counties on the first day of January, 1871 . . . ." Reports compiled in the several counties on this basis were submitted to the General Assembly by the Secretary of State and were used in the first apportionment. Appendix to Tenn. S. J., 1871, 41–43. Yet such figures would not reflect the numbers of persons qualified to exercise the franchise under the then-governing qualifications: (a) citizenship; (b) residence in the State 12 months, and in the county 6 months; (c) payment of poll taxes for the preceding year unless entitled to exemption. Acts of 1870 (2d Sess.), c. 10. (These qualifications continued at least until after 1901. See Shan. Tenn. Code Ann., §§ 1167, 1220 (1896; Supp. 1904).) Still, when the General Assembly directed the Secretary of State to do all he could to obtain complete reports from the counties, the Resolution spoke broadly of "the impossibility of . . . [redistricting] without the census returns of the voting population from each county . . . ." Tenn. S. J., 1871, 46–47, 96. The figures also showed a correlation with Federal Census figures for 1870. The Census reported 259,016 male citizens 21 and upward in Tennessee. Ninth Census of the United States, 1870, Statistics of the Population 635 (1872). The Tennessee Secretary of State's Report, with 15 counties not reported, gave a figure of 237,431. Using the numbers of actual votes in the last gubernatorial election for those 15 counties, the Secretary arrived at a total of 250,025. Appendix to Tenn. S. J., 1871, 41–43. This and subsequent history indicate continued reference to Census figures and finally in 1901, abandonment of a state enumeration in favor of the use of Census figures. See notes 7, 8, 9, *infra*. See also Williams, Legislative Apportionment in Tennessee, 20 Tenn. L. Rev. 235, 236, n. 6. It would therefore appear that unless there is a contrary showing at the trial, appellants' current figures, taken from the United States Census Reports, are apposite.

[5] Acts of 1871 (1st Sess.), c. 146.

[6] Acts of 1870 (1st Sess.), c. 107.

33 members and the House from 75 to 99 members, and the third apportioning the membership of both Houses.[7] In 1891 there were both an enumeration and an apportionment.[8] In 1901 the General Assembly abandoned separate enumeration in favor of reliance upon the Federal Census and passed the Apportionment Act here in controversy.[9] In the more than 60 years since that action, all proposals in both Houses of the General Assembly for reapportionment have failed to pass.[10]

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[7] The statute authorizing the enumeration was Acts of 1881 (1st Sess.), c. 124. The enumeration commissioners in the counties were allowed "access to the U. S. Census Reports of the enumeration of 1880, on file in the offices of the County Court Clerks of the State, and a reference to said reports by said commissioners shall be legitimate as an auxiliary in the enumeration required . . . ." *Ibid.*, § 4.

The United States Census reported 330,305 male citizens 21 and upward in Tennessee. The Tenth Census of the United States, 1880, Compendium 596 (1883). The Tennessee Secretary of State's Report gave a figure of 343,817, Tenn. H. J. (1st Extra. Sess.), 1881, 12–14 (1882).

The General Assembly was enlarged in accordance with the constitutional mandate since the State's population had passed 1,500,000. Acts of 1881 (1st Extra. Sess.), c. 5; and see, *id.*, S. J. Res. No. III; see also Tenth Census of the United States, 1880, Statistics of the Population 77 (1881). The statute apportioning the General Assembly was Acts of 1881 (1st Extra. Sess.), c. 6.

[8] Acts of 1891, c. 22; Acts of 1891 (Extra. Sess.), c. 10. Reference to United States Census figures was allowed just as in 1881, see *supra*, n. 7. The United States Census reported 402,476 males 21 and over in Tennessee. The Eleventh Census of the United States, 1890, Population (Part I) 781 (1895). The Tennessee Secretary of State's Report gave a figure of 399,575. 1 Tenn. S. J., 1891, 473–474.

[9] Acts of 1901, S. J. Res. No. 35; Acts of 1901, c. 122. The Joint Resolution said: "The Federal census of 1900 has been very recently taken and by reference to said Federal census an accurate enumeration of the qualified voters of the respective counties of the State of Tennessee can be ascertained and thereby save the expense of an actual enumeration . . . ."

[10] For the history of legislative apportionment in Tennessee, including attempts made since 1901, see Tenn. S. J., 1959, 909–930;

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Between 1901 and 1961, Tennessee has experienced substantial growth and redistribution of her population. In 1901 the population was 2,020,616, of whom 487,380 were eligible to vote.[11] The 1960 Federal Census reports the State's population at 3,567,089, of whom 2,092,891 are eligible to vote.[12] The relative standings of the counties in terms of qualified voters have changed significantly. It is primarily the continued application of the 1901 Apportionment Act to this shifted and enlarged voting population which gives rise to the present controversy.

Indeed, the complaint alleges that the 1901 statute, even as of the time of its passage, "made no apportionment of Representatives and Senators in accordance with the constitutional formula . . . , but instead arbitrarily and capriciously apportioned representatives in the Senate and House without reference . . . to any logical or reasonable formula whatever." [13] It is further alleged

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and "A Documented Survey of Legislative Apportionment in Tennessee, 1870–1957," which is attached as exhibit 2 to the intervening complaint of Mayor West of Nashville, both prepared by the Tennessee State Historian, Dr. Robert H. White. Examples of preliminary steps are: In 1911, the Senate called upon the Redistricting Committee to make an enumeration of qualified voters and to use the Federal Census of 1910 as the basis. Acts of 1911, S. J. Res. No. 60, p. 315. Similarly, in 1961, the Senate called for appointment of a select committee to make an enumeration of qualified voters. Acts of 1961, S. J. Res. No. 47. In 1955, the Senate called for a study of reapportionment. Tenn. S. J., 1955, 224; but see *id.*, at 1403. Similarly, in 1961, the House directed the State Legislative Council to study methods of reapportionment. Acts of 1961, H. J. Res. No. 65.

[11] Twelfth Census of the United States, 1900, Population (Part 1) 39 (1901); (Part 2) 202 (1902).

[12] United States Census of Population: 1960, General Population Characteristics—Tennessee, Table 16 (1961).

[13] In the words of one of the intervening complaints, the apportionment was "wholly arbitrary, . . . and, indeed, based upon no lawfully pertinent factor whatever."

that "because of the population changes since 1900, and the failure of the Legislature to reapportion itself since 1901," the 1901 statute became "unconstitutional and obsolete." Appellants also argue that, because of the composition of the legislature effected by the 1901 Apportionment Act, redress in the form of a state constitutional amendment to change the entire mechanism for reapportioning, or any other change short of that, is difficult or impossible.[14] The complaint concludes that "these plain-

[14] The appellants claim that no General Assembly constituted according to the 1901 Act will submit reapportionment proposals either to the people or to a Constitutional Convention. There is no provision for popular initiative in Tennessee. Amendments proposed in the Senate or House must first be approved by a majority of all members of each House and again by two-thirds of the members in the General Assembly next chosen. The proposals are then submitted to the people at the next general election in which a Governor is to be chosen. Alternatively, the legislature may submit to the people at any general election the question of calling a convention to consider specified proposals. Such as are adopted at a convention do not, however, become effective unless approved by a majority of the qualified voters voting separately on each proposed change or amendment at an election fixed by the convention. Conventions shall not be held oftener than once in six years. Tenn. Const., Art. XI, § 3. Acts of 1951, c. 130, § 3, and Acts of 1957, c. 340, § 3, provided that delegates to the 1953 and 1959 conventions were to be chosen from the counties and floterial districts just as are members of the State House of Representatives. The General Assembly's call for a 1953 Constitutional Convention originally contained a provision "relating to the appointment [*sic*] of representatives and senators" but this was excised. Tenn. H. J., 1951, 784. A Resolution introduced at the 1959 Constitutional Convention and reported unfavorably by the Rules Committee of the Convention was as follows:

"By Mr. Chambliss (of Hamilton County), Resolution No. 12—Relative to Convention considering reapportionment, which is as follows:

"WHEREAS, there is a rumor that this Limited Convention has been called for the purpose of postponing for six years a Convention that would make a decision as to reapportionment; and

[*Footnote 14 continued on p. 194*]

tiffs and others similarly situated, are denied the equal protection of the laws accorded them by the Fourteenth Amendment to the Constitution of the United States by virtue of the debasement of their votes." [15] They seek a

"WHEREAS, there is pending in the United States Courts in Tennessee a suit under which parties are seeking, through decree, to compel reapportionment; and

"WHEREAS, it is said that this Limited Convention, which was called for limited consideration, is yet a Constitutional Convention within the language of the Constitution as to Constitutional Conventions, forbidding frequent Conventions in the last sentence of Article Eleven, Section 3, second paragraph, more often than each six years, to-wit:

" 'No such Convention shall be held oftener than once in six years.'

"NOW, THEREFORE, BE IT RESOLVED, That it is the consensus of opinion of the members of this Convention that since this is a Limited Convention as hereinbefore set forth another Convention could be had if it did not deal with the matters submitted to this Limited Convention.

"BE IT FURTHER RESOLVED, That it is the consensus of opinion of this Convention that a Convention should be called by the General Assembly for the purpose of considering reapportionment in order that a possibility of Court enforcement being forced on the Sovereign State of Tennessee by the Courts of the National Government may be avoided.

"BE IT FURTHER RESOLVED, That this Convention be adjourned for two years to meet again at the same time set forth in the statute providing for this Convention, and that it is the consensus of opinion of this body that it is within the power of the next General Assembly of Tennessee to broaden the powers of this Convention and to authorize and empower this Convention to consider a proper amendment to the Constitution that will provide, when submitted to the electorate, a method of reapportionment." Tenn. Constitutional Convention of 1959, The Journal and Debates, 35, 278.

[15] It is clear that appellants' federal constitutional claims rest exclusively on alleged violation of the Fourteenth Amendment. Their primary claim is that the 1901 statute violates the Equal Protection Clause of that amendment. There are allegations invoking the Due Process Clause but from the argument and the exhibits it appears that the Due Process Clause argument is directed at certain tax statutes. Insofar as the claim involves the validity of those statutes

declaration that the 1901 statute is unconstitutional and an injunction restraining the appellees from acting to conduct any further elections under it. They also pray that unless and until the General Assembly enacts a valid reapportionment, the District Court should either decree a reapportionment by mathematical application of the Tennessee constitutional formulae to the most recent Federal Census figures, or direct the appellees to conduct legislative elections, primary and general, at large. They also pray for such other and further relief as may be appropriate.

I.

The District Court's Opinion and Order of Dismissal.

Because we deal with this case on appeal from an order of dismissal granted on appellees' motions, precise identi-

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under the Due Process Clause we find it unnecessary to decide its merits. And if the allegations regarding the tax statutes are designed as the framework for proofs as to the effects of the allegedly discriminatory apportionment, we need not rely upon them to support our holding that the complaint states a federal constitutional claim of violation of the Equal Protection Clause. Whether, when the issue to be decided is one of the constitutional adequacy of this particular apportionment, taxation arguments and exhibits as now presented add anything, or whether they could add anything however presented, is for the District Court in the first instance to decide.

The complaint, in addition to the claims under the Federal Constitution, also alleges rights, and the General Assembly's duties, under the Tennessee Constitution. Since we hold that appellants have—if it develops at trial that the facts support the allegations—a cognizable federal constitutional cause of action resting in no degree on rights guaranteed or putatively guaranteed by the Tennessee Constitution, we do not consider, let alone enforce, rights under a State Constitution which go further than the protections of the Fourteenth Amendment. Lastly, we need not assess the legal significance, in reaching our conclusion, of the statements of the complaint that the apportionment effected today under the 1901 Act is "contrary to the philosophy of government in the United States and all Anglo-Saxon jurisprudence . . . ."

fication of the issues presently confronting us demands clear exposition of the grounds upon which the District Court rested in dismissing the case. The dismissal order recited that the court sustained the appellees' grounds "(1) that the Court lacks jurisdiction of the subject matter, and (2) that the complaint fails to state a claim upon which relief can be granted . . . ."

In the setting of a case such as this, the recited grounds embrace two possible reasons for dismissal:

First: That the facts and injury alleged, the legal bases invoked as creating the rights and duties relied upon, and the relief sought, fail to come within that language of Article III of the Constitution and of the jurisdictional statutes which define those matters concerning which United States District Courts are empowered to act;

Second: That, although the matter is cognizable and facts are alleged which establish infringement of appellants' rights as a result of state legislative action departing from a federal constitutional standard, the court will not proceed because the matter is considered unsuited to judicial inquiry or adjustment.

We treat the first ground of dismissal as "lack of jurisdiction of the subject matter." The second we consider to result in a failure to state a justiciable cause of action.

The District Court's dismissal order recited that it was issued in conformity with the court's *per curiam* opinion. The opinion reveals that the court rested its dismissal upon lack of subject-matter jurisdiction and lack of a justiciable cause of action without attempting to distinguish between these grounds. After noting that the plaintiffs challenged the existing legislative apportionment in Tennessee under the Due Process and Equal Protection Clauses, and summarizing the supporting allegations and the relief requested, the court stated that

> "The action is presently before the Court upon the defendants' motion to dismiss predicated upon three

> grounds: first, that the Court lacks jurisdiction of the subject matter; second, that the complaints fail to state a claim upon which relief can be granted; and third, that indispensable party defendants are not before the Court." 179 F. Supp., at 826.

The court proceeded to explain its action as turning on the case's presenting a "question of the distribution of political strength for legislative purposes." For,

> "From a review of [numerous Supreme Court] . . . decisions there can be no doubt that the federal rule, as enunciated and applied by the Supreme Court, is that the federal courts, whether from a lack of jurisdiction or from the inappropriateness of the subject matter for judicial consideration, will not intervene in cases of this type to compel legislative reapportionment." 179 F. Supp., at 826.

The court went on to express doubts as to the feasibility of the various possible remedies sought by the plaintiffs. 179 F. Supp., at 827–828. Then it made clear that its dismissal reflected a view not of doubt that violation of constitutional rights was alleged, but of a court's impotence to correct that violation:

> "With the plaintiffs' argument that the legislature of Tennessee is guilty of a clear violation of the state constitution and of the rights of the plaintiffs the Court entirely agrees. It also agrees that the evil is a serious one which should be corrected without further delay. But even so the remedy in this situation clearly does not lie with the courts. It has long been recognized and is accepted doctrine that there are indeed some rights guaranteed by the Constitution for the violation of which the courts cannot give redress." 179 F. Supp., at 828.

In light of the District Court's treatment of the case, we hold today only (a) that the court possessed jurisdiction of the subject matter; (b) that a justiciable cause of

action is stated upon which appellants would be entitled to appropriate relief; and (c) because appellees raise the issue before this Court, that the appellants have standing to challenge the Tennessee apportionment statutes.[16] Beyond noting that we have no cause at this stage to doubt the District Court will be able to fashion relief if violations of constitutional rights are found, it is improper now to consider what remedy would be most appropriate if appellants prevail at the trial.

II.

Jurisdiction of the Subject Matter.

The District Court was uncertain whether our cases withholding federal judicial relief rested upon a lack of federal jurisdiction or upon the inappropriateness of the subject matter for judicial consideration—what we have designated "nonjusticiability." The distinction between the two grounds is significant. In the instance of nonjusticiability, consideration of the cause is not wholly and immediately foreclosed; rather, the Court's inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded. In the instance of lack of jurisdiction the cause either does not "arise under" the Federal Constitution, laws or treaties (or fall within one of the other enumerated categories of Art. III, § 2), or is not a "case or controversy" within the meaning of that section; or the cause is not one described by any jurisdictional statute. Our conclusion, see pp. 208–237, *infra,* that this cause presents no nonjusticiable "political question" settles the only possible doubt that it is a case or controversy. Under the present heading of "Jurisdic-

[16] We need not reach the question of indispensable parties because the District Court has not yet decided it.

tion of the Subject Matter" we hold only that the matter set forth in the complaint does arise under the Constitution and is within 28 U. S. C. § 1343.

Article III, § 2, of the Federal Constitution provides that "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . ." It is clear that the cause of action is one which "arises under" the Federal Constitution. The complaint alleges that the 1901 statute effects an apportionment that deprives the appellants of the equal protection of the laws in violation of the Fourteenth Amendment. Dismissal of the complaint upon the ground of lack of jurisdiction of the subject matter would, therefore, be justified only if that claim were "so attenuated and unsubstantial as to be absolutely devoid of merit," *Newburyport Water Co.* v. *Newburyport,* 193 U. S. 561, 579, or "frivolous," *Bell* v. *Hood,* 327 U. S. 678, 683.[17] That the claim is unsubstantial must be "very plain." *Hart* v. *Keith Vaudeville Exchange,* 262 U. S. 271, 274. Since the District Court obviously and correctly did not deem the asserted federal constitutional claim unsubstantial and frivolous, it should not have dismissed the complaint for want of jurisdiction of the subject matter. And of course no further consideration of the merits of the claim is relevant to a determination of the court's jurisdiction of the subject matter. We said in an earlier voting case from Tennessee: "It is obvious . . . that the court, in dismissing for want of jurisdiction, was controlled by what it deemed to be the want of merit in the averments which were made in the complaint as to the violation of the Federal right. But as the very nature of the controversy was Federal, and, therefore,

[17] The accuracy of calling even such dismissals "jurisdictional" was questioned in *Bell* v. *Hood.* See 327 U. S., at 683.

jurisdiction existed, whilst the opinion of the court as to the want of merit in the cause of action might have furnished ground for dismissing for that reason, it afforded no sufficient ground for deciding that the action was not one arising under the Constitution and laws of the United States." *Swafford* v. *Templeton,* 185 U. S. 487, 493. "For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction." *Bell* v. *Hood,* 327 U. S. 678, 682. See also *Binderup* v. *Pathe Exchange,* 263 U. S. 291, 305–308.

Since the complaint plainly sets forth a case arising under the Constitution, the subject matter is within the federal judicial power defined in Art. III, § 2, and so within the power of Congress to assign to the jurisdiction of the District Courts. Congress has exercised that power in 28 U. S. C. § 1343 (3):

> "The district courts shall have original jurisdiction of any civil action authorized by law [18] to be commenced by any person . . . [t]o redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States . . . ." [19]

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[18] 42 U. S. C. § 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[19] This Court has frequently sustained District Court jurisdiction under 28 U. S. C. § 1343 (3) or its predecessors to entertain suits to redress deprivations of rights secured against state infringement by the Equal Protection and Due Process Clauses of the Fourteenth

An unbroken line of our precedents sustains the federal courts' jurisdiction of the subject matter of federal constitutional claims of this nature. The first cases involved the redistricting of States for the purpose of electing Representatives to the Federal Congress. When the Ohio Supreme Court sustained Ohio legislation against an attack for repugnancy to Art. I, § 4, of the Federal Constitution, we affirmed on the merits and expressly refused to dismiss for want of jurisdiction "In view . . . of the subject-matter of the controversy and the Federal characteristics which inhere in it . . . ." *Ohio ex rel. Davis* v. *Hildebrant,* 241 U. S. 565, 570. When the Minnesota Supreme Court affirmed the dismissal of a suit to enjoin the Secretary of State of Minnesota from acting under Minnesota redistricting legislation, we reviewed the constitutional merits of the legislation and reversed the State Supreme Court. *Smiley* v. *Holm,* 285 U. S. 355. And see companion cases from the New York Court of Appeals and the Missouri Supreme Court, *Koenig* v. *Flynn,* 285 U. S. 375; *Carroll* v. *Becker,* 285 U. S. 380. When a three-judge District Court, exercising jurisdiction under the predecessor of 28 U. S. C. § 1343 (3), permanently enjoined officers of the State of Mississippi from conducting an election of Representatives under a Mississippi redistricting act, we reviewed the federal questions on the merits and reversed the District Court. *Wood* v. *Broom,* 287 U. S. 1, reversing 1 F. Supp. 134. A similar decree of a District Court, exercising jurisdiction under the same statute, concerning a Kentucky redistricting act, was

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Amendment. *Douglas* v. *Jeannette,* 319 U. S. 157; *Stefanelli* v. *Minard,* 342 U. S. 117; cf. *Nixon* v. *Herndon,* 273 U. S. 536; *Nixon* v. *Condon,* 286 U. S. 73; *Snowden* v. *Hughes,* 321 U. S. 1; *Smith* v. *Allwright,* 321 U. S. 649; *Monroe* v. *Pape,* 365 U. S. 167; *Egan* v. *Aurora,* 365 U. S. 514.

reviewed and the decree reversed. *Mahan* v. *Hume,* 287 U. S. 575, reversing 1 F. Supp. 142.[20]

The appellees refer to *Colegrove* v. *Green,* 328 U. S. 549, as authority that the District Court lacked jurisdiction of the subject matter. Appellees misconceive the holding of that case. The holding was precisely contrary to their reading of it. Seven members of the Court participated in the decision. Unlike many other cases in this field which have assumed without discussion that there was jurisdiction, all three opinions filed in *Colegrove* discussed the question. Two of the opinions expressing the views of four of the Justices, a majority, flatly held that there was jurisdiction of the subject matter. MR. JUSTICE BLACK joined by MR. JUSTICE DOUGLAS and Mr. Justice Murphy stated: "It is my judgment that the District Court had jurisdiction . . . ," citing the predecessor of 28 U. S. C. § 1343 (3), and *Bell* v. *Hood, supra.* 328 U. S., at 568. Mr. Justice Rutledge, writing separately, expressed agreement with this conclusion. 328 U. S., at 564, 565, n. 2. Indeed, it is even questionable that the opinion of MR. JUSTICE FRANKFURTER, joined by Justices Reed and Burton, doubted jurisdiction of the subject matter. Such doubt would have been inconsistent with the professed willingness to turn the decision on either the majority or concurring views in *Wood* v. *Broom, supra.* 328 U. S., at 551.

Several subsequent cases similar to *Colegrove* have been decided by the Court in summary *per curiam* statements. None was dismissed for want of jurisdiction of the subject matter. *Cook* v. *Fortson,* 329 U. S. 675; *Turman* v.

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[20] Since that case was not brought to the Court until after the election had been held, the Court cited not only *Wood* v. *Broom,* but also directed dismissal for mootness, citing *Brownlow* v. *Schwartz,* 261 U. S. 216.

Duckworth, ibid.; Colegrove v. *Barrett,* 330 U. S. 804; [21] *Tedesco* v. *Board of Supervisors,* 339 U. S. 940; *Remmey* v. *Smith,* 342 U. S. 916; *Cox* v. *Peters,* 342 U. S. 936; *Anderson* v. *Jordan,* 343 U. S. 912; *Kidd* v. *McCanless,* 352 U. S. 920; *Radford* v. *Gary,* 352 U. S. 991; *Hartsfield* v. *Sloan,* 357 U. S. 916; *Matthews* v. *Handley,* 361 U. S. 127.[22]

Two cases decided with opinions after *Colegrove* likewise plainly imply that the subject matter of this suit is within District Court jurisdiction. In *MacDougall* v. *Green,* 335 U. S. 281, the District Court dismissed for want of jurisdiction, which had been invoked under 28 U. S. C. § 1343 (3), a suit to enjoin enforcement of the requirement that nominees for state-wide elections be supported by a petition signed by a minimum number of persons from at least 50 of the State's 102 counties. This Court's disagreement with that action is clear since the Court affirmed the judgment after a review of the merits and concluded that the particular claim there was without merit. In *South* v. *Peters,* 339 U. S. 276, we affirmed the dismissal of an attack on the Georgia "county unit" system but founded our action on a ground that plainly would not have been reached if the lower court lacked jurisdiction of the subject matter, which allegedy existed under 28 U. S. C. § 1343 (3). The express words of our holding were that "Federal courts consistently refuse to exercise their equity powers in cases posing

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[21] Compare *Boeing Aircraft Co.* v. *King County,* 330 U. S. 803 ("the appeal is dismissed for want of jurisdiction"). See *Coleman* v. *Miller,* 307 U. S. 433, 440.

[22] *Matthews* did affirm a judgment that may be read as a dismissal for want of jurisdiction, 179 F. Supp. 470. However, the motion to affirm also rested on the ground of failure to state a claim upon which relief could be granted. Cf. text following, on *MacDougall* v. *Green.* And see text, *infra,* p. 236.

political issues arising from a state's geographical distribution of electoral strength among its political subdivisions." 339 U. S., at 277.

We hold that the District Court has jurisdiction of the subject matter of the federal constitutional claim asserted in the complaint.

III.

Standing.

A federal court cannot "pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies." *Liverpool Steamship Co.* v. *Commissioners of Emigration,* 113 U. S. 33, 39. Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing. It is, of course, a question of federal law.

The complaint was filed by residents of Davidson, Hamilton, Knox, Montgomery, and Shelby Counties. Each is a person allegedly qualified to vote for members of the General Assembly representing his county.[23] These appellants sued "on their own behalf and on behalf of all qualified voters of their respective counties, and further, on behalf of all voters of the State of Tennessee who

[23] The Mayor of Nashville suing "on behalf of himself and all residents of the City of Nashville, Davidson County, . . ." and the Cities of Chattanooga (Hamilton County) and Knoxville (Knox County), each suing on behalf of its residents, were permitted to intervene as parties plaintiff. Since they press the same claims as do the initial plaintiffs, we find it unnecessary to decide whether the intervenors would have standing to maintain this action in their asserted representative capacities.

are similarly situated . . . ." [24] The appellees are the Tennessee Secretary of State, Attorney General, Coordinator of Elections, and members of the State Board of Elections; the members of the State Board are sued in their own right and also as representatives of the County Election Commissioners whom they appoint.[25]

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[24] The complaint also contains an averment that the appellants sue "on their own behalf and *on behalf of all other voters* in the State of Tennessee." (Emphasis added.) This may be read to assert a claim that voters in counties allegedly over-represented in the General Assembly also have standing to complain. But it is not necessary to decide that question in this case.

[25] The duties of the respective appellees are alleged to be as follows:

"Defendant, *Joe C. Carr,* is the duly elected, qualified and acting Secretary of State of the State of Tennessee, with his office in Nashville in said State, and as such he is charged with the duty of furnishing blanks, envelopes and information slips to the County Election Commissioners, certifying the results of elections and maintaining the records thereof; and he is further ex officio charged, together with the Governor and the Attorney General, with the duty of examining the election returns received from the County Election Commissioners and declaring the election results, by the applicable provisions of the Tennessee Code Annotated, and by Chapter 164 of the Acts of 1949, inter alia.

"Defendant, *George F. McCanless,* is the duly appointed and acting Attorney General of the State of Tennessee, with his office in Nashville in said State, and is charged with the duty of advising the officers of the State upon the law, and is made by Section 23–1107 of the Tennessee Code Annotated a necessary party defendant in any declaratory judgment action where the constitutionality of statutes of the State of Tennessee is attacked, and he is ex-officio charged, together with the Governor and the Secretary of State, with the duty of declaring the election results, under Section 2–140 of the Tennessee Code Annotated.

"Defendant, *Jerry McDonald,* is the duly appointed Coordinator of Elections in the State of Tennessee, with his office in Nashville, Tennessee, and as such official, is charged with the duties set forth in the public law enacted by the 1959 General Assembly of Tennessee creating said office.

"Defendants, *Dr. Sam Coward, James Alexander,* and *Hubert Brooks* are the duly appointed and qualified members constituting

We hold that the appellants do have standing to maintain this suit. Our decisions plainly support this conclusion. Many of the cases have assumed rather than articulated the premise in deciding the merits of similar claims.[26] And *Colegrove* v. *Green, supra,* squarely held that voters who allege facts showing disadvantage to themselves as individuals have standing to sue.[27] A num-

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the State Board of Elections, and as such they are charged with the duty of appointing the Election Commissioners for all the counties of the State of Tennessee, the organization and supervision of the biennial elections as provided by the Statutes of Tennessee, Chapter 9 of Title 2 of the Tennessee Code Annotated, Sections 2–901, et seq.

"That this action is brought against the aforenamed defendants in their representative capacities, and that said Election Commissioners are sued also as representatives of all of the County Election Commissioners in the State of Tennessee, such persons being so numerous as to make it impracticable to bring them all before the court; that there is a common question of law involved, namely, the constitutionality of Tennessee laws set forth in the Tennessee Code Annotated, Section 3–101 through Section 3–109, inclusive; that common relief is sought against all members of said Election Commissions in their official capacities, it being the duties of the aforesaid County Election Commissioners, within their respective jurisdictions, to appoint the judges of elections, to maintain the registry of qualified voters of said County, certify the results of elections held in said County to the defendants State Board of Elections and Secretary of State, and of preparing ballots and taking other steps to prepare for and hold elections in said Counties by virtue of Sections 2–1201, et seq. of Tennessee Code Annotated, and Section 2–301, et seq. of Tennessee Code Annotated, and Chapter 164 of the Acts of 1949, inter alia."

The question whether the named defendants are sufficient parties remains open for consideration on remand.

[26] *Smiley* v. *Holm, supra,* at 361 (" 'citizen, elector and taxpayer' of the State"); *Koenig* v. *Flynn, supra,* at 379 (" 'citizens and voters' of the State") *Wood* v. *Broom, supra,* at 4 ("citizen of Mississippi, a qualified elector under its laws, and also qualified to be a candidate for election as representative in Congress"); cf. *Carroll* v. *Becker, supra* (candidate for office).

[27] Mr. Justice Rutledge was of the view that any question of standing was settled in *Smiley* v. *Holm, supra;* Mr. Justice Black stated "that appellants had standing to sue, since the facts alleged show that

ber of cases decided after *Colegrove* recognized the standing of the voters there involved to bring those actions.[28]

These appellants seek relief in order to protect or vindicate an interest of their own, and of those similarly situated. Their constitutional claim is, in substance, that the 1901 statute constitutes arbitrary and capricious state action, offensive to the Fourteenth Amendment in its irrational disregard of the standard of apportionment prescribed by the State's Constitution or of any standard, effecting a gross disproportion of representation to voting population. The injury which appellants assert is that this classification disfavors the voters in the counties in which they reside, placing them in a position of constitutionally unjustifiable inequality *vis-à-vis* voters

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they have been injured as individuals." He relied on *Coleman* v. *Miller*, 307 U. S. 433, 438, 467. See 328 U. S. 564, 568.

Commentators have suggested that the following statement in MR. JUSTICE FRANKFURTER's opinion might imply a view that appellants there had no standing: "This is not an action to recover for damage because of the discriminatory exclusion of a plaintiff from rights enjoyed by other citizens. The basis for the suit is not a private wrong, but a wrong suffered by Illinois as a polity." 328 U. S., at 552. See Jaffe, Standing to Secure Judicial Review: Public Actions, 74 Harv. L. Rev. 1265, 1298 (1961); Lewis, Legislative Apportionment and the Federal Courts, 71 Harv. L. Rev. 1057, 1081–1083 (1958). But since the opinion goes on to consider the merits, it seems that this statement was not intended to intimate any view that the plaintiffs in that action lacked standing. Nor do the cases cited immediately after the above quotation deal with standing. See especially *Lane* v. *Wilson*, 307 U. S. 268, 272–273.

[28] *MacDougall* v. *Green*, *supra*, at 282 ("the 'Progressive Party,' its nominees for United States Senator, Presidential Electors, and State offices, and several Illinois voters"); *South* v. *Peters*, *supra*, at 277 ("residents of the most populous county in the State"); *Radford* v. *Gary*, 145 F. Supp. 541, 542 ("citizen of Oklahoma and resident and voter in the most populous county"); *Matthews* v. *Handley*, *supra* ("citizen of the State"); see also *Hawke* v. *Smith* (*No. 1*), 253 U. S. 221; *Leser* v. *Garnett*, 258 U. S. 130; *Coleman* v. *Miller*, 307 U. S. 433, 437–446.

in irrationally favored counties. A citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution, when such impairment resulted from dilution by a false tally, cf. *United States* v. *Classic,* 313 U. S. 299; or by a refusal to count votes from arbitrarily selected precincts, cf. *United States* v. *Mosley,* 238 U. S. 383, or by a stuffing of the ballot box, cf. *Ex parte Siebold,* 100 U. S. 371; *United States* v. *Saylor,* 322 U. S. 385.

It would not be necessary to decide whether appellants' allegations of impairment of their votes by the 1901 apportionment will, ultimately, entitle them to any relief, in order to hold that they have standing to seek it. If such impairment does produce a legally cognizable injury, they are among those who have sustained it. They are asserting "a plain, direct and adequate interest in maintaining the effectiveness of their votes," *Coleman* v. *Miller,* 307 U. S., at 438, not merely a claim of "the right, possessed by every citizen, to require that the Government be administered according to law . . . ." *Fairchild* v. *Hughes,* 258 U. S. 126, 129; compare *Leser* v. *Garnett,* 258 U. S. 130. They are entitled to a hearing and to the District Court's decision on their claims. "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury* v. *Madison,* 1 Cranch 137, 163.

IV.

Justiciability.

In holding that the subject matter of this suit was not justiciable, the District Court relied on *Colegrove* v. *Green, supra,* and subsequent *per curiam* cases.[29] The

[29] *Cook* v. *Fortson,* 329 U. S. 675; *Turman* v. *Duckworth, ibid.; Colegrove* v. *Barrett,* 330 U. S. 804; *MacDougall* v. *Green,* 335 U. S. 281; *South* v. *Peters,* 339 U. S. 276; *Remmey* v. *Smith,* 342 U. S. 916;

court stated: "From a review of these decisions there can be no doubt that the federal rule . . . is that the federal courts . . . will not intervene in cases of this type to compel legislative reapportionment." 179 F. Supp., at 826. We understand the District Court to have read the cited cases as compelling the conclusion that since the appellants sought to have a legislative apportionment held unconstitutional, their suit presented a "political question" and was therefore nonjusticiable. We hold that this challenge to an apportionment presents no nonjusticiable "political question." The cited cases do not hold the contrary.

Of course the mere fact that the suit seeks protection of a political right does not mean it presents a political question. Such an objection "is little more than a play upon words." *Nixon* v. *Herndon,* 273 U. S. 536, 540. Rather, it is argued that apportionment cases, whatever the actual wording of the complaint, can involve no federal constitutional right except one resting on the guaranty of a republican form of government,[30] and that complaints based on that clause have been held to present political questions which are nonjusticiable.

We hold that the claim pleaded here neither rests upon nor implicates the Guaranty Clause and that its justiciability is therefore not foreclosed by our decisions of cases involving that clause. The District Court misinterpreted *Colegrove* v. *Green* and other decisions of this Court on which it relied. Appellants' claim that they are being denied equal protection is justiciable, and if

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Anderson v. *Jordan,* 343 U. S. 912; *Kidd* v. *McCanless,* 352 U. S. 920; *Radford* v. *Gary,* 352 U. S. 991.

[30] "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence." U. S. Const., Art. IV, § 4.

"discrimination is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights." *Snowden* v. *Hughes,* 321 U. S. 1, 11. To show why we reject the argument based on the Guaranty Clause, we must examine the authorities under it. But because there appears to be some uncertainty as to why those cases did present political questions, and specifically as to whether this apportionment case is like those cases, we deem it necessary first to consider the contours of the "political question" doctrine.

Our discussion, even at the price of extending this opinion, requires review of a number of political question cases, in order to expose the attributes of the doctrine—attributes which, in various settings, diverge, combine, appear, and disappear in seeming disorderliness. Since that review is undertaken solely to demonstrate that neither singly nor collectively do these cases support a conclusion that this apportionment case is nonjusticiable, we of course do not explore their implications in other contexts. That review reveals that in the Guaranty Clause cases and in the other "political question" cases, it is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the "political question."

We have said that "In determining whether a question falls within [the political question] category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations." *Coleman* v. *Miller,* 307 U. S. 433, 454–455. The nonjusticiability of a political question is primarily a function of the separation of powers. Much confusion results from the capacity of the "political question" label to obscure the need for

case-by-case inquiry. Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution. To demonstrate this requires no less than to analyze representative cases and to infer from them the analytical threads that make up the political question doctrine. We shall then show that none of those threads catches this case.

Foreign relations: There are sweeping statements to the effect that all questions touching foreign relations are political questions.[31] Not only does resolution of such issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature;[32] but many such questions uniquely demand single-voiced statement of the Government's views.[33] Yet it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible conse-

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[31] *E. g.*, "The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." *Oetjen* v. *Central Leather Co.*, 246 U. S. 297, 302.

[32] See *Doe* v. *Braden*, 16 How. 635, 657; *Taylor* v. *Morton*, 23 Fed. Cas., No. 13,799 (C. C. D. Mass.) (Mr. Justice Curtis), affirmed, 2 Black 481.

[33] See *Doe* v. *Braden*, 16 How. 635, 657.

quences of judicial action. For example, though a court will not ordinarily inquire whether a treaty has been terminated, since on that question "governmental action . . . must be regarded as of controlling importance," if there has been no conclusive "governmental action" then a court can construe a treaty and may find it provides the answer. Compare *Terlinden* v. *Ames,* 184 U. S. 270, 285, with *Society for the Propagation of the Gospel in Foreign Parts* v. *New Haven,* 8 Wheat. 464, 492–495.[34] Though a court will not undertake to construe a treaty in a manner inconsistent with a subsequent federal statute, no similar hesitancy obtains if the asserted clash is with state law. Compare *Whitney* v. *Robertson,* 124 U. S. 190, with *Kolovrat* v. *Oregon,* 366 U. S. 187.

While recognition of foreign governments so strongly defies judicial treatment that without executive recognition a foreign state has been called "a republic of whose existence we know nothing," [35] and the judiciary ordinarily follows the executive as to which nation has sovereignty over disputed territory,[36] once sovereignty over an area is politically determined and declared, courts may examine the resulting status and decide independently whether a statute applies to that area.[37] Similarly, recognition of belligerency abroad is an executive responsibility, but if the executive proclamations fall short of an explicit answer, a court may construe them seeking, for example, to determine whether the situation is such that statutes designed to assure American neutrality have

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[34] And see *Clark* v. *Allen,* 331 U. S. 503.

[35] *United States* v. *Klintock,* 5 Wheat. 144, 149; see also *United States* v. *Palmer,* 3 Wheat. 610, 634–635.

[36] *Foster & Elam* v. *Neilson,* 2 Pet. 253, 307; and see *Williams* v. *Suffolk Insurance Co.,* 13 Pet. 415, 420.

[37] *Vermilya-Brown Co.* v. *Connell,* 335 U. S. 377, 380; *De Lima* v. *Bidwell,* 182 U. S. 1, 180–200.

become operative. *The Three Friends,* 166 U. S. 1, 63, 66. Still again, though it is the executive that determines a person's status as representative of a foreign government, *Ex parte Hitz,* 111 U. S. 766, the executive's statements will be construed where necessary to determine the court's jurisdiction, *In re Baiz,* 135 U. S. 403. Similar judicial action in the absence of a recognizedly authoritative executive declaration occurs in cases involving the immunity from seizure of vessels owned by friendly foreign governments. Compare *Ex parte Peru,* 318 U. S. 578, with *Mexico* v. *Hoffman,* 324 U. S. 30, 34–35.

Dates of duration of hostilities: Though it has been stated broadly that "the power which declared the necessity is the power to declare its cessation, and what the cessation requires," *Commercial Trust Co.* v. *Miller,* 262 U. S. 51, 57, here too analysis reveals isolable reasons for the presence of political questions, underlying this Court's refusal to review the political departments' determination of when or whether a war has ended. Dominant is the need for finality in the political determination, for emergency's nature demands "A prompt and unhesitating obedience," *Martin* v. *Mott,* 12 Wheat. 19, 30 (calling up of militia). Moreover, "the cessation of hostilities does not necessarily end the war power. It was stated in *Hamilton* v. *Kentucky Distilleries & W. Co.,* 251 U. S. 146, 161, that the war power includes the power 'to remedy the evils which have arisen from its rise and progress' and continues during that emergency. *Stewart* v. *Kahn,* 11 Wall. 493, 507." *Fleming* v. *Mohawk Wrecking Co.,* 331 U. S. 111, 116. But deference rests on reason, not habit.[38] The question in a particular case may not seriously implicate considerations of finality—*e. g.,* a public program of importance

[38] See, *e. g., Home Building & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, 426.

(rent control) yet not central to the emergency effort.[39] Further, clearly definable criteria for decision may be available. In such case the political question barrier falls away: "[A] Court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared. . . . [It can] inquire whether the exigency still existed upon which the continued operation of the law depended." *Chastleton Corp.* v. *Sinclair,* 264 U. S. 543, 547–548.[40] Compare *Woods* v. *Miller Co.,* 333 U. S. 138. On the other hand, even in private litigation which directly implicates no feature of separation of powers, lack of judicially discoverable standards and the drive for even-handed application may impel reference to the political departments' determination of dates of hostilities' beginning and ending. *The Protector,* 12 Wall. 700.

Validity of enactments: In *Coleman* v. *Miller, supra,* this Court held that the questions of how long a proposed amendment to the Federal Constitution remained open to ratification, and what effect a prior rejection had on a subsequent ratification, were committed to congressional resolution and involved criteria of decision that necessarily escaped the judicial grasp.[41] Similar considerations apply to the enacting process: "The respect due to coequal and independent departments," and the need for finality and certainty about the status of a statute contribute to judicial reluctance to inquire whether, as passed, it complied with all requisite formalities. *Field* v. *Clark,* 143 U. S. 649, 672, 676–677; see *Leser* v. *Garnett,* 258 U. S. 130, 137. But it is not true that courts will never delve

[39] Contrast *Martin* v. *Mott, supra.*

[40] But cf. *Dakota Central Tel. Co.* v. *South Dakota,* 250 U. S. 163, 184, 187.

[41] Cf. *Dillon* v. *Gloss,* 256 U. S. 368. See also *United States* v. *Sprague,* 282 U. S. 716, 732.

into a legislature's records upon such a quest: If the enrolled statute lacks an effective date, a court will not hesitate to seek it in the legislative journals in order to preserve the enactment. *Gardner* v. *The Collector,* 6 Wall. 499. The political question doctrine, a tool for maintenance of governmental order, will not be so applied as to promote only disorder.

The status of Indian tribes: This Court's deference to the political departments in determining whether Indians are recognized as a tribe, while it reflects familiar attributes of political questions,[42] *United States* v. *Holliday,* 3 Wall. 407, 419, also has a unique element in that "the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist no where else. . . . [The Indians are] domestic dependent nations . . . in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian." *The Cherokee Nation* v. *Georgia,* 5 Pet. 1, 16, 17.[43] Yet, here too, there is no blanket rule. While

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[42] See also *Fellows* v. *Blacksmith,* 19 How. 366, 372; *United States* v. *Old Settlers,* 148 U. S. 427, 466; and compare *Doe* v. *Braden,* 16 How. 635, 657.

[43] This case, so frequently cited for the broad proposition that the status of an Indian tribe is a matter for the political departments, is in fact a noteworthy example of the limited and precise impact of a political question. The Cherokees brought an original suit in this Court to enjoin Georgia's assertion of jurisdiction over Cherokee territory and abolition of Cherokee government and laws. Unquestionably the case lay at the vortex of most fiery political embroilment. See 1 Warren, The Supreme Court in United States History (Rev. ed.), 729–779. But in spite of some broader language in separate opinions, all that the Court held was that it possessed no original jurisdiction over the suit: for the Cherokees could in no view be considered either a State of this Union or a "foreign state." Chief Justice Marshall treated the question as one of *de novo* interpretation of words in the Constitution. The Chief Justice did say that "The acts of our government plainly recognize the Cherokee nation

" 'It is for [Congress] . . . , and not for the courts, to determine when the true interests of the Indian require his release from [the] condition of tutelage' . . . , it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe . . . ." *United States* v. *Sandoval,* 231 U. S. 28, 46. Able to discern what is "distinctly Indian," *ibid.,* the courts will strike down

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as a state, and the courts are bound by those acts," but here he referred to their existence "as a state, as a distinct political society, separated from others . . . ." From there he went to "A question of much more difficulty . . . . Do the Cherokees constitute a foreign state in the sense of the constitution?" *Id.,* at 16. Thus, while the Court referred to "the political" for the decision whether the tribe was an entity, a separate polity, it held that whether being an entity the tribe had such status as to be entitled to sue originally was a judicially soluble issue: criteria were discoverable in relevant phrases of the Constitution and in the common understanding of the times. As to this issue, the Court was not hampered by problems of the management of unusual evidence or of possible interference with a congressional program. Moreover, Chief Justice Marshall's dictum that "It savours too much of the exercise of political power to be within the proper province of the judicial department," *id.,* at 20, was not addressed to the issue of the Cherokees' status to sue, but rather to the breadth of the claim asserted and the impropriety of the relief sought. Compare *Georgia* v. *Stanton,* 6 Wall. 50, 77. The Chief Justice made clear that if the issue of the Cherokees' rights arose in a customary legal context, "a proper case with proper parties," it would be justiciable. Thus, when the same dispute produced a case properly brought, in which the right asserted was one of protection under federal treaties and laws from conflicting state law, and the relief sought was the voiding of a conviction under that state law, the Court did void the conviction. *Worcester* v. *Georgia,* 6 Pet. 515. There, the fact that the tribe was a separate polity served as a datum contributing to the result, and despite the consequences in a heated federal-state controversy and the opposition of the other branches of the National Government, the judicial power acted to reverse the State Supreme Court. An example of similar isolation of a political question in the decision of a case is *Luther* v. *Borden,* 7 How. 1, see *infra.*

any heedless extension of that label. They will not stand impotent before an obvious instance of a manifestly unauthorized exercise of power.

It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question's presence. The doctrine of which we treat is one of "political questions," not one of "political cases." The courts cannot reject as "no law suit" a bona fide controversy as to whether some action denominated "political" exceeds constitutional authority. The cases we have reviewed show the necessity for discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloguing.

But it is argued that this case shares the characteristics of decisions that constitute a category not yet considered, cases concerning the Constitution's guaranty, in Art. IV,

§ 4, of a republican form of government. A conclusion as to whether the case at bar does present a political question cannot be confidently reached until we have considered those cases with special care. We shall discover that Guaranty Clause claims involve those elements which define a "political question," and for that reason and no other, they are nonjusticiable. In particular, we shall discover that the nonjusticiability of such claims has nothing to do with their touching upon matters of state governmental organization.

Republican form of government: Luther v. *Borden,* 7 How. 1, though in form simply an action for damages for trespass was, as Daniel Webster said in opening the argument for the defense, "an unusual case." [44] The defendants, admitting an otherwise tortious breaking and entering, sought to justify their action on the ground that they were agents of the established lawful government of Rhode Island, which State was then under martial law to defend itself from active insurrection; that the plaintiff was engaged in that insurrection; and that they entered under orders to arrest the plaintiff. The case arose "out of the unfortunate political differences which agitated the people of Rhode Island in 1841 and 1842," 7 How., at 34, and which had resulted in a situation wherein two groups laid competing claims to recognition as the lawful government.[45] The plaintiff's right to

[44] 7 How., at 29. And see 11 The Writings and Speeches of Daniel Webster 217 (1903).

[45] See Mowry, The Dorr War (1901), and its exhaustive bibliography. And for an account of circumstances surrounding the decicion here, see 2 Warren, The Supreme Court in United States History (Rev. ed.), 185–195.

Dorr himself, head of one of the two groups and held in a Rhode Island jail under a conviction for treason, had earlier sought a decision from the Supreme Court that his was the lawful government. His application for original habeas corpus in the Supreme Court was

recover depended upon which of the two groups was entitled to such recognition; but the lower court's refusal to receive evidence or hear argument on that issue, its charge to the jury that the earlier established or "charter" government was lawful, and the verdict for the defendants, were affirmed upon appeal to this Court.

Chief Justice Taney's opinion for the Court reasoned as follows: (1) If a court were to hold the defendants' acts unjustified because the charter government had no legal existence during the period in question, it would follow that all of that government's actions—laws enacted, taxes collected, salaries paid, accounts settled, sentences passed—were of no effect; and that "the officers who carried their decisions into operation [were] answerable as trespassers, if not in some cases as criminals." [46] There was, of course, no room for application of any doctrine of *de facto* status to uphold prior acts of an officer not authorized *de jure,* for such would have defeated the plaintiff's very action. A decision for the plaintiff would inevitably have produced some significant measure of chaos, a consequence to be avoided if it could be done without abnegation of the judicial duty to uphold the Constitution.

(2) No state court had recognized as a judicial responsibility settlement of the issue of the locus of state governmental authority. Indeed, the courts of Rhode Island had in several cases held that "it rested with the political power to decide whether the charter government had been displaced or not," and that that department had acknowledged no change.

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denied because the federal courts then lacked authority to issue habeas for a prisoner held under a state court sentence. *Ex parte Dorr,* 3 How. 103.

[46] 7 How., at 39.

(3) Since "[t]he question relates, altogether, to the constitution and laws of [the] . . . State," the courts of the United States had to follow the state courts' decisions unless there was a federal constitutional ground for overturning them.[47]

(4) No provision of the Constitution could be or had been invoked for this purpose except Art. IV, § 4, the Guaranty Clause. Having already noted the absence of standards whereby the choice between governments could be made by a court acting independently, Chief Justice Taney now found further textual and practical reasons for concluding that, if any department of the United States was empowered by the Guaranty Clause to resolve the issue, it was not the judiciary:

> "Under this article of the Constitution it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal. It is true that the contest in this case did not last long enough to bring the matter to this issue; and . . . Congress was not called upon to decide the controversy. Yet the right to decide is placed there, and not in the courts.

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[47] *Id.*, at 39, 40.

"So, too, as relates to the clause in the above-mentioned article of the Constitution, providing for cases of domestic violence. It rested with Congress, too, to determine upon the means proper to be adopted to fulfill this guarantee. . . . [B]y the act of February 28, 1795, [Congress] provided, that, 'in case of an insurrection in any State against the government thereof, it shall be lawful for the President of the United States, on application of the legislature of such State or of the executive (when the legislature cannot be convened), to call forth such number of the militia of any other State or States, as may be applied for, as he may judge sufficient to suppress such insurrection.'

"By this act, the power of deciding whether the exigency had arisen upon which the government of the United States is bound to interfere, is given to the President. . . .

"After the President has acted and called out the militia, is a Circuit Court of the United States authorized to inquire whether his decision was right? . . . If the judicial power extends so far, the guarantee contained in the Constitution of the United States is a guarantee of anarchy, and not of order. . . .

"It is true that in this case the militia were not called out by the President. But upon the application of the governor under the charter government, the President recognized him as the executive power of the State, and took measures to call out the militia to support his authority if it should be found necessary for the general government to interfere . . . . [C]ertainly no court of the United States, with a knowledge of this decision, would have been justified in recognizing the opposing party as the lawful gov-

> ernment . . . . In the case of foreign nations, the government acknowledged by the President is always recognized in the courts of justice. . . ." 7 How., at 42–44.

Clearly, several factors were thought by the Court in *Luther* to make the question there "political": the commitment to the other branches of the decision as to which is the lawful state government; the unambiguous action by the President, in recognizing the charter government as the lawful authority; the need for finality in the executive's decision; and the lack of criteria by which a court could determine which form of government was republican.[48]

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[48] Even though the Court wrote of unrestrained legislative and executive authority under this Guaranty, thus making its enforcement a political question, the Court plainly implied that the political question barrier was no absolute: "Unquestionably a military government, established as the permanent government of the State, would not be a republican government, and it would be the duty of Congress to overthrow it." 7 How., at 45. Of course, it does not necessarily follow that if Congress did not act, the Court would. For while the judiciary might be able to decide the limits of the meaning of "republican form," and thus the factor of lack of criteria might fall away, there would remain other possible barriers to decision because of primary commitment to another branch, which would have to be considered in the particular fact setting presented.

That was not the only occasion on which this Court indicated that lack of criteria does not obliterate the Guaranty's extreme limits: "The guaranty is of a republican form of government. No particular government is designated as republican, neither is the exact form to be guaranteed, in any manner especially designated. Here, as in other parts of the instrument, we are compelled to resort elsewhere to ascertain what was intended.

"The guaranty necessarily implies a duty on the part of the States themselves to provide such a government. All the States had governments when the Constitution was adopted. In all the people participated to some extent, through their representatives elected in the manner specially provided. These governments the Constitution did not change. They were accepted precisely as they were, and it

But the only significance that *Luther* could have for our immediate purposes is in its holding that the Guaranty Clause is not a repository of judicially manageable standards which a court could utilize independently in order to identify a State's lawful government. The Court has since refused to resort to the Guaranty Clause—which alone had been invoked for the purpose—as the source of a constitutional standard for invalidating state action. See *Taylor & Marshall* v. *Beckham* (*No. 1*), 178 U. S. 548 (claim that Kentucky's resolution of contested gubernatorial election deprived voters of republican government held nonjusticiable); *Pacific States Tel. Co.* v. *Oregon,* 223 U. S. 118 (claim that initiative and referendum negated republican government held nonjusticiable); *Kiernan* v. *Portland,* 223 U. S. 151 (claim that municipal charter amendment *per* municipal initiative and referendum negated republican government held non-

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is, therefore, to be presumed that they were such as it was the duty of the States to provide. Thus we have unmistakable evidence of what was republican in form, within the meaning of that term as employed in the Constitution." *Minor* v. *Happersett,* 21 Wall. 162, 175–176. There, the question was whether a government republican in form could deny the vote to women.

In re Duncan, 139 U. S. 449, upheld a murder conviction against a claim that the relevant codes had been invalidly enacted. The Court there said:

"By the Constitution, a republican form of government is guaranteed to every State in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves; but, while the people are thus the source of political power, their governments, National and State, have been limited by written constitutions, and they have themselves thereby set bounds to their own power, as against the sudden impulses of mere majorities." 139 U. S., at 461. But the Court did not find any of these fundamental principles violated.

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justiciable); *Marshall* v. *Dye,* 231 U. S. 250 (claim that Indiana's constitutional amendment procedure negated republican government held nonjusticiable); *O'Neill* v. *Leamer,* 239 U. S. 244 (claim that delegation to court of power to form drainage districts negated republican government held "futile"); *Ohio ex rel. Davis* v. *Hildebrant,* 241 U. S. 565 (claim that invalidation of state reapportionment statute *per* referendum negates republican government held nonjusticiable);[49] *Mountain Timber Co.* v. *Washington,* 243 U. S. 219 (claim that workmen's compensation violates republican government held nonjusticiable); *Ohio ex rel. Bryant* v. *Akron Metropolitan Park District,* 281 U. S. 74 (claim that rule requiring invalidation of statute by all but one justice of state court negated republican government held nonjusticiable); *Highland Farms Dairy* v. *Agnew,* 300 U. S. 608 (claim that delegation to agency of power to control milk prices violated republican government, rejected).

Just as the Court has consistently held that a challenge to state action based on the Guaranty Clause presents no justiciable question so has it held, and for the same reasons, that challenges to congressional action on the ground of inconsistency with that clause present no justiciable question. In *Georgia* v. *Stanton,* 6 Wall. 50, the State sought by an original bill to enjoin execution of the Reconstruction Acts, claiming that it already possessed "A republican State, in every political, legal, constitutional, and juridical sense," and that enforcement of the new Acts "Instead of keeping the guaranty against a forcible overthrow of its government by foreign invaders or domestic insurgents, . . . is destroying that very government by force."[50] Congress had clearly refused to

[49] But cf. *Hawke* v. *Smith* (*No. 1*), 253 U. S. 221; *National Prohibition Cases,* 253 U. S. 350.

[50] 6 Wall., at 65, 66.

recognize the republican character of the government of the suing State.[51] It seemed to the Court that the only constitutional claim that could be presented was under the Guaranty Clause, and Congress having determined that the effects of the recent hostilities required extraordinary measures to restore governments of a republican form, this Court refused to interfere with Congress' action at the behest of a claimant relying on that very guaranty.[52]

In only a few other cases has the Court considered Art. IV, § 4, in relation to congressional action. It has refused to pass on a claim relying on the Guaranty Clause to establish that Congress lacked power to allow the States to employ the referendum in passing on legislation redistricting for congressional seats. *Ohio ex rel. Davis* v. *Hildebrant, supra.* And it has pointed out that Congress is not required to establish republican government in the territories before they become States, and before they have attained a sufficient population to warrant a

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[51] The First Reconstruction Act opened: "Whereas no legal State governments . . . now exists [*sic*] in the rebel States of . . . Georgia [and] Mississippi . . . ; and whereas it is necessary that peace and good order should be enforced in said States until loyal and republican State governments can be legally established: . . ." 14 Stat. 428. And see 15 Stat. 2, 14.

[52] In *Mississippi* v. *Johnson,* 4 Wall. 475, the State sought to enjoin the President from executing the Acts, alleging that his role was purely ministerial. The Court held that the duties were in no sense ministerial, and that although the State sought to compel inaction rather than action, the absolute lack of precedent for any such distinction left the case one in which "general principles . . . forbid judicial interference with the exercise of Executive discretion." 4 Wall., at 499. See also *Mississippi* v. *Stanton,* 154 U. S. 554; and see 2 Warren, The Supreme Court in United States History (Rev. ed.), 463.

For another instance of congressional action challenged as transgressing the Guaranty Clause, see *The Collector* v. *Day,* 11 Wall. 113, 125–126, overruled, *Graves* v. *O'Keefe,* 306 U. S. 466.

popularly elected legislature. *Downes* v. *Bidwell,* 182 U. S. 244, 278–279 (dictum).[53]

We come, finally, to the ultimate inquiry whether our precedents as to what constitutes a nonjusticiable "political question" bring the case before us under the umbrella of that doctrine. A natural beginning is to note whether any of the common characteristics which we have been able to identify and label descriptively are present. We find none: The question here is the consistency of state action with the Federal Constitution. We have no question decided, or to be decided, by a political branch of government coequal with this Court. Nor do we risk embarrassment of our government abroad, or grave disturbance at home [54] if we take issue with Tennessee as to the constitutionality of her action here challenged. Nor need the appellants, in order to succeed in this action, ask the Court to enter upon policy determinations for which judicially manageable standards are lacking. Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action.

This case does, in one sense, involve the allocation of political power within a State, and the appellants

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[53] On the other hand, the implication of the Guaranty Clause in a case concerning congressional action does not always preclude judicial action. It has been held that the clause gives Congress no power to impose restrictions upon a State's admission which would undercut the constitutional mandate that the States be on an equal footing. *Coyle* v. *Smith,* 221 U. S. 559. And in *Texas* v. *White,* 7 Wall. 700, although Congress had determined that the State's government was not republican in form, the State's standing to bring an original action in this Court was sustained.

[54] See, *infra,* p. 235, considering *Kidd* v. *McCanless,* 352 U. S. 920.

might conceivably have added a claim under the Guaranty Clause. Of course, as we have seen, any reliance on that clause would be futile. But because any reliance on the Guaranty Clause could not have succeeded it does not follow that appellants may not be heard on the equal protection claim which in fact they tender. True, it must be clear that the Fourteenth Amendment claim is not so enmeshed with those political question elements which render Guaranty Clause claims nonjusticiable as actually to present a political question itself. But we have found that not to be the case here.

In this connection special attention is due *Pacific States Tel. Co.* v. *Oregon,* 223 U. S. 118. In that case a corporation tax statute enacted by the initiative was attacked ostensibly on three grounds: (1) due process; (2) equal protection; and (3) the Guaranty Clause. But it was clear that the first two grounds were invoked solely in aid of the contention that the tax was invalid by reason of its passage:

> "The defendant company does not contend here that it could not have been required to pay a license tax. It does not assert that it was denied an opportunity to be heard as to the amount for which it was taxed, or that there was anything inhering in the tax or involved intrinsically in the law which violated any of its constitutional rights. If such questions had been raised they would have been justiciable, and therefore would have required the calling into operation of judicial power. Instead, however, of doing any of these things, the attack on the statute here made is of a wholly different character. Its essentially political nature is at once made manifest by understanding that the assault which the contention here advanced makes it [*sic*] not on the tax as a tax, but on the State as a State. It is addressed to the

framework and political character of the government by which the statute levying the tax was passed. It is the government, the political entity, which (reducing the case to its essence) is called to the bar of this court, not for the purpose of testing judicially some exercise of power assailed, on the ground that its exertion has injuriously affected the rights of an individual because of repugnancy to some constitutional limitation, but to demand of the State that it establish its right to exist as a State, republican in form." 223 U. S., at 150–151.

The due process and equal protection claims were held nonjusticiable in *Pacific States* not because they happened to be joined with a Guaranty Clause claim, or because they sought to place before the Court a subject matter which might conceivably have been dealt with through the Guaranty Clause, but because the Court believed that they were invoked merely in verbal aid of the resolution of issues which, in its view, entailed political questions. *Pacific States* may be compared with cases such as *Mountain Timber Co.* v. *Washington,* 243 U. S. 219, wherein the Court refused to consider whether a workmen's compensation act violated the Guaranty Clause but considered at length, and rejected, due process and equal protection arguments advanced against it; and *O'Neill* v. *Leamer,* 239 U. S. 244, wherein the Court refused to consider whether Nebraska's delegation of power to form drainage districts violated the Guaranty Clause, but went on to consider and reject the contention that the action against which an injunction was sought was not a taking for a public purpose.

We conclude then that the nonjusticiability of claims resting on the Guaranty Clause which arises from their embodiment of questions that were thought "political," can have no bearing upon the justiciability of the equal protection claim presented in this case. Finally, we

emphasize that it is the involvement in Guaranty Clause claims of the elements thought to define "political questions," and no other feature, which could render them nonjusticiable. Specifically, we have said that such claims are not held nonjusticiable because they touch matters of state governmental organization. Brief examination of a few cases demonstrates this.

When challenges to state action respecting matters of "the administration of the affairs of the State and the officers through whom they are conducted" [55] have rested on claims of constitutional deprivation which are amenable to judicial correction, this Court has acted upon its view of the merits of the claim. For example, in *Boyd* v. *Nebraska ex rel. Thayer,* 143 U. S. 135, we reversed the Nebraska Supreme Court's decision that Nebraska's Governor was not a citizen of the United States or of the State and therefore could not continue in office. In *Kennard* v. *Louisiana ex rel. Morgan,* 92 U. S. 480, and *Foster* v. *Kansas ex rel. Johnston,* 112 U. S. 201, we considered whether persons had been removed from public office by procedures consistent with the Fourteenth Amendment's due process guaranty, and held on the merits that they had. And only last Term, in *Gomillion* v. *Lightfoot,* 364 U. S. 339, we applied the Fifteenth Amendment to strike down a redrafting of municipal boundaries which effected a discriminatory impairment of voting rights, in the face of what a majority of the Court of Appeals thought to be a sweeping commitment to state legislatures of the power to draw and redraw such boundaries.[56]

Gomillion was brought by a Negro who had been a resident of the City of Tuskegee, Alabama, until the municipal boundaries were so recast by the State Legis-

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[55] *Boyd* v. *Nebraska ex rel. Thayer,* 143 U. S. 135, 183 (Field, J., dissenting).

[56] *Gomillion* v. *Lightfoot,* 270 F. 2d 594, relying upon, *inter alia, Hunter* v. *Pittsburgh,* 207 U. S. 161.

lature as to exclude practically all Negroes. The plaintiff claimed deprivation of the right to vote in municipal elections. The District Court's dismissal for want of jurisdiction and failure to state a claim upon which relief could be granted was affirmed by the Court of Appeals. This Court unanimously reversed. This Court's answer to the argument that States enjoyed unrestricted control over municipal boundaries was:

> "Legislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution. . . . The opposite conclusion, urged upon us by respondents, would sanction the achievement by a State of any impairment of voting rights whatever so long as it was cloaked in the garb of the realignment of political subdivisions. 'It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.' " 364 U. S., at 344–345.

To a second argument, that *Colegrove* v. *Green, supra,* was a barrier to hearing the merits of the case, the Court responded that *Gomillion* was lifted "out of the so-called 'political' arena and into the conventional sphere of constitutional litigation" because here was discriminatory treatment of a racial minority violating the Fifteenth Amendment.

> "A statute which is alleged to have worked unconstitutional deprivations of petitioners' rights is not immune to attack simply because the mechanism employed by the legislature is a redefinition of municipal boundaries. . . . While in form this is merely an act redefining metes and bounds, if the allegations are established, the inescapable human effect of this essay in geometry and geography is to despoil colored citizens, and only colored citizens, of

their theretofore enjoyed voting rights. That was not *Colegrove* v. *Green.*

"When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right." 364 U. S., at 347.[57]

We have not overlooked such cases as *In re Sawyer,* 124 U. S. 200, and *Walton* v. *House of Representatives,* 265 U. S. 487, which held that federal equity power could not be exercised to enjoin a state proceeding to remove a public officer. But these decisions explicitly reflect only a traditional limit upon equity jurisdiction, and not upon federal courts' power to inquire into matters of state governmental organization. This is clear not only from the opinions in those cases, but also from *White* v. *Berry,* 171 U. S. 366, which, relying on *Sawyer,* withheld federal equity from staying removal of a *federal* officer. *Wilson* v. *North Carolina,* 169 U. S. 586, simply dismissed an appeal from an unsuccessful suit to upset a State's removal procedure, on the ground that the constitutional claim presented—that a jury trial was necessary if the removal procedure was to comport with due process requirements—was frivolous. Finally, in *Taylor and Marshall* v. *Beckham (No. 1),* 178 U. S. 548, where losing candidates attacked the constitutionality of Kentucky's resolution of a contested gubernatorial election, the Court refused to consider the merits of a claim posited upon

[57] The Court's opinion was joined by MR. JUSTICE DOUGLAS, noting his adherence to the dissents in *Colegrove* and *South* v. *Peters, supra;* and the judgment was concurred in by MR. JUSTICE WHITTAKER, who wrote that the decision should rest on the Equal Protection Clause rather than on the Fifteenth Amendment, since there had been not solely a denial of the vote (if there had been that at all) but also a "fencing out" of a racial group.

the Guaranty Clause, holding it presented a political question, but also held on the merits that the ousted candidates had suffered no deprivation of property without due process of law.[58]

Since, as has been established, the equal protection claim tendered in this case does not require decision of any political question, and since the presence of a matter affecting state government does not render the case nonjusticiable, it seems appropriate to examine again the reasoning by which the District Court reached its conclusion that the case was nonjusticiable.

We have already noted that the District Court's holding that the subject matter of this complaint was nonjusticiable relied upon *Colegrove* v. *Green, supra,* and later cases. Some of those concerned the choice of members of a state legislature, as in this case; others, like *Colegrove* itself and earlier precedents, *Smiley* v. *Holm,* 285 U. S. 355, *Koenig* v. *Flynn,* 285 U. S. 375, and *Carroll* v. *Becker,* 285 U. S. 380, concerned the choice of Representatives in the Federal Congress. *Smiley, Koenig* and *Carroll* settled the issue in favor of justiciability of questions of congressional redistricting. The Court followed these precedents in *Colegrove* although over the dissent of three of the seven Justices who participated in that decision. On the issue of justiciability, all four Justices comprising a majority relied upon *Smiley* v. *Holm,* but in two opinions, one for three Justices, 328 U. S., at 566, 568, and a separate one by Mr. Justice Rutledge, 328 U. S., at 564. The argument that congressional redistricting problems presented a "political question" the resolution of which was confided to Congress might have been rested upon Art. I, § 4, Art. I, § 5, Art. I, § 2, and Amendment

[58] No holding to the contrary is to be found in *Cave* v. *Newell,* 246 U. S. 650, dismissing a writ of error to the Supreme Court of Missouri, 272 Mo. 653, 199 S. W. 1014; or in *Snowden* v. *Hughes,* 321 U. S. 1.

XIV, § 2. Mr. Justice Rutledge said: "But for the ruling in *Smiley* v. *Holm,* 285 U. S. 355, I should have supposed that the provisions of the Constitution, Art. I, § 4, that 'The Times, Places and Manner of holding Elections for . . . Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations . . .'; Art. I, § 2 [but see Amendment XIV, § 2], vesting in Congress the duty of apportionment of representatives among the several states 'according to their respective Numbers'; and Art. I, § 5, making each House the sole judge of the qualifications of its own members, would remove the issues in this case from justiciable cognizance. But, in my judgment, the *Smiley* case rules squarely to the contrary, save only in the matter of degree. . . . Assuming that that decision is to stand, I think . . . that its effect is to rule that this Court has power to afford relief in a case of this type as against the objection that the issues are not justiciable." 328 U. S., at 564–565. Accordingly, Mr. Justice Rutledge joined in the conclusion that the case was justiciable, although he held that the dismissal of the complaint should be affirmed. His view was that "The shortness of the time remaining [before forthcoming elections] makes it doubtful whether action could, or would, be taken in time to secure for petitioners the effective relief they seek. . . . I think, therefore, the case is one in which the Court may properly, and should, decline to exercise its jurisdiction. Accordingly, the judgment should be affirmed and I join in that disposition of the cause." 328 U. S., at 565–566.[59]

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[59] The ground of Mr. Justice Rutledge's vote to affirm is further explained in his footnote 3, 328 U. S., at 566: " 'The power of a court of equity to act is a discretionary one. . . . Where a federal court of equity is asked to interfere with the enforcement of state laws, it should do so only "to prevent irreparable injury which is clear and

Article I, §§ 2, 4, and 5, and Amendment XIV, § 2, relate only to congressional elections and obviously do not govern apportionment of state legislatures. However, our decisions in favor of justiciability even in light of those provisions plainly afford no support for the District Court's conclusion that the subject matter of this controversy presents a political question. Indeed, the refusal to award relief in *Colegrove* resulted only from the controlling view of a want of equity. Nor is anything contrary to be found in those *per curiams* that came after *Colegrove*. This Court dismissed the appeals in *Cook* v. *Fortson* and *Turman* v. *Duckworth*, 329 U. S. 675, as moot. *MacDougall* v. *Green*, 335 U. S. 281, held only that in that case equity would not act to void the State's requirement that there be at least a minimum of support for nom-

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imminent.'" *American Federation of Labor* v. *Watson*, 327 U. S. 582, 593 and cases cited."

No constitutional questions, including the question whether voters have a judicially enforceable constitutional right to vote at elections of congressmen from districts of equal population, were decided in *Colegrove*. Six of the participating Justices reached the questions but divided three to three on their merits. Mr. Justice Rutledge believed that it was not necessary to decide them. He said: "There is [an alternative to constitutional decision] in this case. And I think the gravity of the constitutional questions raised so great, together with the possibilities for collision [with the political departments of the Government], that the admonition [against avoidable constitutional decision] is appropriate to be followed here. Other reasons support this view, including the fact that, in my opinion, the basic ruling and less important ones in *Smiley* v. *Holm*, *supra*, would otherwise be brought into question." 328 U. S., at 564–565. He also joined with his brethren who shared his view that the issues were justiciable in considering that *Wood* v. *Broom*, 287 U. S. 1, decided no constitutional questions but "the Court disposed of the cause on the ground that the 1929 Reapportionment Act, 46 Stat. 21, did not carry forward the requirements of the 1911 Act, 37 Stat. 13, and declined to decide whether there was equity in the bill." 328 U. S., at 565; see also, *id.*, at 573. We agree with this view of *Wood* v. *Broom*.

inees for state-wide office, over at least a minimal area of the State. Problems of timing were critical in *Remmey* v. *Smith,* 342 U. S. 916, dismissing for want of a substantial federal question a three-judge court's dismissal of the suit as prematurely brought, 102 F. Supp. 708; and in *Hartsfield* v. *Sloan,* 357 U. S. 916, denying mandamus sought to compel the convening of a three-judge court—movants urged the Court to advance consideration of their case, "Inasmuch as the mere lapse of time before this case can be reached in the normal course of . . . business may defeat the cause, and inasmuch as the time problem is due to the inherent nature of the case . . . ." *South* v. *Peters,* 339 U. S. 276, like *Colegrove* appears to be a refusal to exercise equity's powers; see the statement of the holding, quoted, *supra,* p. 203. And *Cox* v. *Peters,* 342 U. S. 936, dismissed for want of a substantial federal question the appeal from the state court's holding that their primary elections implicated no "state action." See 208 Ga. 498, 67 S. E. 2d 579. But compare *Terry* v. *Adams,* 345 U. S. 461.

Tedesco v. *Board of Supervisors,* 339 U. S. 940, indicates solely that no substantial federal question was raised by a state court's refusal to upset the districting of city council seats, especially as it was urged that there was a rational justification for the challenged districting. See 43 So. 2d 514. Similarly, in *Anderson* v. *Jordan,* 343 U. S. 912, it was certain only that the state court had refused to issue a discretionary writ, original mandamus in the Supreme Court. That had been denied without opinion, and of course it was urged here that an adequate state ground barred this Court's review. And in *Kidd* v. *McCanless,* 200 Tenn. 273, 292 S. W. 2d 40, the Supreme Court of Tennessee held that it could not invalidate the very statute at issue in the case at bar, but its holding rested on its state law of remedies, *i. e.,* the state view of

de facto officers,[60] and not on any view that the norm for legislative apportionment in Tennessee is not numbers of qualified voters resident in the several counties. Of course this Court was there precluded by the adequate state ground, and in dismissing the appeal, 352 U. S. 920, we cited *Anderson, supra,* as well as *Colegrove.* Nor does the Tennessee court's decision in that case bear upon this, for just as in *Smith* v. *Holm,* 220 Minn. 486, 19 N. W. 2d 914, and *Magraw* v. *Donovan,* 163 F. Supp. 184, 177 F. Supp. 803, a state court's inability to grant relief does not bar a federal court's assuming jurisdiction to inquire into alleged deprivation of federal constitutional rights. Problems of relief also controlled in *Radford* v. *Gary,* 352 U. S. 991, affirming the District Court's refusal to mandamus the Governor to call a session of the legislature, to mandamus the legislature then to apportion, and if they did not comply, to mandamus the State Supreme Court to do so. And *Matthews* v. *Handley,* 361 U. S. 127, affirmed a refusal to strike down the State's gross income tax statute—urged on the ground that the legislature was malapportioned—that had rested on the adequacy of available state legal remedies for suits involving that tax, including challenges to its constitutionality. Lastly, *Colegrove* v. *Barrett,* 330 U. S. 804, in which Mr. Justice Rutledge concurred in this Court's refusal to note the appeal from a dismissal for want of equity, is sufficiently explained by his statement in *Cook* v. *Fortson, supra:* "The discretionary exercise or non-exercise of equitable or declaratory judgment jurisdiction . . . in one case is not precedent in another case

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[60] See also *Buford* v. *State Board of Elections,* 206 Tenn. 480, 334 S. W. 2d 726; *State ex rel. Sanborn* v. *Davidson County Board of Election Comm'rs,* No. 36,391 Tenn. Sup. Ct., Oct. 29, 1954 (unreported); 8 Vand. L. Rev. 501 (1955).

where the facts differ." 329 U. S., at 678, n. 8. (Citations omitted.)

We conclude that the complaint's allegations of a denial of equal protection present a justiciable constitutional cause of action upon which appellants are entitled to a trial and a decision. The right asserted is within the reach of judicial protection under the Fourteenth Amendment.

The judgment of the District Court is reversed and the cause is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

MR. JUSTICE WHITTAKER did not participate in the decision of this case.

APPENDIX TO OPINION OF THE COURT.

The Tennessee Code Annotated provides for representation in the General Assembly as follows:

"3–101. *Composition—Counties electing one representative each.*—The general assembly of the state of Tennessee shall be composed of thirty-three (33) senators and ninety-nine (99) representatives, to be apportioned among the qualified voters of the state as follows: Until the next enumeration and apportionment of voters each of the following counties shall elect one (1) representative, to wit: Bedford, Blount, Cannon, Carroll, Chester, Cocke, Claiborne, Coffee, Crockett, DeKalb, Dickson, Dyer, Fayette, Franklin, Giles, Greene, Hardeman, Hardin, Henry, Hickman, Hawkins, Haywood, Jackson, Lake, Lauderdale, Lawrence, Lincoln, Marion, Marshall, Maury, Monroe, Montgomery, Moore, McMinn, McNairy, Obion, Overton, Putnam, Roane, Robertson, Rutherford, Sevier, Smith, Stewart, Sullivan, Sumner, Tipton, Warren, Washington, White, Weakley, William-

son and Wilson. [Acts 1881 (E. S.), ch. 5, § 1; 1881 (E. S.), ch. 6, § 1; 1901, ch. 122, § 2; 1907, ch. 178, §§ 1, 2; 1915, ch. 145; Shan., § 123; Acts 1919, ch. 147, §§ 1, 2; 1925 Private, ch. 472, § 1; Code 1932, § 140; Acts 1935, ch. 150, § 1; 1941, ch. 58, § 1; 1945, ch. 68, § 1; C. Supp. 1950, § 140.]

"3–102. *Counties electing two representatives each.*—The following counties shall elect two (2) representatives each, to wit: Gibson and Madison. [Acts 1901, ch. 122, § 3; Shan., § 124; mod. Code 1932, § 141.]

"3–103. *Counties electing three representatives each.*—The following counties shall elect three (3) representatives each, to wit: Knox and Hamilton. [Acts 1901, ch. 122, § 4; Shan., § 125; Code 1932, § 142.]

"3–104. *Davidson County.*—Davidson county shall elect six (6) representatives. [Acts 1901, ch. 122, § 5; Shan., § 126; Code 1932, § 143.]

"3–105. *Shelby county.*—Shelby county shall elect eight (8) representatives. Said county shall consist of eight (8) representative districts, numbered one (1) through eight (8), each district co-extensive with the county, with one (1) representative to be elected from each district. [Acts 1901, ch. 122, § 6; Shan., § 126a1; Code 1932, § 144; Acts 1957, ch. 220, § 1; 1959, ch. 213, § 1.]

"3–106. *Joint representatives.*—The following counties jointly, shall elect one representative, as follows, to wit:

"First district—Johnson and Carter.

"Second district—Sullivan and Hawkins.

"Third district—Washington, Greene and Unicoi.

"Fourth district—Jefferson and Hamblen.

"Fifth district—Hancock and Grainger.

"Sixth district—Scott, Campbell, and Union.

"Seventh district—Anderson and Morgan.

"Eighth district—Knox and Loudon.

"Ninth district—Polk and Bradley.

"Tenth district—Meigs and Rhea.

"Eleventh district—Cumberland, Bledsoe, Sequatchie, Van Buren and Grundy.

"Twelfth district—Fentress, Pickett, Overton, Clay and Putnam.

"Fourteenth district—Sumner, Trousdale and Macon.

"Fifteenth district—Davidson and Wilson.

"Seventeenth district — Giles, Lewis, Maury and Wayne.

"Eighteenth district—Williamson, Cheatham and Robertson.

"Nineteenth district—Montgomery and Houston.

"Twentieth district—Humphreys and Perry.

"Twenty-first district—Benton and Decatur.

"Twenty-second district—Henry, Weakley and Carroll.

"Twenty-third district—Madison and Henderson.

"Twenty-sixth district—Tipton and Lauderdale. [Acts 1901, ch. 122, § 7; 1907, ch. 178, §§ 1, 2; 1915, ch. 145, §§ 1, 2; Shan., § 127; Acts 1919, ch. 147, § 1; 1925 Private, ch. 472, § 2; Code 1932, § 145; Acts 1933, ch. 167, § 1; 1935, ch. 150, § 2; 1941, ch. 58, § 2; 1945, ch. 68, § 2; C. Supp. 1950, § 145; Acts 1957, ch. 220, § 2.]

"3–107. *State senatorial districts.*—Until the next enumeration and apportionment of voters, the following counties shall comprise the senatorial districts, to wit:

"First district—Johnson, Carter, Unicoi, Greene, and Washington.

"Second district—Sullivan and Hawkins.

"Third district—Hancock, Morgan, Grainger, Claiborne, Union, Campbell, and Scott.

"Fourth district—Cocke, Hamblen, Jefferson, Sevier, and Blount.

"Fifth district—Knox.

"Sixth district—Knox, Loudon, Anderson, and Roane.

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"Seventh district—McMinn, Bradley, Monroe, and Polk.

"Eighth district—Hamilton.

"Ninth district—Rhea, Meigs, Bledsoe, Sequatchie, Van Buren, White, and Cumberland.

"Tenth district—Fentress, Pickett, Clay, Overton, Putnam, and Jackson.

"Eleventh district—Marion, Franklin, Grundy and Warren.

"Twelfth district—Rutherford, Cannon, and DeKalb.

"Thirteenth district—Wilson and Smith.

"Fourteenth district—Sumner, Trousdale and Macon.

"Fifteenth district—Montgomery and Robertson.

"Sixteenth district—Davidson.

"Seventeenth district—Davidson.

"Eighteenth district—Bedford, Coffee and Moore.

"Nineteenth district—Lincoln and Marshall.

"Twentieth district—Maury, Perry and Lewis.

"Twenty-first district—Hickman, Williamson and Cheatham.

"Twenty-second district—Giles, Lawrence and Wayne.

"Twenty-third district—Dickson, Humphreys, Houston and Stewart.

"Twenty-fourth district—Henry and Carroll.

"Twenty-fifth district—Madison, Henderson and Chester.

"Twenty-sixth district—Hardeman, McNairy, Hardin, Decatur and Benton.

"Twenty-seventh district—Gibson.

"Twenty-eighth district—Lake, Obion and Weakley.

"Twenty-ninth district — Dyer, Lauderdale and Crockett.

"Thirtieth district—Tipton and Shelby.

"Thirty-first district—Haywood and Fayette.

"Thirty-second district—Shelby.

"Thirty-third district—Shelby. [Acts 1901, ch. 122, § 1; 1907, ch. 3, § 1; Shan., § 128; Code 1932, § 146; Acts 1945, ch. 11, § 1; C. Supp. 1950, § 146.]"

Today's apportionment statute is as enacted in 1901, with minor changes. For example:

(1) In 1957, Shelby County was raised from 7½ to 8 representatives. Acts of 1957, c. 220. See also Acts of 1959, c. 213. The 1957 Act, § 2, abolished the Twenty-seventh Joint Representative District, which had included Shelby and Fayette Counties.

(2) In 1907, Marion County was given a whole House seat instead of sharing a joint seat with Franklin County. Acts of 1907, c. 178. Acts of 1915, c. 145, repealed that change, restoring the *status quo ante*. And that reversal was itself reversed, Acts of 1919, c. 147.

(3) James County was in 1901 one of five counties in the Seventh State Senate District and one of the three in the Ninth House District. It appears that James County no longer exists but we are not advised when or how it was dissolved.

(4) In 1945, Anderson and Roane Counties were shifted to the Sixth State Senate District from the Seventh, and Monroe and Polk Counties were shifted to the Seventh from the Sixth. Acts of 1945, c. 11.

MR. JUSTICE DOUGLAS, concurring.

While I join the opinion of the Court and, like the Court, do not reach the merits, a word of explanation is necessary.[1] I put to one side the problems of "politi-

[1] I feel strongly that many of the cases cited by the Court and involving so-called "political" questions were wrongly decided.

In joining the opinion, I do not approve those decisions but only construe the Court's opinion in this case as stating an accurate historical account of what the prior cases have held.

cal" questions involving the distribution of power between this Court, the Congress, and the Chief Executive. We have here a phase of the recurring problem of the relation of the federal courts to state agencies. More particularly, the question is the extent to which a State may weight one person's vote more heavily than it does another's.

So far as voting rights are concerned, there are large gaps in the Constitution. Yet the right to vote is inherent in the republican form of government envisaged by Article IV, Section 4 of the Constitution. The House—and now the Senate—are chosen by the people. The time, manner, and place of elections of Senators and Representatives are left to the States (Article I, Section 4, Clause 1; Amendment XVII) subject to the regulatory power of Congress. A "republican form" of government is guaranteed each State by Article IV, Section 4, and each is likewise promised protection against invasion.[2] *Ibid.*

[2] The statements in *Luther* v. *Borden,* 7 How. 1, 42, that this guaranty is enforceable only by Congress or the Chief Executive is not maintainable. Of course the Chief Executive, not the Court, determines how a State will be protected against invasion. Of course each House of Congress, not the Court, is "the Judge of the Elections, Returns, and Qualifications of its own Members." Article I, Section 5, Clause 1. But the abdication of all judicial functions respecting voting rights (7 How., at 41), however justified by the peculiarities of the charter form of government in Rhode Island at the time of Dorr's Rebellion, states no general principle. It indeed is contrary to the cases discussed in the body of this opinion—the modern decisions of the Court that give the full panoply of judicial protection to voting rights. Today we would not say with Chief Justice Taney that it is no part of the judicial function to protect the right to vote of those "to whom it is denied by the written and established constitution and laws of the State." *Ibid.*

Moreover, the Court's refusal to examine the legality of the regime of martial law which had been laid upon Rhode Island (*id.,* at 45–46) is indefensible, as Mr. Justice Woodbury maintained in his dissent. *Id.,* at 59 *et seq.* Today we would ask with him: ". . . who

That the States may specify the qualifications for voters is implicit in Article I, Section 2, Clause 1, which provides that the House of Representatives shall be chosen by the

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could hold for a moment, when the writ of habeas corpus cannot be suspended by the legislature itself, either in the general government or most of the States, without an express constitutional permission, that all other writs and laws could be suspended, and martial law substituted for them over the whole State or country, without any express constitutional license to that effect, in any emergency?" *Id.*, at 67.

Justice Woodbury went on to say:

"It would be alarming enough to sanction here an unlimited power, exercised either by legislatures, or the executive, or courts, when all our governments are themselves governments of limitations and checks, and of fixed and known laws, and the people a race above all others jealous of encroachments by those in power. And it is far better that those persons should be without the protection of the ordinary laws of the land who disregard them in an emergency, and should look to a grateful country for indemnity and pardon, than to allow, beforehand, the whole frame of jurisprudence to be overturned, and every thing placed at the mercy of the bayonet.

"No tribunal or department in our system of governments ever can be lawfully authorized to dispense with the laws, like some of the tyrannical Stuarts, or to repeal, or abolish, or suspend the whole body of them; or, in other words, appoint an unrestrained military dictator at the head of armed men.

"Whatever stretches of such power may be ventured on in great crises, they cannot be upheld by the laws, as they prostrate the laws and ride triumphant over and beyond them, however the Assembly of Rhode Island, under the exigency, may have hastily supposed that such a measure in this instance was constitutional. It is but a branch of the omnipotence claimed by Parliament to pass bills of attainder, belonging to the same dangerous and arbitrary family with martial law." *Id.*, at 69–70.

What he wrote was later to become the tradition, as expressed by Chief Justice Hughes in *Sterling* v. *Constantin*, 287 U. S. 378, 401: "What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions."

people and that "the Electors (voters) in each State shall have the Qualifications requisite for Electors (voters) of the most numerous Branch of the State Legislature." The same provision, contained in the Seventeenth Amendment, governs the election of Senators. Within limits those qualifications may be fixed by state law. See *Lassiter* v. *Northampton Election Board,* 360 U. S. 45, 50–51. Yet, as stated in *Ex parte Yarbrough,* 110 U. S. 651, 663–664, those who vote for members of Congress do not "owe their right to vote to the State law in any sense which makes the exercise of the right to depend exclusively on the law of the State." The power of Congress to prescribe the qualifications for voters and thus override state law is not in issue here. It is, however, clear that by reason of the commands of the Constitution there are several qualifications that a State may not require.

Race, color, or previous condition of servitude is an impermissible standard by reason of the Fifteenth Amendment, and that alone is sufficient to explain *Gomillion* v. *Lightfoot,* 364 U. S. 339. See Taper, Gomillion versus Lightfoot (1962), pp. 12–17.

Sex is another impermissible standard by reason of the Nineteenth Amendment.

There is a third barrier to a State's freedom in prescribing qualifications of voters and that is the Equal Protection Clause of the Fourteenth Amendment, the provision invoked here. And so the question is, may a State weight the vote of one county or one district more heavily than it weights the vote in another?

The traditional test under the Equal Protection Clause has been whether a State has made "an invidious discrimination," as it does when it selects "a particular race or nationality for oppressive treatment." See *Skinner* v. *Oklahoma,* 316 U. S. 535, 541. Universal equality is not

the test; there is room for weighting. As we stated in *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 489, "The prohibition of the Equal Protection Clause goes no further than the invidious discrimination."

I agree with my Brother CLARK that if the allegations in the complaint can be sustained a case for relief is established. We are told that a single vote in Moore County, Tennessee, is worth 19 votes in Hamilton County, that one vote in Stewart or in Chester County is worth nearly eight times a single vote in Shelby or Knox County. The opportunity to prove that an "invidious discrimination" exists should therefore be given the appellants.

It is said that any decision in cases of this kind is beyond the competence of courts. Some make the same point as regards the problem of equal protection in cases involving racial segregation. Yet the legality of claims and conduct is a traditional subject for judicial determination. Adjudication is often perplexing and complicated. An example of the extreme complexity of the task can be seen in a decree apportioning water among the several States. *Nebraska* v. *Wyoming*, 325 U. S. 589, 665. The constitutional guide is often vague, as the decisions under the Due Process and Commerce Clauses show. The problem under the Equal Protection Clause is no more intricate. See Lewis, Legislative Apportionment and the Federal Courts, 71 Harv. L. Rev. 1057, 1083–1084.

There are, of course, some questions beyond judicial competence. Where the performance of a "duty" is left to the discretion and good judgment of an executive officer, the judiciary will not compel the exercise of his discretion one way or the other (*Kentucky* v. *Dennison*, 24 How. 66, 109), for to do so would be to take over the office. Cf. *Federal Communications Comm'n* v. *Broadcasting Co.*, 309 U. S. 134, 145.

Where the Constitution assigns a particular function wholly and indivisibly [3] to another department, the federal judiciary does not intervene. *Oetjen* v. *Central Leather Co.*, 246 U. S. 297, 302. None of those cases is relevant here.

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[3] The category of the "political" question is, in my view, narrower than the decided cases indicate. "Even the English courts have held that a resolution of one House of Parliament does not change the law (*Stockdale* v. *Hansard* (1839), 9 A. & E. 1; and *Bowles* v. *Bank of England* (*No. 2*) [1913] 1 Ch. 57), and these decisions imply that the House of Commons acting alone does not constitute the 'Parliament' recognised by the English courts." 103 Sol. Jour. 995, 996. The Court in *Bowles* v. *Bank of England*, [1913] 1 Ch. 57, 84–85, stated: "By the statute 1 W. & M., usually known as the Bill of Rights, it was finally settled that there could be no taxation in this country except under authority of an Act of Parliament. The Bill of Rights still remains unrepealed, and no practice or custom, however prolonged, or however acquiesced in on the part of the subject, can be relied on by the Crown as justifying any infringement of its provisions. It follows that, with regard to the powers of the Crown to levy taxation, no resolution, either of the Committee for Ways and Means or of the House itself, has any legal effect whatever. Such resolutions are necessitated by a parliamentary procedure adopted with a view to the protection of the subject against the hasty imposition of taxes, and it would be strange to find them relied on as justifying the Crown in levying a tax before such tax is actually imposed by Act of Parliament."

In *The Pocket Veto Case*, 279 U. S. 655, the Court undertook a review of the veto provisions of the Constitution and concluded that the measure in litigation had not become a law. Cf. *Coleman* v. *Miller*, 307 U. S. 433.

Georgia v. *Stanton*, 6 Wall. 50, involved the application of the Reconstruction Acts to Georgia—laws which destroyed by force the internal regime of that State. Yet the Court refused to take jurisdiction. That question was no more "political" than a host of others we have entertained. See, *e. g.*, *Pennsylvania* v. *West Virginia*, 262 U. S. 553; *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579; *Alabama* v. *Texas*, 347 U. S. 272. [*Note 3 continued on p. 247*]

There is no doubt that the federal courts have jurisdiction of controversies concerning voting rights. The Civil Rights Act gives them authority to redress the deprivation "under color of any State law" of any "right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens . . . ." 28 U. S. C. § 1343 (3). And 28 U. S. C. § 1343 (4) gives the federal courts authority to award damages or issue an injunction to redress the violation of "any Act of Congress providing for the protection of civil rights, including the *right to vote.*" (Italics added.) The element of state action covers a wide range. For as stated in *United States* v. *Classic,* 313 U. S. 299, 326:

> "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." And see *Monroe* v. *Pape,* 365 U. S. 167.

The right to vote in both federal and state elections was protected by the judiciary long before that right received the explicit protection it is now accorded by § 1343 (4). Discrimination against a voter on account of race has been penalized (*Ex parte Yarbrough,* 110 U. S. 651) or struck down. *Nixon* v. *Herndon,* 273 U. S. 536; *Smith* v. *Allwright,* 321 U. S. 649; *Terry* v. *Adams,* 345 U. S. 461. Fraudulent acts that dilute the votes of some

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Today would this Court hold nonjusticiable or "political" a suit to enjoin a Governor who, like Fidel Castro, takes everything into his own hands and suspends all election laws?

Georgia v. *Stanton, supra,* expresses a philosophy at war with *Ex parte Milligan,* 4 Wall. 2, and *Duncan* v. *Kahanamoku,* 327 U. S. 304. The dominance of the civilian authority has been expressed from the beginning. See *Wise* v. *Withers,* 3 Cranch 331, 337; *Sterling* v. *Constantin, supra,* note 2.

have long been held to be within judicial cognizance. *Ex parte Siebold,* 100 U. S. 371. The "right to have one's vote counted" whatever his race or nationality or creed was held in *United States* v. *Mosley,* 238 U. S. 383, 386, to be "as open to protection by Congress as the right to put a ballot in a box." See also *United States* v. *Classic, supra,* 324–325; *United States* v. *Saylor,* 322 U. S. 385.

Chief Justice Holt stated in *Ashby* v. *White,* 2 Ld. Raym. 938, 956 (a suit in which damages were awarded against election officials for not accepting the plaintiff's vote, 3 Ld. Raym. 320) that:

> "To allow this action will make publick officers more careful to observe the constitution of cities and boroughs, and not to be so partial as they commonly are in all elections, which is indeed a great and growing mischief, and tends to the prejudice of the peace of the nation."

The same prophylactic effect will be produced here, as entrenched political regimes make other relief as illusory in this case as a petition to Parliament in *Ashby* v. *White* would have been.[4]

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[4] We are told by the National Institute of Municipal Law Officers in an *amicus* brief:

"Regardless of the fact that in the last two decades the United States has become a predominantly urban country where well over two-thirds of the population now lives in cities or suburbs, political representation in the majority of state legislatures is 50 or more years behind the times. Apportionments made when the greater part of the population was located in rural communities are still determining and undermining our elections.

"As a consequence, the municipality of 1960 is forced to function in a horse and buggy environment where there is little political recognition of the heavy demands of an urban population. These demands will become even greater by 1970 when some 150 million people will be living in urban areas.

"The National Institute of Municipal Law Officers has for many years recognized the wide-spread complaint that by far the greatest

Intrusion of the Federal Government into the election machinery of the States has taken numerous forms—investigations (*Hannah* v. *Larche,* 363 U. S. 420); criminal proceedings (*Ex parte Siebold, supra; Ex parte Yarbrough, supra; United States* v. *Mosley, supra; United States* v. *Classic, supra*); collection of penalties (*Smith* v. *Allwright, supra*); suits for declaratory relief and for an injunction (*Terry* v. *Adams, supra*); suits by the United States under the Civil Rights Act to enjoin discriminatory practices. *United States* v. *Raines,* 362 U. S. 17.

As stated by Judge McLaughlin in *Dyer* v. *Kazuhisa Abe,* 138 F. Supp. 220, 236 (an apportionment case in Hawaii which was reversed and dismissed as moot, 256 F. 2d 728):

> "The whole thrust of today's legal climate is to end unconstitutional discrimination. It is ludicrous to preclude judicial relief when a mainspring of representative government is impaired. Legislators have no immunity from the Constitution. The legislatures of our land should be made as responsive to the Constitution of the United States as are the citizens who elect the legislators."

With the exceptions of *Colegrove* v. *Green,* 328 U. S. 549; *MacDougall* v. *Green,* 335 U. S. 281; *South* v. *Peters,* 339 U. S. 276, and the decisions they spawned, the Court has never thought that protection of voting rights

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preponderance of state representatives and senators are from rural areas which, in the main, fail to become vitally interested in the increasing difficulties now facing urban administrators.

"Since World War II, the explosion in city and suburban population has created intense local problems in education, transportation, and housing. Adequate handling of these problems has not been possible to a large extent, due chiefly to the political weakness of municipalities. This situation is directly attributable to considerable under-representation of cities in the legislatures of most states." *Amicus* brief, pp. 2–3.

was beyond judicial cognizance. Today's treatment of those cases removes the only impediment to judicial cognizance of the claims stated in the present complaint.

The justiciability of the present claims being established, any relief accorded can be fashioned in the light of well-known principles of equity.[5]

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[5] The recent ruling by the Iowa Supreme Court that a legislature, though elected under an unfair apportionment scheme, is nonetheless a legislature empowered to act (*Cedar Rapids* v. *Cox*, 252 Iowa 948, 964, 108 N. W. 2d 253, 262–263; cf. *Kidd* v. *McCanless*, 200 Tenn. 273, 292 S. W. 2d 40) is plainly correct.

There need be no fear of a more disastrous collision between federal and state agencies here than where a federal court enjoins gerrymandering based on racial lines. See *Gomillion* v. *Lightfoot*, *supra*.

The District Court need not undertake a complete reapportionment. It might possibly achieve the goal of substantial equality merely by directing respondent to eliminate the egregious injustices. Or its conclusion that reapportionment should be made may in itself stimulate legislative action. That was the result in *Asbury Park Press* v. *Woolley*, 33 N. J. 1, 161 A. 2d 705, where the state court ruled it had jurisdiction:

"If by reason of passage of time and changing conditions the reapportionment statute no longer serves its original purpose of securing to the voter the full constitutional value of his franchise, and the legislative branch fails to take appropriate restorative action, the doors of the courts must be open to him. The law-making body cannot by inaction alter the constitutional system under which it has its own existence." 33 N. J., at 14, 161 A. 2d, at 711. The court withheld its decision on the merits in order that the legislature might have an opportunity to consider adoption of a reapportionment act. For the sequel see *Application of Lamb*, 67 N. J. Super. 39, 46–47, 169 A. 2d 822, 825–826.

Reapportionment was also the result in *Magraw* v. *Donovan*, 159 F. Supp. 901, where a federal three-judge District Court took jurisdiction, saying, 163 F. Supp. 184, 187:

"Here it is the unmistakable duty of the State Legislature to reapportion itself periodically in accordance with recent population changes. . . . Early in January 1959 the 61st Session of the Minnesota Legislature will convene, all of the members of which will be newly elected on November 4th of this year. The facts which have

MR. JUSTICE CLARK, concurring.

One emerging from the rash of opinions with their accompanying clashing of views may well find himself suffering a mental blindness. The Court holds that the appellants have alleged a cause of action. However, it refuses to award relief here—although the facts are undisputed—and fails to give the District Court any guidance whatever. One dissenting opinion, bursting with words that go through so much and conclude with so little, contemns the majority action as "a massive repudiation of the experience of our whole past." Another describes the complaint as merely asserting conclusory allegations that Tennessee's apportionment is "incorrect," "arbitrary," "obsolete," and "unconstitutional." I believe it can be shown that this case is distinguishable from earlier cases dealing with the distribution of political power by a State, that a patent violation of the Equal Protection Clause of the United States Constitution has been shown, and that an appropriate remedy may be formulated.

I.

I take the law of the case from *MacDougall* v. *Green,* 335 U. S. 281 (1948), which involved an attack under the Equal Protection Clause upon an Illinois election statute. The Court decided that case on its merits without hindrance from the "political question" doctrine. Although the statute under attack was upheld, it is clear

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been presented to us will be available to them. It is not to be presumed that the Legislature will refuse to take such action as is necessary to comply with its duty under the State Constitution. We defer decision on all the issues presented (including that of the power of this Court to grant relief), in order to afford the Legislature full opportunity to 'heed the constitutional mandate to redistrict.'"

See 177 F. Supp. 803, where the case was dismissed as moot, the State Legislature having acted.

that the Court based its decision upon the determination that the statute represented a rational state policy. It stated:

> "It would be strange indeed, and doctrinaire, for this Court, applying such broad constitutional concepts as due process and equal protection of the laws, to deny a State the power to assure a *proper* diffusion of political initiative as between its thinly populated counties and those having concentrated masses, *in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former.*" *Id.*, at 284. (Emphasis supplied.)

The other cases upon which my Brethren dwell are all distinguishable or inapposite. The widely heralded case of *Colegrove* v. *Green*, 328 U. S. 549 (1946), was one not only in which the Court was bobtailed but in which there was no majority opinion. Indeed, even the "political question" point in MR. JUSTICE FRANKFURTER'S opinion was no more than an alternative ground.[1] Moreover, the appellants did not present an equal protection argument.[2] While it has served as a Mother Hubbard to most of the subsequent cases, I feel it was in that respect ill-cast and for all of these reasons put it to one side.[3] Like-

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[1] The opinion stated at 551 that the Court "could also dispose of this case on the authority of *Wood* v. *Broom* [287 U. S. 1 (1932)]." *Wood* v. *Broom* involved only the interpretation of a congressional reapportionment Act.

[2] Similarly, the Equal Protection Clause was not invoked in *Tedesco* v. *Board of Supervisors*, 339 U. S. 940 (1950).

[3] I do not read the later case of *Colegrove* v. *Barrett*, 330 U. S. 804 (1947), as having rejected the equal protection argument adopted here. That was merely a dismissal of an appeal where the equal protection point was mentioned along with attacks under three other constitutional provisions, two congressional Acts, and three state constitutional provisions.

wise, I do not consider the Guaranty Clause cases based on Art. I, § 4, of the Constitution, because it is not invoked here and it involves different criteria, as the Court's opinion indicates. Cases resting on various other considerations not present here, such as *Radford* v. *Gary,* 352 U. S. 991 (1957) (lack of equity); *Kidd* v. *McCanless,* 352 U. S. 920 (1956) (adequate state grounds supporting the state judgment); *Anderson* v. *Jordan,* 343 U. S. 912 (1952) (adequate state grounds); *Remmey* v. *Smith,* 342 U. S. 916 (1952) (failure to exhaust state procedures), are of course not controlling. Finally, the Georgia county-unit-system cases, such as *South* v. *Peters,* 339 U. S. 276 (1950), reflect the viewpoint of *MacDougall, i. e.,* to refrain from intervening where there is some rational policy behind the State's system.[4]

II.

The controlling facts cannot be disputed. It appears from the record that 37% of the voters of Tennessee elect 20 of the 33 Senators while 40% of the voters elect 63 of the 99 members of the House. But this might not on its face be an "invidious discrimination," *Williamson* v. *Lee Optical of Oklahoma,* 348 U. S. 483, 489 (1955), for a "statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan* v. *Maryland,* 366 U. S. 420, 426 (1961).

It is true that the apportionment policy incorporated in Tennessee's Constitution, *i. e.,* state-wide numerical equality of representation with certain minor qualifications,[5] is a rational one. On a county-by-county compari-

[4] Georgia based its election system on a consistent combination of political units and population, giving six unit votes to the eight most populous counties, four unit votes to the 30 counties next in population, and two unit votes to each of the remaining counties.

[5] See Part I of the Appendix to MR. JUSTICE HARLAN'S dissent, *post,* p. 341.

son a districting plan based thereon naturally will have disparities in representation due to the qualifications. But this to my mind does not raise constitutional problems, for the overall policy is reasonable. However, the root of the trouble is not in Tennessee's Constitution, for admittedly its policy has not been followed. The discrimination lies in the action of Tennessee's Assembly in allocating legislative seats to counties or districts created by it. Try as one may, Tennessee's apportionment just cannot be made to fit the pattern cut by its Constitution. This was the finding of the District Court. The policy of the Constitution referred to by the dissenters, therefore, is of no relevance here. We must examine what the Assembly has done.[6] The frequency and magnitude of the inequalities in the present districting admit of no policy whatever. An examination of Table I accompanying this opinion, *post,* p. 262, conclusively reveals that the apportionment picture in Tennessee is a topsy-turvical of gigantic proportions. This is not to say that some of the disparity cannot be explained, but when the entire table is examined—comparing the voting strength of counties of like population as well as contrasting that of the smaller with the larger counties—it leaves but one conclusion, namely that Tennessee's apportionment is a crazy quilt without rational basis. At the risk of being accused of picking out a few of the horribles I shall allude to a series of examples that are taken from Table I.

As is admitted, there is a wide disparity of voting strength between the large and small counties. Some

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[6] It is suggested that the districting is not unconstitutional since it was established by a statute that was constitutional when passed some 60 years ago. But many Assembly Sessions since that time have deliberately refused to change the original act, and in any event "[a] statute [constitutionally] valid when enacted may become invalid by change in the conditions to which it is applied." *Nashville, C. & St. L. R. Co.* v. *Walters,* 294 U. S. 405, 415 (1935).

samples are: Moore County has a total representation of two [7] with a population (2,340) of only one-eleventh of Rutherford County (25,316) with the same representation; Decatur County (5,563) has the same representation as Carter (23,303) though the latter has four times the population; likewise, Loudon County (13,264), Houston (3,084), and Anderson County (33,990) have the same representation, *i. e.*, 1.25 each. But it is said that in this illustration all of the under-represented counties contain municipalities of over 10,000 population and they therefore should be included under the "urban" classification, rationalizing this disparity as an attempt to effect a rural-urban political balance. But in so doing one is caught up in the backlash of his own bull whip, for many counties have municipalities with a population exceeding 10,000, yet the same invidious discrimination is present. For example:

County	*Population*	*Representation*
Carter	23,303	1.10
Maury	24,556	2.25
Washington	36,967	1.93
Madison	37,245	3.50

[7] "Total representation" indicates the combined representation in the State Senate (33 members) and the State House of Representatives (99 members) in the Assembly of Tennessee. Assuming a county has one representative, it is credited in this calculation with 1/99. Likewise, if the same county has one-third of a senate seat, it is credited with another 1/99, and thus such a county, in our calculation, would have a "total representation" of two; if a county has one representative and one-sixth of a senate seat, it is credited with 1.5/99, or 1.50. It is this last figure that I use here in an effort to make the comparisons clear. The 1950 rather than the 1960 census of voting population is used to avoid the charge that use of 1960 tabulations might not have allowed sufficient time for the State to act. However, the 1960 picture is even more irrational than the 1950 one.

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Likewise, counties with no municipality of over 10,000 suffer a similar discrimination:

County	*Population*	*Representation*
Grundy	6,540	0.95
Chester	6,391	2.00
Cumberland	9,593	0.63
Crockett	9,676	2.00
Loudon	13,264	1.25
Fayette	13,577	2.50

This could not be an effort to attain political balance between rural and urban populations. Since discrimination is present among counties of like population, the plan is neither consistent nor rational. It discriminates horizontally creating gross disparities between rural areas themselves as well as between urban areas themselves,[8] still maintaining the wide vertical disparity already pointed out between rural and urban.

It is also insisted that the representation formula used above (see n. 7) is "patently deficient" because "it eliminates from consideration the relative voting power of the counties that are joined together in a single election district." This is a strange claim coming from those who rely on the proposition that "the voice of every voter" need not have "approximate equality." Indeed, representative government, as they say, is not necessarily one of "bare numbers." The use of floterial districts in our political system is not ordinarily based on the theory that the floterial representative is splintered among the counties of his district per relative population. His function is to represent the whole district. However, I shall meet the charge on its own ground and by use of its "adjusted

[8] Of course this was not the case in the Georgia county unit system, *South* v. *Peters, supra,* or the Illinois initiative plan, *MacDougall* v. *Green, supra,* where recognized political units having independent significance were given minimum political weight.

'total representation' " formula show that the present apportionment is loco. For example, compare some "urban" areas of like population, using the HARLAN formula:

County	*Population*	*Representation*
Washington	36,967	2.65
Madison	37,245	4.87
Carter	23,303	1.48
Greene	23,649	2.05
Maury	24,556	3.81
Coffee	13,406	2.32
Hamblen	14,090	1.07

And now, using the same formula, compare some so-called "rural" areas of like population:

County	*Population*	*Representation*
Moore	2,340	1.23
Pickett	2,565	.22
Stewart	5,238	1.60
Cheatham	5,263	.74
Chester	6,391	1.36
Grundy	6,540	.69
Smith	8,731	2.04
Unicoi	8,787	0.40

And for counties with similar representation but with gross differences in population, take:

County	*Population*	*Representation*
Sullivan	55,712	4.07
Maury	24,556	3.81
Blount	30,353	2.12
Coffee	13,406	2.32

These cannot be "distorted effects," for here the same formula proposed by the dissenters is used and the result is even "a crazier" quilt.

The truth is that—although this case has been here for two years and has had over six hours' argument (three times the ordinary case) and has been most carefully considered over and over again by us in Conference and individually—no one, not even the State nor the dissenters, has come up with any rational basis for Tennessee's apportionment statute.

No one—except the dissenters advocating the HARLAN "adjusted 'total representation' " formula—contends that mathematical equality among voters is required by the Equal Protection Clause. But certainly there must be some rational design to a State's districting. The discrimination here does not fit any pattern—as I have said, it is but a crazy quilt. My Brother HARLAN contends that other proposed apportionment plans contain disparities. Instead of chasing those rabbits he should first pause long enough to meet appellants' proof of discrimination by showing that in fact the present plan follows a rational policy. Not being able to do this, he merely counters with such generalities as "classic legislative judgment," no "significant discrepancy," and "de minimis departures." I submit that even a casual glance at the present apportionment picture shows these conclusions to be entirely fanciful. If present representation has a policy at all, it is to maintain the *status quo* of invidious discrimination at any cost. Like the District Court, I conclude that appellants have met the burden of showing "Tennessee is guilty of a clear violation of the state constitution and of the [federal] rights of the plaintiffs. . . ."

III.

Although I find the Tennessee apportionment statute offends the Equal Protection Clause, I would not consider intervention by this Court into so delicate a field if there were any other relief available to the people of Tennessee. But the majority of the people of Tennessee have no

"practical opportunities for exerting their political weight at the polls" to correct the existing "invidious discrimination." Tennessee has no initiative and referendum. I have searched diligently for other "practical opportunities" present under the law. I find none other than through the federal courts. The majority of the voters have been caught up in a legislative strait jacket. Tennessee has an "informed, civically militant electorate" and "an aroused popular conscience," but it does not sear "the conscience of the people's representatives." This is because the legislative policy has riveted the present seats in the Assembly to their respective constituencies, and by the votes of their incumbents a reapportionment of any kind is prevented. The people have been rebuffed at the hands of the Assembly; they have tried the constitutional convention route, but since the call must originate in the Assembly it, too, has been fruitless. They have tried Tennessee courts with the same result,[9] and Governors have fought the tide only to flounder. It is said that there is recourse in Congress and perhaps that may be, but from a practical standpoint this is without substance. To date Congress has never undertaken such a task in any State. We therefore must conclude that the people of Tennessee are stymied and without judicial intervention will be saddled with the present discrimination in the affairs of their state government.

IV.

Finally, we must consider if there are any appropriate modes of effective judicial relief. The federal courts are of course not forums for political debate, nor should they

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[9] It is interesting to note that state judges often rest their decisions on the ground that this Court has precluded adjudication of the federal claim. See, *e. g.*, *Scholle* v. *Secretary of State*, 360 Mich. 1, 104 N. W. 2d 63 (1960).

resolve themselves into state constitutional conventions or legislative assemblies. Nor should their jurisdiction be exercised in the hope that such a declaration as is made today may have the direct effect of bringing on legislative action and relieving the courts of the problem of fashioning relief. To my mind this would be nothing less than blackjacking the Assembly into reapportioning the State. If judicial competence were lacking to fashion an effective decree, I would dismiss this appeal. However, like the Solicitor General of the United States, I see no such difficulty in the position of this case. One plan might be to start with the existing assembly districts, consolidate some of them, and award the seats thus released to those counties suffering the most egregious discrimination. Other possibilities are present and might be more effective. But the plan here suggested would at least release the strangle hold now on the Assembly and permit it to redistrict itself.

In this regard the appellants have proposed a plan based on the rationale of state-wide equal representation. Not believing that numerical equality of representation throughout a State is constitutionally required, I would not apply such a standard albeit a permissive one. Nevertheless, the dissenters attack it by the application of the HARLAN "adjusted 'total representation' " formula. The result is that some isolated inequalities are shown, but this in itself does not make the proposed plan irrational or place it in the "crazy quilt" category. Such inequalities, as the dissenters point out in attempting to support the present apportionment as rational, are explainable. Moreover, there is no requirement that any plan have mathematical exactness in its application. Only where, as here, the total picture reveals incommensurables of both magnitude and frequency can it be said that there is present an invidious discrimination.

In view of the detailed study that the Court has given this problem, it is unfortunate that a decision is not reached on the merits. The majority appears to hold, at least *sub silentio,* that an invidious discrimination is present, but it remands to the three-judge court for it to make what is certain to be that formal determination. It is true that Tennessee has not filed a formal answer. However, it has filed voluminous papers and made extended arguments supporting its position. At no time has it been able to contradict the appellants' factual claims; it has offered no rational explanation for the present apportionment; indeed, it has indicated that there are none known to it. As I have emphasized, the case proceeded to the point before the three-judge court that it was able to find an invidious discrimination factually present, and the State has not contested that holding here. In view of all this background I doubt if anything more can be offered or will be gained by the State on remand, other than time. Nevertheless, not being able to muster a court to dispose of the case on the merits, I concur in the opinion of the majority and acquiesce in the decision to remand. However, in fairness I do think that Tennessee is entitled to have my idea of what it faces on the record before us and the trial court some light as to how it might proceed.

As John Rutledge (later Chief Justice) said 175 years ago in the course of the Constitutional Convention, a chief function of the Court is to secure the national rights.[10] Its decision today supports the proposition for which our forebears fought and many died, namely, that to be fully conformable to the principle of right, the form of government must be representative.[11] That is the keystone upon which our government was founded

[10] 1 Farrand, The Records of the Federal Convention of 1787, 124.

[11] Kant, Perpetual Peace.

and lacking which no republic can survive. It is well for this Court to practice self-restraint and discipline in constitutional adjudication, but never in its history have those principles received sanction where the national rights of so many have been so clearly infringed for so long a time. National respect for the courts is more enhanced through the forthright enforcement of those rights rather than by rendering them nugatory through the interposition of subterfuges. In my view the ultimate decision today is in the greatest tradition of this Court.

TABLE I.

County	*1950 voting population*	*Present total representation using J. Clark's formula*	*Present total representation using J. Harlan's formula*	*Proposed total representation (appellants' plan), using J. Harlan's formula*
Van Buren	2,039	.63	.23	.11
Moore	2,340	2.00	1.23	.18
Pickett	2,565	.70	.22	.24
Sequatchie	2,904	.63	.33	.19
Meigs	3,039	.93	.48	.17
Houston	3,084	1.25	.46	.24
Trousdale	3,351	1.33	.43	.12
Lewis	3,413	1.25	.39	.25
Perry	3,711	1.50	.71	.40
Bledsoe	4,198	.63	.49	.24
Clay	4,528	.70	.40	.42
Union	4,600	.76	.37	.45
Hancock	4,710	.93	.62	.49
Stewart	5,238	1.75	1.60	.41
Cheatham	5,263	1.33	.72	.20
Cannon	5,341	2.00	1.43	.52
Decatur	5,563	1.10	.79	.52
Lake	6,252	2.00	1.44	.41
Chester	6,391	2.00	1.36	.19
Grundy	6,540	.95	.69	.43
Humphreys	6,588	1.25	1.39	.72
Johnson	6,649	1.10	.42	.43

County	*1950 voting population*	*Present total representation using J. Clark's formula*	*Present total representation using J. Harlan's formula*	*Proposed total representation (appellants' plan), using J. Harlan's formula*
Jackson	6,719	1.50	1.43	.63
De Kalb	6,984	2.00	1.56	.68
Benton	7,023	1.10	1.01	.66
Fentress	7,057	.70	.62	.64
Grainger	7,125	.93	.94	.65
Wayne	7,176	1.25	.69	.76
Polk	7,330	1.25	.68	.73
Hickman	7,598	2.00	1.85	.80
Macon	7,974	1.33	1.01	.61
Morgan	8,308	.93	.59	.75
Scott	8,417	.76	.68	.62
Smith	8,731	2.50	2.04	.67
Unicoi	8,787	.93	.40	.63
Rhea	8,937	.93	1.42	.21
White	9,244	1.43	1.69	.90
Overton	9,474	1.70	1.83	.89
Hardin	9,577	1.60	1.61	.93
Cumberland	9,593	.63	1.10	.87
Crockett	9,676	2.00	1.66	.63
Henderson	10,199	1.50	.78	.96
Marion	10,998	1.75	1.73	.72
Marshall	11,288	2.50	2.28	.84
Dickson	11,294	1.75	2.29	1.23
Jefferson	11,359	1.10	.87	1.03
McNairy	11,601	1.60	1.74	1.13
Cocke	12,572	1.60	1.46	.89
Sevier	12,793	1.60	1.47	.69
Claiborne	12,799	1.43	1.61	1.34
Monroe	12,884	1.75	1.68	1.30
Loudon	13,264	1.25	.28	.52
Warren	13,337	1.75	1.89	1.68
Coffee	13,406	2.00	2.32	1.68
Hardeman	13,565	1.60	1.86	1.11
Fayette	13,577	2.50	2.48	1.11
Haywood	13,934	2.50	2.52	1.69
Williamson	14,064	2.33	2.96	1.71

County	*1960 voting population*	*Present total representation using J. Clark's formula*	*Present total representation using J. Harlan's formula*	*Proposed total representation (appellants' plan), using J. Harlan's formula*
Hamblen	14,090	1.10	1.07	1.67
Franklin	14,297	1.75	1.95	1.73
Lauderdale	14,413	2.50	2.45	1.73
Bedford	14,732	2.00	1.45	1.74
Lincoln	15,092	2.50	2.72	1.77
Henry	15,465	2.83	2.76	1.73
Lawrence	15,847	2.00	2.22	1.81
Giles	15,935	2.25	2.54	1.81
Tipton	15,944	3.00	1.68	1.13
Robertson	16,456	2.83	2.62	1.85
Wilson	16,459	3.00	3.03	1.21
Carroll	16,472	2.83	2.88	1.82
Hawkins	16,900	3.00	1.93	1.82
Putnam	17,071	1.70	2.50	1.86
Campbell	17,477	.76	1.40	1.94
Roane	17,639	1.75	1.26	1.30
Weakley	18,007	2.33	2.63	1.85
Bradley	18,273	1.25	1.67	1.92
McMinn	18,347	1.75	1.97	1.92
Obion	18,434	2.00	2.30	1.94
Dyer	20,062	2.00	2.36	2.32
Sumner	20,143	2.33	3.56	2.54
Carter	23,303	1.10	1.48	2.55
Greene	23,649	1.93	2.05	2.68
Maury	24,556	2.25	3.81	2.85
Rutherford	25,316	2.00	3.02	2.39
Montgomery	26,284	3.00	3.73	3.06
Gibson	29,832	5.00	5.00	2.86
Blount	30,353	1.60	2.12	2.19
Anderson	33,990	1.25	1.30	3.62
Washington	36,967	1.93	2.65	3.45
Madison	37,245	3.50	4.87	3.69
Sullivan	55,712	3.00	4.07	5.57
Hamilton	131,971	6.00	6.00	15.09
Knox	140,559	7.25	8.96	15.21
Davidson	211,930	12.50	12.93	21.57
Shelby	312,345	15.50	16.85	31.59

MR. JUSTICE STEWART, concurring.

The separate writings of my dissenting and concurring Brothers stray so far from the subject of today's decision as to convey, I think, a distressingly inaccurate impression of what the Court decides. For that reason, I think it appropriate, in joining the opinion of the Court, to emphasize in a few words what the opinion does and does not say.

The Court today decides three things and no more: "(a) that the court possessed jurisdiction of the subject matter; (b) that a justiciable cause of action is stated upon which appellants would be entitled to appropriate relief; and (c) . . . that the appellants have standing to challenge the Tennessee apportionment statutes." *Ante*, pp. 197–198.

The complaint in this case asserts that Tennessee's system of apportionment is utterly arbitrary—without any possible justification in rationality. The District Court did not reach the merits of that claim, and this Court quite properly expresses no view on the subject. Contrary to the suggestion of my Brother HARLAN, the Court does not say or imply that "state legislatures must be so structured as to reflect with approximate equality the voice of every voter." *Post*, p. 332. The Court does not say or imply that there is anything in the Federal Constitution "to prevent a State, acting not irrationally, from choosing any electoral legislative structure it thinks best suited to the interests, temper, and customs of its people." *Post*, p. 334. And contrary to the suggestion of my Brother DOUGLAS, the Court most assuredly does not decide the question, "may a State weight the vote of one county or one district more heavily than it weights the vote in another?" *Ante*, p. 244.

In *MacDougall* v. *Green*, 335 U. S. 281, the Court held that the Equal Protection Clause does not "deny a State the power to assure a proper diffusion of political initia-

tive as between its thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former." 335 U. S., at 284. In case after case arising under the Equal Protection Clause the Court has said what it said again only last Term—that "the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others." *McGowan* v. *Maryland,* 366 U. S. 420, 425. In case after case arising under that Clause we have also said that "the burden of establishing the unconstitutionality of a statute rests on him who assails it." *Metropolitan Casualty Ins. Co.* v. *Brownell,* 294 U. S. 580, 584.

Today's decision does not turn its back on these settled precedents. I repeat, the Court today decides only: (1) that the District Court possessed jurisdiction of the subject matter; (2) that the complaint presents a justiciable controversy; (3) that the appellants have standing. My Brother CLARK has made a convincing prima facie showing that Tennessee's system of apportionment is in fact utterly arbitrary—without any possible justification in rationality. My Brother HARLAN has, with imagination and ingenuity, hypothesized possibly rational bases for Tennessee's system. But the merits of this case are not before us now. The defendants have not yet had an opportunity to be heard in defense of the State's system of apportionment; indeed, they have not yet even filed an answer to the complaint. As in other cases, the proper place for the trial is in the trial court, not here.

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

The Court today reverses a uniform course of decision established by a dozen cases, including one by which the very claim now sustained was unanimously rejected

only five years ago. The impressive body of rulings thus cast aside reflected the equally uniform course of our political history regarding the relationship between population and legislative representation—a wholly different matter from denial of the franchise to individuals because of race, color, religion or sex. Such a massive repudiation of the experience of our whole past in asserting destructively novel judicial power demands a detailed analysis of the role of this Court in our constitutional scheme. Disregard of inherent limits in the effective exercise of the Court's "judicial Power" not only presages the futility of judicial intervention in the essentially political conflict of forces by which the relation between population and representation has time out of mind been and now is determined. It may well impair the Court's position as the ultimate organ of "the supreme Law of the Land" in that vast range of legal problems, often strongly entangled in popular feeling, on which this Court must pronounce. The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.

A hypothetical claim resting on abstract assumptions is now for the first time made the basis for affording illusory relief for a particular evil even though it foreshadows deeper and more pervasive difficulties in consequence. The claim is hypothetical and the assumptions are abstract because the Court does not vouchsafe the lower courts—state and federal—guidelines for formulating specific, definite, wholly unprecedented remedies for the inevitable litigations that today's umbrageous disposition is bound to stimulate in connection with politically motivated reapportionments in so many States. In

such a setting, to promulgate jurisdiction in the abstract is meaningless. It is as devoid of reality as "a brooding omnipresence in the sky," for it conveys no intimation what relief, if any, a District Court is capable of affording that would not invite legislatures to play ducks and drakes with the judiciary. For this Court to direct the District Court to enforce a claim to which the Court has over the years consistently found itself required to deny legal enforcement and at the same time to find it necessary to withhold any guidance to the lower court how to enforce this turnabout, new legal claim, manifests an odd—indeed an esoteric—conception of judicial propriety. One of the Court's supporting opinions, as elucidated by commentary, unwittingly affords a disheartening preview of the mathematical quagmire (apart from divers judicially inappropriate and elusive determinants) into which this Court today catapults the lower courts of the country without so much as adumbrating the basis for a legal calculus as a means of extrication. Even assuming the indispensable intellectual disinterestedness on the part of judges in such matters, they do not have accepted legal standards or criteria or even reliable analogies to draw upon for making judicial judgments. To charge courts with the task of accommodating the incommensurable factors of policy that underlie these mathematical puzzles is to attribute, however flatteringly, omnicompetence to judges. The Framers of the Constitution persistently rejected a proposal that embodied this assumption and Thomas Jefferson never entertained it.

Recent legislation, creating a district appropriately described as "an atrocity of ingenuity," is not unique. Considering the gross inequality among legislative electoral units within almost every State, the Court naturally shrinks from asserting that in districting at least substantial equality is a constitutional requirement enforceable

by courts.* Room continues to be allowed for weighting. This of course implies that geography, economics, urban-rural conflict, and all the other non-legal factors which have throughout our history entered into political districting are to some extent not to be ruled out in the undefined vista now opened up by review in the federal courts of state reapportionments. To some extent—aye, there's the rub. In effect, today's decision empowers the courts of the country to devise what should constitute the proper composition of the legislatures of the fifty States. If state courts should for one reason or another find themselves unable to discharge this task, the duty of doing so is put on the federal courts or on this Court, if State views do not satisfy this Court's notion of what is proper districting.

We were soothingly told at the bar of this Court that we need not worry about the kind of remedy a court could effectively fashion once the abstract constitutional right to have courts pass on a state-wide system of electoral districting is recognized as a matter of judicial rhetoric, because legislatures would heed the Court's admonition. This is not only a euphoric hope. It implies a sorry

*It is worth reminding that the problem of legislative apportionment is not one dividing North and South. Indeed, in the present House of Representatives, for example, Michigan's congressional districts are far less representative of the numbers of inhabitants, according to the 1960 census, than are Louisiana's. Michigan's Sixteenth District, which is 93.1% urban, contains 802,994 persons and its Twelfth, which is 47.6% urban, contains 177,431—one-fifth as many persons. Louisiana's most populous district, the Sixth, is 53.6% urban and contains 536,029 persons, and its least populous, the Eighth, 36.7% urban, contains 263,850—nearly half. Gross disregard of any assumption that our political system implies even approximation to the notion that individual votes in the various districts within a State should have equal weight is as true, *e. g.*, of California, Illinois, and Ohio as it is of Georgia. See United States Department of Commerce, Census Release, February 24, 1962, CB62–23.

confession of judicial impotence in place of a frank acknowledgment that there is not under our Constitution a judicial remedy for every political mischief, for every undesirable exercise of legislative power. The Framers carefully and with deliberate forethought refused so to enthrone the judiciary. In this situation, as in others of like nature, appeal for relief does not belong here. Appeal must be to an informed, civically militant electorate. In a democratic society like ours, relief must come through an aroused popular conscience that sears the conscience of the people's representatives. In any event there is nothing judicially more unseemly nor more self-defeating than for this Court to make *in terrorem* pronouncements, to indulge in merely empty rhetoric, sounding a word of promise to the ear, sure to be disappointing to the hope.

This is the latest in the series of cases in which the Equal Protection and Due Process Clauses of the Fourteenth Amendment have been invoked in federal courts as restrictions upon the power of the States to allocate electoral weight among the voting populations of their various geographical subdivisions.[1] The present action, which

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[1] See *Wood* v. *Broom*, 287 U. S. 1; *Colegrove* v. *Green*, 328 U. S. 549, rehearing denied, 329 U. S. 825, motion for reargument before the full bench denied, 329 U. S. 828; *Cook* v. *Fortson*, 329 U. S. 675, rehearing denied, 329 U. S. 829; *Turman* v. *Duckworth*, 329 U. S. 675, rehearing denied, 329 U. S. 829; *Colegrove* v. *Barrett*, 330 U. S. 804; *MacDougall* v. *Green*, 335 U. S. 281; *South* v. *Peters*, 339 U. S. 276; *Tedesco* v. *Board of Supervisors*, 339 U. S. 940; *Remmey* v. *Smith*, 342 U. S. 916; *Cox* v. *Peters*, 342 U. S. 936, rehearing denied, 343 U. S. 921; *Anderson* v. *Jordan*, 343 U. S. 912; *Kidd* v. *McCanless*, 352 U. S. 920; *Radford* v. *Gary*, 352 U. S. 991; *Hartsfield* v. *Sloan*, 357 U. S. 916; *Matthews* v. *Handley*, 361 U. S. 127; *Perry* v. *Folsom*, 144 F. Supp. 874 (D. C. N. D. Ala.); *Magraw* v. *Donovan*, 163 F. Supp. 184 (D. C. D. Minn.); cf. *Dyer* v. *Kazuhisa Abe*, 138 F. Supp. 220 (D. C. D. Hawaii). And see *Keogh* v. *Neely*, 50 F. 2d 685 (C. A. 7th Cir.).

comes here on appeal from an order of a statutory three-judge District Court dismissing amended complaints seeking declaratory and injunctive relief, challenges the provisions of Tenn. Code Ann., 1955, §§ 3-101 to 3-109, which apportion state representative and senatorial seats among Tennessee's ninety-five counties.

The original plaintiffs, citizens and qualified voters entitled to vote for members of the Tennessee Legislature in the several counties in which they respectively reside, bring this action in their own behalf and "on behalf of all other voters in the State of Tennessee," or, as they alternatively assert, "on behalf of all qualified voters of their respective counties, and further, on behalf of all voters of the State of Tennessee who are similarly situated." The cities of Knoxville and Chattanooga, and the Mayor of Nashville—on his own behalf as a qualified voter and, pursuant to an authorizing resolution by the Nashville City Council, as a representative of all the city's residents—were permitted to intervene as parties plaintiff.[2] The defendants are executive officials charged with statutory duties in connection with state elections.[3]

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[2] Although the motion to intervene by the Mayor of Nashville asserted an interest in the litigation in only a representative capacity, the complaint which he subsequently filed set forth that he was a qualified voter who also sued in his own behalf. The municipalities of Knoxville and Chattanooga purport to represent their residents. Since the claims of the municipal intervenors do not differ materially from those of the parties who sue as individual voters, the Court need not now determine whether the municipalities are proper parties to this proceeding. See, *e. g., Stewart* v. *Kansas City,* 239 U. S. 14.

