UNITED STATES REPORTS

VOLUME 373

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1962

APRIL 29 THROUGH JUNE 3, 1963

WALTER WYATT
REPORTER OF DECISIONS

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

EARL WARREN, Chief Justice.
HUGO L. BLACK, Associate Justice.
WILLIAM O. DOUGLAS, Associate Justice.
TOM C. CLARK, Associate Justice.
JOHN M. HARLAN, Associate Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice.
ARTHUR J. GOLDBERG, Associate Justice.

RETIRED

STANLEY REED, Associate Justice.
FELIX FRANKFURTER, Associate Justice.
HAROLD H. BURTON, Associate Justice.
SHERMAN MINTON, Associate Justice.
CHARLES E. WHITTAKER, 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.

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, Arthur J. Goldberg, 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, Byron R. White, Associate Justice.

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

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

October 15, 1962.

(For next previous allotment, see 370 U. S., p. iv.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1962.

SANDERS *v.* UNITED STATES.

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

No. 202. Argued February 25, 1963.—Decided April 29, 1963.

Arrested on a charge of robbing a federally insured bank in violation of 18 U. S. C. § 2113 (a) and brought into a Federal District Court, petitioner declined assistance of counsel, signed a waiver of indictment, pleaded guilty, and was sentenced to imprisonment. Subsequently, he filed in the sentencing Court a motion under 28 U. S. C. § 2255 for his release, alleging that the "indictment" was invalid, that he had been denied assistance of counsel, and that he had been intimidated and coerced into pleading guilty without counsel and without knowledge of the charges against him. This motion was denied without a hearing, on the ground that it stated only conclusions and no facts upon which conclusions could be based; but the Court added that the files and records showed conclusively that petitioner was entitled to no relief. Later petitioner filed a second motion under § 2255, alleging that, at the time of his trial and sentence, he had been mentally incompetent as a result of narcotics administered to him while he was in jail pending trial, and he alleged specific facts in support of this claim. This motion was denied without a hearing, on the ground that petitioner should have raised the issue of mental incompetency at the time of his first motion. *Held:* The Court should have granted a hearing on the second motion. Pp. 2–23.

(a) Controlling weight may be given to denial of a prior application for relief under § 2255 only if (1) the same ground presented

in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application. Pp. 15–17.

(b) No matter how many prior applications for relief under § 2255 a prisoner has made, controlling weight may not be given to denial of prior applications if they were not adjudicated on the merits or if a different ground is presented by the new application. In such circumstances, consideration of the merits of the new application can be avoided only if there has been an abuse of the remedy, and this must be pleaded by the Government. Pp. 17–19.

(c) In this case, the Court should have granted a hearing on the second application, because the first application was not adjudicated on the merits and the facts on which the second application was predicated were outside the record. Pp. 19–20.

(d) On remand, a hearing will be required; but it will not automatically become necessary to produce petitioner at the hearing to enable him to testify. The Court will have discretion to ascertain whether the claim is substantial before granting a full evidentiary hearing, and it will be open to respondent to attempt to to show that petitioner's failure to claim mental incompetency in his first motion was an abuse of the motion remedy. Pp. 20–22.

297 F. 2d 735, reversed and case remanded.

Fred M. Vinson, Jr., by appointment of the Court, 371 U. S. 806, argued the cause and filed a brief for petitioner.

Beatrice Rosenberg argued the cause for the United States. With her on the brief were *Solicitor General Cox, Assistant Attorney General Miller* and *Sidney M. Glazer.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

We consider here the standards which should guide a federal court in deciding whether to grant a hearing on a motion of a federal prisoner under 28 U. S. C. § 2255.[1]

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[1] Section 2255 provides:

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground

Under that statute, a federal prisoner who claims that his sentence was imposed in violation of the Constitution or laws of the United States may seek relief from the sentence by filing a motion in the sentencing court stating the facts supporting his claim. "[A] prompt hearing" on the motion is required "[u]nless the motion and the files

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that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

"A motion for such relief may be made at any time.

"Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

"A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

"The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

"An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

"An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

and records of the case conclusively show that the prisoner is entitled to no relief . . . ." The section further provides that "[t]he sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner."

The petitioner is serving a 15-year sentence for robbery of a federally insured bank in violation of 18 U. S. C. § 2113 (a). He filed two motions under § 2255. The first alleged no facts but only bare conclusions in support of his claim. The second, filed eight months after the first, alleged facts which, if true, might entitle him to relief. Both motions were denied, without hearing, by the District Court for the Northern District of California. On appeal from the denial of the second motion, the Court of Appeals for the Ninth Circuit affirmed. 297 F. 2d 735. We granted leave to proceed *in forma pauperis* and certiorari. 370 U. S. 936.

On January 19, 1959, petitioner was brought before the United States District Court for the Northern District of California, and was handed a copy of a proposed information charging him with the robbery. He appeared without counsel. In response to inquiries of the trial judge, petitioner stated that he wished to waive assistance of counsel and to proceed by information rather than indictment; [2] he signed a waiver of indictment, and then pleaded guilty to the charge in the information. On February 10 he was sentenced. Before sentence was pronounced, petitioner said to the judge: "If possible, your Honor, I would like to go to Springfield or Lexington for addiction cure. I have been using narcotics off and on for quite a while." The judge replied that he was "willing to recommend that."

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[2] Petitioner makes no claim that the procedure employed by the District Court was not adequate to advise him of his constitutional rights to assistance of counsel, grand jury indictment, and trial by jury.

On January 4, 1960, petitioner, appearing *pro se,* filed his first motion. He alleged no facts but merely the conclusions that (1) the "Indictment" was invalid, (2) "Appellant was denied adequate assistance of Counsel as guaranteed by the Sixth Amendment," and (3) the sentencing court had "allowed the Appellant to be intimidated and coerced into intering [*sic*] a plea without Counsel, and any knowledge of the charges lodged against the Appellant." He filed with the motion an application for a writ of *habeas corpus ad testificandum* requiring the prison authorities to produce him before the court to testify in support of his motion. On February 3 the District Court denied both the motion and the application. In a memorandum accompanying the denial, the court explained that the motion, "although replete with conclusions, sets forth no facts upon which such conclusions can be founded. For this reason alone, this motion may be denied without a hearing." Nevertheless, the court stated further that the motion "sets forth nothing but unsupported charges, which are completely refuted by the files and records of this case. Since the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, no hearing on the motion is necessary." No appeal was taken by the petitioner from this denial.

On September 8 petitioner, again appearing *pro se,* filed his second motion. This time he alleged that at the time of his trial and sentence he was mentally incompetent as a result of narcotics administered to him while he was held in the Sacramento County Jail pending trial. He stated in a supporting affidavit that he had been confined in the jail from on or about January 16, 1959, to February 18, 1959; that during this period and during the period of his "trial" he had been intermittently under the influence of narcotics; and that the narcotics had been administered to him by the medical authorities in attendance at the jail because of his being a known addict. The District Court

denied the motion without hearing, stating: "As there is no reason given, or apparent to this Court, why petitioner could not, and should not, have raised the issue of mental incompetency at the time of his first motion, the Court will refuse, in the exercise of its statutory discretion, to entertain the present petition." (Footnote omitted.) The court also stated that "petitioner's complaints are without merit in fact." On appeal from the order denying this motion, the Court of Appeals for the Ninth Circuit affirmed. 297 F. 2d 735 (1961). The Court of Appeals said in a *per curiam* opinion: "Where, as here, it is apparent from the record that at the time of filing the first motion the movant knew the facts on which the second motion is based, yet in the second motion set forth no reason why he was previously unable to assert the new ground and did not allege that he had previously been unaware of the significance of the relevant facts, the district court, may, in its discretion, decline to entertain the second motion." 297 F. 2d, at 736–737.

We reverse. We hold that the sentencing court should have granted a hearing on the second motion.

I.

The statute in terms requires that a prisoner shall be granted a hearing on a motion which alleges sufficient facts to support a claim for relief unless the motion and the files and records of the case "conclusively show" that the claim is without merit. This is the first case in which we have been called upon to determine what significance, in deciding whether to grant a hearing, the sentencing court should attach to any record of proceedings on prior motions for relief which may be among the files and records of the case, in light of the provision that: "The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner." This provision has caused uncer-

tainty in the District Courts, see *Bistram* v. *United States,* 180 F. Supp. 501 (D. C. D. N. Dak.), aff'd, 283 F. 2d 1 (C. A. 8th Cir. 1960), and has provoked a conflict between circuits: with the decision of the Court of Appeals for the Ninth Circuit in the instant case, compare, *e. g., Juelich* v. *United States,* 300 F. 2d 381 (C. A. 5th Cir. 1962); *Smith* v. *United States,* 106 U. S. App. D. C. 169, 270 F. 2d 921 (1959). We think guidelines to the proper construction of the provision are to be found in its history.

At common law, the denial by a court or judge of an application for habeas corpus was not *res judicata. King* v. *Suddis,* 1 East 306, 102 Eng. Rep. 119 (K. B. 1801); *Burdett* v. *Abbot,* 14 East 1, 90, 104 Eng. Rep. 501, 535 (K. B. 1811); *Ex parte Partington,* 13 M. & W. 679, 153 Eng. Rep. 284 (Ex. 1845); Church, Habeas Corpus (1884), § 386; Ferris and Ferris, Extraordinary Legal Remedies (1926), § 55.[3] "A person detained in custody might thus proceed from court to court until he obtained his liberty." *Cox* v. *Hakes,* 15 A. C. 506, 527 (H. L., 1890).[4] That this was a principle of our law of habeas corpus as well as the English was assumed to be the case from the earliest days of federal habeas corpus jurisdiction. Cf. *Ex parte Burford,* 3 Cranch 448 (Chief Justice Marshall). Since then, it has become settled in an unbroken line of decisions. *Ex parte Kaine,* 3 Blatchf. 1, 5–6 (Mr. Justice Nelson in

[3] "This case has already been before the Court of Queen's Bench, on the return of a habeas corpus, and before my Lord Chief Baron at chambers, on a subsequent application for a similar writ. In both instances the discharge was refused. The defendant, however, has a right to the opinion of every court as to the propriety of his imprisonment, and therefore we have thought it proper to examine attentively the provisions of the statute, without considering ourselves as concluded by these decisions." *Ex parte Partington, supra,* 13 M. & W., at 683–684, 153 Eng. Rep., at 286.

[4] See also Church, *supra,* § 389. The traditional English practice has recently been curtailed by statute. Administration of Justice Act, 1960, 8 & 9 Eliz. II, c. 65, § 14 (2).

Chambers); *In re Kaine,* 14 How. 103; *Ex parte Cuddy,* 40 F. 62, 65 (Cir. Ct. S. D. Cal. 1889) (Mr. Justice Field); *Frank* v. *Mangum,* 237 U. S. 309, 334; *Salinger* v. *Loisel,* 265 U. S. 224, 230; *Waley* v. *Johnston,* 316 U. S. 101; *United States ex rel. Accardi* v. *Shaughnessy,* 347 U. S. 260, 263, n. 4; *Heflin* v. *United States,* 358 U. S. 415, 420 (opinion of Mr. Justice Stewart) (dictum); *Powell* v. *Sacks,* 303 F. 2d 808 (C. A. 6th Cir. 1962). Indeed, only the other day we remarked upon "the familiar principle that *res judicata* is inapplicable in habeas proceedings." *Fay* v. *Noia,* 372 U. S. 391, 423.

It has been suggested, see *Salinger* v. *Loisel, supra,* at 230–231, that this principle derives from the fact that at common law habeas corpus judgments were not appealable. But its roots would seem to go deeper. Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged. If "government . . . [is] always [to] be accountable to the judiciary for a man's imprisonment," *Fay* v. *Noia, supra,* at 402, access to the courts on habeas must not be thus impeded. The inapplicability of *res judicata* to habeas, then, is inherent in the very role and function of the writ.

A prisoner whose motion under § 2255 is denied will often file another, sometimes many successive motions. We are aware that in consequence the question whether to grant a hearing on a successive motion can be troublesome—particularly when the motion is prepared without the assistance of counsel and contains matter extraneous to the prisoner's case. But the problem is not new, and our decisions under habeas corpus have identified situations where denial without hearing is proper even though a second or successive application states a claim for relief. One such situation is that involved in *Salinger* v. *Loisel, supra.* There, a first application for habeas corpus had been denied, after hearing, by one District Court, and the

denial was affirmed by the Court of Appeals. The prisoner then filed subsequent applications, all identical to the first, in a different District Court. We indicated that the subsequent applications might properly have been denied simply on the basis that the first denial had followed a full hearing on the merits. We there announced a governing principle; while reaffirming the inapplicability of *res judicata* to habeas, we said: "each application is to be disposed of in the exercise of a sound judicial discretion guided and controlled by a consideration of whatever has a rational bearing on the propriety of the discharge sought. Among the matters which may be considered, and even given controlling weight, are . . . a prior refusal to discharge on a like application." 265 U. S., at 231. The Court quoted approvingly from Mr. Justice Field's opinion in *Ex parte Cuddy, supra,* at 66: " 'The action of the court or justice on the second application will naturally be affected to some degree by the character of the court or officer to whom the first application was made, and the fullness of the consideration given to it.' " 265 U. S., at 231–232. The petitioner's successive applications were properly denied because he sought to retry a claim previously fully considered and decided against him. Similarly, nothing in § 2255 requires that a sentencing court grant a hearing on a successive motion alleging a ground for relief already fully considered on a prior motion and decided against the prisoner.

Another such situation is that which was presented in *Wong Doo* v. *United States,* 265 U. S. 239. In *Wong Doo* the prisoner in his first application for habeas corpus tendered two grounds in support of his position. A hearing was held but the petitioner offered no proof of his second ground, even though the return to the writ had put it in issue. Relief was denied and the denial affirmed by the Circuit Court of Appeals. Later, he filed a second application relying exclusively on the second ground.

Relief was denied. We upheld the denial: "The petitioner had full opportunity to offer proof of . . . [the second ground] at the hearing on the first petition; and, if he was intending to rely on that ground, good faith required that he produce the proof then. To reserve the proof for use in attempting to support a later petition, if the first failed, was to make an abusive use of the writ of *habeas corpus*. No reason for not presenting the proof at the outset is offered. It has not been embodied in the record, but what is said of it there and in the briefs shows that it was accessible all the time." 265 U. S., at 241. Similarly, the prisoner who on a prior motion under § 2255 has deliberately withheld a ground for relief need not be heard if he asserts that ground in a successive motion; his action is inequitable—an abuse of the remedy—and the court may in its discretion deny him a hearing.

The interaction of these two principles—a successive application on a ground heard and denied on a prior application, and abuse of the writ—was elaborated in *Price* v. *Johnston*, 334 U. S. 266, 287–293. The petitioner had for the first time in his fourth application alleged the knowing use of perjured testimony by the prosecution. But the Court held that regardless of the number of prior applications, the governing principle announced in *Salinger* v. *Loisel* could not come into play because the fourth application relied on a ground not previously heard and determined. *Wong Doo* was distinguished on the ground that there the proof had been "accessible at all times" to the petitioner, which demonstrated his bad faith, 334 U. S., at 289; in *Price*, by contrast, for aught the record disclosed petitioner might have been justifiably ignorant of newly alleged facts or unaware of their legal significance. The case also decided an important procedural question with regard to abuse of remedy as justification for denial of a hearing, namely, that the burden is on the Govern-

ment to plead abuse of the writ. "[I]f the Government chooses not to deny the allegation [of knowing use of perjured testimony] or to question its sufficiency and desires instead to claim that the prisoner has abused the writ of *habeas corpus,* it rests with the Government to make that claim with clarity and particularity in its return to the order to show cause." *Id.,* at 292. The Court reasoned that it would be unfair to compel the habeas applicant, typically unlearned in the law and unable to procure legal assistance in drafting his application, to plead an elaborate negative.

Very shortly after the *Price* decision, as part of the 1948 revision of the Judicial Code, the Court's statement in *Salinger* of the governing principle in the treatment of a successive application was given statutory form. 28 U. S. C. § 2244.[5] There are several things to be observed about this codification.

First, it plainly was not intended to change the law as judicially evolved. Not only does the Reviser's Note disclaim any such intention, but language in the original bill which would have injected *res judicata* into federal habeas corpus was deliberately eliminated from the Act as finally passed. See S. Rep. No. 1559, 80th Cong., 2d Sess. 9; Moore, Commentary on the United States Judicial Code (1949), 436–438. Moreover, if construed to derogate from the traditional liberality of the writ of habeas corpus,

[5] Section 2244 provides:

"No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States, or of any State, if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not theretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry."

see pp. 7–8, *supra,* § 2244 might raise serious constitutional questions.[6] Cf. *Fay* v. *Noia, supra,* at 406.

Second, even with respect to successive applications on which hearings may be denied because the ground asserted was previously heard and decided, as in *Salinger,* § 2244 is faithful to the Court's phrasing of the principle in *Salinger,* and does not enact a rigid rule. The judge is permitted, not compelled, to decline to entertain such an application, and then only if he "is satisfied that the ends of justice will not be served" by inquiring into the merits.

Third, § 2244 is addressed only to the problem of successive applications based on grounds previously heard and decided. It does not cover a second or successive application containing a ground "not theretofore presented and determined," and so does not touch the problem of abuse of the writ. In *Wong Doo,* petitioner's second ground had been presented but not determined on his prior application; § 2244 would be inapplicable in such a situation. On the other hand, § 2244 was obviously not intended to foreclose judicial application of the abuse-of-writ principle as developed in *Wong Doo* and *Price.*

Section 2255 of the Judicial Code, under which the instant case arises, is of course also a product of the 1948 revision—enacted, in the language of the Reviser's Note, to provide "an expeditious remedy for correcting erroneous sentences [of federal prisoners] without resort to habeas corpus." It will be noted that although § 2255 contains a parallel provision to § 2244, there is an apparent verbal discrepancy. Under § 2255, it is enough, in order to invoke the court's discretion to decline to reach the

[6] Article I, § 9, cl. 2, of the Federal Constitution provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

merits, that the prisoner is seeking "similar relief" for the second time. This language might seem to empower the sentencing court to apply *res judicata* virtually at will, since even if a second motion is predicated on a completely different ground from the first, the prisoner ordinarily will be seeking the same "relief." Note, 59 Yale L. J. 1183, 1188, n. 24 (1950). But the language cannot be taken literally. In *United States* v. *Hayman,* 342 U. S. 205, the prisoner vigorously contended that § 2255 was an unconstitutional suspension of the writ of habeas corpus.[7] The Court avoided the constitutional question by holding that § 2255 was as broad as habeas corpus:

> "This review of the history of Section 2255 shows that it was passed at the instance of the Judicial Conference to meet practical difficulties that had arisen in administering the habeas corpus jurisdiction of the federal courts. Nowhere in the history of Section 2255 do we find any purpose to impinge upon prisoners' rights of collateral attack upon their convictions. On the contrary, the sole purpose was to minimize the difficulties encountered in habeas corpus hearings by affording *the same rights* in another and more convenient forum." 342 U. S., at 219. (Emphasis supplied.) Accord, *United States* v. *Morgan,* 346 U. S. 502, 511; *Smith* v. *United States,* 88 U. S. App. D. C. 80, 187 F. 2d 192 (1950); *Heflin* v. *United States,* 358 U. S. 415, 421 (opinion of MR. JUSTICE STEWART).

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[7] The Court of Appeals in *Hayman* had held § 2255 unconstitutional. 187 F. 2d 456 (C. A. 9th Cir. 1950), amended, *id.,* at 471 (1951). The same position had been taken in a Note in the Yale Law Journal, "Section 2255 of the Judicial Code: The Theatened Demise of Habeas Corpus," 59 Yale L. J. 1183 (1950). In this Court, a powerful constitutional attack was mounted by respondent's assigned counsel, Mr. Paul A. Freund.

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As we said just last Term, "it conclusively appears from the historic context in which § 2255 was enacted that the legislation was intended simply to provide in the sentencing court a remedy exactly commensurate with that which had previously been available by habeas corpus in the court of the district where the prisoner was confined." *Hill* v. *United States,* 368 U. S. 424, 427.

Plainly, were the prisoner invoking § 2255 faced with the bar of *res judicata,* he would not enjoy the "same rights" as the habeas corpus applicant, or "a remedy exactly commensurate with" habeas. Indeed, if he were subject to any substantial procedural hurdles which made his remedy under § 2255 less swift and imperative than federal habeas corpus, the gravest constitutional doubts would be engendered, as the Court in *Hayman* implicitly recognized. And cf. pp. 11–12, *supra.* We therefore hold that the "similar relief" provision of § 2255 is to be deemed the material equivalent of § 2244. See *Smith* v. *United States,* 106 U. S. App. D. C. 169, 173, 270 F. 2d 921, 925 (1959); Longsdorf, The Federal Habeas Corpus Acts Original and Amended, 13 F. R. D. 407, 424 (1953). We are helped to this conclusion by two further considerations.

First, there is no indication in the legislative history to the 1948 revision of the Judicial Code that Congress intended to treat the problem of successive applications differently under habeas corpus than under the new motion procedure; and it is difficult to see what logical or practical basis there could be for such a distinction.

Second, even assuming the constitutionality of incorporating *res judicata* in § 2255, such a provision would probably prove to be completely ineffectual, in light of the further provision in the section that habeas corpus remains available to a federal prisoner if the remedy by motion is "inadequate or ineffective." A prisoner barred by *res judicata* would seem as a consequence to have an

"inadequate or ineffective" remedy under § 2255 and thus be entitled to proceed in federal habeas corpus—where, of course, § 2244 applies. See *Smith* v. *United States, supra,* 106 U. S. App. D. C., at 174, 270 F. 2d, at 926.

II.

We think the judicial and statutory evolution of the principles governing successive applications for federal habeas corpus and motions under § 2255 has reached the point at which the formulation of basic rules to guide the lower federal courts is both feasible and desirable. Compare *Townsend* v. *Sain,* 372 U. S. 293, 310. Since the motion procedure is the substantial equivalent of federal habeas corpus, we see no need to differentiate the two for present purposes. It should be noted that these rules are not operative in cases where the second or successive application is shown, on the basis of the application, files, and records of the case alone, conclusively to be without merit. 28 U. S. C. §§ 2243, 2255. In such a case the application should be denied without a hearing.

A. Successive Motions on Grounds Previously Heard and Determined.

Controlling weight may be given to denial of a prior application for federal habeas corpus or § 2255 relief [8] only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application.

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[8] The discussion in this opinion relates, of course, solely to the problem of successive applications for federal collateral relief. For the principles which govern where the prior application is not for federal collateral relief, see *Fay* v. *Noia, supra,* and *Townsend* v. *Sain, supra.*

(1) By "ground," we mean simply a sufficient legal basis for granting the relief sought by the applicant. For example, the contention that an involuntary confession was admitted in evidence against him is a distinct ground for federal collateral relief. But a claim of involuntary confession predicated on alleged psychological coercion does not raise a different "ground" than does one predicated on alleged physical coercion. In other words, identical grounds may often be proved by different factual allegations. So also, identical grounds may often be supported by different legal arguments, cf. *Wilson* v. *Cook,* 327 U. S. 474, 481; *Dewey* v. *Des Moines,* 173 U. S. 193, 198, or be couched in different language, *United States* v. *Jones,* 194 F. Supp. 421 (D. C. D. Kan. 1961) (dictum), aff'd mem., 297 F. 2d 835 (C. A. 10th Cir. 1962), or vary in immaterial respects, *Stilwell* v. *United States Marshals,* 192 F. 2d 853 (C. A. 4th Cir. 1951) (*per curiam*). Should doubts arise in particular cases as to whether two grounds are different or the same, they should be resolved in favor of the applicant.

(2) The prior denial must have rested on an adjudication of the merits of the ground presented in the subsequent application. See *Hobbs* v. *Pepersack,* 301 F. 2d 875 (C. A. 4th Cir. 1962). This means that if factual issues were raised in the prior application, and it was not denied on the basis that the files and records conclusively resolved these issues, an evidentiary hearing was held. See *Motley* v. *United States,* 230 F. 2d 110 (C. A. 5th Cir. 1956); *Hallowell* v. *United States,* 197 F. 2d 926 (C. A. 5th Cir. 1952).

(3) Even if the same ground was rejected on the merits on a prior application, it is open to the applicant to show that the ends of justice would be served by permitting the redetermination of the ground. If factual issues are involved, the applicant is entitled to a new hearing upon showing that the evidentiary hearing on the prior appli-

cation was not full and fair; we canvassed the criteria of a full and fair evidentiary hearing recently in *Townsend* v. *Sain, supra,* and that discussion need not be repeated here. If purely legal questions are involved, the applicant may be entitled to a new hearing upon showing an intervening change in the law or some other justification for having failed to raise a crucial point or argument in the prior application. Two further points should be noted. *First,* the foregoing enumeration is not intended to be exhaustive; the test is "the ends of justice" and it cannot be too finely particularized. *Second,* the burden is on the applicant to show that, although the ground of the new application was determined against him on the merits on a prior application, the ends of justice would be served by a redetermination of the ground.

B. The Successive Application Claimed to be an Abuse of Remedy.

No matter how many prior applications for federal collateral relief a prisoner has made, the principle elaborated in Subpart A, *supra,* cannot apply if a different ground is presented by the new application. So too, it cannot apply if the same ground was earlier presented but not adjudicated on the merits. In either case, full consideration of the merits of the new application can be avoided only if there has been an abuse of the writ or motion remedy; and this the Government has the burden of pleading. See p. 11, *supra.*

To say that it is open to the respondent to show that a second or successive application is abusive is simply to recognize that "habeas corpus has traditionally been regarded as governed by equitable principles. *United States ex rel. Smith* v. *Baldi,* 344 U. S. 561, 573 (dissenting opinion). Among them is the principle that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks. Narrowly circumscribed, in

conformity to the historical role of the writ of habeas corpus as an effective and imperative remedy for detentions contrary to fundamental law, the principle is unexceptionable." *Fay* v. *Noia, supra,* at 438. Thus, for example, if a prisoner deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application, in the hope of being granted two hearings rather than one or for some other such reason, he may be deemed to have waived his right to a hearing on a second application presenting the withheld ground. The same may be true if, as in *Wong Doo,* the prisoner deliberately abandons one of his grounds at the first hearing. Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay.

We need not pause over the test governing whether a second or successive application may be deemed an abuse by the prisoner of the writ or motion remedy. The Court's recent opinions in *Fay* v. *Noia, supra,* at 438–440, and *Townsend* v. *Sain, supra,* at 317, deal at length with the circumstances under which a prisoner may be foreclosed from federal collateral relief. The principles developed in those decisions govern equally here.

A final qualification, applicable to both A and B of the foregoing discussion, is in order. The principles governing both justifications for denial of a hearing on a successive application are addressed to the sound discretion of the federal trial judges. Theirs is the major responsibility for the just and sound administration of the federal collateral remedies, and theirs must be the judgment as to whether a second or successive application shall be denied without consideration of the merits. Even as to such an application, the federal judge clearly has the power—and, if the ends of justice demand, the duty—to

reach the merits. Cf. *Townsend* v. *Sain, supra,* at 312, 318. We are confident that this power will be soundly applied.

III.

Application of the foregoing principles to the instant case presents no difficulties. Petitioner's first motion under § 2255 was denied because it stated only bald legal conclusions with no supporting factual allegations. The court had the power to deny the motion on this ground, see *Wilkins* v. *United States,* 103 U. S. App. D. C. 322, 258 F. 2d 416 (C. A. D. C. Cir. 1958), although the better course might have been to direct petitioner to amend his motion, see *Stephens* v. *United States,* 246 F. 2d 607 (C. A. 10th Cir. 1957) (*per curiam*). But the denial, thus based, was not on the merits. It was merely a ruling that petitioner's pleading was deficient. To be sure, the district judge stated in a footnote to his memorandum: "The Court has reviewed the entire file . . . which includes the previous proceeding, and a transcript of the proceedings at the time petitioner entered his plea, and . . . is of the view that petitioner's complaints are without merit in fact." But the "files and records of the case," including the transcript, could not "conclusively show" that the claim alleged in the second motion entitled the petitioner to no relief. The crucial allegation of the second motion was that petitioner's alleged mental incompetency was the result of administration of narcotic drugs during the period petitioner was held in the Sacramento County Jail pending trial in the instant case. However regular the proceedings at which he signed a waiver of indictment, declined assistance of counsel, and pleaded guilty might appear from the transcript, it still might be the case that petitioner did not make an intelligent and understanding

waiver of his constitutional rights. See *Machibroda* v. *United States,* 368 U. S. 487; *Moore* v. *Michigan,* 355 U. S. 155; *Pennsylvania ex rel. Herman* v. *Claudy,* 350 U. S. 116; *Taylor* v. *United States,* 193 F. 2d 411 (C. A. 10th Cir. 1952). Cf. *Von Moltke* v. *Gillies,* 332 U. S. 708. For the facts on which petitioner's claim in his second application is predicated are outside the record. This is so even though the judge who passed on the two motions was the same judge who presided at the hearing at which petitioner made the waivers, and the later hearing at which he was sentenced. Whether or not petitioner was under the influence of narcotics would not necessarily have been apparent to the trial judge. Petitioner appeared before him without counsel and but briefly. That the judge may have thought that he acted with intelligence and understanding in responding to the judge's inquiries cannot "conclusively show," as the statute requires, that there is no merit in his present claim. Cf. *Machibroda* v. *United States, supra,* at 495. If anything, his request before sentence that the judge send him to a hospital "for addiction cure" cuts the other way. Moreover, we are advised in the Government's brief that the probation officer's report made to the judge before sentence (the report is not part of the record in this Court) disclosed that petitioner received medical treatment for withdrawal symptoms while he was in jail prior to sentencing.

On remand, a hearing will be required. This is not to say, however, that it will automatically become necessary to produce petitioner at the hearing to enable him to testify. Not every colorable allegation entitles a federal prisoner to a trip to the sentencing court. Congress, recognizing the administrative burden involved in the transportation of prisoners to and from a hearing in the sentencing court, provided in § 2255 that the application may be entertained and determined "without requiring

the production of the prisoner at the hearing." This does not mean that a prisoner can be prevented from testifying in support of a substantial claim where his testimony would be material. However, we think it clear that the sentencing court has discretion to ascertain whether the claim is substantial before granting a full evidentiary hearing. In this connection, the sentencing court might find it useful to appoint counsel to represent the applicant. Cf. *Coppedge* v. *United States,* 369 U. S. 438, 446. Also, it will be open to the respondent to attempt to show that petitioner's failure to claim mental incompetency in his first motion was an abuse of the motion remedy, within the principles of *Wong Doo* and *Price* v. *Johnston,* disentitling him to a hearing on the merits. We leave to the District Court, in its sound discretion, the question whether the issue of abuse of the motion remedy, if advanced by respondent, or the issue on the merits, can under the circumstances be tried without having the prisoner present. As we said only last Term:

> "What has been said is not to imply that a movant [under § 2255] must always be allowed to appear in a district court for a full hearing if the record does not conclusively and expressly belie his claim, no matter how vague, conclusory, or palpably incredible his allegations may be. The language of the statute does not strip the district courts of all discretion to exercise their common sense. Indeed, the statute itself recognizes that there are times when allegations of facts outside the record can be fully investigated without requiring the personal presence of the prisoner. Whether the petition in the present case can appropriately be disposed of without the presence of the petitioner at the hearing is a question to be resolved in the further proceedings in the District Court.

> "There will always be marginal cases, and this case is not far from the line. But the specific and detailed factual assertions of the petitioner, while improbable, cannot at this juncture be said to be incredible. If the allegations are true, the petitioner is clearly entitled to relief. . . ." *Machibroda* v. *United States, supra,* at 495–496. (Footnote omitted.)

The need for great care in criminal collateral procedure is well evidenced by the instant case. Petitioner was adjudged guilty of a crime carrying a heavy penalty in a summary proceeding at which he was not represented by counsel. Very possibly, the proceeding was constitutionally adequate. But by its summary nature, and because defendant was unrepresented by counsel, a presumption of adequacy is obviously less compelling than it would be had there been a full criminal trial. Moreover, the nature of the proceeding was such as to preclude direct appellate review. In such a case it is imperative that a fair opportunity for collateral relief be afforded. An applicant for such relief ought not to be held to the niceties of lawyers' pleadings or be cursorily dismissed because his claim seems unlikely to prove meritorious. That his application is vexatious or repetitious, or that his claim lacks any substance, must be fairly demonstrated.

Finally, we remark that the imaginative handling of a prisoner's first motion would in general do much to anticipate and avoid the problem of a hearing on a second or successive motion. The judge is not required to limit his decision on the first motion to the grounds narrowly alleged, or to deny the motion out of hand because the allegations are vague, conclusional, or inartistically expressed. He is free to adopt any appropriate means for inquiry into the legality of the prisoner's detention in order to ascertain all possible grounds upon which the prisoner might claim to be entitled to relief. Certainly

such an inquiry should be made if the judge grants a hearing on the first motion and allows the prisoner to be present. The disposition of all grounds for relief ascertained in this way may then be spread on the files and records of the case. Of course, to the extent the files and records "conclusively show" that the prisoner is entitled to no relief on any such grounds, no hearing on a second or successive motion, to the extent of such grounds, would be necessary.

The judgment of the Court of Appeals is reversed and the case is remanded to the District Court for a hearing consistent with this opinion.

It is so ordered.

MR. JUSTICE WHITE concurs in the result.

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

This case, together with *Townsend* v. *Sain,* 372 U. S. 293, and *Fay* v. *Noia,* 372 U. S. 391, form a trilogy of "guideline" decisions in which the Court has undertaken to restate the responsibilities of the federal courts in federal post-conviction proceedings. *Sain* and *Noia* relate to federal habeas corpus proceedings arising out of state criminal convictions. The present case involves successive § 2255 applications (and similar habeas corpus proceedings under § 2244, which the Court finds sets the pattern for § 2255) arising out of federal convictions.

The over-all effect of this trilogy of pronouncements is to relegate to a back seat, as it affects state and federal criminal cases finding their way into federal post-conviction proceedings, the principle that there must be some end to litigation.

While, contrary to the Court, I think the District Court's denial without hearing of a second § 2255 application in this case was entirely proper in the circum-

stances shown by the record, the more serious aspect of the Court's opinion is the impact it is likely to have in curbing the ability of the Federal District Courts to cope efficiently, as well as fairly, with successive applications by federal prisoners,[1] the number of which will doubtless increase as a result of what is said today. The net of it is that the Court has come forth with a new § 2255 of its own which bears little resemblance to the statute enacted by Congress. And in the process the Court has even gone so far as to suggest that any tampering with its new composition may run afoul of the Constitution.

I.

At the outset, there is one straw man that should be removed from this case. The Court is at great pains to develop the theme that denial of a prisoner's application for collateral relief is not *res judicata.* But the Government recognizes, as indeed it must in view of the decisions, that strict doctrines of *res judicata* do not apply in this field. The consequences of injustice—loss of liberty and sometimes loss of life—are far too great to permit the automatic application of an entire body of technical rules whose primary relevance lies in the area of civil litigation.

This is not to suggest, however, that finality, as distinguished from the particular rules of *res judicata,* is without significance in the criminal law. Both the individual criminal defendant and society have an interest in

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[1] According to the reports of the Administrative Office of the United States Courts, 538 § 2255 proceedings were commenced in 1960, 560 in 1961, and 546 in 1962. Annual Report of the Director, 1960, p. 231; *id.,* 1961, p. 239; Preliminary Annual Report of the Director, 1962, Division of Procedural Studies and Statistics, p. 23. The Government, in referring to these figures in its brief, has stated that even they "do not . . . appear to be complete in light of the Department's experience with petitions for writs of certiorari in this Court."

insuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community. It is with this interest in mind, as well as the desire to avoid confinements contrary to fundamental justice, that courts and legislatures have developed rules governing the availability of collateral relief.

Thus it has long been recognized that not every error that may have occurred at a criminal trial may be raised in collateral proceedings. For many years after the Constitution was adopted, and even down to the present century, such proceedings were generally confined to matters of personal and subject matter jurisdiction. Cf. *Fay* v. *Noia,* 372 U. S. 391, 450–455 (dissenting opinion of this writer). And while the scope of collateral review has expanded to cover questions of the kind raised by petitioner here, the Court has consistently held that neither habeas corpus nor its present federal counterpart § 2255 is a substitute for an appeal. See, *e. g., Sunal* v. *Large,* 332 U. S. 174; *Hill* v. *United States,* 368 U. S. 424; see also, *e. g., Franano* v. *United States,* 303 F. 2d 470.

Similarly, the Court has held that not all questions that were or could have been raised in an initial application for collateral relief must necessarily be entertained if raised in a successive application. A District Court, for example, has discretion to deny a successive application if the claim asserted was heard and determined on a prior application, *Salinger* v. *Loisel,* 265 U. S. 224. Indeed the Court has stated that it would be an *abuse* of discretion to entertain a second application if the claim raised had been raised before, a hearing had been held, and no proof in support of the claim had been offered at the hearing. *Wong Doo* v. *United States,* 265 U. S. 239. And in the same year that § 2255 was adopted, the decision in *Price* v.

Johnston, 334 U. S. 266, made it clear that a successive application could be denied for abuse of the remedy even if the prisoner's claim had not been raised in any prior application, unless there were some acceptable excuse for the failure to do so.

It is in light of this history that § 2255, and the related § 2244, dealing with successive applications for writs of habeas corpus, must be considered. Concern with existing and potential abuse of the remedy by prisoners who made a pastime of filing collateral proceedings led to proposals that successive applications for habeas corpus on grounds previously available would be wholly barred, except in the form of petitions for rehearing to the same judge, and that applications under what became § 2255 would have to be submitted within one year after discovery of the facts or a change in the law. *E. g.*, H. R. 4232, 79th Cong., 1st Sess.; H. R. 6723, 79th Cong., 2d Sess. These proposals were rejected in favor of the traditional discretion exercised by courts with respect to successive applications, and it was made clear that this discretion extended to a case in which an applicant asserted for the first time a ground that could have been raised before. Thus the final wording of § 2244 provided that the court shall not be *required* to entertain a petition

> ". . . if it appears that the legality of such detention has been determined . . . on a prior application . . . and the petition presents no *new* ground not theretofore presented and determined . . . ." (Emphasis added.)

The word "new," a word ignored by the Court in its discussion of this provision, is of cardinal importance. A memorandum by Circuit Judge Stone, adopted in a Senate Report (S. Rep. No. 1527, 80th Cong., 2d Sess.), noted that two of the purposes of an earlier version of this

provision were "to compel petitioner to state in his petition all of the grounds for the writ then known to him" and "to afford unlimited opportunity to present any grounds which petitioner may *thereafter discover* at any time." (Emphasis added.) This latter purpose was "brought about by allowing presentation of a subsequent petition based upon 'new' grounds 'not theretofore presented and determined.' " [2] Thus a "new ground," within the meaning of § 2244, is one that has not previously been asserted and had not previously been *known*. The Court is manifestly in error in its conclusion, *ante*, pp. 11–13, that the discretion provided for in § 2244 is limited to petitions relying on grounds previously heard and decided.

Although the wording of § 2255 is more general, it is clearly directed to the same end:

> "The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner."

The "relief" sought is the setting aside of the sentence; the statute contains no reference to the nature of the grounds urged in support of the motion, and there can be little doubt that the discretion vested in the court was intended to extend to cases in which a particular ground was urged for the first time.

Further, it would appear from the language of § 2255—the "sentencing court" is not "required to entertain" successive motions—that the court was given discretion

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[2] The memorandum of Circuit Judge Stone was written at a time when the proposal was to bar successive applications except in the form of petitions for rehearing to the same judge that had passed on the prior application. But the language in issue here, defining those applications considered to be successive, *i. e.*, those presenting "no new ground not theretofore presented and determined," was the same as that contained in § 2244 as ultimately enacted.

to deny a second motion, on grounds of abuse, on its own initiative and without waiting for the Government to raise the point in its return. The provision, to this extent, departed from the rule of pleading declared in the year of its adoption in *Price* v. *Johnston, supra,* at 292—that in habeas corpus applications, "it rests with the Government to make that claim [of abuse] with clarity and particularity in its return to the order to show cause." Such a departure was amply justified by the fact that on a § 2255 motion, unlike a habeas corpus application, the prisoner's claim is presented to the sentencing court (usually the trial judge himself), which has ready access to the record of the original conviction and of the prior motions. Moreover, Congress could certainly have reasonably concluded, as did the dissenters in *Price,* that:

> "It is not too much to ask the petitioner to state, however informally, that his . . . petition is based on newly discovered matter, or, in any event, on a claim that he could not fairly have been asked to bring to the court's attention in his . . . prior petitions. Such a requirement certainly does not narrow the broad protection which the writ . . . serves." 334 U. S., at 294.[3]

The Court in *Price* held only that the burden is on the Government to *plead* abuse of the writ; the burden of *proving* an adequate excuse was explicitly placed on the prisoner:

> "Once a particular abuse has been alleged, the prisoner has the burden of answering that allegation and of proving that he has not abused the writ." 334 U. S., at 292.

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[3] It seems clear that the actual decision in *Price* v. *Johnston* could not have entered into Congress' deliberations on §§ 2244 and 2255, since the decision was handed down only one month before formal enactment, and well after study and formulation of the proposals.

The Court today, however, leaves the crucial question of burden of proof up in the air. If it means to suggest that this burden also rests with the Government, then it is going far beyond the holding of the sharply divided Court in *Price*. The relevant facts on the question of abuse would almost always lie within the exclusive possession of the prisoner, and any evidentiary burden placed on the Government would therefore be one that it could seldom meet.

It is startling enough that the Government may now be required to *establish,* in a collateral attack on a prior conviction, that a successive application is an abuse of the remedy. It is at least equally startling to learn that the question whether or not there has been abuse of the remedy may turn on whether the prisoner had "deliberately" withheld the ground now urged or had "deliberately" abandoned it at some earlier stage. *Ante,* p. 18. The established concept of inexcusable neglect is apparently in the process of being entirely eliminated from the criminal law, cf. *Fay* v. *Noia,* 372 U. S. 391, and the standard that seems to be taking its place will, I am afraid, prove wholly inadequate and in the long run wholly unsatisfactory.

I must also protest the implication in the Court's opinion that every decision of this Court in the field of habeas corpus—even one like *Price* v. *Johnston,* dealing with a purely procedural question on which reasonable men surely may differ—has become enshrined in the Constitution because of the guarantee in Article I against suspension of the writ. This matter may perhaps be brought back into proper perspective by noting again that at the time of the adoption of the Constitution, and for many years afterward, a claim of the kind asserted by Price, or asserted here by petitioner, was not cognizable in habeas corpus at all. See p. 25, *supra.*

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II.

Section 2255, read against the background of this Court's decisions and the history of the related provision § 2244, is surely designed to vest in the District Court a sound discretion to deny a successive motion, on its own initiative, for abuse of the remedy. At the very least, this exercise of discretion should be upheld in a case in which there has been no adequate explanation of the earlier failure to make the claim *and* in which the whole record, including that of the prior motion, casts substantial doubts on the merit of that claim. This is such a case.

In the affidavit filed in support of his second motion, the petitioner asserted that he "did not understand trial proceeding owing to his mental incompetency cause[d] by the administration of a drug." The judge who denied this motion was the same judge who presided at the trial, and the record not only shows that the judge took pains to make certain Sanders was aware of all of his rights but also indicates that Sanders did indeed understand the nature of the proceedings. After the judge explained at some length Sanders' right to force the Government to proceed by indictment, the following questions were asked:

"Having in mind all that I have told you do you wish to have the matter heard by the grand jury?

"The DEFENDANT. No, your honor, I waive it.

"The COURT. I didn't hear that.

"The DEFENDANT. I waive that right.

"The COURT. You waive that right?

"The DEFENDANT. Yes.

"The COURT. You understand you do have the right, though?

"The DEFENDANT. Yes.

"The COURT. And you now want to proceed without indictment and by way of information?

"The DEFENDANT. Yes."

In response to further questions, Sanders said he was acting freely and voluntarily. He then signed a waiver of indictment and after the information was read to him, pleaded guilty.

Sentencing followed some three weeks after, and about *one year* later Sanders filed a § 2255 motion alleging, *inter alia,* that the court had allowed him to be "intimidated and coerced into intering [*sic*] a plea without Counsel, and any knowledge of the charges." This motion was denied on the merits, not simply for insufficiency, the trial judge correctly stating that the charges were "completely refuted by the files and records of this case."

The motion before us now was filed some nine months after the initial application. In addition to commenting that he was "not required to entertain a second motion for similar relief," the trial judge said that he had "reviewed the entire file" and was "of the view that petitioner's complaints are without merit in fact." In support of this conclusion, in addition to whatever inferences the judge may properly have drawn from his own observation of Sanders at the trial, there is:

(1) the record of the original trial, which strongly indicates that, contrary to his sworn allegation, petitioner did understand precisely what was going on and responded promptly and intelligently;

(2) an initial application under § 2255 which not only failed to mention the claim now urged—a lack of mental competence to understand—but indeed advanced a wholly inconsistent claim—that the court allowed him to be "intimidated and coerced" into pleading guilty; and

(3) a second application, not filed for another nine months, without any explanation why a point which was obviously known to petitioner before, and which would so clearly have been relevant, had not previously been raised.

In the light of the whole record, including the prior application, the second motion rested on an assertion of fact that was highly suspect, if not self-refuting. If the assertion had been made in the initial application, or if a valid excuse had been offered for the failure to do so, a hearing would doubtless have been necessary. But to require a hearing under the present circumstances, and to tell the trial court that it has abused its discretion, is to sanction manifest abuse of the remedy.

III.

I seriously doubt the wisdom of these "guideline" decisions. They suffer the danger of pitfalls that usually go with judging in a vacuum. However carefully written, they are apt in their application to carry unintended consequences which once accomplished are not always easy to repair. Rules respecting matters daily arising in the federal courts are ultimately likely to find more solid formulation if left to focused adjudication on a case-by-case basis, or to the normal rule-making processes of the Judicial Conference, rather than to *ex cathedra* pronouncements by this Court, which is remote from the arena.

In dealing with cases of this type, I think we do better to confine ourselves to the particular issues presented, and on that basis I would affirm the judgment of the Court of Appeals.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS ET AL. *v.* LOUISVILLE & NASHVILLE RAILROAD CO.

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

No. 94. Argued February 21, 1963.—Decided April 29, 1963.

Under § 3 First (i) of the Railway Labor Act, a railroad submitted to the National Railroad Adjustment Board a "minor dispute" with a union growing out of the discharge of an employee. The Board sustained the employee's claim for reinstatement and back pay. The railroad reinstated the employee; but a dispute then ensued as to whether the employee was entitled to full pay for the time lost without deduction for money earned from other employers. This dispute led to a threat of a strike, and the railroad sued in a Federal District Court to enjoin the threatened strike. *Held:* Under the Railway Labor Act, the union could not legally strike for the purpose of enforcing its interpretation of the Board's money award; it must utilize instead the judicial enforcement procedure provided by § 3 First (p) of the Act; and the District Court properly enjoined the threatened strike. *Trainmen* v. *Chicago R. & I. R. Co.*, 353 U. S. 30. Pp. 33–42.

297 F. 2d 608, affirmed.

Harold C. Heiss argued the cause for petitioners. With him on the briefs were *Chas. I. Dawson, Russell B. Day, Harold N. McLaughlin, Wayland K. Sullivan* and *V. C. Shuttleworth.*

John P. Sandidge argued the cause for respondent. With him on the brief were *H. G. Breetz, W. L. Grubbs, M. D. Jones* and *Joseph L. Lenihan.*

MR. JUSTICE STEWART delivered the opinion of the Court.

The respondent railroad company dismissed an employee named Humphries on the ground that he had assaulted two fellow employees. His union, the Brother-

hood of Locomotive Firemen and Enginemen, protested the discharge. The customary grievance procedures on the property were invoked, but to no avail. To enforce its demand that Humphries be reinstated, the union threatened to call a strike. Before a strike was actually called, the respondent submitted the dispute to the National Railroad Adjustment Board, pursuant to § 3 First (i) of the Railway Labor Act.[1] The Adjustment Board sustained the employee's claim for reinstatement in the following brief order:

> "Claim sustained with pay for time lost as the rule is construed on the property."

The respondent reinstated Humphries, and, for the purpose of computing his pay for lost time, it asked him to submit a record of the outside income he had earned during the period which followed his dismissal. Humphries and his union resisted this demand for information, claiming that the Adjustment Board's award entitled him to full pay for the time lost, without deduction for outside income.

Several conferences were called to discuss this dispute. When the respondent refused to accede to the union's interpretation of the award's lost-time provision, the union again threatened to call a strike. To forestall the impending work stoppage, the respondent twice peti-

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[1] "(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes." 45 U. S. C. § 153 First (i).

tioned the Adjustment Board to resolve the dispute as to the amount due Humphries under the award, asking the Board first for a clarification of its earlier order and then submitting the disputed issue for resolution in a separate *de novo* proceeding. The Adjustment Board refused to entertain either petition, stating in its second order that "The matter must be judged *res judicata*" in light of the original Adjustment Board decision dealing with the Humphries controversy.

After the respondent had submitted the dispute for the second time to the Adjustment Board, the union set a definite strike deadline. The respondent then brought the present lawsuit in a Federal District Court, requesting injunctive relief against the threatened strike. After the Adjustment Board proceedings were completed, the court issued the injunction, holding that under the Railway Labor Act the union could not legally strike for the purpose of enforcing its interpretation of the Board's money award, but must instead utilize the judicial enforcement procedure provided by § 3 First (p) of the Act.[2] 190 F.

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[2] "(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be

Supp. 829. The Court of Appeals for the Sixth Circuit affirmed, 297 F. 2d 608, and we granted certiorari to consider an obviously substantial question affecting the administration of the Railway Labor Act. 370 U. S. 908. For the reasons stated in this opinion, we conclude that the District Court and the Court of Appeals correctly decided the issues presented, and we accordingly affirm the judgment before us.

The statute governing the central issue in this case is § 3 First of the Railway Labor Act, covering so-called "minor disputes." [3] The present provisions of § 3 First were added to the Act in 1934.[4] The historical background of these provisions has been described at length in previous opinions of this Court. See *Elgin, J. & E. R. Co.* v. *Burley,* 325 U. S. 711; *Trainmen* v. *Chicago R. & I. R. Co.,* 353 U. S. 30; *Union Pacific R. Co.* v. *Price,* 360 U. S. 601. As explained in detail in those opinions, the 1934 amendments were enacted because the scheme of voluntary arbitration contained in the original Railway Labor Act [5] had proved incapable of achieving peaceful settlements of grievance disputes. To arrive at a more efficacious solution, Congress, at the behest of the several

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taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board." 45 U. S. C. § 153 First (p).

[3] There can be no doubt that the controversy over the amount of the "time lost" award is a minor dispute, because it involves "the interpretation or application" of the collective agreement between the railroad and the union. See note 1, *supra.* See also, *Elgin, J. & E. R. Co.* v. *Burley,* 325 U. S. 711; *Trainmen* v. *Chicago R. & I. R. Co.,* 353 U. S. 30.

[4] 48 Stat. 1185, 1189 (1934).

[5] 44 Stat. 577, 578 (1926).

interests involved, settled upon a new detailed and comprehensive statutory grievance procedure.

Subsections (a) to (h) of § 3 First create the National Railroad Adjustment Board and define its composition and duties.[6] Subsection (i) provides that it shall be the duty of both the carrier and the union to negotiate on the property concerning all minor disputes which arise; failing adjustment by this means, "the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board . . . ." [7] Subsection (*l*) directs the appointment of a neutral referee to sit on the Adjustment Board in the event its regular members are evenly divided.[8] Subsection (m) makes awards of the Adjustment Board "final and binding upon both parties to the dispute, except insofar as they shall contain a money award." It further directs the Adjustment Board to entertain a petition for clarification of its award if a dispute should arise over its meaning.[9] And finally, subsections (o) and (p) describe the manner in which Adjustment Board awards may be enforced, providing for the issuance of an order by the Board itself and for judicial action to enforce such orders.[10]

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[6] 45 U. S. C. § 153 First (a)–(h).

[7] See note 1, *supra*.

[8] 45 U. S. C. § 153 First (*l*).

[9] "(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute." 45 U. S. C. § 153 First (m).

[10] "(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the

The several decisions of this Court interpreting § 3 First have made it clear that this statutory grievance procedure is a mandatory, exclusive, and comprehensive system for resolving grievance disputes. The right of one party to place the disputed issue before the Adjustment Board, with or without the consent of the other, has been firmly established. *Trainmen* v. *Chicago R. & I. R. Co.*, 353 U. S., at 34. And the other party may not defeat this right by resorting to some other forum. Thus, in *Order of Conductors* v. *Southern R. Co.*, 339 U. S. 255, the Court held that a state court could not take jurisdiction over an employer's declaratory judgment action concerning an employee grievance subject to § 3 First, because, "if a carrier or a union could choose a court instead of the Board, the other party would be deprived of the privilege conferred by § 3 First (i) . . . which provides that after negotiations have failed 'either party' may refer the dispute to the appropriate division of the Adjustment Board." *Id.*, at 256–257. See *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239. Similarly, an employee is barred from choosing another forum in which to litigate claims arising under the collective agreement. *Pennsylvania R. Co.* v. *Day*, 360 U. S. 548, 552–553. A corollary of this view has been the principle that the process of decision through the Adjustment Board cannot be challenged collaterally by methods of review not provided for in the statute. In *Union Pacific R. Co.* v. *Price*, 360 U. S. 601, the Court held that an employee could not resort to a common law action for wrongful discharge after the same claim had been rejected on the merits in a proceeding before the Adjustment Board. The decision in that

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award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named." 45 U. S. C. § 153 First (o).

The language of § 3 First (p) is set out in note 2, *supra*.

case was based upon the conclusion that, when invoked, the remedies provided for in § 3 First were intended by Congress to be the complete and final means for settling minor disputes. 360 U. S., at 616–617. See also, *Washington Terminal Co.* v. *Boswell,* 75 U. S. App. D. C. 1, 124 F. 2d 235 (per Rutledge, J.), aff'd by an equally divided court, 319 U. S. 732.

Of even more particularized relevance to the issue now before us is this Court's decision in *Trainmen* v. *Chicago R. & I. R. Co., supra.* There the railroad had submitted several common grievances to the Adjustment Board pursuant to § 3 First (i). The union had resisted the submission, and called a strike to enforce its grievance demands. The Court held that the strike violated those provisions of the Act making the minor dispute procedures compulsory on both parties. In an opinion which reviewed at length the legislative history of the 1934 amendments, the Court concluded that this history entirely supported the plain import of the statutory language—that Congress had intended the grievance procedures of § 3 First to be a compulsory substitute for economic self-help, not merely a voluntary alternative to it. For this reason, the Court concluded that the Norris-LaGuardia Act, 29 U. S. C. §§ 101–115, was not a bar to injunctive relief against strikes called in support of grievance disputes which had been submitted to the National Railroad Adjustment Board.[11]

[11] "[The Norris-LaGuardia Act was designed primarily] to prevent the injunctions of the federal courts from upsetting the natural interplay of the competing economic forces of labor and capital. Rep. LaGuardia . . . recognized that the machinery of the Railway Labor Act channeled these economic forces, in matters dealing with railway labor, into special processes intended to compromise them. Such controversies, therefore, are not the same as those in which the injunction strips labor of its primary weapon without substituting any reasonable alternative." 353 U. S., at 40–41. Cf. *Manion* v. *Kansas City Terminal R. Co.,* 353 U. S. 927, which held that injunc-

It is against this pattern of decisions that we must evaluate the petitioners' claim that the District Court in the present case was wrong in enjoining the threatened strike. The claim, simply stated, is that the power to issue injunctions recognized by the *Chicago River* decision is limited to those situations in which a strike is called during the proceedings before the Adjustment Board. Once a favorable award has been rendered, say the petitioners, the union becomes free to enforce the award as it will—by invoking the judicial enforcement procedures of § 3 First (p), or by resorting to economic force. The right to strike, it is argued, is necessary to achieve "the congressional policy of requiring carriers and their employees to settle grievances by the collective bargaining process."

The broad premise of the petitioners' argument—that Congress intended to permit the settlement of minor disputes through the interplay of economic force—is squarely in conflict with the basic teaching of *Chicago River*. After a detailed analysis of the historic background of the 1934 Act, the Court there determined that "there was general understanding between both the supporters and the opponents of the 1934 amendment that the provisions dealing with the Adjustment Board were to be considered as compulsory arbitration in this limited field." 353 U. S., at 39.

The petitioners' narrower argument—that, at the least, strikes may be permitted *after* the Adjustment Board makes an award—is likewise untenable under the circumstances of this case. We do not deal here with non-money awards, which are made "final and binding" by § 3 First (m).[12] The only portion of the award which presently remains unsettled is the dispute concerning the

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tive relief is not available if the processes of the Railway Labor Act have not actually been invoked. Compare *Sinclair Refining Co.* v. *Atkinson,* 370 U. S. 195, 210–212.

[12] See note 9, *supra.*

computation of Humphries' "time lost" award, an issue wholly separable from the merits of the wrongful discharge issue. This, then, is clearly a controversy concerning a "money award," as to which decisions of the Adjustment Board are not final and binding.[13] Instead, the Act provides a further step in the settlement process. If the carrier does not comply with the award, or with the employee's or union's interpretation of it, § 3 First (p) authorizes the employee to bring an action in a Federal District Court to enforce the award.[14] The lawsuit is to "proceed in all respects as other civil suits," but the findings and order of the Adjustment Board are to be regarded as "prima facie evidence" of the facts stated in the complaint. The employee is excused from the costs of suit, and, in addition, is awarded attorney's fees if he prevails. The total effect of these detailed provisions is to provide a carefully designed procedure for reviewing money awards, one which will achieve the reviewing function without any significant expense to the employee or his union. See *Washington Terminal Co.* v. *Boswell, supra.*

The express provision for this special form of judicial review for money awards, both in subsection (m) and again in subsection (p), makes it clear that Congress regarded this procedure as an integral part of the Act's grievance machinery. Congress has, in effect, decreed a two-step grievance procedure for money awards, with the first step, the Adjustment Board order and findings, serving as the foundation for the second. Money awards against carriers cannot be made final by any other means. To allow one of the parties to resort to economic self-help at this point in the process would violate this direct statutory command. It would permit that party to withdraw at will from the process of settlement which Congress has

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[13] See note 9, *supra.*

[14] See note 2, *supra.*

expressly required both parties to follow. In addition, it would obviously render the earlier parts of the grievance procedure totally meaningless.

A strike in these circumstances would therefore be no less disruptive of the explicit statutory grievance procedure than was the strike enjoined in the *Chicago River* case. Consequently, the reasons which, in that case, required accommodating the more generalized provisions of the Norris-LaGuardia Act apply with equal force to the present case.[15] We hold that the District Court was not in error in issuing the injunction.

Affirmed.

MR. JUSTICE BLACK dissents.

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

This Court's decision in the *Chicago River* case, *Trainmen* v. *Chicago R. & I. R. Co.*, 353 U. S. 30, holds that strikes are excluded *pending* grievance proceedings over "minor disputes" before the Adjustment Board. Though this is *all* that *Chicago River* holds, the Court today impliedly reads it to mean and, indeed, there is language in *Chicago River* to the effect that Congress is to be taken as having elected in favor of a comprehensive and wholly exclusive system of compulsory arbitration and as having outlawed all use of economic force in the form of a strike at any stage of a "minor dispute" which is subject to consideration by the Adjustment Board. The logic of *Chicago River* is that "final and binding" awards of the Adjustment Board are enforceable in favor of, or against, either the employer railroad, the union, or the grievant employee in the federal courts. Given the premises of *Chicago River,* it must follow that such enforcement proceedings are governed by federal law as declared by

[15] See note 11, *supra.*

this Court in cases such as *Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564, *Steelworkers* v. *Warrior & Gulf Co.*, 363 U. S. 574, and *Steelworkers* v. *Enterprise Corp.*, 363 U. S. 593, and, of course, that the merits of such awards are not subject to *de novo* consideration upon a petition for judicial enforcement. See *Machinists Assn.* v. *Central Airlines*, 372 U. S. 682.

Here, however, unlike *Chicago River*, the Adjustment Board proceedings have ended; moreover, we are dealing not with a nonmoney award which is made specifically "final and binding" by the statute, but with a money award which, as the majority recognizes, is governed by different considerations and is treated differently in the statute itself. A money award by the Board is expressly declared by the Act *not* to be "final and binding." The enforcement machinery contained in subsection (p) of the Act—which the Court's opinion inferentially suggests is confined to money awards, and which I would expressly declare to be so limited [1]—contemplates for such awards not that limited type of review applicable to "final and binding" nonmoney awards, but a *de novo*

[1] A common sense and practical reading of the statutory provisions seems to me to compel the conclusion that subsection (p) is confined in its application to money claims. Subsection (m) makes all nonmoney awards "final and binding" and any reading of subsection (p) which allowed *de novo* review of the merits of such awards would be directly contradictory to the effect expressly accorded to them. Moreover, subsection (o) provides that if the claimant wins, the Board shall enter an "order, directed to the carrier, to make the award effective" and that, in cases involving a money award, such order shall require payment by a day certain. Such detailed direction with respect to the money-award order would appear exclusively complementary to the provision in subsection (p), the immediately succeeding section, which provides for the *de novo* review only in cases in which a losing carrier does not comply with the award "within the time limit in such order." (The relevant subsections of the Act are set out in notes 2, 9, and 10, of the Court's opinion, *ante*, pp. 35, 37.)

trial before the court, subject only to the limitation, as the statute requires, that the findings of fact of the Board shall constitute "prima facie" evidence. Under such circumstances, the logic of *Chicago River* in excluding strikes in favor of an exclusive scheme of "compulsory arbitration" seems to me to have no application, for here we are dealing with nonfinal and nonbinding awards, the direct antithesis of a compulsory arbitration scheme.

In addition, the Court's opinion leads to what seems to me to be a wholly anomalous result plainly never intended by Congress. What was merely expressed as dicta in *Union Pac. R. Co.* v. *Price,* 360 U. S. 601, is apparently reinforced by today's holding. In *Price,* the Court said, though the question was not before it, that a strike *against* an Adjustment Board award denying a money claim of a grievant could be enjoined in the federal courts under the rationale of *Chicago River.* See 360 U. S., at 611, n. 10. The Court here holds that a strike *to enforce* a money award favorable to the claimant is forbidden even when the carrier refuses to abide thereby. In so holding, the Court cites *Price* with apparent approval and its language supports the result declared by the *Price* dicta. Thus, as of today, it appears even more clearly that a grievant filing a money claim which is denied by the Adjustment Board is finally bound by the result and may neither bring an independent suit on his claim (the holding of *Price* [2]), nor, presumably, utilize economic pressure, *i. e.,* the strike, in support of his claim (the purport of the *Price* dicta and the thrust of today's holding), nor even seek further judicial review of the merits of his claim since the literal language of subsection (p) applies only to awards in the claimant's favor. The carrier will have no reason to seek further judicial review because the award is favorable to it and both the unsuccessful grievant and the union are

[2] See also *Pennsylvania R. Co.* v. *Day,* 360 U. S. 548.

without effective means to prevent its enforcement. Thus, under today's opinion and the prior cases cited therein, the grievant whose money claim is denied by the Board is wholly without further remedy or recourse.

Such complete foreclosure of a losing money claimant would be less objectionable were it not for the wholly disparate consequences obtaining as a result of today's decision when it is the carrier who loses on a money claim before the Board. If this occurs, the carrier is free to refuse to comply, as it did here; since today's opinion forecloses other avenues of relief to the successful grievant and his union, the carrier, by such recalcitrance, can compel a suit to enforce the award under subsection (p), which requires an entire retrial of the issues in court. During this lengthy procedure and, presumably, even at its conclusion, the grievant and the union will be left without economic or other recourse. The net result, therefore, is that on all money claims, the award of the Board is "final and binding," and not subject to further review or other challenge, if the *claimant* loses, but it is subject to *de novo* review and trial at the sole behest of the employer, if the *employer* loses. And in either case, apparently, the union is completely foreclosed even from using its most traditional weapon, the strike. I cannot believe that Congress intended such an unevenhanded application of the statute. Nor can I believe, as the Court holds, that Congress could have contemplated that the protection of the right to strike afforded by the Norris-LaGuardia Act was being rescinded in favor of such an inadequate and unfair procedure as the Court declares the Act to have created.

Absent a willingness to permit equally broad *de novo* review to a grievant whose money claim is denied by the Board,[3] a reading of the statute which admittedly seems contrary to literal words of subsection (p), the only inter-

[3] Cf. *United States* v. *Interstate Commerce Comm'n,* 337 U. S. 426.

pretation which provides a semblance of fairness in this situation is one which interprets congressional intent to be that, in money-claim cases at least, the right to strike—while perhaps suspended during Adjustment Board proceedings—is available either if the Board decides for the claimant and the carrier does not comply, or if the Board decides for the carrier and the claimant does not acquiesce. This at least would not leave the entire balance in money cases in favor of the carrier.

The suggested result is in no way foreclosed by *Chicago River,* which did not treat of the difference between enforcement of money and nonmoney awards once made, nor by *Price,* since that case did not deal with the right to strike, and is distinguishable on the ground that there, having once resorted to the Adjustment Board, the losing grievant could not, under traditional election-of-remedy principles, relitigate the same issues afresh by bringing an independent, unrelated common-law action in another forum.[4]

My ultimate view, therefore, is that Congress—whatever its intent with respect to impliedly repealing the Norris-LaGuardia Act in nonmoney cases in which the Board's decision is expressly made final and binding—cannot fairly be deemed to have intended such a repeal in money-award cases, in which the Board's decisions are expressly not final and binding. The legislative history is not merely uninstructive as to today's result; it clearly demonstrates that Congress never focused on or considered the problem here raised, or even recognized the anomaly today's opinion in part effects and in part portends. Notwithstanding, the Court has read Congress as intending allowance of what in *Chicago River* was

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[4] In fact, the manner in which the Court in *Price* distinguished its earlier decision in *Moore* v. *Illinois Central R. Co.,* 312 U. S. 630, suggests this very rationale. See 360 U. S., at 609, n. 8.

described as an injunction which "strips labor of its primary weapon without substituting any reasonable alternative." 353 U. S., at 41. To impute so drastic a result without any clear indication that it was intended seems to me to be unwarranted.

I reach these conclusions reluctantly since I believe that arbitration of grievances is, in general, a salutary policy in the field of labor-management relations and contributes substantially to industrial peace. Wholly apart from questions as to the general desirability of compulsory arbitration, the results flowing from *Chicago River* would, in these terms, be commendable, assuming that the normally cumbersome and slow procedures of the Adjustment Board could be expedited to achieve the efficacy and efficiency typical of private labor arbitrations and essential to success of the process. The court procedure under subsection (p) of the Act, which today is made an integral, if not mandatory, part of the statutory grievance machinery, will, however, only increase the already undue delay in resolution of grievances.[5] Moreover, the *de novo* nature of the requisite court trial on review under subsection (p)

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[5] While the Adjustment Board handles and disposes of an impressive number of cases each year, the backlog of pending disputes is immense. During its 1962 fiscal year, a total of 997 cases were disposed of by decision and 383 cases were withdrawn. During the same period, however, 1,873 new cases were docketed. The total of 1,380 cases thus removed from the docket during the year still fell almost 500 cases short of equalling the number of new grievances filed. At the end of the year, the Board had still pending before it some 6,461 cases, of which only 1,679 had been heard. By way of comparison, though there were 4,948 cases pending at the end of fiscal year 1958, only 415 of these had not been heard. In only one of the past five fiscal years has the Board even come close to maintaining an equilibrium in its backlog by being able to dispose of almost as many cases as were docketed during the period. Twenty-eighth Annual Report of the National Mediation Board for fiscal year ended June 30, 1962, pp. 59, 86.

runs directly contrary to the best view of the treatment to be judicially accorded such awards. See, *e. g., Steelworkers* v. *Enterprise Corp., supra,* 363 U. S., 596–599. These latter considerations do not themselves compel my conclusion here, however, for standing alone they are the result of policy determinations which, in this instance, either have already been made by, or are more properly committed to, Congress as direct consequences of the literal statutory scheme. They are, nonetheless, relevant factors in appraising the propriety and wisdom of the Court's construction of the statute and its estimate of the intention of its framers.

Thus, with all deference, I must respectfully dissent from today's opinion since, though neither mandated by this Court's prior holdings nor supported, much less compelled, by specific congressional intent, it creates additional exceptions to the Norris-LaGuardia Act protections and does so in a fashion which effects, in my view, an unfair imbalance, if not outright clear advantage, in favor of the carrier and against the employee and his union.

MAXIMOV, TRUSTEE, *v.* UNITED STATES.

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

No. 240. Argued March 28, 1963.—Decided April 29, 1963.

An American trust, created in the United States under Connecticut law and administered in the United States by an American trustee, the beneficiaries of which are British subjects and residents and which retains capital gains income realized in this country is not exempt from federal income tax on such gains by virtue of a provision of the Income Tax Convention between the United States and the United Kingdom which exempts capital gains of a "resident of the United Kingdom." Pp. 49–56.

299 F. 2d 565, affirmed.

David A. Lindsay argued the cause for petitioner. With him on the briefs were *D. Nelson Adams, John A. Reed* and *John A. Corry.*

Louis F. Claiborne argued the cause for the United States. With him on the brief were *Solicitor General Cox, Assistant Attorney General Oberdorfer, Meyer Rothwacks* and *Harold C. Wilkenfeld.*

MR. JUSTICE GOLDBERG delivered the opinion of the Court.

The question in this case is whether an American trust whose beneficiaries are British subjects and residents and which retains capital gains income realized in this country is exempt from federal income tax on such gains by virtue of a provision of the Income Tax Convention between the United States of America and the United Kingdom, April 16, 1945, 60 Stat. 1377, 1384, which exempts capital gains of a "resident of the United Kingdom." Certiorari was granted, 371 U. S. 810, to resolve

a conflict between the decision of the Court of Appeals for the Second Circuit, 299 F. 2d 565, denying the exemption to the domestic trust, the petitioner in this case, and the decision of the Court of Appeals for the Ninth Circuit in *American Trust Co.* v. *Smyth,* 247 F. 2d 149, granting the exemption to a domestic trust under similar circumstances.

I.

The petitioner, represented here by its successor trustee, Maximov, a citizen and resident of the United States, is a private trust created under Connecticut law in 1947 by an *inter vivos* deed executed by the grantor, a resident and citizen of the United Kingdom. A lifetime interest in trust income was retained by the grantor, his wife was named contingent successor income beneficiary for her life, and their children were designated as contingent remaindermen. All of the beneficiaries were citizens and residents of the United Kingdom at the times here relevant.

The trust, which is administered in the United States, realized capital gains income upon the sale of certain of its assets during 1954 and 1955. In accordance with controlling Connecticut law, which the trust instrument expressly makes applicable, these gains were treated as accretions to corpus and were not distributed. Pursuant to United States income tax provisions applicable to trusts in general, the gains were reported as part of the trust's income on federal fiduciary tax returns filed by the trustee for the years in question and the appropriate amount of tax paid thereon.

Asserting exemption from United States tax under the Convention, the trustee filed claims for refund which were disallowed by the Internal Revenue Service. The trustee then brought this suit in the Federal District Court seek-

ing recovery of the tax attributable to the capital gains. Motions for summary judgment were filed both by the petitioner and by the Government. The District Court denied the Government's motion and entered judgment for the petitioner in the full amount of the tax, holding, upon the authority of the *Smyth* case, *supra,* that the petitioner was entitled to exemption under the treaty. The Court of Appeals for the Second Circuit reversed and denied the petitioner's claim of exemption under the Convention. In so doing, the Second Circuit expressly rejected the reasoning adopted, and result reached, by the Ninth Circuit in *Smyth.*

We conclude that the interpretation of the relevant provisions of the Convention adopted by the Second Circuit in this case is the one more consonant with its language, purpose and intent. Accordingly, we affirm the judgment of the Court of Appeals below, denying the exemption.

II.

Under United States tax laws, a trust, like the petitioner trust, is treated as a separate taxable entity, apart from its beneficiaries. §§ 641, 7701 (a)(1), (14), Int. Rev. Code of 1954. And, under appropriate provisions of the Internal Revenue Code, trust income neither distributed nor otherwise taxable directly to the beneficiaries is taxable to the trust entity. See §§ 641–668, Int. Rev. Code of 1954. Under these statutory concepts of taxability, the gains here in question are properly includable in, and taxable as, gross income of the petitioner. Whatever basis there may be, therefore, for relieving the trust from tax must be found in the words or implications of the Convention.

In asserting freedom from liability for United States income tax on its realized and retained capital gains, the

petitioner trust relies on Article XIV of the Convention, which provides:

> "A resident of the United Kingdom not engaged in trade or business in the United States shall be exempt from United States tax on gains from the sale or exchange of capital assets."

The petitioner itself is a United States trust established in this country, governed by the laws of one of our States and administered here by an American trustee. It is plainly not a "resident of the United Kingdom," the class to which exemption under Article XIV is expressly limited. It argues, however, that the purposes and objectives of the treaty require that we disregard its identity as a separate taxable entity and measure the application of the exemptive provision by the economic impact of the tax which would otherwise be imposed. The petitioner thus says that since the real burden of the tax falls upon its beneficiaries, all of whom are residents of the United Kingdom and objects of the treaty protections, the treaty should be read as exempting the trust from the tax asserted by the United States. Mindful that it is a treaty we are construing, and giving the Convention all proper effect, we cannot, and do not, either read its language or conceive its purpose as encompassing, much less compelling, so significant a deviation from normal word use or domestic tax concepts.