[3] The original complaint named as defendants Tennessee's Secretary of State, Attorney General, Coordinator of Elections, and the three members of the State Board of Elections, seeking to make the Board members representatives of all the State's County Election Commissioners. The prayer in an intervening complaint by the City of Knoxville, that the Commissioners of Elections of Knox County be added as parties defendant seems not to have been acted on by the court below. Defendants moved to dismiss, *inter alia,* on the ground

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The original plaintiffs' amended complaint avers, in substance, the following.[4] The Constitution of the State of Tennessee declares that "elections shall be free and equal," provides that no qualifications other than age, citizenship and specified residence requirements shall be attached to the right of suffrage, and prohibits denying to any person the suffrage to which he is entitled except upon conviction of an infamous crime. Art. I, § 5; Art. IV, § 1. It requires an enumeration of qualified voters within every term of ten years after 1871 and an apportionment of representatives and senators among the several counties or districts according to the number of qualified voters in each [5] at the time of each decennial

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of failure to join indispensable parties, and they argue in this Court that only the County Election Commissioners of the ninety-five counties are the effective administrators of Tennessee's elections laws, and that none of the defendants have substantial duties in connection therewith. The District Court deferred ruling on this ground of the motion. Inasmuch as it involves questions of local law more appropriately decided by judges sitting in Tennessee than by this Court, and since in any event the failure to join County Election Commissioners in this action looking to prospective relief could be corrected, if necessary, by amendment of the complaints, the issue does not concern the Court on this appeal.

[4] Jurisdiction is predicated upon R. S. § 1979, 42 U. S. C. § 1983, and 28 U. S. C. § 1343 (3).

[5] However, counties having two-thirds of the ratio required for a Representative are entitled to seat one member in the House, and there are certain geographical restrictions upon the formation of Senate districts. The applicable provisions of Article II of the Tennessee Constitution are:

"*Sec. 4. Census.*—An enumeration of the qualified voters, and an apportionment of the Representatives in the General Assembly, shall be made in the year one thousand eight hundred and seventy-one, and within every subsequent term of ten years."

"*Sec. 5. Apportionment of representatives.*—The number of Representatives shall, at the several periods of making the enumeration, be apportioned among the several counties or districts, according to the number of qualified voters in each; and shall not exceed seventy-

enumeration. Art. II, §§ 4, 5, 6. Notwithstanding these provisions, the State Legislature has not reapportioned itself since 1901. The Reapportionment Act of that year, Tenn. Acts 1901, c. 122, now Tenn. Code Ann., 1955, §§ 3–101 to 3–109,[6] was unconstitutional when enacted, because not preceded by the required enumeration of qualified voters and because it allocated legislative seats arbitrarily, unequally and discriminatorily, as measured by the 1900 federal census. Moreover, irrespective of the question of its validity in 1901, it is asserted that the Act became "unconstitutional and obsolete" in 1911 by virtue of the decennial reapportionment requirement of the Tennessee Constitution. Continuing a "purposeful and systematic plan to discriminate against a geographical class of persons," recent Tennessee Legislatures have failed, as did their predecessors, to enact reapportionment legislation, although a number of bills providing for reapportionment have been introduced. Because of population shifts since 1901, the apportionment fixed by the Act of that year and still in effect is not proportionate to population, denies to the counties in which the plaintiffs

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five, until the population of the State shall be one million and a half, and shall never exceed ninety-nine; Provided that any county having two-thirds of the ratio shall be entitled to one member."

"*Sec. 6. Apportionment of senators.*—The number of Senators shall, at the several periods of making the enumeration, be apportioned among the several counties or districts according to the number of qualified electors in each, and shall not exceed one-third the number of representatives. In apportioning the Senators among the different counties, the fraction that may be lost by any county or counties, in the apportionment of members to the House of Representatives, shall be made up to such county or counties in the Senate, as near as may be practicable. When a district is composed of two or more counties, they shall be adjoining; and no county shall be divided in forming a district."

[6] It is alleged that certain amendments to the Act of 1901 made only minor modifications of that Act, adjusting the boundaries of individual districts in a manner not material to plaintiffs' claims.

live an additional number of representatives to which they are entitled, and renders plaintiffs' votes "not as effective as the votes of the voters residing in other senatorial and representative districts . . . ." Plaintiffs "suffer a debasement of their votes by virtue of the incorrect, arbitrary, obsolete and unconstitutional apportionment of the General Assembly . . . ," and the totality of the malapportionment's effect—which permits a minority of about thirty-seven percent of the voting population of the State to control twenty of the thirty-three members of Tennessee's Senate, and a minority of forty percent of the voting population to control sixty-three of the ninety-nine members of the House—results in "a distortion of the constitutional system" established by the Federal and State Constitutions, prevents the General Assembly "from being a body representative of the people of the State of Tennessee, . . ." and is "contrary to the basic principle of representative government . . . ," and "contrary to the philosophy of government in the United States and all Anglo-Saxon jurisprudence . . . ."

Exhibits appended to the complaint purport to demonstrate the extent of the inequalities of which plaintiffs complain. Based upon "approximate voting population," [7] these set forth figures showing that the State

[7] The exhibits do not reveal the source of the population figures which they set forth, but it appears that the figures were taken from the United States Census of Population, 1950, Volume II, Part 42 (Tennessee), Table 41, at 76–91. These census figures represent the total population over twenty-one years of age in each Tennessee county; they do not purport to enumerate "qualified voters" or "qualified electors," the measure of apportionment prescribed by the Tennessee Constitution. See note 5, *supra*. To qualify to vote in Tennessee, in addition to fulfilling the age requirement, an individual must be a citizen of the United States, a resident of the State for twelve months and of the county where he offers his vote for six months next preceding the election, and must not be under the dis-

Senator from Tennessee's most populous senatorial district represents five and two-tenths times the number of voters represented by the Senator from the least populous district, while the corresponding ratio for most and least populous House districts is more than eighteen to one. The General Assembly thus apportioned has discriminated against the underrepresented counties and in favor of the overrepresented counties in the collection and distribution of various taxes and tax revenues, notably in the distribution of school and highway-improvement funds,[8] this discrimination being "made possible and effective" by the Legislature's failure to reapportion itself. Plaintiffs conclude that election of the State Legislature pursuant to the apportionment fixed by the 1901 Act violates the Tennessee Constitution and deprives them of due process of law and of the equal protection of the laws guaranteed by the Fourteenth Amendment. Their prayer below was for a declaratory judgment striking down the Act, an injunction restraining defendants from any acts necessary to the holding of elections in the districts prescribed by Tenn. Code Ann., 1955, §§ 3–101 to 3–109, until such time as the legislature is reapportioned "according to the

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qualification attaching to conviction for certain offenses. Tenn. Code Ann., 1955, §§ 2–201, 2–205. The statistics found in the United States Census of Population, 1950, Volume II, Part 42 (Tennessee), Table 42, at 92–97, suggest that the residence requirement, in particular, may be an unknown variable of considerable significance. Appellants do not suggest a means by which a court, on the basis of the federal census figures, can determine the number of qualified voters in the various Tennessee counties.

[8] The "county aid funds" derived from a portion of a state gasoline privilege tax, for example, are distributed among the counties as follows: one-half equally among the ninety-five counties, one-quarter on the basis of area, one-quarter on the basis of population, to be used by county authorities in the building, repairing and improving of county roads and bridges. Tenn. Code Ann., 1955, § 54–403. Appellants urge that this distribution is discriminatory.

Constitution of the State of Tennessee," and an order directing defendants to declare the next primary and general elections for members of the Tennessee Legislature on an at-large basis—the thirty-three senatorial candidates and the ninety-nine representative candidates receiving the highest number of votes to be declared elected.[9]

Motions to dismiss for want of jurisdiction of the subject matter and for failure to state a claim were made and granted, 179 F. Supp. 824, the District Court relying upon this Court's series of decisions beginning with *Colegrove* v. *Green,* 328 U. S. 549, rehearing denied, 329 U. S. 825, motion for reargument before the full bench denied, 329 U. S. 828. The original and intervening plaintiffs bring the case here on appeal. 364 U. S. 898. In this Court they have altered their request for relief, suggesting a "step-by-step approach." The first step is a remand to the District Court with directions to vacate the order dismissing the complaint and to enter an order retaining jurisdiction, providing "the necessary spur to legislative action . . . ." If this proves insufficient, appellants will ask the "additional spur" of an injunction prohibiting elections under the 1901 Act, or a declaration of the Act's unconstitutionality, or both. Finally, all other means failing, the District Court is invited by the plaintiffs, greatly daring, to order an election at large or redistrict the State itself or through a master. The Solicitor General of the United States, who has filed a brief *amicus* and argued in favor of reversal, asks the Court on this appeal to hold only that the District Court has "jurisdiction" and may properly exercise it to entertain the plaintiffs' claims on the merits. This would leave to that court after remand the questions of the challenged stat-

[9] Plaintiffs also suggested, as an alternative to at-large elections, that the District Court might itself redistrict the State. They did not, however, expressly pray such relief.

ute's constitutionality and of some undefined, unadumbrated relief in the event a constitutional violation is found. After an argument at the last Term, the case was set down for reargument, 366 U. S. 907, and heard this Term.

I.

In sustaining appellants' claim, based on the Fourteenth Amendment, that the District Court may entertain this suit, this Court's uniform course of decision over the years is overruled or disregarded. Explicitly it begins with *Colegrove* v. *Green, supra,* decided in 1946, but its roots run deep in the Court's historic adjudicatory process.

Colegrove held that a federal court should not entertain an action for declaratory and injunctive relief to adjudicate the constitutionality, under the Equal Protection Clause and other federal constitutional and statutory provisions, of a state statute establishing the respective districts for the State's election of Representatives to the Congress. Two opinions were written by the four Justices who composed the majority of the seven sitting members of the Court. Both opinions joining in the result in *Colegrove* v. *Green* agreed that considerations were controlling which dictated denial of jurisdiction though not in the strict sense of want of power. While the two opinions show a divergence of view regarding some of these considerations, there are important points of concurrence. Both opinions demonstrate a predominant concern, first, with avoiding federal judicial involvement in matters traditionally left to legislative policy making; second, with respect to the difficulty—in view of the nature of the problems of apportionment and its history in this country—of drawing on or devising judicial standards for judgment, as opposed to legislative determinations, of the part which mere numerical equality among voters should play as a criterion for the allocation of

political power; and, third, with problems of finding appropriate modes of relief—particularly, the problem of resolving the essentially political issue of the relative merits of at-large elections and elections held in districts of unequal population.

The broad applicability of these considerations—summarized in the loose shorthand phrase, "political question"—in cases involving a State's apportionment of voting power among its numerous localities has led the Court, since 1946, to recognize their controlling effect in a variety of situations. (In all these cases decision was by a full Court.) The "political question" principle as applied in *Colegrove* has found wide application commensurate with its function as "one of the rules basic to the federal system and this Court's appropriate place within that structure." *Rescue Army* v. *Municipal Court,* 331 U. S. 549, 570. In *Colegrove* v. *Barrett,* 330 U. S. 804, litigants brought suit in a Federal District Court challenging as offensive to the Equal Protection Clause Illinois' state legislative-apportionment laws. They pointed to state constitutional provisions requiring decennial reapportionment and allocation of seats in proportion to population, alleged a failure to reapportion for more than forty-five years—during which time extensive population shifts had rendered the legislative districts grossly unequal—and sought declaratory and injunctive relief with respect to all elections to be held thereafter. After the complaint was dismissed by the District Court, this Court dismissed an appeal for want of a substantial federal question. A similar District Court decision was affirmed here in *Radford* v. *Gary,* 352 U. S. 991. And cf. *Remmey* v. *Smith,* 342 U. S. 916. In *Tedesco* v. *Board of Supervisors,* 339 U. S. 940, the Court declined to hear, for want of a substantial federal question, the claim that the division of a municipality into voting districts of unequal population for the selection for councilmen fell

afoul of the Fourteenth Amendment, and in *Cox* v. *Peters,* 342 U. S. 936, rehearing denied, 343 U. S. 921, it found no substantial federal question raised by a state court's dismissal of a claim for damages for "devaluation" of plaintiff's vote by application of Georgia's county-unit system in a primary election for the Democratic gubernatorial candidate. The same Georgia system was subsequently attacked in a complaint for declaratory judgment and an injunction; the federal district judge declined to take the requisite steps for the convening of a statutory three-judge court; and this Court, in *Hartsfield* v. *Sloan,* 357 U. S. 916, denied a motion for leave to file a petition for a writ of mandamus to compel the district judge to act. In *MacDougall* v. *Green,* 335 U. S. 281, 283, the Court noted that "To assume that political power is a function exclusively of numbers is to disregard the practicalities of government," and, citing the *Colegrove* cases, declined to find in "such broad constitutional concepts as due process and equal protection of the laws," *id.,* at 284, a warrant for federal judicial invalidation of an Illinois statute requiring as a condition for the formation of a new political party the securing of at least two hundred signatures from each of fifty counties. And in *South* v. *Peters,* 339 U. S. 276, another suit attacking Georgia's county-unit law, it affirmed a District Court dismissal, saying

> "Federal courts consistently refuse to exercise their equity powers in cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions." *Id.,* at 277.

Of course it is important to recognize particular, relevant diversities among comprehensively similar situations. Appellants seek to distinguish several of this Court's prior decisions on one or another ground—*Colegrove* v.

Green on the ground that federal, not state, legislative apportionment was involved; *Remmey* v. *Smith* on the ground that state judicial remedies had not been tried; *Radford* v. *Gary* on the ground that Oklahoma has the initiative, whereas Tennessee does not. It would only darken counsel to discuss the relevance and significance of each of these assertedly distinguishing factors here and in the context of this entire line of cases. Suffice it that they do not serve to distinguish *Colegrove* v. *Barrett, supra,* which is on all fours with the present case, or to distinguish *Kidd* v. *McCanless,* 352 U. S. 920, in which the full Court without dissent, only five years ago, dismissed on authority of *Colegrove* v. *Green* and *Anderson* v. *Jordan,* 343 U. S. 912, an appeal from the Supreme Court of Tennessee in which a precisely similar attack was made upon the very statute now challenged. If the weight and momentum of an unvarying course of carefully considered decisions are to be respected, appellants' claims are foreclosed not only by precedents governing the exact facts of the present case but are themselves supported by authority the more persuasive in that it gives effect to the *Colegrove* principle in distinctly varying circumstances in which state arrangements allocating relative degrees of political influence among geographic groups of voters were challenged under the Fourteenth Amendment.

II.

The *Colegrove* doctrine, in the form in which repeated decisions have settled it, was not an innovation. It represents long judicial thought and experience. From its earliest opinions this Court has consistently recognized a class of controversies which do not lend themselves to judicial standards and judicial remedies. To classify the various instances as "political questions" is rather a form

of stating this conclusion than revealing of analysis.[10] Some of the cases so labelled have no relevance here. But from others emerge unifying considerations that are compelling.

1. The cases concerning war or foreign affairs, for example, are usually explained by the necessity of the country's speaking with one voice in such matters. While this concern alone undoubtedly accounts for many of the decisions,[11] others do not fit the pattern. It would hardly embarrass the conduct of war were this Court to determine, in connection with private transactions between litigants, the date upon which war is to be deemed terminated. But the Court has refused to do so. See, *e. g.*, *The Protector,* 12 Wall. 700; *Brown* v. *Hiatts,* 15 Wall. 177; *Adger* v. *Alston,* 15 Wall. 555; *Williams* v. *Bruffy,* 96 U. S. 176, 192–193. It does not suffice to explain such cases as *Ludecke* v. *Watkins,* 335 U. S. 160—deferring to political determination the question of the duration of war for purposes of the Presidential power to deport alien enemies—that judicial intrusion would seriously

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[10] See Bickel, Foreword: The Passive Virtues, 75 Harv. L. Rev. 40, 45 *et seq.* (1961).

[11] See, *e. g.*, *United States* v. *Palmer,* 3 Wheat. 610, 634, 635; *The Divina Pastora,* 4 Wheat. 52; *Williams* v. *Suffolk Ins. Co.,* 13 Pet. 415; *Kennett* v. *Chambers,* 14 How. 38; *Doe* v. *Braden,* 16 How. 635; *Jones* v. *United States,* 137 U. S. 202; *Terlinden* v. *Ames,* 184 U. S. 270; *Charlton* v. *Kelly,* 229 U. S. 447; *Oetjen* v. *Central Leather Co.,* 246 U. S. 297; *Ex parte Peru,* 318 U. S. 578; *Clark* v. *Allen,* 331 U. S. 503. Compare *Foster and Elam* v. *Neilson,* 2 Pet. 253, with *United States* v. *Arredondo,* 6 Pet. 691. Of course, judgment concerning the "political" nature of even a controversy affecting the Nation's foreign affairs is not a simple mechanical matter, and certain of the Court's decisions have accorded scant weight to the consideration of unity of action in the conduct of external relations. Compare *Vermilya-Brown Co.* v. *Connell,* 335 U. S. 377, with *United States* v. *Pink,* 315 U. S. 203.

impede the President's power effectively to protect the country's interests in time of war. Of course, this is true; but the precise issue presented is the duration of the time of war which demands the power. Cf. *Martin* v. *Mott,* 12 Wheat. 19; *Lamar* v. *Browne,* 92 U. S. 187, 193; *Hamilton* v. *Kentucky Distilleries & Warehouse Co.,* 251 U. S. 146; *Kahn* v. *Anderson,* 255 U. S. 1. And even for the purpose of determining the extent of congressional regulatory power over the tribes and dependent communities of Indians, it is ordinarily for Congress, not the Court, to determine whether or not a particular Indian group retains the characteristics constitutionally requisite to confer the power.[12] *E. g., United States* v. *Holliday,* 3 Wall. 407; *Tiger* v. *Western Investment Co.,* 221 U. S. 286; *United States* v. *Sandoval,* 231 U. S. 28. A controlling factor in such cases is that, decision respecting these kinds of complex matters of policy being traditionally committed not to courts but to the politicial agencies of government for determination by criteria of political expediency, there exists no standard ascertainable by settled judicial experience or process by reference to which a political decision affecting the question at issue between the parties can be judged. Where the question arises in the course of a litigation involving primarily the adjudication of other issues between the litigants, the Court accepts as a basis for adjudication the political departments' decision of it. But where its determination is the sole function to be served by the exercise of the judicial power, the Court will not entertain the action. See *Chicago & Southern Air Lines, Inc.,* v. *Waterman S. S. Corp.,*

[12] Obviously, this is the equivalent of saying that the characteristics are not "constitutionally requisite" in a judicially enforceable sense. The recognition of their necessity as a condition of legislation is left, as is observance of certain other constitutional commands, to the conscience of the non-judicial organs. Cf. *Kentucky* v. *Dennison,* 24 How. 66.

333 U. S. 103. The dominant consideration is "the lack of satisfactory criteria for a judicial determination . . . ." Mr. Chief Jusice Hughes, for the Court, in *Coleman* v. *Miller,* 307 U. S. 433, 454–455. Compare *United States* v. *Rogers,* 4 How. 567, 572, with *Worcester* v. *Georgia,* 6 Pet. 515.[13]

This may be, like so many questions of law, a matter of degree. Questions have arisen under the Constitution to which adjudication gives answer although the criteria for decision are less than unwavering bright lines. Often in these cases illumination was found in the federal structures established by, or the underlying presuppositions of, the Constitution. With respect to such questions, the Court has recognized that, concerning a particular power of Congress put in issue, ". . . effective restraints on its exercise must proceed from political rather than from judicial processes." *Wickard* v. *Filburn,* 317 U. S. 111, 120. It is also true that even regarding the duration of war and the status of Indian tribes, referred to above as subjects ordinarily committed exclusively to the non-judicial branches, the Court has suggested that some limitations exist upon the range within which the decisions of those branches will be permitted to go unreviewed. See *United States* v. *Sandoval, supra,* at 46; cf. *Chastleton Corp.* v. *Sinclair,* 264 U. S. 543. But this is merely to acknowledge that particular circumstances may differ so greatly in degree as to differ thereby in kind, and that, although within a certain range of cases on a continuum, no standard of distinction can be found to tell between them, other cases will fall above or below the range. The doctrine of political questions, like any other, is not to

[13] Also compare the *Coleman* case and *United States* v. *Sprague,* 282 U. S. 716, with *Hawke* v. *Smith (No. 1),* 253 U. S. 221. See the *National Prohibition Cases,* 253 U. S. 350; and consider the Court's treatment of the several contentions in *Leser* v. *Garnett,* 258 U. S. 130.

be applied beyond the limits of its own logic, with all the quiddities and abstract disharmonies it may manifest. See the disposition of contentions based on logically distorting views of *Colegrove* v. *Green* and *Hunter* v. *Pittsburgh,* 207 U. S. 161, in *Gomillion* v. *Lightfoot,* 364 U. S. 339.

2. The Court has been particularly unwilling to intervene in matters concerning the structure and organization of the political institutions of the States. The abstention from judicial entry into such areas has been greater even than that which marks the Court's ordinary approach to issues of state power challenged under broad federal guarantees. "We should be very reluctant to decide that we had jurisdiction in such a case, and thus in an action of this nature to supervise and review the political administration of a state government by its own officials and through its own courts. The jurisdiction of this court would only exist in case there had been . . . such a plain and substantial departure from the fundamental principles upon which our government is based that it could with truth and propriety be said that if the judgment were suffered to remain, the party aggrieved would be deprived of his life, liberty or property in violation of the provisions of the Federal Constitution." *Wilson* v. *North Carolina,* 169 U. S. 586, 596. See *Taylor and Marshall* v. *Beckham* (No. 1), 178 U. S. 548; *Walton* v. *House of Representatives,* 265 U. S. 487; *Snowden* v. *Hughes,* 321 U. S. 1. Cf. *In re Sawyer,* 124 U. S. 200, 220–221.

Where, however, state law has made particular federal questions determinative of relations within the structure of state government, not in challenge of it, the Court has resolved such narrow, legally defined questions in proper proceedings. See *Boyd* v. *Nebraska ex rel. Thayer,* 143 U. S. 135. In such instances there is no conflict between state policy and the exercise of federal judicial

power. This distinction explains the decisions in *Smiley* v. *Holm,* 285 U. S. 355; *Koenig* v. *Flynn,* 285 U. S. 375; and *Carroll* v. *Becker,* 285 U. S. 380, in which the Court released state constitutional provisions prescribing local lawmaking procedures from misconceived restriction of superior federal requirements. Adjudication of the federal claim involved in those cases was not one demanding the accommodation of conflicting interests for which no readily accessible judicial standards could be found. See *McPherson* v. *Blacker,* 146 U. S. 1, in which, in a case coming here on writ of error from the judgment of a state court which had entertained it on the merits, the Court treated as justiciable the claim that a State could not constitutionally select its presidential electors by districts, but held that Art. II, § 1, cl. 2, of the Constitution left the mode of choosing electors in the absolute discretion of the States. Cf. *Pope* v. *Williams,* 193 U. S. 621; *Breedlove* v. *Suttles,* 302 U. S. 277. To read with literalness the abstracted jurisdictional discussion in the *McPherson* opinion reveals the danger of conceptions of "justiciability" derived from talk and not from the effective decision in a case. In probing beneath the surface of cases in which the Court has declined to interfere with the actions of political organs of government, of decisive significance is whether in each situation the ultimate decision has been to intervene or not to intervene. Compare the reliance in *South* v. *Peters,* 339 U. S. 276, on *MacDougall* v. *Green,* 335 U. S. 281, and the "jurisdictional" form of the opinion in *Wilson* v. *North Carolina,* 169 U. S. 586, 596, *supra.*

3. The cases involving Negro disfranchisement are no exception to the principle of avoiding federal judicial intervention into matters of state government in the absence of an explicit and clear constitutional imperative. For here the controlling command of Supreme Law is plain and unequivocal. An end of discrimination against

the Negro was the compelling motive of the Civil War Amendments. The Fifteenth expresses this in terms, and it is no less true of the Equal Protection Clause of the Fourteenth. *Slaughter-House Cases,* 16 Wall. 36, 67–72; *Strauder* v. *West Virginia,* 100 U. S. 303, 306–307; *Nixon* v. *Herndon,* 273 U. S. 536, 541. Thus the Court, in cases involving discrimination against the Negro's right to vote, has recognized not only the action at law for damages,[14] but, in appropriate circumstances, the extraordinary remedy of declaratory or injunctive relief.[15] *Schnell* v. *Davis,* 336 U. S. 933; *Terry* v. *Adams,* 345 U. S. 461.[16] Injunctions in these cases, it should be noted, would not have restrained state-wide general elections. Compare *Giles* v. *Harris,* 189 U. S. 475.

4. The Court has refused to exercise its jurisdiction to pass on "abstract questions of political power, of sovereignty, of government." *Massachusetts* v. *Mellon,* 262 U. S. 447, 485. See *Texas* v. *Interstate Commerce Commission,* 258 U. S. 158, 162; *New Jersey* v. *Sargent,* 269 U. S. 328, 337. The "political question" doctrine, in this aspect, reflects the policies underlying the requirement of "standing": that the litigant who would challenge offi-

[14] *E. g., Myers* v. *Anderson,* 238 U. S. 368; *Nixon* v. *Condon,* 286 U. S. 73; *Lane* v. *Wilson,* 307 U. S. 268; *Smith* v. *Allwright,* 321 U. S. 649. The action for damages for improperly rejecting an elector's vote had been given by the English law since the time of *Ashby* v. *White,* 1 Brown's Cases in Parliament 62; 2 Ld. Raym. 938; 3 Ld. Raym. 320, a case which in its own day precipitated an intra-parliamentary war of major dimensions. See 6 Hansard, Parliamentary History of England (1810), 225–324, 376–436. Prior to the racial-discrimination cases, this Court had recognized the action, by implication, in dictum in *Swafford* v. *Templeton,* 185 U. S. 487, and *Wiley* v. *Sinkler,* 179 U. S. 58, both respecting federal elections.

[15] Cf. *Gomillion* v. *Lightfoot,* 364 U. S. 339.

[16] By statute an action for preventive relief is now given the United States in certain voting cases. 71 Stat. 637, 42 U. S. C. § 1971 (c), amending R. S. § 2004. See *United States* v. *Raines,* 362 U. S. 17; *United States* v. *Thomas,* 362 U. S. 58.

cial action must claim infringement of an interest particular and personal to himself, as distinguished from a cause of dissatisfaction with the general frame and functioning of government—a complaint that the political institutions are awry. See *Stearns* v. *Wood,* 236 U. S. 75; *Fairchild* v. *Hughes,* 258 U. S. 126; *United Public Workers* v. *Mitchell,* 330 U. S. 75, 89–91. What renders cases of this kind non-justiciable is not necessarily the nature of the parties to them, for the Court has resolved other issues between similar parties; [17] nor is it the nature of the legal question involved, for the same type of question has been adjudicated when presented in other forms of controversy.[18] The crux of the matter is that courts are not fit instruments of decision where what is essentially at stake is the composition of those large contests of policy traditionally fought out in non-judicial forums, by which governments and the actions of governments are made and unmade. See *Texas* v. *White,* 7 Wall. 700; *White* v. *Hart,* 13 Wall. 646; *Phillips* v. *Payne,* 92 U. S. 130; *Marsh* v. *Burroughs,* 1 Woods 463, 471–472 (Bradley, Circuit Justice); cf. *Wilson* v. *Shaw,* 204 U. S. 24; but see *Coyle* v. *Smith,* 221 U. S. 559. Thus, where the Cherokee Nation sought by an original motion to restrain the State of Georgia from the enforcement of laws which assimilated Cherokee territory to the State's counties, abrogated Cherokee law, and abolished Cherokee government, the Court held that such a claim was not judicially cognizable. *Cherokee Nation* v. *Georgia,* 5 Pet. 1.[19] And in *Georgia*

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[17] Compare *Rhode Island* v. *Massachusetts,* 12 Pet. 657, and cases following, with *Georgia* v. *Stanton,* 6 Wall. 50.

[18] Compare *Worcester* v. *Georgia,* 6 Pet. 515, with *Cherokee Nation* v. *Georgia,* 5 Pet. 1, 20, 28 (Mr. Justice Johnson, concurring), 51 and 75 (Mr. Justice Thompson, dissenting).

[19] This was an alternative ground of Chief Justice Marshall's opinion for the Court. *Id.,* at 20. The question which Marshall reserved as "unnecessary to decide," *ibid.,* was not the justiciability of the bill

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v. *Stanton,* 6 Wall. 50, the Court dismissed for want of jurisdiction a bill by the State of Georgia seeking to enjoin enforcement of the Reconstruction Acts on the ground that the command by military districts which they established extinguished existing state government and replaced it with a form of government unauthorized by the Constitution: [20]

> "That these matters, both as stated in the body of the bill; and, in the prayers for relief, call for the judgment of the court upon political questions, and, upon rights, not of persons or property, but of a political character, will hardly be denied. For the rights for the protection of which our authority is invoked, are the rights of sovereignty, of political jurisdiction, of government, of corporate existence as a State, with all its constitutional powers and privileges. No case of private rights or private property infringed, or in danger of actual or threatened infringement, is presented by the bill, in a judicial form, for the judgment of the court." *Id.,* at 77.[21]

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in this aspect, but the "more doubtful" question whether that "part of the bill which respects the land occupied by the Indians, and prays the aid of the court to protect their possession," might be entertained. *Ibid.* Mr. Justice Johnson, concurring, found the controversy nonjusticiable and would have put the ruling solely on this ground, *id.,* at 28, and Mr. Justice Thompson, in dissent, agreed that much of the matter in the bill was not fit for judicial determination. *Id.,* at 51, 75.

[20] Cf. *Mississippi* v. *Johnson,* 4 Wall. 475.

[21] Considerations similar to those which determined the *Cherokee Nation* case and *Georgia* v. *Stanton* no doubt explain the celebrated decision in *Nabob of the Carnatic* v. *East India Co.,* 1 Ves. jun. *371; 2 Ves. jun. *56, rather than any attribution of a portion of British sovereignty, in respect of Indian affairs, to the company. The reluctance of the English Judges to involve themselves in contests of factional political power is of ancient standing. In *The Duke*

5. The influence of these converging considerations—the caution not to undertake decision where standards meet for judicial judgment are lacking, the reluctance to interfere with matters of state government in the absence of an unquestionable and effectively enforceable mandate, the unwillingness to make courts arbiters of the broad issues of political organization historically committed to other institutions and for whose adjustment the judicial process is ill-adapted—has been decisive of the settled line of cases, reaching back more than a century, which holds that Art. IV, § 4, of the Constitution, guaranteeing to the States "a Republican Form of Government," [22] is not enforceable through the courts. *E. g., O'Neill* v. *Leamer,* 239 U. S. 244; *Mountain Timber Co.* v. *Washington,* 243 U. S. 219; *Cochran* v. *Board of Education,* 281 U. S. 370; *Highland Farms Dairy, Inc.,* v. *Agnew,* 300 U. S. 608.[23] Claims resting on this specific

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of York's Claim to the Crown, 5 Rotuli Parl. 375, printed in Wambaugh, Cases on Constitutional Law (1915), 1, the role which the Judges were asked to play appears to have been rather that of advocates than of judges, but the answer which they returned to the Lords relied on reasons equally applicable to either role.

[22] "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."

[23] Cf. the cases holding that the Fourteenth Amendment imposes no such restriction upon the form of a State's governmental organization as will permit persons affected by government action to complain that in its organization principles of separation of powers have been violated. *E. g., Dreyer* v. *Illinois,* 187 U. S. 71; *Soliah* v. *Heskin,* 222 U. S. 522; *Houck* v. *Little River Drainage District,* 239 U. S. 254. The same consistent refusal of this Court to find that the Federal Constitution restricts state power to design the structure of state political institutions is reflected in the cases rejecting claims arising out of the States' creation, alteration, or destruction of local

guarantee of the Constitution have been held non-justiciable which challenged state distribution of powers between the legislative and judicial branches, *Ohio ex rel. Bryant* v. *Akron Metropolitan Park District,* 281 U. S. 74, state delegation of power to municipalities, *Kiernan* v. *Portland, Oregon,* 223 U. S. 151, state adoption of the referendum as a legislative institution, *Ohio ex rel. Davis* v. *Hildebrant,* 241 U. S. 565, 569, and state restriction upon the power of state constitutional amendment, *Marshall* v. *Dye,* 231 U. S. 250, 256–257. The subject was fully considered in *Pacific States Telephone & Telegraph Co.* v. *Oregon,* 223 U. S. 118, in which the Court dismissed for want of jurisdiction a writ of error attacking a state license-tax statute enacted by the initiative, on the claim that this mode of legislation was inconsistent with a Republican Form of Government and violated the Equal Protection Clause and other federal guarantees. After noting ". . . the ruinous destruction of legislative authority in matters purely political which would necessarily be occasioned by giving sanction

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subdivisions or their powers, insofar as these claims are made by the subdivisions themselves, see *Laramie County* v. *Albany County,* 92 U. S. 307; *Pawhuska* v. *Pawhuska Oil & Gas Co.,* 250 U. S. 394; *Trenton* v. *New Jersey,* 262 U. S. 182; *Risty* v. *Chicago, R. I. & P. R. Co.,* 270 U. S. 378, 389–390; *Williams* v. *Mayor and City Council of Baltimore,* 289 U. S. 36, or by the whole body of their residents who share only a general, undifferentiated interest in their preservation. See *Hunter* v. *Pittsburgh,* 207 U. S. 161. The policy is also given effect by the denial of "standing" to persons seeking to challenge state action as infringing the interest of some separate unit within the State's administrative structure—a denial which precludes the arbitrament by federal courts of what are only disputes over the local allocation of government functions and powers. See, *e. g., Smith* v. *Indiana,* 191 U. S. 138; *Braxton County Court* v. *West Virginia,* 208 U. S. 192; *Marshall* v. *Dye,* 231 U. S. 250; *Stewart* v. *Kansas City,* 239 U. S. 14.

to the doctrine which underlies and would be necessarily involved in sustaining the propositions contended for," [24] the Court said:

> ". . . [The] essentially political nature [of this claim] is at once made manifest by understanding that the assault which the contention here advanced makes it [*sic*] not on the tax as a tax, but on the State as a State. It is addressed to the framework and political character of the government by which the statute levying the tax was passed. It is the government, the political entity, which (reducing the case to its essence) is called to the bar of this court, not for the purpose of testing judicially some exercise of power assailed, on the ground that its exertion

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[24] 223 U. S., at 141. ". . . [T]he contention, if held to be sound, would necessarily affect the validity, not only of the particular statute which is before us, but of every other statute passed in Oregon since the adoption of the initiative and referendum. And indeed the propositions go further than this, since in their essence they assert that there is no governmental function, legislative or judicial, in Oregon, because it cannot be assumed, if the proposition be well founded, that there is at one and the same time one and the same government which is republican in form and not of that character." Compare *Luther* v. *Borden*, 7 How. 1, 38–39:

". . . For, if this court is authorized to enter upon this inquiry as proposed by the plaintiff, and it should be decided that the charter government had no legal existence during the period of time above mentioned,—if it had been annulled by the adoption of the opposing government,—then the laws passed by its legislature during that time were nullities; its taxes wrongfully collected; its salaries and compensation to its officers illegally paid; its public accounts improperly settled; and the judgments and sentences of its courts in civil and criminal cases null and void, and the officers who carried their decisions into operation answerable as trespassers, if not in some cases as criminals.

"When the decision of this court might lead to such results, it becomes its duty to examine very carefully its own powers before it undertakes to exercise jurisdiction."

has injuriously affected the rights of an individual because of repugnancy to some constitutional limitation, but to demand of the State that it establish its right to exist as a State, republican in form." *Id.*, at 150–151.

The starting point of the doctrine applied in these cases is, of course, *Luther* v. *Borden*, 7 How. 1. The case arose out of the Dorr Rebellion in Rhode Island in 1841–1842. Rhode Island, at the time of the separation from England, had not adopted a new constitution but had continued, in its existence as an independent State, under its original royal Charter, with certain statutory alterations. This frame of government provided no means for amendment of the fundamental law; the right of suffrage was to be prescribed by legislation, which limited it to freeholders. In the 1830's, largely because of the growth of towns in which there developed a propertied class whose means were not represented by freehold estates, dissatisfaction arose with the suffrage qualifications of the charter government. In addition, population shifts had caused a dated apportionment of seats in the lower house to yield substantial numerical inequality of political influence, even among qualified voters. The towns felt themselves underrepresented, and agitation began for electoral reform. When the charter government failed to respond, popular meetings of those who favored the broader suffrage were held and delegates elected to a convention which met and drafted a state constitution. This constitution provided for universal manhood suffrage (with certain qualifications); and it was to be adopted by vote of the people at elections at which a similarly expansive franchise obtained. This new scheme of government was ratified at the polls and declared effective by the convention, but the government elected and organized under it, with Dorr at its head, never came to power. The

charter government denied the validity of the convention, the constitution and its government and, after an insignificant skirmish, routed Dorr and his followers. It meanwhile provided for the calling of its own convention, which drafted a constitution that went peacefully into effect in 1843.[25]

Luther v. *Borden* was a trespass action brought by one of Dorr's supporters in a United States Circuit Court to recover damages for the breaking and entering of his house. The defendants justified under military orders pursuant to martial law declared by the charter government, and plaintiff, by his reply, joined issue on the legality of the charter government subsequent to the adoption of the Dorr constitution. Evidence offered by the plaintiff tending to establish that the Dorr government was the rightful government of Rhode Island was rejected by the Circuit Court; the court charged the jury that the charter government was lawful; and on a verdict for defendants, plaintiff brought a writ of error to this Court.

The Court, through Mr. Chief Justice Taney, affirmed. After noting that the issue of the charter government's legality had been resolved in that government's favor by the state courts of Rhode Island—that the state courts, deeming the matter a political one unfit for judicial determination, had declined to entertain attacks upon the existence and authority of the charter government—the Chief Justice held that the courts of the United States must follow those of the State in this regard. *Id.*, at 39–40. It was recognized that the compulsion to follow

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[25] See Bowen, The Recent Contest in Rhode Island (1844); Frieze, A Concise History of the Efforts to Obtain an Extension of Suffrage in Rhode Island; From the Year 1811 to 1842 (2d ed. 1842); Mowry, The Dorr War (1901); Wayland, The Affairs of Rhode Island (2d ed. 1842).

state law would not apply in a federal court in the face of a superior command found in the Federal Constitution, *ibid.*, but no such command was found. The Constitution, the Court said—referring to the Guarantee Clause of the Fourth Article—". . . as far as it has provided for an emergency of this kind, and authorized the general government to interfere in the domestic concerns of a State, has treated the subject as political in its nature, and placed the power in the hands of that department." *Id.*, at 42.

> "Under this article of the Constitution it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal. It is true that the contest in this case did not last long enough to bring the matter to this issue; and as no senators or representatives were elected under the authority of the government of which Mr. Dorr was the head, Congress was not called upon to decide the controversy. Yet the right to decide is placed there, and not in the courts." *Ibid.*[26]

[26] The Court reasoned, with respect to the guarantee against domestic violence also contained in Art. IV, § 4, that this, too, was an authority committed solely to Congress; that Congress had empowered the President, not the courts, to enforce it; and that it

In determining this issue non-justiciable, the Court was sensitive to the same considerations to which its later decisions have given the varied applications already discussed. It adverted to the delicacy of judicial intervention into the very structure of government.[27] It acknowledged that tradition had long entrusted questions of this nature to non-judicial processes,[28] and that judicial processes were unsuited to their decision.[29] The absence of guiding standards for judgment was critical, for the question whether the Dorr constitution had been rightfully adopted depended, in part, upon the extent of the franchise to be recognized—the very point of contention over which rebellion had been fought.

> ". . . [I]f the Circuit Court had entered upon this inquiry, by what rule could it have determined the qualification of voters upon the adoption or rejection of the proposed constitution, unless there was some previous law of the State to guide it? It is the province of a court to expound the law, not to make it. And certainly it is no part of the judicial functions of any court of the United States to prescribe the qualification of voters in a State, giving the right to those to whom it is denied by the written and established constitution and laws of the State, or taking it away from those to whom it is given; nor has it the right to determine what political privileges

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was inconceivable that the courts should assume a power to make determinations in the premises which might conflict with those of the Executive. It noted further that, in fact, the President had recognized the governor of the charter government as the lawful authority in Rhode Island, although it had been unnecessary to call out the militia in his support.

[27] See note 24, *supra*.

[28] *Id.*, at 39, 46–47.

[29] *Id.*, at 41–42.

the citizens of a State are entitled to, unless there is an established constitution or law to govern its decision." *Id.*, at 41.

Mr. Justice Woodbury (who dissented with respect to the effect of martial law) agreed with the Court regarding the inappropriateness of judicial inquiry into the issues:

> "But, fortunately for our freedom from political excitements in judicial duties, this court can never with propriety be called on officially to be the umpire in questions merely political. The adjustment of these questions belongs to the people and their political representatives, either in the State or general government. These questions relate to matters not to be settled on strict legal principles. They are adjusted rather by inclination,—or prejudice or compromise, often. Some of them succeed or are defeated even by public policy alone, or mere naked power, rather than intrinsic right. . . .
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> "Another evil, alarming and little foreseen, involved in regarding these as questions for the final arbitrament of judges would be, that in such an event all political privileges and rights would, in a dispute among the people, depend on our decision finally. . . . [D]isputed points in making constitutions, depending often, as before shown, on policy, inclination, popular resolves, and popular will, . . . if the people, in the distribution of powers under the constitution, should ever think of making judges supreme arbiters in political controversies, when not selected by nor, frequently, amenable to them, nor at liberty to follow such various considerations in their judgments as belong to mere political questions, they will dethrone themselves and lose one of their own invaluable birthrights; building up in this way—slowly, but surely—a new sovereign power in the

republic, in most respects irresponsible and unchangeable for life, and one more dangerous, in theory at least, than the worst elective oligarchy in the worst of times. . . ." *Id.*, at 51–53.[30]

III.

The present case involves all of the elements that have made the Guarantee Clause cases non-justiciable. It is, in effect, a Guarantee Clause claim masquerading under a different label. But it cannot make the case more fit for judicial action that appellants invoke the Fourteenth Amendment rather than Art. IV, § 4, where, in fact, the gist of their complaint is the same—unless it can be found that the Fourteenth Amendment speaks with greater particularity to their situation. We have been admonished to avoid "the tyranny of labels." *Snyder* v. *Massachusetts*, 291 U. S. 97, 114. Art. IV, § 4, is not committed by express constitutional terms to Congress. It is the nature of the controversies arising under it, nothing else, which has made it judicially unenforceable. Of course, if a controversy falls within judicial power, it depends "on how he [the plaintiff] casts his action," *Pan American Petroleum Corp.* v. *Superior Court*, 366 U. S. 656, 662, whether he brings himself within a jurisdictional statute. But where judicial competence is wanting, it cannot be created by invoking one clause of the Constitution rather than another. When what was essentially a Guarantee Clause claim was sought to be laid, as well, under the Equal Protection Clause in *Pacific States Telephone & Telegraph Co.* v. *Oregon, supra,* the Court had no difficulty in "dis-

[30] In evaluating the Court's determination not to inquire into the authority of the charter government, it must be remembered that, throughout the country, Dorr "had received the sympathy of the Democratic press. His cause, therefore, became distinctly a party issue." 2 Warren, The Supreme Court in United States History (Rev. ed. 1937), 186.

pelling any mere confusion resulting from forms of expression and considering the substance of things . . . ." 223 U. S., at 140.

Here appellants attack "the State as a State," precisely as it was perceived to be attacked in the *Pacific States* case, *id.*, at 150. Their complaint is that the basis of representation of the Tennessee Legislature hurts them. They assert that "a minority now rules in Tennessee," that the apportionment statute results in a "distortion of the constitutional system," that the General Assembly is no longer "a body representative of the people of the State of Tennessee," all "contrary to the basic principle of representative government . . . ." Accepting appellants' own formulation of the issue, one can know this handsaw from a hawk. Such a claim would be nonjusticiable not merely under Art. IV, § 4, but under any clause of the Constitution, by virtue of the very fact that a federal court is not a forum for political debate. *Massachusetts* v. *Mellon, supra.*

But appellants, of course, do not rest on this claim *simpliciter.* In invoking the Equal Protection Clause, they assert that the distortion of representative government complained of is produced by systematic discrimination against them, by way of "a debasement of their votes . . . ." Does this characterization, with due regard for the facts from which it is derived, add anything to appellants' case? [31]

At first blush, this charge of discrimination based on legislative underrepresentation is given the appearance of

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[31] Appellants also allege discrimination in the legislature's allocation of certain tax burdens and benefits. Whether or not such discrimination would violate the Equal Protection Clause if the tax statutes were challenged in a proper proceeding, see *Dane* v. *Jackson,* 256 U. S. 589; cf. *Nashville, C. & St. L. R. Co.* v. *Wallace,* 288 U. S. 249, 268, these recitative allegations do not affect the nature of the controversy which appellants' complaints present.

a more private, less impersonal claim, than the assertion that the frame of government is askew. Appellants appear as representatives of a class that is prejudiced as a class, in contradistinction to the polity in its entirety. However, the discrimination relied on is the deprivation of what appellants conceive to be their proportionate share of political influence. This, of course, is the practical effect of any allocation of power within the institutions of government. Hardly any distribution of political authority that could be assailed as rendering government non-republican would fail similarly to operate to the prejudice of some groups, and to the advantage of others, within the body politic. It would be ingenuous not to see, or consciously blind to deny, that the real battle over the initiative and referendum, or over a delegation of power to local rather than state-wide authority, is the battle between forces whose influence is disparate among the various organs of government to whom power may be given. No shift of power but works a corresponding shift in political influence among the groups composing a society.

What, then, is this question of legislative apportionment? Appellants invoke the right to vote and to have their votes counted.[32] But they are permitted to vote and their votes are counted. They go to the polls, they cast their ballots, they send their representatives to the state

[32] Appellants would find a "right" to have one's ballot counted on authority of *United States* v. *Mosley,* 238 U. S. 383; *United States* v. *Classic,* 313 U. S. 299; *United States* v. *Saylor,* 322 U. S. 385. All that these cases hold is that conspiracies to commit certain sharp election practices which, in a federal election, cause ballots not to receive the weight which the law has in fact given them, may amount to deprivations of the constitutionally secured right to vote for federal officers. But see *United States* v. *Bathgate,* 246 U. S. 220. The cases do not so much as suggest that there exists a constitutional limitation upon the relative weight to which the law might properly entitle respective ballots, even in federal elections.

councils. Their complaint is simply that the representatives are not sufficiently numerous or powerful—in short, that Tennessee has adopted a basis of representation with which they are dissatisfied. Talk of "debasement" or "dilution" is circular talk. One cannot speak of "debasement" or "dilution" of the value of a vote until there is first defined a standard of reference as to what a vote should be worth. What is actually asked of the Court in this case is to choose among competing bases of representation—ultimately, really, among competing theories of political philosophy—in order to establish an appropriate frame of government for the State of Tennessee and thereby for all the States of the Union.

In such a matter, abstract analogies which ignore the facts of history deal in unrealities; they betray reason. This is not a case in which a State has, through a device however oblique and sophisticated, denied Negroes or Jews or redheaded persons a vote, or given them only a third or a sixth of a vote. That was *Gomillion* v. *Lightfoot,* 364 U. S. 339. What Tennessee illustrates is an old and still widespread method of representation—representation by local geographical division, only in part respective of population—in preference to others, others, forsooth, more appealing. Appellants contest this choice and seek to make this Court the arbiter of the disagreement. They would make the Equal Protection Clause the charter of adjudication, asserting that the equality which it guarantees comports, if not the assurance of equal weight to every voter's vote, at least the basic conception that representation ought to be proportionate to population, a standard by reference to which the reasonableness of apportionment plans may be judged.

To find such a political conception legally enforceable in the broad and unspecific guarantee of equal protection is to rewrite the Constitution. See *Luther* v. *Borden, supra.* Certainly, "equal protection" is no more secure

a foundation for judicial judgment of the permissibility of varying forms of representative government than is "Republican Form." Indeed since "equal protection of the laws" can only mean an equality of persons standing in the same relation to whatever governmental action is challenged, the determination whether treatment is equal presupposes a determination concerning the nature of the relationship. This, with respect to apportionment, means an inquiry into the theoretic base of representation in an acceptably republican state. For a court could not determine the equal-protection issue without in fact first determining the Republican-Form issue, simply because what is reasonable for equal-protection purposes will depend upon what frame of government, basically, is allowed. To divorce "equal protection" from "Republican Form" is to talk about half a question.

The notion that representation proportioned to the geographic spread of population is so universally accepted as a necessary element of equality between man and man that it must be taken to be the standard of a political equality preserved by the Fourteenth Amendment—that it is, in appellants' words "the basic principle of representative government"—is, to put it bluntly, not true. However desirable and however desired by some among the great political thinkers and framers of our government, it has never been generally practiced, today or in the past. It was not the English system, it was not the colonial system, it was not the system chosen for the national government by the Constitution, it was not the system exclusively or even predominantly practiced by the States at the time of adoption of the Fourteenth Amendment, it is not predominantly practiced by the States today. Unless judges, the judges of this Court, are to make their private views of political wisdom the measure of the Constitution—views which in all honesty cannot but give the appearance, if not reflect the reality, of

involvement with the business of partisan politics so inescapably a part of apportionment controversies—the Fourteenth Amendment, "itself a historical product," *Jackman* v. *Rosenbaum Co.*, 260 U. S. 22, 31, provides no guide for judicial oversight of the representation problem.

1. *Great Britain.* Writing in 1958, Professor W. J. M. Mackenzie aptly summarized the British history of the principle of representation proportioned to population: " 'Equal electoral districts' formed part of the programme of radical reform in England in the 1830s, the only part of that programme which has not been realised." [33] Until the late nineteenth century, the sole base of representation (with certain exceptions not now relevant) was the local geographical unit: each county or borough returned its fixed number of members, usually two for the English units, regardless of population.[34] Prior to the Reform Act of 1832, this system was marked by the almost total disfranchisement of the populous northern industrial centers, which had grown to significant size at the advent of the Industrial Revolution and had not been granted borough representation, and by the existence of the rotten borough, playing its substantial part in the Crown's struggle for continued control of the Commons.[35] In 1831, ten southernmost English counties, numbering three and a quarter million people, had two hundred and thirty-five parliamentary representatives, while the six northernmost counties, with more than three and a half million people, had sixty-eight.[36] It was said that one hundred and eighty persons appointed three hundred and

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[33] Mackenzie, Free Elections (1958) (hereafter, Mackenzie), 108.

[34] Ogg, English Government and Politics (2d ed. 1936) (hereafter, Ogg), 248–250, 257; Seymour, Electoral Reform in England and Wales (1915) (hereafter, Seymour), 46–47.

[35] Ogg 257–259; Seymour 45–52; Carpenter, The Development of American Political Thought (1930) (hereafter, Carpenter), 45–46.

[36] Ogg 258.

fifty members in the Commons.[37] Less than a half century earlier, Madison in the Federalist had remarked that half the House was returned by less than six thousand of the eight million people of England and Scotland.[38]

The Act of 1832, the product of a fierce partisan political struggle and the occasion of charges of gerrymandering not without foundation,[39] effected eradication of only the most extreme numerical inequalities of the unreformed system. It did not adopt the principle of representation based on population, but merely disfranchised certain among the rotten borough and enfranchised most of the urban centers—still quite without regard to their relative numbers.[40] In the wake of the Act there remained substantial electoral inequality: the boroughs of Cornwall were represented sixteen times as weightily, judged by population, as the county's eastern division; the average ratio of seats to population in ten agricultural counties was four and a half times that in ten manufacturing divisions; Honiton, with about three thousand inhabitants, was equally represented with Liverpool, which had four hundred thousand.[41] In 1866 apportionment by population began to be advocated generally in the House, but was not made the basis of the redistribution of 1867, although the act of that year did apportion representation more evenly, gauged by the population standard.[42] Population shifts increased the surviving inequalities; by 1884 the representation ratio

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[37] Seymour 51.

[38] The Federalist, No. 56 (Wright ed. 1961), at 382. Compare Seymour 49. This takes account of the restricted franchise as well as the effect of the local-unit apportionment principle.

[39] Seymour 52–76.

[40] Ogg 264–265; Seymour 318–319.

[41] For these and other instances of gross inequality, see Seymour 320–325.

[42] Seymour 333–346; Ogg 265.

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in many small boroughs was more than twenty-two times that of Birmingham or Manchester, forty-to-one disparities could be found elsewhere, and, in sum, in the 1870's and 1880's, a fourth of the electorate returned two-thirds of the members of the House.[43]

The first systematic English attempt to distribute seats by population was the Redistribution Act of 1885.[44] The statute still left ratios of inequality of as much as seven to one,[45] which had increased to fifteen to one by 1912.[46] In 1918 Parliament again responded to "shockingly bad" conditions of inequality,[47] and to partisan political inspiration,[48] by redistribution.[49] In 1944, redistribution was put on a periodic footing by the House of Commons (Redistribution of Seats) Act of that year,[50] which committed a continuing primary responsibility for reapportioning the Commons to administrative agencies (Boundary Commissions for England, Scotland, Wales and Northern Ireland, respectively).[51] The Commissions, having regard to certain rules prescribed for their guidance, are to prepare at designated intervals reports for the Home Secretary's submission to Parliament, along with the draft of an Order in Council to give effect to the

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[43] Seymour 349, 490–491.

[44] Seymour 489–518.

[45] Mackenzie 108; see also Seymour 513–517.

[46] Ogg 270.

[47] Ogg 253.

[48] Ogg 270–271.

[49] Ogg 273–274.

[50] 7 & 8 Geo. VI, c. 41. The 1944 Act was amended by the House of Commons (Redistribution of Seats) Act, 1947, 10 & 11 Geo. VI, c. 10, and the two, with other provisions, were consolidated in the House of Commons (Redistribution of Seats) Act, 1949, 12 & 13 Geo. VI, c. 66, since amended by the House of Commons (Redistribution of Seats) Act, 1958, 6 & 7 Eliz. II, c. 26.

[51] See generally Butler, The Redistribution of Seats, 33 Public Administration 125 (1955).

Commissions' recommendations. The districting rules adopt the basic principle of representation by population, although the principle is significantly modified by directions to respect local geographic boundaries as far as practicable, and by discretion to take account of special geographical conditions, including the size, shape and accessibility of constituencies. Under the original 1944 Act, the rules provided that (subject to the exercise of the discretion respecting special geographical conditions and to regard for the total size of the House of Commons as prescribed by the Act) so far as practicable, the single-member districts should not deviate more than twenty-five percent from the electoral quota (population divided by number of constituencies). However, apparently at the recommendation of the Boundary Commission for England, the twenty-five percent standard was eliminated as too restrictive in 1947, and replaced by the flexible provision that constituencies are to be as near the electoral quota as practicable, a rule which is expressly subordinated both to the consideration of special geographic conditions and to that of preserving local boundaries.[52] Free of the twenty-five percent rule, the Commissions drew up plans of distribution in which inequalities among the districts run, in ordinary cases, as high as two to one and, in the case of a few extraordinary constituencies, three to one.[53] The action of the Boundary Commission for England was twice challenged in the courts in 1954—the claim being that the Commission had violated statutory rules

[52] See note 50, *supra*. However, Commissions are given discretion to depart from the strict application of the local boundary rule to avoid excessive disparities between the electorate of a constituency and the electoral quota, or between the electorate of a constituency and that of neighboring constituencies. For detailed discussion, see Craig, Parliament and Boundary Commissions, [1959] Public Law 23. See also Butler, *supra*, note 51, at 127.

[53] Mackenzie 108, 113.

prescribing the standards for its judgment—and in both cases the Judges declined to intervene. In *Hammersmith Borough Council* v. *Boundary Commission for England*,[54] Harman, J., was of opinion that the nature of the controversy and the scheme of the Acts made the matter inappropriate for judicial interference, and in *Harper* v. *Home Secretary*,[55] the Court of Appeal, per Evershed, M. R., quoting Harman, J., with approval, adverting to the wide range of discretion entrusted to the Commission under the Acts, and remarking the delicate character of the parliamentary issues in which it was sought to engage the court, reached the same conclusion.[56]

The House of Commons (Redistribution of Seats) Act, 1958,[57] made two further amendments to the law. Responsive to the recommendation of the Boundary Commission for England,[58] the interval permitted between Commission reports was more than doubled, to a new maximum of fifteen years.[59] And at the suggestion of the same Commission that "It would ease the future labours of the Commission and remove much local irritation if Rule 5 [requiring that the electorate of each constituency be as near the electoral quota as practicable] were to be so amended as to allow us to make recommendations preserving the status quo in any area where such a course appeared to be desirable and not inconsistent

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[54] The Times, Dec. 15, 1954, p. 4, cols 3–4.

[55] [1955] 1 Ch. 238.

[56] The court reserved the question whether a judicial remedy might be found in a case in which it appeared that a Commission had manifestly acted in complete disregard of the Acts.

[57] Note 50, *supra*.

[58] First Periodical Report of the Boundary Commission for England [Cmd. 9311] (1954), 4, par. 19.

[59] Under the 1949 Act, see note 50, *supra*, the intervals between reports were to be not less than three nor more than seven years, with certain qualifications. The 1958 Act raised the minimum to ten and the maximum to fifteen years.

with the broad intention of the Rules," [60] the Commissions were directed to consider the inconveniences attendant upon the alteration of constituencies, and the local ties which such alteration might break. The Home Secretary's view of this amendment was that it worked to erect "a presumption against making changes unless there is a very strong case for them." [61]

2. *The Colonies and the Union.* For the guiding political theorists of the Revolutionary generation, the English system of representation, in its most salient aspects of numerical inequality, was a model to be avoided, not followed.[62] Nevertheless, the basic English principle of apportioning representatives among the local governmental entities, towns or counties, rather than among units of approximately equal population, had early taken root in the colonies.[63] In some, as in Massachusetts and Rhode Island, numbers of electors were taken into account, in a rough fashion, by allotting increasing fixed quotas of representatives to several towns or classes of towns graduated by population, but in most of the colonies delegates were allowed to the local units without respect to numbers.[64] This resulted in grossly unequal electoral units.[65] The representation ratio in one North Carolina county was more than eight times that in another.[66] Moreover, American rotten boroughs had appeared,[67] and apportionment was made an instrument first in the politi-

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[60] First Periodical Report, *supra*, note 58, at 4, par. 20.

[61] 582 H. C. Deb. (5th ser. 1957–1958), 230.

[62] See The Federalist, No. 56, *supra*, note 38; Tudor, Life of James Otis (1823), 188–190.

[63] Griffith, The Rise and Development of the Gerrymander (1907) (hereafter, Griffith), 23–24.

[64] Luce, Legislative Principles (1930) (hereafter, Luce), 336–342.

[65] Griffith 25.

[66] Griffith 15–16, n. 1.

[67] Griffith 28.

cal struggles between the King or the royal governors and the colonial legislatures,[68] and, later, between the older tidewater regions in the colonies and the growing interior.[69] Madison in the Philadelphia Convention adverted to the "inequality of the Representation in the Legislatures of particular States, . . ." [70] arguing that it was necessary to confer on Congress the power ultimately to regulate the times, places and manner of selecting Representatives,[71] in order to forestall the over-represented counties' securing themselves a similar over-representation in the national councils. The example of South Carolina, where Charleston's overrepresentation was a continuing bone of contention between the tidewater and the back country, was cited by Madison in the Virginia Convention and by King in the Massachusetts Convention, in support of the same power, and King also spoke of the extreme numerical inequality arising from Connecticut's town-representation system.[72]

Such inequalities survived the constitutional period. The United States Constitution itself did not largely adopt the principle of numbers. Apportionment of the national legislature among the States was one of the most difficult problems for the Convention; [73] its solution—involving State representation in the Senate [74] and the three-fifths compromise in the House [75]—left neither chamber apportioned proportionately to population.

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[68] Carpenter 48–49, 54; Griffith 26, 28–29; Luce 339–340.

[69] Carpenter 87; Griffith 26–29, 31.

[70] II Farrand, Records of the Federal Convention (1911), 241.

[71] The power was provided. Art. I, § 4, cl. 1.

[72] III Elliot's Debates (2d ed. 1891), 367; II *id.*, at 50–51.

[73] See Madison, in I Farrand, *op. cit., supra,* note 70, at 321: "The great difficulty lies in the affair of Representation; and if this could be adjusted, all others would be surmountable."

[74] See The Federalist, No. 62 (Wright ed. 1961), at 408–409.

[75] See The Federalist, No. 54, *id.*, at 369–374.

Within the States, electoral power continued to be allotted to favor the tidewater.[76] Jefferson, in his Notes on Virginia, recorded the "very unequal" representation there: individual counties differing in population by a ratio of more than seventeen to one elected the same number of representatives, and those nineteen thousand of Virginia's fifty thousand men who lived between the falls of the rivers and the seacoast returned half the State's senators and almost half its delegates.[77] In South Carolina in 1790, the three lower districts, with a white population of less than twenty-nine thousand elected twenty senators and seventy assembly members; while in the uplands more than one hundred and eleven thousand white persons elected seventeen senators and fifty-four assemblymen.[78]

In the early nineteenth century, the demands of the interior became more insistent. The apportionment quarrel in Virginia was a major factor in precipitating the calling of a constitutional convention in 1829. Bitter animosities racked the convention, threatening the State with disunion. At last a compromise which gave the three hundred and twenty thousand people of the west thirteen senators, as against the nineteen senators returned by the three hundred sixty-three thousand people of the east, commanded agreement. It was adopted at the polls but left the western counties so dissatisfied that there were threats of revolt and realignment with the State of Maryland.[79]

Maryland, however, had her own numerical disproportions. In 1820, one representative vote in Calvert County

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[76] Carpenter 130.

[77] Jefferson, Notes on the State of Virginia (Peden ed. 1955), 118–119. See also II Writings of Thomas Jefferson (Memorial ed. 1903), 160–162.

[78] Carpenter 139–140.

[79] Griffith 102-104.

was worth five in Frederick County, and almost two hundred thousand people were represented by eighteen members, while fifty thousand others elected twenty.[80] This was the result of the county-representation system of allotment. And, except for Massachusetts which, after a long struggle, did adopt representation by population at the mid-century, a similar town-representation principle continued to prevail in various forms throughout New England, with all its attendant, often gross inequalities.[81]

3. *The States at the time of ratification of the Fourteenth Amendment, and those later admitted.* The several state conventions throughout the first half of the nineteenth century were the scenes of fierce sectional and party strifes respecting the geographic allocation of representation.[82] Their product was a wide variety of apportionment methods which recognized the element of population in differing ways and degrees. Particularly pertinent to appraisal of the contention that the Fourteenth Amendment embodied a standard limiting the freedom of the States with regard to the principles and bases of local legislative apportionment is an examination of the apportionment provisions of the thirty-three States which ratified the Amendment between 1866 and 1870, at their respective times of ratification. These may be considered in two groups: (A) the ratifying States other than the ten Southern States whose constitutions, at the time of ratification or shortly thereafter, were the work of the Reconstruction Act conventions; [83] and

[80] Griffith 104–105.

[81] Luce 343–350. Bowen, *supra,* note 25, at 17–18, records that in 1824 Providence County, having three-fifths of Rhode Island's population, elected only twenty-two of its seventy-two representatives, and that the town of Providence, more than double the size of Newport, had half Newport's number of representatives.

[82] Carpenter 130–137; Luce 364–367; Griffith 116–117.

[83] See 14 Stat. 428; 15 Stat. 2, 14, 41.

(B) the ten Reconstruction-Act States. All thirty-three are significant, because they demonstrate how unfounded is the assumption that the ratifying States could have agreed on a standard apportionment theory or practice, and how baseless the suggestion that by voting for the Equal Protection Clause they sought to establish a test mold for apportionment which—if appellants' argument is sound—struck down *sub silentio* not a few of their own state constitutional provisions. But the constitutions of the ten Reconstruction-Act States have an added importance, for it is scarcely to be thought that the Congress which was so solicitous for the adoption of the Fourteenth Amendment as to make the readmission of the late rebel States to Congress turn on their respective ratifications of it, would have approved constitutions which—again, under appellants' theory—contemporaneously offended the Amendment.

A. Of the twenty-three ratifying States of the first group, seven or eight had constitutions which demanded or allowed apportionment of both houses on the basis of population,[84] unqualifiedly or with only qualifications respecting the preservation of local boundaries.[85] Three

[84] Various indices of population were employed among the States which took account of the factor of numbers. Some counted all inhabitants, *e. g.*, N. J. Const., 1844, Art. IV, § 3; some, only white inhabitants, *e. g.*, Ill. Const., 1848, Art. III, § 8; some, male inhabitants over twenty-one, *e. g.*, Ind. Const., 1851, Art. IV, §§ 4–5; some, qualified voters, *e. g.*, Tenn. Const., 1834, Art. II, §§ 4 to 6; some excluded aliens, *e. g.*, N. Y. Const., 1846, Art. III, §§ 4, 5 (and untaxed persons of color); some excluded untaxed Indians and military personnel, *e. g.*, Neb. Const., 1866–1867, Art. II, § 3. For present purposes these differences, although not unimportant as revealing fundamental divergences in representation theory, will be disregarded.

[85] Ore. Const., 1857, Art. IV, §§ 5, 6, 7; Ill. Const., 1848, Art. III, §§ 8, 9; Ind. Const., 1851, Art. IV, §§ 4, 5, 6; Minn. Const., 1857,

more apportioned on what was essentially a population base, but provided that in one house counties having a specified fraction of a ratio—a moiety or two-thirds—should have a representative.[86] Since each of these three States limited the size of their chambers, the fractional rule could operate—and, at least in Michigan, has in fact operated [87]—to produce substantial numerical inequalities

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Art. IV, § 2; Wis. Const., 1848, Art. IV, §§ 3 to 5; Mass. Const., 1780, Amends. XXI, XXII; Neb. Const., 1866–1867, Art. II, § 3. All of these but Minnesota made provision for periodic reapportionment. Nevada's Constitution of 1864, Art. XV, § 13, provided that the federal censuses and interim state decennial enumerations should serve as the bases of representation for both houses, but did not expressly require either numerical equality or reapportionment at fixed intervals.

Several of these constitutions contain provisions which forbid splitting counties or which otherwise require recognition of local boundaries. See, *e. g.*, the severe restriction in Ill. Const., 1848, Art. III, § 9. Such provisions will almost inevitably produce numerical inequalities. See, for example, University of Oklahoma, Bureau of Government Research, Legislative Apportionment in Oklahoma (1956), 21–23. However, because their effect in this regard will turn on idiosyncratic local factors, and because other constitutional provisions are a more significant source of inequality, these provisions are here disregarded.

[86] Tenn. Const., 1834, Art. II, §§ 4 to 6 (two-thirds of a ratio entitles a county to one representative in the House); W. Va. Const., 1861–1863, Art. IV, §§ 4, 5, 7, 8, 9 (one-half of a ratio entitles a county to one representative in the House); Mich. Const., 1850, Art. IV, §§ 2 to 4 (one-half of a ratio entitles each county thereafter organized to one representative in the House). In Oregon and Iowa a major-fraction rule applied which gave a House seat not only to counties having a moiety of a single ratio, but to all counties having more than half a ratio in excess of the multiple of a ratio. Ore. Const., 1857, Art. IV, § 6, note 85, *supra;* Iowa Const., 1857, Art. III, §§ 33, 34, 35, 37, note 89, *infra.*

[87] See Bone, States Attempting to Comply with Reapportionment Requirements, 17 Law & Contemp. Prob. 387, 391 (1952).

in favor of the sparsely populated counties.[88] Iowa favored her small counties by the rule that no more than four counties might be combined in a representative district,[89] and New York and Kansas compromised population and county-representation principles by assuring every county, regardless of the number of its inhabitants, at least one seat in their respective Houses.[90]

Ohio and Maine recognized the factor of numbers by a different device. The former gave a House representative to each county having half a ratio, two representatives for a ratio and three-quarters, three representatives for three ratios, and a single additional representative for each additional ratio.[91] The latter, after apportioning among counties on a population base, gave each town of fifteen hundred inhabitants one representative, each town of three thousand, seven hundred and fifty inhabitants two representatives, and so on in increasing intervals to twenty-six thousand, two hundred and fifty inhabitants—towns of that size or larger receiving the maximum permitted number of representatives: seven.[92] The departure from numerical equality under these systems is apparent: in Maine, assuming the incidence of towns in

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[88] It also appears, although the section is not altogether clear, that the provisions of West Virginia's Constitution controlling apportionment of senators would operate in favor of the State's less populous regions by limiting any single county to a maximum of two senators. W. Va. Const., 1861–1863, Art. IV, § 4.

[89] Iowa Const., 1857, Art. III, §§ 33, 34, 35, 37.

[90] N. Y. Const., 1846, Art. III, §§ 4, 5 (except Hamilton County); Kan. Const., 1859, Art. 2, § 2; Art. 10. The Kansas provisions require periodic apportionment based on censuses, but do not in terms demand equal districts.

[91] Ohio Const., 1851, Art. XI, §§ 1 to 5. See Art. XI, §§ 6 to 9 for Senate apportionment.

[92] Me. Const., 1819, Art. IV, Pt. First, §§ 2, 3. See Art. IV, Pt. Second, § 2, for Senate apportionment based on numbers.

all categories, representative ratios would differ by factors of two and a half to one, at a minimum. Similarly, Missouri gave each of its counties, however small, one representative, two representatives for three ratios, three representatives for six ratios, and one additional representative for each three ratios above six.[93] New Hampshire allotted a representative to each town of one hundred and fifty ratable male polls of voting age and one more representative for each increment of three hundred above that figure; [94] its Senate was not apportioned by population but among districts based on the proportion of direct taxes paid.[95] In Pennsylvania, the basis of apportionment in both houses was taxable inhabitants; and in the House every county of at least thirty-five hundred taxables had a representative, nor could more than three counties be joined in forming a representative district; while in the Senate no city or county could have more than four of the State's twenty-five to thirty-three senators.[96]

Finally, four States apportioned at least one House with no regard whatever to population. In Connecticut [97] and Vermont [98] representation in the House was on a town basis; Rhode Island gave one senator to each of its towns or cities,[99] and New Jersey, one to each of its counties.[100]

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[93] Mo. Const., 1865, Art. IV, §§ 2, 7, 8. See Art. IV, §§ 4 to 8, for Senate apportionment based on numbers.

[94] Towns smaller than one hundred and fifty, if so situated that it was "very inconvenient" to join them to other towns for voting purposes, might be permitted by the legislature to send a representative.

[95] N. H. Const., 1792, Pt. Second, §§ IX to XI; Pt. Second, § XXVI.

[96] Pa. Const., 1838, as amended, Art. I, §§ 4, 6, 7.

[97] Conn. Const., 1818, Art. Third, § 3.

[98] Vt. Const., 1793, c. II, § 7.

[99] R. I. Const., 1842, Art. VI, § 1.

[100] N. J. Const., 1844, Art. IV, § 2, cl. One.

Nor, in any of these States, was the other House apportioned on a strict principle of equal numbers: Connecticut gave each of its counties a minimum of two senators [101] and Vermont, one; [102] New Jersey assured each county a representative; [103] and in Rhode Island, which gave at least one representative to each town or city, no town or city could have more than one-sixth of the total number in the House.[104]

B. Among the ten late Confederate States affected by the Reconstruction Acts, in only four did it appear that apportionment of both state legislative houses would or might be based strictly on population.[105] In North Carolina,[106] South Carolina,[107] Louisiana,[108] and Alabama,[109] each county (in the case of Louisiana, each parish) was assured at least one seat in the lower House irrespective of numbers—a distribution which exhausted, respectively,

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[101] Conn. Const., 1818, Amend. II.

[102] Vt. Const., 1793, Amend. 23.

[103] N. J. Const., 1844, Art. IV, § 3, cl. One.

[104] R. I. Const., 1842, Art. V, § 1.

[105] Ark. Const., 1868, Art. V, §§ 8, 9; Va. Const., 1864, Art. IV, § 6 (this constitution was in effect when Virginia ratified the Fourteenth Amendment); Va. Const., 1870, Art. V, § 4 (this was Virginia's Reconstruction-Act convention constitution); Miss. Const., 1868, Art. IV, §§ 33 to 35; Tex. Const., 1868, Art. III, §§ 11, 34. The Virginia Constitutions and Texas' provisions for apportioning its lower chamber do not in terms require equality of numbers, although they call for reapportionment following a census. In Arkansas, the legislature was authorized, but not commanded, to reapportion periodically; it is not clear that equality was required.

[106] N. C. Const., 1868, Art. II, §§ 6, 7. See Art. II, § 5, for Senate apportionment based on numbers.

[107] S. C. Const., 1868, Art. I, § 34; Art. II, §§ 4 to 6.

[108] La. Const., 1868, Tit. II, Arts. 20, 21. See Tit. II, Arts. 28 to 30, for Senate apportionment based on numbers.

[109] Ala. Const., 1867, Art. VIII, § 1. See Art. VIII, § 3, for Senate apportionment based on numbers.

on the basis of the number of then-existing counties, three-quarters, one-quarter, two-fifths and three-fifths of the maximum possible number of representatives, before a single seat was available for assignment on a population basis; and in South Carolina, moreover, the Senate was composed of one member elected from each county, except that Charleston sent two.[110] In Florida's House, each county had one seat guaranteed and an additional seat for every thousand registered voters up to a maximum of four representatives; [111] while Georgia, whose Senate seats were distributed among forty-four single-member districts each composed of three contiguous counties,[112] assigned representation in its House as follows: three seats to each of the six most populous counties, two to each of the thirty-one next most populous, one to each of the remaining ninety-five.[113] As might be expected, the one-representative-per-county minimum pattern has proved incompatible with numerical equality,[114] and Georgia's

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[110] S. C. Const., 1868, Art. II, § 8.

[111] Fla. Const., 1868, Art. XIV, par. 1. See Art. XIV, par. 2, for Senate apportionment.

[112] Ga. Const., 1868, Art. III, § 2. The extent of legislative authority to alter these districts is unclear, but it appears that the structure of three contiguous counties for each of forty-four districts is meant to be permanent.

[113] Ga. Const., 1868, Art. III, § 3. The extent of legislative authority to alter the apportionment is unclear, but it appears that the three-tiered structure is meant to be permanent.

[114] See, *e. g.*, Durfee, Apportionment of Representation in the Legislature: A Study of State Constitutions, 43 Mich. L. Rev. 1091, 1097 (1945); Short, States That Have Not Met Their Constitutional Requirements, 17 Law & Contemp. Prob. 377 (1952); Harvey, Reapportionments of State Legislatures—Legal Requirements, 17 Law & Contemp. Prob. 364, 370 (1952). For an excellent case study of numerical inequalities deriving solely from a one-member-per-county minimum provision in Ohio, see Aumann, Rural Ohio Hangs On, 46 Nat. Mun. Rev. 189, 191–192 (1957).

county-clustering system has produced representative-ratio disparities, between the largest and smallest counties, of more than sixty to one.[115]

C. The constitutions[116] of the thirteen States which Congress admitted to the Union after the ratification of the Fourteenth Amendment showed a similar pattern. Six of them required or permitted apportionment of both Houses by population, subject only to qualifications concerning local boundaries.[117] Wyoming, apportioning by population, guaranteed to each of its counties at least one seat in each House,[118] and Idaho, which prescribed (after the first legislative session) that apportionment should be "as may be provided by law," gave each county at least one representative.[119] In Oklahoma, House members were apportioned among counties so as to give one

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[115] Dauer and Kelsay, Unrepresentative States, 44 Nat. Mun. Rev. 571, 574 (1955). (This is the effect of a later Georgia constitutional provision, Ga. Const., 1945, § 2–1501, substantially similar to that of 1868.) The same three-tiered system has subsequently been adopted in Florida, Fla. Const., 1885, Art. VII, §§ 3, 4, where its effects have been inequalities of the order of eighty to one. Dauer and Kelsay, *supra*, at 575, 587.

[116] The constitutions discussed are those under which the new States entered the Union.

[117] Colo. Const., 1876, Art. V, §§ 45, 47; N. D. Const., 1889, Art. 2, §§ 29, 35; S. D. Const., 1889, Art. III, § 5; Wash. Const., 1889, Art. II, §§ 3, 6; Utah Const., 1895, Art. IX, §§ 2, 4; N. M. Const., 1911, Art. IV, following § 41. The Colorado and Utah Constitutions provide for reapportionment "according to ratios to be fixed by law" after periodic census and enumeration. In New Mexico the legislature is authorized, but not commanded, to reapportion periodically. North Dakota does not in terms demand equality in House representation; members are to be assigned among the several senatorial districts, which are of equal population.

[118] Wyo. Const., 1889, Art. III, Legislative Department, § 3; Art. III, Apportionment, §§ 2, 3.

[119] Idaho Const., 1889, Art. III, § 4.

seat for half a ratio, two for a ratio and three-quarters, and one for each additional ratio up to a maximum of seven representatives per county.[120] Montana required reapportionment of its House on the basis of periodic enumerations according to ratios to be fixed by law [121] but its counties were represented as counties in the Senate, each county having one senator.[122] Alaska [123] and Hawaii [124] each apportioned a number of senators among constitutionally fixed districts; their respective Houses were to be periodically reapportioned by population, subject to a moiety rule in Alaska [125] and to Hawaii's guarantee of one representative to each of four constitutionally designated areas.[126] The Arizona Constitution assigned representation to each county in each house, giving one or two senators and from one to seven representatives to each, and making no provision for reapportionment.[127]

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[120] Okla. Const., 1907, Art. V, § 10 (b) to (j). See Art. V, §§ 9 (a), 9 (b) for Senate apportionment based on numbers.

[121] Mont. Const., 1889, Art. VI, §§ 2, 3.

[122] Mont. Const., 1889, Art. V, § 4; Art. VI, § 4. The effective provisions are, first, that there shall be no more than one senator from each county, and, second, that no senatorial district shall consist of more than one county.

[123] Alaska Const., 1956, Art. VI, § 7; Art. XIV, § 2. The exact boundaries of the districts may be modified to conform to changes in House districts, but their numbers of senators and their approximate perimeters are to be preserved.

[124] Hawaii Const., 1950, Art. III, § 2.

[125] Alaska Const., 1956, Art. VI, §§ 3, 4, 6. The method of equal proportions is used.

[126] Hawaii Const., 1950, Art. III, § 4. The method of equal proportions is used, and, for sub-apportionment within the four "basic" areas, a form of moiety rule obtains.

[127] Ariz. Const., 1910, Art. IV, Pt. 2, § 1. On the basis of 1910 census figures, this apportionment yielded, for example, a senatorial-ratio differential of more than four to one between Mohave and Cochise or between Mohave and Maricopa Counties. II Thirteenth Census of the United States (1910), 71–73.

4. *Contemporary apportionment.* Detailed recent studies are available to describe the present-day constitutional and statutory status of apportionment in the fifty States.[128] They demonstrate a decided twentieth-century trend away from population as the exclusive base of representation. Today, only a dozen state constitutions provide for periodic legislative reapportionment of both houses by a substantially unqualified application of the population standard,[129] and only about a dozen more prescribe such reapportionment for even a single chamber. "Specific provision for county representation in at least one house of the state legislature has been increasingly adopted since the end of the 19th century. . . ." [130] More than twenty States now guarantee each county at least one seat in one of their houses regardless of population, and in nine others county or town units are given equal representation in one legislative branch, whatever the number of each unit's inhabitants. Of course, numerically considered, "These provisions invariably result in over-representation of the least populated areas. . . ." [131] And in an effort to curb the political dominance of metropolitan regions, at least ten States now limit the maximum entitlement of any single county (or, in some cases, city)

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[128] The pertinent state constitutional provisions are set forth in tabular form in XIII Book of the States (1960–1961), 54–58; and Greenfield, Ford and Emery, Legislative Reapportionment: California in National Perspective (University of California, Berkeley, 1959), 81–85. An earlier treatment now outdated in several respects but still useful is Durfee, *supra,* note 114. See discussions in Harvey, *supra,* note 114; Shull, Political and Partisan Implications of State Legislative Apportionment, 17 Law & Contemp. Prob. 417, 418–421 (1952).

[129] Nebraska's unicameral legislature is included in this count.

[130] Greenfield, Ford and Emery, *supra,* note 128, at 7.

[131] Harvey, *supra,* note 114, at 367. See Tabor, The Gerrymandering of State and Federal Legislative Districts, 16 Md. L. Rev. 277, 282–283 (1956).

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in one legislative house—another source of substantial numerical disproportion.[132]

Moreover, it is common knowledge that the legislatures have not kept reapportionment up to date, even where state constitutions in terms require it.[133] In particular, the pattern of according greater per capita representation to rural, relatively sparsely populated areas—the same pattern which finds expression in various state constitutional provisions,[134] and which has been given effect in England and elsewhere [135]—has, in some of the States, been made the law by legislative inaction in the face of

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[132] See, *e. g.*, Mather and Ray, The Iowa Senatorial Districts Can Be Reapportioned—A Possible Plan, 39 Iowa L. Rev. 535, 536–537 (1954).

[133] See, *e. g.*, Walter, Reapportionment and Urban Representation, 195 Annals of the American Academy of Political and Social Science 11, 12–13 (1938); Bone, *supra*, note 87. Legislative inaction and state constitutional provisions rejecting the principle of equal numbers have both contributed to the generally prevailing numerical inequality of representation in this country. Compare Walter, *supra*, with Baker, One Vote, One Value, 47 Nat. Mun. Rev. 16, 18 (1958).

[134] See, *e. g.*, Griffith 116–117; Luce 364–367, 370; Merriam, American Political Ideas (1929), 244–245; Legislation, Apportionment of the New York State Senate, 31 St. John's L. Rev. 335, 341–342 (1957).

[135] In 1947, the Boundary Commission for England, ". . . impressed by the advantages of accessibility [that large compact urban regions] . . . enjoy over widely scattered rural areas . . . came to the conclusion that they could conveniently support electorates in excess of the electoral quota, and would in the majority of cases prefer to do so rather than suffer severance of local unity for parliamentary purposes"—that "in general urban constituencies could more conveniently support large electorates than rural constituencies . . . ." Initial Report of the Boundary Commission for England [Cmd. 7260] (1947), 5. See also Mackenzie 110–111; De Grazia, General Theory of Apportionment, 17 Law & Contemp. Prob. 256, 261–262 (1952).

population shifts.[136] Throughout the country, urban and suburban areas tend to be given higher representation ratios than do rural areas.[137]

The stark fact is that if among the numerous widely varying principles and practices that control state legislative apportionment today there is any generally prevailing feature, that feature is geographic inequality in relation to the population standard.[138] Examples could be endlessly multiplied. In New Jersey, counties of

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[136] See Walter, *supra*, note 133; Walter, Reapportionment of State Legislative Districts, 37 Ill. L. Rev. 20, 37–38 (1942). The urban-rural conflict is often the core of apportionment controversy. See Durfee, *supra*, note 114, at 1093–1094; Short, *supra*, note 114, at 381.

[137] Baker, Rural Versus Urban Political Power (1955), 11–19; MacNeil, Urban Representation in State Legislatures, 18 State Government 59 (1945); United States Conference of Mayors, Government Of the People, By the People, For the People (ca. 1947).

[138] See, in addition to the authorities cited in notes 130, 131, 136 and 137, *supra*, and 140 to 144, *infra*, (all containing other examples than those remarked in text), Hurst, The Growth of American Law, The Law Makers (1950), 41–42; American Political Science Assn., Committee on American Legislatures, American State Legislatures (Zeller ed. 1954), 34–35; Gosnell, Democracy, The Threshold of Freedom (1948), 179–181; Lewis, Legislative Apportionment and the Federal Courts, 71 Harv. L. Rev. 1057, 1059–1064 (1958); Friedman, Reapportionment Myth, 49 Nat. Civ. Rev. 184, 185–186 (1960); 106 Cong. Rec. 14901–14916 (remarks of Senator Clark and supporting materials); H. R. Rep. No. 2533, 85th Cong., 2d Sess. 24; H. R. Doc. No. 198, 84th Cong., 1st Sess. 38–40; Hadwiger, Representation in the Missouri General Assembly, 24 Mo. L. Rev. 178, 180–181 (1959); Hamilton, Beardsley and Coats, Legislative Reapportionment in Indiana: Some Observations and a Suggestion, 35 Notre Dame Law. 368–370 (1960); Corter, Pennsylvania Ponders Apportionment, 32 Temple L. Q. 279, 283–288 (1959). Concerning the classical gerrymander, see Griffith, passim; Luce 395–404; Brooks, Political Parties and Electoral Problems (3d ed. 1933), 472–481. For foreign examples of numerical disproportion, see Hogan, Election and Representation (1945), 95; Finer, Theory and Practice of Modern Government (Rev. ed. 1949), 551–552.

thirty-five thousand and of more than nine hundred and five thousand inhabitants respectively each have a single senator.[139] Representative districts in Minnesota range from 7,290 inhabitants to 107,246 inhabitants.[140] Ratios of senatorial representation in California vary as much as two hundred and ninety-seven to one.[141] In Oklahoma, the range is ten to one for House constituencies and roughly sixteen to one for Senate constituencies.[142] Colebrook, Connecticut—population 592—elects two House representatives; Hartford—population 177,397—also elects two.[143] The first, third and fifth of these examples are the products of constitutional provisions which subordinate population to regional considerations in apportionment; the second is the result of legislative inaction; the fourth derives from both constitutional and legislative sources. A survey made in 1955, in sum, reveals that less than thirty percent of the population inhabit districts sufficient to elect a House majority in thirteen States and a Senate majority in nineteen States.[144] These figures show more than individual variations from a generally accepted standard of electoral equality. They show that there is not—as there has never been—a standard by

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[139] Baker, *supra*, note 137, at 11. Recent New Jersey legislation provides for reapportionment of the State's lower House by executive action following each United States census subsequent to that of 1960. N. J. Laws 1961, c. 1. The apportionment is to be made on the basis of population, save that each county is assured at least one House seat. In the State's Senate, however, by constitutional command, each county elects a single senator, regardless of population. N. J. Const., 1947, Art. IV, § II, par. 1.

[140] Note, 42 Minn. L. Rev. 617, 618–619 (1958).

[141] Greenfield, Ford and Emery, *supra*, note 128, at 3.

[142] University of Oklahoma, Bureau of Government Research, The Apportionment Problem in Oklahoma (1959), 16–29.

[143] 1 Labor's Economic Rev. 89, 96 (1956).

[144] Dauer and Kelsay, Unrepresentative States, 44 Nat. Mun. Rev. 571, 572, 574 (1955).

which the place of equality as a factor in apportionment can be measured.

Manifestly, the Equal Protection Clause supplies no clearer guide for judicial examination of apportionment methods than would the Guarantee Clause itself. Apportionment, by its character, is a subject of extraordinary complexity, involving—even after the fundamental theoretical issues concerning what is to be represented in a representative legislature have been fought out or compromised—considerations of geography, demography, electoral convenience, economic and social cohesions or divergencies among particular local groups, communications, the practical effects of political institutions like the lobby and the city machine, ancient traditions and ties of settled usage, respect for proven incumbents of long experience and senior status, mathematical mechanics, censuses compiling relevant data, and a host of others.[145]

[145] See the Second Schedule to the House of Commons (Redistribution of Seats) Act, 1949, 12 & 13 Geo. VI, c. 66, as amended by the House of Commons (Redistribution of Seats) Act, 1958, 6 & 7 Eliz. II, c. 26, § 2, and the English experience described in text at notes 50 to 61, *supra*. See also the Report of the Assembly Interim Committee on Elections and Reapportionment, California Assembly (1951) (hereafter, California Committee Report), 37: "The geographic—the socio-economic—the desires of the people—the desires of the elected officeholders—the desires of political parties—all these can and do legitimately operate not only within the framework of the 'relatively equal in population districts' factor, but also within the factors of contiguity and compactness. The county and Assembly line legal restrictions operate outside the framework of theoretically 'equal in population districts.' All the factors might conceivably have the same weight in one situation; in another, some factors might be considerably more important than others in making the final determination." A Virginia legislative committee adverted to ". . . many difficulties such as natural topographical barriers, divergent business and social interests, lack of communication by rail or highway, and disinclinations of communities to breaking up political ties of long standing, resulting in some cases of districts requesting to remain with populations more than their averages rather than have their equal

Legislative responses throughout the country to the reapportionment demands of the 1960 Census have glaringly confirmed that these are not factors that lend themselves to evaluations of a nature that are the staple of judicial determinations or for which judges are equipped to adjudicate by legal training or experience or native wit. And this is the more so true because in every strand of this complicated, intricate web of values meet the contending forces of partisan politics.[146] The practical significance of apportionment is that the next election results may differ because of it. Apportionment battles are overwhelmingly party or intra-party contests.[147] It will add a virulent source of friction and tension in federal-state relations to embroil the federal judiciary in them.[148]

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representation with the changed conditions." Report of the Joint Committee on the Re-apportionment of the State into Senatorial and House Districts, Virginia General Assembly, House of Delegates, H. Doc. No. 9 (1922), 1–2. And the Tennessee State Planning Commission, concerning the problem of congressional redistricting in 1950, spoke of a "tradition [which] relates to the sense of belonging—loyalties to groups and items of common interest with friends and fellow citizens of like circumstance, environment or region." Tennessee State Planning Commission, Pub. No. 222, Redistricting for Congress (1950), first page.

[146] See, *e. g.*, California Committee Report, at 52.

". . . [T]he reapportionment process is, by its very nature, political. . . . There will be politics in reapportionment as long as a representative form of government exists . . . .

"It is impossible to draw a district boundary line without that line's having some political significance. . . ."

[147] See, *e. g.*, Celler, Congressional Apportionment—Past, Present, and Future, 17 Law & Contemp. Prob. 268 (1952), speaking of the history of congressional apportionment:

". . . A mere reading of the debates [from the Constitutional Convention down to contemporary Congresses] on this question of apportionment reveals the conflicting interests of the large and small states and the extent to which partisan politics permeates the entire problem."

[148] See Standards for Congressional Districts (Apportionment), Hearings before Subcommittee No. 2 of the Committee on the

IV.

Appellants, however, contend that the federal courts may provide the standard which the Fourteenth Amendment lacks by reference to the provisions of the constitution of Tennessee. The argument is that although the same or greater disparities of electoral strength may be suffered to exist immune from federal judicial review in States where they result from apportionment legislation consistent with state constitutions, the Tennessee Legislature may not abridge the rights which, on its face, its own constitution appears to give, without by that act denying equal protection of the laws. It is said that the law of Tennessee, as expressed by the words of its written constitution, has made the basic choice among policies in favor of representation proportioned to population, and that it is no longer open to the State to allot its voting power on other principles.

This reasoning does not bear analysis. Like claims invoking state constitutional requirement have been rejected here and for good reason. It is settled that whatever federal consequences may derive from a discrimination worked by a state statute must be the same as if the same discrimination were written into the

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Judiciary, House of Representatives, 86th Cong., 1st Sess. 23, concerning a proposed provision for judicial enforcement of certain standards in the laying out of districts:

"Mr. KASEM. You do not think that that [a provision embodying the language: 'in as compact form as practicable'] might result in a decision depending upon the political inclinations of the judge?

"Mr. CELLER. Are you impugning the integrity of our Federal judiciary?

"Mr. KASEM. No; I just recognize their human frailties."

For an instance of a court torn, in fact or fancy, over the political issues involved in reapportionment, see *State ex rel. Lashly* v. *Becker*, 290 Mo. 560, 235 S. W. 1017, and especially the dissenting opinion of Higbee, J., 290 Mo., at 613, 235 S. W., at 1037.

State's fundamental law. *Nashville, C. & St. L. R. Co.* v. *Browning,* 310 U. S. 362. And see *Castillo* v. *McConnico,* 168 U. S. 674; *Coulter* v. *Louisville & N. R. Co.,* 196 U. S. 599, 608–609; *Owensboro Waterworks Co.* v. *Owensboro,* 200 U. S. 38; *Hebert* v. *Louisiana,* 272 U. S. 312, 316–317; *Snowden* v. *Hughes,* 321 U. S. 1, 11. Appellants complain of a practice which, by their own allegations, has been the law of Tennessee for sixty years. They allege that the Apportionment Act of 1901 created unequal districts when passed and still maintains unequal districts. They allege that the Legislature has since 1901 purposefully retained unequal districts. And the Supreme Court of Tennessee has refused to invalidate the law establishing these unequal districts. *Kidd* v. *McCanless,* 200 Tenn. 273, 292 S. W. 2d 40; appeal dismissed here in 352 U. S. 920. In these circumstances, what was said in the *Browning* case, *supra,* at 369, clearly governs this case:

> ". . . Here, according to petitioner's own claim, all the organs of the state are conforming to a practice, systematic, unbroken for more than forty years, and now questioned for the first time. It would be a narrow conception of jurisprudence to confine the notion of 'laws' to what is found written on the statute books, and to disregard the gloss which life has written upon it. Settled state practice cannot supplant constitutional guarantees, but it can establish what is state law. The Equal Protection Clause did not write an empty formalism into the Constitution. Deeply embedded traditional ways of carrying out state policy, such as those of which petitioner complains, are often tougher and truer law than the dead words of the written text. . . . [T]he Equal Protection Clause is not a command of candor. . . ."

Tennessee's law and its policy respecting apportionment are what 60 years of practice show them to be, not what appellants cull from the unenforced and, according to its own judiciary, unenforceable words of its Constitution. The statute comes here on the same footing, therefore, as would the apportionment laws of New Jersey, California or Connecticut,[149] and is unaffected by its supposed repugnance to the state constitutional language on which appellants rely.[150]

In another aspect, however, the *Kidd* v. *McCanless* case, *supra,* introduces a factor peculiar to this litigation, which only emphasizes the duty of declining the exercise of federal judicial jurisdiction. In all of the apportionment cases which have come before the Court, a consideration which has been weighty in determining their non-justiciability has been the difficulty or impossibility of devising effective judicial remedies in this class of case. An injunction restraining a general election unless the legislature reapportions would paralyze the critical centers of a State's political system and threaten political dislocation whose consequences are not foreseeable. A declaration devoid

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[149] See text at notes 139–143, *supra.*

[150] Decisions of state courts which have entertained apportionment cases under their respective state constitutions do not, of course, involve the very different considerations relevant to federal judicial intervention. State-court adjudication does not involve the delicate problems of federal-state relations which would inhere in the exercise of federal judicial power to impose restrictions upon the States' shaping of their own governmental institutions. Moreover, state constitutions generally speak with a specificity totally lacking in attempted utilization of the generalities of the Fourteenth Amendment to apportionment matters. Some expressly commit apportionment to state judicial review, see, *e. g.,* N. Y. Const., 1938, Art. III, § 5, and even where they do not, they do precisely fix the criteria for judicial judgment respecting the allocation of representative strength within the electorate. See, *e. g., Asbury Park Press, Inc.,* v. *Woolley,* 33 N. J. 1, 161 A. 2d 705.

of implied compulsion of injunctive or other relief would be an idle threat.[151] Surely a Federal District Court could not itself remap the State: the same complexities which impede effective judicial review of apportionment *a fortiori* make impossible a court's consideration of these imponderables as an original matter. And the choice of elections at large as opposed to elections by district, however unequal the districts, is a matter of sweeping political judgment having enormous political implications, the nature and reach of which are certainly beyond the informed understanding of, and capacity for appraisal by, courts.

In Tennessee, moreover, the *McCanless* case has closed off several among even these unsatisfactory and dangerous modes of relief. That case was a suit in the state courts attacking the 1901 Reapportionment Act and seeking a declaration and an injunction of the Act's enforcement or, alternatively, a writ of mandamus compelling state election officials to hold the elections at large, or, again alternatively, a decree of the court reapportioning the State. The Chancellor denied all coercive relief, but entertained the suit for the purpose of rendering a declaratory judgment. It was his view that despite an invalidation of the statute under which the present legislature was elected, that body would continue to possess *de facto* authority to reapportion, and that therefore the maintaining of the suit did not threaten the disruption of the government. The Tennessee Supreme Court agreed that no coercive relief could be granted; in particular, it said, "There is no provision of law for election of our General Assembly by an election at large over the State." 200 Tenn., at 277, 292 S. W. 2d, at 42. Thus, a legislature elected at

[151] Appellants' suggestion that, although no relief may need be given, jurisdiction ought to be retained as a "spur" to legislative action does not merit discussion.

large would not be the legally constituted legislative authority of the State. The court reversed, however, the Chancellor's determination to give declaratory relief, holding that the ground of demurrer which asserted that a striking down of the statute would disrupt the orderly process of government should have been sustained:

> "(4) It seems obvious and we therefore hold that if the Act of 1901 is to be declared unconstitutional, then the *de facto* doctrine cannot be applied to maintain the present members of the General Assembly in office. If the Chancellor is correct in holding that this statute has expired by the passage of the decade following its enactment then for the same reason all prior apportionment acts have expired by a like lapse of time and are non-existent. Therefore we would not only not have any existing members of the General Assembly but we would have no apportionment act whatever under which a new election could be held for the election of members to the General Assembly.
>
> . . . . .
>
> "The ultimate result of holding this Act unconstitutional by reason of the lapse of time would be to deprive us of the present Legislature and the means of electing a new one and ultimately bring about the destruction of the State itself." 200 Tenn., at 281–282, 292 S. W. 2d, at 44.

A federal court enforcing the Federal Constitution is not, to be sure, bound by the remedial doctrines of the state courts. But it must consider as pertinent to the propriety or impropriety of exercising its jurisdiction those state-law effects of its decree which it cannot itself control. A federal court cannot provide the authority requisite to make a legislature the proper governing body of the State of Tennessee. And it cannot be doubted that the strik-

ing down of the statute here challenged on equal protection grounds, no less than on grounds of failure to reapportion decennially, would deprive the State of all valid apportionment legislation and—under the ruling in *McCanless*—deprive the State of an effective law-based legislative branch. Just such considerations, among others here present, were determinative in *Luther* v. *Borden* and the Oregon initiative cases.[152]

Although the District Court had jurisdiction in the very restricted sense of power to determine whether it could adjudicate the claim, the case is of that class of political controversy which, by the nature of its subject, is unfit for federal judicial action. The judgment of the District Court, in dismissing the complaint for failure to state a claim on which relief can be granted, should therefore be affirmed.

Dissenting opinion of MR. JUSTICE HARLAN, whom MR. JUSTICE FRANKFURTER joins.

The dissenting opinion of MR. JUSTICE FRANKFURTER, in which I join, demonstrates the abrupt departure the majority makes from judicial history by putting the federal courts into this area of state concerns—an area which, in this instance, the Tennessee state courts themselves have refused to enter.

It does not detract from his opinion to say that the panorama of judicial history it unfolds, though evincing a steadfast underlying principle of keeping the federal courts out of these domains, has a tendency, because of variants in expression, to becloud analysis in a given case. With due respect to the majority, I think that has happened here.

Once one cuts through the thicket of discussion devoted to "jurisdiction," "standing," "justiciability," and "po-

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[152] See note 24, *supra*.

litical question," there emerges a straightforward issue which, in my view, is determinative of this case. Does the complaint disclose a violation of a federal constitutional right, in other words, a claim over which a United States District Court would have jurisdiction under 28 U. S. C. § 1343 (3) and 42 U. S. C. § 1983? The majority opinion does not actually discuss this basic question, but, as one concurring Justice observes, seems to decide it *"sub silentio."* *Ante,* p. 261. However, in my opinion, appellants' allegations, accepting all of them as true, do not, parsed down or as a whole, show an infringement by Tennessee of any rights assured by the Fourteenth Amendment. Accordingly, I believe the complaint should have been dismissed for "failure to state a claim upon which relief can be granted." Fed. Rules Civ. Proc., Rule 12 (b)(6).

It is at once essential to recognize this case for what it is. The issue here relates not to a method of state electoral apportionment by which seats in the *federal* House of Representatives are allocated, but solely to the right of a State to fix the basis of representation in its *own* legislature. Until it is first decided to what extent that right is limited by the Federal Constitution, and whether what Tennessee has done or failed to do in this instance runs afoul of any such limitation, we need not reach the issues of "justiciability" or "political question" or any of the other considerations which in such cases as *Colegrove* v. *Green,* 328 U. S. 549, led the Court to decline to adjudicate a challenge to a state apportionment affecting seats in the federal House of Representatives, in the absence of a controlling Act of Congress. See also *Wood* v. *Broom,* 287 U. S. 1.

The appellants' claim in this case ultimately rests entirely on the Equal Protection Clause of the Fourteenth Amendment. It is asserted that Tennessee has violated the Equal Protection Clause by maintaining in effect a

system of apportionment that grossly favors in legislative representation the rural sections of the State as against its urban communities. Stripped to its essentials the complaint purports to set forth three constitutional claims of varying breadth:

> (1) The Equal Protection Clause requires that each vote cast in state legislative elections be given approximately equal weight.
>
> (2) Short of this, the existing apportionment of state legislators is so unreasonable as to amount to an arbitrary and capricious act of classification on the part of the Tennessee Legislature, which is offensive to the Equal Protection Clause.
>
> (3) In any event, the existing apportionment is rendered invalid under the Fourteenth Amendment because it flies in the face of the Tennessee Constitution.

For reasons given in MR. JUSTICE FRANKFURTER'S opinion, *ante*, pp. 325–327, the last of these propositions is manifestly untenable, and need not be dealt with further. I turn to the other two.

I.

I can find nothing in the Equal Protection Clause or elsewhere in the Federal Constitution which expressly or impliedly supports the view that state legislatures must be so structured as to reflect with approximate equality the voice of every voter. Not only is that proposition refuted by history, as shown by my Brother FRANKFURTER, but it strikes deep into the heart of our federal system. Its acceptance would require us to turn our backs on the regard which this Court has always shown for the judgment of state legislatures and courts on matters of basically local concern.

In the last analysis, what lies at the core of this controversy is a difference of opinion as to the function of representative government. It is surely beyond argument that those who have the responsibility for devising a system of representation may permissibly consider that factors other than bare numbers should be taken into account. The existence of the United States Senate is proof enough of that. To consider that we may ignore the Tennessee Legislature's judgment in this instance because that body was the product of an asymmetrical electoral apportionment would in effect be to assume the very conclusion here disputed. Hence we must accept the present form of the Tennessee Legislature as the embodiment of the State's choice, or, more realistically, its compromise, between competing political philosophies. The federal courts have not been empowered by the Equal Protection Clause to judge whether this resolution of the State's internal political conflict is desirable or undesirable, wise or unwise.

With respect to state tax statutes and regulatory measures, for example, it has been said that the "day is gone when this Court uses the . . . Fourteenth Amendment to strike down state laws . . . because they may be unwise, improvident, or out of harmony with a particular school of thought." *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 488. I would think it all the more compelling for us to follow this principle of self-restraint when what is involved is the freedom of a State to deal with so intimate a concern as the structure of its own legislative branch. The Federal Constitution imposes no limitation on the form which a state government may take other than generally committing to the United States the duty to guarantee to every State "a Republican Form of Government." And, as my Brother FRANKFURTER so conclusively proves (*ante*, pp. 308–317), no intention to fix immutably the

means of selecting representatives for state governments could have been in the minds of either the Founders or the draftsmen of the Fourteenth Amendment.

In short, there is nothing in the Federal Constitution to prevent a State, acting not irrationally, from choosing any electoral legislative structure it thinks best suited to the interests, temper, and customs of its people. I would have thought this proposition settled by *MacDougall* v. *Green,* 335 U. S. 281, in which the Court observed (at p. 283) that to "assume that political power is a function exclusively of numbers is to disregard the practicalities of government," and reaffirmed by *South* v. *Peters,* 339 U. S. 276. A State's choice to distribute electoral strength among geographical units, rather than according to a census of population, is certainly no less a rational decision of policy than would be its choice to levy a tax on property rather than a tax on income. Both are legislative judgments entitled to equal respect from this Court.

II.

The claim that Tennessee's system of apportionment is so unreasonable as to amount to a capricious classification of voting strength stands up no better under dispassionate analysis.

The Court has said time and again that the Equal Protection Clause does not demand of state enactments either mathematical identity or rigid equality. *E. g., Allied Stores of Ohio* v. *Bowers,* 358 U. S. 522, 527–528, and authorities there cited; *McGowan* v. *Maryland,* 366 U. S. 420, 425–426. All that is prohibited is "invidious discrimination" bearing no rational relation to any permissible policy of the State. *Williamson* v. *Lee Optical Co., supra,* at 489. And in deciding whether such discrimination has been practiced by a State, it must be borne in mind that a "statutory discrimination will not be set aside if any state of facts reasonably may be con-

ceived to justify it." *McGowan* v. *Maryland, supra.* It is not inequality alone that calls for a holding of unconstitutionality; only if the inequality is based on an impermissible standard may this Court condemn it.

What then is the basis for the claim made in this case that the distribution of state senators and representatives is the product of capriciousness or of some constitutionally prohibited policy? It is not that Tennessee has arranged its electoral districts with a deliberate purpose to dilute the voting strength of one race, cf. *Gomillion* v. *Lightfoot,* 364 U. S. 339, or that some religious group is intentionally underrepresented. Nor is it a charge that the legislature has indulged in sheer caprice by allotting representatives to each county on the basis of a throw of the dice, or of some other determinant bearing no rational relation to the question of apportionment. Rather, the claim is that the State Legislature has unreasonably retained substantially the same allocation of senators and representatives as was established by statute in 1901, refusing to recognize the great shift in the population balance between urban and rural communities that has occurred in the meantime.

It is further alleged that even as of 1901 the apportionment was invalid, in that it did not allocate state legislators among the counties in accordance with the formula set out in Art. II, § 5, of the Tennessee Constitution. In support of this the appellants have furnished a Table which indicates that as of 1901 six counties were overrepresented and 11 were underrepresented. But that Table in fact shows nothing in the way of significant discrepancy; in the instance of each county it is only one representative who is either lacking or added. And it is further perfectly evident that the variations are attributable to nothing more than the circumstance that the then enumeration of voters resulted in fractional remainders with respect to which the precise formula of the Tennessee Constitution was in some

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instances slightly disregarded. Unless such *de minimis* departures are to be deemed of significance, these statistics certainly provide no substantiation for the charge that the 1901 apportionment was arbitrary and capricious. Indeed, they show the contrary.

Thus reduced to its essentials, the charge of arbitrariness and capriciousness rests entirely on the consistent refusal of the Tennessee Legislature over the past 60 years to alter a pattern of apportionment that was reasonable when conceived.

A Federal District Court is asked to say that the passage of time has rendered the 1901 apportionment obsolete to the point where its continuance becomes vulnerable under the Fourteenth Amendment. But is not this matter one that involves a classic legislative judgment? Surely it lies within the province of a state legislature to conclude that an existing allocation of senators and representatives constitutes a desirable balance of geographical and demographical representation, or that in the interest of stability of government it would be best to defer for some further time the redistribution of seats in the state legislature.

Indeed, I would hardly think it unconstitutional if a state legislature's expressed reason for establishing or maintaining an electoral imbalance between its rural and urban population were to protect the State's agricultural interests from the sheer weight of numbers of those residing in its cities. A State may, after all, take account of the interests of its rural population in the distribution of tax burdens, *e. g., American Sugar Rfg. Co.* v. *Louisiana,* 179 U. S. 89, and recognition of the special problems of agricultural interests has repeatedly been reflected in federal legislation, *e. g.,* Capper-Volstead Act, 42 Stat. 388; Agricultural Adjustment Act of 1938, 52 Stat. 31. Even the exemption of agricultural activities from state criminal statutes of otherwise general application has not been deemed offensive to the Equal Protection Clause.

Tigner v. *Texas,* 310 U. S. 141. Does the Fourteenth Amendment impose a stricter limitation upon a State's apportionment of political representatives to its central government? I think not. These are matters of local policy, on the wisdom of which the federal judiciary is neither permitted nor qualified to sit in judgment.

The suggestion of my Brother FRANKFURTER that courts lack standards by which to decide such cases as this, is relevant not only to the question of "justiciability," but also, and perhaps more fundamentally, to the determination whether any cognizable constitutional claim has been asserted in this case. Courts are unable to decide when it is that an apportionment originally valid becomes void because the factors entering into such a decision are basically matters appropriate only for legislative judgment. And so long as there exists a possible rational legislative policy for retaining an existing apportionment, such a legislative decision cannot be said to breach the bulwark against arbitrariness and caprice that the Fourteenth Amendment affords. Certainly, with all due respect, the facile arithmetical argument contained in Part II of my Brother CLARK's separate opinion (*ante,* pp. 253–258) provides no tenable basis for considering that there has been such a breach in this instance. (See the Appendix to this opinion.)

These conclusions can hardly be escaped by suggesting that capricious state action might be found were it to appear that a majority of the Tennessee legislators, in refusing to consider reapportionment, had been actuated by self-interest in perpetuating their own political offices or by other unworthy or improper motives. Since *Fletcher* v. *Peck,* 6 Cranch 87, was decided many years ago, it has repeatedly been pointed out that it is not the business of the federal courts to inquire into the personal motives of legislators. *E. g., Arizona* v. *California,* 283 U. S. 423, 455 & n. 7. The function of the federal judiciary ends in

matters of this kind once it appears, as I think it does here on the undisputed facts, that the state action complained of could have rested on some rational basis. (See the Appendix to this opinion.)

It is my view that the majority opinion has failed to point to any recognizable constitutional claim alleged in this complaint. Indeed, it is interesting to note that my Brother STEWART is at pains to disclaim for himself, and to point out that the majority opinion does not suggest, that the Federal Constitution requires of the States any particular kind of electoral apportionment, still less that they must accord to each voter approximately equal voting strength. Concurring opinion, *ante,* p. 265. But that being so, what, may it be asked, is left of this complaint? Surely the bare allegations that the existing Tennessee apportionment is "incorrect," "arbitrary," "obsolete" and "unconstitutional"—amounting to nothing more than legal conclusions—do not themselves save the complaint from dismissal. See *Snowden* v. *Hughes,* 321 U. S. 1; *Collins* v. *Hardyman,* 341 U. S. 651. Nor do those allegations shift to the appellees the burden of proving the *constitutionality* of this state statute; as is so correctly emphasized by my Brother STEWART (*ante,* p. 266), this Court has consistently held in cases arising under the Equal Protection Clause that " 'the burden of establishing the *unconstitutionality* of a statute rests on him who assails it.' *Metropolitan Casualty Ins. Co.* v. *Brownell,* 294 U. S. 580, 584." (Emphasis added.) Moreover, the appellants do not suggest that they could show at a trial anything beyond the matters previously discussed in this opinion, which add up to nothing in the way of a supportable constitutional challenge against this statute. And finally, the majority's failure to come to grips with the question whether the complaint states a claim cognizable under the Federal Constitution—an issue necessarily presented by appellees' motion to dismiss—

does not of course furnish any ground for permitting this action to go to trial.

From a reading of the majority and concurring opinions one will not find it difficult to catch the premises that underlie this decision. The fact that the appellants have been unable to obtain political redress of their asserted grievances appears to be regarded as a matter which should lead the Court to stretch to find some basis for judicial intervention. While the Equal Protection Clause is invoked, the opinion for the Court notably eschews explaining how, consonant with past decisions, the undisputed facts in this case can be considered to show a violation of that constitutional provision. The majority seems to have accepted the argument, pressed at the bar, that if this Court merely asserts authority in this field, Tennessee and other "malapportioning" States will quickly respond with appropriate political action, so that this Court need not be greatly concerned about the federal courts becoming further involved in these matters. At the same time the majority has wholly failed to reckon with what the future may hold in store if this optimistic prediction is not fulfilled. Thus, what the Court is doing reflects more an adventure in judicial experimentation than a solid piece of constitutional adjudication. Whether dismissal of this case should have been for want of jurisdiction or, as is suggested in *Bell* v. *Hood*, 327 U. S. 678, 682–683, for failure of the complaint to state a claim upon which relief could be granted, the judgment of the District Court was correct.

In conclusion, it is appropriate to say that one need not agree, as a citizen, with what Tennessee has done or failed to do, in order to deprecate, as a judge, what the majority is doing today. Those observers of the Court who see it primarily as the last refuge for the correction of all inequality or injustice, no matter what its nature or source, will no doubt applaud this decision and its break

with the past. Those who consider that continuing national respect for the Court's authority depends in large measure upon its wise exercise of self-restraint and discipline in constitutional adjudication, will view the decision with deep concern.

I would affirm.

APPENDIX TO OPINION OF MR. JUSTICE HARLAN.

THE INADEQUACY OF ARITHMETICAL FORMULAS AS MEASURES OF THE RATIONALITY OF TENNESSEE'S APPORTIONMENT.

Two of the three separate concurring opinions appear to concede that the Equal Protection Clause does not guarantee to each state voter a vote of approximately equal weight for the State Legislature. Whether the existing Tennessee apportionment is constitutional is recognized to depend only on whether it can find "any possible justification in rationality" (*ante,* p. 265); it is to be struck down only if "the discrimination here does not fit any pattern" (*ante,* p. 258).

One of the concurring opinions, that of my Brother STEWART, suggests no reasons which would justify a finding that the present distribution of state legislators is unconstitutionally arbitrary. The same is true of the majority opinion. My Brother CLARK, on the other hand, concludes that "the apportionment picture in Tennessee is a topsy-turvical of gigantic proportions" (*ante,* p. 254), solely on the basis of certain statistics presented in the text of his separate opinion and included in a more extensive Table appended thereto. In my view, that analysis is defective not only because the "total representation" formula set out in footnote 7 of the opinion (*ante,* p. 255), rests on faulty mathematical foundations, but, more basically, because the approach taken wholly

ignores all other factors justifying a legislative determination of the sort involved in devising a proper apportionment for a State Legislature.

In failing to take any of such other matters into account and in focusing on a particular mathematical formula which, as will be shown, is patently unsound, my Brother CLARK's opinion has, I submit, unwittingly served to bring into bas-relief the very reasons that support the view that this complaint does not state a claim on which relief could be granted. For in order to warrant holding a state electoral apportionment invalid under the Equal Protection Clause, a court, in line with well-established constitutional doctrine, must find that *none* of the permissible policies and *none* of the possible formulas on which it might have been based could rationally justify particular inequalities.

I.

At the outset, it cannot be denied that the apportionment rules explicitly set out in the Tennessee Constitution are rational. These rules are based on the following obviously permissible policy determinations: (1) to utilize counties as electoral units; (2) to prohibit the division of any county in the composition of electoral districts; (3) to allot to each county that has a substantial voting population—at least two-thirds of the average voting population per county—a separate "direct representative"; (4) to create "floterial" districts (multicounty representative districts) made up of more than one county; and (5) to require that such districts be composed of adjoining counties.[1] Such a framework unavoidably

[1] The relevant provisions of the Tennessee Constitution are Art. II, §§ 5 and 6:

"Sec. 5. *Apportionment of representatives.*—The number of Representatives shall, at the several periods of making the enumeration, be apportioned among the several counties or districts, according to the

leads to unreliable arithmetic inequalities under any mathematical formula whereby the counties' "total representation" is sought to be measured. It particularly results in egregiously deceptive disparities if the formula proposed in my Brother CLARK's opinion is applied.

That formula computes a county's "total representation" by adding (1) the number of "direct representatives" the county is entitled to elect; (2) a fraction of any other seats in the Tennessee House which are allocated to that county jointly with one or more others in a "floterial district"; (3) triple the number of senators the county is entitled to elect alone; and (4) triple a fraction of any seats in the Tennessee Senate which are allocated to that county jointly with one or more others in a multicounty senatorial district. The fractions used for items (2) and (4) are computed by allotting to each county in a combined district an equal share of the House or Senate seat, *regardless* of the voting population of each of the counties that make up the election district.[2]

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number of qualified voters in each; and shall not exceed seventy-five, until the population of the State shall be one million and a half, and shall never exceed ninety-nine; Provided, that any county having two-thirds of the ratio shall be entitled to one member.

"Sec. 6. *Apportionment of senators.*—The number of Senators shall, at the several periods of making the enumeration, be apportioned among the several counties or districts according to the number of qualified electors in each, and shall not exceed one-third the number of representatives. In apportioning the Senators among the different counties, the fraction that may be lost by any county or counties, in the apportionment of members to the House of Representatives, shall be made up to such county or counties in the Senate, as near as may be practicable. When a district is composed of two or more counties, they shall be adjoining; and no counties shall be divided in forming a district."

[2] This formula is not clearly spelled out in the opinion, but it is necessarily inferred from the figures that are presented. Knox County, for example, is said to have a "total representation" of 7.25. It

This formula is patently deficient in that it eliminates from consideration the relative voting power of the counties that are joined together in a single election district. As a result, the formula unrealistically assigns to Moore County one-third of a senator, in addition to its direct representative (*ante,* p. 255), although it must be obvious that Moore's voting strength in the Eighteenth Senatorial District is almost negligible. Since Moore County could cast only 2,340 votes of a total eligible vote of 30,478 in the senatorial district, it should in truth be considered as represented by one-fifteenth of a senator. Assuming, *arguendo,* that any "total representation" figure is of significance, Moore's "total representation" should be 1.23, not 2.[3]

The formula suggested by my Brother CLARK must be adjusted regardless whether one thinks, as I assuredly do not, that the Federal Constitution requires that each vote be given equal weight. The correction is necessary simply to reflect the real facts of political life. It may, of course, be true that the floterial representative's "function

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elects (1) three direct representatives (value 3.00); (2) one representative from a two-county district (value .50); (3) one direct senator (value 3.00); and (4) one senator in a four-county district (value .75). See Appendix to opinion of MR. JUSTICE CLARK, *ante,* pp. 262–264.

[3] If this "adjusted" formula for measuring "total representation" is applied to the other "horribles" cited in the concurring opinion (*ante,* p. 255), it reveals that these counties—which purportedly have equal "total representation" but distinctly unequal voting population—do not have the same "total representation" at all. Rather than having the same representation as Rutherford County, Moore County has only about 40% of what Rutherford has. Decatur County has only 55% of the representation of Carter County. While Loudon and Anderson Counties are substantially underrepresented, this is because of their proximity to Knox County, which outweighs their votes in the Sixth Senatorial District and in the Eighth Floterial District.

is to represent the whole district" (*ante*, p. 256). But can it be gainsaid that so long as elections within the district are decided not by a county-unit system, in which each county casts one vote, but by adding the total number of individual votes cast for each candidate, the concern of the elected representatives will primarily be with the most populous counties in the district?

II.

I do not mean to suggest that *any* mathematical formula, albeit an "adjusted" one, would be a proper touchstone to measure the rationality of the present or of appellants' proposed apportionment plan. For, as the Table appended to my Brother CLARK's opinion so conclusively shows, whether one applies the formula he suggests or one that is adjusted to reflect proportional voting strength within an election district, no plan of apportionment consistent with the principal policies of the Tennessee Constitution could provide proportionately equal "total representation" for each of Tennessee's 95 counties.

The pattern suggested by the appellants in Exhibits "A" and "B" attached to their complaint is said to be a "fair distribution" which accords with the Tennessee Constitution, and under which each of the election districts represents approximately equal voting population. But even when tested by the "adjusted" formula, the plan reveals gross "total representation" disparities that would make it appear to be a "crazy quilt." For example, Loudon County, with twice the voting population of Humphreys County would have *less* representation than Humphreys, and about one-third the representation of Warren County, which has only 73 more voters. Among the more populous counties, similar discrepancies would appear. Although Anderson County has only somewhat over 10% more voters than Blount County, it would have

approximately 75% more representation. And Blount would have approximately two-thirds the representation of Montgomery County, which has about 13% *less* voters.[4]

III.

The fault with a purely statistical approach to the case at hand lies not with the particular mathematical formula used, but in the failure to take account of the fact that a multitude of legitimate legislative policies, along with circumstances of geography and demography, could account for the seeming electoral disparities among counties. The principles set out in the Tennessee Constitution are just some of those that were deemed significant. Others may have been considered and accepted by those entrusted with the responsibility for Tennessee's apportionment. And for the purposes of judging constitutionality under the Equal Protection Clause it must be remembered that what is controlling on the issue of "rationality" is not what the State Legislature may *actually* have considered but what it may be *deemed* to have considered.

For example, in the list of "horribles" cited by my Brother CLARK (*ante,* p. 255), *all* the "underrepresented" counties are semiurban: all contain municipalities of over 10,000 population.[5] This is not to say, however, that the

[4] These disparities are as serious, if not more so, when my Brother CLARK's formula is applied to the appellants' proposal. For example, if the seven counties chosen by him as illustrative are examined as they would be represented under the appellants' distribution, Moore County, with a voting population of 2,340, is given more electoral strength than Decatur County, with a voting population of 5,563. Carter County (voting population 23,302) has 20% *more* "total representation" than Anderson County (voting population 33,990), and 33% *more* than Rutherford County (voting population 25,316).

[5] Murfreesboro, Rutherford County (pop. 16,017); Elizabethton, Carter County (pop. 10,754); Oak Ridge, Anderson County (pop. 27,387). Tennessee Blue Book, 1960, pp. 143–149.

presence of any such municipality within a county necessarily demands that its proportional representation be reduced in order to render it consistent with an "urban versus rural" plan of apportionment. Other considerations may intervene and outweigh the Legislature's desire to distribute seats so as to achieve a proper balance between urban and rural interests. The size of a county, in terms of its total area, may be a factor.[6] Or the location within a county of some major industry may be thought to call for dilution of voting strength.[7] Again, the combination of certain smaller counties with their more heavily populated neighbors in senatorial or "floterial" districts may result in apparent arithmetic inequalities.[8]

More broadly, the disparities in electoral strength among the various counties in Tennessee, both those relied upon by my Brother CLARK and others, may be

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[6] For example, Carter and Washington Counties are each approximately 60% as large as Maury and Madison Counties in terms of square miles, and this may explain the disparity between their "total representation" figures.

[7] For example, in addition to being "semi-urban," Blount County is the location of the City of Alcoa, where the Aluminum Company of America has located a large aluminum smelting and rolling plant. This may explain the difference between its "total representation" and that of Gibson County, which has no such large industry and contains no municipality as large as Maryville.

[8] For example, Chester County (voting population 6,391) is one of those that is presently said to be overrepresented. But under the appellants' proposal, Chester would be combined with populous Madison County in a "floterial district" and with four others, including Shelby County, in a senatorial district. Consequently, its total representation according to the Appendix to my Brother CLARK's opinion would be .19. (*Ante*, p. 262.) This would have the effect of disenfranchising all the county's voters. Similarly, Rhea County's almost 9,000 voters would find their voting strength so diluted as to be practically nonexistent.

accounted for by various economic,[9] political,[10] and geographic [11] considerations. No allegation is made by the appellants that the existing apportionment is the result of any other forces than are always at work in any legislative process; and the record, briefs, and arguments in this Court themselves attest to the fact that the appellants could put forward nothing further at a trial.

By disregarding the wide variety of permissible legislative considerations that may enter into a state electoral apportionment my Brother CLARK has turned a highly complex process into an elementary arithmetical puzzle.

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[9] For example, it is primarily the eastern portion of the State that is complaining of malapportionment (along with the Cities of Memphis and Nashville). But the eastern section is where industry is principally located and where population density, even outside the large urban areas, is highest. Consequently, if Tennessee is apportioning in favor of its agricultural interests, as constitutionally it was entitled to do, it would necessarily reduce representation from the east.

[10] For example, sound political reasons surely justify limiting the legislative chambers to workable numbers; in Tennessee, the House is set at 99 and the Senate at 33. It might have been deemed desirable, therefore, to set a ceiling on representation from any single county so as not to deprive others of individual representation. The proportional discrepancies among the four counties with large urban centers may be attributable to a conscious policy of limiting representation in this manner.

[11] For example, Moore County is surrounded by four counties each of which has sufficient voting population to exceed two-thirds of the average voting population per county (which is the standard prescribed by the Tennessee Constitution for the assignment of a direct representative), thus qualifying for direct representatives. Consequently Moore County must be assigned a representative of its own despite its small voting population because it cannot be joined with any of its neighbors in a multicounty district, and the Tennessee Constitution prohibits combining it with nonadjacent counties. See note 1, *supra*.

It is only by blinking reality that such an analysis can stand and that the essentially legislative determination can be made the subject of judicial inquiry.

IV.

Apart from such policies as those suggested which would suffice to justify particular inequalities, there is a further consideration which could rationally have led the Tennessee Legislature, in the exercise of a deliberate choice, to maintain the status quo. Rigidity of an apportionment pattern may be as much a legislative policy decision as is a provision for periodic reapportionment. In the interest of stability, a State may write into its fundamental law a permanent distribution of legislators among its various election districts, thus forever ignoring shifts in population. Indeed, several States have achieved this result by providing for minimum and maximum representation from various political subdivisions such as counties, districts, cities, or towns. See Harvey, Reapportionments of State Legislatures—Legal Requirements, 17 Law & Contemp. Probs. (1952), 364, 368–372.

It is said that one cannot find any rational standard in what the Tennessee Legislature has failed to do over the past 60 years. But surely one need not search far to find rationality in the Legislature's continued refusal to recognize the growth of the urban population that has accompanied the development of industry over the past half decade. The existence of slight disparities between rural areas does not overcome the fact that the foremost apparent legislative motivation has been to preserve the electoral strength of the rural interests notwithstanding shifts in population. And I understand it to be conceded by at least some of the majority that this policy is not

rendered unconstitutional merely because it favors rural voters.

Once the electoral apportionment process is recognized for what it is—the product of legislative give-and-take and of compromise among policies that often conflict—the relevant constitutional principles at once put these appellants out of the federal courts.

TURNER *v.* CITY OF MEMPHIS ET AL.

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

No. 84. Argued February 27, 1962.—Decided March 26, 1962.

Appellant, a Negro who had been refused nonsegregated service in a restaurant operated by a private corporation on premises leased from a city at its municipal airport, sued in a Federal District Court on behalf of himself and others similarly situated to enjoin such discrimination. He rested jurisdiction on 28 U. S. C. § 1343 (3), based the cause of action on 42 U. S. C. § 1983 and alleged that appellees had acted under color of state law. A three-judge District Court convened to consider the case abstained from further proceedings pending interpretation by the state courts of certain state statutes relied upon by appellees as requiring racial segregation in the restaurant. Appellants appealed both to the Court of Appeals and directly to this Court. *Held:*

1. Since the unconstitutionality of state statutes requiring racial segregation in publicly operated facilities is so well settled that it is foreclosed as a litigable issue (*Burton* v. *Wilmington Parking Authority*, 365 U. S. 715), a three-judge court was not required to pass on this case under 28 U. S. C. § 2281 (*Bailey* v. *Patterson*, *ante*, p. 31), and jurisdiction of this appeal is vested in the Court of Appeals. P. 353.

2. There was no occasion for abstention from decision pending interpretation of the state statutes by the state courts; appellant's jurisdictional statement is treated as a petition for certiorari prior to the judgment of the Court of Appeals under 28 U. S. C. §§ 1254 (1) and 2101 (e); the petition is granted; the order of the District Court is vacated; and the case is remanded to that Court with directions to enter a decree granting appropriate injunctive relief against the discrimination complained of. Pp. 353–354.

Judgment vacated and case remanded.

Constance Baker Motley argued the cause for appellant. With her on the brief were *Jack Greenberg* and *James M. Nabrit III*.

Frank B. Gianotti, Jr. argued the cause for the City of Memphis, appellee. With him on the briefs was *James M. Manire.*

John M. Heiskell argued the cause for Dobbs Houses, Inc., et al., appellees. With him on the briefs was *Edward P. A. Smith.*

PER CURIAM.

Appellant, a Negro who was refused nonsegregated service in the Memphis Municipal Airport restaurant operated by appellee Dobbs Houses, Inc., under a lease from appellee City of Memphis, instituted this action on behalf of himself and other Negroes similarly situated seeking an injunction against such discrimination. He rested jurisdiction upon 28 U. S. C. § 1343 (3) and premised the cause of action upon 42 U. S. C. § 1983. Although the complaint alleged that appellees acted under color of state law, it did not identify any particular state statutes or regulations being challenged. But appellees' answers, in addition to asserting that the restaurant was a private enterprise to which the Fourteenth Amendment did not apply, invoked Tenn. Code Ann. §§ 53–2120, 53–2121, and Regulation No. R–18 (L). The statutes as now phrased authorize the Division of Hotel and Restaurant Inspection of the State Department of Conservation to issue "such rules and regulations . . . as may be necessary pertaining to the safety and/or sanitation of hotels and restaurants . . ." and make violations of such regulations a misdemeanor. The regulation, promulgated by the Division, provides that "Restaurants catering to both white and negro patrons should be arranged so that each race is properly segregated." The answers also set up the lease agreement which provides, *inter alia,* that the leased premises are to be used "only and exclusively for lawful pur-

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poses, and no part of the premises shall be used in any manner whatsoever for any purposes in violation of the laws of . . . the State of Tennessee . . . ." The City of Memphis alleged further that unless and until the regulation was declared unconstitutional, the city would be bound to object to desegregation of the restaurant by Dobbs Houses as a violation of Tennessee law and of the lease. Dobbs Houses alleged that desegregation by it of the restaurant would therefore subject it to forfeiture of the lease. Dobbs Houses later amended its answer to include a defense based on Tenn. Code Ann. § 62–710. That statute "abrogates" Tennessee's common-law cause of action for exclusion from hotels or other public places, and declares that the operators of such establishments are free to exclude persons "for any reason whatever."

When the appellant moved for summary judgment before a single district judge, the appellees opposed the motion on the ground that the relief sought necessarily challenged the constitutionality of the state statutes and regulation so that under 28 U. S. C. §§ 2281, 2284, a three-judge court was required. The single judge thereupon convened a three-judge court. Upon renewal by the appellant before that court of his motion for summary judgment, the appellees urged, and the three-judge court ordered, that appellant's suit should be held in abeyance pending a "Declaratory Judgment suit to be brought by plaintiffs in the Tennessee Courts seeking an interpretation of the State statutes under consideration." Appellant, being in doubt whether the case was one "required . . . to be heard and determined by a district court of three judges," in addition to appealing from the abstention order directly to this Court under 28 U. S. C. § 1253, also perfected a timely appeal to the Court of Appeals for the Sixth Circuit. We postponed consideration of the question of our jurisdiction of the direct appeal to the hearing on the merits. 368 U. S. 808.