The plain language of the Convention does not afford any support to the petitioner's argument in favor of disregarding the trust entity. In fact, the very words of the treaty impel a contrary reading. The exemption provided by Article XIV applies in terms only to a "resident of the United Kingdom" and Article II (1)(g) defines such a resident as "any person (other than a citizen of the United States or a United States corporation) who is resident in the United Kingdom for the purposes of

United Kingdom tax and not resident in the United States for the purposes of United States tax." The word "person" is not defined in the treaty and we are referred by Article II (3) of the Convention, therefore, to the domestic tax law of the country applying the treaty, in this case the United States, to determine its meaning.[1] Under United States tax law, and apparently under British law as well, the term "person" includes a trust. Int. Rev. Code of 1954, § 7701 (a)(1); see Harvard Law School, World Tax Series, Taxation in the United Kingdom, ¶ 5/3.4, p. 127 (1957). Thus, it appears quite clearly that, within the meaning of the Convention, the petitioner trust is a separate "person" and distinct tax entity, apart from its beneficiaries. Since the petitioner meets neither of the definitional tests of the treaty—it is not resident in the United Kingdom for purposes of that signatory's tax and is a resident in the United States for purposes of this country's tax—it plainly is not a "resident of the United Kingdom" exempted from United States tax by the Convention.

Apparently recognizing the impediments of the language of the exemptive provision interpreted in accordance with its terms and pursuant to the standards set out in the treaty itself, the petitioner asserts that equality of tax treatment was the objective of the treaty and that furtherance of this objective compels adoption of its theory that exemption must be accorded whenever the burden of the tax would diminish such equality. Since, in general terms at least, the United Kingdom imposes no

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[1] Article II (3) of the Convention provides:

"In the application of the provisions of the present Convention by one of the Contracting Parties any term not otherwise defined shall, unless the context otherwise requires, have the meaning which it has under the laws of that Contracting Party relating to the taxes which are the subject of the present Convention."

tax on capital gains, says the petitioner, no similar tax should be imposed by the United States here.

The immediate and compelling answer to this contention is that, as already noted, the language of the Convention itself not only fails to support the petitioner's view, but is contrary to it. Moreover, it is particularly inappropriate for a court to sanction a deviation from the clear import of a solemn treaty between this Nation and a foreign sovereign, when, as here, there is no indication that application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories. It appears from the relevant materials instructive as to the intent of the parties to the Convention that the general purpose of the treaty was not to assure complete and strict equality of tax treatment—a virtually impossible task in light of the different tax structures of the two nations—but rather, as appears from the preamble to the Convention itself, to facilitate commercial exchange through elimination of double taxation resulting from both countries levying on the same transaction or profit; an additional purpose was the prevention of fiscal evasion.[2] Certainly, neither of these purposes requires the granting of relief in the situation here presented. There is concededly no imposition of a double tax on the gains of the petitioner, since neither it nor its beneficiaries are taxed thereon under United Kingdom law. See Harvard Law School, World Tax Series, Taxation in the United Kingdom, ¶¶ 9/8.1, 10/7.2, pp. 277, 307–308.

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[2] The preamble recites that the parties desired "to conclude a Convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income." See also Hearings before a Subcommittee of the Committee on Foreign Relations, on Conventions With Great Britain and Northern Ireland Respecting Income and Estate Taxes, S. Exec. Docs. D and E, 79th Cong., 1st Sess. 1–2.

Moreover, no impairment of, or obstacle to, trade or commercial intercourse is threatened in the context of this case, and considerations of fiscal evasion are not here involved.

Even to the extent that one purpose of the Convention was to secure a measure of equality of tax treatment, it is apparent from the face of the treaty itself that no invariable or inflexible equality was sought or intended. In fact, the treaty creates some inequalities of treatment. For example, the very exemption provided by Article XIV, on which the petitioner relies, is limited in its application to United Kingdom residents who are not "engaged in trade or business in the United States." Thus, not even all United Kingdom residents are immune from capital gains taxation in this country, though United States residents doing business or conducting a trade in the United Kingdom would receive the full benefit of the absence of a general capital gains tax there. It appears that the treaty did not represent an attempt to equalize all disparities in tax treatment between its signatories. To the extent that complete equality was intended, it was specifically provided. We cannot, in such a context, read the treaty to accord unintended benefits inconsistent with its words and not compellingly indicated by its implications.[3]

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[3] Treatment of the petitioner trust as a taxable entity for purposes of construing the treaty exemption and imposition of liability for tax on its undistributed capital gains is not only mandated by the terms of the treaty itself, the apparent intention of its signatories, and the context in which negotiated, but is consistent with long-standing administrative practice and regulations, see T. D. 5569, 1947–2 Cum. Bull. 100, § 7.519 (c), and with the administrative interpretation accorded many other United States tax conventions limiting such exemptions to items of income distributed or otherwise normally directly taxable to the trust beneficiaries. See, *e. g.*, Australia, T. D. 6108, 1954–2 Cum. Bull. 614, § 501.10; Belgium, T. D. 6160, 1956–1 Cum. Bull. 815, § 504.119; Switzerland, T. D. 6149, 1955–2 Cum. Bull. 814, § 509.121.

To say that we should give a broad and efficacious scope to a treaty does not mean that we must sweep within the Convention what are legally and traditionally recognized to be domestic taxpayers not clearly within its protections; we would not expect the United Kingdom to exempt similarly recognized British taxpayers not lucidly intended to be freed of its taxes.

This, of course, does not mean that the treaty fails to provide bilateral benefits to residents of both the United States and the United Kingdom. A resident of the United Kingdom realizing capital gains in this country is appropriately protected and exempt, and the Congress has adopted provisions fully implementing the operative dimensions of the treaty. The Internal Revenue Code contains sections designed to give effect to exemptions of this type and to assure consistency with tax treaty obligations in general. See, *e. g.*, Int. Rev. Code of 1954, §§ 894, 7852 (d). Our interpretation affords every benefit negotiated for by the parties to the Convention on behalf of their respective residents and prevents an unintended tax windfall to a private party. The language and purposes of the treaty are amply served by adhering to its clear import limiting exemption to "residents of the United Kingdom" falling within the exemptive purview. The petitioner, a resident American trust, is properly subject to United States income tax on its retained capital gains. Accordingly, the judgment below is

Affirmed.

HAWAII *v.* GORDON.

ON BILL OF COMPLAINT.

No. 12, Original. Argued April 15, 1963.—Decided April 29, 1963.

The State of Hawaii filed this original action against the Director of the Bureau of the Budget under Art. III, § 2, of the Constitution, seeking to obtain an order requiring him to (1) withdraw his advice to federal agencies that § 5 (e) of the Hawaii Statehood Act, which provides for the conveyance to the State of land "no longer needed by the United States," does not apply to lands obtained by the United States through purchase, condemnation or gift; (2) determine whether a certain tract of land in Hawaii acquired by the United States through condemnation was "needed by the United States"; and (3) convey this land, if not needed, to Hawaii. *Held:* The complaint is dismissed, because this is a suit against the United States which has not consented to the maintenance of such a suit against it. Pp. 57–58.

Complaint dismissed.

Bert T. Kobayashi, Attorney General of Hawaii, and *Dennis G. Lyons* argued the cause for plaintiff. Also on the briefs were *Shiro Kashiwa,* former Attorney General of Hawaii, *Wilbur K. Watkins, Jr.,* former Deputy Attorney General of Hawaii, *Thurman Arnold, Abe Fortas* and *Paul A. Porter.*

Wayne G. Barnett argued the cause for defendant. With him on the briefs were *Solicitor General Cox, David R. Warner* and *Thos. L. McKevitt.*

PER CURIAM.

Section 5 (e) of the Hawaii Statehood Act, 73 Stat. 4, 48 U. S. C. (Supp. II, 1960), pp. 1257–1261, provides that within five years from the date Hawaii is admitted to the Union federal agencies having control over land or properties retained by the United States under § 5 (c) and (d) of the Act shall report to the President as to the "continued need for such land or property, and if the President

determines that the land or property is no longer needed by the United States it shall be conveyed to the State of Hawaii." The President designated the Director of the Bureau of the Budget to perform his functions thereunder. The Director thereafter, pursuant to an opinion of the Attorney General, 42 Op. Atty. Gen. (No. 4), concluded, and so advised federal agencies, that the lands referred to in § 5 (e) do not include lands obtained by the United States through purchase, condemnation or gift but are limited to lands which at one time belonged to Hawaii and were ceded to the United States or acquired in exchange therefor.

Hawaii filed this original action against the Director, under Art. III, § 2, of the Constitution of the United States, seeking to obtain an order requiring him to withdraw this advice to the federal agencies, determine whether a certain 203 acres of land in Hawaii acquired by the United States through condemnation was land or properties "needed by the United States" and, if not needed, to convey this land to Hawaii. We have concluded that this is a suit against the United States and, absent its consent, cannot be maintained by the State. The general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter. *E. g., Dugan* v. *Rank,* 372 U. S. 609 (1963); *Malone* v. *Bowdoin,* 369 U. S. 643 (1962); *Larson* v. *Domestic & Foreign Corp.,* 337 U. S. 682 (1949). Here the order requested would require the Director's official affirmative action, affect the public administration of government agencies and cause as well the disposition of property admittedly belonging to the United States. The complaint is therefore dismissed. *Oregon* v. *Hitchcock,* 202 U. S. 60 (1906).

Dismissed.

Mr. Justice White took no part in the consideration or decision of this case.

WHITE *v.* MARYLAND.

CERTIORARI TO THE COURT OF APPEALS OF MARYLAND.

No. 600. Argued April 16, 1963.—Decided April 29, 1963.

Arrested on a charge of murder, petitioner was taken before a Maryland magistrate for a preliminary hearing, and he pleaded guilty without having the advice or assistance of counsel. Counsel was later appointed for him, and he pleaded not guilty at his formal "arraignment"; but the plea of guilty made at the preliminary hearing was introduced in evidence at his trial, and he was convicted and sentenced to death. *Held:* Absence of counsel for petitioner when he entered the plea of guilty before the magistrate violated his rights under the Due Process Clause of the Fourteenth Amendment. *Hamilton* v. *Alabama,* 368 U. S. 52. Pp. 59–60.

227 Md. 615, 177 A. 2d 877, reversed.

Fred E. Weisgal argued the cause and filed a brief for petitioner.

Robert F. Sweeney, Assistant Attorney General of Maryland, argued the cause for respondent. With him on the brief was *Thomas B. Finan,* Attorney General of Maryland.

PER CURIAM.

Petitioner, who was sentenced to death while his co-defendant was given life, appealed to the Maryland Court of Appeals which affirmed his conviction. 227 Md. 615, 177 A. 2d 877. We granted certiorari "limited to the point of law raised in *Hamilton* v. *Alabama,* 368 U. S. 52." See 371 U. S. 909.

Petitioner was arrested on May 27, 1960, and brought before a magistrate on May 31, 1960, for a preliminary hearing. But that hearing was postponed and not actually held until August 9, 1960. At that time petitioner was not yet represented by a lawyer. When arraigned at that preliminary hearing he pleaded guilty. What Mary-

land calls the "arraignment" was first held September 8, 1960; but since petitioner was not represented by counsel, his arraignment was postponed and counsel appointed for him on September 9, 1960. He was finally arraigned on November 25, 1960, and entered pleas of "not guilty" and "not guilty by reason of insanity." At his trial the plea of guilty made at the preliminary hearing on August 9, 1960, was introduced in evidence.* Since he did not have counsel at the time of the preliminary hearing, he argued that *Hamilton* v. *Alabama, supra,* applied. The Court of Appeals disagreed, saying that arraignment in Alabama is "a critical stage in a criminal proceeding" where rights are preserved or lost (368 U. S. 53–54), while under Maryland law there was "no requirement (nor any practical possibility under our present criminal procedure) to appoint counsel" for petitioner at the "preliminary hearing . . . nor was it necessary for appellant to enter a plea at that time." 227 Md., at 625, 177 A. 2d, at 882.

Whatever may be the normal function of the "preliminary hearing" under Maryland law, it was in this case as "critical" a stage as arraignment under Alabama law. For petitioner entered a plea before the magistrate and that plea was taken at a time when he had no counsel.

We repeat what we said in *Hamilton* v. *Alabama, supra,* at 55, that we do not stop to determine whether prejudice resulted: "Only the presence of counsel could have enabled this accused to know all the defenses available to him and to plead intelligently." We therefore hold that *Hamilton* v. *Alabama* governs and that the judgment below must be and is

Reversed.

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*Although petitioner did not object to the introduction of this evidence at the trial (227 Md., at 619–620, 177 A. 2d, at 879), the rationale of *Hamilton* v. *Alabama, supra,* does not rest, as we shall see, on a showing of prejudice.

JOHNSON *v.* VIRGINIA.

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

No. 715. Decided April 29, 1963.

Petitioner, a Negro, was convicted of contempt of court solely because he refused to comply with a judge's instructions to sit in the section of a courtroom reserved for Negroes. *Held:* A State may not require racial segregation in a courtroom, and the conviction is reversed. Pp. 61–62.

Reversed.

Roland D. Ealey and *Herman T. Benn* for petitioner.

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

PER CURIAM.

The petition for a writ of certiorari is granted, the judgment of the Supreme Court of Appeals of Virginia is reversed, and the case is remanded for proceedings not inconsistent with this opinion.

The petitioner, Ford T. Johnson, Jr., was convicted of contempt of the Traffic Court of the City of Richmond, Virginia, and appealed his conviction to the Hustings Court, where he was tried without a jury and again convicted. The Supreme Court of Appeals of Virginia refused to grant a writ of error on the ground that the judgment appealed from was "plainly right," but the Chief Justice of that court stayed execution of the judgment pending disposition of this petition for certiorari.

The evidence at petitioner's trial in the Hustings Court is summarized in an approved statement of facts. According to this statement, the witnesses for the State testified as follows: The petitioner, a Negro, was seated in the Traffic Court in a section reserved for whites, and

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when requested to move by the bailiff, refused to do so. The judge then summoned the petitioner to the bench and instructed him to be seated in the right-hand section of the courtroom, the section reserved for Negroes. The petitioner moved back in front of the counsel table and remained standing with his arms folded, stating that he preferred standing and indicating that he would not comply with the judge's order. Upon refusal to obey the judge's further direction to be seated, the petitioner was arrested for contempt. At no time did he behave in a boisterous or abusive manner, and there was no disorder in the courtroom. The State, in its Brief in Opposition filed in this Court, concedes that in the section of the Richmond Traffic Court reserved for spectators, seating space "is assigned on the basis of racial designation, the seats on one side of the aisle being for use of Negro citizens and the seats on the other side being for the use of white citizens."

It is clear from the totality of circumstances, and particularly the fact that the petitioner was peaceably seated in the section reserved for whites before being summoned to the bench, that the arrest and conviction rested entirely on the refusal to comply with the segregated seating requirements imposed in this particular courtroom. Such a conviction cannot stand, for it is no longer open to question that a State may not constitutionally require segregation of public facilities. See, *e. g., Brown* v. *Board of Education,* 347 U. S. 483; *Mayor and City Council of Baltimore* v. *Dawson,* 350 U. S. 877; *Turner* v. *Memphis,* 369 U. S. 350. State-compelled segregation in a court of justice is a manifest violation of the State's duty to deny no one the equal protection of its laws.

Reversed and remanded.

A. L. KORNMAN CO. *v.* PACK, COMMISSIONER OF HIGHWAYS OF TENNESSEE.

APPEAL FROM THE SUPREME COURT OF TENNESSEE.

No. 775. Decided April 29, 1963.

Appeal dismissed for want of a substantial federal question. Reported below: 210 Tenn. 491, 360 S. W. 2d 30.

Thomas Wardlaw Steele for appellant.

George F. McCanless, Attorney General of Tennessee, and *J. Malcolm Shull,* Assistant Attorney General, for appellee.

PER CURIAM.

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

FOREMAN ET UX. *v.* CITY OF BELLEFONTAINE.

APPEAL FROM THE COURT OF APPEALS OF OHIO, LOGAN COUNTY.

No. 878. Decided April 29, 1963.

Appeal dismissed and certiorari denied.

Appellants *pro se.*

James B. West 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.

HALLIBURTON OIL WELL CEMENTING CO. *v.* REILY, COLLECTOR OF REVENUE OF LOUISIANA.

APPEAL FROM THE SUPREME COURT OF LOUISIANA.

No. 24. Argued March 26–27, 1962.—Restored to calendar for reargument April 2, 1962.—Reargued December 3, 1962.—Decided May 13, 1963.

Appellant sued in a Louisiana State Court for refund of Louisiana use taxes paid under protest and claimed by appellant to be discriminatory against interstate commerce. Louisiana taxed sales within the State at the same rate that it taxed the use within the State of articles brought from other States, and, in applying its use tax, it gave credit for sales or use taxes paid to other States; but there were discrepancies in the tax burden arising out of the methods of applying the taxes. Part of the tax involved was based on the cost of labor and shop overhead arising out of the assembling in Oklahoma of specialized oil well servicing equipment brought into Louisiana and used there, although these items of cost would not have been included in computing the tax had the assembling been done in Louisiana. Another part of the tax involved was based on the cost of certain articles bought second-hand in another State from parties not regularly engaged in the sale of such articles, although these articles would have been exempt from the Louisiana sales tax had they been purchased within the State. *Held:* The taxes here involved are invalid, because they discriminate against interstate commerce. Pp. 65–75.

(a) Equal treatment for in-state and out-of-state taxpayers similarly situated is the condition precedent for a valid use tax on goods imported from out-of-state. Pp. 69–70.

(b) Characterizing the discrimination here involved as "incidental" does not validate the tax, since equality for the purposes of competition and the flow of commerce is measured in dollars and cents, not legal abstractions. Pp. 70–71.

(c) On this record, the proper comparison is between the in-state and out-of-state manufacturer-user, and the Louisiana use tax, as applied to appellant's specialized equipment, discriminates against interstate commerce. Pp. 71–73.

(d) Since Louisiana exempts from its sales tax certain isolated sales within the State, the application of its use tax to similar isolated sales outside the State discriminates against interstate commerce. Pp. 73–74.

241 La. 67, 127 So. 2d 502, reversed.

Benjamin B. Taylor, Jr. reargued the cause for appellant. With him on the briefs were *Robert O. Brown, C. Vernon Porter, Robert E. Rice, Laurance W. Brooks, Frank W. Middleton, Jr.* and *Tom F. Phillips.*

Chapman L. Sanford reargued the cause and filed a brief for appellee. With him on a motion to dismiss were *John B. Smullin* and *Emmett E. Batson.*

Forrest M. Darrough filed a brief for the Humble Oil & Refining Company, *Albert L. Hopkins* for the Chicago Bridge & Iron Company, and *Charles D. Marshall* for Thomas Jordan, Inc., as *amici curiae,* urging reversal.

Ben R. Miller filed a brief for the American Can Company, *Cicero C. Sessions* for Sperry Rand Corporation, and *Robert E. Leake, Jr.* for the Rosson-Richards Processing Company, as *amici curiae.*

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

The sole issue before us is whether the Louisiana use tax, as applied to the appellant, discriminates against interstate commerce in violation of the Commerce Clause of the Constitution.

The Louisiana sales and use taxes follow the basic pattern approved by this Court in *Henneford* v. *Silas Mason Co.,* 300 U. S. 577. Louisiana Revised Statutes, Tit. 47, § 302, provides for the imposition of a tax "[a]t the rate of two per centum (2%) of the sales price of each item or article of tangible personal property *when sold at retail in this state* . . . ." [1] It imposes another tax "[a]t the

[1] Emphasis added.

rate of two per centum (2%) of the cost price of each item or article of tangible personal property *when the same is not sold but is used . . . in this state . . .*" [2] This latter tax, commonly known as a use tax, is to be reduced by the amount of any similar sales or use tax paid on the item in a different State. La. Rev. Stat. Ann. § 47:305. As noted by the Louisiana Supreme Court below and approved in *Silas Mason,* the purpose of such a sales-use tax scheme is to make all tangible property used or consumed in the State subject to a uniform tax burden irrespective of whether it is acquired within the State, making it subject to the sales tax, or from without the State, making it subject to a use tax at the same rate. The appellant admits the validity of such a scheme. It contends, however, that in this case Louisiana has departed from the norm of tax equality and imposes on the appellant a greater tax burden solely because the property it uses in Louisiana is brought from out-of-state. The difference in tax burden is admitted by the appellee.

The facts were stipulated by the parties. The appellant is engaged in the business of servicing oil wells in a number of oil producing States, including Louisiana. Its business requires the use of specialized equipment including oil well cementing trucks and electrical well logging trucks. These trucks and their equipment are not generally available on the retail market, but are manufactured by the appellant at its principal place of business in Duncan, Oklahoma. The raw materials and semifinished and finished articles necessary for the manufacture of these units are acquired on the open market by the appellant and assembled by its employees. The completed units are tested at Duncan and then assigned to specific field camps maintained by the appellant. The assignment is permanent unless better use of the unit can be

[2] Emphasis added.

made at another camp. None of these units is manufactured or held for sale to third parties.

Between January 1, 1952, and May 31, 1955, the appellant shipped new and used units of its specialized equipment to field camps in Louisiana. In its Louisiana tax returns filed for these years, the appellant calculated and paid use taxes upon the value of the raw materials and semifinished and finished articles used in manufacturing the units. The appellant did not include in its calculations the value of labor and shop overhead attributable to assembling the units. It is admitted that this cost factor would not have been taxed had the appellant assembled its units in Louisiana rather than in Oklahoma. The stipulation of facts stated:

> "If Halliburton had purchased its materials, operated its shops, and incurred its Labor and Shop Overhead expenses at a location within the State of Louisiana, there would have been a sales tax due to the State of Louisiana upon the cost of materials purchased in Louisiana and a Use Tax on materials purchased outside of Louisiana; but there would have been no Louisiana sales tax or use tax due upon the Labor and Shop Overhead."

Nevertheless, in September 1955, the Louisiana Collector of Revenue, the appellee, assessed a deficiency of $36,238.43 in taxes, including interest, on the labor and shop overhead cost of assembling the units. The Collector held that this was required by the language of the use tax section of the statute which levies the 2% use tax on the "cost price" of the item, "cost price" being defined in an earlier section as the actual cost without deductions on account of "labor or service cost, . . . or any other expenses whatsoever." La. Rev. Stat. Ann. § 47:301 (3).

Also during this period, the appellant purchased 14 oil well cementing service units from the Spartan Tool and

Service Company of Houston, Texas. Spartan was not regularly engaged in the sale of such equipment and made the sale after deciding to liquidate its oil well servicing business. The appellant transferred these units to Louisiana. On one other occasion, the appellant purchased an airplane from the Western Newspaper Union of New York, a company not regularly engaged in the business of selling airplanes. The appellant acquired the plane for use in Louisiana. No Louisiana use tax was declared or paid subsequent to the transfer of these items to Louisiana. It is admitted in the stipulation of facts that had these acquisitions been made within Louisiana, they would have not been taxed. This is occasioned by the fact that the sales tax section of the statute applies only to sales made at retail and not to isolated sales by those not regularly engaged in the business of selling the item involved. Nevertheless, the Collector assessed a deficiency of $4,404.22 on the value of these items since the use tax on goods imported from out-of-state contains no equivalent distinction between isolated and retail sales.

The appellant paid the deficiency under protest and brought an action in the Louisiana District Court for the Nineteenth District for a refund pursuant to La. Rev. Stat. Ann. § 47:1576, alleging that this unequal tax burden is a discrimination against interstate commerce. The District Court found the assessment discriminatory. On appeal, the Louisiana Supreme Court reversed, holding that since no unreasonable distinctions or classifications had been drawn in the Louisiana sales and use tax statute, the incidental discrepancy in tax burden did not amount to a discrimination against interstate commerce. 241 La. 67, 127 So. 2d 502. On appeal to this Court, we noted probable jurisdiction. 368 U. S. 809. The case was first argued during the October Term 1961. We subsequently ordered it reargued. 369 U. S. 835.

I.

This is another in a long line of cases attacking state taxation as unduly burdening interstate commerce. As this Court stated in *Best & Co.* v. *Maxwell,* 311 U. S. 454, 455–456: "In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce." This concern with the actuality of operation, a dominant theme running through all state taxation cases, extends to every aspect of the tax operations. Thus, in *Nippert* v. *Richmond,* 327 U. S. 416, the City of Richmond placed a fixed fee and earnings tax on itinerant solicitors of sales within the city. On its face, the ordinance applied to in-state as well as out-of-state distributors doing business by means of itinerant solicitors. The Court noted, however, the very fact that a distributor is out-of-state makes his use of, and dependence on, solicitors more likely. Thus, "the very difference between interstate and local trade, taken in conjunction with the inherent character of the tax, makes equality of application as between those two classes of commerce, generally speaking, impossible." *Id.,* at 432. The Court concluded that the tax was "discriminatory in favor of the local merchant as against the out-of-state one." *Id.,* at 431. Considered in isolation, the Louisiana use tax is discriminatory; it was intended to apply primarily to goods acquired out-of-state and used in Louisiana.[3] If it stood alone, it would be invalid. However, a proper analysis must take "the whole scheme of taxation into account." *Galveston, H. & S. A. R. Co.* v. *Texas,* 210 U. S. 217, 227; *Gregg Dyeing Co.* v. *Query,* 286 U. S. 472, 479–

[3] In fact, it was just such isolated consideration that led the trial court in *Silas Mason Co.* v. *Henneford,* 15 F. Supp. 958, 962, rev'd, 300 U. S. 577, to strike down the State of Washington use tax.

480. Thus, in *Best & Co.* v. *Maxwell, supra,* the Court compared the solicitation tax with the equivalent tax on local retail merchants before finding it discriminatory. 311 U. S., at 456. See *Memphis Steam Laundry Cleaner, Inc.,* v. *Stone,* 342 U. S. 389, 394–395; cf. *Phillips Chemical Co.* v. *Dumas School District,* 361 U. S. 376.

When *Henneford* v. *Silas Mason Co.,* 300 U. S. 577, reached this Court on appeal, the Court considered the Washington use tax in the context of the tax scheme of which it was a part, as a "compensating tax" intended to complement the state sales tax. So considered, the Court concluded: "Equality is the theme that runs through all the sections of the statute. . . . No one who uses property in Washington after buying it at retail is to be exempt from a tax upon the privilege of enjoyment except to the extent that he has paid a use or sales tax somewhere." The use tax is "upon one activity or incident," and the sales tax is "upon another, but the sum is the same when the reckoning is closed." The burden on the out-of-state acquisition "is balanced by an equal burden where the sale is strictly local." 300 U. S., at 583–584.

The conclusion is inescapable: equal treatment for in-state and out-of-state taxpayers similarly situated is the condition precedent for a valid use tax on goods imported from out-of-state.

The inequality of the Louisiana tax burden between in-state and out-of-state manufacturer-users is admitted. Although the rate is the same, the appellant's tax base is increased through the inclusion of its product's labor and shop overhead. The Louisiana Supreme Court characterized this discrepancy as incidental. However, equality for the purposes of competition and the flow of commerce is measured in dollars and cents, not legal abstractions.[4]

[4] Thus in *Memphis Steam Laundry Cleaner, Inc.,* v. *Stone, supra,* and *Best & Co.* v. *Maxwell, supra,* the Court compared the actual tax bills of the local and out-of-state taxpayers. In the former, the Court

In this case the "incidental discrepancy"—the labor and shop overhead for the units in dispute—amounts to $1,547,109.70. The use tax rate in Louisiana is 2% and has risen in some States to 4%.[5] The resulting tax inequality is clearly substantial.

But even accepting this, the Louisiana Supreme Court concluded that the comparison between in-state and out-of-state manufacturer-users is not the proper way to frame the issue of equality. It stated: "The proper comparison would be between the use tax on the assembled equipment and a sales tax on the same equipment if it were sold." On the basis of such a comparison, the out-of-state manufacturer-user is on the same tax footing with respect to the item used as the retailer of a similar item, or the competitor who buys from the retailer rather than manufacture his own. However, such a comparison excludes from consideration, without any explanation, the very in-state taxpayer who is most similarly situated to the appellant, the local manufacturer-user. If the Louisiana Legislature were in fact concerned over any tax break the manufacturer-user obtains, it would surely have made special arrangements to take care of the in-state as well as out-of-state loophole—unless, of course, it intended to discriminate. We can only conclude, therefore, that the proper comparison on the basis of this record is between in-state and out-of-state manufacturer-users. And if this comparison discloses discriminatory effects, it could be ignored only after a showing of adequate justification.

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found discriminatory a $50 license tax on each truck used by an out-of-state laundry business soliciting and picking up laundry in Mississippi because resident laundries were required to pay only $8 per truck. In the latter, the Court found determinative a similar discrepancy between the $1 tax paid by local merchants and the $250 tax paid by the itinerant solicitor.

[5] Michigan, Pennsylvania, and Washington each has 4% sales and use taxes. 2 P–H 1963 Fed. Tax Serv. ¶ 13,299.

While the inequality in question may have been an accident of statutory drafting, it does in fact strike at a significant segment of economic activity and carries economic effects of a type proscribed by many previous cases. The appellant manufactures equipment specially adapted to its oil servicing business. The equipment is expensive; because of its limited and custom production, the labor and shop overhead is necessarily a significant cost factor. Activity of this character is often on the forefront of economic development where equipment and methods have yet to reach the standardization and acceptance necessary for mass production. If Louisiana were the only State to impose an additional tax burden for such out-of-state operations, the disparate treatment would be an incentive to locate within Louisiana; it would tend "to neutralize advantages belonging to the place of origin." *Baldwin* v. *Seelig, Inc.*, 294 U. S. 511, 527. Disapproval of such a result is implicit in all cases dealing with tax discrimination, since a tax which is "discriminatory in favor of the local merchant," *Nippert* v. *Richmond, supra,* also encourages an out-of-state operator to become a resident in order to compete on equal terms.[6] If similar unequal tax structures were adopted in other States, a not unlikely result of affirming here, the effects would be more widespread. The economic advantages of a single assembly plant for the appellant's multistate activities would be decreased for units sent to every State other than the State of residence. At best, this would encourage the appellant to locate his assembly operations in the State of largest use for the units. At worst, it would encourage their actual fractionalization or discontinuance. Clearly, approval of the Louisiana use tax in this case would "invite a multiplication of preferential trade areas destructive

[6] See cases collected in *Memphis Steam Laundry Cleaner, Inc.*, v. *Stone, supra,* p. 392, n. 7.

of the very purpose of the Commerce Clause." *Dean Milk Co.* v. *Madison,* 340 U. S. 349, 356.[7]

In light of these considerations we see no reason to depart from the strict rule of equality adopted in *Silas Mason,* and we conclude that the Louisiana use tax as applied to the appellant's specialized equipment discriminates against interstate commerce.

A similar disposition of the tax on the isolated sales follows as a matter of course. The disparate treatment is baldly admitted by the Louisiana Supreme Court: "The exemption of an isolated sale from the provisions of the sales tax applies strictly to sales within the State of Louisiana; it has no effect whatsoever on any transaction without the state." The out-of-state isolated sale, it concludes, must therefore be treated "as if" it were a sale at retail. As the facts of this case indicate, isolated sales involve primarily the acquisition of second-hand equipment from previous users. The effect of the tax is to favor local users who wish to dispose of equipment over

[7] In *Dean Milk Co.,* the City of Madison passed an ordinance requiring milk pasteurization plants to locate within a five mile radius of Madison to ease the problem of local health inspection. The Court held that where there were adequate alternative methods for insuring health standards, the locational requirement was a burden on interstate commerce. The dissent saw no problem in this restriction:

"As a practical matter, so far as the record shows, Dean can easily comply with the ordinance whenever it wants to. Therefore, Dean's personal preference to pasteurize in Illinois, not the ordinance, keeps Dean's milk out of Madison." 340 U. S., at 357.

However, this "personal preference" is the essence of a national unrestricted market. If, before striking down a burden on interstate commerce, this Court had to look to the record for economic justifications for Dean's location in Illinois, for the appellant's location in Oklahoma, for single rather than multipasteurization or assembly operations, the free flow of commerce would disappear before our very eyes. Justification for the system is presumed in the Commerce Clause itself.

out-of-state users similarly situated. Whatever the Louisiana Legislature's reasons for granting such an exemption to this segment of the local second-hand market,[8] no attempt has been made to justify it or to show how its purpose would be defeated by extending the same exemption to similar out-of-state transactions.[9] We therefore conclude that the use tax on isolated sales in this case departs from the equality required by *Silas Mason* and discriminates against interstate commerce.

Thirty-five States other than Louisiana have sales and use tax statutes. At this juncture, Louisiana, according to the parties, is the only State to adopt the constructions presented for decision in this case. Those few States

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[8] The appellee argues that the reason for the exemption is that any item sold in a local isolated sale has already been subjected to either a sales tax if it was originally acquired in Louisiana or a use tax if it was imported, whereas there is no assurance that an item acquired in an out-of-state isolated sale has ever sustained such a tax burden. The appellee further maintains that the taxes here in question could have been reduced by any such previous taxation. If the record supported the appellee's position, it would be carefully considered. However, the appellee has shown us no regulations providing for the deduction of sales or use taxes paid on the item prior to the out-of-state isolated sale; the appellee stated in the stipulation of facts that all evidence showing an isolated sale was irrelevant; and the above-quoted statement of the Louisiana Supreme Court leaves little room for such modification.

[9] Although no evidence was presented on the issue, one reason for not taxing local isolated sales and the labor and shop overhead of the local manufacturer-user may be the difficult administrative burden in either calculating or enforcing the tax. However, such a local administrative problem would not justify a different treatment of the similar out-of-state transaction, since the mere extension of the special treatment to the out-of-state transaction would satisfy both the local problem and the Commerce Clause.

We fail to see a similar administrative problem in calculating the appellant's labor and shop overhead, since the tax base under either approach is calculated on the basis of the cost factors recorded in the appellant's books.

which have considered these issues at all appear to have rejected the Louisiana position for reasons in accord with our opinion here. Both Ohio and North Dakota have by administrative regulations excluded labor and shop overhead from the tax base of the out-of-state manufacturer-user on the ground that its inclusion might violate the Commerce Clause.[10] In *Chicago Bridge & Iron Co.* v. *Johnson,* 19 Cal. 2d 162, 119 P. 2d 945, the California Supreme Court upheld the application of its use tax to an out-of-state manufacturer-user, expressly pointing out that because labor and shop overhead had been excluded from its tax base, the taxpayer was in no different position from its in-state competitor. The parties have been able to find only one state case passing directly on either question. In *State* v. *Bay Towing & Dredging Co., Inc.,* 265 Ala. 282, 90 So. 2d 743, the Alabama Supreme Court held that the in-state exemption for isolated sales had to be extended to out-of-state isolated sales to avoid discrimination against interstate commerce.

The judgment of the Supreme Court of Louisiana is reversed and the case remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE BRENNAN, concurring.

I fully concur in the opinion of the Court insofar as it treats of isolated sales. It seems clear that Louisiana exempts from sales taxation within the State the pur-

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[10] CCH Ohio State Rep., Cir. No. 18, Mar. 1, 1954, ¶ 60371.70; North Dakota Tax Commission, Rules Nos. 55 and 113.

Moreover, as this Court noted in *Henneford* v. *Silas Mason Co.,* 300 U. S. 577, 581, the State of Washington, recognizing the latent inequality, made special arrangements for the manufacturer-user: "The tax presupposes everywhere a retail purchase by the user before the time of use. If he has manufactured the chattel for himself, . . . he is exempt from the use tax, whether title was acquired in Washington or elsewhere."

chase of items which, if bought outside the State and brought in, would eventually incur a Louisiana use tax. The equality of treatment which my Brother CLARK finds assured by the credit for taxes already paid to other States seems to me wholly fortuitous. The credit for prior sales or use taxes will avert discrimination in the taxation of casual sales only if the out-of-state purchaser has already paid a sales or use tax equal to or greater than Louisiana's use tax, so that the credit is fully effective. If the purchaser abroad has paid no prior tax, or one of smaller amount, then upon his first use of the article in Louisiana he incurs a tax liability which he would clearly have escaped had he made the identical purchase at an exempted casual sale within the State. No justification for such discrimination has been suggested, and I can think of none beyond a mere possibility of administrative convenience.

I also agree that, under the circumstances of this case, the application of Louisiana's use tax statute to appellant is constitutionally impermissible. This result does not, I think, flow from any duty upon the States to ensure absolute equality of economic burden as between sales and use taxpayers. For we have sustained the constitutionality of the sales and compensating use tax system, *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, even though as a matter of economic fact the out-of-state use taxpayer is likely ultimately to incur a heavier burden than his in-state counterpart, the sales taxpayer. Such a disparity may result, though the rate of taxation upon the two is identical, because the in-state seller is somewhat likelier to absorb some part of the sales-tax burden than is the out-of-state seller to absorb the burden of the use tax which his customer eventually must pay. Warren and Schlesinger, Sales and Use Taxes: Interstate Commerce Pays Its Way, 38 Col. L. Rev. 49, 70–74 (1938). And we have

also intimated, 300 U. S., at 587, that a State may not be constitutionally obliged to credit the amount of sales taxes paid in other States against the use tax it imposes. See Note, 51 Harv. L. Rev. 130, 132–133 (1937). Nevertheless, if the Constitution does not mandate absolute equality of treatment as between in-state and out-of-state sales, it assuredly does forbid discriminatory treatment by the States. Discrimination would result if different rates of taxation were imposed by the State on use and sale, and it is the result here because Louisiana, while it taxes the full value of property assembled without and used but not sold within the State, does not tax the full value of property assembled within the State and used but not sold there.

It does not follow, however, nor do I read the Court's opinion as so holding, that as a result of today's decision Louisiana has no option but to adopt the practice of Ohio, North Dakota, and California, see pp. 74–75, *supra,* and exclude labor and shop overhead from the tax base of the out-of-state manufacturer-user. That might be the case if the sole justification for the use tax were to offset the effect of sales taxes imposed on in-state purchasers, and thereby to deter domestic consumers from seeking to evade the sales tax by purchasing out of state. But we have recognized an alternative justification for the use tax as a levy upon "the privilege of use after commerce is at an end." 300 U. S., at 582; see Hartman, State Taxation of Interstate Commerce (1953), 162–163. Thus Louisiana surely may if it chooses tax appellant's trucks and equipment, when they come to rest in the State, at their full value. Since this alternative is available to Louisiana and any other use-tax State, I fail to see the inevitability of my Brother CLARK's prediction that "this decision will deprive Louisiana of millions of dollars under its sales tax." The Court holds no more than that if Louisiana

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chooses to levy such a use tax it cannot constitutionally exempt in-state manufacturer-users as it now does; it must tax "the privilege of use" within the State of the property of such users at full value and at the same rates. Nothing in the Court's opinion nor in my view of the case prescribes the particular manner in which Louisiana must obey the Constitution.

MR. JUSTICE CLARK, with whom MR. JUSTICE BLACK joins, dissenting.

The Court strikes down Louisiana's use tax on the ground that it discriminates against out-of-state assemblers who move their products into the State for use therein. In so doing the Court permits the out-of-state assembler to move his finished product into the State at a tax lower than that exacted upon Louisiana's residents who purchase the identical product within the State. The damage that this decision will do to the tax structure of a State is clearly revealed by the *amici curiae* briefs filed here. Thomas Jordan, Inc., rents barges to others in Louisiana. They are built by shipyards outside of Louisiana. Jordan claims that when it brings a barge to Louisiana it can only be taxed on the items that went into the barge, not the finished product. Chicago Bridge and Iron Company fabricates steel plates outside of Louisiana and ships them into Louisiana. It claims that its tax should be on the components of the plates. Sperry Rand Corporation, through its subsidiary Remington Rand, manufactures office furniture which it brings into Louisiana and rents to customers. It claims its tax is on the wood, metal, lacquers, etc., going into the furniture. Humble Oil and Refining Co. has Chicago Bridge and Iron Co. fabricate, outside of Louisiana, certain field erected structures for Humble's oil refinery at

Baton Rouge and it claims the tax should be on the components of these completed structures. American Can Co. manufactures can manufacturing machinery outside of Louisiana which it ships into Louisiana for its use and it claims the tax should be only on the components of the machines. And, finally, Rosson-Richards Processing Co. wire wraps and coats iron pipe which it transports to Louisiana where the pipe is laid into oil and gas pipelines. It claims the tax is due only on the components of the finished pipe.

These claims are predicated on the proposition that the finished product assembled outside Louisiana pays more tax upon entering Louisiana for use than a like finished product pays when assembled from parts within that State and used by the assembler thereof. But the tax is on the privilege of use after commerce is at an end and the test is whether all persons similarly situated are treated alike. *Royster Guano Co.* v. *Virginia,* 253 U. S. 412, 415 (1920). And so it cannot be said that equal protection is denied by a statute which operates alike on all *persons* and *property similarly situated.* The fallacy of the Court's holding is that it ignores the incidence of the tax in Louisiana's Tax Act. That incidence is the moment that the product becomes a part of the mass of property within the State. It matters not what happens to the property subsequently. The tax attaches to the property in its form at that specific time. This is true in both the sales and the use tax here. It follows that if the barge, steel plates, office furniture, field erected structures, can manufacturing machinery, wire wrapped pipes and oil well servicing trucks are sold in Louisiana the 2% sales tax is exacted on the completed articles just as it is when they are moved into the State without sale and the use tax of 2% is levied. All persons and like property similarly situated are thus given identical treatment.

Likewise if Halliburton brought in nuts and bolts and put them together within Louisiana into a truck it would pay the identical tax a resident paid in a similar transaction. Again, if a Louisiana resident bought a completed truck outside his State and brought it into the State as did Halliburton, he would pay the same tax on the property. The result of Louisiana's law is similar to that described in *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, 584 (1937):

> "When the account is made up, the stranger from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates. The one pays upon one activity or incident, and the other upon another, but the sum is the same when the reckoning is closed. Equality exists when the chattel subjected to the use tax is bought in another state and then carried into Washington. It exists when the imported chattel is shipped from the state of origin under an order received directly from the state of destination. In each situation the burden borne by the owner is balanced by an equal burden where the sale is strictly local."

The Court, however, would look beyond the taxable event. It would require the State to trace the nuts and bolts, etc., sold to the resident and tax their ultimate form—a truck—if it wished to tax Halliburton. This, of course, is an impossible burden and from a practical standpoint would not be enforceable. In addition, the Court changes the incidence of the tax as well as the property taxed. Nuts and bolts are not trucks. The incidence of the tax on the former was when they were nuts and bolts and not when they became a truck. They became a part of the mass of property of the State on their sale as nuts and bolts, not trucks.

I believe that this decision will deprive Louisiana of millions of dollars under its sales tax.[1] Every sizable business concern not having Louisiana facilities to manufacture its own requirements will buy raw materials out of state and have them fabricated outside Louisiana—just as do Halliburton, Jordan, Humble, Chicago Bridge and the other *amici*—and then bring the finished product into Louisiana for use. Instead of paying a tax on the greater value of the finished product brought into and used in the State they will, under the Court's interpretation, pay only the lesser value of the various components that went into the finished product.

As for the isolated sales, the Act specifically provides for a credit on Louisiana use taxes of any like tax equal to or greater than the Louisiana tax which has been paid in another State. La. Rev. Stat. Ann. § 47:305. Property within Louisiana has already been subjected to a sales tax and subsequent sales are exempted. The credit allowed on the use tax for taxes paid in another State on isolated sales of property brought into Louisiana effects the same identical result. As the Supreme Court of Louisiana noted the "property involved herein has not borne a similar tax in another state," 241 La., at 92, 127 So. 2d, at 511, and the taxing authorities have unequivocally represented to this Court that such taxes would be allowed

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[1] For a like appraisal see *Henneford* v. *Silas Mason Co., supra,* at 581: "The plan embodied in these provisions is neither hidden nor uncertain. . . . The practical effect . . . is readily perceived. One of its effects must be that retail sellers in Washington will be helped to compete upon terms of equality with retail dealers in other states who are exempt from a sales tax or any corresponding burden. Another effect, or at least another tendency, must be to avoid the likelihood of a drain upon the revenues of the state, buyers being no longer tempted to place their orders in other states in the effort to escape payment of the tax on local sales."

as credits if claimed and proven. I would take the promise of the State's authorities at its face value.[2]

For these, as well as the reasons given in the opinion of the Supreme Court of Louisiana, I would affirm.

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[2] My Brother BRENNAN finds that the tax credit allowed by La. Rev. Stat. Ann. § 47:305 will not avoid inequality of treatment in all situations. I find no cases from Louisiana interpreting this section of the Act, but the appellee tax collector states in his brief that a tax credit is given "for all similar taxes paid to another state" in order "to insure perfect equality of the tax burden. . . ." In view of the Louisiana Supreme Court's demonstrated practice of construing the provisions of the use tax so as to avoid unreasonable and discriminatory applications, *Fontenot* v. *S. E. W. Oil Corp.*, 232 La. 1011, 95 So. 2d 638 (1957), I cannot agree with my Brother BRENNAN's anticipation that unequal treatment will result in future applications of the Act. Cf. *Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86, 95–96 (1934).

BRADY *v.* MARYLAND.

CERTIORARI TO THE COURT OF APPEALS OF MARYLAND.

No. 490. Argued March 18–19, 1963.—Decided May 13, 1963.

In separate trials in a Maryland Court, where the jury is the judge of both the law and the facts but the court passes on the admissibility of the evidence, petitioner and a companion were convicted of first-degree murder and sentenced to death. At his trial, petitioner admitted participating in the crime but claimed that his companion did the actual killing. In his summation to the jury, petitioner's counsel conceded that petitioner was guilty of murder in the first degree and asked only that the jury return that verdict "without capital punishment." Prior to the trial, petitioner's counsel had requested the prosecution to allow him to examine the companion's extrajudicial statements. Several of these were shown to him; but one in which the companion admitted the actual killing was withheld by the prosecution and did not come to petitioner's notice until after he had been tried, convicted and sentenced and after his conviction had been affirmed by the Maryland Court of Appeals. In a post-conviction proceeding, the Maryland Court of Appeals held that suppression of the evidence by the prosecutor denied petitioner due process of law, and it remanded the case for a new trial of the question of punishment, but not the question of guilt, since it was of the opinion that nothing in the suppressed confession "could have reduced [petitioner's] offense below murder in the first degree." *Held:* Petitioner was not denied a federal constitutional right when his new trial was restricted to the question of punishment; and the judgment is affirmed. Pp. 84–91.

(a) Suppression by the prosecution of evidence favorable to an accused who has requested it violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. Pp. 86–88.

(b) When the Court of Appeals restricted petitioner's new trial to the question of punishment, it did not deny him due process or equal protection of the laws under the Fourteenth Amendment, since the suppressed evidence was admissible only on the issue of punishment. Pp. 88–91.

226 Md. 422, 174 A. 2d 167, affirmed.

E. Clinton Bamberger, Jr. argued the cause for petitioner. With him on the brief was *John Martin Jones, Jr.*

Thomas W. Jamison III, Special Assistant Attorney General of Maryland, argued the cause for respondent. With him on the brief were *Thomas B. Finan,* Attorney General, and *Robert C. Murphy,* Deputy Attorney General.

Opinion of the Court by Mr. Justice Douglas, announced by Mr. Justice Brennan.

Petitioner and a companion, Boblit, were found guilty of murder in the first degree and were sentenced to death, their convictions being affirmed by the Court of Appeals of Maryland. 220 Md. 454, 154 A. 2d 434. Their trials were separate, petitioner being tried first. At his trial Brady took the stand and admitted his participation in the crime, but he claimed that Boblit did the actual killing. And, in his summation to the jury, Brady's counsel conceded that Brady was guilty of murder in the first degree, asking only that the jury return that verdict "without capital punishment." Prior to the trial petitioner's counsel had requested the prosecution to allow him to examine Boblit's extrajudicial statements. Several of those statements were shown to him; but one dated July 9, 1958, in which Boblit admitted the actual homicide, was withheld by the prosecution and did not come to petitioner's notice until after he had been tried, convicted, and sentenced, and after his conviction had been affirmed.

Petitioner moved the trial court for a new trial based on the newly discovered evidence that had been suppressed by the prosecution. Petitioner's appeal from a denial of that motion was dismissed by the Court of Appeals without prejudice to relief under the Maryland

Post Conviction Procedure Act. 222 Md. 442, 160 A. 2d 912. The petition for post-conviction relief was dismissed by the trial court; and on appeal the Court of Appeals held that suppression of the evidence by the prosecution denied petitioner due process of law and remanded the case for a retrial of the question of punishment, not the question of guilt. 226 Md. 422, 174 A. 2d 167. The case is here on certiorari, 371 U. S. 812.[1]

The crime in question was murder committed in the perpetration of a robbery. Punishment for that crime in Maryland is life imprisonment or death, the jury being empowered to restrict the punishment to life by addition of the words "without capital punishment." 3 Md. Ann. Code, 1957, Art. 27, § 413. In Maryland, by reason of the state constitution, the jury in a criminal case are "the Judges of Law, as well as of fact." Art. XV, § 5. The question presented is whether petitioner was denied a federal right when the Court of Appeals restricted the new trial to the question of punishment.

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[1] Neither party suggests that the decision below is not a "final judgment" within the meaning of 28 U. S. C. § 1257 (3), and no attack on the reviewability of the lower court's judgment could be successfully maintained. For the general rule that "Final judgment in a criminal case means sentence. The sentence is the judgment" (*Berman* v. *United States,* 302 U. S. 211, 212) cannot be applied here. If in fact the Fourteenth Amendment entitles petitioner to a new trial on the issue of guilt as well as punishment the ruling below has seriously prejudiced him. It is the right to a trial on the issue of guilt "that presents a serious and unsettled question" (*Cohen* v. *Beneficial Loan Corp.,* 337 U. S. 541, 547) that "is fundamental to the further conduct of the case" (*United States* v. *General Motors Corp.,* 323 U. S. 373, 377). This question is "independent of, and unaffected by" (*Radio Station WOW* v. *Johnson,* 326 U. S. 120, 126) what may transpire in a trial at which petitioner can receive only a life imprisonment or death sentence. It cannot be mooted by such a proceeding. See *Largent* v. *Texas,* 318 U. S. 418, 421–422. Cf. *Local No. 438* v. *Curry,* 371 U. S. 542, 549.

We agree with the Court of Appeals that suppression of this confession was a violation of the Due Process Clause of the Fourteenth Amendment. The Court of Appeals relied in the main on two decisions from the Third Circuit Court of Appeals—*United States ex rel. Almeida* v. *Baldi,* 195 F. 2d 815, and *United States ex rel. Thompson* v. *Dye,* 221 F. 2d 763—which, we agree, state the correct constitutional rule.

This ruling is an extension of *Mooney* v. *Holohan,* 294 U. S. 103, 112, where the Court ruled on what nondisclosure by a prosecutor violates due process:

> "It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation."

In *Pyle* v. *Kansas,* 317 U. S. 213, 215–216, we phrased the rule in broader terms:

> "Petitioner's papers are inexpertly drawn, but they do set forth allegations that his imprisonment resulted from perjured testimony, knowingly used by the State authorities to obtain his conviction, and from the deliberate suppression by those same authorities of evidence favorable to him. These allegations sufficiently charge a deprivation of rights guaranteed by the Federal Constitution, and, if proven, would entitle petitioner to release from his present custody. *Mooney* v. *Holohan,* 294 U. S. 103."

The Third Circuit in the *Baldi* case construed that statement in *Pyle* v. *Kansas* to mean that the "suppression of evidence favorable" to the accused was itself sufficient to amount to a denial of due process. 195 F. 2d, at 820. In *Napue* v. *Illinois,* 360 U. S. 264, 269, we extended the test formulated in *Mooney* v. *Holohan* when we said: "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." And see *Alcorta* v. *Texas,* 355 U. S. 28; *Wilde* v. *Wyoming,* 362 U. S. 607. Cf. *Durley* v. *Mayo,* 351 U. S. 277, 285 (dissenting opinion).

We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

The principle of *Mooney* v. *Holohan* is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: "The United States wins its point whenever justice is done its citizens in the courts." [2] A prosecution that withholds evidence on demand of an accused which, if made avail-

[2] Judge Simon E. Sobeloff when Solicitor General put the idea as follows in an address before the Judicial Conference of the Fourth Circuit on June 29, 1954:

"The Solicitor General is not a neutral, he is an advocate; but an advocate for a client whose business is not merely to prevail in the instant case. My client's chief business is not to achieve victory but to establish justice. We are constantly reminded of the now classic words penned by one of my illustrious predecessors, Frederick William Lehmann, that the Government wins its point when justice is done in its courts."

able, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not "the result of guile," to use the words of the Court of Appeals. 226 Md., at 427, 174 A. 2d, at 169.

The question remains whether petitioner was denied a constitutional right when the Court of Appeals restricted his new trial to the question of punishment. In justification of that ruling the Court of Appeals stated:

> "There is considerable doubt as to how much good Boblit's undisclosed confession would have done Brady if it had been before the jury. It clearly implicated Brady as being the one who wanted to strangle the victim, Brooks. Boblit, according to this statement, also favored killing him, but he wanted to do it by shooting. We cannot put ourselves in the place of the jury and assume what their views would have been as to whether it did or did not matter whether it was Brady's hands or Boblit's hands that twisted the shirt about the victim's neck. . . . [I]t would be 'too dogmatic' for us to say that the jury would not have attached any significance to this evidence *in considering the punishment of the defendant Brady.*
>
> "Not without some doubt, we conclude that the withholding of this particular confession of Boblit's was prejudicial to the defendant Brady. . . .
>
> "The appellant's sole claim of prejudice goes to the punishment imposed. *If Boblit's withheld confession had been before the jury, nothing in it could have reduced the appellant Brady's offense below murder in the first degree.* We, therefore, see no occasion to retry that issue." 226 Md., at 429–430, 174 A. 2d, at 171. (Italics added.)

If this were a jurisdiction where the jury was not the judge of the law, a different question would be presented. But since it is, how can the Maryland Court of Appeals state that nothing in the suppressed confession could have reduced petitioner's offense "below murder in the first degree"? If, as a matter of Maryland law, juries in criminal cases could determine the admissibility of such evidence on the issue of innocence or guilt, the question would seem to be foreclosed.

But Maryland's constitutional provision making the jury in criminal cases "the Judges of Law" does not mean precisely what it seems to say.[3] The present status of that provision was reviewed recently in *Giles* v. *State,* 229 Md. 370, 183 A. 2d 359, appeal dismissed, 372 U. S. 767, where the several exceptions, added by statute or carved out by judicial construction, are reviewed. One of those exceptions, material here, is that "Trial courts have always passed and still pass upon the admissibility of evidence the jury may consider on the issue of the innocence or guilt of the accused." 229 Md., at 383, 183 A. 2d, at 365. The cases cited make up a long line going back nearly a century. *Wheeler* v. *State,* 42 Md. 563, 570, stated that instructions to the jury were advisory only, "except in regard to questions as to what shall be considered as evidence." And the court "having such right, it follows of course, that it also has the right to prevent counsel from arguing against such an instruction." *Bell* v. *State,* 57 Md. 108, 120. And see *Beard* v. *State,* 71 Md. 275, 280, 17 A. 1044, 1045; *Dick* v. *State,* 107 Md. 11, 21, 68 A. 286, 290. Cf. *Vogel* v. *State,* 163 Md. 267, 162 A. 705.

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[3] See Dennis, Maryland's Antique Constitutional Thorn, 92 U. of Pa. L. Rev. 34, 39, 43; Prescott, Juries as Judges of the Law: Should the Practice be Continued, 60 Md. St. Bar Assn. Rept. 246, 253–254.

We usually walk on treacherous ground when we explore state law,[4] for state courts, state agencies, and state legislatures are its final expositors under our federal regime. But, as we read the Maryland decisions, it is the court, not the jury, that passes on the "admissibility of evidence" pertinent to "the issue of the innocence or guilt of the accused." *Giles* v. *State, supra.* In the present case a unanimous Court of Appeals has said that nothing in the suppressed confession "could have reduced the appellant Brady's offense below murder in the first degree." We read that statement as a ruling on the admissibility of the confession on the issue of innocence or guilt. A sporting theory of justice might assume that if the suppressed confession had been used at the first trial, the judge's ruling that it was not admissible on the issue of innocence or guilt might have been flouted by the jury just as might have been done if the court had first admitted a confession and then stricken it from the record.[5] But we cannot raise that trial strategy to the dignity of a constitutional right and say that the deprival of this defendant of that sporting chance through the use of a

[4] For one unhappy incident of recent vintage see *Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co.*, 309 U. S. 4, that replaced an earlier opinion in the same case, 309 U. S. 703.

[5] "In the matter of confessions a hybrid situation exists. It is the duty of the Court to determine from the proof, usually taken out of the presence of the jury, if they were freely and voluntarily made, etc., and admissible. If admitted, the jury is entitled to hear and consider proof of the circumstances surrounding their obtention, the better to determine their weight and sufficiency. The fact that the Court admits them clothes them with no presumption for the jury's purposes that they are either true or were freely and voluntarily made. However, after a confession has been admitted and read to the jury the judge may change his mind and strike it out of the record. Does he strike it out of the jury's mind?" Dennis, Maryland's Antique Constitutional Thorn, 92 U. of Pa. L. Rev. 34, 39. See also *Bell* v. *State, supra,* at 120; *Vogel* v. *State,* 163 Md., at 272, 162 A., at 706–707.

bifurcated trial (cf. *Williams* v. *New York,* 337 U. S. 241) denies him due process or violates the Equal Protection Clause of the Fourteenth Amendment.

Affirmed.

Separate opinion of MR. JUSTICE WHITE.

1. The Maryland Court of Appeals declared, "The suppression or withholding by the State of material evidence exculpatory to an accused is a violation of due process" without citing the United States Constitution or the Maryland Constitution which also has a due process clause.* We therefore cannot be sure which Constitution was invoked by the court below and thus whether the State, the only party aggrieved by this portion of the judgment, could even bring the issue here if it desired to do so. See *New York City* v. *Central Savings Bank,* 306 U. S. 661; *Minnesota* v. *National Tea Co.,* 309 U. S. 551. But in any event, there is no cross-petition by the State, nor has it challenged the correctness of the ruling below that a new trial on punishment was called for by the requirements of due process. In my view, therefore, the Court should not reach the due process question which it decides. It certainly is not the case, as it may be suggested, that without it we would have only a state law question, for assuming the court below was correct in finding a violation of petitioner's rights in the suppression of evidence, the federal question he wants decided here still remains, namely, whether denying him a new trial on guilt as well as punishment deprives him of equal protection. There is thus a federal question to deal with in this Court, cf. *Bell* v. *Hood,* 327 U. S. 678,

*Md. Const., Art. 23; *Home Utilities Co., Inc.,* v. *Revere Copper & Brass, Inc.,* 209 Md. 610, 122 A. 2d 109; *Raymond* v. *State,* 192 Md. 602, 65 A. 2d 285; *County Comm'rs of Anne Arundel County* v. *English,* 182 Md. 514, 35 A. 2d 135; *Oursler* v. *Tawes,* 178 Md. 471, 13 A. 2d 763.

wholly aside from the due process question involving the suppression of evidence. The majority opinion makes this unmistakably clear. Before dealing with the due process issue it says, "The question presented is whether petitioner was denied a federal right when the Court of Appeals restricted the new trial to the question of punishment." After discussing at some length and disposing of the suppression matter in federal constitutional terms it says the question still to be decided is the same as it was before: "The question remains whether petitioner was denied a constitutional right when the Court of Appeals restricted his new trial to the question of punishment."

The result, of course, is that the due process discussion by the Court is wholly advisory.

2. In any event the Court's due process advice goes substantially beyond the holding below. I would employ more confining language and would not cast in constitutional form a broad rule of criminal discovery. Instead, I would leave this task, at least for now, to the rule-making or legislative process after full consideration by legislators, bench, and bar.

3. I concur in the Court's disposition of petitioner's equal protection argument.

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

I think this case presents only a single federal question: did the order of the Maryland Court of Appeals granting a new trial, limited to the issue of punishment, violate petitioner's Fourteenth Amendment right to equal protection? [1] In my opinion an affirmative answer would

[1] I agree with my Brother WHITE that there is no necessity for deciding in this case the broad due process questions with which the Court deals at pp. 86–88 of its opinion.

be required *if* the Boblit statement would have been admissible on the issue of guilt at petitioner's original trial. This indeed seems to be the clear implication of this Court's opinion.

The Court, however, holds that the Fourteenth Amendment was not infringed because it considers the Court of Appeals' opinion, and the other Maryland cases dealing with Maryland's constitutional provision making juries in criminal cases "the Judges of Law, as well as of fact," as establishing that the Boblit statement would not have been admissible at the original trial on the issue of petitioner's guilt.

But I cannot read the Court of Appeals' opinion with any such assurance. That opinion can as easily, and perhaps more easily, be read as indicating that the new trial limitation followed from the Court of Appeals' concept of its power, under § 645G of the Maryland Post Conviction Procedure Act, Md. Code, Art. 27 (1960 Cum. Supp.) and Rule 870 of the Maryland Rules of Procedure, to fashion appropriate relief meeting the peculiar circumstances of this case,[2] rather than from the view that the Boblit statement would have been relevant at the original trial only on the issue of punishment. 226 Md., at 430, 174 A. 2d, at 171. This interpretation is indeed fortified by the Court of Appeals' earlier general discussion as to the admissibility of third-party confessions, which falls short of saying anything that is disposi-

[2] Section 645G provides in part: "If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence in the former proceedings, and any supplementary orders as to rearraignment, retrial, custody, bail, discharge, correction of sentence, or other matters that may be necessary and proper." Rule 870 provides that the Court of Appeals "will either affirm or reverse the judgment from which the appeal was taken, or direct the manner in which it shall be modified, changed or amended."

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tive of the crucial issue here. 226 Md., at 427–429, 174 A. 2d, at 170.[3]

Nor do I find anything in any of the other Maryland cases cited by the Court (*ante*, p. 89) which bears on the admissibility *vel non* of the Boblit statement on the issue of guilt. None of these cases suggests anything more relevant here than that a jury may not "overrule" the trial court on questions relating to the admissibility of evidence. Indeed they are by no means clear as to what happens if the jury in fact undertakes to do so. In this very case, for example, the trial court charged that "in the final analysis the jury are the judges of both the *law* and the facts, and the verdict in this case is *entirely* the jury's responsibility." (Emphasis added.)

Moreover, uncertainty on this score is compounded by the State's acknowledgment at the oral argument here that the withheld Boblit statement *would* have been admissible at the trial on the issue of guilt.[4]

In this state of uncertainty as to the proper answer to the critical underlying issue of state law, and in view of the fact that the Court of Appeals did not in terms

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[3] It is noteworthy that the Court of Appeals did not indicate that it was limiting in any way the authority of *Day* v. *State*, 196 Md. 384, 76 A. 2d 729. In that case two defendants were jointly tried and convicted of felony murder. Each admitted participating in the felony but accused the other of the homicide. On appeal the defendants attacked the trial court's denial of a severance, and the State argued that neither defendant was harmed by the statements put in evidence at the joint trial because admission of the felony amounted to admission of guilt of felony murder. Nevertheless the Court of Appeals found an abuse of discretion and ordered separate new trials on all issues.

[4] In response to a question from the Bench as to whether Boblit's statement, had it been offered at petitioner's original trial, would have been admissible for all purposes, counsel for the State, after some colloquy, stated: "It would have been, yes."

address itself to the equal protection question, I do not see how we can properly resolve this case at this juncture. I think the appropriate course is to vacate the judgment of the State Court of Appeals and remand the case to that court for further consideration in light of the governing constitutional principle stated at the outset of this opinion. Cf. *Minnesota* v. *National Tea Co.*, 309 U. S. 551.

WILLNER *v.* COMMITTEE ON CHARACTER AND FITNESS, APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT.

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK.

No. 140. Argued February 21, 1963.—Decided May 13, 1963.

After passing the New York bar examinations in 1936, petitioner was denied admission to the Bar because of an adverse report by a Committee of lawyers appointed by the Appellate Division to investigate and report on the character and fitness of applicants. In the latest of several efforts to gain admission, he petitioned the Appellate Division for leave to file a *de novo* application, and he alleged, *inter alia*, that, in connection with hearings before the Committee on his 1937 application, he was shown a letter from a New York attorney containing various adverse statements about him; that a member of the Committee promised him a personal confrontation with that attorney, but that promise was never kept; and that another lawyer intended "to destroy" him and was acting in collusion with the Secretary and two members of the Committee. The Appellate Division denied the petition without opinion. In the State Court of Appeals, petitioner alleged that he had never been afforded an opportunity to confront his accusers or to cross-examine them and that he could not be sure of the Committee's reasons for refusing to certify him for admission. After granting leave to appeal, obtaining the file from the Appellate Division, receiving briefs and hearing arguments, the Court of Appeals affirmed the order of the Appellate Division without opinion; but it amended its remittitur to recite that it had necessarily passed upon a question under the Federal Constitution and held that petitioner was not denied due process of law in violation of the Fifth and Fourteenth Amendments. *Held:* Petitioner was denied procedural due process when he was denied admission to the Bar by the Appellate Division without a hearing before either the Committee or the Appellate Division on the charges filed against him. Pp. 97–106.

(a) The issue presented is justiciable, since the claim of present right to admission to the Bar of a State and the denial of that right is a controversy. P. 102.

(b) The requirements of procedural due process must be met before a State can exclude a person from practicing law. P. 102.

(c) Procedural due process often requires confrontation and cross-examination of those whose word deprives a person of his livelihood. Pp. 103–104.

(d) Where, as here, the Appellate Division held no hearings of its own to determine petitioner's character but relied entirely upon the report of the Committee, it cannot escape the requirements of due process by claiming that the Committee's action was merely advisory. P. 104.

(e) In view of the certification by the Court of Appeals that it "necessarily" ruled on the constitutional issue "presented," it cannot be said that petitioner sought relief too late. P. 104.

(f) Petitioner was clearly entitled to notice of, and a hearing on, the grounds for his rejection, either before the Committee or before the Appellate Division. Pp. 104–105.

11 N. Y. 2d 866, 182 N. E. 2d 288, reversed.

Henry Waldman argued the cause and filed briefs for petitioner.

Daniel M. Cohen, Assistant Attorney General of New York, argued the cause for respondent. With him on the briefs were *Louis J. Lefkowitz,* Attorney General, and *Paxton Blair,* Solicitor General.

Herbert Monte Levy, Robert B. McKay and *Herbert Prashker* filed a brief for the Committee on the Bill of Rights of the Association of the Bar of the City of New York, as *amicus curiae,* urging reversal.

Opinion of the Court by MR. JUSTICE DOUGLAS, announced by MR. JUSTICE BLACK.

Petitioner passed the New York bar examinations in 1936 but has not yet been admitted to practice. The present case is the latest in a long series of proceedings whereby he seeks admission.

Under New York law the Appellate Division of the State Supreme Court of each of the four Judicial Departments

has power to admit applicants to the Bar. Once the State Board of Bar Examiners certifies that an applicant has passed the examination (or that an examination has been dispensed with), the Appellate Division shall admit him to practice "if it shall be satisfied that such person possesses the character and general fitness requisite for an attorney and counsellor-at-law." Judiciary Law § 90 (1)(a).

The Appellate Division is required by Rule 1 of the New York Rules of Civil Practice to appoint a committee of not less than three practicing lawyers "for the purpose of investigating the character and fitness" of applicants. "Unless otherwise ordered by the Appellate Division, no person shall be admitted to practice" without a favorable certificate from the Committee. *Ibid.* Provision is made for submission by the applicant to the Committee of "all the information and data required by the committee and the Appellate Division justices." *Ibid.* If an applicant has once applied for admission and failed to obtain a certificate of good character and fitness, he must obtain and submit "the written consent" of the Appellate Division to a renewal of his application. *Ibid.*

The papers of an applicant for admission to the Bar are required by Rule 1 (g) of the Rules of Civil Practice to be kept on file in the Office of the Clerk of the Appellate Division.

The Court of Appeals pursuant to its rule-making authority (Judiciary Law § 53(1)) has promulgated Rules for the Admission of Attorneys and Counsellors-at-Law which provide, *inter alia,* that every applicant must produce before the Committee "evidence that he possesses the good moral character and general fitness requisite for an attorney and counsellor-at-law" (Rule VIII–1), and that justices of the Appellate Division shall adopt "such additional rules for ascertaining the moral and general

fitness of applicants as to such justices may seem proper." Rule VIII–4.

The Appellate Division to which petitioner has made application has not promulgated any "additional rules" under Rule VIII–4. Its Character and Fitness Committee consists of 10 members; and that Committee, we are advised, has not published or provided any rules of procedure.

The statute provides that "all papers, records and documents" of applicants "shall be sealed and be deemed private and confidential," except that "upon good cause being shown, the justices of the appellate division . . . are empowered, in their discretion, by written order, to permit to be divulged all or any part of such papers, records and documents." Judiciary Law § 90 (10). And for that purpose they may make such rules "as they may deem necessary." *Ibid.*

But New York does not appear to have any procedure whereby an applicant for admission to the Bar is served with an order to show cause by the Appellate Division before he is denied admission nor any other procedure that gives him a hearing prior to the court's adverse action.[1]

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[1] In New Jersey the Committee on Character and Fitness is directed by Rule 1:20–6 (a) of the Supreme Court Rules to take the following steps in case of an adverse report:

"If the committee believes that an applicant is not of fit character or has not served a satisfactory clerkship, it shall promptly notify the applicant of its intention to file an adverse report as to his moral character or clerkship and of the time, not less than 5 days, within which the applicant may file with the committee a written request for a hearing. If the applicant does not request a hearing within the time fixed by the committee, it shall promptly notify him of its action and file its report with the court for appropriate action by it. If the applicant requests a hearing within the time fixed by the committee, it shall promptly notify him of the time and place of the

The present case started with a petition by Willner to the Appellate Division seeking leave to file a *de novo* application which alleged the following:

Willner had been certified by the State Board of Bar Examiners as having passed the bar examinations in 1936, and the Committee in 1938, after several hearings, filed with the Appellate Division its determination that it was not satisfied and could not "certify that the applicant possesses the character and general fitness requisite for an attorney and counsellor-at-law." In 1943 Willner applied to the Appellate Division for an order directing the Committee to review its 1938 determination. This motion was denied without opinion. Willner in 1948 again petitioned the Appellate Division for a reexamination of his application, and for permission to file a new application. The Appellate Division permitted him to file a new application. Upon the filing of that application, the Committee conducted two hearings in 1948 and, by a report in 1950, refused to certify him for the second time. In 1951 Willner again made application to the Appellate Division for an order directing, *inter alia,* the Com-

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hearing. The hearing shall be conducted in private and in a formal manner. A complete stenographic record shall be kept and to this end an official court reporter of the county, assigned by the supervising court reporter for that purpose, shall serve the committee and prepare, without additional compensation, such transcripts as may be ordered by it. A transcript may be ordered by the applicant at his own expense. The committee shall submit a report of its findings and conclusions to the court, with a copy to the applicant, for appropriate action by it. An applicant aggrieved by the determination of the committee may, on notice to the committee, petition the court for relief."

Rule 1:20–6 (b) goes on to provide:

"The Board of Bar Examiners, subject to the approval of the court, shall prescribe the procedures to be followed by the committees on character and fitness in the performance of their duties under paragraph (a) of this rule."

mittee to furnish him with statements of its reasons for its refusal to certify him or that a referee be appointed to hear and report on the question of his character and fitness. This application was denied without opinion. In 1954 Willner filed a fourth application with the Appellate Division requesting leave to file an application for admission. This was denied without opinion. The Court of Appeals refused leave to appeal, and this Court denied certiorari. 348 U. S. 955. In 1960 Willner filed a fifth application with the Appellate Division, which application was denied without opinion.

The present petition further alleged that Willner has been a member in good standing of the New York Society of Certified Public Accountants and of the American Institute of Accountants since 1951 and that he has been admitted to practice before the Tax Court and the Treasury Department since 1928. Petitioner alleged that in connection with his hearings before the Committee on his 1937 application he was shown a letter containing various adverse statements about him from a New York attorney; that a member of the Committee promised him a personal confrontation with that attorney; but that the promise was never kept. Petitioner also alleged that he had been involved in litigation with another lawyer who had as his purpose "to destroy me"; that the secretary of the Committee was taking orders from that lawyer and that two members of the Committee were "in cahoots" with that lawyer.

The Appellate Division denied the petition without opinion and denied leave to appeal to the Court of Appeals. Willner thereupon sought leave to appeal to the Court of Appeals and in an affidavit in support of his motion stated, "I was never afforded the opportunity of confronting my accusers, of having the accusers sworn and cross examining them, and the opportunity of refuting the accusations and accusers."

The Court of Appeals granted leave to appeal and the Clerk of that Court obtained from the Clerk of the Appellate Division the file in the case. Willner, in his brief before the Court of Appeals, argued he had been denied his constitutional rights in that he had been denied confrontation of his accusers and that, in spite of the repeated attempts, he could not be sure of the Committee's reasons for refusing to certify him for admission. The Court of Appeals, after oral argument, affirmed the order without opinion. 11 N. Y. 2d 866, 182 N. E. 2d 288. Thereafter, at Willner's request, the Court of Appeals amended its remittitur to recite that

> "Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz: Appellant contended that he was denied due process of law in violation of his constitutional rights under the Fifth and Fourteenth Amendments of the Constitution. The Court of Appeals held that appellant was not denied due process in violation of such constitutional rights."

We granted certiorari, 370 U. S. 934.

The issue presented is justiciable. "A claim of a present right to admission to the bar of a state and a denial of that right is a controversy." *In re Summers,* 325 U. S. 561, 568. Moreover, the requirements of procedural due process must be met before a State can exclude a person from practicing law. "A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment." *Schware* v. *Board of Bar Examiners,* 353 U. S. 232, 238–239. As the Court said in *Ex parte Garland,* 4 Wall. 333, 379, the right is not "a matter of grace and favor."