Whether or not it may be said that appellant's complaint is to be read as seeking, under 28 U. S. C. § 2281, an "injunction restraining the enforcement, operation or execution of [a] . . . State statute by restraining the action of any officer of such State in the enforcement or execution of such statute," a question which we need not decide, it is clear for other reasons that a three-judge court was not required for the disposition of this case. Since, as was conceded by Dobbs Houses at the bar of this Court, the Dobbs Houses restaurant was subject to the strictures of the Fourteenth Amendment under *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715, the statutes and regulation invoked by appellees could have furnished a defense to the action only insofar as they expressed an affirmative state policy fostering segregation in publicly operated facilities. But our decisions have foreclosed any possible contention that such a statute or regulation may stand consistently with the Fourteenth Amendment. *Brown* v. *Board of Education,* 347 U. S. 483; *Mayor & City Council* v. *Dawson,* 350 U. S. 877; *Holmes* v. *City of Atlanta,* 350 U. S. 879; *Gayle* v. *Browder,* 352 U. S. 903; *New Orleans City Park Improvement Assn.* v. *Detiege,* 358 U. S. 54. It follows under our recent decision in *Bailey* v. *Patterson, ante,* p. 31, that a three-judge court was not required and that jurisdiction of this appeal is vested in the Court of Appeals.

But we see no reason why disposition of the case should await decision of the appeal by the Court of Appeals. On the merits, no issue remains to be resolved. This is clear under prior decisions and the undisputed facts of the case. Accordingly no occasion is presented for abstention, and the litigation should be disposed of as expeditiously as is consistent with proper judicial administration. In light of the perfected appeal to the Sixth Circuit Court of Appeals, it is appropriate that we treat, and we do treat, appellant's jurisdictional statement as a petition for writ

of certiorari prior to judgment in the Court of Appeals. 28 U. S. C. §§ 1254 (1), 2101 (e); *Stainback* v. *Mo Hock Ke Lok Po,* 336 U. S. 368, 370–371. The petition is granted, the District Court's abstention order is vacated and the case is remanded to the District Court with directions to enter a decree granting appropriate injunctive relief against the discrimination complained of.

Vacated and remanded.

MR. JUSTICE WHITTAKER did not participate in the decision of this case.

Syllabus.

ATLANTIC & GULF STEVEDORES, INC., *v.* ELLERMAN LINES, LTD., ET AL.

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

No. 282. Argued February 20, 1962.—Decided April 2, 1962.

A longshoreman employed by petitioner, a stevedoring contractor, was injured while helping to unload a vessel, and he sued respondents, the shipowners, in a Federal District Court on the basis of diversity of citizenship, alleging that the vessel was unseaworthy and that they were negligent. Respondents impleaded petitioner and asked indemnity, alleging that it was negligent in the manner of unloading. The jury found that the injury resulted from unseaworthiness of the vessel and negligence of respondents and not from any failure of petitioner to do its work in accordance with its contract. The District Court entered judgment in favor of the longshoreman against respondents and in favor of petitioner on respondents' claim for indemnity. The Court of Appeals affirmed the judgment in favor of the longshoreman but reversed the judgment in favor of petitioner on the ground that it also was negligent. *Held:* Redetermination by the Court of Appeals of the facts found by the jury was contrary to the provision of the Seventh Amendment that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." Pp. 356–364.

(a) Even though a stevedoring contract is a maritime contract, the Seventh Amendment was applicable in this case, because the suit, being in a Federal Court by reason of diversity of citizenship, carried with it the right to trial by jury. Pp. 359–360.

(b) On the record in this case, it cannot be said that petitioner was liable as a matter of law, that the trial judge in the charge to the jury omitted any ingredient from petitioner's contractual liability, or that the jury's verdict was inconsistent. Pp. 360–364.

(c) Where an appellate court is asked to review the jury's answers to special interrogatories, the Seventh Amendment prohibits a reversal on the ground that the jury's answers are inconsistent, if under any view of the case they are, or can be made, consistent. P. 364.

289 F. 2d 201, reversed.

Francis E. Marshall argued the cause for petitioner. With him on the briefs was *James J. Davis, Jr.*

Thomas E. Byrne, Jr. argued the cause and filed briefs for respondents.

Martin J. McHugh argued the cause for the National Association of Stevedores, as *amicus curiae,* urging reversal. With him on the brief was *James M. Leonard.*

Mr. Justice Douglas delivered the opinion of the Court.

Leighton Beard was a longshoreman employed by Atlantic and Gulf Stevedores, Inc. Atlantic, the petitioner, performed stevedoring services for respondents. Beard received injuries while helping to discharge bales of burlap from a vessel owned by respondents. These bales, loaded in India, were bound by four parallel one-inch steel bands that petitioner had not placed around the bales but were part of the cargo; and each bale, containing 30 to 40 bolts of burlap, was stowed in tiers. The discharging operation consisted of pulling the bales from their stowed positions to the hatch and then raising them vertically through the hatch and lowering them onto the pier. This was accomplished by using a ring to which six equal-length ropes were attached. A hook was on the end of each rope; and two hooks were used on each bale, three bales being raised in one operation. Beard and his co-workers would signal the winch operator to pull the bales from their stow to a position under the hatch. When the sideways movement had ended, the bales would be raised vertically. After several hours of one unloading operation, two bands of one bale broke. The bale fell, injuring Beard.

The evidence showed that Atlantic played no part in the loading or stowage of this cargo of burlap. There were sixty-three tons of bales in the forward end of the

hold destined for New York; and they extended halfway into the space under the hatch. The bales being unloaded were in the after end of the hold. The bale that fell struck the New York cargo and bounded toward Beard, pinning him against the after bulkhead and causing injuries resulting in the amputation of his right leg.

Beard sued respondents in the District Court on the basis of diversity of citizenship, alleging that their vessel was unseaworthy and that they were negligent. Respondents impleaded petitioner, alleging that it was negligent in its manner and method of unloading and asking indemnity from it in case respondents were held liable to Beard. Counsel near the end of the trial agreed upon five special interrogatories, to which the jury responded as follows:

> 1. Was unseaworthiness a substantial factor in causing the injuries to the plaintiff?
>
> Yes.
>
> 2. Was there negligence on the part of Ellerman Lines, Ltd., which was a substantial factor in causing injuries to the plaintiff?
>
> Yes.
>
> 3. In what amount, if any, did you assess the damages to be awarded the plaintiff?
>
> $100,000.
>
> 4. If you have answered yes to Interrogatories 1 or 2, did the fault of Ellerman Lines, Ltd., and the City Line, Ltd., arise out of any failure on the part of Atlantic and Gulf Stevedores, Inc., to do its work in accordance with the contractual obligation?
>
> No.
>
> 5. If you have answered yes to Interrogatory No. 4 was Atlantic and Gulf Stevedores, Inc.'s breach of this contract a substantial factor in bringing about the injuries to the plaintiff?
>
> No.

The District Court thereupon entered judgment in favor of Beard against respondents and in favor of petitioner on respondents' claim for indemnity.

On appeal it was argued, *inter alia,* that a finding of negligence on the part of respondents was warranted because they failed to provide a safe place to work in view of the manner in which the New York cargo was stowed. With this the Court of Appeals agreed. Negligence on the part of respondents, it said, was also established by the knowledge of their chief mate that the use of bale hooks was a dangerous way to discharge burlap bales, and from evidence that bands on the bales broke in "roughly between 3 and 5 percent of the bales" during discharging operations. The court said that though the use of bale hooks may have been customary in Philadelphia, such use was not sufficient to relieve respondents of negligence.

It went on to say that there was evidence to show that respondents, by virtue of the manner of loading, were negligent in not affording Beard a safe place to work. It held, however, that since the "warranty of workmanlike service extends to the handling of cargo . . . as well as to the use of equipment incidental to cargo handling" (*Waterman Co.* v. *Dugan & McNamara,* 364 U. S. 421, 423), petitioner was liable, as a matter of law, to respondents. For if it was negligent for respondents to permit Beard to work in an unsafe place, it was "equally negligent" for petitioner to handle the cargo in the manner it did, in light of the unsafe place where Beard worked. 289 F. 2d 201, 207.

The Court of Appeals therefore affirmed the judgment in favor of Beard and against respondents on the issue of negligence (without reaching the question of unseaworthiness), but reversed the judgment in favor of Atlantic. The case is here on a petition for certiorari. 368 U. S. 874.

We might agree with the Court of Appeals had the questions of fact been left to us. But neither we nor the

Court of Appeals can redetermine facts found by the jury any more than the District Court can predetermine them. For the Seventh Amendment says that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

The requirements of the Seventh Amendment were brought into play in this case, even though a stevedoring contract is a maritime contract.[1] Since "loading and stowing a ship's cargo" is part of the "maritime service," a stevedore can recover against his employer in admiralty for the latter's negligence (*Atlantic Transport Co.* v. *Imbrovek,* 234 U. S. 52, 61), on the conditions provided in the Longshoremen's Act, 33 U. S. C. § 905, 44 Stat. 1426. And when the shipowner is held liable, it may in the same suit recover over against the stevedoring company on the stevedore contract in order to prevent needless multiplicity of litigation. *American Stevedores* v. *Porello,* 330 U. S. 446, 456.

Congress since 1789, in giving Federal District Courts original jurisdiction of civil cases in admiralty, has saved "to suitors in all cases all other remedies to which they are otherwise entitled." 28 U. S. C. § 1333 (1). Therefore, a suit for breach of a maritime contract, while it may be brought in admiralty, may also be pursued in an ordinary civil action,[2] since, unlike the proceeding in *The Moses*

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[1] A stevedore's contract with a shipowner is "comparable to a manufacturer's warranty of the soundness of its manufactured product. The shipowner's action is not changed from one for a breach of contract to one for a tort simply because recovery may turn upon the standard of the performance" of the stevedoring service. *Ryan Co.* v. *Pan-Atlantic Corp.,* 350 U. S. 124, 133–134.

[2] Suits on maritime contracts may be brought in the federal courts under the head of diversity jurisdiction. *Pope & Talbot, Inc.,* v. *Hawn,* 346 U. S. 406; *Wilburn Boat Co.* v. *Fireman's Ins. Co.,* 348 U. S. 310.

Taylor, 4 Wall. 411, it is a suit *in personam*. "Where the suit is *in personam*, it may be brought either in admiralty or, under the saving clause, in an appropriate non-maritime court, by ordinary civil action." Gilmore and Black, The Law of Admiralty (1957), p. 36. And such suits on the law side are not restricted to enforcement of common-law rights but extend as well to maritime torts. *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 88–89.

This suit being in the federal courts by reason of diversity of citizenship carried with it, of course, the right to trial by jury. As in cases under the Jones Act (*Schulz* v. *Pennsylvania R. Co.*, 350 U. S. 523; *Senko* v. *LaCrosse Dredging Corp.*, 352 U. S. 370) and under the Federal Employers' Liability Act (*Tennant* v. *Peoria & P. U. R. Co.*, 321 U. S. 29; *Ellis* v. *Union Pacific R. Co.*, 329 U. S. 649, 653; *Dice* v. *Akron, C. & Y. R. Co.*, 342 U. S. 359; *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500), trial by jury is part of the remedy. Thus the provisions of the Seventh Amendment, noted above, are brought into play. *Schulz* v. *Pennsylvania R. Co., supra*, at 524. As we recently stated in another diversity case, it is the Seventh Amendment that fashions "the federal policy favoring jury decisions of disputed fact questions." *Byrd* v. *Blue Ridge Cooperative*, 356 U. S. 525, 538, 539. And see *Herron* v. *Southern Pac. Co.*, 283 U. S. 91, 94–95.

In answer to interrogatories Nos. 4 and 5 the jury found that petitioner had not failed to perform its contractual obligation to respondents. The contract provided that petitioner should do the work "with every care and due dispatch to the satisfaction" of the owners. In its charge to the jury the District Court said that the owner had a duty to provide longshoremen a safe place to work; and it left to the jury whether respondents had warning that the method of unloading was unsafe and whether the manner of loading the cargo by respondents made this an unsafe place for Beard to work. It left to

the jury respondents' contention that, if anyone was negligent in leaving the New York cargo in the place where it was and in not shifting it, it was petitioner's negligence, not theirs. It also charged the jury on petitioner's liability, should Beard be found to have established his case. It referred the jury to the contract saying petitioner was obliged "to unload and discharge this cargo of burlap with the utmost care."

The Court of Appeals held that the jury had been charged too restrictively, that their attention had been called only to the manner of using the hook. The trial judge did indeed charge:

> "You must answer the question, was that a reasonable and safe method of operation for the discharge of that cargo? Taking into consideration that it had been done over a period of years, that it was a usual and accepted method in various places, you will have to examine into the nature of the application of the hook to the bale, and you will take into consideration the testimony of both experts, and both counsel argued to you in their interpretation of the testimony the results that they feel favor their side."

But it went further and charged that if petitioner was responsible for the breaking of the bands, petitioner would be liable:

> ". . . if you . . . find that that negligent conduct was such that it broke the band, rather than any unseaworthiness of the band,[3] then you must find for the defendant shipping companies; but you have to make that finding in the light of all the circumstances, whether or not there was sufficient evidence

[3] The trial judge also charged that "if you find that the bands of the bale were defective, were inadequate, or insufficient . . . then you might find the defendants liable under the doctrine of unseaworthiness."

that persuades you that that conduct of the longshoremen was responsible for the breaking of the band—not any unseaworthiness in the band itself."

It also charged that if the verdict was for Beard, the jury should determine whether petitioner created the condition that made respondents liable. It charged:

"There again you have to run the whole gamut of facts in the case. You will have to decide whether or not there was an unreasonable discharge of this cargo, an unsafe method used in the discharge of this cargo, in the placing of the hook. Did they breach that contract to do it in a workmanlike manner with the utmost care? The steamship company says, 'Yes, they did. They breached that contract. They did not do it in a workmanlike manner. All the evidence here points to the fact that they did not do it with the utmost care, and therefore they caused the condition which created the liability which is ours, which the plaintiff has secured against us as defendants.' "

The trial judge further charged:

". . . Whether or not there was a breach of that contract, what you look to decide is whether or not there was reasonably safe discharge of that cargo by the Atlantic & Gulf Stevedores. If it was not, if it was not done in a reasonably safe manner, then Atlantic & Gulf Stevedores would breach their warranty under the contract. If there was sub-standard performance on which it was foreseeable by them that some injury might happen or eventuate, then Atlantic & Gulf Stevedores would be responsible to the plaintiff shipping company."

More specifically the trial judge charged:

". . . you will have to determine whether there was negligence in the leaving of that New York part of

that cargo in the place where it was, and whether it was an interference, as the plaintiff claims, with his condition of safety.

"On the other hand, the defendant says, 'This was not our job; the shifting should have been done by the stevedores. We, the shipping company, were not negligent in failing to get it out of the way.'

"The plaintiff asserts here and asks you to believe and to weigh in the balance toward meeting the burden which he has to establish by the fair preponderance of the evidence that this officer was there but did not stop the operation. The defendant says, 'If you find, no matter what the officer says, that this was being unloaded in a reasonably safe manner then we were not liable; it may well be that the Atlantic & Gulf stevedores are liable, but we were not liable.' "

We disagree with the Court of Appeals that the trial judge limited the issue of petitioner's liability to "the use of the bale hook method in discharging the cargo." 289 F. 2d, at p. 208. When the District Court charged that in determining petitioner's contractual obligation the jury should decide "whether or not there was a reasonably safe discharge" of the cargo, it included the totality of the circumstances.

The question of the manner in which the New York cargo had been stored was prominent in the case; and the trial judge left it to the jury on the question of respondents' negligence. On the issue of petitioner's liability his charge was no more precise than has been indicated. Yet respondents did not ask for more on this phase of the controversy. In their requested charge they were no more specific, except they maintained,[4] as did the Court

[4] One of respondents' requested charges was:

"If, on the other hand, you find in favor of the plaintiff and against the defendant, and the basis of your finding is that the method of dis-

of Appeals, that under these circumstances the stevedore is liable under its contract as a matter of law.

We cannot say that petitioner was liable as a matter of law nor that the trial judge in the charge to the jury omitted any ingredient from petitioner's contractual liability. Moreover, we cannot say that the jury's verdict was inconsistent. The Court of Appeals said that the case of the respondents' negligence was established because

> ". . . the record affords ample basis for a jury fact-finding that (1) use of the bale hook method in the discharge of the burlap bales constituted negligence, and (2) that the injured longshoreman was not afforded a safe place to work." 289 F. 2d, p. 207.

So far as we know the jury may have found respondents liable not on either of those two grounds but solely on a third, namely, because of defective bands—a matter which was covered by the charge to the jury on the issue of unseaworthiness, and properly so. *Weyerhaeuser S. S. Co.* v. *Nacirema Co.*, 355 U. S. 563, 567. If that was the jury's view of the facts, then petitioner plainly would not be liable under its warranty. Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way. For a search for one possible view of the case which will make the jury's finding inconsistent results in a collision with the Seventh Amendment. *Arnold* v. *Panhandle & S. F. R. Co.*, 353 U. S. 360. Cf. *Dick* v. *New York Life Ins. Co.*, 359 U. S. 437, 446.

Reversed.

MR. JUSTICE HARLAN concurs in the result.

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charging was not reasonably safe and proper under the circumstances existing at the time of the accident, then I charge you that under these circumstances you must further find a verdict in favor of the defendant and against Atlantic & Gulf Stevedores, Inc."

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

In my view the Court of Appeals correctly ruled that the respondents were entitled to indemnity from the petitioner under principles first set forth by this Court in *Ryan Co.* v. *Pan-Atlantic Corp.*, 350 U. S. 124, and followed in *Weyerhaeuser S. S. Co.* v. *Nacirema Co.*, 355 U. S. 563, *Crumady* v. *The J. H. Fisser*, 358 U. S. 423, and *Waterman Co.* v. *Dugan & McNamara*, 364 U. S. 421.

Beard's action was based upon both negligence and unseaworthiness. The respondents were alleged to have been negligent (1) in permitting the use of the bale hook method of discharging the bales, particularly in view of the chief officer's statement that he thought the method dangerous, and (2) in improperly stowing the New York cargo and thereby failing to use ordinary care to provide Beard with a safe place to work.* The Court of Appeals properly determined that there was sufficient evidence on either ground to support the jury's general finding of negligence, a determination which I do not understand to be contested here. But a finding of negligence on either ground would necessarily carry with it the conclusion that the petitioner had breached its contractual obligation to the respondents.

As we said only last Term in *Waterman Co.* v. *Dugan & McNamara, supra,* at 423, the stevedore's "warranty of workmanlike service extends to the handling of cargo . . . as well as to the use of equipment incidental to cargo handling . . . ." If the respondents were negligent in permitting the petitioner's use of a dangerous method of unloading cargo, the petitioner surely breached its "war-

*The opinion of the Court suggests that there was a third possible ground for the jury's finding of negligence, namely, failure to inspect the bands on the bale which fell. No such issue was ever submitted to the jury. The only issues submitted to the jury with respect to the bands related to the plaintiff's unseaworthiness claim.

ranty of workmanlike service" by using such a method in the first instance. Similarly, if the location of the so-called New York bales in the hold made the hold an unsafe place to work, the petitioner necessarily breached its warranty to the respondents by unloading the cargo before first moving those bales. The petitioner is in the business of handling cargo, and any danger created by the New York bales was at least as apparent to the petitioner as to the respondents. Under its warranty the petitioner had a duty to see that the danger was removed before proceeding to unload the Philadelphia cargo.

It is questionable whether the right to a jury trial under the Seventh Amendment is involved in this case, since the respondents' rights against the petitioner depend upon a maritime contract, not upon the common law. *American Stevedores, Inc.,* v. *Porello,* 330 U. S. 446, 456. We need not pursue that inquiry, however, because in any event nothing in the Seventh Amendment removes the duty of a trial judge to give proper instructions to a jury, or the duty of a reviewing court to correct a trial judge's errors. Fed. Rules Civ. Proc., 50. Here, each possible ground of the respondents' negligence *vis-à-vis* the original plaintiff involved a breach of the petitioner's warranty as a matter of law. The Court of Appeals correctly held that the trial judge was in error in not so instructing the jury.

I would affirm.

RUSK, SECRETARY OF STATE, *v.* CORT.

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

No. 20. Argued October 11, 1961.—Decided April 2, 1962.

Appellee was born in the United States but has resided abroad since 1951. His original passport having expired, he applied to the United States Embassy in Prague, Czechoslovakia, for a new one. This was denied on the ground that he had lost his citizenship under § 349 (a) (10) of the Immigration and Nationality Act of 1952 by remaining outside the United States for the purpose of avoiding military service. He sued in a Federal District Court for declaratory and injunctive relief against appellant, the Secretary of State, alleging that he had not remained abroad to evade military service and that § 349 (a) (10) was unconstitutional. A three-judge District Court convened to try the case denied a motion to dismiss which was based on the claim that § 360 (b) and (c) of the Immigration and Nationality Act of 1952 provide the exclusive procedure under which appellee could attack the administrative determination that he was not a citizen. It also held that § 349 (a) (10) was unconstitutional and awarded appellee a judgment declaring him to be a citizen and enjoining appellant from denying him a passport on the ground that he was not a citizen. Appellant appealed directly to this Court. *Held:*

1. Since the District Court held § 349 (a) (10) unconstitutional, this appeal is properly before this Court under 28 U. S. C. § 1252. P. 370, n. 4.

2. A person outside the United States who has been denied a right of citizenship is not confined to the procedures prescribed by § 360 (b) and (c) of the Immigration and Nationality Act of 1952, and the remedy pursued in the present case under the Administrative Procedure Act and the Declaratory Judgment Act was an appropriate one. Pp. 370–380.

3. With respect to the other issues presented by this appeal, the case is set for reargument during the October Term, 1962. P. 380.

Reported below: 187 F. Supp. 683.

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Oscar H. Davis argued the cause for appellant. With him on the briefs were *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit.*

Leonard B. Boudin argued the cause for appellee. With him on the brief was *Victor Rabinowitz.*

Briefs of *amici curiae,* urging affirmance, were filed by *Jack Wasserman, David Carliner, Rowland Watts* and *Lawrence Speiser* for the American Civil Liberties Union, and by *Milton V. Freeman, Robert E. Herzstein, Horst Kurnik* and *Charles A. Reich* for Angelika Schneider.

MR. JUSTICE STEWART delivered the opinion of the Court.

Section 349 (a)(10) of the Immigration and Nationality Act of 1952 provides:

> "From and after the effective date of this Act a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by—
>
> . . . . . .
>
> "(10) departing from or remaining outside of the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the military, air, or naval forces of the United States. For the purposes of this paragraph failure to comply with any provision of any compulsory service laws of the United States shall raise the presumption that the departure from or absence from the United States was for the purpose of evading or avoiding training and service in the military, air, or naval forces of the United States." [1]

[1] 66 Stat. 163, 267–268, 8 U. S. C. § 1481 (a)(10).

The appellee, Joseph Cort, is a physician and research physiologist. He was born in Massachusetts in 1927. In May of 1951 he registered with his Selective Service Board under the so-called "Doctors' Draft Act." [2] A few days later he left the United States for Cambridge, England. In 1953, while still in England, he was repeatedly notified by his draft board to report for a physical examination either in the United States or at an examining facility in Europe. He disregarded these communications, and in September of 1953 his draft board ordered him to report to Brookline, Massachusetts, for induction into the Armed Forces. He failed to report as directed and remained in England. In 1954 an indictment charging him with draft evasion was returned in the United States District Court for the District of Massachusetts. Earlier that year, after the British Home Office had refused to renew his residence permit, Cort had gone to Prague, Czechoslovakia. He has been there ever since.

In 1959 Cort applied to our Embassy in Prague for a United States passport, his original passport having long since expired. His application was denied by the Passport Office of the Department of State on the ground that he had lost his citizenship under § 349 (a)(10) of the 1952 Act by remaining outside the United States for the purpose of avoiding military service. Subsequently, the State Department's Board of Review on Loss of Nationality affirmed the decision of the Passport Office, on the same ground.

Cort then instituted the present action against the Secretary of State in the United States District Court for the District of Columbia, seeking declaratory and injunctive relief. His complaint alleged that he had not remained abroad to evade his military obligations, and

[2] 50 U. S. C. App. § 454 *et seq.* Appellee had previously registered as a regular registrant under the Universal Military Training and Service Act of 1948.

that § 349 (a)(10) was in any event unconstitutional. A three-judge court was convened. The Secretary of State moved to dismiss the action upon the ground that § 360 (b) and (c) of the Immigration and Nationality Act of 1952 provide the exclusive procedure under which Cort could attack the administrative determination that he was not a citizen. The District Court rejected this contention, holding that it had jurisdiction of the action for a declaratory judgment and an injunction. On motions for summary judgment, the court determined that the appellee had remained abroad to avoid service in the Armed Forces. Relying upon *Trop* v. *Dulles*,[3] the court held, however, that § 349 (a)(10) was unconstitutional, and that consequently the appellee's citizenship had not been divested. The court accordingly entered a judgment declaring the appellee to be a citizen of the United States and enjoining the Secretary of State from denying him a passport on the ground that he is not a citizen. *Cort* v. *Herter*, 187 F. Supp. 683. This is a direct appeal from that judgment.

The only question we decide today is whether the District Court was correct in holding that it had jurisdiction to entertain this action for declaratory and injunctive relief. If not, we must vacate the judgment and direct the District Court to dismiss the complaint.[4]

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[3] 356 U. S. 86.

[4] We postponed consideration of the question of our jurisdiction of this appeal until the hearing of the case on the merits. 365 U. S. 808. Under 28 U. S. C. § 1252, a direct appeal may be taken from a District Court decision holding unconstitutional an Act of Congress in a civil action in which an officer of the United States is a party. Since the District Court held § 349 (a)(10) unconstitutional, this appeal is properly before us under § 1252.

An alternative basis for our jurisdiction over this appeal might be found in 28 U. S. C. § 1253, providing for direct appeals from the decisions of three-judge courts convened under 28 U. S. C. §§ 2282,

In support of its jurisdiction the District Court relied upon the Declaratory Judgment Act and the Administrative Procedure Act. 187 F. Supp., at 685. The Declaratory Judgment Act, 48 Stat. 955, as amended, 28 U. S. C. § 2201, provides:

> "In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

Section 10 of the Administrative Procedure Act provides:

> "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—
>
> "(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.
>
> "(b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the

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2284. But since jurisdiction is clearly authorized by 28 U. S. C. § 1252, we need not inquire further into the applicability of 28 U. S. C. § 2282 to this case. In view of the unanimous decision below, the fact that three judges heard the case originally would not affect an otherwise final and reviewable decision of the District Court. See *Thompson* v. *Whittier*, 365 U. S. 465; compare *Garment Workers* v. *Donnelly Co.*, 304 U. S. 243, 251–252.

> absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law." 60 Stat. 243, 5 U. S. C. § 1009.

Section 12 of the Administrative Procedure Act provides in part:

> "No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly." 60 Stat. 244, 5 U. S. C. § 1011.

On their face the provisions of these statutes appear clearly to permit an action such as was brought here to review the final administrative determination of the Secretary of State. This view is confirmed by our decisions establishing that an action for a declaratory judgment is available as a remedy to secure a determination of citizenship—decisions rendered both before and after the enactment of the Administrative Procedure Act. *Perkins* v. *Elg,* 307 U. S. 325; *McGrath* v. *Kristensen,* 340 U. S. 162. Moreover, the fact that the plaintiff is not within the United States has never been thought to bar an action for a declaratory judgment of this nature. *Stewart* v. *Dulles,* 101 U. S. App. D. C. 280, 248 F. 2d 602; *Bauer* v. *Acheson,* 106 F. Supp. 445; see *Flemming* v. *Nestor,* 363 U. S. 603.

It is the appellant's position, however, that despite these broad provisions of the Declaratory Judgment Act and the Administrative Procedure Act, Cort could not litigate his claim to citizenship in an action such as the

one he brought in the District Court, but is confined instead to the procedures set out in subsections (b) and (c) of § 360 of the Immigration and Nationality Act of 1952. Section 360 establishes procedures for determining claims to American citizenship by those within and without the country. Subsection (a) covers claimants "within the United States" and authorizes an action for a declaratory judgment against the head of the agency denying the claimant a right or privilege of citizenship—except that such an action cannot be instituted if the issue of citizenship arises in connection with an exclusion proceeding.[5] Subsections (b) and (c) deal with citizenship claimants "not within the United States." The former provides, with limitations, for the issuance abroad of certificates of identity "for the purpose of traveling to a port of entry in the United States and applying for admission." The latter subsection declares that a person issued such a certificate "may apply for admission to the United States at any port of entry, and shall be subject

[5] Section 360 (a), 66 Stat. 163, 273, 8 U. S. C. § 1503 (a):

"(a) If any person who is within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may institute an action under the provisions of section 2201 of title 28, United States Code, against the head of such department or independent agency for a judgment declaring him to be a national of the United States, except that no such action may be instituted in any case if the issue of such person's status as a national of the United States (1) arose by reason of, or in connection with any exclusion proceeding under the provisions of this or any other act, or (2) is in issue in any such exclusion proceeding. An action under this subsection may be instituted only within five years after the final administrative denial of such right or privilege and shall be filed in the district court of the United States for the district in which such person resides or claims a residence, and jurisdiction over such officials in such cases is hereby conferred upon those courts."

to all the provisions of this Act relating to the conduct of proceedings involving aliens seeking admission to the United States." Judicial review of those proceedings is to be by habeas corpus and not otherwise.[6]

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[6] Section 360 (b) and (c), 66 Stat. 163, 273–274, 8 U. S. C. § 1503 (b) and (c):

"(b) If any person who is not within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may make application to a diplomatic or consular officer of the United States in the foreign country in which he is residing for a certificate of identity for the purpose of traveling to a port of entry in the United States and applying for admission. Upon proof to the satisfaction of such diplomatic or consular officer that such application is made in good faith and has a substantial basis, he shall issue to such person a certificate of identity. From any denial of an application for such certificate the applicant shall be entitled to an appeal to the Secretary of State, who, if he approves the denial, shall state in writing his reasons for his decision. The Secretary of State shall prescribe rules and regulations for the issuance of certificates of identity as above provided. The provisions of this subsection shall be applicable only to a person who at some time prior to his application for the certificate of identity has been physically present in the United States, or to a person under sixteen years of age who was born abroad of a United States citizen parent.

"(c) A person who has been issued a certificate of identity under the provisions of subsection (b), and while in possession thereof, may apply for admission to the United States at any port of entry, and shall be subject to all the provisions of this Act relating to the conduct of proceedings involving aliens seeking admission to the United States. A final determination by the Attorney General that any such person is not entitled to admission to the United States shall be subject to review by any court of competent jurisdiction in habeas corpus proceedings and not otherwise. Any person described in this section who is finally excluded from admission to the United States shall be subject to all the provisions of this Act relating to aliens seeking admission to the United States."

Thus, the question posed is whether the procedures specified in § 360 (b) and (c) provide the only method of reviewing the Secretary of State's determination that Cort has forfeited his citizenship. More precisely stated, the question in this case is whether, despite the liberal provisions of the Administrative Procedure Act, Congress intended that a native of this country living abroad must travel thousands of miles, be arrested, and go to jail in order to attack an administrative finding that he is not a citizen of the United States. We find nothing in the statutory language, in the legislative history, or in our prior decisions which leads us to believe that Congress had any such purpose.

The Administrative Procedure Act confers the right to judicial review of "any agency action." The procedures of § 360 (b) and (c) would culminate in litigation not against the Secretary of State whose determination is here being attacked, but against the Attorney General. Whether such litigation could properly be considered review of the Secretary of State's determination presents a not insubstantial question. Putting to one side this conceptual difficulty, it is to be noted that subsections (b) and (c) by their very terms simply provide that a person outside of the United States who wishes to assert his citizenship "*may*" apply for a certificate of identity and that a holder of a certificate of identity "*may*" apply for admission to the United States. As the District Court said, "The language of the section shows no intention to provide an exclusive remedy, or any remedy, for persons outside the United States who have not adopted the procedures outlined in subsections (b) and (c). Neither does the section indicate that such persons are to be denied existing remedies." 187 F. Supp., at 685.

The predecessor of § 360 of the 1952 Act was § 503 of the Nationality Act of 1940, 54 Stat. 1137. That section pro-

vided that a claimant whose citizenship was denied by administrative authorities could institute a declaratory judgment suit in the federal courts to determine his right to citizenship, whether he was in the United States or abroad. In addition, the section broadened the venue of such an action by permitting suit to be brought in the "district in which such person claims a permanent residence." Finally, the section provided a method by which a claimant could enter the United States and prosecute his claim personally.[7]

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[7] Section 503 of the Nationality Act of 1940, 54 Stat. 1137, 1171–1172, provided:

"If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. If such person is outside the United States and shall have instituted such an action in court, he may, upon submission of a sworn application showing that the claim of nationality presented in such action is made in good faith and has a substantial basis, obtain from a diplomatic or consular officer of the United States in the foreign country in which he is residing a certificate of identity stating that his nationality status is pending before the court, and may be admitted to the United States with such certificate upon the condition that he shall be subject to deportation in case it shall be decided by the court that he is not a national of the United States. Such certificate of identity shall not be denied solely on the ground that such person has lost a status previously had or acquired as a national of the United States; and from any denial of an application for such certificate the applicant shall be entitled to an appeal to the Secretary of State, who, if he approves the denial, shall state in writing the reasons for his decision. The Secretary of State, with approval of the Attorney General, shall prescribe rules and regulations for the issuance of certificates of identity as above provided."

The legislative history of § 503 indicates that Congress understood the provision for a declaratory judgment action to be merely a confirmation of existing law, or at most a clarification of it.[8] What was concededly novel about § 503 was the provision designed to permit a citizenship claimant outside the United States to be admitted to this country upon a certificate of identity in order personally to prosecute his claim to citizenship, subject to the condition of deportation in the event of an adverse decision. At the time of the enactment of this provision some misgivings were expressed that it might be utilized by aliens to gain physical entry into

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[8] For example, one of the managers of the bill in the House explained the declaratory judgment provisions as follows:

"We have a rather new situation here, and that is we are cutting off the claim to citizenship of these thousands of persons under this provision in the bill who do not comply with its terms and therefore it was deemed advisable that some chance be given them to have what might be called their day in court. We have safeguarded the situation extremely carefully and feel that so far as possible we have prevented any abuse of it. It was my contention when this measure was up for consideration in the committee that such people did have the right to go into court either on a declaratory judgment or under a writ of habeas corpus, but there was a feeling on the part of others that they may not have that right." 86 Cong. Rec. 13247.

A similar understanding of the measure was indicated during the House Committee Hearings on the bill.

"Mr. FLOURNOY. . . . The question remains, whether while still abroad he would not be able to resort to a petition for declaratory judgment or for a writ of mandamus.

"The CHAIRMAN. I should think, gentlemen, that we ought to go a little step further . . . to say that such person may, upon application, be permitted under certain conditions . . . to enter the United States for a short period of time as a temporary person only." Hearings before the House Committee on Immigration and Naturalization on H. R. 6127, superseded by H. R. 9980, 76th Cong., 1st Sess., pp. 291–292.

the United States and then to disappear into the general populace.[9]

In the ensuing years the abuses which some had anticipated did, indeed, develop, and the legislative history of § 360 of the 1952 Act shows that the predominate concern of Congress was to limit the easy-entry provision of § 503 of the 1940 Act, under which these abuses had occurred. Thus the report of the Senate Committee which studied immigration and nationality problems for two and a half years found that § 503 "has been used, in a considerable number of cases, to gain entry into the United States where no such right existed." S. Rep. No. 1515, 81st Cong., 2d Sess., p. 777; see also Joint Hearings before the Subcommittees of the Committees on the Judiciary on S. 716, H. R. 2379 and H. R. 2816, 82d Cong., 1st Sess., pp. 108–110, 443–445. In describing the purpose of the legislation which became § 360 of the 1952 Act the Senate Judiciary Committee, stating that "[t]he bill modifies section 503 of the Nationality Act of 1940," explained that it provides:

> "that any person who has previously been physically present in the United States but who is not within the United States who claims a right or privilege as a national of the United States and is denied such right or privilege by any government agency may be issued a certificate of identity for the purpose of traveling to the United States and applying for admission to the United States. The net effect of

[9] For instance, a representative of the Immigration and Naturalization Service testified at the House Committee hearings that after a citizen claimant had been permitted to enter the United States, "[I]t would be open to question, in my mind, whether you would ever get him out again." Hearings before the House Committee on Immigration and Naturalization on H. R. 6127, superseded by H. R. 9980, 76th Cong., 1st Sess., p. 292; see also, *id.*, at 294, 296.

> this provision is to require that the determination of the nationality of such person shall be made in accordance with the normal immigration procedures. These procedures include review by habeas corpus proceedings where the issue of the nationality status of the person can be properly adjudicated." S. Rep. No. 1137, 82d Cong., 2d Sess., p. 50.

As a matter simply of grammatical construction, it seems obvious that the "such person" referred to in the Committee Report is a person who has chosen to obtain a certificate of identity and to seek admission to the United States in order to prosecute his claim. The appellee in the present case is, of course, not such a person.

This legislative history is sufficient, we think, to show that the purpose of § 360 (b) and (c) was to cut off the opportunity which aliens had abused under § 503 of the 1940 Act to gain fraudulent entry to the United States by prosecuting spurious citizenship claims. We are satisfied that Congress did not intend to foreclose lawsuits by claimants, such as Cort, who do not try to gain entry to the United States *before* prevailing in their claims to citizenship.

For these reasons, we hold that a person outside the United States who has been denied a right of citizenship is not confined to the procedures prescribed by § 360 (b) and (c), and that the remedy pursued in the present case was an appropriate one. This view is in accord with previous decisions of this Court concerning the relationship of §§ 10 and 12 of the Administrative Procedure Act to the subsequently enacted Immigration and Nationality Act of 1952. See *Shaughnessy* v. *Pedreiro,* 349 U. S. 48; *Brownell* v. *Tom We Shung,* 352 U. S. 180. The teaching of those cases is that the Court will not hold that the broadly remedial provisions of the Administrative Pro-

cedure Act are unavailable to review administrative decisions under the 1952 Act in the absence of clear and convincing evidence that Congress so intended.

With respect to the other issues presented by this appeal, the case is set for reargument during the October Term, 1962, to follow No. 19.

It is so ordered.

MR. JUSTICE BRENNAN, concurring.

While I agree with the reasoning of the Court and join its opinion, I wish to note my view that its interpretation of § 360 of the Immigration and Nationality Act of 1952 is further supported by serious doubt as to whether the statute as construed and applied by the dissenting opinion would be constitutional. Compare, *e. g., United States* v. *Witkovich,* 353 U. S. 194, 201–202.

Necessarily implicit in the administrative denial of a right or privilege of citizenship on the ground that the individual affected has committed an expatriating act enumerated in § 401 of the 1940 Act or § 349 of the 1952 Act, is the assumption that the individual was theretofore a citizen. Accordingly, it follows from the interpretation advanced by the dissent that a person abroad who just prior to the adverse administrative action admittedly had been deemed a citizen, entitled to all the incidents of citizenship including the freedom to re-enter the country, may by unreviewable administrative action be relegated to the status of an alien confronted by all the barriers to alien entry and the limited access to judicial review that an alien enjoys. That Congress may, consistently with the requirements of due process, circumscribe general grants of jurisdiction [1] so as to deny judicial review of administrative action which peremptorily initi-

[1] Administrative Procedure Act, 5 U. S. C. § 1009; Declaratory Judgment Act, 28 U. S. C. § 2201.

ates the treatment as an alien of one who had been a citizen seems at least doubtful enough that we should, if reasonably possible, avoid interpreting any statute to accomplish such a result.

If §§ 360 (b), (c) provided the sole avenue to judicial review for one who while abroad is denied a right of citizenship, the following consequences would result: He would have to apply for a certificate of identity, which would be granted only if an administrative official was satisfied that the application was made in good faith and had a substantial basis. If the certificate were initially denied, an administrative appeal would have to be taken. If that failed, an attempt might be made to secure judicial review. A holding that no such review is available would mean that one who admittedly had been a citizen would have been conclusively converted into an alien without *ever* having gained access to *any* court. On the other hand, if review were forthcoming at this stage, and if issuance of a certificate were ordered, the individual would have gained only the right to travel to a United States port of entry—if he could afford the passage—there to be "subject to all the provisions of this chapter relating to the conduct of proceedings involving aliens seeking admission to the United States." He would, in other words, have to submit to detention as an alien although it is assumed that he was once a citizen and no court had ever determined that he had been expatriated. Should he still encounter an administrative denial of the right to enter, he would finally get into court, but "in habeas corpus proceedings and not otherwise," with whatever limitations upon the scope of review such language may imply.

The dissent would construe § 360 to mean that administrative action resulting in such a stark limitation of such fundamental rights is totally unreviewable. For the very procedures of subsections (b) and (c), which according to

the dissent's interpretation are the only avenues to review open to the putative expatriate abroad, accomplish a conversion of citizenship into alienage. To read Congress as having denied judicial review of administrative action which throws an individual into this bind would be to tread upon a constitutional quicksand.

The dissent finds shelter in *United States* v. *Ju Toy*, 198 U. S. 253, but that case does not resolve the constitutional doubts I have suggested. The precise issue there was the degree of finality to be accorded in habeas corpus proceedings to an administrative refusal of entry based on a finding that the petitioner was not, as he claimed, native-born and so had never been a citizen. *Ju Toy* was not an expatriation case in which administrative officials purported to withdraw rights of citizenship which admittedly once existed. Even if "the mere fact that [persons seeking entry] . . . claimed to be citizens would not have entitled them under the Constitution to a judicial hearing," [2] it does not follow that rights attaching to admitted citizenship may be forfeited without a judicial hearing. To deny the rights of citizenship to one who previously enjoyed them "obviously deprives him of liberty . . . . It may result also in loss of both property and life; or of all that makes life worth living. Against the danger of such deprivation without the sanction afforded by judicial proceedings, the Fifth Amendment affords protection

[2] *Ng Fung Ho* v. *White*, 259 U. S. 276, 282. See *United States* v. *Ju Toy*, 198 U. S. 253, 261:

"This petition should have been denied . . . , irrespective of what more we have to say, because it alleged nothing except citizenship. It disclosed neither abuse of authority nor the existence of evidence not laid before the Secretary. It did not even set forth that evidence or allege its effect. But as it was entertained and the District Court found for the petitioner it would be a severe measure to order the petition to be dismissed on that ground now, and we pass on to further considerations."

in its guarantee of due process of law. The difference in security of judicial over administrative action has been adverted to by this court." *Ng Fung Ho* v. *White,* 259 U. S. 276, 284–285.

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

The decision that the District Court had jurisdiction to entertain this declaratory judgment action, notwithstanding that the appellee is a *foreign resident,* seems to me manifestly wrong, in light of the governing statute and its legislative history which could hardly be more clear.

This issue depends upon § 360 of the 1952 Act. That section is entitled: "Proceedings For Declaration of United States Nationality In The Event of [the administrative] Denial of Rights And Privileges as National." The provisions of the section set out in full in the margin,[1] may be summarized as follows:

(1) If the person whose rights as a national have been administratively denied "is within the United

[1] "(a) If any person who is *within the United States* claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may institute an action under the provisions of section 2201 of title 28, United States Code, against the head of such department or independent agency for a judgment declaring him to be a national of the United States, except that no such action may be instituted in any case if the issue of such person's status as a national of the United States (1) arose by reason of, or in connection with any exclusion proceeding under the provisions of this or any other act, or (2) is in issue in any such exclusion proceeding. An action under this subsection may be instituted only within five years after the final administrative denial of such right or privilege and shall be filed in the district court of the United States for the district in

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States," he may bring a declaratory judgment action under 28 U. S. C. § 2201 to establish his citizenship,[2] unless that issue was, or is, already involved in an "exclusion" proceeding. The action must be brought

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which such person resides or claims a residence, and jurisdiction over such officials in such cases is hereby conferred upon those courts.

"(b) If any person who is *not within the United States* claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may make application to a diplomatic or consular officer of the United States in the foreign country in which he is residing for a certificate of identity for the purpose of traveling to a port of entry in the United States and applying for admission. Upon proof to the satisfaction of such diplomatic or consular officer that such application is made in good faith and has a substantial basis, he shall issue to such person a certificate of identity. From any denial of an application for such certificate the applicant shall be entitled to an appeal to the Secretary of State, who, if he approves the denial, shall state in writing his reasons for his decision. The Secretary of State shall prescribe rules and regulations for the issuance of certificates of identity as above provided. The provisions of this subsection shall be applicable only to a person who at some time prior to his application for the certificate of identity has been physically present in the United States, or to a person under sixteen years of age who was born abroad of a United States citizen parent.

"(c) A person who has been issued a certificate of identity under the provisions of subsection (b), and while in possession thereof, may apply for admission to the United States at any port of entry, and shall be subject to all the provisions of this Act relating to the conduct of proceedings involving aliens seeking admission to the United States. A final determination by the Attorney General that any such person is not entitled to admission to the United States shall be subject to review by any court of competent jurisdiction in habeas corpus proceedings and not otherwise. Any person described in this section who is finally excluded from admission to the United States shall be subject to all the provisions of this Act relating to aliens seeking admission to the United States." Section 360, 66 Stat. 273–274, 8 U. S. C. § 1503. (Emphasis added.)

[2] Throughout this opinion "nationality" is spoken of as "citizenship."

within five years after the final administrative denial, and in the district where such person resides or claims residence. (Subsection "(a).")

(2) If such person is "not within the United States," but had previously been "physically" there, or was born abroad of an American citizen parent and is under the age of 16, (i) he may apply abroad for a "certificate of identity" to enable him to seek admission to the United States (subsection "(b)"); and (ii) if admission at a port of entry is finally denied him by the Attorney General, he may have that determination judicially reviewed "in habeas corpus proceedings and not otherwise." If ultimately excluded from the United States, such person is made subject to all the provisions of the immigration law relating to the admission of aliens to the United States. (Subsection "(c).")

As will be shown later, these provisions of the 1952 Act, among other things, departed from the comparable procedural provisions of § 503 of the Nationality Act of 1940, 54 Stat. 1137, 1171–1172, which had expressly made declaratory relief available to *all* citizenship claimants, whether "within the United States or abroad," following an administrative denial of that status.[3] The purpose

[3] Section 503, 54 Stat. 1171–1172, provides:

"If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, *regardless of whether he is within the United States or abroad,* may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. If such person is outside the United States and shall have instituted such an action in court, he may, upon submission of a sworn application showing that the claim of nationality

and effect of the new provisions are shown by the following extract from the Senate Judiciary Committee's report on the bill (S. 2550), § 360 of which, with only a minor addition and deletion,[4] now bears the same number in the 1952 Act:

"G. DECLARATORY JUDGMENT

"Under the provisions of section 503 of the Nationality Act of 1940 *any* person who claims a right or privilege as a national of the United States and who is denied such right or privilege by a governmental agency on the ground that he is not a national of the United States may institute an action in a district Federal court for a judgment declaring him to be a national of the United States. If such person is outside the United States and shall have instituted the action in court, he may obtain from a diplomatic or consular officer a certificate of identity and may be admitted to the United States with the certificate upon the condition that he shall be sub-

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presented in such action is made in good faith and has a substantial basis, obtain from a diplomatic or consular officer of the United States in the foreign country in which he is residing a certificate of identity stating that his nationality status is pending before the court, and may be admitted to the United States with such certificate upon the condition that he shall be subject to deportation in case it shall be decided by the court that he is not a national of the United States. Such certificate of identity shall not be denied solely on the ground that such person has lost a status previously had or acquired as a national of the United States; and from any denial of an application for such certificate the applicant shall be entitled to an appeal to the Secretary of State, who, if he approves the denial, shall state in writing the reasons for his decision. The Secretary of State, with approval of the Attorney General, shall prescribe rules and regulations for the issuance of certificates of identity as above provided." (Emphasis added.)

[4] See note 25, *infra*.

ject to deportation in case it shall be decided by the court that he is not a national of the United States.

"The bill modifies section 503 of the Nationality Act of 1940 *by limiting the court action exclusively to persons who are within the United States,* and prohibits the court action in any case if the issue of the person's status as a national of the United States (1) arose by reason of, or in connection with, any deportation or exclusion proceeding or (2) is an issue in any such deportation or exclusion proceeding. The reason for the modification is that the issue of citizenship is always germane in an exclusion and deportation proceeding, in which case an adjudication of nationality status can be appropriately made.

"The bill further provides that any person who has previously been physically present in the United States but who is not within the United States who claims a right or privilege as a national of the United States and is denied such right or privilege by any government agency may be issued a certificate of identity for the purpose of traveling to the United States and applying for admission to the United States. The net effect of this provision is to require that the determination of the nationality of *such person* shall be made in accordance with the normal immigration procedures. These procedures include review by habeas corpus proceedings where the issue of the nationality status of the person can be properly adjudicated." S. Rep. No. 1137, to accompany S. 2550, 82d Cong., 2d Sess., p. 50. (Emphasis added.)

The Court now holds, however, that under § 360 declaratory relief is still available to those "not within the United States" as well as those "within the United States," as was so under § 503 of the 1940 Act; that the certificate of identity procedure provided in sub-

sections (b) and (c) of § 360 is not the exclusive remedy available to nonresident citizenship claimants; that Congress' "predominant concern" in enacting those subsections was to fend against possible misuse of certificates of identity in effecting fraudulent entry into this country; and that jurisdiction of this action accordingly lies under the Declaratory Judgment Act and the Administrative Procedure Act. These conclusions, which I believe are plainly inconsistent with the congressional purpose, as reflected on the face of § 360 itself and in the foregoing Senate Judiciary Committee report, are refuted beyond any doubt by the background and legislative history of § 360.

Prior to 1940, immigration and nationality statutes were silent on the form and scope of judicial review in deportation, exclusion, and nationality cases. In 1905 this Court, in a habeas corpus proceeding involving an administrative denial of admission to this country of a nonresident citizenship claimant who had temporarily departed, held that due process did not require a judicial trial of the issue of citizenship; and that the courts could inquire into the administrative decision only within the conventional limits of habeas corpus review.[5] *United States* v. *Ju Toy,* 198 U. S. 253 (Holmes, J.). In 1922, however, the Court held that a resident claimant in a deportation proceeding *was* entitled to a judicial determination of his citizenship status, thus turning the availability of full judicial relief on the geographical location of the claimant. *Ng Fung Ho* v. *White,* 259 U. S. 276 (Brandeis, J.).

In 1934 the Declaratory Judgment Act was passed. 48 Stat. 955–956; 28 U. S. C. § 2201, as since amended.

[5] That is, whether the administrative determination had afforded a fair hearing; whether it was supported by evidence; and whether it had been reached under correct principles of law. See *Ng Fung Ho* v. *White,* 259 U. S. 276, 284.

In a case decided in 1939, this Court held that remedy applicable to resident citizenship claimants, see *Perkins* v. *Elg,* 307 U. S. 325. However, despite the *Elg* decision, and no doubt because of the *Ju Toy* and *Ng Fung Ho* cases, the continuing prevailing view prior to 1940 seems to have been that relief under the Declaratory Judgment Act was not available to nonresidents seeking a determination of their citizenship claims.

It was not until 1940 that Congress, in the Nationality Act of 1940, first specifically dealt with the availability of declaratory relief in nationality cases. Under that statute the requirements for citizenship were greatly tightened and the provisions for loss of citizenship expanded. During the debates concern was expressed lest under existing law some persons might not get their "day in court" with respect to claims to citizenship. 86 Cong. Rec. 13247. This led to the enactment of § 503 under which declaratory relief was made available to resident and nonresident claimants alike, and, in the case of the latter, authorizing, but not requiring, their provisional entry into the United States under certificates of identity, issuable in aid of a declaratory judgment suit already filed. Note 3, *supra.*

At the same time Congress recognized the possibility of abuse of this liberalized procedure on the part of nonresident claimants who might seek certificates of identity only to achieve entry into this country, without any thought of pressing their citizenship claims; and an attempt was made to guard against such abuse. Accordingly, the section was written to provide that certificates of identity should be furnished only upon "a sworn application showing that the claim of nationality presented in such [declaratory judgment] action is made in good faith and has a substantial basis"; it also authorized the Secretary of State, with the approval of the Attorney Gen-

eral, to prescribe regulations for the issuance of such certificates.[6] Note 3, *supra.*

Commencing soon after the close of World War II, and perhaps in part as a result of the then recent repeal of the Chinese Exclusion Act and continuing Communist successes in China, a large number of suits were filed in the federal courts by Chinese citizenship claimants. These carried in their wake consequences which Congress could hardly have fully anticipated when it enacted § 503. Such consequences were principally of three kinds. *First,* there was an increase in the volume of fraudulent entries into this country; many Chinese who had obtained certificates of identity incident to the institution of a declaratory judgment citizenship action would abandon the suit upon arrival here and disappear into the stream of the population. *Second,* the courts experienced difficulty in adjudicating "derivative" citizenship claims without the claimants having been first exposed to normal immigration screening; such claims were often based on the assertion that the claimant was the foreign-born child of an American citizen who had temporarily returned to China, an assertion frequently difficult to disprove. *Third,* the federal court dockets became cluttered with these suits. See, *e. g., United States ex rel. Dong Wing Ott* v. *Shaughnessy,* 116 F. Supp. 745, 751–752, aff'd, 220 F. 2d 537; *Mar Gong* v. *McGranery,* 109 F. Supp. 821, rev'd *sub nom. Mar Gong* v. *Brownell,* 209 F. 2d 448. By the end of 1952, 1,288 such cases had been instituted. See *Ly Shew* v. *Acheson,* 110 F. Supp. 50, 54–55, vacated and remanded *sub nom. Ly Shew* v. *Dulles,* 219 F. 2d 413;

[6] It was an effort to allay the doubts of those who, on the one hand, wished to assure a full judicial remedy to all citizenship claimants, and of those who, on the other, feared the possible abuse of such a remedy, that led to the remarks of one of the managers of the House bill (Representative Rees), quoted in note 8 of the Court's opinion, *ante,* p. 377. See 86 Cong. Rec. 13247.

Annual Reports of the Attorney General for 1956 (pp. 111–113) and 1957 (pp. 121–123). This state of affairs contributed in no small degree to the revamping of § 503 by § 360 of the statute now before us, enacted after five years of investigation pursuant to a 1947 Senate Resolution authorizing a general study of the immigration laws. S. Res. No. 137, 80th Cong., 1st Sess. (1947).

The first step in this direction occurred in 1950 when Senator McCarran introduced S. 3455, § 359 of which, entitled "Judicial Proceedings for Declaration of United States Nationality in the Event of Denial of Rights and Privileges as a National," [7] was the earliest version of what ultimately became § 360 of the 1952 Act. Section 359 provided declaratory relief *only* for "any person in the United States." The Senate Report [8] accompanying that bill, after observing that § 503 of the 1940 Act permitted persons "within or without" the United States to file declaratory judgment suits, went on to say of proposed new § 359:

> "In spite of the definite restrictions on the use and application of section 503 to bona fide cases [see *supra,* pp. 389–390], the subcommittee finds that the section had been subject to broad interpretation, and that it has been used, in a considerable number of cases, to gain entry into the United States where no such right existed. . . . The subcommittee therefore recommends that *the provisions of section 503* as set out in the proposed bill be *modified to limit the privilege to persons who are in the United States* . . . ." (Emphasis added.)

Read in connection with this report it is surely beyond doubt that the § 503 "privilege" which was intended to be changed was not merely the right to a certificate of

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[7] S. 3455, 81st Cong., 2d Sess., § 359, pp. 239–240 (1950).

[8] S. Rep. No. 1515, 81st Cong., 2d Sess., pp. 776–777 (1950).

identity, which, under the existing statute, was an optional, not a necessary, appurtenance of a declaratory judgment suit, but the right of one abroad to maintain such a suit itself. Since a person "in" the United States had no need for a certificate of identity, the "privilege" limited by this bill to persons "in" the United States can only mean the privilege of bringing a declaratory suit. In other words, the new proposal did not view the "entry" problem as something that could be dealt with independently of the character of the judicial remedy to be afforded those administratively denied citizenship.[9] This, as will be seen, remained in the forefront of the subsequent legislative discussions.

Early in the following year three additional bills were placed before the Congress, one in the Senate and two in the House. S. 716,[10] a revision of the earlier McCarran bill, and H. R. 2379,[11] introduced by Representative Walter, both provided for "citizenship" declaratory relief only as to persons "within the United States." The third, H. R. 2816,[12] introduced by Representative Celler, afforded such relief to "any person" (making no reference to location), and in other respects was also substantially like existing § 503.

In the ensuing Joint Hearings on these bills [13] attention became sharply focused on the question of what, if

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[9] This was the view of the Immigration and Naturalization Service, which in reporting on this bill stated that the new section was designed to "replace section 503" authorizing a nonresident citizenship claimant "to come to this country *after filing such a suit* in order to prosecute it to a conclusion." See Legislative History, Immigration & Nationality Act, 82d Cong., Vol. 5 (Analysis of S. 3455), pp. 359–1 to 359–2. (Emphasis added.)

[10] S. 716, 82d Cong., 1st Sess., § 360, p. 262 (1951).

[11] H. R. 2379, 82d Cong., 1st Sess., § 360, pp. 263–264 (1951).

[12] H. R. 2816, 82d Cong., 1st Sess., § 360, pp. 260–261 (1951).

[13] Joint Hearings before the Subcommittees of the Committees on the Judiciary on S. 716, H. R. 2379, and H. R. 2816, 82d Cong., 1st Sess. (1951). (Hereafter Joint Hearings.)

any, judicial relief (other than habeas corpus) should be available to nonresident citizenship claimants. The most revealing points of view are found in the statements submitted on behalf of the Departments of State and Justice.[14] While both Departments took the position that some such relief should be afforded nonresidents,[15] their proposals were quite different. State suggested declaratory relief for persons abroad limited to those whose *original* citizenship status was not in doubt, but who were deemed to have *lost* it; and that certificates of identity should be made available to such persons, on an optional basis, to permit their coming to this country in aid of their suits.[16] Justice, on the other hand, recommended that all nonresidents whose claims to citizenship were not frivolous should be required to obtain a special certificate of identity, or its equivalent, so as to permit them to come to this country to test their claims in accordance with normal immigration procedures.[17]

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[14] A large number of "lay" witnesses expressed their views before the Joint Committee. All were highly critical of the McCarran and Walter bills which afforded no declaratory remedy to nonresident citizenship claimants, but most had not heard of the so-called "Chinese derivative suit" and other problems experienced under § 503. (*Supra*, pp. 390–391.) On the other hand, it is entirely evident from the questioning of all witnesses that the problem which was uppermost in the minds of the committee members on this aspect of the bills was how best to afford adequate judicial relief to nonresidents under tight controls which would minimize the dangers of abuse. Joint Hearings, pp. 106–109, 338–339, 443–444, 522.

[15] The State Department representative noted that the proposed McCarran bill "withdraws from all persons abroad the right to obtain the judicial review of their claims of citizenship which is granted to them by section 503 of the Nationality Act of 1940." Joint Hearings, p. 710. The representative of the Department of Justice described matters in the same vein. Joint Hearings, p. 720.

[16] Joint Hearings, p. 710.

[17] The Department's statement read:

"The Department of Justice objects to the enactment of section 360 unless it is amended to provide for the protection of *persons*

However, it is evident that the proposals of both State and Justice were intended to fill the remedial gap in S. 716 respecting nonresidents; that they contemplated either limiting, or entirely doing away with, the unrestricted declaratory relief available to nonresidents under § 503 of the 1940 statute; that they were envisaged as constituting the *exclusive* remedy for those living abroad; and that they negative any idea that one so situated was to have the choice between such procedures and the general remedies provided by the Declaratory Judgment Act or the Administrative Procedure Act.

Following the Joint Hearings, the McCarran bill, S. 716, was redrawn as S. 2055,[18] and the Walter bill, H. R. 2379, was revised as H. R. 5678,[19] in consultation with representatives of the State and Justice Departments.[20] The

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abroad who have more than a frivolous claim to citizenship but who are unable to obtain a United States passport. To protect such persons the Department recommends adding to section 360 language which would permit the issuance to such persons of a special certificate of identity or a special 'visa.' That document should be described in such a manner as merely to authorize the person in question to proceed to a port in the United States and apply for admission as a national, in the usual manner. . . . However, the intent of this suggestion is that the person claiming citizenship shall be required to apply for admission to the United States at a port of entry and go through the usual screening, interrogation, and investigation, applicable in the cases of other persons seeking admission to the United States, so that the Immigration and Naturalization Service will have as complete a record as possible on each person entering this country claiming to be a national thereof." Joint Hearings, p. 721. (Emphasis added.)

[18] S. 2055, 82d Cong., 1st Sess., § 360, pp. 277–279 (1951).

[19] H. R. 5678, 82d Cong., 1st Sess., § 360, pp. 150–152 (1951). The Celler bill, H. R. 2816, which, like § 503, proposed a judicial remedy for both resident and nonresident citizenship claimants, scarcely figured in the Joint Hearings discussion.

[20] "Following the joint hearings and in the course of numerous conferences attended by advisers representing unofficially the Departments of State and Justice, two modified versions of the above-

revised McCarran bill adopted the Department of Justice proposals, in effect limiting the judicial remedy for testing nonresident citizenship claims to that afforded in connection with "exclusion" cases, that is habeas corpus.[21] The new Walter bill was in effect a combination of existing § 503 and the suggestions of the State Department.[22] That bill was eventually passed by the House.[23] The McCarran bill, except for two minor deletions,[24] was

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mentioned three bills [S. 716, H. R. 2379, H. R. 2816] were introduced . . . ." H. R. Rep. No. 1365, to accompany H. R. 5678, 82d Cong., 2d Sess., p. 28 (1952).

[21] It should be noted that there was added to what in the final result became subsection (a) of § 360, relating to resident claimants, a specific reference to 28 U. S. C. § 2201, the Declaratory Judgment Act, which had not been in § 503. No reference to 28 U. S. C. § 2201 was included in what ultimately became subsection (b).

[22] Whereas the State Department had proposed that declaratory relief, as to nonresidents, should be limited to those who had *lost* their American citizenship, the Walter bill provided declaratory relief for any claimant abroad, but limited eligibility for a certificate of identity to those who had been "physically" in the United States at some prior time, or to a person who was born abroad of an American-citizen parent and who wished to come to the United States to meet residential requirements for the retention of citizenship. After a declaratory action was filed, the bill provided that the claimant "may" make application for a certificate of identity "for the purpose of traveling to the United States to prosecute his action for determination of his citizenship status."

[23] At p. 22 of his brief before this Court the appellee, Cort, quotes extensively from the House Report which accompanied H. R. 5678—H. R. Rep. No. 1365, 82d Cong., 2d Sess., pp. 87–88 (1952)—to support his contention that present § 360 was not designed to prohibit a suit for a declaratory judgment by a nonresident claimant, but only to limit the use of certificates of identity to gain entry in this country. However true this may be as to § 360 of H. R. 5678, Cort's reliance on that bill is misplaced since the House bill was rejected in conference and the Senate version of § 360 was eventually passed by both Houses and became law.

[24] A qualifying phrase, "as a national of the United States," was deleted from subsections (b) and (c).

reported out by the Senate Judiciary Committee as S. 2550 and passed by the Senate. *Supra,* pp. 386–387.

Congress, thus squarely faced with making, or not making, declaratory relief available to nonresident citizenship claimants, chose the latter course. It accepted S. 2550,[25] the judicial remedy provisions of which became § 360 of the Immigration and Nationality Act of 1952. Note 1, *supra.*

In light of this unambiguous course of events, I do not understand how the Government's contention that the District Court lacked jurisdiction over this declaratory judgment action can be successfully challenged, the appellee at all relevant times having resided abroad. To say the least, the Court's contrary conclusion seems to me to rest on the most insecure kind of reasoning.

Certainly, the past cases in this Court lend no support to this decision. *Perkins* v. *Elg,* 307 U. S. 325, holding that a *resident,* threatened with deportation, could maintain a declaratory judgment action to establish citizenship, was of course quite in line with *Ng Fung Ho* v. *White, supra.* Moreover, the case was decided in 1939, before Congress, for the first time, addressed itself to the availability of declaratory relief in nationality cases. *Supra,* p. 389. *McGrath* v. *Kristensen,* 340 U. S. 162, is even more inapposite. The issue there was simply whether, in the circumstances involved, an alien then in this country was eligible for naturalization, so that the

[25] The conferees modified § 360 of S. 2550 in two minor respects. In subsection (a), a reference to "deportation proceedings" was deleted, so that the disability to bring declaratory relief for a person "within the United States" was limited only if the issue of nationality arose in an "exclusion" proceeding. (Compare note 1 and text accompanying note 2, *supra,* with S. Rep. No. 1137, *supra,* pp. 386–387.) In subsection (b) "a person under sixteen years of age who was born abroad of a United States citizen parent" was also made eligible for a certificate of identity. (Compare note 1 with S. Rep. No. 1137, *supra,* pp. 386–387.)

Attorney General had power to stay his deportation. The Court noted that § 503 of the 1940 Act was not available to the alien, since his citizenship status was not in issue. Incidentally, the Court did not reach the applicability of the Administrative Procedure Act. *Flemming* v. *Nestor,* 363 U. S. 603, involved a nonresident alien's right to social security benefits, not citizenship.[26]

Shaughnessy v. *Pedreiro,* 349 U. S. 48, and *Brownell* v. *Tom We Shung,* 352 U. S. 180, the two cases relied on by the Court as supporting the applicability of the Administrative Procedure Act in this instance, were, respectively, simply straightforward deportation and exclusion cases, neither involving a citizenship claim. Unlike the sections in the 1952 Act relating to nationality, those governing deportation and exclusion then had no specific provisions dealing with judicial relief,[27] and unlike this case, the relief in those cases was sought only after the administrative process had run its full course, and a "final" determination had been made by the Attorney General.

When it comes to § 360 itself and the legislative history of the section, the Court's analysis is, if anything, even

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[26] In addition to *Flemming* v. *Nestor,* the Court cites two opinions from the District of Columbia Circuit, *Stewart* v. *Dulles,* 101 U. S. App. D. C. 280, 248 F. 2d 602; *Bauer* v. *Acheson,* 106 F. Supp. 445, in support of its sweeping statement that "the fact that the plaintiff is not within the United States has never been thought to bar an action for a declaratory judgment of this nature." If the phrase "of this nature" is intended to refer to citizenship claims, the two cases are inapposite since neither determined citizenship; in both cases the issue was whether the State Department could refuse to renew a passport, except for the limited purpose of returning to this country, without affording a hearing. Moreover, taking that phrase as referring to citizenship claims, compare both the decision of the District Court in the present case, 187 F. Supp. 683, and *Tom Mung Ngow* v. *Dulles,* 122 F. Supp. 709, with *D'Argento* v. *Dulles,* 113 F. Supp. 933.

[27] This is not so now. See the 1961 amendments to the Immigration and Nationality Act of 1952, note 28, *infra.*

more cursory and unpersuasive. The Court initially finds that the declaratory judgment provision respecting nonresidents, contained in the predecessor of § 360—§ 503 of the 1940 Act—was understood "to be merely a confirmation of existing law, or at most a clarification of it." In this, the Court has overlooked the *Ju Toy* and *Ng Fung Ho* cases which of course indicate precisely the contrary. *Supra,* p. 388, and note 6.

Proceeding from that premise, and despite the unequivocal directive in subsection (c) of § 360 that a final determination of the Attorney General denying admission to a citizenship claimant shall be subject to judicial review "in habeas corpus proceedings and not otherwise," the Court concludes that such is not indeed the exclusive remedy. This is said to be so because § 360 provides only that the claimant "may" apply abroad for a certificate of identity (subsection (b)), and upon arrival at our shores "may" apply for admission (subsection (c)). This conclusion is supported only by a quotation from the District Court's opinion in this very case. It cannot withstand the statute and legislative history already discussed.

Finally, the Court considers that Congress' "predominate concern" in enacting subsections (b) and (c) of § 360 was with fraudulent entry, not judicial remedies. It is said that this "seems obvious" because the phrase "such person," contained in the extract quoted by the Court from the Judiciary Committee Report on S. 2550 (*ante,* pp. 378–379), refers grammatically only to those persons who had elected to pursue the certificate of identity procedure in prosecuting their citizenship claims. But this conclusion also will hardly stand up when the full text of the Judiciary Committee Report, especially the clause "The bill modifies section 503 of the Nationality Act of 1940 by limiting the court action exclusively to persons who are within the United States . . . ," is read (*supra,* p. 387), and the relevant legislative history is considered.

In deciding the jurisdictional issue as it has, I fear that the Court has become the victim of the manner in which it has put that issue to itself:

> "More precisely stated, the question in this case is whether, despite the liberal provisions of the Administrative Procedure Act, Congress intended that a native of this country living abroad must travel thousands of miles, be arrested, and go to jail in order to attack an administrative finding that he is not a citizen of the United States."

But to sustain the Government's position on this issue it is not necessary to find that Congress, in enacting § 360, suddenly became severe, irrational, or capricious. As a result of the unfavorable experience with § 503 of the 1940 Act, Congress simply restored, with some alleviations, what until 1940 had been the procedure in such cases—a procedure whose constitutionality had long since been upheld by this Court with the firm support of such men as Holmes and Brandeis, JJ. And in so doing Congress acted only after the fullest inquiry, debate, and deliberation.

I am unable to grasp how the Court could have reached the conclusion that the present declaratory action is not precluded by § 360, except by making its own wish father to the thought.[28]

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[28] It is not without irony that less than a year ago Congress, with the support of the Department of Justice, acted to tighten still further the Immigration and Nationality Act of 1952. Public Law 87–301, 75 Stat. 650 (effective October 26, 1961), amending the 1952 Act in various respects, among other things makes habeas corpus the sole judicial remedy in exclusion proceedings, thereby in effect rejecting *Brownell* v. *Tom We Shung, supra,* which had held the Administrative Procedure Act also available in such cases. See 8 U. S. C. § 1105a (Supp. III 1962); H. R. Rep. No. 1086, 87th Cong., 1st Sess., pp. 22–33 (1961).

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IN RE ZIPKIN.

CERTIORARI TO THE SUPREME COURT OF MISSOURI.

No. 288. Argued March 28–29, 1962.—Decided April 2, 1962.

Writ dismissed as improvidently granted.
Reported below: —— S. W. 2d ——.

Heywood H. Davis argued the cause for petitioner. With him on the brief was *William J. Burrell.*

Richmond C. Coburn argued the cause for respondent. With him on the brief was *Alan C. Kohn.*

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS dissent.

CROSS ET AL. *v.* FLORIDA.

APPEAL FROM THE SUPREME COURT OF FLORIDA.

No. 425. Decided April 2, 1962.

Appeal dismissed; certiorari denied.
Reported below: 138 So. 2d 338.

A. K. Black for appellants.

Richard W. Ervin, Attorney General of Florida, and *George R. Georgieff,* Assistant Attorney General, 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.

GRANT ET AL. *v.* UNITED STATES.

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

No. 297. Decided April 2, 1962.

Certiorari granted; judgment vacated; case remanded with instructions to dismiss the appeal.

Reported below: 291 F. 2d 227.

Joseph W. Burns for petitioners.

Solicitor General Cox, Assistant Attorney General Oberdorfer and *Joseph Kovner* for the United States.

PER CURIAM.

The petition for writ of certiorari is granted. The judgment of the United States Court of Appeals for the Second Circuit is vacated and the case is remanded to that court with instructions to dismiss the appeal. *DiBella* v. *United States,* 369 U. S. 121.

MURPHY ET AL. *v.* UNITED STATES.

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

No. 317. Decided April 2, 1962.

Certiorari granted; judgment vacated; case remanded with instructions to dismiss the appeal.

Reported below: 290 F. 2d 573.

Albert A. Fiok for petitioners.

Solicitor General Cox, Assistant Attorney General Miller and *Beatrice Rosenberg* for the United States.

PER CURIAM.

The petition for writ of certiorari is granted. The judgment of the United States Court of Appeals for the Third Circuit is vacated and the case is remanded to that court with instructions to dismiss the appeal. *DiBella* v. *United States*, 369 U. S. 121.

MR. JUSTICE BLACK dissents.

GREENE ET AL. *v.* UNITED STATES.

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

No. 687. Decided April 2, 1962.

Certiorari granted; judgment vacated; case remanded with instructions to dismiss the appeal.

Reported below: 296 F. 2d 841.

Richard E. Moot for petitioners.

Solicitor General Cox, Assistant Attorney General Oberdorfer and *Joseph M. Howard* for the United States.

PER CURIAM.

The petition for writ of certiorari is granted. The judgment of the United States Court of Appeals for the Second Circuit is vacated and the case is remanded to that court with instructions to dismiss the appeal. *DiBella* v. *United States,* 369 U. S. 121.

NATIONAL LABOR RELATIONS BOARD *v.* WALTON MANUFACTURING CO. ET AL.

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

No. 77. Argued March 19, 1962.—Decided April 9, 1962.*

The Court of Appeals for the Fifth Circuit denied enforcement of orders of the National Labor Relations Board requiring reinstatement with back pay of employees found to have been discriminatorily discharged in violation of the National Labor Relations Act. In doing so, the Court of Appeals applied a special rule which it had adopted for use in reinstatement cases, to the effect that the employer's statement under oath as to the reason for the discharge must be believed unless he is impeached or contradicted. *Held:* The judgments are reversed and the cases are remanded to the Court of Appeals for reconsideration. Pp. 405–409.

(a) A reviewing court is not barred from setting aside a decision of the National Labor Relations Board when it cannot conscientiously find that the evidence supporting that decision is substantial when viewed in the light of "the record considered as a whole"; but it may not displace the Board's choice between two fairly conflicting views, even though the Court would justifiably have made a different choice had the matter been before it *de novo*. *Universal Camera Corp.* v. *Labor Board,* 340 U. S. 474. P. 405.

(b) There is no place in the statutory scheme for one test of the substantiality of evidence in reinstatement cases and another test in other cases. Pp. 407–408.

(c) Since this Court is in doubt as to how the Court of Appeals would have decided these two cases in the absence of its own special rule applicable to such cases, the cases are remanded to that Court for reconsideration. Pp. 408–409.

286 F. 2d 16; 288 F. 2d 630, reversed and cases remanded.

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*Together with No. 94, *National Labor Relations Board* v. *Florida Citrus Canners Cooperative,* also on certiorari to the same Court, argued March 19–20, 1962.

Norton J. Come argued the cause for petitioner in both cases. With him on the briefs were *Solicitor General Cox, Stuart Rothman, Dominick L. Manoli, Frederick U. Reel, Russell Specter* and *Allan I. Mendelsohn.*

Robert T. Thompson argued the cause for respondents in No. 77. With him on the briefs was *Alexander E. Wilson, Jr.*

O. R. T. Bowden argued the cause and filed briefs for respondent in No. 94.

PER CURIAM.

These cases are here on petitions for certiorari to the Court of Appeals for the Fifth Circuit, which refused enforcement of orders of the Board. We granted certiorari (368 U. S. 810, 812) because there was a seeming noncompliance by that court with our admonitions in *Universal Camera Corp.* v. *Labor Board,* 340 U. S. 474. We there said that while the "reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view," it may not "displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo.*" *Id.,* at 488.

Each of these cases involves alleged discriminatory discharges of employees in violation of the National Labor Relations Act, 29 U. S. C. § 158 (a)(3); and in each the Board ordered, *inter alia,* reinstatement of the workers in question with back pay. See 124 N. L. R. B. 1331, 124 N. L. R. B. 1182. In that type of case the Fifth Circuit has fashioned a special rule that was announced in *Labor*

Board v. *Tex-O-Kan Flour Mills Co.*, 122 F. 2d 433, a decision rendered in 1941. In case of a cease-and-desist order, the court said that it generally "costs no money and only warns to observe a right which already existed; evidence short of demonstration may easily justify such an order." *Id.*, at 438. But the court established a more onerous rule for reinstatement cases:

> "Orders for reinstatement of employees with back pay are somewhat different. They may impoverish or break an employer, and while they are not in law penal orders, they are in the nature of penalties for the infraction of law. The evidence to justify them ought therefore to be substantial, and surmise or suspicion, even though reasonable, is not enough. The duty to weigh and test the evidence is of course on the Board. This court may not overrule a fact conclusion supported by substantial evidence, even though we deem it incorrect under all the evidence. . . . In the matters now concerning us, the controlling and ultimate fact question is the true reason which governed the very person who discharged or refused to reemploy in each instance. There is no doubt that each employee here making complaint was discharged, or if laid off was not reemployed, and that he was at the time a member of the union. In each case such membership may have been the cause, for the union was not welcomed by the persons having authority to discharge and employ. If no other reason is apparent, union membership may logically be inferred. Even though the discharger disavows it under oath, if he can assign no other credible motive or cause, he need not be believed. But it remains true that the discharger knows the real cause of discharge, it is a fact to which he may swear. If he says it was not union membership or activity, but

> something else which in fact existed as a ground, his oath cannot be disregarded because of suspicion that he may be lying. There must be impeachment of him, or substantial contradiction, or if circumstances raise doubts, they must be inconsistent with the positive sworn evidence on the exact point." *Id.*, at 438–439.

This special rule concerning the weight of the evidence necessary to sustain the Board's orders *for reinstatement with back pay* has been repeatedly followed by the Fifth Circuit Court of Appeals in decisions refusing enforcement of that particular type of order. See *Labor Board* v. *Williamson-Dickie Mfg. Co.*, 130 F. 2d 260; *Labor Board* v. *Alco Feed Mills*, 133 F. 2d 419; *Labor Board* v. *Ingram*, 273 F. 2d 670; *Labor Board* v. *Allure Shoe Corp.*, 277 F. 2d 231; *Frosty Morn Meats, Inc.*, v. *Labor Board*, 296 F. 2d 617.

The Court of Appeals in No. 77, *Labor Board* v. *Walton Mfg. Co.*, 286 F. 2d 16, 25, in resolving the issue of credibility between witnesses for the employer and witnesses for the union, as to the reasons for the discharge of the employees in question, relied on the test stated in *Labor Board* v. *Tex-O-Kan Flour Mills Co., supra.* In No. 94, *Labor Board* v. *Florida Citrus Canners Cooperative*, 288 F. 2d 630, decided less than three months later, the *Tex-O-Kan* opinion was not mentioned. But its test of credibility of witnesses seemingly was applied. 288 F. 2d, at 636–638.

There is no place in the statutory scheme for one test of the substantiality of evidence in reinstatement cases and another test in other cases. *Labor Board* v. *Pittsburgh S. S. Co.*, 340 U. S. 498, and the *Universal Camera Corp.* case, both decided the same day, were cases involving reinstatement. They state a rule for review by Courts of Appeals in all Labor Board cases. The test in the

Tex-O-Kan opinion for reinstatement cases is that the employer's statement under oath must be believed unless there is "impeachment of him" or "substantial contradiction," or if there are "circumstances" that "raise doubts" they must be "inconsistent with the positive sworn evidence on the exact point." But the Examiner—the one whose appraisal of the testimony was discredited by the Court of Appeals in the *Florida Citrus Canners Cooperative* case—sees the witnesses and hears them testify, while the Board and the reviewing court look only at cold records. As we said in the *Universal Camera* case:

> ". . . The findings of the examiner are to be considered along with the consistency and inherent probability of testimony. The significance of his report, of course, depends largely on the importance of credibility in the particular case." 340 U. S., at 496.

For the demeanor of a witness

> ". . . may satisfy the tribunal, not only that the witness' testimony is not true, but that the truth is the opposite of his story; for the denial of one, who has a motive to deny, may be uttered with such hesitation, discomfort, arrogance or defiance, as to give assurance that he is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies." *Dyer* v. *MacDougall,* 201 F. 2d 265, 269.

We are in doubt as to how the Court of Appeals would have decided these two cases were it rid of the yardstick for reinstatement proceedings fashioned in its *Tex-O-Kan* decision. The reviewing function has been deposited, not here, but in the Court of Appeals, as the *Universal Camera* case makes clear. We "will intervene only . . . when the standard appears to have been misapprehended or grossly misapplied." 340 U. S., at 491. Since the

special rule for reinstatement cases announced in the *Tex-O-Kan* opinion apparently colored the review given by the Court of Appeals of these two orders, we remand the cases to it for reconsideration.

Reversed.

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

These cases were brought here on the claim that the Court of Appeals had exceeded its reviewing power over orders of the National Labor Relations Board under the National Labor Relations Act, 29 U. S. C. § 160 (e), requiring that "the record considered as a whole" be canvassed. The Court does not find that the court did not assess the evidence, including inferences fairly to be drawn, in accordance with the scope of judicial review outlined in *Universal Camera Corp.* v. *Labor Board,* 340 U. S. 474, and its companion case, *Labor Board* v. *Pittsburgh S. S. Co.,* 340 U. S. 498. But it remands the cases to the Court of Appeals because of doubt whether that court was improperly influenced in its determinations by what is deemed an erroneous legal rule as applied in *Labor Board* v. *Tex-O-Kan Flour Mills Co.,* 122 F. 2d 433.

I am constrained to disagree with the Court's disposition of these cases on three grounds. First, the Court assumes legal identity between two cases that raise entirely different issues. Second, in neither case did the Court of Appeals apply a special and more stringent rule of review in cases of reinstatement for wrongful discharge. Finally, I think the *Tex-O-Kan* rule, insofar as it was applied below in *Walton* and is disapproved here, is in accord with prior decisions of this Court and does not conflict with the substantial evidence rule.

The Court of Appeals in *Walton* accepted findings by the Trial Examiner and the Board, 124 N. L. R. B. 1331,

that respondents had violated § 8 (a)(1) of the National Labor Relations Act, 29 U. S. C. § 158 (a)(1), by surveillance of union activities, interrogations of employees regarding the union, and threats of reprisals for union adherence. But the court refused to enforce an order to reinstate a number of employees with back pay, holding on its reading of the same dead record that the Board had before it, that there was not substantial evidence to support the Board's findings that the employees had been discharged or laid off because of their union membership and activities. 286 F. 2d 16.

In *Florida Citrus* the Examiner and the Board found that the respondent had refused to bargain as required by § 8 (a)(5), and therefore that employees who had participated in a resulting strike had been discharged and replaced in violation of § 8 (a)(1) and (3). 124 N. L. R. B. 1182. The Court of Appeals denied enforcement of the order to cease and desist, to bargain on request, and to reinstate the discharged employees with pay; it did so because it concluded, on consideration of the record as a whole, that the critical finding of refusal to bargain was not supported by substantial evidence. 288 F. 2d 630.

The Court today reverses both decisions for misapplication of the standard of review set forth in § 10 (e) of the National Labor Relations Act, 29 U. S. C. § 160 (e), and § 10 (e) of the Administrative Procedure Act, 5 U. S. C. § 1009 (e), and elaborated in *Universal Camera Corp.* v. *Labor Board,* 340 U. S. 474, that "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." The Court finds that the Court of Appeals may have erroneously adopted a special rule for cases of reinstatement for wrongful discharge, forbidding the Board to discredit an employer's testimony as to the reason for discharge unless he is

impeached or contradicted. These decisions are reversed because in *Walton* the Court of Appeals "relied on the test stated in *Labor Board* v. *Tex-O-Kan Flour Mills Co.*," 122 F. 2d 433, and in *Florida Citrus,* although *Tex-O-Kan* was not cited, "its test of credibility of witnesses seemingly was applied."

1. *Tex-O-Kan.*

That case came before the Court of Appeals for the Fifth Circuit in 1941. Judge Sibley, writing for the court, found ample evidence to sustain a cease-and-desist order against interference with union activity: "a cease and desist order on this point costs no money and only warns to observe a right which already existed; evidence short of demonstration may easily justify such an order." 122 F. 2d, at 438. But, he continued,

> "Orders for reinstatement of employees with back pay are somewhat different. They may impoverish or break an employer, and while they are not in law penal orders, they are in the nature of penalties for the infraction of law. The evidence to justify them ought therefore to be substantial, and surmise or suspicion, even though reasonable, is not enough."

Accepting that the union membership of each discharged employee "may have been the cause, for the union was not welcomed by the persons having authority to discharge and employ," the court enforced the back-pay order in several instances where no other reason for discharge was apparent, or where the reason given was refuted by the facts. But where management gave reasons for the discharge that were not contradicted by the facts—that a job had been abolished, that work had been inadequately done, that an employee had engaged in irregular conduct with company property or failed to report

the taking of sick leave—the court held the findings of anti-union animus to be without substantial support:

> "[I]t remains true that the discharger knows the real cause of discharge, it is a fact to which he may swear. If he says it was not union membership or activity, but something else which in fact existed as a ground, his oath cannot be disregarded because of suspicion that he may be lying. There must be impeachment of him, or substantial contradiction, or if circumstances raise doubts, they must be inconsistent with the positive sworn evidence on the exact point. This was squarely ruled as to a jury in Pennsylvania R. R. Co. v. Chamberlain, . . . and the ruling is applicable to the Board as fact-finder." 122 F. 2d, at 439.

2. *History of Tex-O-Kan in the Fifth Circuit.*

In numerous cases *Tex-O-Kan* has been cited and quoted by the Court of Appeals for its view that testimony justifying discharge should not lightly be disregarded. *Labor Board* v. *Goodyear Tire & Rubber Co.*, 129 F. 2d 661, 665; *Labor Board* v. *Alco Feed Mills*, 133 F. 2d 419, 421; *Labor Board* v. *Oklahoma Transp. Co.*, 140 F. 2d 509, 510; *Labor Board* v. *Edinburg Citrus Assn.*, 147 F. 2d 353, 355; *Labor Board* v. *McGahey*, 233 F. 2d 406, 411–412; *Labor Board* v. *Drennon Food Products Co.*, 272 F. 2d 23, 27; *Labor Board* v. *Walton Mfg. Co.*, 286 F. 2d 16, 25; *Labor Board* v. *Atlanta Coca-Cola Bottling Co.*, 293 F. 2d 300, 306. See also *Frosty Morn Meats, Inc.*, v. *Labor Board*, 296 F. 2d 617, 620–621, where *Tex-O-Kan* was not cited. On occasion *Tex-O-Kan* has also been quoted to distinguish between cease-and-desist orders and those requiring payment of back pay. *Labor Board* v. *Williamson-Dickie Mfg. Co.*, 130 F. 2d 260, 263; *Labor Board* v. *Ingram*, 273 F. 2d 670, 673. The *Tex-O-*

Kan credibility view has also been applied by the court in determining whether to enforce an order requiring payment of a bonus found to have been withheld in order to discourage union activity. *Labor Board* v. *Crosby Chemicals, Inc.*, 274 F. 2d 72, 78. It has not been cited on the issue of credibility in cases involving only cease-and-desist orders.

3. *A Special Rule for Reinstatement?*

I agree with the Court that, despite the consequences of back-pay orders, "There is no place in the statutory scheme for one test of the substantiality of evidence in reinstatement cases and another test in other cases." However, although the Court of Appeals has several times in the past seemingly applied two different rules, and although it has not relied on *Tex-O-Kan* in cases dealing solely with cease-and-desist orders, I do not think either of the present cases presents an appropriate occasion for admonishing that court against applying a double standard. Both cases concerned both cease-and-desist orders and reinstatement with back pay. In neither did the Court of Appeals suggest that it was applying a special rule for reinstatement orders alone. The part of the *Tex-O-Kan* opinion differentiating back-pay from cease-and-desist orders, quoted by this Court, was not quoted by the Court of Appeals in either case. In *Walton* the court said only that "The requirements of substantiality of evidence and reasonableness of the inferences to be drawn from the evidence are not less in a case of reinstatement and reimbursement than where a cease and desist order is directed against interference"—not that the requirements are more strict. In *Florida Citrus* the single factual issue whether respondent had refused to bargain underlay both back-pay and cease-and-desist orders. The court

properly dealt with this as a single issue and did not purport to apply different standards of review for purposes of various parts of the order. *Tex-O-Kan* was nowhere cited.

4. *Tex-O-Kan's Credibility Rule and the Present Cases.*

(1) In *Florida Citrus* collective bargaining had broken off shortly after a disastrous freeze that threatened future business. The Trial Examiner found that the company was responsible for the failure of bargaining. He recited a delay in meeting which he attributed to the company. He referred to the company's refusal to discuss the union's proposal at a meeting held just after the freeze, and to the company's failure in the face of union demands to request a postponement of negotiations to permit assessment of the effect of the freeze, as it had announced it intended to do. Finally, by resolving conflicting testimony in favor of the General Counsel's witnesses, he found that after the failure of negotiations the company had made anti-union statements and offered inducements to the employees should they forsake the union. This finding buttressed his interpretation of the company's earlier conduct when bargaining was called off. In rejecting the testimony of production manager Stephenson and accepting that of Holly, an employee to whom the alleged anti-union statements and promises had been made, the Examiner relied in part on a comparison of the demeanor of these two witnesses, saying also that Stephenson admitted such subjects as a company union had come up in the conversation; that many of the statements he was said to have made later came true; and that Holly was a logical choice to speak such sentiments to because he might reasonably have been induced to lead a movement of defection from the union.

The Court of Appeals held the finding of refusal to bargain to be without substantial support. It ruled that the Board could not reasonably infer a refusal to bargain from the company's refusal to make a formal request for postponing negotiations, since the union had issued an ultimatum that in effect rejected the request. Moreover, it rejected the Board's determinations of credibility. The court made it clear that it believed the Examiner's findings to have been based on "the belief that reliance may not be placed upon the testimony of a witness who is a part of the management of an employer in a controversy with a labor union." Beyond this, the court declared it was unable to accept the Examiner's crediting of Holly and discrediting of Stephenson because there was no prior indication of company opposition to the union and because it was unlikely that a manager would divulge the details of company labor policy to a watchman. As to a conflict in testimony between Stephenson and Wingate, the union's chief representative, the court ruled that Wingate's testimony should have been "more carefully scrutinized" because the Examiner himself had found Wingate sometimes inaccurate or careless.

The Board attacks this decision as in conflict with the substantial evidence test of the Labor Management Relations Act and of the *Universal Camera* doctrine. The crux of its objection is that the court has substituted its judgment as to credibility for that of the Examiner and the Board; in particular, it complains that the record gives no support to the court's conclusion that the Examiner was inclined to discredit on principle all company witnesses. Neither in its petition for certiorari nor its brief on the merits did the Board cite *Tex-O-Kan* as the ground of its objection to the decision in *Florida Citrus*. Yet this Court reverses the Court of Appeals' decision without reference to the facts or the holding of that case,

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saying simply that the *Tex-O-Kan* "test of credibility of witnesses seemingly was applied." But *Tex-O-Kan* was no more relied on by the Court of Appeals than it was attacked in this case by the Board. *Tex-O-Kan* forbids the Examiner and the Board to dismiss summarily management's reasons for a discharge if not contradicted, impeached, or inherently improbable. *Florida Citrus* was not a case of uncontradicted testimony. It was not a case in which motivation for a discharge was in doubt. The issue was what Stephenson said to the Board's witnesses; the problem was a conflict of testimony. To be sure, the Board argues that both *Florida Citrus* and *Tex-O-Kan* are manifestations of the same attitude of hostility to findings of the Labor Board. But if the Court of Appeals strayed outside the *Universal Camera* bounds, it did not do so by discrediting uncontradicted testimony pursuant to *Tex-O-Kan*. If this Court is of the opinion that the Court of Appeals unjustifiably substituted its own judgment for that of the Board, it ought to say so. The Court of Appeals ought not to be reversed for following a decision it did not follow.

(2) *Walton*, by contrast, squarely presents a *Tex-O-Kan* problem. Four employees had been discharged and nine more laid off. The Trial Examiner, in each case rejecting company testimony that the employee was a substandard performer, attributed all thirteen to the employees' union activities. The Board agreed. In holding all these findings to be without substantial support, the Court of Appeals pointed out in the case of the four discharges that in addition to the company's witnesses there was evidence, sometimes given by the employee herself, either of unsatisfactory work or of meager union activity, or both. But in reversing the Board with respect to the nine layoffs the court quoted and relied on *Tex-O-Kan*, pointing out that management

testimony, unimpeached, assigned plausible grounds for selecting each employee for layoff, and that the factual bases for these statements were largely uncontradicted.

5. *Tex-O-Kan and the Substantial Evidence Test.*

This Court today lays down a dogmatic rule against a Fifth Circuit evidentiary practice authorizing acceptance of plausible, uncontradicted, unimpeached testimony of motivation and apparently holds the Board's power in reviewing the dead record to determine witness credibility to be absolute and unreviewable:

> "the demeanor of a witness '. . . may satisfy the tribunal, not only that the witness' testimony is not true, but that the truth is the opposite of his story . . . .'"

This statement, torn from context in Judge Learned Hand's opinion in *Dyer* v. *MacDougall,* 201 F. 2d 265, 269, is elevated into a rule of law that ignores earlier decisions of this Court and effectively insulates many administrative findings from judicial review, contrary to the command of the Labor Management Relations Act and the Administrative Procedure Act that such findings should be set aside if not supported by substantial evidence on the whole record.

The cases abound with statements that the determination of credibility is for the trier of fact and is not to be upset on appeal. *E. g., Tractor Training Service* v. *Federal Trade Commission,* 227 F. 2d 420, 424 (C. A. 9th Cir.); *Kitty Clover, Inc.,* v. *Labor Board,* 208 F. 2d 212, 214 (C. A. 8th Cir.). Professor Jaffe has said "It is generally held that whether made by jury, judge, or agency a determination of credibility is nonreviewable unless there is uncontrovertible documentary evidence or physical fact which contradicts it." Judicial Review: Question of Fact,

69 Harv. L. Rev. 1020, 1031. It is this view that has led some courts to hold that a verdict cannot be directed in favor of a party having the burden of proof if his case rests on the credibility of witnesses, *e. g., Giles* v. *Giles,* 204 Mass. 383, 90 N. E. 595. Likewise, Professor Davis speaks of it as settled "that a trial tribunal may disbelieve the only evidence presented and dispose of the case by holding against the party having the burden of proof," Administrative Law Treatise, § 29.06, p. 148. Even in reviewing the findings of a trial judge sitting without a jury, where the standard of review permits closer scrutiny by the Court of Appeals, Rule 52 (a) of the Federal Rules of Civil Procedure requires that "due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." And in *Labor Board* v. *Pittsburgh S. S. Co.,* 337 U. S. 656, 660, this Court held that the Board's crediting of all General Counsel's witnesses and discrediting of all respondent's does not indicate bias, so long as none of the credited testimony "carries its own death wound" and none of that which was rejected "carries its own irrefutable truth."

The opportunity of the trier of fact to observe the demeanor of witnesses should not be overlooked. But neither should it be overlooked that the Board itself has no opportunity to observe the demeanor of witnesses. Yet the Board is not required to accept a trial examiner's credibility findings, see *Universal Camera Corp.* v. *Labor Board,* 340 U. S. 474, 492–497, and, therefore, neither is the Court of Appeals. Even where the fact-finding function is not divided, "due regard" for the advantage of the trier of fact does not require appellate impotence. Judge Hand's statement in *Dyer* v. *MacDougall* was one of logic, not of law; the court went on to affirm a summary judgment against the plaintiff, who presented no evidence and relied on the chance that defendant's witnesses would be disbelieved in their denials—because, despite the logi-

cal possibility that demeanor alone might convince of the affirmative, to deny summary judgment would have destroyed the effectiveness of judicial review. Indeed, this Court has never before required complete deference to credibility findings. *Labor Board* v. *Pittsburgh S. S. Co.*, 337 U. S. 656, does not so hold; a great many findings not so unfounded as to indicate bias are nonetheless reversible error. In *Universal Camera Corp.* v. *Labor Board*, 340 U. S. 474, 490, this Court declared that Labor Board findings must be set aside when the record "clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both." A "fair estimate of the worth of the testimony" hardly suggests that the Board is free to make an unfair estimate, especially in the light of the decision in *Universal Camera* that "courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. . . . Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds." Professor Davis states frankly that "Administrative determinations of credibility are often set aside because the reviewing court firmly believes that the evidence supporting the determination is clearly less credible than the opposing evidence," Administrative Law Treatise, § 29.06, p. 145. Professor Jaffe concedes that his general rule of deference to credibility findings is not unyielding and agrees that this may be proper: "even on a credibility issue we should probably not tolerate the intuitive 'hunch' where the record evidence overwhelmingly points to the contrary." 69 Harv. L. Rev., at 1032.

In fact, *Tex-O-Kan* is clearly supported by at least two decisions of this Court requiring a trier of fact to accept unimpeached testimony not contradicted by substantial evidence in the record. In *Dickinson* v. *United States*,

346 U. S. 389, a draft board had classified petitioner I–A for Selective Service purposes despite his uncontradicted testimony, letters, and an affidavit that he was an ordained minister exempted from service. Notwithstanding its holding that such an order was subject to more limited scrutiny than most agency orders, the Court reversed his conviction for refusing to report for induction:

> "The court below in affirming the conviction apparently thought the local board was free to disbelieve Dickinson's testimonial and documentary evidence even in the absence of any impeaching or contradictory evidence. . . . But when the uncontroverted evidence supporting a registrant's claim places him prima facie within the statutory exemption, dismissal of the claim solely on the basis of suspicion and speculation is both contrary to the spirit of the Act and foreign to our concepts of justice." 346 U. S., at 396–397.

In *Chesapeake & Ohio R. Co.* v. *Martin,* 283 U. S. 209, the Court reversed a trial judge's refusal to sustain a demurrer to the evidence on the ground that a complete defense was established by uncontradicted, unimpeached testimony. Quoting at length from cases in other courts upholding appellate review of credibility determinations, the Court concluded:

> "We recognize the general rule, of course, as stated by both courts below, that the question of the credibility of witnesses is one for the jury alone; but this does not mean that the jury is at liberty, under the guise of passing upon the credibility of a witness, to disregard his testimony, when from no reasonable point of view is it open to doubt." 283 U. S., at 216.

In short, the Court of Appeals was entitled to come to the conclusion to which it came, for neither the Board nor the reviewing court was bound by the Examiner's findings

on credibility. I do not think the Court of Appeals applied an erroneous standard of review or grossly misapplied the correct standard, and, therefore, since it is not for this Court to "pass on the Board's conclusions in the first instance or to make an independent review of the review by the Court of Appeals," *Labor Board* v. *Pittsburgh S. S. Co.*, 340 U. S. 498, 502, I would either affirm the cases or, preferably, dismiss the writs as improvidently granted.

KERR STEAMSHIP CO., INC., ET AL. *v.* UNITED STATES ET AL.

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

No. 29. Decided April 9, 1962.

Certiorari granted; judgment vacated; case remanded with instructions to dismiss the petition for review as moot.

Reported below: 284 F. 2d 61.

Herman Goldman, Elkan Turk and *Elkan Turk, Jr.* for petitioners.

Solicitor General Cox and *Robert E. Mitchell* for respondents.

PER CURIAM.

Upon the respondents' suggestion of mootness, the petition for writ of certiorari is granted and the judgment of the Court of Appeals is vacated. The case is remanded to that court with instructions to dismiss the petition for review as moot.

GENERAL FINANCE CORP. *v.* ARCHETTO.

APPEAL FROM THE SUPREME COURT OF RHODE ISLAND.

No. 705. Decided April 16, 1962.

Appeal dismissed for want of a substantial federal question.
Reported below: —— R. I. ——, 176 A. 2d 73.

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 BLACK is of the opinion that probable jurisdiction should be noted.

MR. JUSTICE FRANKFURTER and MR. JUSTICE WHITE took no part in the consideration or decision of this case.

BROWN *v.* KETCH.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

No. 751. Decided April 16, 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.

MR. JUSTICE FRANKFURTER and MR. JUSTICE WHITE took no part in the consideration or decision of this case.

MANAGED FUNDS, INC., *v.* BROUK ET AL.

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

No. 87. Decided April 16, 1962.

Judgment vacated and case remanded to District Court with directions to dismiss cause of action as to respondents.

Reported below: 286 F. 2d 901.

R. Walston Chubb for petitioner.

Forrest M. Hemker for Brouk et al. and *William Stix* for Baker et al., respondents.

Solicitor General Cox, Daniel M. Friedman, Allan F. Conwill and *Walter P. North* for the Securities and Exchange Commission, as *amicus curiae,* urging reversal.

PER CURIAM.

Upon the suggestion of mootness and the joint motion of counsel to vacate and remand, the judgment of the Court of Appeals is vacated and the case remanded to the District Court with directions to dismiss the cause of action as to the respondents.

MR. JUSTICE FRANKFURTER and MR. JUSTICE WHITE took no part in the consideration or decision of this case.

SMITH ET AL. *v.* BENNETT, WARDEN.

APPEAL FROM THE SUPREME COURT OF IOWA.

No. 624, Misc. Decided April 16, 1962.

Appeal dismissed and certiorari denied.

Appellants *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 FRANKFURTER and MR. JUSTICE WHITE took no part in the consideration or decision of this case.

GRABINA *v.* UNITED STATES.

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

No. 851, Misc. Decided April 16, 1962.

Certiorari granted; judgment vacated; and case remanded to District Court for resentencing.

Reported below: 295 F. 2d 792.

Petitioner *pro se.*

Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg and *Theodore George Gilinsky* for the United States.

PER CURIAM.

In light of the concession by the Solicitor General and upon an examination of the entire record, the motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded to the District Court for resentencing.

MR. JUSTICE FRANKFURTER and MR. JUSTICE WHITE took no part in the consideration or decision of this case.

WARREN *v.* LARSON, STATE TREASURER.

APPEAL FROM THE SUPREME COURT OF FLORIDA.

No. 920, Misc. Decided April 16, 1962.

Appeal dismissed for want of a substantial federal question.
Reported below: 132 So. 2d 177.

Walter Warren for appellant.

Richard W. Ervin, Attorney General of Florida, and *Robert J. Kelly* and *Gerald Mager,* 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.

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

MR. JUSTICE FRANKFURTER and MR. JUSTICE WHITE took no part in the consideration or decision of this case.

NEW YORK EX REL. ANONYMOUS *v.* LaBURT, STATE HOSPITAL DIRECTOR.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 926, Misc. Decided April 16, 1962.

Appeal dismissed and certiorari denied.

Reported below: See 14 App. Div. 2d 560, 218 N. Y. S. 2d 738.

Morton Birnbaum 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. 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 certiorari should be granted.

MR. JUSTICE FRANKFURTER and MR. JUSTICE WHITE took no part in the consideration or decision of this case.

SCHOLLE *v.* HARE, SECRETARY OF STATE OF MICHIGAN, ET AL.

APPEAL FROM THE SUPREME COURT OF MICHIGAN.

No. 22. Decided April 23, 1962.

Appellant petitioned the Supreme Court of Michigan for a writ of mandamus to restrain appellees from conducting a state senatorial election in accordance with a 1952 amendment to the State Constitution providing for the election of each Senator from a district geographically described in the amendment and not subject to change because of fluctuations in the population. He claimed that the amendment denied him equal protection of the laws and due process of law contrary to the Fourteenth Amendment. The State Supreme Court dismissed the petition. *Held:* The judgment is vacated and the case is remanded to that Court for further consideration in the light of *Baker* v. *Carr*, *ante*, p. 186.

Reported below: 360 Mich. 1, 104 N. W. 2d 63.

Theodore Sachs for appellant.

Paul L. Adams, Attorney General of Michigan, *Joseph R. Bilitzke,* Solicitor General, *Samuel J. Torina,* former Solicitor General, *Stanton S. Faville,* Chief Assistant Attorney General, *Leon S. Cohan,* Deputy Attorney General, and *G. Douglas Clapperton,* Assistant Attorney General, for James M. Hare, Secretary of State of Michigan, appellee. *Edmund E. Shepherd* entered an appearance for Frank D. Beadle et al., appellees.

Melvin Nord and *Harold Norris* filed a brief, as *amici curiae,* in support of appellant.

PER CURIAM.

The judgment is vacated and the case is remanded to the Supreme Court of Michigan for further consideration in the light of *Baker* v. *Carr,* 369 U. S. 186.

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

[*Individual opinions begin on next page*]

MR. JUSTICE CLARK and MR. JUSTICE STEWART, concurring.

If we were able to read the several opinions in the Michigan Supreme Court the way our Brother HARLAN does, we would find much to persuade us that this case should not be remanded. But the state court opinions are not that clear to us. A careful reading of the opinions leaves us with the fixed impression that all but three members of the Michigan court were convinced that, whatever the underlying merits of the appellant's Equal Protection claim, it was, in the words of one of the justices, "not enforcible in the courts." 360 Mich. 1, 112, 104 N. W. 2d 63, 121. In *Baker* v. *Carr* we held that such a claim *is* judicially cognizable. Accordingly, we join in the Court's order remanding this case to the Supreme Court of Michigan.

The present order of course reflects no views on the merits of the appellant's Equal Protection claim. It may well turn out that the assertion of invidious discrimination is not borne out by the record. Today's order simply reflects our belief that the Michigan Supreme Court should be the first to consider the merits of the federal constitutional claim, free from any doubts as to its justiciability.

MR. JUSTICE HARLAN, dissenting.

The Court remands this case to the Supreme Court of Michigan "for further consideration in the light of *Baker* v. *Carr*, 369 U. S. 186." In my opinion nothing decided or said by the majority in *Baker* casts any light upon, still less controls, the only issue actually adjudicated by the Michigan Supreme Court in the present case. I think that either this appeal should be dismissed for want of a substantial federal question or probable jurisdiction should be noted and the case set for argument.

The sole and dispositive question decided by the Michigan Supreme Court was concisely put by Justice Edwards, speaking for four members of that eight-man court:

> "Does the Fourteenth Amendment to the United States Constitution prohibit any State from enacting provisions for electoral districts for 1 house of its legislature [the State Senate] which result in substantial inequality of popular representation in that house?" *Scholle* v. *Secretary of State,* 360 Mich. 1, at 85, 104 N. W. 2d 63, at 107.

These four members of the state court concluded that nothing in the Fourteenth Amendment or in the decisions of this Court construing the Equal Protection Clause "prohibits a State from establishing senate electoral districts by geographic areas drawn generally along county lines which result in substantial inequality of voter representation favoring thinly populated areas as opposed to populous ones." 360 Mich., at 91, 104 N. W. 2d, at 110. Accordingly, the original petition for mandamus filed in the Supreme Court of Michigan was dismissed.[1] The

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[1] On appeals to the Supreme Court of Michigan the result of an equally divided court is that the judgment below is affirmed. Mich. Stat. Ann. § 27.46 (1938). Although no statute expressly controls, it appears that Michigan follows the general rule that no affirmative action may be taken on an original petition unless a majority of the justices considering the case vote to grant relief. Consequently the effect of an equal division on an original petition for a writ of mandamus would be a dismissal of the petition. Cf. *In re Hartley,* 317 Mich. 441, 27 N. W. 2d 48.

It appears, moreover, that in fact five members (a majority) of the Michigan Supreme Court concurred as to this issue. The separate concurring opinion of Justice Black of that court shows that he also concluded "that a State may—unfettered juridically by the Fourteenth Amendment—determine what as a matter of State policy shall be 'a proper diffusion of political initiative' as between the thinly and heavily populated areas of the State." 360 Mich., at 119–120, 104 N. W. 2d, at 125.

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opinion of the four judges did not so much as mention questions pertaining to the "jurisdiction" of the court, the "standing" of the appellant, or the "justiciability" of his claim.

Appellant filed a timely notice of appeal to this Court, and on docketing the record submitted a jurisdictional statement which set forth the questions presented for review.[2] These papers, along with the motion to dismiss

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[2] The appellant listed the following as the "Questions Presented":

"I. Does the Fourteenth Amendment to the U. S. Constitution prohibit the establishment by a state of permanent state legislative districts grossly unequal in population?

"II. Does the Fourteenth Amendment to the U. S. Constitution prohibit the establishment by a state of permanent legislative districts lacking any discernible, rational, uniform, non-arbitrary and non-discriminatory basis of representation whatever (save, only, the freezing by such enactment of legislative malapportionment theretofore invalid under prior constitutional provisions)?

"III. Does a suit duly brought in a state court of otherwise competent jurisdiction, challenging a state constitutional amendment respecting legislative apportionment and/or districting on grounds of asserted conflict with the Fourteenth Amendment to the United States Constitution, present a justiciable controversy of which such court has jurisdiction and the power to render relief?

"IV. Do the 1952 amendments to Art. V, § 2 and § 4 of the Michigan Constitution, and the implementing legislation thereto, offend the Fourteenth Amendment to the U. S. Constitution, including the due-process and equal protection clauses thereof?

"V. If so, may the Michigan Supreme Court, otherwise possessed of jurisdiction, entertain and render relief in an action to invalidate such enactments?"

The third of these questions does assert the issue of "justiciability." However, no reference to "justiciability" appears in the opinion written for four justices of the state court, and the appellees' motion to dismiss or affirm combined, entirely justifiably in face of the record, the appellant's five questions into the following single question:

"Does Article V, Section 2 of the Michigan Constitution, as amended by a majority vote in the general election of November 1952, of the people of the State of Michigan, which prescribes that

or affirm, taken in light of the prevailing opinion in the Michigan Supreme Court, leave no room for doubt but that the precise and single issue in this case is the one presented as Question IV in the jurisdictional statement: "Do the 1952 amendments to Art. V, § 2 and § 4 of the Michigan Constitution, and the implementing legislation thereto, offend the Fourteenth Amendment to the U. S. Constitution, including the due-process and equal protection clauses thereof?" That issue is the more precisely delineated by three circumstances: (1) the legislative branch with which this case is concerned is the State Senate (not the entire State Legislature, as in *Baker* v. *Carr*); (2) the challenged electoral apportionment reflects the desires of Michigan's citizenry, as expressed in a 1952 popular referendum (and is not, as in *Baker* v. *Carr,* the product of legislative inaction);[3] and (3) the present apportionment is prescribed by the Michigan Constitution (and is not in conflict with the State Constitution, as in *Baker* v. *Carr*).

Were there anything in this Court's recent decision in *Baker* v. *Carr* intimating that the constitutional question in this case ought to have been decided differently than it was by the Michigan Supreme Court, I would be content, for reasons given in my dissent in *Baker* (369 U. S. 186, 330), simply to note my dissent to the Court's failure to dismiss this appeal for want of a substantial

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the Michigan Senate shall consist of 34 members, each of whom is to be elected from a geographically described area, not subject to change because of fluctuations in population, violate the equal protection or due process clause of the Fourteenth Amendment to the United States Constitution?"

[3] The disputed provision of the Michigan Constitution, Art. V, § 2, which establishes permanent state senatorial districts not subject to change because of fluctuations in population, was adopted as initiative Proposition No. 3 in a referendum held throughout the State in November 1952.

federal question. But both the majority opinion in the *Baker* case and a separate concurrence written to dispel any "distressingly inaccurate impression of what the Court decides," 369 U. S., at 265, were at pains to warn that nothing more was decided than "(a) that the [federal district] court possessed jurisdiction of the subject matter; (b) that a justiciable cause of action is stated upon which appellants would be entitled to appropriate relief; and (c) . . . that the appellants have standing to challenge the Tennessee apportionment statutes." 369 U. S., at 197–198, 265. How any of the extensive discussion on these three subjects in the *Baker* majority opinion can be thought to shed light on the discrete federal constitutional question on which the present case turns—a question which was indeed studiously avoided in the majority opinion in *Baker*—is difficult to understand.

Moreover, the remand cannot be justified on the theory that *Baker* v. *Carr* for the first time suggests—albeit *sub silentio*—that an arbitrary or capricious state legislative apportionment may violate the Equal Protection Clause. For the Michigan Supreme Court assumed precisely that proposition and nonetheless said of the existing apportionment: "In the face of . . . history and . . . precedent, we find no way by which we can say that the classification we are concerned with herein is 'wholly arbitrary,' and hence repugnant to the Fourteenth Amendment of the United States Constitution as the United States supreme court has construed it to this date." 360 Mich., at 106, 104 N. W. 2d, at 118.

With all respect, I consider that in thus remanding this case the Court has been less than forthright with the Michigan Supreme Court. That court is left in the uncomfortable position where it will have to choose between adhering to its present decision—in my view a faithful reflection of this Court's past cases—or treating the remand as an oblique invitation from this Court to

hold that the Equal Protection Clause prohibits a State from constitutionally freezing the seats in its Senate, with the effect of maintaining numerical voting inequalities, even though that course reflects the expressed will of the people of the State. (Note 3, *supra.*)

In my view the matter should not be left in this equivocal posture. Both the orderly solution of this particular case, and the wider ramifications that are bound to follow in the wake of *Baker* v. *Carr,* demand that the Court come to grips now with the basic issue tendered by this case. This should be done either by dismissing the appeal for want of a substantial federal question or by noting probable jurisdiction and then deciding the issue one way or another. For reasons given in my separate dissent in the *Baker* case, I think dismissal is the right course.

BYRNES *v.* WALKER, WARDEN.

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

No. 396, Misc. Decided April 23, 1962.

Certiorari granted; judgment vacated and case remanded for a hearing.

Petitioner *pro se.*

Jack P. F. Gremillion, Attorney General of Louisiana, *Scallan E. Walsh,* Assistant Attorney General, and *Albin P. Lassister* 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. *Herman* v. *Claudy,* 350 U. S. 116.

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

RAGAN *v.* COX, COMMANDANT.

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

No. 634, Misc. Decided April 23, 1962.

Certiorari granted; order of Court of Appeals vacated insofar as it denies petitioner leave to proceed *in forma pauperis;* case remanded to that court for further proceedings.

Petitioner *pro se.*

Solicitor General Cox, Assistant Attorney General Marshall and *Harold H. Greene* for respondent.

PER CURIAM.

In accordance with the suggestion of the Solicitor General and upon consideration of the entire record, the motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The order of the Court of Appeals, insofar as it denies petitioner leave to proceed *in forma pauperis,* is vacated and the case is remanded to that court for further proceedings. *Simcox* v. *Madigan,* 366 U. S. 765.

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

COPPEDGE *v.* UNITED STATES.

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

No. 157. Argued December 12, 1961.—Decided April 30, 1962.

Tried and convicted in a Federal District Court, petitioner applied to that Court under 28 U. S. C. § 1915 for leave to appeal *in forma pauperis*. The District Court denied the application and certified that the appeal was not in good faith. Petitioner then filed a similar application in the Court of Appeals, which appointed counsel for petitioner. Such counsel filed a memorandum in support of the application, contending, *inter alia*, that the indictment had been procured by perjured testimony and that petitioner had been unable to prove this charge because of the refusal of the District Court to permit him to examine the transcript of the grand jury proceedings. The Court of Appeals ordered that a transcript of the trial proceedings be furnished to petitioner and that the application to appeal *in forma pauperis* otherwise be held in abeyance. After the transcript had been prepared, the Government filed a detailed memorandum opposing the application and petitioner filed another memorandum based upon the transcript, urging the same questions and others which he claimed showed that his appeal was not frivolous. After considering the petition and the memoranda in support and in opposition, but without hearing arguments, the Court of Appeals denied the petition without opinion. *Held:* The summary disposition of petitioner's application was not justified. Pp. 440–454.

(a) A person convicted in a Federal District Court of a federal offense is entitled to appeal as a matter of right, and he need not petition the Court of Appeals for the exercise of its discretion to allow him to bring the case before it. Pp. 441–442.

(b) If a defendant is unable to pay the fee for docketing his appeal in the Court of Appeals or to pay the cost of preparing a transcript of the record of the proceedings in the trial court, he cannot perfect his appeal except by applying under 28 U. S. C. § 1915 for leave to appeal *in forma pauperis*. Pp. 442–444.

(c) The sole statutory language to guide the District Court in passing upon such an application is that, "An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith." P. 444.

(d) The requirement that an appeal *in forma pauperis* be taken "in good faith" is satisfied when the defendant seeks appellate review of any issue that is not frivolous. Pp. 444–445.

(e) When a defendant applies to a Court of Appeals for leave to proceed *in forma pauperis,* the District Court's certification that the application is not "in good faith" is entitled to weight; but it is not conclusive. Pp. 445–446.

(f) If it appears from the face of the papers filed in the Court of Appeals that the applicant will present issues for review which are not clearly frivolous, the Court of Appeals should grant leave to proceed *in forma pauperis,* appoint counsel to represent the appellant and proceed to consideration of the appeal on the merits in the same manner that it considers paid appeals. P. 446.

(g) If the claims made or the issues sought to be raised by the applicant are such that their substance cannot adequately be ascertained from the face of the application, the Court of Appeals must provide the would-be appellant with the assistance of counsel and with a transcript of the record sufficient to enable him to attempt to make a showing that the District Court's certificate of lack of good faith is erroneous. P. 446.

(h) If, with such aid, the applicant then presents any issue for the court's consideration which is not clearly frivolous, leave to proceed *in forma pauperis* must be granted. P. 446.

(i) An indigent defendant is entitled in all respects to the same right of appeal as a defendant who is able to pay the expenses of his appeal. Pp. 446–447.

(j) On an application for leave to appeal *in forma pauperis,* the burden is not on the applicant to show that his appeal has merit in the sense that he is bound, or even likely, to prevail ultimately; the burden is on the Government to show that the appeal is so lacking in merit that the court would dismiss the case as frivolous on the Government's motion had the case been docketed and had a record been filed by an appellant able to pay the expenses of complying with these requirements. Pp. 447–448.

(k) If it is the practice of a Court of Appeals to defer rulings on motions to dismiss paid appeals until the court has had the benefit of hearing argument and considering briefs and an adequate record, it must accord the same procedural rights to a person applying for leave to proceed *in forma pauperis.* P. 448.

(l) In passing upon applications for leave to appeal *in forma pauperis,* the Courts of Appeals should have due regard for the

facts that Federal Rule of Criminal Procedure 39 (d) requires that, in setting appeals for argument, preference shall be given by the Courts of Appeals to appeals in criminal cases and that the purpose of this requirement is to meet the need for speedy disposition of such cases. Pp. 448–450.

(m) Although there have been many proceedings and much delay in disposing of this case, the petitioner has not yet received the plenary review of his conviction to which he is entitled, since he has not yet received the benefits of presenting either oral argument or full briefs on the merits to the Court of Appeals. Pp. 450–453.

(n) On the record in this case taken as a whole, it cannot be said that petitioner's claims are so frivolous as to justify the summary disposition of his case which was ordered below. Pp. 450–454.

Judgment vacated and case remanded for further proceedings.

Bennett Boskey argued the cause and filed a brief for petitioner.

Carl W. Belcher argued the cause for the United States. On the brief were *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer.*

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

Tried and convicted in a Federal District Court for an offense against the United States, petitioner applied for leave to appeal his conviction to the Court of Appeals *in forma pauperis.* His application was denied. The case presents this question: What standard is to be applied by the lower federal courts in passing upon such applications? The articulation of a usable standard has been the source of considerable recent litigation.[1] And, while

[1] During the past five Terms of the Court, we have found it necessary to vacate and remand for reconsideration 14 cases in which a Court of Appeals has applied an erroneous standard in passing on an indigent's application for leave to appeal. *Johnson* v. *United States,*

we recognize that no single word or group of words can provide a precise formula that will dispose of every case, we think it appropriate to indicate in somewhat greater detail than in the past, the approach a Court of Appeals must take toward an indigent's application for leave to take a direct appeal from his criminal conviction *in forma pauperis.*

Statutory provision for litigation *in forma pauperis* in the federal courts is made by 28 U. S. C. § 1915, authorizing "[a]ny court of the United States" to allow indigent persons to prosecute, defend or appeal suits without prepayment of costs. Before discussing our understanding of the proper manner in which a Court of Appeals is to exercise its authority to allow a criminal appeal *in forma pauperis,* we believe it would be helpful to indicate briefly the law applicable to criminal appeals generally. The provisions of § 1915 can be understood and applied in such cases only when read together with the other provisions of the Judicial Code and the Federal Rules governing criminal appeals.

Present federal law has made an appeal from a District Court's judgment of conviction in a criminal case what is, in effect, a matter of right.[2] That is, a defendant has a right to have his conviction reviewed by a Court of Appeals, and need not petition that court for an exercise

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352 U. S. 565; *Farley* v. *United States,* 354 U. S. 521; *Delbridge* v. *United States,* 354 U. S. 906; *Edwards* v. *United States,* 355 U. S. 36; *Ellis* v. *United States,* 356 U. S. 674; *Hill* v. *United States,* 356 U. S. 704; *Cash* v. *United States,* 357 U. S. 219; *Hansford* v. *United States,* 357 U. S. 578; *Kitchens* v. *United States,* 358 U. S. 42; *Smith* v. *United States,* 358 U. S. 281; *Smith* v. *United States,* 361 U. S. 13; *Smith* v. *United States,* 361 U. S. 38; *McAbee* v. *United States,* 361 U. S. 537; *Lurk* v. *United States,* 366 U. S. 712. See also *Page* v. *United States,* 359 U. S. 116; *Willis* v. *United States,* 362 U. S. 216. Cf. *Simcox* v. *Madigan,* 366 U. S. 765; *Ragan* v. *Cox,* 369 U. S. 437.

[2] 28 U. S. C. §§ 1291, 1294; Fed. Rules Crim. Proc. 37 (a). Cf. *Carroll* v. *United States,* 354 U. S. 394, 400–401.

of its discretion to allow him to bring the case before the court. The only requirements a defendant must meet for perfecting his appeal are those expressed as time limitations within which various procedural steps must be completed. First, a timely notice of appeal must be filed in the District Court to confer jurisdiction upon the Court of Appeals over the case.[3] Subsequently, designations of the transcript, a record on appeal and briefs must be filed in the appropriate forum.[4]

The indigent defendant will generally experience no material difficulty in filing a timely notice of appeal.[5]

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[3] Fed. Rules Crim. Proc. 37 (a); *United States* v. *Robinson,* 361 U. S. 220.

[4] Fed. Rules Crim. Proc. 39 (c) (record on appeal to be docketed in Court of Appeals within 40 days of filing of notice of appeal); Rules of the Court of Appeals for the District of Columbia Circuit 33 (b) (application for copies of stenographic transcript of trial proceedings to be made within 3 days of filing of notice of appeal, or within 10 days if appellant is incarcerated), 33 (c) (appellant's designation of record on appeal to be filed within 20 days of filing notice of appeal), 18 (a) (appellant's briefs due within 20 days of filing record on appeal).

[5] Although the timely filing of a notice of appeal is a jurisdictional prerequisite for perfecting an appeal, *United States* v. *Robinson,* 361 U. S. 220, a liberal view of papers filed by indigent and incarcerated defendants, as equivalents of notices of appeal, has been used to preserve the jurisdiction of the Courts of Appeals. See, *e. g., Lemke* v. *United States,* 346 U. S. 325 (notice of appeal filed prior to judgment); *O'Neal* v. *United States,* 272 F. 2d 412 (C. A. 5th Cir.) (appeal bond filed in District Court); *Tillman* v. *United States,* 268 F. 2d 422 (C. A. 5th Cir.) (application for leave to appeal *in forma pauperis* filed in District Court); *Belton* v. *United States,* 104 U. S. App. D. C. 81, 259 F. 2d 811 (letter written to District Court); *Williams* v. *United States,* 88 U. S. App. D. C. 212, 188 F. 2d 41 (notice of appeal delivered to prison officials for forwarding to District Court). See also *Jordan* v. *United States District Court,* 98 U. S. App. D. C. 160, 233 F. 2d 362, vacated on other grounds *sub nom. Jordan* v. *United States,* 352 U. S. 904 (mandamus petition filed in Court of Appeals held equivalent of notice of appeal from

But thereafter he is immediately faced with court fees for docketing his appeal in the Court of Appeals and with the cost of preparing the record, including a stenographic transcript of at least portions of the trial proceedings.[6] If he is unable to meet either or both of these expenses, he can perfect his appeal only by applying for leave to appeal *in forma pauperis*. The application, to be made to the District Court in which the defendant was convicted,[7]

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judgment in proceeding pursuant to 28 U. S. C. § 2255); *West* v. *United States*, 94 U. S. App. D. C. 46, 222 F. 2d 774 (petition for leave to appeal *in forma pauperis* filed in Court of Appeals held equivalent in § 2255 case).

Further, Fed. Rules Crim. Proc. 37 (a)(2) expressly provides:

"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."

The salutary purpose of this provision may, however, not be achieved when the defendant appears at sentencing with counsel. If neither counsel, whether retained or court appointed, nor the district judge imposing sentence, notifies the defendant of the requirement for filing a prompt notice of appeal, the right of appeal may irrevocably be lost. Cf. *Hodges* v. *United States*, 108 U. S. App. D. C. 375, 282 F. 2d 858, cert. granted, 365 U. S. 810, cert. dismissed as improvidently granted, 368 U. S. 139, 140–141 (dissent); *Lewis and Simms* v. *United States*, 107 U. S. App. D. C. 353, 278 F. 2d 33, 111 U. S. App. D. C. 13, 294 F. 2d 209.

[6] The fee for docketing an appeal in the Court of Appeals is $25. Stenographic transcripts in the federal courts cost $0.65 per page for the first copy, and $0.30 per page for additional copies. Transcripts in excess of 100 pages are not uncommon. The cost of printing briefs, records, and appendices, as illustrated by the present charge for printing records in this Court, may be $3.80 per page or more. The printing requirements are generally waived in appeals proceeding *in forma pauperis*. Cf. Fed. Rules Civ. Proc. 75 (m). But if, in such cases, printing is required by the Court of Appeals, the expense is borne by the United States. 28 U. S. C. § 1915 (b).

[7] The statute appears to contemplate an initial application to the District Court by providing "An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in

must conform to the requirements of 28 U. S. C. § 1915 (a) and include, in affidavit form, the defendant's representations of poverty, a statement of the case, and his belief that he is entitled to redress. The sole statutory language by which the District Court is guided in passing upon the application provides "[a]n appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith." 28 U. S. C. § 1915 (a).

What meaning should be placed on the "good faith" of which the statute speaks? In the context of a criminal appeal, we do not believe it can be read to require a District Court to determine whether the would-be appellant seeks further review of his case in *subjective* good faith, *i. e.*, good faith from his subjective point of view.[8] Such

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good faith." 28 U. S. C. § 1915 (a). And this is the manner in which the statute has been interpreted. See, *e. g.*, *West* v. *United States*, 94 U. S. App. D. C. 46, 222 F. 2d 774; *Waterman* v. *McMillan*, 77 U. S. App. D. C. 310, 135 F. 2d 807; *Murrey* v. *United States*, 134 F. 2d 956 (C. A. 8th Cir.); *Bayless* v. *Johnston*, 127 F. 2d 531 (C. A. 9th Cir.). And see Rules of the Court of Appeals for the District of Columbia Circuit 41 (a). But cf. *Jordan* v. *United States District Court*, 98 U. S. App. D. C. 160, 163, 233 F. 2d 362, 365 note 3, vacated on other grounds *sub nom. Jordan* v. *United States*, 352 U. S. 904.

[8] In discussing the "good faith" requirement of what is now 28 U. S. C. § 1915 (a), Senator Bacon of the Senate Judiciary Committee said:

"When a judge has heard a case and it is about to be carried to an appellate court, he . . . is in a position to judge whether it is a case proceeding captiously, or viciously, or with prejudice, or from any other improper motive, or whether the litigant is proceeding in good faith." 45 Cong. Rec. 1533 (1910).

However, he was discussing primarily civil suits. And see *Jaffe* v. *United States*, 246 F. 2d 760 (C. A. 2d Cir.) (civil case). But in criminal cases cf. *Cash* v. *United States*, 104 U. S. App. D. C. 265, 269, 261 F. 2d 731, 735, vacated, 357 U. S. 219; *Parsell* v. *United States*, 218 F. 2d 232 (C. A. 5th Cir.). See also *United States* v. *Visconti*, 261 F. 2d 215 (C. A. 2d Cir.) (proceeding under 28 U. S. C. § 2255).

a construction would deprive the legislation of sensible meaning, there probably being no convicted defendant who would not sincerely wish a Court of Appeals to review his conviction. Further, a subjective standard might suggest that only persons who, in good conscience, could insist on their innocence, are to be entitled to a review of their convictions without payment of costs. We believe this interpretation of the statute is not required by reason nor is it consistent with the sound administration of criminal justice in the federal courts. We hold, instead, that "good faith" in this context must be judged by an *objective* standard. We consider a defendant's good faith in this type of case demonstrated when he seeks appellate review of any issue not frivolous. In so doing, we note that if *in forma pauperis* litigation is attempted for reasons that may genuinely be characterized as the litigant's "bad faith," express authority exists in 28 U. S. C. § 1915 (d) for dismissal of the cause as frivolous.[9]

If the District Court finds the application is not in good faith, and therefore denies leave to appeal *in forma pauperis*, the defendant may seek identical relief from the Court of Appeals.[10] In considering such an appli-

[9] And see Fed. Rules Crim. Proc. 39 (a); Fed. Rules Civ. Proc. 12 (f).

[10] 28 U. S. C. § 1915 expressly authorizes "[a]ny court of the United States" to permit a litigant to proceed *in forma pauperis*. Thus it is not necessary to consider the application to the Court of Appeals a separate "appeal" from the order of the District Court denying relief, to which the time requirements of the Federal Rules of Civil Procedure would be applicable as they are to appeals in other ancillary post-conviction proceedings. Cf. *Roberts* v. *United States District Court*, 339 U. S. 844, 845. The court below has, by its own Rule 41 (b), required all persons seeking leave to appeal a judgment of the District Court *in forma pauperis*, to apply for such leave from the Court of Appeals within 30 days of the date on which their applications for such relief from the District Court have been denied. The instant petitioner has complied with this Rule.

cation addressed to it, the Court of Appeals will have before it what is usually the *pro se* pleading of a layman and the certificate of a district judge that the applicant lacks "good faith" in seeking appellate review. The District Court's certificate is not conclusive, although it is, of course, entitled to weight.[11] However, we have recognized that the materials before the Court of Appeals at this stage of the proceedings are generally inadequate for passing upon the defendant's application. Nevertheless, if from the face of the papers he has filed, it is apparent that the applicant will present issues for review not clearly frivolous, the Court of Appeals should then grant leave to appeal *in forma pauperis,* appoint counsel to represent the appellant and proceed to consideration of the appeal on the merits in the same manner that it considers paid appeals. If, on the other hand, the claims made or the issues sought to be raised by the applicant are such that their substance cannot adequately be ascertained from the face of the defendant's application, the Court of Appeals must provide the would-be appellant with both the assistance of counsel and a record of sufficient completeness to enable him to attempt to make a showing that the District Court's certificate of lack of "good faith" is in error and that leave to proceed with the appeal *in forma pauperis* should be allowed.[12] If, with such aid, the applicant then presents any issue for the court's consideration not clearly frivolous, leave to proceed *in forma pauperis* must be allowed.