We are not here concerned with grounds which justify denial of a license to practice law, but only with what procedural due process requires if the license is to be withheld. This is the problem which Chief Justice Taft adverted to in *Goldsmith* v. *Board of Tax Appeals,* 270 U. S. 117, involving an application of a certified public accountant to practice before the Board of Tax Appeals. Chief Justice Taft writing for the Court said:

> "We think that the petitioner having shown by his application that, being a citizen of the United States and a certified public accountant under the laws of a State, he was within the class of those entitled to be admitted to practice under the Board's rules, he should not have been rejected upon charges of his unfitness without giving him an opportunity by notice for hearing and answer. The rules adopted by the Board provide that 'the Board may in its discretion deny admission, suspend or disbar any person.' But this must be construed to mean the exercise of a discretion to be exercised after fair investigation, with such a notice, hearing and opportunity to answer for the applicant as would constitute due process." *Id.,* p. 123.

We have emphasized in recent years that procedural due process often requires confrontation and cross-examination of those whose word deprives a person of his livelihood. See *Greene* v. *McElroy,* 360 U. S. 474, 492, 496–497, and cases cited.[2] That view has been taken by several state courts when it comes to procedural due process and the admission to practice law. *Coleman* v. *Watts,* 81 So. 2d 650; *Application of Burke,* 87 Ariz. 336, 351 P. 2d 169; *In re Crum,* 103 Ore. 296, 204 P. 948; *Moity* v.

[2] Cf. *Cafeteria Workers* v. *McElroy,* 367 U. S. 886, where only "the opportunity to work at one isolated and specific military installation" was involved. *Id.,* at 896.

Louisiana State Bar Assn., 239 La. 1081, 121 So. 2d 87. Cf. *Brooks* v. *Laws*, 208 F. 2d 18, 33 (concurring opinion). We think the need for confrontation is a necessary conclusion from the requirements of procedural due process in a situation such as this. Cf. *Greene* v. *McElroy*, *supra*; *Cafeteria Workers* v. *McElroy*, 367 U. S. 886.

This result is sought to be avoided in several ways. First, it is said that the Committee's action is merely advisory, that it is an investigator not a trier of facts, since under § 90 of the Judiciary Law it is the Appellate Division that ultimately must be convinced of an applicant's good character. The answer is that "[u]nless otherwise ordered by the Appellate Division" (New York Rules of Civil Practice, Rule 1 (d)), a favorable certificate from the Committee is requisite to admission by the Appellate Division; and where, as here, the Appellate Division has held no hearings of its own to determine an applicant's character, the role of the Committee is more than that of a mere investigator.

Second, it is said that petitioner has sought relief too late. But the Court of Appeals did not reject his petition on that ground. Instead, it stated that it "necessarily" ruled on the constitutional issue "presented." We can only conclude that the Court of Appeals would have found it "unnecessary" to pass upon any constitutional question if under state law some other ground had existed for denying petitioner relief. See *Cincinnati Packet Co.* v. *Bay*, 200 U. S. 179, 182; *Lynumn* v. *Illinois*, 372 U. S. 528, 535–536.

Third, it is said that the record shows that petitioner was not rejected on the basis of *ex parte* statements but on the basis of his own statements to the Committee. If the Court of Appeals reached this conclusion, the only constitutional question which was presented and which it could have "necessarily" passed on was whether petitioner was denied due process by not being informed of and

allowed to rebut the bases for either the Committee's or the Appellate Division's failure to find his good character. It does not appear from the record that either the Committee or the Appellate Division, at any stage in these proceedings, ever apprised petitioner of its reasons for failing to be convinced of his good character. Petitioner was clearly entitled to notice of and a hearing on the grounds for his rejection either before the Committee or before the Appellate Division. *Goldsmith* v. *Board of Tax Appeals, supra;* cf. *In re Oliver,* 333 U. S. 257, 273. There seems no question but that petitioner was apprised of the matters the Committee was considering.

> "But a 'full hearing'—a fair and open hearing—requires more than that. . . . Those who are brought into contest with . . . Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command." *Morgan* v. *United States,* 304 U. S. 1, 18–19.

Petitioner had no opportunity to ascertain and contest the bases of the Committee's reports to the Appellate Division, and the Appellate Division gave him no separate hearing. Yet, "[t]he requirements of fairness are not exhausted in the taking or consideration of evidence but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps." *Id.,* at 20. Cf. *Gonzales* v. *United States,* 348 U. S. 407, 414.

If the Court of Appeals based its decision on the ground that denying petitioner the right of confrontation did not violate due process, we also hold that it erred for the reasons earlier stated. But because respondent has asserted that the *ex parte* statements involved in this case played no part in any of the decisions below, we have searched the record to assess this contention. It shows that the

Committee had several complaints against petitioner. The various intra-Committee memoranda and reports to the Appellate Division contained in this record support the conclusion that the Committee did in fact rely on these complaints, at least to some extent, in reaching its determinations. And there is no indication in the record that any of the Appellate Division's orders were based solely on petitioner's own statements. Thus, despite respondent's assurances that the Committee never bases its final action on *ex parte* statements, we cannot say that the Court of Appeals erred in concluding that this constitutional question was "necessarily" decided.

We hold that petitioner was denied procedural due process when he was denied admission to the Bar by the Appellate Division without a hearing on the charges filed against him before either the Committee or the Appellate Division.

Reversed.

MR. JUSTICE GOLDBERG, whom MR. JUSTICE BRENNAN and MR. JUSTICE STEWART join, concurring.

I concur in the opinion and judgment of the Court believing, as I do, that under all of the circumstances here the petitioner was denied procedural due process which the Constitution demands be accorded by the States to applicants for admission to the bar. No conflict exists between constitutional requisites and exaction of the highest moral standards from those who would practice law. See *Schware* v. *Board of Bar Examiners,* 353 U. S. 232, 238–239. Certainly lawyers and courts should be particularly sensitive of, and have a special obligation to respect, the demands of due process. This special awareness, however, does not alter our essential function or duty. In reviewing state action in this area, as in all others, we look to substance, not to bare form, to de-

termine whether constitutional minimums have been honored.

The New York admissions procedures described in the opinion of the Court are fairly characteristic of those prevalent throughout the country. In general, they contemplate that an applicant for admission who has successfully passed the bar examination will file an application before a court-appointed committee of lawyers which conducts an inquiry into his moral character and on the basis thereof recommends the grant or denial of admission by the court. Committee proceedings are often informal and, for the protection of the candidate, are generally not publicized. Committee members are usually unpaid and serve in fulfillment of their obligation to the profession and as officers of the court. They perform an indispensable and very often thankless task. While the vast majority of candidates are approved without difficulty, in exceptional cases, such as this, either information supplied by the applicant himself or material developed in the course of the committee's investigation gives rise to questions concerning the applicant's moral character.

The constitutional requirements in this context may be simply stated: in all cases in which admission to the bar is to be denied on the basis of character, the applicant, at some stage of the proceedings prior to such denial, must be adequately informed of the nature of the evidence against him and be accorded an adequate opportunity to rebut this evidence. As I understand the opinion of the Court, this does not mean that in every case confrontation and cross-examination are automatically required. It must be remembered that we are dealing, at least at the initial stage of proceedings, not with a court trial, but with a necessarily much more informal inquiry into an applicant's qualifications for admission to the bar. The circumstances will determine the necessary limits and incidents implicit in the concept of a "fair" hearing. Thus, for

example, when the derogatory matter appears from information supplied or confirmed by the applicant himself, or is of an undisputed documentary character disclosed to the applicant, and it is plain and uncontradicted that the committee's recommendation against admission is predicated thereon and reasonably supported thereby, then neither the committee's informal procedures, its ultimate recommendations, nor a court ruling sustaining the committee's conclusion may be properly challenged on due process grounds, provided the applicant has been informed of the factual basis of the conclusion and has been afforded an adequate opportunity to reply or explain. Of course, if the denial depends upon information supplied by a particular person whose reliability or veracity is brought into question by the applicant, confrontation and the right of cross-examination should be afforded. Since admission to the bar is ultimately a matter for the courts, there is ample power to compel attendance of witnesses as required.

Application of these principles to this case leads me to concur in the Court's opinion and judgment. The record here, to say the least, is complex, muddled, and in many respects unsatisfactory. We are dealing with an applicant who first applied for admission 25 years ago. Comparison of his applications with facts later confirmed by the petitioner himself suggests a lack of complete candor in dealing with the committee. While this failure to disclose, along with other more recently occurring matters here present, might have supported a refusal to certify the petitioner's character, there are present additional elements which indicate that the committee may have been motivated in its conclusion by charges made against the petitioner by certain informants, the evaluation of which would necessarily depend upon estimates of credibility. The record is not clear whether the petitioner actually requested an opportunity to confront and cross-examine

these informants at the time of his first application in the late 1930's. It is plain, however, that he now seeks that opportunity and there is no indication that the state court considered the claim to be untimely. Moreover, at no point are we or the petitioner specifically advised by any finding of the committee or of the state courts as to the precise basis of denial to him of either his original or renewed applications for admission or his requests for reconsideration thereof. In substance, therefore, as the case reaches us, we are confronted with circumstances which, upon sifting, may or may not support the denial of admission to the bar. And our difficulties are compounded by the amended remittitur of the New York Court of Appeals which is fairly susceptible to the reading given it in the Court's opinion—that confrontation is not constitutionally required in a bar admission case such as this in which the character committee appears to have relied, at least in part, for its adverse recommendation upon contradicted information supplied by informers whose credibility was challenged by the applicant. The net result to me, therefore, is that this case, whatever it started out to be, has become one in which due process requires either *de novo* consideration of the petitioner's application or an orderly sorting out of the issues and an articulated and constitutionally grounded decision on the merits of the petitioner's claims to admission. New York procedures are, I am sure, adequate to effect the proper result upon remand.

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

The majority and concurring opinions bear witness to the difficulty the Court has had divining from this messy and opaque record whether the case in truth presents a substantial federal question. Obviously much influenced by the amended remittitur of the Court of Appeals, the

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Court considers that the state courts have held that an applicant for membership in the New York Bar may be denied admission without having had the opportunity at any stage to confront persons whose unfavorable information may have led the Character Committee to refuse to certify the candidate's "character and fitness."

It would take a great deal to persuade me that either of these experienced and respected New York courts has been guilty of such a questionable constitutional holding. In light of the record, I do not believe that either the Court of Appeals' affirmance or its amended remittitur by any means points to the interpretation which this Court now places on the action of that court. In my view the more reasonable, and correct, interpretation is that the Court of Appeals simply held that, in light of what had gone before,[1] the Appellate Division's refusal to

[1] The chronology of events was in substance this: The Appellate Division, upon the Character Committee's refusal to certify the applicant, originally denied admission in 1938. Refusal of certification had followed petitioner's appearance before the Committee at which, among other things, he had been informed and interrogated about complaints received from two lawyers, Wieder and Dempsey. (Wieder charged that petitioner had not completed his required "clerkship," having been discharged from Wieder's office for unsatisfactory performance before the end of the clerkship period. Dempsey's complaint related to certain litigation involving petitioner and one of Dempsey's clients, in which petitioner had been charged with fraud in connection with accountancy services performed for the client.) Apart from these *ex parte* charges, petitioner in his return to the Committee's written questionnaire had (1) stated that he had not been connected with any law offices, although in a later interview he had informed the Committee that he had in fact been employed in Wieder's office for a short time; (2) stated that he had served "no clerkship," although he had subsequently informed the Committee of the filing of a certificate of clerkship with the Court of Appeals in Albany; (3) failed to disclose the aforementioned suit brought against him by Dempsey's client; (4) failed to disclose an annulment suit that had been brought against him by his 16-year-old wife, later

entertain petitioner's last *de novo* application for admission—the eighth proceeding before that court—involved no abuse of its discretion under Rule 1 of the New York Rules of Civil Practice. More particularly, in these prior proceedings no confrontation claim was raised until 1954—some 16 years after the original denial of admission—during which period the matter had already been before the Appellate Division five times (note 1, *supra*).[2]

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stating that he had omitted this information because "Some people consider it a heinous offense"; and (5) failed to include six other suits or judgments against him among those listed in the questionnaire. The Committee characterized petitioner's demeanor as one of "general evasiveness."

Although he made no contemporary effort to obtain review of the original denial of admission, petitioner thereafter sought to attack it before the Appellate Division on four successive occasions during the years 1943–1951—all to no avail. Again, he sought no review of any of these proceedings, one of which involved a *de novo* hearing before the Character Committee, and in none does he appear to have raised the confrontation claim now made here.

Lack of confrontation seems to have been asserted for the first time in 1954, when petitioner again unsuccessfully moved the Appellate Division for leave to file a *de novo* application for admission. Leave to appeal to the New York Court of Appeals, sought then for the first time, was denied, and this Court in turn denied certiorari. 348 U. S. 955.

Finally in 1960 and 1961 petitioner twice more unsuccessfully moved the Appellate Division for leave to file a *de novo* application for admission, the latter proceeding being the one presently before the Court.

[2] In his petition initiating the present proceeding petitioner alleged that during the interviews held in connection with his original application the Chairman of the Character Committee promised him "a confrontation." The record, however, discloses no such episode. Indeed at the third Committee hearing in 1938 petitioner was asked whether he had anything further to present and he responded simply by referring to one of the affidavits submitted on his behalf purporting to refute the Wieder charge (note 1, *supra*). He made no request for confrontation.

So interpreting the Court of Appeals' action, I do not think this case presents a substantial federal question—no more so than did the petition for certiorari which was filed here in 1955, raising this same confrontation question in almost the same context of prior proceedings, and which this Court then denied. *In re Willner,* 348 U. S. 955.

Now that plenary consideration has shed more light on this case than in the nature of things was afforded at the time the petition for certiorari was acted upon, I think the proper course is to dismiss the writ as improvidently granted.

Syllabus.

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES ET AL. *v.* ALLEN ET AL.

CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA.

No. 316. Argued March 25, 1963.—Decided May 13, 1963.

A group of nonunion railroad employees sued in a North Carolina State Court to enjoin enforcement of a union-shop agreement entered into between a railroad and several unions representing their employees under § 2 Eleventh, of the Railway Labor Act, which required all employees to pay uniformly exacted union initiation fees, assessments and dues, in order to keep their jobs. The complaint alleged that sums exacted under the agreement "have been and are and will be regularly and continually used" to finance political activities "directly at cross-purposes with the free will and choice of the plaintiffs." A jury made separate findings that moneys exacted under the agreement were used by the unions for purposes not reasonably necessary or related to collective bargaining, including certain political activities. The trial court enjoined the unions "from placing any compulsion of any nature upon the [plaintiffs] . . . whereby they . . . against their free will and choice would be required to join the Defendant Unions . . . or pay money to said Unions"; provided, however, that, upon a showing by the unions of the proportion of expenditures from exacted funds that was reasonably necessary and related to collective bargaining, the injunction would be modified appropriately. The State Supreme Court affirmed by an equally divided vote. *Held:* The judgment is reversed and the cause is remanded for further proceedings not inconsistent with this opinion. Pp. 115–124.

1. The allegation of the complaint that sums exacted under the agreement "have been and are and will be regularly and continually used by the defendant Unions to carry on, finance and pay for political activities directly at cross-purposes with the free will and choice of the plaintiffs" sufficiently stated a cause of action. Pp. 118–119.

(a) Section 2 Eleventh, denies the unions the power, over an employee's objection, to use his exacted funds to support political activities which he opposes. *International Assn. of Machinists* v. *Street,* 367 U. S. 740. P. 118.

(b) It would be impracticable to require a dissenting employee to allege and prove each distinct union political expenditure to which he objects; it is enough that he manifests his objection to *any* political expenditures by the union. P. 118.

(c) However, dissent is not to be presumed but must be made known to the union by each dissenting employee; this is not a class action; and no plaintiff who does not in the course of the further proceedings in this case prove that he objects to such use will be entitled to relief. Pp. 118–119.

2. The trial court's injunction relieving the plaintiffs of all obligation to pay the moneys due under the agreement was improper, even though it was subject to modification if the unions came forward and proved the proportion of exacted funds required for purposes germane to collective bargaining. Pp. 119–120.

(a) Such a remedy is too broad and might interfere with the performance by the unions of those functions and duties which the Railway Labor Act places upon them to attain its goal of stability in the industry. P. 120.

(b) On remand, the plaintiffs should be given a reasonable time in which to pay to the appropriate union all sums required under the agreement, including arrears, that are owing; and the action must be dismissed as to any plaintiff failing to do this. P. 120.

3. Among the permissible remedies for dissenting employees are an injunction against expenditure for political causes opposed by each complaining employee of a sum, from those moneys to be spent by the union for political purposes, which is so much of the moneys exacted from the employee as is the proportion of the union's total expenditures made for such political activities to the union's total budget, and restitution of such a sum already exacted from the employees and expended by the union over his objection. In order to frame such a decree on remand, it will be necessary to make determinations as to (1) what expenditures disclosed by the record are political, and (2) what percentage of total union expenditures are political expenditures; and the unions, not the individual employees, must bear the burden of proving such proportion. Pp. 120–122.

4. A practical decree to which each plaintiff proving his right to relief would be entitled would order (1) the refund to him of a portion of the exacted funds in the same proportion that union

political expenditures bear to total union expenditures, and (2) a reduction of future such exactions from him by the same proportion. Pp. 122–124.

256 N. C. 700, 124 S. E. 2d 871, reversed and cause remanded.

Milton Kramer argued the cause for petitioners. With him on the briefs was *Lester P. Schoene.*

Whiteford S. Blakeney argued the cause and filed a brief for respondents.

J. Albert Woll, Theodore J. St. Antoine and *Thomas E. Harris* filed a brief for the American Federation of Labor and Congress of Industrial Organizations, as *amicus curiae,* urging reversal.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

By the terms of an agreement (the Agreement) authorized by § 2 Eleventh of the Railway Labor Act [1] between

[1] Section 2 Eleventh, 45 U. S. C. § 152 Eleventh, provides in part:

"Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

"(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided,* That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership."

the Southern Railway Company and a number of railway labor organizations including the two petitioners herein, employees of Southern are obligated, as a condition of employment, to pay the periodic dues, initiation fees and assessments uniformly required as a condition of acquiring or retaining membership in the union representing their particular class or craft.[2] The individual respondents herein are a number of such employees belonging to classes or crafts represented by petitioners.[3] When the Agreement was adopted respondents were not union members. They refused to pay petitioners any part of the moneys required under the Agreement, instead bringing this action in the Superior Court of Mecklenburg County, North Carolina, to restrain its enforcement.[4] After a

[2] Although the Agreement requires employees to become union members within the 60-day period, in fact petitioners do not insist that employees actually join the union, but regard payment of the uniform exactions required by the Agreement as complete compliance therewith.

[3] This action was commenced by 26 such employees but subsequent to the filing of the complaint 11 more were added as plaintiffs by amendment thereto; all 37 are respondents herein. Southern, which was a defendant below but disclaimed interest in the merits of the dispute between the employees and petitioners and did not appeal the Superior Court's judgment, appears in this Court as a respondent. In this opinion, the term "respondents" refers only to the individual respondents, and excludes Southern.

[4] The action was predicated in part on North Carolina's "right to work" law, which makes the union shop unlawful. N. C. Gen. Stats., §§ 95–78 to 95–84; but see *Hudson* v. *Atlantic Coast Line R. Co.*, 242 N. C. 650, 89 S. E. 2d 441. The complaint sought temporary and permanent injunctive relief on behalf of the named plaintiffs, respondents herein, and all other employees similarly situated, against Southern and every union representing employees of Southern. But the case was nonsuited as to all the defendant unions except petitioners when at trial no proof was offered that any of the plaintiffs belonged to crafts or classes other than those represented by petitioners. Also, the relief granted by the Superior Court in its final judgment was limited to "the plaintiffs, individually named as such in the caption of

trial the Superior Court granted an injunction upon the jury's separate findings that moneys exacted under the Agreement were used by petitioners for purposes not reasonably necessary or related to collective bargaining, namely, (1) to support or oppose legislation, (2) to influence votes in elections for public office, (3) to make campaign contributions in such elections, (4) to support the death-benefits system operated by petitioner Brotherhood of Railway Clerks. The injunction restrained petitioners "from placing any compulsion of any nature upon the [respondents] . . . whereby they . . . against their free will and choice would be required to join the Defendant Unions . . . or pay money to said Unions." It was provided, however, that upon a showing by petitioners of the proportion of expenditures from exacted funds that was reasonably necessary and related to collective bargaining, the injunction would be modified appropriately.

On appeal, the Supreme Court of North Carolina reversed, *Allen* v. *Southern R. Co.*, 249 N. C. 491, 107 S. E. 2d 125, holding that judgment for petitioners was required by our decision in *Railway Employes' Dept.* v. *Hanson*, 351 U. S. 225, where we held that § 2 Eleventh was a valid exercise by Congress of its powers under the

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this case." This limitation was obviously proper and indeed required, since the instant "action is not a true class action, for there is no attempt to prove the existence of a class of workers who had specifically objected to the exaction of dues for political purposes." *International Assn. of Machinists* v. *Street*, 367 U. S. 740, 774; see p. 119, *infra*.

Upon commencement of the instant action, the plaintiffs obtained an *ex parte* order temporarily restraining enforcement of the union-shop agreement; after hearing, the order was continued in effect *pendente lite*, although it was subsequently modified to be "effective only for the protection of persons who are individually named as parties plaintiff herein or who become added by order of court as such within thirty days from date hereof." Even as modified, such relief was improper. See p. 120, *infra*.

Commerce Clause and did not violate the First Amendment or the Due Process Clause of the Fifth. However, rehearing was granted, and pending decision thereon we decided *International Assn. of Machinists* v. *Street,* 367 U. S. 740. Upon reconsideration of the Superior Court's judgment in the light of that decision, the Supreme Court of North Carolina divided equally, which had the effect of affirming the lower court's judgment. 256 N. C. 700, 124 S. E. 2d 871 (*per curiam*); see *Schoenith* v. *Town & Country Realty Co.,* 244 N. C. 601, 94 S. E. 2d 592 (*per curiam*); *Ward* v. *Odell Mfg. Co.,* 126 N. C. 946, 36 S. E. 194. We granted certiorari, 371 U. S. 875, to consider whether the injunction granted by the Superior Court might stand consistently with our decision in *Street.* We reverse and remand for further proceedings not inconsistent with this opinion.

First. We held in *Street* "that § 2, Eleventh is to be construed to deny the unions, over an employee's objection, the power to use his exacted funds to support political causes which he opposes." 367 U. S., at 768–769. Respondents' amended complaint alleges that sums exacted under the Agreement "have been and are and will be regularly and continually used by the defendant Unions to carry on, finance and pay for political activities directly at cross-purposes with the free will and choice of the plaintiffs." This allegation sufficiently states a cause of action. It would be impracticable to require a dissenting employee to allege and prove each distinct union political expenditure to which he objects; it is enough that he manifests his opposition to *any* political expenditures by the union.[5] But we made clear in *Street*

[5] Respondents testified before any evidence of union political expenditures had been introduced and were asked hypothetical questions such as the following: "If the evidence should show that the money which you might be compelled to pay to the union would be used in part to influence the passage of laws, or to defeat the passage of

that "dissent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee." 367 U. S., at 774.[6] At trial, only 14 of the respondents testified that they objected to the use of exacted sums for political causes. No respondent who does not in the course of the further proceedings in this case prove that he objects to such use will be entitled to relief. This is not and cannot be a class action. See note 4, *supra*. "The union receiving money exacted from an employee under a union-shop agreement should not in fairness be subjected to sanctions in favor of an employee who makes no complaint of the use of his money for such activities." 367 U. S., at 774.

Second. We also held in *Street* that an injunction relieving dissenting employees of all obligation to pay the moneys due under an agreement authorized by § 2 Eleventh was impermissible. Such employees "remain obliged, as a condition of continued employment, to make

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legislation, or to influence the election of certain candidates and defeat the election of other candidates, what is your position with respect to such uses of your money?" The answer to this particular question was typical of respondents' testimony: "I am opposed to it. I am opposed to use of my money to influence the passage of laws or effect the election of candidates because I think that as individuals we should have the right to make our own decisions about such matters." Some plaintiffs, however, testified somewhat more specifically.

In holding respondents' allegations and testimony adequately specific, we are not inconsistent with the plurality opinion in *Lathrop* v. *Donohue*, 367 U. S. 820, 845–846, where it was observed, in concluding that the question of the constitutionality of the integrated bar was not yet ripe for decision, that "[n]owhere are we clearly apprised as to the views of the appellant on any particular legislative issues on which the State Bar has taken a position . . . ." This observation was made in the context of *constitutional* adjudication, not statutory as here.

[6] Respondents first made known their objection to the petitioners' political expenditures in their complaint filed in this action; however, this was early enough. *Street*, 367 U. S., at 771.

the payments to their respective unions called for by the agreement. Their . . . grievance stems from the spending of their funds for purposes not authorized by the Act in the face of their objection, not from the enforcement of the union-shop agreement by the mere collection of funds." 367 U. S., at 771. The injunction granted by the Superior Court was thus improper, even though it is subject to modification if petitioners come forward and prove the proportion of exacted funds required for purposes germane to collective bargaining. Even such a remedy, we think, "sweeps too broadly . . . [and] might well interfere with the . . . unions' performance of those functions and duties which the Railway Labor Act places upon them to attain its goal of stability in the industry." *Ibid.*

It also follows from *Street* that the Superior Court erred in granting respondents interim relief against compliance with the financial obligations imposed by the Agreement. As a result of this relief none of the respondents has taken any steps toward compliance since the suit was instituted. We think that lest the important functions of labor organizations under the Railway Labor Act be unduly impaired, dissenting employees (at least in the absence of special circumstances not shown here) can be entitled to no relief until final judgment in their favor is entered. Therefore, on remand respondents should be given a reasonable time within which they must pay to the bargaining representative of their class or craft all sums required under the Agreement, including arrears, that are owing; as to any respondent failing to do this, the action must be dismissed.

Third. We suggested in *Street* that among the permissible remedies for dissenting employees were "an injunction against expenditure for political causes opposed by each complaining employee of a sum, from those

moneys to be spent by the union for political purposes, which is so much of the moneys exacted from him as is the proportion of the union's total expenditures made for such political activities to the union's total budget," and restitution of such a sum already exacted from the complainant and expended by the union over his objection. 367 U. S., at 774–775. The necessary predicate for such remedies is a division of the union's political expenditures from those germane to collective bargaining, since only the former, to the extent made from exacted funds of dissenters, are not authorized by § 2 Eleventh. But at trial no evidence was offered by either side, nor was the jury required to make findings, as to the total amount of union expenditures for political purposes, the breakdown of the total union budget according to particular kinds of expenditure, or the proportion of political expenditures in the total union budget of a given period.[7] On remand, in order to frame a decree embodying the suggested remedies, two determinations will have to be made: (1) what expenditures disclosed by the record are political; (2) what percentage of total union expenditures are political expenditures. As to (1) we presently intimate no view, see note 7, *infra,* because here, as in *Street,* see 367 U. S., at 768–770, the courts below made no attempt to draw the boundary between political expenditures and those germane to collective bargaining, and it would be inappropriate for this Court to do so in the first instance and upon the present record. As to (2) the present record is insufficient to enable any calculation.

[7] We do conclude, however, without necessarily finding all the questions put to the jury proper for the purpose of distinguishing political expenditures from those germane to collective bargaining, see p. 117, *supra,* or all the answers adequately supported by the evidence, that the verdict, fairly read, constitutes a finding for which there is adequate support in the record that petitioners use a part of the exacted funds in support of political causes.

Since the unions possess the facts and records from which the proportion of political to total union expenditures can reasonably be calculated, basic considerations of fairness compel that they, not the individual employees, bear the burden of proving such proportion. Absolute precision in the calculation of such proportion is not, of course, to be expected or required; we are mindful of the difficult accounting problems that may arise. And no decree would be proper which appeared likely to infringe the unions' right to expend uniform exactions under the union-shop agreement in support of activities germane to collective bargaining and, as well, to expend nondissenters' such exactions in support of political activities.

Fourth. While adhering to the principles governing remedy which we announced in *Street,* see 367 U. S., at 771–775, we think it appropriate to suggest, in addition, a practical decree to which each respondent proving his right to relief would be entitled. Such a decree would order (1) the refund to him of a portion of the exacted funds in the same proportion that union political expenditures bear to total union expenditures, and (2) a reduction of future such exactions from him by the same proportion. We recognize that practical difficulties may attend a decree reducing an employee's obligations under the union-shop agreement by a fixed proportion, since the proportion of the union budget devoted to political activities may not be constant. The difficulties in judicially administered relief, although not insurmountable (a decree once entered would of course be modifiable upon a showing of changed circumstances), should, we think, encourage petitioner unions to consider the adoption by their membership of some voluntary plan by which dissenters would be afforded an internal union remedy.

There is precedent for such a plan.[8] If a union agreed upon a formula for ascertaining the proportion of political expenditures in its budget, and made available a simple procedure for allowing dissenters to be excused from having to pay this proportion of moneys due from them under the union-shop agreement, prolonged and expensive litigation might well be averted. The instant action, for example, has been before the courts for 10 years and has not yet run its course. It is a lesson of our national history of industrial relations that resort to litigation to settle the rights of labor organizations and employees very

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[8] See Trade Union Act of 1913, 2 & 3 Geo. V, c. 30, reenacted by Trade Disputes and Trade Unions Act, 1946, 9 & 10 Geo. VI, c. 52; Comment, 19 U. of Chi. L. Rev. 371, 381–388 (1952); Rothschild, Government Regulation of Trade Unions in Great Britain: II, 38 Col. L. Rev. 1335, 1360–1366 (1938). Pertinent portions of the Act are set out in an Appendix at the end of this opinion. Although the Act is a legislative solution to the problem of dissenters' rights, it might be possible for unions to adopt the substantial equivalent without legislation; we do not mean to suggest, however, that the Act provides a perfect model for a plan that would conform with the discussion in this opinion and in *Street,* nor that all aspects of the English Act are essential, for example the actual segregation of political funds, nor that the particular boundary drawn by the Act between political expenditures and those germane to collective bargaining is necessarily sound. It may be noted that one possible solution to the problem of fluctuating union political expenditures, see p. 122, *supra,* might be adoption by the union of a proportion calculated on the basis not of present political expenditures but projected future such expenditures, so as to anticipate possible fluctuations, with the dissenting employee free to contract out of this proportion of his dues and fees. Alternatively, unions might consider actually fixing a percentage ceiling of political expenditures, from which proportion dissenters could contract out. On the problem of remedies, see generally McAlister, Labor, Liberalism and Majoritarian Democracy, 31 Ford. L. Rev. 661, 687–693 (1963). Cf. Dudra, Approaches to Union Security in Switzerland, Canada, and Colombia, 86 Monthly Lab. Rev. 136 (1963).

often proves unsatisfactory. The courts will not shrink from affording what remedies they may, with due regard for the legitimate interests of all parties; but it is appropriate to remind the parties of the availability of more practical alternatives to litigation for the vindication of the rights and accommodation of interests here involved.

Reversed and remanded.

MR. JUSTICE BLACK, while adhering to the views he expressed in *International Assn. of Machinists* v. *Street*, 367 U. S. 740, 780–797, concurs in the judgment and opinion of the Court in this case because he believes both are in accord with the holding and opinion of the Court in the *Street* case.

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

[For opinion of MR. JUSTICE HARLAN, see *post*, p. 129.]

APPENDIX TO OPINION OF THE COURT.

The Trade Union Act of 1913, 2 & 3 Geo. V, c. 30, reads in part as follows:

3.—(1) The funds of a trade union shall not be applied, either directly or in conjunction with any other trade union, association, or body, or otherwise indirectly, in the furtherance of the political objects to which this section applies (without prejudice to the furtherance of any other political objects), unless the furtherance of those objects has been approved as an object of the union by a resolution for the time being in force passed on a ballot of the members of the union taken in accordance with this Act for the purpose by a majority of the members

voting; and where such a resolution is in force, unless rules, to be approved, whether the union is registered or not, by the Registrar of Friendly Societies, are in force providing—

(*a*) That any payments in the furtherance of those objects are to be made out of a separate fund (in this Act referred to as the political fund of the union), and for the exemption in accordance with this Act of any member of the union from any obligation to contribute to such a fund if he gives notice in accordance with this Act that he objects to contribute; and

(*b*) That a member who is exempt from the obligation to contribute to the political fund of the union shall not be excluded from any benefits of the union, or placed in any respect either directly or indirectly under any disability or at any disadvantage as compared with other members of the union (except in relation to the control or management of the political fund) by reason of his being so exempt, and that contribution to the political fund of the union shall not be made a condition for admission to the union.

(2) If any member of a trade union alleges that he is aggrieved by a breach of any rule made in pursuance of this section, he may complain to the Registrar of Friendly Societies, and the Registrar of Friendly Societies, after giving the complainant and any representative of the union an opportunity of being heard, may, if he considers that such a breach has been committed, make such order for remedying the breach as he thinks just under the circumstances; and any such order of the Registrar shall be binding and conclusive on all parties without appeal and shall not be removable into any court of law or restrainable by injunction, and on

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being recorded in the county court, may be enforced as if it had been an order of the county court. . . .

(3) The political objects to which this section applies are the expenditure of money—

(*a*) on the payment of any expenses incurred either directly or indirectly by a candidate or prospective candidate for election to Parliament or to any public office, before, during, or after the election in connexion with his candidature or election; or

(*b*) on the holding of any meeting or the distribution of any literature or documents in support of any such candidate or prospective candidate; or

(*c*) on the maintenance of any person who is a member of Parliament or who holds a public office; or

(*d*) in connection with the registration of electors or the selection of a candidate for Parliament or any public office; or

(*e*) on the holding of political meetings of any kind, or on the distribution of political literature or political documents of any kind, unless the main purpose of the meetings or of the distribution of the literature or documents is the furtherance of statutory objects within the meaning of this Act.

The expression "public office" in this section means the office of member of any county, county borough, district, or parish council, or board of guardians, or of any public body who have power to raise money, either directly or indirectly, by means of a rate.

(4) A resolution under this section approving political objects as an object of the union shall take effect as if it were a rule of the union and may be rescinded in the same manner and subject to the same provisions as such a rule.

(5) The provisions of this Act as to the application of the funds of a union for political purposes shall apply

to a union which is in whole or in part an association or combination of other unions as if the individual members of the component unions were the members of that union and not the unions; but nothing in this Act shall prevent any such component union from collecting from any of their members who are not exempt on behalf of the association or combination any contributions to the political fund of the association or combination.

4.—(1) A ballot for the purposes of this Act shall be taken in accordance with rules of the union to be approved for the purpose, whether the union is registered or not, by the Registrar of Friendly Societies, but the Registrar of Friendly Societies shall not approve any such rules unless he is satisfied that every member has an equal right, and, if reasonably possible, a fair opportunity of voting, and that the secrecy of the ballot is properly secured.

(2) If the Registrar of Friendly Societies is satisfied, and certifies, that rules for the purpose of a ballot under this Act or rules made for other purposes of this Act which require approval by the Registrar, have been approved by a majority of members of a trade union, whether registered or not, voting for the purpose, or by a majority of delegates of such a trade union voting at a meeting called for the purpose, those rules shall have effect as rules of the union, notwithstanding that the provisions of the rules of the union as to the alteration of rules or the making of new rules have not been complied with.

5.—(1) A member of a trade union may at any time give notice, in the form set out in the Schedule to this Act or in a form to the like effect, that he objects to contribute to the political fund of the union, and, on the adoption of a resolution of the union approving the furtherance of political objects as an object of the union, notice shall be given to the members of the union ac-

quainting them that each member has a right to be exempt from contributing to the political fund of the union, and that a form of exemption notice can be obtained by or on behalf of a member either by application at or by post from the head office or any branch office of the union or the office of the Registrar of Friendly Societies.

Any such notice to members of the union shall be given in accordance with rules of the union approved for the purpose by the Registrar of Friendly Societies, having regard in each case to the existing practice and to the character of the union.

(2) On giving notice in accordance with this Act of his objection to contribute, a member of the union shall be exempt, so long as his notice is not withdrawn, from contributing to the political fund of the union as from the first day of January next after the notice is given, or, in the case of a notice given within one month after the notice given to members under this section on the adoption of a resolution approving the furtherance of political objects, as from the date on which the member's notice is given.

6. Effect may be given to the exemption of members to contribute to the political fund of a union either by a separate levy of contributions to that fund from the members of the union who are not exempt, and in that case the rules shall provide that no moneys of the union other than the amount raised by such separate levy shall be carried to that fund, or by relieving any members who are exempt from the payment of the whole or any part of any periodical contributions required from the members of the union towards the expenses of the union, and in that case the rules shall provide that the relief shall be given as far as possible to all members who are exempt on the occasion of the same periodical payment and for enabling each member of the union to know as respects

any such periodical contribution, what portion, if any, of the sum payable by him is a contribution to the political fund of the union.

. . . . . .

SCHEDULE.

FORM OF EXEMPTION NOTICE.

Name of Trade Union

POLITICAL FUND (EXEMPTION NOTICE).

I hereby give notice that I object to contribute to the Political Fund of the Union, and am in consequence exempt, in manner provided by the Trade Union Act, 1913, from contributing to that fund.

A. B.
Address

day of 19

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

I agree with the reversal of the interim and qualified permanent relief that was granted by the state courts respecting the obligation to pay union dues. But I disagree with what in effect amounts to an affirmance of the state judgment in other respects. I believe that dismissal of this action in its entirety is called for.

International Assn. of Machinists v. *Street,* 367 U. S. 740, decided only two years ago, stated in unmistakable terms that a plaintiff claiming relief in an action of this kind must show two things: (1) that he had made known

to the union the *particular* political candidates or causes for whose support he did not wish his union dues used; (2) that membership dues had been used for such purposes.

The statement of these principles was reinforced on the very same day in *Lathrop* v. *Donohue,* 367 U. S. 820, the Wisconsin integrated bar case, where a plurality of the Court said (at 845–846):

> "Even if the demurrer is taken as admitting all the factual allegations of the complaint, even if these allegations are construed most expansively, and even if, like the Wisconsin Supreme Court, we take judicial notice of the political activities of the State Bar, still we think that the issue of impingement upon rights of free speech through the use of exacted dues is no more concretely presented for adjudication than it was in *Hanson* [351 U. S. 225]. Compare *International Association of Machinists* v. *Street, ante,* p. 740, at pp. 747–749. Nowhere are we clearly apprised as to the views of the appellant on any particular legislative issues on which the State Bar has taken a position, or as to the way in which and the degree to which funds compulsorily exacted from its members are used to support the organization's political activities." See also what follows at pp. 846–848.

These requirements have not been met in this case. At best all that has been alleged or proved is that the union *will* expend a part of each respondent's still-unpaid membership dues for so-called political or other purposes not connected with collective bargaining, and that each respondent would object to the use of any part of his dues for matters other than those relating to collective bargaining. None of the respondents who testified could specify any *particular* expenditure, or even class of expenditure, to which he objected.

I do not understand how, consistently with *Street,* the Court can now hold that "it is enough that . . . [a union member] manifests his opposition to *any* political expenditures by the union" (*ante,* p. 118), or how it can say that in so holding "we are not inconsistent with" what the plurality was at such pains to point out in *Lathrop* (albeit in a constitutional context), *id.,* note 5. The truth of the matter is that the Court has departed from the strict substantive limitations of *Street* and has given them (and, as I see it, also that case's remedial limitations, compare 367 U. S., at 772–775, 778–779, 779–780, 796–797, with *ante,* p. 122–123 and Appendix) an expansive thrust which can hardly fail to increase the volume of this sort of litigation in the future.

Believing that our decisions should have more lasting power than has been accorded *Street,* I must respectfully dissent. I would reverse the judgment and remand the case for dismissal of the complaint.

FLORIDA LIME & AVOCADO GROWERS, INC., ET AL. *v.* PAUL, DIRECTOR OF THE DEPARTMENT OF AGRICULTURE OF CALIFORNIA, ET AL.

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

No. 45. Argued January 8, 1963.—Decided May 13, 1963.*

Appellants, who are engaged in the business of growing, packing and marketing Florida avocados in interstate commerce, sued in a Federal District Court to enjoin appellees, state officers of California, from enforcing § 792 of the California Agricultural Code, which prohibits the transportation or sale in California of avocados containing less than 8% of oil by weight, against Florida avocados certified as mature under federal regulations issued under the Federal Agricultural Marketing Agreement Act of 1937. They contended that § 792 of the California statute, as so applied, was unconstitutional, because (1) under the Supremacy Clause, it must be deemed displaced by the federal standard for determining the maturity of avocados grown in Florida; (2) its application to Florida avocados denied appellants the equal protection of the laws in violation of the Fourteenth Amendment; and (3) its application to them unreasonably burdened or discriminated against interstate marketing of Florida avocados in violation of the Commerce Clause. A three-judge District Court convened to hear the case denied an injunction, on the ground that the proofs did not establish that application of § 792 to Florida avocados violated any provision of the Federal Constitution. *Held:*

1. Section 792 is not invalid under the Supremacy Clause, because there is neither such actual conflict between the two schemes of regulation that both cannot stand in the same area, nor is there evidence of a congressional design to preempt the field. Pp. 141–152.

(a) The present record demonstrates no inevitable collision between the two schemes of regulation, despite the dissimilarity of the standards. Pp. 142–143.

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*Together with No. 49, *Paul, Director of the Department of Agriculture of California, et al.* v. *Florida Lime & Avocado Growers, Inc., et al.*, also on appeal from the same Court.

(b) The subject matter of the California regulation, while not concerned with health or safety, is one traditionally within the scope of the power of the States to prevent deception of consumers in the retail marketing of foodstuffs. Pp. 143–146.

(c) Neither the terms nor the history of the Federal Agricultural Marketing Agreement Act of 1937 discloses a congressional intent to displace traditional state powers to regulate the retail distribution of agricultural commodities. Pp. 146–152.

2. Section 792 does not violate the Equal Protection Clause of the Fourteenth Amendment, because it does not work an irrational discrimination between persons or groups of persons. P. 152.

3. The findings of the District Court with respect to the effect of § 792 upon interstate commerce cannot be reviewed because of substantial uncertainty as to the content of the record on which those findings were predicated. Therefore, the judgment is reversed in this respect and the case is remanded to the District Court for a new trial of appellants' contentions that § 792 unreasonably burdens or discriminates against interstate commerce in Florida avocados. Pp. 152–156.

4. Since the appellants showed sufficient injury to warrant at least a trial of their allegations, the District Court properly refused to dismiss the complaint for want of equity jurisdiction. Pp. 157–159.

197 F. Supp. 780, affirmed in part, reversed in part, and remanded.

Isaac E. Ferguson argued the cause and filed briefs for appellants in No. 45 and appellees in No. 49.

John Fourt, Deputy Attorney General of California, argued the cause for appellees in No. 45 and appellants in No. 49. With him on the briefs were *Stanley Mosk,* Attorney General, *Lawrence E. Doxsee,* Deputy Attorney General, and *William A. Norris.*

Mr. Justice Brennan delivered the opinion of the Court.

Section 792 of California's Agricultural Code, which gauges the maturity of avocados by oil content, prohibits the transportation or sale in California of avocados which contain "less than 8 per cent of oil, by weight . . .

excluding the skin and seed." [1] In contrast, federal marketing orders approved by the Secretary of Agriculture gauge the maturity of avocados grown in Florida by standards which attribute no significance to oil content.[2] This case presents the question of the constitutionality of the California statute insofar as it may be applied to exclude from California markets certain Florida avocados which, although certified to be mature under the federal regulations, do not uniformly meet the California requirement of 8% of oil.

Appellants in No. 45, growers and handlers of avocados in Florida, brought this action in the District Court for the Northern District of California to enjoin the enforcement of § 792 against Florida avocados certified as mature under the federal regulations. Appellants challenged the constitutionality of the statute on three grounds: (1) that under the Supremacy Clause, Art. VI, the California standard must be deemed displaced by the federal standard for determining the maturity of avocados grown in Florida; (2) that the application of the California statute to Florida-grown avocados denied appellants the Equal

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[1] Avocados not meeting this standard may not be sold in California. *Id.*, § 784. Substandard fruits are "declared to be a public nuisance," and they may be seized, condemned, and abated. *Id.*, § 785. Violators may be punished criminally, *id.*, § 831 ($50 to $500 fine or imprisonment for not more than six months, or both), and by civil penalty action, *id.*, § 785.6 (market value of fruits).

[2] The orders are approved by the Secretary pursuant to § 8c of the Agricultural Adjustment Act, 7 U. S. C. § 608c. The basic marketing agreement provisions were initially adopted, in substantially their present form, in the 1935 amendments to the Agricultural Adjustment Act, 49 Stat. 750, 753–761. These sections were reenacted in 1937, 50 Stat. 246, as the Agricultural Marketing Agreement Act of 1937, virtually unchanged. Concerning the reasons for the reenactment, and the extent of the changes, see United States Department of Agriculture, Agricultural Adjustment 1937–1938 (1939), 72–73.

Protection of the Laws in violation of the Fourteenth Amendment; (3) that its application unreasonably burdened or discriminated against interstate marketing of Florida-grown avocados in violation of the Commerce Clause, Art. I, § 8. A three-judge District Court initially dismissed the complaint. 169 F. Supp. 774. On direct appeal we held, *Florida Lime & Avocado Growers, Inc.*, v. *Jacobsen*, 362 U. S. 73, that the suit was one for a three-judge court under 28 U. S. C. § 2281, and presented a justiciable controversy to be tried on the merits. After a trial the three-judge court denied an injunction against the enforcement of § 792, on the ground that the proofs did not establish that its application to Florida-grown avocados violated any provision of the Federal Constitution. 197 F. Supp. 780. The District Court held for several reasons that the Supremacy Clause did not operate to displace § 792: no actual conflict existed between the statute and the federal marketing orders; neither the Agricultural Act nor the marketing orders occupied the field to the exclusion of the state statute; and Congress had not ordained that a federal marketing order was to give a license to Florida producers to "market their avocados without further inspection by the states" after compliance with the federal maturity test. 197 F. Supp., at 787. Rather, the court observed, "[t]he Federal law does not cover the whole field of interstate shipment of avocados" but by necessary implication leaves the regulation of certain aspects of distribution to the States. Further, the District Court found no violation of the Equal Protection Clause because the California statute was applicable on identical terms to Florida and California producers, and was reasonably designed to enforce a traditional and legitimate interest of the State of California in the protection of California consumers. The District Court concluded, finally, that § 792 did not unreasonably burden or discriminate against interstate commerce in out-of-state

avocados—that the 8% oil content test served in practice only to keep off California grocers' shelves fruit which was unpalatable because prematurely picked. This holding rested in part on the conclusion that mature Florida fruit had not been shown to be incapable of attaining 8% oil content, since only a very small fraction of Florida avocados of certain varieties in fact failed to meet the California test.[3]

Both parties have brought appeals here from the District Court's judgment: the Florida growers urge in No. 45 that the court erred in not enjoining enforcement of the state statute against Florida-grown avocados; in No. 49 the California state officials appeal on the ground that the action should have been dismissed for want of equity jurisdiction rather than upon the merits. We noted probable jurisdiction of both appeals. 368 U. S. 964, 965. We affirm the judgment in the respect challenged by the cross-appeal in No. 49. In No. 45 we agree that appellants have not sustained their challenges to § 792 under the Supremacy and Equal Protection Clauses. However, we reverse and remand for a new trial insofar as the judgment sus-

[3] The evidence in the record concerning the actual effect of the California maturity test upon Florida avocados is sketchy at best. The appellants introduced only one witness, a marketing expert in the United States Department of Agriculture, who testified concerning the relative scientific and other merits of the federal and California maturity tests. He gave no testimony concerning the actual impact of the California regulation upon shipments from Florida. One of appellees' witnesses at trial made cursory references to the fact that California inspectors had rejected and excluded some Florida shipments, but there was no testimony concerning the dates and quantities of any rejections. In a motion for dismissal and an accompanying affidavit before the District Court, the appellees presented certain figures concerning the percentage of Florida avocados which failed to comply with the California regulation during the years 1954 through 1957. There was, however, neither data for years after 1957 nor statistical proof at the trial which would corroborate these summary figures.

tains § 792 against appellants' challenge to the statute grounded on the Commerce Clause. We hold that the effect of the statute upon interstate commerce cannot be determined on the record now before us.

The California statute was enacted in 1925. Like the federal marketing regulations applicable to appellants, this statute sought to ensure the maturity of avocados reaching retail markets.[4] The District Court found on sufficient evidence that before 1925 the marketing of immature avocados had created serious problems in California.[5] An avocado, if picked prematurely, will not ripen properly, but will tend to decay or shrivel and become rubbery and unpalatable after purchase. Not only retail consumers but even experienced grocers have difficulty in distinguishing mature avocados from the immature by physical characteristics alone.[6] Thus, the District Court

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[4] See Roche, Regulations for Marketing Avocados in California, in California Avocado Assn. 1937 Yearbook (1937), 88–89, concerning the purpose of the California oil-test statute. It has not been contended that the purpose of this statute is to ensure a certain caloric or nutritional value in avocados which reach the consumer. No health issue has been raised in this case. See 197 F. Supp., at 785–786.

[5] See also Church and Chace, Some Changes in the Composition of California Avocados During Growth (U. S. Dept. of Agriculture Bull. No. 1073, 1922), 2; Hodgson, The California Avocado Industry (Calif. Agricultural Extension Service Circular No. 43, 1930), 54–55; Hodges, Immature Avocado Selling Illegal, 111 Pacific Rural Press, Apr. 3, 1926, p. 435. And for a discussion of the particular problems encountered in the marketing of immature avocados in California, see Roche, *supra*, note 4, at 88–89.

[6] The nature of the avocado and its ripening process make it very difficult for any but the expert to gauge its maturity, and an avocado which may *appear* satisfactory at the time of purchase may later fail to ripen properly because it was prematurely picked. See, *e. g.*, Ruehle, The Florida Avocado Industry (Univ. of Fla. Agr. Expt. Stations Bull. No. 602, 1958), 69; Avocado Maturity Tests, 37 Cali-

concluded, "[t]he marketing of . . . [immature] avocados cheats the consumer" and adversely affects demand for and orderly distribution of the fruit. 197 F. Supp., at 783.

The federal marketing regulations were adopted pursuant to the Agricultural Adjustment Act, 7 U. S. C. §§ 601 *et seq.* The declared purposes of the Act are to restore and maintain parity prices for the benefit of producers of agricultural commodities, to ensure the stable and steady flow of commodities to consumers, and "to establish and maintain such minimum standards of quality and maturity . . . as will effectuate such orderly marketing of such agricultural commodities as will be in the public interest," § 2 (3), 7 U. S. C. § 602 (3). Whenever he finds that it would promote these declared policies, the Secretary is empowered upon notice and hearing to adopt federal marketing orders and regulations for a particular growing area, § 8c (3), (4), 7 U. S. C. § 608c (3), (4). Orders thus proposed by the Secretary become effective only when approved by a majority of the growers or producers concerned, § 8c (8), (9), 7 U. S. C. § 608c (8), (9).

In 1954, after proceedings in compliance with the statute, 19 Fed. Reg. 3439, the Secretary promulgated orders governing the marketing of avocados grown in South Florida.[7] The orders established an Avocado Administrative Committee, composed entirely of South Florida avocado growers and handlers. 7 CFR § 969.20. This Committee has authority to draft and recommend to the Secretary various marketing regulations governing the

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fornia Citrograph, Dec. 1951, p. 87; Roche, Look Out for Immature Avocados, 87 California Cultivator, Nov. 2, 1940, p. 590; Church and Chace, *supra,* note 5, at 2.

[7] This order is applicable only to avocados grown in the South Florida growing area. The California growers have not adopted a federal marketing order or agreement.

quality and maturity of South Florida avocados. The maturity test for the South Florida fruit is based upon a schedule of picking dates, sizes and weights annually drafted and recommended by the Committee and promulgated by the Secretary.[8] The regulations forbid picking and shipping of any fruit before the prescribed date, although an exemption from the picking-date schedule may be granted by the Committee.[9] The regulations drafted by the Committee and promulgated by the Secretary concern other qualities and physical characteristics of Florida avocados besides maturity. See 22 Fed. Reg. 6205, 7 CFR §§ 51.3050–51.3053, 51.3064. All regulated avocados, including those shipped under picking-date exemptions, must be inspected for compliance with certain quality standards by the Federal-State Inspection Service, a joint authority supervised by the United States and Florida Departments of Agriculture.

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[8] The findings of the United States Department of Agriculture, contained in its order determining what terms should be contained in the avocado regulations, were that the marketing of immature fruits increases consumer resistance and materially impairs the marketing of the entire crop, that there was no satisfactory physical or chemical test for determining maturity, and that maturity can satisfactorily be determined by the picking-date-size method. Handling of Avocados Grown in South Florida, 19 Fed. Reg. 2418, 2424–2425.

Each year since 1954, the Secretary has issued maturity regulations fixing the dates upon which each variety of Florida avocados may be picked and shipped. See, *e. g.*, 27 Fed. Reg. 5135–5136, 6705, 8264–8265, 9174–9175, 10090–10091.

[9] Section .53 of the regulations, 7 CFR § 969.53, provides that an exemption certificate shall be granted to a grower "who furnishes proof, satisfactory to the committee, that his avocados of a particular variety are mature prior to the time such variety may be handled under such regulation." Such a certificate authorizes the recipient to "handle" the certified fruit, *i. e.*, to "sell, consign, deliver, or transport avocados within the production area or between the production area and any point outside thereof . . . ." 7 CFR § 969.10.

Almost all avocados commercially grown in the United States come either from Southern California or South Florida. The California-grown varieties are chiefly of Mexican ancestry, and in most years contain at least 8% oil content when mature.[10] The several Florida species, by contrast, are of West Indian and Guatemalan ancestry. West Indian avocados, which constitute some 12% of the total Florida production, may contain somewhat less than 8% oil when mature and ready for market. They do not, the District Court found, attain that percentage of oil "until they are past their prime." 197 F. Supp., at 783. But that variety need not concern us in this case, since the District Court concluded on sufficient evidence that "poor shipping qualities and short retail store shelf-life" make it commercially unprofitable, regardless of the oil test, to market the variety in California. On the other hand, the Florida hybrid and Guatemalan varieties, which do not encounter such handicaps, *may* reach maturity before they attain 8% oil content. The District Court concluded, nevertheless, that § 792 did not unreasonably interfere with their marketability since these species "attain or exceed 8% oil content while in a prime commercial marketing condition," so that the California test was "scientifically valid as applied to" these varieties.

The experts who testified at the trial disputed whether California's percentage-of-oil test or the federal marketing orders' test of picking dates and minimum sizes and weights was the more accurate gauge of the maturity of

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[10] See Traub et al., Avocado Production in the United States (U. S. Dept. of Agriculture Circular No. 620, 1941), 6–8. Occasionally, however, even California growers have experienced difficulty in meeting the oil content requirement, and sizable shipments have had to be destroyed. See Demand for Avocados, 74 California Cultivator, Feb. 8, 1930, p. 167; Roche, Look Out for Immature Avocados, 87 California Cultivator, Nov. 2, 1940, p. 590; California Avocado Assn. 1937 Yearbook (1937), 88.

avocados.[11] In adopting his calendar test of maturity for the varieties grown in South Florida the Secretary expressly rejected physical and chemical tests as insufficiently reliable guides for gauging the maturity of the Florida fruit.[12]

I.

We consider first appellants' challenge to § 792 under the Supremacy Clause. That the California statute and the federal marketing orders embody different maturity tests is clear. However, this difference poses, rather than disposes of the problem before us. Whether a State may constitutionally reject commodities which a federal authority has certified to be marketable depends upon whether the state regulation "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines* v. *Davidowitz,* 312 U. S. 52, 67. By that test, we hold that § 792 is not such an obstacle; there is neither such actual conflict between the two schemes of regulation that both cannot stand in the same area, nor evidence of a congressional design to preempt the field.

We begin by putting aside two suggestions of the appellants which obscure more than aid in the solution of the problem. First, it is suggested that a federal license or certificate of compliance with minimum federal standards immunizes the licensed commerce from inconsistent or more demanding state regulations. While this suggestion draws some support from decisions which have invalidated direct state interference with the activities of interstate *carriers, Castle* v. *Hayes Freight Lines, Inc.,*

[11] Compare Hodgson, The California Avocado Industry (Calif. Agricultural Extension Service Circular No. 43, 1930), 39.

[12] See 19 Fed. Reg. 2418, 2424–2425; compare Harding, The Relation of Maturity to Quality in Florida Avocados, 67 Florida State Horticultural Society Proceedings, 276 (1954).

348 U. S. 61, even in that field of paramount federal concern the suggestion has been significantly qualified, *e. g., Huron Portland Cement Co.* v. *Detroit,* 362 U. S. 440, 447–448; *Kelly* v. *Washington,* 302 U. S. 1; cf. *Bradley* v. *Public Utilities Comm'n,* 289 U. S. 92. That no State may completely exclude federally licensed commerce is indisputable, but that principle has no application to this case.

Second, it is suggested that the coexistence of federal and state regulatory legislation should depend upon whether the *purposes* of the two laws are parallel or divergent. This Court has, on the one hand, sustained state statutes having objectives virtually identical to those of federal regulations, *California* v. *Zook,* 336 U. S. 725, 730–731; cf. *De Veau* v. *Braisted,* 363 U. S. 144, 156–157; *Parker* v. *Brown,* 317 U. S. 341; and has, on the other hand, struck down state statutes where the respective purposes were quite dissimilar, *First Iowa Hydro-Electric Cooperative* v. *Federal Power Comm'n,* 328 U. S. 152. The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives.

The principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained. See, *e. g., Huron Portland Cement Co.* v. *Detroit, supra.*

A.

A holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a

physical impossibility for one engaged in interstate commerce, cf. *Union Bridge Co.* v. *United States,* 204 U. S. 364, 399–401; *Morgan* v. *Virginia,* 328 U. S. 373; *Bibb* v. *Navajo Freight Lines, Inc.,* 359 U. S. 520. That would be the situation here if, for example, the federal orders forbade the picking and marketing of any avocado testing more than 7% oil, while the California test excluded from the State any avocado measuring less than 8% oil content. No such impossibility of dual compliance is presented on this record, however. As to those Florida avocados of the hybrid and Guatemalan varieties which were actually rejected by the California test, the District Court indicated that the Florida growers might have avoided such rejections by leaving the fruit on the trees beyond the earliest picking date permitted by the federal regulations, and nothing in the record contradicts that suggestion. Nor is there a lack of evidentiary support for the District Court's finding that the Florida varieties marketed in California "attain or exceed 8% oil content while in a prime commercial marketing condition," even though they may be "mature enough to be acceptable prior to the time that they reach that content . . . ." 197 F. Supp., at 783. Thus the present record demonstrates no inevitable collision between the two schemes of regulation, despite the dissimilarity of the standards.

B.

The issue under the head of the Supremacy Clause is narrowed then to this: Does either the nature of the subject matter, namely the maturity of avocados, or any explicit declaration of congressional design to displace state regulation, require § 792 to yield to the federal marketing orders? The maturity of avocados seems to be an inherently unlikely candidate for exclusive federal regulation. Certainly it is not a subject by its very nature admitting only of national supervision, cf. *Cooley*

v. *Board of Port Wardens,* 12 How. 299, 319–320. Nor is it a subject demanding exclusive federal regulation in order to achieve uniformity vital to national interests, cf. *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236, 241–244.

On the contrary, the maturity of avocados is a subject matter of the kind this Court has traditionally regarded as properly within the scope of state superintendence. Specifically, the supervision of the readying of foodstuffs for market has always been deemed a matter of peculiarly local concern. Many decades ago, for example, this Court sustained a State's prohibition against the importation of artificially colored oleomargarine (which posed no health problem), over claims of federal preemption and burden on commerce. In the course of the opinion, the Court recognized that the States have always possessed a legitimate interest in "the protection of . . . [their] people against fraud and deception in the sale of food products" at retail markets within their borders. *Plumley* v. *Massachusetts,* 155 U. S. 461, 472. See also *Crossman* v. *Lurman,* 192 U. S. 189, 199–200; *Hygrade Provision Co.* v. *Sherman,* 266 U. S. 497; *Savage* v. *Jones,* 225 U. S. 501, 525–529.

It is true that more recently we sustained a federal statute broadly regulating the production of renovated butter. But we were scrupulous in pointing out that a State might nevertheless—at least in the absence of an express contrary command of Congress—confiscate or exclude from market the processed butter which had complied with all the federal *processing* standards, "because of a higher standard demanded by a state for its consumers." A state regulation so purposed was, we affirmed, "permissible under all the authorities." [13] *Cloverleaf*

[13] It is true that the statute involved in the *Cloverleaf* case provided that federal law was not intended to displace state laws "enacted in the exercise of [the States'] police powers . . . ." 32 Stat. 193, 21

Butter Co. v. *Patterson,* 315 U. S. 148, 162. That distinction is a fundamental one, which illumines and delineates the problem of the present case. Federal regulation by means of minimum standards of the picking, processing, and transportation of agricultural commodities, however comprehensive *for those purposes* that regulation may be, does not of itself import displacement of state control over the distribution and retail sale of those commodities in the interests of the *consumers* of the commodities within the State. Thus, while Florida may perhaps not prevent the exportation of federally certified fruit by superimposing a higher maturity standard, nothing in *Cloverleaf* forbids California to regulate their marketing. Congressional regulation of one end of the stream of commerce does not, *ipso facto,* oust all state regulation at the other end. Such a displacement may not be inferred automatically from the fact that Congress has regulated production and packing of commodities for the interstate market. We do not mean to suggest that certain local regulations may not unreasonably or arbitrarily burden interstate commerce; we consider that question separately, *infra,* pp. 152–154. Here we are concerned only whether partial congressional superintendence of the field (maturity for the purpose of introduction of Florida fruit into the stream of interstate commerce) automatically forecloses regulation of maturity by another State in the interests of that State's consumers of the fruit.

U. S. C. § 25. But this proviso was presumably intended to do no more than recognize explicitly an accommodation between federal and state interests to which Congress and the decisions of this Court have consistently adhered. Nor did the Court's deference to state regulation rest upon this congressional proviso. Rather, the Court simply considered it a well-settled proposition that a State may impose upon imported foodstuffs "a higher standard demanded . . . for its consumers."

The correctness of the District Court's conclusion that § 792 was a regulation well within the scope of California's police powers is thus clear. While it is conceded that the California statute is not a health measure, neither logic nor precedent invites any distinction between state regulations designed to keep unhealthful or unsafe commodities off the grocer's shelves, and those designed to prevent the deception of consumers.[14] See, *e. g., Hygrade Provision Co.* v. *Sherman, supra; Plumley* v. *Massachusetts, supra.* Nothing appearing in the record before us affords any ground for departure in this case from our consistent refusal to draw such a distinction.

C.

Since no irreconcilable conflict with the federal regulation requires a conclusion that § 792 was displaced, we turn to the question whether Congress has nevertheless ordained that the state regulation shall yield. The settled mandate governing this inquiry, in deference to the fact that a state regulation of this kind is an exercise of the "historic police powers of the States," is not to decree such a federal displacement "unless that was the clear and manifest purpose of Congress," *Rice* v. *Santa Fe Elevator Corp.,* 331 U. S. 218, 230. In other words, we are not to conclude that Congress legislated the ouster of this California statute by the marketing orders in the absence

[14] It might also be argued that the California statute, having been designed to test the maturity only of *California* avocados, bears no rational relationship to the marketability of *Florida* fruit. Such a contention would seem untenable, however, in the face of the District Court's express finding of fact, supportable on the testimony before it, that "[a] standard requiring a minimum of 8% of oil in an avocado before it may be marketed is scientifically valid as applied to hybrid and Guatemalan varieties of avocados grown in Florida and marketed in California." And there is considerable dispute as to the oil content of Florida avocados which have been certified as mature under the federal regulations. See note 21, *infra.*

of an unambiguous congressional mandate to that effect. We search in vain for such a mandate.

The provisions and objectives of the Agricultural Adjustment Act bear little resemblance to those in which only last Term we found a preemptive design in *Campbell* v. *Hussey,* 368 U. S. 297. In the Federal Tobacco Inspection Act involved in that case, Congress had declared "uniform standards of classification and inspection" to be "imperative for the protection of producers and others engaged in commerce and the public interest therein." 7 U. S. C. § 511a. The legislative history was replete with references to a need for "uniform" or "official" standards, which could harmonize the grading and inspection of tobacco at all markets throughout the country. Under the statute a single set of standards was to be promulgated by the Secretary of Agriculture, "and the standards so established would be the official standards of the United States for such purpose." S. Rep. No. 1211, 74th Cong., 1st Sess. 1.

Nothing in the language of the Agricultural Adjustment Act—passed by the same Congress the very next day [15]—discloses a similarly comprehensive congressional design. There is but one provision of the statute which intimates any purpose to make agricultural production controls the monitors of retail distribution—the reference to a policy of establishing such "minimum standards of quality and maturity and such grading and inspection requirements . . . as will effectuate . . . orderly marketing . . . in the public interest." 7 U. S. C. § 602 (3). That language cannot be said, without more, to reveal a design that federal marketing orders should displace all state

[15] The marketing agreement provisions were enacted among the 1935 amendments to the Agricultural Adjustment Act, 49 Stat. 750, 753–761. These amendments were accepted by Congress the day following the enactment of the Tobacco Inspection Act, 49 Stat. 731–735.

regulations. By its very terms, in fact, the statute purports only to establish *minimum* standards.

Other provisions of the Act, and their history, militate even more strongly against federal displacement of these state regulations. First, the adoption of marketing agreements and orders is authorized only when the Secretary has determined that economic conditions within a particular growing area require federally supervised cooperation among the growers to alleviate those conditions. 7 U. S. C. § 608c (1), (2). Moreover, the relief afforded the growers is to be temporary; "the Secretary is directed to cease exercising such powers" when "the circumstances described . . . no longer exist." H. R. Rep. No. 1241, 74th Cong., 1st Sess. 4. And consistently with these terms, the Secretary himself has characterized the marketing agreements as essentially "self-help programs" instituted and administered by the farmers involved. This view has recently been elaborated by the Secretary:

> "The Act itself does not impose regulations over the marketing of any agricultural commodity. It merely provides the authority under which an industry can develop regulations to fit its own situation and solve its own marketing problems." United States Department of Agriculture, Marketing Agreements and Orders, AMS–230 (rev. ed. 1961), 3. See also United States Department of Agriculture, Agricultural Adjustment 1937–1938 (1939), 71.

Second, the very terms of the statute require that the Secretary promulgate marketing orders "limited in their application to the smallest regional production areas" which he finds practicable; and the orders are to "prescribe such different terms, applicable to different production areas and marketing areas" as will serve to "give due recognition to the differences in production and market-

ing" between those areas. 7 U. S. C. § 608c (11). While this language is not conclusive on the question before us, it indicates that Congress contemplated—quite by contrast to the design embodied in the Tobacco Inspection Act—that there might be widespread regional variations in the standards governing production and processing. Thus avocado growers in another region could, for example, propose—and the Secretary would presumably adopt—maturity regulations which would gauge the marketability of the fruit not by the calendar, as do the South Florida rules, but by the color of the skin, or the texture and color of the seed-coat, or perhaps even by oil content. Thus if the Congress of 1935 really intended that distribution would be comprehensively governed by grower-adopted quality and maturity standards, and all state regulation of the same subject would be ousted, it does not seem likely that the statute would have invited local variations at the production end while saying absolutely nothing about the effect of those production controls upon distribution for consumption.

A third factor which strongly suggests that Congress did not mandate uniformity for each marketing order arises from the legislative history. The provisions concerning the limited duration and local application of marketing agreements received much attention from both House and Senate Committees reporting on the bill. Though recognizing that the powers conferred upon the Secretary were novel and extensive, both Committees concluded: "These and other restrictive provisions are . . . adequately drawn to guard against any fear that the regulatory power is so broad as to subject its exercise to the risk of abuse." H. R. Rep. No. 1241, 74th Cong., 1st Sess. 7; S. Rep. No. 1011, 74th Cong., 1st Sess. 3. The Committee Reports also discussed § 10 (i), 7 U. S. C. § 610 (i), which authorized federal-state cooperation

in the administration of the program, and cautioned significantly:

> "Notwithstanding the authorization of cooperation contained in this section, there is nothing in it to permit or require the Federal Government to invade the field of the States, for the limitations of the act and the Constitution forbid federal regulation in that field, and this provision does not indicate the contrary. Nor is there anything in the provision to force States to cooperate. Each sovereignty operates in its own sphere but can exert its authority in conformity rather than in conflict with that of the other." H. R. Rep. No. 1241, 74th Cong., 1st Sess. 22–23; S. Rep. No. 1011, 74th Cong., 1st Sess. 15.

Thus the revealed congressional design was apparently to do no more than to invite farmers and growers to get together, under the auspices of the Department of Agriculture, to work out local harvesting, packing and processing programs and thereby relieve temporarily depressed marketing conditions. Had Congress meant the Act to have in addition a pervasive effect upon the ultimate distribution and sale of produce, evidence of such a design would presumably have accompanied the statute, as it did the Tobacco Inspection Act, see *Campbell* v. *Hussey, supra.* In the absence of any such manifestations, it would be unreasonable to infer that Congress delegated to the growers in a particular region the authority to deprive the States of their traditional power to enforce otherwise valid regulations designed for the protection of consumers.

An examination of the operation of these particular marketing orders reinforces the conclusion we reach from this analysis of the terms and objectives of the statute. The regulations show that the Florida avocado maturity standards are drafted each year not by impartial experts in Washington or even in Florida, but rather by the South

Florida Avocado Administrative Committee, which consists entirely of representatives of the growers and handlers concerned. It appears that the Secretary of Agriculture has invariably adopted the Committee's recommendations for maturity dates, sizes, and weights.[16] Thus the pattern which emerges is one of maturity regulations drafted and administered locally by the growers' own representatives, and designed to do no more than promote orderly competition among the South Florida growers.[17]

This case requires no consideration of the scope of the constitutional power of Congress to oust all state regulation of maturity, and we intimate no view upon that ques-

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[16] Although the Manager of the Avocado Administrative Committee stated in his deposition (which was neither formally admitted nor excluded by the District Court) that the Secretary had occasionally rejected orders recommended by the Committee, he insisted that as to *maturity* regulations "the Secretary has always followed the Committee's recommendations."

[17] Significant with regard to the essentially local nature of the orders and their administration is the testimony in a deposition (on the admissibility of which the District Court did not rule) of the supervising inspector of fruits and vegetables of the Federal and State Agricultural Inspection Service for the South Florida district:

". . . these regulations from time to time are subject to change at the direction of the Avocado Administrative Committee. Whenever they do change them, Mr. Biggar, the manager of the Avocado Administrative Committee, immediately furnishes the inspection service with copies of the effective rules and changes. There are times when they change them, and when they change them I am the first man to get the changed regulations, because I have to see that the inspectors get the revised regulations issued by the Avocado Administrative Committee."

For further evidence that the avocado marketing agreement was undertaken chiefly as a "self-help program," designed only to regulate South Florida production and ensure maturity of the produce from that growing area, see Krome, The Federal Avocado Marketing Agreement, 67 Florida State Horticultural Society Proceedings 268 (1954).

tion.[18] It is enough to decide this aspect of the present case that we conclude that Congress has not attempted to oust or displace state powers to enact the regulation embodied in § 792. The most plausible inference from the legislative scheme is that the Congress contemplated that state power to enact such regulations should remain unimpaired.

II.

We turn now to appellants' arguments under the Equal Protection and Commerce Clauses.

It is enough to dispose of the equal protection claim that we express our agreement with the District Court that the state standard does not work an "irrational discrimination as between persons or groups of persons," *Goesaert* v. *Cleary,* 335 U. S. 464, 466; cf. *Railway Express Agency, Inc.,* v. *New York,* 336 U. S. 106. While it may well be that arguably superior tests of maturity could be devised, we cannot say, in derogation of the findings of the District Court, that this possibility renders the choice made by California either arbitrary or devoid of rational relationship to a legitimate regulatory interest. Whether or not the oil content test is the *most* reliable indicator of marketability of avocados is not a question for the courts to decide; it is sufficient that on this record we should conclude, as we do, that oil content appears to be an acceptable criterion of avocado maturity.

More difficult is the claim that the California statute unreasonably burdens or discriminates against interstate

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[18] Compare, *e. g., Oregon-Washington R. & Nav. Co.* v. *Washington,* 270 U. S. 87; *McDermott* v. *Wisconsin,* 228 U. S. 115. See generally Note, Federal Inspection Legislation—A Partial Remedy for Interstate Trade Barriers, 53 Harv. L. Rev. 1185 (1940).

Nor have we any occasion to consider the possible applicability to the Supremacy Clause issue of the provisions of 21 U. S. C. § 341, since neither party has made any reference to that statute either before the District Court or in this Court.

commerce because its application has excluded Florida avocados from the State. Although Florida and California were competitors in avocado production when the statute was passed in 1925, the present record permits no inference that the California statute had a discriminatory objective.[19] Nevertheless it may be that the continued appli-

[19] The District Court assumed that in 1925 California growers faced no meaningful competition from Florida growers. It appears, however, that the Florida industry was well developed when the California industry was in its infancy, see Collins, The Avocado, A Salad Fruit From the Tropics (U. S. Dept. of Agriculture Bureau of Plant Industry, Bull. No. 77, 1905), 35–36. Not only does there appear to have been vigorous competition between Florida and California producers for all markets in 1925, see Popenoe, The Avocado—California vs. Florida, 61 California Cultivator, Nov. 3, 1923, p. 459; but in some years during the 1920's the Florida production exceeded that of California. See Traub, *supra,* note 10, at 2. See generally Hodgson, *supra,* note 5, at 60, 82–83.