In so holding we have been impelled by considerations beyond the corners of 28 U. S. C. § 1915, considerations that it is our duty to assure to the greatest degree possible,

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[11] *Johnson* v. *United States,* 352 U. S. 565, 566.

[12] *Johnson* v. *United States,* 352 U. S. 565, 566. See also *Farley* v. *United States,* 354 U. S. 521; *Ellis* v. *United States,* 356 U. S. 674; *Whitt* v. *United States,* 104 U. S. App. D. C. 1, 259 F. 2d 158.

within the statutory framework for appeals created by Congress, equal treatment for every litigant before the bar.[13] We have expressed this view in a case comparable to the one before us here by holding that

> "[u]nless the issues raised [by the indigent seeking leave to appeal *in forma pauperis*] are so frivolous that the appeal would be dismissed in the case of a nonindigent litigant, Fed. Rules Crim. Proc. 39 (a), the request of an indigent for leave to appeal *in forma pauperis* must be allowed." *Ellis* v. *United States,* 356 U. S. 674, 675.

The point of equating the test for allowing a pauper's appeal to the test for dismissing paid cases, is to assure equality of consideration for all litigants. The equation is intended to place the burdens of proof and persuasion in all cases on the same party—in these cases, on the Government. Since our statutes and rules make an appeal in a criminal case a matter of right, the burden of showing that that right has been abused through the prosecution

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[13] Cf. *Griffin* v. *Illinois,* 351 U. S. 12, in which we were presented with a state law requiring defendants in all criminal cases in that State to furnish a bill of exceptions to the appellate court in which they sought review of their convictions. The bill of exceptions was difficult, if not impossible, to prepare without a stenographic transcript of the trial proceedings. Persons sentenced to death received transcripts at the expense of the State; all others were required to purchase a transcript. We found the failure of the State to provide for appellate review for indigents in non-capital cases, when such review was available for all defendants able to purchase transcripts, an "invidious discrimination" inconsistent with the guarantees of due process and equal protection of the laws of the Fourteenth Amendment. See also *Eskridge* v. *Washington State Board,* 357 U. S. 214; *Ross* v. *Schneckloth,* 357 U. S. 575; *Burns* v. *Ohio,* 360 U. S. 252; *Douglas* v. *Green,* 363 U. S. 192; *McCrary* v. *Indiana,* 364 U. S. 277; *Smith* v. *Bennett,* 365 U. S. 708, in which comparable state rules and practices, effectively limiting the poor person's access to courts ostensibly open to all, similarly have been found vulnerable.

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of frivolous litigation should, at all times, be on the party making the suggestion of frivolity. It is not the burden of the petitioner to show that his appeal has merit, in the sense that he is bound, or even likely, to prevail ultimately. He is to be heard, as is any appellant in a criminal case, if he makes a rational argument on the law or facts. It is the burden of the Government, in opposing an attempted criminal appeal *in forma pauperis,* to show that the appeal is lacking in merit, indeed, that it is so lacking in merit that the court would dismiss the case on motion of the Government, had the case been docketed and a record been filed by an appellant able to afford the expense of complying with those requirements.[14] If it were the practice of a Court of Appeals to screen the paid appeals on its docket for frivolity, without hearing oral argument, reviewing a record of the trial proceedings or considering full briefs, paupers could, of course, be bound by the same rules. But, if the practice of the Court of Appeals is to defer rulings on motions to dismiss paid appeals until the court has had the benefit of hearing argument and considering briefs and an adequate record, we hold it must no less accord the poor person the same procedural rights.

Two additional factors have relevance to our view of the proper disposition of motions for leave to perfect criminal appeals *in forma pauperis.* These factors are the foundation for Rule 39 (d) of the Federal Rules of Criminal Procedure, specifying that preference shall be given by the Courts of Appeals to criminal cases. This Rule, first, acknowledges the importance to the sovereign,

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[14] See *Brown* v. *United States,* 110 U. S. App. D. C. 310, 293 F. 2d 149; *United States* v. *Nudelman,* 207 F. 2d 109 (C. A. 3d Cir.). Cf. *United States* v. *Johnson,* 327 U. S. 106; *Smith* v. *United States,* 105 U. S. App. D. C. 414, 267 F. 2d 691; *Young* v. *United States,* 105 U. S. App. D. C. 415, 267 F. 2d 692; *United States* v. *Peltz,* 246 F. 2d 537 (C. A. 2d Cir.).

to the accused and to society of a criminal prosecution. When society acts to deprive one of its members of his life, liberty or property, it takes its most awesome steps. No general respect for, nor adherence to, the law as a whole can well be expected without judicial recognition of the paramount need for prompt, eminently fair and sober criminal law procedures. The methods we employ in the enforcement of our criminal law have aptly been called the measures by which the quality of our civilization may be judged.[15] Second, the preference to be accorded criminal appeals recognizes the need for speedy disposition of such cases. Delay in the final judgment of conviction, including its appellate review, unquestionably erodes the efficacy of law enforcement.

Both of these considerations are particularly pertinent to criminal appeals *in forma pauperis*. Statistics compiled in the court below illustrate the undeniable fact that as many meritorious criminal cases come before that court through applications for leave to proceed *in forma pauperis* as on the paid docket, and that no *a priori* justification can be found for considering them, as a class, to be more frivolous than those in which costs have been paid.[16] Even-handed administration of the criminal law

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[15] Justice Schaefer of the Supreme Court of Illinois, in the 1956 Oliver Wendell Holmes Lecture at the Harvard Law School, reprinted as Federalism and State Criminal Procedure, 70 Harv. L. Rev. 1, 26 (1956).

[16] *Jones* v. *United States,* 105 U. S. App. D. C. 326, 328, 266 F. 2d 924, 926. There, Judge Bazelon pointed out that of 86 criminal appeals considered by the Court of Appeals within a period of approximately 15 months, 18 were prepaid, while 68 were considered after either the District Court or the Court of Appeals had granted leave to appeal *in forma pauperis.* Of this total, 14 of the prepaid appeals resulted in a judgment affirming the conviction; a similar majority of the paupers' appeals resulted in affirmance. However, during a comparable span between September 1, 1957, and February 28, 1959, 24 criminal appeals were decided by the Court of Appeals in which the

demands that these cases be given no less consideration than others on the courts' dockets. Particularly since litigants *in forma pauperis* may, in the trial court, have suffered disadvantages in the defense of their cases inherent in their impecunious condition, is appellate review of their cases any less searching than that accorded paid appeals inappropriate. Indigents' appeals from criminal convictions cannot be used as a convenient valve for reducing the pressures of work on the courts. If there are those who insist on pursuing frivolous litigation, the courts are not powerless to dismiss or otherwise discourage it. But if frivolous litigation exists, we are not persuaded that it is concentrated in this narrow, yet vital, area of judicial duty.

Similarly, statistics demonstrate the inevitable delay that surrounds a procedure in which the courts give piecemeal attention to the series of motions that indigents must make before a final adjudication of the merits of their cases is reached. Delays described in years between trial and final decision in criminal cases are the unhappy result of separate considerations of motions for the appointment of counsel, for the preparation of a transcript of the trial proceedings and, ultimately, for the leave to appeal *in forma pauperis*. The case before us illustrates the point. Petitioner was indicted on June 16, 1958, for offenses alleged to have been committed in early December 1957. He was first tried and convicted in December 1958. Leave to appeal *in forma pauperis* was

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District Court had initially denied leave to appeal *in forma pauperis*. In 11 of those 24 cases, reversals were ordered, and in 6 more, one of the three judges of the court's panel dissented from the judgment affirming the conviction. During those same 18 months, the court granted 31 of 47 petitions for leave to take a direct appeal *in forma pauperis* from a conviction, and this Court subsequently reversed the denials of leave to appeal ordered in the cases of 5 of the 16 unsuccessful applicants in the court below.

granted by the District Court, and on June 23, 1959, the Court of Appeals reversed the conviction and remanded the case for a new trial. 106 U. S. App. D. C. 275, 272 F. 2d 504. In October 1959, new counsel was appointed by the District Court to represent petitioner at his second trial. Pre-trial motions were argued in the District Court in December 1959 and January 1960, and petitioner's trial took place in the first week of March 1960. Petitioner was convicted and then sentenced on March 11, 1960. On March 22, 1960, the District Court denied an application for leave to appeal *in forma pauperis*. An application for leave to appeal *in forma pauperis* was then directed to the Court of Appeals, and was filed in that court on April 15, 1960. On April 20, that court appointed counsel to represent petitioner, and on June 15, 1960, counsel filed a 30-page memorandum in support of the petition for leave to appeal. The following day, the Government answered with a memorandum stating that it believed it appropriate for the court to order the preparation of a transcript at government expense before ruling on the petition for leave to appeal. Petitioner objected to this procedure on the grounds that his memorandum sufficiently indicated that non-frivolous issues were present in his case and that further delay in allowing the appeal was, therefore, unwarranted. On July 1, 1960, the Court of Appeals ordered the preparation of a transcript at the expense of the United States. The transcript became available August 15, 1960, and the Government's opposition to petitioner's application for leave to appeal *in forma pauperis* was filed, pursuant to an extension of time granted by the court, on September 2, 1960. The Government, misconceiving the issue as we understand it, claimed the points sought to be raised were "not sufficiently substantial" to warrant an appeal *in forma pauperis;* it did not suggest the appeal sought was "frivolous." Petitioner filed a reply memorandum on

September 8. On November 5, 1960, the court, one judge dissenting, denied the petition for leave to appeal *in forma pauperis*. The petition for certiorari was filed in this Court on November 16, 1960, and was granted on June 19, 1961. 366 U. S. 959. We heard oral argument in December 1961, and our present disposition of the case, remanding it for reconsideration by the Court of Appeals on an intermediary step, still far from the end of petitioner's course through the courts on his original conviction, is now ordered more than four years after the commission of the offenses for which petitioner was tried and more than two years from the date of the trial and judgment petitioner seeks to have reviewed.[17]

In the light of this delay, it is not surprising that petitioner asks us to reach the merits of his case immediately. However, delay alone, unfortunate though it is, is not sufficient cause to bypass the orderly processes of judicial review. Contrary to the Government's assertion here that petitioner has already received what amounts to

[17] The instant case is not unique in this regard. See, *e. g., Johnson:* Indicted (March 1956), tried (May 1956), appeal *in forma pauperis* denied, 238 F. 2d 565 (C. A. 2d Cir. 1956), vacated, 352 U. S. 565 (1957), conviction affirmed on the merits, 254 F. 2d 175, petition for certiorari dismissed per stipulation of parties, 357 U. S. 933 (June 1958); *Farley:* Indicted (December 1955), tried (May 1956), application for leave to appeal *in forma pauperis* remanded to District Court, 238 F. 2d 575 (C. A. 2d Cir. 1956), appeal *in forma pauperis* denied, 242 F. 2d 338, vacated, 354 U. S. 521 (1957), remanded to District Court for settling transcript (December 1960), appeal *in forma pauperis* granted by District Court (May 1961), conviction affirmed on the merits, 292 F. 2d 789 (1961), cert. denied, 369 U. S. 857 (April 1962); *Ellis:* Indicted (April 1956), tried (September 1956), appeal *in forma pauperis* denied, 101 U. S. App. D. C. 386, 249 F. 2d 478 (1957), vacated, 356 U. S. 674 (1958), conviction affirmed on the merits, 105 U. S. App. D. C. 86, 264 F. 2d 372, cert. denied, 359 U. S. 998 (May 1959), motion for leave to file petition for rehearing denied, 361 U. S. 945 (January 1960).

plenary review of the conviction following his second trial, we hold petitioner has not yet received the benefits of presenting either oral argument or full briefs on the merits of his claims to the court first charged with the supervision of the trial court.[18] The memoranda prepared by counsel in support of petitioner's application for leave to appeal *in forma pauperis* were not intended to be, nor are they rightly considered as, full appellate briefs. But they do serve to demonstrate that petitioner sought consideration of issues that it would be difficult for an appellate court to consider so patently frivolous as to require a dismissal of petitioner's case without full briefing or argument. In so saying, we need not, and do not, express any opinion on whether petitioner's conviction should ultimately be affirmed or reversed. We only hold that taken as a whole, petitioner's various claims cannot justify the summary disposition of his case ordered below.

The first of numerous claims asserted by the petitioner is that the indictment against him was procured through the use of perjured testimony before the grand jury. This Court has not yet decided whether such a charge, if proven, would require the reversal of a criminal conviction based upon an indictment returned by a grand jury hearing the perjury. But we have granted certiorari and given full consideration to related issues in other cases. See, *e. g., Costello* v. *United States,* 350 U. S. 359 (hearsay evidence considered by grand jury); *Lawn* v. *United States,* 355 U. S. 339 (illegally seized evidence considered by grand jury); *Beck* v. *Washington, post,* p. 541 (alleged inflammatory publicity surrounding state grand jury deliberations).

Petitioner also claims that he has been unable to prove his charge that perjured testimony was presented to the

[18] This argument was also presented by the Government, and then rejected by us, in *Lurk* v. *United States,* 366 U. S. 712.

grand jury because of the refusal of the courts below to permit him to examine the transcript of the grand jury's proceedings. Again, although in the particular context of this case access to the normally secret minutes of the grand jury may ultimately be held to have been properly denied, recent volumes of the United States Reports and the Federal Reporter include a number of opinions in which the extent of the secrecy normally attached to grand jury minutes has been explored.[19]

A number of other arguable claims were also made by petitioner to support his application for leave to appeal. But we believe those mentioned would alone have warranted the allowance of an appeal *in forma pauperis*. They meet the test of being sufficiently reasonable to withstand a claim that their frivolity is so manifest that they merit no further argument or consideration, and that dismissal of petitioner's case is, therefore, in order. The judgment of the Court of Appeals is vacated, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE FRANKFURTER took no part in the decision of this case.

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

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[19] See, *e. g.*, *Pittsburgh Plate Glass Co.* v. *United States*, 360 U. S. 395, 399–400; *De Binder* v. *United States*, 110 U. S. App. D. C. 244, 246, 292 F. 2d 737, 739; *United States* v. *Rose*, 215 F. 2d 617, 628–630 (C. A. 3d Cir.); *Parr* v. *United States*, 265 F. 2d 894, 901–904 (C. A. 5th Cir.), reversed on other grounds, 363 U. S. 370. Cf. *United States* v. *Procter & Gamble Co.*, 356 U. S. 677, 682–684. See Louisell, Criminal Discovery: Dilemma Real or Apparent? 49 Calif. L. Rev. 56, 68–71 (1961); Note, Inspection of Grand Jury Minutes by Criminal Defendants, 1961 Wash. U. L. Q. 382.

MR. JUSTICE STEWART, with whom MR. JUSTICE BRENNAN agrees, concurring.

In joining the opinion and judgment of the Court, I think it appropriate to add a few words. The rule of *Ellis* v. *United States* is a simple one. An appeal *in forma pauperis* must be allowed in a criminal case "unless the issues raised are so frivolous that the appeal would be dismissed in the case of a nonindigent litigant." 356 U. S. 674, 675. The difficulties which the Courts of Appeals have encountered in applying this simple and practical test are largely, I think, of their own making.

These difficulties may stem in part from a failure to consider the *in forma pauperis* statute in the context of the over-all scheme governing criminal appeals. Our statutes and rules make an appeal in a criminal case a matter of right. The provisions governing appeals *in forma pauperis* are not to be read as diluting that right by imposing a more stringent test of merit. Rather, 28 U. S. C. § 1915 provides at most a device for advance screening of appeals which, if paid, would upon motion be dismissed before argument as frivolous. The only justification for such a preliminary screening is the absence of the built-in pecuniary brake upon frivolous appeals which is present in nonindigent cases. There is no other difference between paid and unpaid appeals. In both, the burden of showing that the right to appeal has been abused is on the party making the suggestion.

It has been said that a District Court's certification that an appeal is not taken in good faith is entitled to great weight. *Johnson* v. *United States,* 352 U. S. 565, 566. Nevertheless, if a District Court has denied leave to appeal *in forma pauperis,* the Court of Appeals has the ultimate responsibility of deciding for itself whether the appeal is frivolous. Justice demands an independent and objective assessment of a district judge's appraisal of his

own conduct of a criminal trial. Anything less would impose a disability upon indigent defendants far greater than that contemplated by the preliminary screening provision which § 1915 permits. The statutory safeguard against overindulgence in free frivolous appeals cannot be allowed to impinge upon the fundamental right of every litigant, rich or poor, to equal consideration before the courts.

When a Court of Appeals chooses to utilize the preliminary screening device permitted by § 1915, difficulties of the kind evident in this case frequently arise. The bare application for leave to appeal *in forma pauperis* seldom furnishes sufficient material for evaluating the weight of the issues involved. For this reason, we have held that in such cases a Court of Appeals must provide the applicant with the assistance of counsel and with a record of sufficient completeness to give him full opportunity to show that the appeal is in "good faith." *Johnson* v. *United States, supra; Farley* v. *United States,* 354 U. S. 521. In the course of such proceedings, however, experience has shown that there may be a tendency to lose sight of the precise issue before the court at this point—whether the appeal is so frivolous that it would be dismissed even if all the fees had been paid. Obviously arguments concerning the weight of the issues raised by an appeal are difficult to disengage from arguments dealing with the ultimate merits of these same issues. Understandably and commendably, counsel for indigent defendants often exert every effort to prove the substantial nature of their clients' claims—an exertion of energy which draws a similar effort from government counsel. The product of these forces is a procedure which may bear close superficial resemblance to the appeal itself.

The result is that a Court of Appeals may come to think of these preliminary proceedings as tantamount to appeals on the merits, and may tend to decide whether or

not to grant leave to appeal by appraising the entire case in terms of whether or not reversible error appears. By the same token, when leave to appeal has been denied, and the case has come here, the Government has argued in the past, as it argues in this case, that the preliminary screening procedure was itself the equivalent of an affirmance on the merits. See *Lurk* v. *United States,* 366 U. S. 712.

This attempted conversion of the proceedings to determine good faith into a truncated substitute for appeal distorts the purpose of § 1915, and, if accepted, would raise serious questions of due process. The filing of memoranda in support of an application for leave to appeal is not an appeal. The merits of the ultimate issues are not logically involved at this point, but only the weight of those issues. Appellate briefs are not written or submitted. There is no oral argument. The court's mode of considering such memoranda, as a matter of internal machinery, may markedly differ from the process employed in the decision of cases actually on appeal. For all these reasons the interim proceeding permitted by § 1915 cannot itself be deemed to constitute the appeal to which a person convicted of crime in the federal courts is entitled.

In addition to the danger of equating the "good faith" determination with the appeal itself, there are other disadvantages inherent in compelling the parties to go through the preliminary procedure permitted by § 1915. It is a serious imposition upon appointed counsel to require dissipation of energy and time in preliminary skirmishing. Moreover, the delay occasioned by this extended interim proceeding is itself offensive to the ideal of speedy administration of criminal justice.

The primary responsibility for containing within limited bounds the separate "good faith" proceeding permitted by § 1915 rests upon those Courts of Appeals

which choose to utilize this system of dealing with *in forma pauperis* appeals. While I would not deny great latitude to the various circuits autonomously to devise their own procedures consistent with their appraisal of local conditions and needs, the courts' duty in this area can be properly achieved only by keeping in mind the very limited test of "good faith" which the *Ellis* case established.

This suggests that each Court of Appeals might well consider whether its task could not be more expeditiously and responsibly performed by simply granting applications to appeal from criminal convictions *in forma pauperis* as a matter of course, and appointing counsel to brief and argue each case on the merits. The Government would then be free in any case to file before argument a motion to dismiss the appeal as frivolous, as every appellee is always free to do. In the absence of such a motion an appeal which after argument appeared clearly without merit could be expeditiously disposed of by summary affirmance, in the secure knowledge that all the issues had been fully canvassed. This procedure, it seems to me, would not only save the time and energy of court and counsel, but would obviate the many difficulties which, as the present case shows, the complicated two-step system is all too likely to produce.

MR. JUSTICE CLARK, with whom MR. JUSTICE HARLAN joins, dissenting.

I.

Congress has provided that no indigent appeal may be taken "if the trial court certifies in writing that it is not taken in good faith," *i. e.,* is frivolous. 28 U. S. C. § 1915 (a). With the opinion today the Court for all practical purposes repeals this statute by placing the burden on the Government to sustain such a certification

rather than on the indigent to overturn it. This position is a *sub silentio* reversal of our previous holding in *Farley* v. *United States,* 354 U. S. 521, 523 (1957), where we said that "petitioner has not yet been afforded an adequate opportunity to show the Court of Appeals that his claimed errors are not frivolous. . . ." Accord, *Johnson* v. *United States,* 352 U. S. 565 (1957).[1] Moreover, the Court goes against a long line of cases holding that the trial judge's certificate of frivolity is entitled to "great weight"—a rule which the opinion here notes but fails to recognize. If the finding is entitled to "great weight," in fact controlling weight in the absence of "some showing that the certificate is made without warrant . . . ," *Wells* v. *United States,* 318 U. S. 257, 259 (1943), how can it be said the Government has the burden of upholding it? The Court seems to say the burden is upon the Government because when it files a motion to dismiss in a nonindigent case it has the burden of showing frivolity. I submit the two are not at all analogous. In the case of paid appeals Congress has not provided for a determination by the trial court of whether the issues warrant further review, and to treat nonpaid appeals like paid appeals is to ignore such a provision in the statute governing indigent appeals.

The Court does not make clear on what grounds it bases its assumption that the Government has the burden of showing frivolity. It professes to act "within the statutory framework for appeals created by Congress"; but it intimates that it is "impelled by considerations beyond the corners of 28 U. S. C. § 1915," and the touchstone of its opinion is a principle arising from cases based on the Equal Protection Clause of the Fourteenth Amend-

[1] *Ellis* v. *United States,* 356 U. S. 674 (1958), is inapposite. There the Court was concerned with the standard governing the allowance of appeals *in forma pauperis,* not with where rests the burden of showing frivolity in the face of a certification by the trial court.

ment. I do not believe, however, that a disparity in the burden of showing frivolity denies equal justice as between paid and nonpaid appeals. They both remain subject to the same peril. Congress has set up a special procedure which subjects every nonpaid appeal to an examination to determine if further briefing and oral argument are necessary. Such an examination in the case of paid appeals is left to the initiative of the court or the Government. This distinction does not give rise to a discrimination of constitutional proportions. As was pointed out in *Hirabayashi* v. *United States,* 320 U. S. 81, 100 (1943), "[t]he Fifth Amendment contains no equal protection clause and it restrains only such discriminatory legislation by Congress as amounts to a denial of due process. . . . Congress may hit at a particular danger where it is seen, without providing for others which are not so evident or so urgent." I see no constitutional impediment to asking one who seeks a free ride to show that he is not just a joyrider. Although a government that affords appellate review must pay the cost of meritorious indigent appeals, surely it may protect itself from frivolous ones (which incidentally in numbers overwhelmingly predominate) being "subsidized and public moneys . . . needlessly spent." *Griffin* v. *Illinois,* 351 U. S. 12, 24 (1956) (concurring opinion).

II.

The Court holds that petitioner is entitled to oral argument in the Court of Appeals on new briefs. An examination of the record shows that the action of the Court of Appeals was on the basis of a complete transcript and extensive briefs filed by counsel. With due deference to the Court's suggestion that these briefs were only preliminary, I find them to be substantially similar in both bulk and substance to the ones filed here on which petitioner asks for a decision on the merits. Upon such

presentation the Court of Appeals found itself satisfied that petitioner's conviction was proper. It is true that no oral argument was permitted. However, having come to the conclusion that the case had no merit, the court had to put a stop to the review proceeding. This is true whether the appeal is paid or nonpaid. See *United States* v. *Johnson,* 327 U. S. 106 (1946). We adjudicate most of our appeals in the same manner, *i. e.,* by dismissing or affirming on the briefs without argument. Inasmuch as the case had arisen within the procedural confines of appeals *in forma pauperis,* the Court of Appeals simply denied leave to appeal. It could have granted leave to proceed and then summarily affirmed or dismissed the appeal under Rule 39 (a), Fed. Rules Crim. Proc. I see no substantial distinction between the two dispositions.

The Court, however, is remanding the case for further review proceedings because it has concluded that at least two of petitioner's claims are not frivolous and that the Court of Appeals therefore erred in not allowing the review to run its full length. The Court in reaching this conclusion has, in my view, misplaced the burden on the issue of frivolity, but even assuming *arguendo* that petitioner's contentions are not frivolous, I cannot agree to the fruitless approach the Court has taken.

To be sure, frivolity or some analogous standard delimits those appeals, paid or nonpaid, which can be decided without oral argument. However, it would seem that any error by a Court of Appeals in evaluating frivolity *upon such a full presentation as was had below* is often not only incorrectable but harmless. Concededly, this Court has of late consistently remanded cases in which a Court of Appeals has mistakenly characterized contentions as frivolous. Experience has shown this tack to be unsatisfactory, and perhaps it is now time to re-evaluate our approach.

This is not to say that we should do a complete turn about and never remand a case for further review. What I am suggesting is that we give substance to the congressional mandate and yet analyze, *inter alia,* the thoroughness of the review below, the character of the issues raised, the beneficiality of further action by a lower court, and the strength or weakness of the contentions made. Applying such criteria to the present case, I am convinced that to remand this case will only compel the lower court to go through wasteful formalities to the detriment of its consideration of other appeals and put off to another day action by this Court.[2] The Court speaks of long delays, but by remanding it appears to have contributed to the very evil which it seeks to eliminate. I would follow the teaching of *Pollard* v. *United States,* 352 U. S. 354 (1957), and *Holiday* v. *Johnston,* 313 U. S. 342 (1941), and decide the merits of petitioner's contentions *now.* I therefore dissent.

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[2] For a case in which a similar warning was sounded, see *Lurk* v. *United States,* 366 U. S. 712 (1961) (dissenting opinion). Subsequent events have shown this admonition to be words of wisdom indeed. See 111 U. S. App. D. C. 238, 296 F. 2d 360, certiorari granted, 368 U. S. 815. [For subsequent decision of this Court, see 370 U. S. 530 (1962).]

GOLDLAWR, INC., *v.* HEIMAN ET AL.

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

No. 101. Argued March 19, 1962.—Decided April 30, 1962.

Petitioner brought this private antitrust action for treble damages and other relief under §§ 1 and 2 of the Sherman Act and § 4 of the Clayton Act in a Federal District Court in Pennsylvania. On a motion to dismiss on grounds of improper venue and want of personal jurisdiction over the defendants, that Court found that venue was improperly laid as to two of the corporate defendants because they were not inhabitants of, "found" or transacting business in Pennsylvania; but, instead of dismissing the action, it used its authority under 28 U. S. C. § 1406 (a) to transfer the case to the Southern District of New York, where venue was proper because the defendants could be found and transacted business there and personal jurisdiction over them could be obtained by service of process under § 12. These two corporate defendants then moved the Federal District Court in New York to dismiss the action on the ground that the District Court in Pennsylvania did not have personal jurisdiction over them and, therefore, lacked power under § 1406 (a) to transfer the action. *Held:* Section 1406 (a) is not limited to cases in which the transferring court has personal jurisdiction over the defendants, and the District Court in Pennsylvania acted within its authority. Pp. 464–467.

288 F. 2d 579, reversed.

Edwin P. Rome argued the cause and filed briefs for petitioner.

C. Russell Phillips argued the cause for Select Operating Corp. et al., respondents. With him on the briefs were *Gerald Schoenfeld, Bernard B. Jacobs, Aaron Lipper* and *C. Brewster Rhoads.*

Aaron Lipper argued the cause for Morgan Guaranty Trust Company of New York, respondent. With him on the brief was *Richard B. Dannenberg.*

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MR. JUSTICE BLACK delivered the opinion of the Court.

This private antitrust action for treble damages and other relief under §§ 1 and 2 of the Sherman Act [1] and § 4 of the Clayton Act [2] was brought by the petitioner against a number of defendants in the United States District Court for the Eastern District of Pennsylvania. After hearings on a motion to dismiss the action on grounds of improper venue and lack of personal jurisdiction over the defendants, the Pennsylvania District Court agreed that venue was improperly laid as to two of the corporate defendants [3] because they were neither inhabitants of, "found" nor transacting business in Pennsylvania, these being the alternative prerequisites for venue under § 12 of the Clayton Act.[4] That court refused to dismiss the action as to these defendants, however, choosing instead to use its authority under 28 U. S. C. § 1406 (a) to transfer it to the Southern District of New York where, because the defendants could be found and transacted business, venue was proper and personal jurisdiction could be obtained over them by service of process under § 12. These two corporate defendants then appeared in the New York District Court and moved to have the case dismissed by that court on the ground that the Pennsylvania District Court had not had personal jurisdiction over them and, lacking such personal jurisdiction, it had not had power under § 1406 (a) to transfer the

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[1] 26 Stat. 209, as amended, 15 U. S. C. §§ 1 and 2.

[2] 38 Stat. 731, 15 U. S. C. § 15.

[3] The District Court also found venue improper as to a number of individual defendants, but that fact is not relevant to any issue properly before us. See note 5, *infra*.

[4] 38 Stat. 736, 15 U. S. C. § 22. This section, which deals with both venue and personal jurisdiction in antitrust actions against corporations, also provides that process may be served in the district of which the corporation "is an inhabitant, or wherever it may be found."

action.[5] The New York District Court granted this motion on the ground asserted,[6] and the Court of Appeals for the Second Circuit, with Judge Hincks dissenting, affirmed on the same ground.[7] Because this decision presented a conflict with the uniform course of decisions previously made on this same question by other Courts of Appeal,[8] we granted certiorari.[9]

Section 1406 (a), under which the Pennsylvania District Court transferred this case, provides:

> "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."

Nothing in that language indicates that the operation of the section was intended to be limited to actions in which the transferring court has personal jurisdiction over the defendants. And we cannot agree that such a restrictive interpretation can be supported by its legislative his-

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[5] The Pennsylvania District Court also transferred the action against the individual defendants as to whom venue had been found improper. Only one of these, Marcus Heiman, moved in the New York District Court to have the action dismissed as to him for lack of power in the transferring court. Heiman's motion was granted on this ground and on a second entirely independent ground. The Court of Appeals affirmed the dismissal as to Heiman on both grounds and the petitioner did not seek certiorari as to the second and independent ground. The writ is therefore dismissed as to Heiman.

[6] 175 F. Supp. 793.

[7] 288 F. 2d 579.

[8] See *Internatio-Rotterdam, Inc.*, v. *Thomsen*, 218 F. 2d 514; *Orion Shipping & Trading Co.* v. *United States*, 247 F. 2d 755; *Amerio Contact Plate Freezers, Inc.*, v. *Knowles*, 107 U. S. App. D. C. 81, 274 F. 2d 590; *Hayes* v. *Livermont*, 108 U. S. App. D. C. 43, 279 F. 2d 818.

[9] 368 U. S. 810.

tory—either that relied upon by the Court of Appeals [10] or any other that has been brought to our attention. The problem which gave rise to the enactment of the section was that of avoiding the injustice which had often resulted to plaintiffs from dismissal of their actions merely because they had made an erroneous guess with regard to the existence of some elusive fact of the kind upon which venue provisions often turn. Indeed, this case is itself a typical example of the problem sought to be avoided, for dismissal here would have resulted in plaintiff's losing a substantial part of its cause of action under the statute of limitations merely because it made a mistake in thinking that the respondent corporations could be "found" or that they "transact . . . business" in the Eastern District of Pennsylvania.[11] The language and history of § 1406 (a), both as originally enacted [12] and as amended in 1949,[13] show a congressional purpose to provide as effective a remedy as possible to avoid precisely this sort of injustice.

The language of § 1406 (a) is amply broad enough to authorize the transfer of cases, however wrong the plaintiff may have been in filing his case as to venue, whether the court in which it was filed had personal jurisdiction over the defendants or not. The section is thus in accord with the general purpose which has prompted many of the procedural changes of the past few years—that of removing whatever obstacles may impede an expeditious and orderly adjudication of cases and controversies

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[10] Senate Report No. 303, 81st Cong., 1st Sess., discussed by the court below at 288 F. 2d 579, 583.

[11] As illustrating the difficulties which may arise in determining where corporations can be found or transact business, see *Polizzi* v. *Cowles Magazines, Inc.*, 345 U. S. 663; *International Shoe Co.* v. *Washington*, 326 U. S. 310.

[12] 62 Stat. 937.

[13] 63 Stat. 101.

on their merits. When a lawsuit is filed, that filing shows a desire on the part of the plaintiff to begin his case and thereby toll whatever statutes of limitation would otherwise apply. The filing itself shows the proper diligence on the part of the plaintiff which such statutes of limitation were intended to insure. If by reason of the uncertainties of proper venue a mistake is made, Congress, by the enactment of § 1406 (a), recognized that "the interest of justice" may require that the complaint not be dismissed but rather that it be transferred in order that the plaintiff not be penalized by what the late Judge Parker aptly characterized as "time-consuming and justice-defeating technicalities." [14] It would at least partially frustrate this enlightened congressional objective to import ambiguities into § 1406 (a) which do not exist in the language Congress used to achieve the procedural reform it desired.

The Court of Appeals erred in upholding the District Court's order dismissing this action as to these two corporate defendants. The judgment of the Court of Appeals is accordingly

Reversed.

MR. JUSTICE FRANKFURTER took no part in the decision of this case.

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

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART joins, dissenting.

The notion that a District Court may deal with an *in personam* action in such a way as possibly to affect a defendant's substantive rights without first acquiring jurisdiction over him is not a familiar one in federal

[14] *Internatio-Rotterdam, Inc.*, v. *Thomsen*, 218 F. 2d 514, 517.

jurisprudence. No one suggests that Congress was aware that 28 U. S. C. § 1406 (a) might be so used when it enacted that statute. The "interest of justice" of which the statute speaks and which the Court's opinion emphasizes in support of its construction of § 1406 (a) is assuredly not a one-way street. And it is incongruous to consider, as the Court's holding would seem to imply, that in the "interest of justice" Congress sought in § 1406 (a) to deal with the transfer of cases where *both* venue and jurisdiction are lacking in the district where the action is commenced, while neglecting to provide any comparable alleviative measures for the plaintiff who selects a district where venue is proper but where personal jurisdiction cannot be obtained.*

In these circumstances I think the matter is better left for further action by Congress, preferably after the Judicial Conference of the United States has expressed its views on the subject. Cf. *Miner* v. *Atlass,* 363 U. S. 641, 650–652. Meanwhile, substantially for the reasons elaborated in the opinion of Judge Moore, 288 F. 2d 579, I would affirm the judgment of the Court of Appeals.

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*In an ordinary diversity suit, for example, a plaintiff may bring suit in the judicial district where he resides. 28 U. S. C. § 1391 (a). But if he is unable to get personal service on the defendant in the territory defined by Fed. Rule Civ. Proc. 4 (f), his suit will be dismissed. See *Robertson* v. *Railroad Labor Board,* 268 U. S. 619; cf. *Mississippi Publishing Corp.* v. *Murphree,* 326 U. S. 438, 442–443. Since this would not be "a case laying venue in the wrong division or district," § 1406 (a) would be inapplicable.

DAIRY QUEEN, INC., *v.* WOOD, U. S. DISTRICT JUDGE, ET AL.

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

No. 244. Argued February 19–20, 1962.—Decided April 30, 1962.

Claiming that petitioner had breached its contract to pay $150,000 for the exclusive use of the trademark "DAIRY QUEEN" in certain portions of Pennsylvania, the owners of the trademark sued in a Federal District Court for (1) temporary and permanent injunctions to restrain petitioner from any future use of or dealing in the franchise and trademark, (2) an accounting to determine the exact amount of money owing by petitioner and a judgment for that amount, and (3) an injunction pending accounting to prevent petitioner from collecting any money from "Dairy Queen" stores in the territory. Petitioner filed an answer raising a number of defenses and made a timely demand for a trial by jury. The District Court struck petitioner's demand for a trial by jury, on the alternative grounds that either the action was "purely equitable" or that whatever legal issues were raised were "incidental" to equitable issues. The Court of Appeals denied petitioner's application for a writ of mandamus to compel the District Judge to vacate his order. *Held:* The District Judge erred in refusing petitioner's demand for a trial by jury of the factual issues related to the question whether there had been a breach of contract or a trademark infringement, and the Court of Appeals should have corrected that error by granting the petition for mandamus. Pp. 470–480.

(a) Where both legal and equitable issues are presented in a single case, any legal issues for which a trial by jury is timely and properly demanded must be submitted to a jury. *Beacon Theatres, Inc.*, v. *Westover*, 359 U. S. 500. Pp. 470–473

(b) Insofar as the complaint in this case requests a money judgment, it presents a claim which is unquestionably legal. Pp. 473–477.

(c) A different conclusion is not required by the fact that the complaint is cast in terms of an "accounting" rather than in terms of an action for "debt" or "damages." Pp. 477–479.

(d) The legal claim here involved was not rendered "purely equitable" by the nature of the defenses interposed by petitioner. P. 479.

Judgment reversed and cause remanded for further proceedings.

Michael H. Egnal argued the cause for petitioner. With him on the briefs was *Wallace D. Newcomb*.

Owen J. Ooms argued the cause for respondents. With him on the briefs was *Mark D. Alspach*.

Mr. Justice Black delivered the opinion of the Court.

The United States District Court for the Eastern District of Pennsylvania granted a motion to strike petitioner's demand for a trial by jury in an action now pending before it on the alternative grounds that either the action was "purely equitable" or, if not purely equitable, whatever legal issues that were raised were "incidental" to equitable issues, and, in either case, no right to trial by jury existed.[1] The petitioner then sought mandamus in the Court of Appeals for the Third Circuit to compel the district judge to vacate this order. When that court denied this request without opinion, we granted certiorari because the action of the Court of Appeals seemed inconsistent with protections already clearly recognized for the important constitutional right to trial by jury in our previous decisions.[2]

At the outset, we may dispose of one of the grounds upon which the trial court acted in striking the demand for trial by jury—that based upon the view that the right to trial by jury may be lost as to legal issues where those issues are characterized as "incidental" to equitable issues—for our previous decisions make it plain that no such rule may be applied in the federal courts. In *Scott*

[1] *McCullough* v. *Dairy Queen, Inc.*, 194 F. Supp. 686.

[2] 368 U. S. 874.

v. *Neely,* decided in 1891, this Court held that a court of equity could not even take jurisdiction of a suit "in which a claim properly cognizable only at law is united in the same pleadings with a claim for equitable relief." [3] That holding, which was based upon both the historical separation between law and equity and the duty of the Court to insure "that the right to a trial by a jury in the legal action may be preserved intact," [4] created considerable inconvenience in that it necessitated two separate trials in the same case whenever that case contained both legal and equitable claims. Consequently, when the procedure in the federal courts was modernized by the adoption of the Federal Rules of Civil Procedure in 1938, it was deemed advisable to abandon that part of the holding of *Scott* v. *Neely* which rested upon the separation of law and equity and to permit the joinder of legal and equitable claims in a single action. Thus Rule 18 (a) provides that a plaintiff "may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party." And Rule 18 (b) provides: "Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to him, without first having obtained a judgment establishing the claim for money."

The Federal Rules did not, however, purport to change the basic holding of *Scott* v. *Neely* that the right to trial

[3] 140 U. S. 106, 117. See also *Cates* v. *Allen,* 149 U. S. 451, in which the principles expressed and applied in *Scott* v. *Neely* were explicitly reaffirmed.

[4] *Id.,* at 110.

by jury of legal claims must be preserved.[5] Quite the contrary, Rule 38 (a) expressly reaffirms that constitutional principle, declaring: "The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate." Nonetheless, after the adoption of the Federal Rules, attempts were made indirectly to undercut that right by having federal courts in which cases involving both legal and equitable claims were filed decide the equitable claim first. The result of this procedure in those cases in which it was followed was that any issue common to both the legal and equitable claims was finally determined by the court and the party seeking trial by jury on the legal claim was deprived of that right as to these common issues. This procedure finally came before us in *Beacon Theatres, Inc.*, v. *Westover*,[6] a case which, like this one, arose from the denial of a petition for mandamus to compel a district judge to vacate his order striking a demand for trial by jury.

Our decision reversing that case not only emphasizes the responsibility of the Federal Courts of Appeals to grant mandamus where necessary to protect the constitutional right to trial by jury but also limits the issues open for determination here by defining the protection to which that right is entitled in cases involving both legal and equitable claims. The holding in *Beacon Theatres* was that where both legal and equitable issues are presented in a single case, "only under the most imperative circumstances, circumstances which in

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[5] "Subdivision (b) [of Rule 18] does not disturb the doctrine of those cases [*Scott* v. *Neely* and *Cates* v. *Allen*] but is expressly bottomed upon their principles. This is true because the Federal Rules abolish the distinction between law and equity, permit the joinder of legal and equitable claims, and safeguard the right to jury trial of legal issues." 3 Moore, Federal Practice, 1831–1832.

[6] 359 U. S. 500.

view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims." [7] That holding, of course, applies whether the trial judge chooses to characterize the legal issues presented as "incidental" to equitable issues or not.[8] Consequently, in a case such as this where there cannot even be a contention of such "imperative circumstances," *Beacon Theatres* requires that any legal issues for which a trial by jury is timely and properly demanded be submitted to a jury. There being no question of the timeliness or correctness of the demand involved here, the sole question which we must decide is whether the action now pending before the District Court contains legal issues.

The District Court proceeding arises out of a controversy between petitioner and the respondent owners of the trademark "DAIRY QUEEN" with regard to a written licensing contract made by them in December 1949, under which petitioner agreed to pay some $150,000 for the exclusive right to use that trademark in certain portions of Pennsylvania.[9] The terms of the contract pro-

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[7] *Id.*, at 510–511.

[8] "It is therefore immaterial that the case at bar contains a stronger basis for equitable relief than was present in Beacon Theatres. It would make no difference if the equitable cause clearly outweighed the legal cause so that the basic issue of the case taken as a whole is equitable. As long as any legal cause is involved the jury rights it creates control. This is the teaching of Beacon Theatres, as we construe it." *Thermo-Stitch, Inc.*, v. *Chemi-Cord Processing Corp.*, 294 F. 2d 486, 491.

[9] There are two groups of respondents in this case in addition to the district judge who is formally a respondent by reason of the procedural posture of the case. H. A. McCullough and H. F. McCullough, a partnership doing business as McCullough's Dairy Queen, are the owners of the trademark and are entitled under the contract to payment for its use. B. F. Myers, R. J. Rydeen, M. E. Montgomery, and H. S. Dale are the original licensees under the contract through

vided for a small initial payment with the remaining payments to be made at the rate of 50% of all amounts received by petitioner on sales and franchises to deal with the trademark and, in order to make certain that the $150,000 payment would be completed within a specified period of time, further provided for minimum annual payments regardless of petitioner's receipts. In August 1960, the respondents wrote petitioner a letter in which they claimed that petitioner had committed "a material breach of that contract" by defaulting on the contract's payment provisions and notified petitioner of the termination of the contract and the cancellation of petitioner's right to use the trademark unless this claimed default was remedied immediately.[10] When petitioner continued to deal with the trademark despite the notice of termination, the respondents brought an action based upon their view that a material breach of contract had occurred.

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whom petitioner obtained its rights by assignment. This latter group of respondents joined in the action against petitioner on the grounds (1) that they would be responsible to the trademark owners if petitioner defaulted on its obligations under the contract, and (2) that they are themselves entitled to certain royalties under the assignment arrangement. Since the portion of the complaint involving this latter group raises no issues relevant to the question to be determined here which differ from those raised in that part of the complaint involving the trademark owners, the discussion can be restricted to the issues raised by the trademark owners and "respondents" as used in this opinion will refer only to that group.

[10] The full text of the letter sent to petitioner is as follows:

"This letter is to advise you that your failure to pay the amounts required in your contract with McCullough's Dairy Queen for the 'Dairy Queen' franchise for the State of Pennsylvania, as called for in your contract with your assignors, constitutes in our opinion a material breach of that contract.

"This will advise you that unless this material breach is completely satisfied for the amount due and owing, your franchise for 'Dairy Queen' in Pennsylvania is hereby cancelled.

"Copies of this letter are being sent to your assignors."

The complaint filed in the District Court alleged, among other things, that petitioner had "ceased paying . . . as required in the contract;" that the default "under the said contract . . . [was] in excess of $60,000.00;" that this default constituted a "material breach" of that contract; that petitioner had been notified by letter that its failure to pay as alleged made it guilty of a material breach of contract which if not "cured" would result in an immediate cancellation of the contract; that the breach had not been cured but that petitioner was contesting the cancellation and continuing to conduct business as an authorized dealer; that to continue such business after the cancellation of the contract constituted an infringement of the respondents' trademark; that petitioner's financial condition was unstable; and that because of the foregoing allegations, respondents were threatened with irreparable injury for which they had no adequate remedy at law. The complaint then prayed for both temporary and permanent relief, including: (1) temporary and permanent injunctions to restrain petitioner from any future use of or dealing in the franchise and the trademark; (2) an accounting to determine the exact amount of money owing by petitioner and a judgment for that amount; and (3) an injunction pending accounting to prevent petitioner from collecting any money from "Dairy Queen" stores in the territory.

In its answer to this complaint, petitioner raised a number of defenses, including: (1) a denial that there had been any breach of contract, apparently based chiefly upon its allegation that in January 1955 the parties had entered into an oral agreement modifying the original written contract by removing the provision requiring minimum annual payments regardless of petitioner's receipts thus leaving petitioner's only obligation that of turning over 50% of all its receipts; (2) laches and estop-

pel arising from respondents' failure to assert their claim promptly, thus permitting petitioner to expend large amounts of money in the development of its right to use the trademark; and (3) alleged violations of the antitrust laws by respondents in connection with their dealings with the trademark. Petitioner indorsed upon this answer a demand for trial by jury in accordance with Rule 38 (b) of the Federal Rules of Civil Procedure.[11]

Petitioner's contention, as set forth in its petition for mandamus to the Court of Appeals and reiterated in its briefs before this Court, is that insofar as the complaint requests a money judgment it presents a claim which is unquestionably legal. We agree with that contention. The most natural construction of the respondents' claim for a money judgment would seem to be that it is a claim that they are entitled to recover whatever was owed them under the contract as of the date of its purported termination plus damages for infringement of their trademark since that date. Alternatively, the complaint could be construed to set forth a full claim based upon both of these theories—that is, a claim that the respondents were entitled to recover both the debt due under the contract and damages for trademark infringement for the entire period of the alleged breach including that before the termination of the contract.[12] Or it might possibly be construed to set forth a claim for recovery based completely on either one of these two theories—that is, a claim

[11] "Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party."

[12] This seems to be the construction given the complaint by the district judge in passing on the motion to strike petitioner's jury demand. See 194 F. Supp., at 687–688.

based solely upon the contract for the entire period both before and after the attempted termination on the theory that the termination, having been ignored, was of no consequence, or a claim based solely upon the charge of infringement on the theory that the contract, having been breached, could not be used as a defense to an infringement action even for the period prior to its termination.[13] We find it unnecessary to resolve this ambiguity in the respondents' complaint because we think it plain that their claim for a money judgment is a claim wholly legal in its nature however the complaint is construed. As an action on a debt allegedly due under a contract, it would be difficult to conceive of an action of a more traditionally legal character.[14] And as an action for damages based upon a charge of trademark infringement, it would be no less subject to cognizance by a court of law.[15]

The respondents' contention that this money claim is "purely equitable" is based primarily upon the fact that their complaint is cast in terms of an "accounting," rather than in terms of an action for "debt" or "damages." But the constitutional right to trial by jury cannot be made

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[13] This last possible construction of the complaint, though accepted as the correct one in the concurring opinion, actually seems the least likely of all. For it seems plain that irrespective of whatever else the complaint sought, it did seek a judgment for the some $60,000 allegedly owing under the contract. Certainly, the district judge had no doubt that this was the case: "Incidental to this relief, the complaint also demands the $60,000 now allegedly due and owing plaintiffs under the aforesaid contract." 194 F. Supp., at 687.

[14] "In the case before us the debt due the complainants was in no respect different from any other debt upon contract; it was the subject of a legal action only, in which the defendants were entitled to a jury trial in the Federal courts." *Scott* v. *Neely,* 140 U. S. 106, 110. See also *Thompson* v. *Railroad Companies,* 6 Wall. 134.

[15] Cf., *e. g., Arnstein* v. *Porter,* 154 F. 2d 464; *Bruckman* v. *Hollzer,* 152 F. 2d 730.

to depend upon the choice of words used in the pleadings. The necessary prerequisite to the right to maintain a suit for an equitable accounting, like all other equitable remedies, is, as we pointed out in *Beacon Theatres,* the absence of an adequate remedy at law.[16] Consequently, in order to maintain such a suit on a cause of action cognizable at law, as this one is, the plaintiff must be able to show that the "accounts between the parties" are of such a "complicated nature" that only a court of equity can satisfactorily unravel them.[17] In view of the powers given to District Courts by Federal Rule of Civil Procedure 53 (b) to appoint masters to assist the jury in those exceptional cases where the legal issues are too complicated for the jury adequately to handle alone,[18] the burden of such a showing is considerably increased and it will indeed be a rare case in which it can be met.[19] But be that as it may, this is certainly

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[16] 359 U. S., at 506–510. See also *Thompson* v. *Railroad Companies,* 6 Wall. 134, 137; *Scott* v. *Neely,* 140 U. S. 106, 110.

[17] *Kirby* v. *Lake Shore & Michigan Southern R. Co.,* 120 U. S. 130, 134.

[18] Even this limited inroad upon the right to trial by jury "'should seldom be made, and if at all only when unusual circumstances exist.'" *La Buy* v. *Howes Leather Co.,* 352 U. S. 249, 258. See also *In re Watkins,* 271 F. 2d 771.

[19] It was settled in *Beacon Theatres* that procedural changes which remove the inadequacy of a remedy at law may sharply diminish the scope of traditional equitable remedies by making them unnecessary in many cases. "Thus, the justification for equity's deciding legal issues once it obtains jurisdiction, and refusing to dismiss a case, merely because subsequently a legal remedy becomes available, must be re-evaluated in the light of the liberal joinder provisions of the Federal Rules which allow legal and equitable causes to be brought and resolved in one civil action. Similarly the need for, and therefore, the availability of such equitable remedies as Bills of Peace, *Quia Timet* and Injunction must be reconsidered in view of the existence of the Declaratory Judgment Act as well as the liberal joinder provision of the Rules." 359 U. S., at 509.

not such a case. A jury, under proper instructions from the court, could readily determine the recovery, if any, to be had here, whether the theory finally settled upon is that of breach of contract, that of trademark infringement, or any combination of the two. The legal remedy cannot be characterized as inadequate merely because the measure of damages may necessitate a look into petitioner's business records.

Nor is the legal claim here rendered "purely equitable" by the nature of the defenses interposed by petitioner. Petitioner's primary defense to the charge of breach of contract—that is, that the contract was modified by a subsequent oral agreement—presents a purely legal question having nothing whatever to do either with novation, as the district judge suggested, or reformation, as suggested by the respondents here. Such a defense goes to the question of just what, under the law, the contract between the respondents and petitioner is and, in an action to collect a debt for breach of a contract between these parties, petitioner has a right to have the jury determine not only whether the contract has been breached and the extent of the damages if any but also just what the contract is.

We conclude therefore that the district judge erred in refusing to grant petitioner's demand for a trial by jury on the factual issues related to the question of whether there has been a breach of contract. Since these issues are common with those upon which respondents' claim to equitable relief is based, the legal claims involved in the action must be determined prior to any final court determination of respondents' equitable claims.[20] The Court

[20] This does not, of course, interfere with the District Court's power to grant temporary relief pending a final adjudication on the merits. Such temporary relief has already been granted in this case (see *McCullough* v. *Dairy Queen, Inc.*, 290 F. 2d 871) and is no part of the issues before this Court.

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of Appeals should have corrected the error of the district judge by granting the petition for mandamus. The judgment is therefore reversed and the cause remanded for further proceedings consistent with this opinion.

Reversed and remanded.

MR. JUSTICE STEWART concurs in the result.

MR. JUSTICE FRANKFURTER took no part in the decision of this case.

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

MR. JUSTICE HARLAN, whom MR. JUSTICE DOUGLAS joins, concurring.

I am disposed to accept the view, strongly pressed at the bar, that this complaint seeks an accounting for alleged trademark infringement, rather than contract damages. Even though this leaves the complaint as formally asking only for equitable relief,* this does not end the inquiry. The fact that an "accounting" is sought is not of itself dispositive of the jury trial issue. To render this aspect of the complaint truly "equitable" it must appear that the substantive claim is one cognizable only in equity or that the "accounts between the parties" are of such a "complicated nature" that they can be satisfactorily unraveled only by a court of equity. *Kirby* v. *Lake Shore & Michigan Southern R. Co.*, 120 U. S. 130, 134. See 5 Moore, Federal Practice (1951), 198–202. It is manifest from the face of the complaint that the "accounting" sought in this instance is not of either variety. A jury, under proper instructions from the court, could readily calculate the damages flowing from this alleged

*Except as to the damage claim there is no dispute but that the complaint seeks only equitable relief.

trademark infringement, just as courts of law often do in copyright and patent cases. Cf., *e. g.*, *Hartell* v. *Tilghman*, 99 U. S. 547, 555; *Arnstein* v. *Porter*, 154 F. 2d 464; *Bruckman* v. *Hollzer*, 152 F. 2d 730.

Consequently what is involved in this case is nothing more than a joinder in one complaint of prayers for both legal and equitable relief. In such circumstances, under principles long since established, *Scott* v. *Neely*, 140 U. S. 106, 110, the petitioner cannot be deprived of his constitutional right to a jury trial on the "legal" claim contained in the complaint.

On this basis I concur in the judgment of the Court.

CALIFORNIA *v.* FEDERAL POWER COMMISSION ET AL.

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

No. 187. Argued March 1, 1962.—
Decided April 30, 1962.

One natural gas company acquired nearly all of the stock of another, and the Federal Government commenced an action in a Federal District Court to have the acquisition of stock declared to be in violation of § 7 of the Clayton Act and to require divestiture. Shortly thereafter, the company which had acquired the stock applied to the Federal Power Commission under § 7 of the Natural Gas Act for authority to merge the assets of the two companies. The Commission authorized the merger of assets while the antitrust action was still pending in the District Court. The Court of Appeals sustained the Commission's action. *Held:* The Commission should not have proceeded to a decision on the merits of the merger application when there was pending in the courts a suit challenging the validity of that transaction under the antitrust laws. It should have awaited the decision of the courts. Pp. 483–490.

111 U. S. App. D. C. 226, 296 F. 2d 348, reversed.

William M. Bennett argued the cause and filed briefs for petitioner.

Solicitor General Cox argued the cause for the Federal Power Commission, respondent. With him on the briefs were *Assistant Attorney General Orrick, John G. Laughlin, Jr., John C. Mason, Ralph S. Spritzer, Howard E. Wahrenbrock, Robert L. Russell* and *Arthur H. Fribourg.*

Arthur H. Dean argued the cause for the El Paso Natural Gas Co., respondent. With him on the briefs were *Charles V. Shannon, Stanley M. Morley* and *Stephen Rackow Kaye.*

Opinion of the Court by MR. JUSTICE DOUGLAS, announced by MR. JUSTICE BRENNAN.

El Paso Natural Gas Company first acquired the stock of the Pacific Northwest Pipeline Corp. and then applied to the Federal Power Commission for authority to acquire the assets pursuant to § 7 of the Natural Gas Act, 52 Stat. 825, 15 U. S. C. § 717f (c). This application was dated August 7, 1957. Prior thereto, on July 22, 1957, the Federal Government commenced an action against El Paso and Pacific Northwest, alleging that El Paso's acquisition of the stock of Pacific Northwest violated § 7 of the Clayton Act,[1] 38 Stat. 731, as amended, 64 Stat. 1125, 15 U. S. C. § 18. On September 30, 1957, El Paso and Pacific Northwest filed a motion to dismiss the antitrust suit or to stay it, pending completion of the proceedings before the Commission. On October 21, 1957, that motion was denied after hearing; and we denied certiorari. 355 U. S. 950.

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[1] Section 7 of the Clayton Act provides in relevant part:

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

"No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly."

In May and June 1958, the Department of Justice wrote four letters to the Commission, asking that the proceeding be stayed pending the outcome of the antitrust suit. On July 29, 1958, the Department of Justice was advised by the Commission that it would not stay its proceedings. The Commission invited the Antitrust Division of the Department to participate in the administrative proceedings; but it did not do so.

The hearings before the Commission started September 17, 1958. On October 2, 1958, El Paso and Pacific Northwest moved in the District Court for a continuance of the antitrust suit. On October 6, 1958, the Department of Justice asked the Commission to postpone its hearing, pending final outcome of the antitrust suit which had then been set for trial November 17, 1958. On October 7, 1958, the Commission wrote the District Court that if the court denied El Paso and Pacific Northwest's motion for a continuance and proceeded with the antitrust trial, the Commission would continue its merger hearings to a date that would not conflict with the trial date of the antitrust case, but that if the court granted the motion for continuance, the Commission would proceed with its hearing. On October 13, 1958, the District Court continued the antitrust suit until the final decision in the administrative proceedings. The latter proceedings were concluded, the Commission authorizing the merger on December 23, 1959. 22 F. P. C. 1091, 23 F. P. C. 350. The merger was consummated December 31, 1959.

Petitioner intervened in the administrative proceedings August 27, 1957, and obtained review by the Court of Appeals, which affirmed the Commission (111 U. S. App. D. C. 226, 296 F. 2d 348), Judge Fahy dissenting. We granted certiorari, 368 U. S. 810.

Evidence of antitrust violations is plainly relevant in merger applications, for part of the content of "public convenience and necessity" as used in § 7 of the Natural

Gas Act is found in the laws of the United States. *City of Pittsburgh* v. *Federal Power Commission,* 99 U. S. App. D. C. 113, 237 F. 2d 741.

Immunity from the antitrust laws is not lightly implied. The exemption of agricultural cooperatives from the antitrust laws granted by § 6 of the Clayton Act and § 1 and § 2 of the Capper-Volstead Act of 1922 became relevant in *Milk Producers Assn.* v. *United States,* 362 U. S. 458. While § 7 of the Clayton Act gave immunity to "transactions duly consummated pursuant to authority given by . . . the Secretary of Agriculture under any statutory provision vesting such power in such . . . Secretary," we held that the only authority of the Secretary was to approve "marketing agreements" (*id.,* 469–470) and not other types of agreements or restraints, typically covered by the antitrust laws. Accordingly, we held that the District Court was authorized to direct the cooperative to dispose as a unit of the assets of an independent producer that had been acquired to stifle competition and restrain trade. We could not assume that Congress, having granted only a limited exemption from the antitrust laws, nonetheless granted an overall inclusive one. See *United States* v. *Borden Co.,* 308 U. S. 188, 198–202. "When there are two acts upon the same subject, the rule is to give effect to both if possible." *Id.,* at 198. Here, as in *United States* v. *R. C. A.,* 358 U. S. 334, while "antitrust considerations" are relevant to the issue of "public interest, convenience, and necessity" (*id.,* at 351), there is no "pervasive regulatory scheme" (*ibid.*) including the antitrust laws that has been entrusted to the Commission. And see *National Broadcasting Co.* v. *United States,* 319 U. S. 190, 223. Under the Interstate Commerce Act, mergers of carriers that are approved have an antitrust immunity, as § 5 (11) of that Act specifically provides that the carriers involved "shall be and they are hereby relieved from the operation of the antitrust

laws . . . ." See *McLean Trucking Co.* v. *United States*, 321 U. S. 67.

There is no comparable provision under the Natural Gas Act. Section 7 of the Clayton Act—which prohibits stock acquisitions "where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly"—contains a proviso that "Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the . . . Federal Power Commission . . . under any statutory provision vesting such power in such Commission . . . ." The words "transactions duly consummated pursuant to authority" given the Commission "under any statutory provision vesting such power" in it are plainly not a grant of power to adjudicate antitrust issues. Congress made clear that by this proviso in § 7 of the Clayton Act ". . . it is not intended that . . . any . . . agency" mentioned "shall be granted any authority or powers which it does not already possess." S. Rep. No. 1775, 81st Cong., 2d Sess., p. 7. The Commission's standard, set forth in § 7 of the Natural Gas Act, is that the acquisition, merger, etc., will serve the "public convenience and necessity." If existing natural gas companies violate the antitrust laws, the Commission is advised by § 20 (a) to "transmit such evidence" to the Attorney General "who, in his discretion, may institute the necessary criminal proceedings." Other administrative agencies are authorized to enforce § 7 of the Clayton Act when it comes to certain classes of companies or persons; [2] but the Federal Power Commission is not included in the list.

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[2] Section 11 of the Clayton Act, 15 U. S. C. § 21, vests authority to enforce compliance with § 7 by the persons subject thereto:

". . . in the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; in the Federal Communications Commission where applicable to com-

We do not decide whether in this case there were any violations of the antitrust laws. We rule only on one select issue and that is: should the Commission proceed to a decision on the merits of a merger application when there is pending in the courts a suit challenging the validity of that transaction under the antitrust laws? We think not. We think the Commission in those circumstances should await the decision of the courts.

The Commission considered the interplay between § 7 of the Clayton Act and § 7 of the Natural Gas Act and said:

> "Section 7 of the Clayton Act, under which the antitrust suit was brought, prohibits the acquisition by one corporation of the stock or assets of another corporation where 'the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.' Exempt, however, are transactions consummated pursuant to Commission authority. This shows, reasons the presiding examiner, that Congress placed reliance on the Commission not to approve an acquisition of assets in violation of the injunction of the Clayton Act, unless in the carefully exercised judgement of the Commission, the acquisition would nevertheless be in the public interest. What we are attempting to arrive at is the public convenience and necessity. In reaching our determination, we do not have authority to determine whether a given transaction is in violation of the Clayton Act, but we are required to consider the bear-

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mon carriers engaged in wire or radio communication or radio transmission of energy; in the Civil Aeronautics Board where applicable to air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce to be exercised as follows: . . ."

ing of the policy of the antitrust laws on the public convenience and necessity. *City of Pittsburgh* v. *F. P. C.*, 237 F. 2d 741, 754 (CADC). With the presiding examiner, we find that any lessening of competition whether in the consumer markets or the producing fields, does not prevent our approving the merger because there are other factors which outweigh the elimination of Pacific as a competitor. In any case, it appears that any lessening of competition is not substantial." 22 F. P. C. 1091, 1095.

Apart from the fact that the Commission did undertake to make a finding reserved to the courts by § 7 of the Clayton Act,[3] there are practical reasons why it should have held its hand until the courts had acted.

One is that if the Commission approves the transaction and the courts in the antitrust suit later hold it to be illegal, an unscrambling is necessary. *Milk Producers Assn.* v. *United States, supra.* Thus a needless waste of time and money may be involved. Also these unscrambling processes often raise complicated and perplexing problems on tax matters and otherwise, as our recent decision in *United States* v. *du Pont & Co.*, 353 U. S. 586; 366 U. S. 316, shows.[4] Such complexities

[3] Where "the effect of such acquisition may be substantially to lessen competition." Section 7, *supra,* note 1.

[4] In that case, which also was under § 7 of the Clayton Act, we said: "Section 7 is designed to arrest in its incipiency not only the substantial lessening of competition from the acquisition by one corporaton of the whole or any part of the stock of a competing corporation, but also to arrest in their incipiency restraints or monopolies in a relevant market which, as a reasonable probability, appear at the time of suit likely to result from the acquisition by one corporation of all or any part of the stock of any other corporation." 353 U. S., at 589. As to the remedy we stated in *United States* v. *du Pont & Co.*, 366 U. S., at 334: "We think the public is entitled to the surer,

are inherent in the situation, as approval of the transaction by the Commission would be no bar to the antitrust suit. See *United States* v. *R. C. A., supra.*

Another practical reason is that a transaction consummated under the aegis of the Commission as being a matter of "public convenience and necessity" is bound to carry momentum into the antitrust suit. The very prospect of undoing what was done raises a powerful influence in the antitrust litigation, as *United States* v. *du Pont & Co., supra,* illustrates.

The orderly procedure is for the Commission to await decision in the antitrust suit before taking action.

Section 7 of the Clayton Act, so far as material here, prohibits stock acquisitions having a prescribed effect. Section 7 of the Natural Gas Act confers jurisdiction on the Commission over the acquisition of assets of natural gas companies,[5] not over stock acquisitions in them. Had the Commission stayed its hand and had the courts found the stock acquisition unlawful, the entire transaction would have been set aside *in limine.* Had the courts found the stock acquisition lawful, presumably no problems under § 7 of the Clayton Act would have remained.

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cleaner remedy of divestiture. The same result would follow even if we were in doubt. For it is well settled that once the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor."

[5] Section 7 (c) provides in relevant part:

"No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations."

When the Commission proceeds in the face of a pending but undecided antitrust suit and approves a merger that has been preceded, as this one was, by a stock acquisition, it in substance treats the entire relation of the companies—from the acquisition of stock to the merger—as an integrated transaction. If that administrative action were approved, the Commission would be allowed to do by indirection what it has no jurisdiction to do directly.

It is not for us to say that the complementary legislative policies reflected in § 7 of the Clayton Act on the one hand and in § 7 of the Natural Gas Act on the other should be better accommodated. Our function is to see that the policy entrusted to the courts is not frustrated by an administrative agency. Where the primary jurisdiction is in the agency, courts withhold action until the agency has acted. *Texas & Pac. R. Co.* v. *Abilene Oil Co.*, 204 U. S. 426. The converse should also be true, lest the antitrust policy whose enforcement Congress in this situation has entrusted to the courts is in practical effect taken over by the Federal Power Commission. Moreover, as noted, the Commission in holding that "any lessening of competition is not substantial" was in the domain of the Clayton Act, a domain which is entrusted to the court in which the antitrust suit was pending.

The judgment of the Court of Appeals is reversed and the case is remanded for proceedings in conformity with this opinion.

It is so ordered.

Mr. Justice Frankfurter took no part in the decision of this case.

Mr. Justice White took no part in the consideration or decision of this case.

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART joins, dissenting.

In this case originating in the Federal Power Commission, the Court today announces a new and surprising antitrust procedural rule: If the Commission is asked to "proceed to a decision on the merits of a merger application when there is pending in the courts a suit challenging the validity of that [merger and its antecedent] transaction[s] under the antitrust laws," the Commission must abstain from a determination and "await decision in the antitrust suit before taking action." (*Ante,* pp. 487, 489.)

The holding does not turn on any facts or circumstances which may be said to be peculiar to this particular case. It is not limited to Federal Power Commission proceedings. Without adverting to any legal principle or statute to support its decision, the Court appears to lay down a pervasive rule, born solely of its own abstract notions of what "orderly procedure" requires, that seemingly will henceforth govern every agency action involving matters with respect to which the antitrust laws are applicable and antitrust litigation is then pending in the courts.

I cannot subscribe to a decision which broadly works such havoc with the proper relationship between the administrative and judicial functions in matters of this kind. The decision, on the one hand, in effect transfers to the Antitrust Division of the Department of Justice regulatory functions entrusted to administrative agencies, and on the other hand deprives the courts in government antitrust litigation of the authority given them by statute to determine whether or not interlocutory relief is necessary or appropriate. What this new rule entails is illustrated by this case: A business transaction of great magnitude and importance, which the Federal Power

Commission has found to be in the public interest, is, at least for the time being, set for naught, without the slightest inquiry into whether the antitrust charges leveled against it are weighty or not. The Court's action is the more unusual because it is taken (1) despite the antitrust court's denial of interlocutory relief when such relief was belatedly sought by the Government; (2) in the face of the considered judgment of the Solicitor General, representing the public interests respectively involved in the administrative and antitrust proceedings, that determination of the ultimate effect of the Commission's order should be left to abide the event of the antitrust case, and that meanwhile such order should be allowed to stand; and (3) at the instance only of an intervenor in the Commission's proceeding which was not even a party to the Government's antitrust suit.

The undiscriminating nature and reach of this decision become apparent when attention is focused on the procedural events occurring prior to the order of the Commission which is here under attack. On July 22, 1957, the Department of Justice instituted a civil action in the United States District Court in Utah against the El Paso Natural Gas Company and the Pacific Northwest Pipeline Company, seeking to restrain an alleged violation of § 7 of the Clayton Act. This violation was said to have occurred when, beginning in January 1957, El Paso embarked on a program of acquiring nearly all of Pacific's outstanding common stock. The complaint asked that the purchase be declared to be a violation of § 7 of the Clayton Act and that El Paso be directed to divest itself of Pacific's stock. No interlocutory relief appears to have been requested.

On August 7, 1957, El Paso filed with the Federal Power Commission its application for authorization to merge Pacific's assets with its own. Despite this announced intention further to intermingle the affairs of the two cor-

porations, the Government did not seek temporary relief from the District Court in Utah. El Paso, on the other hand, contended that "primary jurisdiction" with regard to the merger resided with the Commission and sought to have the antitrust action stayed. Its motion was denied by the District Court, and on March 3, 1958, we denied leave to file a petition for common-law certiorari to that decision. 355 U. S. 950.

When the case was returned to the District Court the Government again made no effort to obtain from that court an order maintaining the status quo pending the outcome of the suit. Instead, the Assistant Attorney General in charge of the Antitrust Division suggested to the Commission that it stay its own proceedings until the antitrust suit had terminated. When this request was rejected by the Commission, the Antitrust Division withdrew from the Commission proceedings despite an express invitation from the Commission that it participate.

Hearings before the Commission's examiner were scheduled to begin on September 17, 1958, and the trial of the antitrust suit in the District Court was set for November 17, 1958. At a hearing on several pretrial matters held in the District Court on September 5 and 6, the Government, for the first time, moved for a temporary injunction to restrain the asset merger even if the Commission's approval were forthcoming.[1] That motion was denied and not renewed thereafter. The Commission's hearings began on September 17 and were recessed on September 26 until November 12.

El Paso again moved in the District Court for a continuance of the antitrust trial until after the Commission had passed on the merger application, and the Govern-

[1] The fact that such a motion was made and denied does not appear in the record before this Court. However, it is asserted in El Paso's brief and is not denied by any of the other parties.

ment once more asked the Commission to stay its proceedings pending the outcome of the antitrust case. While noting that the Government had refused the Commission's invitation to intervene in the merger proceedings, the Commission agreed to defer to the District Court. It notified the court that if El Paso's motion for a continuance of the trial were denied, the Commission would continue its merger proceeding to a later date. On October 13, 1958, the District Court issued an order granting El Paso's motion and continued the antitrust trial "until the final determination by the Federal Power Commission of the applications now pending before it." The Government has never sought to review this order by mandamus or by any other available means. The Commission subsequently held its hearings and authorized the merger of El Paso and Pacific in an order dated December 23, 1959. It is that order which the Court today in effect holds to have been entered without jurisdiction.

The Court relies on three "practical reasons" to support its perplexing conclusion that despite the Government's failure promptly to seek relief *pendente lite* in the antitrust suit, its failure to press for review of the denial of such relief when belatedly sought, and the Commission's expressed willingness to defer to the antitrust court, the Commission was nonetheless required to withhold approval of the merger application: (1) If the asset merger were approved and executed, and the stock purchase thereafter held to be illegal, an "unscrambling" involving "needless waste of time and money" would be necessary; (2) such an "unscrambling" would "raise complicated and perplexing problems on tax matters and otherwise"; (3) the Commission's approval of the asset merger "is bound to carry momentum into the antitrust suit." (*Ante*, pp. 488–489.) Whatever weight these considerations may be deemed to have, I think that "orderly proce-

dure" required their determination, at least in the first instance, by the antitrust court, if indeed they were not rejected by the District Court on the Government's 1958 motion to enjoin consummation of the merger. Their consideration by this Court as an original matter is entirely inappropriate, and in no event do any of them affect the *validity* of the Commission's order approving the merger.[2]

I.

Section 15 of the Clayton Act, 15 U. S. C. § 25, grants jurisdiction to the United States District Courts "to prevent and restrain violations" of the Clayton Act, and empowers the United States Attorneys "to institute proceedings in equity to prevent and restrain such violations." The same statutory section provides that pending determination of the merits of a complaint filed by the United States "and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises." Consequently, it is the duty of the District Court before which an antitrust suit is pending to pass on the desirability of temporary relief in order to avoid later problems of "unscrambling." In the case before us, it was not until more than a year after the Government knew of El Paso's intention to merge Pacific's assets with its own that it requested the District Court to enjoin the execution of

[2] Because of the posture of this case, I would not reach the question as to what weight should be given to the pendency of administrative merger proceedings by an antitrust court which is asked to grant interlocutory relief. However, I think more can be said than the Court does in favor of staying the hand of an antitrust court pending consideration by the appropriate agency of matters touching on "those areas . . . in which active regulation has been found necessary to compensate for the inability of competition to provide adequate regulation." *Federal Communications Comm'n* v. *RCA Communications, Inc.*, 346 U. S. 86, 92.

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this plan. The court's denial of the temporary injunction must be presumed to have been based on its evaluation of the likelihood of success of the antitrust suit and of the difficulties that might arise if interlocutory relief were denied. Not having renewed its motion, the Government may surely not revive it indirectly by attacking the Commission's order. Moreover, by what authority is petitioner, the State of California, an intervenor only in the Commission's proceedings, empowered to assert claims relating to the enforcement of the antitrust laws that are unavailable to the Government, the plaintiff in the antitrust action?

II.

Similarly, whatever is meant by the suggestion that the Commission's approval carries "momentum" into the antitrust suit, this factor is one that should be remedied, if necessary, by purging the antitrust proceedings of any improper influence deriving from the agency determination, not by invalidating the administrative action. The Court's holding—which is unnecessary to a decision of this case and, as the Government argues, also premature [3]—that the concluding proviso of § 7 of the Clayton Act gives the Commission's approval of this asset merger no immunizing effect against the antitrust claim, surely lends added support to the view that the agency is permitted to consider this application as it might consider any other which suggests no difficulties under the antitrust laws. If the Commission's approval is irrelevant to the merits of the Government's

[3] Whatever may be the impact on a § 7 action of the Commission's approval of this merger, it can be felt only in the antitrust suit. Consequently, I would, as the Solicitor General has suggested, leave this issue open for consideration in the District Court should the agency's order be asserted as a defense in that action.

antitrust suit, it is the court considering the antitrust claim which should guard itself against giving weight to this irrelevancy, not the Commission passing on the merger application. And if the lower courts should ultimately go wrong in this regard, their error would be correctible in this Court.

Likewise there is little substance to the difficulty which this Court finds in a court "undoing what was done" (*ante,* p. 489) by the Commission. Had the antitrust trial court been fearful on that score it could have entered an appropriate interlocutory order ensuring that nothing would be done while the litigation was pending.

III.

Finally, I do not think that the record in this case justifies a conclusion that the Commission's refusal to postpone consideration of the merger application amounted to an abuse of discretion. On the Court's premise that the agency's approval did not immunize the transaction from antitrust liability, the Commission's action in granting the certificate of public convenience and necessity did no more than *permit* the merger to be consummated subject to all possible antitrust infirmities. And even proceeding on the Commission's premise that the proviso of § 7 of the Clayton Act gives it the power to immunize mergers from antitrust liability, its decision to go ahead after being notified by the District Court that the motion to continue the antitrust suit had been granted could hardly be regarded as an abuse of discretion.

In conclusion, the Court's decision in this case creates a wholly artificial imbalance between antitrust law enforcement and administrative regulation with respect to federally regulated industries. By displacing the continuing supervision of a court over such interlocutory

terms as are "just in the premises" with an absolute rule prohibiting the regulating agency from considering applications relating to matters which are also involved in a pending antitrust suit, this decision seems to leave no room for sensible accommodation of the two sets of interests in a given instance. Neither the inflexible rule announced by the Court nor its decision on the facts of this case is supported by reason or authority.

I would affirm.

COMMISSIONER OF INTERNAL REVENUE *v.* BILDER, EXECUTRIX.

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

No. 384. Argued March 29, 1962.—Decided April 30, 1962.

Under § 213 of the Internal Revenue Code of 1954, a taxpayer who has been ordered by his physician to spend the winter months in Florida, as part of a regimen of medical treatments, may not deduct as an expense for "medical care" the rent paid for an apartment in Florida. Pp. 499–505.

289 F. 2d 291, reversed.

Stephen J. Pollak argued the cause for petitioner. On the briefs were *Solicitor General Cox, Assistant Attorney General Oberdorfer, I. Henry Kutz* and *Joseph Kovner.*

Martin D. Cohen argued the cause for respondent. With him on the briefs was *Louis J. Cohen.*

MR. JUSTICE HARLAN delivered the opinion of the Court.

This case concerns the deductibility as an expense for "medical care," under § 213 of the Internal Revenue Code of 1954, 26 U. S. C. § 213, of rent paid by a taxpayer for an apartment in Florida, where he was ordered by his physician, as part of a regimen of medical treatment, to spend the winter months.[1]

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[1] Section 213 of the 1954 Code allows as deductions in computing net income "the expenses paid during the taxable year, not compensated for by insurance or otherwise, for medical care of the taxpayer, his spouse, or a dependent . . . ." Subdivision (e)(1) defines such expenses as "amounts paid"—

"(A) for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function

The taxpayer, now deceased, was an attorney practicing law in Newark, New Jersey. In December 1953, when he was 43 years of age and had suffered four heart attacks during the previous eight years, he was advised by a heart specialist to spend the winter season in a warm climate. The taxpayer, his wife, and his three-year-old daughter proceeded immediately to Fort Lauderdale, Florida, where they resided for the ensuing three months in an apartment rented for $1,500. Two months of the succeeding winter were also spent in Fort Lauderdale in an apartment rented for $829.

The taxpayer claimed the two rental payments as deductible medical expenses in his 1954 and 1955 income tax returns. These deductions were disallowed in their entirety by the Commissioner.[2] The Tax Court reversed the Commissioner's determination to the extent of one-third of the deductions, finding that proportion of the total claimed attributable to the taxpayer's own living accommodations. The remaining two-thirds it attributed to the accommodations of his wife and child, whose presence, the Tax Court concluded, had not been shown to be necessary to the medical treatment of the taxpayer's illness. 33 T. C. 155.

On cross-appeals from the decision of the Tax Court, the Court of Appeals held, by a divided vote, that the full

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of the body (including amounts paid for accident or health insurance), or

"(B) for transportation primarily for and essential to medical care referred to in subparagraph (A)."

[2] The Commissioner concedes that the taxpayer's sojourn in Florida was not for vacation purposes but was "a medical necessity and . . . a primary part of necessary medical treatment of a disease" from which the taxpayer was suffering, *i. e.*, atherosclerosis. 33 T. C., at 157. The taxpayer also claimed in each of his tax returns a $250 deduction for his transportation between Newark and Fort Lauderdale. Although the Commissioner initially disallowed this deduction, he thereafter acquiesced in its allowance by the Tax Court.

rental payments were deductible as expenses for "medical care" within the meaning of § 213. 289 F. 2d 291. Because of a subsequent contrary holding by the Court of Appeals for the Second Circuit, *Carasso* v. *Commissioner,* 292 F. 2d 367, and the need for a uniform rule on the point, we granted certiorari to resolve the conflict. 368 U. S. 912.

The Commissioner concedes that prior to the enactment of the Internal Revenue Code of 1954 rental payments of the sort made by the taxpayer were recognized as deductible medical expenses. This was because § 23 (x) of the Internal Revenue Code of 1939, though expressly authorizing deductions only for "amounts paid for the diagnosis, cure, mitigation, treatment, or prevention of disease," [3] had been construed to include "travel primarily for and essential to . . . the prevention or alleviation of a physical or mental defect or illness," Treasury Regulations 111, § 29.23 (x)–1, and the cost of meals and lodging during such travel, I. T. 3786, 1946–1 Cum. Bull. 76. See, *e. g., Stringham* v. *Commissioner,* 12 T. C. 580, aff'd, 183 F. 2d 597; Rev. Rule 55–261, 1955–1 Cum. Bull. 307.

The Commissioner maintains, however, that it was the purpose of Congress, in enacting § 213 (e)(1)(A) of the 1954 Code, albeit in language identical to that used in § 23 (x) of the 1939 Code (compare notes 1 and 3, *supra*),

[3] Section 23 (x) was added to the Internal Revenue Code of 1939 by § 127 (a) of the Revenue Act of 1942, 56 Stat. 825. It provided, in pertinent part:

"[In computing net income there shall be allowed as deductions] . . . expenses paid during the taxable year, not compensated for by insurance or otherwise, for medical care of the taxpayer, his spouse, or a dependent . . . of the taxpayer. The term 'medical care,' as used in this subsection, shall include amounts paid for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body (including amounts paid for accident or health insurance)."

to deny deductions for all personal or living expenses incidental to medical treatment other than the cost of transportation of the patient alone, that exception having been expressly added by subdivision (B) to the definition of "medical care" in § 213 (e)(1). Note 1, *supra.*

We consider the Commissioner's position unassailable in light of the congressional purpose explicitly revealed in the House and Senate Committee Reports on the bill. These reports, anticipating the precise situation now before us, state:

> "Subsection (e) defines medical care to mean amounts paid for the diagnosis, cure, mitigation, treatment, or prevention of diseases or for the purpose of affecting any structure or function of the body (including amounts paid for accident or health insurance), or for transportation primarily for and essential to medical care. The deduction permitted for 'transportation primarily for and essential to medical care' *clarifies existing law* in that it specifically *excludes deduction of any meals and lodging while away from home receiving medical treatment.* For example, if a doctor prescribes that a patient must go to Florida in order to alleviate specific chronic ailments and to escape unfavorable climatic conditions which have proven injurious to the health of the taxpayer, and the travel is prescribed for reasons other than the general improvement of a patient's health, the cost of the patient's transportation to Florida would be deductible *but not his living expenses while there.* However, if a doctor prescribed an appendectomy and the taxpayer chose to go to Florida for the operation not even his transportation costs would be deductible. The subsection is not intended otherwise to *change* the existing definitions of medical care, to deny the cost of ordinary

> ambulance transportation nor to deny the cost of food or lodging provided as part of a hospital bill." H. R. Rep. No. 1337, 83d Cong., 2d Sess. A60 (1954); S. Rep. No. 1622, 83d Cong., 2d Sess. 219–220 (1954).[4] (Emphasis supplied.)

Since under the predecessor statute, as it had been construed, expenses for meals and lodging *were* deductible as expenses for "medical care," it may well be true that the Committee Reports spoke in part inartistically when they referred to subsection (e) as a mere clarification of "existing law," although it will be noted that the report also referred to what was being done as a *pro tanto* "change" in "the existing definitions of medical care." Yet Congress' purpose to exclude such expenses as medical deductions under the new bill is unmistakable in these authoritative pronouncements, *ibid.;* cf. Budget Message of the President for the Fiscal Year 1955, H. R.

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[4] The substance of the rule set forth in both Reports has been embodied in the Treasury Regulations interpreting § 213:

"(iv) Expenses paid for transportation primarily for and essential to the rendition of the medical care are expenses paid for medical care. However, an amount allowable as a deduction for 'transportation primarily for and essential to medical care' shall not include the cost of any meals and lodging while away from home receiving medical treatment. For example, if a doctor prescribes that a taxpayer go to a warm climate in order to alleviate a specific chronic ailment, the cost of meals and lodging while there would not be deductible. On the other hand, if the travel is undertaken merely for the general improvement of a taxpayer's health, neither the cost of transportation nor the cost of meals and lodging would be deductible. If a doctor prescribes an operation or other medical care, and the taxpayer chooses for purely personal considerations to travel to another locality (such as a resort area) for the operation or the other medical care, neither the cost of transportation nor the cost of meals and lodging (except where paid as part of a hospital bill) is deductible." Treasury Regulations on Income Tax (1954 Code) § 1.213–1 (e)(1)(iv).

Doc. No. 264, 83d Cong., 2d Sess. M17 (1954); Memorandum of Joint Committee on Internal Revenue Taxation, 1 Senate Hearings on the Internal Revenue Code of 1954, 83d Cong., 2d Sess. 24 (1954); Memorandum of the Under Secretary of the Treasury, *id.*, at 103. It is that factor which is of controlling importance here.[5]

We need not consider whether we would be warranted in disregarding these unequivocal expressions of legislative intent if the statute were so written as to permit no reasonable construction other than that urged on behalf of the taxpayer. Compare *Boston Sand & Gravel Co.* v. *United States,* 278 U. S. 41, 48; *United States* v. *Dickerson,* 310 U. S. 554, 561–562; *Harrison* v. *Northern Trust Co.,* 317 U. S. 476, 479. See also *Association of Westinghouse Salaried Employees* v. *Westinghouse Elec. Corp.,* 348 U. S. 437, 444. Even the initial decision of the Tax Court under the 1939 Code respecting the deductibility of similar expenses under § 23 (x) recognized that the language of that statute was "susceptible to a variety of conflicting interpretations," *Stringham* v. *Commissioner,* 12 T. C. 580, 583. The Tax Court's conclusion as to the meaning of § 23 (x) of the earlier statute which was affirmed by the Court of Appeals, 183 F. 2d 579, and acquiesced in by the Commissioner, necessarily rested on what emerged from a study of the legislative history of

[5] The explicitness of the Committee Reports renders it unnecessary to consider the Commissioner's alternative argument that the statute on its face precludes these deductions because (1) § 262 of the 1954 Code, 26 U. S. C. § 262, allows no deductions for "personal, living, or family expenses" "[e]xcept as otherwise expressly provided in this chapter," and (2) apart from the medical "transportation" expense provided in § 213 (e) (1) (B), no other *express* exception can be found in the statute. And the equitable considerations which the respondent brings to bear in support of her construction of § 213 are of course beside the point in this Court, since we must give the statute effect in accordance with the purpose so clearly manifested by Congress.

that enactment. So too the conclusion in this case, which turns on the construction of the identical words re-enacted as part of § 213, must be based on an examination of the legislative history of this provision of the 1954 Code. The Committee Reports foreclose any reading of that provision which would permit this taxpayer to take the rental payments for his Florida apartment as "medical care" deductions.

Reversed.

MR. JUSTICE DOUGLAS would affirm the judgment below for the reasons given by Judge Kalodner, 289 F. 2d 291.

MR. JUSTICE FRANKFURTER took no part in the decision of this case.

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

CARNLEY *v.* COCHRAN, CORRECTIONS DIRECTOR.

CERTIORARI TO THE SUPREME COURT OF FLORIDA.

No. 158. Argued February 20–21, 1962.—Decided April 30, 1962.

Petitioner, an illiterate, was tried in a Florida State Court without counsel and was convicted of serious noncapital offenses. The record was silent as to whether he had been offered and had waived counsel; but it clearly showed that he was incapable of conducting his own defense. *Held:*

1. Petitioner's case was one in which the assistance of counsel, unless intelligently and understandingly waived by him, was a right guaranteed him by the Fourteenth Amendment. Pp. 506–513.

2. Presuming waiver of counsel from a silent record is impermissible. To sustain a claim that counsel was waived, the record must show, or there must be an allegation and evidence which show, that the accused was offered counsel but intelligently and understandingly rejected the offer. Pp. 513–517.

123 So. 2d 249, reversed and cause remanded.

By appointment of the Court, 368 U. S. 806, *Harold A. Ward III* argued the cause and filed briefs for petitioner.

James G. Mahorner, Assistant Attorney General of Florida, argued the cause for respondent by special leave of Court, *pro hac vice.* With him on the brief was *Richard W. Ervin,* Attorney General.

Mr. Justice Brennan delivered the opinion of the Court.

The petitioner, who was not afforded the assistance of counsel for his defense at his trial, claims that, for this reason, his conviction by a jury in the Court of Record for Escambia County, Florida, deprived him of rights guaranteed by the Fourteenth Amendment. He obtained a provisional writ of habeas corpus from the Florida Supreme Court on his petition asserting that claim.

However, that court, on the petition, the respondent's return and the petitioner's reply—but without any hearing—discharged the writ. 123 So. 2d 249. Since an important constitutional right is involved, we granted certiorari and appointed counsel to represent the petitioner in this Court. 366 U. S. 958, 368 U. S. 806.

The assistance of counsel might well have materially aided the petitioner in coping with several aspects of the case. He was charged with the noncapital offenses of incestuous sexual intercourse with his 13-year-old daughter and, in a separate count relating to the same acts, fondling a minor child, that is, assault in a lewd, lascivious, and indecent manner, upon a female child under the age of 14. At the time of trial two sets of Florida criminal statutes contained language reaching such behavior. Sections 741.22 and 800.04, Florida Statutes, 1959, were general criminal provisions separately defining the two offenses of incest and assault in a lewd, lascivious, and indecent manner. In addition, both offenses were included within the later enacted Chapter 801 of the Florida Statutes—Florida's so-called Child Molester Act—if the victim was 14 years of age or younger.[1] The Florida Supreme Court

[1] Fla. Stat., 1959, § 741.22:

"Punishment for incest.—Persons within the degrees of consanguinity within which marriages are prohibited or declared by law to be incestuous and void, who intermarry or commit adultery or fornication with each other, shall be punished by imprisonment in the state prison not exceeding twenty years, or in the county jail not exceeding one year."

Fla. Stat., 1959, § 800.04:

"Lewd, lascivious or indecent assault or act upon or in presence of child.—Any person who shall handle, fondle or make an assault upon any male or female child under the age of fourteen years in a lewd, lascivious or indecent manner, or who shall knowingly commit any lewd or lascivious act in the presence of such child, without intent to commit rape where such child is female, shall be deemed guilty of

plainly conceived the petitioner's prosecution for both offenses as having been under the Child Molester Act. 123 So. 2d, at 250. While that is an obviously plausible view, a lawyer, but not a layman, might have perceived that because the Child Molester Act was invoked against the petitioner in respect of conduct elsewhere specifically defined as criminal, the 1954 decision of the Florida Supreme Court in *Copeland* v. *State,* 76 So. 2d 137, raised doubts, under the Florida Constitution, of the validity of a prosecution based on the Act.[2] The picture is further complicated by the fact that the Child Molester Act had included no reference to incest prior to an amendment made subsequent to the petitioner's alleged offense.[3]

Establishing the basis of the petitioner's prosecution was vitally important for the protection of his rights. If the Child Molester Act was validly applied against the

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a felony and punished by imprisonment in the state prison or county jail for not more than ten years."

Fla. Stat., 1959, § 801.02:

"Definitions.—An offense under the provisions of this chapter shall include attempted rape, sodomy, attempted sodomy, crimes against nature, attempted crimes against nature, lewd and lascivious behavior, incest and attempted incest, assault (when a sexual act is completed or attempted) and assault and battery (when a sexual act is completed or attempted), when said acts are committed against, to or with a person fourteen years of age or under."

[2] In the *Copeland* case, *supra,* the Florida Supreme Court held that the inclusion of rape in the Child Molester Act—with its attendant alteration in the consequences of that offense when committed against a child of 14 or younger—ran afoul of the State Constitution because the Act embraced 11 distinct crimes separately dealt with in other statutes, because the Act failed to set forth at length the general rape provisions which were *pro tanto* amended, and because the title of the Act failed to give notice that the consequences of rape had been changed. But see *Buchanan* v. *State,* 111 So. 2d 51, in which the District Court of Appeal upheld the Child Molester Act as applied to lewd and lascivious conduct.

[3] Florida Laws, E. S. 1957, c. 57–1990.

petitioner, counsel could have materially assisted him by invoking on his behalf the special provisions of that law governing the disposition of defendants charged under it. Sections 741.22 and 800.04 authorize only jail sentences. In contrast, the Child Molester Act empowers the sentencing judge in a proper case to commit the convicted defendant to a Florida state hospital for treatment and rehabilitation.[4] That law also permits the accused to

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[4] Fla. Stat., 1959, § 801.03 (1):

"Powers and duties of judge after convictions.—

"(1) When any person has been convicted of an offense within the meaning of this chapter, it shall be within the power and jurisdiction of the trial judge to:

"(a) Sentence said person to a term of years not to exceed twenty-five years in the state prison at Raiford.

"(b) Commit such person for treatment and rehabilitation to the Florida state hospital, or to the hospital or the state institution to which he would be sent as provided by law because of his age or color provided the hospital or institution possesses a maximum security facility as prescribed by the board of commissioners of state institutions. When, as provided for in this law, there shall have been created and established a Florida research and treatment center then the trial judge shall, instead of committing a person to the Florida state hospital, commit such person instead to the Florida research and treatment center. In any such case the court may, in its discretion, stay further criminal proceedings or defer the imposition of sentence pending the discharge of such person from further treatment in accordance with the procedure as outlined in this chapter."

Fla. Stat., 1959, § 801.08:

"Execution of judgment may be suspended; probation; requirements.—

"(1) The trial judge under whose jurisdiction a conviction is obtained may suspend the execution of judgment and place the defendant upon probation.

"(2) The trial court placing a defendant on probation may at any time revoke the order placing such defendant on probation and impose such sentence or commitment as might have been imposed at the time of conviction. [*Footnote 4 continued on p. 510*]

petition for a psychiatric or psychological examination for the purpose of assisting the court in the trial of the case.[5]

There are thus present considerations of a sort often deemed sufficient to require the conclusion that a trial for crime without defense counsel did not measure up to the requirements of the Fourteenth Amendment. See, *e. g., Chewning* v. *Cunningham,* 368 U. S. 443, 446–447; *Reynolds* v. *Cochran,* 365 U. S. 525, 531–532; *McNeal* v. *Culver,* 365 U. S. 109, 114–116; *Rice* v. *Olson,* 324 U. S. 786, 789–791.

Other aspects of this record also support petitioner's claim of the unfairness of trying him without affording him the help of a lawyer. As must generally be the case, the trial judge could not effectively discharge the roles of both judge and defense counsel. Here the record shows that the trial judge made efforts to assist the petitioner, but there were important omissions in the guidance he gave. He did not fully apprise the petitioner of vital

"(3) No defendant shall be placed on probation or continue on probation until the court is satisfied that the defendant will take regular psychiatric, psychotherapeutic or counseling help, and the individual helping the defendant shall make written reports at intervals of not more than six months to the court and the probation officer in charge of the case. The costs, fees and charges for treatment of a defendant on probation shall not be a charge of the county where the defendant was tried."

[5] Fla. Stat., 1959, § 801.10:

"Examination; petition for, court order.—When any person is charged with an offense within the purview of this chapter, said person may petition the court for a psychiatric and psychological examination as heretofore set out and the written report shall be filed with the clerk of the court having jurisdiction of the offense for the purpose of assisting the court in the trial of the case. The court may, of its own initiative, or upon petition of an interested person, order such examination and report as heretofore set out."

procedural rights of which laymen could not be expected to know but to which defense counsel doubtless would have called attention. The omissions are significant. See, *e. g., Cash* v. *Culver,* 358 U. S. 633, 637–638; *Gibbs* v. *Burke,* 337 U. S. 773, 776–778; *Hudson* v. *North Carolina,* 363 U. S. 697, 702–703. Despite the allegation in respondent's return that "the petitioners were carefully instructed by the trial court with regard to the rights guaranteed by both the *Constitution of Florida* and the *Constitution of the United States*[6] and with regard to the procedures to be followed during the course of the trial," it appears that, while petitioner was advised that he need not testify, he was not told what consequences might follow if he did testify. He chose to testify and his criminal record was brought out on his cross-examination. For defense lawyers, it is commonplace to weigh the risk to the accused of the revelation on cross-examination of a prior criminal record, when advising an accused whether to take the stand in his own behalf; for petitioner, the question had to be decided in ignorance of this important consideration. Nor does it appear that the trial judge advised the petitioner of his right to examine prospective jurors on *voir dire,* or of his right to submit proposed instructions to the jury, or of his right to object to the instructions that were given.

Other circumstances attending this case only serve to accentuate the unfairness of trial without counsel. Petitioner is illiterate. He did not interpose a single objection during the trial. The only two witnesses against him were his daughter and a 15-year-old son. Although both petitioner and his wife testified that they had experienced disciplinary problems with the children, and thus clearly revealed a possibly significant avenue for impeachment of

[6] Emphasis in original.

the children's testimony, there was no cross-examination worthy of the name.[7]

We hold that petitioner's case was one in which the assistance of counsel, unless intelligently and understand-

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[7] The wife testified: "We tried to be firm with them, but it seemed like the more firm we got, these two older kids, they couldn't stand the pressure, so they would, every time that their Daddy would get after them or something or other about some of their doings, well, that oldest boy would say, 'Well, Daddy, you will sure regret it. I will get even with you one way or the other,' and also the girl would get mad and flirtified and she would almost have the same opinion."

The entire cross-examination of both witnesses by petitioner and by his wife, who was a codefendant, is as follows:

"CROSS EXAMINATION BY MR. WILLARD CARNLEY:

"Q. Carol Jean, you say your mother, she went and made arrangements to get the casket for your sister?

"A. Yes.

"Q. You are right sure now that she did?

"A. I am sure.

"Q. Well, I will tell the Court, my wife was out at Mr. Joe Gayfer's house—

"THE COURT: Wait a minute, sir, you are testifying. You will have a chance to testify when the State rests. Any questions you wish to ask your daughter, you are welcome to do it.

"CROSS EXAMINATION BY MRS. PEARL CARNLEY:

"Q. Carol Jean, don't you recall after you got age of maturity that Mother tried to tell you right from wrong and always teach you right from wrong?

"A. Yes, you have taught me right from wrong.

"THEREUPON the witness was excused."

"CROSS EXAMINATION BY MRS. CARNLEY:

"Q. J. W., at this period of time, did you realize whenever we was up there at Century of your Dad's sickness from the time we moved up there until it was springtime, and after he was sick from his stomach that he taken a serious attack down by reason of his employment?

"A. Yes, I realize he said he was sick. He was supposed to be sick. I know that.

"THEREUPON the witness was excused."

ingly waived by him, was a right guaranteed him by the Fourteenth Amendment.

We must therefore consider whether the petitioner did intelligently and understandingly waive the assistance of counsel. The record does not show that the trial judge offered and the petitioner declined counsel. Cf. *Moore* v. *Michigan,* 355 U. S. 155, 160–161. Nevertheless, the State Supreme Court imputed to petitioner the waiver of the benefit of counsel on a ground stated in the court's opinion as follows: "If the record shows that defendant did not have counsel . . . , it will be presumed that defendant waived the benefit of counsel . . . ." 123 So. 2d, at 251. This might mean that the petitioner could have suffered no constitutional deprivation if he had not formally requested counsel, and that failure to make such a request is to be presumed unless the record shows the contrary. But it is settled that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request.[8] In *McNeal* v. *Culver, supra,* the petitioner's allegation that he had requested counsel was countered by a denial in the return that "petitioner's constitutional rights were violated by the court's alleged refusal to appoint counsel in his behalf," and the State Supreme Court noted that the record was silent as to any request. We held that when the Constitution grants protection against criminal proceedings without the assistance of counsel, counsel must be furnished "whether or not the accused requested the appointment of counsel. *Uveges* v. *Pennsylvania,* 335 U. S. 437, 441." 365 U. S., at 111, n. 1. See *Rice* v. *Olson, supra,* at 788; *Gibbs* v. *Burke, supra,* at 780.

[8] For this reason, there is no occasion to hold a hearing in this case to settle the fact issue raised by the petition and return as to whether the petitioner requested counsel.

However, the Florida Supreme Court may not have meant that the constitutional right to counsel depends upon a formal request. The court may have meant that from the very fact that no counsel was present, it would be assumed that the trial judge made an offer of counsel which the petitioner declined.[9] Or, it may have meant that it would assume simply that petitioner knew of his right to counsel and was willing to forego it. Of course, the validity of such presumptions is immediately called in question because the accused has no way of protecting against them during his trial except by requesting counsel—a formality upon which we have just said his right may not be made to depend. Nor is it an answer to say that he may counter such presumptions on collateral attack by showing—if he can—that he had not in fact agreed, or been willing, to be tried without counsel. To cast such a burden on the accused is wholly at war with the standard of proof of waiver of the right to counsel which we laid down in *Johnson* v. *Zerbst*, 304 U. S. 458, 464–465:

> "It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.'
>
> . . . . . .
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> "The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without counsel. This protecting duty imposes the serious and weighty

[9] Or that the trial judge was justified in believing that the accused knew perfectly well of his right to counsel, and that it was unnecessary to make an explicit offer and to secure the accused's rejection of the offer.

> responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record."

We have held the principles declared in *Johnson* v. *Zerbst* equally applicable to asserted waivers of the right to counsel in state criminal proceedings. In *Rice* v. *Olson, supra,* the petitioner had pleaded guilty to a burglary charge. He did not claim that he had requested counsel, but alleged that he had not been advised of his right to the assistance of counsel and that he had not waived that right. In affirming the denial of relief, the State Supreme Court wrote that " 'It is not necessary that there be a formal waiver; and a waiver will ordinarily be implied where accused appears without counsel and fails to request that counsel be assigned to him, particularly where accused voluntarily pleads guilty.' " We held that even when there had been a guilty plea such an implication, treated as a conclusive presumption, was "inconsistent with our interpretation of the scope of the Fourteenth Amendment," and that "A defendant who pleads guilty is entitled to the benefit of counsel, and a request for counsel is not necessary." 324 U. S., at 788. However, we recognized in *Rice* v. *Olson* that, although the Fourteenth Amendment would not countenance any presumption of waiver from the appearance of the accused without counsel and the silence of the record as to a request, the entry of the guilty plea might have raised a fact issue as to whether the accused did not intelligently and understandingly waive his constitutional right. We held that a hearing was required since the facts were in

dispute. In the present case, however, there was no guilty plea, and the return to the writ does not allege an affirmative waiver.[10] Therefore, there is no disputed fact question requiring a hearing. Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver.

Neither *Bute* v. *Illinois*, 333 U. S. 640, nor *Moore* v. *Michigan, supra,* is in any way inconsistent with our holding and disposition here. In *Bute,* in which the petitioner pleaded guilty without having requested counsel, it was alleged that he had not been advised of his right to counsel. The Court held that there had been no denial of a constitutional right, but it expressly disclaimed a waiver rationale. It decided simply that the nature of the charge and the circumstances attending the reception of the guilty plea, as recited in that record, were not such as to call into play any constitutionally protected right to counsel. In *Moore,* the record showed clearly that the petitioner had expressly declined an offer of counsel by the trial judge, and we held that the accused had to show by a preponderance of the evidence that his acquiescence was not sufficiently understanding and intelligent to amount to an effective waiver. But no such burden can be imposed upon an accused unless the record—or a hear-

[10] Petitioner's allegation that he requested counsel is, obviously, tantamount to a denial of waiver. The return's denial of a request is not, however, for reasons already canvassed, the equivalent of an allegation of waiver.

The return alleged that the trial judge instructed petitioner as to his constitutional rights, but this allegation claimed support in the transcript, inspection of which reveals no instruction as to any constitutional right except the right not to testify.

ing, where required—reveals his affirmative acquiescence. Where, as in this case, the constitutional infirmity of trial without counsel is manifest, and there is not even an allegation, much less a showing, of affirmative waiver, the accused is entitled to relief from his unconstitutional conviction.

The judgment of the Florida Supreme Court is reversed and the cause is remanded for proceedings not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE HARLAN concurs in the result.

MR. JUSTICE FRANKFURTER took no part in the decision of this case.

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

MR. JUSTICE BLACK, concurring.

I concur in the Court's judgment of reversal and agree for the reasons stated in its opinion that petitioner was, even under the constitutional doctrine announced in *Betts* v. *Brady,* 316 U. S. 455, entitled to be represented by counsel. That case, decided in 1942, held that an indigent defendant charged with crime in a state court did not have a right under the Federal Constitution to be provided with counsel unless this Court could say "by an appraisal of the totality of facts in a given case" that the refusal to provide counsel for the particular defendant constituted "a denial of fundamental fairness, shocking to the universal sense of justice . . . ." *Id.,* at 462. I dissented from the Court's denial of counsel and its announcement of what I considered to be such an impossibly vague and unpredictable standard. Among other

grounds I thought the defendant in that case entitled to counsel because of my belief that the Fourteenth Amendment makes applicable to the States the Sixth Amendment's guarantee that "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence." That is still my view.

Twenty years' experience in the state and federal courts with the *Betts* v. *Brady* rule has demonstrated its basic failure as a constitutional guide. Indeed, it has served not to guide but to confuse the courts as to when a person prosecuted by a State for crime is entitled to a lawyer. Little more could be expected, however, of a standard which imposes upon courts nothing more than the perplexing responsibility of appointing lawyers for an accused when a trial judge believes that a failure to do so would be "shocking to the universal sense of justice." To be sure, in recent years this Court has been fairly consistent in assuring indigent defendants the right to counsel. As the years have gone on we have been compelled even under the *Betts* rule to reverse more and more state convictions either for new trial or for hearing to determine whether counsel had been erroneously denied [1]—a result that in my judgment is due to a growing recognition of the fact that our Bill of Rights is correct in assuming that no layman should be compelled to defend himself in a criminal

[1] *Chewning* v. *Cunningham,* 368 U. S. 443; *Hamilton* v. *Alabama,* 368 U. S. 52; *McNeal* v. *Culver,* 365 U. S. 109; *Hudson* v. *North Carolina,* 363 U. S. 697; *Cash* v. *Culver,* 358 U. S. 633; *Moore* v. *Michigan,* 355 U. S. 155; *Herman* v. *Claudy,* 350 U. S. 116; *Massey* v. *Moore,* 348 U. S. 105; *Gibbs* v. *Burke,* 337 U. S. 773; *Uveges* v. *Pennsylvania,* 335 U. S. 437; *Townsend* v. *Burke,* 334 U. S. 736; *Wade* v. *Mayo,* 334 U. S. 672; *Marino* v. *Ragen,* 332 U. S. 561; *De Meerleer* v. *Michigan,* 329 U. S. 663; *Tomkins* v. *Missouri,* 323 U. S. 485; *Williams* v. *Kaiser,* 323 U. S. 471. But cf. *Quicksall* v. *Michigan,* 339 U. S. 660; *Gryger* v. *Burke,* 334 U. S. 728; *Bute* v. *Illinois,* 333 U. S. 640; *Foster* v. *Illinois,* 332 U. S. 134.

prosecution. But all defendants who have been convicted of crime without the benefit of counsel cannot possibly bring their cases to us. And one need only look at the records of the right-to-counsel cases since *Betts* v. *Brady* in both state and federal courts to understand the capriciousness with which the "shocking to the universal sense of justice" standard bestows its protection upon persons accused of crime.[2] I think that now is the time to abandon this vague, fickle standard for determining the right to counsel of a person prosecuted for crime in a state court. We can do that by recognizing that defendants in state courts have by reason of the Fourteenth Amendment the same unequivocal right to counsel as defendants in federal courts have been held to have by virtue of the Sixth Amendment. *Johnson* v. *Zerbst,* 304 U. S. 458. For these and many other reasons, including those set out in *McNeal* v. *Culver,* 365 U. S. 109, 117, by MR. JUSTICE DOUGLAS and joined in by MR. JUSTICE BRENNAN, I would overrule *Betts* v. *Brady* in this case. In so doing we would simply return to the holding of this Court in *Powell* v. *Alabama,* 287 U. S. 45, 68–69, where it was stated with reference to prosecution for crime in the state courts that the ". . . right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." I am aware that this statement was made in a capital case, but the Fourteenth Amend-

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[2] Compare, *e. g., Flansburg* v. *Kaiser,* 55 F. Supp. 959, aff'd on other grounds, 144 F. 2d 917, with *Powell* v. *Alabama,* 287 U. S. 45; *Parker* v. *Ellis,* 258 F. 2d 937, with *Massey* v. *Moore,* 348 U. S. 105; *Henderson* v. *Bannan,* 256 F. 2d 363, with *United States ex rel. Savini* v. *Jackson,* 250 F. 2d 349. Numerous other examples could of course be cited including the contrast between the decisions cited in note 1 and the lower court decisions which they reversed which had held that the denial of counsel had not been erroneous under the *Betts* v. *Brady* rule.

ment protects life, liberty, and property and I would hold that defendants prosecuted for crime are entitled to counsel whether it is their life, their liberty, or their property which is at stake in a criminal prosecution.

THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS, while joining the opinion of the Court, also join this opinion.

MR. JUSTICE DOUGLAS, concurring.

While I join the opinion of the Court and the separate opinion of MR. JUSTICE BLACK, I wish to add a word to the reasons MR. JUSTICE BRENNAN and I gave in *McNeal* v. *Culver,* 365 U. S. 109, 117–119, for overruling *Betts* v. *Brady,* 316 U. S. 455.

Petitioner, an admitted illiterate,* was forced to try his case to a six-man jury. There is no record of the proceedings at which the jury was impaneled. There is nothing to show that petitioner was told of his right to challenge individual veniremen, or the panel as a whole, or that he challenged anyone for cause or exercised any of the six peremptory challenges granted him by Florida law. Fla. Stat., 1959, § 913.08.

It is certain that he could have made no challenge to the panel as a whole. Such challenge must be in writing,

*The Florida Supreme Court denied petitioner's application for a writ of habeas corpus without a hearing. With respect to the allegation that both petitioner and his wife were illiterate and unable to defend themselves, the court admitted that the record showed conclusively that they were in fact illiterate. It concluded, however, that illiteracy alone did not necessarily import ignorance of the ordinary things of life, such as how to get money from a bank. Apparently classifying the conduct of a defense to a felony charge as one of the "commonplace things of life," the court concluded there was no showing petitioner or his wife "suffered in the slightest from lack of intelligence." 123 So. 2d 249, 251. (Petitioner's wife joined in the proceedings below, but is not a party to the petition for certiorari.)

Fla. Stat., 1959, § 913.01, and the Florida Supreme Court tells us he could not write. But even if he could, it is doubtful that he would have been able to show an improper method of selection or even discrimination, because he was confined for a lengthy period prior to trial, five months of which were alleged to have been spent in solitary confinement. He did not have an opportunity, therefore, to gather the factual evidence necessary to sustain a possible challenge to the panel. The Florida statute, moreover, explicitly requires that the written challenge specify the facts on which it is based. *Ibid.*

Had petitioner been able to write, and had he access to the facts, he still would not, in all probability, have been able to build a legal argument sufficient to challenge the panel. He is a man of low intelligence. Some of the grounds for challenging the panel that might have been invoked by petitioner turn on difficult questions of state law, as where it is alleged that the legislature has passed a special, or local, law providing for the summoning and impaneling of grand and petit jurors. Article III, § 20, of the Florida Constitution prohibits such "special" laws. It is not always clear, though, whether a particular law is "special" or "general." See, *e. g., Hysler* v. *State,* 132 Fla. 200, 181 So. 350; 132 Fla. 209, 181 So. 354; *State* v. *Pearson,* 153 Fla. 314, 14 So. 2d 565. The sophisticated nature of the arguments necessary to attack a law as "special" would almost always be beyond the comprehension of one unlearned in the law.

In Florida, a plea of abatement is the usual manner of testing the legality of a jury list. In some cases, a proceeding in mandamus has been deemed a proper remedy, as where it is claimed that the county commissioners have erred in the manner in which they selected the panel. *Jackson* v. *Jordan,* 101 Fla. 616, 135 So. 138. Often a simple oral challenge to an individual juror can achieve just as much, as where an accused contends a venireman

does not have the "qualifications required by law." Fla. Stat., 1959, § 913.03 (1). Yet obviously an illiterate cannot be expected to know these niceties of criminal procedure.

Assuming that an accused does decide to challenge prospective veniremen, either peremptorily or for cause, he must then decide how to secure the maximum benefit from his peremptory challenges. Florida statutes provide at least 12 independent grounds for a challenge for cause. Fla. Stat., 1959, § 913.03. Ignorance of a ground for challenge is no defense. *Denmark* v. *State,* 43 Fla. 182, 31 So. 269; *McNish* v. *State,* 47 Fla. 69, 36 So. 176; *Webster* v. *State,* 47 Fla. 108, 36 So. 584. Objections to qualifications of jurors not raised at the trial will not be considered on appeal. *McNish* v. *State, supra; Crosby* v. *State,* 90 Fla. 381, 106 So. 741.

Where the trial court excuses a juror on its own motion, the accused has a right to object. The objection must be timely made, and the grounds therefor clearly stated. It is too late to object once the juror has been excused. *Ellis* v. *State,* 25 Fla. 702, 6 So. 768. On appeal, the accused must be able to show that the action of the court was prejudicial, or constituted an abuse of discretion. *Williams* v. *State,* 45 Fla. 128, 34 So. 279; *Peadon* v. *State,* 46 Fla. 124, 35 So. 204.

The special difficulties facing an accused in a jury trial do not end with challenges to the panel or individual jurors. Florida prohibits the trial judge from commenting on the weight of the evidence, *Lester* v. *State,* 37 Fla. 382, 20 So. 232; *Leavine* v. *State,* 109 Fla. 447, 147 So. 897; *Seward* v. *State,* 59 So. 2d 529, or from expressing an opinion that the accused should be convicted, *Wood* v. *State,* 31 Fla. 221, 12 So. 539, lest he influence the jury in its decision. But if he did make such comment, and the accused took no exception, the error will be deemed waived on appeal (*Surrency* v. *State,* 48 Fla. 59, 37 So.

575; *Smith* v. *State,* 65 Fla. 56, 61 So. 120), except where the interests of justice would not be served. *Kellum* v. *State,* 104 So. 2d 99 (Fla. Ct. App. 3d Dist.).

Hearsay evidence takes on added importance in jury trials. It is excluded if prejudicial. *Owens* v. *State,* 65 Fla. 483, 62 So. 651; *Alvarez* v. *State,* 75 Fla. 286, 78 So. 272. But if admitted without objection, it is generally regarded as having been received by consent. *Sims* v. *State,* 59 Fla. 38, 52 So. 198. An objection after a question has been answered is sometimes held to come too late. *Schley* v. *State,* 48 Fla. 53, 37 So. 518; *Williams* v. *State,* 58 Fla. 138, 50 So. 749; *Sims* v. *State, supra.* Yet a motion to strike may achieve the same result. *Dickens* v. *State,* 50 Fla. 17, 38 So. 909. In a rapid-fire exchange of questions and answers by the prosecution and a witness, a defendant without the assistance of counsel will oftentime find himself helpless to object or even to conceive grounds on which an objection to hearsay will lie. Indeed, what constitutes hearsay is itself a difficult question, on which judges may not always agree. See, *e. g.,* *Royal* v. *State,* 127 Fla. 320, 170 So. 450.

Once the evidence is in, an accused in Florida has the right to have the jury instructed on the law of the case before any final arguments are made. "The Judge's charge following immediately upon the conclusion of the evidence may enable the jury to obtain a clearer and more accurate conception of their duties in the particular case than if they were required to wait until after the argument of counsel to hear the law of the case from the judge." *Smithie* v. *State,* 88 Fla. 70, 76, 101 So. 276, 278. This right is waived by a failure to take exception to the procedure adopted by the court. Defects in the instructions of the court will likewise be deemed waived, where the accused fails to make timely objection. *White* v. *State,* 122 So. 2d 340 (Fla. Ct. App. 2d Dist.); *Williams* v. *State,* 117 So. 2d 473.

Intricate procedural rules are not restricted to criminal trials in Florida. Similar rules, equally as complex and confusing to the layman, may be found in the criminal statutes of the other States. I assume that they might not be applied with the same vigor against a layman defending himself, as they would against one represented by a lawyer. Yet even so, the rule of *Betts* v. *Brady* projected in a jury trial faces a layman with a labyrinth he can never understand nor negotiate.

As a result, the jury system—pride of the English-speaking world—becomes a trap for the layman because he is utterly without ability to make it serve the ends of justice.

FRIEDBERG *v.* SILBERGLITT, WARDEN.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 777. Decided April 30, 1962.

Appeal dismissed for want of a substantial federal question.

Gilbert S. Rosenthal for appellant.

Frank S. Hogan and *H. Richard Uviller* for appellee.

PER CURIAM.

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

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

EAGLE ET AL. *v.* BENNETT, WARDEN.

APPEAL FROM THE DISTRICT COURT OF LEE COUNTY, IOWA.

No. 687, Misc. Decided April 30, 1962.

Appeal dismissed; 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.

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

SIMPSON, DOING BUSINESS AS MID-SEVEN TRANSPORTATION CO., *v.* UNITED STATES ET AL.

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

No. 748. Decided April 30, 1962.

200 F. Supp. 372, affirmed.

D. C. Nolan for appellant.

Solicitor General Cox, Assistant Attorney General Loevinger, Lionel Kestenbaum, Robert W. Ginnane and *Francis A. Silver* for the United States and the Interstate Commerce Commission, appellees.

PER CURIAM.

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

THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS are of the opinion that probable jurisdiction should be noted.

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

VAUGHAN *v.* ATKINSON ET AL.

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

No. 323. Argued March 22, 1962.—Decided May 14, 1962.

Petitioner, a seaman, was discharged from respondents' ship at the end of a voyage, and the master gave him a certificate to enter a Public Health Service Hospital, which admitted him as an inpatient, treated him for suspected tuberculosis for several weeks and then treated him as an outpatient for over two years before declaring him fit for duty. When he was admitted to outpatient status, petitioner sent the shipowner an abstract of his medical record and requested payment for maintenance and cure; but his request was not complied with, and he worked as a taxi driver to support himself while receiving outpatient treatment. Finally he employed counsel and brought this suit in admiralty to recover (a) maintenance and cure, and (b) damages for failure to pay for maintenance and cure. The District Court awarded him maintenance, minus the amount of his earnings as a taxi driver, but denied him damages. *Held:*

1. On the record in this case, petitioner was entitled to reasonable counsel fees as damages for failure to pay for maintenance. Pp. 530–531.

2. On the record in this case, petitioner was entitled to pay for maintenance without deduction of the amount of his earnings as a taxi driver. Pp. 531–534.

291 F. 2d 813, reversed.

Jacob L. Morewitz argued the cause and filed a brief for petitioner.

Walter B. Martin, Jr. argued the cause for respondents. With him on the brief was *Barron F. Black.*

Opinion of the Court by MR. JUSTICE DOUGLAS, announced by MR. JUSTICE BRENNAN.

This is a suit in admiralty brought by a seaman to recover (a) maintenance and cure and (b) damages for

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failure to pay maintenance and cure.[1] The District Court, while disallowing the claim for damages, granted maintenance, less any sums earned by the libellant during the period in question. 200 F. Supp. 802. The Court of Appeals affirmed, Chief Judge Sobeloff dissenting. 291 F. 2d 813. The case is here on a writ of certiorari. 368 U. S. 888.

Libellant served on respondents'[2] vessel from November 26, 1956, to March 2, 1957, when he was discharged on termination of a voyage. On March 7, 1957, he reported to a United States Public Health Service Hospital for examination and was admitted on March 18, 1957, as an inpatient, and treated for suspected tuberculosis. On June 6, 1957, he was discharged to an outpatient status and he remained in that status for over two years. On August 25, 1959, he was notified that he was fit for duty as of August 19, 1959.

The hospital records show a strong probability of active tuberculosis. The Master furnished libellant a certificate to enter the hospital on his discharge, March 2, 1957. Though libellant forwarded to the owner's agent an abstract of his clinical record at the hospital in 1957, the only investigation conducted by them was an interrogation of the Master and Chief Engineer, who stated that the libellant had never complained of any illness during his four months' service. The owner made no effort to make any further investigation of libellant's claim for maintenance and cure, and according to the findings did not bother even to admit or deny the validity

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[1] Claims for damages for the illness and for wages, disallowed below, are not presented here.

[2] The owner was American Waterways Corp., and National Shipping & Trading Corp. was its agent, both being respondents. Respondent Atkinson was the Master.

of that claim. Nearly two years passed during which libellant was on his own. Ultimately he was required to hire an attorney and sue in the courts to recover maintenance and cure, agreeing to pay the lawyer a 50% contingent fee. Even so, the District Court held that no damages for failure to furnish maintenance and cure had been shown. In its view such damages are payable not for attorney's fees incurred but only when the failure to furnish maintenance and cure caused or aggravated the illness or other physical or mental suffering.

The District Court first allowed maintenance at the rate of $8 a day from June 6, 1957, to February 18, 1959. Since libellant during that period had worked as a taxi driver, the District Court ordered that his earnings be deducted from the amount owed by respondents. Subject to that credit, the order also provided that maintenance at $8 per day be continued until such time as the libellant reached the maximum state of recovery. The District Court allowed in addition 6% interest for each week's maintenance unpaid. Subsequently the District Court extended the maintenance to cover the period from March 7, 1957, to March 17, 1957, and from February 18, 1959, through August 25, 1959, these later awards being without interest.

The Court of Appeals denied counsel fees as damages, relying on the conventional rule that in suits for breach of contract the promisee is not allowed that item in computing the damages payable by the promisor. And the Court of Appeals, following *Wilson* v. *United States,* 229 F. 2d 277, and *Perez* v. *Suwanee S. S. Co.,* 239 F. 2d 180, from the Second Circuit, held that a seaman has the duty to mitigate damages and that since "the purpose of maintenance and cure is to make the seaman whole," "he will get something more than he is entitled to" unless his

earnings during the period are deducted. 291 F. 2d, at 814, 815.

We disagree with the lower courts on both points.

I.

Equity is no stranger in admiralty; admiralty courts are, indeed, authorized to grant equitable relief. See *Swift & Co.* v. *Compania Caribe,* 339 U. S. 684, 691–692, where we said, "We find no restriction upon admiralty by chancery so unrelenting as to bar the grant of any equitable relief even when that relief is subsidiary to issues wholly within admiralty jurisdiction."

Counsel fees have been awarded in equity actions, as where Negroes were required to bring suit against a labor union to prevent discrimination. *Rolax* v. *Atlantic Coast Line R. Co.,* 186 F. 2d 473, 481. As we stated in *Sprague* v. *Ticonic Bank,* 307 U. S. 161, 164, allowance of counsel fees and other expenses entailed by litigation, but not included in the ordinary taxable costs regulated by statute, is "part of the historic equity jurisdiction of the federal courts." We do not have here that case. Nor do we have the usual problem of what constitutes "costs" in the conventional sense. Cf. *The Baltimore,* 8 Wall. 377. Our question concerns damages. Counsel fees were allowed in *The Apollon,* 9 Wheat. 362, 379, an admiralty suit where one party was put to expense in recovering demurrage of a vessel wrongfully seized. While failure to give maintenance and cure may give rise to a claim for damages for the suffering and for the physical handicap which follows (*The Iroquois,* 194 U. S. 240), the recovery may also include "necessary expenses." *Cortes* v. *Baltimore Insular Line,* 287 U. S. 367, 371.

In the instant case respondents were callous in their attitude, making no investigation of libellant's claim and

by their silence neither admitting nor denying it. As a result of that recalcitrance, libellant was forced to hire a lawyer and go to court to get what was plainly owed him under laws that are centuries old. The default was willful and persistent. It is difficult to imagine a clearer case of damages suffered for failure to pay maintenance than this one.[3]

II.

Maintenance and cure is designed to provide a seaman with food and lodging when he becomes sick or injured in the ship's service; and it extends during the period when he is incapacitated to do a seaman's work and continues until he reaches maximum medical recovery. The policy underlying the duty was summarized in *Calmar S. S. Corp.* v. *Taylor,* 303 U. S. 525, 528:

> "The reasons underlying the rule, to which reference must be made in defining it, are those enumerated in the classic passage by Mr. Justice Story in *Harden* v. *Gordon,* Fed. Cas. No. 6047 (C. C.): the protection of seamen, who, as a class, are poor, friendless and improvident, from the hazards of illness and abandonment while ill in foreign ports; the inducement to masters and owners to protect the safety and health of seamen while in service; the maintenance of a merchant marine for the commercial service and maritime defense of the nation by inducing men to accept employment in an arduous and perilous service."

Admiralty courts have been liberal in interpreting this duty "for the benefit and protection of seamen who are

[3] Whether counsel fees in the amount of 50% of the award are reasonable is a matter on which we express no opinion, as it was not considered by either the District Court or the Court of Appeals.

its wards." *Id.*, at 529. We noted in *Aguilar* v. *Standard Oil Co.*, 318 U. S. 724, 730, that the shipowner's liability for maintenance and cure was among "the most pervasive" of all and that it was not to be defeated by restrictive distinctions nor "narrowly confined." *Id.*, at 735. When there are ambiguities or doubts, they are resolved in favor of the seaman. *Warren* v. *United States*, 340 U. S. 523.

Maintenance and cure differs from rights normally classified as contractual. As Mr. Justice Cardozo said in *Cortes* v. *Baltimore Insular Line, supra*, 371, the duty to provide maintenance and cure [4] "is imposed by the

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[4] It derives from Article VI of the Laws of Oleron, 30 Fed. Cas. 1171, 1174:

"If any of the mariners hired by the master of any vessel, go out of the ship without his leave, and get themselves drunk, and thereby there happens contempt to their master, debates, or fighting and quarrelling among themselves, whereby some happen to be wounded: in this case the master shall not be obliged to get them cured, or in any thing to provide for them, but may turn them and their accomplices out of the ship; and if they make words of it, they are bound to pay the master besides: but if by the master's orders and commands any of the ship's company be in the service of the ship, and thereby happen to be wounded or otherwise hurt, in that case they shall be cured and provided for at the costs and charges of the said ship."

Justice Story, in holding that maintenance and cure was a charge upon the ship, said concerning its history:

"The same principle is recognised in the ancient laws of Wisbuy (Laws of Wisbuy, art. 19), and in those of Oleron, which have been held in peculiar respect by England, and have been in some measure incorporated into her maritime jurisprudence. The Consolato del Mare does not speak particularly on this point; but from the provisions of this venerable collection of maritime usages in cases nearly allied, there is every reason to infer, that a similar rule then prevailed in the Mediterranean. Consolato del Mare, cc. 124, 125; Boucher, Consulat de la Mer, cc. 127, 128. Molloy evidently adopts it as a general doctrine of maritime law (Molloy, b. 2, c. 3, § 5, p. 243); and

law itself as one annexed to the employment. . . . Contractual it is in the sense that it has its source in a relation which is contractual in origin, but given the relation, no agreement is competent to abrogate the incident."

In *Johnson* v. *United States,* 333 U. S. 46, we held that a seaman who while an outpatient was living on his parents' ranch without cost to himself was not entitled to maintenance payments. There maintenance and cure was wholly provided by others. Here the libellant was on his own for nearly two years and required to work in order to survive. It would be a sorry day for seamen if shipowners, knowing of the claim for maintenance and cure, could disregard it, force the disabled seaman to work, and then evade part or all of their legal obligation by having it reduced by the amount of the sick man's earnings. This would be a dreadful weapon in the hands of unconscionable employers and a plain inducement, as Chief Judge Sobeloff said below (291 F. 2d, at 820), to use the withholding of maintenance and cure as a means of forcing sick seamen to go to work when they should be resting, and to make the seamen themselves pay in whole or in part the amounts owing as maintenance and cure. This result is at war with the liberal attitude that heretofore has obtained and with admiralty's tender regard for seamen. We think the view of the Third Circuit (see *Yates* v. *Dann,* 223 F. 2d 64, 67) is preferable to that of

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two elementary writers of most distinguished reputation have quoted it from the old ordinances without the slightest intimation, that it was not perfectly consonant with the received law and usage of England. Abb. Shipp. p. 2, c. 4, § 14; 2 Brown, Adm. 182–184. There is perhaps upon this subject a greater extent and uniformity of maritime authority, than can probably be found in support of most of those principles of commercial law, which have been so successfully engrafted into our jurisprudence within the last century." *Harden* v. *Gordon,* 11 Fed. Cas. 480, 483.

the Second Circuit as expressed in *Wilson* v. *United States* and *Perez* v. *Suwanee S. S. Co., supra,* and to that of the Fourth Circuit in this case.

Reversed.

MR. JUSTICE FRANKFURTER took no part in the decision of this case.

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

MR. JUSTICE STEWART, whom MR. JUSTICE HARLAN joins, dissenting.

I agree with the Court that whether earnings received by a disabled seaman prior to his maximum medical recovery are to be credited against the shipowner's obligation for maintenance is an issue which should not be resolved by a mechanical application of the rules of contract law relating to mitigation of damages. But I cannot agree that in this case the petitioner's earnings should not have been set off against the maintenance owed to him. Nor can I agree with the Court's conclusion that the petitioner is entitled as a matter of law to damages in the amount of the counsel fees expended in his suit for maintenance and cure.

The duty to provide maintenance and cure is in no real sense contractual, and a suit for failure to provide maintenance or cure can hardly be equated, therefore, with an action for breach of contract. "The duty . . . is one annexed by law to a relation, and annexed as an inseparable incident without heed to any expression of the will of the contracting parties." *Cortes* v. *Baltimore Insular Line,* 287 U. S. 367, 372. Moreover, if the seaman's accountability for earnings were to be determined solely by reference to damage mitigation principles of contract law, the breach of the shipowner's duty to pay main-

tenance would become crucial, since without such a breach on his part no duty to mitigate would arise.[1] The assignment of such a dispositive role to the shipowner's failure to perform his obligation would create an unwarranted incentive for refusing to perform it.

The issue should be decided, rather, with reference to the scope of the duty which the admiralty law imposes. The obligation of a shipowner, irrespective of fault, to provide maintenance and cure to a seaman injured or taken ill while in the ship's service has lost much of its original significance in this era of relaxed unseaworthiness and negligence concepts. But the obligation is of ancient origin,[2] first recognized in our law in *Harden* v. *Gordon,* 11 Fed. Cas. 480, No. 6,047, and *Reed* v. *Canfield,* 20 Fed. Cas. 426, No. 11,641.[3] The duty was historically imposed in order to alleviate the physical and financial hardships which otherwise would have beset a sick or injured seaman put ashore, perhaps in a foreign port, without means of support, or hope of obtaining medical care. See *Harden* v. *Gordon, supra,* at 483 (Story, J.). The law

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[1] McCormick, Damages, §§ 158–160; Restatement, Contracts, § 336 (1); 5 Corbin, Contracts, § 1041.