The passage of the California statute was immediately and vigorously protested by Florida producers, and a United States Senator from Florida filed an informal complaint with the Department of Agriculture, see, *e. g.*, California Avocado Law Unfair to Florida: New Pacific Coast Maturity Standards Practically Ban All Shipments from this State, 32 Florida Grower, Nov. 7, 1925, pp. 4, 22. See also *id.*, Nov. 21, 1925, p. 15. Even in California there was contemporaneous recognition that passage of the statute severely restricted the access of Florida growers to the markets at least of Northern California, see Hodgson, The Florida Avocado Industry—A Survey II, 66 California Cultivator, June 26, 1926, pp. 721, 743. And see 80 American Fruit Grower, Feb. 1960, p. 64.

On the other hand, there have been suggestions that neither the adoption nor the application of the California statute reflected any discriminatory or anticompetitive purpose. In some years, California growers themselves experience great difficulty meeting the oil content requirement, and sizable shipments must be destroyed—see Demand for Avocados, 74 California Cultivator, Feb. 8, 1930, p. 167; Roche, Look Out for Immature Avocados, 87 California Cultivator, Nov. 2, 1940, p. 590; California Avocado Assn., 1937 Yearbook (1937), 88—even though the oil content of mature California avocados in good years runs substantially above 8%, see Traub, *supra,* note 10, at 6–8. Moreover, the California Growers' Association has regarded its ability

cation of this regulation to Florida avocados has imposed an unconstitutional burden on commerce, or has discriminated against another State's exports of the particular commodity. Other state regulations raising similar problems have been found to be discriminatory or burdensome notwithstanding a legitimate state interest in some form of regulation—either because they exceeded the limits necessary to vindicate that interest, *Dean Milk Co.* v. *Madison,* 340 U. S. 349, or because they unreasonably favored local producers at the expense of competitors from other States, *Baldwin* v. *Seelig, Inc.,* 294 U. S. 511. Such a state regulation might also constitute an illegitimate attempt to control the conduct of producers beyond the borders of California, cf. *Bibb* v. *Navajo Freight Lines, Inc., supra; Southern Pacific Co.* v. *Arizona,* 325 U. S. 761, 775.

The District Court referred to these precedents but nevertheless concluded that the California oil content test was not burdensome upon or discriminatory against interstate commerce. 197 F. Supp., at 786–787. However, we are unable to review that conclusion or decide whether the court properly applied the principles announced in these decisions because we cannot ascertain what constituted the record on which the conclusion was predicated. Much of the appellants' offered proof consisted of depositions and exhibits, designed to detail both the rejection of Florida avocados in California and the oil content of Florida avocados which had met the federal test but which might nonetheless have been excluded from California markets.

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to market Florida fruit during the months when California fruit is not available as strengthening rather than weakening its own market position. See Fourteenth Annual Report of the General Manager of the Calavo Growers of California (1937), 20. Plainly the questions indicated by these conflicting materials can be resolved only at a trial fully developing the Commerce Clause issue.

The parties' own assumptions concerning the content of the record are in irreconcilable conflict: the appellants have argued the case on the apparent assumption that the depositions and exhibits *were* admitted before the District Court; the appellees, on the other hand, have assumed both in their briefs and in oral argument that the disputed evidence *was not* admitted. This lack of consensus is altogether understandable in light of the confusion created by the District Court's evidentiary rulings. The appellees objected to the introduction of the disputed materials on several grounds, both during and after the trial. The court expressly reserved its rulings on the issue of admissibility, and after the entry of its order on the merits of the case made a supplemental "ruling on evidentiary matters," in which it stated that the disputed exhibits and depositions "are not admitted into evidence, but have been considered by the Court as an offer of proof by the plaintiffs . . . ." The earlier memorandum of the court explained that it would "assume, *arguendo,* that the exhibits and depositions offered by plaintiffs are all admissible." 197 F. Supp., at 782. If this was intended to mean that appellants would not have made out a case for relief, even were the evidence to be admitted, then there would have been no need to rule on admissibility. But we are unable to determine, just as the parties were unable to agree, whether the District Court viewed the evidence in that posture.[20]

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[20] At the very close of the trial, two of the three members of the court offered inconsistent views when appellees' counsel asked for clarification concerning the status of appellants' disputed depositions and exhibits. One member of the court replied that "your objections stand to every word that is in these depositions here," while another responded, "[t]hey are all in evidence subject to your objections and the Court will rule on them when it makes its ruling in the case if it is necessary."

Thus the only evidence which would seem to support an injunction on the ground of burden on interstate commerce has never been formally admitted to the record in this case. For this Court to reverse and order an injunction on the basis of that evidence would be, in effect, to admit the contested depositions and exhibits on appeal without ever affording the appellees an opportunity to argue their seemingly substantial objections.[21] To assume the admissibility of the evidence under these circumstances would be to deny the appellees their day in court as to a disputed part of the case on which the trial court has never ruled because its view of the law evidently made such a ruling unnecessary. Cf. *Byrd* v. *Blue Ridge Rural Electric Cooperative, Inc.*, 356 U. S. 525, 533; *Fountain* v. *Filson*, 336 U. S. 681; *Globe Liquor Co.* v. *San Roman*, 332 U. S. 571. On the other hand, to affirm the District Court would require us to make equally impermissible assumptions as to the state of the record. Cf. *Florida* v. *United States*, 282 U. S. 194, 215.

For these reasons we conclude that the judgment must, to the extent appealed from in No. 45, be reversed and the case remanded to the District Court for a new trial of appellants' Commerce Clause contentions. We intimate no view with respect to either the admissibility or the probative value of the disputed evidence, or of any other evidence which might be brought forth by either party concerning this aspect of the case.

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[21] Specifically, appellees offered to show that in measuring the oil content of avocados the Florida experimental test procedures did not employ the same equipment as is used in California, the former, so it was contended, extracting less oil than the California equipment would obtain from the same avocado. They claimed that the average variation amounted to a failure of the Florida equipment to remove 2.9% of the oil from the fruit, and, further, that the Florida results were erratic. In addition, appellees asserted that the avocados used in the Florida experiments were not representative of the graded, sized, and inspected fruit that appellants would normally market.

III.

In No. 49, the state officers cross-appeal on the ground that the District Court should have dismissed the action for want of equity, rather than for lack of merit. Their contention is that there was insufficient showing of injury to the Florida growers to invoke the District Court's equity jurisdiction. We reject that contention, and affirm the judgment insofar as it is challenged by the cross-appeal.

In *Florida Lime & Avocado Growers, Inc.,* v. *Jacobsen,* 362 U. S. 73, we held that because of the Florida growers' allegations that California officials had consistently condemned Florida avocados as unfit for sale in California, "thus requiring appellants [the Florida growers]—to prevent destruction and complete loss of their shipments—to reship the avocados to and sell them in other States," it was evident that "there is an existing dispute between the parties as to present legal rights amounting to a justiciable controversy which appellants are entitled to have determined on the merits." 362 U. S., at 85–86. In view of our mandate in *Jacobsen,* therefore, the District Court necessarily assumed jurisdiction and heard the case on its merits. Cf. *United States* v. *Haley,* 371 U. S. 18.

Even on the present ambiguous record, we think that the Florida growers have demonstrated sufficient injury to warrant at least a trial of their allegations. In the California officials' briefs below, it was conceded that the Florida growers had suffered damage in the amount of some $1,500 by reason of the enforcement of the statute. Before the bar of this Court, it was conceded that the State, in objecting to the growers' proffered evidence, did not dispute the claim that some shipments of Florida avocados had in fact been rejected by California for failure to comply with the oil content requirement. Indeed, the

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State conceded in its pleadings before the trial court that rejections of Florida avocados had averaged in recent years as much as 6.4% of the total shipments of Florida fruit into California. While these concessions were not corroborated by statistical proofs at trial, and thus do not form an adequate basis for the entry of a final injunction, they nevertheless supplied an adequate basis, apart from the requirement of our remand, for the District Court's proceeding to trial on the merits.

In addition, it is clear that the California officials will continue to enforce the statute against the Florida-grown avocados, for the State's answer to the complaint declared that these officials "have in the past and now stand ready to perform their duties under their oath of office should they acquire knowledge of violations of the Agricultural Code of the State of California." Thus the District Court, both on the pleadings before it, and in light of our opinion in *Jacobsen,* properly heard the remanded case on the merits and did not err in refusing to dismiss for want of equity jurisdiction.

The cross-appellants rely upon the court's finding of fact that "[p]laintiffs have neither suffered nor been threatened with irreparable injury." This finding was, however, adopted pursuant to that court's prior opinion, which stated that "[p]laintiffs' monetary losses as a result of the rejected shipments are not clearly established, but at most do not appear to be over two or three thousand dollars." 197 F. Supp., at 783–784. We read this finding as importing no more than the District Court's view that whatever harm or damage the Florida growers might have suffered fell short of the "irreparable injury" requisite for the entry of an injunction against enforcement of the statute.

The judgment of the District Court is reversed and the cause is remanded for a new trial limited to appellants'

claim in No. 45 that the enforcement of § 792 unreasonably burdens or discriminates against interstate commerce. In the respect challenged by the cross-appeal in No. 49, the judgment is affirmed.

It is so ordered.

MR. JUSTICE WHITE, with whom MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS and MR. JUSTICE CLARK join, dissenting in No. 45.

This is the second time this case has come before the Court. In *Florida Lime & Avocado Growers, Inc.,* v. *Jacobsen,* 362 U. S. 73, the case was here for review of dismissal of the complaint for want of jurisdiction. The Court reversed and remanded for trial and the case is now here on the merits, after the three-judge District Court refused to enjoin the appellee state officers from enforcing § 792 of the California Agricultural Code against the appellant growers. 197 F. Supp. 780, probable jurisdiction noted, 368 U. S. 964, 965. In view of the Court's disposition of the matter today, it is probable that this case like a revenant will return to us within another few Terms with a still more copious record.

Appellants grow, package, and market Florida avocados in interstate commerce, subject to the applicable provisions of § 8c of the Agricultural Adjustment Act, as amended, 7 U. S. C. § 608c, and the regulations of the Secretary of Agriculture promulgated thereunder. An average of 6.4% of the Florida avocados shipped to California each year are barred for failure to satisfy the requirements of California Agricultural Code § 792,[1] which

[1] There is no question in this case as to whether the California oil content law keeps out of California Florida avocados which pass the federal test. In their motion to dismiss and the accompanying sworn affidavit below, the appellee state officers gave 6.4% as the average rejection figure per year, over a four-year period, basing the per-

provides in pertinent part that "all avocados, at the time of picking, and at all times thereafter, shall contain not less than 8 per cent of oil, by weight of the avocado excluding the skin and seed." [2] Appellants based their claim for relief upon the Equal Protection Clause of the Fourteenth Amendment, the Commerce Clause, and the Supremacy Clause. Since we in the minority have concluded that the Agricultural Adjustment Act and regulations promulgated thereunder leave no room for this inconsistent and conflicting state legislation, we reach only the Supremacy Clause issue.

The California statute was enacted in 1925, when, according to the District Court, practically all the avocados in the United States came from that State. 197 F. Supp., at 782. The purpose of this legislation was to prevent the marketing of immature avocados, which never

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centage on the official records of the California Department of Agriculture. Rejections reached a high of 16.4% in the 1955–1956 season. It is hard to understand the Court's refusal to consider the figures because of the way they entered the record. See *ante*, p. 136 and n. 3, and p. 157. We believe appellees' sworn statements as to the State's official records are properly before the Court now, and that in any event they will come into the record shortly, since it is clear that on remand the same data will come in via deposition. If the majority actually has any doubt on this score, and believes that accepting as a fact that California rejects six out of every 100 Florida avocados as immature would have an effect on the result, it should remand for further findings on preemption as it does on burden on commerce. The same papers below, and the opinion of the District Court, 197 F. Supp., at 783, reveal that about 5% of the appellants' shipments to California have been rejected for failure to attain the 8% oil content required under California law. The record is silent on the *in terrorem* effect of the California law on interstate commerce in Florida avocados, and we therefore do not consider it here.

[2] Avocados not meeting this standard may not be sold in California, are "declared to be a public nuisance," and they may be seized, condemned, and abated. Violators may be punished criminally and by civil penalty action. See *ante*, p. 134, at n. 1.

ripen properly, but decay or shrivel up and become rubbery and unpalatable after purchase by the consumer.[3] *Ibid.* The effect of marketing immature avocados is to "cheat the consumer," and thus have "a bad [economic] effect upon retailers and producers as a whole, since it increases future sales resistance" against buying avocados. *Id.*, at 783.

In 1925, when the state law was enacted, most of the avocados grown in California were, as they are at the present time, from trees derived from Mexican varieties. Such avocados contain at least 8% oil when mature. The Florida avocado growers, however, the only substantial competitors of the California growers, 197 F. Supp., at 787, n. 8, depend in substantial part on trees of non-Mexican parentage. The Florida avocados involved here, hybrid and Guatemalan varieties, may reach maturity and be acceptable for marketing, at least under federal standards, prior to reaching an 8% oil content.[4]

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[3] It is not contended that the purpose of the 8% minimum oil content requirement is for the purpose of insuring a high caloric or other nutritional content in the fruit. No health issue has been raised in this case. Cf. 197 F. Supp., at 785–786. Nor has it been contended at any stage of the proceedings that the statutory purpose is directly to protect local consumers from fraudulent and deceptive practices; moreover, there is no evidence to support that view.

[4] "Mexican varieties of avocados contain (generally speaking) the highest oil content of any varieties, when mature. Hybrid varieties attain the next highest oil percentages, and West Indian the lowest. Hybrid varieties generally attain oil content in excess of 8% if left on the trees long enough, but they do not necessarily attain such an oil content by the time that they may be marketed under the Florida Avocado Order. They are mature enough to be acceptable prior to the time that they reach that content, according to plaintiffs' witnesses." 197 F. Supp., at 783.

While it would appear to be theoretically feasible to determine the proper oil content to gauge maturity for each different variety of avocado, this is highly impracticable, as the District Court pointed out; over 40 varieties of avocado are marketed in Florida. *Id.*, at 785.

There is expert opinion to the effect that the best gauge of maturity is the percentage of oil contained in the fruit. *Id.*, at 783. California has adopted that physical-chemical test in § 792. There is also expert opinion that the best test of maturity is the date on which the fruit is picked, and its size and weight at such time. *Ibid.* The United States Secretary of Agriculture has adopted that test for measuring maturity of avocados for ripening, and has specifically rejected as unsatisfactory all physical and chemical tests. Handling of Avocados Grown in South Florida, 19 Fed. Reg. 2418, 2424–2425 (Dept. Agr. Dkt. No. AO–254). The District Court found the California oil test to be of the latter type.

I.

The Agricultural Adjustment Act, § 8c, 7 U. S. C. § 608c, provides that, whenever the Secretary "has reason to believe that the issuance of an order will tend to effectuate the declared policy" of the Act, which is "to establish and maintain such minimum standards of quality and maturity . . . [for fruit] in interstate commerce as will effectuate . . . [the] orderly marketing of . . . agricultural commodities as will be in the public interest," § 2 (3), 7 U. S. C. § 602 (3), he shall give notice for and hold a hearing upon a proposed order. In the case of fruits, § 8c (6)(A) provides that the Secretary may limit or provide methods for the limitation of quality of produce "which may be marketed in or transported to any or all markets in the current of interstate or foreign commerce . . . ," or affecting commerce, during any specified period.

Orders proposed by the Secretary under this statute become effective only when approved by a majority of the affected growers. See § 8c (8)–(9). In 1954 the Secretary held hearings and found that a majority of the South Florida avocado growers favored imposition

of quality and maturity standards for avocados pursuant to a marketing order promulgated under the Act. 19 Fed. Reg. 3439.[5] The order, *id.*, at 3440–3443, as amended, 7 CFR § 915.1–.71 (formerly §§ 969.1–969.71), establishes an Avocado Administrative Committee, comprised of South Florida avocado growers and shippers, with the power to recommend marketing regulations to the Secretary relating to quality and maturity standards and prohibiting the marketing of substandard fruits.[6] It

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[5] The findings of the United States Department of Agriculture, contained in its order determining what terms should be contained in the avocado regulations, were that the marketing of immature fruits increases consumer resistance and materially impairs the marketing of the entire crop, that there was no satisfactory physical or chemical test for determining maturity, and that maturity can satisfactorily be determined by the picking-date-size method. Handling of Avocados Grown in South Florida, 19 Fed. Reg. 2418, 2424–2425 (Dept. of Agr. Dkt. No. AO–254).

California has a statute similar to the federal law, the California Marketing Act, Cal. Agr. Code §§ 1300.10–1300.29, which allows the Director of Agriculture to promulgate marketing orders when a majority of the affected handlers or producers assent. *Id.*, § 1300.16 (a). The purpose of the Act is to restore and maintain adequate purchasing power for California agricultural producers, establish orderly marketing, provide uniform grading, develop new and larger markets and maintain present markets for produce grown within the State, eliminate trade barriers which obstruct the free flow of such produce to the market, and permit the issuance of marketing orders which assure stabilized and orderly distribution of produce. *Id.*, §§ 1300.10, 1300.29; *Brock* v. *Superior Court*, 109 Cal. App. 2d 594, 598, 241 P. 2d 283, 286. The Director promulgated an avocado marketing order in 1960 and it has been upheld as valid in the state courts. *Child* v. *Warne*, 194 Cal. App. 2d 623, 15 Cal. Rptr. 437.

[6] This is the customary method of administering marketing orders under the Act. See, *e. g.*, 7 CFR §§ 905.51, 906.39, 907.51, 907.63, 908.51, 908.63, 909.51, 909.52, 910.51, 910.65, 911.51. In the case of the avocado order, *supra*, note 5, the Department specifically determined that this would be the appropriate method to administer the regulatory program. 19 Fed. Reg., at 2422–2423.

is specifically contemplated in § .51 that such maturity standards be based on a picking-date schedule, and other tests are rejected as unsatisfactory. Section .53 provides that exemption from the regular picking-date regulations of § .51 be allowed for portions of avocado crops of particular varieties when they are proved to be mature prior to the prescribed picking date.[7] All regulated avocados, including those with so-called picking-date exemption certificates, must be inspected by the Federal-State Inspection Service, a United States Department of Agriculture and Florida Department of Agriculture joint service, and be certified as meeting the prescribed quality and maturity standards before they may be marketed. § .54.[8] At various times, other regulations governing Florida avocados have been issued which include more specific quality standards. See 22 Fed. Reg. 6205, 7 CFR §§ 51.3050–51.3053, 51.3058. These quality standards require that the fruit be "mature," for all grades of avocados, but, as in the case of the main order, they do not refer to oil content.[9] Since 1954, each year the Secretary has issued

[7] Section .53 provides that such exemption shall be granted under procedural rules approved by the Secretary. Section .52 (b) would appear to provide for review of particular determinations before the Secretary, taken by a party aggrieved thereby or taken by the Secretary *sua sponte*. Exemption under § .53 is allowed only from the picking-date-size standards prescribed under § .51 (a)(1), and not from other regulations such as quality (§ .51 (a)(2)), container and packaging (§ .51 (a)(3)), or grading and labeling (§ .51 (a)(4)). And inspection by the Federal-State Inspection Service for these standards and those set out as the terms and conditions of advance release under § .53 is, of course, required.

[8] Violation of the order is punishable by a fine of from $50 to $500. 7 U. S. C. § 608c (14). Violations of regulations may also be made punishable by the Secretary by a penalty not to exceed $100. 7 U. S. C. § 610 (c).

[9] These regulations and others, 7 CFR §§ 51.3055–51.3069, govern in exhaustive detail the size and shape of avocados, their color, skin condition, stem length, and the manner in which they may be shipped.

maturity regulations fixing the dates when and minimum sizes at which the various varieties of Florida avocados may be packed and shipped.[10] These regulations are recommended by the committee, pursuant to 7 CFR §§ 915.50–915.51, approved by the Secretary after consideration and modification if necessary, 7 CFR § 915.52 (b), and published in the Federal Register, after which they have the force of law. *California Comm'n* v. *United States,* 355 U. S. 534, 542–543; *Standard Oil Co.* v. *Johnson,* 316 U. S. 481, 484; *Maryland Cas. Co.* v. *United States,* 251 U. S. 342, 349.

II.

The ultimate question for the Court is whether the California law may validily apply to Florida avocados which the Secretary or his inspector says are mature under the federal scheme. We in the minority believe that it cannot, for in our view the California law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz,* 312 U. S. 52, 67.[11]

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[10] 27 Fed. Reg. 5135–5136, 6705, 8265, 9175, 10091; 26 Fed. Reg. 3692, 4928, 5418–5419, 6429, 7694, 8663; 25 Fed. Reg. 5476, 7712, 8903, 9170, 9888; 24 Fed. Reg. 1152, 3105, 4050, 4828, 5824–5825, 6904, 7354, 8444, 9123, 9262; 23 Fed. Reg. 1025–1026, 4351–4352, 5477, 6318, 7344, 7943, 8047, 9056, 9689; 22 Fed. Reg. 3652, 4251–4252, 5680, 6746, 7173–7174, 7357–7358, 8118; 21 Fed. Reg. 3307–3308, 3488, 6329–6330; 20 Fed. Reg. 3427, 4178–4179, 6699–6700, 7876, 8328–8329, 8688; 19 Fed. Reg. 4404–4405, 4601, 4862, 5469, 5966, 5967, 6368, 6604, 6625, 7477. Similar orders have been issued from time to time concerning maturity of imported avocados. See, *e. g.,* 25 Fed. Reg. 5445; 24 Fed. Reg. 4134, 4829, 5825, 5996; 23 Fed. Reg. 4352, 6027; 22 Fed. Reg. 3957; 21 Fed. Reg. 4257.

[11] "There is not—and from the very nature of the problem there cannot be—any rigid formula or rule which can be used as a universal pattern to determine the meaning and purpose of every act of Congress. This Court, in considering the validity of state laws in the

The central and unavoidable fact is that six out of every 100 Florida avocados certified as mature by federal standards are turned away from the California markets as being immature, and are excluded from that State by the application of a maturity test different from the federal measure. Congress empowered the Secretary to provide for the orderly marketing of avocados and to specify the quality and maturity of avocados to be transported in interstate commerce to any and all markets. Although the Secretary determined that these Florida avocados were mature by federal standards and fit for sale in interstate markets, the State of California determined that they were unfit for sale by applying a test of the type which the Secretary had determined to be unsatisfactory. We think the state law has erected a substantial barrier to the accomplishment of congressional objectives.

We would hesitate to strike down the California statute if the state regulation touched a phase of the subject matter not reached by the federal law and a claim were nevertheless made that such complementary state regulation is preempted, compare *Campbell* v. *Hussey,* 368 U. S. 297, with *Savage* v. *Jones,* 225 U. S. 501. But here the Secretary has promulgated a comprehensive and pervasive regulatory scheme for determining the quality and maturity of Florida avocados, pursuant to the statutory

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light of . . . federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference. But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula. Our primary function is to determine whether, under the circumstances of this particular case, Pennsylvania's law *stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.*" *Hines* v. *Davidowitz,* 312 U. S. 52, 67. (Emphasis added.) Compare *ante,* p. 141.

mandate to "effectuate orderly marketing of such agricultural commodities." He prescribes in minute detail the standards for the size, appearance, shape, and maturity of avocados. Inspection procedures and, for violation of the regulations, criminal and civil sanctions are provided. No gap exists in the regulatory scheme which would warrant state action to prevent the evils of a no-man's land—at least in relation to the issues presented in this case. Compare *International Union* v. *Wisconsin Board,* 336 U. S. 245, 254. No aspects of avocado maturity are omitted under the federal regulations.[12] Any additional state regulation to "supplement" federal regulation would *pro tanto* supplant it with another scheme, thereby compromising to some degree the congressional policy expressed in the Act.[13]

[12] We do not imply that these regulations governing the fitness of avocados in terms of maturity would preclude application of local regulations concerning, for example, bacteria content or DDT content. Cf. *Huron Co.* v. *Detroit,* 362 U. S. 440. Neither health regulation nor safety considerations, cf. *Lyons* v. *Thrifty Drug Stores Co.,* 105 Cal. App. 2d 844, 234 P. 2d 62, are involved in this case. And there is no finding that there is anything fraudulent, deceptive, or unmarketable about a Florida avocado which is mature enough to be introduced into interstate commerce under a federal certificate evidencing its quality. Compare *Plumley* v. *Massachusetts,* 155 U. S. 461, 472, quoted *ante,* p. 144.

[13] It was suggested that there is a gap in the federal scheme through which immature avocados may enter commerce bearing an exemption certificate issued "seemingly . . . in the unfettered discretion of the growers' own Committee." This contention omits the requirement of § .53 that exemption from the normal picking-date-size provisions be allowed only to avocados inspected and proved mature because they satisfied special maturity tests prescribed under procedures approved by the Secretary, and the fact that such avocados carry a federal certificate as to maturity and quality. It also omits the Secretary's general review power over regulatory determinations provided by § .52 (b). No contention has been made that actual abuses have occurred under the exemption certificate provisions nor has any basis upon which they may be anticipated been suggested.

By contrast, in *Parker* v. *Brown*, 317 U. S. 341, upon which appellees seek to rely, the federal agricultural regulatory scheme was partial and incomplete. It was contended that § 8c of the Agricultural Adjustment Act, by its own force, preempted application of the California Agricultural Prorate Act. The Court held that since no marketing order concerning the affected commodities had been promulgated under § 8c, and since the Act's policies therefore must be deemed by the Secretary not to be effectuated by entry into the field, it followed that there was no preemption: "It is evident, therefore, that the Marketing Act contemplates the existence of state programs at least until such time as the Secretary shall establish a federal marketing program . . . ." *Id.*, at 354.[14] In the case at bar, of course, the Secretary has entered the field with his own comprehensive regulatory program with which the state program conflicts.

Nor does the California statute further a distinctive interest of the State different from the one which the federal scheme protects. Compare *Huron Co.* v. *Detroit*, 362 U. S. 440; *Union Brokerage Co.* v. *Jensen*, 322 U. S. 202. There is no health interest here. The question

[14] It also came out, by representation of the Solicitor General as *amicus curiae* before this Court, that the Department of Agriculture had collaborated in drafting the state raisin program, and had taken other actions which "must be taken as an expression of opinion by the Department of Agriculture that the state program . . . is consistent with the policies of the Agricultural Adjustment and Agricultural Marketing Agreement Acts." *Id.*, at 358. Hence, in holding "We find no conflict between the two acts [state and federal] and no such occupation of the legislative field by the mere adoption of the . . . [federal] Act, without the issuance of any order by the Secretary putting it into effect, as would preclude the effective operation of the state act," the Court expressly declared, "We have no occasion to decide whether the same conclusion would follow if the state program had not been adopted with the collaboration of officials of the Department of Agriculture . . . ." *Id.*, at 358.

is, as the District Court recognized, 197 F. Supp., at 782–783, a purely economic one: the marketing of immature avocados, which do not ripen properly after purchase by the consumer but instead shrivel up and decay, has a substantial adverse effect on consumer demand for avocados. According to the testimony of appellees' expert from the California Department of Agriculture, § 792 was "deemed to be necessary by representatives in the industry due to deplorable marketing conditions"—the sale of immature avocados, which was severely "damaging the reputation of the industry by providing consumers with undesirable avocado fruits." Despite the repeated suggestions to this effect in the Court's opinion, there is no indication that the state regulatory scheme has any purpose other than protecting the good will of the avocado industry—such as protecting health or preventing deception of the public—unless as a purely incidental by-product. Similar findings on damage to the industry because some growers marketed immature avocados are contained in the United States Department of Agriculture order which preceded the issuance of the federal regulations. 19 Fed. Reg., at 2419, 2424. These two regulatory schemes have precisely the same purpose, which is purely an economic one; they seek to achieve it, however, by applying different tests to the same avocados.

We also believe that the purpose and objective of Congress and of the marketing order promulgated under its authority call for the application of uniform standards of quality, even absent the total occupation of the field by the federal regulatory scheme. See *Guss* v. *Utah Board,* 353 U. S. 1; *Gibbons* v. *Ogden,* 9 Wheat. 1. Lack of uniformity tends to obstruct commerce, to divide the Nation into many markets. When produce is accepted or rejected in different localities depending upon local vagaries, the flow of commerce is inevitably interrupted, hindered, and diminished. In recognition of this need for uni-

formity, Congress stated at the outset of the Agricultural Adjustment Act:

> "It is declared that the disruption of the orderly exchange of commodities in interstate commerce . . . destroys the value of agricultural assets which support the national credit structure . . . and burden[s] and obstruct[s] . . . commerce.
>
> "It is declared to be the policy of Congress . . . to establish and maintain such minimum standards of quality and maturity and such grading and inspection requirements for agricultural commodities . . . as will effectuate . . . orderly marketing . . . ." §§ 1, 2, 7 U. S. C. §§ 601, 602.

The language of the statute is buttressed by the Committee Reports, H. R. Rep. No. 1241, 74th Cong., 1st Sess., at 22; S. Rep. No. 1011, 74th Cong., 1st Sess., at 15, where it is said in explanation of § 10 (i) that the Secretary is authorized to negotiate with state authorities in order to secure their voluntary compliance in carrying out the declared policy of the Act of uniformity of regulatory programs.

The contention is made that § 8c (11) negatives the policy declaration that uniformity is sought by the Act. That section directs the Secretary to issue orders limited to as small a geographic region as practicable in order to insure that due recognition be accorded to local conditions of soil, climate, and the like. This provision recognizes that while uniformity at the market-end of the flow of commerce may be necessary to prevent burdens on commerce in produce, nationwide uniformity may be neither necessary nor desirable at the production-end of the flow of commerce. It may be, as the Court suggests, that the Secretary might find for other avocado growing regions, if there were any, that different tests furnished the most convenient index of maturity for those avocados. But it

does not follow from this premise that the statutory scheme will permit equally varied standards in the Nation's various market places. Section 8c (11) does not contemplate such regional variations nor would they comport with the statutory purpose. It may not obstruct or burden commerce to admit avocados into commerce on diverse bases in different parts of the country; any individual grower in that situation would face but one standard. But it does burden commerce and frustrate the congressional purpose when each grower faces different standards in different markets. To slip from permissible nonuniformity at one end of the stream of commerce to permissible nonuniformity at the other end thus is to read the statute too casually and gloss over the congressional purpose, which expressly was to facilitate marketing in and transportation to "any and all markets in the current of interstate commerce."

It is also suggested that the use of the term "minimum standards" indicates a lack of desire for uniformity. This reads too much into a phrase, for it is a commonplace that when the appropriate federal regulatory agency adopts minimum standards which on balance satisfy the needs of the subject matter without disproportionate burden on the regulatees, the balance struck is not to be upset by the imposition of higher local standards. See for example *Southern R. Co.* v. *Railroad Comm'n,* 236 U. S. 439. And when the cumulative operation of more strict local law is to be continued in such circumstances, despite the congressional balance struck, Congress has so provided in express terms. For example, in *Rice* v. *Board of Trade,* 331 U. S. 247, 255, it was noted that the federal statute provided that "nothing in this section or section 4b shall be construed to impair any State law applicable to any transaction enumerated or described in such sections." See, to the same effect, *Plumley* v. *Massachu-*

setts, 155 U. S. 461; *Cloverleaf Co.* v. *Patterson,* 315 U. S. 148, 161–162.

Nothing in the Act, marketing order, or legislative history shows any congressional intention to accommodate or permit state controls inconsistent with federal law or marketing orders issued thereunder. The authorization contained in § 10 (i) to seek the cooperation of state authorities in pursuit of the goal of uniform standards of quality and maturity carries no implication that state standards contrary to the federal are to stand. The Secretary was not directed to defer to any State. The fact is that he did work out a cooperative scheme with the State of Florida where the avocados involved in this case are grown. These avocados, which California rejected, were jointly inspected by federal and state authorities applying the same standards in order to move mature avocados into the stream of interstate commerce. To read into an authorization to the Secretary to cooperate with the States a direction that he cooperate with, or that his regulatory scheme defer to, not only the State directly affected by a marketing order but every other State in which avocados might be sold would clearly frustrate the federal purpose of the orderly marketing of avocados in interstate commerce.

We would not, as appellees would have it and as the majority appears to suggest, construe § 10 as limiting the power of the Secretary under § 608c to the issuance of marketing orders which are complementary to and not inconsistent with state regulation.[15] The suggestion that

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[15] We note that § 1300.24 (b) of the California Agricultural Code contains a provision similar to federal § 10 (i):

"The director is hereby authorized to confer with and cooperate with the legally constituted authorities of other States and of the United States, for the purpose of obtaining uniformity in the administration of Federal and State marketing regulations, licenses or orders, and

the Secretary cooperate with the States should be viewed as was a very similar authorization to the same government official in *Rice* v. *Chicago Board of Trade,* 331 U. S. 247. There the statute provided that the Secretary of Agriculture "may cooperate with any department or agency of the Government, any State . . . or political subdivision thereof." A unanimous Court remarked that this provision supported "the inference that Congress did not design a regulatory system which excluded state regulation not in conflict with the federal requirements," but it was careful to note that "it would be quite a different matter if the Illinois Commission adopted rules for the Board which either violated the standards of the Act or collided with rules of the Secretary."

The conflict between federal and state law is unmistakable here. The Secretary asserts certain Florida avocados are mature. The state law rejects them as immature. And the conflict is over a matter of central importance to the federal scheme. The elaborate regulatory scheme of the marketing order is focused upon the problem of moving mature avocados into interstate commerce. The maturity regulations are not peripheral aspects of the federal scheme. Compare *International Assn. of Machinists* v. *Gonzales,* 356 U. S. 617. On the contrary, in the Department of Agriculture order which

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said director is authorized to conduct joint hearings, issue joint or concurrent marketing orders, for the purposes and within the standards set forth in this act, and may exercise any administrative authority prescribed by this act to effect such uniformity of administration and regulation."

Under the reasoning suggested to us the California law should be construed not to apply to Florida avocados marketed under a federal order. And see *Oil Workers Union* v. *Missouri,* 361 U. S. 363, 370; *Allen-Bradley Local* v. *Wisconsin Board,* 315 U. S. 740, 746; *Pearson* v. *Probate Court,* 309 U. S. 270, 277; *Carey* v. *South Dakota,* 250 U. S. 118, 122.

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preceded issuance of the avocado regulations, it was found that the marketing of immature avocados was one of the principal problems, if not the principal problem, faced by the industry and that these regulations should be adopted to solve this problem which was demoralizing the industry. 19 Fed. Reg., at 2419, 2424.[16] The conflict involved in this case therefore cannot properly be deemed "too contingent, too remotely related to" (356 U. S., at 621) the policy and purpose of the Act to call for requiring the inconsistent state scheme to defer or be accommodated to the federal one.

California nevertheless argues that it should be permitted to apply its oil test cumulatively with the federal test to insure that only mature avocados are offered in its markets. The Court accepts this contention as "a well-settled proposition," in the name of *Cloverleaf Butter Co.* v. *Patterson,* 315 U. S. 148, and the uncited "all the authorities," which appear to be nonexistent, *ante,* p. 144 and n. 13. There are at least three answers to this contention.[17] First, it ignores the limitations of the 8% oil test as applied to the inherently less oily Florida avocados, which the District Court indicated were "acceptable prior to the time that they reach that content." As applied to California avocados, the 8% oil figure leaves an ample tolerance for individual variation, but it is otherwise as applied to the less oily Florida varieties. Second, if the argument is that the federal test is unsatisfactory and that the California test is a better one—as it would appear to be in view of the reliance on "a higher stand-

[16] "Probably the most important single factor of quality is that of maturity." 19 Fed. Reg., at 2424.

[17] To the extent that this contention is to be understood to be limited to "all the authorities" supporting "a higher standard for *consumers,*" we have already indicated, pp. 168–169, *supra,* that the California law is not aimed at consumer protection but at avocado grower protection.

ard," which in this case means only a more accurate standard because no one asserts that some avocados can be less highly mature than others and therefore ripen less fully—it must be remembered that the Secretary, to whom Congress delegated its power, made a legislative finding in his order adopting the picking-date-size method of determining maturity and specifically rejecting physical chemical tests of the California type. That finding cannot be impeached collaterally in this proceeding. Adopting one maturity test rather than another "is a legislative not a judicial choice" and its validity "is not to be determined by weighing in the judicial scales the merits of the legislative choice and rejecting it if the weight of evidence presented in court appears to favor a different standard." *South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 191. See *Security Administrator* v. *Quaker Oats Co.*, 318 U. S. 218; *United States* v. *Carolene Products Co.*, 304 U. S. 144. Neither California nor this Court has any place second-guessing the wisdom of Congress or its delegate. Third, Congress did not limit its interest to the picking of avocados, nor even to their transportation in commerce to markets in other States. It expressly declared its intention to regulate the maturity and quality of produce "which may be marketed in . . . any and all interstate markets." Congress sought to regulate marketing from the beginning through the end of the stream of commerce, in order to eliminate impediments at any part of that stream. The Court ignores the plain words of the statute in concluding that the California law does not frustrate the federal scheme.

Even if the California oil test were an acceptable test for the maturity of the Florida avocados, which the Secretary found it was not, the cumulative application of that test solely for the purpose of a second check on the maturity of Florida avocados, solely to catch possible errors in the federal scheme, would prove only that the particular

avocados actually tested (and thereby destroyed) were immature, and it would not justify the rejection of whole lots from which these samples came. If Florida avocados are to be subjected to this test, the alternatives are to leave the California market to the California producers (at least, to producers of Mexican varieties) or else, in order to avoid the hazard of rejection, to leave the Florida avocados on the trees past the normal (and federally prescribed) picking date, thereby shortening the post-picking marketing period and thus frustrating the federal scheme aimed at moving avocados mature under federal standards into all interstate markets.[18] A reasonable balancing of the state and federal interests at stake here requires that the former give way as too insubstantial to warrant frustration of the congressional purpose.

We have, then, a case where the federal regulatory scheme is comprehensive, pervasive, and without a hiatus which the state regulations could fill. Both the subject matter and the statute call for uniformity. The conflict is substantial—at least six out of every 100 federally certified avocados are barred for failure to pass the California test [19]—and it is located in a central portion of the federal

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[18] The avocado may remain hard and in perfect condition on the tree for some time after reaching maturity, for the fruit does not soften until after it is picked. But the harvesting and shipping of fruit which has reached the fullest possible degree of maturity on the tree is not recommended. The seed may sprout while the fruit is on the tree or the fruit may ripen so rapidly after harvesting that it cannot be shipped satisfactorily. Ruehle, The Florida Avocado Industry, 70 (Univ. of Fla. Agr. Expt. Sta. Bull. No. 602, 1958); Wolfe, Toy and Stahl, Avocado Production in Florida, 83 (Ruehle rev. ed., Fla. Agr. Ext. Serv. Bull. No. 141, 1949).

[19] There is no indication in the record as to how many Florida avocados are kept out of the California market by the prudence of growers and handlers who voluntarily avoid the risks of the California oil test. Nor are we advised as to whether other States have

scheme. The effect of the conflict is to disrupt and burden the flow of commerce and the sale of Florida avocados in distant markets, contrary to the congressional policy underlying the Act. The State may have a legitimate economic interest in the subject matter, but it is adequately served by the federal regulations and this interest would be but slightly impaired, if at all, by the supersession of § 792.[20]

In such circumstances, the state law should give way; it "becomes inoperative and the federal legislation exclusive in its application." *Cloverleaf Co.* v. *Patterson,* 315 U. S. 148, 156. Accord, *McDermott* v. *Wisconsin,* 228 U. S. 115; *Hill* v. *Florida,* 325 U. S. 538. The conclusion is inescapable that the California law is an obstacle to the accomplishment and execution of the congressional purposes and objectives, and that the California law and

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adopted avocado legislation, so that the cumulative burden on commerce is further increased. In any event, 6% is a not insubstantial figure in terms of restraints upon commerce.

[20] It is suggested that the regulations involved here are "simply schemes for regulating competition among growers . . . initiated and administered by the growers and shippers themselves." From this proposition it is in some way reasoned that "the self-help standards of this marketing program" should not be deemed to preclude application of state law which conflicts with and interferes with the operation of the comprehensive federal marketing program. The "simply" part of the proposition overlooks, however, the fact that these are the *Secretary's* regulations, promulgated under congressional authority. It also overlooks the Secretary's extensive supervisory powers and his statutory duty under 7 U. S. C. § 602 (3) to insure that regulations be carried on "in the public interest." And no case has been cited to us which indicates that the delegation to the regulatees of the power to propose regulations in the first instance violates any provision of general law. See *Parker* v. *Brown,* 317 U. S. 341, 352; *Sunshine Anthracite Co.* v. *Adkins,* 310 U. S. 381; *United States* v. *Rock Royal Co-op.,* 307 U. S. 533, 577–578; *Currin* v. *Wallace,* 306 U. S. 1, 16; *Johnson Co.* v. *Securities & Exchange Comm'n,* 198 F. 2d 690, 695 (C. A. 2d Cir.).

the Agricultural Adjustment Act, as supplemented by the regulations promulgated thereunder, cannot be reconciled and cannot consistently stand together.[21] The Court should not allow avocados certified as mature under the federal marketing order to be embargoed by any State because it thinks that they are immature. We would therefore reverse with instructions to grant the injunction requested.

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[21] And see *Castle* v. *Hayes Lines, Inc.*, 348 U. S. 61; *First Iowa Coop.* v. *Federal Power Comm'n*, 328 U. S. 152; *Gibbons* v. *Ogden*, 9 Wheat. 1; *Dumont Labs.* v. *Carroll*, 184 F. 2d 153 (C. A. 3d Cir.). The suggestion, *ante*, p. 141, that the doctrine of *Gibbons* v. *Ogden* is limited to carriers is unwarranted in view of such cases as *First Iowa*.

NAMET *v.* UNITED STATES.

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

No. 134. Argued March 18, 1963.—
Decided May 13, 1963.

During a trial in a Federal District Court in which petitioner was convicted by a jury of violating the federal wagering tax law, the prosecutor asked two witnesses questions concerning their relationship with petitioner. Refusal of these witnesses to answer some of the questions, based on their privilege against self-incrimination, was sustained. Counsel for the witnesses had previously stated that the witnesses would claim their privilege against self-incrimination if asked about wagering violations. The judge instructed the jury that no inference should be drawn against petitioner from these refusals to testify, "unless it would be a logical inference that would appeal to you as having a direct bearing upon the defendant's guilt," and petitioner's counsel made no objection to this instruction. *Held:*

1. In the light of the entire record in this case, no reversible error was committed when the prosecutor asked the witnesses questions as to which their plea of privilege against self-incrimination was sustained. Pp. 185–190.

2. Even if the instruction on this subject was erroneous, it was not a plain error or defect "affecting substantial rights," within the meaning of Federal Rule of Criminal Procedure 52 (b), and it did not constitute reversible error. Pp. 190–191.

301 F. 2d 314, affirmed.

John H. FitzGerald argued the cause and filed a brief for petitioner.

Stephen J. Pollak argued the cause for the United States. With him on the brief were *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky.*

MR. JUSTICE STEWART delivered the opinion of the Court.

The petitioner was convicted by a jury on two counts of violating the federal wagering tax law, §§ 4411 and 4412 of the Internal Revenue Code of 1954, 26 U. S. C. §§ 4411, 4412. His conviction was affirmed by the Court of Appeals for the First Circuit, 301 F. 2d 314. The petitioner contends that his conviction should have been reversed because at his trial the prosecutor was permitted to ask two witnesses incriminating questions concerning their relationship with the petitioner, with the knowledge that the witnesses would invoke their privilege against self-incrimination. We granted certiorari to resolve an asserted conflict with decisions in other circuits. 371 U. S. 858.

The theory of the prosecution's case was that the petitioner had operated a small gambling ring in Chelsea, Massachusetts. His method of operation, according to the Government's theory, was to visit several neighborhood stores at regular times each day for the purpose of collecting betting receipts and paying off winning bets. One of the shops he visited was a variety store owned by Irving and Annette Kahn.

Informations charging violations of the federal wagering tax laws were filed against the petitioner and the Kahns on the same day. All three were represented by the same lawyer, John H. Fitzgerald, and all three pleaded not guilty. On the day of the petitioner's trial, the Kahns changed their pleas to guilty. Because they had previously told government investigators that the petitioner had collected the wagers made in their store and had personally settled accounts with them, the Kahns were subpoenaed to appear at the petitioner's trial.

In his opening statement to the jury, the prosecuting attorney stated that he had reason to believe "a husband

and wife" would testify against the petitioner. Upon the completion of the opening statement, Mr. Fitzgerald approached the bench, and the following colloquy took place:

> "MR. FITZGERALD: Your Honor, it is my understanding that the United States Attorney is going to attempt to use the Kahns as witnesses.
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> "Now, keeping in mind that they are defendants, that they are entitled not to testify in their own case—
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> "The COURT: They have pleaded guilty.
>
> "MR. FITZGERALD: I know that, your Honor, but still I didn't waive any Constitutional privileges in their behalf.
>
> "The COURT: I think the law is that they have no Constitutional privileges after they have pleaded.
>
> "MR. FITZGERALD: Your Honor, further that they are under investigation by the Internal Revenue Department as far as their income taxes are concerned, and everything else.
>
> "The COURT: Well, I haven't seen them take the stand yet, and if they claim the Fifth, I will rule on it then."

After brief testimony by the first government witness, the United States called Annette Kahn. Mr. Fitzgerald repeated his objection for the record, but made no further arguments.[1] Mrs. Kahn then testified to her name, her address, the ownership of the store, and her acquaintance with the petitioner. She refused to answer whether she and her husband had "some type of business relationship" with the petitioner. An extended colloquy at the

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[1] "MR. FITZGERALD: Your Honor, may the record show that I object to the use of this witness.

"The COURT: All right, it may be noted."

bench ensued. The court eventually concluded that Mrs. Kahn's plea of guilty to the charge of engaging in the business of accepting wagers deprived her of the right to refuse to testify about her own gambling activity. But the court also ruled that she did not have to testify about any dealings with third persons since she was still, at least theoretically, subject to prosecution for conspiracy, or possibly bribery. Mr. Fitzgerald made no new objections or arguments during this colloquy. To the contrary, he appeared to acquiesce in the questioning of Mrs. Kahn in open court once he had managed to work out a convenient means for advising her when to assert her privilege against self-incrimination.[2]

The questioning of Mrs. Kahn was resumed after a brief recess. The prosecuting attorney began a line of questioning designed to determine whether Mrs. Kahn had known of the gambling tax requirement before the date of her arrest. Mr. Fitzgerald objected, on the ground that the questions were not material. Another conference at the bench was held, in which the prosecuting attorney explained that his purpose was to show that Mrs. Kahn was not in danger of a conspiracy charge. The court sustained Mr. Fitzgerald's objection to the materiality of the questions. The interrogation was then discontinued.

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[2] "Mr. Fitzgerald: Your Honor, may I stand beside her while she testifies, being her counsel?

"The Court: Well, I would rather have you not stand beside her, because that could impress the jury.

"But ask the questions slowly, and you can take your objection each time.

. . . . . .

"Mr. Fitzgerald: Your Honor, if I should rise in my chair, may that be taken that she pleads the Fifth Amendment?

"The Court: Yes. Now, the question pending is what?"

After another recess, the Government resumed the presentation of its case by calling its other witnesses. Their testimony established the following case for the prosecution: The petitioner had been under surveillance by the government agents for one month. They had observed him following the same route twice a day, stopping for a few minutes in each of several variety and cigar stores. During the petitioner's afternoon round, the pockets in his coat became progressively more bulging, inferentially with material gathered in each of the stores. Petitioner returned home with the material. No persons were seen to enter his home between his arrival after the afternoon round and his departure the next morning for the morning round. Expert testimony was introduced showing that the petitioner's activities were consistent with those of a principal in a gambling operation. The afternoon visits during which his pockets became filled, it was testified, indicated a pick-up of the day's betting slips, and the morning visits would fit a pattern of "setting-up" the store owners to pay off the previous day's winning bets. The absence of any apparent contact with other persons after the petitioner's afternoon round would indicate that he himself was acting as banker for the enterprise, and was not passing the money on to another principal. The final ingredient of the Government's case was certain material found during a search of the petitioner's home. This consisted of "slips of number pool wagers," "daily double horse bet slips," and over $1,000 cash in bills of small denominations. The gambling slips were identified by experts as those normally held by the "bookie" rather than by the bettor.

One of the key issues which developed during this part of the case was the question of whether the places regularly visited by the petitioner were, in fact, known gambling establishments. The court sustained objections

by Mr. Fitzgerald to such testimony by government agents, on the ground that the agents could not testify to events observed when the petitioner was not present.

The Government then called Irving Kahn to the stand. No objection was made. Mr. Kahn testified voluntarily that he owned the store in question, and that he was acquainted with the petitioner. After being directed to answer by the court, he testified that he had had dealings with the petitioner. And, when a second claim of privilege was overruled, he also testified that he had accepted wagers in his store. In the questioning which followed, the witness testified that the petitioner did come to his store "a couple of times a week," but denied that the petitioner came every day in the morning and afternoon.

In the course of this interrogation the witness was asked a total of only four questions to which his refusal to answer was sustained.[3] At no time during this questioning did Mr. Fitzgerald object to the questions on behalf of the petitioner, nor did he request any instructions regarding the inferences the jury might draw from these refusals to answer. Indeed, counsel attempted in his closing argument to utilize that part of Irving Kahn's testimony which had contradicted the Government's evidence about the regularity of the petitioner's visits. The closing arguments for the Government contained no references to the Kahns' refusal to answer, and the jury was not told that the Kahns had been arrested or charged together with the petitioner.

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[3] "Can you tell us what those dealings [the witness' dealings with the petitioner] were?"

"And were you paid a commission on all the bets you took in your variety store?"

"Who did you accept the bets for that you took in your variety store?"

"Did you ever take bets for the defendant David Namet?"

The court's instructions to the jury contained the following statement with regard to the Kahns' testimony:

> "Nor should any inference be drawn against him because the Kahns refused to testify, unless it would be a logical inference that would appeal to you as having a direct bearing upon the defendant's guilt."

Mr. Fitzgerald made no objection whatever to this part of the instructions.

In turning to the petitioner's argument that his conviction must be set aside because of the circumstances described, we emphasize at the outset what this case does *not* involve. No constitutional issues of any kind are presented. The petitioner does not claim any infringement of his Fifth Amendment privilege against self-incrimination.[4] He does not contend that the Kahns were in any way prejudiced by their assertion of this constitutional privilege.[5] All that this case involves, in short, is a claim of evidentiary trial error.

The petitioner's principal contention is that reversible error was committed in permitting the Government to question the Kahns after it was known that they were going to claim their privilege not to incriminate themselves. It is said that when a witness is asked whether he participated in criminal activity with the defendant, a refusal to answer based on the privilege against self-incrimination tends to imply to the jury that a truthful

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[4] The petitioner did not take the stand. The court's instruction concerning this fact was as follows:

". . . you must not draw any inference from the fact that the defendant himself did not take the stand. He doesn't have to. He can sit mute and stand or fall upon the Government's case. Or he may take the stand as he wishes. But from the fact that he didn't take it, you should not draw any inference against him."

[5] Cf. *Grunewald* v. *United States*, 353 U. S. 391, 415–424; *Konigsberg* v. *State Bar*, 353 U. S. 252.

answer would be in the affirmative. This inference, the petitioner argues, cannot properly be used as evidence against a criminal defendant. To support this argument, the petitioner relies on dicta in several federal cases and upon the decision in *United States* v. *Maloney*, 262 F. 2d 535, in which the Court of Appeals for the Second Circuit said, "Such refusals [to testify] have been uniformly held not to be a permissible basis for inferring what would have been the answer, although logically they are very persuasive." *Id.*, at 537.[6]

None of the several decisions dealing with this question suggests that reversible error is invariably committed whenever a witness claims his privilege not to answer. Rather, the lower courts have looked to the surrounding circumstances in each case, focusing primarily on two factors, each of which suggests a distinct ground of error. First, some courts have indicated that error may be based upon a concept of prosecutorial misconduct, when the Government makes a conscious and flagrant attempt to build its case out of inferences arising from use of the testimonial privilege. This seems to have been one of the principal reasons underlying the finding of reversible error in *United States* v. *Maloney, supra.* In that case, the prosecution admitted knowing that two of its key witnesses could validly invoke the privilege against self-incrimination and intended to do so. The prosecutor nevertheless called and questioned them. The court also found that the Government's closing argument attempted to make use of the adverse inferences from their refusals to testify. See also *United States* v. *Tucker*, 267 F. 2d

[6] See *United States* v. *Tucker*, 267 F. 2d 212, 215; *United States* v. *Gernie*, 252 F. 2d 664; *United States* v. *Romero*, 249 F. 2d 371; *United States* v. *Cioffi*, 242 F. 2d 473; *United States* v. *Amadio*, 215 F. 2d 605; *United States* v. *Hiss*, 185 F. 2d 822; *Weinbaum* v. *United States*, 184 F. 2d 330; *United States* v. *5 Cases, etc.*, 179 F. 2d 519. See generally 86 A. L. R. 2d Ann. 1443.

212. A second theory seems to rest upon the conclusion that, in the circumstances of a given case, inferences from a witness' refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination, and thus unfairly prejudiced the defendant. This theory seems also to have been present to some extent in the *Maloney* decision, where the court noted that the challenged inferences were the only corroboration for dubious and interested testimony by the Government's chief witness. 262 F. 2d, at 536–537. On the other hand, courts have failed to find reversible error when such episodes were "no more than minor lapses through a long trial." *United States* v. *Hiss,* 185 F. 2d 822, 832 (C. A. 2d Cir.). See also *United States* v. *Amadio,* 215 F. 2d 605, 614 (C. A. 7th Cir.). And even when the objectionable inferences might have been found prejudicial, it has been held that instructions to the jury to disregard them sufficiently cured the error.[7]

The petitioner appears to contend that error was committed under both theories. He stresses the fact that the prosecutor had advance notice of the Kahns' intention to invoke the Fifth Amendment, but questioned them nevertheless. He also argues that the inferences from the Kahns' refusals to testify were crucial to the Government's case, pointing out that the rest of the Government's evidence against the petitioner was entirely circumstantial.

We need not pass upon the correctness of the several lower court decisions upon which the petitioner relies,[8] for we think that even within the basic rationale of those

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[7] See, *e. g., United States* v. *Gernie,* 252 F. 2d 664 (C. A. 2d Cir.); *Weinbaum* v. *United States,* 184 F. 2d 330 (C. A. 9th Cir.). See also *United States* v. *Maloney, supra,* at 538.

[8] See generally *Grunewald* v. *United States,* 353 U. S. 391, 415–426; *Stewart* v. *United States,* 366 U. S. 1.

cases reversible error was not committed in this case. In the first place, the record does not support any inference of prosecutorial misconduct. It is true, of course, that Mr. Fitzgerald announced that the Kahns would invoke their testimonial privilege if questioned. But certainly the prosecutor need not accept at face value every asserted claim of privilege, no matter how frivolous. In this case, the prosecutor initially did not believe that the Kahns could properly invoke their privilege against self-incrimination, reasoning with some justification that their plea of guilty to the gambling charge would erase any testimonial privileges as to that conduct. His view of the law was supported by substantial authority, cf. *Reina* v. *United States,* 364 U. S. 507, 513, and was in fact upheld by the trial judge. Although it was later ruled that the guilty plea did not render all of the Kahns' conduct immune from further prosecution, thus making testimony as to that conduct privileged, there remained an independent and quite proper reason to call the Kahns as witnesses. Both Mr. and Mrs. Kahn possessed nonprivileged information that could be used to corroborate the Government's case. They could, and did, testify that they knew the petitioner, that he did frequently visit their variety store, and that they themselves had engaged in accepting wagers. The Government had a right to put this evidence before the jury.

Moreover, the bulk of Mrs. Kahn's interrogation, including the only question involving privileged information, occurred before the court ruled that she had a limited testimonial privilege. Although Mr. Kahn was called to the stand somewhat later, there had developed, at that time, still another clearly permissible reason for calling him. The court's rulings during the questioning of the intervening witnesses had prevented the Government from introducing most of the evidence it had planned to use to show that the stores on the petitioner's daily

route were engaged in gambling. Mr. Kahn had pleaded guilty to accepting wagers, and under the District Court's prior ruling his testimony that he had accepted wagers in his store was clearly not privileged. He did so testify, after the court directed him to answer. In the course of eliciting this and other relevant testimony, the prosecutor asked only four questions held to be privileged.

We cannot find that these few lapses, when viewed in the context of the entire trial, amounted to planned or deliberate attempts by the Government to make capital out of witnesses' refusals to testify. We are particularly reluctant to fasten such motives on the Government's conduct when, as here, defense counsel not only failed to object on behalf of the defendant, but in many instances actually acquiesced in the procedure as soon as the rights of the witnesses were secured.

Nor can we find that the few invocations of privilege by the Kahns were of such significance in the trial that they constituted reversible error even in the absence of prosecutorial misconduct. The effect of these questions was minimized by the lengthy nonprivileged testimony which the Kahns gave. They testified about the conduct of gambling operations in their store, as well as their general association with the petitioner. Once these facts were admitted by the Kahns themselves, after government agents had testified to the petitioner's daily visits, a natural and completely permissible inference could be drawn linking the petitioner's visits with the admitted gambling operation. Thus the present case is not one, like *Maloney,* in which a witness' refusal to testify is the only source, or even the chief source, of the inference that the witness engaged in criminal activity with the defendant. In this case the few claims of testimonial privilege were at most cumulative support for an inference already well established by the nonprivileged portion of the witness' testimony.

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It should be borne in mind that nothing in this case presents the issue whether the petitioner would have been entitled to instructions or other curative devices [9] if he had asked for them. No such requests were ever made. Far from it, Mr. Fitzgerald impliedly accepted the Kahns' testimony and attempted to use it on behalf of the petitioner in his argument to the jury. The petitioner would have us hold that even in these circumstances the court committed reversible error because it did not, *sua sponte,* take some affirmative action. We see no reason to require such extravagant protection against errors which were not obviously prejudicial and which the petitioner himself appeared to disregard.[10]

There remains for consideration a question concerning the correctness of the court's instruction on the subject of the Kahns' refusals to testify. This issue was nowhere mentioned in the petition for certiorari in this Court, and under our rules it is not before us.[11] Even if it were, we could not find that the instruction amounted to reversible error on the facts of this case. No objection was ever made to this instruction, even though counsel for the petitioner did object to other aspects of the charge. Thus, we are not concerned with whether the instruction was right, but only whether, assuming it was wrong, it was a

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[9] The Government has suggested that in appropriate circumstances the defendant may be entitled to request a preliminary screening of the witness' testimony, outside the hearing of the jury.

[10] Finding, as we do, that this case involves neither misconduct by the prosecution nor inferences of material importance, we need not pass upon the holding in *United States* v. *Maloney, supra,* that a failure to give proper curative instructions when such elements are present constitutes plain error.

[11] The issue was brought to this Court's attention in the Government's memorandum in reply to the petition.

Rule 23, par. 1 (c) of the Supreme Court Rules provides, "Only the questions set forth in the petition or fairly comprised therein will be considered by the court."

plain error or defect "affecting substantial rights" under Rule 52 (b) of the Federal Rules of Criminal Procedure.[12] What has been said concerning the very limited effect of any inferences arising from the Kahns' refusals to testify makes it clear that this brief passage in the charge could not have affected any substantial rights of the petitioner.

Affirmed.

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

I believe it was error for the trial court to permit the prosecuting attorney in the presence of the jury to ask questions which he well knew the witnesses would refuse to answer on the ground of self-incrimination. And I cannot conclude that this error was not prejudicial to the defendant. Certainly the prosecutor must have thought the refusals to answer would help the State's case; otherwise, he would not have asked the questions that he knew would not be answered. One need only glance at the questions set out in note 3 of the majority opinion to see that, as people ordinarily reason, the jury would have inferred that the witnesses refused to answer so that they would not have to admit that they had been engaged in violating the gambling laws with the defendant. Indeed,

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[12] Rule 30 provides, in pertinent part: "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

Rule 52 provides:

"(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

"(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

a part of the court's charge, to which no exception was taken, left the jury free to infer this defendant's guilt from the refusal of the Kahns to answer the questions.* To my way of thinking, this is an unfair way of getting convictions and should not be condoned by the Court's treating these questions as minor lapses or by its speculation as to how good or bad the motives of the prosecutor were. Nor can I agree that the defendant either disregarded or acquiesced in the trial court's erroneously permitting the jury to be influenced by the witnesses' claim of privilege. Even before the witnesses were put on the stand by the prosecutor, defendant's counsel warned the court and the prosecutor that the privilege would be claimed, and later, when examination of the witnesses had begun, the court acknowledged not only the right to claim the Fifth Amendment's privilege under the circumstances but also the court's intention to sustain the claim if made. The court nevertheless allowed the Government to proceed with its examination, during which the jury heard the witnesses claim, and the court sustain, their privilege in refusing to answer several questions put to them. True, counsel for defendant later tried, as any good lawyer would, to turn this bad situation to his advantage by referring to it. But this took place after the trial court had permitted the poisonous questions to be asked over the original objections. This was not acquiescence in error. I would reverse.

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* "Nor should any inference be drawn against him [petitioner] because the Kahns refused to testify, unless it would be a logical inference that would appeal to you as having a direct bearing upon the defendant's guilt."

WHIPPLE ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 305. Argued March 26–27, 1963.—Decided May 13, 1963.

Petitioner organized, owned the controlling interest in, and managed several business corporations. One was a bottling company to which he sold on credit bottling equipment owned by him individually, leased a plant built by him on land which he owned individually, and made a loan to pay off other creditors. Its indebtedness to him became worthless in 1953, and he deducted it as a business bad debt in computing his 1953 taxable income. The Commissioner claimed that the debt was a nonbusiness bad debt within the meaning of § 23 (k) (4) of the Internal Revenue Code of 1939, as amended in 1942, and assessed deficiencies. The Tax Court determined that petitioner was not in the business of organizing, promoting, managing or financing corporations, of bottling soft drinks or of general financing and money lending, and it sustained the deficiency. The Court of Appeals affirmed. *Held:*

1. The 1942 amendment of § 23 (k) was designed to make full deductibility of a bad debt turn upon its proximate connection with activities which the tax laws recognized as a "trade or business," a concept which falls far short of reaching every income-producing or profit-making activity. Pp. 197–201.

2. Absent substantial additional evidence, furnishing organizational, promotional and managerial services to corporations for a reward not different from that flowing to an investor in those corporations is not a "trade or business," within the meaning of § 23 (k) (4). Pp. 201–203.

3. The determinations of the Tax Court, affirmed by the Court of Appeals, that petitioner was not engaged in the business of money lending, of financing corporations, of bottling soft drinks or of any combination of these were not clearly erroneous, and they will not be disturbed by this Court. Pp. 203–204.

4. However, the loss may have been attributable to petitioner's position as the owner and lessor of the real estate and bottling

plant in which the corporation did business. Since neither of the Courts below disposed of that possibility, the case is remanded for further proceedings in the Tax Court on that question. Pp. 204–205.

301 F. 2d 108, judgment vacated and cause remanded.

Charles Dillingham argued the cause for petitioners. With him on the briefs were *Ben H. Schleider, Jr., John S. Brunson* and *A. C. Lesher, Jr.*

Solicitor General Cox argued the cause for respondent. With him on the brief were *Assistant Attorney General Oberdorfer* and *Robert N. Anderson.*

MR. JUSTICE WHITE delivered the opinion of the Court.

Section 23 (k)(1) of the Internal Revenue Code of 1939 [1] provides for the deduction in full of worthless debts other than nonbusiness bad debts while § 23 (k)(4) restricts nonbusiness bad debts to the treatment accorded losses on the sale of short-term capital assets.[2] The statute defines a nonbusiness bad debt in part as "a debt . . . other than a debt the loss from the worthlessness of which is incurred in the taxpayer's trade or busi-

[1] The 1954 Code provision, § 166, is substantially identical to that in the 1939 Code with respect to the problem here. Preceding the enactment of the 1954 Code, there were statements from witnesses urging an express provision for the full bad debt deduction in circumstances such as these to overturn contrary lower court decisions like *Commissioner* v. *Smith,* 203 F. 2d 310 (C. A. 2d Cir.), Hearings before the House Committee on Ways and Means on Forty Topics Pertaining to the General Revision of the Internal Revenue Code, 83d Cong., 1st Sess. (pt. 3), 1519–1525, and bills introduced for that purpose, H. R. 3165 and H. R. 4853, 83d Cong., 1st Sess. The provision finally enacted, however, was one without these suggested modifications.

[2] In general, short-term capital losses are deductible only to the extent of the gains from the sale or exchange of capital assets, plus the taxable income of the taxpayer or $1,000, whichever is smaller. § 117 (d)(2). See also § 1211 (b), 1954 Code.

ness." § 23 (k)(4). The question before us is whether petitioner's activities in connection with several corporations in which he holds controlling interests can themselves be characterized as a trade or business so as to permit a debt owed by one of the corporations to him to be treated within the general rule of § 23 (k)(1) as a "business" rather than a "nonbusiness" bad debt.

Prior to 1941 petitioner was a construction superintendent and an estimator for a lumber company but during that year and over the next several ones he was instrumental in forming and was a member of a series of partnerships engaged in the construction or construction supply business. In 1949 and 1950 he was an original incorporator of seven corporations, some of which were successors to the partnerships, and in 1951 he sold his interest in the corporations along with his equity in five others in the rental and construction business, the profit on the sales being reported as long-term capital gains. In 1951 and 1952 he formed eight new corporations, one of which was Mission Orange Bottling Co. of Lubbock, Inc., bought the stock of a corporation known as Mason Root Beer [3] and acquired an interest in a related vending machine business. From 1951 to 1953 he also bought and sold land, acquired and disposed of a restaurant and participated in several oil ventures.

On April 25, 1951, petitioner secured a franchise from Mission Dry Corporation entitling him to produce, bottle, distribute and sell Mission beverages in various counties in Texas. Two days later he purchased the assets of a sole proprietorship in the bottling business and conducted that business pursuant to his franchise as a sole pro-

[3] This corporation owned a franchise to distribute Mason root beer which petitioner bottled at the Mission Orange plant in Lubbock. Mason Root Beer failed in 1953 and petitioner's return for that year, the same one as involved in this suit, reflects a $3,300 loss on the stock and a $53.33 nonbusiness bad debt from that corporation.

prietorship. On July 1, 1951, though retaining the franchise in his own name, he sold the bottling equipment to Mission Orange Bottling Co. of Lubbock, Inc., a corporation organized by petitioner as mentioned, of which he owned approximately 80% of the shares outstanding.[4] In 1952 he purchased land in Lubbock and erected a bottling plant thereon at a cost of $43,601 and then leased the plant to Mission Orange for a 10-year term at a prescribed rental. Depreciation was taken on the new bottling plant on petitioner's individual tax returns for 1952 and 1953.

Petitioner made sizable cash advances to Mission Orange in 1952 and 1953, and on December 1, 1953, the balance due him, including $25,502.50 still owing from his sale of the bottling assets to the corporation in July 1951, totaled $79,489.76. On December 15, 1953, petitioner advanced to Mission Orange an additional $48,000 to pay general creditors and on the same day received a transfer of the assets of the corporation with a book value of $70,414.66. The net amount owing to petitioner ultimately totaled $56,975.10, which debt became worthless in 1953 and is in issue here. During 1951, 1952 and 1953 Mission Orange made no payments of interest, rent or salary to petitioner although he did receive such income from some of his other corporations.[5]

Petitioner deducted the $56,975.10 debt due from Mission Orange as a business bad debt in computing his 1953

[4] At the time Mission Orange was organized petitioner was issued 88% of the outstanding shares. The charter was amended in December of 1952 to authorize additional capital stock which, when subsequently issued, reduced his interest in the corporation to 77%. Sometime before the end of 1953, petitioner increased his holdings to about 79.5% of the outstanding shares.

[5] He collected interest totaling $1,680.15 in 1951, $2,285.35 in 1952 and $1,747.59 in 1953; rental income of $15,570.78 in 1952 and $12,225.19 in 1953; and salaries totaling $29,400 for 1952 and $33,450 for 1953.

taxable income. The Commissioner, claiming the debt was a nonbusiness bad debt, assessed deficiencies. The Tax Court, after determining that petitioner in 1953 was not in the business of organizing, promoting, managing or financing corporations, of bottling soft drinks or of general financing and money lending, sustained the deficiencies. A divided Court of Appeals affirmed, 301 F. 2d 108, and upon a claim of conflict [6] among the Courts of Appeals, we granted certiorari. 371 U. S. 875.

I.

The concept of engaging in a trade or business as distinguished from other activities pursued for profit is not new to the tax laws. As early as 1916, Congress, by providing for the deduction of losses incurred in a trade or business separately from those sustained in other transactions entered into for profit, § 5, Revenue Act of 1916, c. 463, 39 Stat. 756, distinguished the broad range of income or profit producing activities from those satisfying the narrow category of trade or business. This pattern has been followed elsewhere in the Code. See, *e. g.*, § 23 (a)(1) and (2) (ordinary and necessary expenses); § 23 (e)(1) and (2) (losses); § 23 (l)(1) and (2) (depreciation); § 122 (d)(5) (net operating loss deduction). It is not surprising, therefore, that we approach the problem of applying that term here with much writing upon the slate.

In *Burnet* v. *Clark*, 287 U. S. 410 (1932), the long-time president and principal stockholder of a corporation in the dredging business endorsed notes for the company which he was forced to pay. These amounts were deductible by him in the current year under the then existing law, but to carry over the loss to later years it was necessary for it to have resulted from the operation of a trade or busi-

[6] See note 10, *infra*.

ness regularly carried on by the taxpayer. The Board of Tax Appeals denied the carry-over but the Court of Appeals for the District of Columbia held otherwise on the grounds that the taxpayer devoted all of his time and energies to carrying on the business of dredging and that he was compelled by circumstances to endorse the company's notes in order to supply it with operating funds.[7] This Court in turn reversed and reinstated the judgment of the Board of Tax Appeals, since "[t]he respondent was employed as an officer of the corporation; the business which he conducted for it was not his own. . . . The unfortunate endorsements were no part of his ordinary business, but occasional transactions intended to preserve the value of his investment in capital shares. . . . A corporation and its stockholders are generally to be treated as separate entities." A similar case, *Dalton* v. *Bowers*, 287 U. S. 404, decided the same day, applied the same principles.[8]

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[7] The lower court relied in part upon the test of trade or business announced in *Washburn* v. *Commissioner*, 51 F. 2d 949, 953:
"A party may have investments in corporate stock, have no particular occupation, and live on the return of his investments. That would not constitute business under the statute in question. He may, however, take such an active part in the management of the enterprise in which he has investments as to amount to the carrying on of a business."

[8] *Dalton* v. *Bowers* involved a taxpayer, owning all the stock of the debtor corporation, who argued that his trade or business was carrying on a comprehensive enterprise of exploiting his own inventions through corporations organized for limited purposes and that these personal activities transcended the separate corporate entities. As in *Burnet*, however, these contentions were rejected.
"He treated [his corporation] as something apart from his ordinary affairs, accepted credits for salaries as an officer, claimed loss to himself because of loans to it which had become worthless, and caused it to make returns for taxation distinct from his own. Nothing indicates that he regarded the corporation as his agent with author-

A few years later, the same problem arose in another context. A taxpayer with large and diversified investment holdings, including a substantial but not controlling interest in the du Pont Company, obtained a block of stock of that corporation for distribution to its officers in order to increase their management efficiency. The taxpayer, as a result, became obligated to refund the annual dividends and taxes thereon and these amounts he sought to deduct as ordinary and necessary expenses paid or incurred in the carrying on of a trade or business pursuant to § 23 (a) of the Revenue Act of 1928. The Court, *Deputy* v. *du Pont,* 308 U. S. 488 (1940), assuming *arguendo* that the taxpayer's activities in investing and managing his estate were a trade or business, nevertheless denied the deduction because the transactions "had their origin in an effort by that company to increase the efficiency of its management" and "arose out of transactions which were intended to preserve his investment in the corporation . . . . The well established decisions of this Court do not permit any such blending of the corporation's business with the business of its stockholders." 308 U. S., at 494. Reliance was placed upon *Burnet* v. *Clark* and *Dalton* v. *Bowers, supra.*

The question assumed in *du Pont* was squarely up for decision in *Higgins* v. *Commissioner,* 312 U. S. 212 (1941). Here the taxpayer devoted his time and energies to managing a sizable portfolio of securities and sought to deduct his expenses incident thereto as incurred in a trade or business under § 23 (a). The Board of Tax Appeals, the Court of Appeals for the Second Circuit and this Court

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ity to contract or act in his behalf. Ownership of all the stock is not enough to show that creation and management of the corporation was a part of his ordinary business. Certainly, under the general rule for tax purposes a corporation is an entity distinct from its stockholders . . . ." 287 U. S., at 410.

held that the evidence was insufficient to establish taxpayer's activities as those of carrying on a trade or business. "The petitioner merely kept records and collected interest and dividends from his securities, through managerial attention for his investments. No matter how large the estate or how continuous or extended the work required may be, such facts are not sufficient as a matter of law to permit the courts to reverse the decision of the Board." 312 U. S., at 218.

Such was the state of the cases in this Court when Congress, in 1942, amended the Internal Revenue Code in respects crucial to this case. In response to the *Higgins* case and to give relief to Higgins-type taxpayers, see H. R. Rep. No. 2333, 77th Cong., 2d Sess. 46, § 23 (a) was amended not by disturbing the Court's definition of "trade or business" but by following the pattern that had been established since 1916 of "[enlarging] the category of incomes with reference to which expenses were deductible," *McDonald* v. *Commissioner,* 323 U. S. 57, 62; *United States* v. *Gilmore,* 372 U. S. 39, 45, to include expenses incurred in the production of income.

At the same time, to remedy what it deemed the abuses of permitting any worthless debt to be fully deducted, as was the case prior to this time, see H. R. Rep. No. 2333, 77th Cong., 2d Sess. 45, Congress restricted the full deduction under § 23 (k) to bad debts incurred in the taxpayer's trade or business [9] and provided that "nonbusiness" bad

[9] "The character of the debt for this purpose is not controlled by the circumstances attending its creation or its subsequent acquisition by the taxpayer or by the use to which the borrowed funds are put by the recipient, but is to be determined rather by the relation which the loss resulting from the debt's becoming worthless bears to the trade or business of the taxpayer. If that relation is a proximate one in the conduct of the trade or business in which the taxpayer is engaged at the time the debt becomes worthless, the debt is not a nonbusiness debt for the purposes of this amendment." H. R. Rep. No. 2333, 77th Cong., 2d Sess. 77; S. Rep. No. 1631, 77th Cong., 2d

debts were to be deducted as short-term capital losses. Congress deliberately used the words "trade or business," terminology familiar to the tax laws, and the respective committees made it clear that the test of whether a debt is incurred in a trade or business "is substantially the same as that which is made for the purpose of ascertaining whether a loss from the type of transaction covered by section 23 (e) is 'incurred in trade or business' under paragraph (1) of that section." H. R. Rep. No. 2333, 77th Cong., 2d Sess. 76–77; S. Rep. No. 1631, 77th Cong., 2d Sess. 90. Section 23 (e)(1), of course, was a successor to the old § 5 of the Revenue Act of 1916 under which it had long been the rule to distinguish between activities in a trade or business and those undertaken for profit. The upshot was that Congress broadened § 23 (a) to reach income producing activities not amounting to a trade or business and conversely narrowed § 23 (k) to exclude bad debts arising from these same sources.

The 1942 amendment of § 23 (k), therefore, as the Court has already noted, *Putnam* v. *Commissioner,* 352 U. S. 82, 90–92, was intended to accomplish far more than to deny full deductibility to the worthless debts of family and friends. It was designed to make full deductibility of a bad debt turn upon its proximate connection with activities which the tax laws recognized as a trade or business, a concept which falls far short of reaching every income or profit making activity.

II.

Petitioner, therefore, must demonstrate that he is engaged in a trade or business, and lying at the heart of his claim is the issue upon which the lower courts have divided and which brought the case here: That where a taxpayer

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Sess. 90. Treasury Regulations 118, § 39.23 (k)–6 (b), adopts substantially this language of the Committee Reports as the test to be applied under § 23 (k).

furnishes regular services to one or many corporations, an independent trade or business of the taxpayer has been shown. But against the background of the 1942 amendments and the decisions of this Court in the *Dalton, Burnet, du Pont* and *Higgins* cases, petitioner's claim must be rejected.

Devoting one's time and energies to the affairs of a corporation is not of itself, and without more, a trade or business of the person so engaged. Though such activities may produce income, profit or gain in the form of dividends or enhancement in the value of an investment, this return is distinctive to the process of investing and is generated by the successful operation of the corporation's business as distinguished from the trade or business of the taxpayer himself. When the only return is that of an investor, the taxpayer has not satisfied his burden of demonstrating that he is engaged in a trade or business since investing is not a trade or business and the return to the taxpayer, though substantially the product of his services, legally arises not from his own trade or business but from that of the corporation. Even if the taxpayer demonstrates an independent trade or business of his own, care must be taken to distinguish bad debt losses arising from his own business and those actually arising from activities peculiar to an investor concerned with, and participating in, the conduct of the corporate business.

If full-time service to one corporation does not alone amount to a trade or business, which it does not, it is difficult to understand how the same service to many corporations would suffice. To be sure, the presence of more than one corporation might lend support to a finding that the taxpayer was engaged in a regular course of promoting corporations for a fee or commission, see Ballantine, Corporations (rev. ed. 1946), 102, or for a profit on their sale, see

Giblin v. *Commissioner,* 227 F. 2d 692 (C. A. 5th Cir.), but in such cases there is compensation other than the normal investor's return, income received directly for his own services rather than indirectly through the corporate enterprise, and the principles of *Burnet, Dalton, du Pont* and *Higgins* are therefore not offended. On the other hand, since the Tax Court found, and the petitioner does not dispute, that there was no intention here of developing the corporations as going businesses for sale to customers in the ordinary course, the case before us inexorably rests upon the claim that one who actively engages in serving his own corporations for the purpose of creating future income through those enterprises is in a trade or business. That argument is untenable in light of *Burnet, Dalton, du Pont* and *Higgins,* and we reject it.[10] Absent substantial additional evidence,[11] furnishing management and other services to corporations for a reward not different from that flowing to an investor in those corporations is not a trade or business under § 23 (k)(4). We are, therefore, fully in agreement with this aspect of the decision below.

III.

With respect to the other claims by petitioner, we are unwilling to disturb the determinations of the Tax Court, affirmed by the Court of Appeals, that petitioner was not

[10] To the extent that they hold or contain statements to the contrary, we disapprove of such cases as *Maytag* v. *United States,* 153 Ct. Cl. 622, 289 F. 2d 647; *Mays* v. *Commissioner,* 272 F. 2d 788 (C. A. 6th Cir.); *Commissioner* v. *Stokes' Estate,* 200 F. 2d 637 (C. A. 3d Cir.); *Foss* v. *Commissioner,* 75 F. 2d 326 (C. A. 1st Cir.); *Washburn* v. *Commissioner,* 51 F. 2d 949 (C. A. 8th Cir.); *Sage* v. *Commissioner,* 15 T. C. 299; *Campbell* v. *Commissioner,* 11 T. C. 510; and *Cluett* v. *Commissioner,* 8 T. C. 1178.

[11] Compare *Maloney* v. *Spencer,* 172 F. 2d 638 (C. A. 9th Cir.), and *Dorminey* v. *Commissioner,* 26 T. C. 940.

engaged in the business of money lending, of financing corporations, of bottling soft drinks or of any combination of these since we cannot say they are clearly erroneous. See *Commissioner* v. *Duberstein,* 363 U. S. 278, 289–291. Nor need we consider or deal with those cases which hold that working as a corporate executive for a salary may be a trade or business. *E. g., Trent* v. *Commissioner,* 291 F. 2d 669 (C. A. 2d Cir.).[12] Petitioner made no such claim in either the Tax Court or the Court of Appeals and, in any event, the contention would be groundless on this record since it was not shown that he has collected a salary from Mission Orange or that he was owed one. Moreover, there is no proof (which might be difficult to furnish where the taxpayer is the sole or dominant stockholder) that the loan was necessary to keep his job or was otherwise proximately related to maintaining his trade or business as an employee. Compare *Trent* v. *Commissioner, supra.*

We are more concerned, however, with the evidence as to petitioner's position as the owner and lessor of the real estate and bottling plant in which Mission Orange did business. The United States does not dispute the fact that in this regard petitioner was engaged in a trade or business[13] but argues that the loss from the worthless debt was not proximately related to petitioner's real estate

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[12] See under § 122 (net operating loss carry-over) *Folker* v. *Johnson,* 230 F. 2d 906 (C. A. 2d Cir.); *Overly* v. *Commissioner,* 243 F. 2d 576 (C. A. 3d Cir.); *Batzell* v. *Commissioner,* 266 F. 2d 371 (C. A. 4th Cir.); *Roberts* v. *Commissioner,* 258 F. 2d 634 (C. A. 5th Cir.); *Pierce* v. *United States,* 254 F. 2d 885 (C. A. 9th Cir.). But cf., *McGinn* v. *Commissioner,* 76 F. 2d 680 (C. A. 9th Cir.); *Hughes* v. *Commissioner,* 38 F. 2d 755 (C. A. 10th Cir.). See under § 23 (a) (1) (ordinary and necessary expenses of trade or business) *Schmidlapp* v. *Commissioner,* 96 F. 2d 680 (C. A. 2d Cir.); *Noland* v. *Commissioner,* 269 F. 2d 108, 111 (C. A. 4th Cir.).

[13] Although petitioner received no rental payments from Mission Orange, there was rent owing to him under the 10-year-lease agreement.

business. While the Tax Court and the Court of Appeals dealt separately with assertions relating to other phases of petitioner's case, we do not find that either court disposed of the possibility that the loan to Mission Orange, a tenant of petitioner, was incurred in petitioner's business of being a landlord. We take no position whatsoever on the merits of this matter but remand the case for further proceedings in the Tax Court.

Vacated and remanded.

MR. JUSTICE DOUGLAS dissents.

692-438 O-63-17

GUTIERREZ *v.* WATERMAN STEAMSHIP CORP.

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

No. 229. Argued March 21, 1963.—Decided May 13, 1963.

While unloading a ship docked at a Puerto Rican port, a longshoreman suffered personal injuries when he slipped on some loose beans spilled on the dock from broken and defective bags being unloaded from the ship. He filed a libel in admiralty against the ship, claiming damages for injuries caused by the ship's unseaworthiness and by the negligence of its owner. *Held:*

1. The case was within the maritime jurisdiction under the Extension of Admiralty Jurisdiction Act, since it was alleged that the shipowner committed a tort while or before the ship was being unloaded and the impact was felt ashore at a time and place not remote from the wrongful act. Pp. 209–210.

2. This Court sustains the finding of the Trial Court that the shipowner was negligent in allowing the beans to be unloaded in their defective bagging, when it knew or should have known that injury was likely to result to persons having to work about the beans that might, and did, spill, and that the shipowner was liable to the longshoreman for injuries resulting from such negligence, irrespective of its alleged lack of control of the impact zone. Pp. 210–212.

3. When a shipowner accepts cargo in a faulty container or allows a container to become faulty, he assumes responsibility for injuries that this may cause to seamen or their substitutes on or about the ship; these leaky bean bags were unfit and thus unseaworthy. Pp. 212–214.

4. The duty to provide a seaworthy ship and gear, including cargo containers, applies to longshoremen unloading the ship, whether they are standing aboard ship or on the pier. Pp. 214–215.

5. Although the longshoreman filed his libel over a year after expiration of the analogous Puerto Rican statute of limitations, the finding of the Trial Court that no prejudice to the shipowner was occasioned by the delay and that the longshoreman's claim therefore was not barred by laches is sustained, as not plainly erroneous. Pp. 215–216.

301 F. 2d 415, reversed and cause remanded.

Harvey B. Nachman argued the cause for petitioner. With him on the brief was *Stanley L. Feldstein.*

Antonio M. Bird argued the cause and filed a brief for respondent.

T. E. Byrne, Jr. and *Mark D. Alspach* filed a brief for Ellerman & Bucknall Steamship Co., Ltd., et al., as *amici curiae,* urging affirmance.

MR. JUSTICE WHITE delivered the opinion of the Court.

Petitioner, a longshoreman unloading the S. S. *Hastings* at Ponce, Puerto Rico, slipped on some loose beans spilled on the dock and suffered personal injuries. He subsequently filed a libel against the *Hastings,* claiming damages for injuries caused by the ship's unseaworthiness and by the negligence of its owner, the respondent corporation. The case was tried in admiralty before the United States District Court for the District of Puerto Rico, and the court found the following facts relevant in the present posture of the case. 193 F. Supp. 894.

The cargo of beans was packed in broken and defective bags, some of which were being repaired by coopers aboard the ship during unloading. Beans spilled out of the bags during unloading, including some from one bag which broke open during unloading, and the scattering of beans about the surface of the pier created a dangerous condition for the longshoremen who had to work there. The shipowner knew or should have known that injury was likely to result to persons who would have to work around the beans spilled from the defective bags, and it was negligent in allowing cargo so poorly stowed or laden to be unloaded. Petitioner fell on the beans and injured himself, and such injuries were proximately caused by the respondent's negligence and the unseaworthiness of its cargo or cargo containers.

Although petitioner filed his libel over a year after the analogous Puerto Rican statute of limitations ran,[1] the court found that the delay was excusable and that no prejudice to respondent was occasioned by the delay, since it had access at all times to its and the stevedore's [2] records which contained the relevant facts and since all the potential witnesses were available and produced at trial. Accordingly, the trial court entered a money judgment of some $18,000 for petitioner.

Respondent appealed to the United States Court of Appeals for the First Circuit, which reversed with directions to dismiss the action. 301 F. 2d 415. It held that respondent had not been negligent, as a matter of law, because it "had neither control of nor even a right to control" the pier. The court also stated that petitioner did not prove what particular beans he slipped on, and that the ones responsible for his fall might have come from a bag that "for all that appears" may have been dropped and broken open due to some third party's negligence. As for seaworthiness, the court held that the shipowner was not responsible for the lading, or cargo containers, stating: "The very fact that unseaworthiness obligations are 'awesome' . . . suggests that they should not be handled with prodigality. We are unwilling to recognize one here." Finally, it reversed the conclusion below as to laches, since the availability to respondent of the witnesses when the libel was filed was not as advantageous to it as would have been an opportunity to examine them at an earlier date. That this was preju-

[1] Petitioner's injury was covered by the Puerto Rico Workmen's Compensation Act, under which suits must be instituted within a year following the date of the final decision in the case by the Manager of the State Insurance Fund. Puerto Rico Laws Ann. § 11:32.

[2] The stevedore was Waterman Dock Company, a wholly owned subsidiary of respondent Waterman Steamship Company.

dicial, the court concluded, was shown by the fact that the witnesses' testimony was at variance with respondent's records of the ship's unloading. Petitioner sought certiorari from this adverse judgment and we brought the case here, 371 U. S. 810, to resolve the apparently troublesome question as to the shipowner's liability for his torts which have impacts on shore. We have concluded that the judgment of the Court of Appeals must be reversed with respect to each of the three headings involved.

I.

At the outset we are met with an issue which is said to be jurisdictional. Counsel for respondent candidly admits failure to raise the point below, but as is our practice we will consider this threshold question before reaching the merits. *McGrath* v. *Kristensen,* 340 U. S. 162, 167–168; *Ford Motor Co.* v. *Treasury Dept.,* 323 U. S. 459, 467; *Matson Nav. Co.* v. *United States,* 284 U. S. 352, 359 (admiralty case); *Grace* v. *American Ins. Co.,* 109 U. S. 278, 283; *Hope Ins. Co.* v. *Boardman,* 5 Cranch 57; see *Wheeldin* v. *Wheeler,* 371 U. S. 812; *Brown Shoe Co.* v. *United States,* 370 U. S. 294, 305–306.

Respondent contends that it is not liable, at least in admiralty, because the impact of its alleged lack of care or unseaworthiness was felt on the pier rather than aboard ship. Whatever validity this proposition may have had until 1948, the passage of the Extension of Admiralty Jurisdiction Act, 62 Stat. 496, 46 U. S. C. § 740, swept it away when it made vessels on navigable water liable for damage or injury "notwithstanding that such damage or injury be done or consummated on land." Respondent and the carrier *amici curiae* would have the statute limited to injuries actually caused by the physical agency of the vessel or a particular part of it—such as when the ship rams a bridge or when its defective winch drops some

cargo onto a longshoreman. Cf. *Strika* v. *Netherlands Ministry of Traffic,* 185 F. 2d 555 (C. A. 2d Cir.); *Hagans* v. *Farrell Lines,* 237 F. 2d 477 (C. A. 3d Cir.). Nothing in the legislative history supports so restrictive an interpretation of the statutory language. There is no distinction in admiralty between torts committed by the ship itself and by the ship's personnel while operating it, any more than there is between torts "committed" by a corporation and by its employees. And ships are libeled as readily for an unduly bellicose mate's assault on a crewman, see *Boudoin* v. *Lykes Bros. Co.,* 348 U. S. 336, 339–340; *The Rolph,* 299 F. 52 (C. A. 9th Cir.), or for having an incompetent crew or master, see *Keen* v. *Overseas Tankship Corp.,* 194 F. 2d 515, 517 (C. A. 2d Cir.), as for a collision. Various far-fetched hypotheticals are raised, such as a suit in admiralty for an ordinary automobile accident involving a ship's officer on ship business in port, or for someone's slipping on beans that continue to leak from these bags in a warehouse in Denver. We think it sufficient for the needs of this occasion to hold that the case is within the maritime jurisdiction under 46 U. S. C. § 740 when, as here, it is alleged that the shipowner commits a tort [3] while or before the ship is being unloaded, and the impact of which is felt ashore at a time and place not remote from the wrongful act.

II.

As indicated, *supra,* the trial court found respondent negligent in allowing the beans to be unloaded in their defective bagging, when it knew or should have known that injury was likely to result to persons having to work about the beans that might, and did, spill. There was substantial evidence to support these findings. Wit-

[3] The question of whether the warranty of seaworthiness extends to longshoremen on the dock is considered, *infra,* at pp. 213–214.

nesses testified that beans spilled out of broken bags throughout unloading, and this is corroborated by respondent's records of the unloading, which stated that bags of beans were found torn at the time of discharging and some of them were recoopered. Moreover, the trial court was entitled to infer that respondent should have known of the defective condition of the bagging when the bean bags were leaking while still in the ship, when beans spilled out of the bags throughout unloading, and when coopers were sent aboard to repair the torn bagging. To be sure, there is some conflict between details of the testimony and respondent's records of the unloading, but the trial court was entitled to believe the one rather than the other. As for the possibility that the beans petitioner slipped on may have come from some other source, such as "for all that appears" a third party, it is sufficient to note that the trial court was not plainly erroneous in not so believing.

The force of these fact findings is not lessened by the contention that respondent did not control the pier or have "even a right to control that locus," 301 F. 2d, at 416. We doubt that respondent had no license to go upon the pier at which it was docked and clean up the loose beans, if it had wanted to; the beans were its cargo that it was unloading onto the pier. But we may put this aside, since control of the impact zone is not essential for negligence. The man who drops a barrel out of his loft need not control the sidewalk to be liable to the pedestrian whom the barrel hits. See *Byrne* v. *Boadle,* 2 H. & C. 722 (Exch.). And the same holds for the man who spills beans out his window, on which the pedestrian slips. Respondent allowed the cargo to be discharged in dangerous and defective bagging, from which beans were leaking before discharge of the cargo began. It had an absolute and nondelegable duty of care toward petitioner

not to create this risk to him, which it failed to meet. When this lack of care culminated in petitioner's injury, respondent became legally liable to compensate him for the harm.

III.

The trial court also found unseaworthiness in the condition of the bagging. Two questions are raised in this connection: (1) whether the use of defective cargo containers constitutes unseaworthiness, and (2) whether the shipowner's warranty of seaworthiness extends to longshoremen on the pier who are unloading the ship's cargo.

The first question is not one of first impression, for it was decided in petitioner's favor in *Atlantic & Gulf Stevedores, Inc.*, v. *Ellerman Lines, Ltd.*, 369 U. S. 355. There a longshoreman was injured when a bale of burlap cloth fell on him because the metal bands wrapped about the bales, cf. *Cotton-Tie Co.* v. *Simmons*, 106 U. S. 89, broke while the bales were being hoisted with a hook and winch. The trial court charged the jury 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." *Id.*, at 361, n. 3. The charge became critical in the posture of the case before this Court because the Court of Appeals had reversed the portion of the judgment in favor of the stevedore on the shipowner's claim for indemnity because both had been negligent, in the Court of Appeals' view of the jury's special findings. This Court reinstated the original judgment because "there is a view of the case that makes the jury's answers to special interrogatories consistent," namely, on the matter covered by the *proper* charge on unseaworthiness, and therefore the interrogatories "must be resolved that way . . . [to avoid] a collision with the Seventh Amendment." *Id.*, at 364. That unseaworthiness could be predicated upon the defectiveness of the

metal bands wrapped around and used to contain the burlap cargo was thus essential to the disposition of the case.

The holding in *Ellerman* is consistent with earlier decisions.[4] Seaworthiness is not limited, of course, to fitness for travel on the high seas; it includes fitness for loading and unloading. *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85. It has already been held that when cargo is stowed unsafely in the hold a longshoreman injured thereby may recover for unseaworthiness. *E. g., Rich* v. *Ellerman & Bucknall Co.,* 278 F. 2d 704, 706 (C. A. 2d Cir.); *Curtis* v. *A. Garcia y Cia.,* 241 F. 2d 30, 33–34 (C. A. 3d Cir.); *Palazzolo* v. *Pan-Atlantic Corp.,* 211 F. 2d 277, 279 (C. A. 2d Cir.), aff'd on other grounds, 350 U. S. 124, 134; see *Morales* v. *City of Galveston,* 370 U. S. 165, 170 (dictum).[5] And in at least one case it has been held that a longshoreman could recover for injuries caused by a "latent defect" in a cargo crate which broke when the longshoreman stood on it. *Reddick* v. *McAllister Line,* 258 F. 2d 297, 299 (C. A. 2d Cir.).

These cases all reveal a proper application of the seaworthiness doctrine, which is in essence that things about a ship, whether the hull, the decks, the machinery, the tools furnished, the stowage, or the cargo containers, must be reasonably fit for the purpose for which they are to be used. See *Mitchell* v. *Trawler Racer, Inc.,* 362 U. S. 539, 550; *Morales* v. *City of Galveston,* 370 U. S. 165, 169, 172 (dissenting opinion). A ship that leaks is unseaworthy; so is a cargo container that leaks. When the shipowner

[4] The *Ellerman* case was cited with approval in the later decision, *Morales* v. *City of Galveston,* 370 U. S. 165, 170, and the majority of the Court in *Morales,* with one exception, joins the majority here. *Morales,* of course, did not involve the unseaworthiness of cargo containers, but rather that of a ship's hold.

[5] But see *Carabellese* v. *Naviera Aznar, S. A.,* 285 F. 2d 355 (C. A. 2d Cir.) (top-heavy crate of machinery).

accepts cargo in a faulty container or allows the container to become faulty, he assumes the responsibility for injury that this may cause to seamen or their substitutes on or about the ship. Beans belong inside their containers, and anyone should know, as the trial court found, that serious injury may result if they get out of their containers and get underfoot. These bean bags were unfit and thus unseaworthy.

The second question is one of first impression in this Court, although other federal courts have already recognized that the case law compels this conclusion. *Strika* v. *Netherlands Ministry of Traffic,* 185 F. 2d 555 (C. A. 2d Cir.); *Robillard* v. *A. L. Burbank & Co.,* 186 F. Supp. 193 (S. D. N. Y.); see *Pope & Talbot, Inc.,* v. *Cordray,* 258 F. 2d 214, 218 (C. A. 9th Cir.). In *Strika,* while the longshoreman was working on the dock, use of an improper wire cable caused a hatch cover to fall on him. Building on such cases as *O'Donnell* v. *Great Lakes Co.,* 318 U. S. 36, where seamen recovered under the Jones Act for injuries due to the owner's negligence despite their being ashore at the time, and *Sieracki, supra,* where longshoremen aboard ship doing seamen's tasks were permitted to recover for unseaworthiness, the court held that the tort of unseaworthiness arises out of a maritime status or relation and is therefore "cognizable by the maritime [substantive] law whether it arises on sea or on land." Accordingly, the court permitted recovery for unseaworthiness. See also *Hagans* v. *Farrell Lines,* 237 F. 2d 477 (C. A. 3d Cir.), where the point was assumed in a case involving a longshoreman on the pier struck with sacks of beans when a defective winch did not brake properly.

In *Robillard, supra,* a longshoreman was injured when, because of unseaworthy stowage and overladen drafts, he was struck by some cargo that was knocked off the deck onto the pier. The court found "the logic of these authorities . . . [*Sieracki, Strika,* etc.] ineluctable" and

allowed recovery in unseaworthiness while denying it in negligence.

We agree with this reading of the case law and hold that the duty to provide a seaworthy ship and gear, including cargo containers, applies to longshoremen unloading the ship whether they are standing aboard ship or on the pier.

IV.

Finally, we have concluded that the ruling of the trial court on laches is not plainly erroneous and should not have been reversed. The test of laches is prejudice to the other party. *Gardner* v. *Panama R. Co.*, 342 U. S. 29, 30–31; *Cities Service Co.* v. *Puerto Rico Co.*, 305 F. 2d 170, 171 (C. A. 1st Cir.) (both unreasonable delay and consequent prejudice). The trial court, having heard the witnesses testify, concluded that there was no prejudice. The Court of Appeals had no warrant to reverse this finding as plainly erroneous merely because in some way it might have been more advantageous to respondent to question the witnesses sooner than it did.[6] Nor can

[6] We note that respondent admits in its brief that "petitioner's witnesses were available . . . , that the payroll records of the stevedore indicated the potential eyewitnesses, that the accident report filed by the stevedore named the witnesses and formed part of the record of the State Insurance Fund, that respondent produced evidence indicating the cargo damaged prior to and at the time of the discharge, that medical records indicating treatment and the names of the treating physicians were available, and that the respondent took petitioner's deposition and submitted interrogatories . . . ." Moreover, the record indicates that respondent never bothered to interview the petitioner's witnesses Roman or Cintron before trial, despite the fact that petitioner's answers to interrogatories named them. And respondent does not contradict petitioner's contention that respondent chose not to interview any of the witnesses even though it had their names through discovery. In such circumstances it is hardly appropriate for respondent to claim prejudice for want of an opportunity to interview the witnesses sooner. In this connection it should be noted that the accident occurred October 21, 1956;

prejudice be inferred from a variance between the witnesses' testimony and respondent's written records of the unloading. The trial court which heard the witnesses was the proper judge of which evidence was credible; that records differ from testimony here does not mean that respondent was prejudiced by delay—it means that respondent was "prejudiced" by the fact finder's refusal to believe its evidence and no more.

The Court of Appeals erred in setting the judgment of the District Court aside. The judgment of the Court of Appeals is reversed and the case remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE HARLAN, dissenting.

The decision in this case has importance in admiralty law beyond what might appear on the surface. It marks another substantial stride toward the development by this Court of a doctrine that a shipowner is an insurer for those who perform any work on or around a ship subject to maritime jurisdiction. While my primary disagreement with the Court goes to its holding on unseaworthiness, I am also unable to agree with its views on the negligence issue.

I.

The shipowner's duty with respect to seaworthiness is a duty to furnish a vessel that is reasonably fit for its intended use—one that is staunch and strong, that is fitted out with all proper equipment and in good order, and that carries a sufficient and competent crew and com-

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the analogous statute of limitations ran out November 30, 1957; the libel was filed January 9, 1959; trial began March 21, 1960—so that as much time elapsed between filing the action and trial, when respondent failed to interview the witnesses, as elapsed during the period of alleged laches.

plement of officers. Gilmore and Black, The Law of Admiralty, 158. As developed by this Court in cases involving injury to seamen and dock workers, the duty has become absolute and has been found to reach even transitory conditions arising after the outset of the voyage. See *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539. But, except for the few unpersuasive instances noted in this opinion, the obligation has remained one relating essentially to the ship and its appurtenances. See *id.*, at 550. Although the doctrine has been extended—in my view, quite questionably—to *equipment* brought on board by a stevedore, see *Alaska S. S. Co.* v. *Petterson*, 347 U. S. 396,[1] the shipowner has not been deemed an insurer of the condition of the *cargo*. His duty with respect to cargo has been to see that it is stowed in a manner that does not make the ship itself an unsafe place to work. See, *e. g.*, *Palazzolo* v. *Pan-Atlantic S. S. Corp.*, 211 F. 2d 277; *Curtis* v. *A. Garcia y Cia.*, 241 F. 2d 30; *Rich* v. *Ellerman & Bucknall S. S. Co.*, 278 F. 2d 704; *Carabellese* v. *Naviera Aznar, S. A.*, 285 F. 2d 355.[2]

The Court, however, has concluded that it is bound by the determination last Term, in *Atlantic & Gulf Stevedores, Inc.*, v. *Ellerman Lines, Ltd.*, 369 U. S. 355, to hold that defective cargo may in and of itself render the shipowner liable for unseaworthiness. I must admit that some language in that case (369 U. S., at 364) does appear to stand for this proposition. But I think it fair to suggest that it was negligence, not unseaworthiness, on which

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[1] A 6–3 unexplicated *per curiam*.

[2] The result in *Reddick* v. *McAllister Lighterage Line*, 258 F. 2d 297, the only other Court of Appeals case cited by the majority, is consistent with these decisions, for all three judges in *Reddick* agreed that the finding of unseaworthiness could be sustained on the basis of improper stowage. Two of the judges said, but only alternatively, that the finding could "*also* be predicated on the latent defect in the cargo-crate." 258 F. 2d, at 299. (Emphasis added.)

attention was focused there—indeed unseaworthiness was neither briefed nor argued. At all events I am frank to say that in concurring in the result in that case, unseaworthiness as a distinct issue entirely eluded me, as it evidently did the dissenters, who interpreted the majority opinion as suggesting that the jury's finding was premised on a *negligent* failure to inspect the cargo containers. See 369 U. S., at 365. Moreover, the case cited by the *Ellerman* Court in support of its unseaworthiness conclusion, *Weyerhaeuser S. S. Co.* v. *Nacirema Co.*, 355 U. S. 563, did not even touch upon such an issue. So casual a determination should not be blindly accepted as fastening on the law of admiralty such a far-reaching innovation. At least it should not preclude us from considering the question anew when it is now fully and squarely presented.[3]

The Court's decision after *Ellerman*, in *Morales* v. *City of Galveston*, 370 U. S. 165, is the strongest evidence that *Ellerman* was not regarded as establishing the fundamental change in the law of unseaworthiness for which it is now cited. In *Morales*, a longshoreman working in the hold of a ship had been injured by the fumes emanating from grain that had been improperly treated with an excessive amount of a chemical insecticide. The grain in question had been found to be "contaminated," although not due to the fault or with the knowledge of the city or the shipowner, and the question before this Court was whether the longshoreman could recover for unseaworthiness. The Court sustained the conclusion of the lower courts that he could not, because under the circumstances

[3] I do not attach significance to the fact that in *Ellerman* the Court was asked in a petition for rehearing to reconsider whether cargo can itself be unseaworthy. Petitions for rehearing lie within the broad discretion of the Court and are almost never granted. Indeed, this petition for rehearing serves principally to underscore the fact that the point had not been briefed, argued, or apparently even considered by the parties as germane to the case prior to its decision.

the absence of a forced ventilation system in the hold did not constitute unseaworthiness.

> "What caused injury in the present case, however, was not the ship, its appurtenances, or its crew, but the isolated and completely unforeseeable introduction of a noxious agent from without. The trier of the facts ruled, under proper criteria, that the *Grelmarion* [the ship] was not in any manner unfit for the service to which she was to be put, and we cannot say that his determination was wrong." 370 U. S., at 171.

The crucial point for present purposes is that both the majority and the dissenting opinions in *Morales* viewed the issue in terms of the seaworthiness of the *ship:* whether or not it should have had a forced ventilation system in the hold. Nowhere was it even suggested that liability for unseaworthiness could arise solely by virtue of the defective state of the *cargo* itself, even though its contaminated and unsafe condition had clearly been established and was not in dispute. Thus the Court in *Morales* unanimously ignored the possibility of a doctrine which the Court today concludes was squarely established less than three months earlier, in *Ellerman.*[4]

II.

In order to conclude that the respondent shipowner was negligent in the circumstances presented here, it was necessary for the trier of fact to find that the respondent knew or should have known of the defective condition of the bags being unloaded. It is doubtful that such a

[4] The Court in *Morales* cited *Ellerman,* along with several other cases, *only* for the proposition that a ship might be unseaworthy because "[t]he method of loading her cargo, or the manner of its stowage, might be improper." 370 U. S., at 170. Such a proposition, of course, is wholly different from the one for which *Ellerman* is cited today.

finding was made by the trial judge in this case—the closest he came was the statement that the shipowner was negligent in permitting broken and weakened bags to be discharged "when it knew or should have known that injury was likely to result." This finding passes over the basic question: whether respondent had notice, or constructive notice, of the condition of the bags themselves.

Even assuming for present purposes that the necessary finding as to notice was made, I believe that the judgment on negligence cannot be sustained, for there is no evidence whatever to support such a finding. The evidence in the record, including the landing report, relates only to the *stevedore company's* knowledge of the condition of the bags. There is nothing to suggest that any agent or employee of the respondent was or should have been in the area, or knew or should have known of the condition of the cargo at the time of unloading.[5] And of course there is no basis in law for charging the shipowner with responsibility for any negligence on the part of the stevedore company.

Whether from the standpoint of negligence or unseaworthiness I see no basis for the holding in this case. Presumably the result reached by the Court would be the same—at least consistency demands that it should be the same—if this accident had occurred on the dock while the beans were being *loaded* rather than unloaded. Yet in neither case is there warrant for holding the shipowner to have breached any obligation, for in neither case does it own or control the place where the accident occurred and in neither case is the ship's equipment, property, or crew in any way responsible, with or without fault, for the injury.

Accordingly, I would affirm.

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[5] The coopers sent aboard were employed by the stevedore company, not the steamship company.

NATIONAL LABOR RELATIONS BOARD *v.* ERIE RESISTOR CORP. ET AL.

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

No. 288. Argued February 18–19, 1963.—Decided May 13, 1963.

Even in the absence of a finding of specific illegal intent and notwithstanding the employer's claim that his action was necessary to continue his operations during a strike, the National Labor Relations Board was justified in finding that it was a violation of § 8 (a) of the National Labor Relations Act for the employer to discriminate between employees who struck and employees who worked during a strike by awarding an additional seniority credit of 20 years to replacements for strikers and also to strikers who returned to work during the strike, so that, in a subsequent layoff, strikers who did not return to work until after the strike terminated were laid off as junior employees. *Labor Board* v. *Mackay Radio & Tel. Co.*, 304 U. S. 333, distinguished. Pp. 221–237.

303 F. 2d 359, reversed and cause remanded.

Norton J. Come argued the cause for petitioner. With him on the brief were *Solicitor General Cox, Stuart Rothman* and *Dominick L. Manoli.*

John G. Wayman argued the cause for respondents. With him on the brief for respondent Erie Resistor Corp. were *John C. Bane, Jr.* and *Irving Olds Murphy.* On the briefs for respondent International Union of Electrical, Radio & Machine Workers, Local 613, AFL–CIO, were *Benjamin C. Sigal* and *David S. Davidson.*

MR. JUSTICE WHITE delivered the opinion of the Court.

The question before us is whether an employer commits an unfair labor practice under § 8 (a) [1] of the

[1] "SEC. 8 (a). It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

. . . . . .

[*Footnote 1 continued on p. 222*]

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National Labor Relations Act, 61 Stat. 136, 29 U. S. C. § 158, when he extends a 20-year seniority credit to strike replacements and strikers who leave the strike and return to work. The Court of Appeals for the Third Circuit in this case joined the Ninth Circuit, *Labor Board* v. *Potlatch Forests, Inc.*, 189 F. 2d 82 (and see *Labor Board* v. *Lewin-Mathes,* 285 F. 2d 329, from the Seventh Circuit), to hold that such super-seniority awards are not unlawful absent a showing of an illegal motive on the part of the employer. 303 F. 2d 359. The Sixth Circuit, *Swarco, Inc.*, v. *Labor Board,* 303 F. 2d 668, and the National Labor Relations Board are of the opinion that such conduct can be unlawful even when the employer asserts that these additional benefits are necessary to continue his operations during a strike. To resolve these conflicting views upon an important question in the administration of the National Labor Relations Act, we brought the case here. 371 U. S. 810.

Erie Resistor Corporation and Local 613 of the International Union of Electrical, Radio and Machine Workers were bound by a collective bargaining agreement which was due to expire on March 31, 1959. In January 1959, both parties met to negotiate new terms but, after extensive bargaining, they were unable to reach agreement. Upon expiration of the contract, the union, in support of its contract demands, called a strike which was joined by all of the 478 employees in the unit.[2]

The company, under intense competition and subject to insistent demands from its customers to maintain deliv-

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"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; . . .

. . . . . .

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a)."

[2] In addition to these employees, 450 employees in the unit were on layoff status.

eries, decided to continue production operations. Transferring clerks, engineers and other nonunit employees to production jobs, the company managed to keep production at about 15% to 30% of normal during the month of April. On May 3, however, the company notified the union members that it intended to begin hiring replacements and that strikers would retain their jobs until replaced. The plant was located in an area classified by the United States Department of Labor as one of severe unemployment and the company had in fact received applications for employment as early as a week or two after the strike began.

Replacements were told that they would not be laid off or discharged at the end of the strike. To implement that assurance, particularly in view of the 450 employees already laid off on March 31, the company notified the union that it intended to accord the replacements some form of super-seniority. At regular bargaining sessions between the company and union, the union made it clear that, in its view, no matter what form the super-seniority plan might take, it would necessarily work an illegal discrimination against the strikers. As negotiations advanced on other issues, it became evident that super-seniority was fast becoming the focal point of disagreement. On May 28, the company informed the union that it had decided to award 20 years' [3] additional seniority both to replacements and to strikers who returned to work, which would be available only for credit against future layoffs and which could not be used for other employee benefits based on years of service. The strikers, at a union meeting the next day, unanimously resolved to continue striking now in protest against the proposed plan as well.

[3] The figure of 20 years was developed from a projection, on the basis of expected orders, of what the company's work force would be following the strike. As of March 31, the beginning of the strike, a male employee needed seven years' seniority to avoid layoff and a female employee nine years'.

The company made its first official announcement of the super-seniority plan on June 10, and by June 14, 34 new employees, 47 employees recalled from layoff status and 23 returning strikers had accepted production jobs. The union, now under great pressure, offered to give up some of its contract demands if the company would abandon super-seniority or go to arbitration on the question, but the company refused. In the following week, 64 strikers returned to work and 21 replacements took jobs, bringing the total to 102 replacements and recalled workers and 87 returned strikers. When the number of returning strikers went up to 125 during the following week, the union capitulated. A new labor agreement on the remaining economic issues was executed on July 17, and an accompanying settlement agreement was signed providing that the company's replacement and job assurance policy should be resolved by the National Labor Relations Board and the federal courts but was to remain in effect pending final disposition.

Following the strike's termination, the company reinstated those strikers whose jobs had not been filled (all but 129 were returned to their jobs). At about the same time, the union received some 173 resignations from membership. By September of 1959, the production unit work force had reached a high of 442 employees, but by May of 1960, the work force had gradually slipped back to 240. Many employees laid off during this cutback period were reinstated strikers whose seniority was insufficient to retain their jobs as a consequence of the company's super-seniority policy.

The union filed a charge with the National Labor Relations Board alleging that awarding super-seniority during the course of the strike constituted an unfair labor practice and that the subsequent layoff of the recalled strikers pursuant to such a plan was unlawful. The Trial Examiner found that the policy was promulgated for legitimate

economic reasons,[4] not for illegal or discriminatory purposes, and recommended that the union's complaint be dismissed. The Board could not agree with the Trial Examiner's conclusion that specific evidence of subjective intent to discriminate against the union was necessary to finding that super-seniority granted during a strike is an unfair labor practice. Its consistent view, the Board said, had always been that super-seniority, in circumstances such as these, was an unfair labor practice. The Board rejected the argument that super-seniority granted during a strike is a legitimate corollary of the employer's right of replacement under *Labor Board* v. *Mackay Radio & Tel. Co.,* 304 U. S. 333, and detailed at some length the factors which to it indicated that "superseniority is a form of discrimination extending far beyond the employer's right of replacement sanctioned by *Mackay,* and is, moreover, in direct conflict with the express provisions of the Act prohibiting discrimination." Having put aside *Mackay,* the Board went on to deny "that specific evidence of Respondent's discriminatory motivation is required to establish the alleged violations of the Act," relying upon *Radio Officers* v. *Labor Board,* 347 U. S. 17, *Republic Aviation Corp.* v. *Labor Board,* 324 U. S. 793, and *Teamsters Local* v. *Labor Board,* 365 U. S. 667. Moreover, in the Board's judgment, the employer's insistence that its overriding purpose in granting super-seniority was to keep its plant open and

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[4] The Examiner had relied upon the company's employment records for his conclusion that the replacement program was ineffective until the announcement of the super-seniority awards. The General Counsel, to show that such a plan was not necessary for that purpose, pointed to the facts that the company had 300 unprocessed job applications when the strike ended, that the company declared to the union that it could have replaced all the strikers and that the company did not communicate its otherwise well-publicized policy to replacements before they were hired but only after they accepted jobs.

that business necessity justified its conduct was unacceptable since "to excuse such conduct would greatly diminish, if not destroy, the right to strike guaranteed by the Act, and would run directly counter to the guarantees of Sections 8 (a)(1) and (3) that employees shall not be discriminated against for engaging in protected concerted activities." [5] Accordingly, the Board declined to make findings as to the specific motivation of the plan or its business necessity in the circumstances here.

The Court of Appeals rejected as unsupportable the rationale of the Board that a preferential seniority policy is illegal however motivated.

> "We are of the opinion that inherent in the right of an employer to replace strikers during a strike is the concomitant right to adopt a preferential seniority policy which will assure the replacements some form of tenure, provided the policy is adopted SOLELY to protect and continue the business of the employer. We find nothing in the Act which proscribes such a policy. Whether the policy adopted by the Company in the instant case was illegally motivated we do not decide. The question is one of fact for decision by the Board." 303 F. 2d, at 364.

It consequently denied the Board's petition for enforcement and remanded the case for further findings.

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[5] In addition, the Board held that continued insistence on this or a similar proposal as a condition to negotiating an agreement constituted a refusal to bargain in good faith under § 8 (a)(5). See *Labor Board* v. *Wooster Division of Borg-Warner,* 356 U. S. 342.

The Board also concluded that on May 29, when the union voted to continue striking in protest against the super-seniority plan, the strike was converted into an unfair labor practice strike. All strikers not replaced at that date, the Board held, were entitled to reinstatement as of the date of their unconditional abandonment of the strike regardless of replacements. See *Labor Board* v. *Pecheur Lozenge Co.,* 209 F. 2d 393.

We think the Court of Appeals erred in holding that, in the absence of a finding of specific illegal intent, a legitimate business purpose is always a defense to an unfair labor practice charge. Cases in this Court dealing with unfair labor practices have recognized the relevance and importance of showing the employer's intent or motive to discriminate or to interfere with union rights. But specific evidence of such subjective intent is "not an indispensable element of proof of violation." *Radio Officers* v. *Labor Board,* 347 U. S. 17, 44. "Some conduct may by its very nature contain the implications of the required intent; the natural foreseeable consequences of certain action may warrant the inference. . . . The existence of discrimination may at times be inferred by the Board, for 'it is permissible to draw on experience in factual inquiries.'" *Teamsters Local* v. *Labor Board,* 365 U. S. 667, 675.

Though the intent necessary for an unfair labor practice may be shown in different ways, proving it in one manner may have far different weight and far different consequences than proving it in another. When specific evidence of a subjective intent to discriminate or to encourage or discourage union membership is shown, and found, many otherwise innocent or ambiguous actions which are normally incident to the conduct of a business may, without more, be converted into unfair labor practices. *Labor Board* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1, 46 (discharging employees); *Associated Press* v. *Labor Board,* 301 U. S. 103, 132 (discharging employees); *Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177 (hiring employees). Compare *Labor Board* v. *Brown-Dunkin Co.,* 287 F. 2d 17, with *Labor Board* v. *Houston Chronicle Publishing Co.,* 211 F. 2d 848 (subcontracting union work); and *Fiss Corp.,* 43 N. L. R. B. 125, with *Jacob H. Klotz,* 13 N. L. R. B. 746 (movement of plant to another town). Such proof itself is normally sufficient to destroy the em-

ployer's claim of a legitimate business purpose, if one is made, and provides strong support to a finding that there is interference with union rights or that union membership will be discouraged. Conduct which on its face appears to serve legitimate business ends in these cases is wholly impeached by the showing of an intent to encroach upon protected rights. The employer's claim of legitimacy is totally dispelled.[6]

The outcome may well be the same when intent is founded upon the inherently discriminatory or destructive nature of the conduct itself. The employer in such cases must be held to intend the very consequences which foreseeably and inescapably flow from his actions and if he fails to explain away, to justify or to characterize his actions as something different than they appear on their face, an unfair labor practice charge is made out. *Radio Officers* v. *Labor Board, supra.* But, as often happens, the employer may counter by claiming that his actions were taken in the pursuit of legitimate business ends and that his dominant purpose was not to discriminate or to invade union rights but to accomplish business objectives acceptable under the Act. Nevertheless, his conduct *does* speak for itself—it *is* discriminatory and it *does* discourage union membership and whatever the claimed overriding justification may be, it carries with it unavoidable consequences which the employer not only foresaw but which he must have intended. As is not uncommon in human experience, such situations present a complex of motives and preferring one motive to another

[6] Accordingly, those cases holding unlawful a super-seniority plan prompted by a desire on the part of the employer to penalize or discriminate against striking employees, *Ballas Egg Products* v. *Labor Board,* 283 F. 2d 871; *Labor Board* v. *California Date Growers Assn.,* 259 F. 2d 587; *Olin Mathieson Chem. Corp.* v. *Labor Board,* 232 F. 2d 158, aff'd *per curiam,* 352 U. S. 1020, are explainable without reaching the considerations present here.

is in reality the far more delicate task, reflected in part in decisions of this Court,[7] of weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing in the light of the Act and its policy the intended consequences upon employee rights against the business ends to be served by the employer's conduct.[8]

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[7] See, *e. g., Labor Board* v. *Mackay Radio & Tel. Co.,* 304 U. S. 333; *Republic Aviation Corp.* v. *Labor Board,* 324 U. S. 793; *Labor Board* v. *Babcock & Wilcox Co.,* 351 U. S. 105; *Labor Board* v. *Truck Drivers Union,* 353 U. S. 87.

[8] In a variety of situations, the lower courts have dealt with and rejected the approach urged here that conduct otherwise unlawful is automatically excused upon a showing that it was motivated by business exigencies. Thus, it has been held that an employer cannot justify the discriminatory discharge of union members upon the ground that such conduct is the only way to induce a rival union to remove a picket line and permit the resumption of business, *Labor Board* v. *Star Publishing Co.,* 97 F. 2d 465, or rearrange the bargaining unit because of an expected adverse effect on production, *Allis-Chalmers Mfg. Co.* v. *Labor Board,* 162 F. 2d 435, or defend a refusal to bargain in good faith on the ground that unless the employer's view prevails dire consequences to the business will follow, *Labor Board* v. *Harris,* 200 F. 2d 656, or refuse exclusive recognition to a union for fear that such recognition will bring reprisals from rival unions, *McQuay-Norris Mfg. Co.* v. *Labor Board,* 116 F. 2d 748, cert. denied, 313 U. S. 565; *Labor Board* v. *National Broadcasting Co.,* 150 F. 2d 895, or discriminate in his business operations against employees of rival unions or without union affiliation solely in order to keep peace in the plant and avoid disruption of business, *Wilson & Co., Inc.,* v. *Labor Board,* 123 F. 2d 411; *Labor Board* v. *Hudson Motor Car Co.,* 128 F. 2d 528; *Labor Board* v. *Gluek Brewing Co.,* 144 F. 2d 847; *Labor Board* v. *Oertel Brewing Co.,* 197 F. 2d 59; *Labor Board* v. *McCatron,* 216 F. 2d 212, cert. denied, 348 U. S. 943; *Labor Board* v. *Richards,* 265 F. 2d 855. See also *Idaho Potato Growers* v. *Labor Board,* 144 F. 2d 295; *Cusano* v. *Labor Board,* 190 F. 2d 898; *Labor Board* v. *Industrial Cotton Mills,* 208 F. 2d 87, cert. denied, 347 U. S. 935. Indeed, many employers doubtless could conscientiously assert that their unfair labor practices were not malicious but were prompted by their best

This essentially is the teaching of the Court's prior cases dealing with this problem and, in our view, the Board did not depart from it.

The Board made a detailed assessment of super-seniority and, to its experienced eye, such a plan had the following characteristics:

(1) Super-seniority affects the tenure of all strikers whereas permanent replacement, proper under *Mackay,* affects only those who are, in actuality, replaced. It is one thing to say that a striker is subject to loss of his job at the strike's end but quite another to hold that in addition to the threat of replacement, all strikers will at best return to their jobs with seniority inferior to that of the replacements and of those who left the strike.

(2) A super-seniority award necessarily operates to the detriment of those who participated in the strike as compared to nonstrikers.

(3) Super-seniority made available to striking bargaining unit employees as well as to new employees is in effect offering individual benefits to the strikers to induce them to abandon the strike.

(4) Extending the benefits of super-seniority to striking bargaining unit employees as well as to new replacements deals a crippling blow to the strike effort. At one stroke, those with low seniority have the opportunity to obtain the job security which ordinarily only long years of service can bring, while conversely, the accumulated seniority of older employees is seriously diluted. This combination of threat and promise could be expected to undermine the strikers' mutual interest and place

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judgment as to the interests of their business. Such good-faith motive itself, however, has not been deemed an absolute defense to an unfair labor practice charge.

the entire strike effort in jeopardy. The history of this strike and its virtual collapse following the announcement of the plan emphasize the grave repercussions of super-seniority.

(5) Super-seniority renders future bargaining difficult, if not impossible, for the collective bargaining representative. Unlike the replacement granted in *Mackay* which ceases to be an issue once the strike is over, the plan here creates a cleavage in the plant continuing long after the strike is ended. Employees are henceforth divided into two camps: those who stayed with the union and those who returned before the end of the strike and thereby gained extra seniority. This breach is re-emphasized with each subsequent layoff and stands as an ever-present reminder of the dangers connected with striking and with union activities in general.

In the light of this analysis, super-seniority by its very terms operates to discriminate between strikers and nonstrikers, both during and after a strike, and its destructive impact upon the strike and union activity cannot be doubted. The origin of the plan, as respondent insists, may have been to keep production going and it may have been necessary to offer super-seniority to attract replacements and induce union members to leave the strike. But if this is true, accomplishment of respondent's business purpose inexorably was contingent upon attracting sufficient replacements and strikers by offering preferential inducements to those who worked as opposed to those who struck. We think the Board was entitled to treat this case as involving conduct which carried its own indicia of intent and which is barred by the Act unless saved from illegality by an overriding business purpose justifying the invasion of union rights. The Board concluded that the business purpose asserted was insufficient to insulate

the super-seniority plan from the reach of § 8 (a)(1) and § 8 (a)(3), and we turn now to a review of that conclusion.

The Court of Appeals and respondent rely upon *Mackay* as precluding the result reached by the Board but we are not persuaded. Under the decision in that case an employer may operate his plant during a strike and at its conclusion need not discharge those who worked during the strike in order to make way for returning strikers. It may be, as the Court of Appeals said, that "such a replacement policy is obviously discriminatory and may tend to discourage union membership." But *Mackay* did not deal with super-seniority, with its effects upon all strikers, whether replaced or not, or with its powerful impact upon a strike itself. Because the employer's interest must be deemed to outweigh the damage to concerted activities caused by permanently replacing strikers does not mean it also outweighs the far greater encroachment resulting from super-seniority in addition to permanent replacement.

We have no intention of questioning the continuing vitality of the *Mackay* rule, but we are not prepared to extend it to the situation we have here. To do so would require us to set aside the Board's considered judgment that the Act and its underlying policy require, in the present context, giving more weight to the harm wrought by super-seniority than to the interest of the employer in operating its plant during the strike by utilizing this particular means of attracting replacements. We find nothing in the Act or its legislative history to indicate that super-seniority is necessarily an acceptable method of resisting the economic impact of a strike, nor do we find anything inconsistent with the result which the Board reached. On the contrary, these sources are wholly consistent with, and lend full support to, the conclusion of the Board.

Section 7 [9] guarantees, and § 8 (a)(1) protects from employer interference the rights of employees to engage in concerted activities, which, as Congress has indicated, H. R. Rep. No. 245, 80th Cong., 1st Sess. 26, include the right to strike. Under § 8 (a)(3), it is unlawful for an employer by discrimination in terms of employment to discourage "membership in any labor organization," which includes discouraging participation in concerted activities, *Radio Officers* v. *Labor Board,* 347 U. S. 17, 39–40, such as a legitimate strike. *Labor Board* v. *Wheeling Pipe Line, Inc.,* 229 F. 2d 391; *Republic Steel Corp.* v. *Labor Board,* 114 F. 2d 820. Section 13 [10] makes clear that although the strike weapon is not an unqualified right, nothing in the Act except as specifically provided is to be construed to interfere with this means of redress, H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 59, and § 2 (3) [11] preserves to strikers their unfilled positions and status as employees during the pendency of a strike. S. Rep. No. 573, 74th Cong., 1st Sess. 6.[12] This repeated solicitude for

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[9] "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3)."

[10] "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

[11] "The term 'employee' . . . shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment . . . ."

[12] This concern for the maintenance of the status prevailing before the strike has had its most recent manifestation in the 1959 amend-

the right to strike is predicated upon the conclusion that a strike when legitimately employed is an economic weapon which in great measure implements and supports the principles of the collective bargaining system.[13]

While Congress has from time to time revamped and redirected national labor policy, its concern for the integrity of the strike weapon has remained constant. Thus when Congress chose to qualify the use of the strike, it did so by prescribing the limits and conditions of the abridgment in exacting detail, *e. g.*, §§ 8 (b)(4), 8 (d), by indicating the precise procedures to be followed in effecting the interference, *e. g.*, § 10 (j), (k), (l); §§ 206–210, Labor Management Relations Act, and by preserving the positive command of § 13 that the right to strike is to be given a

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ments to the National Labor Relations Act. Congress there withdrew the ban inserted by the Taft-Hartley amendment disqualifying replaced strikers from voting in union elections. Now, employees not entitled to reinstatement can, under regulations promulgated by the Board, exercise their pre-strike voting rights. See § 9 (c)(3); S. Rep. No. 187, 86th Cong., 1st Sess. 32–33.

[13] "Labor unions . . . were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to deal on equality with their employer. They united to exert influence upon him and to leave him in a body in order by this inconvenience to induce him to make better terms with them. They were withholding their labor of economic value to make him pay what they thought it was worth. The right to combine for such a lawful purpose has in many years not been denied by any court. The strike became a lawful instrument in a lawful economic struggle or competition between employer and employees as to the share or division between them of the joint product of labor and capital."

American Steel Foundries v. *Tri-City Council*, 257 U. S. 184, 209, quoted in Staff Report of Senate Committee on Education and Labor, 74th Cong., 1st Sess., Comparison of S. 2926 (73d Cong.) and S. 1958

generous interpretation within the scope of the labor Act. The courts have likewise repeatedly recognized and effectuated the strong interest of federal labor policy in the legitimate use of the strike. *Automobile Workers* v. *O'Brien,* 339 U. S. 454; *Amalgamated Assn. of Elec. Ry. Employees* v. *Wisconsin Employment Rel. Bd.,* 340 U. S. 383; *Labor Board* v. *Remington Rand, Inc.,* 130 F. 2d 919; *Cusano* v. *Labor Board,* 190 F. 2d 898; cf. *Sinclair Ref. Co.* v. *Atkinson,* 370 U. S. 195.

Accordingly, in view of the deference paid the strike weapon by the federal labor laws and the devastating consequences upon it which the Board found was and would be precipitated by respondent's inherently discriminatory super-seniority plan, we cannot say the Board erred

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(74th Cong.) 20. See also, Remarks of Senator Wagner before Senate Committee on Education and Labor, 73d Cong., 2d Sess., Hearings on S. 2926, 10–11:

> "It has been urged that the bill places a premium on discord by declaring that none of its provisions shall impair the right to strike. On the contrary, nothing would do more to alienate employee cooperation and to promote unrest than a law which did not make it clear that employees could refrain from working if that should become their only redress."

Remarks of Senator Taft, 93 Cong. Rec. 3835 (1947):

> "That means that we recognize freedom to strike when the question involved is the improvement of wages, hours, and working conditions, when a contract has expired and neither side is bound by a contract. We recognize that right in spite of the inconvenience, and in some cases perhaps danger, to the people of the United States which may result from the exercise of such right. . . . We have considered the question whether the right to strike can be modified. I think it can be modified in cases which do not involve the basic question of wages, prices, and working conditions. . . . So far as the bill is concerned, we have proceeded on the theory that there is a right to strike and that labor peace must be based on free collective bargaining. We have done nothing to outlaw strikes for basic wages, hours, and working conditions after proper opportunity for mediation."

in the balance which it struck here. Although the Board's decisions are by no means immune from attack in the courts as cases in this Court amply illustrate, *e. g., Labor Board* v. *Babcock & Wilcox Co.,* 351 U. S. 105; *Labor Board* v. *United Steelworkers,* 357 U. S. 357; *Labor Board* v. *Insurance Agents,* 361 U. S. 477, its findings here are supported by substantial evidence, *Universal Camera Corp.* v. *Labor Board,* 340 U. S. 474, its explication is not inadequate, irrational or arbitrary, compare *Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177, 196–197; *Labor Board* v. *United Steeworkers, supra,* and it did not exceed its powers or venture into an area barred by the statute. Compare *Labor Board* v. *Insurance Agents, supra.* The matter before the Board lay well within the mainstream of its duties. It was attempting to deal with an issue which Congress had placed in its hands and "where Congress has in the statute given the Board a question to answer, the courts will give respect to that answer." *Labor Board* v. *Insurance Agents, supra,* at 499. Here, as in other cases, we must recognize the Board's special function of applying the general provisions of the Act to the complexities of industrial life, *Republic Aviation Corp.* v. *Labor Board,* 324 U. S. 793, 798; *Phelps Dodge Corp.* v. *Labor Board, supra,* at 194, and of "[appraising] carefully the interests of both sides of any labor-management controversy in the diverse circumstances of particular cases" from its special understanding of "the actualities of industrial relations." *Labor Board* v. *United Steelworkers, supra,* at 362–363. "The ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." *Labor Board* v. *Truck Drivers Union,* 353 U. S. 87, 96.

Consequently, because the Board's judgment was that the claimed business purpose would not outweigh the

necessary harm to employee rights—a judgment which we sustain—it could properly put aside evidence of respondent's motive and decline to find whether the conduct was or was not prompted by the claimed business purpose. We reverse the judgment of the Court of Appeals and remand the case to that court since its review was a limited one and it must now reach the remaining questions before it, including the propriety of the remedy which at least in part turns upon the Board's construction of the settlement agreement as being no barrier to an award not only of reinstatement but of back pay as well.[14]

Reversed and remanded.

MR. JUSTICE HARLAN, concurring.

I agree with the Court that the Board's conclusions respecting this 20-year "superseniority" plan were justified without inquiry into the respondents' motives. However, I do not think that the same thing would necessarily be true in all circumstances, as for example with a plan providing for a much shorter period of extra seniority. Being unsure whether the Court intends to hold that the Board has power to outlaw *all* such plans, irrespective of the employer's motives and other circumstances, or only to sustain its action in the particular circumstances of *this* case, I concur in the judgment.

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[14] "We do not agree with Respondent's contention that the Union in its strike settlement agreement of July 17 waived all rights for these employees. The settlement agreement provided, *inter alia:* 'The Company's replacement and job assurance policy to be resolved by the NLRB and the Federal Courts and to remain in effect pending final disposition.' It is clear that this agreement was intended merely as an interim settlement pending legal determination of the employees' rights. In any event, we would not in our discretion honor a private settlement which purported to deny to employees the rights guaranteed them by the Act. Cf. *Wooster Division of Borg-Warner Corporation,* 121 NLRB 1492, 1495." *Erie Resistor Corp.,* 132 N. L. R. B. 621, 631 n. 31.

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SMITH *v.* MISSISSIPPI.

CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI.

No. 667. Argued April 30, 1963.—Decided May 13, 1963.

After oral argument and study of the record, it appears that the record is not sufficient to permit decision of petitioner's claims that, in his trial and conviction for rape, he was denied rights secured to him by the Fourteenth Amendment. Therefore, the writ of certiorari is dismissed as improvidently granted, without prejudice to an application for federal habeas corpus relief under 28 U. S. C. § 2241 after exhaustion of any state remedies still open to petitioner.

Reported below: —— Miss. ——, 139 So. 2d 857.

Morris B. Abram argued the cause for petitioner. With him on the brief were *Melvin L. Wulf, Rowland Watts, Norman Dorsen* and *William L. Higgs.*

G. Garland Lyell, Jr., Assistant Attorney General of Mississippi, argued the cause for respondent. With him on the brief was *Joe T. Patterson,* Attorney General of Mississippi.

PER CURIAM.

The petitioner was convicted of rape by a jury in the Circuit Court of Madison County, Mississippi, and sentenced to death. The conviction was affirmed by the Supreme Court of Mississippi. —— Miss. ——, 139 So. 2d 857. We granted petitioner's motion for leave to proceed *in forma pauperis,* and his petition for certiorari which presented several claims of alleged denial of rights secured to him by the Fourteenth Amendment. 371 U. S. 939. After oral argument and study of the record, we have reached the conclusion that the record is not sufficient to permit decision of his constitutional claims. The writ is therefore dismissed as improvidently granted, with-

out prejudice to an application for federal habeas corpus relief under 28 U. S. C. § 2241 after exhaustion of any state remedies still open to him. See 28 U. S. C. § 2254; *Fay* v. *Noia,* 372 U. S. 391, 435.

Upon the effective date of our action today, the stay of execution granted October 5, 1962, by MR. JUSTICE BLACK expires of its own terms. We see no reason, however, to continue the stay in effect. Although the Mississippi Supreme Court, see —— Miss. ——, 145 So. 2d 688, reserved to the State the right, upon this Court's disposition of the writ of certiorari, to apply for an order fixing a new execution date, we assume that that court will not act on application of the State without affording petitioner an opportunity to pursue with due diligence any available state remedies and, if necessary, the remedy in federal habeas corpus.

Writ dismissed.

SHOTT *v.* OHIO.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 877. Decided May 13, 1963.

Appeal dismissed and certiorari denied.

Reported below: 173 Ohio St. 542, 184 N. E. 2d 213.

Thurman Arnold, James G. Andrews, Jr. and *John A. Lloyd, Jr.* for appellant.

Harry C. Schoettmer for appellee.

PER CURIAM.

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

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

FLORA CONSTRUCTION CO. *v.* GRAND JUNCTION STEEL FABRICATING CO. ET AL.

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

No. 949. Decided May 13, 1963.

Appeal dismissed for want of a substantial federal question.

PER CURIAM.

The motion to dispense with printing the jurisdictional statement is granted.

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

ABERNATHY ET AL. *v.* CARPENTER, DIRECTOR OF REVENUE FOR MISSOURI.

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

No. 905. Decided May 13, 1963.

208 F. Supp. 793, affirmed.

Stanford S. Meyer for appellants.

Thomas F. Eagleton, Attorney General of Missouri, and *Robert D. Kingsland* and *Albert J. Stephan, Jr.,* Assistant Attorneys General, for appellee.

PER CURIAM.

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

GEORGE ET AL. *v.* CLEMMONS, SHERIFF.

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

No. 975. Decided May 13, 1963.

Certiorari granted; judgment reversed.

Robert L. Carter and *Johnnie A. Jones* for petitioners.

Jack P. F. Gremillion, Attorney General of Louisiana, for respondent.

PER CURIAM.

The petition for writ of certiorari is granted and the judgment is reversed. *Johnson* v. *Virginia, ante,* p. 61. Cf. *Thompson* v. *Louisville,* 362 U. S. 199.

BOYES *v.* UNITED STATES.

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

No. 59, Misc. Decided May 13, 1963.

Certiorari granted; judgment vacated; and case remanded.

Petitioner *pro se.*

Solicitor General Cox for the United States.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded to the United States District Court for the Western District of Texas for further consideration in light of *Sanders* v. *United States, ante,* p. 1.

MR. JUSTICE CLARK and MR. JUSTICE HARLAN would deny certiorari on the basis of their dissent in *Sanders* v. *United States, ante,* p. 23.

COPENHAVER *v.* BENNETT, WARDEN.

APPEAL FROM THE SUPREME COURT OF IOWA AND THE DISTRICT COURT OF LEE COUNTY, IOWA.

No. 928, Misc. Decided May 13, 1963.

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.

BAKER *v.* UNITED STATES.

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

No. 494, Misc. Decided May 13, 1963.

Certiorari granted; judgment vacated; and case remanded.
Reported below: 306 F. 2d 491.

Petitioner *pro se.*

Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg and *Sidney M. Glazer* for the United States.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded to the United States District Court for the Western District of Washington for further consideration in light of *Sanders* v. *United States, ante,* p. 1.

MR. JUSTICE CLARK and MR. JUSTICE HARLAN would deny certiorari on the basis of their dissent in *Sanders* v. *United States, ante,* p. 23.

CLARK *v.* PENNSYLVANIA.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

No. 689, Misc. Decided May 13, 1963.

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.

PETERSON ET AL. *v.* CITY OF GREENVILLE.

CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA.

No. 71. Argued November 6–7, 1962.—
Decided May 20, 1963.

Petitioners, ten Negroes, entered a store in Greenville, S. C., and seated themselves at the lunch counter. The manager of the store did not request their arrest; but he sent for police, in whose presence he stated that the lunch counter was closed and requested everyone to leave the area. When petitioners failed to do so, they were arrested and later they were tried and convicted of violating a state trespass statute. The store manager testified that he had asked them to leave because to have served them would have been "contrary to local customs" of segregated service at lunch counters and would have violated a city ordinance requiring separation of the races in restaurants. *Held:* Petitioners' convictions for failure to leave the lunch counter violated the Equal Protection Clause of the Fourteenth Amendment, even if the manager would have acted as he did independently of the existence of the ordinance. Pp. 245–248.

239 S. C. 298, 122 S. E. 2d 826, reversed.

Matthew J. Perry argued the cause for petitioners. With him on the brief were *Jack Greenberg, Constance Baker Motley, James M. Nabrit III, Lincoln C. Jenkins, Jr., Willie T. Smith, Leroy Clark, William T. Coleman, Jr., William R. Ming, Jr.* and *Louis H. Pollak.*

Theodore A. Snyder, Jr. argued the cause for respondent. With him on the brief was *Thomas A. Wofford.*

Solicitor General Cox, by special leave of Court, argued the cause for the United States, as *amicus curiae,* urging reversal. With him on the brief were *Assistant Attorney General Marshall, Ralph S. Spritzer, Louis F. Claiborne, Harold H. Greene, Howard A. Glickstein* and *Richard K. Berg.*

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

The petitioners were convicted in the Recorder's Court of the City of Greenville, South Carolina, for violating the trespass statute of that State.* Each was sentenced to pay a fine of $100 or in lieu thereof to serve 30 days in jail. An appeal to the Greenville County Court was dismissed, and the Supreme Court of South Carolina affirmed. 239 S. C. 298, 122 S. E. 2d 826. We granted certiorari to consider the substantial federal questions presented by the record. 370 U. S. 935.

The 10 petitioners are Negro boys and girls who, on August 9, 1960, entered the S. H. Kress store in Greenville and seated themselves at the lunch counter for the purpose, as they testified, of being served. When the Kress manager observed the petitioners sitting at the counter, he "had one of [his] . . . employees call the Police Department and turn the lights off and state the lunch counter was closed." A captain of police and two other officers responded by proceeding to the store in a patrol car where they were met by other policemen and two state agents who had preceded them there. In the

*S. C. Code, 1952 (Cum. Supp. 1960), § 16–388:

"Entering premises after warned not to do so or failing to leave after requested.

"Any person:

"(1) Who without legal cause or good excuse enters into the dwelling house, place of business or on the premises of another person, after having been warned, within six months preceding, not to do so or

"(2) Who, having entered into the dwelling house, place of business or on the premises of another person without having been warned within six months not to do so, and fails and refuses, without good cause or excuse, to leave immediately upon being ordered or requested to do so by the person in possession, or his agent or representative,

"Shall, on conviction, be fined not more than one hundred dollars, or be imprisoned for not more than thirty days."

presence of the police and the state agents, the manager "announced that the lunch counter was being closed and would everyone leave" the area. The petitioners, who had been sitting at the counter for five minutes, remained seated and were promptly arrested. The boys were searched, and both boys and girls were taken to police headquarters.

The manager of the store did not request the police to arrest petitioners; he asked them to leave because integrated service was "contrary to local customs" of segregation at lunch counters and in violation of the following Greenville City ordinance requiring separation of the races in restaurants:

> "It shall be unlawful for any person owning, managing or controlling any hotel, restaurant, cafe, eating house, boarding-house or similar establishment to furnish meals to white persons and colored persons in the same room, or at the same table, or at the same counter; provided, however, that meals may be served to white persons and colored persons in the same room where separate facilities are furnished. Separate facilities shall be interpreted to mean:
>
> "(a) Separate eating utensils and separate dishes for the serving of food, all of which shall be distinctly marked by some appropriate color scheme or otherwise;
>
> "(b) Separate tables, counters or booths;
>
> "(c) A distance of at least thirty-five feet shall be maintained between the area where white and colored persons are served;
>
> "(d) The area referred to in subsection (c) above shall not be vacant but shall be occupied by the usual display counters and merchandise found in a business concern of a similar nature;

"(e) A separate facility shall be maintained and used for the cleaning of eating utensils and dishes furnished the two races." Code of Greenville, 1953, as amended in 1958, § 31–8.

The manager and the police conceded that the petitioners were clean, well dressed, unoffensive in conduct, and that they sat quietly at the counter which was designed to accommodate 59 persons. The manager described his establishment as a national chain store of 15 or 20 departments, selling over 10,000 items. He stated that the general public was invited to do business at the store and that the patronage of Negroes was solicited in all departments of the store other than the lunch counter.

Petitioners maintain that South Carolina has denied them rights of free speech, both because their activity was protected by the First and Fourteenth Amendments and because the trespass statute did not require a showing that the Kress manager gave them notice of his authority when he asked them to leave. Petitioners also assert that they have been deprived of the equal protection of the laws secured to them against state action by the Fourteenth Amendment. We need decide only the last of the questions thus raised.

The evidence in this case establishes beyond doubt that the Kress management's decision to exclude petitioners from the lunch counter was made because they were Negroes. It cannot be disputed that under our decisions "private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it." *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715, 722; *Turner* v. *City of Memphis,* 369 U. S. 350.

It cannot be denied that here the City of Greenville, an agency of the State, has provided by its ordinance that the decision as to whether a restaurant facility is to be

operated on a desegregated basis is to be reserved to it. When the State has commanded a particular result, it has saved to itself the power to determine that result and thereby "to a significant extent" has "become involved" in it, and, in fact, has removed that decision from the sphere of private choice. It has thus effectively determined that a person owning, managing or controlling an eating place is left with no choice of his own but must segregate his white and Negro patrons. The Kress management, in deciding to exclude Negroes, did precisely what the city law required.

Consequently these convictions cannot stand, even assuming, as respondent contends, that the manager would have acted as he did independently of the existence of the ordinance. The State will not be heard to make this contention in support of the convictions. For the convictions had the effect, which the State cannot deny, of enforcing the ordinance passed by the City of Greenville, the agency of the State. When a state agency passes a law compelling persons to discriminate against other persons because of race, and the State's criminal processes are employed in a way which enforces the discrimination mandated by that law, such a palpable violation of the Fourteenth Amendment cannot be saved by attempting to separate the mental urges of the discriminators.

Reversed.

MR. JUSTICE HARLAN, concurring in the result in No. 71, and dissenting in whole or in part in Nos. 58, 66, 11, and 67.*

These five racial discrimination cases, and No. 68, *Wright* v. *Georgia* (*post*, p. 284) in which I join the opin-

*[No. 58 is *Lombard et al.* v. *Louisiana*, *post*, p. 267; No. 66 is *Gober et al.* v. *City of Birmingham*, *post*, p. 374; No. 11 is *Avent et al.* v. *North Carolina*, *post*, p. 375, and No. 67 is *Shuttlesworth et al.* v. *City of Birmingham*, *post*, p. 262.]

ion of the Court, were argued together. Four of them arise out of "sit-in" demonstrations in the South and involve convictions of Negro students [1] for violations of criminal trespass laws, or similar statutes, in South Carolina (*Peterson, ante,* p. 244), Louisiana (*Lombard, post,* p. 267), Alabama (*Gober, post,* p. 374), and North Carolina (*Avent, post,* p. 375) respectively. Each of these convictions rests on state court findings, which in my opinion are supported by evidence, that the several petitioners had refused to move from "white" lunch counters situated on the premises of privately owned department stores after having been duly requested to do so by the management. The other case involves the conviction of two Negro ministers for inciting, aiding, or abetting criminal trespasses in Alabama (*Shuttlesworth, post,* p. 262).

In deciding these cases the Court does not question the long-established rule that the Fourteenth Amendment reaches only state action. *Civil Rights Cases,* 109 U. S. 3. And it does not suggest that such action, denying equal protection, may be found in the mere enforcement of trespass laws in relation to private business establishments from which the management, of its own free will, has chosen to exclude persons of the Negro race.[2] Judicial enforcement is of course state action, but this is not the end of the inquiry. The ultimate substantive question is whether there has been "State action of a particular character" (*Civil Rights Cases, supra,* at 11)—whether the character of the State's involvement in an arbitrary discrimination is such that it should be held *responsible* for the discrimination.

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[1] Except for one white student who participated in a demonstration. *Lombard, post,* p. 267.

[2] It is not nor could it well be suggested that general admission of Negroes to the stores prevented the management from excluding them from service at the white lunch counters.

This limitation on the scope of the prohibitions of the Fourteenth Amendment serves several vital functions in our system. Underlying the cases involving an alleged denial of equal protection by ostensibly private action is a clash of competing constitutional claims of a high order: liberty and equality. Freedom of the individual to choose his associates or his neighbors, to use and dispose of his property as he sees fit, to be irrational, arbitrary, capricious, even unjust in his personal relations are things all entitled to a large measure of protection from governmental interference. This liberty would be overridden, in the name of equality, if the strictures of the Amendment were applied to governmental and private action without distinction. Also inherent in the concept of state action are values of federalism, a recognition that there are areas of private rights upon which federal power should not lay a heavy hand and which should properly be left to the more precise instruments of local authority.

My differences with the Court relate primarily to its treatment of the state action issue and to the broad strides with which it has proceeded in setting aside the convictions in all of these cases. In my opinion the cases call for discrete treatment and results.

I.

THE PETERSON CASE (No. 71).