[2] The earliest codifications of the law of the sea provided for medical treatment and wages for mariners injured or falling ill in the ship's service. These early maritime codes are, for the most part, reprinted in 30 Fed. Cas. 1171–1216. See Arts. VI and VII of the Laws of Oleron, 30 Fed. Cas. 1174–1175; Arts. XVIII, XIX, and XXXIII of the Laws of Wisbuy, 30 Fed. Cas. 1191, 1192; Arts. XXXIX and XLV of the Laws of the Hanse Towns, 30 Fed. Cas. 1200; and Title Fourth, Arts. XI and XII, of the Marine Ordinances of Louis XIV, 30 Fed. Cas. 1209. These provisions may also be found reprinted in 2 Norris, The Law of Seamen, § 537. Other provisions rather similar to the present maintenance and cure remedy may be found in the Ordinances of Trani, Art. X, 4 Black Book of the Admiralty (Twiss' ed. 1876) 531; The Tables of Amalphi, Art. 14, 4 Black Book of the Admiralty (Twiss' ed. 1876) 13.

[3] See Gilmore and Black, Admiralty, 253.

of the sea sought to alleviate these hardships, partly for humanitarian reasons, and partly because of the strong national interest in maintaining the morale and physical effectiveness of the merchant marine. *Calmar S. S. Corp.* v. *Taylor,* 303 U. S. 525, 528.

But "[t]he duty does not extend beyond the seaman's need." *Calmar S. S. Corp.* v. *Taylor, supra,* at 531. It ends absolutely when a point of maximum medical recovery has been reached. *Id.,* at 530; *Farrell* v. *United States,* 336 U. S. 511. And when the seaman has not incurred expense, the shipowner has no obligation to make payment.[4] Thus a seaman hospitalized without expense in a marine hospital is not entitled to maintenance and cure for that period. *Calmar S. S. Corp.* v. *Taylor, supra,* at 531. Nor must the shipowner pay maintenance to a seaman who convalesces at the home of his parents without incurring expense or liability for his support. *Johnson* v. *United States,* 333 U. S. 46, 50.

Since the limited purpose of maintenance is to make the seaman whole, it would logically follow that there should be no such duty for periods when the seaman, though not yet at the point of maximum cure, either does in fact obtain equivalently gainful employment or is able to do so.[5] Moreover, no rule which keeps able workers idle can

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[4] See *Stankiewicz* v. *United Fruit S. S. Corp.,* 229 F. 2d 580; *Williams* v. *United States,* 228 F. 2d 129; *Dodd* v. *The M/V Peggy G.,* 149 F. Supp. 823; *Nunes* v. *Farrell Lines, Inc.,* 129 F. Supp. 147, affirmed as to this point, 227 F. 2d 619; *Ballard* v. *Alcoa S. S. Co., Inc.,* 122 F. Supp. 10; Gilmore and Black, Admiralty, 266; 2 Norris, The Law of Seamen, § 568.

[5] Similarly, there is generally no duty to make payments for cure if marine hospital service is available, and a seaman seeks hospitalization elsewhere. *United States* v. *Loyola,* 161 F. 2d 126; *United States* v. *Johnson,* 160 F. 2d 789; *Marshall* v. *International Mercantile Marine Co.,* 39 F. 2d 551; *Zackey* v. *American Export Lines, Inc.,*

be deemed a desirable one.[6] But there are countervailing policies involved in resolving the issue. The adequate protection of an injured or ill seaman against suffering and want requires more than the assurance that he will

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152 F. Supp. 772; *Benton* v. *United Towing Co.*, 120 F. Supp. 638. See *Kossick* v. *United Fruit Co.*, 365 U. S. 731, 737; *Calmar S. S. Corp.* v. *Taylor*, 303 U. S. 525, 531. In exceptional circumstances, however, where adequate treatment is not available at a marine hospital, expenses incurred for hospitalization elsewhere may be chargeable to the shipowner. *Williams* v. *United States*, 133 F. Supp. 319, aff'd, 228 F. 2d 129.

[6] Actual earnings during a period prior to maximum cure have been allowed as an offset against maintenance payments in many reported cases, usually without discussion. *Rodgers* v. *United States Lines Co.*, 189 F. 2d 226; *Inter Ocean S. S. Co.* v. *Behrendsen*, 128 F. 2d 506; *Loverich* v. *Warner Co.*, 118 F. 2d 690; *Colon* v. *Trinidad Corp.*, 188 F. Supp. 97; *Scott* v. *Lykes Bros. S. S. Co.*, 152 F. Supp. 104; *Benton* v. *United Towing Co.*, 120 F. Supp. 638, aff'd, 224 F. 2d 558; *Steinberg* v. *American Export Lines, Inc.*, 81 F. Supp. 362; *Burch* v. *Smith*, 77 F. Supp. 6; *The Eastern Dawn*, 25 F. 2d 322. In *Wilson* v. *United States*, 229 F. 2d 277, the court held, after discussion, that the shipowner should be permitted to offset potential earnings, the seaman having failed to establish that he could not have secured work. The seaman had done some work during the period, and had not sought maintenance for the days he was actually employed. The same court subsequently ruled that under *Wilson* a recuperating seaman must account for actual earnings. *Perez* v. *Suwanee S. S. Co.*, 239 F. 2d 180.

In three cases setoff of actual earnings has been denied. In *Yates* v. *Dann*, 124 F. Supp. 125, the district judge found that the seaman had been "in need" throughout the whole period and should not be "penalized" because he returned to work. The case was reversed on other grounds, 223 F. 2d 64, the court sustaining the ruling of the District Court on this point with the statement that "the circumstance that appellee was forced by financial necessity to return to his regular employment is not legally a bar to his recovery." 223 F. 2d, at 67. See also *Hanson* v. *Reiss Steamship Co.*, 184 F. Supp. 545, 550 ("Liability for maintenance and cure does not necessarily cease when the injured person obtains gainful occupation where such

receive payments at some time in the indefinite future. Payments must be promptly made, at a time contemporaneous to the illness or injury. And for this reason the maintenance remedy should be kept simple, uncluttered by fine distinctions which breed litigation, with its attendant delays and expenses. See *Farrell* v. *United States*, 336 U. S. 511, 516. A shipowner should therefore not be encouraged to withhold maintenance payments in the hope that economic necessity will force the seaman back to work and thereby reduce the shipowner's liability. Moreover, maintenance payments are designed to meet the living expenses of the seaman until maximum cure is reached. The ultimate goal is the recovery of the seaman, and this requires the avoidance of pressures which would force him to obtain employment which hinders his recovery.[7]

The need for prompt payment and the desirability of avoiding any rule which might force a seaman back to work to the detriment of his recovery might well require that no compulsion to seek employment be placed on a convalescing seaman, and that a setoff be allowed only with respect to actual, as opposed to potential, earnings. But this question is not presented by the record before us. Similarly, it may well be that a seaman should not be held to account for actual earnings to a shipowner whose dereliction in making payments compels the seaman, as

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employment is compelled or induced by economic necessity."); *Meirino* v. *Gulf Oil Corp.*, 170 F. Supp. 515, 517 ("The fact that libellant returned to work because of economic necessity while he was in need of medical care and attention does not deprive him of his right to maintenance and cure.").

[7] A seaman whose condition is actually aggravated by reason of the shipowner's dereliction in making maintenance and cure payments may of course seek damages above and beyond the maintenance and cure payments due. *Cortes* v. *Baltimore Insular Line*, 287 U. S. 367. But the availability of this remedy does not detract from the importance of avoiding the harmful effects of a premature return to work.

a matter of economic necessity, to obtain gainful employment. But that question is not presented by the present case either, for there is no showing here that the seaman's return to work was brought on by economic necessity. So far as the record before us indicates, the petitioner's return to work was completely voluntary, and not the result of the shipowner's failure to pay maintenance. Holding the seaman accountable for his earnings in such circumstances carries out the basic purpose of making the seaman whole, and creates neither an undue incentive for withholding payments, nor pressure compelling a premature return to work. I therefore think that the District Court and the Court of Appeals were right in holding that the petitioner was not entitled to maintenance for the period during which he was gainfully employed as a taxicab driver.[8]

The second issue presented in this case is whether the petitioner should have been awarded damages in the amount of the counsel fees incurred in bringing his action for maintenance and cure. The Court held in *Cortes* v. *Baltimore Insular Line, supra,* at 371, that "[i]f the failure to give maintenance or cure has caused or aggravated an illness, the seaman has his right of action for the injury thus done to him, the recovery in such circumstances including not only necessary expenses, but also compensation for the hurt." But neither the *Cortes* decision, nor any other that I have been able to find, furnishes a basis for holding as a matter of law that a seaman

[8] I would, however, remand the case to the District Court for recomputation of its award. Maintenance is a day-by-day concept, and in my view maintenance should be reduced or denied only as to days during which the petitioner was gainfully employed. Instead, the District Court computed the total amount of maintenance due, and then deducted the total amount earned by the petitioner. Compare *Perez* v. *Suwanee S. S. Co.,* 239 F. 2d 180, with *Wilson* v. *United States,* 229 F. 2d 277. See the full discussion of this aspect of the problem in Note, 37 N. Y. U. L. Rev. 316, 320–321.

forced to bring suit to recover maintenance and cure is also entitled to recover his counsel fees. *Cortes* dealt with compensatory damages for a physical injury, and the opinion in that case contains nothing to indicate a departure from the well-established rule that counsel fees may not be recovered as compensatory damages. McCormick, Damages, § 61.

However, if the shipowner's refusal to pay maintenance stemmed from a wanton and intentional disregard of the legal rights of the seaman, the latter would be entitled to exemplary damages in accord with traditional concepts of the law of damages. McCormick, Damages, § 79. While the amount so awarded would be in the discretion of the fact finder, and would not necessarily be measured by the amount of counsel fees, indirect compensation for such expenditures might thus be made. See *Day* v. *Woodworth,* 13 How. 363, 371. On this issue I would accordingly remand the case to the District Court, so that the circumstances which motivated the respondents' failure to make maintenance payments could be fully canvassed.

BECK *v.* WASHINGTON.

CERTIORARI TO THE SUPREME COURT OF WASHINGTON.

No. 40. Argued November 14, 1961.—Decided May 14, 1962.

Petitioner contended that his conviction in a Washington State court of grand larceny from the union of which he was president was invalid under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, primarily because of voluminous and intensive adverse publicity circulated by news media in the vicinity where he was indicted and tried. Specifically he claimed that the grand jury which indicted him was biased, that it was unfairly impaneled and instructed, and that the prosecutor acted improperly before it. *Held:* On the record in this case, petitioner has failed to sustain the burden of showing that his indictment, trial and conviction violated the Due Process or Equal Protection Clause of the Fourteenth Amendment. Pp. 542–558.

1. Petitioner has failed to show that the grand jury proceedings which resulted in his indictment violated the Due Process or Equal Protection Clause of the Fourteenth Amendment. Pp. 545–555.

(a) Petitioner has failed to show that the grand jury which indicted him was unfairly impaneled or instructed or was biased or prejudiced against him. Pp. 545–549.

(b) Petitioner has failed to show that he was denied equal protection of the laws on the ground that he is a member of a class (the union of which he was president) that was not accorded equal treatment in the grand jury proceedings. P. 549.

(c) Petitioner's contention that he was denied equal protection of the laws by a Washington statute which permits persons in custody or on bail to challenge grand jurors but denies the same right to persons who are not in custody or on bail when investigated by grand juries, is not properly before this Court. Pp. 549–554.

(d) On the record in this case, it cannot be said that the State has failed to afford petitioner the procedural safeguards it affords others to insure an unbiased grand jury or that a failure to afford such procedures would deny petitioner equal protection of the laws. Pp. 554–555.

(e) It cannot be said that the manner in which a witness before the grand jury was interrogated violated petitioner's constitutional rights. P. 555.

2. On the record in this case, petitioner has not sustained the burden of showing that the petit jury which convicted him was biased or prejudiced against him. Pp. 555–558.

56 Wash. 2d 474, 349 P. 2d 387, 353 P. 2d 429, affirmed.

Charles S. Burdell argued the cause and filed briefs for petitioner. *Donald McL. Davidson* entered an appearance for petitioner.

James E. Kennedy argued the cause for respondent. With him on the briefs was *William L. Paul, Jr.*

Mr. Justice Clark delivered the opinion of the Court.

Petitioner David D. Beck contends that his conviction of grand larceny in the Superior Court of the State of Washington for King County is invalid under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. This contention is based primarily on what is characterized as voluminous and continuous adverse publicity circulated by news media in the vicinity of Seattle, Washington, where he was indicted and tried. Specifically he claims, *inter alia,* that the grand jury was unfairly impaneled and instructed, that the prosecutor acted improperly before the grand jury, and that his motions for a change of venue and for continuances were erroneously denied. The judges of the Supreme Court of Washington divided equally in review, 56 Wash. 2d 474, 349 P. 2d 387, 353 P. 2d 429, leaving petitioner's conviction undisturbed. We granted certiorari limited to the above contentions, 365 U. S. 866, and we now affirm the conviction.

I. The Publicity of Which Petitioner Complains.

In addition to challenges to the grand and petit juries, petitioner prior to the selection of the petit jury made five motions on the ground of bias and prejudice arising

from the publicity, *viz.*, one to quash the indictment, three for continuances ranging from one month to an indefinite period, and one for a change of venue to Snohomish or Whatcom County. Petitioner's counsel supported his factual contentions in regard to these various motions by his personal affidavits as well as by photostats of stories appearing in local newspapers and national magazines. We shall now summarize the highlights of the publicity set forth by the petitioner in his moving papers and exhibits.

The Select Committee on Improper Activities in the Labor or Management Field of the United States Senate began its investigation on February 26, 1957. In early March the Chairman of the Committee announced that the Committee had "produced 'rather conclusive' evidence of a tie-up between West Coast Teamsters and underworld bosses to monopolize vice in Portland, Ore." The announcement also stated that "Teamsters' President Dave Beck and Brewster [also a Teamster leader] will be summoned for questioning on a charge that they schemed to control Oregon's law enforcement machinery from a local level on up to the governor's chair."

On March 22 the Committee was quoted in the newspapers as stating "$250,000 had been taken from Teamster funds . . . and used for Beck's personal benefit." Petitioner appeared before the Committee on March 26, and the newspapers reported: "BECK TAKES 5TH AMENDMENT President of Teamsters 'Very Definitely' Thinks Records Might Incriminate Him." Television cameras were permitted at the hearings. One Seattle TV station ran an 8¾-hour "live" broadcast of the session on March 27, and films of this session were shown by various TV stations in the Seattle-Tacoma area. The April 12 issue of the U. S. News & World Report ran a caption: "Take a look around Seattle these days, and you find what a Senate inquiry can do to a top labor leader

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in his own home town." On April 26 the county prosecutor announced that a special grand jury would be impaneled in Seattle "to investigate possible misuse of Teamsters Union funds by international president Dave Beck . . . ." It was later announced that former Mayor Devin of Seattle was to be appointed Chief Special Prosecutor. On May 3 petitioner was indicted by a federal grand jury at Tacoma for income tax evasion. The announcement of this action was of course in front-page headlines. Five days later the petitioner was again called as a witness before the Committee in Washington. News stories on his appearance concentrated on his pleading of the Fifth Amendment 60 times during the hearings. Other stories emanating from the Committee hearings were featured intermittently, and on May 20, the day of the convening of the special grand jury, the Chairman of the Senate Committee announced that "the Committee has not convicted Mr. Beck of any crime, although it is my belief that he has committed many criminal offenses." The publicity continued to some degree after the grand jury had been convened and during the three-week period in which the prosecutors were gathering up documentary evidence through the use of grand jury subpoenas. Among other stories that appeared was one of June 4 stating that at the Committee hearings "Beck, Jr., who even refused to say whether he knew his father, took shelter behind the [fifth] amendment 130 times, following the example of Beck, Sr., who refused to answer 210 times in three appearances before the committee." The indictment in this case was returned by the special grand jury on July 12 and of course received banner headlines. Intermittent publicity continued, some from Washington, D. C., until August 28 when a federal grand jury indicted petitioner and others on additional income tax evasion counts. The co-conspirators named in this latter indictment were then called before the Committee in Washing-

ton, and these hearings, which were held on November 5, brought on additional publicity. On November 12 Dave Beck, Jr., went to trial on other larceny charges and was convicted on November 23, a Saturday. The state papers gave that event considerable coverage. The trial of petitioner in this case began on December 2 and continued until his conviction on December 14.

II. The Objections to the Grand Jury Proceedings.

Ever since *Hurtado* v. *California,* 110 U. S. 516 (1884), this Court has consistently held that there is no federal constitutional impediment to dispensing entirely with the grand jury in state prosecutions. The State of Washington abandoned its mandatory grand jury practice some 50 years ago.[1] Since that time prosecutions have been instituted on informations filed by the prosecutor, on many occasions without even a prior judicial determination of "probable cause"—a procedure which has likewise had approval here in such cases as *Ocampo* v. *United States,* 234 U. S. 91 (1914), and *Lem Woon* v. *Oregon,* 229 U. S. 586 (1913). Grand juries in Washington are convened only on special occasions and for specific purposes. The grand jury in this case, the eighth called in King County in 40 years, was summoned primarily to investigate circumstances which had been the subject of the Senate Committee hearings.

In his attempts before trial to have the indictment set aside petitioner did not contend that any particular grand juror was prejudiced or biased. Rather, he asserted that the judge impaneling the grand jury had breached his duty to ascertain on *voir dire* whether any prospective juror had been influenced by the adverse publicity and that this error had been compounded by his failure to ade-

[1] Washington Laws 1909, c. 87.

quately instruct the grand jury concerning bias and prejudice. It may be that the Due Process Clause of the Fourteenth Amendment requires the State, having once resorted to a grand jury procedure, to furnish an unbiased grand jury. Compare *Lawn* v. *United States,* 355 U. S. 339, 349–350 (1958); *Costello* v. *United States,* 350 U. S. 359, 363 (1956); *Hoffman* v. *United States,* 341 U. S. 479, 485 (1951). But we find that it is not necessary for us to determine this question; for even if due process would require a State to furnish an unbiased body once it resorted to grand jury procedure—a question upon which we do not remotely intimate any view—we have concluded that Washington, so far as is shown by the record, did so in this case.

Petitioner's appearance before the Senate Committee was current news of high national interest and quite normally was widely publicized throughout the Nation, including his home city of Seattle and the State of Washington. His answers to and conduct before the Committee disclosed the possibility that he had committed local offenses within the jurisdiction of King County, Washington, against the laws of that State. In the light of those disclosures the King County authorities were duty-bound to investigate and, if the State's laws had been violated, to prosecute the offenders. It appears that documentary evidence—in the hands of petitioner's union—was necessary to a complete investigation. The only method available to secure such documents was by grand jury process, and it was decided therefore to impanel a grand jury. This Washington was free to do.

Twenty-three prospective grand jurors were called. The trial judge explained, as is customary in such matters, that they had been called primarily to investigate possible crimes committed in King County by officers of the Teamsters Union which had been the subject of the Senate Committee hearings. In impaneling the grand jury the

judge, after determining their statutory qualifications, businesses, union affiliations and the like, asked each of the prospective jurors: "Is there anything about sitting on this grand jury that might embarrass you at all?" In answer to this or the question of whether they were conscious of any prejudice or bias, which was asked whenever previous answers suggested a need for further inquiry, two admitted they were prejudiced by the publicity and were excused. Another stated that whether he was prejudiced was "pretty hard to answer," and he, too, was excused. In addition three persons who were or had been members of unions that were affiliated with petitioner's union were excused. The remaining 17 were accepted and sworn as grand jurors and as a part of the oath swore that they would not "present [any] person through envy, hatred or malice." Among them were a retired city employee who had been a Teamster, the manager of a real estate office, a bookkeeper, an engineer, an airplane manufacturer's employee, a seamstress whose husband was a union member, a material inspector, a gravel company superintendent who was a former Teamsters Union member, a civil engineer with the State Department of Fisheries, and an engineer for a gyroscope manufacturer.

In his charge to the grand jury the trial judge explained that its "function is to inquire into the commission of crime in the county," that ordinarily this was done "by the regularly established law enforcement agencies," but that this was impossible here because further investigation was necessary requiring the attendance of witnesses and the examination of books and records which a prosecutor had no power to compel. As to the purpose for which it was called, he explained that "disclosures" by the Senate Investigating Committee indicated "hundreds of thousands of dollars of the funds" of the Teamsters Union had been "embezzled or stolen" by its officers. He also stated that the president of the Teamsters had "publicly

declared" that the money he had received was a loan. "This presents a question of fact," he added, "the truth of which is for you to ascertain." After mentioning other accusations he concluded, "I urge you to do all that you can within practical limitations to ascertain the truth or falsity of these charges. . . . You have a most serious task to perform . . . . It is a tremendous responsibility, and I wish you well in your work."

It is true that the judge did not admonish the grand jurors to disregard or disbelieve news reports and publicity concerning petitioner. Nor did he mention or explain the effect of the invocation of the Fifth Amendment by petitioner before the Committee or inquire as to the politics of any panel member. Discussion along such lines might well have added fuel to the flames which some see here. Apparently sensing this dilemma the judge admonished the grand jury that its function was to inquire into the commission of crime in the county and that it was to conduct an examination of witnesses as well as books and records. Twice in his short statement he said that it was for the grand jury to determine whether the charges were true or false. Taking the instructions as a whole, they made manifest that the jurors were to sift the charges by careful investigation, interrogation of witnesses, and examination of records, not by newspaper stories.

In the light of these facts and on the attack made we cannot say that the grand jury was biased. It was chosen from the regular jury list. Some six months thereafter a petit jury to try this case was selected from the same community and, as will hereafter be shown, was not found to be prejudiced. Indeed, every judge who passed on the issue in the State's courts, including its highest court, has so held. A look at the grand jury through the record reveals that it was composed of people from all walks of life, some of whom were former union members. The judge immediately and in the presence of all of the panel

eliminated six prospective grand jurors when indications of prejudice appeared. No grand juror personally knew petitioner or was shown to be adverse to the institutions with which petitioner is generally identified. Every person who was selected on the grand jury took an oath that he would not indict any person through "hatred or malice." Moreover, the grand jury sat for six weeks before any indictment was returned against petitioner. The record also indicates that it heard voluminous testimony on the charges that had been made against petitioner and others and that it gave the matter most meticulous and careful consideration. We therefore conclude that petitioner has failed to show that the body which indicted him was biased or prejudiced against him.

In addition to the above due process contention three equal protection arguments are made by petitioner or suggested on his behalf. First, petitioner argues he is a member of a class (Teamsters) that was not accorded equal treatment in grand jury proceedings. The contention is based on references to the Teamsters by the judge impaneling the grand jury as he conducted the *voir dire* and explained the scope of the investigation. The complete answer to petitioner's argument is that references to the Teamsters were necessary in the *voir dire* to eliminate persons who might be prejudiced for or against petitioner and in the instructions to explain the purpose and scope of this special body. Petitioner has totally failed to establish that non-Teamsters who are members of groups under investigation are given any different treatment.

Secondly, it is said that the Washington statute permitting persons in custody to challenge grand jurors, Revised Code of Washington § 10.28.030, denies equal protection to persons not in custody who are investigated by grand juries. This point is not properly before this Court. Although both opinions of the Washington Supreme Court discuss the *interpretation* of § 10.28.030,

neither considered that question in light of the equal protection argument for that argument was never properly presented to the court in relation to this statute. The Washington Supreme Court has unfailingly refused to consider constitutional attacks upon statutes not made in the trial court, even where the constitutional claims arise from the trial court's interpretation of the challenged statute. *E. g., Johnson* v. *Seattle,* 50 Wash. 2d 543, 313 P. 2d 676 (1957).[2] Petitioner's formal attack at the trial court level did not even mention § 10.28.030, much less argue that a restrictive interpretation would be unconstitutional under the Equal Protection Clause.[3] That the

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[2] *Washington* v. *Griffith,* 52 Wash. 2d 721, 328 P. 2d 897 (1958), does not detract from this principle. In *Griffith* the Washington Supreme Court, while recognizing the general rule that constitutional arguments cannot be presented for the first time in the Supreme Court, found an exception to this general rule when the accused in a capital case asserts his court-appointed attorney incompetently conducted his trial. The reasons for such an exception are obvious, and it is just as obvious that such reasons are not applicable to the present case.

[3] Petitioner made the following attacks upon the grand jury:

"Motion to Set Aside and Dismiss Indictment—Filed October 18, 1957

"Comes Now David D. Beck, also known as Dave Beck, defendant herein, by and through his attorneys of record herein, and respectfully moves to set aside and dismiss the indictment on the following grounds:

"1. That the grand jurors were not selected, drawn, summoned, impaneled or sworn as prescribed by law.

"2. That unauthorized persons, not required or permitted by law to attend sessions of the grand jury were present before the grand jury during the investigation of the allegations of the indictment.

"3. That persons other than the grand jurors were present before the grand jury during consideration of the matters and things charged in the indictment.

"4. That the proceedings of the grand jury which returned the indictment were conducted in an atmosphere of extreme bias, prejudice and hostility toward this defendant, and that said atmosphere

prosecution and the court viewed petitioner as outside the scope of § 10.28.030 was brought home to him in the course of the trial court proceedings on his grand jury attack. But even then petitioner did not suggest that constitu-

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was in part created by the Prosecuting Attorney and by persons acting or claiming to act upon his behalf; all of which was prejudicial to this defendant and which has denied and will continue to deny him rights guaranteed under the 14th Amendment of the Constitution of the United States, Amendment 10 of the Constitution of the State of Washington, and Article I, § 3 of the Constitution of the State of Washington.

"5. That by reason of extreme bias, prejudice and hostility toward the defendant herein, contributed to in part by the conduct of the Prosecuting Attorney and persons acting or claiming to act upon his behalf, it is and will be impossible for the defendant to secure and obtain a fair and impartial trial in the jurisdiction of this Court, all of which is and will be prejudicial to this defendant and which will constitute a denial of his rights guaranteed under the 14th Amendment of the Constitution of the United States, Amendment 10 of the Constitution of the State of Washington, and Article I, § 3 of the Constitution of the State of Washington.

"6. That the Court erred in its instructions and directions to the Grand Jury to the prejudice of the defendant and in denial of rights guaranteed under the 14th Amendment of the Constitution of the United States, Amendment 10 of the Constitution of the State of Washington, and Article I, § 3 of the Constitution of the State of Washington.

"7. That there were excluded from the Grand Jury persons of defendant's financial, social and business class and occupation, contrary to the 14th Amendment to the Constitution of the United States, and contrary to Article I, § 3 of the Constitution of the State of Washington.

"8. That the defendant herein was required and compelled to give evidence against himself, contrary to the provisions of Article I, § 9 of the Constitution of the State of Washington and the 5th and 14th Amendments of the Constitution of the United States.

"9. That the Grand Jury committed misconduct in violation of RCW 10.28.085 and RCW 10.28.100.

"This motion is based upon all of the files, records, transcripts, exhibits and affidavits herein." [*Note 3 continued on p. 552*]

tional considerations might compel a different result. The failure to inject the equal protection contention into the case was carried forward to the proceedings before the Washington Supreme Court when petitioner failed to comply with that court's rule prescribing the manner in which contentions are to be brought to its attention. Rule 43 of the Rules on Appeal, Revised Code of Washington, provides that "[n]o alleged error of the superior court will be considered by this court unless the same be definitely pointed out in the 'assignments of error' in appellant's brief." Mere generalized attacks upon the validity of the holding below as petitioner made in his "assignments of error" [4] are not considered by reason of

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"Challenge to Grand Jury—Filed October 18, 1957

"Comes Now the defendant herein and challenges each and all of the members of the grand jury which returned the indictment herein for the reason and on the grounds that the Court which impaneled said grand jury made no determination as to whether a state of mind existed on the part of any juror such as would render him unable to act impartially and without prejudice."

[4] Petitioner's 29 "assignments of error" included the following:

"6. The lower court erred in denying appellant's motion to set aside and dismiss the indictment.

"7. The lower court erred in denying appellant's challenge to grand jury.

. . . . . .

"25. The court denied appellant's rights to a fair and impartial grand jury."

However, when petitioner did attempt to conform to the rule of the Washington Supreme Court by pointing out "definitely" the errors committed in denying his attacks upon the grand jury, he limited the review to violations of the Due Process Clause as set out below.

"29. The appellant was denied due process of law under the Fourteenth Amendment of the Constitution of the United States of America and under the Tenth Amendment of the Constitution of the State of Washington, as follows:

"a. by denying appellant his right to challenge the grand jury or to dismiss the indictment for bias and prejudice of the grand jury members. [*Note 4 continued on p. 553*]

this rule sufficient to invoke review of the underlying contentions. See, *e. g., Washington* v. *Tanzymore,* 54 Wash. 2d 290, 292, 340 P. 2d 178, 179 (1959); *Fowles* v. *Sweeney,* 41 Wash. 2d 182, 188, 248 P. 2d 400, 403, (1952). Nor will the Washington Supreme Court search through the brief proper to find specific contentions which should have been listed within the "assignments of error." See *Washington ex rel. Linden* v. *Bunge,* 192 Wash. 245, 251, 73 P. 2d 516, 518–519 (1937). Moreover, the failure of petitioner to argue the constitutional contention in his brief, as opposed to merely setting it forth as he did in one sentence of his 125-page brief, is considered by the Washington Supreme Court to be an abandonment or waiver of such contention. *E. g., Martin* v. *J. C. Penney Co.,* 50 Wash. 2d 560, 565, 313 P. 2d 689, 693 (1957); *Washington* v. *Williams,* 49 Wash. 2d 354, 356–357, 301 P. 2d 769, 770 (1956). Nor was the equal protection contention made at all in the petitions for rehearing filed after the Supreme Court had agreed with the lower court's interpretation of the statute to exclude petitioner. Assuming *arguendo* that for the purposes of our jurisdiction the question would have been timely if raised in a petition for rehearing, not having been raised there or elsewhere or actually decided by the Washington Supreme Court, the argument cannot be entertained here under an unbroken line of precedent.

"b. by denying his motions for continuance and change of venue thereby forcing appellant to go to trial in an atmosphere of extreme hostility and prejudice.

"c. by misconduct of the prosecutor

"1. during and after the grand jury proceedings, and

"2. at the trial.

"d. by denying appellant an opportunity to examine or inspect transcripts of proceedings before the grand jury after the State had introduced evidence of particular statements made before the grand jury by cross-examination or secondary evidence.

"e. the means used to accuse and convict appellant were not compatible with reasonable standards of fair play."

E. g., Ferguson v. *Georgia,* 365 U. S. 570, 572 (1961); *Capital City Dairy Co.* v. *Ohio,* 183 U. S. 238, 248 (1902). Furthermore, it was not within the scope of the questions to which the writ of certiorari in this case was specifically limited, 365 U. S. 866, and for this additional reason cannot now be presented.

The final argument under the Equal Protection Clause is that Washington has singled out petitioner for special treatment by denying him the procedural safeguards the law affords others to insure an unbiased grand jury. But this reasoning proceeds on the wholly unsupported assumption that such procedures have been required in Washington in all other cases.[5] Moreover, it is contrary to the underlying finding of the Superior Court, in denying the motion to dismiss the indictment, that the grand jurors were lawfully selected and instructed. And even if we were to assume that Washington law requires such procedural safeguards, the petitioner's argument here comes down to a contention that Washington law was misapplied. Such misapplication cannot be shown to be an invidious discrimination. We have said time and again that the Fourteenth Amendment does not "assure uniformity of judicial decisions . . . [or] immunity from

[5] There are no reported Washington cases so holding. The two cases on which this claim is predicated, *Washington* v. *Guthrie,* 185 Wash. 464, 56 P. 2d 160 (1936), and *Washington ex rel. Murphy* v. *Superior Court,* 82 Wash. 284, 144 P. 32 (1914), were concerned only with whether the members of the grand jury had been selected by chance as the law requires. Quotations from these cases when read in context clearly have reference only to the desirability of selecting grand jurors by chance. Petitioner in his rehearing petition before the Washington Supreme Court quoted from two unnamed, unreported Washington grand jury proceedings in which some prospective jurors were questioned as to bias. Even if it were clear that all the jurors in those cases were so questioned (which it is not), such isolated, unreviewable instances would not establish that Washington law requires the claimed procedures.

judicial error . . . ." *Milwaukee Electric Ry. & Light Co.* v. *Wisconsin ex rel. Milwaukee,* 252 U. S. 100, 106 (1920). Were it otherwise, every alleged misapplication of state law would constitute a federal constitutional question. Finally, were we to vacate this conviction because of a failure to follow certain procedures although it has not been shown that their ultimate end—a fair grand jury proceeding—was not obtained, we would be exalting form over substance contrary to our previous application of the Equal Protection Clause, *e. g., Graham* v. *West Virginia,* 224 U. S. 616, 630 (1912).

Petitioner also contends that a witness before the grand jury was improperly interrogated in a manner which prejudiced his case before that body. It appears that an employee of petitioner's union was called before the grand jury to testify in reference to activities within his employment. During his first appearance he made statements which he subsequently changed on a voluntary reappearance before the grand jury some two days before the indictment was returned. On the second appearance the prosecutor attacked the witness' changed story as incredible and warned him that he was under oath, that he might be prosecuted for perjury, and that there was no occasion for him to go to jail for petitioner. The record indicates that the prosecutor became incensed over the witness' new story; and though some of his threats were out of bounds, it appears that they had no effect upon the witness whatsoever for he stuck to his story. We can find no irregularity of constitutional proportions, and we therefore reject this contention.

III. The Objections as to the Petit Jury.

As in his grand jury attack, petitioner makes no claim that any particular petit juror was biased. Instead, he states the publicity which prevented the selection of a fair grand jury also precluded a fair petit jury. He argues

that such a strong case of adverse publicity has been proved that any jury selected in Seattle at the time he was tried must be held to be presumptively biased and that the trial court's adverse rulings on his motions for a change of venue and for continuances were therefore in error. Of course there could be no constitutional infirmity in these rulings if petitioner actually received a trial by an impartial jury. Hence, our inquiry is addressed to that subject.

Petitioner's trial began early in December. This was nine and one-half months after he was first called before the Senate Committee and almost five months after his indictment. Although there was some adverse publicity during the latter period which stemmed from the second tax indictment and later Senate hearings as well as from the trial of petitioner's son, it was neither intensive nor extensive. The news value of the original "disclosures" was diminished, and the items were often relegated to the inner pages. Even the occasional front-page items were straight news stories rather than invidious articles which would tend to arouse ill will and vindictiveness. If there was a campaign against him as petitioner infers, it was sidetracked by the appearance of other "labor bosses" on the scene who shared the spotlight.

The process of selecting a jury began with the exclusion from the panel of all persons summoned as prospective jurors in the November 12 trial of Dave Beck, Jr. In addition, all persons were excused who were in the courtroom at any time during the trial of that case. Next, the members were examined by the court and counsel at length. Of the 52 so examined, only eight admitted bias or a preformed opinion as to petitioner's guilt and six others suggested they might be biased or might have formed an opinion—all of whom were excused. Every juror challenged for cause by petitioner's counsel was

excused; in addition petitioner was given six peremptory challenges, all of which were exercised. Although most of the persons thus selected for the trial jury had been exposed to some of the publicity related above, each indicated that he was not biased, that he had formed no opinion as to petitioner's guilt which would require evidence to remove, and that he would enter the trial with an open mind disregarding anything he had read on the case.

A study of the *voir dire* indicates clearly that each juror's qualifications as to impartiality far exceeded the minimum standards this Court established in its earlier cases as well as in *Irvin* v. *Dowd,* 366 U. S. 717 (1961), on which petitioner depends. There we stated:

> "To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Id.,* at 723.

We cannot say the pretrial publicity was so intensive and extensive or the examination of the entire panel revealed such prejudice that a court could not believe the answers of the jurors and would be compelled to find bias or preformed opinion as a matter of law. Compare *Irvin* v. *Dowd, supra,* at 723–728, where sensational publicity adverse to the accused permeated the small town in which he was tried, the *voir dire* examination indicated that 90% of 370 prospective jurors and two-thirds of those seated on the jury had an opinion as to guilt, and the accused unsuccessfully challenged for cause several persons accepted on the jury. The fact that petitioner did

not challenge for cause any of the jurors so selected is strong evidence that he was convinced the jurors were not biased and had not formed any opinions as to his guilt. In addition, we note that while the Washington Supreme Court was divided on the question of the right of an accused to an impartial grand jury, the denial of the petitioner's motions based on the bias and prejudice of the petit jury did not raise a single dissenting voice.

"While this Court stands ready to correct violations of constitutional rights, it also holds that 'it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality.' " *United States ex rel. Darcy* v. *Handy*, 351 U. S. 454, 462 (1956). This burden has not been met.

Affirmed.

MR. JUSTICE FRANKFURTER took no part in the decision of this case.

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

MR. JUSTICE BLACK, with whom THE CHIEF JUSTICE concurs, dissenting.

I dissent from the Court's holding because I think that the failure of the Washington courts to follow their own state law by taking affirmative action to protect the petitioner Beck from being indicted by a biased and prejudiced grand jury was a denial to him of the equal protection of the laws guaranteed by the Fourteenth Amendment.

Since 1854, when Washington was a Territory, that State has had a statute comprehensively governing the use of grand juries in criminal trials which provides in part:

> "Challenges to individual grand jurors may be made by . . . [any person in custody or held to answer for an offense] for reason of want of qualification to sit as such juror; and when, in the opinion of the court, a state of mind exists in the juror, such as would render him unable to act impartially and without prejudice." [1]

In *State ex rel. Murphy* v. *Superior Court*,[2] the Washington Supreme Court held in construing this statute that in order to preserve the right of defendants to fair and impartial grand jurors, Washington State judges must select grand jurors by chance, explaining:

> "That it was the policy of the legislature to preserve the right to have an unbiased and unprejudiced jury and grand jury, and that no suspicion should attach to the manner of its selection in all cases, cannot be questioned."

Some years later in *State* v. *Guthrie* [3] the Washington Supreme Court held that it was not only within the power of Washington State judges but it was also their duty to insure unbiased grand juries, even if so doing meant changing the composition of the grand juries selected by the rules of chance. That court in this latter case reiterated the statute's policy to preserve impartial grand

[1] Revised Code of Washington § 10.28.030. The bracketed portion is from § 10.28.010, a companion section relating to challenges to the entire grand jury panel. These provisions were §§ 45–46 of the original 1854 Act, Washington Territory Acts, p. 110.

[2] 82 Wash. 284, 286, 144 P. 32, 32–33.

[3] 185 Wash. 464, 475, 56 P. 2d 160, 164.

juries and made it crystal clear that juries biased because of judicial inaction are as offensive to the policy of the Washington statute as juries biased because of deliberate judicial selection:

> "While this section may be said to relate to challenges made by interested persons, it is not to be construed as denying to the court the right, upon its own motion, to excuse a juror deemed to be disqualified or incompetent. To deny this right would be out of harmony with the policy of the law, which charges the court with the responsibility of insuring that qualified and impartial grand jurors are secured."

That this state policy for impartial grand juries has been generally accepted as the settled law of Washington is demonstrated, not only by the statements of the four judges who voted to reverse this conviction,[4] but also by the current practice cited to us of other Washington trial courts.[5] Indeed, the presiding judge who impaneled the

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[4] These four judges were of the opinion that the above-cited statute and cases required this case to be decided on the "premise that . . . [Beck], as a matter of law, was entitled to an impartial and unprejudiced grand jury," and that the "failure of the court to interrogate the jurors for the existence of possible bias and prejudice against the officers of the teamsters' union constituted prejudicial error." *State* v. *Beck*, 56 Wash. 2d 474, 519, 520, 349 P. 2d 387, 412, 413. Judge Hunter in a separate opinion stated that the requirement of impartiality "was announced as essential to a grand jury proceeding by both the legislature and the supreme court of this state, in the statutes and decisions . . . ." 56 Wash. 2d, at 537, 349 P. 2d, at 423–424.

[5] The following were quoted to us as typical *voir dire* questions asked by presiding judges in the impaneling of two recent grand juries in Washington:

" 'Q—Would there be anything in your acquaintanceship with Mr. Schuster that would in any way tend to affect your decisions in this Grand Jury investigation? [*Note 5 continued on p. 561*]

Beck grand jury made sufficient inquiries to insure that grand jurors would not be biased against the State in its investigation of Beck.

The Court, however, finds that the *Murphy* and *Guthrie* cases have no relation to the guarantee of a fair and impartial grand jury but are "concerned only with whether the members of the grand jury had been selected by chance." But even the State has taken no such position, either before the Washington Supreme Court or here. In its brief before the Washington Supreme Court the State acknowledged that the Washington statute as interpreted by the *Murphy* and *Guthrie* cases set out a "well-recognized rule" that state "grand juries should be impartial and unprejudiced." [6] And even in this Court the State

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" 'A—I don't think so.

" 'Q—In other words, you wouldn't have any hatred or malice or fear or favor or anything of that nature so far as your deliberating would be concerned in connection with this investigation?

" 'A—No.' "

" 'Q—From what you have heard, and I don't believe you live in a vacuum any more than the rest of us, is there anything you have read or that has been suggested by the court in these proceedings that would suggest to you why you couldn't be fair, impartial and objective in making an examination into law enforcement in this county?

" 'A—No, sir.' "

[6] The four judges who voted to reverse this conviction below relied in part upon this acknowledgment, saying:

"The state has filed a comprehensive brief consisting of one hundred fifty pages containing the following answer to appellant's argument regarding his right to an impartial and unprejudiced grand jury:

" 'Appellant asserts that the denial of his motion to set aside the indictment constituted error under our statutes and constitution and the constitution of the United States (App. Br. 35).

" '. . . *Except for citing the well-recognized rule that grand juries should be impartial and unprejudiced* (App. Br. 37), the cases are not otherwise applicable.' " (Emphasis supplied by the Washington

does not repudiate this acknowledgment but says only that because the Washington Supreme Court was equally divided "the meaning of Washington statutes in regard to grand juries cannot be determined at this point." But of course we must decide what the Washington law is in order to pass upon Beck's claim that Washington has denied him the equal protection of the law.

The Washington statute as authoritatively interpreted by its Supreme Court in the *Murphy* and *Guthrie* cases means not only that defendants are entitled under Washington law to have indictments against them returned by impartial grand jurors but also that Washington State judges are specifically charged with the duty and responsibility of making all inquiries necessary to insure defendants against being tried on indictments returned by prejudiced grand jurors. Neither the legislature nor the State Supreme Court has ever changed that statute or its interpretation. Certainly, the equal division of judges in the Washington Supreme Court which left Beck's conviction standing did not impair the old statute or its previously established interpretation. Even Washington's own counsel tell us that "since the reasons for the Washington court being equally divided are signed by no more than four judges each, those reasons are not a decision of that court," and "are of no significance whatsoever as far as the decisional law of the state of Washington is concerned." Since the legislature has not changed its statute and the Supreme Court of Washington has not changed its interpretation of that statute, the law of Washington remains the same as it was before Beck's

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Supreme Court.) Among the cases cited in appellant's state court brief to support his contention that the grand jury was not organized in accordance with state law were *Watts* v. *Washington Territory*, 1 Wash. Terr. 409; *State ex rel. Murphy* v. *Superior Court*, 82 Wash. 284, 144 P. 32; and *State* v. *Guthrie*, 185 Wash. 464, 56 P. 2d 160.

conviction was left standing by the equally divided Washington court. And as it was before, it required Washington judges to protect persons from being indicted by prejudiced and biased grand juries. If Beck has been denied that protection without the law's having been changed, then he has been singled out by the State as the sole person to be so treated. Such a singling out would be a classic invidious discrimination and would amount to a denial of equal protection of the law. We must determine, therefore, whether the grand jury that indicted Beck was impaneled in a way that violated the state law.

This question is not that which the Court treats as crucial, whether there is proof in the record that some individual grand juror was actually prejudiced against Beck, but rather the quite different question of whether the judge who impaneled the grand jury took the precautions required by the statute and its controlling judicial interpretation to insure a grand jury that would not be tainted by prejudice against Beck. I think that the record in this case shows beyond doubt that the presiding judge failed to do what the state law required him to do—try to keep prejudiced persons off the grand jury. This failure was particularly serious here because of the extraordinary opportunity for prejudgment and prejudice created by the saturation of the Seattle area with publicity hostile and adverse to Beck in the months preceding and during the grand jury hearing.

Petitioner Beck is a long-time resident of Seattle, well known to the community as president of the International Brotherhood of Teamsters and as a former president of the Western Conference of Teamsters. Beginning in March 1957, he became the target of a number of extremely serious charges of crime and corruption by the Senate Select Committee on Improper Activities in the Labor or Management Field and its staff. These charges were

given unprecedented circulation in the Seattle area.[7] On March 22–23, banner headlines proclaimed the Committee's charge that Beck had used $270,000 in Teamsters funds for his own benefit. When Beck appeared before the Committee several days later and refused to answer questions regarding the charges, he again drew headline coverage in the Seattle press: "BECK TAKES 5TH AMENDMENT." One television station went so far as to run a 9¾-hour telecast of the proceedings. On May 3, the headlines announced the fact that Beck had been indicted for federal tax evasion and that a former mayor of Seattle had received a special appointment to prosecute further charges before a state grand jury. On May 9, 15 and 16, other front-page, page-wide headlines appeared, the last charging that Beck had misused his position of union trust no less than 52 different times. On May 17, a three-column front-page story recounted the fact that Beck had pleaded the Fifth Amendment 60 times to questions from the Senate Committee. And on May 20, the day the grand jury was impaneled, headlines announced Beck's expulsion from his AFL–CIO post on the ground that "Dave Beck was found 'guilty as charged' by the A. F. of L.–C. I. O. executive council," and that same paper also carried a charge by Senator McClellan that Beck "has committed many criminal offenses." All the while radio, television, the national news magazines and the press in lesser front-page and backup stories published charges of a similar nature. This flood of intense public accusation of crime and breach of trust by prominent and highly placed persons, coupled with publicity resulting from Beck's refusal on grounds of possible self-incrimination to answer ques-

[7] "The amount, intensity, and derogatory nature of the publicity received by appellant during this period is without precedent in the state of Washington." 56 Wash. 2d, at 511, 349 P. 2d, at 408 (opinion of Judge Donworth for the four judges who voted to reverse).

tions before the Senate Committee as to the charges made, imposed a very heavy duty on the presiding judge under Washington law to protect Beck from a biased and prejudiced grand jury.

Far from discharging that duty, however, the judge actually increased the probability that persons biased against Beck would be left on the grand jury. For while he asked a number of questions directed toward excluding from the jury union members who might be sympathetic to Beck, he made no effective effort at all to protect Beck. Thus, he managed to ask almost every juror whether he had any connection with the Teamsters or any affiliated union, whether he knew any of the Teamsters officers, or whether he had ever been a union officer himself. But, despite his knowledge of the widespread prejudice-breeding publicity against Beck, the judge failed to ask a single juror a single question regarding whether he had read about, heard about or discussed the charges against Beck. Moreover, he failed to ask a single juror who actually sat on the jury whether he was prejudiced against Beck or had already made up his mind about the many public charges.[8] Indeed as to those jurors the most searching question which even the Court has managed to pull from the record was the sterile query: "Is there anything about sitting on this grand jury that might embarrass you at all?" Even the most tenuous logic could not equate that search for embarrassment with a search for bias and prejudice. That a search for bias and prejudice would have shown its existence hardly seems questionable, particularly in view of the fact that six months later when the publicity adverse to Beck was, according to the Court, "neither intensive nor extensive," 15 of 43 prospective petit jurors

[8] No prospective grand juror was asked if he was prejudiced against Beck, and only three were asked if they were conscious of bias or prejudice of any kind. Two of these were excused.

subjected to *voir dire* questioning expressed some degree of bias or prejudice in the case.[9]

After such a restrained effort toward affording Beck the protection of the unbiased grand jury assured by Washington law, it would be expected that the presiding judge would have given careful and detailed instructions to the grand jury in order to dispel any possible prejudice in their minds. Not so here, however. In fact the instructions given not only failed to cure, they made the situation worse. For instead of instructing that the testimony and charges before the Senate Committee were not evidence before the grand jury and that it would be highly improper for the grand jury to consider them at all, the presiding judge called the jury's attention to the charges of theft and embezzlement against Beck before the Committee and told the jury that it was under a duty to determine whether these charges were refuted by an explanation attributed by the press to Beck:

> "It seems unnecessary to review the recent testimony before a Senate Investigating Committee except to say that disclosures have been made indicating that officers of the Teamsters Union have, through trick and device, embezzled or stolen hundreds of thousands of dollars of the funds of that union—money which had come to the union from the dues of its members. . . .
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> "The president of the Teamsters Union has publicly declared that the money he received from the union was a loan which he has repaid. This presents a question of fact, the truth of which is for you to ascertain."

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[9] Although 52 prospective jurors were admitted to *voir dire*, nine of these were excused for personal reasons of health or convenience and were not therefore questioned by either counsel.

Together with the additional facts set out by MR. JUSTICE DOUGLAS in his dissent, what I have said above seems clearly to show that the presiding judge took none of the steps, either in interrogation or in instruction, that in the atmosphere of the day would have fulfilled his state statutory duty to insure a grand jury unbiased against Beck.

This failure of the judge denies petitioner a protection which Washington has provided to similarly situated defendants over the years and which, so far as now foreseeable, Washington will continue to provide to all Washington defendants in the future. This failure would be cast in a different light if the Washington Legislature had repealed its law or if its Supreme Court had altered its interpretation and set out a general rule abrogating the right to have judges take affirmative action to insure an unbiased grand jury. But without any change in the prior law or any sure indication that Beck's "law" is the law of the future, the State of Washington in convicting Beck applies special and unfair treatment to him. For only Beck, a single individual out of all the people charged with crime by indictment in Washington, is denied his clearly defined right under the law to have the state judicial system insure his indictment by "impartial grand jurors." Through the device of an equally divided vote in the Washington Supreme Court he goes to prison for 15 years. I think that the Equal Protection Clause of the Fourteenth Amendment forbids such an invidious picking out of one individual to bear legal burdens that are not imposed upon others similarly situated.[10] I cannot agree with the Court that such a gross discrimination against a single individual with such disastrous conse-

[10] See *Atchison, Topeka & Santa Fe R. Co.* v. *Matthews*, 174 U. S. 96, 104–105. Cf. *McFarland* v. *American Sugar Refining Co.*, 241 U. S. 79, 86.

quences can be treated as a mere trial error. For a judicial decision which sends a man to prison by refusing to apply settled law which always has been and so far as appears will continue to be applied to all other defendants similarly situated is far more than a mere misapplication of state law.[11] It is a denial of equal protection of the law and a State should no more be allowed to deny a defendant protection of its laws through its judicial branch than through its legislative or executive branch.

I think that petitioner was denied equal protection of the law for still another reason. The four Washington judges who voted to affirm the conviction below, and whose views have therefore determined the outcome of Beck's case, agreed that those "in custody or held [on bail] to answer for an offense," the "[p]ersons for whose benefit that statute was enacted," are entitled to grand jurors without bias or prejudice.[12] This divides all persons suspected of larceny by embezzlement, as petitioner was, into two classes: (1) those persons in custody or on bail, and (2) those persons who are only under investigation by grand jury. The first class is entitled to have an impartial and unbiased grand jury; the second is not. The four judges who wanted to reverse this conviction could see no reason, nor can I, for saying that one charged with crime and in jail or on bail should be entitled to an unprejudiced grand jury but one who happened not to be already held for grand jury action could validly be indicted by a biased and prejudiced grand jury. So far as

[11] Unlike this case, which involves the contention that the failure of the Washington courts to apply their prior settled law as to a single statute denies petitioner Beck the equal protection of the law, *Milwaukee Elec. R. Co.* v. *Milwaukee*, 252 U. S. 100, involves the question of whether the Wisconsin Supreme Court was inconsistent in its treatment of two different municipal legislative provisions.

[12] 56 Wash. 2d, at 480, 349 P. 2d, at 390.

the need to be free from prosecution by a prejudiced grand jury is concerned, there can be no rational distinction between the need of the man who is not yet in custody and the need of the man who is in jail or on bail,[13] particularly where as here the grand jury was called for the specific purpose of examining into petitioner's activities and was so instructed. No doubt the clearest evidence of the lack of rationality in such a distinction is the fact that for 108 years the State of Washington has itself made no such distinction. For even though the statute on its face applies only to those in custody or on bail, it has always been interpreted to guarantee an impartial grand jury to all.

A fair trial under fair procedure is a basic element in our Government. Zealous partisans filled with bias and

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[13] Even before the adoption of the Equal Protection Clause of the Fourteenth Amendment, other courts had refused to allow any distinction as to the right to a proper composition of a grand jury under state law between those in jail or on bail and those merely subject to grand jury investigation. Thus in *United States* v. *Blodgett*, 30 Fed. Cas. 1157, 1159 (No. 18312), the court said:

"True, he was not arrested and imprisoned on any criminal charge, and now brought hither by order of the court, nor is he under bail or recognizance; but because he is not in any of these constrained positions, is he any the less entitled to a grand jury of his country, legally qualified under its laws? Surely not."

And in *McQuillen* v. *State*, 16 Miss. 587, 597, the Mississippi court said as to a purported distinction between the right of persons in court at the time of indictment to challenge grand jurors for cause and the right of those not in court to challenge such jurors:

"[T]he law works unequally by allowing one class of persons to object to the competency of the grand jury, whilst another class has no such privilege. This cannot be. The law furnishes the same security to all, and the same principle which gives to a prisoner in court the right to challenge, gives to one who is not in court the right to accomplish the same end by plea . . . ." See also *Hardin* v. *State*, 22 Ind. 347, 351–352; *Crowley* v. *United States*, 194 U. S. 461, 469–470.

prejudice have no place among those whom government selects to play important parts in trials designed to lead to fair determinations of guilt or innocence. Whether the due process provisions of the Federal Constitution require, however, that every procedural step in a trial, including the impaneling of a grand jury, be absolutely fair and impartial, I need not determine here. But in considering whether people charged with the same crimes under the same circumstances, subject to the same penalties in the same place may be divided up into classes, some of whom are given the benefit of fair grand jurors and some of whom are not, we must keep in mind the high standard of fair and equal treatment imposed by the Equal Protection Clause of the Fourteenth Amendment, as well as the important part that grand juries play in trial procedures when they are used. For me the need for fair grand juries as between those who have not yet been formally arrested and those who have is too much the same to be treated as though it were different. I would not permit the State of Washington to lay its hands so unequally upon groups whose interests, whose needs and whose dangers are so similar.[14]

Not surprisingly the Court attempts to shrug off both of Beck's equal protection claims without reaching them on the merits. As to his first claim, that he was denied equal protection by the failure of the Washington courts to accord him the benefit of the state law guaranteeing an impartial grand jury, this Court asserts that even if Beck was, unlike everyone else, denied the benefit of a grand jury which had been questioned by the presiding judge to protect against bias, the error was harmless because he presented no proof to show that the grand jury selected in violation of Washington law was actually

[14] Cf. *Skinner* v. *Oklahoma ex rel. Williamson,* 316 U. S. 535.

biased or prejudiced against him. But the Washington law puts the duty on the judge to insure against bias not on the defendant to show bias. The court cites absolutely no authority and I have been unable to find any that when a Washington State judge neglects his duty to assure an impartial grand jury his error is cured by the failure of the defendant to show actual bias on the part of one or more grand jurors. On the contrary, the Washington Supreme Court said in *State ex rel. Murphy* v. *Superior Court:*

> "Granting, for the sake of argument, that no real injustice has been done in this particular case, and that a fair jury was selected, to approve the method adopted by the court would be to permit a judge, if he so willed, to provide a grand jury of his own choosing in every case under color of law." [15]

Moreover, even if it were possible under Washington law so cavalierly to fritter away important rights of criminal procedure designed to achieve fairness, this record should satisfy the most doubting Thomas that the failure to insure a proper grand jury here was in fact not harmless. While the trial court made no determination as to whether the grand jury was prejudiced against Beck, four of the eight Washington Supreme Court judges who ruled on the question felt that a conclusive showing of prejudice had been made. Judge Donworth, speaking for those four judges, after an exhaustive review of the facts concluded:

> "I think it would be unrealistic to believe that a very substantial number of the citizens of the community had not adopted, consciously or unconsciously, an attitude of bias and prejudice toward appellant at the time the grand jury was convened. If ever there

[15] 82 Wash. 284, 287–288, 144 P. 32, 33.

> was a case which required the most stringent observance of every safeguard known to the law to protect a citizen against bias and prejudice, this was it." [16]

The other four judges did say: "There is no showing of bias or prejudice," but gave not the slightest evidentiary or even argumentative support to show the correctness of this offhand statement.[17] In these circumstances where there has been no finding by the trial court and where the highest court of the State has divided evenly so that there is no finding there either, our ordinary "solemn duty to make independent inquiry and determination of the disputed facts" [18] upon which the question of denial of equal protection of the law turns becomes particularly pointed. Considering the overwhelming evidence to support the four judges who thought that petitioner had made a showing of prejudice, it seems inconceivable to me that it can fairly be said that no showing of prejudice was made.

As to Beck's second claim, that it is a denial of equal protection of the law to afford those in jail or on bail the judicial assurance of an impartial grand jury while denying such protection to those not in jail or on bail like Beck, the Court apparently does not claim that the error was harmless but discovers yet another way to avoid having to pass on the plain merits of his constitutional claim. It concludes on a number of grounds that petitioner's claim was not properly presented to the Washington Supreme Court. I do not think any one of the Court's grounds or all of them together justify its avoidance of determining Beck's constitutional contention on its merits.

(a) It is said that this contention was not properly before the State Supreme Court because "Petitioner's

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[16] 56 Wash. 2d, at 512, 349 P. 2d, at 408.

[17] 56 Wash. 2d, at 480, 349 P. 2d, at 390.

[18] *Pierre* v. *Louisiana*, 306 U. S. 354, 358.

formal attack at the trial court level did not even mention § 10.28.030 . . . ." But Beck did claim that that section had not been complied with both in his "Challenge to Grand Jury" and in his separate motion to set aside the indictment, both of which are set out in note 3 of the Court's opinion. In fact his challenge to the grand jury was specifically cast in the terms of § 10.28.030. And Beck's reliance on § 10.28.030 and related sections of Washington's grand jury statute was emphasized time and time again by his counsel's arguments to the trial court, both oral and written, on the challenge and on his separate motion to dismiss the indictment. For example, trial counsel said:

> ". . . [T]he decisions which we have been able to find all indicate the same thing. That is, that the Grand Jury just like the trial jury, must be unbiased and unprejudiced, and indeed in a couple of the decisions they referred to this 10.28.030 in the same manner I have done to indicate the intent of the Legislature." [19]

(b) The Court says: "That the prosecution and the court viewed petitioner as outside the scope of § 10.28.030 was brought home to him in the course of the trial court proceedings on his grand jury attack." I cannot agree that the trial court construed § 10.28.030 as denying Beck the right to an impartial and unprejudiced grand jury or informed him to that effect. While it is true that the State's counsel argued and the trial court agreed that petitioner could not question the method of impaneling the grand jury by a "Challenge to Grand Jury," the trial court never even intimated that § 10.28.030 limited its assurance of an impartial and unprejudiced grand jury

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[19] The decisions referred to were *Watts* v. *Washington Territory*, 1 Wash. Terr. 409; *State ex rel. Murphy* v. *Superior Court*, 82 Wash. 284, 144 P. 32; and *State* v. *Guthrie*, 185 Wash. 464, 56 P. 2d 160.

only to those who were indicted while they were in jail or out on bond. On the contrary, the trial court admitted, even though it ultimately denied petitioner's motion without further comment, that petitioner could attack the grand jury—"incidentally on a motion to set aside the indictment"—precisely the kind of motion the petitioner actually made under § 10.40.070, which motion is set out in note 3 of the Court's opinion.

(c) The Court says that the State Supreme Court was not required to pass on petitioner's claim of denial of equal protection because it was not "definitely pointed out in the 'assignments of error' in appellant's brief," as required by Rule 43 of the State Rules on Appeal. But as just pointed out the trial court had not construed the statute as denying Beck who was not in custody or on bail the benefit of an impartial grand jury while insuring such a grand jury for defendants who were in custody or on bail. Since the trial court had made no such ruling, Beck could not of course assign as error a ruling that had not been made. He did, however, properly assign errors which, as shown in the Court's note 4, were sufficiently broad to challenge the trial court's failure to comply with state law in insuring an impartial grand jury. That was all that he could do at that time.

(d) Another ground for this Court's refusal to rule on Beck's claim is that: "The Washington Supreme Court has unfailingly refused to consider constitutional attacks upon statutes not made in the trial court . . . ." But even a casual investigation of the opinions of that court shows that it has not "unfailingly" followed any such practice.[20] Moreover, no Washington case or any other

[20] See, *e. g.*, *Washington* v. *Griffith*, 52 Wash. 2d 721, 328 P. 2d 897; *Lee* v. *Seattle-First National Bank*, 49 Wash. 2d 254, 299 P. 2d 1066.

has been cited to prove that a question of equal protection of the law must be raised in the trial court even though that court does not itself ever make a ruling which denies equal protection of the law. And I would think that this Court would not tolerate use of such a state device to bar correction of constitutional violations.

(e) Finally while I disagree that Beck's claim has not been properly presented to the Washington Supreme Court, I find that wholly immaterial here. For as we said in *Raley* v. *Ohio:* "There can be no question as to the proper presentation of a federal claim when the highest state court passes on it." [21] And here although undoubtedly familiar with the state rule and the state cases dug up here by this Court for the first time to show that Beck's claim was not properly presented, the fact is that the eight judges of the Washington Supreme Court who sat in this case did actually pass on Beck's claim in his brief before them that to take away his right to an impartial grand jury because he was not in custody or on bail would deny him the equal protection of the laws. That claim in Beck's State Supreme Court brief was:

> "In fact, to permit one who has already been arrested to challenge the mental qualifications of a grand juror, while denying this right to one who has not been arrested, would amount to a denial of equal protection of the law. This is particularly true . . . in the state of Washington . . . ." [22]

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[21] 360 U. S. 423, 436.

[22] I know of no reason why this Court should say that the Washington Supreme Court would not "search through the brief" "to find" this contention, for I am not willing to assume that the members of the highest court of Washington did not read the briefs of the parties in this case. I must also take issue with the Court's view that this particular constitutional contention was stated in only one sentence. As I read the briefs before me petitioner took up almost two whole

In response to Beck's claim Judge Donworth, speaking for the four judges who voted to reverse the conviction, fully agreed with his contention, saying:

> "I do not understand how it can be said, under the facts shown in this record, that the *reason* entitling a person in custody or held to answer for an offense to be investigated by an impartial and unprejudiced grand jury, does not apply equally well to appellant. It is axiomatic that all men are equal before the law and are entitled to the same rights *under the same or similar circumstances.*
>
> . . . . . .
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> "Until the legislature amends or repeals the statutory law, . . . it must be applied with equal effect to every person whose conduct is under investigation by a grand jury pursuant to the court's charge to it." [23]

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pages in presenting this argument and cites eight cases and other authorities. Moreover, the four State Supreme Court judges who voted to affirm and who had petitioner's brief before them referred to that part of the brief devoted to the "Grand Jury Proceedings" as "the longest section of appellant's brief." 56 Wash. 2d, at 475, 349 P. 2d, at 387. Since they had to read this section to refer to it in this way and to discuss it, I am at a complete loss to understand the Court's further statement that petitioner's argument on this point was "considered by the Washington Supreme Court to be an abandonment or waiver of such contention." I can only consider the abandonment found by this Court to be an *ex post facto* abandonment as far as the Washington Supreme Court is concerned because as pointed out above that court actually considered and passed on the point.

[23] 56 Wash. 2d, at 528, 530, 349 P. 2d, at 418, 419. (Emphasis supplied by Judge Donworth.) To suggest, as the Court does, that this discussion involves "*interpretation*" of the statute but does not relate to equal protection of the laws is to draw a distinction that simply does not exist. What the four judges who wanted to reverse this conviction said in the plainest words possible was that the interpretation of the statute adopted by the four who voted to affirm is one that is wrong because, among other reasons, it denies equal protection of the law.

The other four judges, obviously disagreeing with their brethren and rejecting Beck's equal protection claim, held that "There was a reason" for the statutory guarantee of an impartial grand jury for one "in custody or held to answer for an offense," although denying it to one not in custody or on bail.[24]

(f) The Court also goes so far as to say that Beck's constitutional question was not included among those questions presented which our writ of certiorari was granted to review. I disagree. In the questions presented in the petition for certiorari and in the brief supporting that petition, counsel for Beck repeatedly asserted that in the manner of selecting this grand jury Beck had been denied the equal protection of the law. The core of all these claims is discrimination growing out of the manner of the selection of the grand jury. The particular classification claim which the Court seeks to avoid passing on is also a claimed discrimination with reference to the manner of selection of the grand jury. Since all these contentions are inextricably intertwined, under our decision of last term in *Boynton* v. *Virginia*[25] I see no more reason for refusing to pass on one than another. That case held a statutory claim of discrimination to have been sufficiently raised where discrimination generally was "the core of the . . . broad constitutional questions presented." Moreover, I agree with MR. JUSTICE DOUGLAS that under Rule 23 which prohibits "unnecessary detail" and which deems a question presented "to include every subsidiary question fairly comprised therein" even the most general claim of equal protection would have been sufficient to raise petitioner's claim.

The petitioner here, however, has no need to rely on either the *Boynton* case or on the broad mandate of Rule 23, for his claims are clearly encompassed among the

[24] 56 Wash. 2d, at 479, 349 P. 2d, at 390.

[25] 364 U. S. 454, 457.

specific questions as to which the writ of certiorari was granted. Two of those questions read in part:

> ". . . [D]oes a person . . . have a right under the due process and equal protection clauses of the Fourteenth Amendment to have the charges and evidence considered by a grand jury which was fair and impartial or, at least, which was instructed and directed to act fairly and impartially?"
>
> ". . . [D]id he [petitioner] have a right under the due process and equal protection clauses of the Fourteenth Amendment to have the grand jury impaneled in a manner which would prevent or at least tend to prevent the selection of biased and prejudiced grand jurors?"

Since petitioner's claim is that he was denied equal protection of the law by the failure of the presiding judge to provide the protection, guaranteed to others, of a grand jury impaneled in a manner that would insure against biased and prejudiced grand jurors, it seems inconceivable that this conviction should be sustained on the basis that the claim was not included in the petition for certiorari.

The net result of what has taken place in the Washington Supreme Court and here is to leave Beck in this predicament: the State Supreme Court considered his contention, tried to decide it but could not because it was equally divided; this Court on the contrary refuses to decide it at all on the ground that Beck has never raised such a question anywhere. The practical consequence of this predicament is to accept the argument of the State that if Beck's constitutional rights are to be protected he must depend upon "the Washington legislature and not the United States Supreme Court." [26] For this Court to

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[26] That argument was fully set out in the State's Opposition to the Petition for certiorari: "The effect of the Washington court decision in the instant case is that the meaning of Washington statutes in

accept such a consequence seems to me to be an abandonment of its solemn responsibility to protect the constitutional rights of the people.

The rules of practice which Congress and this Court have adopted over the course of years to crystallize and define the issues properly before the Court were designed to assist the Court in the fair and impartial administration of justice. I cannot believe that this end has been achieved here.

MR. JUSTICE DOUGLAS, dissenting.

I.

Although, according to *Hurtado* v. *California,* 110 U. S. 516, Washington need not use the grand jury in order to bring criminal charges against persons, it occasionally does use one; and a grand jury was impaneled in this case. It is well settled that when either the Federal Government or a State uses a grand jury, the accused is entitled to those procedures which will insure, so far as possible, that the grand jury selected is fair and impartial.[1] That

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regard to grand juries cannot be determined at this point. It would follow that this determination also is binding on the United States Supreme Court.

"Since there is neither a Federal nor a Washington state Constitutional right to an impartial grand jury, and the Washington Supreme Court cannot determine what the Washington statutes prescribe in that regard, *the Washington legislature and not the United States Supreme Court* must answer that question." (Emphasis supplied.)

[1] Since petitioner was not represented by counsel at the impaneling of the grand jury, his objection at the return of the indictment was timely. As stated in *Crowley* v. *United States,* 194 U. S. 461, 469–470:

"Some of the cases have gone so far as to hold that an objection to the personal qualifications of grand jurors is not available for the accused unless made before the indictment is returned in court. Such a rule would, in many cases, operate to deny altogether the right of an accused to question the qualifications of those who found

is the reason why the systematic exclusion of Negroes from grand jury service infects the accusatory process. See *Pierre* v. *Louisiana,* 306 U. S. 354; *Cassell* v. *Texas,* 339 U. S. 282. The same principle was applied in *Hernandez* v. *Texas,* 347 U. S. 475, when Mexicans were systematically excluded from duty as grand and petit jurors. The same principle would also apply "if a law should be passed excluding all naturalized Celtic Irishmen" from grand jury duty. *Strauder* v. *West Virginia,* 100 U. S. 303, 308.

Racial discrimination is only one aspect of the grand jury problem. As stated in *Hale* v. *Henkel,* 201 U. S. 43, 59, ". . . the most valuable function of the grand jury was not only to examine into the commission of crimes, but to stand between the prosecutor and the accused, and to determine whether the charge was founded upon credible testimony or was dictated by malice or personal ill will." We emphasized in *Hoffman* v. *United States,* 341 U. S. 479, 485, the importance of "the continuing necessity that prosecutors and courts alike be 'alert to repress' any abuses of the investigatory power" of the grand jury.[2] We recently stated in *Costello* v. *United States,* 350 U. S. 359, 362, that:

> "The grand jury is an English institution, brought to this country by the early colonists and incorporated in the Constitution by the Founders. There is every reason to believe that our constitutional grand jury was intended to operate substantially like its English progenitor. The basic purpose of the English grand jury was to provide *a fair method* for instituting criminal proceedings against persons believed to have committed crimes." (Italics added.)

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the indictment against him; for he may not know, indeed, is not entitled, of right, to know, that his acts are the subject of examination by the grand jury."

[2] See Morse, A Survey of the Grand Jury System, 10 Ore. L. Rev. 217.

The Washington Supreme Court, which affirmed this judgment of conviction, did so by an equally divided vote. The four voting for affirmance stated that absent a statutory requirement, "bias or prejudice" on the part of the grand jury was irrelevant. 56 Wash. 2d 474, 480, 349 P. 2d 387, 390.

The case of *Frisbie* v. *Collins,* 342 U. S. 519, is offered as justification for the use of an unfair procedure in bringing this charge against petitioner. We there held that forcibly abducting a person and bringing him into the State did not vitiate a state conviction where the trial was fair and pursuant to constitutional procedural requirements. Here, however, a part of the criminal proceeding is itself infected with unfairness. Whether it was necessary to use the grand jury is immaterial. It was used; and the question is whether it was used unfairly. The case is, therefore, like those where procedures, anterior to the trial, are oppressive. A notorious example is an unlawful arrest or the use of detention by the police to obtain a confession. See, *e. g., Payne* v. *Arkansas,* 356 U. S. 560; *Fikes* v. *Alabama,* 352 U. S. 191; *Watts* v. *Indiana,* 338 U. S. 49; *Turner* v. *Pennsylvania,* 338 U. S. 62; *Ward* v. *Texas,* 316 U. S. 547. Another example is denial of the right to counsel. As stated in *Powell* v. *Alabama,* 287 U. S. 45, 57, that right extends to a period anterior to the trial itself "when consultation, thoroughgoing investigation and preparation" are "vitally important." Cf. *Spano* v. *New York,* 360 U. S. 315, 324 (concurring opinion).

Could we possibly sustain a conviction obtained in either a state or federal court where the grand jury that brought the charge was composed of the accused's political enemies? If we did, we would sanction prosecution for private, not public, purposes. Whenever unfairness can be shown to infect any part of a criminal proceeding, we should hold that the requirements of due process are lacking.

A dissent in *Cassell* v. *Texas,* 339 U. S. 282, 298, said, "It hardly lies in the mouth of a defendant whom a fairly chosen trial jury has found guilty beyond reasonable doubt, to say that his indictment is attributable to prejudice." *Id.,* at 302. But the Court did not agree. Since a grand jury was used to indict, the Court held the grand jury to constitutional requirements. We should do the same here. As we stated in *Hill* v. *Texas,* 316 U. S. 400, 406:

> "It is the State's function, not ours, to assess the evidence against a defendant. But it is our duty as well as the State's to see to it that throughout the procedure for bringing him to justice he shall enjoy the protection which the Constitution guarantees. Where, as in this case, timely objection has laid bare a discrimination in the selection of grand jurors, the conviction cannot stand, because the Constitution prohibits the procedure by which it was obtained."

A grand jury serves a high function. As stated in *United States* v. *Wells,* 163 F. 313, 324:

> "It is a familiar historical fact that the system was devised to prevent harassments growing out of malicious, unfounded, or vexatious accusations. That it serves the purpose of allowing prosecutions to be initiated by the people themselves in no way detracts from the fact that it still stands as a safeguard against arbitrary or oppressive action."

The same view was stated by Mr. Justice Field, sitting as Circuit Justice:

> "In this country, from the popular character of our institutions, there has seldom been any contest between the government and the citizen, which required the existence of the grand jury as a protection against oppressive action of the government.

> Yet the institution was adopted in this country, and is continued from considerations similar to those which give to it its chief value in England, and is designed as a means, not only of bringing to trial persons accused of public offenses upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it come from government or be prompted by partisan passion or private enmity." 30 Fed. Cas. 992, 993, No. 18,255.

One who reads this record is left with doubts of the most serious character that the procedure used in the selection of the grand jury was fair in light of the unusual conditions that obtained at the time.

II.

Petitioner on March 26 and 27, 1957, appeared before a Senate Committee in Washington, D. C., and during his questioning invoked the Fifth Amendment 150 times.

On May 2, 1957, petitioner was indicted in Tacoma by a federal grand jury for income tax evasion.

On May 8, 1957, petitioner was recalled to testify before the Senate Committee and during another long interrogation invoked the Fifth Amendment about 60 times.

During these hearings the Committee members made various comments concerning petitioner. As Judge Donworth, speaking for himself and three other members of the Supreme Court of Washington, said:

> "These comments, which were extremely derogatory to appellant, were widely circulated by all news media throughout the United States, and particularly in the Seattle area. In these comments, appellant was characterized as a thief, and it was asserted that he was guilty of fraud and other illegal conduct with respect to his management of the affairs of the teamsters' union as its principal officer in the eleven

western states, and later in his position as its international president.

"These conclusions and opinions (particularly those expressed by Senator McClellan, the chairman of the committee) were displayed by local newspapers on the front page in prominent headlines. The following are a few of the comments which were referred to in such headlines which appeared in Seattle newspapers:

" 'TEAMSTERS' CASH KEPT GOING TO BECK AFTER HE BECAME UNION PRESIDENT, SAYS PROBER.' Seattle Times, March 23, 1957.

. . . . . .

" 'BECK GIVES "BLACK EYE" TO LABOR, SAYS SEN. MCNAMARA.' Seattle Times, March 27, 1957.

" 'SENATE PROBE LIFTS LID ON BECK BEER BUSINESS—USE OF UNION MONEY RELATED.' Seattle Post-Intelligencer, May 9, 1957.

"Substantial portions of the committee proceedings relating to these charges were also reproduced in the course of news broadcasts on local radio and television stations.

"The amount, intensity, and derogatory nature of the publicity received by appellant during this period is without precedent in the state of Washington. A Seattle newspaper carried a news item reporting that the switchboard of a local radio station that had broadcast the committee proceedings on the preceding day was jammed with calls, and that the officials of the station characterized the response to the broadcast on the part of the public as 'astounding,' and that such response was greater than that resulting from any other broadcast ever aired by them. The serious accusations made by United States senators in the committee hearings are generally regarded by

> laymen as being officials charges (which appellant had refused to answer), and thus the impression was created among the general public that appellant had been found guilty of a crime." 56 Wash. 2d 474, 510–512, 349 P. 2d 387, 408.

The grand jury which returned the indictment was convened on May 20, 1957.

The effect of the saturation of Seattle with this adverse publicity was summarized by Judge Donworth:

> "The natural effect of this publicity was that, in the eyes of the average citizen, the character of appellant had been thoroughly discredited in the Seattle area on or before May 20, 1957." 56 Wash. 2d, at 512, 349 P. 2d, at 408.

The *trial court* at the time of the selection of the *petit jury* referred to the publicity the case had received in the papers and over the radio and TV and sought to determine whether any jurors had become prejudiced or biased against the accused. The judge who impaneled the *grand jury* took no such precautions. He excused three who might have been prejudiced because they were or had been members of petitioner's union or of affiliated unions. He excused one employer who in reply to the question "Are you conscious of any bias, prejudice or sympathy in this case at all?" said, "That is pretty hard to answer." Of the six he excused, two admitted prejudice. Not once did the judge inquire as to the intensive adverse publicity petitioner had received and its likely effect on each juror. He asked two types of questions. The one already noted, whether the juror was conscious of bias, etc., and the other one, "Is there anything about sitting on this grand jury that might embarrass you at all?" It seems to me that the judge was derelict in failing to ascertain whether the amount of adverse

publicity petitioner had received had prejudiced the jurors toward the case about to be presented. Although he made no such inquiry of any juror, he proceeded upon the assumption that the grand jury had full knowledge of the activities of the Senate Committee:

> "We come now to the purpose of this grand jury and the reasons which the judges of this court thought sufficient to justify the expense to the county, and the inconvenience to and sacrifice by you, which this grand jury session will require.
>
> "It seems unnecessary to review the recent testimony before a Senate Investigating Committee except to say that disclosures have been made indicating that officers of the Teamsters Union have, through trick and device, embezzled or stolen hundreds of thousands of dollars of the funds of that union—money which had come to the union from the dues of its members. It has been alleged that many of these transactions, through which the money was siphoned out of the union treasury, occurred in King County. Such crimes, if committed, cannot be punished under Federal law, or under any law other than that of the State of Washington, and prosecution must take place in King County. The necessary criminal charges can only be brought in this county upon indictment by the grand jury or information filed by the prosecuting attorney.
>
> "The president of the Teamsters Union has publicly declared that the money he received from the union was a loan which he has repaid. This presents a question of fact, the truth of which is for you to ascertain.
>
> "You may find that many of the transactions happened more than three years ago; this would raise the question of the statute of limitations, which ordi-

narily bars a prosecution for larceny after three years. There are some instances, however, where the period is extended. This is a question of law and you should be guided by the advice of the prosecutors on this and similar questions. Your investigation may conceivably result in the adoption of better standards of conduct for union officials."

No admonition was given that radio, television, and newspaper reports were not the gospel. No warning was made that one who invokes the Fifth Amendment does not admit guilt. No admonition was given that the deliberations should be free of bias or prejudice. The question is not whether one who receives large-scale adverse publicity can escape grand jury investigation nor whether the hue and cry attendant on adverse publicity must have died down before the grand jury can make its investigation. This case shows the need to make as sure as is humanly possible that one after whom the mob and public passion are in full pursuit is treated fairly, that the grand jury stands between him and an aroused public, that the judge uses the necessary procedures to insure dispassionate consideration of the charge.

The State of Washington uses the grand jury only occasionally, the normal method of accusation being by information. Whether grand jurors in other cases are screened for bias or prejudice does not appear. Yet on the assumption that they are not, Beck's objections should not be in vain. Whether the unfair device is used customarily or only once, it does not comport with the Due Process Clause of the Fourteenth Amendment.

III.

I think the Court is correct in rejecting the general equal protection question on the merits. But I do think that a narrow phase of equal protection was raised and

should be decided in petitioner's favor.[3] It is conceded that if Beck had been "in custody or held to answer for an offense" he would have been entitled to challenge the grand jurors for prejudice. 56 Wash. 2d, at 479, 349 P.

[3] This is not a case where decision is asked on a question not "formally presented" by the petition for certiorari, as was true in *General Pictures Co.* v. *Electric Co.*, 304 U. S. 175, 179. It appears from the record that the question of equal protection was a "definite issue" decided by the Washington Supreme Court (*Seaboard Air Line R. Co.* v. *Duvall*, 225 U. S. 477, 487); and in at least two places in the questions presented by the petition for certiorari that decision was challenged for denial of equal protection. This was clearly sufficient, as Rule 23 (1)(c), *in haec verba*, discourages detailed amplification of the questions presented:

"The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. . . ."

The petition states, *inter alia:*

"1. Where accusation is by a grand jury indictment, does a person (in this case a member and officer of a labor union who at the time of the grand jury proceedings was the subject of continuous, extensive and intensely prejudicial publicity) have a right under the due process and equal protection clauses of the Fourteenth Amendment to have the charges and evidence considered by a grand jury which was fair and impartial or, at least, which was instructed and directed to act fairly and impartially?

"(a) Where petitioner was a member and officer of a labor union, and where prejudicial and inflammatory charges against him were being widely and intensively disseminated by all news media, did he have a right under the due process and equal protection clauses of the Fourteenth Amendment to have the grand jury impaneled in a manner which would prevent or at least tend to prevent the selection of biased and prejudiced grand jurors?"

This is enough to bring the case within our rule that only the questions "urged in the petition for certiorari and incidental to their determination will be considered on review." *Rorick* v. *Devon Syndicate*, 307 U. S. 299, 303.

At least four of the judges below thought that the equal protection point treated in this dissent was an issue. For after referring to the Washington statute which gives those in custody or held to answer

2d, at 390. To grant that class the right to challenge for prejudice and to deny it to those who are merely under investigation is to draw a line not warranted by the requirements of equal protection. I agree with the views of Judge Donworth, with whom Judges Finley, Hunter, and Rosellini concurred:

> "I do not understand how it can be said, under the facts shown in this record, that the *reason* entitling a person in custody or held to answer for an offense to be investigated by an impartial and unprejudiced grand jury, does not apply equally well to appellant. It is axiomatic that all men are equal before the law and are entitled to the same rights *under the same or similar circumstances.*" 56 Wash. 2d, at 528, 349 P. 2d, at 418.

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for an offense the right to an impartial and unprejudiced grand jury (56 Wash. 2d, at 527–528, 349 P. 2d, at 417) they stated: "Until the legislature amends or repeals the statutory law, quoted and emphasized above, it must be applied with equal effect to every person whose conduct is under investigation by a grand jury pursuant to the court's charge to it." 56 Wash. 2d, at 530, 349 P. 2d, at 419. That seems to me sufficient to bring this ruling within the statement in *Raley* v. *Ohio,* 360 U. S. 423, 436, to the effect that "There can be no question as to the proper presentation of a federal claim when the highest state court passes on it."

GOLDBLATT ET AL. *v.* TOWN OF HEMPSTEAD.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 78. Argued January 15–16, 1962.—Decided May 14, 1962.

The individual appellant owned a 38-acre tract within the Town of Hempstead on which the corporate appellant had been mining sand and gravel continuously since 1927. During the first year the excavation reached the water table, leaving a water-filled crater which had since been widened and deepened until it became a 20-acre lake with an average depth of 25 feet, around which the Town had expanded until, within a radius of 3,500 feet, there were more than 2,200 homes and 4 public schools with a combined enrollment of 4,500 pupils. In 1958 the Town amended its ordinance regulating such excavations so as to prohibit any excavating below the water table. Although this concededly prohibited the beneficial use to which the property had previously been devoted, a state court granted the Town an injunction to enforce this prohibition. *Held:* On the record in this case, appellants have not sustained the burden of showing that the depth limitation is so onerous and unreasonable as to result in a taking of their property without due process of law in violation of the Fourteenth Amendment. Pp. 590–598.

9 N. Y. 2d 101, 172 N. E. 2d 562, affirmed.

Milton I. Newman argued the cause for appellants. With him on the briefs were *John J. Bennett* and *Edward M. Miller.*

William C. Mattison argued the cause for appellee. With him on the briefs were *Richard P. Charles* and *Mario Matthew Cuomo.*

John F. Lane and *Jerome Powell* filed a brief for the National Crushed Stone Association, as *amicus curiae,* urging reversal.

MR. JUSTICE CLARK delivered the opinion of the Court.

The Town of Hempstead has enacted an ordinance regulating dredging and pit excavating on property within its limits. Appellants, who engaged in such operations

prior to the enactment of the ordinance, claim that it in effect prevents them from continuing their business and therefore takes their property without due process of law in violation of the Fourteenth Amendment. The trial court held that the ordinance was a valid exercise of the town's police power, 19 Misc. 2d 176, 189 N. Y. S. 2d 577, and the Appellate Division affirmed, 9 App. Div. 2d 941, 196 N. Y. S. 2d 573. The New York Court of Appeals in a divided opinion affirmed. 9 N. Y. 2d 101, 172 N. E. 2d 562. We noted probable jurisdiction, 366 U. S. 942, and having heard argument we now affirm the judgment.

Appellant Goldblatt owns a 38-acre tract within the Town of Hempstead. At the time of the present litigation appellant Builders Sand and Gravel Corporation was mining sand and gravel on this lot, a use to which the lot had been put continuously since 1927. Before the end of the first year the excavation had reached the water table leaving a water-filled crater which has been widened and deepened to the point that it is now a 20-acre lake with an average depth of 25 feet. The town has expanded around this excavation, and today within a radius of 3,500 feet there are more than 2,200 homes and four public schools with a combined enrollment of 4,500 pupils.

The present action is but one of a series of steps undertaken by the town in an effort to regulate mining excavations within its limits. A 1945 ordinance, No. 16, provided that such pits must be enclosed by a wire fence and comply with certain berm and slope requirements. Although appellants complied with this ordinance, the town sought an injunction against further excavation as being violative of a zoning ordinance. This failed because appellants were found to be "conducting a prior non-conforming use on the premises . . . ." 135 N. Y. L. J., issue 52, p. 12 (1956). The town did not appeal.

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In 1958 the town amended Ordinance No. 16 to prohibit any excavating below the water table [1] and to impose an affirmative duty to refill any excavation presently below that level. The new amendment also made the berm, slope, and fence requirements more onerous.

In 1959 the town brought the present action to enjoin further mining by the appellants on the grounds that they had not complied with the ordinance, as amended, nor acquired a mining permit as required by it.[2] Appellants contended, *inter alia,* that the ordinance was unconstitutional because (1) it was not regulatory of their business but completely prohibitory and confiscated their property without compensation, (2) it deprived them of the benefit of the favorable judgment arising from the previous zoning litigation, and (3) it constituted *ex post facto* legislation. However, the trial court did not agree, and the appellants were enjoined from conducting further operations on the lot until they had obtained a permit and had complied with the new provisions of Ordinance No. 16.

Concededly the ordinance completely prohibits a beneficial use to which the property has previously been devoted. However, such a characterization does not tell us whether or not the ordinance is unconstitutional. It is an oft-repeated truism that every regulation necessarily speaks as a prohibition. If this ordinance is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional. *Walls* v. *Midland Carbon Co.,* 254 U. S. 300 (1920); *Hadacheck* v. *Sebastian,* 239 U. S.

[1] Specifically the ordinance provides that "[n]o excavation shall be made below two feet above the maximum ground water level at the site."

[2] Under the ordinance the town may deny a permit if the proposed excavation will violate any of the provisions of the ordinance.

394 (1915); *Reinman* v. *Little Rock,* 237 U. S. 171 (1915); *Mugler* v. *Kansas,* 123 U. S. 623 (1887); see *Laurel Hill Cemetery* v. *San Francisco,* 216 U. S. 358 (1910). As pointed out in *Mugler* v. *Kansas, supra,* at 668–669:

> "[T]he present case must be governed by principles that do not involve the power of eminent domain, in the exercise of which property may not be taken for public use without compensation. A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests. . . . The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community."

Nor is it of controlling significance that the "use" prohibited here is of the soil itself as opposed to a "use" upon the soil, cf. *United States* v. *Central Eureka Mining Co.,* 357 U. S. 155 (1958), or that the use prohibited is arguably not a common-law nuisance, *e. g., Reinman* v. *Little Rock, supra.*

This is not to say, however, that governmental action in the form of regulation cannot be so onerous as to constitute a taking which constitutionally requires compensation. *Pennsylvania Coal Co.* v. *Mahon,* 260 U. S. 393 (1922); see *United States* v. *Central Eureka Mining Co., supra.* There is no set formula to determine where regulation ends and taking begins. Although a comparison of values before and after is relevant, see *Pennsylvania Coal Co.* v. *Mahon, supra,* it is by no means conclusive, see *Hadacheck* v. *Sebastian, supra,* where a diminution in value from $800,000 to $60,000 was upheld. How far regulation may go before it becomes a taking we need not now decide, for there is no evidence in the present record which even remotely suggests that prohibition of further mining will reduce the value of the lot in question.[3] Indulging in the usual presumption of constitutionality, *infra,* p. 596, we find no indication that the prohibitory effect of Ordinance No. 16 is sufficient to render it an unconstitutional taking if it is otherwise a valid police regulation.

The question, therefore, narrows to whether the prohibition of further excavation below the water table is a valid exercise of the town's police power. The term "police power" connotes the time-tested conceptional limit of public encroachment upon private interests. Except for the substitution of the familiar standard of "reasonableness," this Court has generally refrained from announcing any specific criteria. The classic statement of the rule in *Lawton* v. *Steele,* 152 U. S. 133, 137 (1894), is still valid today:

> "To justify the State in . . . interposing its authority in behalf of the public, it must appear, first, that

[3] There is a similar scarcity of evidence relative to the value of the processing machinery in the event mining operations were shut down.

> the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."

Even this rule is not applied with strict precision, for this Court has often said that "debatable questions as to reasonableness are not for the courts but for the legislature . . . ." *E. g., Sproles* v. *Binford,* 286 U. S. 374, 388 (1932).

The ordinance in question was passed as a safety measure, and the town is attempting to uphold it on that basis. To evaluate its reasonableness we therefore need to know such things as the nature of the menace against which it will protect, the availability and effectiveness of other less drastic protective steps, and the loss which appellants will suffer from the imposition of the ordinance.

A careful examination of the record reveals a dearth of relevant evidence on these points. One fair inference arising from the evidence is that since a few holes had been burrowed under the fence surrounding the lake it might be attractive and dangerous to children. But there was no indication whether the lake as it stood was an actual danger to the public or whether deepening the lake would increase the danger. In terms of dollars or some other objective standard, there was no showing how much, if anything, the imposition of the ordinance would cost the appellants. In short, the evidence produced is clearly indecisive on the reasonableness of prohibiting further excavation below the water table.

Although one could imagine that preventing further deepening of a pond already 25 feet deep would have a *de minimis* effect on public safety, we cannot say that such a conclusion is compelled by facts of which we can take notice. Even if we could draw such a conclusion,

we would be unable to say the ordinance is unreasonable; for all we know, the ordinance may have a *de minimis* effect on appellants. Our past cases leave no doubt that appellants had the burden on "reasonableness." *E. g., Bibb* v. *Navajo Freight Lines,* 359 U. S. 520, 529 (1959) (exercise of police power is presumed to be constitutionally valid); *Salsburg* v. *Maryland,* 346 U. S. 545, 553 (1954) (the presumption of reasonableness is with the State); *United States* v. *Carolene Products Co.,* 304 U. S. 144, 154 (1938) (exercise of police power will be upheld if any state of facts either known or which could be reasonably assumed affords support for it). This burden not having been met, the prohibition of excavation on the 20-acre-lake tract must stand as a valid police regulation.

We now turn our attention to the remainder of the lot, the 18 acres surrounding the present pit which have not yet been mined or excavated. Appellants themselves contend that this area cannot be mined. They say that this surface space is necessary for the processing operations incident to mining and that no other space is obtainable. This was urged as an important factor in their contention that upholding the depth limitation of the ordinance would confiscate the entire mining utility of their property. However, we have upheld the validity of the prohibition even on that supposition. If the depth limitation in relation to deepening the existing pit is valid, it follows *a fortiori* that the limitation is constitutionally permissible as applied to prevent the creation of new pits. We also note that even if appellants were able to obtain suitable processing space the geology of the 18-acre tract would prevent any excavation. The water table, appellants admit, is too close to the ground surface to permit commercial mining in the face of the depth restrictions of the ordinance. The impossibility of further mining

makes it unnecessary for us to decide to what extent the berm and slope of such excavation could be limited by the ordinance.

Appellants' other contentions warrant only a passing word. The claim that rights acquired in previous litigation are being undermined is completely unfounded. A successful defense to the imposition of one regulation does not erect a constitutional barrier to all other regulation. The first suit was brought to enforce a zoning ordinance, while the present one is to enforce a safety ordinance. In fact no relevant issues presented here were decided in the first suit.[4] We therefore do not need to consider to what extent such issues would have come under the protective wing of due process.

Appellants also contend that the ordinance is unconstitutional because it imposes under penalty of fine and imprisonment such affirmative duties as refilling the existing excavation and the construction of a new fence. This claim is founded principally on the constitutional prohibitions against bills of attainder and *ex post facto* legislation.[5] These provisions are severable, both in nature and by express declaration, from the prohibition against further excavation. Since enforcement of these provisions was not sought in the present litigation, this Court under well-established principles will not at this time undertake to decide their constitutionality. *E. g., Ohio Tax Cases,* 232 U. S. 576, 594 (1914); cf. *United States* v. *Raines,* 362 U. S. 17 (1960). That

[4] Although it was adjudicated that *at that time* appellants had made substantial improvements on the lot, this fact would not be indicative of the loss appellants would *presently* suffer if the mine were closed; perhaps the improvements are commercially salable.

[5] The appellee asserts that these grounds were not properly preserved below. Due to our disposition of these arguments, it is unnecessary to reach this question.

determination must await another day. We pass only on the provisions of the ordinance here invoked, not on probabilities not now before us, and to that extent the judgment is

Affirmed.

MR. JUSTICE FRANKFURTER took no part in the decision of this case.

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

HUTCHESON *v.* UNITED STATES.

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

No. 46. Argued November 6, 1961.—Decided May 14, 1962.

Summoned to testify before the Senate Select Committee on Improper Activities in the Labor or Management Field, which was seeking information to aid in drafting and adopting legislation to curb misuse of union funds by union officials, petitioner, president of a labor union, refused to answer 18 questions pertaining to the use of union funds in an attempt to forestall an indictment in Lake County, Indiana, for the alleged bribery of a state official in connection with a sale of land to the State. He disclaimed any intention to rely on his privilege against self-incrimination; but he claimed that the questions were not pertinent to any activity which the Committee was authorized to investigate, that they were asked for purposes of "exposure" and that they might aid the prosecution of criminal charges then pending against him in a state court and thus violate his rights under the Due Process Clause of the Fifth Amendment. These objections were overruled; but petitioner persisted in his refusal to answer. For such refusal, he was convicted of a violation of 2 U. S. C. § 192, which makes it a misdemeanor for any person summoned as a witness by either House of Congress or a committee thereof to refuse to answer any question pertinent to the question under inquiry. *Held:* The questions which petitioner refused to answer were clearly within the proper scope of the Committee's inquiry; the record does not support a conclusion that they were asked merely for the sake of "exposure" or to aid in the pending state criminal trial; the mere fact that answers to the questions might have been used against petitioner in the pending state criminal trial did not make this conviction violative of the Due Process Clause of the Fifth Amendment; and the conviction is sustained. Pp. 600–628.

109 U. S. App. D. C. 200, 285 F. 2d 280, affirmed.

Frederick Bernays Wiener argued the cause for petitioner. With him on the briefs were *Charles H. Tuttle* and *Joseph P. Tumulty, Jr.*

Solicitor General Cox argued the cause for the United States. With him on the briefs were *Assistant Attorney General Miller, Philip R. Monahan, Beatrice Rosenberg* and *Jerome M. Feit.*

MR. JUSTICE HARLAN announced the judgment of the Court and an opinion in which MR. JUSTICE CLARK and MR. JUSTICE STEWART join.

After a trial without a jury, petitioner was found guilty on all 18 counts of an indictment charging him with having violated 2 U. S. C. § 192 [1] by refusing to answer pertinent questions put to him on June 27, 1958, by the Senate Select Committee on Improper Activities in the Labor or Management Field, commonly known as the McClellan Committee. He was sentenced to six months' imprisonment and fined $500. The judgment was affirmed by the Court of Appeals, without opinion. We granted certiorari to consider petitioner's constitutional challenges to his conviction. 365 U. S. 866.

The McClellan Committee was established by the Senate in 1957

> "to conduct an investigation and study of the extent to which criminal or other improper practices or activities are, or have been, engaged in in the field of labor-management relations or in groups or organi-

[1] "§ 192. Refusal of witness to testify or produce papers.

"Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months."

> zations of employees or employers to the detriment of the interests of the public, employers or employees, and to determine whether any changes are required in the laws of the United States in order to protect such interests against the occurrence of such practices or activities." S. Res. 74, 85th Cong., 1st Sess. (1957).[2]

Pursuing an investigative pattern which in 1957 and the the forepart of 1958 had disclosed misuse of union funds for the personal benefit of various union officials,[3] the Committee on June 4, 1958, began hearings at Washington, D. C., into the affairs of various organizations, including the United Brotherhood of Carpenters and Joiners of America of which the petitioner was president. Initially, the Committee sought to inquire into the personal financial interests of petitioner and other officials of the Carpenters Union in the World Wide Press, a New York publishing house owned by one Maxwell Raddock, which was publisher of the "Trade Union Courier." More especially the Committee wished to learn whether union funds had been misused in the publication by the Press of a biography of petitioner's father, entitled "The Portrait of an American Labor Leader, William L. Hutcheson." Senator McClellan, Chairman of the Committee,

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[2] The original resolution provided that the Committee was to exist until January 31, 1958. Its term was thereafter extended for an additional 26 months by several Senate Resolutions. S. Res. 221, 85th Cong., 2d Sess. (1958); S. Res. 44, 86th Cong., 1st Sess. (1959); S. Res. 249, 86th Cong., 2d Sess. (1960).

[3] See S. Rep. No. 1417, 85th Cong., 2d Sess. (1958). See also S. Rep. No. 621, 86th Cong., 1st Sess. (1959); S. Rep. No. 1139, 86th Cong., 2d Sess. (1960). The reports covered 2,032 pages and summarized 46,150 pages of testimony taken during 270 days of hearings at which 1,526 witnesses appeared. S. Rep. No. 1139, pt. 4, 86th Cong., 2d Sess. 868 (1960).

announced that the petitioner and Raddock would both be called to testify.[4]

On June 25 Raddock testified as to the affairs of the "Trade Union Courier" and the publication of the

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[4] The Chairman's full opening statement, which appears at pp. 11785–11786 of the Hearings before the Select Committee on Improper Activities in the Labor or Management Field, pt. 31, 85th Cong., 2d Sess. (1958) (hereinafter Hearings), is as follows:

"The committee will hear witnesses today on the operations of Mr. Maxwell Raddock, owner of the World Wide Press, a large New York printing plant, and publisher of the Trade Union Courier.

"Witnesses will be called to testify as to financial interests and investments in the World Wide Press by labor organizations and certain labor officials and the unorthodox manner in which bonds of the company were issued and handled.

"The committee will also inquire into the propriety of labor officials' having financial interests in Maxwell Raddock's company at the same time that they invested considerable sums of their union's funds in the plant that prints the Trade Union Courier and in subscriptions to that paper.

"The manner in which advertisements were solicited by the Trade Union Courier has been the subject of investigation by the committee staff. The committee is particularly interested in whether solicitors employed by the Trade Union Courier represented it as the organ of the AFL–CIO as well as making other false representations.

"Preliminary investigation by the staff has disclosed certain financial transactions of the United Brotherhood of Carpenters which require explanation.

"One of these transactions involves very large expenditures in the publication of a book entitled, 'The Portrait of an American Labor Leader, William L. Hutcheson.'

"Maurice Hutcheson, who is now president of the United Brotherhood of Carpenters, and Mr. Raddock will be questioned about this matter.

"The Chair may say that during the existence of this committee we have had much information and a great deal of testimony regarding the misuse of union funds, regarding personal financial gain and benefit and profit and expenditure of such funds by union officials, and we are still pursuing that aspect of labor-management relations.

"We have also had considerable evidence of collusion between

Hutcheson book.[5] On the following day, however, he claimed the Fifth Amendment privilege against self-incrimination with respect to another matter to which the Committee had turned. That matter related to the possible use of union funds or influence to "fix" a 1957 criminal investigation, conducted in Lake County, Indiana, by a state grand jury, into an alleged scheme to defraud the State of Indiana, in which petitioner and two other officials of the Carpenters Union, O. William Blaier and Frank M. Chapman, were allegedly implicated.

The alleged scheme to defraud had been revealed in testimony given before a Subcommittee of the Senate Committee on Public Works during May and June 1957. That testimony had disclosed that in June 1956 the petitioner, Blaier, and Chapman had together bought, in their individual capacities, certain real property in Lake County for $20,000, and had shortly thereafter sold it, at a profit of $78,000, to the State of Indiana for highway construction purposes, pursuant to an agreement whereby a deputy in the Indiana Right-of-Way Department was paid one-fifth of that profit.[6] The ensuing grand jury proceeding had been terminated in August 1957 without any indictment having been found, with an announcement by the county prosecutor, Metro Holovachka, that "jurisdiction" over the matter was lacking in Lake County, and that the entire $78,000 profit had been returned to the State. Thereafter, in February 1958,

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management and union officials where they both profit at the expense of the men who work and pay the dues.

"In this particular instance, there is indication that the union membership have again been imposed upon by transactions that have occurred that we will look into as the evidence unfolds before us."

[5] Hearings, 11932–11995, 12000–12006.

[6] Investigation of Highway Right-of-Way Acquisition—State of Indiana, Hearings before a Subcommittee of the Committee on Public Works, U. S. Senate, 85th Cong., 1st Sess. (1957).

the petitioner, Blaier, and Chapman were indicted in adjoining Marion County on this transaction.[7]

It is apparent from the questioning of Raddock by the chief counsel for the McClellan Committee that the Committee had information indicating that Raddock, the petitioner, Blaier, and several officials of the Teamsters Union had been involved in a plan whereby Holovachka had been induced to drop the Lake County grand jury investigation, and Committee counsel explained to Raddock that the Committee was interested to learn whether union funds or influence had been used for that purpose.[8]

In addition to Raddock, whose self-incrimination plea with respect to all questions relating to that episode was respected by the Committee, Blaier, and two witnesses connected with an Indiana Local of the Teamsters Union, Michael Sawochka its secretary-treasurer and Joseph P. Sullivan its attorney, were also examined before the Committee on June 26. Sawochka and Sullivan each refused to answer any questions relating to the termination of the Lake County grand jury proceedings, Sawochka basing his refusal on the Fifth Amendment privilege against self-incrimination, and Sullivan invoking the attorney-client privilege insofar as the questions related to any discussions with Sawochka. Both claims were honored by the Committee.

Blaier, who was asked no questions regarding the Lake County real estate transaction itself,[9] refused to answer the question whether he had made "any arrangements for

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[7] The Government's brief informs us that petitioner and his two codefendants, Blaier and Chapman, were convicted on the Marion County indictment in November 1960, and that the conviction is now pending on appeal in the Supreme Court of Indiana.

[8] Note 17, *infra*.

[9] A copy of the state indictment was accepted for reference, and the Chairman announced that it was a "rule or policy" of the Committee not to interrogate about matters for which the witness was under pending state indictment. Hearings, 12060.

Mr. Max Raddock to fix any case for you in Indiana." He asserted that the question "relates solely to a personal matter, not pertinent to any activity which this committee is authorized to investigate and . . . it might aid the prosecution in the case in which I am under indictment." The Committee Chairman, without ruling on the objection, stated that the witness might claim the privilege against self-incrimination. Although Blaier did not thereafter do so, he was never directed by the Committee to answer this question.[10]

The last witness who was examined by the Committee on this phase of its investigation was the petitioner, who was called on June 27. He answered questions concerning the publication by Raddock of the biography of petitioner's father, commissioned by the Carpenters Union at a total expense of $310,000. When the inquiry turned to the subject of the Lake County grand jury investigation, however, petitioner refused to answer any questions. Being under the same indictment as Blaier and represented by the same counsel, petitioner's grounds for refusal were the same as those which had been advanced the day before by Blaier: "it [the question] relates solely to a personal matter, not pertinent to any activity which this committee is authorized to investigate, and also it

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[10] The Committee's chief counsel stated that the question did not relate to the subject matter of the state indictment but "to steps taken in a later conspiracy to present [prevent?] an indictment in Lake County, Ind." Hearings, 12074. Blaier's attorney argued that the answer could be used by the prosecution in the Indiana case to prove the continuation of the conspiracy. Whether the question involved the state indictment or not, the Committee's counsel conceded that Blaier might "not want to answer the questions on the grounds it may tend to incriminate him, but not because he is under indictment or that I am asking questions dealing with the indictment." The chairman ruled, "It may be a borderline case. I am unable to determine it at this time. The witness can exercise his privilege." Hearings, 12074.

relates or might be claimed to relate to or aid the prosecution in the case in which I am under indictment and thus be in denial of due process of law." [11] No claim of the Fifth Amendment privilege against self-incrimination was made at any stage. This objection, upon which the petitioner stood throughout this phase of his interrogation, was overruled by the Committee, and petitioner was directed, and refused to answer, each of the 18 questions constituting the subject matter of the indictment upon which he has been convicted.[12]

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[11] Hearings, 12115.

[12] *Count 1:* "Has he [Mr. Raddock] received from the union payment for acts performed in your behalf and for you as an individual?" *Count 2:* "Have you, unrelated to this offense charged in the indictment now against you, engaged the services of Mr. Raddock, and have you paid him out of union funds for the performance of those services, to aid and assist you in avoiding or preventing an indictment from being found against you or for being criminally prosecuted for any other offense other than that mentioned in this indictment?" *Count 3:* "Did you engage the services of Mr. Raddock and pay him for those services out of union funds, to contact, either directly or indirectly, the county prosecuting attorney, Mr. Holovachka, given name Metro, in Lake County, Gary, Ind.?" *Count 4:* "Have you paid Max C. Raddock out of union funds for personal services rendered to you at any time within the past 5 years?" *Count 5:* "Have you used union funds to pay Max C. Raddock for any services rendered to you personally, wholly disassociated from any matters out of which the pending criminal charge arose?" *Count 6:* "Was he there [in Chicago] on union business for which the union had the responsibility for payment?" *Count 7:* "Was Mr. Raddock paid on that trip, the expenses of his paid by union funds while he was on union business?" *Count 8:* "You were out in Chicago at the same time?" *Count 9:* "Were your expenses on that Chicago trip paid by the union?" *Count 10:* "Were you out in Chicago at that time on union business?" *Count 11:* "Do you know Mr. James Hoffa?" *Count 12:* "Did you make an arrangement with Mr. Hoffa that he was to perform tasks for you in return for your support on the question of his being ousted from the A. F. L.–CIO?" *Count 13:* "Isn't it a fact that you telephoned Mr. Hoffa from your hotel in Chicago on August 12, 1957?" *Count 14:* "And wasn't that tele-

The many arguments now made to us in support of reversal are reducible to two constitutional challenges. First, it is contended that questioning petitioner on any matters germane to the state criminal charges then pending against him was offensive to the Due Process Clause of the Fifth Amendment. Second, it is argued that the Committee invaded domains constitutionally reserved to the Executive and the Judiciary, in that its inquiry was simply aimed at petitioner's "exposure" and served no legislative purpose. For reasons now to be discussed we decide that neither challenge is availing.

I.

Due Process.

The Committee's interrogation is said to have been fundamentally unfair in two respects: (1) it placed the petitioner in a position where, save for silence, his only choice lay between prejudicing his defense to the state indictment, and committing perjury; and (2) it was a "pretrial" of the state charges before the Committee. The first of these propositions rests on two premises respecting Indiana law, which we accept for the purposes of the ensuing discussion: admissions of an attempt to "fix" the grand jury investigation could have been used against petitioner in the state trial as evidence of consciousness of guilt (see, *e. g., Davidson* v. *State,* 205 Ind. 564, 569, 187 N. E. 376, 378); a claim of the federal self-

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phone call in fact paid out of union funds, the telephone call that you made to him on August 12?" *Count 15:* "Do you also know Mr. Sawochka of the Brotherhood of Teamsters?" *Count 16:* "Isn't it a fact that you had Mr. Plymate who is a representative of the brotherhood, telephone, and your secretary telephone, Mr. Sawochka from your room on August 13, 1957?" *Count 17:* "And isn't it a fact that that telephone bill and that telephone call was paid out of union funds?" *Count 18:* "Did you have any business with local 142 of the Teamsters in Gary, Ind.?"

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incrimination privilege before that Committee could also have been so used, at least to impeach petitioner's testimony had he taken the stand at the state trial (see *Crickmore* v. *State,* 213 Ind. 586, 592–593, 12 N. E. 2d 266, 269).

The contention respecting Indiana's future use of incriminatory answers at once encounters an obstacle in *Hale* v. *Henkel,* 201 U. S. 43, and *United States* v. *Murdock,* 284 U. S. 141. Those cases establish that possible self-incrimination under state law is not a ground for refusing to answer questions in a federal inquiry; accordingly, the Fifth Amendment privilege against self-incrimination will not avail one so circumstanced. Manifestly, this constitutional doctrine is no less relevant here either because the petitioner was actually under, and not merely threatened with, state indictment at the time of his appearance before the Committee, or because of the likelihood that the Committee would have respected, even though not required to do so under existing law, a privilege claim had one been made.

Recognizing this obstacle, petitioner asks us to overrule *Hale* and *Murdock,* asserting that both decisions rested on misapprehensions as to earlier American and English law.[13] But we need not consider those conten-

[13] Among other things, petitioner contends that both *Hale* v. *Henkel* and *United States* v. *Murdock* were founded on a misreading of an earlier decision of this Court, *United States* v. *Saline Bank,* 1 Pet. 100, which was delivered by Chief Justice Marshall. It is argued that *Saline Bank* stands for the proposition that the constitutional privilege against self-incrimination may be invoked in a federal court if the information divulged may aid a state prosecution. It is abundantly clear, however, that *Saline Bank* stands for no constitutional principle whatever. It was merely a reassertion of the ancient *equity rule* that a court of equity will not order discovery that may subject a party to criminal prosecution. In fact, the decision was cited in support of that proposition by an esteemed member of the very Court that decided the case. 2 Story, Commentaries on Equity, § 1494, n. 1 (1836).

tions, for petitioner never having claimed the Fifth Amendment privilege before the Committee, this aspect of his due process challenge is not open to him now. This is not a case like *Quinn* v. *United States,* 349 U. S. 155, or *Emspak* v. *United States,* 349 U. S. 190, where there is doubt whether that privilege was invoked by the witness. "If," as was noted in *Emspak,* at 195, "the witness intelligently and unequivocally waives any objection based on the Self-Incrimination Clause, or if the witness refuses a committee request to state whether he relies on the Self-Incrimination Clause, he cannot later invoke its protection in a prosecution for contempt for refusing to answer that question." In this instance, the petitioner, with counsel at his side, unequivocally and repeatedly disclaimed any reliance on the Fifth Amendment privilege.[14]

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[14] Typical of such disclaimers are the following:

"The CHAIRMAN. I understand, it very clear now, that you are not invoking the fifth amendment privilege?

"Mr. HUTCHESON. That is right, sir, I am not invoking it.

"The CHAIRMAN. You are not exercising that privilege?

"Mr. HUTCHESON. No, sir.

"The CHAIRMAN. You are challenging the question and the jurisdiction of the committee for the reasons you have stated and for those reasons only?

"Mr. HUTCHESON. Yes, sir.

"The CHAIRMAN. All right. We have a clear understanding about that." Hearings, 12116.

"The CHAIRMAN. And, again, not invoking the privilege of the fifth amendment, you stand only and solely upon the statement you have read?" [See pp. 605–606, *supra.*]

"Mr. HUTCHESON. Yes, sir.

"The CHAIRMAN. And you are not exercising the privilege that, by answering, a truthful answer might tend to incriminate you?

"(Witness conferred with counsel.)

"Mr. HUTCHESON. No, sir." Hearings, 12117.

Further disclaimers of the same tenor will be found at Hearings, 12119, 12121–12122, and 12124. Petitioner did not explain at the

Petitioner cannot escape the effect of his waiver by arguing, as he does, that his refusals to answer were based on "due process" grounds, and not upon a claim of "privilege." We agree, of course, that a congressional committee's right to inquire is "subject to" *all* relevant "limitations placed by the Constitution on governmental action," including "the relevant limitations of the Bill of

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hearings why he went to such pains to avoid any appearance of invoking the privilege against self-incrimination. However, the following colloquy between petitioner and a member of the Committee sheds some light on his motivation:

"Senator ERVIN. Mr. Chairman, may I ask one or two questions along that line and then I will subside?

"Mr. Hutcheson, you are familiar with the provisions of the AFL–CIO ethical code concerning officers of affiliated unions who invoke the fifth amendment; aren't you?

"Mr. HUTCHESON. Yes, sir.

"Senator ERVIN. In that connection I would like to state that this is my opinion of the law, though it may not be your counsel's. The only reason for recognizing the right that a man may not testify concerning matters involved in an indictment against him arises out of the fact that the indictment is probably the strongest kind of evidence that anything he may say in reference to it may be construed to incriminate him, and that the only reason that a man has a right to refrain from answering matters about an indictment is the fact that what he may say about those matters may tend to incriminate him.

"Therefore, Mr. Hutcheson, don't you realize that what you are doing is that you are seeking to avoid an expressed violation? In other words, you are seeking to get the benefit of the fifth amendment without invoking it so that you will not run the risk of committing an offense against the ethical code of the A. F. of L.–CIO?

"(The witness conferred with his counsel.)

"Mr. HUTCHESON. Sir, I have been following the advice of counsel on the grounds outlined by me.

"Senator ERVIN. Well, you are concerned that there shall be no actual or apparent violation on your part of the provisions of the A. F. of L.–CIO code of ethics concerning union officers who invoke the fifth amendment when asked about their official conduct, aren't you?

"Mr. HUTCHESON. Yes, sir." Hearings, 12124–12125.

Rights," *Barenblatt* v. *United States,* 360 U. S. 109, 112; that such limitations go beyond the protection of the self-incrimination clause of the Fifth Amendment, *id.,* 111–112, and that nonreliance on one such limitation does not preclude reliance on another. But it is surely equally clear that where, as here, the validity of a particular constitutional objection depends in part on the availability of another, both must be adequately raised before the inquiring committee if the former is to be fully preserved for review in this Court.

To hold otherwise would enable a witness to toy with a congressional committee in a manner obnoxious to the rule that such committees are entitled to be clearly apprised of the grounds on which a witness asserts a right of refusal to answer. *Emspak* v. *United States, supra,* at 195; cf. *Barenblatt* v. *United States, supra,* at 123–124. The present case indeed furnishes an apt illustration of this. Pursuant to its policy of respecting Fifth Amendment privilege claims with respect to "state" self-incrimination (even though with *Hale* and *Murdock* still on the books it need not have done so), the Committee was at pains to discover whether petitioner's due process objection included a privilege claim. Had he made such a claim, there is little doubt but that the Committee would have honored it. It was only after petitioner's express disclaimer of the privilege that the Committee proceeded to disallow his due process objection. Now to consider that the self-incrimination aspect of petitioner's due process claim is still open to him would in effect require us to say that, despite petitioner's unequivocal disclaimer, the Committee should nonetheless have taken his due process objection as subsuming also a privilege claim.[15] We cannot so consider the situation.

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[15] While the Committee did not press Blaier to answer questions relating to the Lake County grand jury proceedings after he had refused to do so on the same grounds as those advanced by the peti-

We also find untenable the contention that possible use in the state trial of a claim of the federal privilege against self-incrimination either excused petitioner from asserting it before the Committee or furnishes independent support for his due process challenge. Whether or not, as is intimated by the Government, but, for obvious reasons, not by the petitioner, the State's use of such a claim directly or for impeachment purposes might be preventable, need not now be considered. For if such a proposition is arguable in the face of *Twining* v. *New Jersey,* 211 U. S. 78, and *Adamson* v. *California,* 332 U. S. 46, 51, let alone *Knapp* v. *Schweitzer,* 357 U. S. 371; *Feldman* v. *United States,* 322 U. S. 487; *Hale* v. *Henkel, supra,* and *United States* v. *Murdock, supra,* its consideration should in any event await another day. The appropriate time for that, had the petitioner in this instance claimed the privilege before the Committee, would have been upon review of his state conviction, when we would have known exactly what use, if any, the State had made of the federal claim. To thwart the exercise of legitimate congressional power, on the basis of conjecture that a State may later abuse an individual's reliance upon federally assured rights, would require of us a constitutional adjudication contrary to well-established principles of ripeness and justiciability. Cf. *United Public Workers* v. *Mitchell,* 330 U. S. 75, 89–90.

There remains for discussion on the due process challenge, the contention that the Committee's inquiry was a "pretrial" of the state indictment. Insofar as this proposition suggests that the congressional inquiry infected the later state proceedings, the answer to it is found in what we have just said respecting the conten-

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tioner, there is nothing to indicate that this resulted from the Committee's understanding that those grounds included a claim of the Fifth Amendment privilege.

tion that a claim of self-incrimination before the Committee could have been used in the state proceedings. If the Committee's public hearings rendered petitioner's state trial unfair, such a challenge should not be dealt with at this juncture. The proper time for its consideration would be on review of the state conviction. To determine it now would require us to pass upon the claim in the dark, since we are entirely ignorant of what transpired at the state trial.

Nor can it be argued that the mere pendency of the state indictment *ipso facto* constitutionally closed this avenue of interrogation to the Committee. "It may be conceded that Congress is without authority to compel disclosures for the purpose of aiding the prosecution of pending suits; but the authority of that body, directly or through its committees, to require pertinent disclosures in aid of its own constitutional power is not abridged because the information sought to be elicited may also be of use in such suits." *Sinclair* v. *United States,* 279 U. S. 263, 295. It would be absurd to suggest that in establishing this committee the Congress was actuated by a purpose to aid state prosecutions, still less that of this particular individual. The pertinency of the observation in *Sinclair* is not lessened by the circumstance that in this instance the state proceeding involved was criminal, rather than civil. Cf. *Delaney* v. *United States,* 199 F. 2d 107, 114.[16]

[16] The suggestion made in dissent that the questions which petitioner refused to answer were "outside the power of a committee to ask" (*post,* p. 638) under the Due Process Clause because they touched on matters then pending in judicial proceedings cannot be accepted for several reasons. *First:* The reasoning underlying this proposition is that these inquiries constituted a legislative encroachment on the judicial function. But such reasoning can hardly be limited to inquiries that may be germane to *existing* judicial proceedings; it would surely apply as well to inquiries calling for answers that might be used to the prejudice of the witness in any *future* judicial

II.

Exposure.

There is also no merit to petitioner's contention that the Committee undertook simply "to expose" petitioner "for the sake of exposure," *Watkins* v. *United States,* 354 U. S. 178, 200. The origins of the McClellan Committee, and the products of its endeavors, both belie that challenge, and nothing in the record of the present hearings points to a contrary conclusion.

It cannot be gainsaid that legislation, whether civil or criminal, in the labor-management field is within the competence of Congress under its power to regulate inter-

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proceeding. If such were the reach of "due process" it would turn a witness' privilege against self-incrimination into a self-operating restraint on congressional inquiry, see 8 Wigmore, Evidence (3d ed.), § 2268; p. 20, *infra,* and would in effect *pro tanto* obliterate the need for that constitutional protection.

Second: The only decision relied on in support of this broad proposition is *Kilbourn* v. *Thompson,* 103 U. S. 168, which because of its "loose language" has been severely discredited, *e. g., United States* v. *Rumely,* 345 U. S. 41, 46, and which cannot well be taken to stand for the pervasive principles for which it is presently relied on. (*Post,* pp. 630, 632–636.) At most, *Kilbourn* is authority for the proposition that Congress cannot constitutionally inquire "into the private affairs of individuals who hold no office under the government" when the investigation "could result in no valid legislation on the subject to which the inquiry referred." 103 U. S., at 195. The tangible fruits of the labors of the McClellan Committee (pp. 615–617, *infra*) show that such is not the case here.

Third: It hardly seems an impairment of "individual liberties protected by the Bill of Rights" (*post,* p. 630) to limit a witness who makes such a "due process" objection to the scope of the privilege against self-incrimination granted by the Fifth Amendment. If neither the Due Process Clause of the Fourteenth Amendment prohibits the State from using the witness' answer nor the Self-Incrimination Clause of the Fifth Amendment prohibits the Federal Government from asking the question, it is difficult to understand

state commerce. The Committee's general legislative recommendations, made at the conclusion of its First Interim Report, S. Rep. No. 1417, 85th Cong., 2d Sess. 450–453 (1958), were embodied in two remedial statutes enacted by Congress: the Welfare and Pension Plans Disclosure Act of 1958, 72 Stat. 997, and the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519. The enactment of the first of these statutes is attributable primarily to the findings and recommendations of several Subcommittees of the Senate Committee on Labor and Public Welfare, S. Rep. No. 1440, 85th Cong., 2d Sess. 2–3 (1958). But passage of the bill was stimulated by the information then being gathered at hearings of the McClellan Committee. See 104 Cong. Rec. 7054, 7197–7198, 7233, 7337–7338, 7483, 7509–7510, 7521 (1958).

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how it can be said that the Due Process Clause of the Fifth Amendment prohibits the inquiry because any answer *may* be used by a State.

Fourth: It should be noted that although this congressional inquiry was *related* to the subject matter of the state indictment, the questions that were asked of the petitioner did not bear directly on his guilt or innocence of the state charges. Indiana's concern was not with whether union funds or influence had been misused; indeed there is no suggestion that the alleged bribery of the Indiana highway official was consummated with funds other than the personal profits reaped by the petitioner and others from their unlawful transactions. On the other hand, Congress' concern was whether, on some later date, union funds had been used to stifle criminal proceedings that had been brought against the petitioner personally. How such payments were made, if they were in fact made, would certainly be a consideration in the establishment of a federal reporting and disclosure system for union funds.

Finally, "the least possible power adequate to the end proposed" phrase in *Anderson* v. *Dunn,* 6 Wheat. 204, 231 (*post,* pp. 632, 636, 638) scarcely bears upon the issue presented by this case. That expression was used in the *Anderson* case not in connection with anything having to do with the permissible scope of congressional inquiry, but solely with respect to "the extent of the punishing power" inherently possessed by the Congress. *Id.,* at 230–231.

The Labor-Management Reporting and Disclosure Act of 1959 was a direct response to the need for remedial federal legislation disclosed by the testimony before the McClellan Committee. This is made clear not by imprecise inferences drawn from legislative history; the proof is in the statute itself. Section 2 (b) of the Act declares it to be a finding of Congress "from recent investigations in the labor and management fields, that there have been a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct which require further and supplementary legislation." 73 Stat. 519. The Senate and House Reports lean heavily on findings made by the McClellan Committee to justify particular provisions in the proposed bills. See S. Rep. No. 187, 86th Cong., 1st Sess. 2, 6, 9, 10, 13–17 (1959); H. R. Rep. No. 741, 86th Cong., 1st Sess. 1, 2, 6, 9, 11–13, 76, 83 (1959).

The resolution which gave birth to this Committee, when considered in light of the fruits of its labors, proves beyond any doubt "that the committee members . . . [were] serving as the representatives of the parent assembly in collecting information for a legislative purpose." *Watkins* v. *United States, supra,* at 200. This is not a case involving an indefinite and fluctuating delegation which permits a legislative committee "in essence, to define its own authority, to choose the direction and focus of its activities." *Id.*, at 205. This Committee was directed to investigate "criminal or other improper practices . . . in the field of labor-management relations." Deciding whether acts that are made criminal by state law ought also to be brought within a federal prohibition, if, as here, the subject is a permissible one for federal regulation, turns entirely on legislative inquiry. And it is this inquiry in which the Senate was engaged when it assigned the fact-finding duty to the Select Committee

on Improper Activities in the Labor or Management Field.

Moreover, this record is barren of evidence indicating that the Committee, for reasons of its own, undertook to "expose" this petitioner.

First: The transcript discloses a most scrupulous adherence to the announced Committee policy of not asking a witness under state indictment any questions "on the subject matter involved in the indictment." Note 9, *supra*. This particular indictment related solely to activity in which petitioner and others had been engaged in their individual capacities, not on behalf of any labor organization. The Committee's concern was not whether petitioner had in fact defrauded the State of Indiana of $78,000 in concluding a dishonest sale or whether he had personally corrupted a state employee. Its interest, which was entirely within the province entrusted to it by the Senate, was to discover whether and how funds of the Brotherhood of Carpenters or of the Teamsters Union [17] had been used in a conspiracy to bribe a state prosecutor to drop charges made against individuals who were also officers of the Brotherhood of Carpenters, and whether the influence of union officials had been exerted to that end. If these suspicions were founded, they would have supported remedial federal legislation for the future, even though they might at the same time have warranted a separate state prosecution for obstruction of justice, or

[17] The Committee had information tending to show that the Teamsters Union, with whose officers petitioner was friendly, purchased for $40,000 some real estate in Gary, Indiana, worth approximately $3,800. The seller in this transaction was a corporation which then proceeded to purchase Holovachka's interest in another failing corporation for an amount substantially in excess of its value. See Second Interim Report of the Select Committee on Improper Activities in the Labor or Management Field, S. Rep. No. 621, pt. 2, 86th Cong., 1st Sess. 558–560 (1959).

been usable at the trial of the Marion County indictment as evidence of consciousness of guilt. *Supra,* pp. 607–608. But surely a congressional committee which is engaged in a legitimate legislative investigation need not grind to a halt whenever responses to its inquiries might potentially be harmful to a witness in some distinct proceeding, *Sinclair* v. *United States, supra,* at 295, or when crime or wrongdoing is disclosed, *McGrain* v. *Daugherty,* 273 U. S. 135, 179–180.

Second: The information sought to be elicited by the Committee was pertinent to the legislative inquiry. The Committee was investigating whether and how union funds had been misused, in the interest of devising a legislative scheme to deal with irregular practices. Because of petitioner's refusal to answer questions, and because of the similar refusal by other witnesses to testify with regard to the Lake County grand jury proceedings, the Committee was not able to learn whether union funds or influence had been used to persuade Holovachka to drop those proceedings.

Petitioner contends that the Committee's finding in its Second Interim Report that Raddock had been "used by Hutcheson as a fixer in an attempt to head-off the indictment of Hutcheson [and others] . . ." shows that his testimony was not needed for any purpose other than to prejudice or embarrass him. But this overlooks the fact that the Committee had been able to obtain no information whatever on the Lake County grand jury proceedings from any of the other witnesses by reason of their refusals to testify on the subject.[18] Moreover, it does not lie with

[18] The meagerness of the Committee's finding on this subject stands in marked contrast to its findings on the Hutcheson biography, with respect to which the petitioner and the other witnesses had testified with comparative freedom. Whereas 17 pages of the Second Interim Report are devoted to summarizing the evidence regarding the publication of the biography, only six pages related to the Lake County

this Court to say when a congressional committee should be deemed to have acquired sufficient information for its legislative purposes.

Third: The Committee's interrogation was within the express terms of its authorizing resolution. If the Committee was to be at all effective in bringing to Congress' attention certain practices in the labor-management field which should be subject to federal prohibitions, it necessarily had to ask some witnesses questions which, if truthfully answered, might place them in jeopardy of state prosecution. Unless interrogation is met with a valid constitutional objection "the scope of the power of [congressional] inquiry . . . is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution." *Barenblatt* v. *United States, supra,* at 111. And it is not until the question is asked that the interrogator can know whether it will be answered or will be met with some constitutional objection. To deny the Committee the right to ask the question would be to turn an "option of refusal" into a "prohibition of inquiry," 8 Wigmore, Evidence (3d ed.) § 2268, and to limit congressional inquiry to those areas in which there is not the slightest possibility of state prosecution for information that may be divulged. Such a restriction upon congressional investigatory powers should not be countenanced.

The three episodes upon which the petitioner relies as evidencing a Committee departure from these legitimate congressional concerns fall far short of sustaining what is sought to be made of them. The first of these is the

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proceedings. Second Interim Report of the Select Committee on Improper Activities in the Labor or Management Field, S. Rep. No. 621, pt. 2, 86th Cong., 1st Sess. 533–550, 554–560 (1959). It is relevant to observe in this regard that ten of the questions with respect to which the petitioner was subsequently indicted related to the possible use of union funds for the purpose of suppressing the Lake County grand jury proceeding. See note 12, Counts 1, 2, 3, 4, 5, 6, 7, 9, 14, 17.

Committee counsel's statement at the outset of the hearings explaining "the subject matter being inquired into," in the course of which he referred to the real estate transaction involved in the Marion County indictment, and explained the Committee's interest in finding out whether union funds or influence had been used in bringing to an end the Lake County grand jury investigation of the matter.[19] The propriety of such an inquiry has already been discussed. Pp. 617–618, *supra*.

The second episode is the Chairman's statement to the effect that all the facts as to the Lake County proceedings had "not been developed by the committee"; that further "exposure" of them "should be made"; and that the

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[19] In relevant part this statement was:

"We are inquiring into the situation in connection with the presentation before the grand jury in Lake County, Ind.; the intervention by certain union officials into that matter, and the part that was played by Mr. Hutcheson himself, Mr. Sawochka, the secretary-treasurer of local 142 of the Teamsters, and Mr. James Hoffa, the international president of the Teamsters.

"The CHAIRMAN. Is there some information that either union funds were used in the course of these transactions or that the influence of official positions of high union officials was used in connection with this alleged illegal operation?

"Mr. KENNEDY. We have information along both lines, Mr. Chairman, not only the influence but also in connection with the expenditure of union funds.

. . . . . .

"The CHAIRMAN. That is the interest of this committee in a transaction of this kind or alleged transaction of this kind, to ascertain again whether the funds or dues money of union members is being misappropriated, improperly spent, or whether officials in unions are using their position to intimidate, coerce, or in any way illegally promote transactions where the public interest is involved.

"Mr. Raddock, you have heard a background statement. That is not evidence, but it is information, however, which the committee has, regarding this matter out there. The committee is undertaking to inquire into this in pursuit of the mandate given to it by the resolution creating the committee." Hearings, 12021.

Committee stood ready to "assist and help" Indiana if it chose to interest itself in the matter.[20] We can see nothing in this statement, which was made after the Committee's inquiry had ended, beyond a perfectly normal offer on the part of the Chairman to put the Committee transcript at the disposal of the Indiana law enforcement authorities if they wished to avail themselves of it.[21]

The final occurrence is the so-called Committee "finding" as to petitioner's alleged use of Raddock as a "fixer" to "head-off" an indictment by the Lake County grand jury. Whatever the basis for that "finding" (cf. note 18, *supra*), we must say that its mere inclusion in an official report to the Senate of the Committee's activities [22] fur-

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[20] The full statement was:

"The testimony further indicates that certain high officials of both the Teamsters and the Carpenters Union, two of the largest unions in the country, with the help and assistance of Mr. Raddock were involved in a conspiracy to subvert justice in the State of Indiana.