In this case, involving the S. H. Kress store in Greenville, South Carolina, the Court finds state action in violation of the Fourteenth Amendment in the circumstance that Greenville still has on its books an ordinance (*ante*, p. 246) requiring segregated facilities for colored and white persons in public eating places. It holds that the *mere existence* of the ordinance rendered the State's enforcement of its trespass laws unconstitutional, quite irrespective of whether the Kress decision to exclude these petitioners from the white lunch counter was actually

influenced by the ordinance. The rationale is that the State, having compelled restaurateurs to segregate their establishments through this city ordinance, cannot be heard to say, in enforcing its trespass statute, that Kress' decision to segregate was in fact but the product of its own untrammeled choice. This is said to follow because the ordinance removes the operation of segregated or desegregated eating facilities "from the sphere of private choice" and because "the State's criminal processes are employed in a way which enforces" the ordinance. *Ante,* p. 248.

This is an alluring but, in my view, a fallacious proposition. Clearly Kress might have preferred for reasons entirely of its own not to serve meals to Negroes along with whites, and the dispositive question on the issue of state action thus becomes whether such was the case, or whether the ordinance played some part in the Kress decision to segregate. That is a question of fact.

Preliminarily, I do not understand the Court to suggest that the ordinance's removal of the right to operate a segregated restaurant "from the sphere of private choice" renders the private restaurant owner the agent of the State, such that his operation of a segregated facility *ipso facto* becomes the act of the State. Such a theory might well carry the consequence that a private person so operating his restaurant would be subject to a Civil Rights Act suit on the part of an excluded Negro for unconstitutional action taken under color of state law (cf. *Monroe* v. *Pape,* 365 U. S. 167)—an incongruous result which I would be loath to infer that the Court intends. Kress is of course a purely private enterprise. It is in no sense "the repository of state power," *Home Tel. & Tel. Co.* v. *Los Angeles,* 227 U. S. 278, 286, and this segregation ordinance no more makes Kress the agent or delegate of the State than would any other prohibitory measure affecting the conduct of its business. The Court does not intimate anything to the contrary.

The majority's approach to the state action issue is in my opinion quite untenable. Although the right of a private restaurateur to operate, if he pleases, on a segregated basis is ostensibly left untouched, the Court in truth effectually deprives him of that right in any State where a law like this Greenville ordinance continues to exist. For a choice that can be enforced only by resort to "self-help" has certainly become a greatly diluted right, if it has not indeed been totally destroyed.

An individual's right to restrict the use of his property, however unregenerate a particular exercise of that right may be thought, lies beyond the reach of the Fourteenth Amendment. The dilution or virtual elimination of that right cannot well be justified either on the premise that it will hasten formal repeal of outworn segregation laws or on the ground that it will facilitate proof of state action in cases of this kind. Those laws have already found their just constitutional deserts in the decisions of this Court, and in many communities in which racial discrimination is no longer a universal or widespread practice such laws may have a purely formal existence and may indeed be totally unknown. Of course this is not to say that their existence on the books may never play a significant and even decisive role in private decision making. But the question in each case, if the right of the individual to make his own decisions is to remain viable, must be: was the discriminatory exclusion in fact influenced by the law? Cf. *Truax* v. *Raich*, 239 U. S. 33.[3] The inexorable rule

[3] In *Truax* the Court, in finding state action in violation of the Fourteenth Amendment, relied on the evidence showing that an alien employee had been discharged by his employer solely because of the latter's fear of criminal penalties for noncompliance with a state statute prohibiting the employment of more than a certain number of aliens. The Court stressed the importance of "the freedom of the employer to exercise his judgment without illegal interference or *compulsion* . . . ." *Id.*, at 38. (Emphasis added.)

which the Court lays down reflects insufficient reckoning with the course of history.

It is suggested that requiring proof of the effect of such laws in individual instances would involve "attempting to separate the mental urges of the discriminators" (*ante,* p. 248). But proof of state of mind is not a novel concept in the law of evidence, see 2 Wigmore, Evidence (3d ed. 1940), §§ 385–393, and such a requirement presents no special barriers in this situation. The mere showing of such an ordinance would, in my judgment, make out a *prima facie* case of invalid state action, casting on the State the burden of proving that the exclusion was in fact the product solely of private choice. In circumstances like these that burden is indeed a heavy one. This is the rule which, in my opinion, evenhanded constitutional doctrine and recognized evidentiary rules dictate. Its application here calls for reversal of these convictions.

At the trial existence of the Greenville segregation ordinance was shown and the city adduced no rebutting evidence indicating that the Kress manager's decision to exclude these petitioners from the white lunch counter was wholly the product of private choice. All doubt on that score is indeed removed by the store manager's own testimony. Asked for the reasons for his action, he said: "It's contrary to local customs *and* its [*sic*] also the ordinance that has been discussed" (quite evidently referring to the segregation ordinance). (Emphasis added.) This suffices to establish state action, and leads me to join in the judgment of the Court.

II.

THE LOMBARD CASE (No. 58).

In this case, involving "sit-ins" at the McCrory store in New Orleans, Louisiana, the Court carries its state

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action rule a step further. Neither Louisiana nor New Orleans has any statute or ordinance requiring segregated eating facilities. In this instance state action is found in the public announcements of the Superintendent of Police and the Mayor of New Orleans, set forth in the Court's opinion (*post,* p. 267), which were issued shortly after "sit-in" demonstrations had first begun in the city. Treating these announcements as the equivalent of a city ordinance, the Court holds that they served to make the State's employment of its "trespass" statute against these petitioners unconstitutional, again without regard to whether or not their exclusion by McCrory was in fact influenced in any way by these announcements.

In addition to what has already been said in criticism of the *Peterson* ruling, there are two further factors that make the Court's theory even more untenable in this case.

1. The announcements of the Police Superintendent and the Mayor cannot well be compared with a city ordinance commanding segregated eating facilities. Neither announcement was addressed to restaurateurs in particular, but to the citizenry generally. They did not press private proprietors to segregate eating facilities; rather they in effect simply urged Negroes and whites not to insist on nonsegregated service in places where segregated service obtained. In short, so far as this record shows, had the McCrory store chosen to serve these petitioners along with whites it could have done so free of any sanctions or official constraint.

2. The Court seems to take the two announcements as an attempt on the part of the Police Superintendent and the Mayor to perpetuate segregation in New Orleans. I think they are more properly read as an effort by these two officials to preserve the peace in what they might reasonably have regarded as a highly charged atmosphere. That seems to me the fair tenor of their exhortations.

If there were nothing more to this case, I would vote to affirm these convictions for want of a sufficient showing of state action denying equal protection. There is, however, some evidence in the record which might indicate advance collaboration between the police and McCrory with respect to these episodes. The trial judge refused to permit defense counsel to pursue inquiry along this line, although counsel had made it perfectly clear that his purpose was to establish official participation in the exclusion of his clients by the McCrory store. I think the shutting off of this line of inquiry was prejudicial error.

For this reason I would vacate the judgment of the state court and remand the case for a new trial so that the issue of state action may be properly explored.

III.

THE GOBER CASE (No. 66).

This case concerns "sit-ins" at five different department stores in Birmingham, Alabama. Birmingham has an ordinance requiring segregated facilities in public eating places.[4]

It is first necessary to consider whether this ordinance is properly before us, a question not dealt with in this Court's *per curiam* reversal. The Alabama Court of Appeals refused to consider the effect of the ordinance on petitioners' claim of denial of equal protection, stating

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[4] General City Code of Birmingham (1944), § 369: "It shall be unlawful to conduct a restaurant or other place for the serving of food in the city, at which white and colored people are served in the same room, unless such white and colored persons are effectually separated by a solid partition extending from the floor upward to a distance of seven feet or higher, and unless a separate entrance from the street is provided for each compartment."

that "there is no question presented in the record before us, by the pleading, of any statute or ordinance requiring the separation of the races in restaurants. The prosecution was for a criminal trespass on private property." 41 Ala. App., at 317, 133 So. 2d, at 701.

This, on the one hand, could be taken to mean that the Birmingham ordinance was not properly before the Court of Appeals because it had not been specially pleaded as a defense. We would then be faced with the necessity of deciding whether such a state ground is adequate to preclude our consideration of the significance of the ordinance. In support of the view that such a ground exists respondent refers us to Alabama Code (1958), Tit. 7, § 225, requiring matters of defense to be pleaded specially in a civil case,[5] and to the statement of the Court of Appeals that "[t]his being an appeal from a conviction for violating a city ordinance, it is quasi criminal in nature, and subject to rules governing civil appeals," 41 Ala. App., at 315, 133 So. 2d, at 699.

On the other hand, in view of the last sentence in the Court of Appeals' statement—"The prosecution was for a criminal trespass on private property"—it may be that the court simply shared the apparent misapprehension of the trial judge as to the materiality of the segregation ordinance in a prosecution laid only under the trespass statute.[6] This view of the matter is lent some color by the circumstance that, although Alabama Code (1958), Tit. 7, § 429 (1), rendered the ordinance judicially noticeable, the Court of Appeals' opinion does not address itself at all to the question whether the ordinance, bearing as it did on the vital issue of state action in this trespass prose-

[5] "The defendant may plead more pleas than one without unnecessary repetition; and, if he does not rely solely on a denial of the plaintiff's cause of action, must plead specially the matter of defense."

[6] See the printed record in this Court, pp. 24–26.

cution, was in truth a "matter of defense" within the meaning of § 225.[7]

In this muddy posture of things it is impossible to say whether or not these judgments are supportable on an adequate and independent state ground. Because of this, and in light of the views I have expressed in the *Peterson* case (*supra,* pp. 250–253), two things are called for. *First,* the parties should be afforded an opportunity to obtain from the Alabama Court of Appeals a clarification of its procedural holding respecting the Birmingham segregation ordinance. If the Court of Appeals holds that it is procedurally foreclosed from considering the ordinance, the adequacy of such a state ground would then of course be a question for this Court. *Second,* if the Court of Appeals holds that it is not foreclosed from considering the ordinance, there should then be a new trial so that the bearing of the ordinance on the issue of state action may be fully explored. To these ends I would vacate the judgments below and remand the case to the Alabama Court of Appeals.

IV.

THE AVENT CASE (No. 11).

In this case it turns out that the City of Durham, North Carolina, where these "sit-ins" took place, also had a restaurant segregation ordinance.[8] In affirming

[7] In this connection it is not at all clear that the state rules relating to civil actions apply to *all* phases of this prosecution. The Court of Appeals referred only to their application to *appeals* in this type of case, and it may be that the special pleading rule of § 225 does not apply in a trespass prosecution. The Alabama cases cited by the Court of Appeals, see 41 Ala. App., at 315, 316, 133 So. 2d, at 699, shed no light on this question, and respondent has not referred to any other relevant authority.

[8] Code of Durham (1947), c. 13, § 42: "In all licensed restaurants, public eating places and 'weenie shops' where persons of the white

these convictions the North Carolina Supreme Court evidently proceeded, however, on the erroneous assumption that no such ordinance existed. 253 N. C. 580, 118 S. E. 2d 47.

In these circumstances I agree with the Court that the case should be returned to the State Supreme Court for further consideration. See *Patterson* v. *Alabama,* 294 U. S. 600. But disagreeing as I do with the premises on which the case will go back under the majority's opinion in *Peterson,* I must to that extent dissent from the opinion and judgment of the Court.

V.

THE SHUTTLESWORTH CASE (No. 67).

This last of these cases concerns the Alabama convictions of two Negro clergymen, Shuttlesworth and Billups, for inciting, aiding, or abetting alleged violations of the criminal trespass ordinance of the City of Birmingham.

On the premise that these two petitioners were charged with inciting, aiding, or abetting only the "sit-ins" involved in the *Gober* case (*post,* p. 374), the Court, relying on the unassailable proposition that "there can be no conviction for aiding and abetting someone to do an innocent act" (*post,* p. 265), holds that these convictions must fall in consequence of its reversal of those in the *Gober* case. The difficulty with this holding is that it is based on an erroneous premise. Shuttlesworth and Billups were not charged *merely* with inciting the *Gober*

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and colored races are permitted to be served with, and eat food, and are allowed to congregate, there shall be provided separate rooms for the separate accommodation of each race. The partition between such rooms shall be constructed of wood, plaster or brick or like material, and shall reach from floor to the ceiling. Any person violating this section shall, upon conviction, pay a fine of ten dollars and each day's violation thereof shall constitute a separate and distinct offense."

"sit-ins" but *generally* with inciting violations of the Birmingham trespass ordinance. And I do not think it can be said that the record lacks evidence of incitement of "sit-ins" other than those involved in *Gober*.[9] Hence the Court's reversal in *Gober* cannot well serve as the ground for reversal here.

There are, however, other reasons why, in my opinion, these convictions cannot stand. As to Billups, the record shows that he brought one of the students to Shuttlesworth's home and remained there while Shuttlesworth talked. But there is nothing to indicate Billups' purpose in bringing the student, what he said to him, or even whether he approved or disapproved of what Shuttlesworth urged the students to do. A conviction so lacking in evidence to support the offense charged must fall under the Fourteenth Amendment. *Thompson* v. *Louisville*, 362 U. S. 199.

On this score the situation is different with respect to Shuttlesworth. Given (1) the then current prevalence of

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[9] At the trial testimony was introduced showing that Gober and Davis (two of the 10 defendants in the *Gober* case), as well as "other persons" who "were present . . . in the Court room" when the defendants in the *Gober* case were tried for trespass, attended the meeting at Shuttlesworth's house. There was also testimony that "other boys who attended the meeting" participated in "sit-ins" in Birmingham on the same day that the *Gober* "sit-ins" occurred. The record does not reveal whether the *Gober* defendants were the *only* persons who participated in the "sit-ins," nor whether there were others who were incited by Shuttlesworth but who did not thereafter take part in "sit-in" demonstrations. The trial court's statement that "you have here the ten students and the Court thinks they were misused and misled into a violation of a City Ordinance" was made in the course of sentencing the *Gober* defendants, not Shuttlesworth or Billups (the trials of both of these groups of defendants having been conducted *seriatim* by the same judge, who reserved sentencing until all trials had been completed). It was in no sense a finding of fact with respect to the crimes with which Shuttlesworth and Billups had been charged.

"sit-in" demonstrations throughout the South,[10] (2) the commonly understood use of the phrase "sit-in" or "sit-down" to designate a form of protest which typically resulted in arrest and conviction for criminal trespass or other similar offense, and (3) the evidence as to Shuttlesworth's calling for "sit-down" volunteers and his statement that he would get any who volunteered "out of jail," I cannot say that it was constitutionally impermissible for the State to find that Shuttlesworth had urged the volunteers to demonstrate on privately owned premises despite any objections by their owners, and thus to engage in criminal trespass.

Nevertheless this does not end the matter. The trespasses which Shuttlesworth was convicted of inciting may or may not have involved denials of equal protection, depending on the event of the "state action" issue. Certainly one may not be convicted for inciting conduct which is not itself constitutionally punishable. And dealing as we are in the realm of expression, I do not think a State may punish incitement of activity in circumstances where there is a substantial likelihood that such activity may be constitutionally protected. Cf. *Garner* v. *Louisiana,* 368 U. S. 157, 196–207 (concurring opinion of this writer). To ignore that factor would unduly inhibit freedom of expression, even though criminal liability for incitement does not ordinarily depend upon the event of the conduct incited.[11]

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[10] See Pollitt, Dime Store Demonstrations: Events and Legal Problems of First Sixty Days, Duke L. J. (1960) 315, 317–337. Apparently the state courts took judicial notice of such demonstrations in Alabama, which they evidently had the right to do. See, *e. g.*, *Green* v. *Mutual Benefit Health & Accident Assn.*, 267 Ala. 56, 99 So. 2d 694.

[11] See Wechsler, Jones and Korn, The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy, 61 Col. L. Rev. 571, 621–628 (1961).

Were I able to agree with the Court that the existence of the Birmingham segregation ordinance without more rendered all incited trespasses in Birmingham immune from prosecution, I think outright reversal of Shuttlesworth's conviction would be called for. But because of my different views as to the significance of such ordinances (*supra,* pp. 251–253), I believe that the bearing of this Birmingham ordinance on the issue of "substantiality" in Shuttlesworth's case, no less than its bearing on "state action" in the *Gober* case, involves questions of fact which must first be determined by the state courts. I would therefore vacate the judgment as to Shuttlesworth and remand his case for a new trial.

These then are the results in these cases which in my view sound legal principles require.

SHUTTLESWORTH ET AL. *v.* CITY OF BIRMINGHAM.

CERTIORARI TO THE COURT OF APPEALS OF ALABAMA.

No. 67. Argued November 6–7, 1962.—
Decided May 20, 1963.

Petitioners, two Negro ministers, were convicted in an Alabama State Court of aiding and abetting a violation of a criminal trespass ordinance of Birmingham, Ala. The only evidence against them was to the effect that they had incited ten Negro students to engage in a "sit-down demonstration" at a white lunch counter as a protest against racial segregation. In *Gober* v. *City of Birmingham, post,* p. 374, this Court today holds, on the authority of *Peterson* v. *City of Greenville, ante,* p. 244, that the convictions of those ten students for criminal trespass were constitutionally invalid. *Held:* Since those convictions have been set aside, it follows that these petitioners did not incite or aid and abet any crime, and that, therefore, the convictions of these petitioners must also be set aside. Pp. 263–266.

41 Ala. App. 318, 319, 134 So. 2d 213, 215, reversed.

Constance Baker Motley argued the cause for petitioners. With her on the brief were *Jack Greenberg, Arthur D. Shores, Peter A. Hall, Orzell Billingsley, Jr., Oscar W. Adams, Jr.* and *Leroy D. Clark.*

Watts E. Davis and *J. M. Breckenridge* argued the cause for respondent. With *Mr. Davis* on the brief was *Earl McBee.*

Solicitor General Cox, by special leave of Court, argued the cause for the United States, as *amicus curiae,* urging reversal. With him on the brief were *Assistant Attorney General Marshall, Ralph S. Spritzer, Louis F. Claiborne, Harold H. Greene, Howard A. Glickstein* and *Richard K. Berg.*

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

The petitioners, both Negro ministers, were tried and convicted in the Birmingham, Alabama, Recorder's Court for aiding and abetting a violation of the city criminal trespass ordinance. The complaint filed with respect to Shuttlesworth charged:

> "Comes the City of Birmingham, Alabama, a municipal corporation, and complains that F. L. Shuttlesworth, within twelve months before the beginning of this prosecution, and within the City of Birmingham or the police jurisdiction thereof, did incite or aid or abet in the violation of an ordinance of the City, to-wit, Section 1436 [1] of the General City Code of Birmingham of 1944, in that F. L. Shuttlesworth did incite or aid or abet another person to go or remain on the premises of another after being warned not to do so, contrary to and in violation of Section 824 [2] of the General City Code of Birmingham of 1944." (Footnotes added.)

An identical complaint was filed charging Billups.

On appeal to the Circuit Court petitioners received a trial *de novo* and were again convicted. Petitioner Shuttlesworth was sentenced to 180 days in jail at hard labor

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[1] Birmingham General City Code, 1944, § 1436, provides:

"*After Warning*—Any person who enters into the dwelling house, or goes or remains on the premises of another, after being warned not to do so, shall on conviction, be punished as provided in Section 4, provided, that this Section shall not apply to police officers in the discharge of official duties."

[2] Birmingham General City Code, 1944, § 824, provides:

"It shall be unlawful for any person to incite, or aid or abet in, the violation of any law or ordinance of the city, or any provision of state law, the violation of which is a misdemeanor."

and a fine of $100. Petitioner Billups was sentenced to 30 days and a fine of $25. On further appeal to the Alabama Court of Appeals the convictions were affirmed. 41 Ala. App. 318, 319, 134 So. 2d 213, 215. The Alabama Supreme Court denied writs of certiorari. 273 Ala. 704, 713, 134 So. 2d 214, 215. Because of the grave constitutional questions involved, we granted certiorari. 370 U. S. 934.

Though petitioners took separate appeals, they were jointly tried in the Circuit Court. The evidence is sketchy in character. Only one witness testified, a city detective who had listened to petitioners' trial in the Recorder's Court.[3] The detective testified to his recollection of the testimony of two college boys whom (among others) petitioners were alleged to have incited to commit the criminal trespass.

These two boys were James E. Gober and James Albert Davis. They were convicted of criminal trespass in a separate proceeding subsequent to petitioners' trial. In *Gober* v. *City of Birmingham, post,* p. 374, decided this day, we hold on the authority of *Peterson* v. *City of Greenville, ante,* p. 244, that the convictions of Gober and Davis are constitutionally invalid. The detective stated that in the Recorder's Court Gober and Davis had testified as follows:

James Gober and James Albert Davis, both Negro college students, went to the home of petitioner, Rev. Shuttlesworth, on March 30, 1960, where there were other college students. Petitioner, Rev. Billups, drove Davis there, and Billups was present when Shuttlesworth asked for volunteers to participate in "sit-down demonstrations." Gober "testified that in response to Rev. Shuttlesworth asking for volunteers to participate in the sit

[3] Petitioners objected to all of this testimony as hearsay and on constitutional grounds, but these objections were overruled.

down strikes that he volunteered to go to Pizitz at 10:30 and take part in the sit down demonstrations." A list was made by someone, and Shuttlesworth announced he would get them out of jail. Gober and Davis participated in sit-down demonstrations on the following day as did others who were present.

This is the sole evidence upon which the petitioners were convicted. There was no evidence that any of the demonstrations which resulted from the meeting were disorderly or otherwise in violation of law.

Petitioners contend that there is no evidence to show guilt of the charged offense. See *Garner* v. *Louisiana,* 368 U. S. 157; *Thompson* v. *Louisville,* 362 U. S. 199. We need not reach that question since there is a more compelling reason why these convictions cannot stand.

Petitioners were convicted for inciting, aiding, and abetting a violation of the city trespass ordinance. The trespass "violation" was that committed by the petitioners in *Gober* v. *City of Birmingham, post,* p. 374.[4] Since the convictions in *Gober* have been set aside, it follows that the present petitioners did not incite or aid and abet any crime, and that therefore their own convictions must be set aside.

It is generally recognized that there can be no conviction for aiding and abetting someone to do an innocent act. See, *e. g., Edwards* v. *United States,* 286 F. 2d 681 (C. A. 5th Cir. 1960); *Meredith* v. *United States,* 238 F. 2d 535 (C. A. 4th Cir. 1956); *Colosacco* v. *United States,* 196 F. 2d 165 (C. A. 10th Cir. 1952); *Karrell* v. *United States,* 181 F. 2d 981, 985 (C. A. 9th Cir. 1950); *Manning* v. *Biddle,* 14 F. 2d 518 (C. A. 8th Cir. 1926); *Kelley* v.

[4] The trial court stated, "[Y]ou have here the ten students and the Court thinks they were misused and misled into a violation of a City Ordinance and has so ruled." As we understand the record, these convictions were based upon the inciting of the 10 students who are the petitioners in *Gober.*

Florida, 79 Fla. 182, 83 So. 909 (1920); *Commonwealth* v. *Long,* 246 Ky. 809, 811–812, 56 S. W. 2d 524, 525 (1933); *Cummings* v. *Commonwealth,* 221 Ky. 301, 313, 298 S. W. 943, 948 (1927); *State* v. *St. Philip,* 169 La. 468, 471–472, 125 So. 451, 452 (1929); *State* v. *Haines,* 51 La. Ann. 731, 25 So. 372 (1899); *Wages* v. *State,* 210 Miss. 187, 190, 49 So. 2d 246, 248 (1950); *State* v. *Cushing,* 61 Nev. 132, 146, 120 P. 2d 208, 215 (1941); *State* v. *Hess,* 233 Wis. 4, 8–9, 288 N. W. 275, 277 (1939); cf. *Langham* v. *State,* 243 Ala. 564, 571, 11 So. 2d 131, 137 (1942).

Reversed.

[For opinion of MR. JUSTICE HARLAN, see *ante,* p. 248.]

LOMBARD ET AL. *v.* LOUISIANA.

CERTIORARI TO THE SUPREME COURT OF LOUISIANA.

No. 58. Argued November 5–7, 1962.—
Decided May 20, 1963.

Petitioners, three Negro students and one white student, entered a store in New Orleans, La., sat at a lunch counter reserved for white people and requested service, which was refused. For refusing to leave when requested to do so by the manager of the store, they were convicted of violating the Louisiana Criminal Mischief Statute, which makes it a crime to refuse to leave a place of business after being ordered to do so by the person in charge of the premises. No state statute or city ordinance required racial segregation in restaurants; but both the Mayor and the Superintendent of Police had announced publicly that such "sit-in demonstrations" would not be permitted. *Held:* Petitioners' convictions violated the Equal Protection Clause of the Fourteenth Amendment. *Peterson* v. *City of Greenville, ante,* p. 244. Pp. 268–274.

241 La. 958, 132 So. 2d 860, reversed.

John P. Nelson argued the cause for petitioners. With him on the brief were *Carl Rachlin, Judith P. Vladeck, Robert F. Collins, Nils R. Douglas* and *Janet M. Riley.*

Jack P. F. Gremillion, Attorney General of Louisiana, argued the cause for respondent. With him on the brief were *Michael E. Culligan* and *William P. Schuler,* Assistant Attorneys General.

Solicitor General Cox, by special leave of Court, argued the cause for the United States, as *amicus curiae,* urging reversal. With him on the brief were *Assistant Attorney General Marshall, Ralph S. Spritzer, Louis F. Claiborne, Harold H. Greene, Howard A. Glickstein* and *Richard K. Berg.*

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

This case presents for review trespass convictions resulting from an attempt by Negroes to be served in a privately owned restaurant customarily patronized only by whites. However, unlike a number of the cases this day decided, no state statute or city ordinance here forbids desegregation of the races in all restaurant facilities. Nevertheless, we conclude that this case is governed by the principles announced in *Peterson* v. *City of Greenville, ante,* p. 244, and that the convictions for this reason must be reversed.

Petitioners are three Negro and one white college students. On September 17, 1960, at about 10:30 in the morning they entered the McCrory Five and Ten Cent Store in New Orleans, Louisiana. They sat down at a refreshment counter at the back of the store and requested service, which was refused. Although no sign so indicated, the management operated the counter on a segregated basis, serving only white patrons. The counter was designed to accommodate 24 persons. Negroes were welcome to shop in other areas of the store. The restaurant manager, believing that the "unusual circumstance" of Negroes sitting at the counter created an "emergency," asked petitioners to leave and, when they did not do so, ordered that the counter be closed. The restaurant manager then contacted the store manager and called the police. He frankly testified that the petitioners did not cause any disturbance, that they were orderly, and that he asked them to leave because they were Negroes. Presumably he asked the white petitioner to leave because he was in the company of Negroes.

A number of police officers, including a captain and major of police, arrived at the store shortly after they were called. Three of the officers had a conference with the store manager. The store manager then went behind

the counter, faced petitioners, and in a loud voice asked them to leave. He also testified that the petitioners were merely sitting quietly at the counter throughout these happenings. When petitioners remained seated, the police major spoke to petitioner Goldfinch, and asked him what they were doing there. Mr. Goldfinch replied that petitioners "were going to sit there until they were going to be served." When petitioners still declined to leave, they were arrested by the police, led out of the store, and taken away in a patrol wagon. They were later tried and convicted for violation of the Louisiana criminal mischief statute.[1] This statute, in its application to this case, has all the elements of the usual trespass statute. Each petitioner was sentenced to serve 60 days in the Parish Prison and to pay a fine of $350. In default of payment of the fine, each was to serve 60 additional days in prison. On appeal to the Supreme Court of Louisiana the judgments of conviction were affirmed. 241 La. 958, 132 So. 2d 860. Because of the substantial federal questions presented, we granted certiorari. 370 U. S. 935.

Prior to this occurrence New Orleans city officials, characterizing conduct such as petitioners were arrested for as "sit-in demonstrations," had determined that such attempts to secure desegregated service, though orderly and possibly inoffensive to local merchants, would not be permitted.

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[1] La. Rev. Stat., 1950 (Cum. Supp. 1960), § 14:59 (6), provides in pertinent part:

"Criminal mischief is the intentional performance of any of the following acts:

. . . . . .

"(6) Taking temporary possession of any part or parts of a place of business, or remaining in a place of business after the person in charge of such business or portion of such business has ordered such person to leave the premises and to desist from the temporary possession of any part or parts of such business."

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Exactly one week earlier, on September 10, 1960, a like occurrence had taken place in a Woolworth store in the same city. In immediate reaction thereto the Superintendent of Police issued a highly publicized statement which discussed the incident and stated that "We wish to urge the parents of both white and Negro students who participated in today's sit-in demonstration to urge upon these young people that such actions are not in the community interest. . . . [W]e want everyone to fully understand that the police department and its personnel is ready and able to enforce the laws of the city of New Orleans and the state of Louisiana." [2] On September 13,

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[2] The full text of the statement reads:

"The regrettable sit-in activity today at the lunch counter of a Canal st. chain store by several young white and Negro persons causes me to issue this statement to the citizens of New Orleans.

"We urge every adult and juvenile to read this statement carefully, completely and calmly.

"First, it is important that all citizens of our community understand that this sit-in demonstration was initiated by a very small group.

"We firmly believe that they do not reflect the sentiments of the great majority of responsible citizens, both white and Negro, who make up our population.

"We believe it is most important that the mature responsible citizens of both races in this city understand that and that they continue the exercise of sound, individual judgment, goodwill and a sense of personal and community responsibility.

"Members of both the white and Negro groups in New Orleans for the most part are aware of the individual's obligation for good conduct—an obligation both to himself and to his community. With the exercise of continued, responsible law-abiding conduct by all persons, we see no reason for any change whatever in the normal, good race-relations that have traditionally existed in New Orleans.

"At the same time we wish to say to every adult and juvenile in this city that the police department intends to maintain peace and order. [*Footnote 2 continued on p. 271*]

four days before petitioners' arrest, the Mayor of New Orleans issued an unequivocal statement condemning such conduct and demanding its cessation. This statement was also widely publicized; it read in part:

> "I have today directed the superintendent of police that no additional sit-in demonstrations . . . will be permitted . . . regardless of the avowed purpose or intent of the participants . . . .
>
> . . . . . .
>
> "It is my determination that the community interest, the public safety, and the economic welfare of this city require that such demonstrations cease and that henceforth they be prohibited by the police department." [3]

"No one should have any concern or question over either the intent or the ability of this department to keep and preserve peace and order.

"As part of its regular operating program, the New Orleans police department is prepared to take prompt and effective action against any person or group who disturbs the peace or creates disorder on public or private property.

"We wish to urge the parents of both white and Negro students who participated in today's sit-in demonstration to urge upon these young people that such actions are not in the community interest.

"Finally, we want everyone to fully understand that the police department and its personnel is ready and able to enforce the laws of the city of New Orleans and the state of Louisiana."

[3] The full text of the Mayor's statements reads:

"I have today directed the superintendent of police that no additional sit-in demonstrations or so-called peaceful picketing outside retail stores by sit-in demonstrators or their sympathizers will be permitted.

"The police department, in my judgment, has handled the initial sit-in demonstration Friday and the follow-up picketing activity Saturday in an efficient and creditable manner. This is in keeping with the oft-announced policy of the New Orleans city government that peace and order in our city will be preserved.

[*Footnote 3 continued on p. 272*]

Both statements were publicized in the New Orleans Times-Picayune. The Mayor and the Superintendent of Police both testified that, to their knowledge, no eating establishment in New Orleans operated desegregated eating facilities.

Both the restaurant manager and the store manager asked the petitioners to leave. Petitioners were charged with failing to leave at the request of the store manager. There was evidence to indicate that the restaurant manager asked petitioners to leave in obedience to the directive of the city officials. He told them that "I am not allowed to serve you here. . . . We *have* to sell to you at the rear of the store where we have a colored counter." (Emphasis supplied.) And he called the police "[a]s a matter of routine procedure." The petitioners testified that when they did not leave, the restaurant manager whistled and the employees removed the stools, turned

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"I have carefully reviewed the reports of these two initial demonstrations by a small group of misguided white and Negro students, or former students. It is my considered opinion that regardless of the avowed purpose or intent of the participants, the effect of such demonstrations is not in the public interest of this community.

"Act 70 of the 1960 Legislative session redefines disturbing the peace to include 'the commission of any act as would foreseeably disturb or alarm the public.'

"Act 70 also provides that persons who seek to prevent prospective customers from entering private premises to transact business shall be guilty of disorderly conduct and disturbing the peace.

"Act 80—obstructing public passages—provides that 'no person shall wilfully obstruct the free, convenient, and normal use of any public sidewalk, street, highway, road, bridge, alley or other passage way or the entrance, corridor or passage of any public building, structure, water craft or ferry by impeding, hindering, stifling, retarding or restraining traffic or passage thereon or therein.'

"It is my determination that the community interest, the public safety, and the economic welfare of this city require that such demonstrations cease and that henceforth they be prohibited by the police department."

off the lights, and put up a sign saying that the counter was closed. One petitioner stated that "it appeared to be a very efficient thing, everyone knew what to do." The store manager conceded that his decision to operate a segregated facility "conform[ed] to state policy and practice" as well as local custom. When asked whether "in the last 30 days to 60 days [he had] entered into any conference with other department store managers here in New Orleans relative to sit-in problems," the store manager stated: "[w]e have spoken of it." The above evidence all tended to indicate that the store officials' actions were coerced by the city. But the evidence of coercion was not fully developed because the trial judge forbade petitioners to ask questions directed to that very issue.

But we need not pursue this inquiry further. A State, or a city, may act as authoritatively through its executive as through its legislative body. See *Ex parte Virginia,* 100 U. S. 339, 347. As we interpret the New Orleans city officials' statements, they here determined that the city would not permit Negroes to seek desegregated service in restaurants. Consequently, the city must be treated exactly as if it had an ordinance prohibiting such conduct. We have just held in *Peterson* v. *City of Greenville, ante,* p. 244, that where an ordinance makes it unlawful for owners or managers of restaurants to seat whites and Negroes together, a conviction under the State's criminal processes employed in a way which enforces the discrimination mandated by that ordinance cannot stand. Equally the State cannot achieve the same result by an official command which has at least as much coercive effect as an ordinance. The official command here was to direct continuance of segregated service in restaurants, and to prohibit any conduct directed toward its discontinuance; it was not restricted solely to preserve the public peace in a nondiscriminatory fashion in a situation where violence

was present or imminent by reason of public demonstrations. Therefore here, as in *Peterson,* these convictions, commanded as they were by the voice of the State directing segregated service at the restaurant, cannot stand. *Turner* v. *City of Memphis,* 369 U. S. 350.

Reversed.

[For opinion of MR. JUSTICE HARLAN, see *ante,* p. 248.]

MR. JUSTICE DOUGLAS, concurring.

While I join the opinion of the Court, I have concluded it necessary to state with more particularity why Louisiana has become involved to a "significant extent" (*Burton* v. *Wilmington Parking Authority,* 365 U. S. 715, 722) in denying equal protection of the laws to petitioners.

I.

The court below based its affirmance of these convictions on the ground that the decision to segregate this restaurant was a private choice, uninfluenced by the officers of the State. *State* v. *Goldfinch,* 241 La. 958, 132 So. 2d 860. If this were an intrusion of a man's home or yard or farm or garden, the property owner could seek and obtain the aid of the State against the intruder. For the Bill of Rights, as applied to the States through the Due Process Clause of the Fourteenth Amendment, casts its weight on the side of the privacy of homes. The Third Amendment with its ban on the quartering of soldiers in private homes radiates that philosophy. The Fourth Amendment, while concerned with official invasions of privacy through searches and seizures, is eloquent testimony of the sanctity of private premises. For even when the police enter private precincts they must, with rare exceptions, come armed with a warrant issued by a magis-

trate. A private person has no standing to obtain even limited access. The principle that a man's home is his castle is basic to our system of jurisprudence.

But a restaurant, like the other departments of this retail store where Negroes were served, though private property within the protection of the Fifth Amendment, has no aura of constitutionally protected privacy about it. Access by the public is the very reason for its existence.

> "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." *Marsh* v. *Alabama,* 326 U. S. 501, 506.

The line between a private business and a public one has been long and hotly contested. *New State Ice Co.* v. *Liebmann,* 285 U. S. 262, is one of the latest cases in a long chain. The Court, over the dissent of Mr. Justice Brandeis and Mr. Justice Stone, held unconstitutional an Oklahoma statute requiring those manufacturing ice for sale and distribution to obtain a license from the State. Mr. Justice Brandeis' dissent was in the tradition of an ancient doctrine perhaps best illustrated [1] by *German Alliance Ins. Co.* v. *Kansas,* 233 U. S. 389, which upheld a Kansas statute that regulated fire insurance rates. Mr. Justice McKenna, writing for the Court, said, "It is the business that is the fundamental thing; property is but its instrument, the means of rendering the service which has become of public interest." *Id.,* 408. Cf. *Ferguson* v. *Skrupa,* 372 U. S. 726.

Some of the cases reflect creative attempts by judges to make innkeepers, common carriers, and the like per-

[1] See Hamilton, Affectation with Public Interest, 39 Yale L. J. 1089, 1098–1099.

form the public function of taking care of all travelers.[2] Others involve the power of the legislature to impose various kinds of restraints or conditions on business. As a result of the conjunction of various forces, judicial and legislative, it came to pass that "A large province of industrial activity is under the joint sovereignty of the market and the state." [3]

The present case would be on all fours with the earlier ones holding that a business may be regulated when it renders a service which "has become of public interest" (*German Alliance Ins. Co.* v. *Kansas, supra,* 408) if Louisiana had declared, as do some States,[4] that a business may not refuse service to a customer on account of race and the proprietor of the restaurant were charged with violating this statute. We should not await legislative action before declaring that state courts cannot enforce this type of segregation. Common-law judges fashioned the rules governing innkeepers and carriers.[5]

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[2] See Jeremy, The Law of Carriers, Inn-Keepers, etc. (1815), 4–5, 144–147; Tidswell, The Innkeeper's Legal Guide (1864), c. 1; Schouler, Law of Bailments (2d ed. 1887), §§ 274–329, 330–341; Beale, The Law of Innkeepers and Hotels (1906), *passim;* 1 Wyman, Public Service Corporations (1911), §§ 1–5; Burdick, The Origin of the Peculiar Duties of Public Service Companies, 11 Col. L. Rev. 514, 616; Arterburn, The Origin and First Test of Public Callings, 75 U. of Pa. L. Rev. 411.

[3] Hamilton, *supra,* note 1, p. 1110.

[4] See, *e. g.,* McKinney's Cons. N. Y. Laws, Vol. 8, Art. 4; *id.,* Vol. 18, Art. 15; N. J. Stat. Ann., Tit. 10; *id.,* Tit. 18, c. 25; Cal. Civ. Code § 51. Cf. Cal. Health and Safety Code, §§ 35700 (1962 Supp.) *et seq.; Burks* v. *Poppy Constr. Co.,* 57 Cal. 2d 463, 370 P. 2d 313; *Martin* v. *New York,* 22 Misc. 2d 389, 201 N. Y. S. 2d 111. See generally, Greenberg, Race Relations and American Law, 101–114 (1959); 7 St. Louis U. L. J. 88 (1962).

[5] See Schouler, *op. cit., supra,* note 2, §§ 274, 335; Wyman, *op. cit., supra,* note 2, § 1; Arterburn, *supra,* note 2.

As stated by Holt, C. J., in *Lane* v. *Cotton,* 12 Mod. 472, 484 (1701):

> "Wherever any subject takes upon himself a public trust for the benefit of the rest of his fellow-subjects, he is *eo ipso* bound to serve the subject in all the things that are within the reach and comprehension of such an office, under pain of an action against him . . . . If on the road a shoe fall off my horse, and I come to a smith to have one put on, and the smith refuse to do it, an action will lie against him, because he has made profession of a trade which is for the public good, and has thereby exposed and vested an interest of himself in all the king's subjects that will employ him in the way of his trade. If an innkeeper refuse to entertain a guest where his house is not full, an action will lie against him, and so against a carrier, if his horses be not loaded, and he refuse to take a packet proper to be sent by a carrier." [6]

Judges who fashioned those rules had no written constitution as a guide. There were, to be sure, criminal statutes that regulated the common callings.[7] But the civil remedies were judge made. We live under a constitution that proclaims equal protection of the laws. That standard is our guide. See *Griffin* v. *Illinois,* 351 U. S. 12; *Douglas* v. *California,* 372 U. S. 353. And under that standard business serving the public cannot seek the aid

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[6] See also *White's Case* (1558), 2 Dyer 158.b.; *Warbrooke* v. *Griffin* (1609), 2 Brownl. 254; *Bennett* v. *Mellor* (1793), 5 Term Rep. 273; *Thompson* v. *Lacy* (1820), 3 B. & Ald. 283.

For criminal prosecutions, see, *e. g., Rex* v. *Ivens* (1835), 7 Car. & P. *213; *Regina* v. *Sprague* (1899), 63 J. P. 233.

For a collection of the English cases, see 21 Halsbury's Laws of England (3d ed. 1957) 441 *et seq.;* 10 Mews' Dig. Eng. Cas. L. to 1924, pp. 1463 *et seq.*

[7] Arterburn, *supra,* note 2.

of the state police or the state courts or the state legislatures to foist racial segregation in public places under its ownership and control. The constitutional protection extends only to "state" action, not to personal action. But we have "state" action here, wholly apart from the activity of the Mayor and police, for Louisiana has interceded with its judiciary to put criminal sanctions behind racial discrimination in public places. She may not do so consistently with the Equal Protection Clause of the Fourteenth Amendment.

The criminal penalty (60 days in jail and a $350 fine) was imposed on these petitioners by Louisiana's judiciary. That action of the judiciary was state action. Such are the holdings in *Shelley* v. *Kraemer,* 334 U. S. 1, and *Barrows* v. *Jackson,* 346 U. S. 249.[8] Those cases involved restrictive covenants. *Shelley* v. *Kraemer* was a civil suit to enjoin violation of a restrictive covenant by a Negro purchaser. *Barrows* v. *Jackson* was a suit to collect damages for violating a restrictive covenant by selling residential property to a Negro. Those cases, like the present one, were "property" cases. In those cases, as in the present one, the line was drawn at dealing with Negroes. There, as here, no state legislature was involved, only the state judiciary. The Court said in *Shelley* v. *Kraemer:*

> "That the action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court." 334 U. S., at 14.

The list of instances where action of the state judiciary is state action within the meaning of the Fourteenth Amendment is a long one. Many were noted in *Shelley*

[8] See also *Abstract Investment Co.* v. *Hutchinson,* 204 Cal. App. 2d 242, 251, 22 Cal. Rptr. 309, 317; 10 U. C. L. A. L. Rev. 401.

v. *Kraemer,* 334 U. S., at 14–18. Most state convictions in violation of the First, Fourth, or Fifth Amendment, as incorporated in the Due Process Clause of the Fourteenth Amendment, have indeed implicated not the state legislature but the state judiciary, or the state judiciary and the state prosecutor and the state police. *Shelley* v. *Kraemer*—and later *Barrows* v. *Jackson*—held that the state judiciary, acting alone to enforce private discrimination against Negroes who desired to buy private property in residential areas, violated the Equal Protection Clause of the Fourteenth Amendment.

Places of public accommodation such as retail stores, restaurants, and the like render a "service which has become of public interest" (*German Alliance Ins. Co.* v. *Kansas, supra,* 408) in the manner of the innkeepers and common carriers of old. The substance of the old common-law rules has no direct bearing on the decision required in this case. Restaurateurs and owners of other places of amusement and resort have never been subjected to the same duties as innkeepers and common carriers.[9] But, what is important is that this whole body of law was a response to the felt needs of the times that spawned it.[10] In our time the interdependence of people has greatly increased; the days of *laissez faire* have largely disappeared; men are more and more dependent on their neighbors for services as well as for housing and the other necessities of life. By enforcing this criminal mischief statute, invoked in the manner now before us, the Louisiana courts are denying some people access to the mainstream of our highly interdependent life solely

[9] See *Marrone* v. *Washington Jockey Club,* 227 U. S. 633; *Madden* v. *Queens County Jockey Club,* 296 N. Y. 249, 72 N. E. 2d 697; *Alpaugh* v. *Wolverton,* 184 Va. 941, 36 S. E. 2d 906; *Nance* v. *Mayflower Tavern,* 106 Utah 517, 150 P. 2d 773.

[10] Wyman, *op. cit., supra,* note 2, §§ 1, 2–16, 330; Schouler, *op. cit., supra,* note 2, §§ 274, 335; Beale, *op. cit., supra,* note 2, c. I; Arterburn, *supra,* note 2, 420–426.

because of their race. Yet, "If there is any one purpose of the Fourteenth Amendment that is wholly outside the realm of doubt, it is that the Amendment was designed to bar States from denying to some groups, on account of their race or color, any rights, privileges, and opportunities accorded to other groups." *Oyama* v. *California,* 332 U. S. 633, 649 (concurring opinion).

An innkeeper or common carrier has always been allowed to exclude drunks, criminals and diseased persons, but only because the public's interest in protecting his and his guests' health and property outweighs its interest in providing accommodations for this small group of travelers.[11] As a general rule, innkeepers and carriers cannot refuse their services on account of race; though the rule developed in this country that they can provide "separate but equal" facilities.[12] And for a period of our history even this Court upheld state laws giving sanction to such a rule. Compare *Plessy* v. *Ferguson,* 163 U. S. 537, with *Gayle* v. *Browder,* 352 U. S. 903, affirming, 142 F. Supp. 707. But surely *Shelley* v. *Kraemer, supra,* and *Barrows* v. *Jackson, supra,* show that the day has passed when an innkeeper, carrier, housing developer, or retailer can draw a racial line, refuse service to some on account of color, and obtain the aid of a State in enforcing his personal bias by sending outlawed customers to prison or exacting fines from them.

Business, such as this restaurant, is still private property. Yet there is hardly any private enterprise that does not feel the pinch of some public regulation—from price control, to health and fire inspection, to zoning, to safety measures, to minimum wages and working con-

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[11] Wyman, *op. cit., supra,* note 2, c. 18; Schouler, *op. cit., supra,* note 2, §§ 320, 322.

[12] Compare, *e. g., Constantine* v. *Imperial Hotels,* [1944] 1 K. B. 693; Wyman, *op. cit., supra,* note 2, §§ 361, 565, 566, with *State* v. *Steele,* 106 N. C. 766, 782, 11 S. E. 478, 484.

ditions, to unemployment insurance. When the doors of a business are open to the public, they must be open to all regardless of race if *apartheid* is not to become engrained in our public places. It cannot by reason of the Equal Protection Clause become so engrained with the aid of state courts, state legislatures, or state police.[13]

II.

There is even greater reason to bar a State through its judiciary from throwing its weight on the side of racial discrimination in the present case, because we deal here with a place of public accommodation under license from the State. This is the idea I expressed in *Garner* v. *Louisiana,* 368 U. S. 157, where another owner of a restaurant refused service to a customer because he was a Negro. That view is not novel; it stems from the dissent of the first Mr. Justice Harlan in the *Civil Rights Cases,* 109 U. S. 3, 58–59:

> "In every material sense applicable to the practical enforcement of the Fourteenth Amendment, railroad corporations, keepers of inns, and managers of places of public amusement are agents or instrumentalities of the State, because they are charged with duties to the public, and are amenable, in respect of their duties and functions, to governmental regulation. It seems to me that, within the principle settled in *Ex parte Virginia,* a denial, by these instrumentalities of the State, to the citizen, because of his race, of that equality of civil rights secured to him by law, is a denial by the State, within the meaning of the Fourteenth Amendment. If it be not, then that race

[13] See generally, Pollitt, Dime Store Demonstrations: Events and Legal Problems of First Sixty Days, 1960 Duke L. J. 315, 350–365; Henkin, *Shelley* v. *Kraemer:* Notes for a Revised Opinion, 110 U. of Pa. L. Rev. 473.

is left, in respect of the civil rights in question, practically at the mercy of corporations and individuals wielding power under the States."

The nexus between the State and the private enterprise may be control, as in the case of a state agency. *Pennsylvania* v. *Board of Trusts,* 353 U. S. 230. Or the nexus may be one of numerous other devices. "State support of segregated schools through any arrangement, management, funds, or property cannot be squared" with the Equal Protection Clause. *Cooper* v. *Aaron,* 358 U. S. 1, 19. Cf. *Hampton* v. *Jacksonville,* 304 F. 2d 320. A state-assisted enterprise serving the public does not escape its constitutional duty to serve all customers irrespective of race, even though its actual operation is in the hands of a lessee. *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715. Cf. *Boynton* v. *Virginia,* 364 U. S. 454. State licensing and surveillance of a business serving the public also brings its service into the public domain. This restaurant needs a permit from Louisiana to operate; [14] and during the existence of the license the State has broad powers of visitation and control.[15] This restaurant is

[14] Under the provisions of Article 7.02 of the Sanitary Code, promulgated by the State Board of Health pursuant to La. Rev. Stat. § 40:11, no person shall operate a public eating place of any kind in the State of Louisiana unless he has been issued a permit to operate by the local health officer; and permits shall be issued only to persons whose establishments comply with the requirements of the Sanitary Code.

[15] Under La. Rev. Stat., Title 40, §§ 11, 12, 15, 16, 52, and 69, state and local health officials closely police the provisions of the Sanitary Code. They may "enter, examine, and inspect all grounds, structures, public buildings, and public places in execution of a warrant issued in accordance with the constitution and laws of Louisiana," and "arrest . . . all persons violating any rule or regulation of the board or any article or provision of the sanitary code . . . ." Penalties are provided for code violations. See also New Orleans City Code, 1956, §§ 29–55, 56, and 58; Home Rule Charter of the City of New Orleans, § 4–1202 (2).

thus an instrumentality of the State since the State charges it with duties to the public and supervises its performance. The State's interest in and activity with regard to its restaurants extends far beyond any mere income-producing licensing requirement.

There is no constitutional way, as I see it, in which a State can license and supervise a business serving the public and endow it with the authority to manage that business on the basis of *apartheid,* which is foreign to our Constitution.

WRIGHT ET AL. *v.* GEORGIA.

CERTIORARI TO THE SUPREME COURT OF GEORGIA.

No. 68. Argued November 7, 1962.—Decided May 20, 1963.

Petitioners, six young Negroes, were convicted of breach of the peace for peacefully playing basketball in a public park in Savannah, Ga., customarily used only by white people and not dispersing when ordered to do so by the police. There was no evidence of disorderly conduct or of any activity which might be thought to violate a breach of the peace statute. One of the arresting officers testified that petitioners were arrested because they were Negroes. At their trial, both in a demurrer to the accusation and in motions for a new trial, petitioners contended, *inter alia*, that the breach of the peace statute violated the Due Process Clause of the Fourteenth Amendment because it did not give adequate warning that their conduct violated it. The Georgia Supreme Court held that error in denial of the motions for a new trial could not be considered because it was not properly briefed on the appeal, and it affirmed the convictions. *Held:*

1. There was no adequate state ground for the refusal by the Georgia Supreme Court to consider error in the denial of petitioners' motions for a new trial. Pp. 289–291.

2. Petitioners' convictions violated the Fourteenth Amendment. Pp. 291–293.

(a) The convictions cannot be sustained on the ground that failure to obey the command of a police officer constitutes a traditional form of breach of the peace. One cannot be punished for failing to obey a command which violates the Constitution, and the police officers' command violated the Equal Protection Clause of the Fourteenth Amendment, since it was intended to enforce racial discrimination in the park. Pp. 291–292.

(b) The convictions cannot be sustained on the ground that petitioners' conduct was likely to cause a breach of the peace by others, since the possibility of disorder by others cannot justify exclusion of a person from a place where he has a constitutional right to be. Pp. 292–293.

(c) If petitioners were convicted because a park rule reserved the park for use by younger people at the time, the statute did not give adequate warning, as required by the Due Process Clause of

the Fourteenth Amendment, since neither the existence nor the publication of any such rule was proved. P. 293.

217 Ga. 453, 122 S. E. 2d 737, reversed.

James M. Nabrit III argued the cause for petitioners. With him on the brief were *Jack Greenberg, Constance Baker Motley, Leroy D. Clark* and *E. H. Gadsden.*

Sylvan A. Garfunkel, Assistant Solicitor General of Georgia, argued the cause for respondent. With him on the brief were *Eugene Cook,* Attorney General, *G. Hughel Harrison,* Assistant Attorney General, and *Andrew J. Ryan, Jr.,* Solicitor General.

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

Petitioners, six young Negroes, were convicted of breach of the peace for peacefully playing basketball in a public park in Savannah, Georgia, on the early afternoon of Monday, January 23, 1961. The record is devoid of evidence of any activity which a breach of the peace statute might be thought to punish. Finding that there is no adequate state ground to bar review by this Court and that the convictions are violative of due process of law secured by the Fourteenth Amendment, we hold that the judgments below must be reversed.

Only four witnesses testified at petitioners' trial: the two arresting officers, the city recreational superintendent, and a sergeant of police. All were prosecution witnesses. No witness contradicted any testimony given by any other witnesses. On the day in question the petitioners were playing in a basketball court at Daffin Park, Savannah, Georgia. The park is owned and operated by the city for recreational purposes, is about 50 acres in area, and is customarily used only by whites. A white woman notified the two police officer witnesses of the presence of petitioners in the park. They investigated, according to

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one officer, "because some colored people were playing in the park. I did not ask this white lady how old these people were. As soon as I found out these were colored people I immediately went there." The officer also conceded that "I have never made previous arrests in Daffin Park because people played basketball there . . . . I arrested these people for playing basketball in Daffin Park. One reason was because they were negroes. I observed the conduct of these people, when they were on the basketball Court and they were doing nothing besides playing basketball, they were just normally playing basketball, and none of the children from the schools were there at that particular time." The other officer admitted that petitioners "were not necessarily creating any disorder, they were just 'shooting at the goal,' that's all they were doing, they wasn't disturbing anything." Petitioners were neat and well dressed. Nevertheless, the officers ordered the petitioners to leave the park. One petitioner asked one of the officers "by what authority" he asked them to leave; the officer responded that he "didn't need any orders to come out there . . . ." But he admitted that "it is [not] unusual for one to inquire 'why' they are being arrested." When arrested the petitioners obeyed the police orders and without disturbance entered the cruiser to be transported to police headquarters. No crowd assembled.

The recreational superintendent's testimony was confused and contradictory. In essence he testified that school children had preference in the use of the park's playground facilities but that there was no objection to use by older persons if children were not there at the time. No children were present at this time. The arrests were made at about 2 p. m. The schools released their students at 2:30 and, according to one officer, it would have been at least 30 minutes before any children could have reached the playground. The officer also stated that he

did not know whether the basketball court was reserved for a particular age group and did not know the rules of the City Recreational Department. It was conceded at the trial that no signs were posted in the park indicating what areas, if any, were reserved for younger children at particular hours. In oral argument before this Court it was conceded that the regulations of the park were not printed.

The accusation charged petitioners with assembling "for the purpose of disturbing the public peace . . . ." and not dispersing at the command of the officers. The jury was charged, with respect to the offense itself, only in terms of the accusation and the statute.[1] Upon conviction five petitioners were sentenced to pay a fine of $100 or to serve five months in prison. Petitioner Wright was sentenced to pay a fine of $125 or to serve six months in prison.

Petitioners' principal contention in this Court is that the breach of the peace statute did not give adequate warning that their conduct violated that enactment in derogation of their rights under the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States. This contention was plainly raised at the trial, both in a demurrer to the accusation and in motions for a new trial, and was pressed on appeal to the Georgia Supreme Court. Both the demurrer and new trial motions raised a number of other issues. The Georgia Supreme Court held that error in the denial of the motions for a new trial could not be considered because it was not properly briefed on the appeal. But the court neverthe-

[1] The statute, Ga. Code Ann., 1953, § 26-5301, provides:

"Unlawful assemblies.—Any two or more persons who shall assemble for the purpose of disturbing the public peace or committing any unlawful act, and shall not disperse on being commanded to do so by a judge, justice, sheriff, constable, coroner, or other peace officer, shall be guilty of a misdemeanor."

less seemed to pass upon the claim because it had been raised in the demurrer,[2] and affirmed the convictions. 217 Ga. 453, 122 S. E. 2d 737. Certiorari was granted. 370 U. S. 935.

Since there is some question as to whether the Georgia Supreme Court considered petitioners' claim of vagueness

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[2] The Georgia court refused to consider two of the constitutional claims asserted in the demurrer. But these allegations charged only unconstitutional administration of the statute. It is well settled in Georgia that the constitutionality of the statute upon which the charge is based may be attacked by demurrer. The Georgia Supreme Court, over 65 years ago, held that "[u]nder the general demurrer [to the accusation] the constitutionality of the law under which the accused was arraigned is brought in question." *Newman* v. *State,* 101 Ga. 534, 536, 28 S. E. 1005 (1897). This rule was later qualified to require the defendant to set out the ground of his attack with particularity in the demurrer. See, *e. g., Henderson* v. *Georgia,* 123 Ga. 465, 466, 51 S. E. 385, 386. In numerous cases it has been assumed that a constitutional objection on the ground of vagueness may properly be made by demurrer. *Teague* v. *Keith,* 214 Ga. 853, 108 S. E. 2d 489; *Harris* v. *State,* 191 Ga. 243, 12 S. E. 2d 64; *Carr* v. *State,* 176 Ga. 747, 169 S. E. 201; *Dalton* v. *State,* 176 Ga. 645, 169 S. E. 198; *Carr* v. *State,* 176 Ga. 55, 166 S. E. 827, 167 S. E. 103; *Hughes* v. *State Board of Medical Examiners,* 162 Ga. 246, 134 S. E. 42. See also *Henderson* v. *State,* 113 Ga. 1148, 39 S. E. 446. In other cases the Georgia Supreme Court has held that certain procedures, other than a demurrer, do not constitute the proper method to attack the constitutionality of the statute upon which the charge or claim was based. In each of these cases the Georgia court specifically stated that a demurrer would constitute a proper procedural device. *Eaves* v. *State,* 113 Ga. 749, 758, 39 S. E. 318, 321; *Boswell* v. *State,* 114 Ga. 40, 41, 39 S. E. 897; *Hendry* v. *State,* 147 Ga. 260, 265, 93 S. E. 413, 415; *Starling* v. *State,* 149 Ga. 172, 99 S. E. 619; *Savannah Elec. Co.* v. *Thomas,* 154 Ga. 258, 113 S. E. 806; *Moore* v. *State,* 194 Ga. 672, 22 S. E. 2d 510; *Stone* v. *State,* 202 Ga. 203, 42 S. E. 2d 727; *Loomis* v. *State,* 203 Ga. 394, 405, 47 S. E. 2d 58, 64; *Flynt* v. *Dumas,* 205 Ga. 702, 54 S. E. 2d 429; *Corbin* v. *State,* 212 Ga. 231, 91 S. E. 2d 764; *Renfroe* v. *Wallace,* 214 Ga. 685, 107 S. E. 2d 225.

Respondent does not argue that an adequate state ground exists insofar as petitioners' claim of vagueness was raised in the demurrer.

to have been properly raised in the demurrer,[3] we prefer to rest our jurisdiction upon a firmer foundation. We hold, for the reasons set forth hereinafter, that there was no adequate state ground for the Georgia court's refusal to consider error in the denial of petitioners' motions for a new trial.

I.

A commentator on Georgia procedure has concluded that "[p]robably no phase of pleading in Georgia is fraught with more technicalities than with respect to raising constitutional issues." [4] Examination of the Georgia cases bears out this assertion. In an extraordinary number an attempt to raise constitutional issues has been frustrated by a holding that the question was not properly raised or pursued. But "[w]hatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Davis* v. *Wechsler,* 263 U. S. 22, 24. See also *Love* v. *Griffith,* 266 U. S. 32; *Stromberg* v. *California,* 283 U. S. 359; *Terminiello* v. *Chicago,* 337 U. S. 1; *Staub* v. *City of Baxley,* 355 U. S. 313; *N. A. A. C. P.* v. *Alabama,* 357 U. S. 449.

In this case the Georgia Supreme Court held that error in the denial of the motions for a new trial could not be considered because "[t]here was no argument, citation of authority, or statement that [the grounds for reversal stated in the new trial motions] . . . were still relied upon." The court found "the applicable rule, as laid

[3] The question arises because of the Georgia rule against speaking demurrers, *i. e.,* demurrers which rely upon facts not stated in the accusation. Though the demurrer itself (in stating the claim of vagueness) did not set forth new facts, petitioners' constitutional claim is established only by considering the State's evidence in connection with the accusation and the statute.

[4] Leverett, Hall, Christopher, Davis and Shulman, Georgia Procedure and Practice (1957), 38.

down in *Henderson* v. *Lott,* 163 Ga. 326 (2) (136 SE 403), [to be] . . . : 'Assignments of error not insisted upon by counsel in their briefs or otherwise will be treated by this court as abandoned. A mere recital in briefs of the existence of an assignment of error, without argument or citation of authorities in its support, and without a statement that it is insisted upon by counsel, is insufficient to save it from being treated as abandoned.' " 217 Ga., at 454–455, 122 S. E. 2d, at 740. Presumably the court was restating the requirements of § 6–1308 of the Georgia Annotated Code of 1935. That section provides: "All questions raised in the motion for new trial shall be considered by the appellate court except where questions so raised are expressly or impliedly abandoned by counsel either in the brief or upon oral argument. A general insistence upon all the grounds of the motion shall be held to be sufficient."

To ascertain the precise holding of the Georgia court we must examine the brief which the petitioners submitted in connection with their appeal. It specifically assigned as error the overruling of their motions for a new trial. And in the section of the brief devoted to argument it was stated:

> "Plaintiffs-in-Error had assembled for the purpose of playing basketball and were in fact only playing basketball in a municipally owned park, according to the State's own evidence. Nevertheless, they were arrested and convicted under the said statute which prohibited assemblies for the purpose of 'disturbing the public peace or committing any unlawful act.' Where a statute is so vague as to make criminal an innocent act, a conviction under it cannot be sustained. *Murray Winters* v. *New York,* 333 U. S. 507. . . . Plaintiffs-in-Error could not possibly have predetermined from the wording of

> the statute that it would have punished as a misdemeanor an assembly for the purpose of playing basketball."

Obviously petitioners did in fact argue the point which they press in this Court. Thus the holding of the Georgia court must not have been that the petitioners abandoned their argument but rather that the argument could not be considered because it was not explicitly identified in the brief with the motions for a new trial. In short the Georgia court would require the petitioners to say something like the following at the end of the paragraph quoted above: "*A fortiori* it was error for the trial court to overrule the motions for a new trial." As was said in a similar case coming to us from the Georgia courts, this "would be to force resort to an arid ritual of meaningless form." *Staub* v. *City of Baxley, supra,* at 320. The State may not do that here any more than it could in *Staub*. Here, as in *Staub,* the state ground is inadequate. Its inadequacy is especially apparent because no prior Georgia case which respondent has cited nor which we have found gives notice of the existence of any requirement that an argument in a brief be specifically identified with a motion made in the trial court. "[A] local procedural rule, although it may now appear in retrospect to form part of a consistent pattern of procedures . . . , cannot avail the State here, because petitioner[s] could not fairly be deemed to have been apprised of its existence. Novelty in procedural requirements cannot be permitted to thwart review in this Court . . . ." *N. A. A. C. P.* v. *Alabama, supra,* at 457. We proceed to a consideration of the merits of petitioners' constitutional claim.

II.

Three possible bases for petitioners' convictions are suggested. First, it is said that failure to obey the command of a police officer constitutes a traditional form of breach of the peace. Obviously, however, one cannot be pun-

ished for failing to obey the command of an officer if that command is itself violative of the Constitution. The command of the officers in this case was doubly a violation of petitioners' constitutional rights. It was obviously based, according to the testimony of the arresting officers themselves, upon their intention to enforce racial discrimination in the park. For this reason the order violated the Equal Protection Clause of the Fourteenth Amendment. See *New Orleans Park Improvement Assn.* v. *Detiege,* 358 U. S. 54, affirming 252 F. 2d 122. The command was also violative of petitioners' rights because, as will be seen, the other asserted basis for the order—the possibility of disorder by others—could not justify exclusion of the petitioners from the park. Thus petitioners could not constitutionally be convicted for refusing to obey the officers. If petitioners were held guilty of violating the Georgia statute because they disobeyed the officers, this case falls within the rule that a generally worded statute which is construed to punish conduct which cannot constitutionally be punished is unconstitutionally vague to the extent that it fails to give adequate warning of the boundary between the constitutionally permissible and constitutionally impermissible applications of the statute. Cf. *Winters* v. *New York,* 333 U. S. 507; *Stromberg* v. *California,* 283 U. S. 359; see also *Cole* v. *Arkansas,* 333 U. S. 196.

Second, it is argued that petitioners were guilty of a breach of the peace because their activity was likely to cause a breach of the peace by others. The only evidence to support this contention is testimony of one of the police officers that "The purpose of asking them to leave was to keep down trouble, which looked like to me might start—there were five or six cars driving around the park at the time, white people." But that officer also stated that this "was [not] unusual traffic for that time of day." And the park was 50 acres in area. Respondent

contends the petitioners were forewarned that their conduct would be held to violate the statute. See *Samuels* v. *State,* 103 Ga. App. 66, 118 S. E. 2d 231. But it is sufficient to say again that a generally worded statute, when construed to punish conduct which cannot be constitutionally punished, is unconstitutionally vague. And the possibility of disorder by others cannot justify exclusion of persons from a place if they otherwise have a constitutional right (founded upon the Equal Protection Clause) to be present. *Taylor* v. *Louisiana,* 370 U. S. 154; *Garner* v. *Louisiana,* 368 U. S. 157, 174; see also *Buchanan* v. *Warley,* 245 U. S. 60, 80–81.

Third, it is said that the petitioners were guilty of a breach of the peace because a park rule reserved the playground for the use of younger people at the time. However, neither the existence nor the posting of any such rule has been proved. Cf. *Lambert* v. *California,* 355 U. S. 225, 228. The police officers did not inform them of it because they had no knowledge of any such rule themselves. Furthermore, it is conceded that there was no sign or printed regulation which would give notice of any such rule.

Under any view of the facts alleged to constitute the violation it cannot be maintained that petitioners had adequate notice that their conduct was prohibited by the breach of the peace statute. It is well established that a conviction under a criminal enactment which does not give adequate notice that the conduct charged is prohibited is violative of due process. *Lanzetta* v. *New Jersey,* 306 U. S. 451; *Connally* v. *General Construction Co.,* 269 U. S. 385; *United States* v. *Cohen Grocery Co.,* 255 U. S. 81; see also *United States* v. *National Dairy Products Corp.,* 372 U. S. 29.

Reversed.

WISCONSIN ET AL. *v.* FEDERAL POWER COMMISSION ET AL.

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

No. 72. Argued January 9, 1963.—Decided May 20, 1963.*

Under § 5 (a) of the Natural Gas Act, the Federal Power Commission conducted a general investigation of the lawfulness of the rates charged by the Phillips Petroleum Co., an independent producer, in its sales of natural gas in interstate commerce. Later, the Commission consolidated with that investigation 12 proceedings under § 4 (e) of the Act which involved the lawfulness of certain rate increases filed by the Company under § 4 (d) prior to the end of 1956. After extensive hearings and the filing of a report by the Examiner, the Commission concluded that the individual company cost-of-service method of fixing rates was not a workable method of fixing rates of independent producers of natural gas and that such rates should be established on an area basis, rather than on an individual company basis. As initial steps toward this end, the Commission promulgated area-by-area price levels for initial and increased rate filings by producers; stated that, in the absence of compelling evidence, it would not certificate initial rates, and would suspend increased rates, which exceeded these price levels; and announced that it would begin a series of hearings, each designed to cover a major producing area. It also terminated ten of the pending proceedings under § 4 (e); left two others open only for limited purposes; and terminated its investigation under § 5 (a). *Held:*

1. Although the Commission announced *prospectively* that it would not accept for filing future contracts containing spiral escalation clauses, it did not err in refusing to reject as void *ab initio* certain past rate increases because they were based on such clauses. Pp. 303–304.

2. The Commission did not abuse its discretion in terminating ten proceedings under § 4 (e) and in leaving two others open only for a limited purpose, since it found, on the basis of substantial

*Together with No. 73, *California et al.* v. *Federal Power Commission et al.*, and No. 74, *Long Island Lighting Co. et al.* v. *Federal Power Commission et al.*, also on certiorari to the same Court.

evidence, that the increases did not bring revenues up to the cost of service and that, therefore, no refund obligation could be imposed, and since these increases had been superseded by subsequent increases which (with one minor exception) had been suspended and made the subject of separate proceedings under § 4 (e), which were continuing. Pp. 304–307.

3. The Commission did not abuse its discretion in terminating its investigation under § 5 (a) of the lawfulness of the Company's current rates. Pp. 307–314.

112 U. S. App. D. C. 369, 303 F. 2d 380, affirmed.

Kent H. Brown argued the cause for petitioners in No. 72. With him on the briefs were *John W. Reynolds,* Attorney General of Wisconsin, *Roy G. Tulane,* Assistant Attorney General, *William E. Torkelson, Morton L. Simons* and *Barbara M. Suchow.*

William M. Bennett argued the cause for petitioners in No. 73. With him on the briefs was *J. Calvin Simpson.*

J. David Mann, Jr. argued the cause for petitioners in No. 74. With him on the briefs were *David K. Kadane, Bertram D. Moll, Vincent P. McDevitt, Samuel Graff Miller, William W. Ross* and *John E. Holtzinger, Jr.*

Richard A. Solomon argued the cause for the Federal Power Commission, respondent. With him on the brief were *Solicitor General Cox, Ralph S. Spritzer, Howard E. Wahrenbrock, Leo E. Forquer* and *Arthur H. Fribourg.*

Kenneth Heady argued the cause for Phillips Petroleum Company, respondent. With him on the brief were *Charles E. McGee* and *Lambert McAllister.*

Mr. Justice Harlan delivered the opinion of the Court.

Almost nine years have passed since this Court's decision in *Phillips Petroleum Co.* v. *Wisconsin,* 347 U. S. 672, holding that the Federal Power Commission has jurisdiction over the rates charged by an independent producer of natural gas. The present case, involving

the same independent producer, Phillips Petroleum (Phillips),[1] is a sequel to that earlier decision and strikingly illustrates the unique problems confronting the Commission in its efforts to achieve the goal of effective regulation.

I.

Following the remand in the *Phillips* case, the Commission, proceeding under § 5 (a) of the Natural Gas Act,[2] reinstituted its general investigation of the lawfulness of Phillips' rates with respect to its sales of natural gas in interstate commerce. Later, it consolidated with that investigation 12 proceedings under § 4 (e) of the Act[3]

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[1] Phillips is a large integrated oil company which is also a producer of natural gas. It is known as an "independent" in that it does not engage in the interstate gas pipeline business and is not affiliated with any interstate gas pipeline company.

[2] Section 5 (a) of the Natural Gas Act, 52 Stat. 823, 15 U. S. C. § 717d (a), provides:

"Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates."

[3] Section 4 (e) of the Natural Gas Act, 52 Stat. 823, as amended, 76 Stat. 72, 15 U. S. C. (Supp. IV) § 717c (e), provides:

"Whenever any such new schedule is filed the Commission shall have authority . . . to enter upon a hearing concerning the lawful-

which involved the lawfulness of certain specific rate increases filed by Phillips under § 4 (d) between June 1954 and May 1956. All of these rate increases had been suspended by the Commission for the maximum five-month period permitted by the statute (§ 4 (e)) and had subsequently gone into effect subject to refund of any portion that might ultimately be found excessive (*ibid.*). With one minor exception, each of these increases had been superseded by a subsequent increase,[4] all of which were

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ness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible."

[4] The exception involves an annual increase of $21,234, and we are advised by Phillips that this increase has since been superseded by a later filing, not suspended by the Commission.

in turn suspended and are the subject of separate § 4 (e) proceedings not now before us.[5]

Hearings in these consolidated proceedings did not begin until June 1956 and extended over a period of almost 18 months. All parties proceeded on the assumption that the lawfulness of Phillips' rates was to be determined on the basis of its jurisdictional cost of service for the test year 1954,[6] and four full-scale cost-of-service studies were presented. A Commission Examiner in April 1959 issued a comprehensive decision (24 F. P. C. 590) comprising over 200 pages, in which he found that Phillips' jurisdictional cost of service for the test year was $57,280,218. He then ordered Phillips to calculate a rate which, when applied to 1954 volumes, would produce revenues substantially equal to its test year cost of service. This rate, with appropriate adjustments for quality, pressure, etc., was to be applied to all of the company's rate schedules on file with the Commission at the time of Commission approval.

Over one year later, in September 1960, the Commission issued the opinion that is the subject of the present litigation. 24 F. P. C. 537. Its basic conclusion was that the individual company cost-of-service method, based on theories of original cost and prudent investment, was not

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[5] An increased rate which is later superseded by a further increase is thus effective only for the limited intervening period, called the "locked-in" period, and retains significance in § 4 (e) proceedings only in respect of its refundability if found unlawful. See, *infra*, pp. 304–305.

[6] The phrase "jurisdictional cost of service" as used here means the producer's system-wide cost of service (*i. e.*, all operating expenses, including depreciation, depletion, and taxes, *plus* a fair return on the rate base) for its sales of natural gas subject to the Commission's jurisdiction. The "test year 1954" means the calendar year 1954, with adjustments for certain changes in costs and increases in revenues through 1956. No challenge is here made by either side to any aspect of the Commission's determination of Phillips' jurisdictional cost of service for the test year.

a workable or desirable method for determining the rates of independent producers and that the "ultimate solution" lay in what has come to be known as the area rate approach: "the determination of fair prices for gas, based on reasonable financial requirements of the industry" for each of the various producing areas of the country. 24 F. P. C., at 547. This means that rates would be established on an area basis, rather than on an individual company basis. As initial steps toward this end, the Commission did two things at the same time it issued the opinion in these proceedings. *First,* it promulgated a Statement of General Policy (S. G. P. 61–1), since amended on several occasions, in which it set forth area-by-area "price levels" for initial and increased rate filings by producers, and stated that in the absence of compelling evidence it would not certificate initial rates, and would suspend increased rates, which exceeded these price levels.[7] *Second,* the Commission announced that it would begin a series of hearings, each designed to cover a major producing area. (At least one of these hearings, involving the Permian Basin, is now well under way.)