"All the facts regarding this conspiracy undoubtedly have not been developed by the committee.

"Further exposure we believe can and should be made. We will be glad to assist and help law enforcement officials in the State of Indiana if they determine that they would interest themselves in the matter." Hearings, 12132.

[21] At the contempt trial Senator McClellan explained his statement as follows:

"Our legislative function had been performed in seeking information regarding crimes and improper activities. Some evidence had been presented indicating the possibility of a further crime involving this defendant possibly and officers of another large union. It has been our practice to cooperate with state and federal officials where any evidence is developed before us with respect to a crime having been committed. Our legislative purpose is to search out and find if crime has been committed.

"My statement here is to the effect that if the state officials desired to pursue any testimony that we had developed, we would cooperate with them and make the record available to them."

[22] Second Interim Report, S. Rep. No. 621, pt. 2, 86th Cong., 1st Sess. 592 (1959).

nishes a slender reed indeed for a charge that that Committee was engaged in unconstitutional "exposure."

In conclusion, it is appropriate to observe that just as the Constitution forbids the Congress to enter fields reserved to the Executive and Judiciary, it imposes on the Judiciary the reciprocal duty of not lightly interfering with Congress' exercise of its legitimate powers. Having scrutinized this case with care, we conclude that the judgment of the Court of Appeals must be

Affirmed.

MR. JUSTICE BLACK and MR. JUSTICE FRANKFURTER took no part in the decision of this case.

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

MR. JUSTICE BRENNAN, concurring in the result.

I join in the judgment affirming the Court of Appeals, but not in my Brother HARLAN'S opinion.

The Select Committee assured petitioner that it would respect his reliance upon his Fifth Amendment privilege against self-incrimination, but petitioner deliberately and explicitly chose not to exercise that privilege. In that circumstance, the case is not one for reconsideration of *Hale* v. *Henkel,* 201 U. S. 43, and *United States* v. *Murdock,* 284 U. S. 141. I adhere, however, to my view that in a proper case we should reconsider the holdings of *Hale* and *Murdock* that, in a federal proceeding, possible incrimination under state law presents no basis for invoking the Fifth Amendment privilege. See *Knapp* v. *Schweitzer,* 357 U. S. 371, 381 (concurring opinion); see also *Cohen* v. *Hurley,* 366 U. S. 117, 154 (dissenting opinion).

The petitioner's constitutional claims find no support, in my view, in *Kilbourn* v. *Thompson,* 103 U. S. 168.

That case involved a congressional inquiry into the settlement of a claim against a bankrupt firm. The settlement was said to threaten depletion of the bankrupt estate to the injury of other creditors, including the United States. The Court held that the subject matter was outside legislative cognizance because it was a matter inherently and historically for adjustment by the judicial branch, and because there was no hint of a legislative purpose to be served by the inquiry—"it could result in no valid legislation on the subject to which the inquiry referred." 103 U. S., at 195.

The congressional inquiry before us here is in sharp contrast to that in *Kilbourn*. The Select Committee was seeking factual material to aid in the drafting and adopting of remedial legislation to curb misuse by union officials of union funds—unquestionably a proper legislative purpose. The pending Marion County indictment did not involve misuse of union funds but the alleged bribery of a state official in connection with a sale of land to the State. However, the congressional inquiry and the state prosecution crossed paths when the Committee learned that union funds might have been used in a corrupt attempt to forestall an earlier indictment in another county, Lake, for the same alleged bribery. It seems to me obvious that the Committee's interrogation of the petitioner about the use of union funds to forestall that indictment did not stray beyond the range of the Committee's valid legislative purpose. It may be that, under Indiana law, evidence of the attempt, although not essential, would be admissible at the trial under the Marion County indictment.[1] But this hardly converts the Com-

[1] We are informed that the petitioner was convicted under the indictment at a trial held some 29 months after his appearance before the Committee, but we are not informed whether the Committee proceedings were part of the State's proofs or otherwise affected the trial. Clearly, however, any contention as to unfairness in his state trial must abide review of that conviction.

mittee's inquiry about the attempt into a legislative rehearsal of the trial of the Marion County indictment, bringing the inquiry within *Kilbourn's* condemnation of legislative usurpation of judicial functions.

When a congressional inquiry and a criminal prosecution cross paths, Congress must accommodate the public interest in legitimate legislative inquiry with the public interest in securing the witness a fair trial. Whether a proper accommodation has been made must be determined from the vantage point of the time of petitioner's appearance before the Committee.

Any thought that some of our recent decisions, *e. g., Barenblatt* v. *United States,* 360 U. S. 109; *Wilkinson* v. *United States,* 365 U. S. 399; *Braden* v. *United States,* 365 U. S. 431, weakened the vitality of our holding in *Watkins* v. *United States,* 354 U. S. 178, 187, that the congressional power of inquiry is not "an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress," is dispelled by today's strong expression of continued adherence to that vital principle. Investigation conducted solely to aggrandize the investigator or punish the investigated, either by publicity or by prosecution, is indefensible—it exceeds the congressional power: exposure for the sake of exposure is not legislative inquiry.

"[T]he power to investigate must not be confused with any of the powers of law enforcement . . . ." *Quinn* v. *United States,* 349 U. S. 155, 161; see *United States* v. *Icardi,* 140 F. Supp. 383. On the other hand, so long as the subject matter is not in "an area in which Congress is forbidden to legislate," *Quinn, supra,* at 161, the mere fact that the conduct under inquiry may have some relevance to the subject matter of a pending state indictment cannot absolutely foreclose congressional inquiry. Surely it cannot be said that a fair criminal trial and a full power of inquiry are interests that defy accommodation. The

courts, responsible for protecting both these vital interests, will give the closest scrutiny to assure that indeed a legislative purpose was being pursued and that the inquiry was not aimed at aiding the criminal prosecution. Even within the realm of relevant inquiry, there may be situations in which fundamental fairness would demand postponement of inquiry until after an immediately pending trial, or the taking of testimony in executive session—or that the State grant a continuance in the trial. On what is before us now, I think that the facts fail to show that this inquiry was unable to proceed without working a serious likelihood of unfairness. Examining the challenged questioning in the full context of the congressional inquiry and its relevance to legislation in process, leads me to conclude that petitioner was not questioned for exposure's sake.

The Select Committee began its hearings in 1957. The Committee engaged from the start in gathering facts which led to the conclusion that legislation requiring labor organizations to report and disclose various matters about their operation was necessary. The Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, resulted. Many features of that statute stem from facts learned by the Select Committee's examination into the affairs of several labor organizations, though the drafting was the work of the Senate Subcommittee on Labor and the House Subcommittee on Labor-Management Relations.[2] The Subcommittees and their parent Standing Committees framed the statute after considering the Select Committee's findings. See, *e. g.*, S. Rep. No. 1684, 85th Cong., 2d Sess. 1 (1958); S. Rep. No. 187, 86th Cong., 1st Sess. 2 (1959); H. R. Rep. No. 741, 86th Cong., 1st

[2] The Select Committee's membership throughout included two members of the Senate Subcommittee on Labor, Senators Kennedy and Goldwater, who participated actively in the work of both Committees.

Sess. 1 (1959); see also S. Doc. No. 10, 86th Cong., 1st Sess. 1 (1959). The bills reported out by those Committees recited that their purpose was "[t]o provide for the reporting and disclosure of certain financial transactions and administrative practices of labor organizations and employers, to prevent abuses in the administration of trusteeships by labor organizations, to provide standards with respect to the election of officers of labor organizations . . . ." The second paragraph of the Preamble to the bills included the following: "The Congress further finds, from recent investigations in the labor and management fields, that there have been a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct which require further and supplementary legislation . . . ." S. 1555 and H. R. 8342, 86th Cong., 1st Sess. (1959); see also S. 3974, 85th Cong., 2d Sess. (1958).

At the opening of the Select Committee's hearings on February 26, 1957, the Chairman, Senator McClellan, noted petitioner's union as one of those that the Committee intended to investigate. Hearings, 2. Although the Committee's hearings during the 16 months before they reached petitioner were very full, they had touched upon the affairs of only a few unions, and petitioner's was only the fourth union inquired into with a particular view toward discovering modes of misusing union funds. See Hearings, at 2581, 3221, 7512, and 11786. Petitioner was subpoenaed on May 20, 1958, to appear before the Committee on June 2; his own appearance was put off to June 27, although testimony of other witnesses was taken commencing on June 4. Three months before he was subpoenaed, the state indictment against him was handed up, on February 18, 1958. He was not tried until November 1960, about 29 months after his appearance before the Committee. At the time he appeared, the question-

ing was directly relevant to the Committee's efforts to inform itself and Congress and to secure legislation within congressional power to enact, aimed at correcting just such evils as those about which petitioner was questioned. Earlier in June 1958, a labor-management reporting and disclosure bill, the Kennedy-Ives Bill, was reported out by the Senate Committee on Labor and Public Welfare and passed by the Senate, but in August it failed of passage in the House. 104 Cong. Rec. 10657, 11486–11487, 18287–18288. Therefore a bill was reintroduced on January 20, 1959, now known as the Kennedy-Ervin Bill. In introducing it, Senator Kennedy read a letter from ex-Senator Ives which said: "[The bill] is designed to meet the objectives set forth in the report of the Senate Select Committee on Improper Activities in the Labor or Management Field." 2 N. L. R. B., Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, p. 968. The Senate Subcommittee on Labor then conducted intensive hearings on that and alternative bills.[3] In opening those hearings, Senator Kennedy said "We expect further recommendations from the McClellan committee in its second annual report, and we expect to have the advice of an expert panel on labor law revision which will form the basis of further hearings and another bill later this year." [4] Reliance on the work of the Select Committee was evident and significant in those hearings. Hearings before the House Subcommittee began after the conclusion of the hearings by the Senate Subcommittee, and continued into June.[5] Spirited debate over the

[3] Hearings before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, on Labor-Management Reform Legislation, 86th Cong., 1st Sess. (January through March 1959).

[4] *Id.*, at 40–41.

[5] Hearings before a Joint Subcommittee of the House Committee on Education and Labor, on Labor-Management Reform Legislation, 86th Cong., 1st Sess. (March through June 1959).

merits of the proposed legislation continued throughout that session of Congress until enactment as the Act of September 14, 1959, Pub. L. 86–257. Section 2 (b) of the declaration of findings, purposes, and policy incorporates the above-quoted findings of the second paragraph of the Kennedy-Ervin Bill. It was not until 14 months after passage that petitioner was tried.

The questioning of petitioner comes into focus against this background of an inquiry begun by the Select Committee more than a year before petitioner's indictment and continued by both the Select Committee and the Senate and House Labor Subcommittees well after petitioner's appearance, all aimed at and culminating in legislation. In this light, petitioner's interrogation emerges as but one step in the process of fact-gathering to establish the necessity for and the nature of remedial legislation, and I cannot say that it was an unnecessary step, or that the record supports a conclusion that the Select Committee questioned petitioner to affect his state trial.

MR. CHIEF JUSTICE WARREN, with whom MR. JUSTICE DOUGLAS joins, dissenting.

This case highlights the problem of defining constitutional limitations upon congressional committees endowed with compulsory process. And because I firmly believe that continued sanction of investigative powers leading to abridgment of individual rights seriously impairs the intent of the Framers of our Bill of Rights, I dissent from MR. JUSTICE HARLAN'S treatment of the constitutional issue presented here. That issue may be simply stated: Is it a violation of the constitutional guarantee of due process of law for a legislative committee, under the circumstances of this case, to inquire into matters for which the witness is about to be tried under a pending criminal indictment?

The petitioner, already indicted and awaiting trial in a state court, was subpoenaed to testify before a congressional committee investigating union activity and union funds. When the questioning led to matters concerning facts upon which the state indictment was based,[1] the dilemma the petitioner found facing him was this: if he answered truthfully his answers might aid the pending prosecution;[2] if he answered falsely, he could have been prosecuted for perjury;[3] and, if he relied on the Fifth Amendment's privilege against self-incrimination, that fact could be admitted against him in the state criminal trial.[4] MR. JUSTICE HARLAN'S opinion now holds that petitioner's dilemma had a fourth horn; he may also be sent to jail for refusing to choose imposition of one of these penalties. I believe that neither the Constitution nor our past decisions allow Congress to enlist the aid of the federal courts to do to this man what four members of the Court permit.

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[1] MR. JUSTICE HARLAN seems to question the relation of the questions asked by the Committee with the subject matter of the state indictment (see pp. 617–618, *ante*). Of course Congress' concern was whether union funds had been used for an unlawful purpose, whereas the State was concerned with *how* the funds had been unlawfully used. However, a truthful answer to the question asked by the Committee would *a fortiori* have answered the State's inquiry if in fact the petitioner had used union funds in violation of state law. As stated by MR. JUSTICE BRENNAN in his concurring opinion (see p. 623, *ante*): ". . . [T]he congressional inquiry and the state prosecution crossed paths when the Committee learned that union funds might have been used in a corrupt attempt to forestall an earlier indictment in another county . . . for the same alleged [offense]."

[2] *Davidson* v. *State,* 205 Ind. 564, 569, 187 N. E. 376, 378.

[3] 18 U. S. C. § 1621.

[4] *Crickmore* v. *State,* 213 Ind. 586, 592–593, 12 N. E. 2d 266, 269; *State* v. *Schopmeyer,* 207 Ind. 538, 194 N. E. 144. And, by our decisions, such a use by the state court would not be barred. *Adamson* v. *California,* 332 U. S. 46; *Twining* v. *New Jersey,* 211 U. S. 78.

In 1821 this Court held for the first time in *Anderson* v. *Dunn,* 6 Wheat. 204, that although the Constitution did not expressly grant to Congress the power to conduct investigations, such a power, within legislative competence, could be implied because it is inherent in the lawmaking process. This investigative function of Congress is, of course, entirely independent of the judicial branch of the Government in strict separation-of-power terms. However, Congress, no less than other branches of the Government, is bound to safeguard individual liberties protected by the Bill of Rights, and it is the duty of the courts to insure that the specific guarantees of liberty are preserved for witnesses before a legislative body just as they are guarded for the benefit of defendants in a criminal court trial. This duty cannot be performed nor can the judicial conscience be stilled by a kind of hand-washing statement that a legislative committee (in some instances a committee of a single person delegated with full investigative power) may finally determine for the courts, not only the importance and relevancy of a matter under investigation, but also that the committee has the constitutional power to ask the questions it wants to ask at the moment. A full Court decided in *Kilbourn* v. *Thompson,* 103 U. S. 168, that the courts must ultimately determine who shall be sent to jail and that only the courts may determine whether questions asked by a committee are within Congress' constitutional power of inquiry.[5] And in our more recent cases, "[t]he

[5] 103 U. S. 168, 197:

"If they [the House of Congress] are proceeding in a matter beyond their legitimate cognizance, we are of opinion that this can be shown, and we cannot give our assent to the principle that, by the mere act of asserting a person to be guilty of a contempt, they thereby establish their right to fine and imprison him, beyond the power of any court or any other tribunal whatever to inquire into the grounds on which the order was made. This necessarily grows out of the nature of an

central theme," as we stated in *Watkins* v. *United States,* 354 U. S. 178, 195, has been "the application of the Bill of Rights as a restraint upon the assertion of governmental power in this form." [6] This includes *all* provisions of the Bill of Rights—the Due Process Clause of the Fifth Amendment, as well as that Amendment's protection against self-incrimination.

MR. JUSTICE HARLAN'S opinion fails to recognize that the essence of petitioner's contention is that largely *because of* this Court's decisions in *Hale* v. *Henkel,* 201 U. S. 43, and *United States* v. *Murdock,* 284 U. S. 141, the interrogation on matters for which he had already been indicted was a violation of due process. Cf. *Aiuppa* v. *United States,* 201 F. 2d 287, 300. The duty of courts to safeguard an individual's personal liberty and to protect him from being compelled to answer questions outside the constitutional power of Congress, to which I have referred above, is particularly pertinent when Congress has enlisted the aid of the federal courts to protect itself against contumacious conduct and recalcitrant witnesses. 2

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authority which can only exist in a limited class of cases, or under special circumstances; otherwise the limitation is unavailing and the power omnipotent."

[6] This principle is not a new or novel one. Again in *Kilbourn,* the Court made this observation (103 U. S., at 190–191):

"It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers intrusted to government, whether state or national, are divided into the three grand departments, the executive, the legislative, and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other."

U. S. C. § 192. In fulfilling their responsibilities under this statute the courts may not simply assume that every congressional investigation is constitutionally conducted merely because it is shown that great national interests lie in passing needed legislation.[7] To do so would be to abdicate the responsibility placed by the Constitution upon the judiciary to insure that no branch of the Government transgresses constitutional limitations. See *Marbury* v. *Madison,* 1 Cranch 137.

Accommodation of the congressional need for particular information with the individual and national interest in assuring dispassionate protection for witnesses against unconstitutional encroachment upon their individual rights has proved to be an arduous task throughout this Nation's history. One principle, however, formulated to keep congressional power of punishment to compel testimony within the very narrowest of limits, seems to have withstood erosion by the passage of time and the ever-increasing complexities in carrying out the legislative function. That principle is that in exercising its power to compel testimony, Congress must utilize "[t]he least possible power adequate to the end proposed." *Anderson* v. *Dunn,* 6 Wheat. 204, 230–231. And, in *Kilbourn* v. *Thompson, supra,* decided in 1880, this Court had occasion to emphasize the narrowness of this congressional power. In my opinion, the latter case is more like the instant one than any other in our reports and I believe the principles upon which it was decided call for a reversal of the conviction of petitioner here.[8]

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[7] "The tendency of modern decisions everywhere is to the doctrine that the *jurisdiction* of a court or other tribunal to render a judgment affecting individual rights, is always open to inquiry, when the judgment is relied on in any other proceeding." *Kilbourn* v. *Thompson, supra,* at 197–198. (Emphasis added.)

[8] I am certain that it will come as a great surprise to many to learn that *Kilbourn* has been "severely discredited," as stated in MR. JUSTICE HARLAN'S opinion (p. 614, note 16, *ante*), and that it no longer

It is important, I believe, to reiterate the basic concept enunciated there: that it is for the courts, and not for Congress, in insuring to all persons the safeguards of the Bill of Rights, to establish the constitutional standards which must be observed before people in this country can legally be sent to prison. The case arose in this manner: While a United States District Court, pursuant to its competent jurisdiction, was administering the estate of the bankrupt firm of Jay Cook & Company, which owed money to the United States Government, the House of Representatives passed a resolution to investigate a settlement made by the trustee. The basis for this action was that the settlement allegedly would be to the disadvantage of creditors, including the Government, and that the courts were powerless to afford adequate relief

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stands to prevent the congressional body of our Government from encroaching upon the exercise of judicial power. The reference to *United States* v. *Rumely,* 345 U. S. 41, 46, where MR. JUSTICE FRANKFURTER indicated in a dictum designed to reserve decision upon a suggested limit of Congress' investigative power, that *Kilbourn* contained "loose language," is hardly the method this Court has chosen to overrule or "discredit" decisions in the past. Indeed, neither have we chosen to do so in footnotes. Moreover, MR. JUSTICE FRANKFURTER'S reliance in *Rumely* on *McGrain* v. *Daugherty,* 273 U. S. 135, 170–171, and *Sinclair* v. *United States,* 279 U. S. 263, to support his statement that "substantial inroads" have been made on *Kilbourn* is rather confusing in light of our recent pronouncement in *Watkins* v. *United States,* 354 U. S. 178, 194, that: "In *McGrain* . . . and *Sinclair* . . . , the Court *applied* the precepts of *Kilbourn* to uphold the authority of the Congress to conduct the challenged investigations." (Emphasis added.)

Kilbourn has also been cited favorably or without a question of its continued validity in other recent decisions of the Court: *e. g., Barenblatt* v. *United States,* 360 U. S. 109, 133 (opinion by HARLAN, J.); *Tenney* v. *Brandhove,* 341 U. S. 367, 377 (opinion by FRANKFURTER, J.: "This Court has not hesitated to sustain the rights of private individuals when it found Congress was acting outside its legislative role. *Kilbourn* v. *Thompson,* 103 U. S. 168."); *Uphaus* v. *Wyman,* 360 U. S. 72, 84 (dissenting opinion).

because of the settlement. Kilbourn was subpoenaed to appear as a witness and to bring records, papers and maps "pertinent to the question under inquiry." Kilbourn refused and was convicted by the House of contempt. In holding that the House had exceeded its power, a unanimous Court forcefully announced restrictions upon the congressional power to punish for contempt and, at the same time, made it emphatically clear that those restrictions are equally applicable to the congressional power to compel testimony. Thus, when a committee attempts to exercise an extraordinary and unwarranted assumption of judicial power, this Court must strike it down, just as it has done in a situation in which the power to investigate infringed upon powers of law enforcement agencies. Cf. *Quinn* v. *United States,* 349 U. S. 155, 161.

When the circumstances of the instant case are compared to those which prompted the Court to void the conviction in *Kilbourn,* a striking similarity emerges. Indeed, the major difference in the circumstances of the two cases—that is, that this case involves a criminal indictment pending against the witness while *Kilbourn* involved only a civil suit—would seem to make this case even stronger than *Kilbourn.* The Court's chief reliance for holding that Congress exceeded its powers in the *Kilbourn* case was that the transactions into which Congress inquired were pending in a court, that the investigation was one "judicial in its character, and could only be properly and successfully made by a court of justice"; and, since the inquiry "related to a matter wherein relief or redress could be had only by a judicial proceeding, . . . that the power attempted to be exercised was one confined by the Constitution to the judicial and not to the legislative department of the government." *Kilbourn* v. *Thompson, supra,* at 192–193. The Court summed up its view of the circumstances that showed an absence of congressional power to ask Kilbourn the questions it did with

this statement: "The matter was still pending in a court, and what right had the Congress of the United States to interfere with a suit pending in a court of competent jurisdiction?"

In this case the particular subject of the Committee's inquiry to which the petitioner objected was whether he had in the past been unfaithful to his union in administering its funds. An indictment was then pending against petitioner in a court of competent jurisdiction charging him with using those same funds for an unlawful purpose.[9] The congressional committee, just as the House in *Kilbourn,* had no power to grant the union relief or redress of any kind for that alleged breach of trust by petitioner. So far as Congress was concerned in *Kilbourn,* the differences between Jay Cook and its creditors were held to be their "private affair" about which Congress could not compel a witness to answer; thus, a pending civil case was enough to bar inquiries concerning the transactions in that litigation. There is far more reason, it seems to me, to apply that principle to this case where Congress attempts to compel a witness to supply testimony which could be used to help convict him of a crime.

In so viewing this matter I do not overlook the argument in MR. JUSTICE HARLAN'S opinion that this particular testimony was relevant to the congressional investigation of the handling of union funds by their officers in order to help Congress decide if it should enact legis-

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[9] Contrary to the implication drawn in MR. JUSTICE HARLAN'S opinion that the principle to which I would adhere in the instant case would also apply "to inquiries calling for answers that might be used to the prejudice of the witness in any *future* judicial proceeding" (p. 613, note 16, *ante*), it seems obvious that nothing in this opinion gives support to such an inference. In fact, I believe a careful reading of it would make clear that it is specifically because of the *pending* nature of the state indictment that due process has been violated by this inquiry.

lation in this field, and, if so, what kind of legislation it should enact. Conceding that under *Anderson* and *Kilbourn* the Committee here had the power to ask general questions along this line, it does not follow that it could make detailed inquiries about the conduct of a witness that related specifically to a crime with which he was already charged and for which he was soon to be tried in a court of competent jurisdiction.[10] Not only would it be contrary to the holding in *Kilbourn* to conclude otherwise, but it is incomprehensible to me how it can be urged that Congress needed the details of how petitioner committed this alleged crime in order to pass general legislation about union funds. It would be hard, indeed, I believe, to make rational proof that to refuse to Congress the power to compel testimony from a witness about a matter for which he is about to be tried criminally, would invade the area of "[t]he least possible power adequate" to enable Congress to legislate about union officers and union funds.

In my view, it is not a satisfactory approach to problems involving principles of constitutional dimension to look first to the interests of the Government and, if they loom large in the particular instance, to go no further. The countervailing principles embodied in our Bill of Rights do not demand attention only when the governmental interest lacks compulsion. The Bill of Rights demands much more than that. In judging whether Congress has used "[t]he least possible power adequate to the end proposed," the courts must assure that any possible infringement on personal rights be minimized. In this determination the courts must consider factors such as the degree of need of the investigating committee for

[10] The State's delay subsequent to the Committee's investigation in bringing the petitioner to trial seems hardly relevant to our inquiry. The speed with which the State's judicial process moves cannot justify an otherwise unconstitutional exercise of federal legislative power.

the particular information requested and whether the Committee is able to get the desired information from some evidentiary source other than from a witness presently under criminal indictment on a charge relating to those very facts. The fact that in this case Indiana appears to have had sufficient evidence to secure an indictment against the petitioner is adequate indication that independent sources of information were easily available to the Committee by which it could have obtained the very information it sought here without jeopardizing the constitutional rights of the petitioner by asking him about it. Moreover, it cannot be argued with persuasion that Congress would be met with an insurmountable barrier in gathering needed information if a defendant in a pending criminal trial could not be compelled to answer questions before a legislative committee relevant to that indictment. Congress has shown that it has at its command means for removing any such barrier. See *Adams* v. *Maryland,* 347 U. S. 179.

The process through which the result has been reached in MR. JUSTICE HARLAN'S opinion seems to me to ignore the very reasons the Bill of Rights was incorporated into our Constitution. Those provisions were adopted as, and are intended to be, restraints upon actions by the Government which trespass upon personal liberties reserved to the individual in our society. If, as I believe, the Constitution has barred the Government from proceeding in a particular instance, despite the conceded validity of its interest in the testimony, the courts are duty bound to stand fast against any impairment of the individual's guaranteed rights. Congress cannot, by imposing upon the courts the responsibility for committing persons to jail for contempt of its committees, expect or require the courts to apply lower standards than are compelled by the Bill of Rights, any more than it could direct the courts to suppress those same rights in judicial proceedings. The

Bill of Rights, not Congress, establishes the standards which must be observed before people in this country may legally be sent to jail. A congressional committee has the power to compel testimony to aid it in shaping legislation, but it does not have the power merely to publicize a citizen's shortcomings or to aid a State in convicting him of crime. I consider a procedure which pinions a citizen within a dilemma such as was created by the circumstances of this case, and which goes beyond "[t]he least possible power" adequate to accomplish Congress' constitutionally permissible ends, a direct encroachment upon rights secured by due process of law. To send this man to jail for his refusal to answer questions that, because of the circumstances of this case, are outside the power of a committee to ask is, as *Kilbourn* v. *Thompson* held, a plain denial of that process guaranteed by the Fifth Amendment to our Federal Constitution. I would reverse the conviction.

MR. JUSTICE DOUGLAS, dissenting.

I agree with the Court that the questions asked petitioner by the Committee were within its competence and were pertinent to the legislative inquiry. I do not think, however, that under the circumstances disclosed, the federal courts should lend a hand in fining him or in sending him off to prison.

Four months before these hearings, petitioner had been indicted in an Indiana court for felonies that involved directly or indirectly the matters concerning which the Committee questioned him. If he had refused to answer because of the Self-Incrimination Clause of the Fifth Amendment, his plea would have been admissible in the Indiana prosecution. *State* v. *Schopmeyer,* 207 Ind. 538, 542–543, 194 N. E. 144, 146. And by our decisions (see *Adamson* v. *California,* 332 U. S. 46) such a use would not

be barred. So, under advice of counsel, petitioner did not refuse to answer on the ground of self-incrimination. Rather, he refused to answer on the ground that the questions might "aid the prosecution in the case in which I am under indictment and thus be in denial of due process of law."

The power to hold in contempt a witness who refuses to testify before a congressional committee has a dual aspect. First is the power of either the House or the Senate to summon him and order him held in custody until he agrees to testify. This power, though not used in recent years (*Watkins* v. *United States,* 354 U. S. 178, 206), is of an ancient vintage.[1] But the power of either House to imprison the witness expires at the end of the session. As stated in *Anderson* v. *Dunn,* 6 Wheat. 204, 231, ". . . although the legislative power continues perpetual, the legislative body ceases to exist on the moment of its adjournment or periodical dissolution. It follows, that imprisonment must terminate with that adjournment."

Second is the power of the courts to punish witnesses who are recalcitrant or defiant before a congressional committee or who, when summoned, default. 2 U. S. C. § 192. This law, enacted in 1857, was passed so that "a greater punishment" than the Congress thought it had the power to impose could be inflicted. *Watkins* v. *United States, supra,* 207, n. 45.

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[1] As stated in *Stockdale* v. *Hansard,* [1839] 9 A. & E. 1, 114:

"The privilege of committing for contempt is inherent in every deliberative body invested with authority by the constitution. But, however flagrant the contempt, the House of Commons can only commit till the close of the existing session. Their privilege to commit is not better known than this limitation of it. Though the party should deserve the severest penalties, yet, his offence being committed the day before a prorogation, if the house ordered his imprisonment but for a week, every court in Westminster Hall and every judge of all the courts would be bound to discharge him by habeas corpus."

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We deal here with the second of these powers.

The federal courts do not sit as push-button mechanisms to fine or imprison those whom Congress refers to the United States Attorney for prosecution.

There is, for example, the case where no quorum of the congressional committee is present when the witness is charged with contempt. As said in *Christoffel* v. *United States*, 338 U. S. 84, 90, "This not only seems to us contrary to the rules and practice of the Congress but *denies petitioner a fundamental right*. That right is that he be convicted of crime only on proof of all the elements of the crime charged against him. A tribunal that is not competent is no tribunal, and it is unthinkable that such a body can be the instrument of criminal conviction." (Italics supplied.)

We held in *Slagle* v. *Ohio*, 366 U. S. 259, 265–266, that though a legislative committee acts within bounds, yet the form of questions asked and rulings on objections to them may be so obtuse as to make it violative of due process for courts to punish a refusal to answer.[2] Cf. *Quinn* v. *United States*, 349 U. S. 155, 167–168.

A court will not lend its hand to inflict punishment on a person for contempt of a congressional committee where the proceeding was *fundamentally unfair*.[3] The proceed-

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[2] *Sinclair* v. *United States*, 279 U. S. 263, is not opposed to this view. For there the pending suit was civil, not criminal, and the defense was that the congressional committee had exhausted its power to investigate, *id.*, 290, not that it would violate due process for the federal courts to become implicated in a criminal prosecution.

[3] MR. JUSTICE FRANKFURTER expressed the idea in his separate opinion in *Watkins* v. *United States, supra:*

"By . . . making the federal judiciary the affirmative agency for enforcing the authority that underlies the congressional power to punish for contempt, Congress necessarily brings into play the specific provisions of the Constitution relating to the prosecution of offenses and those implied restrictions under which courts function." *Id.*, at 216.

ing was held unfair in *Watkins* v. *United States, supra,* because it was far from clear that the questions asked by the Committee were "pertinent" to the question under inquiry. *Id.*, 204–214. "Fundamental fairness," we said, demands that the witness be informed "what the topic under inquiry is and the connective reasoning whereby the precise questions asked relate to it." *Id.,* at 215. Vagueness in investigatory inquiries, like vagueness in criminal statutes, may not give a witness the notice that is necessary under our standards of due process. *Id.,* at 208.

There is, I submit, a fundamental unfairness when we make it impossible for a witness to invoke a privilege which the Constitution grants him, and then send him off to jail when the privilege we withhold would have protected him. The guarantee against self-incrimination would have given petitioner full and complete immunity but for our decisions in cases like *Adamson* v. *California, supra,* and *Cohen* v. *Hurley,* 366 U. S. 117. Those decisions, however, make his plea of self-incrimination admissible in the pending prosecution in the Indiana court. When we say that the Self-Incrimination Clause of the Fifth Amendment is not applicable to the States by reason of the Fourteenth Amendment, we turn a federal proceeding into a pretrial of the state prosecution, should the witness invoke his constitutional right. Since he dare not invoke it for fear of going to a state prison, he ends up in a federal prison. The result is to turn the guarantee against self-incrimination into a sham. A witness is whipsawed between state and federal agencies, having no way to escape the federal prison unless he confesses himself into a state prison.

We have at times said that this Hobson's choice granted a witness is a product of federalism. *Feldman* v. *United States,* 322 U. S. 487, 493, was, indeed, a case where the testimony of a man compelled to testify in a state pro-

ceeding sent him to a federal prison. But the result of this line of cases is a needless consequence of federalism, and one that makes the constitutional privilege against self-incrimination a "phrase without reality." *Cohen* v. *Hurley, supra,* at 132 (dissenting opinion). Why due process for the States should be different in this respect from due process for the Federal Government is a mystery. We should overrule *Adamson* v. *California, supra,* and hold that no admission made by a witness in a federal proceeding nor any refusal to testify can be used against him in a state prosecution. Until we take that course, we cannot in good conscience send a man to a federal prison who goes there solely because we deprived him of a basic constitutional guarantee.

What we do today is consistent with our prior decisions in *Hale* v. *Henkel,* 201 U. S. 43; *United States* v. *Murdock,* 284 U. S. 141. Yet the result is unfair. This case, like its forebears, shows why we should rid the books of *Adamson* v. *California, supra,* and hold that the privilege against self-incrimination contained in the Fifth Amendment is applicable to the States and to the Federal Government alike.

There has never, in my view, been a satisfactory answer to the position of the first Justice Harlan that due process in the Fourteenth Amendment does not mean something different from due process in the Fifth Amendment. See *Hurtado* v. *California,* 110 U. S. 516, 541 *et seq.*

MALONE *v.* BOWDOIN ET AL.

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

No. 113. Argued March 20, 1962.—Decided May 14, 1962.

By this common law action of ejectment, brought in a state court and removed to a Federal District Court, respondents sought to eject petitioner, a Forest Service Officer of the United States Department of Agriculture, from land occupied by him solely in his official capacity under a claim of title in the United States. There was no allegation that petitioner was acting beyond his authority or that his occupation of the land amounted to an unconstitutional taking. *Held:* The action was one against the United States and, in the absence of consent by the United States, the District Court was without jurisdiction. *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U. S. 682. Pp. 643–648.

284 F. 2d 95, reversed.

Daniel M. Friedman argued the cause for petitioner. On the briefs were *Solicitor General Cox* and *Roger P. Marquis.*

William Buford Mitchell argued the cause for respondents. With him on the briefs was *John Burke Harris, Jr.*

MR. JUSTICE STEWART delivered the opinion of the Court.

This litigation began in a Georgia court when the respondents filed a common law action of ejectment against the petitioner, a Forest Service Officer of the United States Department of Agriculture.[1] The basis

[1] The original pleading was in the fictitious common law form in use in Georgia, Ga. Code Ann. § 33–111, alleging that John Doe, as a lessee of the respondents, had entered the land in question and had been forceably ejected by Richard Roe. The petitioner and the United States were served with process, which was accompanied by a

for the suit was the respondents' claim that they were the rightful owners of certain land occupied by the petitioner.[2] The action was removed to a Federal District Court under the provisions of 28 U. S. C. § 1442 (a).[3] The removal petition stated that the action "involves lands that were acquired by the United States of America by deed on June 6, 1936," that the petitioner's "official duties as a Forest Service Officer required him to be, and he was, in charge and in possession of the land described in said ejectment suit," and that "all his acts in connection with

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"Notice to the Real Defendants," stating that Richard Roe had "acted as casual ejector only." The subsequent dismissal of the United States as a petitioner is not challenged here.

[2] This assertion did not appear on the face of the original pleadings because of their fictitious form. In a subsequent brief, however, the respondents explained the basis of their claim. They alleged that an 1857 will had devised a life estate in the land to Martha A. Sanders, with remainder over to her children, and that in 1873 Mrs. Sanders had devised the land in fee to mesne grantors of the United States, which had acquired title in 1936. Mrs. Sanders died in 1928, and the respondents claimed to be the remaindermen under the 1857 will.

[3] 28 U. S. C. § 1442 (a) provides:

"A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

"(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

"(2) A property holder whose title is derived from any such officer, where such action or prosecution affects the validity of any law of the United States.

"(3) Any officer of the courts of the United States, for any act under color of office or in the performance of his duties;

"(4) Any officer of either House of Congress, for any act in the discharge of his official duty under an order of such House."

the matters charged in said complaint were committed by him under color of his said office."

The petitioner filed a motion to dismiss upon the ground that the suit was in substance and effect one against the United States, which had not consented to be sued or waived its immunity from suit. Noting that the respondents had conceded in a pretrial conference that the petitioner in occupying the land was acting solely as an official or employee of the United States, the District Court granted the motion to dismiss, relying upon *Larson* v. *Domestic & Foreign Corp.,* 337 U. S. 682.[4] On appeal, the judgment was reversed, one judge dissenting, 284 F. 2d 95.[5] We granted certiorari to consider the scope of sovereign immunity in suits of this kind. 368 U. S. 811. We agree with the District Court that the doctrine of the *Larson* case required dismissal of this action, and we therefore reverse the judgment of the Court of Appeals.

For its view that the sovereign immunity of the United States did not bar the maintenance of this suit, the Court of Appeals found principal support in *United States* v. *Lee,* 106 U. S. 196. In that case the Virginia estate of General Robert E. Lee had been acquired by the United States for nonpayment of taxes, although the taxes had in fact been tendered by a third party. An ejectment action was brought against the governmental custodians of the land, upon which a federal military installation and a cemetery had been established. The trial court found that the tax sale had been invalid, and that title to the land was in the plaintiff. This Court upheld a judgment in favor of the plaintiff upon the trial court's finding that the defendants' possession of the land was illegal, holding

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[4] The District Court's opinion is reported *sub nom. Doe* v. *Roe,* 186 F. Supp. 407.

[5] A petition for rehearing was denied, 287 F. 2d 282.

that a suit against them under such circumstances was not a suit against the sovereign.

In a number of later cases, arising over the years in a variety of factual situations, the principles of the *Lee* case were approved.[6] But in several other cases which came to the Court during the same period, it was held that suits against government agents, specifically affecting property in which the United States claimed an interest, were barred by the doctrine of sovereign immunity.[7] While it is possible to differentiate many of these cases upon their individualized facts, it is fair to say that to reconcile completely all the decisions of the Court in this field prior to 1949 would be a Procrustean task.

The Court's 1949 *Larson* decision makes it unnecessary, however, to undertake that task here. For in *Larson* the Court, aware that it was called upon to "resolve the conflict in doctrine" (337 U. S., at 701), thoroughly reviewed the many prior decisions, and made an informed and carefully considered choice between the seemingly conflicting precedents.

In that case a suit had been brought against the War Assets Administrator to enjoin him from selling surplus coal which, it was alleged, the Administrator had already sold to the plaintiff. The theory of the action was that where "an officer of the Government wrongly takes or

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[6] See *Cunningham* v. *Macon & Brunswick R. Co.*, 109 U. S. 446, 452; *Tindal* v. *Wesley*, 167 U. S. 204; *Scranton* v. *Wheeler*, 179 U. S. 141, 152–153; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 619–620; *Goltra* v. *Weeks*, 271 U. S. 536, 545; *Ickes* v. *Fox*, 300 U. S. 82, 96; *Great Northern Life Ins. Co.* v. *Read*, 322 U. S. 47, 50–51; *Land* v. *Dollar*, 330 U. S. 731.

[7] See *Stanley* v. *Schwalby*, 162 U. S. 255; *Oregon* v. *Hitchcock*, 202 U. S. 60; *Naganab* v. *Hitchcock*, 202 U. S. 473; *Louisiana* v. *Garfield*, 211 U. S. 70; *Goldberg* v. *Daniels*, 231 U. S. 218; *New Mexico* v. *Lane*, 243 U. S. 52; *Morrison* v. *Work*, 266 U. S. 481; cf. *Mine Safety Co.* v. *Forrestal*, 326 U. S. 371, 374–375; *Wells* v. *Roper*, 246 U. S. 335.

holds specific property to which the plaintiff has title, then his taking or holding is a tort, and 'illegal' as a matter of general law, whether or not it be within his delegated powers," and that the officer "may therefore be sued individually to prevent the 'illegal' taking or to recover the property 'illegally' held." 337 U. S., at 692. The Court held that this theory was not adequate to support a conclusion that the relief asked was not relief against the sovereign.

Cutting through the tangle of previous decisions, the Court expressly postulated the rule that the action of a federal officer affecting property claimed by a plaintiff can be made the basis of a suit for specific relief against the officer as an individual only if the officer's action is "not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void." 337 U. S., at 702. Since the plaintiff had not made an affirmative allegation of any relevant statutory limitation upon the Administrator's powers, and had made no claim that the Administrator's action amounted to an unconstitutional taking, the Court ruled that the suit must fail as an effort to enjoin the United States.

While not expressly overruling *United States* v. *Lee, supra,* the Court in *Larson* limited that decision in such a way as to make it inapplicable to the case before us. Pointing out that at the time of the *Lee* decision there was no remedy by which the plaintiff could have recovered compensation for the taking of his land,[8] the Court interpreted *Lee* as simply "a specific application of the constitutional exception to the doctrine of sovereign

[8] See 337 U. S., at 697, n. 17. Unlike the situation in the *Lee* case, there has been at all relevant times a tribunal where the respondents could seek just compensation for the taking of their land by the United States. That tribunal is the Court of Claims. *United States* v. *Causby,* 328 U. S. 256, 267.

immunity." 337 U. S., at 696. So construed, the *Lee* case has continuing validity only "where there is a claim that the holding constitutes an unconstitutional taking of property without just compensation." *Id.*, at 697.

No such claim has been advanced in the present case. Nor has it been asserted that the petitioner was exceeding his delegated powers as an officer of the United States in occupying the land in question,[9] or that he was in possession of the land in anything other than his official capacity. This suit, therefore, is not within the class of cases in which, under *Larson,* specific relief can be obtained against a government officer. Accordingly, it was rightly dismissed by the District Court as an action which in substance and effect was one against the United States without its consent.

Reversed.

MR. JUSTICE FRANKFURTER took no part in the decision of this case.

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

MR. JUSTICE DOUGLAS, dissenting.

United States v. *Lee,* 106 U. S. 196, serves a useful function and should be followed here. There, as here, the contest was over real estate which an officer of the Federal Government held against the claim of the plaintiff. Here, as there, if the federal agent's possession of the

[9] If such a claim is to be made, "it is necessary that the plaintiff set out in his complaint the statutory limitation on which he relies." *Larson* v. *Domestic & Foreign Corp.,* 337 U. S. 682, 690. While this requirement could probably not have been precisely complied with here because of the fictitious form of pleading involved, no such claim was ever suggested at any stage of the proceedings.

land is illegal, the suit is not against the sovereign. Mr. Justice Miller, speaking for the Court, said:

> "The instances in which the life and liberty of the citizen have been protected by the judicial writ of *habeas corpus* are too familiar to need citation, and many of these cases, indeed almost all of them, are those in which life or liberty was invaded by persons assuming to act under the authority of the government. . . .
>
> "If this constitutional provision is a sufficient authority for the court to interfere to rescue a prisoner from the hands of those holding him under the asserted authority of the government, what reason is there that the same courts shall not give remedy to the citizen whose property has been seized without due process of law, and devoted to public use without just compensation?" *Id.*, at 218.

United States v. *Lee* was a five-to-four decision. But as late as 1947 seven members of the Court agreed to the statement in *Land* v. *Dollar*, 330 U. S. 731, 737, that "[w]here the right to possession or enjoyment of property under general law is in issue, and the defendants claim as officers or agents of the sovereign, the rule of *United States* v. *Lee, supra,* has been repeatedly approved." Two years later in *Larson* v. *Domestic & Foreign Corp.*, 337 U. S. 682, the case of *United States* v. *Lee* was attempted to be distinguished in the manner indicated by the Court. But the *Larson* decision was six to three, Mr. Justice Rutledge concurring in the result and my vote being the fifth. But I explained my concurrence on the following grounds:

> "I think that the principles announced by the Court are the ones which should govern the selling of government property. Less strict applications of those principles would cause intolerable interference with public administration. To make the right to

sue the officer turn on whether by the law of sales title had passed to the buyer would clog this governmental function with intolerable burdens. . . ." *Id.*, at 705.

The holding in *United States* v. *Lee* has thus not been repudiated or necessarily restricted by anything decided prior to today.

The Court is quite correct in saying that all of our decisions in this field cannot easily be reconciled; and the same will doubtless be true if said by those who sit here several decades hence. The reason the decisions are not consistent is that policy considerations, not always apparent on the surface, are powerful agents of decision. Thus the *Larson* case was a suit for specific performance of a contract to sell coal, a matter that courts had long left to damage suits. As I said in my separate concurrence in that case, any other rule would "clog" government procurement "with intolerable burdens." 337 U. S., at 705.

Ejectment, on the other hand, is the classic form of action to try title. It takes place in the locality where the land is located. No judges are better qualified to try it than the local judges. It is a convenient and ready form of remedy for possession of land. Moreover, the United States, not being a party, is not bound by the state court decree. If it is aggrieved by the state or federal court ruling on title, it can bring its arsenal of power into play. Eminent domain—with the power immediately to take possession—is available.

If, however, the citizen must bow to the doctrine of sovereign immunity, he is precluded from any relief except a suit for damages under 28 U. S. C. § 1346 (b) or 28 U. S. C. § 1346 (a)(2), or 28 U. S. C. § 1491. This places the advantage with an all-powerful Government, not with the citizen. He may, as the Court says, go into court and get the value of his property. But he does not

get his property, even though we assume, as we must, that the Government is not the rightful claimant.

The result is at war with our prior decisions. Those remedies with which the Court leaves the property owner are not "special remedies" provided to "displace those that otherwise would be at the plaintiff's command." See *Sloan Shipyards* v. *United States Fleet Corp.*, 258 U. S. 549, 567. As stated by MR. JUSTICE FRANKFURTER:

> "When there is such a special remedy the suit against the officer is barred, not because he enjoys the immunity of the sovereign but because the sovereign can constitutionally change the traditional rules of liability for the tort of the agent by providing a fair substitute. *Crozier* v. *Fried,* 224 U. S. 290; *Richmond Screw Anchor Co.* v. *United States,* 275 U. S. 331. But the general statute permitting suit in the Court of Claims in certain instances against the Government is not a statute that provides that remedies otherwise at the plaintiff's command are to be displaced. A holding that the availability of an action for monetary damages in the Court of Claims against the United States prevents a suit at law, or, if the necessary requisites for equity jurisdiction are present, in equity, against the governmental agent, would be as novel as it is indefensible in the light of the settled course of decisions. Indeed, this argument is not novel; it has been explicitly negatived in at least two cases. See *Sloan Shipyards Corp.* v. *United States Fleet Corp.*, 258 U. S. 549, 567, 568; *Land* v. *Dollar,* 330 U. S. 731, 738." *Larson* v. *Domestic & Foreign Corp., supra,* at 722–723 (dissenting opinion).

What Mr. Justice Miller said in *United States* v. *Lee, supra,* 220, 221, needs repeating:

> "No man in this country is so high that he is above the law. No officer of the law may set that law at

defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.

. . . . . .

"It cannot be, then, that when, in a suit between two citizens for the ownership of real estate, one of them has established his right to the possession of the property according to all the forms of judicial procedure, and by the verdict of a jury and the judgment of the court, the wrongful possessor can say successfully to the court, Stop here, I hold by order of the President, and the progress of justice must be stayed. That, though the nature of the controversy is one peculiarly appropriate to the judicial function, though the United States is no party to the suit, though one of the three great branches of the government to which by the Constitution this duty has been assigned has declared its judgment after a fair trial, the unsuccessful party can interpose an absolute veto upon that judgment by the production of an order of the Secretary of War, which that officer had no more authority to make than the humblest private citizen."

Sovereign immunity has become more and more out of date, as the powers of the Government and its vast bureaucracy have increased. *Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U. S. 381, 390 *et seq.* To give the agent immunity from suit is, to use the words of Mr. Justice Holmes:

"a very dangerous departure from one of the first principles of our system of law. The sovereign properly so called is superior to suit for reasons that often have been explained. But the general rule is that any person within the jurisdiction always is amenable to the law. If he is sued for conduct harmful to the

plaintiff his only shield is a constitutional rule of law that exonerates him. Supposing the powers of the Fleet Corporation to have been given to a single man we doubt if anyone would contend that the acts of Congress and the delegations of authority from the President left him any less liable than other grantees of the power of eminent domain to be called upon to defend himself in court. An instrumentality of government he might be and for the greatest ends, but the agent, because he is agent, does not cease to be answerable for his acts." *Sloan Shipyards* v. *United States Fleet Corp., supra,* pp. 566–567.

The balance between the convenience of the citizen and the management of public affairs is a recurring consideration in suits determining when and where a citizen can sue a government official. See *Williams* v. *Fanning,* 332 U. S. 490. The balance is, in my view, on the side of the citizen where he claims realty in the Government's possession and where there are ready means of adjudicating the title. If legal title is actually in the claimant, if the action of the official in taking possession under authority of the United States is *ultra vires,* what objectionable interference with governmental functions can be said to exist?

I am authorized to say that MR. JUSTICE HARLAN agrees with this opinion.

UNITED STATES *v.* DIEBOLD, INCORPORATED.

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

No. 286. Argued April 23, 1962.—Decided May 14, 1962.

In this civil antitrust action by the Government challenging respondent's acquisition of the assets of another corporation as being violative of § 7 of the Clayton Act, the affidavits, exhibits and depositions before the District Court raised a genuine issue as to ultimate facts material to the question whether the acquired corporation was a "failing company" under the doctrine of *International Shoe Co.* v. *Federal Trade Comm'n,* 280 U. S. 291, and it was improper for the District Court to decide the applicability of that doctrine and dismiss the case on a motion for summary judgment. Pp. 654–655.

197 F. Supp. 902, reversed.

Daniel M. Friedman argued the cause for the United States. With him on the briefs were *Solicitor General Cox, Assistant Attorney General Loevinger, Richard A. Solomon* and *Irwin A. Seibel.*

William L. McGovern argued the cause for appellee. With him on the briefs were *Abe Fortas* and *Victor H. Kramer.*

Edgar Barton filed a brief for the Mosler Safe Co. in opposition to appellee's motion to unseal sealed papers.

PER CURIAM.

This is a civil antitrust suit by the Government challenging Diebold's acquisition of the assets of the Herring-Hall-Marvin Safe Company as being violative of § 7 of the Clayton Act. On motion of Diebold the District Court entered summary judgment against the Government on the ground that the acquired firm was a "failing company" under the doctrine of *International Shoe Co.* v. *Federal Trade Comm'n,* 280 U. S. 291 (1930). The case is here on direct appeal. 368 U. S. 894.

In determining that the acquisition of the assets of Herring-Hall-Marvin Safe Company was not a violation of § 7, the District Court acted upon its findings that "HHM was hopelessly insolvent and faced with imminent receivership" and that "Diebold was the only bona fide prospective purchaser for HHM's business." The latter finding represents at least in part the resolution of a head-on factual controversy as revealed by the materials before the District Court of whether other offers for HHM's assets or business were actually made. In any event both findings represent a choice of inferences to be drawn from the subsidiary facts contained in the affidavits, attached exhibits, and depositions submitted below. On summary judgment the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion. A study of the record in this light leads us to believe that inferences contrary to those drawn by the trial court might be permissible. The materials before the District Court having thus raised a genuine issue as to ultimate facts material to the rule of *International Shoe Co.* v. *Federal Trade Comm'n,* it was improper for the District Court to decide the applicability of the rule on a motion for summary judgment. Fed. Rules Civ. Proc., 56 (c).

Reversed and remanded.

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

657327 O–62–47

MATTOX *v.* SACKS, WARDEN.

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

No. 584, Misc. Decided May 14, 1962.

In the circumstances of this case, the petition for writ of certiorari to the Supreme Court of Ohio is denied. Petitioner may file his application for habeas corpus in the appropriate United States District Court. His allegations raise serious questions under the Fourteenth Amendment and entitle him to a hearing.

Reported below: 172 Ohio St. 385, 176 N. E. 2d 221.

Petitioner *pro se.*

Mark McElroy, Attorney General of Ohio, and *Aubrey A. Wendt,* Assistant Attorney General, for respondent.

PER CURIAM.

Petitioner was convicted in an Ohio state court of assault with intent to kill and of cutting with intent to kill, wound or maim the same person. He immediately sought a writ of habeas corpus which was denied on the ground that appeal was the proper remedy. He then attempted to appeal, but this was denied as out of time and the Supreme Court of Ohio affirmed this denial. He unsuccessfully sought habeas corpus twice more, the latest petition being to the Supreme Court of Ohio and alleging, among other matters, a denial of counsel at his trial and a deprivation of rights guaranteed by the Due Process Clause of the Fourteenth Amendment. The Supreme Court of Ohio denied the petition, holding that habeas corpus was not a substitute for appeal and was not available to remedy the defects alleged by petitioner. Petitioner now seeks our writ of certiorari to review that ruling.

The petition for certiorari must be denied. The decision below and the several prior actions in the Ohio courts indicate that petitioner is without a state remedy to challenge his conviction upon the federal constitutional grounds asserted. In these circumstances, *Darr* v. *Burford,* 339 U. S. 200, 208, is not applicable and a prisoner may, without first seeking certiorari here, file his application for habeas corpus in the appropriate United States District Court. 28 U. S. C. § 2254. *Massey* v. *Moore,* 348 U. S. 105; *Frisbie* v. *Collins,* 342 U. S. 519. Petitioner's allegations, if true, would present serious questions under the Fourteenth Amendment, and those allegations would therefore entitle him to a hearing. *Massey* v. *Moore, supra; Pennsylvania ex rel. Herman* v. *Claudy,* 350 U. S. 116.

Mr. Justice Frankfurter took no part in the consideration or decision of this case.

BEST *v.* CITY OF TOLEDO.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 1048, Misc. Decided May 14, 1962.

Appeal dismissed; certiorari denied.

James W. Cowell for appellant.

Louis R. Young and *Lewis W. Combest* 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 Frankfurter took no part in the consideration or decision of this case.

TORRANCE *v.* CALLENIUS ET AL., MEMBERS OF THE IOWA BOARD OF CONTROL, ET AL.

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

No. 227, Misc. Decided May 14, 1962.

Certiorari granted; judgment vacated; case remanded for consideration in light of *Goldlawr, Inc.*, v. *Heiman, ante,* p. 463.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded for consideration in light of *Goldlawr, Inc.*, v. *Heiman, ante,* p. 463.

MR. JUSTICE HARLAN and MR. JUSTICE STEWART, for the reasons given in their dissent in the *Goldlawr* case, would deny certiorari.

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

NEWLON *v.* BENNETT, WARDEN.

APPEAL FROM THE SUPREME COURT OF IOWA.

No. 1110, Misc. Decided May 14, 1962.

Appeal dismissed; 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.

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

HOHENSEE *v.* NEWS SYNDICATE, INC.

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

No. 214. Decided May 14, 1962.

Certiorari granted; judgment vacated; case remanded for consideration in light of *Goldlawr, Inc.*, v. *Heiman, ante,* p. 463.

Reported below: 286 F. 2d 527.

James C. Newton for petitioner.

Stuart N. Updike for respondent.

PER CURIAM.

The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded for consideration in light of *Goldlawr, Inc.*, v. *Heiman, ante,* p. 463.

MR. JUSTICE HARLAN and MR. JUSTICE STEWART, for the reasons given in their dissent in the *Goldlawr* case, would deny certiorari.

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

SHUBIN ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA ET AL.

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

No. 726. Decided May 14, 1962.

Certiorari granted; judgment vacated; case remanded for consideration in light of *Dairy Queen, Inc.*, v. *Wood, ante,* p. 469.

Reported below: 299 F. 2d 47.

William Douglas Sellers for petitioners.

Robert W. Fulwider for S. Vincen Bowles, Inc., respondent.

PER CURIAM.

The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded for consideration in light of *Dairy Queen, Inc.*, v. *Wood, ante,* p. 469.

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

KEMP *v.* UNITED STATES.

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

No. 311, Misc. Decided May 14, 1962.

Certiorari granted; judgment vacated; case remanded for consideration in light of *Coppedge* v. *United States, ante,* p. 438.

A. Kenneth Pye for petitioner.

Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg and *Robert G. Maysack* for the United States.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded for consideration in light of *Coppedge* v. *United States, ante,* p. 438.

MR. JUSTICE CLARK and MR. JUSTICE HARLAN dissent for the reasons stated in their dissenting opinion in the *Coppedge* case.

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

GARRETT *v.* UNITED STATES.

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

No. 773, Misc. Decided May 14, 1962.

Certiorari granted; judgment vacated; case remanded for consideration in light of *Coppedge* v. *United States, ante,* p. 438.

Petitioner *pro se.*

Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg and *Robert G. Maysack* for the United States.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded for consideration in light of *Coppedge* v. *United States, ante,* p. 438.

MR. JUSTICE CLARK and MR. JUSTICE HARLAN dissent for the reasons stated in their dissenting opinion in the *Coppedge* case.

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

FREE *v.* BLAND.

CERTIORARI TO THE SUPREME COURT OF TEXAS.

No. 205. Argued March 21, 1962.—
Decided May 21, 1962.

By virtue of the Supremacy Clause of the Constitution, the Treasury Regulations creating a right of survivorship in United States Savings Bonds registered in co-ownership form preempt any inconsistent provision of the Texas community property law. Pp. 664–671.

(a) The Treasury Regulations which provide, *inter alia*, that, when a savings bond is registered in co-ownership form, *i. e.*, payable to one person "or" another, a co-owner who survives the other co-owner "will be recognized as the sole and absolute owner" of the bond, and that "No judicial determination will be recognized which would . . . defeat or impair the rights of survivorship conferred by these regulations," constitute a valid federal law within the meaning and intent of the Supremacy Clause. Pp. 666–668.

(b) A provision of the Texas community property law which, in effect, prohibits a married couple from taking advantage of the survivorship provisions of these regulations merely because the purchase price of the savings bonds is paid out of community property conflicts with the federal regulations on this subject and must fall under the Supremacy Clause. Pp. 667–671.

162 Tex. 72, 344 S. W. 2d 435, reversed.

W. Graham Claytor, Jr. argued the cause for petitioner. With him on the briefs were *Peter S. Craig, Edwin M. Fulton, Hollie G. McClain* and *Gerhard A. Gesell.*

Olin P. McWhirter argued the cause for respondent. With him on the briefs was *Royal H. Brin, Jr.*

Solicitor General Cox, Assistant Attorney General Orrick and *Morton Hollander* filed briefs for the United States, as *amicus curiae,* urging reversal.

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

We are called upon to determine whether the Treasury Regulations creating a right of survivorship in United States Savings Bonds pre-empt any inconsistent Texas community property law by virtue of the Supremacy Clause, Article VI, Clause 2, of the Constitution.

The petitioner is the widower of Mrs. Mary Ida Free, and the respondent is her son by a previous marriage. Mr. and Mrs. Free were domiciled in Texas. That State follows the community property system; except in certain instances not here material, all property acquired by either spouse during marriage belongs to the community of the husband and wife.[1] Property purchased with community property retains a community character. See *Love* v. *Robertson,* 7 Tex. 6. Although each spouse owns an undivided one-half interest in the community property, the husband is the sole authorized manager.[2] During the years 1941 to 1945, petitioner Free, using community property, purchased several United States Savings Bonds, series "E" and "F." The bonds were all issued to "Mr. *or* Mrs." Free. Under the Treasury Regulations promulgated under 31 U. S. C. § 757c (a) which govern bonds issued in that form, when either co-owner

[1] Vernon's Tex. Civ. Stat., Art. 4619. See Tex. Const., Art. XVI, § 15; Vernon's Tex. Civ. Stat., Arts. 4613–4627. Property acquired by gift, devise or descent is separate property. Vernon's Tex. Civ. Stat., Arts. 4613–4614. Also, community property partitioned in the manner provided in Vernon's Tex. Civ. Stat., Art. 4624a, becomes separate property. See generally Huie, Commentary on the Community Property Laws of Texas, 13 Vernon's Tex. Civ. Stat. 1.

[2] Vernon's Tex. Civ. Stat., Art. 4619. See Huie, *supra,* note 1, at 39. The wife may have managerial power over the "special" community comprised of her income and the income from her separate property. See *Bearden* v. *Knight,* 149 Tex. 108, 228 S. W. 2d 837. Blevins, Recent Statutory Changes in the Wife's Managerial Powers, 38 Tex. L. Rev. 55.

dies, "the survivor will be recognized as the sole and absolute owner." 31 CFR § 315.61. After Mrs. Free passed away in 1958, this controversy arose between the husband, who claimed exclusive ownership by operation of the Treasury Regulations, and the son, who, as the principal beneficiary under his mother's will, claimed an interest in the bonds by virtue of the state community property laws. Respondent son demanded either one-half of the bonds or reimbursement for the loss of Mrs. Free's community half interest in the bonds which was converted into petitioner's separate property by operation of the federal regulations.

In order to resolve the controversy, petitioner Free filed suit in the District Court of Upshur County, Texas, against the respondent individually and as the executor of Mrs. Free's estate. Respondent Bland filed a counterclaim. On the petitioner's motion for summary judgment, the trial court awarded full title to the bonds to the petitioner by virtue of the federal regulations but awarded reimbursement to the respondent by virtue of the state community property laws, making the bonds security for payment. The petitioner appealed to the Court of Civil Appeals. That court affirmed the trial court's award of full title to the petitioner but reversed the award of reimbursement to the respondent,[3] relying upon *Smith* v. *Ricks,* 159 Tex. 280, 318 S. W. 2d 439, in which unconditional effect was given to the survivorship provisions of the federal regulations governing savings bonds.

While respondent's writ of error was pending in the Supreme Court of Texas, that court overruled the *Ricks* case in *Hilley* v. *Hilley,* 161 Tex. 569, 342 S. W. 2d 565. After holding that married couples in Texas would not be permitted to agree to any survivorship provision with

[3] 337 S. W. 2d 805 (Tex. Civ. App.).

regard to community property, the court dismissed the argument that the Supremacy Clause would compel recognition of the survivorship provisions in United States Savings Bonds with:

> "It is clear that the Federal regulations do not override our local laws in matters of purely private ownership where the interests of the United States are not involved. Bank of America National Trust & Savings Ass'n v. Parnell, 352 U. S. 29." 161 Tex., at 577, 342 S. W. 2d, at 570.

Subsequently, respondent Bland's writ of error was granted, and the Supreme Court of Texas, acting under the authority of the *Hilley* case, reversed the Court of Civil Appeals and reinstated the judgment of the trial court in a *per curiam* opinion. *Bland* v. *Free,* 162 Tex. 72, 344 S. W. 2d 435. We granted certiorari. 368 U. S. 811.

The Supreme Court of Texas' interpretation of the Supremacy Clause is not in accord with controlling doctrine. The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail. Article VI, Clause 2. This principle was made clear by Chief Justice Marshall when he stated for the Court that any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield. *Gibbons* v. *Ogden,* 9 Wheat. 1, 210–211. See *Franklin National Bank* v. *New York,* 347 U. S. 373; *Wissner* v. *Wissner,* 338 U. S. 655; *Sola Electric Co.* v. *Jefferson Electric Co.,* 317 U. S. 173. Thus our inquiry is directed toward whether there is a valid federal law, and if so, whether there is a conflict with state law.

Article I, Section 8, Clause 2 of the Constitution delegates to the Federal Government the power "[t]o borrow

money on the credit of the United States." Pursuant to this grant of power, the Congress authorized the Secretary of the Treasury, with the approval of the President, to issue savings bonds in such form and under such conditions as he may from time to time prescribe, subject to certain limitations not here material. 31 U. S. C. § 757c (a).[4] Cf. *United States* v. *Sacks,* 257 U. S. 37. Exercising that authority, the Secretary of the Treasury issued savings bonds under regulations which provided, *inter alia,* that the co-owner of a savings bond issued in the "or" form who survives the other co-owner "will be recognized as the sole and absolute owner" of the bond, 31 CFR § 315.61,[5] and that "[n]o judicial determination will be recognized which would . . . defeat or impair the rights of survivorship conferred by these regulations," 31 CFR § 315.20.[6] The Treasury has consistently main-

[4] "The Secretary of the Treasury, with the approval of the President, is authorized to issue, from time to time, through the Postal Service or otherwise, United States savings bonds and United States Treasury savings certificates, the proceeds of which shall be available to meet any public expenditures authorized by law, and to retire any outstanding obligations of the United States bearing interest or issued on a discount basis. The various issues and series of the savings bonds and the savings certificates shall be in such forms, shall be offered in such amounts, subject to the limitation imposed by section 757b of this title, and shall be issued in such manner and subject to such terms and conditions consistent with subsections (b)–(d) of this section, and including any restrictions on their transfer, as the Secretary of the Treasury may from time to time prescribe."

[5] "If either coowner dies without the bond having been presented and surrendered for payment or authorized reissue, the survivor will be recognized as the sole and absolute owner. Thereafter, payment or reissue will be made as though the bond were registered in the name of the survivor alone . . . ."

[6] "No judicial determination will be recognized which would give effect to an attempted voluntary transfer inter vivos of a bond or would defeat or impair the rights of survivorship conferred by these

tained that the purpose of these regulations is to establish the right of survivorship regardless of local state law,[7] and a majority of the States which have considered the problem have recognized this right.[8] The respondent, however, contends that the purpose of the regulations is simply to provide a convenient method of payment.[9] This argument depends primarily on the distinction between stating that the surviving co-owner will "be recognized as" the sole owner and stating that the surviving co-owner will "be" the sole owner. This distinction is insubstantial. The clear purpose of the regulations is to confer the right of survivorship on the surviving co-owner. Thus, the survivorship provision is a federal law [10] which must prevail if it conflicts with state law. See *Wissner* v. *Wissner,* 338 U. S. 655.

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regulations upon a surviving coowner or beneficiary, and all other provisions of this subpart are subject to this restriction. Otherwise, a claim against an owner or coowner of a savings bond and conflicting claims as to ownership of, or interest in, such bond as between coowners or between the registered owner and beneficiary will be recognized, when established by valid judicial proceedings, upon presentation and surrender of the bond, but only as specifically provided in this subpart."

[7] See, *e. g.,* Statement of Treasury Department on Rights of Surviving Coowners and Beneficiaries of Savings Bonds, dated July 5, 1945, and fifth revision, dated October 1, 1958; Letter from the Acting Assistant General Counsel of the Treasury to the Attorney General of Missouri, June 9, 1941; Treasury Department Circular No. 530, 1935.

[8] See, *e. g., Lee* v. *Anderson,* 70 Ariz. 208, 218 P. 2d 732; *Stephens* v. *First National Bank of Nevada,* 65 Nev. 352, 196 P. 2d 756.

[9] See, *e. g., Decker* v. *Fowler,* 199 Wash. 549, 92 P. 2d 254. In this case the Government participated as *amicus curiae* in support of an application for rehearing, urging that the court had erroneously construed the regulations.

[10] *Leslie Miller, Inc.,* v. *Arkansas,* 352 U. S. 187; *Standard Oil Co.* v. *Johnson,* 316 U. S. 481; *United States* v. *Sacks,* 257 U. S. 37; *United States* v. *Birdsall,* 233 U. S. 223.

The success of the management of the national debt depends to a significant measure upon the success of the sales of the savings bonds. The Treasury is authorized to make the bonds attractive to savers and investors.[11] One of the inducements selected by the Treasury is the survivorship provision, a convenient method of avoiding complicated probate proceedings. Notwithstanding this provision, the State awarded full title to the co-owner but required him to account for half of the value of the bonds to the decedent's estate. Viewed realistically, the State has rendered the award of title meaningless. Making the bonds security for the payment confirms the accuracy of this view. If the State can frustrate the parties' attempt to use the bonds' survivorship provision through the simple expedient of requiring the survivor to reimburse the estate of the deceased co-owner as a matter of law, the State has interfered directly with a legitimate exercise of the power of the Federal Government to borrow money.

Bank of America Trust & Savings Assn. v. *Parnell,* 352 U. S. 29, relied upon by the court below, does not support the result reached. The Court in that case held that, in the absence of any federal law, the application of state law to determine the liability of a converter of Federal Home Owners' Loan Corporation bonds was permissible, because the litigation between the two private parties there did not intrude upon the rights and the duties of the United States, the effect on the only possible interest of the United States—the floating of securities—being too speculative to justify the application of a federal rule. That doctrine clearly does not apply when the State fails to give effect to a term or condition under which a federal bond is issued, as the Court there noted. "Federal law of course governs the interpretation of the nature of the

[11] 31 U. S. C. § 757c (a). See note 4, *supra.*

rights and obligations created by the Government bonds themselves." 352 U. S., at 34.

We hold, therefore, that the state law which prohibits a married couple from taking advantage of the survivorship provisions of United States Savings Bonds merely because the purchase price is paid out of community property must fall under the Supremacy Clause.

Our holding is supported by *Wissner* v. *Wissner,* 338 U. S. 655. There the Congress made clear its intent to allow a serviceman to select the beneficiary of his own government life insurance policy regardless of state law, even when it was likely that the husband intended to deprive his wife of a right to share in his life insurance proceeds, a right guaranteed by state law. But the regulations governing savings bonds do not go that far. While affording purchasers of bonds the opportunity to choose a survivorship provision which must be recognized by the States, the regulations neither insulate the purchasers from all claims regarding ownership nor immunize the bonds from execution in satisfaction of a judgment.[12] The Solicitor General, appearing as *amicus curiae,* acknowledges that there is an exception implicit in the savings bond regulations, including the survivorship provision, so that federal bonds will not be a "sanctuary for a wrongdoer's gains." [13] With this, we agree. The regulations are not intended to be a shield for fraud, and relief would be available in a case where the circumstances manifest fraud or a breach of trust tantamount thereto on the part of a husband while acting in his capacity as manager of the general community property. However, the doctrine of fraud applicable under federal

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[12] 31 CFR §§ 315.20–315.23. See note 6, *supra.*

[13] Brief for the United States as *amicus curiae,* p. 21. See also *id.,* pp. 26–28.

law [14] in such a case must be determined on another day, for this issue is not presently here. On the record before us, no issue of fraud was or could properly have been decided by the court below on summary judgment. There was no direct allegation of fraud in the counterclaim. Other allegations which in some circumstances might have a bearing on the subject were controverted and therefore can only be resolved by a trial on the merits. Accordingly, the judgment is reversed and the case is remanded for proceedings not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE FRANKFURTER took no part in the decision of this case.

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

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[14] See, *e. g.*, *Holmberg* v. *Armbrecht*, 327 U. S. 392; *Clearfield Trust Co.* v. *United States*, 318 U. S. 363.

HANOVER BANK, EXECUTOR, ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 224. Argued February 27, 1962.—Decided May 21, 1962.

The Internal Revenue Code of 1939 permits a taxpayer to deduct, through amortization, the premium he has paid in purchasing corporate bonds, and § 125 provides that the amount to be amortized "shall be determined . . . with reference to the amount payable on maturity or on earlier call date." In 1953, prior to December 1, taxpayers purchased at a premium corporate bonds which were callable on 30 days' notice, either at a "general call price" or at a lower "special call price," and elected on their 1953 income tax returns to claim deductions for bond premiums computed with reference to the 30-day call period and the special call price. *Held:* They were entitled to do so, since the special call price at which the bonds here involved could be redeemed from a limited sinking fund and from other special funds made available upon the occurrence of certain contingent events was an "amount payable . . . on earlier call date" within the meaning of § 125, and there was no basis in the statute, in the legislative history or in the Commissioner's prior interpretations of the statute for a distinction between a reference to a general or special call price in computing amortizable bond premiums under the 1939 Code. Pp. 673–688.

289 F. 2d 69, reversed.

Theodore Tannenwald, Jr. argued the cause for petitioners. With him on the briefs was *David Alter. Horace S. Manges* was on the petition.

Stephen J. Pollak argued the cause for respondent. With him on the briefs were *Solicitor General Cox, Assistant Attorney General Oberdorfer, Meyer Rothwacks, Douglas A. Kahn* and *Wayne G. Barnett.*

A brief urging reversal was filed by *William Waller,* as *amicus curiae.*

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

Despite the seemingly complex factual composition of the two cases consolidated herein,[1] this opinion deals with a relatively simple question of taxation: The extent to which a taxpayer may deduct, through amortization under the Internal Revenue Code of 1939, the premium he has paid in purchasing corporate bonds. In 1953, prior to December 1, the petitioners purchased fully taxable utility bonds at a premium above maturity value.[2] The bonds were callable at the option of the issuer at either a general or special call price, and at either price they were callable upon 30 days' notice. The term "general call price" is used to designate the price at which the issuer may freely and unconditionally redeem all or any portion of the outstanding bonds from its general funds. The lower, "special call price," is the amount the issuer would pay if the bonds were redeemed with cash from certain specially designated funds.[3]

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[1] We have before us two cases which originated in the Tax Court: *Estate of Gourielli* v. *Commissioner,* 33 T. C. 357, and *Goldfarb* v. *Commissioner,* 33 T. C. 568. The cases were consolidated on appeal to the Court of Appeals for the Second Circuit, and one opinion was filed by that court. *Estate of Gourielli* v. *Commissioner,* 289 F. 2d 69. Petitioner Hanover Bank is the executor of the estate of Mr. Gourielli, who passed away since the commencement of this action.

[2] The bonds involved in the *Gourielli* case were Appalachian Electric Power Company, 1981 series, bonds, which decedent and his wife purchased for $117.50 per $100 face value, and which were later sold for $115.50. The bonds in *Goldfarb* were Arkansas Power & Light Company, 30-year, Eighth Series, bonds, which petitioners purchased at an average price of $110.50 per $100 face amount, and which were later sold at an average price of $105.40. The total purchases in the two cases were $540,000 (*Gourielli*) and $500,000 (*Goldfarb*) face amount; the purchase prices were paid in cash in both cases.

[3] In addition to a "sinking fund" into which the indenture required Appalachian to deposit during each annual period an amount (in

In computing net income, the 1939 Code permits a taxpayer to deduct, through amortization, the premium he has paid in purchasing corporate bonds.[4] Section 125 of the Code, set forth in pertinent part in the margin,[5] pro-

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cash or property additions of an equivalent amount) equal to one percent of the bond issue, the special funds in the case of the Appalachian bonds were: (1) a released property and insurance fund, to which deposits were required only upon a loss by casualty or by a release of mortgaged properties securing the bonds; and (2) a maintenance fund, to which deposits were required only when Appalachian failed to expend a stated percentage of its revenues on maintenance or improvements. The special funds in the case of the Arkansas bonds were made up from the same type contributions as above, plus additions made to an eminent domain fund if and when mortgaged property was taken from the company by eminent domain proceedings.

[4] Internal Revenue Code of 1939 (26 U. S. C., 1952 ed.):

"SEC. 23. DEDUCTIONS FROM GROSS INCOME.

"In computing net income there shall be allowed as deductions:

. . . . . .

"(v) [as added by § 126 (a), Revenue Act of 1942, c. 619, 56 Stat. 798] BOND PREMIUM DEDUCTION.—In the case of a bondholder, the deduction for amortizable bond premium provided in section 125."

[5] This Section was also added by the Revenue Act of 1942, *supra*, note 4, § 126 (b). Entitled "Amortizable Bond Premium," it reads in pertinent part as follows:

"(a) GENERAL RULE.—In the case of any bond, as defined in subsection (d), the following rules shall apply to the amortizable bond premium (determined under subsection (b)) on the bond for any taxable year beginning after December 31, 1941:

. . . . . .

"(b) AMORTIZABLE BOND PREMIUM.—

"(1) AMOUNT OF BOND PREMIUM.—For the purposes of paragraph (2), the amount of bond premium, in the case of the holder of any bond, shall be determined with reference to the amount of the basis (for determining loss on sale or exchange) of such bond, and with reference to the amount payable on maturity or on earlier call date, with adjustments proper to reflect unamortized bond premium with respect to the bond, for the period prior to the date as of which

vides that the amount of bond premium to be amortized "shall be determined . . . with reference to the amount payable on maturity or on earlier call date." Pursuant to this Section, the petitioners elected to claim on their 1953 income tax returns a deduction for bond premium amortization computed with reference to the special redemption price and to the 30-day redemption period appearing in the bond indentures. The respondent did not question the petitioners' use of the 30-day amortization period, but he disallowed the computation based upon the special redemption price and recomputed the amount of bond premium using the higher, general call price.[6] The Court of Appeals for the Second Circuit

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subsection (a) becomes applicable with respect to the taxpayer with respect to such bond.

"(2) AMOUNT AMORTIZABLE.—The amortizable bond premium of the taxable year shall be the amount of the bond premium attributable to such year.

"(3) METHOD OF DETERMINATION.—The determinations required under paragraphs (1) and (2) shall be made—

"(A) in accordance with the method of amortizing bond premium regularly employed by the holder of the bond, if such method is reasonable;

"(B) in all other cases, in accordance with regulations prescribing reasonable methods of amortizing bond premium, prescribed by the Commissioner with the approval of the Secretary."

[6] At the time of the deduction in *Gourielli*, the schedule appearing in the Appalachian bond indenture provided that the bonds could be redeemed at a general call price of 105⅜ or a special call price of 102⅜. The petitioners' basis was $117.50 (see *supra*, note 2) and therefore amortization of premium with reference to the two prices would result in a deduction of $64,831.07 or $83,056.07, respectively. The difference in these amounts, $18,225.00, was the amount disallowed by the respondent. By a similar recomputation with reference to the schedule of redemption prices appearing in the Arkansas bond indenture (105.36 as compared to 101.36), the respondent reduced the deduction in *Goldfarb* by $27,175.00. The actual tax deficiency in each case was considerably less ($14,200.92 and $14,708.16, respectively), of course, because disallowance of the larger premium

affirmed the Tax Court's orders sustaining the Commissioner's deficiency determination. 289 F. 2d 69. However, in cases presenting the identical legal issue, the Courts of Appeals for the Third (*Evans* v. *Dudley,* 295 F. 2d 713) and Sixth (*United States* v. *Parnell,* 272 F. 2d 943, affirming 187 F. Supp. 576) Circuits allowed amortization taken with reference to the special redemption prices.[7] To resolve this conflict, we granted certiorari. 368 U. S. 812.

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resulted in a corresponding increase in the petitioners' basis which had been adjusted pursuant to Section 113 (b)(1)(H) of the Code when the premium was amortized. This increase in basis resulted in a smaller short-term capital gain (the petitioners held the bonds less than six months) than had been reported by petitioners in their 1953 returns. The decrease in tax due on the capital gain was offset against the amount of amortization disallowed to arrive at the petitioners' actual tax deficiencies in issue here.

[7] In addition to the Third and Sixth Circuits' cases, the First and Seventh Circuits have also allowed deductions of bond premium amortization taken with reference to special redemption prices. In the First Circuit: *Fabreeka Products Co.* v. *Commissioner,* 294 F. 2d 876, vacating and remanding 34 T. C. 290; *Sherman* v. *Commissioner,* 34 T. C. 303; and *Friedman* v. *Commissioner,* 34 T. C. 456. In the Seventh Circuit: *Gallun* v. *Commissioner,* 297 F. 2d 455, reversing 1960 P–H T. C. Memo. Dec. ¶ 60,104; and *Maysteel Products, Inc.,* v. *Commissioner,* 287 F. 2d 429, reversing 33 T. C. 1021. In each of these cases the taxpayer had purchased bonds at a premium, amortized that premium to the special call price, and thereafter made a distribution of the bonds which entailed a double tax deduction (*e. g.,* a gift to charity). In each case the Court of Appeals allowed the double deduction. Although the precise issue presented in the instant case was not expressly decided in these latter cases, due to the fact that the Commissioner did not choose to challenge the use of the special call price as against the general call price for determining the amount of the premium, the allowance of the amortization to the special redemption price impliedly places the First and Seventh Circuits in accord with the Third and Sixth Circuits.

Bond premium is the amount a purchaser pays in buying a bond that exceeds the face or call value of the bond.[8] When a bond sells at a premium, it is generally because the interest it bears exceeds the rate of return on similar securities in the current market. For the right to receive this higher interest rate the purchaser of a bond pays a premium price when making the investment. However, interest is taxable to the recipient, and when a premium has been paid the actual interest received is not a true reflection of the bond's yield, but represents in part a return of the premium paid. It was to give effect to this principle that Congress in 1942 enacted Section 125 of the 1939 Code,[9] which for the first time provided for amortization of bond premium for tax purposes.

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[8] See the authorities collected in *Commissioner* v. *Korell,* 339 U. S. 619, 627, n. 10. The Court in *Korell,* a case also involving an interpretation of Section 125 (see discussion, pp. 682–683, *infra*), concluded (339 U. S., at 627): "We adopt the view that 'bond premium' in § 125 means any extra payment, regardless of the reason therefor . . . ."

[9] *Commissioner* v. *Korell,* 339 U. S. 619, 621. See 1 Hearings before House Committee on Ways and Means on Revenue Revision of 1942, 77th Cong., 2d Sess. 90 (1942). The House Committee noted the recommendation made in the hearings that the difference between yield and the actual interest rate be treated as a return of capital and not as a capital loss (H. R. Rep. No. 2333, 77th Cong., 2d Sess. 47):

"Under existing law, bond premium is treated as a capital loss sustained by the owner of the bond at the time of disposition or maturity and periodical payments on the bond at the nominal or coupon rate are treated in full as interest. The want of statutory recognition of the sound accounting practice of amortizing premium leads to incorrect tax results which in many instances are so serious that provision should be made for their avoidance."

However, in rejecting the Government's argument in *Korell, supra,* that Congress intended to confine the deduction only to premium paid for a higher-than-market interest rate, the Court stated (339 U. S., at 626–627):

"At most, [the Commissioner's] presentation of the legislative materials suggests that Congress may have had the bondholder who was

By providing that amortization could be taken with reference to the "amount payable on maturity or on *earlier call date*" (emphasis added), Congress recognized that bonds are generally subject to redemption by the issuer prior to their maturity. In electing to allow amortization with reference to the period the bonds might actually be outstanding, Congress, through the words to which we have lent emphasis, provided that a bondholder could amortize bond premium with reference to any date named in the indenture at which the bond might be called.[10]

A bond indenture might contain any number of possible call dates, but we need only to be concerned in this case with the issuer's right to call the bonds on 30 days' notice at either a general or special call price. Unquestionably, both general and special redemption provisions have a legitimate, though distinct, business purpose, and both were in widespread use well before the enactment of Section 125. The general call price is employed when the issuer finds that the current rate of interest on marketable securities is substantially lower than what it is paying on

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seeking a higher interest rate primarily in mind; but it does not establish that Congress in fact legislated with reference to him exclusively. [Citation omitted.] Congress, and the Treasury in advising Congress, may well have concluded that the best manner of affording him relief and correcting the inequitable treatment of bondholders whose interest receipts were taxable, was to define the scope of the amendment by reference to types of bonds rather than causes of premium payment."

[10] Congress' intent in this regard was expressly noted by the respondent in enacting Treas. Reg. 118, § 39.125 (b)-2:

"*Callable and convertible bonds.* (a) The fact that a bond is callable . . . does not, in itself, prevent the application of section 125. . . . The earlier call date may be the earliest call date specified in the bond as a day certain, the earliest interest payment date if the bond is callable at such date, the earliest date at which the bond is callable at par, or such other call date, prior to maturity, specified in the bond as may be selected by the taxpayer. . . ."

an outstanding issue. The issuer may then call the bonds at the general price and, following redemption, may refinance the obligation at the lower, prevailing rate of interest. In contrast, the provision for special funds from which bonds may be redeemed at the special call price, serves an entirely different purpose. Bond indentures normally require the issuer to protect the underlying security of the bonds by maintaining the mortgaged property and by insuring that its value is not impaired. This is done, first, through the maintenance of a special sinking fund, to which the issuer is obligated to make periodic payments, and, secondly, through the maintenance of other special funds, to which are added the proceeds from a sale or destruction of mortgaged property, or from its loss through a taking by eminent domain.[11] Although the issuer normally reserves an alternative to maintaining these special funds with cash, circumstances may dictate that the only attractive option from a business standpoint is the payment of cash and, to prevent the accumulation of this idle money, the indenture provides that the issuer may use it to redeem outstanding bonds at a special call price. It is evident that just as prevailing market conditions may render redemption at the special call price unlikely at a given time, the same or different market conditions may also cause redemption at the general call price equally unlikely,[12] particularly in an expanding

[11] See generally *Evans* v. *Dudley,* 295 F. 2d 713, 715; *Estate of Gourielli* v. *Commissioner,* 289 F. 2d 69, 73; *Parnell* v. *United States,* 187 F. Supp. 576, 577, aff'd, 272 F. 2d 943. See also Badger, Investment Principles and Practices (5th ed. 1961), 46–47, 114–115, 129; I Dewing, Financial Policy of Corporations (5th ed. 1953), 186–188, 247–249.

[12] Hence, the occurrence of a redemption at the general call price is dependent upon one set of events—the fluctuation in the interest market; the occurrence of a redemption at the special call price is dependent upon another set of events—deposits in the sinking fund

industry such as utilities. During the period the petitioners held their bonds, none were called at either price, but the risk incurred that they would be called was present with equal force as to both the general and special call provisions. The market for bonds reflects that risk, and the Section of the Code we are asked to interpret takes cognizance of that market reality.

Turning to the specific problem in the instant case, we are asked to determine whether the special price at which the bonds may be redeemed by the issuer from the limited sinking fund account and from the other special funds made available upon the occurrence of certain contingent events (see note 3, *supra*) is an "amount payable . . . on earlier call date" within the meaning of Section 125. For the reasons stated below, we answer this question affirmatively and hold that there is no basis either in the statute, in the legislative history, or in the respondent's own prior interpretations of the statute, for a distinction between reference to a general or special call price in computing amortizable bond premiums under the 1939 Code.

First, we note that the Government has made certain important concessions which lighten considerably the task before us. It does not question the right of the petitioners to amortize bond premium with reference to the 30-day call period, nor does it question amortization to the general call price.[13] In addition, in requesting a rule

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by the issuer over one or more years, takings by governmental agencies through eminent domain, destruction of the property securing the bonds, etc. In either case, the events could happen. In fact, the petitioners point out in their brief here that in recent years more bonds have been called at the special redemption price than at the general price. See also *Evans* v. *Dudley*, 295 F. 2d 713, 716.

[13] Allowing a 30-day amortization period is in accord with the decision of the Court in *Korell* where, although the point was not argued by the Government, the taxpayer had amortized the premium

which will apply to the "generality of cases," [14] it professes to have abandoned its argument below which became the rationale of the Second Circuit in holding against the taxpayers, that the statute calls for an analysis into the "likelihood of redemption" before amortization at a special call price will be permitted.[15] Moreover, the

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with reference to the 30-day period provided in the indenture. In its brief in the instant case the Government states:

". . . [W]e concede that it is now too late to challenge the amortization of the premium on bonds subject to an unlimited right of redemption on 30 days' notice. Not only has the consistent administrative practice, culminating in a published ruling, been to allow such amortization, but Congress, in narrowing such deductions in the 1954 Code and prohibiting them entirely after 1957, expressly acknowledged that the prior law permitted that treatment. . . . Accordingly, we did not challenge in the lower courts and do not challenge here petitioners' right to amortization of the premium on the basis of the general right of the issuer to redeem the bonds at any time upon 30 days' notice."

See also Int. Rev. Rul. 56–398, 1956–2 Cum. Bull. 984, where the respondent, in a published ruling, acquiesced in a 30-day amortization period under the 1939 Code.

[14] This concession also conforms to the pronouncement in *Korell* (339 U. S., at 625): "Congress was legislating for the generality of cases." See also *Evans* v. *Dudley,* 295 F. 2d 713, 716; *Parnell* v. *United States,* 187 F. Supp. 576, 579, aff'd, 272 F. 2d 943.

[15] The Court of Appeals for the Second Circuit stated (289 F. 2d 69, 74): "We do not think that . . . in § 125 of the Code . . . [Congress] meant to include an amount payable on a call at a 'special' price of which there was no real possibility during the period for which the amortization is being taken and the deduction claimed." And (289 F. 2d, at 72): ". . . [T]he hazard that any significant number of petitioners' bonds would be called during [the] period was infinitesimal." In so holding, the Court accepted the Government's argument below that "[t]he taxpayer is not entitled to compute his amortizable bond premium deduction . . . with reference to the 'special' call price . . . because . . . such a call was so contingent and unlikely that there was no realistic call date at the 'special' call price . . . ."

In contrast, the Government states in its brief here: ". . . [O]ur position is not dependent upon the particular market conditions or

Government does not contend that the transactions entered into by the petitioners were a sham without any business purpose except to gain a tax advantage.[16] Rather, the Government's position in this Court is that before an "earlier call date" is established with reference to the special call price, the taxpayer must show that "there is an ascertainable date on which the issuer will become entitled to redeem [a particular] bond at its option." The Government asserts that it is not enough that the issuer has the right to call some bonds at the special redemption price. Rather, "[i]t must have the right to call the particular bond for which amortization is claimed, for otherwise *that* bond has no 'earlier call date.'" The Government's primary reason for urging this interpretation of Section 125 is that the statute has created a tax loophole of major dimension that should be closed short of allowing the deduction sought in this case. While this assertion might have been persuasive in securing enactment of the amendments to the statute made subsequent to the time the transactions involved here took place (see discussion, *infra*), it may not, of course, have any impact upon our interpretation of the statute under review. We are bound by the meaning of the words used by Congress, taken in light of the pertinent legislative history. In neither do we find support for the Government's interpretation.

This Court was first called upon to construe Section 125 in 1950 in *Commissioner* v. *Korell,* 339 U. S. 619. The

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the actual probabilities that a right of redemption will be exercised. . . . [W]e agree with petitioners that the question . . . should not be dependent upon a finding in each case of the actual 'likelihood' that any particular redemption right will be exercised." As to the futility in attempting to apply a "likelihood of redemption" standard, see note 12, *supra.*

[16] Cf. *Knetsch* v. *United States,* 364 U. S. 361; *Gregory* v. *Helvering,* 293 U. S. 465.

taxpayer there had purchased bonds at a premium which reflected in large part not a higher yield of interest, but, rather, the attractiveness of the convertible feature of the bonds. The bonds were callable on 30 days' notice and the taxpayer amortized the premium accordingly. In contesting the deduction thus taken, the Commissioner contended that Section 125, in establishing a deduction for "amortizable bond premium," did not include premium paid for the conversion privilege. In rejecting this contention, the Court made it clear that Section 125 was not enacted solely to enable a bondholder to amortize "true premium," but that by "the clear and precise avenue of expression actually adopted by the Congress" (339 U. S., at 625), the legislation was adopted with "no distinctions based upon the inducements for paying the premium." (*Id.*, at 628.)

The decision in *Korell* led to congressional re-examination of Section 125, and the enactment of Section 217 (a) of the Revenue Act of 1950 (64 Stat. 906), which eliminated amortization of bond premiums attributable to a conversion feature. However, response to the *Korell* decision was specifically limited to the convertible bond situation; no further change was made in the statute which would reflect on its interpretation in the case before us.[17]

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[17] The legislation simply provided:

"In no case shall the amount of bond premium of a convertible bond include any amount attributable to the conversion features of the bond."

Where, as in the case before us, a question of interpretation of Section 125 is presented lying outside the scope of the 1950 Amendment, *Korell* retains its full vitality. Thus, it is worth noting that the Government's "right to call" approach advocated in the case at bar would result in a *sub silentio* overruling of *Korell* to the extent that in the latter case the right of the bondholder to exercise his conversion option at any time through the expiration of the notice period of a call defeated completely the issuer's "right" to call and redeem

In 1954, in enacting the successor to Section 125, Section 171 of the Internal Revenue Code of 1954 (26 U. S. C., 1958 ed.), Congress again took cognizance of the tax benefit in question, and determined to eliminate the abuses inherent in permitting amortization with reference to 30-day call periods. Thus Congress further narrowed the loophole by providing that the premium on callable bonds could be amortized to the nearest call date only if such date was more than three years from the date of the original issue of the securities. With particular relevance to the Government's argument in the instant case, it is worthy of note that Congress understood the operation of the statute to the taxpayer's advantage, but limited correction of the abuses inherent in it to elimination of the quick write-off. The House Report accompanying H. R. 8300, which was to become the Internal Revenue Code of 1954, stated (H. R. Rep. No. 1337, 83d Cong., 2d Sess. 26):

> "Under existing law, a bond premium may be amortized with reference to the amount payable on maturity or on earlier call date, at the election of the taxpayer. In the case of bonds with a very short call feature, such as those providing for call at any time on 30-day notice, the entire premium may be deducted in the year of purchase.
>
> "This provision has given rise to tax-avoidance opportunities. Substantial bond issues have been made subject to a 30-day call, permitting the purchaser to take an immediate deduction for the entire premium against ordinary income. *Where the call feature is nominal or inoperative* this permits a

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even a single bond. In the instant case, however, neither party disputes the fact that at least some of the bonds could have been called at the special price and that if the issuer exercised his right so to call them the bondholder would have had no choice but to turn over the bonds and forfeit the premium paid for them.

deduction for an unreal loss, since the market value of the bonds ordinarily remains fairly stable over considerable periods. The bonds may then be resold after 6 months subject to long-term capital gain treatment. The writeoff of premium thus affords a gratuitous tax saving, equivalent to the conversion of a corresponding amount of ordinary income into capital gain. This process may be repeated indefinitely.

"To curb this type of abuse, your committee's bill provides that the premium on callable bonds may be amortized to the nearest call date only if such date is more than 3 years from the date of original issue of the securities. *This provision will apply only to bonds issued after January 22, 1951, and acquired after January 22, 1954.*" (Emphasis added.)

Not only did Congress fail to make the distinction between general and special call provisions urged by the respondent, but it expressly recognized that deductions could be taken under Section 125 with reference to a call date that was "nominal or inoperative." It did not remotely imply that a showing of a right to call all or any part of the outstanding bonds was necessary for operation of the statute. Furthermore, the change that it did adopt was to operate prospectively only.

Finally, in 1958, by adoption of Section 13 of the Technical Amendments Act of 1958, 72 Stat. 1610, Congress eliminated entirely the right to amortize to call date, permitting amortization to be taken only over the period to maturity.[18] Again, the legislative change was prospec-

[18] The 1958 Amendment literally permits amortization to an earlier call date but only if it results in a *smaller* amortization deduction than would amortization to maturity, which, for all practical purposes, effectively eliminates the privilege of calling to an earlier call date.

tive only and again no distinction was made with respect to general and special call dates or with respect to a right to call all or a part of the outstanding bonds.

Persuasive evidence that we are correct in our interpretation of Section 125, as bolstered by its legislative history and subsequent amendments, may be found in the respondent's own prior construction of the statute. As is true with the language of the statute itself, the respondent's regulations contained not the slightest hint of the distinction urged upon us here. The Commissioner defined "earlier call date" in Treas. Reg. 118, § 39.125 (b)–2 (see note 10, *supra*) as any call date prior to maturity, specified in the bond. The regulations in effect in 1953 give no support to the Government's present contention that the taxpayer must show an unconditional right in the issuer to call the outstanding bonds at a particular redemption price before amortization with reference to that price would be permitted. Furthermore, although the petitioners are not entitled to rely upon unpublished private rulings which were not issued specifically to them,[19] such rulings do reveal the interpretation put upon the statute by the agency charged with the responsibility of administering the revenue laws. And, because the Commissioner ruled, in letters addressed to taxpayers requesting them, that amortization with reference to a special call price was proper under the statute,[20] we have

[19] See, *e. g.*, *Commissioner* v. *P. G. Lake, Inc.*, 356 U. S. 260, 265–266, n. 5; *Automobile Club* v. *Commissioner*, 353 U. S. 180; *Helvering* v. *New York Trust Co.*, 292 U. S. 455, 467–468.

[20] For example, the record in the instant case contains a copy of the following letter to a taxpayer from the respondent's office (we quote the relevant portion):

"Gentlemen:

. . . . . .

"The Appalachian Electric Power Company 3¾% bonds, 1981 Series, are callable in whole or in part through May of 1953 at 105⅝. They are also callable for sinking fund through funds derived from

further evidence that our construction of allowable bond premium amortization is compelled by the language of the statute.[21]

A firmly established principle of statutory interpretation is that "the words of statutes—including revenue acts—should be interpreted where possible in their ordinary, everyday senses." *Crane* v. *Commissioner,* 331 U. S. 1, 6.[22] The statute in issue here, in plain and ordinary language, evidences a clear congressional intent to allow amortization with reference to any call date named in the indenture. Under such circumstances we are not at liberty, notwithstanding the apparent tax-saving windfall bestowed upon taxpayers, to add to or alter the words employed to effect a purpose which does not appear on the face of the statute. Moreover, the legislative history, too, is persuasive evidence that the statute, as it appeared

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maintenance or sale of property at any time upon thirty days notice through May 31, 1954 at 102⅜. You request to be advised whether the above-mentioned ruling of July 30, 1952, means that such bonds may be amortized down to 102⅜ or whether it means that they can only be amortized down to 105⅝ through May of 1953.

"Upon the basis of the information on file in this office, it is the opinion of this office that a taxpayer electing to amortize the premium on Appalachian Electric Power Company bonds in accordance with section 125 of the Code may use the regular redemption price of 105⅝ or the special redemption price of 102⅜.

"Very truly yours, [etc.] . . ."

[21] In 1956, three years after the deductions in the present case were taken, the Commissioner—reversing the position he had previously and uniformly adhered to in a series of private rulings—for the first time announced that amortization of bond premium under Section 125 of the 1939 Code was to be limited to premium in excess of a general call price and could not include premium in excess of a lower special call price, except where an actual call was made at the latter price. Int. Rev. Rul. 56–398, 1956–2 Cum. Bull. 984.

[22] See also *Commissioner* v. *Korell,* 339 U. S. 619, 627–628; *Lang* v. *Commissioner,* 289 U. S. 109, 111; *Old Colony R. Co.* v. *Commissioner,* 284 U. S. 552, 560.

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in 1953 when these deductions were taken, allowed the deduction refused these taxpayers. Simply stated, an informed Congress enacted Section 125 with full realization of the existence and operation of special call provisions, but chose not to make any distinction between them and general redemption rights. Neither did the Commissioner. Nevertheless, the Government now urges this Court to do what the legislative branch of the Government failed to do or elected not to do. This, of course, is not within our province.[23]

The judgments are reversed.

MR. JUSTICE FRANKFURTER took no part in the decision of this case.

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

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[23] We believe the Court of Appeals for the First Circuit was correct when it said in *Fabreeka Products Co.* v. *Commissioner,* 294 F. 2d 876, 879: "Granting the government's proposition that these taxpayers have found a hole in the dike, we believe it one that calls for the application of the Congressional thumb, not the court's." See also *Evans* v. *Dudley,* 295 F. 2d 713, 715, where the Third Circuit quotes this language from Judge Aldrich's opinion in *Fabreeka Products.*

IN RE GREEN.

CERTIORARI TO THE SUPREME COURT OF OHIO.

No. 312. Argued April 9, 1962.—Decided May 21, 1962.

An employer who was engaged in a labor dispute with a union which dispute was the subject of an unfair labor practice charge pending before the National Labor Relations Board sued in a state court to enjoin peaceful picketing by the union, and the state court issued a restraining order without a hearing. Petitioner, who was counsel for the union, believed that the *ex parte* restraining order was invalid under state law and that the controversy was within the exclusive jurisdiction of the National Labor Relations Board, and he so advised the union and also advised it that the best way to test the order was to continue picketing and, if the pickets were held in contempt, to appeal or to test any order of commitment by habeas corpus. The union followed petitioner's advice, and the court held petitioner in contempt for disobeying or resisting its restraining order. Although petitioner was given an opportunity to be heard, he was not allowed to testify in his own behalf, the proceeding being restricted to sentencing him for contempt. *Held:* Conviction of petitioner for contempt without a hearing and an opportunity to establish that the state court was acting in a field reserved for the National Labor Relations Board violated the Due Process Clause of the Fourteenth Amendment. Pp. 689–693.

172 Ohio St. 269, 175 N. E. 2d 59, reversed.

Merritt W. Green argued the cause for petitioner. With him on the briefs was *Fred A. Smith.*

Ben Neidlinger argued the cause for respondent. With him on the briefs was *Harry Friberg.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioner, a member of the Ohio bar, has been held in contempt of a state court and sentenced to jail and fined. He brought this habeas corpus proceeding in the state courts challenging, *inter alia,* their jurisdiction to

punish him for the conduct in question. He was denied relief by the Supreme Court of Ohio on a divided vote, 172 Ohio St. 269, 175 N. E. 2d 59. We granted the petition for certiorari, 368 U. S. 894.

The matter in dispute arose out of a management-labor controversy. The employer sought and obtained from the state court an injunction against picketing. Petitioner had been retained by the International Longshoremen's Association to represent the local involved in this labor dispute and when advised by the clerk of the court that a petition for an injunction had been requested, he said he would be ready any time for a hearing. The injunction, however, was issued *ex parte*. Petitioner immediately asked for a hearing; but none was granted. At the time the *ex parte* injunction issued, the union had on file with the National Labor Relations Board an unfair labor practice charge, but no hearing had been held on it.

Petitioner, believing that under Ohio Rev. Code, 1954, § 2727.06 the restraining order was invalid because it was issued without a hearing and that the controversy was properly one for the National Labor Relations Board and not for the state court, advised the union officials that the restraining order was invalid and that the best way to contest it was to continue picketing and, if the pickets were held in contempt, to appeal or to test any order of commitment by habeas corpus. The union officials agreed on that course of action and the picketing continued.

Petitioner again sought to obtain a hearing on his motion to vacate the restraining order. But the judge said none could be had for a week. Thereupon petitioner and opposing counsel agreed to submit four pickets for a contempt hearing and to stipulate the facts.

He produced the four pickets the following day and the judge held them in contempt, giving them two days to purge themselves. At the end of the two days another hearing was held; the pickets did not purge themselves.

Petitioner made clear at this hearing and at the earlier one that it was he who had advised the union to test the injunction by risking contempt. The judge held him in contempt for disobeying or resisting "a lawful writ, process, order, rule, judgment, or command" of the court. Ohio Rev. Code, 1954, § 2705.02. While an opportunity was given petitioner to be heard, petitioner was not allowed to testify on his own behalf, the judge ruling that the only purpose of the hearing was to sentence petitioner.

There was a hearing in the Ohio Court of Appeals when a petition for habeas corpus was filed; and at that hearing the undisputed facts showed that the employer was engaged in interstate commerce, that when the contempt order was issued an unfair labor practice charge involving the same dispute as the picketing was pending before the National Labor Relations Board, and that the picketing which had been enjoined was peaceful picketing.

Respondent argues that the controversy between the employer and the union involved no attempt to organize workers and no refusal of the employer to bargain but only the enforcement of a "no-strike" clause in a collective bargaining agreement which was left by Congress either to federal courts (*Textile Workers Union* v. *Lincoln Mills,* 353 U. S. 448) or to state courts. *Teamsters Local* v. *Lucas Flour Co.,* 369 U. S. 95.

Petitioner, however, argues that the unfair labor practice charge filed with the National Labor Relations Board was based on the refusal of the employer to bargain in good faith and that the collective bargaining agreement which the employer asked the state court to enforce had been signed by unauthorized agents.

We said in *In re Oliver,* 333 U. S. 257, 275, that procedural due process "requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented

by counsel, and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation."

Petitioner was guilty of no misconduct that fell within the category of acts which constitute contempt in open court, where immediate punishment is necessary to prevent "demoralization of the court's authority" (*id.*, at 275) or the other types of contempt considered in *Brown* v. *United States,* 359 U. S. 41. The question was whether the state court was trenching on the federal domain. The issue thus tendered emphasizes one important function that a hearing performs. It is impossible to determine from this record whether or not the dispute was exclusively within the jurisdiction of the National Labor Relations Board under the principles of *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236, and *Amalgamated Association* v. *Wisconsin Employment Relations Board,* 340 U. S. 383. The Ohio court could not know whether it was within bounds in citing a person for contempt for violating the injunction without such a hearing. For, as *Amalgamated Association* v. *Wisconsin Employment Relations Board, supra,* held, a state court is without power to hold one in contempt [1] for violating an injunction that the state court had no power to enter by reason of federal pre-emption. Even if we assume that an *ex parte* order could properly issue as a matter of state

[1] One of the companion cases in *Amalgamated Association* v. *Wisconsin Employment Relations Board, supra,* was No. 438, *United Gas Workers* v. *Wisconsin Employment Relations Board,* in which a conviction for contempt for not obeying a restraining order issued by the state court (258 Wis. 1, 44 N. W. 2d 547) was reversed. 340 U. S. 383, 386, 399. The opinion was written by Chief Justice Vinson who also wrote the opinion in *United States* v. *United Mine Workers,* 330 U. S. 258. The latter case involved a restraining order of a federal court and presented no question of pre-emption of a field by Congress where, if the federal policy is to prevail, federal power must be complete.

law, it violates the due process requirements of the Fourteenth Amendment [2] to convict a person of a contempt of this nature without a hearing and an opportunity to establish that the state court was acting in a field reserved exclusively by Congress for the federal agency. When an activity is "arguably" subject to the National Board the States must defer to its "exclusive competence," "if the danger of state interference with national policy is to be averted." *San Diego Building Trades Council* v. *Garmon, supra,* at 245.

Reversed.

MR. JUSTICE FRANKFURTER and MR. JUSTICE WHITE took no part in the consideration or decision of this case.

MR. JUSTICE HARLAN, whom MR. JUSTICE CLARK joins, dissenting in part and concurring in part.

I agree that this contempt conviction must be set aside, but not for the reasons given by the Court.

In *United States* v. *United Mine Workers,* 330 U. S. 258, 289–295, this Court held that disobedience of a temporary restraining order issued by a court whose claim to jurisdiction over the underlying proceeding is not frivolous may be punished as criminal contempt even if it is determined on appeal that such jurisdiction was lacking. This holding was not new, *United States* v. *Shipp,* 203 U. S. 563; *Howat* v. *Kansas,* 258 U. S. 181, and it has not been departed from since. It is the law of Ohio, *Ohio Contractors Assn.* v. *Local 894, Hod Carriers' Union,* 108 Ohio App. 395, 162 N. E. 2d 155. It was one ground of decision below, 172 Ohio St. 269, 274–275, 175 N. E. 2d 59, 62–63, and is relied on here by respondent. However, the Court in its opinion gives only a passing glance at the *Mine Workers* decision.

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[2] Cf. *Ex parte Bradley,* 7 Wall. 364, 375; *Hovey* v. *Elliott,* 167 U. S. 409.

The injunction petition out of which this contempt proceeding arose alleged that the posting of union pickets "and the calling of a strike by so doing" violated the no-strike clause of a collective bargaining agreement signed by union representatives who claimed authority to contract. The assertion of state court jurisdiction to redress violation of such an agreement has recently been upheld in *Charles Dowd Box Co.* v. *Courtney,* 368 U. S. 502, and can hardly be deemed to have been frivolous before that decision. It does not become frivolous because an argument might be made for holding the state court powerless to issue an injunction in such a case, see *Dowd Box, supra,* 368 U. S., at 514, n. 8, or because it is arguable either that no contract was concluded in this case or that the picketing did not constitute a breach of such a contract. *Local 174, Teamsters Union* v. *Lucas Flour Co.,* 369 U. S. 95, 101, makes clear that the rule stated in *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236, 245, ousting state courts from dealing in tort with activities even arguably subject to § 7 or § 8 of the National Labor Relations Act, does not apply when relief is sought for breach of an alleged collective bargaining agreement. State jurisdiction was upheld in *Lucas Flour,* although the activity there would have been protected by § 7 if not forbidden by a contract provision whose interpretation was fairly disputed, and thus was still arguably protected.

Accordingly, unless *Mine Workers* is distinguishable, the state court in this instance had power to punish petitioner for contempt even though it may ultimately be determined that it lacked jurisdiction over the injunction suit itself. The Court seeks to find such a distinction in the fact that *Mine Workers* involved a federal restraining order, whereas in *Amalgamated Assn. of Bus Employees* v. *Wisconsin Employment Relations Board,* 340 U. S. 383, where state jurisdiction was found to be

preempted by the National Labor Relations Act, a state court restraining order *pendente lite* was set aside. The *Amalgamated* case, however, did not involve an alleged breach of a labor agreement. The *Mine Workers* principle was neither relied on by the state court in *Bus Employees* nor argued here, and there is nothing in this Court's opinion in that case which suggests that the State would have been without power to reinstate the original contempt order on the basis of *Mine Workers* if that rule were followed in Wisconsin. Moreover, the Court's opinion in the present case does not enlighten us as to why the *Mine Workers* principle should not obtain in a "preemption" case. Indeed, I would have supposed that if a federal court can preserve the status quo pending resolution of a disputed question as to its jurisdiction, the considerations in favor of allowing a state court to take such action in the same situation are at least as strong, if not stronger.

It is suggested that the federal policy behind preemption of state jurisdiction in Labor Board cases would be frustrated if the *Mine Workers* rule were to be considered applicable in a case such as this. But the policy underlying the preemption doctrine cannot well be thought stronger than the policy of the Norris-LaGuardia Act. The restraining order was issued in *Mine Workers* despite the commands of the Norris-LaGuardia Act—a statute specifically directed towards proscribing the issuance of injunctive orders in labor disputes.*

*The very argument now advanced here by the majority opinion was made by Mr. Justice Murphy, dissenting, in the *Mine Workers* case (330 U. S., at 341): "But we are acting here in the unique field of labor relations, dealing with a type of order which Congress has definitely proscribed. If we are to hold these defendants in contempt for having violated a void restraining order, we must close our eyes to the expressed will of Congress and to the whole history of equitable

Petitioner's argument that the restraining order must be ancillary to a dispute over which the court has admitted jurisdiction scarcely serves to explain either *United States* v. *Shipp, supra,* in which the Court assumed that jurisdiction of the entire controversy depended on whether the Constitution had been violated, or *Howat* v. *Kansas, supra,* in which the jurisdiction of the state court, apart from the validity of the statute attacked, was relied on only as an alternative holding. Whether a restraining order is thus ancillary or not, respect for the orderly process of law requires obedience to it until a debatable issue of jurisdiction can be authoritatively decided. *United States* v. *United Mine Workers, supra,* 330 U. S., at 309–310 (FRANKFURTER, J., concurring). Petitioner would limit the rule to injunctive orders issued to preserve the status quo. Even so, the power of the court to act pending decision of the jurisdictional issue surely does not depend upon whether a strike has begun an hour before the complaint is filed or is to begin an hour later.

Nevertheless, I agree that for a different reason petitioner's conviction did not comport with the requirements of due process. For the record shows that the petitioner was deprived of an opportunity to prove that contempt proceedings against the pickets were agreed to among himself, his adversary, and the judge as the appropriate way to test the court's jurisdiction over the basic lawsuit. Petitioner offered to testify—and his proffered testimony appears not to have been disputed—that "I was convinced that both the Judge and Mr. Ragan [opposing counsel] were aware that I had consented to bring these men before the court and stipulate the essential matters

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restraints in the field of labor disputes. We must disregard the fact that to compel one to obey a void restraining order in a case involving a labor dispute and to require that it be tested on appeal is to sanction the use of the restraining order to break strikes—which was precisely what Congress wanted to avoid."

for the express purpose of testing the validity of the court's order and its jurisdiction over the subject matter." Yet petitioner was denied the right to present this testimony.

I agree with the dissenting judge in the Ohio Court of Appeals, 47 L. R. R. M. 2230, 2233, that there is a vast difference between a defendant openly contumacious and defiant of a court order and one who disobeys the order pursuant to an understanding with court and counsel in order to test the underlying jurisdictional issues. If petitioner's contentions are true, he cannot be punished for violating the order after this agreement, and therefore he has a right to be heard. *In re Oliver,* 333 U. S. 257, 275.

On this basis I agree that the state contempt order must be set aside.

GUZMAN *v.* PICHIRILO.

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

No. 358. Argued March 27, 1962.—Decided May 21, 1962.

Petitioner, a longshoreman, brought suit in admiralty, *in rem* against a ship and *in personam* against her owner, to recover damages for injuries which he claimed resulted from unseaworthiness of the ship, which he was helping to unload. The defense was that the ship was under demise charter to petitioner's employer at all pertinent times, including the time when the unseaworthy condition arose. The District Court found that there was in fact no such demise charter and awarded petitioner a judgment against the ship and its owner. The Court of Appeals reversed, holding that the ship was under a demise charter to petitioner's employer, that this relieved the owner of personal responsibility for unseaworthiness and that the ship was not liable *in rem* because no personal responsibility could be visited upon either the owner or the charterer. *Held:* The District Court's findings of fact relative to the existence of a demise charter were not clearly erroneous, and the Court of Appeals erred in reversing its judgment. Pp. 698–703.

290 F. 2d 812, reversed.

Harvey B. Nachman argued the cause for petitioner. With him on the briefs was *Max Goldman.*

Seymour P. Edgerton argued the cause and filed briefs for respondent.

MR. JUSTICE CLARK delivered the opinion of the Court.

Petitioner, a longshoreman, was injured while unloading the M/V *Carib,* of Dominican registry, when a shackle broke causing one of the ship's booms to fall upon and severely injure him. He brought this suit in admiralty to recover damages resulting from the unseaworthy condition of the ship. The libel was *in rem* against the *Carib* and *in personam* against respondent Pichirilo, her owner. The defense was that the *Carib*

had been demised to petitioner's employer, Bordas & Company, at all times pertinent hereto, including the time when the unseaworthy condition arose. The United States District Court for the District of Puerto Rico, where the *Carib* lay, held against the ship and the respondent Pichirilo, finding there was no such demise, and judgment for $30,000 was awarded. The Court of Appeals reversed, holding that the *Carib* was under a demise to petitioner's employer, which relieved the owner of personal responsibility for unseaworthiness, and that the *Carib* was not liable *in rem* because no personal responsibility could be visited upon either the owner or the charterer.[1] 290 F. 2d 812. There being a conflict on the latter point between the Courts of Appeals, see *Grillea* v. *United States,* 232 F. 2d 919 (C. A. 2d Cir. 1956), we granted certiorari, 368 U. S. 895.[2] Concluding that the District Court's findings relative to the operative facts of a demise charter party were not clearly erroneous, we hold that the Court of Appeals erred in reversing its judgment.

To create a demise the owner of the vessel must completely and exclusively relinquish "possession, command, and navigation" thereof to the demisee. *United States* v. *Shea,* 152 U. S. 178 (1894); *Leary* v. *United States,* 14 Wall. 607 (1872); *Reed* v. *United States,* 11 Wall. 591 (1871). See generally Gilmore & Black, The Law of Admiralty, 215–219; Robinson, Admiralty, 593–601; Scrutton, Charterparties (16th ed., McNair & Mocatta),

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[1] Since the alleged charterer was petitioner's employer, its liability to him was statutorily limited by the Puerto Rico Workmen's Accident Compensation Act. 11 L. P. R. A. § 21.

[2] After certiorari was granted in this case, the Court of Appeals for the Third Circuit, faced with a demise to the longshoreman's employer, aligned itself *in toto* with the position of the Court of Appeals for the First Circuit. *Reed* v. *The Yaka,* 307 F. 2d 203 (1962).

4–7. It is therefore tantamount to, though just short of, an outright transfer of ownership. However, anything short of such a complete transfer is a time or voyage charter party or not a charter party at all. While a demise may bring about a change in the respective legal obligations of the owner and demisee, *ibid.*, we need not decide here whether it relieves the owner of his traditional duty to maintain a seaworthy vessel, for under our view of the record the trial court's determination that there was no demise charter party must stand.[3]

The owner who attempts to escape his normal liability for the unseaworthiness of his vessel on the ground that he has temporarily been relieved of this obligation has the burden of establishing the facts which give rise to such relief. Thus, assuming *arguendo* that a demise charter party would isolate the owner from liability, the owner has the burden of showing such a charter. This burden is heavy, for courts are reluctant to find a demise when the dealings between the parties are consistent with any lesser relationship. *E. g., Reed* v. *United States, supra,* at 601. To establish a demise the owner in the instant case offered only the testimony of the director-partner of the claimed demisee, petitioner's employer.[4] He testified that his company had complete control over and responsibility for the operation of the *Carib,* in consideration of which the owner was paid $200 monthly. He explained that his company's agreement with the owner was "a kind of charter, because it does not comply with the regular provisions of a charter party. I pay the seamen, food, repair, maintenance, drydocking; which in a regular charter party are excluded." To negate the existence of a demise the petitioner offered the deposition

[3] Similarly, we do not pass on whether the vessel can be held liable *in rem* when neither the demisee nor the owner is personally liable.

[4] Our view of the case makes it unnecessary to determine whether a demise charter party can be created without a written document.

of the Captain of the *Carib,* who testified simply that he was employed by the owner. On the basis of this evidence the trial court *found* that the owner "was at all times mentioned in the libel . . . in possession and control of the vessel M/V 'CARIB.' " In addition that court pointed out that the only witness offered to prove the existence of a demise had admitted there was no charter and that the Captain of the vessel had testified he was working for the owner, not Bordas & Co. The Court of Appeals in reversing thought the trial court had been misled as to the legal significance of the testimony and that this, as opposed to a refusal to believe the testimony of the owner's witness, had prompted it to conclude there was no charter.

It is true, as the Court of Appeals pointed out, that the equivocation by the witness for the owner on the nature of his company's arrangement is not inconsistent with the existence of a demise charter party, for the very elements he thought made the arrangement "a kind of charter" are inherent in a demise charter party. See authorities cited, p. 699, *supra.* And it is equally true the fact that the Captain is employed by the owner is not fatal to the creation of a demise charter party, for a vessel can be demised complete with captain if he is subject to the orders of the demisee during the period of the demise. *United States* v. *Shea, supra,* at 190; Robinson, *op. cit., supra,* 594–595. If we were convinced, as was the Court of Appeals, that the trial court's action was colored by a misunderstanding of such legal principles, we would have to remand, as the Court of Appeals should have, for further findings by the trial court on the credibility of the owner's witness. *E. g., Kweskin* v. *Finkelstein,* 223 F. 2d 677, 679 (C. A. 7th Cir. 1955). However, we have concluded that the trial court clearly disbelieved the testimony offered by respondent to establish a demise charter party. The trial judge not only found that respondent

was in complete possession and control of the vessel, which in and of itself indicates disbelief in the witness' testimony, but upon the conclusion of the trial pointedly stated that he did not "believe that Bordas is the operator of the boat." This factual finding, rather than being tainted by an admission as to the legal relationship between the parties, appears to flow from the court's interpretation of the Captain's testimony. And to the extent this finding was based on such testimony, it cannot be said to have been influenced by an erroneous concept of a demise charter party. For as we read the record the Captain's testimony was sufficiently ambiguous for the trial court to reasonably construe it—as the court did—as saying he remained subject to the owner's control during the period of the alleged demise. Viewed in this light the testimony, of course, negates the existence of a demise. The determination of the factual content of ambiguous testimony is for the trial court, and such determination can be set aside on review only if "clearly erroneous." *United States* v. *National Association of Real Estate Boards,* 339 U. S. 485, 495–496 (1950).

The "clearly erroneous" rule of civil actions is applicable to suits in admiralty in general, *McAllister* v. *United States,* 348 U. S. 19, 20 (1954); see *Roper* v. *United States,* 368 U. S. 20, 23 (1961), and to the existence of the operative facts of a demise charter party in particular, *Gardner* v. *The Calvert*, 253 F. 2d 395, 399 (C. A. 3d Cir. 1958). Under this rule an appellate court cannot upset a trial court's factual findings unless it "is left with the definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.,* 333 U. S. 364, 395 (1948). A refusal to credit the uncorroborated testimony of the director-partner, who obviously was not disinterested in the outcome of the litigation, would not be considered clearly erroneous. See, *e. g.*, *United States* v. *Oregon State Medical Society,* 343

U. S. 326, 339 (1952); *Mayer* v. *Zim Israel Navigation Co.*, 289 F. 2d 562, 563 (C. A. 2d Cir. 1960). This is especially so when such testimony is prompted by leading questions as was the case here.[5] *A fortiori* the refusal to accept such testimony, disputed as it was by the testimony of the Captain, cannot be considered clearly erroneous.

Since the trial court's determination that there was no demise charter party is not clearly erroneous, its holding that the owner is liable *in personam* and the vessel *in rem* must be reinstated. The case is therefore remanded to the Court of Appeals for further proceedings consistent with this opinion including the resolution of any questions it might have left unanswered on the assumption that there was no liability.

Reversed and remanded.

MR. JUSTICE FRANKFURTER took no part in the decision of this case.

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

MR. JUSTICE HARLAN, dissenting.

Certiorari was granted in this case because it was thought that the legal principles underlying one aspect of the decision below were in conflict with those applied by the Second Circuit in *Grillea* v. *United States*, 232 F. 2d 919.

The Court, however, does not resolve that conflict, nor does it decide any other question of law not already established by its past decisions. Instead, the judgment below is reversed merely because this Court disagrees with the Court of Appeals' factual estimate of the case.

[5] At one point the judge interrupted the direct examination of the witness to point out he could not "give any credit to a witness answering leading questions."

Had the issue which the Court decides been the only question tendered by the petition for certiorari, the case could not well have been regarded as one for review by this Court. See *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500, 524, 559 (dissenting opinions). To reverse it now on what is essentially only an evidentiary ground is, in my view, an improvident use of the certiorari power: the Court has done no more than "to substitute its views" for those of the Court of Appeals on purely factual issues, reached upon a fair assessment of the trial record. 352 U. S., at 562–563. Respecting the legal issues which this Court does not decide, I think that the Court of Appeals was plainly correct in deciding them as it did.

I would affirm.

Syllabus.

LYNCH *v.* OVERHOLSER, HOSPITAL SUPERINTENDENT.

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

No. 159. Argued January 15, 1962.—Decided May 21, 1962.

After petitioner had received treatment in a mental hospital, a psychiatrist advised the court that he was able to stand trial, but that he was suffering from a mental disease and that further treatment would be advisable. Petitioner was then brought to trial in the District of Columbia on two charges of passing worthless checks. On advice of counsel, he sought to withdraw an earlier plea of not guilty and to plead guilty to both charges; but the judge refused to permit him to do so. Although petitioner maintained that he was mentally responsible when the offenses were committed and presented no evidence to support an acquittal by reason of insanity, the trial judge concluded that he was not guilty on the ground that he was insane at the time of the commission of the offense, and ordered him committed to a mental hospital under D. C. Code § 24–301 (d), which provides that, "If any person . . . is acquitted solely on the ground that he was insane at the time of [the] commission [of the offense], the court shall order such person to be confined in a hospital for the mentally ill." In this habeas corpus proceeding, *held:* The trial court erred in ordering petitioner committed, because § 24–301 (d) applies only to a defendant who by his own act has relied on a defense that he was insane when the offense was committed and who is acquitted on that ground. Pp. 706–720.

109 U. S. App. D. C. 404, 288 F. 2d 388, reversed.

Richard Arens argued the cause for petitioner. With him on the briefs was *Rufus King.*

Assistant Attorney General Marshall argued the cause for respondent. With him on the briefs were *Solicitor General Cox, Richard J. Medalie, Harold H. Greene* and *David Rubin.*

Briefs urging reversal were filed by *Francis M. Shea* and *Lawrence Speiser* for the American Civil Liberties Union, as *amicus curiae*.

MR. JUSTICE HARLAN delivered the opinion of the Court.

This is a habeas corpus proceeding instituted in the District Court by the petitioner, presently confined in Saint Elizabeths Hospital for the insane pursuant to a commitment under D. C. Code § 24–301 (d), to test the legality of his detention. The District Court, holding that petitioner had been unlawfully committed, directed his release from custody unless civil commitment proceedings (D. C. Code § 21–310) were begun within 10 days of the court's order. The Court of Appeals, sitting *en banc*, reversed by a divided vote. 109 U. S. App. D. C. 404, 288 F. 2d 388. Since the petition for certiorari raised important questions regarding the procedure for confining the criminally insane in the District of Columbia and suggested possible constitutional infirmities in § 24–301 (d) as applied in the circumstances of this case, we granted the writ. 366 U. S. 958.

Two informations filed in the Municipal Court for the District of Columbia on November 6. 1959, charged petitioner with having violated D. C. Code § 22–1410 by drawing and negotiating checks in the amount of $50 each with knowledge that he did not have sufficient funds or credit with the drawee bank for payment. On the same day, petitioner appeared in Municipal Court to answer these charges and a plea of not guilty was recorded. He was thereupon committed under D. C. Code § 24–301 (a) to the District of Columbia General Hospital for a mental examination to determine his competence to stand trial.[1] On December 4, 1959, the Assistant Chief Psychiatrist of

[1] The record does not reveal the basis for the trial court's action.

the Hospital reported that petitioner's mental condition was such that he was then "of unsound mind, unable to adequately understand the charges and incapable of assisting counsel in his own defense." The case was continued while petitioner was given treatment at the General Hospital.

On December 28, 1959, the Assistant Chief Psychiatrist sent a letter to the court advising that petitioner had "shown some improvement and at this time appears able to understand the charges against him, and to assist counsel in his own defense." This communication also noted that it was the psychiatrist's opinion that petitioner "was suffering from a mental disease, i. e., a manic depressive psychosis, at the time of the crime charged," such that the crime "would be a product of this mental disease." As for petitioner's current condition, the psychiatrist added that petitioner "appears to be in an early stage of recovery from manic depressive psychosis," but that it was "possible that he may have further lapses of judgment in the near future." He stated that it "would be advisable for him to have a period of further treatment in a psychiatric hospital."

Petitioner was brought to trial the following day in the Municipal Court before a judge without a jury. The record before us contains no transcript of the proceedings,[2] but it is undisputed that petitioner, represented by counsel, sought at that time to withdraw the earlier plea of not guilty and to plead guilty to both informations. The trial judge refused to allow the change of plea, apparently on the basis of the Hospital's report that petitioner's commission of the alleged offenses was the product of mental illness.

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[2] Despite the absence of a trial record, the District Court made findings of fact respecting the proceedings at petitioner's trial, some of which are contested by the parties. We rely only upon those facts that were here admitted.

At the trial one of the prosecution's witnesses, a physician representing the General Hospital's Psychiatric Division, testified, over petitioner's objection, that petitioner's crimes had been committed as a result of mental illness. Although petitioner never claimed that he had not been mentally responsible when the offenses were committed and presented no evidence to support an acquittal by reason of insanity, the trial judge concluded that petitioner was "not guilty on the ground that he was insane at the time of the commission of the offense." [3] The court then ordered that petitioner be committed to Saint Elizabeths Hospital as prescribed by D. C. Code § 24–301 (d), which reads:

> "(d) If any person tried upon an indictment or information for an offense, or tried in the juvenile court of the District of Columbia for an offense, is acquitted solely on the ground that he was insane at the time of its commission, the court shall order such person to be confined in a hospital for the mentally ill."

There can be no doubt as to the effect of this provision with respect to a defendant who has asserted a defense of insanity at some point during the trial. By its plain terms it directs confinement in a mental hospital of any criminal defendant in the District of Columbia who is "acquitted solely on the ground" that his offense was committed while he was mentally irresponsible, and forecloses the trial judge from exercising any discretion in this regard. Nor does the statute require a finding by the trial judge or jury, or by a medical board, with respect to the accused's mental health on the date of the judgment of acquittal. The sole necessary and sufficient condition for bringing the compulsory commitment provision into

[3] Petitioner did not appeal from this judgment.

play is that the defendant be found not guilty of the crime with which he is charged because of insanity "at the time of its commission." [4] Petitioner does not contend that the statute was misinterpreted in these respects.

Petitioner maintains, however, that his confinement is illegal for a variety of other reasons, among which is the assertion that the "mandatory commitment" provision, as applied to an accused who protests that he is presently sane and that the crime he committed was not the product of mental illness, deprives one so situated of liberty without due process of law.[5] We find it unnecessary to con-

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[4] Similar statutes are found in 12 States, the Virgin Islands, and in England. Compare Colo. Rev. Stat. Ann. (Supp. 1957) § 39–8–4; Ga. Code Ann., 1953, § 27–1503; Kan. Gen. Stat. Ann., 1949, § 62–1532; Maine Pub. L., 1961, c. 310; Mass. Ann. Laws, 1957, c. 123, § 101 (murder or manslaughter); Mich. Stat. Ann., 1954, § 28.933 (3) (murder); Minn. Stat. Ann. (Supp. 1957) § 631.19; Neb. Rev. Stat. Ann., 1943, § 29–2203; Nev. Rev. Stat., 1955, § 175.445; N. Y. Sess. Laws 1960, c. 550, §§ 1–3; Ohio Rev. Code (Baldwin 1953) § 2945.39; Wis. Stat., 1958, § 957.11; V. I. Code Ann., 1957, Tit. 5, § 3637. The English procedure is found in Trial of Lunatics Act, 46 & 47 Vict., c. 38, s. 2 (1883).

Statutes under which commitment is mandatory if the trial judge or jury finds that the accused is *presently* insane are, of course, clearly distinguishable. The focus of the inquiry on which commitment turns is the accused's mental health as of the time of commitment, and the verdict of not guilty by reason of insanity is merely evidence bearing on that issue. Consequently, the effect of the compulsory aspect of such a commitment provision is by no means comparable to that involved in the present case. Similarly, any discretionary commitment statute presumably leaves the trial judge or jury free to find the accused presently sane and thus entitled to full liberty.

[5] In essence the claim is that § 24–301 (d) compels the indeterminate commitment of such a person without any inquiry as to his present sanity, and solely on evidence sufficient to warrant a reasonable doubt as to his mental responsibility as of the time he committed the offense charged. The claim is said to be buttressed when § 24–301 (d) is taken in conjunction with the rigorous release-from-

sider this and other constitutional claims concerning the fairness of the Municipal Court proceeding, since we read § 24–301 (d) as applicable only to a defendant acquitted on the ground of insanity who has affirmatively relied upon a defense of insanity, and not to one, like the petitioner, who has maintained that he was mentally responsible when the alleged offense was committed.[6]

The decisions of this Court have repeatedly warned against the dangers of an approach to statutory construction which confines itself to the bare words of a statute, *e. g., Church of the Holy Trinity* v. *United States,* 143 U. S. 457, 459–462; *Markham* v. *Cabell,* 326 U. S. 404, 409, for "literalness may strangle meaning," *Utah Junk Co.* v. *Porter,* 328 U. S. 39, 44. Heeding that principle we conclude that to construe § 24–301 (d) as applying only to criminal defendants who have interposed a defense of insanity is more consistent with the general pattern of laws governing the confinement of the mentally ill in the District of Columbia, and with the congressional policy that impelled the enactment of this mandatory commitment provision, than would be a literal reading of the section. That construction finds further support in the rule

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confinement provisions of § 24–301 (e) and § 24–301 (g) as construed by the Court of Appeals for the District of Columbia in *Overholser* v. *Leach,* 103 U. S. App. D. C. 289, 257 F. 2d 667; *Ragsdale* v. *Overholser,* 108 U. S. App. D. C. 308, 281 F. 2d 943.

[6] The defense of insanity need not, of course, be asserted by means of a formal plea. Fed. Rules Crim. Proc. 11, which governs proceedings in the District Courts, permits the entry of certain enumerated pleas, not including "not guilty by reason of insanity," a plea which is authorized in some jurisdictions. D. C. Munic. Ct. Crim. Rule 9 is identical to Fed. Rules Crim. Proc. 11. Consequently, a defense of insanity in a criminal proceeding in the District of Columbia may be established under a general plea of not guilty. We read § 24–301 (d) as making commitment mandatory whenever the defendant successfully relies, in any affirmative way, on a claim that he was insane at the time of commission of the crime of which he is accused.

that a statute should be interpreted, if fairly possible, in such a way as to free it from not insubstantial constitutional doubts. *E. g., United States* v. *Jin Fuey Moy,* 241 U. S. 394, 401; *International Assn. of Machinists* v. *Street,* 367 U. S. 740, 749. Such doubts might arise in this case were the Government's construction of § 24–301 (d) to be accepted.

I.

To construe § 24–301 (d) as requiring a court, without further proceedings, automatically to commit a defendant who, as in the present case, has competently and advisedly not tendered a defense of insanity to the crime charged and has not been found incompetent at the time of commitment is out of harmony with the awareness that Congress has otherwise shown for safeguarding those suspected of mental incapacity against improvident confinement.

Thus, a civil commitment must commence with the filing of a verified petition and supporting affidavits. D. C. Code § 21–310. This is followed by a preliminary examination by the staff of Saint Elizabeths Hospital, a hearing before the Commission on Mental Health, and then another hearing in the District Court, which must be before a jury if the person being committed demands one. D. C. Code § 21–311. At both of these hearings representation by counsel or by a guardian *ad litem* is necessary. *Dooling* v. *Overholser,* 100 U. S. App. D. C. 247, 243 F. 2d 825, construing D. C. Code §§ 21–308, 21–311. The burden of proof is on the party seeking commitment, and it is only if the trier of fact is "satisfied that the alleged insane person is insane," that he may be committed "for the best interest of the public and of the insane person." D. C. Code § 21–315.[7]

[7] A police officer may arrest and detain any person who appears to be of unsound mind on the belief that if such person is "permitted to remain at large or to go unrestrained in the District of Columbia

Likewise, Congress has afforded protection from improvident commitment to an accused in a criminal case who appears to the trial court "from the court's own observations, or from prima facie evidence submitted to the court . . . [to be] of unsound mind or . . . mentally incompetent so as to be unable to understand the proceedings against him or properly to assist in his own defense." D. C. Code § 24–301 (a). In such circumstances preliminary commitment for a "reasonable period" is authorized in order to permit observation and examination. If the medical report shows that the accused is of unsound mind, the court may "commit by order the accused to a hospital for the mentally ill *unless* the accused or the Government objects." (Emphasis added.) In case of objection, there must be a judicial determination with respect to the accused's mental health, and it is only "if the court shall find the accused to be then of unsound mind or mentally incompetent to stand trial" that an order for continued commitment is permissible. Hence if the accused denies that he is mentally ill, he is entitled to a judicial determination of his present mental state despite the hospital board's certification that he is of unsound mind. And it should be noted that the burden rests with the party seeking commitment to prove that the accused is "then of unsound mind." D. C. Code § 24–301 (a).

Considering the present case against this background, we should be slow in our reading of § 24–301 (d) to attribute to Congress a purpose to compel commitment of

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the rights of persons and of property will be jeopardized or the preservation of public peace imperiled and the commission of crime rendered probable." D. C. Code § 21–326. However, within 48 hours of such apprehension, the petition that is otherwise required for an involuntary commitment must be filed, and the procedural machinery which follows the filing of such a petition must be set in motion. D. C. Code § 21–311, par. 3.

an accused who never throughout the criminal proceedings suggests that he is, or ever was, mentally irresponsible.[8] This is the more so when there is kept in mind the contrast between the nature of an acquittal by reason of insanity and the finding of insanity required in other kinds of commitment proceedings. In the District of Columbia, as in all federal courts, an accused "is entitled to an acquittal of the specific crime charged if upon all the evidence there is reasonable doubt whether he was capable in law of committing crime." *Davis* v. *United States,* 160 U. S. 469, 484. See, *e. g., Isaac* v. *United States,* 109 U. S. App. D. C. 34, 284 F. 2d 168. Compare *Leland* v. *Oregon,* 343 U. S. 790. Consequently, the trial judge or jury must reach a judgment or verdict of not guilty by reason of insanity even if the evidence as to mental responsibility at the time the offense was committed raises no more than a reasonable doubt of sanity. If § 24–301 (d) were taken to apply to petitioner's situation, there would be an anomalous disparity between what

[8] In eight of the 13 other American jurisdictions where statutes providing for mandatory commitment, following an acquittal by reason of insanity, are in effect, see note 4, *supra,* the provisions of the statutes indicate that they are to apply *only* if an insanity defense is interposed by the accused: Colorado ("in a trial involving the plea of not guilty by reason of insanity"); Georgia ("in all criminal trials . . . wherein an accused shall contend that he was insane"); Nebraska (accused "may plead that he is not guilty by reason of insanity or mental derangement"); Nevada ("where on a trial a defense of insanity is interposed by the defendant"); New York ("when the defense is insanity of the defendant"); Ohio ("when a defendant pleads 'not guilty by reason of insanity'"); Wisconsin ("no plea that the defendant . . . was insane . . . shall be received unless it is interposed at the time of arraignment"); Virgin Islands ("if the defense is the mental illness of the defendant"). We have not been referred to any case in the remaining American jurisdictions or in England where a mandatory commitment of this nature, following a proceeding in which the defendant did not interpose a defense of insanity, was sustained.

§ 24–301 (d) commands and what § 24–301 (a) forbids. On the one hand, § 24–301 (d) would *compel* posttrial commitment upon the suggestion of the Government and over the objection of the accused merely on evidence introduced by the Government that raises a reasonable doubt of the accused's sanity as of the time at which the offense was committed. On the other hand, § 24–301 (a) would *prohibit* pretrial commitment upon the suggestion of the Government and over the objection of the accused, although the record contained an affirmative medical finding of present insanity, unless the Government is able to prove, by a preponderance of the evidence, that the accused is presently of unsound mind.

Of course the posttrial commitment of § 24–301 (d) presupposes a determination that the accused has committed the criminal act with which he is charged, whereas pretrial commitment antedates any such finding of guilt. But the fact that the accused has pleaded guilty or that, overcoming some defense other than insanity, the Government has established that he committed a criminal act constitutes only strong evidence that his continued liberty could imperil "the preservation of public peace." It no more rationally justifies his indeterminate commitment to a mental institution on a bare reasonable doubt as to past sanity than would any other cogent proof of possible jeopardy to "the rights of persons and of property" in any civil commitment. Compare note 7, *supra*.

Moreover, the literal construction urged here by the Government is quite out of keeping with the congressional policy that underlies the elaborate procedural precautions included in the civil commitment provisions. It seems to have been Congress' intention to insure that only those who need treatment and may be dangerous are confined; committing a criminal defendant who denies the existence of any mental abnormality merely on the

basis of a reasonable doubt as to his condition at some earlier time is surely at odds with this policy.

The criminal defendant who chooses to claim that he was mentally irresponsible when his offense was committed is in quite a different position. It is true that he may avoid the ordinary criminal penalty merely by submitting enough evidence of an abnormal mental condition to raise a reasonable doubt of his responsibility at the time of committing the offense. Congress might have thought, however, that having successfully claimed insanity to avoid punishment, the accused should then bear the burden of proving that he is no longer subject to the same mental abnormality which produced his criminal acts. Alternatively, Congress might have considered it appropriate to provide compulsory commitment for those who successfully invoke an insanity defense in order to discourage false pleas of insanity. We need go no further here than to say that such differentiating considerations are pertinent to ascertaining the intended reach of this statutory provision.

II.

The enactment of § 24–301 (d) in 1955 was the direct result of the change in the standard of criminal responsibility in the District of Columbia wrought by *Durham* v. *United States,* 94 U. S. App. D. C. 228, 214 F. 2d 862. That decision provoked a congressional re-examination of the laws governing commitment of the criminally insane. "Apprehension that *Durham* would result in a flood of acquittals by reason of insanity and fear that these defendants would be immediately set loose led to agitation for remedial legislation." Krash, The Durham Rule and Judicial Administration of the Insanity Defense in the District of Columbia, 70 Yale L. J. 905, 941 (1961). A Committee on Mental Disorder as a Criminal Defense was established

by the Council on Law Enforcement in the District of Columbia to inquire into "the substantive and procedural law of the District of Columbia bearing on mental disorder as a defense in a criminal prosecution." S. Rep. No. 1170, 84th Cong., 1st Sess. 1 (1955); H. R. Rep. No. 892, 84th Cong., 1st Sess. 1 (1955). Among its recommendations was a mandatory commitment provision, subsequently enacted as § 24–301 (d). The Committee noted that while under the then existing discretionary commitment statute [9] it had been customary for the court and the appropriate executive official to order the confinement of all those who had been found not guilty solely by reason of insanity, more assurance should be given the public that those so acquitted would not be allowed to be at large until their recovery from past mental illness had been definitely established:

> "No recent cases have come to the attention of this Committee where a person acquitted in the District of Columbia of a crime on the sole ground of insanity has not been committed to a mental hospital for treatment. Nevertheless, the Committee is of the opinion that the public is entitled to know that, in every case where a person has committed a crime as a result of a mental disease or defect, such person *shall* be given a period of hospitalization and treatment to guard against imminent recurrence of some criminal act by that person." (Emphasis in the original.)

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[9] The statute then in effect provided:
"If the jury shall find the accused to be then insane, or if an accused person shall be acquitted by the jury solely on the ground of insanity, the court *may* certify the fact to the Federal Security Administrator, who *may* order such person to be confined in the hospital for the insane, and said person and his estate shall be charged with the expense of his support in the said hospital." 59 Stat. 311. (Emphasis added.)

> "The Committee believes that a mandatory commitment statute would add much to the public's peace of mind, and to the public safety, without impairing the rights of the accused. *Where accused has pleaded insanity as a defense to a crime,* and the jury has found that the defendant was, in fact, insane at the time the crime was committed, it is just and reasonable in the Committee's opinion that the insanity, once established, should be presumed to continue and that the accused should automatically be confined for treatment until it can be shown that he has recovered." S. Rep. No. 1170, 84th Cong., 1st Sess. 13 (1955); H. R. Rep. No. 892, 84th Cong., 1st Sess. 13 (1955). (Emphasis added.)

It is significant to note that in finding that mandatory commitment would not result in "impairing the rights of the accused" and that it was "just and reasonable . . . that the insanity, once established, should be presumed to continue . . . until it can be shown that . . . [the accused] has recovered," the Committee Report, which was embraced in the reports of the Senate and House committees on the bill, spoke entirely in terms of one who "has pleaded insanity as a defense to a crime." Certainly such confidence could hardly have been vouchsafed with respect to a defendant who, as in this case, had stoutly denied his mental incompetence at any time. And it is surely straining things to assume that any of the committees had in mind such cases as this, which are presumably rare.[10]

Nor is it necessary to read § 24–301 (d) as an assurance that an accused who requires medical treatment will be

[10] We have been told of four such cases in the District of Columbia, two arising in the Municipal Court and two in the District Court: *District of Columbia* v. *Trembley,* D. C. 28343–60; *United States* v. *Taylor,* U. S. 4774–59; *United States* v. *Kloman,* Crim. No. 383–58; *United States* v. *Strickland,* Crim. No. 374–59.

hospitalized rather than be confined to jail. Simultaneously with the mandatory commitment provision, Congress enacted the present § 24–302, which permits transfers of mentally ill convicts from penal institutions to hospitals. Consequently, if an accused who pleads guilty is found to be in need of psychiatric assistance, he may be transferred to a hospital following sentence.

Finally, it is not necessary to accept the Government's literal reading of § 24–301 (d) in order to effectuate Congress' basic concern, in passing this legislation, of reassuring the public. Section 24–301 (a) provides a procedure for confining an accused who, though found competent to stand trial, is nonetheless committable as a person of unsound mind. That section permits the trial judge to act "prior to the imposition of sentence or prior to the expiration of any period of probation," if he has reason to believe that the accused "is of unsound mind *or* is mentally incompetent so as to be unable to understand the proceedings against him." (Emphasis added.) The statute provides for a preliminary examination by a hospital staff, and then "if the court shall find the accused to be then of unsound mind *or* mentally incompetent to stand trial, the court shall order the accused confined to a hospital for the mentally ill." [11] (Emphasis added.)

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[11] D. C. Code § 24–301 (a) provides:

"(a) Whenever a person is arrested, indicted, charged by information, or is charged in the juvenile court of the District of Columbia, for or with an offense and, prior to the imposition of sentence or prior to the expiration of any period of probation, it shall appear to the court from the court's own observations, or from prima facie evidence submitted to the court, that the accused is of unsound mind or is mentally incompetent so as to be unable to understand the proceedings against him or properly to assist in his own defense, the court may order the accused committed to the District of Columbia General Hospital or other mental hospital designated by the court, for such reasonable period as the court may determine for examination and observation and for care and treatment if such is

This inquiry, therefore, is not limited to the accused's competence to stand trial; the judge may consider, as well, whether the accused is presently committable as a person of unsound mind.[12] Since this inquiry may be undertaken at any time "prior to the imposition of sentence," it appears to be as available after the jury returns a verdict of not guilty by reason of insanity as before trial.

In light of the foregoing considerations we conclude that it was not Congress' purpose to make commitment compulsory when, as here, an accused disclaims reliance on a defense of mental irresponsibility. This does not mean, of course, that a criminal defendant has an absolute right to have his guilty plea accepted by the court. As provided in Rule 11, Fed. Rules Crim. Proc., and Rule 9, D. C. Munic. Ct. Crim. Rules, the trial judge may refuse to accept such a plea and enter a plea of not guilty on behalf of the accused. We decide in this case only that if this is done and the defendant, despite his own assertions of sanity, is found not guilty by reason of insanity,

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necessary by the psychiatric staff of said hospital. If, after such examination and observation, the superintendent of the hospital, in the case of a mental hospital, or the chief psychiatrist of the District of Columbia General Hospital, in the case of District of Columbia General Hospital, shall report that in his opinion the accused is of unsound mind or mentally incompetent, such report shall be sufficient to authorize the court to commit by order the accused to a hospital for the mentally ill unless the accused or the Government objects, in which event, the court, after hearing without a jury, shall make a judicial determination of the competency of the accused to stand trial. If the court shall find the accused to be then of unsound mind or mentally incompetent to stand trial, the court shall order the accused confined to a hospital for the mentally ill."

[12] Compare 18 U. S. C. § 4244, considered in *Greenwood* v. *United States,* 350 U. S. 366, which relates only to "mental incompetency after arrest and before trial." By the terms of 18 U. S. C. § 4246, commitment is to last only "until the accused shall be mentally competent to stand trial or until the pending charges against him are disposed of according to law."

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§ 24–301 (d) does not apply. If commitment is then considered warranted, it must be accomplished either by resorting to § 24–301 (a) or by recourse to the civil commitment provisions in Title 21 of the D. C. Code.

The judgment of the Court of Appeals is reversed and the case is remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE FRANKFURTER took no part in the decision of this case.

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

MR. JUSTICE CLARK, dissenting.

Eighty-seven years ago, Chief Justice Waite in speaking of the function of this Court said: "Our province is to decide what the law is, not to declare what it should be . . . . If the law is wrong, it ought to be changed; but the power for that is not with us." *Minor* v. *Happersett,* 21 Wall. 162, 178 (1875). This holding followed as long a line of cases as it preceded. Today the Court seems to me to do what this long-established rule of statutory interpretation forbids. With sophisticated frankness it admits that the District's statute [1] "[b]y its plain terms . . . directs confinement in a mental hospital of any criminal defendant . . . who is 'acquitted solely on the ground' that his offense was committed while he was mentally irresponsible, and forecloses the trial judge from exercising any discretion in this regard." Despite these "plain terms" the Court writes into the statute an exception, *i. e.,* it applies "only to criminal defendants who have interposed a defense of insanity . . . ." It does

[1] § 24–301 (d), District of Columbia Code.

this despite the fact that the petitioner here apparently made no such contention in the trial court. Indeed, though he had counsel at the time of his trial in Municipal Court on two charges of passing bad checks, he made no attempt to appeal from the refusal of the court to accept his guilty plea and its finding that he was "not guilty on the ground that he was insane at the time of the commission of the offense." After being committed to St. Elizabeths Hospital for treatment for some six months, he filed this habeas corpus application. Today's action may have the effect of setting him free though he makes no claim that he was sane at the time of trial or is so at this time. In fact, the last doctor's report in the record shows him to be suffering from a manic depressive psychosis from which though he "appears to be in an early stage of recovery" it is "possible that he may have further lapses . . . ." It further states that it "would be advisable for him to have a period of further treatment in a psychiatric hospital." The order today risks bringing that to an end.

I.

The case therefore presents the complex and challenging problem of criminal incompetency with which the people of the District of Columbia have for years been plagued. The Congress in 1955 adopted the present statute to meet what it called the "serious and dangerous imbalance . . . in favor of the accused and against the public" which was created in part by the rule in *Durham* v. *United States,* 94 U. S. App. D. C. 228, 214 F. 2d 862 (1954). S. Rep. No. 1170, 84th Cong., 1st Sess. 3 (1955). The statute, in my view, is not only designed to protect the public from the criminally incompetent but at the same time has the humanitarian purpose of affording hospitalization for those in need of treatment. It is, therefore, of the utmost importance to this community. More-

over, it has its counterpart in varying degrees in 36 of our States and in the federal system as well, many of which will be affected by this decision. In my view the Court undermines the purposes of these statutes; places a premium on pleas of guilty by defendants who were insane when they acted, made either *pro se* or through their attorneys; and thereby forces the conviction of innocent persons. And all of this is done in the face of the admitted "plain terms" of the mandate of Congress under the guise that the Court's holding "is more consistent with the general pattern of laws governing the confinement of the mentally ill in the District of Coumbia." I believe, however, that the Congress in adopting § 24–301 (d) said what it meant and that it meant what it said. I regret that the Court has seen fit to repeal the "plain terms" of this statute and write its own policy into the District's law. Especially do I deplore its suggestion of doubt as to its constitutionality. In the light of the cases this is chimerical. Finding myself with reference to the opinion like Mrs. Gummidge, "a lone, lorn creetur' and every think [about it] goes contrairy with me," I respectfully dissent.

II.

It is well to point out first what is not involved here. First, this is not a civil commitment case, although this Court attempts to force one upon the parties. In providing the safeguards of D. C. Code § 21–310 as to the ordinary civil commitment of persons claimed to be insane the Congress clearly acted in protection of those who were not charged with criminal offenses or who had never exhibited any criminal proclivities. In protecting the public from the criminally incompetent it could with reason act with less caution. See *Overholser* v. *Leach,* 103 U. S. App. D. C. 289, 291, 257 F. 2d 667, 669, and *Kenstrip* v. *Cranor,* 39 Wash. 2d 403, 405, 235 P. 2d 467, 468. In criminal cases the person could be held in custody in any

event and humanitarian principles require his hospitalization where needed. Nor are the procedures for release involved here. Petitioner has not sought his release under the statute. The procedure, however, is simple and effective, *i. e.*, a doctor's certificate recommending release filed with the court is sufficient. If the doctor refuses such certificate, the inmate may seek to prove his sanity on habeas corpus. Here, however, no claim of sanity has been made.

Nor does this case involve commitment under D. C. Code § 24–301 (a). The first provision of that section largely has to do with cases before trial. The accused is entitled to a speedy trial. He may be acquitted. Hence his commitment to a hospital would delay the effectuation of these rights. The Congress, therefore, provided safeguards, *i. e.*, he might object to such a commitment and the consequent delay of his trial. But here—under § 24–301 (d)—the accused has already had his trial.

Finally, the fallacy in the Court's position is clearly apparent when in an attempt to justify its holding on practical grounds it says that an accused who pleads guilty and is sentenced may thereafter be transferred from the prison to a hospital and the assurances of hospitalization provided by § 24–301 (d) thus afforded. The short of this is that if the accused pleads guilty and is sentenced he then may suffer in addition to his conviction the same fate as petitioner suffers here. With due deference, this is a most cruel position. The accused, though innocent of the crime because of insanity, pleads guilty in hopes of a short jail sentence. He then has the stigma of criminal conviction permanently on his record. During or after sentence he is transferred to the hospital where he *may* be released at the end of his sentence but if found not cured at that time may still be subject to further custody and treatment. D. C. Code, § 24–302; 18 U. S. C. § 4247.

III.

It has long been generally acknowledged that justice does not permit punishing persons with certain mental disorders for committing acts offending against the public peace and order. But insane offenders are no less a menace to society for being held irresponsible, and reluctance to impose blame on such individuals does not require their release. The community has an interest in protecting the public from antisocial acts whether committed by sane or by insane persons. We have long recognized that persons who because of mental illness are dangerous to themselves or to others may be restrained against their will in the interest of public safety and to seek their rehabilitation, even if they have done nothing proscribed by the criminal law. The insane who have committed acts otherwise criminal are a still greater object of concern, as they have demonstrated their risk to society. In an attempt to deal with these problems, Congress has enacted § 24–301 (d), which requires the court to order a person who has been acquitted of a criminal offense solely on the ground that he was insane at the time of its commission, to be confined in a hospital for the mentally ill.

Commitment to an institution of persons acquitted of crime because of insanity is no novelty. At common law, before 1800, the trial judge had power to order detention in prison of an acquitted defendant he considered dangerous because of insanity.[2] Hadfield, acquitted of

[2] Williams, Criminal Law: The General Part (2d ed. 1961), 456; Note, Releasing Criminal Defendants Acquitted and Committed Because of Insanity: The Need for Balanced Administration, 68 Yale L. J. 293 (1958); Weihofen & Overholser, Commitment of the Mentally Ill, 24 Tex. L. Rev. 307, 328. It has been said that in most cases, nevertheless, the defendant was released. Glueck, Mental Disorder and the Criminal Law (1925), 392–393.

attempted regicide in 1800 as insane, was remanded to an English prison because his future confinement was "absolutely necessary for the safety of society," 27 How. St. Tr. 1281, 1354. Parliament responded by providing for automatic commitment to a mental institution rather than prison in felony cases in which the accused was acquitted on grounds of insanity, 39 & 40 Geo. III, c. 94, and mandatory commitment has been the rule in misdemeanor cases as well in England since 1883. 46 & 47 Vict., c. 38. An accused acquitted on insanity grounds in Massachusetts was remanded to the sheriff for continued custody as early as 1810, *Commonwealth* v. *Meriam,* 7 Mass. 168, and in the District of Columbia, the judge being convinced that "it would be extremely dangerous to permit him to be at large," in 1835, *United States* v. *Lawrence,* 26 Fed. Cas. No. 15,577. The District of Columbia Code of 1901, 31 Stat. 1189, 1340, authorized the trial judge, in his discretion and without further hearing, to forward the defendant's name to an administrator, who, in his discretion, again without hearing, might order commitment. Most defendants acquitted on insanity grounds were committed under this rule.[3] At the present time statutes provide for mandatory commitment of persons acquitted by reason of insanity in 12 States and the Virgin Islands as well as in England and the District of Columbia.[4] Six States per-

[3] See Krash, The Durham Rule and Judicial Administration of the Insanity Defense in the District of Columbia, 70 Yale L. J. 905, 941 (1961); S. Rep. No. 1170, 84th Cong., 1st Sess. 12 (1955).

[4] Colo. Rev. Stat., 1957 Supp., § 39–8–4; D. C. Code, 1961, § 24–301; Ga. Code Ann., 1953, § 27–1503; Kan. Gen. Stat. Ann., 1949, § 62–1532; Me. Laws 1961, c. 310; Mass. Gen. Laws Ann., 1957, c. 123, § 101 (murder and manslaughter only; in other cases, c. 278, § 13, the trial judge may commit if satisfied the defendant is insane); Mich. Stat. Ann., 1954, § 28.933 (3) (murder only; in other felony cases, 1961 Supp., § 28.967, the trial judge shall commit if, after hearing, he determines continuing insanity); Minn. Stat. Ann., 1961

mit commitment in the discretion of the trial judge.[5] Eighteen more provide for mandatory or discretionary commitment if the trial judge finds that the defendant's insanity continues [6] or that his discharge would be dangerous to the public peace.[7] In 10 States and in Puerto

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Supp., § 631.19; Neb. Rev. Stat., 1956, § 29–2203; Nev. Rev. Stat., 1961, § 175.445; N. Y. Code of Crim. Proc., § 454, as amended by Laws 1960, c. 550; Ohio Rev. Code Ann., 1954, § 2945.39; V. I. Code Ann., 1957, Tit. 5, § 3637; Wis. Stat. Ann., 1958, § 957.11 ("rehearing" of present sanity and danger on request, see § 51.11).

[5] Ark. Stat. Ann., 1961 Supp., § 59–242 ("shall be committed . . . upon probable cause"); Conn. Gen. Stat., 1961 Supp., § 54–37; Del. Code Ann., 1960 Supp., Tit. 11, § 4702 (on motion of Attorney General); N. M. Stat. Ann., 1953, § 41–13–3; Purdon's Pa. Stat. Ann., 1930, Tit. 19, § 1351; S. C. Code, 1952, § 32–927 (on acquittal or "question" of insanity at time of act).

[6] *Mandatory:* Ala. Code, 1958 recompilation, Tit. 15, § 429; Burns' Ind. Stat. Ann., 1961 Supp., § 9–1704a (or if recurrence "highly probable"); Utah Code Ann., 1953, § 77–24–15; as well as Michigan in felony cases other than murder, see note 4, *supra.* In Hawaii, Rev. Laws, 1960 Supp., § 258–38, the burden is on the defendant to show recovery. In California, insanity is tried after it has been determined whether defendant committed the act. On a verdict of acquittal because of insanity, the defendant is committed "unless it shall appear to the court" that he has recovered, in which case he is held until determined sane by civil procedures. Cal. Penal Code, 1956, § 1026.

Discretionary: Ky. Crim. Code, 1960, § 268 (after hearing); W. Va. Code Ann., 1961, § 6198 (on report of two appointed experts); as well as Massachusetts in cases other than murder, see note 4, *supra.*

[7] *Mandatory:* Alaska Comp. Laws Ann., 1949, § 66–13–78; Ore. Rev. Stat., 1961, § 136.730.

Discretionary: Fla. Stat., 1961, § 919.11 (must confine or remand to friends' care); Iowa Code Ann., 1950, § 785.18; N. H. Rev. Stat. Ann., 1961 Supp., § 607:3; N. C. Gen. Stat., 1958, § 122–84 (after hearing, shall commit if found dangerous because of mental condition, and if "his confinement for care, treatment, and security demands it"); N. D. Century Code, 1960, § 12–05–03; R. I. Gen. Laws, 1956, § 26–4–7 (Governor may commit on judge's certification); S. D. Code, 1960 Supp., § 34.3672; Vt. Stat. Ann., 1958, Tit. 13, § 4805; Va. Code, 1960 replacement, § 19.1–239.

Rico, mandatory commitment follows a like finding by the trial jury [8] or by a second jury.[9] In three States standards for civil commitment must be met.[10] Only Tennessee makes no provision for such cases.[11] Many of these laws providing for commitment of acquitted defendants are by no means new, see the tabulation in Glueck, Mental Disorder and the Criminal Law, 394–399 (1925), and with very few exceptions such laws have been upheld by state courts against constitutional attacks.[12] The

[8] Ill. Rev. Stat., 1961, c. 38, § 592 (not entirely and permanently recovered); Md. Code Ann., 1957, Art. 59, § 8 (still insane); Miss. Code Ann., 1956 recompilation, § 2575 (still insane and dangerous); Mo. Stat. Ann., Vernon 1961 Supp., § 546.510 (not entirely and permanently recovered); N. J. Stat. Ann., 1953, § 2A:163–3 (still insane); Okla. Stat. Ann., 1958, c. 22, § 1161 (dangerous to discharge); Vernon's Tex. Code Crim. Proc. Ann., 1961 Supp., Art. 932b, § 1 (still insane); Wash. Rev. Code, 1951, § 10.76.040 (still insane or danger of recurrence).

[9] Idaho Code, 1948, § 19–2320 (still insane); Mont. Rev. Code Ann., 1947, § 94–7420 (same); Puerto Rico Laws Ann., 1956, Tit. 34, § 823 (same). In all three jurisdictions the trial judge has discretion whether or not to call the second jury.

[10] In Arizona, Rules of Crim. Proc., 1956, Rule 288, and in Wyoming, Stat., 1957, § 7–242, a civil commitment petition is required to be filed. In Louisiana, Rev. Stat., 1950, § 28:59, the acquitted defendant may be committed by the trial court "in the manner provided" for civil commitment in § 28:53. Presumably this requires compliance with the substantive standards as well as the procedures of civil commitment.

[11] Apparently in Tennessee there is likewise no common-law power to confine the acquitted insane. See *Dove* v. *State,* 50 Tenn. 348, 373 (dictum). But there appears to be no obstacle to instituting civil proceedings under Tenn. Code Ann., 1961 Supp., § 33–502, and 1955 ed., § 33–512.

[12] *In re Slayback,* 209 Cal. 480, 288 P. 769; *Bailey* v. *State,* 210 Ga. 52, 77 S. E. 2d 511; *In re Clark,* 86 Kan. 539, 121 P. 492; *In re Beebe,* 92 Kan. 1026, 142 P. 269; *Hodison* v. *Rogers,* 137 Kan. 950, 22 P. 2d 491; *State* v. *Burris,* 169 La. 520, 125 So. 580; *People* v. *Dubina,* 304 Mich. 363, 8 N. W. 2d 99; *People ex rel. Peabody* v. *Chanler,* 133 App. Div. 159, 117 N. Y. Supp. 322; *In re Brown,* 39

Model Penal Code of the American Law Institute contains a provision for mandatory commitment. ALI Model Penal Code, Proposed Final Draft No. 1, § 4.08. See also comments on this section in *id.*, Tentative Draft No. 4, p. 199. In practice, it has been said despite the varying provisions in the several jurisdictions that acquitted defendants are "nearly always" committed. Note, 68 Yale L. J. 293.

IV.

The Court does not deny that petitioner was tried for an offense and acquitted solely on the ground of insanity at the time of its commission. It argues, however, that the procedure of § 24–301 (d), as applied to a criminal defendant who has not pleaded insanity, is inconsistent with the whole scheme of procedural safeguards provided for commitment of other individuals to mental hospitals in the District of Columbia and therefore could not have been intended by Congress. But the procedure of § 24–301 (d) applies only to defendants found not guilty solely on the ground of insanity. That is, unlike defendants committed before or during the trial, see *State ex rel. Smilack* v. *Bushong,* 159 Ohio St. 259, 111 N. E. 2d 918, all persons committed under § 24–301 (d) either have been found after trial to have committed the act itself, or, as here, have conceded that they committed it. It is this

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Wash. 160, 81 P. 522; *State* v. *Saffron,* 146 Wash. 202, 262 P. 970; see also *Gleason* v. *West Boylston,* 136 Mass. 489; *Yankulov* v. *Bushong,* 80 Ohio App. 497, 77 N. E. 2d 88. Similar procedures were struck down in *Brown* v. *Urquhart,* 139 F. 846 (C. C. W. D. Wash.); *In re Boyett,* 136 N. C. 415, 48 S. E. 789; and *Underwood* v. *People,* 32 Mich. 1. *Brown* v. *Urquhart* required a hearing on present sanity as a matter of statutory construction and was overturned by the state court in *In re Brown, supra. Boyett* and *Underwood* relied in part on the abolition of habeas corpus, not present here, and the Michigan court has since allowed a commitment statute with more adequate release provisions to stand, *People* v. *Dubina, supra.*

adjudication, or this admission, that serves to explain and, in Congress' opinion, to justify different treatment for such individuals. *Overholser* v. *Leach,* 103 U. S. App. D. C. 289, 257 F. 2d 667. Whether we would have drawn this distinction is not the question; it suffices that the distinction was drawn and is not so untenable that we can say Congress could not reasonably have drawn it. And, insofar as § 24–301 (a) applies also to those who have been tried and found guilty, it is no more inconsistent with mandatory commitment where the defendant has not pleaded insanity than where he has done so. In either case Congress wanted commitment if the judge found the accused insane or if the jury entertained a reasonable doubt.

V.

I agree with the Court that the present § 24–301 (d) was the response of Congress to the decision in *Durham* v. *United States, supra.* That decision substituted for the *McNaghten* rule the simple question whether the "unlawful act was the product of mental disease or mental defect." 94 U. S. App. D. C., at 240–241, 214 F. 2d, at 874–875. In amending the then § 24–301 (d), Congress sought "to protect the public against the immediate unconditional release of accused persons who have been found not responsible for a crime solely by reason of insanity. . . ." H. R. Rep. No. 892, 84th Cong., 1st Sess. 3, 13 (1955); S. Rep. No. 1170, 84th Cong., 1st Sess. 3; 101 Cong. Rec. 9258, 12229. This danger of improvident release, so crucial in the eyes of the Congress, has in fact inhibited the adoption of the *Durham* rule by other courts in jurisdictions where no mandatory commitment statute is available. *Sauer* v. *United States,* 241 F. 2d 640 (C. A. 9th Cir.); *United States* v. *Smith,* 5 U. S. C. M. A. 314, 329, 17 C. M. R. 314, 329; *United States* v. *Currens,* 290 F.

2d 751, 776–777, dissenting opinion; Sobeloff, Insanity and the Criminal Law: From McNaghten to Durham, and Beyond, 41 A. B. A. J. 793, 879 (1955).

This is not to say, however, that the sole purpose of § 24–301 (d) is commitment as a protection to the public. The policy of the law also includes assurance of rehabilitation for those so committed. *Ragsdale* v. *Overholser,* 108 U. S. App. D. C. 308, 312, 281 F. 2d 943, 947. The common law permitted an acquitted incompetent to be confined in the District of Columbia even before 1901. *United States* v. *Lawrence, supra.* The desire of the Congress to satisfy its interest in the rehabilitation of an incompetent defendant brought on the original statute authorizing commitment to a mental institution. The 1955 amendment, here under attack, was designed only to strengthen the safeguards to the public safety in the light of the intervening *Durham* rule. There can be no question that the interest of a free society is better served by commitment to hospitals than by imprisonment of the criminally incompetent. While, as the Court points out, transfer after confinement permits treatment during sentence, it is not mandatory, and it may be interrupted before completion and the patient set free. Almost every newspaper reports depredations of the criminally insane who unfortunately for themselves and the safety of others have been released on the public. It was the purpose of the statute to prevent this occurrence whether or not the accused pleads not guilty because of insanity. A defendant's plea neither proves nor affects his guilt or his sanity. To make the commitment procedure effective only on the defendant's option limits the statute's protection of the public, forces an unfortunate choice on attorneys appointed to represent defendants, convicts those who are innocent by reason of insanity and deprives them of the treatment afforded by a humanitarian public policy. See *Ragsdale* v. *Overholser,* 108 U. S. App. D. C. 308, 281

F. 2d 943. The Court says that this can all be done through another trial under civil commitment procedures, but this is but to disagree with the policy of Congress rather than the Court of Appeals which has upheld the statute. As mentioned, *supra,* the civil procedures are entirely insufficient where criminal acts are involved. The criterion of § 24–301 (d)—merely whether there is a reasonable doubt that the accused was capable in law of committing the offense—is a far cry from the test of civil commitment, where it must be proven to the satisfaction of the court that the accused is actually insane. The requirement that the petitioner here go free unless civil commitment proceedings be filed and he be adjudged insane creates a serious risk that petitioner will again be turned loose on an unsuspecting public to carry on his check-writing proclivities and perhaps much worse. His is but one example that will inevitably follow in the wake of this decision today.

VI.

The Court disclaims the intention of granting petitioner an absolute right to plead guilty. Such a right would be *contra* to our concept of the fair administration of justice as exemplified in Rule 9 of the Criminal Rules of the Municipal Court of the District of Columbia, which was lifted *verbatim* from Rule 11 of the Federal Rules of Criminal Procedure.[13] It provides ex-

[13] Rule 9 of the Criminal Rules of the Municipal Court of the District of Columbia reads:

"A defendant may plead not guilty, guilty or, with the consent of the Court *nolo contendere*. The Court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. If a defendant refuses to plead or if the Court refuses to accept a plea of guilty, or if a defendant corporation fails to appear, the Court shall enter a plea of not guilty."

plicitly that "[t]he Court may refuse to accept a plea of guilty." And it further prohibits the acceptance of a guilty plea without the court's "first determining that the plea is made voluntarily with understanding of the nature of the charge." The opinion today acknowledges that the trial judge need not accept the plea of guilty when, as here, he has in his hands a certificate from competent doctors that the petitioner was and remains insane and in need of treatment. The Court emphasizes again and again that the petitioner never at any time during his trial on the check charges suggested that "he is, or ever was, mentally irresponsible." Of course he did not; he preferred to go to jail for a short period. But the right of a court to refuse a plea of guilty is based on the principle that in a free society it is as important that the court make certain that the innocent go free as it is that the guilty be punished. This the court did here and decided that a just disposition of the case would not permit the entry of the plea of guilty. That the evidence of insanity was sufficient is not questioned. As this Court has often held, the judge "is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct . . . ." *Quercia* v. *United States,* 289 U. S. 466, 469 (1933); *Glasser* v. *United States,* 315 U. S. 60, 82 (1942). In the words of the late and revered Learned Hand, "he is charged to see that the law is properly administered, and it is a duty which he cannot discharge by remaining inert." *United States* v. *Marzano,* 149 F. 2d 923, 925. And here in the District of Columbia its court of last resort, the Court of Appeals, has held that the trial judge is required to set aside jury findings of sanity where the record shows a reasonable doubt. *Isaac* v. *United States,* 109 U. S. App. D. C. 34, 284 F. 2d 168. This is only further indication of his duty to seek a just disposition of every case, which justified, if it did not require, the rejection of the guilty plea here.

It was also unquestionably proper for the prosecutor to introduce testimony of insanity. His function, this Court said in *Berger* v. *United States,* 295 U. S. 78, 88, is to act as "the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer."

The Court denies none of this. Yet, although it stresses that the purpose of § 24–301 (d) was to protect the public from the release of dangerous persons acquitted as insane, and although it concedes that a defendant may be acquitted as insane without pleading insanity, the Court requires a finding of present insanity in order to commit in such a case. To me neither the words nor the policy of the law supports this; I cannot believe Congress thought only people who claim to be crazy are dangerous enough to be confined without further findings.

VII.

The Court did not reach the constitutional issue. Its failure so to do is, I believe, a "disingenuous evasion," to borrow a phrase from Mr. Justice Cardozo in *Moore Ice Cream Co.* v. *Rose,* 289 U. S. 373, 379 (1933). The Court should not, as I have said, rewrite a statute merely to escape upholding it against easily parried constitutional objections. I would uphold the statute. I shall not go into details, however, since the Court does not deal with the issue. In short, petitioner has no constitutional right to choose jail confinement instead of hospitalization. It is said that automatic hospitalization without a finding of present insanity renders the statute invalid but, as I see it, Congress may reasonably prefer the safety of compulsory hospitalization subject to the release procedures

offered by the statute and through habeas corpus. It is said that these release procedures are too strict, placing the burden on the petitioner. But it appears reasonable once a jury or a judge has found a reasonable doubt as to the sanity of a man who has admittedly passed bad checks to require a doctor's certificate to authorize release, and failing such to require proof of the doctor's error in refusing to issue it. There is no reason to believe that the doctors or, for that matter, the judge would be improperly motivated. Release is by no means illusory. In the past six years over 25% of those committed have been released. It must be remembered that here the constitutionality of § 24–301 (d) is at issue, not the wisdom of its enactment. That is for Congress. So long as its choice meets due process standards it cannot be overturned. The problem which faced Congress was the reconciliation of the opportunity for release of the accused through a judicial hearing with the vital public interest, deference to the views of institutional authorities and a decent regard for the hospitalization and cure of the accused. The balance struck by Congress, in my view, meets the essential requirements of due process.

In any event, petitioner does not claim that he is now sane. He has made no effort to secure his release on the ground of being cured. Surely he should be required to make such an effort before asking the Court to strike down the statute on that ground. Moreover, if the burden is too heavy, rather than opening the hospital doors to all persons committed under the statute, it would be more fitting to rewrite the release procedures by shifting the burden to the hospital authorities to prove the necessity for further hospitalization. The Court has not hesitated to use a similar device in another area. *Coppedge* v. *United States,* 369 U. S. 438. I would also think the Court would prefer to do this rather than create a loophole for those who seek to plead guilty. In so doing, the

Court would not force the badge of criminal conviction on innocent persons but would afford them the benefit of treatment, safeguarded by entirely fair and reasonable release procedures, and at the same time afford the public protection from those unfortunates among us that know not what they do. The Court has chosen not to reverse the burden of proof; perhaps the Congress will consider doing so.

I dissent.

657327 O–62–52

NATIONAL LABOR RELATIONS BOARD *v.* KATZ ET AL.

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

No. 222. Argued March 22, 1962.—Decided May 21, 1962.

While bona fide contract negotiations with a union representing its employees were being carried on, the employer, unilaterally and without first consulting the union, put into effect a new system of automatic wage increases, changes in sick-leave benefits and numerous merit increases, although such matters were subjects of the pending contract negotiations. *Held:* By so doing, the employer violated the duty "to bargain collectively" imposed by § 8 (a) (5) of the National Labor Relations Act. Pp. 737–748.

(a) On the record in this case, the National Labor Relations Board was justified in finding that the employer's unilateral action was taken before the contract negotiations were discontinued and before the existence of any possible impasse. Pp. 741–742.

(b) Even in the absence of a finding of over-all subjective bad faith, an employer's unilateral change in conditions of employment under negotiation violates § 8 (a) (5), for it is a circumvention of the duty to negotiate which frustrates the objectives of § 8 (a) (5) as much as would a flat refusal to negotiate. Pp. 742–743.

(c) The unilateral changes in sick-leave benefits plainly frustrated the statutory objective of establishing working conditions through collective bargaining and violated § 8 (a) (5). P. 744.

(d) The employer's grant of wage increases greater than any he had ever offered the union at the bargaining table was necessarily inconsistent with a sincere desire to conclude an agreement with the union, and it violated § 8 (a) (5). Pp. 744–745.

(e) The employer's unilateral action in granting discretionary merit increases to 20 employees was tantamount to an outright refusal to negotiate on that subject, and it violated § 8 (a) (5). Pp. 745–747.

(f) *Labor Board* v. *Insurance Agents' Union,* 361 U. S. 477, distinguished. Pp. 747–748.

289 F. 2d 700, reversed.

Solicitor General Cox argued the cause for petitioner. With him on the briefs were *Stuart Rothman, Dominick L. Manoli, Norton J. Come, Frederick U. Reel* and *Stephen J. Pollak.*

Sidney O. Raphael argued the cause for respondents. With him on the briefs was *Leo M. Drachsler.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Is it a violation of the duty "to bargain collectively" imposed by § 8 (a)(5) of the National Labor Relations Act [1] for an employer, without first consulting a union with which it is carrying on bona fide contract negotiations, to institute changes regarding matters which are subjects of mandatory bargaining under § 8 (d) and which are in fact under discussion? [2] The National Labor Relations Board answered the question affirmatively in this case, in a decision which expressly disclaimed any finding that the totality of the respondents' conduct manifested bad faith in the pending negotiations.[3] 126 N. L. R. B.

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[1] National Labor Relations Act § 8 (a)(5), 49 Stat. 452–453, as amended, 29 U. S. C. § 158 (a)(5):

"It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159 (a) of this title."

[2] National Labor Relations Act § 8 (d), added by 61 Stat. 142, 29 U. S. C. § 158 (d):

"For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . ." See *Labor Board* v. *Borg-Warner Corp.*, 356 U. S. 342, 348–349.

[3] For earlier Board decisions in accord, see, *e. g., Chambers Mfg. Corp.*, 124 N. L. R. B. 721; *Bonham Cotton Mills, Inc.*, 121 N. L. R. B. 1235, 1236. [*Footnote 3 continued on p. 738*]

288. A divided panel of the Court of Appeals for the Second Circuit denied enforcement of the Board's cease-and-desist order, finding in our decision in *Labor Board* v. *Insurance Agents' Union,* 361 U. S. 477, a broad rule that the statutory duty to bargain cannot be held to be violated, when bargaining is in fact being carried on, without a finding of the respondent's subjective bad faith in negotiating. 289 F. 2d 700.[4] The Court of Appeals said:

> "We are of the opinion that the unilateral acts here complained of, occurring as they did during the negotiating of a collective bargaining agreement, do not *per se* constitute a refusal to bargain collectively and *per se* are not violative of § 8 (a)(5). While the subject is not generally free from doubt, it is our conclusion that in the posture of this case a necessary requisite of a Section 8 (a)(5) violation is a finding that the employer failed to bargain in good faith." 289 F. 2d, at 702–703.

We granted certiorari, 368 U. S. 811, in order to consider whether the Board's decision and order were contrary to *Insurance Agents.* We find nothing in the Board's decision inconsistent with *Insurance Agents* and hold that

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The Board's order herein, in pertinent part, ordered that the respondents

"1. Cease and desist from:

"(a) Unilaterally changing wages, rates of pay, or sick leave, or granting merit increases, or in any similar or related manner refusing to bargain collectively with Architectural and Engineering Guild, Local 66, American Federation of Technical Engineers, AFL–CIO . . . .

"(b) Refusing to bargain collectively concerning rates of pay, wages, hours of employment, and other conditions of employment with the Union . . . ."

[4] Accord: *Labor Board* v. *Cascade Employers Assn., Inc.,* 296 F. 2d 42 (C. A. 9th Cir.).

the Court of Appeals erred in refusing to enforce the Board's order.

The respondents are partners engaged in steel fabricating under the firm name of Williamsburg Steel Products Company. Following a consent election in a unit consisting of all technical employees at the company's plant, the Board, on July 5, 1956, certified as their collective bargaining representative Local 66 of the Architectural and Engineering Guild, American Federation of Technical Engineers, AFL–CIO. The Board simultaneously certified the union as representative of similar units at five other companies which, with the respondent company, were members of the Hollow Metal Door & Buck Association. The certifications related to separate units at the several plants and did not purport to establish a multi-employer bargaining unit.

On July 11, 1956, the union sent identical letters to each of the six companies, requesting collective bargaining. Negotiations were invited on either an individual or "association wide" [5] basis, with the reservation that wage rates and increases would have to be discussed with each employer separately. A follow-up letter of July 19, 1956, repeated the request for contract negotiations and enumerated proposed subjects for discussion. Included were merit increases, general wage levels and increases, and a sick-leave proposal.

The first meeting between the company and the union took place on August 30, 1956. On this occasion, as at the ten other conferences held between October 2, 1956, and May 13, 1957, all six companies were in attendance

[5] By their references to "association wide bargaining" the parties appear to mean negotiations at which the six members of the Association for whose employees the union had received certifications on July 5, 1956, would be concurrently represented.

and represented by the same counsel.[6] It is undisputed that the subject of merit increases was raised at the August 30, 1956, meeting although there is an unresolved conflict as to whether an agreement was reached on joint participation by the company and the union in merit reviews, or whether the subject was simply mentioned and put off for discussion at a later date. It is also clear that proposals concerning sick leave were made. Several meetings were held during October and one in November, at which merit raises and sick leave were each discussed on at least two occasions. It appears, however, that little progress was made.

On December 5, a meeting was held at the New York State Mediation Board attended by a mediator of that agency, who was at that time mediating a contract negotiation between the union and Aetna Steel Products Corporation, a member of the Association bargaining separately from the others; and a decision was reached to recess the negotiations involved here pending the results of the Aetna negotiation. When the mediator called the next meeting on March 29, 1957, the completed Aetna contract was introduced into the discussion. At a resumption of bargaining on April 4, the company, along with the other employers, offered a three-year agreement with certain initial and prospective automatic wage increases. The offer was rejected. Further meetings with the mediator on April 11, May 1, and May 13, 1957, produced no agreement, and no further meetings were held.

Meanwhile, on April 16, 1957, the union had filed the charge upon which the General Counsel's complaint later issued. As amended and amplified at the hearing and construed by the Board, the complaint's charge of unfair

[6] On one occasion in November 1956, a representative of the company conferred individually with the union about job classifications.

labor practices particularly referred to three acts by the company: unilaterally granting numerous merit increases in October 1956 and January 1957; unilaterally announcing a change in sick-leave policy in March 1957; and unilaterally instituting a new system of automatic wage increases during April 1957. As the ensuing litigation has developed, the company has defended against the charges along two fronts: First, it asserts that the unilateral changes occurred after a bargaining impasse had developed through the union's fault in adopting obstructive tactics.[7] According to the Board, however, "the evidence is clear that the Respondent undertook its unilat-

[7] Particularizations of this charge are that the union adamantly insisted that the employers agree to a contract identical with that entered into by Aetna because the Aetna agreement contained a "most favored nation" clause; that the union evasively vacillated between insistence on individual and group negotiations; and that the conduct of negotiations by the union created unrest impairing the efficiency of the company's operations and causing valued employees to quit.

The Board found as a fact that the introduction of the Aetna agreement did not create any impasse at least until after the unilateral actions here in issue. The Board adopted the Examiner's finding that the company and not the union was responsible for any confusion over individual as opposed to association-wide bargaining. The unrest seems to have been a concomitant of the assertion by the employees of their rights to organize and negotiate a collective agreement, and could not justify a refusal of the company to bargain, at least in the absence of conduct of the union which amounted to an unfair labor practice.

The Examiner rejected the company's offer to prove union-instigated slowdowns. But such proof would not have justified the company's refusal to bargain. Since, as we held in *Labor Board* v. *Insurance Agents' Union,* 361 U. S. 477, the *Board* may not brand partial strike activity as illegitimate and forbid its use in support of bargaining, an *employer* cannot be free to refuse to negotiate when the union resorts to such tactics. Engaging in partial strikes is not inherently inconsistent with a continued willingness to negotiate; and as long as there is such willingness and no impasse has developed, the employer's obligation continues.

eral actions before negotiations were discontinued in May 1957, or before, as we find on the record, the existence of any possible impasse." 126 N. L. R. B., at 289–290. There is ample support in the record considered as a whole for this finding of fact, which is consistent with the Examiner's Intermediate Report, 126 N. L. R. B., at 295–296, and which the Court of Appeals did not question.[8]

The second line of defense was that the Board could not hinge a conclusion that § 8 (a)(5) had been violated on unilateral actions alone, without making a finding of the employer's subjective bad faith at the bargaining table; and that the unilateral actions were merely evidence relevant to the issue of subjective good faith. This argument prevailed in the Court of Appeals which remanded the cases to the Board saying:

> "Although we might . . . be justified in denying enforcement without remand, . . . since the Board's finding of an unfair labor practice impliedly proceeds from an erroneous view that specific unilateral acts, regardless of bad faith, may constitute violations of § 8 (a)(5), the case should be remanded to the Board in order that it may have an opportunity to take additional evidence, and make such findings as may be warranted by the record." 289 F. 2d, at 709.[9]

The duty "to bargain collectively" enjoined by § 8 (a)(5) is defined by § 8 (d) as the duty to "meet . . . and confer in good faith with respect to wages, hours, and other terms

[8] See *Universal Camera Corp.* v. *Labor Board*, 340 U. S. 474.

[9] The Board had also found the company's actions violative of § 8 (a)(1), 49 Stat. 452, as amended, 29 U. S. C. § 158 (a)(1), but the Court of Appeals held that those findings were merely derivative of the Board's conclusions regarding § 8 (a)(5) and so rejected them. We need not consider this question because the Board's order presents no separate issue as to § 8 (a)(1). It requires the company to cease and desist from refusing to bargain collectively, and to bargain collectively on request. It imposes no broader obligation either in the language of, or by reference to, § 8 (a)(1).

and conditions of employment." Clearly, the duty thus defined may be violated without a general failure of subjective good faith; for there is no occasion to consider the issue of good faith if a party has refused even to negotiate *in fact*—"to meet . . . and confer"—about any of the mandatory subjects.[10] A refusal to negotiate *in fact* as to any subject which is within § 8 (d), and about which the union seeks to negotiate, violates § 8 (a)(5) though the employer has every desire to reach agreement with the union upon an over-all collective agreement and earnestly and in all good faith bargains to that end. We hold that an employer's unilateral change in conditions of employment under negotiation is similarly a violation of § 8 (a)(5), for it is a circumvention of the duty to negotiate which frustrates the objectives of § 8 (a)(5) much as does a flat refusal.[11]

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[10] See, *e. g., Labor Board* v. *Allison & Co.*, 165 F. 2d 766.

[11] Compare *Medo Corp.* v. *Labor Board,* 321 U. S. 678; *May Department Stores* v. *Labor Board,* 326 U. S. 376; *Labor Board* v. *Crompton-Highland Mills,* 337 U. S. 217.

In *Medo,* the Court held that the employer interfered with his employees' right to bargain collectively through a chosen representative, in violation of § 8 (1), 49 Stat. 452 (now § 8 (a)(1)), when it treated directly with employees and granted them a wage increase in return for their promise to repudiate the union they had designated as their representative. It further held that the employer violated the statutory duty to bargain when he refused to negotiate with the union after the employees had carried out their promise.

May held that the employer violated § 8 (1) when, after having unequivocally refused to bargain with a certified union on the ground that the unit was inappropriate, it announced that it had applied to the War Labor Board for permission to grant a wage increase to all its employees except those whose wages had been fixed by "closed shop agreements."

Crompton-Highland Mills sustained the Board's conclusion that the employer's unilateral grant of a wage increase substantially greater than any it had offered to the union during negotiations which had ended in impasse clearly manifested bad faith and violated the employer's duty to bargain.

The unilateral actions of the respondent illustrate the policy and practical considerations which support our conclusion.

We consider first the matter of sick leave. A sick-leave plan had been in effect since May 1956, under which employees were allowed ten paid sick-leave days annually and could accumulate half the unused days, or up to five days each year. Changes in the plan were sought and proposals and counterproposals had come up at three bargaining conferences. In March 1957, the company, without first notifying or consulting the union, announced changes in the plan, which reduced from ten to five the number of paid sick-leave days per year, but allowed accumulation of twice the unused days, thus increasing to ten the number of days which might be carried over. This action plainly frustrated the statutory objective of establishing working conditions through bargaining. Some employees might view the change to be a diminution of benefits. Others, more interested in accumulating sick-leave days, might regard the change as an improvement. If one view or the other clearly prevailed among the employees, the unilateral action might well mean that the employer had either uselessly dissipated trading material or aggravated the sick-leave issue. On the other hand, if the employees were more evenly divided on the merits of the company's changes, the union negotiators, beset by conflicting factions, might be led to adopt a protective vagueness on the issue of sick leave, which also would inhibit the useful discussion contemplated by Congress in imposing the specific obligation to bargain collectively.

Other considerations appear from consideration of the respondents' unilateral action in increasing wages. At the April 4, 1957, meeting the employers offered, and the union rejected, a three-year contract with an imme-

diate across-the-board increase of $7.50 per week, to be followed at the end of the first year and again at the end of the second by further increases of $5 for employees earning less than $90 at those times. Shortly thereafter, without having advised or consulted with the union, the company announced a new system of automatic wage increases whereby there would be an increase of $5 every three months up to $74.99 per week; an increase of $5 every six months between $75 and $90 per week; and a merit review every six months for employees earning over $90 per week. It is clear at a glance that the automatic wage increase system which was instituted unilaterally was considerably more generous than that which had shortly theretofore been offered to and rejected by the union. Such action conclusively manifested bad faith in the negotiations, *Labor Board* v. *Crompton-Highland Mills,* 337 U. S. 217, and so would have violated § 8 (a)(5) even on the Court of Appeals' interpretation, though no additional evidence of bad faith appeared. An employer is not required to lead with his best offer; he is free to bargain. But even after an impasse is reached he has no license to grant wage increases greater than any he has ever offered the union at the bargaining table, for such action is necessarily inconsistent with a sincere desire to conclude an agreement with the union.[12]

The respondents' third unilateral action related to merit increases, which are also a subject of mandatory bargaining. *Labor Board* v. *Allison & Co.,* 165 F. 2d 766. The matter of merit increases had been raised at three of the

[12] Of course, there is no resemblance between this situation and one wherein an employer, after notice and consultation, "unilaterally" institutes a wage increase identical with one which the union has rejected as too low. See *Labor Board* v. *Bradley Washfountain Co.,* 192 F. 2d 144, 150–152; *Labor Board* v. *Landis Tool Co.,* 193 F. 2d 279.

conferences during 1956 but no final understanding had been reached. In January 1957, the company, without notice to the union, granted merit increases to 20 employees out of the approximately 50 in the unit, the increases ranging between $2 and $10.[13] This action too must be viewed as tantamount to an outright refusal to negotiate on that subject, and therefore as a violation of § 8 (a)(5), unless the fact that the January raises were in line with the company's long-standing practice of granting quarterly or semiannual merit reviews—in effect, were a mere continuation of the status quo—differentiates them from the wage increases and the changes in the sick-leave plan. We do not think it does. Whatever might be the case as to so-called "merit raises" which are in fact simply automatic increases to which the employer has already committed himself, the raises here in question were in no sense automatic, but were informed by a large measure of discretion. There simply is no way in such case for a union to know whether or not there has been a substantial departure from past practice, and therefore the union may properly insist that the company

[13] The Board also concluded that the company had violated § 8 (a)(5) by granting 34 merit increases in October 1956. However, it appears from a stipulation in the record and from the Board's reply brief that the latter increases occurred on October 1, 1956, while the charge on which the instant complaint issued was not filed until April 16, 1957, more than six months thereafter. Section 10 (b) of the Act, as amended, 61 Stat. 146, 29 U. S. C. § 160 (b), provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board . . . ." Therefore, we disregard the October 1956 increases as independently constituting an unfair labor practice. Nor do we find it necessary to decide whether they may be considered as evidence in connection with the Board's suggestion that the merit increases of October 1956 and January 1957 should be viewed as together amounting to a general wage increase.

negotiate as to the procedures and criteria for determining such increases.[14]

It is apparent from what we have said why we see nothing in *Insurance Agents* contrary to the Board's decision. The union in that case had not in any way whatever foreclosed discussion of any issue, by unilateral actions or otherwise.[15] The conduct complained of consisted of partial-strike tactics designed to put pressure on the employer to come to terms with the union negotiators. We held that Congress had not, in § 8 (b)(3), the counterpart of § 8 (a)(5), empowered the Board to pass judgment on the legitimacy of any particular economic weapon used in support of genuine negotiations. But the Board *is* authorized to order the cessation of behavior which is in effect a refusal to negotiate, or which directly obstructs or inhibits the actual process of discussion, or which reflects a cast of mind against reaching agreement. Unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining, contrary to the congressional policy. It will often disclose an unwillingness to agree with the union. It will rarely be justified by any reason of substance. It follows that the Board may hold such unilateral action to be an unfair labor practice in violation of § 8 (a)(5), without also finding the employer guilty of over-all subjective bad faith. While

[14] See *Armstrong Cork Co.* v. *Labor Board,* 211 F. 2d 843, 847; *Labor Board* v. *Dealers Engine Rebuilders, Inc.,* 199 F. 2d 249. Compare the isolated individual wage adjustments held not to be unfair labor practices in *Labor Board* v. *Superior Fireproof Door & Sash Co.,* 289 F. 2d 713, 720, and *White* v. *Labor Board,* 255 F. 2d 564, 565.

[15] The Court expressly left open the question which would be raised by a union's attempt to impose new working conditions unilaterally. 361 U. S., at 496–497, n. 28.

we do not foreclose the possibility that there might be circumstances which the Board could or should accept as excusing or justifying unilateral action, no such case is presented here.[16]

The judgment of the Court of Appeals is reversed and the case is remanded with direction to the court to enforce the Board's order.

It is so ordered.

MR. JUSTICE FRANKFURTER took no part in the decision of this case.

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

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[16] The company urges that, because of the lapse of time between the occurrence of the unfair labor practices and the Board's final decision and order, and because the union was repudiated by the employees subsequently to the events recounted in this opinion, enforcement should be either denied altogether or conditioned on the holding of a new election to determine whether the union is still the employees' choice as a bargaining representative. The argument has no merit. *Franks Bros. Co.* v. *Labor Board*, 321 U. S. 702; *Labor Board* v. *P. Lorillard Co.*, 314 U. S. 512; *Labor Board* v. *Mexia Textile Mills, Inc.*, 339 U. S. 563, 568. Inordinate delay in any case is regrettable, but Congress has introduced no time limitation into the Act except that in § 10 (b).

RUSSELL *v.* UNITED STATES.

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

No. 8. Argued December 7, 1961.—
Decided May 21, 1962.*

The petitioners in these six cases were convicted of violating 2 U. S. C. § 192, which makes it a misdemeanor for any person summoned to testify before a committee of Congress to refuse to answer "any question pertinent to the question under inquiry." In each case the indictment returned by the grand jury stated that the questions to which answers were refused "were pertinent to the question then under inquiry" by the subcommittee; but it failed to identify the subject under subcommittee inquiry when the witness was interrogated. In each case a motion was filed to quash the indictment before trial for failure to state the subject under inquiry; but in each case the motion was denied and the issue thus raised was preserved and properly presented in this Court. *Held:* The grand jury indictment required by 2 U. S. C. § 194 as a prerequisite to a prosecution for a violation of § 192 must state the question which was under inquiry at the time of the defendant's alleged default or refusal to answer, as found by the grand jury; and the judgment affirming the conviction of each of the petitioners is reversed. Pp. 751–772.

(a) The Congress which originally enacted in 1857 the law which was a predecessor of 2 U. S. C. § 192 was expressly aware that pertinency to the subject under inquiry was the basic preliminary question which the federal courts would have to decide in determining whether a violation of the statute had been alleged or proved. Pp. 756–758.

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*Together with No. 9, *Shelton* v. *United States,* argued December 6–7, 1961; No. 10, *Whitman* v. *United States,* argued December 7, 11, 1961; No. 11, *Liveright* v. *United States,* argued December 11, 1961; No. 12, *Price* v. *United States,* argued December 11, 1961; and No. 128, *Gojack* v. *United States,* argued December 11–12, 1961, also on certiorari to the same Court.

(b) Many decisions of this Court arising under 2 U. S. C. § 192 have recognized the crucial importance of determining the issue of pertinency; and the obvious first step in determining whether the questions asked were pertinent to the subject under inquiry is to ascertain what that subject was. Pp. 758–760.

(c) While convictions are no longer reversed because of minor and technical deficiencies which did not prejudice the accused, the substantial safeguards to those charged with serious crimes cannot be eradicated under the guise of technical departures from the rules. Pp. 760–763.

(d) Omission from the indictments here involved of statements of the subject under inquiry deprived the defendants of one of the significant protections which the guaranty of a grand jury indictment was intended to confer—*i. e.*, they failed adequately to apprise the defendants of what they must be prepared to meet. Pp. 763–768.

(e) These indictments were also insufficient to serve the corollary purpose of enabling the courts to decide whether the facts alleged were sufficient in law to support convictions. Pp. 768–769.

(f) The deficiencies in these indictments could not have been cured by bills of particulars, because under 2 U. S. C. § 194 only a grand jury may determine whether a person should be held to answer in a criminal trial for refusing to give testimony pertinent to a question under congressional committee inquiry, and the grand jury itself must necessarily determine what the question under inquiry was. Pp. 769–771.

108 U. S. App. D. C. 140, 280 F. 2d 688; 108 U. S. App. D. C. 153, 280 F. 2d 701; 108 U. S. App. D. C. 226, 281 F. 2d 59; 108 U. S. App. D. C. 160, 280 F. 2d 708; 108 U. S. App. D. C. 167, 280 F. 2d 715; 108 U. S. App. D. C. 130, 280 F. 2d 678, reversed.

Joseph A. Fanelli argued the cause for petitioner in No. 8. With him on the briefs was *Benedict P. Cottone.*

Joseph L. Rauh, Jr. argued the cause for petitioner in No. 9. With him on the briefs was *John Silard.*

Gerhard P. Van Arkel argued the cause for petitioner in No. 10. With him on the briefs was *George Kaufman.*

Harry I. Rand argued the cause for petitioner in No. 11. With him on the briefs was *Leonard B. Boudin.*

Leonard B. Boudin argued the cause for petitioner in No. 12. With him on the briefs was *Harry I. Rand.*

Frank J. Donner argued the cause for petitioner in No. 128. With him on the brief was *David Rein.*

Kevin T. Maroney argued the causes for the United States in Nos. 8 and 128. With him on the briefs were *Solicitor General Cox, Assistant Attorney General Yeagley, Bruce J. Terris* and (in No. 128) *Doris Spangenburg.*

Bruce J. Terris argued the cause for the United States in No. 9. With him on the briefs were *Solicitor General Cox, Assistant Attorney General Yeagley* and *Kevin T. Maroney.*

J. William Doolittle argued the cause for the United States in Nos. 10, 11 and 12. On the briefs were *Solicitor General Cox, Assistant Attorney General Yeagley, Bruce J. Terris, Kevin T. Maroney* and *Lee B. Anderson.*

Nanette Dembitz filed a brief for New York Civil Liberties Union, as *amicus curiae,* urging reversal in No. 10.

Mr. Justice Stewart delivered the opinion of the Court.

In these six cases we review judgments of the Court of Appeals for the District of Columbia,[1] which affirmed convictions obtained in the District Court under 2 U. S. C.

[1] 108 U. S. App. D. C. 140, 280 F. 2d 688; 108 U. S. App. D. C. 153, 280 F. 2d 701; 108 U. S. App. D. C. 226, 281 F. 2d 59; 108 U. S. App. D. C. 160, 280 F. 2d 708; 108 U. S. App. D. C. 167, 280 F. 2d 715; 108 U. S. App. D. C. 130, 280 F. 2d 678.

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§ 192.[2] Each of the petitioners was convicted for refusing to answer certain questions when summoned before a congressional subcommittee.[3] The cases were separately briefed and argued here, and many issues were presented. We decide each case upon a single ground common to all, and we therefore reach no other questions.

In each case the indictment returned by the grand jury failed to identify the subject under congressional subcommittee inquiry at the time the witness was interrogated. The indictments were practically identical in this respect, stating only that the questions to which answers were refused "were pertinent to the question then under inquiry" by the subcommittee.[4] In each case a motion

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[2] "Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months." 2 U. S. C. § 192.

[3] No. 8 and No. 128 grew out of hearings before subcommittees of the House Committee on Un-American Activities. The other four cases grew out of hearings before the Internal Security Subcommittee of the Senate Judiciary Committee.

[4] The indictment in No. 8 is typical:

"The Grand Jury charges:

"Introduction

"On November 17, 1954, in the District of Columbia, a subcommittee of the Committee on Un-American Activities of the House of Representatives was conducting hearings, pursuant to Public Law 601, Section 121, 79th Congress, 2d Session, (60 Stat. 828), and to H. Res. 5, 83d Congress.

"Defendant, Norton Anthony Russell, appeared as a witness before that subcommittee, at the place and on the date above stated, and

was filed to quash the indictment before trial upon the ground that the indictment failed to state the subject under investigation at the time of the subcommittee's interrogation of the defendant.[5] In each case the motion was denied. In each case the issue thus raised was preserved on appeal, in the petition for writ of certiorari, and in brief and argument here.

Congress has expressly provided that no one can be prosecuted under 2 U. S. C. § 192 except upon indictment by a grand jury.[6] This Court has never decided whether

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was asked questions which were pertinent to the question then under inquiry. Then and there the defendant unlawfully refused to answer those pertinent questions. The allegations of this introduction are adopted and incorporated into the counts of this indictment which follow, each of which counts will in addition merely describe the question which was asked of the defendant and which he refused to answer."

(The questions which Russell allegedly refused to answer were then quoted verbatim under separately numbered counts.)

[5] The motion in No. 9 is typical:

"The defendant moves that the indictment be dismissed on the following grounds:

"1. The indictment fails to plead the following essential and material elements of the offense:

. . . . . .

"c. the nature of the 'question then under inquiry' to which the questions addressed to defendant are alleged to be relevant."

[6] 2 U. S. C. § 194 provides:

"Whenever a witness summoned as mentioned in section 192 of this title fails to appear to testify or fails to produce any books, papers, records, or documents, as required, or whenever any witness so summoned refuses to answer any question pertinent to the subject under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee or subcommittee of either House of Congress, and the fact of such failure or failures is reported to either House while Congress is in session, or when Congress is not in session, a statement of fact constituting such failure is reported to and filed with the President of the Senate or the Speaker of the House, it shall be the duty of the said President of the Senate or Speaker of the House, as the case

the indictment must identify the subject which was under inquiry at the time of the defendant's alleged default or refusal to answer.[7] For the reasons that follow, we hold

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may be, to certify, and he shall so certify, the statement of facts aforesaid under the seal of the Senate or House, as the case may be, to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action."

[7] The question was presented but not reached in *Sacher* v. *United States*, 356 U. S. 576, where the conviction was reversed on other grounds. The question was also raised in the petition for certiorari in *Braden* v. *United States*, 365 U. S. 431, but was abandoned when the case was briefed and argued on the merits. Although the question was decided by the lower court in *Barenblatt* v. *United States*, 100 U. S. App. D. C. 13, 240 F. 2d 875, it was not raised in this Court, 360 U. S. 109.

The Court of Appeals for the District of Columbia Circuit has passed on the question, holding that the indictment need not set forth the subject under committee inquiry. See *Barenblatt* v. *United States*, 100 U. S. App. D. C. 13, 240 F. 2d 875; *Sacher* v. *United States*, 102 U. S. App. D. C. 264, 252 F. 2d 828. Indictments returned in that circuit of course reflect this rule. See cases cited in MR. JUSTICE HARLAN'S dissenting opinion, *post*, p. 782, n. 2. The Court of Appeals for the Second Circuit sustained an indictment under 2 U. S. C. § 192 which did not set forth the subject under inquiry in *United States* v. *Josephson*, 165 F. 2d 82. However, *Josephson* appears to have been substantially limited by the same court in *United States* v. *Lamont*, 236 F. 2d 312, and indictments under 2 U. S. C. § 192 currently being returned in the Second Circuit do in fact set forth the subject under inquiry. See the unreported indictments in *United States* v. *Yarus* (D. C. S. D. N. Y.) No. C 152–239 (the opinion acquitting defendant Yarus is reported at 198 F. Supp. 425); *United States* v. *Turoff* (D. C. W. D. N. Y.) No. 7539–C (the opinion of the Court of Appeals reversing defendant Turoff's conviction is reported at 291 F. 2d 864).

No other Court of Appeals has passed squarely on the point. In *Braden* v. *United States*, 272 F. 2d 653, the Court of Appeals for the Fifth Circuit ruled that the indictment need not explain how and why the questions were pertinent to the subject under inquiry, but did not discuss whether the subject itself had to be specified. In a number of other recent cases arising under 2 U. S. C. § 192 the indictments have stated the subject under inquiry. See, in addition

that the indictment must contain such an averment, and we accordingly reverse the judgments before us.

In enacting the criminal statute under which these petitioners were convicted Congress invoked the aid of the federal judicial system in protecting itself against contumacious conduct. *Watkins* v. *United States,* 354 U. S. 178, 207. The obvious consequence, as the Court has repeatedly emphasized, was to confer upon the federal courts the duty to accord a person prosecuted for this statutory offense every safeguard which the law accords in all other federal criminal cases. *Sinclair* v. *United States,* 279 U. S. 263, 296–297; *Watkins* v. *United States, supra,* at 208; *Sacher* v. *United States,* 356 U. S. 576, 577; *Flaxer* v. *United States,* 358 U. S. 147, 151; *Deutch* v. *United States,* 367 U. S. 456, 471.

Recognizing this elementary concept, the *Sinclair* case established several propositions which provide a relevant starting point here. First, there can be criminality under the statute only if the question which the witness refused to answer pertained to a subject then under investigation by the congressional body which summoned him. "[A] witness rightfully may refuse to answer where . . . the questions asked are not pertinent to the matter under inquiry." *Sinclair* v. *United States, supra,* at 292. Secondly, because the defendant is presumed to be innocent, it is "incumbent upon the United States to plead and show that the question [he refused to answer] pertained to some matter under investigation." *Id.,* at 296–297. Finally, *Sinclair* held that the question of

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to the examples cited above, the indictment set forth in *United States* v. *Yellin,* 287 F. 2d 292, 293, n. 2 (C. A. 7th Cir.); the indictment described in *Davis* v. *United States,* 269 F. 2d 357, 359 (C. A. 6th Cir.); and the unreported indictment in *United States* v. *Lorch* (D. C. S. D. Ohio) Cr. No. 3185 (an indictment arising out of the same series of hearings in which Russell, the petitioner in No. 8, was initially summoned to testify).

pertinency is one for determination by the court as a matter of law. *Id.*, at 298.

In that case the Court had before it an indictment which set out in specific and lengthy detail the subject under investigation by the Senate Committee which had summoned Sinclair. The Court was thereby enabled to make an enlightened and precise determination that the question he had refused to answer was pertinent to that subject. *Id.*, at 285–289, 296–298.

That the making of such a determination would be a vital function of the federal judiciary in a prosecution brought under 2 U. S. C. § 192 was clearly foreseen by the Congress which originally enacted the law in 1857.[8] Congress not only provided that a person could be prosecuted only upon an indictment by a grand jury, but, as the record of the legislative debates shows, Congress was expressly aware that pertinency to the subject under inquiry was the basic preliminary question which the federal courts were going to have to decide in determin-

[8] 11 Stat. 155–156. The statute, now 2 U. S. C. §§ 192–194, was enacted to supplement the established contempt power of Congress itself. *Jurney* v. *MacCracken*, 294 U. S. 125, 151. The specific background of the statute's adoption is sketched in *Watkins* v. *United States*, 354 U. S., at 207, n. 45. See Cong. Globe, 34th Cong., 3d Sess. 405. See also *id.*, at 403–413, 426–433, 434–445. Except for a basic change in the immunity provisions in 1862, 12 Stat. 333, the legislation has continued substantially unchanged to the present time, with only a slight modification in language in R. S. §§ 102 and 104. The only other amendment in the substantive provisions was made in 1938, 52 Stat. 942, so as to make the statute applicable to joint committees. The provision requiring grand jury indictment has been amended twice since 1857. The original legislation provided for certification only to the United States Attorney for the District of Columbia. In 1936 an amendment was made to permit certification to any United States Attorney, 49 Stat. 2041. In 1938 the provision was amended to bring it into accord with the joint committee amendment of the substantive provisions of the law.

ing whether a criminal offense had been alleged or proved. The principal spokesman for the bill, Senator Bayard, repeatedly made this very point:

> "The bill provides for punishing a witness who shall refuse to answer any question 'pertinent' to the matter of inquiry under consideration before the House or its committee. If he refuses to answer an irrelevant question, he is not subject to the penalties of the bill. The question must be pertinent to the subject-matter, and that will have to be decided by the courts of justice on the indictment. That power is not given to Congress; it is given appropriately to the judiciary." Cong. Globe, 34th Cong., 3d Sess. 439 (1857).
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> "This law does not propose to give to this miscellaneous political body the power of punishment; but one of its greatest recommendations is, that it transfers that power of punishment to a court of justice after judicial inquiry. All that is to be done in the case of a refusal to testify is to certify the fact to the district attorney, who is to lay it before the grand jury, and if the party is indicted he is bound to answer according to the terms of the law, as any other person would for an offense against the laws of the land. . . . I am aware that legislative bodies have transcended their powers—that under the influence of passion and political excitement they have very often invaded the rights of individuals, and may have invaded the rights of coördinate branches of the Government; but if our institutions are to last, there can be no greater safeguard than will result from transferring that which now stands on an indefinite power (the punishment as well as the offense resting

in the breast of either House) from Congress to the courts of justice. When a case of this kind comes before a court, will not the first inquiry be, have Congress jurisdiction of the subject-matter?—has the House which undertakes to inquire, jurisdiction of the subject? If they have not, the whole proceedings are *coram non judice* and void, and the party cannot be held liable under indictment. The Court would quash the indictment if this fact appeared on its face; and if it appeared on the trial they would direct the jury to acquit." Cong. Globe, 34th Cong., 3d Sess. 440 (1857).

. . . . . .

". . . The law prescribes that, in case of such refusal, the House shall certify the fact to the district attorney, and he shall bring the matter before the grand jury. When that comes up by indictment before the court, must not the court decide whether the question put was pertinent to the inquiry? Of course they must; and they cannot hold the party guilty without doing it." Cong. Globe, 34th Cong., 3d Sess. 440 (1857).

These forecasts of the office which the federal courts would be called upon to perform under 2 U. S. C. § 192 have been amply borne out by the cases which have arisen under the statute. The crucial importance of determining the issue of pertinency is reflected in many cases which have come here since *Sinclair, supra. Watkins* v. *United States,* 354 U. S. 178, 208; *Sacher* v. *United States,* 356 U. S. 576, 577; *Barenblatt* v. *United States,* 360 U. S. 109, 123–125; *Wilkinson* v. *United States,* 365 U. S. 399, 407–409, 413; *Braden* v. *United States,* 365 U. S. 431, 435–436; *Deutch* v. *United States,* 367 U. S. 456, 467–471. Our decisions have pointed out that the obvious first step in determining whether the questions asked were perti-

nent to the subject under inquiry is to ascertain what that subject was. See, *e. g., Deutch* v. *United States, supra,* at 469. Identification of the subject under inquiry is also an essential preliminary to the determination of a host of other issues which typically arise in prosecutions under the statute. In *Wilkinson* v. *United States, supra,* for example, the Court pointed out that in order properly to consider any of the many issues there presented, "the starting point must be to determine the subject matter of the subcommittee's inquiry." 365 U. S., at 407.

Where, as in the *Sinclair* case, the subject under inquiry has been identified in the indictment, this essential first step has presented no problem. Where, as in the more recent cases, the indictment has not identified the topic under inquiry, the Court has often found it difficult or impossible to ascertain what the subject was. The difficulty of such a determination in the absence of an allegation in the indictment is illustrated by *Deutch* v. *United States, supra.* In that case the members of this Court were in sharp disagreement as to what the subject under subcommittee inquiry had been. Moreover, all of us disagreed with the District Court's theory, and the Court of Appeals had not even ventured a view on the question. 367 U. S., at 467. In *Watkins* v. *United States, supra,* the Court found it not merely difficult, but actually impossible, to determine what the topic under subcommittee inquiry had been at the time the petitioner had refused to answer the questions addressed to him. "Having exhausted the several possible indicia of the 'question under inquiry,' we remain unenlightened as to the subject to which the questions asked petitioner were pertinent." 354 U. S., at 214.[9]

[9] In the *Watkins* case the Court's primary concern was not whether pertinency had been proved at the criminal trial, but whether the petitioner had been apprised of the pertinency of the questions at the time he had been called upon to answer them. These two issues

To be sure, the fact that difficulties and doubts have beset the federal courts in trying to ascertain the subject under inquiry in cases arising under 2 U. S. C. § 192 could hardly justify, in the abstract, a requirement that indictments under the statute contain averments which would simplify the courts' task. Difficult and doubtful questions are inherent in the judicial process, particularly under a system of criminal law which places heavy emphasis upon the protection of the rights and liberties of the individual. Courts sit to resolve just such questions, and rules of law are not to be made merely to suit judicial convenience. But a proliferation of doubtful issues which not only burden the judiciary, but, because of uncertainties inherent in their resolution, work a hardship upon both the prosecution and the defense in criminal cases, is hardly a desideratum. And the repeated appearance in prosecutions under a particular criminal statute of the same critical and difficult question, which could be obviated by a simple averment in the indictment, invites inquiry into the purposes and functions which a grand jury indictment is intended to serve. The cases we have discussed, therefore, furnish an appropriate background for the inquiry to which we now turn.

Any discussion of the purpose served by a grand jury indictment in the administration of federal criminal law must begin with the Fifth and Sixth Amendments to the Constitution. The Fifth Amendment provides that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; . . ." We need not pause

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are, of course, quite different. See *Deutch* v. *United States*, 367 U. S., at 467–468. But identification of the subject under inquiry is essential to the determination of either issue. See *Barenblatt* v. *United States*, 360 U. S., at 123–125.

to consider whether an offense under 2 U. S. C. § 192 is an "infamous crime," *Duke* v. *United States,* 301 U. S. 492, since Congress has from the beginning explicitly conferred upon those prosecuted under the statute the protection which the Fifth Amendment confers, by providing that no one can be prosecuted for this offense except upon an indictment by a grand jury. This specific guaranty, as well as the Fifth Amendment's Due Process Clause, are, therefore, both brought to bear here. Of like relevance is the guaranty of the Sixth Amendment that "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; . . ."

The constitutional provision that a trial may be held in a serious federal criminal case only if a grand jury has first intervened reflects centuries of antecedent development of common law, going back to the Assize of Clarendon in 1166.[10] "The grand jury is an English institution, brought to this country by the early colonists and incorporated in the Constitution by the Founders. There is every reason to believe that our constitutional grand jury was intended to operate substantially like its English progenitor. The basic purpose of the English grand jury was to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes." *Costello* v. *United States,* 350 U. S. 359, 362. See McClintock, Indictment by a Grand Jury, 26 Minn. L. Rev. 153; Orfield, Criminal Procedure from Arrest to Appeal, 137–140, 144–146.

For many years the federal courts were guided in their judgments concerning the construction and sufficiency of grand jury indictments by the common law alone. Not until 1872 did Congress enact general legislation touch-

[10] See I Holdsworth, History of English Law (7th ed. 1956), 321–323; I Pollock and Maitland, History of English Law (2d ed. 1909), 137–155, and Vol. II, pp. 647–653.

ing upon the subject. In that year a statute was enacted which reflected the drift of the law away from the rules of technical and formalized pleading which had characterized an earlier era. The 1872 statute provided that "no indictment found and presented by a grand jury in any district or circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant." 17 Stat. 198. This legislation has now been repealed, but its substance is preserved in the more generalized provision of Rule 52 (a) of the Federal Rules of Criminal Procedure, which states that "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." [11]

There was apparently no other legislation dealing with the subject of indictments generally until the promulgation of Rule 7 (c), Fed. Rules Crim. Proc., in 1946. The Rule provides:

> "The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information

[11] The 1872 statute became Rev. Stat. § 1025 and ultimately 18 U. S. C. (1940 ed.) § 556. The statute was repealed in the 1948 legislative reorganization of Title 18, 62 Stat. 862, because its substance was contained in Fed. Rules Crim. Proc., 52 (a).

> shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice."

As we have elsewhere noted, "This Court has, in recent years, upheld many convictions in the face of questions concerning the sufficiency of the charging papers. Convictions are no longer reversed because of minor and technical deficiencies which did not prejudice the accused. [Citing cases.] This has been a salutary development in the criminal law." *Smith* v. *United States,* 360 U. S. 1, 9. "But," as the *Smith* opinion went on to point out, "the substantial safeguards to those charged with serious crimes cannot be eradicated under the guise of technical departures from the rules." *Ibid.* Resolution of the issue presented in the cases before us thus ultimately depends upon the nature of "the substantial safeguards" to a criminal defendant which an indictment is designed to provide. Stated concretely, does the omission from an indictment under 2 U. S. C. § 192 of the subject under congressional committee inquiry amount to no more than a technical deficiency of no prejudice to the defendant? Or does such an omission deprive the defendant of one of the significant protections which the guaranty of a grand jury indictment was intended to confer?

In a number of cases the Court has emphasized two of the protections which an indictment is intended to guarantee, reflected by two of the criteria by which the sufficiency of an indictment is to be measured. These criteria are, first, whether the indictment "contains the elements of the offense intended to be charged, 'and sufficiently apprises the defendant of what he must be prepared to meet,' "

and, secondly, " 'in case any other proceedings are taken against him for a similar offence, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.' *Cochran and Sayre* v. *United States,* 157 U. S. 286, 290; *Rosen* v. *United States,* 161 U. S. 29, 34." *Hagner* v. *United States,* 285 U. S. 427, 431. See *Potter* v. *United States,* 155 U. S. 438, 445; *Bartell* v. *United States,* 227 U. S. 427, 431; *Berger* v. *United States,* 295 U. S. 78, 82; *United States* v. *Debrow,* 346 U. S. 374, 377–378.

Without doubt the second of these preliminary criteria was sufficiently met by the indictments in these cases. Since the indictments set out not only the times and places of the hearings at which the petitioners refused to testify, but also specified the precise questions which they then and there refused to answer, it can hardly be doubted that the petitioners would be fully protected from again being put in jeopardy for the same offense, particularly when it is remembered that they could rely upon other parts of the present record in the event that future proceedings should be taken against them. See McClintock, Indictment by a Grand Jury, 26 Minn. L. Rev. 153, 160; *Bartell* v. *United States,* 227 U. S. 427, 433. The vice of these indictments, rather, is that they failed to satisfy the first essential criterion by which the sufficiency of an indictment is to be tested, *i. e.,* that they failed to sufficiently apprise the defendant "of what he must be prepared to meet."

As has been pointed out, the very core of criminality under 2 U. S. C. § 192 is pertinency to the subject under inquiry of the questions which the defendant refused to answer. What the subject actually was, therefore, is central to every prosecution under the statute. Where guilt depends so crucially upon such a specific identification of fact, our cases have uniformly held that an indictment must do more than simply repeat the language of the criminal statute.

"It is an elementary principle of criminal pleading, that where the definition of an offence, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition; but it must state the species,—it must descend to particulars.'" *United States* v. *Cruikshank,* 92 U. S. 542, 558. An indictment not framed to apprise the defendant "with reasonable certainty, of the nature of the accusation against him . . . is defective, although it may follow the language of the statute." *United States* v. *Simmons,* 96 U. S. 360, 362. "In an indictment upon a statute, it is not sufficient to set forth the offence in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished; . . ." *United States* v. *Carll,* 105 U. S. 611, 612. "Undoubtedly the language of the statute may be used in the general description of an offence, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged." *United States* v. *Hess,* 124 U. S. 483, 487. See also *Pettibone* v. *United States,* 148 U. S. 197, 202–204; *Blitz* v. *United States,* 153 U. S. 308, 315; *Keck* v. *United States,* 172 U. S. 434, 437; *Morissette* v. *United States,* 342 U. S. 246, 270, n. 30. Cf. *United States* v. *Petrillo,* 332 U. S. 1, 10–11.[12] That these basic principles of fundamental

[12] *Rosen* v. *United States,* 161 U. S. 29, heavily relied upon in the dissenting opinion, is inapposite. In that case the Court held that an indictment charging the mailing of obscene material did not need to specify the particular portions of the publication which were allegedly obscene. As pointed out in *Bartell* v. *United States,* 227 U. S. 427, 431, the rule established in *Rosen* was always regarded as a "well recognized exception" to usual indictment rules, applicable only to "the pleading of printed or written matter which is alleged to be

fairness retain their full vitality under modern concepts of pleading, and specifically under Rule 7 (c) of the Federal Rules of Criminal Procedure, is illustrated by many recent federal decisions.[13]

The vice which inheres in the failure of an indictment under 2 U. S. C. § 192 to identify the subject under inquiry is thus the violation of the basic principle "that the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him, . . ." *United States* v. *Simmons, supra,* at 362. A cryptic form of indictment in cases of this kind requires the defendant to go to trial with the chief issue undefined. It enables his conviction to rest on one point and the affirmance of the conviction to rest on another. It gives the prosecution free hand on appeal to fill in the gaps of proof by surmise or conjecture. The Court has had occasion before now to condemn just such a practice in a quite different factual setting. *Cole* v. *Arkansas,* 333 U. S. 196, 201–202. And the unfairness and uncertainty which have characteristically infected criminal proceedings under this statute which were based upon indictments which failed to specify the subject under inquiry are illustrated by the cases in this Court we have already discussed. The same uncertainty and unfairness are underscored by the records of the cases now before us. A single example will suffice to illustrate the point.

In No. 12, *Price* v. *United States,* the petitioner refused to answer a number of questions put to him by the Inter-

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too obscene or indecent to be spread upon the records of the court." Under *Roth* v. *United States,* 354 U. S. 476, 488–489, the issue dealt with in *Rosen* would presumably no longer arise.

[13] *United States* v. *Lamont,* 236 F. 2d 312; *Meer* v. *United States,* 235 F. 2d 65; *Babb* v. *United States,* 218 F. 2d 538; *United States* v. *Simplot,* 192 F. Supp. 734; *United States* v. *Devine's Milk Laboratories, Inc.,* 179 F. Supp. 799; *United States* v. *Apex Distributing Co.,* 148 F. Supp. 365.

nal Security Subcommittee of the Senate Judiciary Committee. At the beginning of the hearing in question, the Chairman and other subcommittee members made widely meandering statements purporting to identify the subject under inquiry. It was said that the hearings were "not . . . an attack upon the free press," that the investigation was of "such attempt as may be disclosed on the part of the Communist Party . . . to influence or to subvert the American press." It was also said that "We are simply investigating communism wherever we find it." In dealing with a witness who testified shortly before Price, counsel for the subcommittee emphatically denied that it was the subcommittee's purpose "to investigate Communist infiltration of the press and other forms of communication." But when Price was called to testify before the subcommittee no one offered even to attempt to inform him of what subject the subcommittee did have under inquiry. At the trial the Government took the position that the subject under inquiry had been Communist activities generally. The district judge before whom the case was tried found that "the questions put were pertinent to the matter under inquiry" without indicating what he thought the subject under inquiry was. The Court of Appeals, in affirming the conviction, likewise omitted to state what it thought the subject under inquiry had been. In this Court the Government contends that the subject under inquiry at the time the petitioner was called to testify was "Communist activity in news media." [14]

It is difficult to imagine a case in which an indictment's insufficiency resulted so clearly in the indictment's failure to fulfill its primary office—to inform the defendant of the nature of the accusation against him. Price refused to answer some questions of a Senate subcommittee. He

[14] Brief for the United States, p. 26.

was not told at the time what subject the subcommittee was investigating. The prior record of the subcommittee hearings, with which Price may or may not have been familiar, gave a completely confused and inconsistent account of what, if anything, that subject was. Price was put to trial and convicted upon an indictment which did not even purport to inform him in any way of the identity of the topic under subcommittee inquiry. At every stage in the ensuing criminal proceeding Price was met with a different theory, or by no theory at all, as to what the topic had been. Far from informing Price of the nature of the accusation against him, the indictment instead left the prosecution free to roam at large—to shift its theory of criminality so as to take advantage of each passing vicissitude of the trial and appeal. Yet Price could be guilty of no criminal offense unless the questions he refused to answer were in fact pertinent to a specific topic under subcommittee inquiry at the time he was interrogated. *Sinclair* v. *United States,* 279 U. S. 263, at 292.

It has long been recognized that there is an important corollary purpose to be served by the requirement that an indictment set out "the specific offence, coming under the general description," with which the defendant is charged. This purpose, as defined in *United States* v. *Cruikshank,* 92 U. S. 542, 558, is "to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had." [15] This criterion is of the greatest relevance

[15] This principle enunciated in *Cruikshank* retains undiminished vitality, as several recent cases attest. "Another reason [for the requirement that every ingredient of the offense charged must be clearly and accurately alleged in the indictment], and one sometimes overlooked, is to enable the court to decide whether the facts alleged are sufficient in law to withstand a motion to dismiss the indictment or to support a conviction in the event that one should be had." *United States* v. *Lamont,* 18 F. R. D. 27, 31. "In addition to informing the defendant, another purpose served by the indictment is to

here, in the light of the difficulties and uncertainties with which the federal trial and reviewing courts have had to deal in cases arising under 2 U. S. C. § 192, to which reference has already been made. See, *e. g., Watkins* v. *United States,* 354 U. S. 178; *Deutch* v. *United States,* 367 U. S. 456. Viewed in this context, the rule is designed not alone for the protection of the defendant, but for the benefit of the prosecution as well, by making it possible for courts called upon to pass on the validity of convictions under the statute to bring an enlightened judgment to that task. Cf. *Watkins* v. *United States, supra.*

It is argued that any deficiency in the indictments in these cases could have been cured by bills of particulars.[16]

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inform the trial judge what the case involves, so that, as he presides and is called upon to make rulings of all sorts, he may be able to do so intelligently." Puttkammer, Administration of Criminal Law, 125–126. See *Flying Eagle Publications, Inc.,* v. *United States,* 273 F. 2d 799; *United States* v. *Goldberg,* 225 F. 2d 180; *United States* v. *Silverman,* 129 F. Supp. 496; *United States* v. *Richman,* 190 F. Supp. 889; *United States* v. *Callanan,* 113 F. Supp. 766. See 4 Anderson, Wharton's Criminal Law and Procedure, 506; Orfield, Indictment and Information in Federal Criminal Procedure, 13 Syracuse L. Rev. 389, 392. See also Orfield, Criminal Procedure from Arrest to Appeal, 226–230.

[16] In No. 128, *Gojack* v. *United States,* the petitioner filed a timely motion for a bill of particulars, requesting that he be informed of the question under subcommittee inquiry. The motion was denied.

In No. 9, *Shelton* v. *United States,* the petitioner filed a similar motion. The motion was granted, and the Government responded orally as follows:

"As to the second asking, the Government contends, and the indictment states, that the inquiry being conducted was pursuant to this resolution. We do not feel, and it is not the case, that there was any smaller, more limited inquiry being conducted.

"This committee was conducting the inquiry for the purposes contained in the resolution and no lesser purpose so that, in that sense, the asking No. 2 of counsel will be supplied by his reading the resolution."

In the four other cases no motions for bills of particulars were filed.

But it is a settled rule that a bill of particulars cannot save an invalid indictment. See *United States* v. *Norris,* 281 U. S. 619, 622; *United States* v. *Lattimore,* 215 F. 2d 847; *Babb* v. *United States,* 218 F. 2d 538; *Steiner* v. *United States,* 229 F. 2d 745; *United States* v. *Dierker,* 164 F. Supp. 304; 4 Anderson, Wharton's Criminal Law and Procedure, § 1870. When Congress provided that no one could be prosecuted under 2 U. S. C. § 192 except upon an indictment, Congress made the basic decision that only a grand jury could determine whether a person should be held to answer in a criminal trial for refusing to give testimony pertinent to a question under congressional committee inquiry. A grand jury, in order to make that ultimate determination, must necessarily determine what the question under inquiry was. To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him. See Orfield, Criminal Procedure from Arrest to Appeal, 243.

This underlying principle is reflected by the settled rule in the federal courts that an indictment may not be amended except by resubmission to the grand jury, unless the change is merely a matter of form. *Ex parte Bain,* 121 U. S. 1; *United States* v. *Norris,* 281 U. S. 619; *Stirone* v. *United States,* 361 U. S. 212. "If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to

an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says 'no person shall be held to answer,' may be frittered away until its value is almost destroyed. . . . Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney; for, if it be once held that changes can be made by the consent or the order of the court in the body of the indictment as presented by the grand jury, and the prisoner can be called upon to answer to the indictment as thus changed, the restriction which the Constitution places upon the power of the court, in regard to the prerequisite of an indictment, in reality no longer exists." *Ex parte Bain, supra,* at 10, 13. We reaffirmed this rule only recently, pointing out that "The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge." *Stirone* v. *United States, supra,* at 218.[17]

For these reasons we conclude that an indictment under 2 U. S. C. § 192 must state the question under congressional committee inquiry as found by the grand jury.[18]

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[17] See also *Smith* v. *United States,* 360 U. S. 1, 13 (dissenting opinion); Comment, 35 Mich. L. Rev. 456.

[18] The federal perjury statute, 18 U. S. C. § 1621, makes it a crime for a person under oath willfully to state or subscribe to "any material matter which he does not believe to be true." The Government, pointing to the analogy between the perjury materiality requirement and the pertinency requirement in 2 U. S. C. § 192 recognized in *Sinclair* v. *United States,* 279 U. S. 263, 298, contends that the present cases are controlled by *Markham* v. *United States,* 160 U. S. 319, where the Court sustained a perjury indictment. But *Markham* is inapposite. The analogy between the perjury statute and 2 U. S. C. § 192, while persuasive for some purposes, is not persuasive here, for the determination of the subject under inquiry does not play the cen-

Only then can the federal courts responsibly carry out the duty which Congress imposed upon them more than a century ago:

> "The question must be pertinent to the subject-matter, and that will have to be decided by the courts of justice on the indictment." [19]

Reversed.

MR. JUSTICE FRANKFURTER took no part in the decision of these cases.

MR. JUSTICE BRENNAN took no part in the consideration or decision of No. 10, *Whitman* v. *United States.*

MR. JUSTICE WHITE took no part in the consideration or decision of these cases.

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tral role in a perjury prosecution which it plays under 2 U. S. C. § 192. But even were the analogy perfect *Markham* would still not control, for it holds only that a perjury indictment need not set forth how and why the statements were allegedly material. The Court carefully pointed out that the indictment did in fact reveal the subject under inquiry, stating that "as [the fourth count of indictment] charged that such statement was material to an inquiry pending before, and within the jurisdiction of, the Commissioner of Pensions; *and* as the fair import of that count was that the inquiry before the Commissioner had reference to a claim made by the accused under the pension laws, on account of personal injuries received while he was a soldier, and made it necessary to ascertain whether the accused had, since the war or after his discharge from the army, received an injury to the fore-finger of his right hand, we think that the fourth count, although unskilfully drawn, sufficiently informed the accused of the matter for which he was indicted, and, therefore, met the requirement that it should set forth the substance of the charge against him." 160 U. S., at 325–326. (Emphasis added.) This has been equally true of other perjury indictments sustained by the Court. See *Hendricks* v. *United States,* 223 U. S. 178; *United States* v. *Debrow,* 346 U. S. 374 (the indictment in *Debrow* is set forth in the opinion of the Court of Appeals, 203 F. 2d 699, 702, n. 1).

[19] See p. 757, *supra.*

MR. JUSTICE DOUGLAS, concurring.

While I join the opinion of the Court, I think it is desirable to point out that in a majority of the six cases that we dispose of today no indictment, however drawn, could in my view be sustained under the requirements of the First Amendment.

The investigation was concededly an investigation of the press. This was clearly brought out by the record in *Shelton,* wherein the following colloquy was alleged to have taken place at the commencement of the Subcommittee hearings:

> "Senator Hennings. On the same subject matter. I do believe it is very important at the outset for us to make it abundantly clear, if that is the purpose of counsel, and if it is the purpose of this committee, that this is not in any sense an attack upon the free press of the United States.
>
> "The Chairman. Why, certainly, that is true.
>
> "Senator Hennings. And I think, too, that it should be clear that the best evidence of any subversion or infiltration into any news-dispensing agency or opinion-forming journal is certainly the product itself.
>
> "The Chairman. That is correct.
>
> "Senator Hennings. Of course, the committee is interested in the extent and nature of so-called Communist infiltration, if such exists, into any news-dispensing agency.
>
> "The Chairman. Correct.
>
> "Senator Hennings. But I would like to have the position of the committee, if it be the position of the majority of this committee, since the committee has not met to determine whether one policy or another is to be pursued in the course of these hearings—that it be generally known and understood that this is not

an attack upon any one newspaper, upon any group of newspapers as such, but an effort on the part of this committee to show such participation and such attempt as may be disclosed on the part of the Communist Party in the United States or elsewhere, indeed, to influence or to subvert the American press.

"And I do think that at some later time, perhaps, it might be appropriate for executives of some of the newspapers under inquiry, whose employees are under inquiry, to be called and to testify and for them to show, if they can show, that the end product, the newspaper itself, has not been influenced by these efforts.

"The Chairman. The Chair thinks that is a very fine and very accurate statement, one with which the Chair certainly agrees, in its entirety.

"We are not singling out any newspaper and not investigating any newspaper or any group of newspapers. We are simply investigating communism wherever we find it,* and I think that when this series

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*The Subcommittee in its Report to the Senate Judiciary Committee, S. Rep. No. 131, 85th Cong., 1st Sess., p. 95, stated:

"The Communists in the United States have their own daily newspaper, the Daily Worker, and control various weekly and monthly periodicals, including Political Affairs and Masses and Mainstream. But those publications are so brazenly slanted that their propaganda value, except for certain elements of the foreign language press in this country, is sharply limited (pts. 28 and 29).

"In order to overcome this disadvantage, and for other reasons, Communists have made vigorous and sustained efforts to infiltrate the American press and radio and to entrench their members in all other forms of mass communications, where, by emphasis or omission of the written or spoken word, it may be turned to the advantage of the conspiracy."

The Report referred to the ruling of an arbiter in a case where a paper had discharged a "rewrite man" because he invoked the Fifth

of hearings is over that no one can say that any newspaper or any employees of any one newspaper has been singled out.

"Senator Hennings. Thank you, Mr. Chairman.

"Senator Watkins. I would like to say I agree with Senator Hennings' statement, Mr. Chairman." R. 72–73.

The New York Times was a prime target of the investigation, 30 of the 38 witnesses called at the 1955 executive session and 15 of the 18 called at the 1956 public hearings being present or past employees of that paper.

The power to investigate is limited to a valid legislative function. Inquiry is precluded where the matter investi-

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Amendment. It said that the following quotations from his opinion were "of more than passing interest:"

"A metropolitan newspaper in America today is more than a mirror to the happenings of the day. It is a moulder of public opinion; capable of leading crusades; capable of introducing new ideas; capable of propagating truth or propaganda as it wills. By its very nature, whether it would abdicate or not, a newspaper maintains a position of leadership and responsibility in this cold war that is vital to our national security. Other industries (atomic energy, defense, et cetera) may be more vital but this fact does not impair the vital role of our press.

"Each worker performs his task in life with tools, and these tools run the gamut from an ax to a zither. The rewrite man has his tools, too. They are words. Words but express ideas and so it follows that the rewrite man works all day with ideas. This is a war of ideas. Can his position then be deemed nonsensitive? A rewrite man can select the facts he considers important as relayed to him by the reporter in the field. His is the choice of the topic sentence and the lead paragraph. His selection of words sets the tone of the article and influences, too, the choice of headline. The conclusion is irresistible that a rewrite man occupies a sensitive position on a newspaper." *Id.*, at 97.

The Committee concluded, "Communists have infiltrated mass communications media in the United States, and efforts to increase such infiltration continue." *Id.*, at 117.

gated is one on which "no valid legislation" can be enacted. *Kilbourn* v. *Thompson,* 103 U. S. 168, 195. Since the First Amendment provides that "Congress shall make no law . . . abridging the freedom . . . of the press," this present investigation was plainly unconstitutional. As we said in *Watkins* v. *United States,* 354 U. S. 178, 197:

> "Clearly, an investigation is subject to the command that the Congress shall make no law abridging freedom of speech or press or assembly. While it is true that there is no statute to be reviewed, and that an investigation is not a law, nevertheless an investigation is part of lawmaking. It is justified solely as an adjunct to the legislative process. The First Amendment may be invoked against infringement of the protected freedoms by law or by lawmaking."

Under our system of government, I do not see how it is possible for Congress to pass a law saying whom a newspaper or news agency or magazine shall or shall not employ. If this power exists, it can reach the rightist as well as the leftist press, as *United States* v. *Rumely,* 345 U. S. 41, shows. Whether it is used against the one or the other will depend on the mood of the day. Whenever it is used to ferret out the ideology of those collecting news or writing articles or editorials for the press, it is used unconstitutionally. The theory of our Free Society is that government must be neutral when it comes to the press—whether it be rightist or leftist, orthodox or unorthodox. The theory is that in a community where men's minds are free, all shades of opinion must be immune from governmental inquiry lest we end with regimentation. Congress has no more authority in the field of the press than it does where the pulpit is involved. Since the editorials written and the news printed and the policies advocated by the press are none of the Govern-

ment's business, I see no justification for the Government investigating the capacities, leanings, ideology, qualifications, prejudices or politics of those who collect or write the news. It was conceded on oral argument that Congress would have no power to establish standards of fitness for those who work for the press. It was also conceded that Congress would have no power to prescribe loyalty tests for people who work for the press. Since this investigation can have no legislative basis as far as the press is concerned, what then is its constitutional foundation?

It is said that Congress has the power to determine the extent of Communist infiltration so that it can know how much tighter the "security" laws should be made. This proves too much. It would give Congress a roving power to inquire into fields in which it could not legislate. If Congress can investigate the press to find out if Communists have infiltrated it, it could also investigate the churches for the same reason. Are the pulpits being used to promote the Communist cause? Were any of the clergy ever members of the Communist Party? How about the governing board? How about those who assist the pastor and perhaps help prepare his sermons or do the research? Who comes to the confession and discloses that he or she once was a Communist?

There is a dictum in *United States* v. *Rumely,* 345 U. S. 41, 43, that the reach of the investigative power of Congress is measured by the "informing function of Congress," a phrase taken from Woodrow Wilson's Congressional Government (1885), p. 303. But the quotation from Wilson was mutilated, because the sentences which followed his statement that "The informing function of Congress should be preferred even to its legislative function" were omitted from the *Rumely* opinion. Those omitted sentences make abundantly clear that Wilson was speak-

ing, not of a congressional inquiry roaming at large, but of one that inquired into and discussed the functions and operations of government. Wilson said:

> "The informing function of Congress should be preferred even to its legislative function. The argument is not only that discussed and interrogated administration is the only pure and efficient administration, but, more than that, that the only really self-governing people is that people which discusses and interrogates its administration. The talk on the part of Congress which we sometimes justly condemn is the profitless squabble of words over frivolous bills or selfish party issues. It would be hard to conceive of there being too much talk about the practical concerns and processes of government. Such talk it is which, when earnestly and purposefully conducted, clears the public mind and shapes the demands of public opinion." *Id.*, at 303–304.

The power to inform is, in my view, no broader than the power to legislate.

Congress has no power to legislate either on "religion" or on the "press." If an editor or a minister violates the law, he can be prosecuted. But the investigative power, as I read our Constitution, is barred from certain areas by the First Amendment. If we took the step urged by the prosecution, we would allow Congress to enter the forbidden domain.

The strength of the "press" and the "church" is in their freedom. If they pervert or misuse their power, informed opinion will in time render the verdict against them. A paper or pulpit might conceivably become a mouthpiece for Communist ideology. That is typical of the risks a Free Society runs. The alternative is governmental oversight, governmental investigation, governmental questioning, governmental harassment, governmental exposure for

exposure's sake. Once we crossed that line, we would sacrifice the values of a Free Society for one that has a totalitarian cast.

Some think a certain leeway is necessary or desirable, leaving it to the judiciary to curb what judges may from time to time think are excessive practices. Thus, a judge with a professorial background may put the classroom in a preferred position. One with a background of a prosecutor dealing with "subversives" may be less tolerant. When a subjective standard is introduced, the line between constitutional and unconstitutional conduct becomes vague, uncertain, and unpredictable. The rationalization, of course, reduces itself ultimately to the idea that "the judges know best." My idea is and has been that those who put the words of the First Amendment in the form of a command knew best. That is the political theory of government we must sustain until a constitutional amendment is adopted that puts the Congress astride the "press."

MR. JUSTICE CLARK, dissenting.

Although I have joined Brother HARLAN in dissenting on the grounds ably expressed in his opinion, the Court today so abruptly breaks with the past that I must visually add my voice in protest. The statute under which these cases were prosecuted, 2 U. S. C. § 192, was originally passed 105 years ago. Case after case has come here during that period. Still the Court is unable to point to one case—not one—in which there is the remotest suggestion that indictments thereunder must include any of the underlying facts necessary to evaluate the propriety of the unanswered questions. Following the universal art and practice, indictments under this statute have commonly phrased the element of pertinency in the statutory language, *i. e.*, the unanswered question was "pertinent to the question under inquiry." This Court in *Sacher* v.

United States, 356 U. S. 576 (1958), had an opportunity to put a stop to this widespread practice but instead reversed on other, rather unsubstantial grounds without even acknowledging that numerous defendants were being denied "one of the significant protections which the guaranty of a grand jury indictment was intended to confer." In requiring these indictments to "identify the subject which was under inquiry at the time of the defendant's alleged default or refusal to answer," the Court has concocted a new and novel doctrine to upset congressional contempt convictions. A rule has been sown which, as pointed out by Brother HARLAN, has no seeds in general indictment law and which will reap no real benefits in congressional contempt cases. If knowing the subject matter under investigation is actually important to these recalcitrant witnesses, they can utilize the right recognized in *Watkins* v. *United States,* 354 U. S. 178 (1957), of demanding enlightenment from the questioning body or the time-honored practice of requesting a bill of particulars from the prosecutor. Let us hope that the reasoning of the Court today does not apply to indictments under other criminal statutes, for if it does an uncountable number of indictments will be invalidated. If, however, the rule is only cast at congressional contempt cases, it is manifestly unjust.

By fastening upon indictment forms under § 192 its superficial luminosity requirement the Court creates additional hazards to the successful prosecution of congressional contempt cases, which impair the informing procedures of the Congress by encouraging contumacy before its committees. It was only five years ago in my dissenting opinion in *Watkins* that I indicated the rule in that case might "well lead to trial of all contempt cases before the bar . . ." of the House of Congress affected. *Watkins* v. *United States, supra,* at p. 225. In that short period the Court has now upset 10 convictions

under § 192. This continued frustration of the Congress in the use of the judicial process to punish those who are contemptuous of its committees indicates to me that the time may have come for Congress to revert to "its original practice of utilizing the coercive sanction of contempt proceedings at the bar of the House [affected]." *Id.*, at 206. Perhaps some simplified method may be found to handle such matters without consuming too much of the time of the full House involved. True, a recalcitrant witness would have to be released at the date of adjournment, but at least contumacious conduct would then receive some punishment. The dignity of the legislative process deserves at least that much sanction.

MR. JUSTICE HARLAN, whom MR. JUSTICE CLARK joins, dissenting.

The ground rules for testing the sufficiency of an indictment are twofold: (1) does the indictment adequately inform the defendant of the nature of the charge he will have to meet; (2) if the defendant is convicted, and later prosecuted again, will a court, under what has been charged, be able to determine the extent to which the defense of double jeopardy is available? *United States* v. *Debrow*, 346 U. S. 374.

Rule 7 (c) of the Federal Rules of Criminal Procedure, effective in 1946, was of course not intended to abrogate or weaken either of these yardsticks. Its purpose simply was to do away with the subtleties and uncertainties that had characterized criminal pleading at common law. The rule provides in pertinent part:

> "The indictment . . . shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. . . . It need not contain . . . any other matter not necessary to such statement."

The rule was "designed to eliminate technicalities" and is "to be construed to secure simplicity in procedure." *Debrow*, at 376.

An essential element of the offense established by 2 U. S. C. § 192 [1] is that the questions which the defendant refused to answer were "pertinent to the question under inquiry" before the inquiring congressional committee. Each of the indictments in these cases charged this element of the offense in the language of the statute, following the practice consistently employed since 1950 in the District of Columbia, where most of the § 192 cases have been brought.[2] The Court now holds, however, that

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[1] "Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer *any question pertinent to the question under inquiry*, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months." (Emphasis added.)

[2] [The following abbreviations have been used to indicate where the indictment may be found: TR, the transcript of the record in this Court; JA, the joint appendix in the Court of Appeals; Cr. No. ——, the docket number in the District Court.] See *Grumman* v. *United States*, 368 U. S. 925 (TR, p. 2); *Silber* v. *United States*, 368 U. S. 925 (TR, p. 2); *Hutcheson* v. *United States*, 369 U. S. 599 (TR, p. 4); *Deutch* v. *United States*, 367 U. S. 456 (TR, p. 7); *Barenblatt* v. *United States*, 360 U. S. 109 (TR, p. 1); *Flaxer* v. *United States*, 358 U. S. 147 (TR, p. 2); *Sacher* v. *United States*, 356 U. S. 576 (JA, p. 2); *Watkins* v. *United States*, 354 U. S. 178 (TR, p. 2); *Bart* v. *United States*, 349 U. S. 219 (TR, p. 108); *Emspak* v. *United States*, 349 U. S. 190 (TR, p. 4); *Quinn* v. *United States*, 349 U. S. 155 (TR, p. 3); *United States* v. *Rumely*, 345 U. S. 41 (TR, pp. 2–4); *Knowles* v. *United States*, 108 U. S. App. D. C. 148, 280 F. 2d 696 (Cr. No. 1211–56); *Watson* v. *United States*, 108 U. S. App. D. C. 141, 280 F. 2d 689 (Cr. No. 1151–54); *Miller* v. *United*

without a statement of the actual subject under inquiry, this allegation was inadequate to satisfy the "apprisal" requisite of a valid indictment. At the same time the allegation is found sufficient to satisfy the "jeopardy" requisite.

The Court's holding is contrary to the uniform course of decisions in the lower federal courts. The Court of Appeals for the District of Columbia Circuit, sitting first as a panel and later *en banc,* has upheld "pertinency" allegations which, like the present indictment, did not identify the particular subject being investigated. *Barenblatt* v. *United States,* 100 U. S. App. D. C. 13, 240 F. 2d 875 (panel); *Sacher* v. *United States,* 102 U. S. App. D. C. 264, 252 F. 2d 828 (*en banc*).[3] The Court of Appeals for the Second Circuit is of the same view. *United States*

States, 104 U. S. App. D. C. 30, 259 F. 2d 187 (Cr. No. 164–57); *La Poma* v. *United States,* 103 U. S. App. D. C. 151, 255 F. 2d 903 (Cr. No. 290–57); *Brewster* v. *United States,* 103 U. S. App. D. C. 147, 255 F. 2d 899 (Cr. No. 289–57); *Singer* v. *United States,* 100 U. S. App. D. C. 260, 244 F. 2d 349 (Cr. No. 1150–54); *O'Connor* v. *United States,* 99 U. S. App. D. C. 373, 240 F. 2d 404 (Cr. No. 1650–53); *Keeney* v. *United States,* 94 U. S. App. D. C. 366, 218 F. 2d 843 (Cr. No. 870–52); *Bowers* v. *United States,* 92 U. S. App. D. C. 79, 202 F. 2d 447 (Cr. No. 1252–51); *Kamp* v. *United States,* 84 U. S. App. D. C. 187, 176 F. 2d 618 (Cr. No. 1788–50); *United States* v. *Peck,* 149 F. Supp. 238 (Cr. No. 1214–56); *United States* v. *Hoag,* 142 F. Supp. 667 (Cr. No. 574–55); *United States* v. *Fischetti,* 103 F. Supp. 796 (Cr. No. 1254–51); *United States* v. *Nelson,* 103 F. Supp. 215 (Cr. No. 1796–50); *United States* v. *Jaffe,* 98 F. Supp. 191 (Cr. No. 1786–50); *United States* v. *Raley,* 96 F. Supp. 495 (Cr. No. 1748–50); *United States* v. *Fitzpatrick,* 96 F. Supp. 491 (Cr. No. 1743–50).

For a short period after Rule 7 (c), Fed. Rules Crim. Proc., came into effect in 1946, vestiges of common-law pleading continued to be found in some, but not all, § 192 indictments. Compare *United States* v. *Fleischman,* 339 U. S. 349 (TR, pp. 2–3), with *United States* v. *Bryan,* 339 U. S. 323 (TR, p. 2A). By 1950, however, all such indictments had come to be in statutory form.

[3] Four judges dissented on other grounds.

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v. *Josephson,* 165 F. 2d 82; [4] *United States* v. *Lamont,* 236 F. 2d 312.[5] And so, quite evidently, is the Court of Appeals for the Fifth Circuit. *Braden* v. *United States,* 272 F. 2d 653.[6] No Court of Appeals has held otherwise.

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[4] The record on appeal shows that one of the grounds of attack was the indictment's failure to allege "the nature of any matter under inquiry before said Committee." Record on Appeal in the Court of Appeals for the Second Circuit, No. 91, Doc. 20790, p. 7.

[5] This case evinces no purpose to depart from *Josephson.* The District Court, although dismissing the indictment on other grounds, quite evidently found the statutory "pertinency" allegation sufficient. 18 F. R. D., at 30, 37. And in affirming, the Court of Appeals, citing the *Josephson* case among others, stated that "the result might well be different" had the authority of the investigating committee appeared in the indictment. 236 F. 2d, at 316 (note 6). (The committee in *Lamont* was a Subcommittee of the Senate Committee on Government Operations whose enabling legislation the court found did not authorize investigation of "subversive activities.") As regards the issue decided in the present cases, the following observations by Chief Judge Clark, who speaks with special authority in procedural matters, are significant (*id.,* at 317):

"Pleading, either civil or criminal, should be a practical thing. Its purpose is to convey information succinctly and concisely. In older days the tendency was to defeat this purpose by overelaboration and formalism. Now we should avoid the opposite trend, but of like consequence, that of a formalism of generality. *There seems to be some tendency to confuse general pleadings with entire absence of statement of claim or charge.* [Footnote omitted.] But this is a mistake, for general pleadings, far from omitting a claim or charge, do convey information to the intelligent and sophisticated circle for which they are designed. Thus the charge that at a certain time and place 'John Doe with premeditation shot and murdered John Roe,' F.R.Cr.P., Form 2, even though of comparatively few words, has made clear the *offense it is bringing before the court.* [Footnote omitted.] The present indictments, however, do not show the basis upon which eventual conviction can be had; rather, read in the light of the background of facts and Congressional action, they show that conviction cannot be had." (Emphasis supplied.)

[6] That case was concerned with the "connective reasoning" aspect of "pertinency," *Watkins* v. *United States,* 354 U. S. 178, 214–215,

And nothing in this Court's more recent cases could possibly be taken as foreshadowing the decision made today.[7]

The reasons given by the Court for its sudden holding, which unless confined to contempt of Congress cases bids fair to throw the federal courts back to an era of criminal pleading from which it was thought they had finally emerged, are novel and unconvincing.

I.

It is first argued that an allegation of "pertinency" in the statutory terms will not do, because that element is at "the very core of criminality" under § 192. This is said to follow from what "our cases have uniformly held." *Ante*, p. 764. I do not so understand the cases on which the Court relies. It will suffice to examine the three cases from which quotations have been culled. *Ante*, pp. 765–766.

United States v. *Cruikshank*, 92 U. S. 542, involved an indictment under the Enforcement Act of 1870 (16 Stat. 140) making it a felony to conspire to prevent any person from exercising and enjoying "any right or privilege granted or secured to him by the Constitution or laws of the United States." Most of the counts were dismissed on the ground that they stated no federal offense whatever. The remainder were held inadequate from the standpoint of "apprisal," in that they simply alleged a conspiracy to prevent certain citizens from enjoying rights "granted and secured to them by the constitution and laws of the United States," such rights not being otherwise described or identified. Small wonder that these opaque allegations drew from the Court the com-

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rather than the "subject under inquiry" aspect; but it is not perceived how this can be thought to make a difference in principle.

[7] This is not the first opportunity the Court has had to consider the matter. *Ante*, p. 754, note 7.

ment that the indictment " 'must descend to particulars.' " *Id.*, at 558. Indeed, the Court observed: "According to the view we take of these counts, the question is not whether it is enough, in general, to describe a statutory offence in the language of the statute, *but whether the offence has here been described at all.*" *Id.*, at 557. (Emphasis supplied.)

United States v. *Simmons*, 96 U. S. 360, was concerned with an indictment involving illegal distilling. Revised Statutes § 3266 made it an offense to distill spirits on premises where vinegar "is" manufactured. One count of the indictment charged the defendant with causing equipment on premises where vinegar "was" manufactured to be used for distilling. This count was dismissed for its failure (1) to identify the person who had so used the equipment or to allege that his identity was unknown to the grand jurors; and (2) to allege that the distilling and manufacture of vinegar were coincidental, as required by the statute.[8] What is more significant from the standpoint of the present cases is that in sustaining another count of the indictment charging the defendant with engaging in the business of distilling "with the intent to defraud the United States of the tax" on the spirits (R. S. § 3281), the Court held that it was not necessary to allege "the particular means by which the United States was to be defrauded of the tax." *Id.*, at 364.

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[8] The Court stated (*id.*, at 362):

"Where the offence is purely statutory . . . it is, 'as a general rule, sufficient in the indictment to charge the defendant with acts coming fully within the statutory description, in the substantial words of the statute, without any further expansion of the matter.' 1 Bishop, Crim. Proc., sect. 611, and authorities there cited. But to this general rule there is the qualification, fundamental in the law of criminal procedure, that the accused must be apprised by the indictment, with *reasonable certainty*, of the *nature* of the accusation against him . . . . An indictment not so framed is defective, although it may follow the language of the statute." (Emphasis supplied.)

United States v. *Carll,* 105 U. S. 611, held no more than that an indictment charging forgery was insufficient for failure to allege *scienter,* which, though not expressly required by the statute, the Court found to be a necessary element of the crime. Hence a charge in the statutory language would not suffice. Section 192 of course contains no such gap in its provisions. What the Court now requires of these indictments under § 192 involves not the supplying of a missing element of the crime, but the addition of the particulars of an element already clearly alleged.

To me it seems quite clear that even under these cases, decided long before Rule 7 (c) came into being, the "pertinency" allegations of the present indictments would have been deemed sufficient. Other early cases indicate the same thing. See, *e. g., United States* v. *Mills,* 7 Pet. 138, 142; *Evans* v. *United States,* 153 U. S. 584, 587; [9] *Markham* v. *United States,* 160 U. S. 319, 325; [10] *Bartell*

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[9] The *Mills* and *Evans* cases suggest that a more lenient rule of pleading applies in misdemeanor than in felony cases. Although that distinction seems to have disappeared in the later cases, it may be noted that § 192 in terms makes this offense a misdemeanor. Note 1, *supra.*

[10] In that case the Court spoke, doubtless by way of dictum, concerning the method of pleading "materiality" in a perjury indictment (an element akin to "pertinency" under § 192, *Sinclair* v. *United States,* 279 U. S. 263, 298):

"It was not necessary that the indictment should set forth all the details or facts involved in the issue as to materiality of [the false] statement . . . . In 2 Chittey's Criminal Law, 307, the author says: 'It is undoubtedly necessary that it should appear on the face of the indictment that the false allegations were material to the matter in issue. But it is not requisite to set forth all the circumstances which render them material; the simple averment that they were so, will suffice.' In *King* v. *Dowlin* . . . Lord Kenyon said that it had always been adjudged to be sufficient in an indictment for perjury, to allege generally that the particular question became a material question. . . ." 160 U. S., at 325.

v. *United States,* 227 U. S. 427, 433–434.[11] I think there can be no doubt about the matter after Rule 7 (c).

In *United States* v. *Debrow, supra,* the Court in reversing the dismissal of perjury indictments which had gone on the ground that they had not alleged the name or authority of the persons administering the oath, said (346 U. S., at 376–378):

> "The Federal Rules of Criminal Procedure were designed to eliminate technicalities in criminal pleading and are to be construed to secure simplicity in procedure.
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> . . . . . .
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> "The charges of the indictments followed substantially the wording of the statute, which embodies all the elements of the crime, and such charges clearly informed the defendants of that with which they

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[11] There, under an exception, prevailing in "obscenity" cases, to the then general rule that in "documentary" crimes the contents of the document must be set forth in the indictment, the Court in sustaining an indictment charging the unlawful mailing of an "indecent" letter, only generally described, said (*id.,* at 433–434):

"The present indictment specifically charged that the accused had knowingly violated the laws of the United States by depositing on a day named, in the post-office specifically named, a letter of such indecent character as to render it unfit to be set forth in detail, enclosed in an envelope bearing a definite address. In the absence of a demand for a bill of particulars we think this description sufficiently advised the accused of the nature and cause of the accusation against him. This fact is made more evident when it is found that this record shows no surprise to the accused in the production of the letter at the trial . . . ."

The Court suggests that *Bartell* and *Rosen* v. *United States* (*infra,* p. 792) are inapposite because of the special rule of pleading applicable in "obscenity" cases. *Ante,* p. 765. However, considering that the "apprisal" requisite of an indictment arises from constitutional requirements, this factor far from lessening the weight of these two cases adds to their authority.

> were accused, so as to enable them to prepare their defense and to plead the judgment in bar of any further prosecutions for the same offense. It is inconceivable to us how the defendants could possibly be misled as to the offense with which they stood charged. *The sufficiency of the indictment is not a question of whether it could have been more definite and certain.* If the defendants wanted more definite information as to the name of the person who administered the oath to them, they could have obtained it by requesting a bill of particulars. Rule 7 (f), F.R. Crim. Proc." (Emphasis supplied.)

It is likewise "inconceivable" to me how the indictments in the present cases can be deemed insufficient to advise these petitioners of the nature of the charge they would have to meet. The indictments gave them the name of the committee before which they had appeared; the place and the dates of their appearances; the references to the enabling legislation under which the committee acted; and the questions which the petitioners refused to answer. The subject matter of the investigations had been stated to the petitioners at the time of their appearances before the committees. And the committee transcripts of the hearings were presumably in their possession and, if not, were of course available to them.

Granting all that the Court says about the crucial character of pertinency as an element of this offense, it is surely not more so than the element of premeditation in the crime of first degree murder. If from the standpoint of "apprisal" it is necessary to particularize "pertinency" in a § 192 indictment, it should follow, *a fortiori,* that, contrary to what is prescribed in Forms 1 and 2 of the Federal Rules of Criminal Procedure, a first degree murder indictment should particularize "premeditation."

II.

The Court says that its holding is needed to prevent the Government from switching on appeal, to the prejudice of the defendants, to a different theory of pertinency from that on which the conviction may have rested. *Ante*, pp. 766–768. There are several good answers to this.

To the extent that this fear relates to the subject under investigation, the Government cannot of course travel outside the confines of the trial record, of which the defendant has full knowledge. If what is meant is that the Government may not modify on appeal its "trial" view of the "connective reasoning" (*supra*, p. 784, note 6) relied on to establish the germaneness of the questions asked to the subject matter of the inquiry, surely it would be free to do so, this aspect of pertinency being simply a matter of law, *Sinclair* v. *United States*, 279 U. S. 263, 299. Moreover the Court does not find these indictments deficient because they failed to allege the "connective reasoning."

Beyond these considerations, a defendant has ample means for protecting himself in this regard. By objecting at the committee hearing to the pertinency of any question asked him he may "freeze" this issue, since the Government's case on this score must then stand or fall on the pertinency explanation given by the committee in response to such an objection. *Deutch* v. *United States*, 367 U. S. 456, 472–473 (dissenting opinion); cf. *Watkins* v. *United States*, *supra*, at 214–215; *Barenblatt* v. *United States*, 360 U. S. 109, 123–125. If he has failed to make a pertinency objection at the committee hearing, thereby leaving the issue "at large" for the trial (*Deutch*, *ibid.*), he may still seek a particularization through a bill of particulars. Cf. *United States* v. *Kamin*, 136 F. Supp. 791, 795 n. 4.

It should be noted that no pertinency objection was made by any of these petitioners at the committee hearings. Further, no motions for a bill of particulars were made in No. 12, *Price,* to which the Court especially addresses itself (*ante,* pp. 766–768), or in No. 8, *Russell,* No. 10, *Whitman,* and No. 11, *Liveright.* In No. 9, *Shelton,* and No. 128, *Gojack,* such motions were made. However, no appeal was taken from the denial of the motion in *Gojack,* and in *Shelton* the sufficiency of the particulars furnished by the Government was not questioned either by a motion for a further bill or on appeal.

III.

Referring to certain language in the *Cruikshank* case, *supra,* the Court suggests that the present holding is supported by a further "important corollary purpose" which an indictment is intended to serve: to make "it possible for courts called upon to pass on the validity of convictions under the statute to bring an enlightened judgment to that task." *Ante,* pp. 768, 769.

But whether or not the Government has established its case on "pertinency" is something that must be determined on the record made at the trial, not upon the allegations of the indictment. There is no such thing as a motion for summary judgment in a criminal case. While appellate courts might be spared some of the tedium of going through these § 192 records were the allegations of indictments to spell out the "pertinency" facts, the Court elsewhere in its opinion recognizes that the issue at hand can hardly be judged in terms of whether fuller indictments "would simplify the courts' task." *Ante,* p. 760.

The broad language in *Cruikshank* on which the Court relies cannot properly be taken as meaning more than that an indictment must set forth enough to enable a court to determine whether a criminal offense over which

the court has jurisdiction has been alleged. Cf. McClintock, Indictment by a Grand Jury, 26 Minn. L. Rev. 153, 159–160 (1942); Orfield, Criminal Procedure from Arrest to Appeal, 222–226, 227 n. 107.[12] Certainly the allegations of these indictments meet such requirements.

IV.

The final point made by the Court is perhaps the most novel of all. It is said that a statement of the subject under inquiry is necessary in the indictment in order to fend against the possibility that a defendant may be convicted on a theory of pertinency based upon a subject under investigation different from that which may have been found by the grand jury. An argument similar to this was rejected by this Court many years ago in *Rosen* v. *United States,* 161 U. S. 29, 34, where an indictment charging the defendant with mailing obscene matter, only generally described, was upheld over strong dissent (*id.,* at 45–51) asserting that the accused was entitled to know the particular parts of the material which the grand jury had deemed obscene.[13]

This proposition is also certainly unsound on principle. In the last analysis it would mean that a prosecutor could not safely introduce or advocate at a trial evidence or theories, however relevant to the crime charged in the indictment, which he had not presented to the grand jury. Such cases as *Ex parte Bain,* 121 U. S. 1, *United States* v.