The Commission, in its opinion here, gave several reasons for rejecting as unsuitable the individual company cost-of-service method. 24 F. P. C., at 542–548. In particular it emphasized that, unlike the business of a typical public utility, the business of producing natural gas involved no fixed, determinable relationship between investment and service to the public. A huge investment might yield only a trickle of gas, while a small investment might lead to a bonanza. Thus the concept of an individual company's "prudent investment," as a basis for calculat-

[7] The Statement of General Policy, as originally issued, appears at 25 Fed. Reg. 9578. It was issued without notice or hearing, and the Commission expressly stated that the price levels were "for the purpose of guidance and initial action by the Commission and their use will not deprive any party of substantive rights or fix the ultimate justness and reasonableness of any rate level."

ing rates that would call forth the necessary capital and also protect consumers from excessive charges, seemed wholly out of place. Further, the Commission noted that the individual company cost-of-service method gave rise to staggering cost allocation problems, could result in such anomalies as widely varying prices for gas coming from a single field and even from a single jointly owned well, and would create an intolerable administrative burden in requiring a separate rate determination for each of the several thousand independent producers.

Returning to the proceedings before it, the Commisssion decided that, despite its disapproval of the cost-of-service method, the whole case having been tried on that basis, a final administrative determination of cost of service for the test year should be made. It then proceeded to resolve a number of difficult questions, including those relating to allocation of production and exploration costs, allocation of costs between natural gas and extracted liquids, and rate of return, and arrived at a system-wide jurisdictional cost of service for the test year of $55,548,054—a figure which substantially exceeded jurisdictional revenues ($45,568,291) for that year.[8]

With this determination in hand, the Commission turned to the consolidated § 4 (e) proceedings, involving specific rate increases filed through May 1956, and found that those increases had produced increased revenues of only about $5,250,000 annually, or considerably less than the total deficit for the test year. It also stated that there was nothing in the record to show that any of the increased rates were "unduly discriminatory or preferential." It then concluded that since it could not order refunds of any portion of these increases, in view of the continuing

[8] On rehearing, the cost of service was redetermined to be $54,525,315, or 11.1009¢ per Mcf, subject to certain necessary adjustments for purchased gas costs, gathering taxes, and royalties. These adjustments would increase the average unit cost to about 12.16¢ per Mcf.

deficit, and since all increases had been superseded, there would be no purpose in continuing the § 4 (e) proceedings and, with two exceptions, they were terminated.

The two exceptions concerned rate increases under "spiral escalation" clauses in Phillips' contracts,[9] and these two proceedings were kept open because the proper amount of the particular increases depended on the amount of increases, if any, allowed to certain pipeline customers of Phillips in their own rate proceedings then pending before the Commission. The Commission refused to hold such spiral clauses void *ab initio,* and in fact a rate increase in one of the 10 *terminated* § 4 (e) proceedings had resulted from the operation of a spiral escalation clause.

The Commission recognized that there remained almost 100 other § 4 (e) proceedings, involving increases filed by Phillips, that had not been consolidated in this case. It said that since the present record indicated that Phillips' costs exceeded revenues at least through 1958 it was inviting Phillips to file motions to terminate all § 4 (e) proceedings relating to increases filed prior to 1959, thus limiting future consideration of Phillips' rates to 1959 and after. Whether this invitation has been accepted by Phillips is not disclosed, but in any event none of these other § 4 (e) proceedings is before us now.

Turning to the § 5 (a) investigation of the lawfulness of Phillips' existing rates, the Commission first noted that there was considerable disagreement over how these rates should be set—whether they should be approximately uniform throughout the country or should vary from area to area. It then said that it was aware that both costs and prices had greatly increased since 1954

[9] These clauses provided that when a specified commodity price index increased by more than a certain number of points, and a general increase in a Phillips pipeline customer's resale rates had gone into effect, then Phillips' rates to that customer could be proportionally increased.

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(and especially after 1958) and it therefore did not "deem it appropriate to prescribe or require that Phillips file rates for the future based upon the present record." 24 F. P. C., at 575–576. Concluding that the public would be adequately protected by Phillips' potential refund obligations under § 4 (e), by the area pricing standards announced in the Statement of General Policy, and by the area rate proceedings to be initiated, the Commission ordered the termination of the present § 5 (a) investigation.

On application for rehearing, the Commission rejected the suggestion that it should reopen the case for submission of 1959 cost data. 24 F. P. C. 1008. It said that the "interest of consumers and the exigencies of regulation will be better served in rate proceedings brought on an area basis rather than on an individual company basis," and that the area method would lead to "more effective and expeditious regulation of the producer sales." 24 F. P. C., at 1009. It also rejected the claim that it had erred in terminating the § 4 (e) proceedings because *some* of the increased rates were in excess of the average unit cost of service, reiterating that there had been no showing of undue discrimination or preference and that the *total* revenue resulting from the increases did not make up the deficit shown by the test year determination.

On review, the Court of Appeals, in a thorough and informative opinion, affirmed the decision of the Commission. 112 U. S. App. D. C. 369, 303 F. 2d 380. Judge Fahy, dissenting in part, argued that whether or not the area rate method of rate regulation was the ultimate solution, the Commission having gone so far in this proceeding should have finished it by deciding on a cost-of-service basis the justness and reasonableness of Phillips' past increases and of its present rates. To have failed to do so, he believed, was a clear abuse of discretion. We granted certiorari because of the importance of this case

in the administration and future operation of the Natural Gas Act. 369 U. S. 870.

The arguments of the parties, both in their briefs and at the bench, have covered a broad range of subjects, including a number of other administrative actions and proceedings—past, present, and future—that are not before us today. We lay these collateral subjects to one side and focus on the three precise questions that have been brought here for review: whether the Commission erred (1) in refusing to reject certain increased rates because they were based on spiral escalation clauses; (2) in terminating the 10 consolidated § 4 (e) proceedings involving increases now superseded and in leaving two such proceedings open only for a limited purpose; or (3) in discontinuing the § 5 (a) investigation of the lawfulness of Phillips' current rates. Of these three questions, which will be considered in the order stated, the third is the only one vigorously pressed by all petitioners and is clearly the principal issue in the case.

II.

California, alone among the petitioners, challenges the Commission's refusal to declare void *ab initio* the spiral escalation clauses in Phillips' contracts on which rate increases in three of the 12 § 4 (e) dockets were based.[10] Such clauses, California contends, are manifestly inconsistent with the public interest, because they constitute a price mechanism by which "[c]onsumers of natural gas are caught in a maelstrom."

But we have at least grave doubts that this question may be raised by California at this time. As to two of the three dockets, the claim would appear premature, since the dockets are still pending, and the increases there involved may eventually be disallowed if the pipeline increases on which they depend are themselves dis-

[10] See note 9, *supra*.

allowed by the Commission. As to the third docket, the particular increase has been made fully effective by termination of the § 4 (e) proceeding, but since the sale in question is to the Michigan-Wisconsin pipeline and appears to affect no California interests, no one whom California may properly represent is "aggrieved" (§ 19 (b)) [11] by the Commission's order.

Further, we see no merit in California's contention. It is true that the Commission has announced *prospectively* that it would not accept for filing contracts containing such clauses,[12] but it would have been quite a different matter for the Commission to have declared that *past* rate increases were ineffective simply because they were based on spiral provisions. The effect of a contract clause of this type, of course, is only to permit the producer to resort to the filing provisions of § 4 (d) of the Act. If the increase is challenged, the producer must still establish its lawfulness wholly apart from the terms of the contract. Thus we have sustained the right of a seller to file an increase under a contract which, in effect, authorized him to do so at any time. *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division,* 358 U. S. 103. The spiral clauses here are far more limited in scope, depending as they do on the occurrence of external events.

III.

The claim that the Commission erred in terminating 10 § 4 (e) dockets, and leaving two others open only for a limited purpose, is pressed primarily by Wisconsin and New York. In considering their contentions, it should

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[11] 52 Stat. 831, as amended, 15 U. S. C. § 717r (b).

[12] By Order Nos. 232, 26 Fed. Reg. 1983, and 232A, 26 Fed. Reg. 2850, the Commission announced that spiral escalation clauses contained in contracts executed on or after April 3, 1961, would be inoperative and without effect. By Order No. 242, 27 Fed. Reg. 1356, the Commission announced that contracts containing such clauses would be unacceptable for filing on or after April 2, 1962.

be noted again that all of the rate increases involved were filed prior to the end of 1956, and have since been superseded or "locked in" by subsequent increases [13] which, with one exception, have been suspended and made the subject of separate § 4 (e) proceedings.

The Commission's termination of these § 4 (e) dockets was a decision on the merits. It was based on the finding that the annual increase in revenue produced by these increased rates was substantially less than the deficit for the test year 1954. Petitioners' principal objection appears to be that Phillips' overall, and unit (per Mcf.), revenues increased so substantially that they may have exceeded costs during the 1955–1959 period for which the increases were allowed. But the fact is that Phillips' average unit revenues during this period never rose significantly above its test year unit revenue requirements as determined by the Commission.[14] Moreover, petitioners do not claim, nor could they on this record, that the test year cost of service was *higher* per unit than in subsequent years. And assuming that unit costs did not decline, it is clear that the increases here did not even bring unit revenues up to those unit costs. Whether other subsequent increases involved in separate proceedings not before us resulted in revenues exceeding cost of service in later years has no effect on the propriety of terminating *these* § 4 (e) dockets. Thus the factors that may have made the record stale for purposes of determining in the § 5 (a) investigation whether Phillips' *present* rates are unjust or unreasonable do not make the record stale for purposes of determining the lawfulness of these *past* increases.

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[13] See note 5, *supra*.

[14] Phillips' test year unit revenue requirements, on the basis of the Commission's determinations, were about 12.16¢ per Mcf. See note 8, *supra*. Data from Phillips' annual reports, filed with the Commission, show average jurisdictional revenues as follows: 8.9¢ (1955); 9.4¢ (1956); 9.9¢ (1957); 11.1¢ (1958); 12.3¢ (1959).

Petitioners also claim that the Commission terminated the § 4 (e) proceedings improperly because it failed to make any finding that the increased rates in question were just and reasonable. But this contention goes to the form and not the substance of what the Commission did. Since these increased rates were "locked in," their validity for the future was not at issue; the sole question was whether all or any part of the increases had to be refunded by Phillips. Having decided on the basis of substantial evidence that the increases did not bring revenues up to cost of service, the Commission properly concluded, on the only matter before it with respect to these dockets, that no refund obligation could be imposed.

It was urged on rehearing before the Commission, and in the court below, that some of the increased rates were above average cost of service and that at most the Commission should have terminated only those § 4 (e) dockets in which the increased rates did not exceed the average unit cost of service. The Commission rejected this contention, stating that Phillips' rates would normally vary greatly because sales were made at widely separated points and under different conditions, and that there was little or nothing to be gained by entering a protracted investigation of allocation of costs to particular past rates "when it is already known that Phillips was not earning its whole cost of service." 24 F. P. C., at 1009.

We believe this conclusion was justified,[15] and petitioners appear to have all but abandoned the theory that

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[15] We find no necessary inconsistency between this determination and the Commission's recent decision in *Hunt Oil Co.*, 28 F. P. C. 623, in which the Commission remanded § 4 (e) proceedings for the taking of additional evidence and stated:

"Our examination of the record in this case convinces us that increased rates for specific sales cannot always be found to be just and rea-

some of the § 4 (e) dockets were improperly terminated merely because the particular increased rates in those dockets exceeded average cost. Rather, they now urge that the variation in the increased rates was so great as to compel the conclusion that they were "discriminatory and preferential *per se*." The Commission noted that there was nothing in the record to show unlawful discrimination, and it is clear that mere differences in rates under this Act are not *per se* unlawful. But in any event, we need not reach the merits of the claim of discrimination because it is not properly before us. It was not presented to the court below, nor was it adequately raised on application to the Commission for rehearing, a step required by § 19 (b) of the Act in order to preserve a point for judicial review. See, *e. g., Sunray Mid-Continent Oil Co.* v. *Federal Power Comm'n*, 364 U. S. 137, 157.

IV.

The final question is whether the Commission was justified in terminating the § 5 (a) investigation of the reasonableness of Phillips' current rates. Preliminarily, it is important to observe that the Commission's accomplishments since the original *Phillips* case, the validity of the Statement of General Policy 61–1, the actions taken pur-

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sonable solely on the basis of a comparison of individual company-wide costs with that company's revenues in a test year." 28 F. P. C., at 626.

The record in the *Hunt* case is not before us, but it is evident from the Commission's opinion that, unlike the present case, certain increased rates there involved were not "locked in" and were higher than the currently prevailing rates in the production area. Thus the factors that may have merited limited supplementation of the record in that case with respect to the § 4 (e) proceedings were not present here. It should also be noted that in *Hunt*, as here, the Commission decided not to pursue the broad § 5 (a) inquiry into the lawfulness of all of the producer's present rates. See p. 314, *infra*.

suant to it, and the lawfulness of the area pricing method are not themselves before the Court for review. To a limited extent, however, these matters do bear upon the propriety of the Commission's decision to terminate this § 5 (a) proceeding.

As the petitioners recognize, the issue is whether the termination constituted an abuse of discretion, a discretion which in general is broad but which the petitioners urge is a good deal narrower in a proceeding that has gone this far than in the case of a decision whether or not to *initiate* an inquiry. See *Minneapolis Gas Co.* v. *Federal Power Comm'n,* 111 U. S. App. D. C. 16, 294 F. 2d 212. Underlying petitioners' position are their claims that the result of the termination is little or no effective regulation in the interim period before the development of area rate regulation, that such regulation may take many years to evolve, and that the method may eventually be held invalid.

1. The petitioners are not of one mind as to the feasibility and lawfulness of the area rate method of regulation, although no one questions the Commission's right to undertake the experiment. California appears to come closest to the view that the individual company cost-of-service method is the only lawful basis for rate regulation and that the invalidity of the area approach is therefore predictable. If we believed that such a departure from present concepts had little, if any, chance of being sustained, we would be hard pressed to say that the Commission had not abused its discretion in terminating this § 5 (a) proceeding while undertaking the area experiment. For if area regulation were almost sure to fail, and if the individual company cost-of-service method of determining the reasonableness of rates had been abandoned, then there would be virtually no foreseeable prospect of effective regulation. Difficult as the problems of cost-of-service regulation may be, they would not warrant a breakdown of the administrative process.

But to declare that a particular method of rate regulation is so sanctified as to make it highly unlikely that any other method could be sustained would be wholly out of keeping with this Court's consistent and clearly articulated approach to the question of the Commission's power to regulate rates. It has repeatedly been stated that no single method need be followed by the Commission in considering the justness and reasonableness of rates, *Federal Power Comm'n* v. *Natural Gas Pipeline Co.*, 315 U. S. 575; *Federal Power Comm'n* v. *Hope Natural Gas Co.*, 320 U. S. 591; *Colorado Interstate Gas Co.* v. *Federal Power Comm'n*, 324 U. S. 581, and we reaffirm that principle today. As the Court said in *Hope:*

> "We held in *Federal Power Commission* v. *Natural Gas Pipeline Co., supra,* that the Commission was not bound to the use of any single formula or combination of formulae in determining rates. Its rate-making function, moreover, involves the making of 'pragmatic adjustments.' *Id.*, p. 586. And when the Commission's order is challenged in the courts, the question is whether that order 'viewed in its entirety' meets the requirements of the Act. *Id.*, p. 586. Under the statutory standard of 'just and reasonable' it is the result reached not the method employed which is controlling." 320 U. S., at 602.

More specifically, the Court has never held that the individual company cost-of-service method is a *sine qua non* of natural gas rate regulation. Indeed the prudent investment, original cost, rate base method which we are now told is lawful, established, and effective is the very one the Court was asked to declare impermissible in the *Hope* case, less than 20 years ago.

To whatever extent the matter of costs may be a requisite element in rate regulation, we have no indication that the area method will fall short of statutory or constitutional standards. The Commission has stated in its

opinion in this proceeding that the goal is to have rates based on the "reasonable financial requirements of the industry" in each production area, 24 F. P. C., at 547, and we were advised at oral argument that composite cost-of-service data will be considered in the area rate proceedings. Surely, we cannot say that the rates to be developed in these proceedings will in all likelihood be so high as to deprive consumers, or so low as to deprive producers, of their right to a just and reasonable rate.[16]

We recognize the unusual difficulties inherent in regulating the price of a commodity such as natural gas.[17] We respect the Commission's considered judgment, backed by sound and persuasive reasoning, that the individual company cost-of-service method is not a feasible or suitable one for regulating the rates of independent producers. We share the Commission's hopes that the area approach may prove to be the ultimate solution.

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[16] We do not interpret the decision of the Court of Appeals in *Detroit* v. *Federal Power Comm'n,* 97 U. S. App. D. C. 260, 230 F. 2d 810, to suggest that, in the view of that court, individual company cost of service is the method required to be used in independent natural gas producer rate regulation. The court did express the view that, in considering the price which a pipeline could charge for gas produced from its own wells, cost of service must be used "at least as a point of departure." 97 U. S. App. D. C., at 268, 230 F. 2d, at 818. Whatever the court may have meant in that context, it is clear that it did not have before it any questions relating to the area rate method, and it is interesting to note that Judge Fahy, the author of the *Detroit* opinion, said in his opinion below in this case: "We should not seek to deter the Commission from pursuing such a method [the area method] in future proceedings, or from using it in any proceedings already initiated along those lines." 112 U. S. App. D. C., at 379, 303 F. 2d, at 390. See also *Panhandle Eastern Pipe Line Co.* v. *Federal Power Comm'n,* 113 U. S. App. D. C. 94, 305 F. 2d 763.

[17] See the discussion in the opinions of Mr. Justice Jackson in *Federal Power Comm'n* v. *Hope Natural Gas Co.,* 320 U. S. 591, 628–660, and in *Colorado Interstate Gas Co.* v. *Federal Power Comm'n,* 324 U. S. 581, 608–615.

2. This is not a case in which the Commission has walked right up to the line and then refused to cross it—a case, in other words, in which all the evidence necessary to a determination had been received but the determination was not made. Here, the Commission concluded that the record, relating to the test year 1954, was too stale in 1960 to permit a finding as to the justness and reasonableness of Phillips' current rates. In view of this inadequacy, and since the Commission must establish the unlawfulness of present rates before taking further action in a § 5 (a) proceeding, continuation of the proceeding would have required remanding the case for the receipt of evidence as to costs in at least one subsequent test year. None of the petitioners specifically challenges the Commission's conclusion that, for § 5 (a) purposes, the record was stale in 1960; *a fortiori* it is stale today.[18]

Thus the question whether the Commission abused its discretion in terminating the proceeding must be measured against the only alternative: remanding for additional evidence. Such a remand undoubtedly would have consumed considerable time and energy, including that of the Commission and its staff, and would almost certainly have involved another decision by a hearing examiner, another appeal to the Commission, another petition for rehearing and further judicial review of complex and difficult issues. In short, the alternative rejected by the Commission would not have resulted in definitive regu-

[18] The fact that this record may have been stale by the time the Commission rendered its decision certainly does not mean that no rate proceeding can be decided before the record becomes out of date. This pilot proceeding was one of unusual length and complexity, and the Commission noted that both costs and revenues "increased greatly" between the test year and the year of decision. The Commission has presumably learned a great deal in this case which will be of use to it in the area proceedings, and there is no reason to suppose that those proceedings will be rendered incapable of decision by the march of time.

lation of Phillips' rates immediately or in the near future. Indeed, several years might have elapsed before even the method of regulation which the Commission regards as unsuitable would have become effective as to even this one producer.

3. It is contended that, as a result of the decision to terminate this § 5 (a) proceeding, the public will receive significantly less protection against the charging of excessive prices by Phillips (and others) in the interim period before the area method sees the light of day. Were this the case, it would bear importantly on our review of the Commission's exercise of its discretion. But in this connection several factors should be noted. *First,* the record before us does not paint a picture of the public interest sacrificed on the altar of private profit. Indications are that at least until 1959 Phillips' jurisdictional revenues did not catch up to its cost of service. Although revenues increased substantially after that time, the Commission observed that costs have also risen dramatically, and we have no basis for assuming that current rates are grossly unreasonable.

Second, most of Phillips' increased rates now in effect are the subject of pending § 4 (e) proceedings and are thus being collected subject to refund. Refund obligations, it is true, do not provide as much protection as the elimination of unreasonable rates, see *Federal Power Comm'n* v. *Tennessee Gas Transmission Co.,* 371 U. S. 145, 154–155, but they are undoubtedly significant and cannot be ignored, as some of the petitioners would have us do.

Third, it is clear that since the Commission's decision in this proceeding, the upward trend in producer prices has been substantially arrested, and in at least one important area the trend has actually been downward.[19] Al-

[19] The area is South Louisiana, and the downward trend is due in part to settlement of certain rate cases and the ordering of substantial refunds.

though the Statement of General Policy did not purport to establish just and reasonable rates, see note 7, *supra,* the price levels declared in that statement, along with implementation of the program there announced, appear to have played a significant role in accomplishing this result.

Fourth, it must be remembered that the problem of this transitional period would still exist if the present § 5 (a) proceeding were reopened for the taking of new evidence; there is no way of predicting how much time would be required for a final decision to be rendered, but it would inevitably be substantial. It is therefore evident that the choice is not between protection or no protection. There will in either event be some protection, though doubtless with room for improvement, for several years.

Petitioners claim that forcing the Commission to reopen this § 5 (a) investigation will not unduly delay area rate proceedings and will in fact provide useful information for area rate-making purposes. The Commission, with equal vigor, states that it does not have the facilities to reopen this case (and all others that have reached approximately the same stage) and at the same time to proceed expeditiously with its area investigations. It estimates that the Permian Basin area proceedings, a case involving some 35% of Phillips' jurisdictional sales and roughly 10% of sales by all producers, will be completed in about the same time that would be required to complete a remanded § 5 (a) proceeding relating to Phillips alone. It warns that if it is required to reopen this and similar proceedings, the result may be to delay unduly the area investigations, while compelling adherence to a method the Commission deems unworkable, thus providing significantly less protection for the public both in the long and the short run.

The Court cannot resolve this dispute against the Commission and tell it that it has made an error of law—abused its discretion—in deciding how best to allocate its

resources. The case might be different if the area approach had little or no chance of being sustained; if the present record were now ripe for determination of reasonable rates for Phillips on an individual company cost-of-service basis; or if it were manifest that the public would receive significantly less protection in the interim period than if the proceeding had not been terminated. But as we have already concluded, none of these conditions exists, and in their absence a reversal of the Commission would be a sheer act of interference in the details of the administrative process. Indeed, it might well have the effect of postponing even further the time when effective regulation will be realized.

Finally, the fact that the Commission in this case terminated the § 5 (a) proceedings, rather than merely holding them in abeyance as it did in *Hunt Oil Co.*, 28 F. P. C. 623,[20] is a circumstance of no significance. At the oral argument general counsel for the Commission assured us that the Commission remains free to reactivate the investigation of Phillips' individual rates if the area proceedings are unduly delayed or if circumstances should otherwise warrant. The distinction between termination and suspension of the § 5 (a) proceedings is thus one of form and not of substance. In either event the Commission retains the flexibility it must have at this still formative period in a difficult area of rate regulation.

Affirmed.

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[20] In *Hunt*, the Commission said: "It is our hope that area proceedings will result in a timely determination of Hunt's rates for the future. However, in order to assure adequate protection to consumers against any unreasonably high rates of Hunt which may not be subject to an early determination on an area basis we will hold in abeyance further action on the 5 (a) aspects of the case pending area rate determinations, with the understanding that 5 (a) proceedings on some or all of Hunt's rates may be subject to reactivation if future circumstances should so dictate." 28 F. P. C., at 626.

MR. JUSTICE CLARK, with whom THE CHIEF JUSTICE, MR. JUSTICE BLACK and MR. JUSTICE BRENNAN join, dissenting.

The Sisyphean labors of the Commission continue as it marches up the hill of producer regulation only to tumble down again with little undertaken and less done. After 16 years without regulation under the Act, resulting from the Commission's position that it had no jurisdiction over the production of gas, this Court decided *Phillips Petroleum Corp.* v. *Wisconsin,* 347 U. S. 672 (1954).[1] The Court there charged the Commission with supervision over Phillips' operating expenses, both producing and gathering, and directed the Commission to fix a just and reasonable rate for the sale of Phillips' gas. Five years later the Presiding Examiner determined Phillips' 1954 cost of service to be 11.662¢ per Mcf. and allowed it a 9.25% rate of return. He directed and Phillips filed a preliminary rate per Mcf. for 1954 and an adjusted rate for subsequent years. A year and a half later the Commission handed down its decision. It found Phillips' 1954 cost of service to be 11.1009¢ per Mcf.[2] and determined that a fair return would be 11%. It found Phillips' jurisdictional revenues substantially less in 1954 than these allowables and, contra to the recommendation of the Examiner and its own staff, it terminated all save two of the § 4 (e) proceedings, discharged Phillips from further refund obligation thereunder and dismissed its own § 5 investigation of these and subsequent rates covering some 95 substantial rate increases

[1] For a discussion of the problems lurking under the decision see the separate dissents of MR. JUSTICE DOUGLAS and of the writer, 347 U. S., at 687 and 690, respectively.

[2] The 11.1009¢ figure for unit cost of service was announced in the Commission's order amending its opinion and denying rehearing. The figure was subject to redetermination for purchased gas costs, gathering taxes and royalties.

made by Phillips. In addition, it assumed from these 1954 figures that the rates were "probably" not excessive through 1958 and invited motions to dismiss these proceedings, thus approving existing and increased rates for the 1955–1959 period on the sole basis of 1954 costs and revenues. It also concluded that there was "nothing in the record to show that these past rates . . . are unduly discriminatory or preferential," 24 F. P. C., at 576, despite the fact that they varied from 5.5¢ per Mcf. to 13.5¢, with one at 17¢ per Mcf. But this is not all. Concurrently with this action the Commission issued *sua sponte* a Statement of General Policy No. 61–1, 24 F. P. C. 818, 25 Fed. Reg. 9578, in which it discarded its long-established cost method in favor of an area basis of fixing rates. It promulgated two lists of area prices, one covering initial rates under § 7 certificates and another for increasing rates for gas sold under existing contracts subject to § 4 (e). In arriving at these price levels the Commission said that it considered "all of the relevant facts available to us," including cost information, "existing and historical price structures, volumes of production, trends in production, price trends in the various areas over a number of years, trends in exploration and development, trends in demands, and the available markets for the gas." 24 F. P. C., at 819. For the new gas level § 7 certification price, there can be no doubt that the level established as a guide is the *highest* permanently certificated rate in the respective areas as of September 1960. The other gas level announced (for § 4 (e) contracts) was but the average weighted price for gas sold from the respective areas in 1959. It is therefore accurate to say that both levels were based on existing price structures as of September 1960, *i. e.*, averaged field prices. The Examiner, contrary to the Commission, had found the cost method not only more accurate but entirely feasible and, in comparison with the area method, no more delaying. The parties them-

selves, including Phillips, concurred in the conclusion that Phillips' rates should be determined by the Examiner on the basis of its over-all cost of service. Nevertheless the Commission held to the contrary and, in addition, issued the statement of policy and accompanying price levels without notice, hearing or record and has since amended them several times in like manner. In this summary fashion the Commission junked its cost-of-service regulation program, wasted a half-dozen years of work thereon and is now experimenting with a new, untried, untested, inchoate program which, in addition, is of doubtful legality.[3] As a consequence the consumers of gas all over the United States and particularly in the large metropolitan cities of the Eastern Seaboard, the Midwest and the West Coast will pay for the Commission's area pricing wild-goose chase. I predict that in the end the consumer will find himself to be the biggest goose of the hunt and the small producer the dead duck.

I cannot let this pass without saying that, as a result of the Court's approval of the Commission's action here, the gas consumers of this country will suffer irretrievable loss amounting to billions of dollars. I shall now offer a few examples in the Commission's rate-base calculation of 1954 that support this conclusion.

I. GROSS ERRORS IN THE COST OF SERVICE COMPUTATIONS.

As the Court has pointed out, the Commission terminated not only the § 5 (a) proceeding but also 10 consolidated § 4 (e) proceedings against Phillips, the latter

[3] The Presiding Examiner found "[a]ny failure . . . to allow . . . rates sufficient to recoup . . . proper cost of service as here determined, would be inherently unfair and contrary to the public interest. It might also raise a serious question with respect to possible violation of the constitutional prohibition against confiscation." 24 F. P. C., at 780.

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on the ground that the revenue received by it for the periods involved was less than cost of service. In view of this disposition it is necessary, aside from the contention that there was no basis for dismissal of those proceedings covering years subsequent to 1954 on that year's findings, for us to examine the basis of its cost-of-service findings for 1954. The dismissal orders are all predicated upon the 1954 cost of service and if it be erroneous the whole basis for the orders of dismissal falls. Thus, while the petitioners have not here argued the specific challenges raised before the Commission and the Court of Appeals, their contention that the Commission abused its discretion in terminating the § 4 (e) proceedings necessarily includes the question of the validity of the determination of cost of service. In addition, the likelihood that the Court's affirmance will be regarded as an approval of these highly questionable standards for cost-of-service determination, thus fostering their application in other cases, calls for discussion of them.

Aside from its direct expenditure for purchased gas [4] the largest single item in Phillips' costs appears to be its exploration and development expense, which was allowed in the amount of some $58,313,230 before allocation. We first examine it and other items going into cost of service.

(a) *Exploration and development, depletion allowance, allocation and interest costs.*—Exploration and development expense for 1954 on the books of the company was $47,474,039, including undeveloped lease rentals, drilling tools, expired and surrendered leases, dry holes and land

[4] Phillips sold 688,811,312 Mcf. of natural gas in 1954; it purchased 407,984,210 Mcf. and produced 375,690,912 Mcf. Its jurisdictional sales ran 71.9% of this total. (The difference between the total volume sold and the somewhat higher total volume produced and purchased results from company uses, losses, residue returned to leases, etc.)

and geological activities. On these expenditures a "return and taxes" item was allowed of $10,839,194. Why the consumer should pay on these items, particularly "dry holes" ($11,306,964), expired and surrendered leases ($9,479,898) and undeveloped offshore leases ($17,765,332) is a matter for the experts; but it appears to me that since Phillips charged off the dry holes in its taxes and the consumers got nothing whatever in 1954 from expired and surrendered leases and undeveloped offshore leases, such expense should not be included in the rate base. This expense alone amounted to 4.281¢ per Mcf. of the total allowed cost of service of 11.1009¢. Moreover, in this connection, Phillips also enjoyed a tax depletion allowance of 27½% on all gas production. This allowance for the year 1954 was $44,784,723, giving Phillips a tax saving of over $20,000,000. This latter sum was included in the rate base. However, depletion is allowed as an incentive to exploration and certainly its savings should be deducted from Phillips' total expense in this regard. Since the book deficit between total revenue and cost of service for 1954 was $8,900,000, it appears that a correction of this item alone would turn that deficit into a nice profit.

(b) *Allocation of cost between oil and gas.*—Much of the gas produced for interstate sale is "associated gas," *i. e.*, it is produced along with oil and is known as casinghead gas. Fifty-seven percent of Phillips' gas production is associated gas but it accounted for only 13.42% of its combined revenue. In addition some wells produce condensate liquids and condensate gas which must be separated through gasoline plants. The question is how much of the expense of exploration, operation, etc., of wells should be chargeable to gas. Phillips used a B.t.u. method which allocated 61.88% of the expense to gas. The Commission cut this to 32.742%, equivalent to 4.281¢

per Mcf. The Examiner had recommended 30.46% while the Wisconsin experts came up with 20.812% and Pacific with 23.98%. As is noted above only 13.42% of Phillips' combined revenue comes from associated gas while 86.58% comes from oil. Still the Commission has allocated almost one-third of the exploration cost to gas, which only brings in one-seventh of the combined revenue. This is a most important item since each 1% shift means over a half million dollars in the rate base.

(c) *Purchased gas.*—If allowed increased rates Phillips says its cost of gas will rise automatically under its percentage type purchase contracts. This item of $1,671,733 was disallowed by the Examiner since the suppliers were not shown to have been entitled to any increase. As the Commission points out an increase in rate would not increase the percentage Phillips was obligated to pay. It would require Phillips to pay the pro-rata increase in rates due on percentage gas, but it recoups this plus a profit when that gas is sold. I submit, as the Examiner found, that the allowance of this million and a half in the cost basis is erroneous. Increases through automatic escalator clauses—which effect the same result—are not permitted because not based on any increase in cost of production. In approving this practice in percentage contracts the Commission creates a perfect loophole for these producers and invites more contracts of this nature.

(d) *Interest.*—Expense for money borrowed for 1954 amounted to $9,892,308. On its tax return Phillips claimed an allowance of only $3,743,077. This variance in cost of money seems to have occurred by reason of an exchange of Phillips' outstanding bonds for common stock. The Commission allowed the larger figure on the basis that it was a "known change" that probably would not occur in other years. It is interesting to note that the "known change" theory was not applied to the "San Juan

transfer" made in 1955.[5] If applied there it would have made a difference against Phillips of some $8,000,000 in its 1954 rate base. Certainly common fairness would require the application of the "known change" theory to all cases, not simply an isolated one.

It is readily apparent that the Commission's cost-of-service calculations for 1954 are full of holes. In addition, assuming, as I do not, that the 1954 cost is correct the Commission should not be permitted to extend that cost and the 1954 revenue into subsequent years through 1958 and hold that they too are deficit years. This is, on its face, not in keeping with rate-making procedures. Moreover, the record itself shows the error of the Commission's method. The Examiner found that, on Phillips' own presentation of its costs, the over-all deficiency for 1956 "was not significantly higher than that derived in Phillips' 1954 test year cost of service." 24 F. P. C., at 773. Phillips' revenues, however, increased each year subsequent to 1954. In 1957 they were some $8,000,000 above 1954; they increased some $17,000,000 in 1958 and about $28,000,000 in 1959. In 1960 revenue was $90,856,248, which was practically twice that of 1954 ($45.6 million). These facts, all known to the Commission, required a reappraisal of the cost of service for all years subsequent to 1954, rather than the arbitrary use of the 1954 figures. The necessary data could have been quickly obtained from Phillips which, of course, had its total revenues readily available and, I am sure, had its cost basis for each § 4 increase likewise calculated.[6]

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[5] The properties of Phillips known as the San Juan transfer were made in 1955 and involved a total "known change" of some $8,000,000 which was not allowed. The assigned reason was that other properties were added but I find no support in the record for this conclusion.

[6] In this connection, it appears strange that the Commission has exempted producers from the Uniform System of Accounts required

II. THE DISMISSALS AND THEIR CONSEQUENCES.

The real problem, however, is not so much in Phillips' 1954 level, for that has long since gone by the board and the consumer may as well forget it. The increased levels that became effective between 1954 and the date of the decision in April 1959 are the main rub. The Examiner understood this when, in his final order, he directed Phillips to file uniform rates which would, when applied to sales made in 1954, bring Phillips its 1954 costs and allowed return. He further directed that the same schedule of rates be applied to all sales made subsequent to 1954 and through the date of his decision and to all sales thereafter. Under this requirement if the subsequent cost of service did increase and was not offset by increased revenues the company could recoup itself with § 4 rate increases. This the Commission refused to do and thereby left Phillips free to collect rates as high as 23.5¢ per Mcf. and subject to no refund. The Commission excused itself on the ground that there would be no reason to fix Phillips' rates on a cost basis since it was going to adopt the area plan. It also found the staleness of the test year prevented its application to subsequent years but obviously this was not the reason. In the first place, it used the "stale" test year of 1954 to justify its finding of deficit through 1958. In addition all parties had agreed upon that year. Investigation covered 1955 and 1956. Hearings began in June 1956 and ran through 1957. Phillips itself presented 1956 data, the latest full year at the time of the closing of the hearings. They were used to show

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of natural gas companies, 18 CFR, c. 1, part 201. No system has as yet been prescribed for producers. Moreover, the annual reports required from pipelines enable the Commission to promptly determine pipeline expense, returns, earnings, etc. This report for producers merely shows sales under each rate schedule. Finally, pipelines, when filing § 4 rate increases, must attach detailed cost justification. No such requirement is made of producers.

that the cost experience of 1954 was identical for all practical purposes with 1956 and the Examiner so found. It required 15 months for the Examiner to decide the case and prepare a more comprehensive and detailed report which reflected his clear grasp of the problems. See 24 F. P. C. 590–818. Thus, like many major administrative proceedings, this one took five to six years to complete. But, I ask, if this makes the test year stale what of all the other major rate cases? Those that reach us not infrequently have been in the Commission for an equal or longer period. Even if stale, the Commission should not have dumped the whole investigation, hearing, Examiner Report, and staff work down the drain. Before doing so, and in the same opinion, it had already laid down detailed standards in the case for determining cost of service. Indeed it had not only determined the cost to Phillips but had formulated the standards governing its rate of return and calculated its allowable return thereunder. All of this it then discarded. Admitting that additional statistics for subsequent years might have been necessary, such data would have been concerned solely with the application of these already determined standards to those years.

The dismissal of the § 4 (e) and § 5 (a) cases is the more unfortunate and indicates a disturbing disregard of the consumer interest. On the § 4 (e) cases the Court says "most of Phillips' increased rates now in effect are the subject of pending § 4 (e) proceedings . . . ." At this very moment Phillips is making sales at nonrefundable rates as high as 23.5¢ per Mcf. which produce annual revenues more than $3,000,000 in excess of the Commission's SGP 61–1 price levels.[7] On this score in 1956 the Com-

[7] The situation is even more extreme in South Louisiana where 55% of the gas is now flowing at prices which exceed the Commissioner's "initial price" ceiling; over 94% is flowing at prices exceeding the Commission's "increased price"; and over 70% is flowing at prices

mission authorized a large number of § 7 high price sales without providing for any conditions. This action was reversed in *Atlantic Refining Co.* v. *Public Service Comm'n of New York,* 360 U. S. 378 (1959), and like cases. Although § 5 proceedings have been filed on these cases there are substantial numbers of other such sales that have never been tested and are not now contested. Section 5 proceedings operate prospectively and so, of course, all of the sales are nonrefundable. The statistics indicate that of the 1960 revenue received by 13 major producers about $250,000,000 (roughly 83%) is not subject to refund.[8] Furthermore, the Court says that the rates covered by the § 4 (e) proceedings dismissed herein "were 'locked in,' their validity for the future was not at issue; the sole question was whether all or any part of the increases had to be refunded by Phillips." The fact is that the Commission has used this same "stale" 1954 price year which it discarded, including its income level, in determining that refunds were not due for the subsequent four years and in dismissing those proceedings. Hence dismissal forecloses any recovery of excess rates for the periods covering those proceedings, *i. e.,* the four-year period 1954–1958, which the Commission has found non-

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which exceed the level the Commission found "in line" for CATCO gas after our remand in *Atlantic Refining Co.* v. *Public Service Comm'n of New York,* 360 U. S. 378 (1959).

[8] The Court seems to admit that the protection the Congress envisaged in § 4 (e) is in practice illusory. First it comes too late; next, many of the consumers entitled to refunds cannot be found, etc. See *Federal Power Comm'n* v. *Tennessee Gas Transmission Co.,* 371 U. S. 145, 154–155 (1962). An even more realistic consideration is that these refunds have been permitted to reach the astronomical figure of $158,000,000 a year, of which amount Phillips has been receiving some $74,000,000. If the "evil day" for the producer ever arrives where he must pay up, from where will the money come? It would bankrupt the average producer. The Commission would necessarily, in order to protect the service of interstate customers, be obliged to compromise or forgive them.

refundable. As I have shown, the 1954 rate as determined by the Commission has serious questions as to its legality. Certainly the subsequent years—based entirely on it—should not have been dismissed. While it may be true, as the Court says, that "Refund obligations . . . do not provide as much protection as the elimination of unreasonable rates" it must be remembered that here the § 5 (a) case was also dismissed. Why this precipitous action? The proceedings had been on the books for six years! Why did not the Commission leave them pending until final determination of Phillips' responsibility on all of its more than 95 filings? The Commission makes no answer. There is none.

The dismissal of the § 5 (a) proceeding was likewise unjustified. Continuation of the proceeding would have required a remand but the conclusion of the Court that "several years might have elapsed" before a determination of the issue is a bad guess. It has been two years since this dismissal and there is nothing in sight as yet for a final decision on the Permian Basin area proceeding. The Commission has 22 more areas to go. Meanwhile all areas, including Phillips', have escaped regulation for the years 1954–1963, a total of nine years. If in 1960 the Commission had remanded the § 5 (a) proceeding it could long since have been decided, since the enormous increase in Phillips' revenue for 1960 ($45.6 million in 1954 to $90.8 million in 1960) would have definitely shown an excessive rate. The Examiner had found, contrary to the conclusion of the Court, that the 1956 cost of service was not "significantly higher" than 1954. All that would have been necessary was to project this to the three-year period 1957–1959, inclusive. Phillips, I wager, could have done this almost overnight, if it did not already have the figures available. The Commission in determining the standards to be used had allowed every cost item save the allocation on associated gas which could have been easily cor-

rected on the percentages involved. The remainder of Phillips' system of accounting had received the approval of the Commission and would have readily revealed its costs.

The Court says that a new § 5 (a) proceeding can be filed. This is true, but if it were filed tomorrow, more than nine years will already have been lost to the consumer!

The Commission, in my view, had no valid excuse for dismissing the § 4 (e) and § 5 (a) proceedings. It followed exactly the opposite course in *Hunt Oil Co.*, 28 F. P. C. 623. The Court dismisses this case as inapposite but its technical distinction merits no discussion. As I see it the conclusion in *Hunt* not to dismiss the pending proceedings is in direct conflict with the action taken here.

I have considered this record page by page—line by line—and have given the Commission's action my most careful attention. There is but one conclusion—namely, that the Commission erred in its determination of the 1954 cost of service and return; and in dismissing the § 4 (e) and § 5 (a) proceedings, rather than concluding the case by determining a just and reasonable rate, it acted in an arbitrary and unreasonable manner entirely outside of the traditional concepts of administrative due process.

III. THE FALLACY OF THE STATEMENT OF GENERAL POLICY.

As the Court says, the validity of the Statement, SGP 61–1, and the rates accompanying it is not before the Court. But despite this declaration I notice that the Court proceeds to discuss the Statement and strongly implies a view as to its validity. I think it both premature and dangerous to pass any judgment at this stage of the proceedings. There are serious legal questions lurking

in the application of the policy and we should not intimate its approval until a definitive case is presented under it. I deem it appropriate to raise these questions here not to join issue on the merits but only to outline the reasons for my reservations about the Court's consideration of this aspect of the case. While I do have serious doubts about both the wisdom and the legality of this approach to price determination, this is certainly not the case in which to give them full-dress treatment.

It is of course true that the cost-of-service method is not the "*sine qua non* of natural gas rate regulation." It is not so much that the Commission must follow a single method but rather that, in abandoning a historic, presently used and undoubtedly legal one in the summary manner done here, it left the production of gas without the required regulation which the Congress has directed. It can hardly be denied that the Commission's action will leave producers for a number of years—estimated by the Court of Appeals at up to 14—without effective regulation and will result in irreparable injury to the consumer of gas. The only brakes on spiraling producer prices are the "guide prices" which the Commission attached to its SGP 61–1. These, rather than being legally established rates, are nonreviewable guides reflecting the highest certificated rate or weighted price. They have no binding effect. Indeed, they may well establish a floor rather than a ceiling.

In addition, area pricing must run the hurdle of legal attack and, to be constitutionally sound, must include a showing that the individual producer at the area rate fixed will recover his costs; otherwise it would be confiscatory and illegal. I cannot share the Court's optimistic view that the Commission's area rate, tested by "the 'reasonable financial requirements of the industry' in each production area," is likely to do this. The facts of gas industry life make it crystal clear that one producer's costs vary

immeasurably from another's and cannot be leveled off—at least until discovered. For example, Phillips' dry holes cost about $11,000,000, its surrendered leases $9,000,000 and its undeveloped offshore ones $17,000,000. Are these items to be included in the "reasonable financial requirements" used to fix the rate of the area? If they are it will be unfair for the reason that other producers in the area may or may not have had such costs. Inevitably, the area average will be lower than the high cost producer. Hence the "financial requirements of the industry" will not satisfy him. If the rate is set by the "financial requirements" of the higher cost producer it will be higher than that necessary to make it just and reasonable to the lower cost producer, thus resulting in a windfall to the latter. If the "financial requirements" of the lower cost producer are used it will result in a rate that will confiscate the gas of the higher cost producer. If the higher and lower costs are averaged, as the Commission indicates it intends to do, then the higher cost producer will still not recover his costs and the rate will be confiscatory. On the other hand the lower cost producer will receive a windfall. And so, as I see it, the area plan is in a squeeze—*i. e.*, any criteria the Commission uses would not reflect individual just and reasonable rates. Moreover, it must be remembered that the burden of proving just and reasonable rates is on the producer and he cannot be precluded from offering relevant proof of his cost. This he will demand in the event his statistics show his costs above those fixed for his area. And so the cold truth is that, after all of its area pricing investigation and the fixing of a rate pursuant thereto, the producer aggrieved at that rate may demand and be entitled to a full hearing on his cost. The result is additional delay, delay and delay until the inevitable day when there is no more gas to regulate.

Typical of this simple fact of gas industry life is the announcement last November 15 that the Commission

staff had recommended two prices for the gas of the Permian Basin (Phillips) area. It was below the "guidelines" of the Commission's SGP 61–1 and, further, suggested that these prices be ceilings but not floors. Immediately there sprang up vigorous protest. Independent producers threatened to withdraw their support of the area pricing plan. A meeting was held in Washington with the Commission where it was insisted that "realistic and uniform prices" be followed in each area consistent with the "implied promise" of the original SGP 61–1 in this case. The producers were assured three months later that the "staff's position is not necessarily that of the Commission." See Tipro Reporter, Feb.-Mar. 1963. It does not require a crystal ball to see what will happen regardless of the conclusion of the Commission. If it decides to make the rates suggested a floor, the respective independent producers will require individual cost proceedings; if the rates are made both a floor and a ceiling, thousands of old rates will be raised to the floor and the consumer will pay the bill.

That the Commission's problems are difficult goes without saying. But as complicated as they appear to be it seems entirely feasible for it to solve them. Other agencies have been faced with like congestion problems. Indeed both the National Labor Relations Board and the Wage and Hour Administration found that they could not process all situations confronting them. They adopted procedures that exempted the inconsequential ones. See 23 N. L. R. B. Ann. Rep. 7–8 (1958). The suggestion that the Commission do likewise has much merit. It appears that in 1953, the year before *Phillips,* of all the producers then selling in interstate commerce, each of 4,191 producers sold less than 2,000,000,000 cubic feet of gas annually, the total of their sales being only 9.26% of the gas then sold in interstate commerce. See Landis, Report on Regulatory Agencies to the President-Elect

(1960), 55. In the Commission's opinion in this case it stated that there were 3,372 producers selling interstate in 1960. The number has therefore decreased almost a thousand since the *Phillips* decision in 1954, which indicates that some of the smaller producers have escaped from their interstate commitments. However, if all of those who escaped were in the less than 2,000,000,000 cubic feet bracket there would still remain some 3,000 producers whose sales are miniscule. It therefore appears to me that inconsequential producers by the hundreds might well be temporarily exempted. The Commission could then concentrate on the large producers (20 of them control over 50% of the interstate gas) without the pressures incident to the smaller ones. The integrated producer of large volume is inevitably going to be the low cost producer. Hence his rate will be an effective floor from which the small producer rates might well be adjusted. This would give the consumer rate protection over the overwhelming amount of interstate gas more quickly [9] and would give assurances to the small producer that he would be protected from confiscation.

IV. INCONSEQUENTIAL MATTERS.

There are two inconsequential matters that the Court discusses. The first is the escalation clause in several of Phillips' contracts. The Commission has promulgated a series of rule-making orders condemning spiral escalation clauses as being against the public interest. By Orders

[9] Four cases involving major producers have been decided by the Examiners and five investigations of other major producers have now been completed. These nine producers, with Phillips, handle 30% of all interstate gas. Still no major rate case has been decided since *Phillips*. Only two area cases are under investigation. These two areas—Permian and South Louisiana—furnish only 32% of all interstate gas. The South Louisiana case will take several years to complete.

Nos. 232 and 232A, 25 F. P. C. 379 and 609, respectively, 26 Fed. Reg. 1983 and 2850, it announced that these clauses in contracts executed on or after April 3, 1961, would be without effect. And Order No. 242, 27 F. P. C. 339, 27 Fed. Reg. 1356, announced that contracts containing such clauses would be unacceptable for filing after April 2, 1962. The Commission argues that the contracts under attack here were all dated prior to 1954 and hence its order refusing to find them void should be upheld. This is, of course, a *non sequitur*. Nor is it understandable how the clauses become effective against the public interest and unacceptable in 1961 but the identical provisions are blessed with validity prior to that date. I cannot subscribe to such a doctrine. However, since the Court requires the producer to "establish its lawfulness wholly apart from the [escalation] terms of the contract" I cannot become excited over it. Obviously the clauses have no effect whatsoever in determining the reasonableness of a rate from the public standpoint. They do have the effect of triggering the filing of increased rates. They should be completely outlawed by the Commission when the two § 4 (e) proceedings left pending are decided.

The other miniscule point when compared to the basic questions in the case is whether Phillips' widely varying rates were "on their face unduly discriminatory and preferential," as contended by petitioners in No. 72. The Court refrains from passing on this issue, regarding it as not raised in the court below or on rehearing before the Commission. Section 19 (b) of the Act precludes a court on review from considering an objection not raised in the petition for rehearing before the Commission, but it appears that petitioner Wisconsin adequately raised the issue of discrimination in its rehearing petition,[10] and

[10] Wisconsin's petition for rehearing, in point (1), challenged the Commission's policy statements regarding rate regulation, on the ground that "the issue in this case is to determine whether the juris-

the Commission in denying rehearing stated that Phillips' rates "normally vary greatly . . . and there is nothing to show that these rates are discriminatory or preferential." 24 F. P. C., at 1009. I regret that the Court has chosen this occasion to stand on technicality, compare *Federal Trade Comm'n* v. *Broch & Co.*, 368 U. S. 360, 363 (1962), when public interest stands the loss. The patently discriminatory nature of the rate increases, resulting in rates varying from 5.5¢ to 17.5¢ per Mcf. cannot seriously be questioned. The Examiner found that on the date of the *Phillips* decision its prices ranged from 1.2¢ to a high of 15.7¢ per Mcf. He concluded that to continue such a rate structure would preserve "for Phillips an unduly discriminatory general rate structure, which would be contrary to the public interest . . . ." 24 F. P. C., at 790. The Commission staff also found that "Phillips contract rates vary so widely, even as between contracts for the same service from the same producing areas, as to patently contravene the public interest, generating and perpetuating undue preference and undue discrimination." *Id.*, at 790–791. While the issue of discrimination was raised only generally in the Court of Appeals,[11] it was implicit in the broad questions on which we granted certiorari. While the issue is minor as compared to the primary issues here, it certainly results in a miscarriage of justice for the Court, on such a highly technical ground, to permit the Commission's disposition to stand, to the irreparable injury of the consumers of gas.

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dictional rates and charges or classifications demanded, observed, charged or collected by Phillips, or any rules, regulations, practices or contracts affecting them, *are unjust, unreasonable, unduly discriminatory or preferential.* Natural Gas Act §§ 4, 5." (Emphasis added.)

[11] See points 1 and 2, Brief of Long Island Lighting Co., petitioner in No. 74, on petition for review of the Commission's order in the Court of Appeals.

V.

As I reminded in the beginning, the Congress directed that gas moving in interstate commerce be sold at just and reasonable rates. The basis of such a determination must have some reference to the costs of the service. The Commission has, however, failed to require this. Instead it has declared the 1954 test year, which it thoroughly investigated, to be "stale" but nevertheless used its findings for that year to release Phillips from regulation not only for 1954 but also for the four succeeding years. Pursuant thereto it dismissed the § 4 (e) proceedings and a § 5 (a) proceeding covering those periods. In addition the Commission has abandoned its cost-of-service program of rate fixing and has embarked on an area basis regulation which is highly questionable. It has also promulgated, without any hearing, rates as guidelines that have no support in evidence as to their justness and reasonableness. Through this course of conduct the Commission's program of producer regulation—of which Phillips is the keystone—has permitted the continued collection of untested, unreasonable, unjust, discriminatory and preferential rates. This situation under the present timetable will continue for years. For these reasons I believe that the public interest requires that this case be reversed and remanded to the Commission with directions to fix the just and reasonable rates of Phillips involved herein. I therefore dissent.

692-438 O-63-25

ANDREWS *v.* UNITED STATES.

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

No. 491. Argued March 25–26, 1963.—
Decided May 20, 1963.*

In a Federal District Court, petitioners were convicted of violating certain federal criminal statutes and were sentenced to imprisonment. Their convictions were affirmed by the Court of Appeals; but their cases were remanded for resentencing. They were resentenced, and the judgments were affirmed by the Court of Appeals. Several years later, petitioners moved in the District Court that their sentences be vacated and that they be resentenced, on the ground that they had not been given an opportunity to make statements in their own behalves, as required by Federal Rule of Criminal Procedure 32 (a), either when they were originally sentenced or when they were resentenced. Finding this to be true, the District Court granted their motions and ordered that petitioners be returned to it for resentencing. Without waiting for them to be resentenced, the Government appealed to the Court of Appeals. *Held:* Petitioners' motions should be considered as having been made in collateral proceedings under 28 U. S. C. § 2255; the District Court's orders were interlocutory, not final; and the Court of Appeals did not have jurisdiction of the Government's appeal. Pp. 335–340.

301 F. 2d 376, judgment set aside and cases remanded.

E. Barrett Prettyman, Jr., by appointment of the Court, 371 U. S. 885, argued the cause and filed briefs for petitioners.

Wayne G. Barnett argued the cause for the United States. On the brief were *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Richard W. Schmude.*

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*Together with No. 494, *Donovan* v. *United States*, also on certiorari to the same Court.

MR. JUSTICE STEWART delivered the opinion of the Court.

The two petitioners and a co-defendant were convicted in a Federal District Court upon a three-count indictment charging that they had (1) assaulted a Post Office employee with intent to rob in violation of 18 U. S. C. § 2114, (2) put the life of the Post Office employee in jeopardy by the use of a dangerous weapon in violation of 18 U. S. C. § 2114, and (3) conspired together to violate the aforesaid statute in violation of 18 U. S. C. § 371. The district judge sentenced each defendant to concurrent prison terms of 25 years on Count 2 and five years on Count 3.[1] None of the defendants was asked before the sentences were imposed whether he had anything to say in his own behalf. On appeal, the convictions were affirmed, but the cases were remanded to the District Court for resentencing on Count 2, on the ground that the trial judge had been in error in thinking that under the statute [2] he was without power to suspend sentence and grant probation on that count. *United States* v. *Donovan,* 242 F. 2d 61. Upon remand, the District Court suspended the 25-year sentence which had been imposed on the petitioners' co-defendant, but resentenced the two

[1] No sentence was imposed on Count 1, because the court concluded that the conviction under this count had merged with the conviction under Count 2.

[2] "Whoever assaults any person having lawful charge, control, or custody of any mail matter or of any money or other property of the United States, with intent to rob, steal, or purloin such mail matter, money, or other property of the United States, or robs any such person of mail matter, or of any money, or other property of the United States, shall, for the first offense, be imprisoned not more than ten years; and if in effecting or attempting to effect such robbery he wounds the person having custody of such mail, money, or other property of the United States, or puts his life in jeopardy by the use of a dangerous weapon, or for a subsequent offense, shall be imprisoned twenty-five years." 18 U. S. C. § 2114.

petitioners to 25-year prison terms. Again, neither petitioner was afforded an opportunity to speak in his own behalf before the sentences were imposed. The Court of Appeals reaffirmed the convictions. *United States* v. *Donovan,* 252 F. 2d 788.

The proceedings now before us began when the petitioner Donovan filed a motion in the District Court requesting that his sentence "be vacated and he be resentenced" on the ground that, contrary to Rule 32 (a) of the Federal Rules of Criminal Procedure, he had been afforded no opportunity to make a statement in his own behalf either at the time of the original sentence or when the sentence was reimposed.[3] The District Court granted the motion and ordered that Donovan "be returned to this district for resentencing." The petitioner Andrews then wrote to Judge Murphy, the district judge who had acted on Donovan's motion, pointing out that "the identical circumstances exist with me" and asking for similar relief. Judge Murphy ordered that Andrews too be returned to the District Court for resentencing. The Government filed a notice of appeal from both orders, and the resentencing of the petitioners was stayed upon the Government's motion. The Court of Appeals ruled that its appellate jurisdiction had been properly invoked, and on the merits reversed the orders of the District Court, holding that under this Court's decisions in *Hill* v. *United States,* 368 U. S. 424, and *Machibroda* v. *United States,* 368 U. S. 487, the sentencing court's failure to comply with Rule 32 (a) did not constitute a ground for collateral relief. 301 F. 2d 376. We granted certiorari, 371 U. S. 812.

As to the merits of the issue decided by the Court of Appeals, the petitioners contend that there was here not

[3] Rule 32 (a), Federal Rules of Criminal Procedure, provides in pertinent part as follows: "Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment."

a mere failure to comply with the formal requirements of Rule 32 (a) as in *Hill* and *Machibroda,* but that a number of aggravating circumstances accompanied the sentencing court's denial of the petitioners' right of allocution. And the Court's opinions in *Hill* and *Machibroda,* say the petitioners, clearly implied that collateral relief would be available in a case where such circumstances were shown to exist. Cf. *United States* v. *Taylor,* 303 F. 2d 165, 167–168. But the petitioners argue preliminarily that the Government had no right of appeal in these cases. We agree with the petitioners that the Court of Appeals did not have appellate jurisdiction, and accordingly, without reaching the merits, we set aside the judgment of the Court of Appeals and remand the cases to the District Court so that the petitioners may be resentenced in accordance with the District Court's orders.

The motion which Donovan filed in the sentencing court was denominated by him as one made under Rule 35 of the Federal Rules of Criminal Procedure.[4] Anderson's letter did not mention Rule 35, but in an affidavit opposing Anderson's request, an Assistant United States Attorney conceded that the "factual and legal posture of this application therefore is identical to the similar motion of Robert L. Donovan." Both applications were filed in the District Court under the docket number of the original criminal case.

In view of this treatment of the motions by the parties and the trial court, the Court of Appeals was asked to consider the motions also as filed in the original criminal cases under Rule 35, and to hold that the trial court's rulings could not be appealed by the Government because they did not come within the limited purview of the Criminal Appeals Act.[5] This reasoning the Court of Ap-

[4] Rule 35 provides in pertinent part as follows: "The court may correct an illegal sentence at any time."

[5] 18 U. S. C. § 3731. The Government makes no claim of a right to appeal under the Criminal Appeals Act. No question as to the

peals declined to adopt, treating the motions instead as having been brought under the provisions of 28 U. S. C. § 2255.

The court was correct in regarding *Hill* v. *United States, supra,* as requiring this view, in the case of a prisoner in custody under the sentence he is attacking. Cf. *United States* v. *Morgan,* 346 U. S. 502. And in this area of the law, as the Court of Appeals pointed out, "adjudication upon the underlying merits of claims is not hampered by reliance upon the titles petitioners put upon their documents." 301 F. 2d, at 378. See *Heflin* v. *United States,* 358 U. S. 415. Section 2255 explicitly authorizes a prisoner in custody under a sentence imposed by a federal court to attack such a sentence collaterally upon the ground that the sentence "was imposed in violation of the . . . laws of the United States," by moving the trial court "to vacate, set aside or correct the sentence." [6]

An action under 28 U. S. C. § 2255 is a separate proceeding, independent of the original criminal case. *United States* v. *Hayman,* 342 U. S. 205. The Criminal Appeals Act has no applicability to such a proceeding. Instead, § 2255 itself provides that "An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus."

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availability of a writ of mandamus is presented by this case. See *United States* v. *Smith,* 331 U. S. 469. Cf. *United States* v. *Mayer,* 235 U. S. 55.

[6] The first paragraph of 28 U. S. C. § 2255 provides:

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence."

We cannot agree with the Court of Appeals, however, that under this provision the Government had a right to take appeals at the time it sought to do so in these cases, because we think it clear that the orders were interlocutory, not final. For a federal prisoner § 2255 can perform the full service of habeas corpus, by effecting the immediate and unconditional discharge of the prisoner. *Sanders* v. *United States, ante,* p. 1. But the provisions of the statute make clear that in appropriate cases a § 2255 proceeding can also be utilized to provide a more flexible remedy. In the present cases neither of the petitioners ever asked for his unconditional release. What they asked, and were granted, was the vacation of the sentences they were serving so that they might be returned to the trial court to be resentenced in proceedings in which their right to allocution would be accorded them. Such a remedy is precisely authorized by the statute. Under § 2255 a petitioner may "move the court which imposed the sentence to vacate, set aside or correct the sentence." [7] And in response to such a motion a District Court is expressly authorized to "discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." [8]

[7] See note 6, *supra.*

[8] The third paragraph of § 2255 provides: "Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate."

Where, as here, what was appropriately asked and appropriately granted was the resentencing of the petitioners, it is obvious that there could be no final disposition of the § 2255 proceedings until the petitioners were resentenced. Cf. *Parr* v. *United States,* 351 U. S. 513, 518.

The long-established rule against piecemeal appeals in federal cases and the overriding policy considerations upon which that rule is founded have been repeatedly emphasized by this Court. See, *e. g., DiBella* v. *United States,* 369 U. S. 121; *Carroll* v. *United States,* 354 U. S. 394; *Cobbledick* v. *United States,* 309 U. S. 323. The standards of finality to which the Court has adhered in habeas corpus proceedings have been no less exacting. See, *e. g., Collins* v. *Miller,* 252 U. S. 364. There the Court said that the rule as to finality "requires that the judgment to be appealable should be final not only as to all the parties, but as to the whole subject-matter and as to all the causes of action involved." 252 U. S., at 370.

The basic reason for the rule against piecemeal interlocutory appeals in the federal system is particularly apparent in the cases before us. Until the petitioners are resentenced, it is impossible to know whether the Government will be able to show any colorable claim of prejudicial error. The District Court may, as before, sentence the petitioners to the same 25 years' imprisonment; it may place one or both of them on probation; it may make some other disposition with respect to their sentences. But until the court acts, none of the parties to this controversy will have had a final adjudication of his claims by the trial court in these § 2255 proceedings.

The judgment of the Court of Appeals is set aside, and the cases are remanded to the District Court for the Southern District of New York for further proceedings consistent with this opinion.

It is so ordered.

Syllabus.

SILVER, DOING BUSINESS AS MUNICIPAL SECURITIES CO., ET AL. *v.* NEW YORK STOCK EXCHANGE.

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

No. 150. Argued February 25–26, 1963.—
Decided May 20, 1963.

Petitioners, two Texas over-the-counter broker-dealers in securities, who were not members of the New York Stock Exchange, arranged with members of the Exchange in New York City for direct-wire telephone connections which were essential to the conduct of their businesses. The members applied to the Exchange, as required by its rules promulgated under the Securities Exchange Act of 1934, for approval of the connections. Temporary approval was granted and the connections were established; but, without prior notice to petitioners, the applications were denied later, and the connections were discontinued, as required by rules of the Exchange. Allegedly as a result, one of the petitioners was forced out of business and the other's business was greatly diminished. Notwithstanding repeated requests, officials of the Exchange refused to grant petitioners a hearing or even to inform them of the reasons for denial of the applications. Petitioners sued the Exchange and its members in a Federal District Court for treble damages and injunctive relief, claiming that their collective refusal to continue the direct-wire connections violated the Sherman Act. *Held:* The duty of self-regulation imposed upon the Exchange by the Securities Exchange Act of 1934 did not exempt it from the antitrust laws nor justify it in denying petitioners the direct-wire connections without the notice and hearing which they requested. Therefore, the Exchange's action in this case violated § 1 of the Sherman Act, and the Exchange is liable to petitioners under §§ 4 and 16 of the Clayton Act. Pp. 342–367.

(a) Absent any justification derived from the Securities Exchange Act of 1934 or otherwise, removal of the direct-wire connections by collective action of the Exchange and its members constituted a *per se* violation of § 1 of the Sherman Act, since it was a group boycott depriving petitioners of a valuable business service which

they needed in order to compete effectively as broker-dealers in the over-the-counter securities market. Pp. 347–349.

(b) In the light of the design of the Securities Exchange Act of 1934 to give the exchanges a major part in curbing abuses by self-regulation, the rules applied in the present case were germane to the performance of the duty implied by §§ 6 (b) and 6 (d) to have rules governing members' transactions and relationships with nonmembers. Pp. 349–357.

(c) The statutory scheme of the Securities Exchange Act of 1934 is not sufficiently pervasive to create a total exemption from the antitrust laws; but particular instances of exchange self-regulation which fall within the scope and purposes of the Act may be regarded as justified in answer to the assertion of an antitrust claim. Pp. 357–361.

(d) In denying petitioners the direct-wire connections without according them the notice and hearing which they requested, the Exchange exceeded the scope of its authority under the Securities Exchange Act of 1934 to engage in self-regulation. Therefore, it was not justified in doing what otherwise was an antitrust violation. Pp. 361–367.

302 F. 2d 714, reversed.

David I. Shapiro argued the cause and filed briefs for petitioners.

A. Donald MacKinnon argued the cause for respondent. With him on the brief were *Samuel L. Rosenberry* and *Edward J. Reilly, Jr.*

By special leave of Court, *Solicitor General Cox* argued the cause for the United States, as *amicus curiae,* urging reversal. With him on the brief was *Daniel M. Friedman.*

Mr. Justice Goldberg delivered the opinion of the Court.

We deal here today with the question, of great importance to the public and the financial community, of whether and to what extent the federal antitrust laws apply to securities exchanges regulated by the Securities Exchange Act of 1934. More particularly, the ques-

tion is whether the New York Stock Exchange is to be held liable to a nonmember broker-dealer under the antitrust laws or regarded as impliedly immune therefrom when, pursuant to rules the Exchange has adopted under the Securities Exchange Act of 1934, it orders a number of its members to remove private direct telephone wire connections previously in operation between their offices and those of the nonmember, without giving the nonmember notice, assigning him any reason for the action, or affording him an opportunity to be heard.

I.

The facts material to resolution of this question are not in dispute. Harold J. Silver, who died during the pendency of this action, entered the securities business in Dallas, Texas, in 1955, by establishing the predecessor of petitioner Municipal Securities (Municipal) to deal primarily in municipal bonds. The business of Municipal having increased steadily, Silver, in June 1958, established petitioner Municipal Securities, Inc. (Municipal, Inc.), to trade in corporate over-the-counter securities. Both firms are registered broker-dealers and members of the National Association of Securities Dealers, Inc. (NASD); neither is a member of the respondent Exchange.

Instantaneous communication with firms in the mainstream of the securities business is of great significance to a broker-dealer not a member of the Exchange, and Silver took steps to see that this was established for his firms. Municipal obtained direct private telephone wire connections with the municipal bond departments of a number of securities firms (three of which were members of the Exchange) and banks, and Municipal, Inc., arranged for private wires to the corporate securities trading departments of 10 member firms of the Exchange, as well as to the trading desks of a number of nonmember firms.

Pursuant to the requirements of the Exchange's rules, all but one of the member firms which had granted private wires to Municipal, Inc., applied to the Exchange for approval of the connections.[1] During the summer of 1958 the Exchange granted "temporary approval" for these, as well as for a direct teletype connection to a member firm in New York City and for stock ticker service to be furnished to petitioners directly from the floor of the Exchange.

On February 12, 1959, without prior notice to Silver, his firms, or anyone connected with them, the Exchange's Department of Member Firms decided to disapprove the private wire and related applications. Notice was sent to the member firms involved, instructing them to discontinue the wires, a directive with which compliance was required by the Exchange's Constitution and rules. These firms in turn notified Silver that the private wires would have to be discontinued, and the Exchange advised him directly of the discontinuance of the stock ticker service. The wires and ticker were all removed by the beginning of March. By telephone calls, letters, and a personal trip to New York, Silver sought an explanation from the Exchange of the reason for its decision, but was repeatedly told it was the policy of the Exchange not to disclose the reasons for such action.[2]

Petitioners contend that their volume of business dropped substantially thereafter and that their profits fell, due to a combination of forces all stemming from the

[1] Exchange approval was never sought for Municipal's private wires to the municipal bond departments of member firms.

[2] Ultimately, during the pretrial stages of this litigation, the Exchange disclosed most of the reasons for its action, and these are summarized and discussed in the opinions of both the District Court, 196 F. Supp. 209, 216–217, 225–227, and the Court of Appeals, 302 F. 2d 714, 716. In view, however, of the disposition we make of the case hereafter, there is no need to set forth these reasons in detail in this opinion.

removal of the private wires—their consequent inability to obtain quotations quickly, the inconvenience to other traders in calling petitioners, and the stigma attaching to the disapproval. As a result of this change in fortunes, petitioners contend, Municipal, Inc., soon ceased functioning as an operating business organization, and Municipal has remained in business only on a greatly diminished scale.

The present litigation was commenced by Silver as proprietor of Municipal and by Municipal, Inc., against the Exchange in April 1959, in the Southern District of New York.[3] Three causes of action were asserted. The first, seeking an injunction and treble damages,[4] alleged that the Exchange had, in violation of §§ 1 and 2 of the Sherman Act, conspired with its member firms to deprive petitioners of their private wire connections and stock ticker service. The second alleged that the Exchange had tortiously induced its member firms to breach their contracts for wire connections with petitioners, and the third asserted that the Exchange's action constituted a tort of intentional and wrongful harm inflicted without reasonable cause.

Petitioners moved for summary judgment on the antitrust claim, and for an accompanying permanent injunction against the Exchange's coercion of its members into refusing to provide private wire connections and against the Exchange's refusal to reinstate the stock ticker service. The district judge, after considering the respective affidavits of the parties, granted summary judgment and a permanent injunction as to the private wire connections, 196 F. Supp. 209, holding that the antitrust

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[3] Silver died while the case was pending in the Court of Appeals, and his widow, Evelyn B. Silver, as executrix of his estate, was substituted for him.

[4] These forms of relief are provided by §§ 4 and 16 of the Clayton Act, 15 U. S. C. §§ 15, 26.

laws applied to the Exchange, and that its directive and the ensuing compliance by its members constituted a collective refusal to continue the wires and was a *per se* violation of § 1 of the Sherman Act. The judge so held on the basis that, although the Exchange had the power to regulate the conduct of its members in dealing with listed securities, its members' relations with nonmembers with regard to over-the-counter securities were not sufficiently germane to the fulfillment of its duties of self-regulation under the Securities Exchange Act to warrant its being excused from having to answer for restraints of trade such as occurred here by removal of the private wires. He left the issues of treble damages and costs to a later trial. With reference to the stock ticker service, the judge held that there were triable issues of fact as to whether the Exchange's action could be considered to have been the concerted action of its members and as to whether, if the Exchange was to be regarded as having acted by itself, any violation of § 2 of the Sherman Act had occurred. He therefore denied summary judgment as to that aspect of petitioners' claims.

On the Exchange's appeal from the grant of partial summary judgment, the United States Court of Appeals for the Second Circuit reversed over the dissent of one judge. 302 F. 2d 714. The court held that the Securities Exchange Act "gives the Commission and the Exchange disciplinary powers over members of the Exchange with respect to their transactions in over-the-counter securities, and that the policy of the statute requires that the Exchange exercise these powers fully." *Id.*, at 720. This meant that "the action of the Exchange in bringing about the cancellation of the private wire connections . . . was within the general scope of the authority of the Exchange as defined by the 1934 Act," *id.*, at 716, and dictated a conclusion that "[t]he Exchange is exempt from the restrictions of the Sherman Act because it is exercising a

power which it is required to exercise by the Securities Exchange Act," *id.*, at 721. The court, however, did not exclude the possibility that the Exchange might be liable on some other theory, and remanded the case for consideration of petitioners' second and third causes of action.

This Court granted certiorari. 371 U. S. 808. What is before us is only so much of the first cause of action as relates to the collective refusal to continue the private wire connections, since petitioners did not attempt to appeal from the denial of summary judgment as to the portion relating to the discontinuance of the stock ticker service. Summary judgment was never sought as to the second and third causes of action, hence those are also not in issue at the present time.

II.

The fundamental issue confronting us is whether the Securities Exchange Act has created a duty of exchange self-regulation so pervasive as to constitute an implied repealer of our antitrust laws, thereby exempting the Exchange from liability in this and similar cases.

A.