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[12] The other cases and commentaries referred to by the Court in Note 15, *ante,* pp. 768–769, indicate nothing different.

[13] It seems clear that the Court proceeded on the premise that the "isolated excerpt" rule of *Regina* v. *Hicklin,* [1868] L. R. 3 Q. B. 360, recently rejected in *Roth* v. *United States,* 354 U. S. 476, 488–489, in favor of the "whole book" rule, obtained, for the Court relied on *United States* v. *Bennett,* 24 Fed. Cas. 1093 (16 Blatchford 338), where the "excerpt" test was applied.

Norris, 281 U. S. 619, and *Stirone* v. *United States,* 361 U. S. 212, lend no support to the Court's thesis. They held only that, consistently with the Fifth Amendment, a trial judge could not amend the indictment itself, either by striking or adding material language, or, amounting to the latter, by permitting a conviction on evidence or theories not fairly embraced in the charges made in the indictment. To allow this would in effect permit a defendant to be put to trial upon an indictment found not by a grand jury but by a judge.[14]

If the Court's reasoning in this part of its opinion is sound, I can see no escape from the conclusion that a defendant convicted on a lesser included offense, not alleged by the grand jury in an indictment for the greater offense, would have a good plea in arrest of judgment. (Fed. Rules Crim. Proc., 34.)

In conclusion, I realize that one in dissent is sometimes prone to overdraw the impact of a decision with which he does not agree. Yet I am unable to rid myself of the view that the reversal of these convictions on such insubstantial grounds will serve to encourage recalcitrance to legitimate congressional inquiry, stemming from the belief that a refusal to answer may somehow be requited in this Court. And it is not apparent how the seeds which this decision plants in other fields of criminal pleading can well be prevented from sprouting. What is done today calls

[14] While the "connective reasoning" aspect of "pertinency" is again evidently not involved in the Court's reasoning, it is appropriate to note that it is scarcely realistic to consider that issue of law as one on which the grand jury has exercised an independent judgment in determining whether an indictment should be returned. For that body may be expected, quite naturally and properly, to follow the District Attorney's advice on this score, as with any other matter of law. That the legal premises on which the grand jury acted in this respect may turn out to have been wrong could hardly vitiate the indictment itself.

to mind the trenchant observation made by Mr. Justice Holmes many years ago in *Paraiso* v. *United States,* 207 U. S. 368, 372:

> "The bill of rights for the Philippines giving the accused the right to demand the nature and cause of the accusation against him does not fasten forever upon those islands the inability of the seventeenth century common law to understand or accept a pleading that did not exclude every misinterpretation capable of occurring to intelligence fired with a desire to pervert."

No more so does the Bill of Rights of the United States Constitution "fasten" on this country these primitive notions of the common law.

On the merits these convictions are of course squarely ruled against the petitioners by principles discussed in our recent decisions in the *Barenblatt, Wilkinson,* and *Braden* [15] cases, as was all but acknowledged at the bar.

I would affirm.

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[15] 360 U. S. 109; 365 U. S. 399; 365 U. S. 431.

I. L. F. Y. CO. *v.* TEMPORARY STATE HOUSING RENT COMMISSION ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 569. Decided May 21, 1962.

Appeal dismissed for want of a substantial federal question.
Reported below: 10 N. Y. 2d 263, 176 N. E. 2d 822.

Robert S. Fougner for appellant.

Harold Zucker, Robert E. Herman and *Edward V. Alfieri* for the State Rent Commission, appellee.

PER CURIAM.

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

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

BROWN, DOING BUSINESS AS TIA WANNA, ET AL. *v.* CHENEY, COMMISSIONER OF REVENUES OF ARKANSAS.

APPEAL FROM THE SUPREME COURT OF ARKANSAS.

No. 829. Decided May 21, 1962.

Appeal dismissed; certiorari denied.

Reported below: 233 Ark. 920, 350 S. W. 2d 184.

D. D. Panich for appellants.

PER CURIAM.

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

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

REPORTER'S NOTE.

The next page is purposely numbered 801. The numbers between 796 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 FEBRUARY 26 THROUGH MAY 21, 1962.

FEBRUARY 26, 1962.

Miscellaneous Orders.

No. 634. GINSBURG *v.* STERN ET AL., 368 U. S. 987. The motion to stay issuance of order denying certiorari presented to MR. JUSTICE BRENNAN, and by him referred to the Court, is denied. *Paul Ginsburg pro se,* on the motion.

No. 897, Misc. BRADEN *v.* HICKMAN ET AL.; and
No. 909, Misc. MILLER *v.* BENNETT, WARDEN. Motions for leave to file petitions for writs of certiorari denied.

No. 554, Misc. GORDON *v.* NORTH CAROLINA. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for writ of certiorari, certiorari is denied.

No. 910, Misc. FERLITO *v.* IMMIGRATION AND NATURALIZATION SERVICE. Motion for leave to file petition for writ of mandamus denied.

No. 901, Misc. SHOTKIN *v.* OLNEY ET AL. Motion for leave to file petition for writ of mandamus and/or prohibition denied.

Certiorari Granted. (*See also No. 1073, Misc., ante, p. 35.*)

No. 663. FORD *v.* FORD. Supreme Court of South Carolina. Certiorari granted. *O. G. Calhoun* for peti-

tioner. *John S. Davenport III, Angus H. Macaulay, Jr.* and *Wesley M. Walker* for respondent. Reported below: 239 S. C. 305, 123 S. E. 2d 33.

No. 656. INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL–CIO, ET AL. *v.* CENTRAL AIRLINES, INC. C. A. 5th Cir. Certiorari granted. *Charles J. Morris, Plato E. Papps* and *L. N. D. Wells, Jr.* for petitioners. *Luther Hudson* for respondent. Reported below: 295 F. 2d 209.

Certiorari Denied. (*See also No. 554, Misc., supra; and No. 884, Misc., ante, p. 36.*)

No. 600. RICHARDSON ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *John C. Evans* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Meyer Rothwacks* for the United States. Reported below: 294 F. 2d 593.

No. 601. BALLANTYNE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Joseph W. Cash* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Joseph M. Howard* for the United States. Reported below: 293 F. 2d 112; 294 F. 2d 958.

No. 602. SHERLOCK, EXECUTRIX, *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. *William S. Pritchard* and *Winston B. McCall* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Harry Baum* and *Douglas A. Kahn* for respondent. Reported below: 294 F. 2d 863.

No. 608. ELLA SHURE CAHEN TRUST ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Benjamin M. Brodsky* and *Claude A. Roth* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Harry Baum* and *Joseph Kovner* for the United States. Reported below: 292 F. 2d 33.

No. 635. KABOT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Henry G. Singer* and *Maurice Edelbaum* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 295 F. 2d 848.

No. 653. REDFIELD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Eli Grubic* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Joseph M. Howard* and *John M. Brant* for the United States. Reported below: 295 F. 2d 249.

No. 657. KENTUCKY HOME MUTUAL LIFE INSURANCE CO. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Louis Lusky* and *Charles I. Dawson* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Melva M. Graney* and *Arthur I. Gould* for the United States. Reported below: 292 F. 2d 39.

No. 661. WEBB ET UX. *v.* OXLEY. Court of Appeals of Maryland. Certiorari denied. Reported below: 226 Md. 339, 173 A. 2d 358.

No. 665. WOODMAR REALTY CO. *v.* MCLEAN, TRUSTEE, ET AL. C. A. 7th Cir. Certiorari denied. *Benjamin Wham* and *Owen W. Crumpacker* for petitioner. *Harry Long* for respondents. Reported below: 294 F. 2d 785.

No. 212, Misc. CLINTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for the United States.

No. 496, Misc. DIBLIN *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se*. *Frank D. O'Connor* for respondent.

No. 666. HAITH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *W. A. Hall, Jr.* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 297 F. 2d 65.

No. 668. GARRISON ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *George C. Dyer* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 296 F. 2d 461.

No. 594. UNITED STATES *v.* REPUBLIC OF FRANCE ET AL.; and

No. 595. TEXAS CITY TERMINAL RAILWAY CO. *v.* REPUBLIC OF FRANCE ET AL. C. A. 5th Cir. Certiorari denied. THE CHIEF JUSTICE, MR. JUSTICE BLACK and MR. JUSTICE BRENNAN are of the opinion that certiorari should be granted. *Solicitor General Cox, Assistant Attorney General Orrick* and *Morton Hollander* for the United States, petitioner in No. 594. *Preston Shirley* for petitioner in No. 595. *Edwin Longcope* for respondents. Reported below: 290 F. 2d 395.

No. 531, Misc. POINDEXTER *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 540, Misc. TSIMPIDES ET AL. *v.* GILES, CIRCUIT COURT JUDGE. Supreme Court of Alabama. Certiorari denied. *George D. Finley* for petitioners. *Reid B. Barnes* for respondent. Reported below: 272 Ala. 430, 131 So. 2d 873.

No. 574, Misc. BANKS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 713, Misc. GLASPER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States.

No. 745, Misc. HOPKINS *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. 786, Misc. SLATER *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. 806, Misc. MOORE *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 837, Misc. OPPENHEIMER *v.* CALIFORNIA. Appellate Department of the Superior Court of California, Los Angeles County. Certiorari denied. Petitioner *pro se*. *Roger Arnebergh, Philip E. Grey* and *Charles W. Sullivan* for respondent.

No. 853, Misc. PRUITT *v.* VIRGINIA. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 854, Misc. HAMLIN *v.* HAMLIN. District Court of Appeal of California, Second Appellate District. Certiorari denied.

No. 855, Misc. GARY *v.* ILLINOIS. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 858, Misc. SMITH *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Fourth Judicial Department. Certiorari denied.

No. 856, Misc. WILLIAMS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 859, Misc. GOSLEE *v.* WARDEN, MARYLAND PENITENTIARY. Baltimore City Court, Maryland. Certiorari denied.

No. 860, Misc. GARDNER *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 862, Misc. DAVIS *v.* WEST VIRGINIA ET AL. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 866, Misc. SCOTT *v.* SUPERIOR COURT OF LOS ANGELES COUNTY. Supreme Court of California. Certiorari denied.

No. 872, Misc. YARBER *v.* HEARD, CORRECTIONS DIRECTOR, ET AL. Court of Criminal Appeals of Texas. Certiorari denied.

No. 873, Misc. FRANKLIN *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 874, Misc. GOFF *v.* MONTANA ET AL. Supreme Court of Montana. Certiorari denied.

No. 876, Misc. PRUITT *v.* CUNNINGHAM, PENITENTIARY SUPERINTENDENT. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 877, Misc. SHOEMAKE *v.* NASH, WARDEN. Supreme Court of Missouri. Certiorari denied.

No. 881, Misc. GOSLEE *v.* WARDEN, MARYLAND PENITENTIARY. Baltimore City Court, Maryland. Certiorari denied.

No. 878, Misc. HOLT *v.* KENTUCKY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 296 F. 2d 722.

No. 879, Misc. LUPO *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 882, Misc. LEWIS *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 883, Misc. EASTMAN *v.* FAY, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 885, Misc. ELLIS *v.* ALABAMA. 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. 886, Misc. MULLENIX *v.* RHAY, PENITENTIARY SUPERINTENDENT. Supreme Court of Washington. Certiorari denied.

No. 888, Misc. TURNER *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 893, Misc. FLETCHER *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 894, Misc. BLAIR *v.* CALIFORNIA ET AL. District Court of Appeal of California, Second Appellate District. Certiorari denied.

No. 898, Misc. OUTING *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari denied. Petitioner *pro se*. *T. W. Bruton,* Attorney General of North Carolina, and *H. Horton Rountree,* Assistant Attorney General, for respondent. Reported below: 255 N. C. 468, 121 S. E. 2d 847.

No. 896, Misc. BURAGE *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 905, Misc. POLLACK *v.* MYERS, POST OFFICE INSPECTOR, ET AL. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Orrick, Alan S. Rosenthal* and *David A. Ticktin* for respondents.

No. 906, Misc. WHITE *v.* HEARD, CORRECTIONS DIRECTOR, ET AL. Court of Criminal Appeals of Texas. Certiorari denied.

No. 922, Misc. HEATH ET AL. *v.* DUNBAR, CORRECTIONS DIRECTOR. C. A. 9th Cir. Certiorari denied.

No. 935, Misc. BURRELL *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 968, Misc. MCGRATH *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

Rehearing Denied.

No. 68. HILL *v.* UNITED STATES, 368 U. S. 424; and
No. 497, Misc. BISNO ET UX. *v.* HYDE, 368 U. S. 959. Petitions for rehearing denied.

FEBRUARY 27, 1962.

Certiorari Denied.

No. 1084, Misc. MOSS *v.* JONES, WARDEN. Application for stay of execution and petition for writ of certiorari to the Court of Appeals of Kentucky denied. MR. JUSTICE DOUGLAS is of the opinion that the application for stay and the petition for certiorari should be granted. Reported below: 352 S. W. 2d 557.

MARCH 5, 1962.

Miscellaneous Orders.

No. 47. ST. REGIS PAPER CO. *v.* UNITED STATES, 368 U. S. 208. The motion of petitioner to recall and amend or correct the judgment is denied. *Horace R. Lamb* for petitioner. *Solicitor General Cox* for the United States. Reported below: 285 F. 2d 607.

No. 468. ENGEL ET AL. *v.* VITALE ET AL., CONSTITUTING THE BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 9, NEW HYDE PARK. Certiorari, 368 U. S. 924, to the Court of Appeals of New York. The motion of Synagogue Council of America et al. for leave to file brief, as *amici curiae,* is granted. The motion of the American Ethical Union for leave to file brief, as *amicus curiae,* is granted. *Leo Pfeffer* for Synagogue Council of America et al., and *Leo Rosen* and *Nancy F. Wechsler* for the American Ethical Union. *Bertram B. Daiker, Thomas J. Ford, Wilford E. Neier* and *Porter R. Chandler* for respondents and intervenors-respondents in opposition. Reported below: 10 N. Y. 2d 174, 176 N. E. 2d 579.

Certiorari Granted.

No. 660, Misc. JONES *v.* CUNNINGHAM, PENITENTIARY SUPERINTENDENT. Motion for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit granted limited to the question of "mootness." Case transferred to the appellate docket. *F. D. G. Ribble* and *Daniel J. Meador* for petitioner. *Reno S. Harp III,* Assistant Attorney General of Virginia, for respondent. *Lawrence Speiser* filed a brief for the American Civil Liberties Union, as *amicus curiae,* in support of the petition. Reported below: 294 F. 2d 608.

No. 674. WEYERHAEUSER STEAMSHIP CO. *v.* UNITED STATES. C. A. 9th Cir. Certiorari granted. *Chalmers G. Graham* and *Henry R. Rolph* for petitioner. *Solicitor General Cox, Assistant Attorney General Orrick, John G. Laughlin, Jr.* and *Kathryn H. Baldwin* for the United States. Reported below: 294 F. 2d 179.

Certiorari Denied.

No. 614. AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, INTERNATIONAL, *v.* NATIONAL MEDIATION BOARD ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Ruth Weyand* and *Rita C. Davidson* for petitioner. *Solicitor General Cox, Assistant Attorney General Orrick* and *Morton Hollander* for the National Mediation Board et al., *Harold A. Katz* and *Irving M. Friedman* for Air Line Pilots Association, International, and *Robert L. Stern* and *Stuart Bernstein* for United Air Lines, Inc., respondents. Reported below: 111 U. S. App. D. C. 126, 294 F. 2d 910.

No. 621. CORAL GABLES FIRST NATIONAL BANK ET AL. *v.* CONSTRUCTORS OF FLORIDA, INC., ET AL. District Court of Appeal of Florida, Third District. Certiorari denied. *W. G. Ward* and *Leo L. Foster* for petitioners. *William L. Gray, Fuller Warren, Tom Maxey, William L. Gray, Jr., Grover C. Herring* and *Egbert Beall* for respondents. Reported below: 132 So. 2d 806.

No. 672. PORETTO ET AL. *v.* USRY, DISTRICT DIRECTOR OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. Petitioners *pro se. Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Lee A. Jackson* for respondent. Reported below: 295 F. 2d 499.

No. 864, Misc. DAVIS *v.* BALKCOM, WARDEN. Supreme Court of Georgia. Certiorari denied. *Melvin L. Wulf* and *Lawrence Speiser* for petitioner. *Eugene Cook*, Attorney General of Georgia, and *Earl L. Hickman*, Assistant Attorney General, for respondent. Reported below: 217 Ga. 205, 121 S. E. 2d 505.

THE CHIEF JUSTICE, with whom MR. JUSTICE DOUGLAS joins, has filed the following memorandum:

While it is not our custom to state reasons when denying a writ of certiorari, there are occasions when the gravity of the allegations in a petition makes it appropriate to state what the denial does *not* mean* in order to give assurance that this Court is not insensible to charges of egregious violations of constitutional rights.

The denial of a writ of certiorari does not mean that this Court approves the decision below nor, in state criminal cases, that the petitioner is necessarily precluded from obtaining relief in some other appropriate proceeding. Both state and federal courts have an equally binding obligation to uphold the Constitution, and when a state court fails to vindicate rights guaranteed by the Constitution in a criminal proceeding upon a proper demand, the federal courts are open to an aggrieved petitioner.

In this case the state courts refused to grant a hearing to the petitioner on procedural grounds. However, a life is at stake, and unless some court, state or federal, entertains his petition, this petitioner will be executed without a hearing on charges that strike at the very foundation of American justice. He contends that, under a statute recently declared unconstitutional by this Court, he was

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*See, *e. g.*, *English* v. *Cunningham*, 361 U. S. 905; *Sheppard* v. *Ohio*, 352 U. S. 910; *Rosenberg* v. *United States*, 344 U. S. 889; *Bondholders, Inc.*, v. *Powell*, 342 U. S. 921; *Maryland* v. *Baltimore Radio Show*, 338 U. S. 912.

denied the right to be a witness in his own defense or even to testify that the confession used against him was coerced during a two-month period of illegal detention. He also claims that he was denied the right to trial by jury of his peers under a valid indictment through the systematic exclusion of members of his race from the jury lists, a practice which has often been condemned as unconstitutional by this Court and which Congress has made criminal.

No man should ever be imprisoned—let alone executed—in this country if such charges can be substantiated.

No. 675. BROWN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *John H. Wrighten* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 296 F. 2d 565.

No. 677. MORGAN ET AL. *v.* PRESBYTERY OF THE EVERGLADES ET AL. Supreme Court of Florida. Certiorari denied. *Robert A. Peterson* for petitioners. *Marion E. Sibley* for respondents. Reported below: 133 So. 2d 318.

No. 684. AMANA REFRIGERATION, INC., *v.* COLUMBIA BROADCASTING SYSTEM, INC. C. A. 7th Cir. Certiorari denied. *L. M. McBride* and *John P. Ryan, Jr.* for petitioner. *Bruce Bromley, Ralph L. McAfee, Hammond E. Chaffetz, John H. Pickering* and *Charles G. Moerdler* for respondent. Reported below: 295 F. 2d 375.

No. 405, Misc. SWEPSTON *v.* UNITED STATES. C. A. 8th 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: 289 F. 2d 166.

No. 676. STARNES *v.* PENNSYLVANIA RAILROAD CO. C. A. 2d Cir. Certiorari denied. MR. JUSTICE BLACK is of the opinion that certiorari should be granted. *Ira Gammerman* for petitioner. *David J. Mountan, Jr.* and *James S. Rowen* for respondent. Reported below: 295 F. 2d 704.

No. 680. CONTRACTORS ASSOCIATION OF PHILADELPHIA AND EASTERN PENNSYLVANIA ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Manus McHugh* for petitioners. *Solicitor General Cox, Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 295 F. 2d 526.

No. 714, Misc. COLEMAN *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE STEWART are of the opinion that certiorari should be granted. *Edward Bennett Williams* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 111 U. S. App. D. C. 210, 295 F. 2d 555.

No. 899, Misc. RALPH *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Walter H. Moorman* for petitioner.

Rehearing Denied.

No. 506. WILLMUT GAS & OIL CO. *v.* FEDERAL POWER COMMISSION ET AL., 368 U. S. 975; and

No. 573. LEWIS ET AL. *v.* LOWRY, DOING BUSINESS AS LOWRY COAL CO., 368 U. S. 977. Petitions for rehearing denied.

MARCH 12, 1962.

Dismissal Under Rule 60.

No. 247, Misc. SMITH *v.* OKLAHOMA. On petition for writ of certiorari to the Court of Criminal Appeals of Oklahoma. Petition dismissed pursuant to Rule 60 of the Rules of this Court. Petitioner *pro se*. *Mac Q. Williamson,* Attorney General of Oklahoma, for respondent. Reported below: 362 P. 2d 113.

MARCH 19, 1962.*

Miscellaneous Orders.

No. 551, October Term, 1960. GINSBURG *v.* GINSBURG ET AL., 364 U. S. 934. The motion for reconsideration of petition for rehearing is denied.

No. 394. GEAGAN ET AL. *v.* GAVIN, CORRECTIONAL SUPERINTENDENT. On petition for writ of certiorari to the United States Court of Appeals for the First Circuit. The motion of *Robert J. DeGiacomo* for leave to withdraw his appearance as counsel for petitioner Maffie is granted.

No. 659. NORTHERN NATURAL GAS CO. *v.* STATE CORPORATION COMMISSION OF KANSAS. Appeal from the Supreme Court of Kansas. The Solicitor General is invited to file a brief expressing the views of the United States.

No. 678, Misc. DE SHORE *v.* CALIFORNIA ET AL. Motion for leave to file petition for writ of certiorari denied.

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*MR. JUSTICE WHITTAKER took no part in the consideration or decision of cases in which orders were this day announced.

No. 532. CALBECK, DEPUTY COMMISSIONER, BUREAU OF EMPLOYEES' COMPENSATION, ET AL. *v.* TRAVELERS INSURANCE CO. ET AL. Certiorari, 368 U. S. 946, to the United States Court of Appeals for the Fifth Circuit. The motion of Isabell Scott McGuyer for leave to participate in oral argument, as *amicus curiae,* is denied.

No. 704, Misc. WOMACK *v.* MAXWELL, WARDEN;
No. 1008, Misc. PRICE *v.* OHIO; and
No. 1014, Misc. MYERS *v.* BLALOCK, HOSPITAL SUPERINTENDENT. Motions for leave to file petitions for writs of habeas corpus denied.

No. 658, Misc. BANDY *v.* UNITED STATES. Motion for leave to file petition for writ of habeas corpus denied.

MR. JUSTICE DOUGLAS dissenting:

We remanded this petitioner's case to the Court of Appeals for the Eighth Circuit on December 5, 1960, for a hearing on questions admittedly not "frivolous" within the meaning of Rule 46 (a)(2) of the Federal Rules of Criminal Procedure. 364 U. S. 477. But as of the date of this application the appeal had not been disposed of. Meanwhile Bandy had spent over two years in jail, time not credited on any sentence he may ultimately serve. I would therefore treat this application as one for release on personal recognizance and grant the relief for the reasons stated in my opinion as Circuit Justice in *Bandy* v. *United States,* 82 Sup. Ct. 11.

No. 1002, Misc. MORGAN *v.* MCNEILL, HOSPITAL SUPERINTENDENT. 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.

No. 1081, Misc. Ex parte Lee. Motion for leave to file petition for writ of habeas corpus denied. Mr. Justice Black took no part in the consideration or decision of this application.

No. 2, Misc. Copley *v.* Adams, Warden;

No. 8, Misc. McClure *v.* Adams, Warden; and

No. 10, Misc. Clark *v.* Adams, Warden. The motions to substitute Otto C. Boles in the place of D. E. Adams as the party respondent are granted. The petitions for writs of certiorari to the Supreme Court of Appeals of West Virginia are denied. Petitioners *pro se*. *Fred H. Caplan* and *Clement R. Bassett,* Assistant Attorneys General of West Virginia, for respondent.

Certiorari Granted. (*See No. 7, Misc., ante, p. 152.*)

Certiorari Denied. (*See also No. 5, Misc., ante, p. 151; and Misc. Nos. 2, 8, 10 and 1002, supra.*)

No. 633. General Gas Corp. *v.* Commissioner of Internal Revenue. C. A. 5th Cir. Certiorari denied. *Paul O. H. Pigman* and *Charles W. Wilson* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Carolyn R. Just* for respondent. Reported below: 293 F. 2d 35.

No. 670. Association for the Preservation of Freedom of Choice, Inc., et al. *v.* Power et al., constituting the New York City Board of Elections, et al. Court of Appeals of New York. Certiorari denied. *Alfred Avins* for petitioners. *Leo A. Larkin* and *Seymour B. Quel* for respondents constituting the New York City Board of Elections. Reported below: 110 N. Y. 2d 886.

No. 679. Barrow Manufacturing Co., Inc., *v.* Commissioner of Internal Revenue. C. A. 5th Cir. Certiorari denied. *William R. Frazier* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *I. Henry Kutz* for respondent. Reported below: 294 F. 2d 79.

No. 682. Spector *v.* Ladd, Commissioner of Patents. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Richard S. Friedman, Armin R. St. George* and *Paul L. O'Brien* for petitioner. *Solicitor General Cox, Assistant Attorney General Orrick* and *Morton Hollander* for respondent. Reported below: 111 U. S. App. D. C. 298, 296 F. 2d 420.

No. 685. State of Washington *v.* United States. C. A. 9th Cir. Certiorari denied. *John J. O'Connell,* Attorney General of Washington, for petitioner. *Solicitor General Cox, Roger P. Marquis* and *George S. Swarth* for the United States. Reported below: 294 F. 2d 830.

No. 686. Cruz de Orona *v.* Orona, Administratrix, et al. C. A. 2d Cir. Certiorari denied. *Milton Garber* for petitioner. *Daniel Flynn* and *Sidney Schmuckler* for respondents. Reported below: —— F. 2d ——

No. 690. Nunn, Receiver, et al. *v.* Feltinton et al. C. A. 5th Cir. Certiorari denied. *Boyd Laughlin* for petitioners. *William D. Neary* and *Morris Harrell* for respondents. Reported below: 294 F. 2d 450.

No. 691. Alaimo *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. Reported below: 297 F. 2d 604.

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No. 692. CLUB RAMON, INC., *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Frederick Bernays Wiener* and *LeRoy Katz* for petitioner. *Solicitor General Cox* and *Assistant Attorney General Oberdorfer* for the United States. Reported below: 296 F. 2d 837.

No. 693. FRANK *v.* LEVY ET AL. C. A. 7th Cir. Certiorari denied. *Maurice J. Walsh* for petitioner. Reported below: 295 F. 2d 580.

No. 695. WHITEFOOT *v.* UNITED STATES. Court of Claims. Certiorari denied. *L. Frederick Paul, Raymond C. Cushwa, Albert A. Grorud, William L. Paul, Sr., John Spiller* and *James Craig Peacock* for petitioner. *Solicitor General Cox* and *Roger P. Marquis* for the United States. Reported below: —— Ct. Cl. ——, 293 F. 2d 658.

No. 696. ROSENZWEIG *v.* BOUTIN, GENERAL SERVICES ADMINISTRATOR. United States Emergency Court of Appeals. Certiorari denied. *Joseph Henry Wolf* and *Paul Wyler* for petitioner. *Solicitor General Cox, Assistant Attorney General Orrick* and *John G. Laughlin, Jr.* for respondent. Reported below: 299 F. 2d 22.

No. 697. UNITED FRUIT CO. *v.* UNITED STATES. Court of Claims. Certiorari denied. *William I. Denning* and *Alan F. Wohlstetter* for petitioner. *Solicitor General Cox, Assistant Attorney General Orrick* and *John G. Laughlin, Jr.* for the United States. Reported below: —— Ct. Cl. ——, 288 F. 2d 489.

No. 699. ATLAS LIFE INSURANCE CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 10th Cir. Certiorari denied. *Harry D. Moreland* and *Harold C. Stuart* for petitioner. *Solicitor General Cox, Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 295 F. 2d 327.

No. 698. HOWARD *v.* COLORADO. Supreme Court of Colorado. Certiorari denied. *Arthur E. Neuman* and *John B. Bromell* for petitioner. *Duke W. Dunbar,* Attorney General of Colorado, *Frank E. Hickey,* Deputy Attorney General, and *Richard A. Zarlengo,* Assistant Attorney General, for respondent. Reported below: 140 Colo. 151, 342 P. 2d 635; 147 Colo. 501, 364 P. 2d 380.

No. 700. HALLATT ET AL. *v.* MARYLAND CASUALTY CO. C. A. 5th Cir. Certiorari denied. *Roy H. Brooks, Jr.* for petitioners. *Dewey Knight* for respondent. Reported below: 295 F. 2d 64.

No. 702. RAPID TRANSIT CO. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Clifford L. Malone* and *Charles E. Jones* for petitioner. *Solicitor General Cox* and *Roger P. Marquis* for the United States. Reported below: 295 F. 2d 465.

No. 704. SIEGFRIED *v.* KANSAS CITY STAR CO. ET AL. C. A. 8th Cir. Certiorari denied. *Ray D. Jones, Jr.* and *Carrol C. Kennett* for petitioner. *Carl E. Enggas* for respondents. Reported below: 298 F. 2d 1.

No. 706. BLOOM *v.* LUNDBURG, TROOPER. Supreme Court of Errors of Connecticut. Certiorari denied. *David Goldstein, Jacob D. Zeldes, Max Kabatznick* for petitioner. *Joseph J. Rose,* Assistant Attorney General of New York, for respondent. Reported below: 149 Conn. 67, 175 A. 2d 568.

No. 707. E. TOTONELLY SONS, INC., *v.* TOWN OF FAIRFIELD. C. A. 2d Cir. Certiorari denied. *Eugene Gressman* for petitioner. *Norman K. Parsells* and *John J. Darcy* for respondent. Reported below: 292 F. 2d 403.

No. 712. GRECO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *John D. Roeder* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 298 F. 2d 247.

No. 650. SHERMAN *v.* HAMILTON, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 1st Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Allan R. Rosenberg* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for respondent. Reported below: 295 F. 2d 516.

No. 688. DAVIS *v.* LOUISVILLE & NASHVILLE RAILROAD CO. ET AL. Appellate Court of Indiana. Certiorari denied. MR. JUSTICE BLACK is of the opinion that certiorari should be granted. *Russell S. Armstrong* and *John D. Clouse* for petitioner. *William T. Fitzgerald, William L. Grubbs, Joe S. Hatfield* and *Charles H. Sparrenberger* for respondents. Reported below: 132 Ind. App. 419, 173 N. E. 2d 749.

No. 4, Misc. BEVELHYMER *v.* HAND, WARDEN. Supreme Court of Kansas. Certiorari denied. Petitioner *pro se. John Anderson, Jr.,* Attorney General of Kansas, and *J. Richard Foth,* Assistant Attorney General, for respondent.

No. 11, Misc. YOWELL *v.* HAND, WARDEN. Supreme Court of Kansas. Certiorari denied. Petitioner *pro se. William M. Ferguson,* Attorney General of Kansas, and *Charles N. Henson, Jr.* and *J. Richard Foth,* Assistant Attorneys General, for respondent.

No. 681. Miami Herald Publishing Co. *v.* Brautigam, Administratrix. District Court of Appeal of Florida, Third Appellate District. Certiorari denied. Mr. Justice Black and Mr. Justice Douglas are of the opinion that certiorari should be granted. *Elisha Hanson, John G. Thompson, Arthur B. Hanson, Calvin H. Cobb, Jr., Emmett E. Tucker, Jr., Hervey Yancey* and *L. S. Bonsteel* for petitioner. *Paul A. Louis* and *Melvin M. Belli* for respondent. Reported below: 127 So. 2d 718.

No. 1, Misc. Akers *v.* Boles, Warden. Supreme Court of Appeals of West Virginia. Certiorari denied. Petitioner *pro se*. *Fred H. Caplan,* Assistant Attorney General of West Virginia, for respondent.

No. 3, Misc. DeLong *v.* Boles, Warden. Supreme Court of Appeals of West Virginia. Certiorari denied. Petitioner *pro se*. *Fred H. Caplan,* Assistant Attorney General of West Virginia, for respondent.

No. 6, Misc. Scalf *v.* Boles, Warden. Supreme Court of Appeals of West Virginia. Certiorari denied. Petitioner *pro se*. *Fred H. Caplan,* Assistant Attorney General of West Virginia, for respondent.

No. 12, Misc. Kilgallen *v.* LaVallee, Warden. Supreme Court of New York, Clinton County. Certiorari denied. Petitioner *pro se*. *Louis J. Lefkowitz,* Attorney General of New York, *Paxton Blair,* Solicitor General, and *Joseph J. Rose,* Assistant Attorney General, for respondent.

No. 20, Misc. Browning *v.* Hand, Warden. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *William M. Ferguson,* Attorney General of Kansas, and *J. Richard Foth,* Assistant Attorney General, for respondent. Reported below: 284 F. 2d 346.

No. 37, Misc. PHILLIPS *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: 187 Kan. 488, 357 P. 2d 856.

No. 64, Misc. BECKETT *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. 71, Misc. TICHNELL *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. 152, Misc. NOLAN *v.* NASH, WARDEN. Supreme Court of Missouri. Certiorari denied. Petitioner *pro se.* *Thomas F. Eagleton,* Attorney General of Missouri, and *Ben Ely, Jr.,* Assistant Attorney General, for respondent.

No. 153, Misc. MERCER *v.* KENTUCKY ET AL. Court of Appeals of Kentucky. Certiorari denied. Petitioner *pro se.* *John B. Breckinridge,* Attorney General of Kentucky, for respondents.

No. 196, Misc. COLBERT *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied.

No. 266, Misc. MCCOY *v.* BOLES, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied. Petitioner *pro se.* *C. Donald Robertson,* Attorney General of West Virginia, and *C. Robert Sarver,* Assistant Attorney General, for respondent.

No. 482, Misc. LUPO *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 491, Misc. DOSTER *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied. Petitioner *pro se.* *Frank J. Kelley,* Attorney General of Michigan, *Eugene Krasicky,* Solicitor General, and *Robert Weinbaum,* Assistant Attorney General, for respondent.

No. 533, Misc. RODRIGUEZ *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. Petitioner *pro se.* *Stanley Mosk,* Attorney General of California, *William E. James,* Assistant Attorney General, and *S. Clark Moore,* Deputy Attorney General, for respondent.

No. 562, Misc. DANIELS ET AL. *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied. Petitioners *pro se.* *Frank J. Kelley,* Attorney General of Michigan, *Eugene Krasicky,* Solicitor General, and *Robert Weinbaum,* Assistant Attorney General, for respondent.

No. 582, Misc. CHAPMAN *v.* COURT OF CRIMINAL APPEALS OF TEXAS ET AL. Court of Criminal Appeals of Texas. Certiorari denied.

No. 586, Misc. TAFARELLA *v.* HAND, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 294 F. 2d 67.

No. 663, Misc. VITA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Daniel H. Greenberg* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 294 F. 2d 524.

No. 688, Misc. McKoy *v.* California. Supreme Court of California. Certiorari denied.

No. 716, Misc. Van Eyk *v.* California. Supreme Court of California. Certiorari denied.

No. 719, Misc. Bender *v.* Pate, Warden. Circuit Court of Macoupin County, Illinois. Certiorari denied.

No. 721, Misc. Moulsdale *v.* Director of Patuxent Institution. Court of Appeals of Maryland. Certiorari denied.

No. 741, Misc. Robison *v.* California. Supreme Court of California. Certiorari denied.

No. 780, Misc. MacGregor *v.* New York. Court of Appeals of New York. Certiorari denied.

No. 784, Misc. Link *v.* New York. Court of Appeals of New York. Certiorari denied.

No. 801, Misc. Smith *v.* Duncan, U. S. District Judge. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *Isabel L. Blair* for respondent.

No. 811, Misc. Ladson *v.* United States. C. A. 2d Cir. Certiorari denied. *Daniel H. Greenberg* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 294 F. 2d 535.

No. 844, Misc. CAMPBELL *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. 891, Misc. GLOUSER *v.* UNITED STATES. C. A. 8th 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: 296 F. 2d 853.

No. 908, Misc. ROBERTS *v.* WARDEN, MARYLAND PENITENTIARY. Court of Appeals of Maryland. Certiorari denied.

No. 911, Misc. RENTERIA *v.* CALIFORNIA STATE LEGISLATURE ET AL. Supreme Court of California. Certiorari denied.

No. 912, Misc. CASTEDY *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 913, Misc. CLINE *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 914, Misc. DEAN *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied.

No. 915, Misc. NERWINSKI *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 919, Misc. BROWN *v.* DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, ET AL. Court of Criminal Appeals of Texas. Certiorari denied.

No. 918, Misc. LEWIS *v.* HAND, WARDEN. Supreme Court of Kansas. Certiorari denied.

No. 988, Misc. MILLER *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 1007, Misc. BUCK *v.* OHIO. Supreme Court of Ohio. Certiorari denied. *Bernard I. Rosen* for petitioner.

No. 1053, Misc. COLEMAN *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 763, Misc. LIPSCOMB *v.* UNITED STATES BOARD OF PAROLE. The petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit and for other relief is denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *David Rubin* for respondent.

Rehearing Denied.

No. 634. GINSBURG *v.* STERN ET AL., 368 U. S. 987;

No. 542, Misc. CURRY *v.* UNITED STATES, 368 U. S. 991;

No. 670, Misc. SMITH *v.* SETTLE, WARDEN, 368 U. S. 994;

No. 703, Misc. WALKER ET AL. *v.* WALKER ET AL., 368 U. S. 996; and

No. 803, Misc. ANTIPAS *v.* OVERHOLSER, HOSPITAL SUPERINTENDENT, 368 U. S. 981. Petitions for rehearing denied.

No. 96. MORGAN ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE, 368 U. S. 836. The motion for leave to file petition for rehearing is denied.

March 26, 1962.*

Miscellaneous Orders.

No. 469. Incres Steamship Co., Ltd., *v.* International Maritime Workers Union et al. Certiorari, 368 U. S. 924, to the Court of Appeals of New York. The motion of the Republic of Liberia for leave to file brief, as *amicus curiae,* is granted.

No. 1078, Misc. White *v.* Taylor, Warden. Motion for leave to file petition for writ of habeas corpus denied.

No. 1021, Misc. Marsh *v.* Bannan, Warden. Motion for leave to file petition for writ of habeas corpus and for other relief denied.

Certiorari Granted. (*See also No. 84, ante, p. 350.*)

No. 89. Smith *v.* Evening News Association. Supreme Court of Michigan. Certiorari granted. The Solicitor General is invited to file a brief expressing the views of the United States. *Thomas E. Harris* for petitioner. *Phillip T. Van Zile II* for respondent. Reported below: 362 Mich. 350, 106 N. W. 2d 785.

Certiorari Denied.

No. 660. Texaco Puerto Rico Inc. *v.* Armaiz et al. Supreme Court of Puerto Rico and Superior Court of Puerto Rico. Certiorari denied. *Milton Handler* for petitioner. *James R. Withrow, Jr.* and *Jose Trias Monge* for respondents.

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*Mr. Justice Whittaker took no part in the consideration or decision of cases in which orders were this day announced.

No. 673. NUGENT *v.* YELLOW CAB CO. C. A. 7th Cir. Certiorari denied. *Albert E. Jenner, Jr., Thomas P. Sullivan* and *Peter Fitzpatrick* for petitioner. *Charles D. Snewind* for respondent. Reported below: 295 F. 2d 794.

No. 689. LEWIS ET AL., DOING BUSINESS AS LEWIS AND MURRAY, ET AL. *v.* FITZGERALD, TRUSTEE IN BANKRUPTCY. C. A. 10th Cir. Certiorari denied. *Bentley M. McMullin* for petitioners. Reported below: 295 F. 2d 877.

No. 708. MONTOUR RAILROAD CO., INC., *v.* ZIMMERMAN. C. A. 3d Cir. Certiorari denied. *Harold R. Schmidt* for petitioner. Reported below: 296 F. 2d 97.

No. 709. RICHTER ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Marvin Garfinkel, Stephen B. Narin* and *Theodore R. Mann* for petitioners. *Solicitor General Cox, Assistant Attorney General Orrick* and *Alan S. Rosenthal* for the United States. Reported below: 296 F. 2d 509.

No. 713. MURRAY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Louis Bender* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Joseph M. Howard* and *John M. Brant* for the United States. Reported below: 297 F. 2d 812.

No. 718. EAGLE-PICHER CO. *v.* HAYNES ET AL. C. A. 10th Cir. Certiorari denied. *John R. Wallace* and *A. C. Wallace* for petitioner. Reported below: 295 F. 2d 761.

No. 719. KLEIN, TRUSTEE IN BANKRUPTCY, *v.* HERMAN. C. A. 7th Cir. Certiorari denied. *Thomas D. Nash, Jr.* for petitioner. Respondent *pro se*. Reported below: 295 F. 2d 324.

No. 724. ANDREWS ET AL. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Robert E. Burns* for petitioners. *Solicitor General Cox* for the United States. Reported below: —— Ct. Cl. ——, 295 F. 2d 819.

No. 736. WHITEFISH LUMBER CO. *v.* INDUSTRIAL SUPPLY CO. ET AL. C. A. 9th Cir. Certiorari denied. *Leif Erickson* for petitioner. *Calvin S. Robinson* for respondents. Reported below: 296 F. 2d 136.

No. 559. CHOCTAWHATCHEE ELECTRICAL CO-OPERATIVES, INC., *v.* GREEN, COMPTROLLER OF FLORIDA. Supreme Court of Florida. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Alex Akerman, Jr., Thomas A. Ziebarth, Roscoe Pickett* and *W. J. Oven, Jr.* for petitioner. *Richard W. Ervin,* Attorney General of Florida, *Joseph C. Jacobs* and *Sam Spector,* Assistant Attorneys General, for respondent. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Joseph Kovner* and *William Massar* for the United States, in opposition to the petition. Reported below: 132 So. 2d 556.

No. 652. SHAPIRO ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Conrad T. Hubner* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Meyer Rothwacks* and *Carolyn R. Just* for respondent. Reported below: 295 F. 2d 306.

No. 509, Misc, ANDERSON *v.* KENTUCKY. Court of Appeals of Kentucky. Certiorari denied. Petitioner *pro se. John B. Breckinridge,* Attorney General of Kentucky, for respondent.

No. 717. CRUMP *v.* SAIN, SHERIFF. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN are of the opinion that certiorari should be granted. *Donald Page Moore* for petitioner. *Daniel P. Ward* and *Edward J. Hladis* for respondent. Reported below: 295 F. 2d 699.

No. 744. UNION LEADER CORP., DOING BUSINESS AS MANCHESTER UNION LEADER ET AL., *v.* CHAGNON, DOING BUSINESS AS CHAGNON'S GARDEN CENTER. Supreme Court of New Hampshire. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. *Edward P. Morgan* and *Herbert E. Forrest* for petitioner. *Stanley M. Brown* for respondent. Reported below: 103 N. H. 426, 174 A. 2d 825.

No. 480, Misc. MCCALLUM *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 705, Misc. VALENTINE *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 708.

No. 812, Misc. BAGGETT *v.* ALABAMA. Court of Appeals of Alabama. Certiorari denied. *Patrick W. Richardson* for petitioner. *MacDonald Gallion,* Attorney General of Alabama, and *John C. Tyson III,* Assistant Attorney General, for respondent. Reported below: —— Ala. App. ——, 133 So. 2d 33.

No. 815, Misc. EX PARTE BLAKELY. Court of Criminal Appeals of Texas. Certiorari denied.

No. 836, Misc. WOLFE *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 *Robert G. Maysack* for the United States.

No. 863, Misc. PETERS *v.* NEW MEXICO ET AL. Supreme Court of New Mexico. Certiorari denied.

No. 869, Misc. SPENCER *v.* GLADDEN, WARDEN. Supreme Court of Oregon. Certiorari denied.

No. 871, Misc. RAMIREZ *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *Whitman Knapp* for petitioner. Reported below: 10 N. Y. 2d 774, 177 N. E. 2d 56.

No. 925, Misc. TURNBAUGH *v.* RANDOLPH, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied.

No. 930, Misc. LIPSCOMB *v.* WARDEN, MARYLAND PENITENTIARY. Court of Appeals of Maryland. Certiorari denied.

No. 932, Misc. SPRINGER *v.* RICHMOND, WARDEN. Superior Court of Connecticut. Certiorari denied.

No. 933, Misc. FLOWERS *v.* RICHMOND, WARDEN. Superior Court of Connecticut. Certiorari denied.

No. 848, Misc. BANDY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Joseph M. Howard* for the United States. Reported below: 296 F. 2d 882.

Rehearing Denied.

No. 647. GULLO *v.* GULLO, 368 U. S. 988;

No. 212, Misc. CLINTON *v.* UNITED STATES, *ante*, p. 803;

No. 574, Misc. BANKS *v.* UNITED STATES, *ante*, p. 804;

No. 659, Misc. SLIVA *v.* PENNSYLVANIA ET AL., 368 U. S. 994;

No. 699, Misc. SCOTT *v.* SUPERIOR COURT OF LOS ANGELES COUNTY, 368 U. S. 996;

No. 819, Misc. SCOTT *v.* CITIZENS NATIONAL TRUST & SAVINGS BANK OF LOS ANGELES ET AL., 368 U. S. 1002; and

No. 835, Misc. RAINSBERGER *v.* LEYPOLDT, SHERIFF, 368 U. S. 516. Petitions for rehearing denied.

MARCH 27, 1962.

Dismissal Under Rule 60.

No. 567. CALLAHAN, COMMISSIONER OF LABOR AND INDUSTRIES OF MASSACHUSETTS, ET AL. *v.* GENERAL ELECTRIC CO. On petition for writ of certiorari to the United States Court of Appeals for the First Circuit. Petition dismissed pursuant to Rule 60 of the Rules of this Court. *Edward J. McCormack,* Attorney General of Massachusetts, *Joseph T. Doyle* and *Theodore R. Stanley,* Assistant Attorneys General, for petitioners. *Lewis H. Weinstein* and *F. Gerald Toye* for respondent. Reported below: 294 F. 2d 60.

APRIL 2, 1962.

Miscellaneous Orders.

No. 19. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES, *v.* MENDOZA-MARTINEZ. Appeal from the United States District Court for the Southern District of California. (Probable jurisdiction noted, 365 U. S. 809.) Argued October 10–11, 1961. This case is restored to the calendar for reargument. *Oscar H. Davis* argued the

cause for appellant. With him on the briefs were former *Solicitor General Rankin, Solicitor General Cox, Assistant Attorney General Miller, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Jerome M. Feit. Thomas R. Davis* argued the cause for appellee. With him on the brief was *John W. Willis. Jacob Wasserman, David Carliner, Rowland Watts, Stephen J. Pollak* and *Osmond K. Fraenkel* filed a brief for the American Civil Liberties Union, as *amicus curiae,* in support of appellee. Reported below: 192 F. Supp. 1.

No. 44. NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE *v.* GRAY, ATTORNEY GENERAL OF VIRGINIA, ET AL. Certiorari, 365 U. S. 842, to the Supreme Court of Appeals of Virginia. Argued November 8, 1961. This case is restored to the calendar for reargument. *Robert L. Carter* argued the cause for petitioner. With him on the briefs were *Oliver W. Hill, Herbert O. Reid* and *Frank D. Reeves. Henry T. Wickham* argued the cause for respondents. With him on the briefs was *David J. Mays.* Reported below: 202 Va. 142, 116 S. E. 2d 55.

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, 368 U. S. 808.) Argued March 21, 1962. This case is restored to the calendar for reargument. *Solicitor General Cox* argued the cause for appellant. With him on the briefs were *Assistant Attorney General Loevinger, Daniel M. Friedman, Lionel Kestenbaum* and *Richard A. Solomon. John T. Chadwell* argued the cause for appellees. With him on the briefs were *Richard W. McLaren, James A. Rahl, Jean Engstrom, Martin J. Purcell* and *John H. Lashly.*

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No. 70. GIBSON *v.* FLORIDA LEGISLATIVE INVESTIGATION COMMITTEE. Certiorari, 366 U. S. 917, to the Supreme Court of Florida. Argued December 5, 1961. This case is restored to the calendar for reargument. *Robert L. Carter* argued the cause for petitioner. With him on the brief was *Frank D. Reeves*. *Mark R. Hawes* argued the cause for respondent. With him on the brief was *Erle B. Askew*. Reported below: 126 So. 2d 129.

No. 76. TOWNSEND *v.* SAIN, SHERIFF, ET AL. Certiorari, 365 U. S. 866, to the United States Court of Appeals for the Seventh Circuit. Argued February 19, 1962. This case is restored to the calendar for reargument. *George N. Leighton* argued the cause and filed a brief for the petitioner. *Edward J. Hladis* argued the cause for respondents. With him on the briefs were *Daniel P. Ward* and *Benjamin S. Adamowski*. Reported below: 276 F. 2d 324.

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, 368 U. S. 809.) Argued February 27–28, 1962. These cases are restored to the calendar for reargument. MR. JUSTICE CLARK took no part in the consideration or decision of these cases. *Hubert D. Johnson* and *Neth L. Leachman* argued the cause for appellants. *Marvin S. Sloman* was with *Mr. Johnson* on the briefs for appellant in No. 90. *Mr. Leachman* was on the briefs for appellant in No. 91. *Quentin Keith* and *W. E. Cureton* argued the cause for appellee. With them on the briefs was *Cecil C. Rotsch*. Reported below: 161 Tex. 349, 341 S. W. 2d 161.

No. 255. UNITED STATES *v.* GILMORE ET AL. Certiorari, 368 U. S. 816, to the Court of Claims. Argued March 27–28, 1962. This case is restored to the calendar for reargument. *Wayne G. Barnett* argued the cause for the United States. On the briefs were *Solicitor General Cox, Assistant Attorney General Oberdorfer, Richard J. Medalie, Melva M. Graney, Harold C. Wilkenfeld* and *Arthur I. Gould. Eli Freed* argued the cause and filed briefs for respondents. Reported below: —— Ct. Cl. ——, 290 F. 2d 942.

No. 256. UNITED STATES *v.* PATRICK ET AL. Certiorari, 368 U. S. 817, to the United States Court of Appeals for the Fourth Circuit. Argued March 28, 1962. This case is restored to the calendar for reargument. *Wayne G. Barnett* argued the cause for the United States. On the briefs were *Solicitor General Cox, Assistant Attorney General Oberdorfer, Richard J. Medalie, Melva M. Graney, Harold C. Wilkenfeld* and *Arthur I. Gould. Robert M. Ward* argued the cause and filed a brief for respondents. Reported below: 288 F. 2d 292.

No. 264. HALLIBURTON OIL WELL CEMENTING CO. *v.* REILY, COLLECTOR OF REVENUE OF LOUISIANA. Appeal from the Supreme Court of Louisiana. (Probable jurisdiction noted, 368 U. S. 809.) Argued March 26–27, 1962. This case is restored to the calendar for reargument. *Benjamin B. Taylor, Jr.* argued the cause for appellant. With him on the briefs were *Robert O. Brown, Robert E. Rice, C. Vernon Porter, Laurance W. Brooks, Frank W. Middleton, Jr.* and *Tom F. Phillips. Chapman L. Sanford* argued the cause for appellee. With him on the briefs were *John B. Smullin* and *Emmett E. Batson.* Briefs of *amici curiae,* in support of appellant, were filed by *Cicero C. Sessions* for Sperry Rand Corp.; *Forrest M. Darrough* for Humble Oil & Refining Co.;

Charles D. Marshall for Thomas Jordan, Inc.; *Albert L. Hopkins* for Chicago Bridge & Iron Co.; *Ben R. Miller* for American Can Co.; and *Robert E. Leake, Jr.* for Rosson-Richards Processing Co. et al. Reported below: 241 La. 67, 127 So. 2d 502.

No. 278. PRESSER *v.* UNITED STATES. Certiorari, 368 U. S. 886, to the United States Court of Appeals for the Sixth Circuit. Argued March 22, 26, 1962. This case is restored to the calendar for reargument. *John G. Cardinal* argued the cause for petitioner. With him on the briefs were *Edwin Knachel* and *Robert E. Freed*. *Richard J. Medalie* argued the cause for the United States. On the briefs were *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer*. Reported below: 292 F. 2d 171.

Probable Jurisdiction Noted.

No. 735. UNITED STATES *v.* SAMPSON ET AL. Appeal from the United States District Court for the Northern District of Georgia. The motion to remand is denied. Probable jurisdiction is noted. *Solicitor General Cox* for the United States. *Randolph W. Thrower* for appellees. Reported below: See 298 F. 2d 826.

Certiorari Granted. (*See also No. 297, ante, p. 401; No. 317, ante, p. 402; and No. 687, ante, p. 403.*)

No. 366. DUGAN ET AL. *v.* RANK ET AL.; and

No. 606. CITY OF FRESNO *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari granted. THE CHIEF JUSTICE took no part in the consideration or decision of these applications. *Solicitor General Cox, J. William Doolittle, Roger P. Marquis* and *William H. Veeder* for petitioners in No. 366. *John H. Lauten* and *Claude L. Rowe* for petitioner in No. 606 and for respondents in No. 366. *Solicitor General Cox* and *Roger P. Marquis* for the United

States et al., and *Stanley Mosk,* Attorney General of California, *B. Abbott Goldberg, Denver C. Peckinpah, Adolph Moskowitz, James K. Abercrombie, Irl Davis Brett* and *J. O. Reavis* for the State of California et al., respondents in No. 606. Reported below: 293 F. 2d 340.

No. 739. Wolf et al. *v.* Weinstein et al. C. A. 2d Cir. Certiorari granted. *Melvin Lloyd Robbins* for petitioners. *Harold Harper, Arnold A. Weinstein, Alex L. Rosen* and *Marvin N. Rosen* for respondents. Reported below: 296 F. 2d 670, 678.

Certiorari Denied. (*See also No. 425, ante, p. 400.*)

No. 34. Saba et al. *v.* United States. C. A. 5th Cir. Certiorari denied. *J. Edward Worton* for petitioners. *Solicitor General Cox* for the United States. Reported below: 282 F. 2d 255.

No. 51. United Gas Pipe Line Co. *v.* Ideal Cement Co. C. A. 5th Cir. Certiorari denied. *E. Dixie Beggs* for petitioner. *Marion R. Vickers* for respondent. *Charles S. Rhyne* and *Herzel H. E. Plaine* for the City of Mobile, Alabama, as *amicus curiae,* in support of petitioner. Reported below: 282 F. 2d 574.

No. 701. Kitchens *v.* United States. C. A. 5th 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: 295 F. 2d 508.

No. 733. De Lucia *v.* Flagg. C. A. 7th Cir. Certiorari denied. *William Scott Stewart* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Philip R. Monahan* for respondent. Reported below: 297 F. 2d 58.

No. 725. TORRES *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. *Russell E. Parsons* for petitioner. Reported below: 56 Cal. 2d 864, 366 P. 2d 823.

No. 731. CITIZENS UTILITIES CO. *v.* PROUTY ET AL. Supreme Court of Vermont. Certiorari denied. *Jesse Climenko, George Trosk* and *Clifton G. Parker* for petitioner. *Arthur L. Graves* and *Edwin W. Lawrence* for respondents. Reported below: 122 Vt. 456, 176 A. 2d 751.

No. 732. ATHENS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Gilbert S. Rosenthal* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 297 F. 2d 639.

No. 737. NORTHERN VIRGINIA SUN PUBLISHING CO. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 4th Cir. Certiorari denied. *Philip W. Amram* and *Gilbert Hahn, Jr.* for petitioner. *Solicitor General Cox, Stuart Rothman, Dominick L. Manoli, Norton J. Come* and *Warren M. Davison* for the National Labor Relations Board, and *Seymour J. Spelman* for Wheeler et al., respondents. Reported below: 299 F. 2d 683.

No. 742. MEJIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Jack E. Hildreth* and *Arthur S. Bell, Jr.* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 301 F. 2d 907.

No. 596, Misc. BARBER *v.* GLADDEN, WARDEN. Supreme Court of Oregon. Certiorari denied.

No. 727. Washington State Board Against Discrimination et al. *v.* O'Meara et al.; and

No. 730. Jones et al. *v.* O'Meara et al. Supreme Court of Washington. Certiorari denied. The Chief Justice and Mr. Justice Stewart are of the opinion that certiorari should be granted, the judgment vacated and the cases remanded to the Supreme Court of Washington to ascertain whether such judgment was based upon a nonfederal ground adequate to support it. *John J. O'Connell,* Attorney General of Washington, and *Herbert H. Fuller,* Deputy Attorney General, for petitioners in No. 727. *Francis Hoague* for petitioners in No. 730. Reported below: 58 Wash. 2d 793, 365 P. 2d 1.

No. 734. Delaware Valley Marine Supply Co. *v.* American Tobacco Co. et al. C. A. 3d Cir. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. *Edwin P. Rome* for petitioner. *R. Sturgis Ingersoll, H. Francis DeLone, C. Brewster Rhoads, Joseph W. Swain, Jr.* and *J. B. H. Carter* for respondents. Reported below: 297 F. 2d 199.

No. 474, Misc. Harrell *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. 510, Misc. Muza *v.* California et al. Supreme Court of California. Certiorari denied. Petitioner *pro se. Stanley Mosk,* Attorney General of California, and *Robert R. Granucci,* Deputy Attorney General, for respondents.

No. 671, Misc. WASHINGTON *v.* HEINZE, WARDEN. 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. 921, Misc. FLOURNOY *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. 924, Misc. SWEENEY *v.* ILLINOIS. Circuit Court of Morgan County, Illinois. Certiorari denied.

No. 936, Misc. CLEGGETT *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 937, Misc. BURT *v.* KEATING. Supreme Court of California. Certiorari denied.

No. 938, Misc. EDWARDS *v.* MYERS, CORRECTIONAL INSTITUTION SUPERINTENDENT. Supreme Court of Pennsylvania. Certiorari denied.

No. 939, Misc. MILLS *v.* WILKINS, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 941, Misc. CRAWFORD *v.* HEARD, DIRECTOR, ET AL. Court of Criminal Appeals of Texas. Certiorari denied.

No. 942, Misc. BAKER *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

No. 945, Misc. FLEISCHER *v.* DISTRICT COURT OF APPEAL, THIRD APPELLATE DISTRICT. Supreme Court of California. Certiorari denied.

No. 943, Misc. STINSON *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 *Robert G. Maysack* for the United States.

No. 944, Misc. SUMPTER *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 947, Misc. TURNER *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied.

No. 948, Misc. WILLIAMS *v.* WILKINS, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 949, Misc. WALKER *v.* ARIZONA. Supreme Court of Arizona. Certiorari denied.

No. 953, Misc. ALLEN *v.* OHIO. Supreme Court of Ohio. Certiorari denied. Petitioner *pro se*. *C. Watson Hover* for respondent.

No. 29, Misc. BURKS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Morris Lavine* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 287 F. 2d 117.

No. 521, Misc. MILLS *v.* COLORADO. Supreme Court of Colorado. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *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: 146 Colo. 457, 362 P. 2d 152.

No. 581, Misc. CRAWFORD *v.* CIRCUIT COURT OF KALAMAZOO ET AL. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted, the judgment vacated and the case remanded to the District Court for a hearing on the issue of the alleged illegal search and seizure.

No. 1085, Misc. JOHNSON *v.* ELLIS, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted limited to the question of the alleged coerced confession. *Bernard A. Golding* for petitioner. *Frank Briscoe, Samuel H. Robertson, Jr.* and *Lee P. Ward, Jr.* for respondent. Reported below: 296 F. 2d 325.

Rehearing Denied.

No. 616. SINCLAIR ET AL. *v.* CALIFORNIA ET AL., 368 U. S. 986;

No. 624. HENDRICKSON *v.* UNITED STATES, 368 U. S. 986;

No. 636. TEITELBAUM *v.* COMMISSIONER OF INTERNAL REVENUE, 368 U. S. 987;

No. 635, Misc. STANMORE *v.* COLORADO, 368 U. S. 993;

No. 655, Misc. O'ROURKE *v.* NEW YORK, 368 U. S. 981;

No. 700, Misc. JOHNSON *v.* HORTON, 368 U. S. 515;

No. 866, Misc. SCOTT *v.* SUPERIOR COURT OF LOS ANGELES COUNTY, *ante*, p. 806; and

No. 901, Misc. SHOTKIN *v.* OLNEY ET AL., *ante*, p. 801. Petitions for rehearing denied.

No. 714, Misc. COLEMAN *v.* UNITED STATES, *ante*, p. 813. Petition for rehearing denied. MR. JUSTICE DOUGLAS is of the opinion that a response to the petition should be requested under Rule 58 (3).

APRIL 9, 1962.

Miscellaneous Order.

No. 142. SHOTWELL MANUFACTURING CO. ET AL. *v.* UNITED STATES. Certiorari, 368 U. S. 946, to the United States Court of Appeals for the Seventh Circuit. The motion of petitioners to postpone oral argument is granted. *George T. Christensen* and *William T. Kirby* for petitioners. Reported below: 287 F. 2d 667.

Certiorari Granted. (*See No. 29, ante, p. 422.*)

Certiorari Denied.

No. 683. PINTO ET AL. *v.* STATES MARINE CORPORATION OF DELAWARE ET AL. C. A. 2d Cir. Certiorari denied. *Jacob Rassner* for petitioners. *Arthur M. Boal* for Volusia Steamship Co. et al., *Victor S. Cichanowicz* for Mathiasen's Tanker Industries, Inc., *Robert M. Pellegrino* for Terminal Steamship Co., and *Corydon B. Dunham* for States Marine Corporation of Delaware, respondents. Reported below: 296 F. 2d 1, 281; 297 F. 2d 215, 494.

No. 720. GULF BOTTLERS, INC., *v.* NATIONAL LABOR RELATIONS BOARD. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Conrad Meyer III* and *Charles A. Hobbs* for petitioner. *Solicitor General Cox, Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 111 U. S. App. D. C. 383, 298 F. 2d 297.

No. 738. HARRIS, TRUSTEE IN BANKRUPTCY, *v.* STANDARD ACCIDENT & INSURANCE CO. C. A. 2d Cir. Certiorari denied. *William A. Hyman* for petitioner. *James B. Donovan* and *Patrick J. Hughes* for respondent. Reported below: 297 F. 2d 627.

No. 745. Order of Railway Conductors and Brakemen et al. *v.* Chicago, Milwaukee, St. Paul & Pacific Railroad Co. C. A. 7th Cir. Certiorari denied. *Burke Williamson, Jack A. Williamson* and *Harry Wilmarth* for petitioners. *James P. Reedy* for respondent. Reported below: 296 F. 2d 453.

No. 746. Diminich *v.* Esperdy, District Director, Immigration and Naturalization Service. C. A. 2d Cir. Certiorari denied. *Alfred Feingold* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for respondent. Reported below: 299 F. 2d 244.

No. 752. Dai Ming Shih 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 *Robert G. Maysack* for respondent. Reported below: 111 U. S. App. D. C. 380, 297 F. 2d 791.

No. 703. Mooring et al. *v.* United States. C. A. 4th Cir. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. *James B. Swails* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 299 F. 2d 92.

No. 570, Misc. Martin *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 *Thomas B. Yost,* Assistant Attorneys General, for respondent.

No. 583, Misc. WOODBURY *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se*. *Manuel W. Levine* for respondent.

No. 682, Misc. ETHERTON *v.* THOMAS, WARDEN. Court of Appeals of Kentucky. Certiorari denied. Petitioner *pro se*. *John B. Breckinridge,* Attorney General of Kentucky, and *Robert L. Montague III,* Assistant Attorney General, for respondent.

No. 916, Misc. MARTIN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall* and *Harold H. Greene* for the United States.

No. 917, Misc. PATRICK *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 931, Misc. LANDRY *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.

No. 955, Misc. EVANS *v.* DICKSON, WARDEN. Supreme Court of California. Certiorari denied.

No. 959, Misc. WHITE *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. 960, Misc. HILL *v.* WARDEN, MARYLAND PENITENTIARY. Court of Appeals of Maryland. Certiorari denied.

No. 975, Misc. BADAMO *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 977, Misc. BREWTON *v.* GLADDEN, WARDEN. Supreme Court of Oregon. Certiorari denied.

Rehearing Denied.

No. 540, Misc. TSIMPIDES ET AL. *v.* GILES, CIRCUIT COURT JUDGE, *ante*, p. 804; and

No. 763, Misc. LIPSCOMB *v.* UNITED STATES BOARD OF PAROLE, *ante*, p. 826. Petitions for rehearing denied.

APRIL 13, 1962.

Certiorari Denied.

No. 853. LUTON *v.* TEXAS ET AL. The motion to dispense with printing the petition for certiorari is granted. Petition for writ of certiorari to the Court of Criminal Appeals of Texas denied. MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this motion and application. *William VanDercreek* and *Tom Ryan* for petitioner. *Henry Wade* for respondents.

APRIL 16, 1962.*

Miscellaneous Orders.

No. 617. KER ET UX. *v.* CALIFORNIA. Certiorari, 368 U. S. 974, to the District Court of Appeal of California, Second Appellate District. The motion of petitioner for leave to proceed further herein *in forma pauperis* is granted. *Robert W. Stanley* for George D. Ker, petitioner.

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*MR. JUSTICE FRANKFURTER and MR. JUSTICE WHITE took no part in the consideration or decision of cases in which orders were this day announced.

No. 754. WISCONSIN ET AL. *v.* FEDERAL POWER COMMISSION;

No. 755. CALIFORNIA ET AL. *v.* FEDERAL POWER COMMISSION; and

No. 756. LONG ISLAND LIGHTING CO. ET AL. *v.* FEDERAL POWER COMMISSION. On petitions for writs of certiorari to the United States Court of Appeals for the District of Columbia Circuit. The motion of Phillips Petroleum Company to correct and amend titles and captions is granted. *Charles E. McGee, Lambert McAllister* and *Kenneth Heady* for movant.

No. 1273, Misc. IN RE DISBARMENT OF CHOPAK. It is ordered that Jules Chopak of New York, New York, be suspended from the practice of the law in this Court and that a rule issue, returnable within forty days, requiring him to show cause why he should not be disbarred from the practice of the law in this Court.

No. 985, Misc. RILEY *v.* OHIO ET AL. Motion for leave to file petition for writ of certiorari denied.

No. 1029, Misc. WILLIAMS *v.* HEINZE, WARDEN. Motion for leave to file petition for writ of habeas corpus denied.

No. 989, Misc. BENNETT *v.* SUPREME COURT OF ILLINOIS. Motion for leave to file petition for writ of mandamus denied.

Certiorari Granted. (*See also No. 851, Misc., ante, p. 426.*)

No. 771. PEARLMAN, TRUSTEE IN BANKRUPTCY, *v.* RELIANCE INSURANCE CO. C. A. 2d Cir. Certiorari granted. *Lowell Grosse* for petitioner. *Mark N. Turner* for respondent. Reported below: 298 F. 2d 655.

No. 765. GALLICK *v.* BALTIMORE & OHIO RAILROAD Co. Court of Appeals of Ohio, Cuyahoga County. Certiorari granted. *Marshall I. Nurenberg* and *Meyer A. Cook* for petitioner. *Raymond T. Jackson* and *Alexander H. Hadden* for respondent. Reported below: 173 N. E. 2d 382.

Certiorari Denied. (*See also No. 751, ante, p. 423; No. 624, Misc., ante, p. 425; and No. 926, Misc., ante, p. 428.*)

No. 582. LLOYD BRASILEIRO PATRIMONIO NACIONAL *v.* MURPHY-COOK & Co. C. A. 3d Cir. Certiorari denied. *T. E. Byrne, Jr.* for petitioner. Reported below: 294 F. 2d 32.

No. 612. SPEICE *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. *Julius Lucius Echeles* for petitioner. *William G. Clark,* Attorney General of Illinois, and *William C. Wines,* Assistant Attorney General, for respondent. Reported below: 23 Ill. 2d 40, 177 N. E. 2d 233.

No. 651. RHODES *v.* SIGLER. Supreme Court of Nebraska. Certiorari denied. Petitioner *pro se*. *Clarence A. H. Meyer,* Attorney General of Nebraska, and *Cecil S. Brubaker,* Assistant Attorney General, for respondent. Reported below: 172 Neb. 439, 109 N. W. 2d 731.

No. 723. ESTATE OF ARENTS *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Sidney W. Davidson* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer, I. Henry Kutz* and *Carolyn R. Just* for respondent. Reported below: 297 F. 2d 894.

No. 678. General Geophysical Co. *v.* United States. C. A. 5th Cir. Certiorari denied. *Homer L. Bruce* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Harry Baum* for the United States. Reported below: 296 F. 2d 86.

No. 711. Nadler *v.* Securities and Exchange Commission et al. C. A. 2d Cir. Certiorari denied. *Cameron I. Kay* and *Robert Reed Gray* for petitioner. *Solicitor General Cox, Peter A. Dammann* and *David Ferber* for the Securities and Exchange Commission, *Bruce Bromley, Allen F. Maulsby* and *John W. Barnum* for Dynamics Corporation of America, and *Bernard D. Cahn* for Securities Corporation General, respondents. Reported below: 296 F. 2d 63.

No. 714. Illinois et al. *v.* United States Civil Service Commission. C. A. 7th Cir. Certiorari denied. *William G. Clark,* Attorney General of Illinois, *William C. Wines, Raymond S. Sarnow, A. Zola Groves* and *Aubrey Kaplan,* Assistant Attorneys General, for petitioners. *Solicitor General Cox, Assistant Attorney General Orrick, Morton Hollander* and *Sherman L. Cohn* for respondent. Reported below: 297 F. 2d 450.

No. 740. Wright et al. *v.* Wagner et al. Supreme Court of Pennsylvania. Certiorari denied. *Isidor Ostroff* for petitioners. *James L. Stern* and *David Berger* for respondents. Reported below: 405 Pa. 546, 175 A. 2d 875.

No. 743. Black *v.* Sinclair Oil & Gas Co. C. A. 5th Cir. Certiorari denied. *Robert L. Ivy* for petitioner. Reported below: 294 F. 2d 580.

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No. 747. Shaw Warehouse Co. et al. *v.* Southern Railway Co. et al. C. A. 5th Cir. Certiorari denied. *A. Alvis Layne, David J. Vann, E. L. All* and *Francis H. Hare* for petitioners. *Joseph F. Johnston* for respondents. Reported below: 288 F. 2d 759; 294 F. 2d 850.

No. 749. McCarthy et al. *v.* United States. C. A. 7th Cir. Certiorari denied. *Julius Lucius Echeles* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 297 F. 2d 183.

No. 753. Wood et al. *v.* United States. C. A. 5th Cir. Certiorari denied. *Joe T. Patterson,* Attorney General of Mississippi, *Dugas Shands* and *Edward L. Cates,* Assistant Attorneys General, and *Peter M. Stockett, Jr.,* Special Assistant Attorney General, for petitioners. *Solicitor General Cox, Assistant Attorney General Marshall* and *Harold H. Greene* for the United States. Reported below: 295 F. 2d 772.

No. 757. Consolidated Edison Company of New York, Inc., *v.* United States. Court of Claims. Certiorari denied. *James K. Polk, Richard Joyce Smith* and *Julius M. Jacobs* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *John B. Jones, Jr.* for the United States.

No. 769. Rogers *v.* Hodges, Secretary of Commerce, et al. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Andrew A. Lipscomb* for petitioner. *Solicitor General Cox, Assistant Attorney General Orrick* and *Alan S. Rosenthal* for respondents. Reported below: 111 U. S. App. D. C. 358, 297 F. 2d 435.

No. 758. Locklin et al., doing business as Radiant Color Co., *v.* Switzer Brothers, Inc., et al.; and

No. 759. Switzer Brothers, Inc., et al. *v.* Locklin et al., doing business as Radiant Color Co. C. A. 7th Cir. Certiorari denied. *Carl Hoppe* for Locklin et al. *M. Hudson Rathburn* for Switzer Brothers, Inc., et al. Reported below: 297 F. 2d 39.

No. 760. Village of Maywood *v.* Illinois Commerce Commission et al. Supreme Court of Illinois. Certiorari denied. *F. Joseph Donohue* for petitioner. *William G. Clark,* Attorney General of Illinois, *Edward V. Hanrahan,* Assistant Attorney General, and *Justin A. Stanley* for respondents. Reported below: 23 Ill. 2d 447, 178 N. E. 2d 345.

No. 768. Local Union 760, International Brotherhood of Electrical Workers, *v.* Presley et al. C. A. 6th Cir. Certiorari denied. *Joe Van Derveer* for petitioner. *E. H. Rayson* and *R. R. Kramer* for respondents. Reported below: 296 F. 2d 731.

No. 770. Adelman *v.* Paramount Pictures, Inc., et al. C. A. 5th Cir. Certiorari denied. *Thomas C. McConnell* for petitioner. *William R. Brown* and *Joseph Irion Worsham* for respondents. Reported below: 296 F. 2d 308.

No. 774. Harris Structural Steel Co., Inc., *v.* United Steelworkers of America, AFL–CIO, Local 3682, et al. C. A. 3d Cir. Certiorari denied. *William W. Lanigan* and *M. Harvey Smedley* for petitioner. *David E. Feller, Elliott Bredhoff, Jerry D. Anker, Samuel L. Rothbard* and *Abraham L. Friedman* for respondents. Reported below: 298 F. 2d 363.

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No. 781. KYLES *v.* JAMES W. ELWELL & CO. ET AL. C. A. 7th Cir. Certiorari denied. Petitioner *pro se.* *Stuart B. Bradley* for respondents. Reported below: 296 F. 2d 703.

No. 802. SAN JUAN DARLINGTON, INC., *v.* NEGRON ET AL. Supreme Court of Puerto Rico. Motion of respondents to dispense with printing brief in opposition granted. Certiorari denied. *William G. Grant* and *Benicio F. Sanchez* for petitioner. *Santos P. Amadeo* for respondents. Reported below: 83 P. R. ——.

No. 557, Misc. PETHICK *v.* PATE, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied. Petitioner *pro se.* *William G. Clark,* Attorney General of Illinois, for respondent.

No. 569, Misc. FORD *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 *Richard D. Lee,* Deputy Attorney General, for respondents.

No. 638, Misc. WHITE *v.* SACKS, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied.

No. 644, Misc. WILLIAMS *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.

No. 785, Misc. MORONES *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. 797, Misc. MYERS *v.* COX, WARDEN, ET AL. Supreme Court of New Mexico. Certiorari denied. Petitioner *pro se*. *Earl E. Hartley*, Attorney General of New Mexico, for Cox, respondent.

No. 940, Misc. HILDEBRANDT *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 950, Misc. SIERRA *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: 297 F. 2d 531.

No. 961, Misc. BOYES *v.* UNITED STATES. C. A. 10th 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: —— F. 2d ——.

No. 963, Misc. WATERSON, ALIAS JANDA, *v.* NEW YORK. Appellate Division, Supreme Court of New York, Fourth Judicial Department. Certiorari denied.

No. 966, Misc. NETTLES *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 23 Ill. 2d 306, 178 N. E. 2d 361.

No. 979, Misc. LIPSCOMB *v.* UNITED STATES. C. A. 8th 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: 298 F. 2d 9.

No. 967, Misc. RINKES *v.* RHAY, PENITENTIARY SUPERINTENDENT. Supreme Court of Washington. Certiorari denied.

No. 971, Misc. ENZOR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Sidney M. Glazer* and *Beatrice Rosenberg* for the United States. Reported below: 296 F. 2d 62.

No. 972, Misc. DISILVESTRO *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.

No. 976, Misc. BRATCHER *v.* WILKINS, WARDEN, ET AL. C. A. 2d Cir. Certiorari denied.

No. 981, Misc. REID *v.* RICHMOND, WARDEN. Supreme Court of Errors of Connecticut. Certiorari denied.

No. 982, 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, Harold H. Greene* and *Howard A. Glickstein* for the United States.

No. 983, Misc. HAMLIN *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 987, Misc. URTADO *v.* HEARD, ACTING CORRECTIONS DIRECTOR. Court of Criminal Appeals of Texas. Certiorari denied.

No. 992, Misc. QUIRK *v.* CONNECTICUT. Supreme Court of Errors of Connecticut. Certiorari denied.

No. 993, Misc. JEFFERSON *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

No. 994, Misc. MASON *v.* NEW YORK. Appellate Division, Supreme Court of New York, First Judicial Department. Certiorari denied.

No. 995, Misc. KEY *v.* NEW YORK. Appellate Division, Supreme Court of New York, First Judicial Department. Certiorari denied.

No. 1003, Misc. WILLIAMS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 1004, Misc. WILLIAMS *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 226 Md. 614, 174 A. 2d 719.

No. 1009, Misc. BOYD *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 226 Md. 614, 174 A. 2d 719.

No. 1013, Misc. CUMBERLAND *v.* WARDEN, MARYLAND PENITENTIARY. Court of Appeals of Maryland. Certiorari denied. Reported below: 225 Md. 636, 171 A. 2d 709.

No. 1016, Misc. MCGRADY *v.* CUNNINGHAM, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied. *Perkins Wilson* for petitioner. Reported below: 296 F. 2d 600.

No. 1015, Misc. POOLE *v.* HEARD, CORRECTIONS DIRECTOR, ET AL. Court of Criminal Appeals of Texas. Certiorari denied.

No. 1011, Misc. CLINTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States. Reported below: 297 F. 2d 899.

No. 1018, Misc. SMEICH ET AL. *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 1026, Misc. WILBURN *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. Reported below: See 195 Cal. App. 2d 702, 16 Cal. Rptr. 97.

No. 1030, Misc. BOWMAN *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: —— F. 2d ——.

No. 1042, Misc. EDWARDS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: —— F. 2d ——.

No. 1052, Misc. ALLISON *v.* ALABAMA. 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. Reported below: 137 So. 2d 761.

No. 1031, Misc. Cooper *v.* Pate, Warden. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 1034, Misc. Sears *v.* Walker, Warden, et al. Supreme Court of Louisiana. Certiorari denied.

No. 1035, Misc. In re Hitchcock. C. A. 9th Cir. Certiorari denied.

No. 530, Misc. Farley *v.* United States. C. A. 2d Cir. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. 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 789.

No. 954, Misc. Gaitan *v.* United States. C. A. 10th Cir. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. *Walter L. Gerash* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 295 F. 2d 277.

Rehearing Denied.

No. 81. Griggs *v.* Allegheny County, *ante*, p. 84;

No. 690. Nunn, Receiver, et al. *v.* Feltinton et al., *ante*, p. 817;

No. 737, Misc. Anderten *v.* United States, 368 U. S. 1004; and

No. 825, Misc. Leach et al. *v.* Florida, 368 U. S. 1005. Petitions for rehearing denied.

No. 1081, Misc. Ex parte Lee, *ante*, p. 816. Petition for rehearing denied. Mr. Justice Black took no part in the consideration or decision of this application.

APRIL 20, 1962.

Dismissal Under Rule 60.

No. 814, Misc. CAULFIELD *v.* U. S. DEPARTMENT OF AGRICULTURE ET AL. On petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit. Petition dismissed pursuant to stipulation under Rule 60 of the Rules of this Court. *J. D. DeBlieux* for petitioner. *Solicitor General Cox* for respondents. Reported below: 293 F. 2d 217.

APRIL 23, 1962.*

Probable Jurisdiction Noted.

No. 619. WHITE MOTOR CO. *v.* UNITED STATES. Appeal from the United States District Court for the Northern District of Ohio. Probable jurisdiction noted. MR. JUSTICE WHITE took no part in the consideration or decision of this case. *Gerhard A. Gesell, John H. Watson, Jr., John T. Scott* and *Nestor S. Foley* for appellant. *Solicitor General Cox, Assistant Attorney General Loevinger* and *Richard A. Solomon* for the United States. Reported below: 194 F. Supp. 562.

Certiorari Granted. (*See No. 396, Misc., ante, p. 436; and No. 634, Misc., ante, p. 437.*)

Certiorari Denied.

No. 776. LONG *v.* ILLINOIS CENTRAL RAILROAD CO. Appellate Court of Illinois, Third District. Certiorari denied. *John Alan Appelman* and *Jo B. Gardner* for petitioner. *Enos L. Phillips, Herbert J. Deany, Robert S. Kirby* and *Joseph H. Wright* for respondent. Reported below: 32 Ill. App. 2d 103, 176 N. E. 2d 812.

*MR. JUSTICE FRANKFURTER took no part in the consideration or decision of cases in which orders were this day announced.

No. 767. JACKSON *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *William H. Collins* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 112 U. S. App. D. C. 191, 301 F. 2d 515.

No. 772. EISNER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Henry J. Cook* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 297 F. 2d 595.

No. 779. FIELD, TRUSTEE IN BANKRUPTCY, *v.* BANKERS TRUST CO. ET AL. C. A. 2d Cir. Certiorari denied. *Edward I. Koch* for petitioner. *Henry B. Singer* for Bankers Trust Co., and *John A. Wilson* for First National City Bank, respondents. Reported below: 296 F. 2d 109.

No. 785. KAHM *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *James Malcolm Williams* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 300 F. 2d 78.

No. 788. VON HENNIG, ANCILLARY EXECUTOR, *v.* KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *John W. Pehle* for petitioner. *Solicitor General Cox, Assistant Attorney General Orrick, John G. Laughlin, Jr.* and *Pauline B. Heller* for respondent. Reported below: 111 U. S. App. D. C. 298, 296 F. 2d 420.

No. 775. HOHENSEE *v.* NIELSEN ET AL. Supreme Court of Washington. Certiorari denied. *Reginald B. Jackson* for petitioner. *Maurice Kadish* for Nielsen, respondent.

No. 780. BALTIMORE LUGGAGE CO. ET AL. *v.* FEDERAL TRADE COMMISSION. C. A. 4th Cir. Certiorari denied. *Albert L. Sklar* and *Robert L. Sullivan, Jr.* for petitioners. *Solicitor General Cox, Assistant Attorney General Loevinger, Richard A. Solomon, Irwin A. Seibel* and *James McI. Henderson* for respondent. Reported below: 296 F. 2d 608.

No. 783. RAILWAY EXPRESS AGENCY, INC., *v.* JACKSONVILLE TERMINAL CO. C. A. 5th Cir. Certiorari denied. *John S. Cox, William Hart Sibley* and *James E. Thomas* for petitioner. *Elliott Adams* for respondent. Reported below: 296 F. 2d 256.

No. 784. GENERAL MOTORS CORP. *v.* ELLIOTT. C. A. 7th Cir. Certiorari denied. *Theodore L. Locke* and *Hugh E. Reynolds, Jr.* for petitioner. *Leon D. Cline* and *Howard S. Young, Jr.* for respondent. Reported below: 296 F. 2d 125.

No. 787. BRYSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Edward Bennett Williams* and *Harold Ungar* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 298 F. 2d 619.

No. 790. D. LOVEMAN & SON EXPORT CORP. ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. *Richard Katcher* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Harry Baum* for respondent. Reported below: 296 F. 2d 732.

No. 791. Cadez et al., doing business as Central Distributing Co., *v.* General Casualty Company of America et al. C. A. 10th Cir. Certiorari denied. Petitioners *pro se*. *Charles W. Johnson* and *Eugene S. Hames* for respondents. Reported below: 298 F. 2d 535.

No. 803. Locklin et al., doing business as Radiant Color Co., *v.* Switzer Brothers, Inc. C. A. 9th Cir. Certiorari denied. *Stephen S. Townsend* and *Charles E. Townsend, Jr.* for petitioners. *Benjamin H. Sherman* and *John F. Swain* for respondent. Reported below: 299 F. 2d 160.

No. 822. Trinidad Corporation *v.* Indian Towing Co., Inc. C. A. 5th Cir. Certiorari denied. *Joseph M. Rault* for petitioner. *Eberhard P. Deutsch* for respondent. Reported below: 293 F. 2d 107.

No. 715. Fleck et al. *v.* Cleveland Bar Association. Supreme Court of Ohio. Certiorari denied. Mr. Justice Black is of the opinion that certiorari should be granted. *Frederick Bernays Wiener* and *David I. Sindell* for petitioners. *Paul J. Gnau* and *Burt J. Fulton* for respondent. Reported below: 172 Ohio St. 467, 178 N. E. 2d 782.

No. 786. Carnes et al. *v.* United States. C. A. 5th Cir. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. *Robert E. Andrews* and *Frank B. Stow* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Robert S. Erdahl* and *Philip R. Monahan* for the United States. Reported below: 295 F. 2d 598.

No. 590, Misc. Sims *v.* Illinois. Supreme Court of Illinois. Certiorari denied.

No. 632, Misc. DANIELS *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied.

No. 929, Misc. NEAR *v.* CUNNINGHAM, PENITENTIARY SUPERINTENDENT. Supreme Court of Appeals of Virginia. Certiorari denied. *Robert Randolph Jones, W. Griffith Purcell* and *W. A. Hall, Jr.* for petitioner. *Reno S. Harp III,* Assistant Attorney General of Virginia, for respondent. Reported below: See 202 Va. 20, 116 S. E. 2d 85.

No. 1019, Misc. RUSSELL *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 1024, Misc. DORES, ADMINISTRATOR, *v.* ANDERSON ET AL., DOING BUSINESS AS ANDERSON & NEAL TRUCKING CO., ET AL. C. A. 5th Cir. Certiorari denied. *Alex Akerman, Jr., Thomas A. Ziebarth* and *J. B. Hodges* for petitioner. Reported below: 295 F. 2d 496.

No. 1025, Misc. CASIAS *v.* COLORADO. Supreme Court of Colorado. Certiorari denied.

No. 1043, Misc. ARGO *v.* ALABAMA. 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. Reported below: 137 So. 2d 757.

No. 1044, Misc. HOLLIS *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied.

No. 1051, Misc. WALLACE *v.* CONNECTICUT. Superior Court of Connecticut. Certiorari denied.

No. 1055, Misc. LANDFORD *v.* COLORADO. Supreme Court of Colorado. Certiorari denied.

No. 1056, Misc. DRAKE *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.

No. 1107, Misc. FENTON *v.* OHIO. Supreme Court of Ohio. Certiorari denied. *Robert D. Moss* for petitioner.

No. 1235, Misc. ANDERSON *v.* KENTUCKY. Court of Appeals of Kentucky. Certiorari denied.

Rehearing Denied.

No. 653. REDFIELD *v.* UNITED STATES, *ante*, p. 803. Rehearing denied. MR. JUSTICE WHITE took no part in the consideration or decision of this application.

APRIL 30, 1962.*

Miscellaneous Order.

No. 22. SCHOLLE *v.* HARE, SECRETARY OF STATE OF MICHIGAN, ET AL., *ante*, p. 429. The motion of the appellant for the immediate issuance of the mandate is denied.

Probable Jurisdiction Noted.

No. 763. SCHROEDER *v.* CITY OF NEW YORK. Appeal from the Court of Appeals of New York. The motion of Goldstein & Goldstein et al. for leave to file brief, as *amici curiae*, is granted. Probable jurisdiction noted. *Louis B. Scheinman* for appellant. *Leo A. Larkin* and *Seymour B. Quel* for appellee. *Benjamin M. Goldstein* for Goldstein & Goldstein et al. Reported below: 10 N. Y. 2d 522, 180 N. E. 2d 568.

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*MR. JUSTICE FRANKFURTER took no part in the consideration or decision of cases in which orders were this day announced.

Certiorari Denied. (*See also No. 687, Misc., ante, p. 525.*)

No. 741. ADAMS ET AL. *v.* FEDERAL TRADE COMMISSION. C. A. 8th Cir. Certiorari denied. *James C. Wilson* for petitioners. *Solicitor General Cox, Assistant Attorney General Loevinger, Richard A. Solomon, James McI. Henderson* and *Alvin L. Berman* for respondent. Reported below: 296 F. 2d 861.

No. 797. WESTON ET AL. *v.* NEW JERSEY STATE BOARD OF OPTOMETRISTS. Supreme Court of New Jersey. Certiorari denied. *Morton Stavis* for petitioners. *Arthur J. Sills,* Attorney General of New Jersey, *Robert B. Kroner,* Deputy Attorney General, *William K. Miller* and *Herman D. Ringle* for respondent. Reported below: 36 N. J. 258, 176 A. 2d 479.

No. 798. ALFRED DUNHILL OF LONDON, INC., *v.* DUNHILL TAILORED CLOTHES, INC. United States Court of Customs and Patent Appeals. Certiorari denied. *Leslie D. Taggart* and *Nicholas John Stathis* for petitioner. *Milton Handler* and *Sidney A. Diamond* for respondent. Reported below: 49 C. C. P. A. (Pat.) 730, 293 F. 2d 685.

No. 804. NEELY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *John P. Frank* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Joseph M. Howard* for the United States. Reported below: 300 F. 2d 67.

No. 808. GUNZBURG *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *G. Wray Gill* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 297 F. 2d 829.

No. 812. Miles Laboratories, Inc., *v.* Frolich, doing business as Encino Chemicals. C. A. 9th Cir. Certiorari denied. *William T. Woodson, Beverly W. Pattishall* and *Reginald E. Caughey* for petitioner. Respondent *pro se*. Reported below: 296 F. 2d 740.

No. 815. Paltier Corporation *v.* Union Asbestos & Rubber Co. C. A. 7th Cir. Certiorari denied. *Edward W. Osann, Jr.* for petitioner. *Norman Lettvin* and *Edwin S. Booth* for respondent. Reported below: 298 F. 2d 48.

No. 818. United States Lines Co. et al. *v.* Van Carpals. C. A. 2d Cir. Certiorari denied. *Thomas Coyne* and *Charles N. Fiddler* for petitioners. *Simone N. Gazan* for respondent. Reported below: 297 F. 2d 9.

No. 841. Herman Schwabe, Inc., *v.* United Shoe Machinery Corp. C. A. 2d Cir. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. *James M. Malloy, Richard A. Sullivan* and *Ralph Warren Sullivan* for petitioner. *Theodore Kiendl, Ralph M. Carson, Robert D. Salinger* and *Louis L. Stanton, Jr.* for respondent. Reported below: 297 F. 2d 906.

No. 795. Cohen *v.* United States. C. A. 9th Cir. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. Mr. Justice White took no part in the consideration or decision of this application. *A. L. Wirin* and *Fred Okrand* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Joseph M. Howard* for the United States. Reported below: 297 F. 2d 760.

No. 92, Misc. Cox *v.* Ellis, Corrections Director. Court of Criminal Appeals of Texas. Certiorari denied. Petitioner *pro se*. *Will Wilson,* Attorney General of Texas, and *Sam R. Wilson, Leon F. Pesek* and *Charles Lind,* Assistant Attorneys General, for respondent. Reported below: 169 Tex. Cr. R. xii, 338 S. W. 2d 711.

No. 607, Misc. Keene *v.* Alabama. 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. Reported below: 272 Ala. 596, 133 So. 2d 246.

No. 686, Misc. Foster *v.* Ellis, Corrections Director. Court of Criminal Appeals of Texas. Certiorari denied. Petitioner *pro se*. *Will Wilson,* Attorney General of Texas, *Leon F. Pesek* and *Norman V. Suarez,* Assistant Attorneys General, for respondent. Reported below: 170 Tex. Cr. R. 61, 338 S. W. 2d 458.

No. 712, Misc. Carmel *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. Reported below: 294 F. 2d 524.

No. 766, Misc. Vaughn *v.* Texas et al. Court of Criminal Appeal of Texas. Certiorari denied. Petitioner *pro se*. *Will Wilson,* Attorney General of Texas, and *Sam R. Wilson, Leon F. Pesek* and *Charles R. Lind,* Assistant Attorneys General, for the State of Texas, respondent.

No. 1141, Misc. Forcella *v.* New Jersey. Supreme Court of New Jersey. Certiorari denied. *Frank A. Paglianite* for petitioner. *Peter Murray* for respondent. Reported below: 35 N. J. 168, 171 A. 2d 649.

No. 834, Misc. HAYES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Stanley M. Rosenblum* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 296 F. 2d 657.

No. 889, Misc. ROBERTS *v.* UNITED STATES. C. A. 4th 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 198.

No. 902, Misc. CAMPBELL *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: 291 F. 2d 401.

No. 1050, Misc. WOYKOVSKY *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. Reported below: 297 F. 2d 179.

No. 1054, Misc. KARP *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: 296 F. 2d 564.

No. 1062, Misc. FILOCOMO *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 1063, Misc. MARQUEZ *v.* DISTRICT COURT OF APPEAL, THIRD APPELLATE DISTRICT. Supreme Court of California. Certiorari denied.

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No. 1064, Misc. PERRY *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 1192, Misc. DUKES *v.* SAIN, SHERIFF. C. A. 7th Cir. Certiorari denied. *Charles A. Bellows* for petitioner. Reported below: 297 F. 2d 799.

No. 588, Misc. KOSTAL ET AL. *v.* STONER, JUDGE, ET AL. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Petitioners *pro se*. *F. E. Dickerson* for respondents. Reported below: 292 F. 2d 492.

No. 907, Misc. EX PARTE STICKNEY. Court of Criminal Appeals of Texas. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Petitioner *pro se*. *Carl E. F. Dally* for the State of Texas, respondent.

Rehearing Denied.

No. 581, Misc. CRAWFORD *v.* CIRCUIT COURT OF KALAMAZOO ET AL., *ante*, p. 842. Rehearing denied. MR. JUSTICE WHITE took no part in the consideration or decision of this application.

MAY 14, 1962.*

Miscellaneous Orders.

No. ——. CARBO *v.* UNITED STATES. The application for review of the order of the Circuit Justice denying bail pending appeal is denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. *William B. Beirne, A. L. Wirin* and *Fred Okrand* for petitioner.

*MR. JUSTICE FRANKFURTER took no part in the consideration or decision of cases in which orders were this day announced.

No. 13, Original. TEXAS *v.* NEW JERSEY ET AL. On a motion for leave to file a bill of complaint. The defendants are directed to file, on or before June 1st, a response, or responses, to the prayers for temporary injunctions contained in Paragraphs 3 and 4 of the motion for leave to file the bill of complaint. *Will Wilson,* Attorney General of Texas, and *Henry G. Braswell,* Assistant Attorney General, for the State of Texas, plaintiff.

No. 602, Misc. CHAAPEL *v.* COCHRAN, CORRECTIONS DIRECTOR. This motion for leave to file an application for a writ of habeas corpus is hereby transferred "for hearing and determination" to the United States District Court for the Southern District of Florida. 28 U. S. C. § 2241 (b); Rule 31 (5), Revised Rules of the Supreme Court of the United States (1954); *Ex parte Abernathy,* 320 U. S. 219. MR. JUSTICE WHITE took no part in the consideration or disposition of this motion.

No. 1119, Misc. EX PARTE SCHLETTE. Motion for leave to file petition for writ of habeas corpus denied.

No. 1040, Misc. GEORGE *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA. Motion for leave to file petition for writ of mandamus denied.

Certiorari Granted. (*See also No. 214, ante, p. 659; No. 227, Misc., ante, p. 658; No. 311, Misc., ante, p. 661; No. 726, ante, p. 660; and No. 773, Misc., ante, p. 662.*)

No. 809. FAY, WARDEN, ET AL. *v.* NOIA. C. A. 2d Cir. Certiorari granted. *Edward S. Silver* and *William I. Siegel* for petitioners. *Leon B. Polsky* for respondent. *Louis J. Lefkowitz,* Attorney General of New York, filed

a brief as *amicus curiae* (*Joseph J. Rose,* Assistant Attorney General, of counsel) in support of the petition. Reported below: 300 F. 2d 345.

No. 819. EDWARDS ET AL. *v.* SOUTH CAROLINA. Supreme Court of South Carolina. Certiorari granted. *Jack Greenberg, Constance Baker Motley, James M. Nabrit III, Matthew J. Perry, Lincoln C. Jenkins, Jr.* and *Donald James Sampson* for petitioners. *Daniel R. McLeod,* Attorney General of South Carolina, *Everett N. Brandon,* Assistant Attorney General, and *J. C. Coleman, Jr.* for respondent. Reported below: 239 S. C. 339, 123 S. E. 2d 247.

No. 754. WISCONSIN ET AL. *v.* FEDERAL POWER COMMISSION ET AL.;

No. 755. CALIFORNIA ET AL. *v.* FEDERAL POWER COMMISSION ET AL.; and

No. 756. LONG ISLAND LIGHTING CO. ET AL. *v.* FEDERAL POWER COMMISSION ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *John W. Reynolds,* Attorney General of Wisconsin, *Roy G. Tulane,* Assistant Attorney General, *William E. Torkelson, Kent H. Brown, Barbara M. Suchow* and *Morton L. Simons* for petitioners in No. 754. *William M. Bennett* and *John T. Murphy* for petitioners in No. 755. *David K. Kadane, Bertram D. Moll, Vincent P. McDevitt, Samuel Graff Miller, J. David Mann, Jr., William W. Ross* and *John E. Holtzinger, Jr.* for petitioners in No. 756. *Solicitor General Cox, Assistant Attorney General Orrick, John G. Laughlin, Jr., Kathryn H. Baldwin, Ralph S. Spritzer, Howard E. Wahrenbrock* and *Arthur H. Fribourg* for the Federal Power Commission, and *Charles E. McGee, Lambert McAllister* and *Kenneth Heady* for Phillips Petroleum Co., respondents. Reported below: 112 U. S. App. D. C. 369, 303 F. 2d 380.

Certiorari Denied. (*See also No. 584, Misc., ante, p. 656; No. 1048, Misc., ante, p. 657; and No. 1110, Misc., ante, p. 658.*)

No. 792. Steel Equipment Co. et al. *v.* Eberhart, Special Agent, Internal Revenue Service. C. A. 6th Cir. Certiorari denied. *John Kennedy Lynch* and *Raymond E. Cookston* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *I. Henry Kutz* for respondent. Reported below: 296 F. 2d 685.

No. 806. Garfield *v.* Palmieri. C. A. 2d Cir. Certiorari denied. *Gustave B. Garfield* for petitioner. *Solicitor General Cox, Assistant Attorney General Orrick* and *Alan S. Rosenthal* for respondent. Reported below: 297 F. 2d 526.

No. 807. Brilliant *v.* United States. C. A. 8th Cir. Certiorari denied. *Bernard J. Mellman* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 297 F. 2d 385.

No. 810. Livingstone *v.* Fatima Charities, Inc., et al. C. A. 1st Cir. Certiorari denied. *Harry Sacher* for petitioner. *Earle W. Carr* for respondents. Reported below: 297 F. 2d 836.

No. 820. Flight Engineers' International Association, AFL–CIO, CAL Chapter, *v.* Continental Air Lines, Inc., et al. C. A. 9th Cir. Certiorari denied. *I. J. Gromfine, Herman Sternstein* and *Charles K. Hackler* for petitioner. *Patrick M. Westfeldt* and *William E. Murane* for Continental Air Lines, Inc., and *Samuel J. Cohen* for Air Line Pilots Association, International, respondents. Reported below: 297 F. 2d 397.

No. 811. RODDY *v.* CIVIL AERONAUTICS BOARD ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Charles E. Robbins* for petitioner. *Solicitor General Cox, Assistant Attorney General Loevinger, Richard A. Solomon, Joseph B. Goldman, O. D. Ozment, William F. Becker, Nathaniel H. Goodrich* and *James D. Hill* for respondents. Reported below: 112 U. S. App. D. C. 52, 299 F. 2d 136.

No. 814. IN RE APPLICATION OF ARTHUR J. PLANTAMURA FOR ADMISSION TO THE BAR. Supreme Court of Errors of Connecticut. Certiorari denied. *Arthur J. Plantamura* and *William I. McCullough, Jr.* for petitioner. *Joseph G. Shapiro* for respondent. Reported below: 149 Conn. 111, 176 A. 2d 61.

No. 816. RASSANO *v.* KENNEDY, ATTORNEY GENERAL. C. A. 7th Cir. Certiorari denied. *Maurice J. Walsh* and *Anna R. Lavin* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Felicia Dubrovsky* for respondent.

No. 825. FITZGERALD *v.* UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied. *John O'C. FitzGerald pro se. Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Joseph M. Howard* for respondents.

No. 801. WILLIAMS *v.* WILLIAMS. The motion to dispense with printing the petition for certiorari is granted. Petition for writ of certiorari to the Supreme Court of Ohio denied. Petitioner *pro se. Clayborne George* for respondent.

No. 828. Local No. 149, International Union United Automobile, Aircraft & Agricultural Implement Workers of America (UAW–AFL–CIO) *v.* American Brake Shoe Co. C. A. 4th Cir. Certiorari denied. *Lowell Goerlich, J. Lynn Lucas* and *Harold A. Cranefield* for petitioner. Reported below: 298 F. 2d 212.

No. 830. Hoover et al. *v.* Pennsylvania Railroad Co. Supreme Court of Pennsylvania. Certiorari denied. *Michael A. Foley* and *B. Nathaniel Richter* for petitioners. *Gordon W. Gerber* and *Philip Price* for respondent. Reported below: 405 Pa. 642, 177 A. 2d 98.

No. 832. Nelson *v.* Moore-McCormack Lines, Inc. C. A. 2d Cir. Certiorari denied. *Murray Gartner* for petitioner. *Eugene Underwood* for respondent. Reported below: 297 F. 2d 936.

No. 837. Lewis et al., Trustees, *v.* Mears, doing business as Mears Coal Co. C. A. 3d Cir. Certiorari denied. *Val J. Mitch, Harold H. Bacon, Charles L. Widman, A. E. Kountz, Alexander Unkovic* and *M. E. Boiarsky* for petitioners. *J. Lee Miller* for respondent. Reported below: 297 F. 2d 101.

No. 848. Silver *v.* City of Los Angeles et al. Supreme Court of California. Certiorari denied. Petitioner *pro se*. *Roger Arnebergh* and *Bourke Jones* for the City of Los Angeles, and *James J. Arditto* and *Joseph A. Ball* for Los Angeles Harbor Oil Development Co., respondents. Reported below: 57 Cal. 2d 39, 366 P. 2d 651.

No. 896. Basic Tool Industries, Inc., *v.* Wikle, Trustee. C. A. 9th Cir. Certiorari denied. *J. Robert Arkush* for petitioner. *Francis F. Quittner* for respondent.

No. 813. McCaw et al. *v.* Superior Court of California, in and for Los Angeles County. The motion to correct title and caption to show Union Bank as a party respondent is granted. Petition for writ of certiorari to the Supreme Court of California denied. *Bernard Reich* for petitioners. *Howard I. Friedman* for Union Bank.

No. 826. Morrissette et al. *v.* Chicago, Burlington & Quincy Railroad Co. C. A. 7th Cir. Certiorari denied. Mr. Justice Black is of the opinion that certiorari should be granted. Petitioners *pro se*. *John H. Bishop* and *Eldon Martin* for respondent. Reported below: 299 F. 2d 502.

No. 9, Misc. Jones *v.* Adams, Warden. Supreme Court of Appeals of West Virginia. Certiorari denied. Petitioner *pro se*. *C. Donald Robertson,* Attorney General of West Virginia, *Fred H. Caplan* and *George H. Mitchell,* Assistant Attorneys General, for respondent.

No. 654, Misc. Torres *v.* Cox, Warden. Supreme Court of New Mexico. Certiorari denied. Petitioner *pro se*. *Earl E. Hartley,* Attorney General of New Mexico, for respondent.

No. 675, Misc. Carasso et al. *v.* Commissioner of Internal Revenue. C. A. 2d Cir. Certiorari denied. Petitioners *pro se*. *Solicitor General Cox, Assistant Attorney General Oberdorfer, I. Henry Kutz* and *Joseph Kovner* for respondent. Reported below: 292 F. 2d 367.

No. 857, Misc. Kill (Smith) *v.* Settle, Warden. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *Isabel L. Blair* for respondent.

No. 725, Misc. TOMICH *v.* MONTANA ET AL. Supreme Court of Montana. Certiorari denied.

No. 807, Misc. WILLIAMS *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 *Robert G. Maysack* for the United States.

No. 870, Misc. GENSBURG *v.* CALIFORNIA STATE LEGISLATURE 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. 923, Misc. MOORE *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Petitioner *pro se*. *William G. Clark,* Attorney General of Illinois, for respondent.

No. 952, Misc. ELLISON *v.* NASH, WARDEN. Supreme Court of Missouri. Certiorari denied. Petitioner *pro se*. *Thomas F. Eagleton,* Attorney General of Missouri, and *Howard L. McFadden,* Assistant Attorney General, for respondent.

No. 956, Misc. RAY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall* and *Harold H. Greene* for the United States. Reported below: 295 F. 2d 416.

No. 958, Misc. COLEMAN *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.

No. 957, Misc. VANDERSEE *v.* SECURITIES AND EXCHANGE COMMISSION. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* and *Peter A. Dammann* for respondent.

No. 973, Misc. BUSBY ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioners *pro se*. *Solicitor General Cox* for the United States. Reported below: 296 F. 2d 328.

No. 978, Misc. NIELSEN *v.* CHARLES KURZ & Co., INC., ET AL. C. A. 2d Cir. Certiorari denied. *Charles Andrews Ellis* for petitioner. *Thomas Coyne* for respondents. Reported below: 295 F. 2d 692.

No. 980, Misc. SMITH *v.* UNITED STATES. C. A. 6th 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: 296 F. 2d 220.

No. 991, Misc. BRINSON *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 998, Misc. WISE *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied. *John J. Spriggs, Sr.* and *John J. Spriggs, Jr.* for petitioner. *Solicitor General Cox, Roger P. Marquis* and *Hugh Nugent* for the United States. Reported below: 297 F. 2d 822.

No. 999, Misc. SPRIGGS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *John J. Spriggs, Sr.* and *John J. Spriggs, Jr.* for petitioner. *Solicitor General Cox, Roger P. Marquis* and *A. Donald Mileur* for the United States. Reported below: 297 F. 2d 460.

No. 1000, Misc. COPPERSMITH *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 1005, Misc. LUDDY *v.* CONNECTICUT. Superior Court of Connecticut, Hartford County. Certiorari denied.

No. 1006, Misc. HUGHES *v.* RICHMOND, WARDEN. Superior Court of Connecticut, Hartford County. Certiorari denied.

No. 1010, Misc. CLARK *v.* WARDEN, MARYLAND PENITENTIARY. C. A. 4th Cir. Certiorari denied.

No. 1028, Misc. PETERSON *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. 1033, Misc. SHELTON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 1036, Misc. JOHNSTONE *v.* NASH, WARDEN. Supreme Court of Missouri. Certiorari denied.

No. 1041, Misc. SPURLOCK *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 387.

No. 1047, Misc. STAFFORD *v.* CALIFORNIA ET AL. District Court of Appeal of California, Second Appellate District. Certiorari denied.

No. 1045, Misc. McNicholas *v.* United States. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 298 F. 2d 914.

No. 1057, Misc. Henderson *v.* United States. C. A. 7th Cir. Certiorari denied. *Hugh Hafer* and *Richard P. Donaldson* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney Glazer* for the United States. Reported below: 298 F. 2d 522.

No. 1059, Misc. Craig *v.* Pennsylvania. Supreme Court of Pennsylvania. Certiorari denied.

No. 1065, Misc. Cuomo *v.* New York. County Court of Kings County, New York. Certiorari denied.

No. 1066, Misc. Capon *v.* Illinois. Supreme Court of Illinois. Certiorari denied.

No. 1067, Misc. Hodges *v.* Heard, Corrections Director, et al. Court of Criminal Appeals of Texas. Certiorari denied.

No. 1068, Misc. Helland *v.* Rhay, Penitentiary Superintendent. Supreme Court of Washington. Certiorari denied.

No. 1069, Misc. Johnson *v.* New York. Court of Appeals of New York. Certiorari denied.

No. 1071, Misc. Schachel *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. 1070, Misc. RAGUSA *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: 297 F. 2d 525.

No. 1072, Misc. WALKER *v.* EYMAN. Supreme Court of Arizona. Certiorari denied.

No. 1076, Misc. BRABSON *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 1077, Misc. MORRISON *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 1080, Misc. SPAULDING *v.* ALASKA. Supreme Court of Alaska. Certiorari denied.

No. 1090, Misc. NELSON *v.* NEW HAMPSHIRE. Supreme Court of New Hampshire. Certiorari denied. *Leo Patrick McGowan* for petitioner. *William Maynard,* Attorney General of New Hampshire, *Elmer T. Bourque,* Deputy Attorney General, and *Alexander J. Kalinski,* Assistant Attorney General, for respondent. Reported below: 103 N. H. 478, 175 A. 2d 814.

No. 1091, Misc. SCELLATO *v.* CUNNINGHAM, PENITENTIARY SUPERINTENDENT. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 1106, Misc. RUTLEDGE *v.* ESPERDY, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for respondent. Reported below: 297 F. 2d 532.

No. 1098, Misc. LITTERIO *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. 1108, Misc. KETCHUM *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. 1113, Misc. FLORES *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. *Floyd Duke James* for petitioner.

No. 1115, 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, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States.

No. 1116, Misc. BIRCH *v.* NEW YORK. Appellate Division of the Supreme Court of New York, First Judicial Department. Certiorari denied.

No. 1117, Misc. HAMLIN *v.* WILSON ET AL. Supreme Court of California. Certiorari denied.

No. 1121, Misc. TAPIA *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 1122, Misc. FERRARO *v.* CONNECTICUT. Supreme Court of Errors of Connecticut. Certiorari denied.

No. 1179, Misc. SPENCER *v.* FLORIDA. Supreme Court of Florida. Certiorari denied.

No. 1203, Misc. MARTINEAU *v.* NEW HAMPSHIRE. Supreme Court of New Hampshire. Certiorari denied. *Julius H. Soble* for petitioner. *William Maynard,* Attorney General of New Hampshire, *Elmer T. Bourque,* Deputy Attorney General, and *Alexander J. Kalinski,* Assistant Attorney General, for respondent. Reported below: 103 N. H. 478, 175 A. 2d 814.

No. 640, Misc. DAUGHERTY *v.* ELLIS, CORRECTIONS DIRECTOR. Motion to substitute Jack Heard in the place of O. B. Ellis as the party respondent granted. Petition for writ of certiorari to the Court of Criminal Appeals of Texas denied. Petitioner *pro se. Will Wilson,* Attorney General of Texas, and *Sam R. Wilson, Leon F. Pesek* and *Charles R. Lind,* Assistant Attorneys General, for respondent.

No. 1075, Misc. COLLINS *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *William F. Walsh* for petitioner. *Carl E. F. Dally* for respondent. Reported below: 171 Tex. Cr. R. 585, 352 S. W. 2d 841.

Rehearing Denied.

No. 587. MITTELMAN *v.* UNITED STATES, 368 U. S. 984. The motion for leave to file petition for rehearing is denied. MR. JUSTICE WHITE took no part in the consideration or decision of this application.

No. 707, Misc. REID *v.* RICHMOND, WARDEN, 368 U. S. 948. Motion for leave to file second petition for rehearing denied. MR. JUSTICE WHITE took no part in the consideration or decision of this application.

No. 282. ATLANTIC & GULF STEVEDORES, INC., *v.* ELLERMAN LINES, LTD., ET AL., *ante*, p. 355;

No. 425. CROSS ET AL. *v.* FLORIDA, *ante*, p. 400;

No. 689. LEWIS ET AL., DOING BUSINESS AS LEWIS AND MURRAY, ET AL. *v.* FITZGERALD, TRUSTEE IN BANKRUPTCY, *ante*, p. 828;

No. 717. CRUMP *v.* SAIN, SHERIFF, *ante*, p. 830;

No. 29, Misc. BURKS *v.* UNITED STATES, *ante*, p. 841; and

No. 972, Misc. DISILVESTRO *v.* UNITED STATES, *ante*, p. 854. Petitions for rehearing denied. MR. JUSTICE WHITE took no part in the consideration or decision of these applications.

MAY 21, 1962.*

Probable Jurisdiction Noted or Question Postponed.

No. 794. UNITED STATES *v.* GEORGIA PUBLIC SERVICE COMMISSION. Appeal from the United States District Court for the Northern District of Georgia. 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; cf. *Kesler* v. *Department of Public Safety*, 369 U. S. 153, 155–158. *Solicitor General Cox, Assistant Attorney General Loevinger* and *Richard A. Solomon* for the United States. *Eugene Cook*, Attorney General of Georgia, and *Paul Rodgers*, Assistant Attorney General, for appellee. Reported below: 197 F. Supp. 793.

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*MR. JUSTICE FRANKFURTER took no part in the consideration or decision of cases in which orders were this day announced.

No. 799. UNITED STATES *v.* PHILADELPHIA NATIONAL BANK ET AL. Appeal from the United States District Court for the Eastern District of Pennsylvania. Probable jurisdiction noted. MR. JUSTICE WHITE took no part in the consideration or decision of this case. *Solicitor General Cox, Assistant Attorney General Loevinger, Richard J. Medalie* and *Lionel Kestenbaum* for the United States. *Arthur Littleton, Ernest R. von Starck, Don B. Blenko* and *Donald A. Scott* for the Philadelphia National Bank, and *Philip Price, Carroll R. Wetzel, John J. Brennan* and *Minturn T. Wright III* for Girard Trust Corn Exchange Bank, appellees. Reported below: 201 F. Supp. 348.

Certiorari Granted.

No. 843. NATIONAL LABOR RELATIONS BOARD *v.* RELIANCE FUEL OIL CORP. C. A. 2d Cir. Certiorari granted. *Solicitor General Cox, Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* for petitioner. Reported below: 297 F. 2d 94.

No. 839. LOCAL NO. 438 CONSTRUCTION & GENERAL LABORERS' UNION, AFL–CIO, *v.* CURRY ET AL., DOING BUSINESS AS S. J. CURRY & CO. The petition for writ of certiorari to the Supreme Court of Georgia is granted limited to the question of whether the Supreme Court of Georgia erred as stated in Questions (d), (h) and (i) of the petition which read as follows:

"(d) In holding that it was illegal for the Petitioner to carry a placard in front of the construction job containing the statement: 'S. J. Curry & Company, Inc., violating contract with City of Atlanta by not paying wages conforming with those of a similar type of work in the Atlanta area. Construction & General Laborers' Union 438, AFL–CIO.' The Court so held, notwithstanding the

fact that the Court found that the legend carried upon said sign was true and that S. J. Curry & Company was not paying the prevailing wage in the area even though it had executed a contract with the City of Atlanta for said construction which contract contained the provision: 'Wages will conform with those being paid on similar types of work in the Atlanta area.'

"(h) In granting said injunction, said court deprived Petitioner in Certiorari of rights protected by the National Labor Relations Act, Title 29, Section 157 of the United States Code Annotated.

"(i) In granting said injunction said court assumes jurisdiction of a cause, the subject matter of which had been pre-empted by enactment of the National Labor Relations Act, Title 29, Section 157–158 (b) of the United States Code Annotated."

Counsel are requested also to brief and argue the question of the Court's jurisdiction to review the judgment of the Supreme Court of Georgia under 28 U. S. C. § 1257; see *Montgomery Building & Construction Trades Council* v. *Ledbetter Erection Co.*, 344 U. S. 178.

Edwin Pearce and *John S. Patton* for petitioner. *H. H. Perry, Jr.* for respondents. Reported below: 217 Ga. 512, 123 S. E. 2d 653.

No. 1123, Misc. WILLIAMS *v.* ZUCKERT, SECRETARY OF THE AIR FORCE, ET AL. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit granted. Case transferred to the appellate docket. *Sidney Dickstein, David I. Shapiro, Lawrence Speiser* and *Melvin Wulf* for petitioner. *Solicitor General Cox, Assistant Attorney General Orrick, Alan S. Rosenthal* and *Sherman L. Cohn* for respondents. Reported below: 111 U. S. App. D. C. 294, 296 F. 2d 416.

Certiorari Denied. (*See also No. 829, ante, p. 796.*)

No. 764. Wisconsin Central Railroad Co. *v.* United States. Court of Claims. Certiorari denied. *Joseph M. Jones, Robert T. Molloy* and *Kenneth W. Moroney* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Philip R. Miller* and *Kenneth E. Levin* for the United States. Reported below: —— Ct. Cl. ——, 296 F. 2d 750.

No. 805. Hausman et al. *v.* Buckley et al. C. A. 2d Cir. Certiorari denied. *Frederick H. Block* and *Irving Sonnenschein* for petitioners. *Alexis C. Coudert* for Pantepec Oil Co., C. A., and *Thomas W. Hill, Jr.* for Buckley et al., respondents. Reported below: 299 F. 2d 696.

No. 821. Las Vegas Hacienda, Inc., *v.* Civil Aeronautics Board. C. A. 9th Cir. Certiorari denied. *Edward L. Compton* and *John W. Preston, Jr.* for petitioner. *Solicitor General Cox, Assistant Attorney General Loevinger, Irwin A. Seibel, Joseph B. Goldman, O. D. Ozment* and *Robert L. Toomey* for respondent. Reported below: 298 F. 2d 430.

No. 835. Wooten et al. *v.* Texas. Court of Civil Appeals of Texas, Third Supreme Judicial District. Certiorari denied. *Coleman Gay* for petitioners. Reported below: 348 S. W. 2d 281.

No. 838. Division No. 14, Order of Railroad Telegraphers, by R. D. Wilson, et al. *v.* Leighty et al. C. A. 4th Cir. Certiorari denied. *L. S. Parsons, Jr.* for petitioners. *Edward J. Hickey, Jr.* and *Moses Ehrenworth* for respondents. Reported below: 298 F. 2d 17.

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No. 831. CAMDEN TRUST CO. *v.* GIDNEY, COMPTROLLER OF THE CURRENCY, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Bernard G. Segal* and *Samuel D. Slade* for petitioner. *Solicitor General Cox, Assistant Attorney General Orrick* and *John G. Laughlin, Jr.* for the Comptroller of the Currency, and *Arthur Littleton* for Delaware Valley National Bank of Delaware Township, respondents. Briefs of *amici curiae,* in support of the petition, were filed by *Arthur J. Sills,* Attorney General of New Jersey, and *David Landau,* Deputy Attorney General, for the State of New Jersey, and by *James F. Bell* for the National Association of Supervisors of State Banks. Reported below: 112 U. S. App. D. C. 197, 301 F. 2d 521.

No. 834. SCOZZARI *v.* ROSENBERG, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. *Joseph S. Hertogs* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for respondent. Reported below: 302 F. 2d 592.

No. 840. ONSRUD MACHINE WORKS, INC., *v.* EKSTROM-CARLSON & Co. C. A. 7th Cir. Certiorari denied. *Charles W. Rummler* and *William A. Snow* for petitioner. *Richard R. Wolfe* for respondent. Reported below: 298 F. 2d 765.

No. 842. KELLY *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *John J. Nealon* 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. 360, 297 F. 2d 437.

No. 849. Lincoln Rochester Trust Co., Administrator, *v.* United States. C. A. 2d Cir. Certiorari denied. *T. Carl Nixon* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Robert N. Anderson* and *Harold M. Seidel* for the United States. Reported below: 297 F. 2d 891.

No. 850. Bernstein *v.* Ribicoff, Secretary of Health, Education, and Welfare. C. A. 3d Cir. Certiorari denied. *Benjamin Bernstein pro se. Solicitor General Cox, Assistant Attorney General Orrick* and *John G. Laughlin, Jr.* for respondent. Reported below: 299 F. 2d 248.

No. 851. Whitelight Products Division of White Metal Rolling and Stamping Corp. *v.* National Labor Relations Board. C. A. 1st Cir. Certiorari denied. *Robert Abelow* for petitioner. *Solicitor General Cox, Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 298 F. 2d 12.

No. 852. Woodard et al., doing business as Woodard Motor Co., *v.* General Motors Corp. C. A. 5th Cir. Certiorari denied. *Irving L. Goldberg* for petitioners. *Ira Butler, Daniel Boone, Aloysius F. Power* and *Charles L. Stephens* for respondent. Reported below: 298 F. 2d 121.

No. 854. Torrance *v.* Salzinger, Warden, et al. C. A. 3d Cir. Certiorari denied. *Elder W. Marshall* for petitioner. *David Stahl,* Attorney General of Pennsylvania, *Huette F. Dowling,* Special Deputy Attorney General, and *Alfred P. Filippone,* Deputy Attorney General, for respondents. Reported below: 297 F. 2d 902.

No. 844. Fox *v.* United States. C. A. 5th Cir. Certiorari denied. *C. Anthony Friloux, Jr.* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 296 F. 2d 217.

No. 855. Torrance *v.* Salzinger, Warden. Supreme Court of Pennsylvania. Certiorari denied. *Elder W. Marshall* for petitioner. *David Stahl,* Attorney General, *Huette F. Dowling,* Special Deputy Attorney General, and *Alfred P. Filippone,* Deputy Attorney General, for respondent. Reported below: 406 Pa. 268, 177 A. 2d 619.

No. 857. Hirsch *v.* Ladd, Commissioner of Patents. Court of Customs and Patent Appeals. Certiorari denied. *Miles D. Pillars* and *Adolph C. Hugin* for petitioner. *Solicitor General Cox, Assistant Attorney General Orrick* and *Alan S. Rosenthal* for respondent. Reported below: 49 C. C. P. A. (Pat.) 745, 295 F. 2d 251.

No. 878. Clinkscales *v.* Georgia. Court of Appeals of Georgia. Certiorari denied. *Frank B. Stow* and *Robert E. Andrews* for petitioner. *H. W. Davis* and *Harry S. McCowen* for respondent. Reported below: 104 Ga. App. 723, 123 S. E. 2d 165.

No. 889. Federal Trade Commission *v.* Exquisite Form Brassiere, Inc. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Mr. Justice Black is of the opinion that certiorari should be granted. Mr. Justice White took no part in the consideration or decision of this application. *James McI. Henderson* and *William A. Bailey* for petitioner. *Peyton Ford* for respondent. Reported below: 112 U. S. App. D. C. 175, 301 F. 2d 499.

No. 893. NAVARRO *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Doyle Vernon Lawyer* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 299 F. 2d 940.

No. 917. ZEGERS, DOING BUSINESS AS PRECISION WEATHERSTRIP CO., *v.* ZEGERS, INC. C. A. 7th Cir. Certiorari denied. *Junius F. Cook, Jr.* and *Daniel V. O'Keeffe* for petitioner. *Thomas F. McWilliams* for respondent. Reported below: 299 F. 2d 769.

No. 833. REICHERT *v.* BOROUGH OF SCHUYLKILL HAVEN. Motion to strike respondent's brief and petition for writ of certiorari to the Court of Common Pleas of Schuylkill County, Pennsylvania, denied. *George G. Lindsay* for petitioner. *Calvin J. Friedberg* for respondent.

No. 585, Misc. HANOVICH *v.* SACKS, WARDEN, ET AL. Supreme Court of Ohio. Certiorari denied. Petitioner *pro se*. *Mark McElroy*, Attorney General of Ohio, and *John J. Connors, Jr.*, Assistant Attorney General, for respondents.

No. 613, Misc. JUDD *v.* COX, COMMANDANT, UNITED STATES DISCIPLINARY BARRACKS, FORT LEAVENWORTH, KANSAS. C. A. 10th Cir. Certiorari denied. *Guy Emery* and *C. Robert Bard* for petitioner. *Solicitor General Cox, Assistant Attorney General Marshall* and *Harold H. Greene* for respondent.

No. 691, Misc. EASON *v.* MCGEE, CORRECTIONS DIRECTOR, ET AL. Supreme Court of California. Certiorari denied. Petitioner *pro se*. *Stanley Mosk*, Attorney General of California, *Robert R. Granucci* and *John S. McInerny*, Deputy Attorneys General, for respondents.

No. 1017, Misc. MITCHELL *v.* BLACKWELL, WARDEN. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall* and *Harold H. Greene* for respondent.

No. 1046, Misc. VACCARO *v.* UNITED STATES. C. A. 5th 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: 296 F. 2d 500.

No. 1082, Misc. WATSON *v.* ARIZONA. Supreme Court of Arizona. Certiorari denied.

No. 1083, Misc. TORRES *v.* WARDEN, MARYLAND PENITENTIARY. Court of Appeals of Maryland. Certiorari denied.

No. 1086, Misc. GLYNN *v.* RICHMOND, WARDEN. Supreme Court of Errors of Connecticut. Certiorari denied.

No. 1087, Misc. WEBER *v.* DIVISION OF PAROLE OF THE STATE OF NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 1088, Misc. BUTLER *v.* DAY. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied.

No. 1094, Misc. MUMMIANI *v.* SILBERGLITT, WARDEN, ET AL. Appellate Division of the Supreme Court of New York, First Judicial Department. Certiorari denied.

No. 1104, Misc. FUENTES *v.* NEW YORK. Appellate Division of the Supreme Court of New York, First Judicial Department. Certiorari denied.

No. 1093, Misc. CHAMBERS *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 1101, Misc. YOUNG *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: 297 F. 2d 593.

No. 1103, Misc. WORTHEM *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: 298 F. 2d 814.

No. 1105, Misc. WITT *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 1168, Misc. JACKSON *v.* COCHRAN, CORRECTIONS DIRECTOR. Supreme Court of Florida. Certiorari denied. Petitioner *pro se*. *Richard W. Ervin,* Attorney General of Florida, and *James G. Mahorner,* Assistant Attorney General, for respondent.

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No. 803. LOCKLIN ET AL., DOING BUSINESS AS RADIANT COLOR CO., *v.* SWITZER BROTHERS, INC., *ante,* p. 851. Rehearing denied.

No. 678. GENERAL GEOPHYSICAL CO. *v.* UNITED STATES, *ante,* p. 849;

No. 683. PINTO ET AL. *v.* STATES MARINE CORPORATION OF DELAWARE ET AL., *ante,* p. 843; and

No. 979, Misc. LIPSCOMB *v.* UNITED STATES, *ante,* p. 853. Petitions for rehearing denied. MR. JUSTICE WHITE took no part in the consideration or decision of these applications.

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1. *Supreme Court — Certiorari — Dismissal as improvidently granted.*—When it became apparent that case presented no substantial federal question, writ of certiorari to State's highest court dis-

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missed as improvidently granted. Benz v. New York State Thruway Authority, p. 147.

2. *Supreme Court—Certiorari—Significance of denial.*—Denial of a writ of certiorari does not mean that the Supreme Court approves the decision below nor, in state criminal proceedings, that the petitioner is necessarily precluded from obtaining relief in some other appropriate proceeding. Davis v. Balkcom (memorandum of Warren, C. J.), p. 811.

3. *Courts of Appeals—Diversity of citizenship—Interpretation of state law.*—When relevant state law had not been interpreted by state courts and declaratory judgment procedures were available, Federal Court of Appeals, in case based on diversity of citizenship, should not have relied on its own interpretation of state law in ruling on constitutionality of municipal license code relative to sales of natural gas. United Gas Pipe Line Co. v. Ideal Cement Co., p. 134.

4. *Courts of Appeals—Appeals in forma pauperis—Good faith.*—Applications under 28 U. S. C. § 1915 for leave to appeal *in forma pauperis* should be considered to have been made "in good faith" if applicant seeks appellate review of any issue that is not frivolous; indigent defendants entitled to same rights of appeal as those able to pay costs; correct procedure; burden of proof. Coppedge v. United States, p. 438.

5. *Courts of Appeals—Review of findings of fact—Not "clearly erroneous"—Existence of demise charter in admiralty suit.*—When District Court's findings of fact as to existence of demise charter in admiralty suit by longshoreman to recover for damages resulting from unseaworthiness of vessel were not clearly erroneous, Court of Appeals erred in reversing judgment based on such finding. Guzman v. Pichirilo, p. 698.

6. *District Courts—Suit to compel reapportionment of state legislature—Standing to sue.*—Qualified voters had standing to sue under 42 U. S. C. §§ 1983 and 1988 to redress alleged denial of constitutional rights by unequal representation in state legislature. Baker v. Carr, p. 186.

7. *District Courts—Case presenting both legal and equitable issues—Right to trial by jury.*—Where both legal and equitable issues are presented in a single case, any issues of fact bearing upon the legal issues must be submitted to a jury, if timely and proper demand for trial by jury is made. Dairy Queen v. Wood, p. 469.

8. *District Courts—Transfer of civil action to another district—Personal jurisdiction over defendants.*—Under 28 U. S. C. § 1406 (a), the power of a District Court to transfer a civil action to another

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district is not limited to cases in which the transferring court has personal jurisdiction over the defendants. Goldlawr, Inc., v. Heiman, p. 463.

9. *District Courts—Challenge to constitutionality of state statute—Three-judge court—Racial segregation of public facilities.*—That no State may require racial segregation of publicly operated facilities is so well settled that it is foreclosed as litigable issue, and three-judge court not required to pass on that issue under 28 U. S. C. § 2281; also no occasion for abstention from decision pending interpretation of state statutes by state courts. Turner v. City of Memphis, p. 350.

10. *District Courts—Challenge to constitutionality of state statute—Three-judge court — Racial segregation of transportation facilities.*—That no State may require racial segregation of interstate or intrastate transportation facilities is so well settled that it is foreclosed as a litigable issue, and a three-judge court is not required to pass on that question under 28 U. S. C. § 2281. Bailey v. Patterson, p. 31.

11. *District Courts—Declaratory judgments—Sufficiency of record—Questions affecting public interest.*—In action under Declaratory Judgment Act for determination of rights of Vice Admiral with respect to speeches delivered while in active service, record held unsatisfactory basis for discretionary grant of declaratory relief relating to claims to intellectual property arising out of public employment. Public Affairs Press v. Rickover, p. 111.

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2. *Income tax—Deductions—Amortization of premiums on bonds.*—Under Internal Revenue Code of 1939, taxpayer who had bought at premium corporate bonds callable on 30 days' notice, either at "general call price" or at a lower "special call price," was entitled to deductions based on 30-day call period and "special call price." Hanover Bank v. Commissioner, p. 672.

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2. *"Contracts."*—Labor Management Relations Act, 1947, § 301 (a). Retail Clerks v. Lion Dry Goods, p. 17.

3. *"In good faith."*—28 U. S. C. § 1915 (a). Coppedge v. United States, p. 438.

4. *"Labor organization representing employees."*—Labor Management Relations Act, 1947, § 301 (a). Retail Clerks v. Lion Dry Goods, p. 17.

5. *"Medical care."*—Internal Revenue Code of 1954, § 213. Commissioner v. Bilder, p. 499.

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U.S. GOVERNMENT PRINTING OFFICE : 1962 O—657327