It is plain, to begin with, that removal of the wires by collective action of the Exchange and its members would, had it occurred in a context free from other federal regulation, constitute a *per se* violation of § 1 of the Sherman Act. The concerted action of the Exchange and its members here was, in simple terms, a group boycott depriving petitioners of a valuable business service which they needed in order to compete effectively as broker-dealers in the over-the-counter securities market. *Fashion Originators' Guild* v. *Federal Trade Comm'n,* 312 U. S. 457; *Associated Press* v. *United States,* 326 U. S. 1; *Klor's, Inc.,* v. *Broadway-Hale Stores, Inc.,* 359 U. S. 207; *Radiant Burners, Inc.,* v. *Peoples Gas Light & Coke Co.,*

364 U. S. 656. Unlike listed securities, there is no central trading place for securities traded over the counter. The market is established by traders in the numerous firms all over the country through a process of constant communication to one another of the latest offers to buy and sell. The private wire connection, which allows communication to occur with a flip of a switch, is an essential part of this process. Without the instantaneously available market information provided by private wire connections, an over-the-counter dealer is hampered substantially in his crucial endeavor—to buy, whether it be for customers or on his own account, at the lowest quoted price and sell at the highest quoted price. Without membership in the network of simultaneous communication, the over-the-counter dealer loses a significant volume of trading with other members of the network which would come to him as a result of his easy accessibility. These important business advantages were taken away from petitioners by the group action of the Exchange and its members. Such "concerted refusals by traders to deal with other traders . . . have long been held to be in the forbidden category," *Klor's, Inc.*, v. *Broadway-Hale Stores, Inc.*, 359 U. S., at 212, of restraints which "because of their inherent nature or effect . . . injuriously restrained trade," *United States* v. *American Tobacco Co.*, 221 U. S. 106, 179.[5] Hence, absent any justification derived from the policy of another statute

[5] The fact that the consensus underlying the collective action was arrived at when the members bound themselves to comply with Exchange directives upon being admitted to membership rather than when the specific issue of Silver's qualifications arose does not diminish the collective nature of the action. A blanket subscription to possible future restraints does not excuse the restraints when they occur. *Associated Press* v. *United States*, 326 U. S. 1. Nor does any excuse derive from the fact that the collective refusal to deal was only with reference to the private wires, the member firms remaining willing to deal with petitioners for the purchase and sale

or otherwise, the Exchange acted in violation of the Sherman Act. In this case, however, the presence of another statutory scheme, that of the Securities Exchange Act of 1934, means that such a conclusion is only the beginning, not the end, of inquiry.

B.

The difficult problem here arises from the need to reconcile pursuit of the antitrust aim of eliminating restraints on competition with the effective operation of a public policy contemplating that securities exchanges will engage in self-regulation which may well have anti-competitive effects in general and in specific applications.

The need for statutory regulation of securities exchanges and the nature of the duty of self-regulation imposed by the Securities Exchange Act are properly understood in the context of a consideration of both the economic role played by exchanges and the historical setting of the Act. Stock exchanges perform an important function in the economic life of this country. They serve, first of all, as an indispensable mechanism through which corporate securities can be bought and sold. To corporate enterprise such a market mechanism is a fundamental element in facilitating the successful marshaling of large aggregations of funds that would otherwise be extremely difficult of access. To the public the exchanges are an investment channel which promises ready convertibility of stock holdings into cash. The importance

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of securities. See *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U. S. 251; *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 167. A valuable service germane to petitioners' business and important to their effective competition with others was withheld from them by collective action. That is enough to create a violation of the Sherman Act. *United States* v. *Terminal R. Assn. of St. Louis*, 224 U. S. 383; *United States* v. *First National Pictures, Inc.*, 282 U. S. 44; *Associated Press* v. *United States, supra;* cf. *Anderson* v. *United States*, 171 U. S. 604, 618–619.

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of these functions in dollar terms is vast—in 1962 the New York Stock Exchange, by far the largest of the 14 exchanges which are registered with the Securities and Exchange Commission, had $47.4 billion of transactions in stocks, rights, and warrants (a figure which represented 86% of the total dollar volume on registered exchanges). Report of the Special Study of Securities Markets (1963), c. IB, p. 6.[6] Moreover, because trading on the exchanges, in addition to establishing the price level of listed securities, affects securities prices in general, and because such transactions are often regarded as an indicator of our national economic health, the significance of the exchanges in our economy cannot be measured only in terms of the dollar volume of trading. Recognition of the importance of the exchanges' role led the House Committee on Interstate and Foreign Commerce to declare in its report preceding the enactment of the Securities Exchange Act of 1934 that "The great exchanges of this country upon which millions of dollars of securities are sold are affected with a public interest in the same degree as any other great utility." H. R. Rep. No. 1383, 73d Cong., 2d Sess. 15 (1934).

The exchanges are by their nature bodies with a limited number of members, each of which plays a certain role in the carrying out of an exchange's activities. The limited-entry feature of exchanges led historically to their being

[6] The report cited in the text is the recently issued first segment of a study which the Commission was directed to make by a 1961 amendment to the Securities Exchange Act, § 19 (d), 15 U. S. C. (Supp. III) § 78s (d). Another set of figures reported by the Special Study illustrates the great importance of corporate securities as a form of private property. As of the end of 1961, individuals had net financial savings of about $900,000,000,000, of which direct holdings of corporate securities amounted to more than half. In addition, life insurance companies and private pension funds held about $93,000,000,000 in corporate securities, and personal trust funds held another $57,000,000,000. Special Study, c. IB, pp. 2–3.

treated by the courts as private clubs, *Belton* v. *Hatch,* 109 N. Y. 593, 17 N. E. 225 (1888), and to their being given great latitude by the courts in disciplining errant members, see Westwood and Howard, Self-Government in the Securities Business, 17 Law and Contemp. Prob. 518–525 (1952). As exchanges became a more and more important element in our Nation's economic and financial system, however, the private-club analogy became increasingly inapposite and the ungoverned self-regulation became more and more obviously inadequate, with acceleratingly grave consequences. This impotency ultimately led to the enactment of the 1934 Act. The House Committee Report summed up the long-developing problem in discussing the general purposes of the bill:

> "The fundamental fact behind the necessity for this bill is that the leaders of private business, whether because of inertia, pressure of vested interests, lack of organization, or otherwise, have not since the war been able to act to protect themselves by compelling a continuous and orderly program of change in methods and standards of doing business to match the degree to which the economic system has itself been constantly changing . . . . The repetition in the summer of 1933 of the blindness and abuses of 1929 has convinced a patient public that enlightened self-interest in private leadership is not sufficiently powerful to effect the necessary changes alone—that private leadership seeking to make changes must be given Government help and protection." H. R. Rep. No. 1383, *supra,* at 3.

It was, therefore, the combination of the enormous growth in the power and impact of exchanges in our economy, and their inability and unwillingness to curb abuses which had increasingly grave implications because of this growth, that moved Congress to enact the Securities Exchange Act

of 1934. S. Rep. No. 792, 73d Cong., 2d Sess. 2–5 (1934); H. R. Rep. No. 1383, *supra,* at 2–5.

The pattern of governmental entry, however, was by no means one of total displacement of the exchanges' traditional process of self-regulation. The intention was rather, as MR. JUSTICE DOUGLAS said, while Chairman of the S. E. C., one of "letting the exchanges take the leadership with Government playing a residual role. Government would keep the shotgun, so to speak, behind the door, loaded, well oiled, cleaned, ready for use but with the hope it would never have to be used." Douglas, Democracy and Finance (Allen ed. 1940), 82. Thus the Senate Committee Report stressed that "the initiative and responsibility for promulgating regulations pertaining to the administration of their ordinary affairs remain with the exchanges themselves. It is only where they fail adequately to provide protection to investors that the Commission is authorized to step in and compel them to do so." S. Rep. No. 792, *supra,* at 13. The House Committee Report added the hope that the bill would give the exchanges sufficient power to reform themselves without intervention by the Commission. H. R. Rep. No. 1383, *supra,* at 15. See also 2 Loss, Securities Regulation (2d ed. 1961), 1175–1178, 1180–1182.

Thus arose the federally mandated duty of self-policing by exchanges. Instead of giving the Commission the power to curb specific instances of abuse, the Act placed in the exchanges a duty to register with the Commission, § 5, 15 U. S. C. § 78e, and decreed that registration could not be granted unless the exchange submitted copies of its rules, § 6 (a)(3), 15 U. S. C. § 78f (a)(3), and unless such rules were "just and adequate to insure fair dealing and to protect investors," § 6 (d), 15 U. S. C. § 78f (d). The general dimensions of the duty of self-regulation are suggested by § 19 (b) of the Act, 15 U. S. C. § 78s (b), which gives the Commission power to order changes in exchange

rules respecting a number of subjects, which are set forth in the margin.[7]

One aspect of the statutorily imposed duty of self-regulation is the obligation to formulate rules governing the conduct of exchange members. The Act specifically requires that registration cannot be granted "unless the rules of the exchange include provision for the expulsion, suspension, or disciplining of a member for conduct or proceeding inconsistent with just and equitable principles of trade . . . ," § 6 (b), 15 U. S. C. § 78f (b). In addition, the general requirement of § 6 (d) that an exchange's rules be "just and adequate to insure fair dealing and to protect investors" has obvious relevance to the area of rules regulating the conduct of an exchange's members.

The § 6 (b) and § 6 (d) duties taken together have the broadest implications in relation to the present problem, for members inevitably trade on the over-the-counter market in addition to dealing in listed securities,[8] and

[7] "The Commission is . . . authorized . . . to alter or supplement the rules of . . . [an] exchange . . . in respect of such matters as (1) safeguards in respect of the financial responsibility of members and adequate provision against the evasion of financial responsibility through the use of corporate forms or special partnerships; (2) the limitation or prohibition of the registration or trading in any security within a specified period after the issuance or primary distribution thereof; (3) the listing or striking from listing of any security; (4) hours of trading; (5) the manner, method, and place of soliciting business; (6) fictitious or numbered accounts; (7) the time and method of making settlements, payments, and deliveries and of closing accounts; (8) the reporting of transactions on the exchange and upon tickers maintained by or with the consent of the exchange, including the method of reporting short sales, stopped sales, sales of securities of issuers in default, bankruptcy or receivership, and sales involving other special circumstances; (9) the fixing of reasonable rates of commission, interest, listing, and other charges; (10) minimum units of trading; (11) odd-lot purchases and sales; (12) minimum deposits on margin accounts; and (13) similar matters."

[8] Member firms of the New York Stock Exchange accounted for over half of the total dollar volume of over-the-counter business in

such trading inexorably brings contact and dealings with nonmember firms which deal in or specialize in over-the-counter securities. It is no accident that the Exchange's Constitution and rules are permeated with instances of regulation of members' relationships with nonmembers including nonmember broker-dealers.[9] A member's purchase of unlisted securities for itself or on behalf of its customer from a boiler-shop operation[10] creates an ob-

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fiscal 1961, Special Study, *op. cit., supra,* c. IB, pp. 17–18, and trading in over-the-counter stocks constituted 21.6% of the estimated gross income of member firms of the Exchange for the same period, *id.,* c. I, Table I–12.

[9] Of most significance in this connection is Art. XIV, § 17, of the Exchange's Constitution, which permits it to order a member to sever any business connection which might cause the interest or good repute of the Exchange to suffer, and Rules 331–335, which provide various specific regulations governing members' relations with nonmember corporations and associations (including broker-dealers) in which they have an ownership interest or with which they are otherwise connected. Equally important are Rule 403, prohibiting transaction of business with a bucket shop, and Rule 435, prohibiting participation in any manipulative operation. The subject of commissions to be collected from nonmembers is regulated by Article XV of the Constitution and by numerous rules. Arbitration involving nonmembers is dealt with by Art. VIII, §§ 1 and 6, of the Constitution. Various other rules prohibit the joint use of an office with a nonmember unless the Exchange approves (Rule 344), the giving of compensation or gratuities to the employees of nonmembers without their employer's consent (Rule 350), and the paying of certain expenses of nonmembers (Rule 369). Rule 418 permits the Exchange to engage in a "surprise" audit of any member who does business with nonmembers. And Art. III, § 6, of the Constitution and Rules 355 through 358 deal with private wire connections and related installations, see note 11, *infra.*

[10] In deposition, the assistant director of the Exchange's Department of Member Firms described a boiler shop as "usually a physically small operation which employs high pressure telephone salesmanship to oversell to the public by quantity, and in many cases by quality." He said that this kind of firm, as well as bucket shops, inadequately capitalized firms, and firms which might misrepresent or

vious danger of loss to the principal in the transaction, and sale of securities to a nonmember insufficiently capitalized to protect customers' rights creates similar risks. In addition to the potential financial injury to the investing public and Exchange members that is inherent in these transactions as well as in dealings with nonmembers who are unreliable for any other reason, all such intercourse carries with it the gravest danger of engendering in the public a loss of confidence in the Exchange and its members, a kind of damage which can significantly impair fulfillment of the Exchange's function in our economy. Rules which regulate Exchange members' doing of business with nonmembers in the over-the-counter market are therefore very much pertinent to the aims of self-regulation under the 1934 Act. Transactions with nonmembers under the circumstances mentioned can only be described as "inconsistent with just and equitable principles of trade," and rules regulating such dealing are indeed "just and adequate to insure fair dealing and to protect investors."

The Exchange's constitutional provision and rules relating to private wire connections [11] are unquestionably part

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withhold material facts from customers, was among those which the Exchange seeks to prevent from having the use of its facilities.

[11] Article III, § 6, of the Constitution, which is entitled "Supervision Over Members, Allied Members, Member Firms and Member Corporations," provides, among other things, that the Exchange "shall have power to approve or disapprove any application for ticker service to any non-member, or for wire, wireless, or other connection between any office of any member of the Exchange, member firm or member corporation and any non-member, and may require the discontinuance of any such service or connection." Rule 355 provides, "(a) No member or member organization shall establish or maintain any wire connection, private radio, television or wireless system between his or its offices and the office of any non-member, or permit any private radio or television system between his or its offices, without prior consent of the Exchange. (b) Every nonmember will be required to execute a private wire contract in form

of this fulfillment of the § 6 (b) and § 6 (d) duties, for such wires between members and nonmembers facilitate trading in and exchange of information about unlisted securities, and such contact with an unreliable nonmember not only may further his business undesirably, but may injure the member or the member's customer on whose behalf the contact is made and ultimately imperil the future status of the Exchange by sapping public confidence. In light of the important role of exchanges in our economy and the 1934 Act's design of giving the exchanges a major part in curbing abuses by obligating them to regulate themselves, it appears conclusively—contrary to the District Court's conclusion—that the rules applied in the present case are germane to performance of the duty, implied by § 6 (b) and § 6 (d), to have rules governing members' transactions and relationships with nonmembers. The Exchange's enforcement of such rules inevitably affects the nonmember involved, often (as here) far more seriously than it affects the members in question. The sweeping of the nonmembers into the currents of the Exchange's process of self-regulation is therefore unavoidable; the case cannot be disposed of by holding as the

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prescribed by the Exchange to be filed with it, unless a contract is already on file with the Exchange. (c) Notification regarding a private means of communication with a non-member and the signed contract when necessary shall be submitted to the Department of Member Firms. This notification, by a member or allied member, may be in form supplied by the Exchange or in letter form, and shall include the essential facts concerning the non-member and the means of communication. (d) Each member or member organization shall submit annually to the Department of Member Firms a list of all non-members with whom private means of communication are maintained. (e) The Exchange may require at any time that any means of communication be discontinued." Rule 356, insofar as relevant, provides, "The Exchange may require at any time the discontinuance of any means of communication whatsoever which has a terminus in the office of a member or member organization."

district judge did that the substantive act of regulation engaged in here was outside the boundaries of the public policy established by the Securities Exchange Act of 1934.

C.

But, it does not follow that the case can be disposed of, as the Court of Appeals did, by holding that since the Exchange has a general power to adopt rules governing its members' relations with nonmembers, particular applications of such rules are therefore outside the purview of the antitrust laws. Contrary to the conclusions reached by the courts below, the proper approach to this case, in our view, is an analysis which reconciles the operation of both statutory schemes with one another rather than holding one completely ousted.

The Securities Exchange Act contains no express exemption from the antitrust laws or, for that matter, from any other statute. This means that any repealer of the antitrust laws must be discerned as a matter of implication, and "[i]t is a cardinal principle of construction that repeals by implication are not favored." *United States* v. *Borden Co.,* 308 U. S. 188, 198; see *Georgia* v. *Pennsylvania R. Co.,* 324 U. S. 439, 456–457; *California* v. *Federal Power Comm'n,* 369 U. S. 482, 485. Repeal is to be regarded as implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary. This is the guiding principle to reconciliation of the two statutory schemes.

Although the Act gives to the Securities and Exchange Commission the power to request exchanges to make changes in their rules, § 19 (b), 15 U. S. C. § 78s (b), and impliedly, therefore, to disapprove any rules adopted by an exchange, see also § 6 (a)(4), 15 U. S. C. § 78f (a)(4), it does not give the Commission jurisdiction to review particular instances of enforcement of exchange rules. See 2 Loss, *op. cit., supra,* at 1178; Westwood and

Howard, *supra,* 17 Law & Contemp. Prob., at 525. This aspect of the statute, for one thing, obviates any need to consider whether petitioners were required to resort to the Commission for relief before coming into court. Compare *Georgia* v. *Pennsylvania R. Co.,* 324 U. S., at 455. Moreover, the Commission's lack of jurisdiction over particular applications of exchange rules means that the question of antitrust exemption does not involve any problem of conflict or coextensiveness of coverage with the agency's regulatory power. See *Georgia* v. *Pennsylvania R. Co., supra; United States* v. *Radio Corp. of America,* 358 U. S. 334; *California* v. *Federal Power Comm'n, supra; Pan American World Airways, Inc.,* v. *United States,* 371 U. S. 296.[12] The issue is only that of the extent to which the character and objectives of the duty of exchange self-regulation contemplated by the Securities Exchange Act are incompatible with the maintenance of an antitrust action. Compare *Maryland & Va. Milk Producers Assn.* v. *United States,* 362 U. S. 458.

The absence of Commission jurisdiction, besides defining the limits of the inquiry, contributes to its solution. There is nothing built into the regulatory scheme which performs the antitrust function of insuring that an exchange will not in some cases apply its rules so as to do injury to competition which cannot be justified as furthering legitimate self-regulative ends. By providing

[12] Were there Commission jurisdiction and ensuing judicial review for scrutiny of a particular exchange ruling, as there is under the 1938 Maloney Act amendments to the Exchange Act to examine disciplinary action by a registered securities association (*i. e.,* by the NASD), §§ 15A (g), 15A (h), 25 (a), 15 U. S. C. §§ 78*o*–3 (g), 78*o*–3 (h), 78y (a); see *R. H. Johnson & Co.* v. *Securities & Exchange Comm'n,* 198 F. 2d 690 (C. A. 2d Cir. 1952), cert. denied, 344 U. S. 855, a different case would arise concerning exemption from the operation of laws designed to prevent anticompetitive activity, an issue we do not decide today.

no agency check on exchange behavior in particular cases, Congress left the regulatory scheme subject to "the influences of . . . [improper collective action] over which the Commission has no authority but which if proven to exist can only hinder the Commission in the tasks with which it is confronted," *Georgia* v. *Pennsylvania R. Co.,* 324 U. S., at 460. See *United States* v. *Borden Co.,* 308 U. S., at 200; *Maryland & Va. Milk Producers Assn.* v. *United States,* 362 U. S., at 465–466. Enforcement of exchange rules, particularly those of the New York Stock Exchange with its immense economic power, may well, in given cases, result in competitive injury to an issuer, a nonmember broker-dealer, or another when the imposition of such injury is not within the scope of the great purposes of the Securities Exchange Act. Such unjustified self-regulatory activity can only diminish public respect for and confidence in the integrity and efficacy of the exchange mechanism. Some form of review of exchange self-policing, whether by administrative agency or by the courts, is therefore not at all incompatible with the fulfillment of the aims of the Securities Exchange Act. Only this year S. E. C. Chairman Cary observed that "some government oversight is warranted, indeed necessary, to insure that action in the name of self-regulation is neither discriminatory nor capricious." Cary, Self-Regulation in the Securities Industry, 49 A. B. A. J. 244, 246 (1963).[13] Since the antitrust laws serve, among other things, to protect competitive freedom, *i. e.,* the freedom of individual business units to compete unhindered by the

[13] Although the recently issued first segment of the Report of the Special Study of Securities Markets is more critical of situations in the over-the-counter market and with reference to exchanges other than the respondent, it does point out that improper selling practices have occurred among member firms of respondent, c. IIIB, pp. 178–179, 183–184, and suggests the need for new Commission rules to govern selling practices of securities dealers, *id.,* p. 186.

group action of others, it follows that the antitrust laws are peculiarly appropriate as a check upon anticompetitive acts of exchanges which conflict with their duty to keep their operations and those of their members honest and viable. Applicability of the antitrust laws, therefore, rests on the need for vindication of their positive aim of insuring competitive freedom. Denial of their applicability would defeat the congressional policy reflected in the antitrust laws without serving the policy of the Securities Exchange Act. Should review of exchange self-regulation be provided through a vehicle other than the antitrust laws, a different case as to antitrust exemption would be presented. See note 12, *supra.*

Yet it is only frank to acknowledge that the absence of power in the Commission to review particular exchange exercises of self-regulation does create problems for the Exchange. The entire public policy of self-regulation, beginning with the idea that the Exchange may set up barriers to membership, contemplates that the Exchange will engage in restraints of trade which might well be unreasonable absent sanction by the Securities Exchange Act. Without the oversight of the Commission to elaborate from time to time on the propriety of various acts of self-regulation, the Exchange is left without guidance and without warning as to what regulative action would be viewed as excessive by an antitrust court possessing power to proceed based upon the considerations enumerated in the preceding paragraphs. But, under the aegis of the rule of reason, traditional antitrust concepts are flexible enough to permit the Exchange sufficient breathing space within which to carry out the mandate of the Securities Exchange Act. See *United States* v. *Terminal R. Assn. of St. Louis,* 224 U. S. 383, 394–395; *Board of Trade of the City of Chicago* v. *United States,* 246 U. S. 231, 238. Although, as we have seen, the statutory scheme of that Act is not sufficiently pervasive to create a total ex-

emption from the antitrust laws, compare Hale and Hale, Competition or Control VI: Application of Antitrust Laws to Regulated Industries, 111 U. of Pa. L. Rev. 46, 48, 57–59 (1962), it is also true that particular instances of exchange self-regulation which fall within the scope and purposes of the Securities Exchange Act may be regarded as justified in answer to the assertion of an antitrust claim.

III.

The final question here is, therefore, whether the act of self-regulation in this case was so justified. The answer to that question is that it was not, because the collective refusal to continue the private wires occurred under totally unjustifiable circumstances. Notwithstanding their prompt and repeated requests, petitioners were not informed of the charges underlying the decision to invoke the Exchange rules and were not afforded an appropriate opportunity to explain or refute the charges against them.

Given the principle that exchange self-regulation is to be regarded as justified in response to antitrust charges only to the extent necessary to protect the achievement of the aims of the Securities Exchange Act, it is clear that no justification can be offered for self-regulation conducted without provision for some method of telling a protesting nonmember why a rule is being invoked so as to harm him and allowing him to reply in explanation of his position. No policy reflected in the Securities Exchange Act is, to begin with, served by denial of notice and an opportunity for hearing. Indeed, the aims of the statutory scheme of self-policing—to protect investors and promote fair dealing—are defeated when an exchange exercises its tremendous economic power without explaining its basis for acting, for the absence of an obligation to give some form of notice and, if timely requested, a hearing creates a great danger of perpetration of injury that will damage public confidence in the exchanges. The re-

quirement of such a hearing will, by contrast, help in effectuating antitrust policies by discouraging anticompetitive applications of exchange rules which are not justifiable as within the scope of the purposes of the Securities Exchange Act. In addition to the general impetus to refrain from making unsupportable accusations that is present when it is required that the basis of charges be laid bare, the explanation or rebuttal offered by the nonmember will in many instances dissipate the force of the *ex parte* information upon which an exchange proposes to act. The duty to explain and afford an opportunity to answer will, therefore, be of extremely beneficial effect in keeping exchange action from straying into areas wholly foreign to the purposes of the Securities Exchange Act. And, given the possibility of antitrust liability for anticompetitive acts of self-regulation which fall too far outside the scope of the Exchange Act, the utilization of a notice and hearing procedure with its inherent check upon unauthorized exchange action will diminish rather than enlarge the likelihood that such liability will be incurred and hence will not interfere with the Exchange's ability to engage efficaciously in legitimate substantive self-regulation.[14] Provision of such a hearing will, moreover, con-

[14] The Exchange argues that total disclosure of the reasons for its action and of the sources of its information will subject it and its informants to a risk of being sued for defamation in many instances. This risk, however, is properly met by the flexibility inherent in the law of defamation in the concept of the conditional or qualified privilege. 1 Harper and James, The Law of Torts (1956), §§ 5.21, 5.25, 5.26, especially § 5.26, at 442, n. 3. In addition, even if a particular communication of information to the Exchange should fall outside the scope of such a privilege, the Exchange can protect itself and its informant from expansion of damage liability by confining the hearing, unless otherwise requested by the aggrieved nonmember, to the parties to the dispute and the necessary witnesses, so as to limit the area of dissemination of the defamatory matter. See 1 Harper and James, *op. cit., supra,* § 5.30, at 469. Similarly, any concern that our holding exposes the Exchange to excessive liability for past

tribute to the effective functioning of the antitrust court, which would be severely impeded in providing the review of exchange action which we deem essential if the exchange could obscure rather than illuminate the circumstances under which it has acted. Hence the affording of procedural safeguards not only will substantively encourage the lessening of anticompetitive behavior outlawed by the Sherman Act but will allow the antitrust court to perform its function effectively.[15]

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enforcement of its rules accomplished without a hearing ignores the presumable applicability of familiar principles of waiver, laches, and estoppel to bar relief to a nonmember who failed to make timely and appropriate protest to the Exchange.

[15] The affording of procedural safeguards will not burden the New York Stock Exchange; notice and hearing are already guaranteed by its Constitution, Art. XIV, § 14, to any member accused of violating its rules. The existence of these guarantees goes far toward dispelling fears that provision of a hearing to nonmembers would interfere significantly with the need for timely Exchange action, for it can surely be assumed that prompt action is as much required to deal with member wrongdoing as with that of a nonmember. We have no doubt, moreover, that provision of a hearing to a protesting nonmember can, when circumstances require, be accomplished expeditiously enough to prevent injury to investors. Indeed, if the basis for invocation of an Exchange rule is also a violation of the Securities Act of 1933, the Securities Exchange Act of 1934, or the Commission's rules and regulations under either statute, the Commission can come to the aid of the Exchange by obtaining a preliminary or permanent injunction or restraining order against such practice in the appropriate United States District Court. Securities Act of 1933, § 20 (b), 15 U. S. C. § 77t (b); Securities Exchange Act of 1934, § 21 (e), 15 U. S. C. § 78u (e). It is significant, however, that the Commission's power to obtain restraint of particular violations is confined to traditional judicial channels with the safeguards implied thereby, and that when the Commission, pursuant to the powers conferred on it by Congress in the Maloney Act of 1938, wishes to resort to the more drastic sanction of suspending or revoking the membership in the NASD of a wrongdoing over-the-counter dealer, it may only do so "after appropriate notice and opportunity for hearing . . . ." § 15A (*l*), 15 U. S. C. § 78*o*–3(*l*).

Our decision today recognizes that the action here taken by the Exchange would clearly be in violation of the Sherman Act unless justified by reference to the purposes of the Securities Exchange Act, and holds that that statute affords no justification for anticompetitive collective action taken without according fair procedures.[16] Congress in effecting a scheme of self-regulation designed to insure fair dealing cannot be thought to have sanctioned and protected self-regulative activity when carried out in a fundamentally unfair manner.[17] The point is not that the antitrust laws impose the requirement of

[16] It may be assumed that the Securities and Exchange Commission would have had the power, under § 19 (b) of the Exchange Act, 15 U. S. C. § 78s (b), pp. 352–353, 357 & note 7, *supra,* to direct the Exchange to adopt a general rule providing a hearing and attendant procedures to nonmembers. However, any rule that might be adopted by the Commission would, to be consonant with the antitrust laws, have to provide as a minimum the procedural safeguards which those laws make imperative in cases like this. Absent Commission adoption of a rule requiring fair procedure, and in light of both the utility of such a rule as an antitrust matter and its compatibility with securities-regulation principles, see p. 361, *supra,* no incompatibility with the Commission's power inheres in announcement by an antitrust court of the rule. Compare *Colorado Anti-Discrimination Comm'n* v. *Continental Air Lines, Inc.,* 372 U. S. 714, 723–724.

[17] The basic nature of the rights which we hold to be required under the antitrust laws in the circumstances of today's decision is indicated by the fact that public agencies, labor unions, clubs, and other associations have, under various legal principles, all been required to afford notice, a hearing, and an opportunity to answer charges to one who is about to be denied a valuable right. *Goldsmith* v. *United States Board of Tax Appeals,* 270 U. S. 117; *Russell* v. *Duke of Norfolk,* [1949] 1 All E. R. 109 (C. A.); Fellman, Constitutional Rights of Association, in The Supreme Court Review, 1961 (Kurland ed.), 74, 104, 112–113; Developments in the Law—Judicial Control of Actions of Private Associations, 76 Harv. L. Rev. 983, 1026–1037 (1963); see authorities cited note 18, *infra;* cf. *Vitarelli* v. *Seaton,* 359 U. S. 535; *Cafeteria & Restaurant Workers Union, Local 473, AFL–CIO,* v. *McElroy,* 367 U. S. 886, 894–895; *Willner* v. *Committee on Character and Fitness, ante,* p. 96.

notice and a hearing here, but rather that, in acting without according petitioners these safeguards in response to their request, the Exchange has plainly exceeded the scope of its authority under the Securities Exchange Act to engage in self-regulation and therefore has not even reached the threshold of justification under that statute for what would otherwise be an antitrust violation. Since it is perfectly clear that the Exchange can offer no justification under the Securities Exchange Act for its collective action in denying petitioners the private wire connections without notice and an opportunity for hearing, and that the Exchange has therefore violated § 1 of the Sherman Act, 15 U. S. C. § 1, and is thus liable to petitioners under §§ 4 and 16 of the Clayton Act, 15 U. S. C. §§ 15, 26, there is no occasion for us to pass upon the sufficiency of the reasons which the Exchange later assigned for its action.[18] Thus there is also no need for

[18] The principle that a private association's failure to afford procedural safeguards may result in the imposition of damage liability without inquiry into whether the association's action lacked substantive basis is reflected in many state-court decisions, resting on various theories of liability. *Cason* v. *Glass Bottle Blowers Assn.*, 37 Cal. 2d 134, 231 P. 2d 6 (1951); *Lahiff* v. *Saint Joseph's Total Abstinence & Benevolent Soc.*, 76 Conn. 648, 57 A. 692 (1904); *Malmsted* v. *Minneapolis Aerie,* 111 Minn. 119, 126 N. W. 486 (1910); *Johnson* v. *International of the United Brotherhood of Carpenters,* 52 Nev. 400, 288 P. 170 (1930), 54 Nev. 332, 16 P. 2d 658 (1932); *Brooks* v. *Engar,* 259 App. Div. 333, 19 N. Y. S. 2d 114 (1st Dept.), appeal dismissed, 284 N. Y. 767, 31 N. E. 2d 514 (1940); *Blek* v. *Wilson,* 145 Misc. 373, 259 N. Y. Supp. 443 (Sup. Ct. 1932), modified and aff'd, 237 App. Div. 712, 262 N. Y. Supp. 416 (1st Dept.), rev'd on other grounds, 262 N. Y. 253, 186 N. E. 692 (1933); *Glauber* v. *Patof,* 183 Misc. 400, 47 N. Y. S. 2d 762 (Sup. Ct. 1944), aff'd mem., 269 App. Div. 687, 54 N. Y. S. 2d 384 (1st Dept.), modified *per curiam* on other grounds, 294 N. Y. 583, 63 N. E. 2d 181 (1945); *O'Brien* v. *Papas,* 49 N. Y. S. 2d 521 (Sup. Ct. 1944); *Taxicab Drivers' Local Union No. 889* v. *Pittman,* 322 P. 2d 159 (Okla. 1957); *International Printing Pressmen & Assistants' Union* v. *Smith,* 145 Tex. 399, 198 S. W. 2d 729 (1946); *Leo* v. *Local Union No. 612 of International Union of*

us to define further whether the interposing of a substantive justification in an antitrust suit brought to challenge a particular enforcement of the rules on its merits is to be governed by a standard of arbitrariness, good faith, reasonableness, or some other measure. It will be time enough to deal with that problem if and when the occasion arises. Experience teaches, however, that the affording of procedural safeguards, which by their nature serve to illuminate the underlying facts, in itself often operates to prevent erroneous decisions on the merits from occurring. There is no reason to believe that the experience of the Exchange will be different from that of other institutions, both public and private. The benefits which a guarantee of procedural safeguards brings about are, moreover, of particular importance here. It requires but little appreciation of the extent of the Exchange's economic power and of what happened in this country during the 1920's and 1930's to realize how essential it is that the highest ethical standards prevail as to every aspect of the Exchange's activities. What is basically at issue here is whether the type of partnership between government and private enterprise that marks the design of the Securities Exchange Act of 1934 can operate effectively to insure the maintenance of such standards in the long run.

Operating Engineers, 26 Wash. 2d 498, 174 P. 2d 523 (1946) (alternative holding). See also Developments in the Law, *supra*, 76 Harv. L. Rev., at 1087–1095; Note, Procedural "Due Process" in Union Disciplinary Proceedings, 57 Yale L. J. 1302 (1948). The precedents cited undoubtedly rest on a recognition that the according of fair procedures is of fundamental significance, that serious and irreversible economic injury may result from their denial in a context like that of the present case, and that a substantive inquiry after the fact cannot possibly succeed in accurately ascertaining retrospectively what the outcome would have been had the procedural safeguards been afforded in the first instance. The conditioning of relief for the procedural breach on a finding that a concomitant substantive breach occurred might well, therefore, result in an ultimate wrongful denial of recovery to a party in the position of petitioners here.

We have today provided not a brake upon the private partner executing the public policy of self-regulation but a balance wheel to insure that it can perform this necessary activity in a setting compatible with the objectives of both the antitrust laws and the Securities Exchange Act.

The judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE CLARK concurs in the result on the grounds stated in the opinion of the District Court, 196 F. Supp. 209, and the dissenting opinion in the Court of Appeals, 302 F. 2d 714.

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

The Court says that the fundamental question in this case is "whether and to what extent the federal antitrust laws apply to securities exchanges regulated by the Securities Exchange Act of 1934." I agree that this is the issue presented, but with all respect it seems to me that the answer which the Court has given is both unsatisfactory and incomplete.

The Court begins by pointing out, correctly, that removal of the petitioners' wire connections by collective action of the Exchange and its members would constitute a violation of the Sherman Act, had it occurred in an ordinary commercial context.[1] The Court then reviews at length the purpose, scope, and structure of the Securities Exchange Act and holds, again correctly I think, that the

[1] See, *e. g., Radiant Burners, Inc.*, v. *Peoples Gas Light & Coke Co.*, 364 U. S. 656; *Klor's, Inc.*, v. *Broadway-Hale Stores, Inc.*, 359 U. S. 207; *Fashion Originators' Guild* v. *Federal Trade Comm'n*, 312 U. S. 457. It may be assumed, I think, that almost every exercise of an exchange's statutory duty of self-regulation would involve an actual or threatened concerted refusal to deal—a "group boycott."

substantive act of regulation engaged in here was inside "the boundaries of the public policy" established by the Exchange Act. The Court next reminds us, correctly, that the Exchange Act contains no express exemption from the antitrust laws, and that a stock exchange or its members might in some cases "apply its rules so as to do injury to competition which cannot be justified as furthering legitimate self-regulative ends."

So far, so good. The Court has fairly and thoroughly stated the competing considerations bearing upon the basic problem involved in this case. But then—in the last five pages of the Court's opinion—the nature of the problem seems suddenly to change. The case becomes one involving due process concepts of notice, confrontation, and hearing.

It may be that a hearing should be accorded a member or nonmember of an exchange, injured by the invocation of an exchange rule, in all cases. On the other hand, in view of the sophisticated, subtle, and highly technical nature of the problem of what are "just and equitable principles of trade," or because of the fragile and mercurial ingredients of public confidence in the securities markets, there might be cases in which the public interest would demand that at least preliminary disciplinary action be taken with swift effectiveness. These broad policy questions were, quite properly, neither briefed nor argued in the present case. They are questions well within the power of Congress and of the Securities and Exchange Commission to canvass and to resolve.[2] But they

[2] See *ante*, p. 364, note 16. Contrary to the Court's suggestion, there has not been a total absence of agency or legislative attention to the problems of the Exchange's disciplinary machinery. In § 19 (c) of the 1934 Act, Congress expressly ordered the Securities and Exchange Commission to study the exchanges' procedures for disciplining members and to report back on the need for further legislation. The Commission reported the following year, giving a detailed account of existing procedures and making specific recommendations for

are questions, I respectfully submit, which have only the most tangential bearing upon the issues now before us.

The Court says that because of the failure to accord "procedural safeguards" to the petitioners, the respondent Exchange is *ipso facto* liable to them under the antitrust laws. This means that a bucket-shop operator who had been engaged in swindling the public could collect treble damages from a stock exchange which had denied him

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reform. H. R. Doc. No. 85, 74th Cong., 1st Sess. (Jan. 25, 1935). It advised against legislation, however, suggesting that the exchanges themselves be given the opportunity to adopt the recommendations voluntarily. The agency also undertook to continue its surveillance of such procedures and to report to Congress "such further recommendations as it may deem advisable in regard to exchange government." *Id.*, at 17. In its 1935 Annual Report, the Commission stated that the respondent Exchange, as well as many others, had voluntarily complied. 1 S. E. C. Ann. Rep. 20 (1935). The process of surveillance has continued. In 1938, a general overhaul of the respondent Exchange's constitution was effected by informal Commission action. See 2 Loss, Securities Regulation, 1179–1182. In 1941, the Commission's proposals for statutory amendments included a specific request to extend § 19 (b) rule-making authority over rules governing discipline of members. Report of the Securities and Exchange Commission on Proposals for Amendments to the Securities Act of 1933 and the Securities Exchange Act of 1934, House Committee Print, Committee on Interstate and Foreign Commerce, 77th Cong., 1st Sess. 40 (Aug. 7, 1941). The proposal was not acted upon. Exchange disciplinary procedures were again examined in recent congressional hearings concerning the operation of the stock market. The absence of review by the Commission in individual cases was noted, but representatives of the respondent Exchange also testified that all such actions are reported informally to the agency. A detailed account of the Exchange's present procedures was included in the record. Hearings before a Subcommittee of the House Committee on Interstate and Foreign Commerce on H. J. Res. 438, 87th Cong., 1st Sess. 107–113. These recent hearings have led to an exhaustive study of current stock market conditions, and completion of the resulting report by the Commission is imminent. See Securities Exchange Act of 1934, § 19 (d), added by 75 Stat. 465, as amended, 76 Stat. 247, 15 U. S. C. (Supp. IV) § 78s (d); S. E. C., Report of Special Study of Securities Markets (Apr. 3, 1963).

its wire connections without first according him notice and a hearing. For, as I understand the Court's opinion, the exchange would not be allowed to prove in this hypothetical antitrust case that the plaintiff *was* such a swindler, even though proof of that fact to an absolute certainty were available. This result seems to me completely to frustrate the purpose and policy of the Securities Exchange Act, and to bear no relevance to the purpose and policy of the antitrust laws. Even assuming that Congress agreed with the Court's notions of the appropriate procedures under the Exchange Act, I cannot believe that Congress would have provided an antitrust forum and private treble damage liability to enforce them.

Whether there has been a violation of the antitrust laws depends not at all upon whether or not the defendants' conduct was arbitrary. As this Court has said, "the reasonableness of the methods pursued by the combination to accomplish its unlawful object is no more material than would be the reasonableness of the prices fixed by unlawful combination." *Fashion Originators' Guild* v. *Federal Trade Comm'n,* 312 U. S. 457, 468.[3] Yet the Court today says that because the Exchange did not accord the petitioners what the Court considers "fair procedures" under the Exchange Act, the Exchange has therefore violated § 1 of the Sherman Act.

I think the Court errs in using the antitrust laws to serve ends they were never intended to serve—to enforce the Court's concept of fair procedures under a totally unrelated statute. I should have thought that the aftermath of *Duplex Printing Press Co.* v. *Deering*[4]

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[3] The Court pointed out that "An elaborate system of trial and appellate tribunals exists, for the determination of whether a given garment is in fact a copy of a Guild member's design." 312 U. S., at 462–463. See also *Klor's, Inc.,* v. *Broadway-Hale Stores,* 359 U. S. 207, 212.

[4] 254 U. S. 443. See *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469; *United States* v. *Hutcheson,* 312 U. S. 219.

would have provided a sufficient lesson as to the unwisdom of such a broad and basically irrelevant use of the antitrust laws.

The purpose of the self-regulation provisions of the Securities Exchange Act was to delegate governmental power to working institutions which would undertake, at their own initiative, to enforce compliance with ethical as well as legal standards in a complex and changing industry. This self-initiating process of regulation can work effectively only if the process itself is allowed to operate free from a constant threat of antitrust penalties. To achieve this end, I believe it must be held that the Securities Exchange Act removes antitrust liability for any action taken in good faith to effectuate an exchange's statutory duty of self-regulation. The inquiry in each case should be whether the conduct complained of was for this purpose. If it was, that should be the end of the matter so far as the antitrust laws are concerned—unless, of course, some antitrust violation other than the mere concerted action of an exchange and its members is alleged.[5]

I would vacate the judgment of the Court of Appeals and remand the case to the District Court for further proceedings consistent with the views expressed in this dissenting opinion.

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[5] For example, an exchange would be liable under the antitrust laws if it conspired with outsiders, or if it attempted to use its power to monopolize. *United States* v. *Borden Co.*, 308 U. S. 188; *Maryland & Va. Milk Producers Assn.* v. *United States*, 362 U. S. 458; *Allen Bradley Co.* v. *Local 3, IBEW*, 325 U. S. 797. Furthermore, individual members of an exchange would be liable if it were shown that they had conspired to use the exchange's machinery for the purpose of suppressing competition. Cf. *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439; *United States* v. *Pacific & Arctic Ry. & Nav. Co.*, 228 U. S. 87. Application of the antitrust laws to such conduct would rest on the presence of an independent violation, not, as the present case does, simply upon concerted activity by the exchange and its members.

BALTIMORE & OHIO RAILROAD CO. ET AL. *v.* BOSTON & MAINE RAILROAD ET AL.

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

No. 97. Argued March 27, 1963.—Decided May 20, 1963.*

Judgment affirmed by an equally divided Court.

Reported below: 202 F. Supp. 830.

Robert W. Ginnane, Jervis Langdon, Jr., and *William L. Marbury* argued the cause for appellants. With *Mr. Ginnane* on the briefs for the Interstate Commerce Commission, appellant in No. 99, was *I. K. Hay.* With *Mr. Langdon* on the briefs for appellants in No. 97 were *Richard R. Bongartz, Robert B. Claytor, John W. Hanifin, John Henry Lewin* and *William C. Purnell.* With *Mr. Marbury* on the briefs for appellants in No. 98 were *Chas. R. Seal, J. Cookman Boyd, Jr., Donald Macleay, John Martin Jones, Jr., Morris Duane, Warren Price, Jr., William C. Burt* and *Robert M. Beckman.*

J. William Doolittle, Thomas E. Dewey and *Robert G. Bleakney, Jr.* argued the cause for appellees. On the brief for the Boston & Maine Railroad et al. were *Robert G. Bleakney, Jr., Henry E. Foley* and *Neal Holland.* On the brief for the United States were *Solicitor General Cox, Assistant Attorney General Loevinger, Stephen J. Pollak, Robert B. Hummel, Irwin A. Seibel* and *John H. D. Wigger.* On the brief for the New York Central Railroad Company et al. were *Thomas E. Dewey, Everett I. Willis* and *Leo B. Connelly.* On the brief for the State

*Together with No. 98, *Maryland Port Authority et al.* v. *Boston & Maine Railroad et al.,* and No. 99, *Interstate Commerce Commission* v. *Boston & Maine Railroad et al.,* also on appeals from the same Court.

of New York et al. were *Louis J. Lefkowitz,* Attorney General of New York, *Paxton Blair,* Solicitor General, *Dunton F. Tynan,* Assistant Solicitor General, *Sidney Goldstein, Leo A. Larkin, F. A. Mulhern, Morris Handel, Samuel Mandell, Charles W. Merritt, Walter J. Myskowski, Arthur L. Winn, Jr.* and *Samuel H. Moerman.*

PER CURIAM.

The judgment is affirmed by an equally divided Court.

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

GOBER ET AL. *v.* CITY OF BIRMINGHAM.

CERTIORARI TO THE COURT OF APPEALS OF ALABAMA.

No. 66. Argued November 6–7, 1962.—
Decided May 20, 1963.

In Birmingham, Ala., which has an ordinance requiring racial segregation in public eating places, ten Negro students were convicted of criminal trespass on private property for sitting at white lunch counters in department stores and failing to leave when requested to do so. *Held:* The convictions are reversed. *Peterson* v. *City of Greenville, ante,* p. 244.

41 Ala. App. 313, 133 So. 2d 697, reversed.

Constance Baker Motley argued the cause for petitioners. With her on the brief were *Jack Greenberg, Arthur D. Shores, Peter A. Hall, Orzell Billingsley, Jr., Oscar W. Adams, Jr., Leroy Clark, William T. Coleman, Jr., William R. Ming, Jr., James M. Nabrit III* and *Louis H. Pollak.*

Watts E. Davis and *J. M. Breckenridge* argued the cause for respondent. With *Mr. Davis* on the brief was *Earl McBee.*

Solicitor General Cox, by special leave of Court, argued the cause for the United States, as *amicus curiae,* urging reversal. With him on the brief were *Assistant Attorney General Marshall, Ralph S. Spritzer, Louis F. Claiborne, Harold H. Greene, Howard A. Glickstein* and *Richard K. Berg.*

PER CURIAM.

The judgments are reversed. *Peterson* v. *City of Greenville, ante,* p. 244.

[For opinion of MR. JUSTICE HARLAN, see *ante,* p. 248.]

AVENT ET AL. *v.* NORTH CAROLINA.

CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA.

No. 11. Argued November 5, 7, 1962.—Decided May 20, 1963.

In Durham, N. C., which has an ordinance requiring racial segregation in public eating places, five Negro students and two white students were convicted of criminal trespass for sitting at a lunch counter where only white people customarily were served and refusing to leave when requested by the manager. *Held:* A judgment affirming their conviction is vacated and the case is remanded to the Supreme Court of North Carolina for consideration in the light of *Peterson* v. *City of Greenville, ante,* p. 244.

Reported below: 253 N. C. 580, 118 S. E. 2d 47.

Jack Greenberg argued the cause for petitioners. With him on the brief were *Constance Baker Motley, James M. Nabrit III, William A. Marsh, Jr., F. B. McKissick, C. O. Pearson, W. G. Pearson, M. Hugh Thompson, William T. Coleman, Jr., William R. Ming, Jr., Louis H. Pollak, Joseph L. Rauh* and *Herbert O. Reid.*

Ralph Moody, Assistant Attorney General of North Carolina, argued the cause for respondent. With him on the brief was *T. W. Bruton,* Attorney General.

Solicitor General Cox, by special leave of Court, argued the cause for the United States, as *amicus curiae,* urging reversal. With him on the brief were *Assistant Attorney General Marshall, Ralph S. Spritzer, Louis F. Claiborne, Harold H. Greene, Howard A. Glickstein* and *Richard K. Berg.*

PER CURIAM.

The judgment is vacated and the case is remanded to the Supreme Court of North Carolina for consideration in the light of *Peterson* v. *City of Greenville, ante,* p. 244. *Patterson* v. *Alabama,* 294 U. S. 600.

[For opinion of MR. JUSTICE HARLAN, see *ante,* p. 248.]

SHIP-BY-TRUCK CO., INC., DOING BUSINESS AS GRAHAM SHIP-BY-TRUCK CO., ET AL. *v.* UNITED STATES ET AL.

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

No. 879. Decided May 20, 1963.

208 F. Supp 847, affirmed.

Tom B. Kretsinger for appellants.

Solicitor General Cox, Assistant Attorney General Loevinger, Robert B. Hummel, Irwin A. Seibel, Robert W. Ginnane and *Arthur J. Cerra* for the United States and the Interstate Commerce Commission; and *J. F. Miller* for Stevens Express, Inc., et al., appellees.

PER CURIAM.

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

RICHARDS *v.* PENNSYLVANIA.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

No. 887, Misc. Decided May 20, 1963.

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.

ATWOOD'S TRANSPORT LINES, INC., *v.* UNITED STATES ET AL.

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

No. 935. Decided May 20, 1963.

211 F. Supp. 168, affirmed.

James E. Wilson and *Edward G. Villalon* for appellant.

Solicitor General Cox, Assistant Attorney General Loevinger, Lionel Kestenbaum and *Robert W. Ginnane* for the United States and the Interstate Commerce Commission; and *S. Harrison Kahn* for Alexandria, Barcroft & Washington Transit Co., appellees.

PER CURIAM.

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

DREXEL *v.* OHIO PARDON AND PAROLE COMMISSION.

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

No. 975, Misc. Decided May 20, 1963.

PER CURIAM.

The appeal is dismissed.

ILLINOIS ET AL. *v.* UNITED STATES ET AL.

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

No. 937. Decided May 20, 1963.

213 F. Supp. 83, affirmed.

William G. Clark, Attorney General of Illinois, *Edward V. Hanrahan,* Special Assistant Attorney General, *Harold A. Cowen,* Assistant Attorney General, and *S. Ashley Guthrie* for appellants.

Robert W. Ginnane and *Stanton P. Sender* for the United States and the Interstate Commerce Commission; and *James J. Magner, Frederick E. Stout* and *L. Agnew Myers, Jr.* for Chicago North Shore & Milwaukee Railway, appellees.

PER CURIAM.

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

SPERRY *v.* FLORIDA EX REL. FLORIDA BAR.

CERTIORARI TO THE SUPREME COURT OF FLORIDA.

No. 322. Argued March 25, 1963.—
Decided May 27, 1963.

Petitioner is not a lawyer and has never been admitted to the Bar of any State; but, under regulations issued by the Commissioner of Patents with the approval of the Secretary of Commerce pursuant to 35 U. S. C. § 31, he has been authorized to practice before the United States Patent Office. As part of that practice, he has for many years represented patent applicants, prepared and prosecuted their applications, and advised them in connection with their applications in the State of Florida. The Florida Bar sued in the Supreme Court of Florida to enjoin the performance of these and other specified acts within the State, contending that they constituted unauthorized practice of law. *Held:*

1. Florida may not prohibit petitioner from performing within the State tasks which are incident to the preparation and prosecution of patent applications before the Patent Office. Pp. 381–402.

(a) The determination of the Supreme Court of Florida that the preparation and prosecution of patent applications for others constitutes the practice of law, within the meaning of the law of that State, is not questioned. P. 383.

(b) Florida has a substantial interest in regulating the practice of law within the State, and, in the absence of federal legislation on the subject, it could validly prohibit nonlawyers from engaging in this circumscribed form of patent practice. P. 383.

(c) A federal statute, 35 U. S. C. § 31, expressly permits the Commissioner of Patents to authorize practice before the Patent Office by nonlawyers; the Commissioner has explicitly granted such authority; and Florida may not deny to those failing to meet its own qualifications the right to perform acts within the scope of the federal authority. Pp. 384–385.

(d) There cannot be read into the federal statute and regulations a condition that such practice must not be inconsistent with state law, thus leaving registered patent practitioners with the unqualified right to practice only in the physical presence of the

Patent Office and in the District of Columbia, where that Office is now located. Pp. 385–387.

(e) The legislative history of the statute and its predecessor provisions shows that Congress recognized that registration in the Patent Office confers a right to practice before that Office, without regard to whether the State within which the practice is conducted would otherwise prohibit such conduct. Pp. 387–402.

(f) Since patent practitioners are authorized to practice only before the Patent Office, the State maintains control over the practice of law within its borders except to the limited extent necessary for the accomplishment of the federal objectives. P. 402.

2. As so construed, 35 U. S. C. § 31 is constitutional. Pp. 403–404.

(a) By establishing the Patent Office and authorizing competent persons to assist in the preparation of patent applications, Congress has not exceeded the bounds of what is "necessary and proper" to the operation of the patent system established under Art. I, § 8, Cl. 8, of the Constitution. P. 403.

(b) Having acted within the scope of the powers "delegated to the United States by the Constitution," Congress has not exceeded the limits of the Tenth Amendment, despite the concurrent effects of its legislation upon a matter otherwise within the control of the State. P. 403.

(c) In view of the standards prescribed in 35 U. S. C. § 31 to guide the Patent Office in its admissions policy, it cannot be said that Congress has improperly delegated its powers to the administrative agency. Pp. 403–404.

140 So. 2d 587, judgment vacated and cause remanded.

Carlisle M. Moore argued the cause for petitioner. With him on the briefs were *Oscar A. Mellin, LeRoy Hanscom* and *Jack E. Hursh.*

F. Trowbridge vom Baur argued the cause for respondent. With him on the brief were *Sherwood Spencer, J. Lewis Hall, Donald J. Bradshaw* and *John Houston Gunn.*

Briefs of *amici curiae,* urging reversal, were filed by *Solicitor General Cox, Acting Assistant Attorney General Guilfoyle, Louis F. Claiborne* and *Morton Hollander* for the United States; by *John R. Turney, D. W. Markham*

and *Nuel D. Belnap* for the Association of Interstate Commerce Commission Practitioners; by *Roger Robb* for the American Association of Registered Patent Attorneys and Agents; and by *Arthur B. Hanson* and *Emmett E. Tucker, Jr.* for the American Chemical Society.

Briefs of *amici curiae,* urging affirmance, were filed by *F. Trowbridge vom Baur, H. H. Perry, Jr., Wayland B. Cedarquist, Raymond Reisler* and *Warren H. Resh* for the American Bar Association; by *Lyman Brownfield* and *Phillip K. Folk* for numerous State Bar Associations; and by *William H. Webb* for the American Patent Law Association.

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

Petitioner is a practitioner registered to practice before the United States Patent Office. He has not been admitted to practice law before the Florida or any other bar. Alleging, among other things, that petitioner "is engaged in the unauthorized practice of law, in that although he is not a member of The Florida Bar, he nevertheless maintains an office . . . in Tampa, Florida, . . . holds himself out to the public as a Patent Attorney . . . represents Florida clients before the United States Patent Office, . . . has rendered opinions as to patentability, and . . . has prepared various legal instruments, including . . . applications and amendments to applications for letters patent, and filed same in the United States Patent Office in Washington, D. C.," the Florida Bar instituted these proceedings in the Supreme Court of Florida to enjoin the performance of these and other specified acts within the State. Petitioner filed an answer in which he admitted the above allegations but pleaded as a defense "that the work performed by him for Florida citizens is solely that work which is presented to the United States Patent Office and that he charges fees solely for his work

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of preparing and prosecuting patent applications and patent assignments and determinations incident to preparing and prosecuting patent applications and assignments." Thereupon, the court granted the Bar's motion for a summary decree and permanently enjoined the petitioner from pursuing the following activities in Florida until and unless he became a member of the State Bar:

> "1. using the term 'patent attorney' or holding himself out to be an attorney at law in this state in any field or phase of the law (we recognize that the respondent according to the record before us has already voluntarily ceased the use of the word 'attorney');
>
> "2. rendering legal opinions, including opinions as to patentability or infringement on patent rights;
>
> "3. preparing, drafting and construing legal documents;
>
> "4. holding himself out, in this state, as qualified to prepare and prosecute applications for letters patent, and amendments thereto;
>
> "5. preparation and prosecution of applications for letters patent, and amendments thereto, in this state; and
>
> "6. otherwise engaging in the practice of law."

The Supreme Court of Florida concluded that petitioner's conduct constituted the unauthorized practice of law which the State, acting under its police power, could properly prohibit, and that neither federal statute nor the Constitution of the United States empowered any federal body to authorize such conduct in Florida. 140 So. 2d 587.

In his petition for certiorari, petitioner attacked the injunction "only insofar as it prohibits him from engaging in the specific activities . . . [referred to above], covered by his federal license to practice before the Patent Office. He does not claim that he has any right otherwise to

engage in activities that would be regarded as the practice of law." [1] We granted certiorari, 371 U. S. 875, to consider the significant, but narrow, questions thus presented.

We do not question the determination that under Florida law the preparation and prosecution of patent applications for others constitutes the practice of law. *Greenough* v. *Tax Assessors,* 331 U. S. 486; *Murdock* v. *Memphis,* 20 Wall. 590. Such conduct inevitably requires the practitioner to consider and advise his clients as to the patentability of their inventions under the statutory criteria, 35 U. S. C. §§ 101–103, 161, 171, as well as to consider the advisability of relying upon alternative forms of protection which may be available under state law. It also involves his participation in the drafting of the specification and claims of the patent application, 35 U. S. C. § 112, which this Court long ago noted "constitute[s] one of the most difficult legal instruments to draw with accuracy," *Topliff* v. *Topliff,* 145 U. S. 156, 171. And upon rejection of the application, the practitioner may also assist in the preparation of amendments, 37 CFR §§ 1.117–1.126, which frequently requires written argument to establish the patentability of the claimed invention under the applicable rules of law and in light of the prior art. 37 CFR § 1.119. Nor do we doubt that Florida has a substantial interest in regulating the practice of law within the State and that, in the absence of federal legislation, it could validly prohibit nonlawyers from engaging in this circumscribed form of patent practice.[2]

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[1] Petitioner's right to refer to himself as a "Patent Attorney" has been mooted by his voluntary discontinuance of the use of the term "attorney."

[2] See *Konigsberg* v. *State Bar of California,* 366 U. S. 36, 40–41; *Schware* v. *Board of Bar Examiners of New Mexico,* 353 U. S. 232, 239; *West Virginia State Bar* v. *Earley,* 144 W. Va. 504, 109 S. E. 2d 420; *Gardner* v. *Conway,* 234 Minn. 468, 48 N. W. 2d 788.

But "the law of the State, though enacted in the exercise of powers not contraverted, must yield" when incompatible with federal legislation. *Gibbons* v. *Ogden,* 9 Wheat. 1, 211. Congress has provided that the Commissioner of Patents "may prescribe regulations governing the *recognition* and conduct *of agents,* attorneys, *or other persons* representing applicants or other parties before the Patent Office," 35 U. S. C. § 31,[3] and the Commissioner, pursuant to § 31, has provided by regulation that "[a]n applicant for patent . . . *may be represented by an* attorney or *agent* authorized to practice before the Patent Office in patent cases." 37 CFR § 1.31. (Emphasis added.) The current regulations establish two separate registers "on which are entered the names of all persons recognized as *entitled to represent applicants* before the Patent Office in the preparation and prosecution of applications for patent." 37 CFR § 1.341. (Emphasis added.) One register is for attorneys at law, 37 CFR § 1.341 (a), and the other is for nonlawyer "agents." 37 CFR § 1.341 (b). A person may be admitted under either category only by establishing "that he is of good moral character and of good repute and possessed of the legal and scientific and technical qualifications necessary to enable him to render applicants for patents valuable service, and is otherwise competent to advise and assist them

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[3] Act of July 19, 1952, c. 950, § 1, 66 Stat. 795, 35 U. S. C. § 31:

"The Commissioner, subject to the approval of the Secretary of Commerce, may prescribe regulations governing the recognition and conduct of agents, attorneys, or other persons representing applicants or other parties before the Patent Office, and may require them, before being recognized as representatives of applicants or other persons, to show that they are of good moral character and reputation and are possessed of the necessary qualifications to render to applicants or other persons valuable service, advice, and assistance in the presentation or prosecution of their applications or other business before the Office."

in the presentation and prosecution of their applications before the Patent Office." 37 CFR § 1.341 (c).

The statute thus expressly permits the Commissioner to authorize practice before the Patent Office by nonlawyers, and the Commissioner has explicitly granted such authority. If the authorization is unqualified, then, by virtue of the Supremacy Clause, Florida may not deny to those failing to meet its own qualifications the right to perform the functions within the scope of the federal authority. A State may not enforce licensing requirements which, though valid in the absence of federal regulation, give "the State's licensing board a virtual power of review over the federal determination" that a person or agency is qualified and entitled to perform certain functions,[4] or which impose upon the performance of activity sanctioned by federal license additional conditions not contemplated by Congress.[5] "No State law can hinder or obstruct the free use of a license granted under an act of Congress." *Pennsylvania* v. *Wheeling & B. Bridge Co.*, 13 How. 518, 566.

Respondent argues, however, that we must read into the authorization conferred by the federal statute and regulations the condition that such practice not be inconsistent with state law, thus leaving registered practitioners with the unqualified right to practice only in the physical presence of the Patent Office and in the District of Columbia, where the Office is now located.

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[4] *Miller, Inc.*, v. *Arkansas*, 352 U. S. 187, 190; *First Iowa Hydro-Electric Coop.* v. *Federal Power Comm'n*, 328 U. S. 152; cf. *Castle* v. *Hayes Freight Lines, Inc.*, 348 U. S. 61; *Cloverleaf Butter Co.* v. *Patterson*, 315 U. S. 148.

[5] *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 235–236; *Moran* v. *New Orleans*, 112 U. S. 69; *Sinnot* v. *Davenport*, 22 How. 227; *Gibbons* v. *Ogden*, 9 Wheat. 1; *Huron Portland Cement Co.* v. *Detroit*, 362 U. S. 440, 449 (dissenting opinion); cf. *Hill* v. *Florida*, 325 U. S. 538.

The only language in either the statute or regulations which affords any plausible support for this view is the provision in the regulations that "[r]egistration in the Patent Office . . . shall only entitle the persons registered to practice before the Patent Office." 37 CFR § 1.341. Respondent suggests that the meaning of this limitation is clarified by reference to the predecessor provision, which provided that registration "shall not be construed as authorizing persons not members of the bar to practice law." 3 Fed. Reg. 2429. Yet the progression to the more circumscribed language without more tends to indicate that the provision was intended only to emphasize that registration in the Patent Office does not authorize the general practice of patent law, but sanctions only the performance of those services which are reasonably necessary and incident to the preparation and prosecution of patent applications. That no more was intended is further shown by the contrast with the regulations governing practice before the Patent Office in trademark cases, also issued by the Commissioner of Patents. These regulations now provide that "[r]ecognition of any person under this section is not to be construed as sanctioning or authorizing the performance of any acts regarded in the jurisdiction where performed as the unauthorized practice of law." 37 CFR § 2.12 (d). The comparison is perhaps sufficiently telling. But any possible uncertainty as to the intended meaning of the Commissioner must be dispelled by the fact that when the present regulations were amended in 1948,[6] it was first proposed to add a provision similar to that appearing in the trademark regulations.[7] After objection had been leveled

[6] 13 Fed. Reg. 9596.

[7] Proposed Revision of Patent Rules § 5.1, 611 O. G. Pat. Off., June 29, 1948, Supp. 8:

"*Registration of attorneys and agents.* . . . Registration in the Patent Office under the provisions of these rules shall not be construed

against the revision on the ground that it "indicated that the office thinks that the states have the power to circumscribe and limit the rights of patent attorneys who are not lawyers," [8] the more sweeping language was deleted and the wording modified to its present form.

Bereft of support in the regulations, respondent directs us to the legislative history of the statute to confirm its understanding that § 31 and its predecessor provisions were not designed to authorize practice not condoned by the State. Insofar as this history provides any insight

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as authorizing persons not members of the bar to practice law or to perform any acts regarded as practicing law in the jurisdiction where performed."

[8] "I think I know what you mean to say, but you have not said what you mean to say. If you stopped at the end of the first clause there and said that it does not authorize the persons not members of the bar to practice law, you might be closer to being right; but, as you have written it here, you have said that patent attorneys may not do in the states things which it may be necessary for them to do in order to prosecute their claims before the Patent Office.

"In other words, you are giving it to the states to say what a patent attorney may do rather than leaving it up to the Congress and to the laws of the United States.

"I may suggest that what patent attorneys do before the Patent Office might be construed as practicing law, were it not for the fact that their particular conduct is permitted by the acts of Congress and under the rules of the Patent Office.

"The states cannot pass laws derogating from the rights of the patent attorneys as created by Congress and existing under the rules of the Patent Office. I think that the rule, as proposed, makes it possible for the states, or indicated that the Office thinks that the states have the power to circumscribe and limit the rights of patent attorneys who are not lawyers, which rights are created under the laws of Congress, and subject to the rules of the Patent Office rather than to regulation by the individual states.

"I think you would have no power to pass this particular part of your proposed rule."

Remarks of A. P. Kane, Attorney, Hearing on Proposed Revision of Rules of Practice in Patent Cases, 281–282 (Sept. 30, 1948). See also *id.*, at pp. 319–330.

into the intent of Congress, however, we are convinced that the interpretation which respondent asks us to give the statute is inconsistent with the assumptions upon which Congress has acted for over a century.

Examination of the development of practice before the Patent Office and its governmental regulation reveals that: (1) nonlawyers have practiced before the Office from its inception, with the express approval of the Patent Office and to the knowledge of Congress; (2) during prolonged congressional study of unethical practices before the Patent Office, the right of nonlawyer agents to practice before the Office went unquestioned, and there was no suggestion that abuses might be curbed by state regulation; (3) despite protests of the bar, Congress in enacting the Administrative Procedure Act refused to limit the right to practice before the administrative agencies to lawyers; and (4) the Patent Office has defended the value of nonlawyer practitioners while taking steps to protect the interests which a State has in prohibiting unauthorized practice of law. We find implicit in this history congressional (and administrative) recognition that registration in the Patent Office confers a right to practice before the Office without regard to whether the State within which the practice is conducted would otherwise prohibit such conduct.

The power of the Commissioner of Patents to regulate practice before the Patent Office dates back to 1861, when Congress first provided that "for gross misconduct he may refuse to recognize any person as a patent agent, either generally or in any particular case . . . ." [9] The "Rules and Directions" issued by the Commissioner in 1869 provided that "[a]ny person of intelligence and good moral character may appear as the attorney in fact or agent of

[9] Act of March 2, 1861, c. 88, § 8, 12 Stat. 247; see also Act of July 8, 1870, c. 230, § 19, 16 Stat. 200, as amended, 66 Stat. 793, 35 U. S. C. § 6.

an applicant upon filing proper power of attorney." [10] From the outset, a substantial number of those appearing in this capacity were engineers or chemists familiar with the technical subjects to which the patent application related. "Many of them were not members of the bar. It probably never occurred to anybody that they should be." [11] Moreover, although a concentration of patent practitioners developed in Washington, D. C., the regulations have provided since the reorganization of the Patent Office in 1836 that personal attendance in Washington is unnecessary and that business with the Office should be transacted in writing.[12] The bulk of practitioners are now scattered throughout the country, and have been so distributed for many years.[13] As a practical matter, if

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[10] Rules and Directions for Proceedings in the Patent Office, § 127 (Aug. 1, 1869).

[11] Letter from Edward S. Rogers, Hearings before House Committee on Patents on H. R. 5527, 70th Cong., 1st Sess. 84 (1928); cf. *Hoosier Drill Co.* v. *Ingels,* 15 O. G. Pat. Off. 1013; 2 Robinson, Patents, § 431.

[12] "Personal attendance of the applicant at the Patent Office, to obtain a patent, is unnecessary. The business can be done by correspondence, (free of postage) or by power of attorney." Information to Persons Having Business to Transact at the Patent Office, 8 (July 1836). In 1854, it was first provided that "[a]ll business with the office should be transacted in writing. . . ." Rules and Directions for Proceedings in the Patent Office, § 122 (Feb. 20, 1854). Compare 37 CFR § 1.2.

[13] Roster of Attorneys and Agents Registered to Practice Before the U. S. Patent Office (1958); Names and Addresses of Attorneys Practicing Before the U. S. Patent Office (1883); Testimony of T. E. Robertson, Commissioner of Patents, Hearings before House Committee on Patents on H. R. 699, 71st Cong., 2d Sess. 12. Commencing in 1848, the Commissioner for many years informed inventors that "[i]f the services of Patent Agents are desired, able and competent persons engaged in that business can be found at their offices *in this city, and in other cities.*" Information to Persons Having Business to Transact at the Patent Office, Patent Agents or Attorneys (1848). (Emphasis deleted and added.)

practitioners were not so located, and thus could not easily consult with the inventors with whom they deal, their effectiveness would often be considerably impaired.[14] Respondent's suggestion that practice by nonlawyers was intended to be confined to the District of Columbia thus assumes either congressional ignorance or disregard of long-established practice.

Despite the early recognition of nonlawyers by the Patent Office, these agents, not subject to the professional restraints of their lawyer brethren, were particularly responsible for the deceptive advertising and victimization of inventors which long plagued the Patent Office.[15] To remedy these abuses, the Commissioner of Patents in 1899 first required registration of persons practicing before the Patent Office [16] and, in 1918, required practitioners to obtain his prior approval of all advertising material which they distributed.[17] It was to reach these same evils that § 31 was given much its present form when, in 1922, the statute was amended to expressly authorize the Commissioner to prescribe regulations for the recognition of agents and attorneys.[18]

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[14] See Berle, Inventions and Their Management, 189–190; Hoar, Patent Tactics and Law (3d ed.), 256–257; Woodling, Inventions and Their Protection (2d ed.), 289–290, 333; Rivise, Preparation and Prosecution of Patent Applications, § 42.

[15] See Hearings before House Committee on Patents on H. R. 5527, 70th Cong., 1st Sess. 16–18; 69 Cong. Rec. 6580; Spencer, The United States Patent Law System, 94–96. Berle, 184–186. Compare H. R. Rep. No. 1622, 68th Cong., 2d Sess. 2–3; H. R. Rep. No. 364, 64th Cong., 1st Sess. 2; Information to Persons Having Business to Transact at the Patent Office, Patent Agents or Attorneys (1848).

[16] Rules of Practice in the United States Patent Office, § 17 (July 18, 1899). Compare § 17 in the edition of June 18, 1897.

[17] 252 O. G. Pat. Off. 967. Compare 37 CFR § 1.345.

[18] Act of February 18, 1922, c. 58, § 3, 42 Stat. 390. Compare Act of July 8, 1870, c. 230, § 19, 16 Stat. 200, as amended, 35 U. S. C. § 6, and Act of July 4, 1884, c. 181, § 5, 23 Stat. 101, 5 U. S. C. § 493.

This modification of the statute, first proposed in 1912, was designed to provide for the "creation of a patent bar" and "to require a higher standard of qualifications for registry." [19] Although it was brought to the attention of the House Committee on Patents that practitioners included lawyers and nonlawyers alike,[20] it was never suggested that agents would be subject to exclusion. In fact, although the Commissioner of Patents had at one time expressed the view that Patent Office abuses could be eliminated only by restricting practice to lawyers,[21]

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[19] Letter from E. B. Moore, Commissioner of Patents, Hearings before House Committee on Patents on H. R. 23417, No. 1, 62d Cong., 2d Sess. 6–7. See also Hearings before House Committee on Patents on H. R. 210, 67th Cong., 1st Sess. 16; Commissioner of Patents, Annual Report, xii (1908).

[20] The following colloquy regarding an identical bill introduced the session before passage occurred between Congressman Himes and the Commissioner of Patents:

"Mr. HIMES. It seems to me that we should know just who the man practicing before the Patent Office happens to be. Must he be a member of the bar or are the requirements the same for the patent attorney who simply goes and gets a patent for his clients as the man that goes and practices before the Patent Office, before the Commissioner of Patents?

"Mr. ROBERTSON. The Patent Office can register anyone who shows a degree of proficiency necessary to write specifications, whether or not he is a member of the bar.

"Mr. HIMES. He must not be a member of the bar?

"Mr. ROBERTSON. He need not be a member of the bar. That is not as bad as it sounds. Some of our best practitioners are not members of the bar. They are the older line of attorneys. There are some very fine ones who have been practicing before the Patent Office 30 or 40 years who are not members of the bar, but they are honest men, and there are some of the practitioners who are members of the bar who are not honest men. So it is a very difficult thing to reach." Hearings before House Committee on Patents on H. R. 210, 67th Cong., 1st Sess. 15–16.

See also Hearings before House Committee on Patents on H. R. 5011, 5012, 7010, 66th Cong., 1st Sess. 281.

[21] Commissioner of Patents, Annual Report, vi (1893).

his successor concluded that such a limitation would be unwise and during the pendency of this legislation recommended to Congress against such a limitation:

> "It has been suggested many times that the privilege of practising before the Office should be granted only after examination similar to examinations held for admission to the bar. It is believed that this requirement would be too severe, as many persons not specially trained in the law and without any particular educational advantages may by careful study of the practice and of the useful arts learn adequately to prosecute applications. Fundamentally knowledge of the invention is more important than knowledge of the rules and is often possessed by men of a type of mind which does not acquire legal knowledge readily." [22]

Moreover, during the consideration in 1916 of another bill enacted to curb abusive advertising by patent practitioners, by prohibiting persons practicing before government agencies from using the names of government officials in their advertising literature,[23] the same point was made on the floor of the House:

> "Mr. OGLESBY. I will say to the gentleman that a good many men appear before the Patent Office who are not admitted attorneys. The commissioner stated at the hearing that he had considered the question as to whether or not anyone except a regularly admitted attorney at law should be excluded from practicing before the Patent Office, but for certain reasons thought, perhaps, he ought not to establish such a rule." [24]

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[22] Commissioner of Patents, Annual Report, xiv (1915).

[23] Act of April 27, 1916, c. 89, 39 Stat. 54.

[24] 53 Cong. Rec. 6313.

Disclosure that persons were falsely holding themselves out to be registered patent practitioners led in 1938 to the enactment of legislation making such misrepresentation a criminal offense.[25] This corrective legislation was under consideration for over a decade and originally contained several other provisions, including one which would have prohibited any person "duly registered to practice in the Patent Office . . . [from holding] himself out as a patent attorney, patent lawyer, patent solicitor, or patent counselor unless he is legally admitted to practice law in the State . . . or in the District of Columbia." [26] During the extended consideration given the matter in both Houses of Congress, the distinction between patent lawyers, who had been admitted to the bar, and nonlawyer agents, was repeatedly brought out; [27] time and again it was made clear that the above provision was not intended to restrict practice by agents, but was designed only to prevent them from labeling themselves "patent attorneys," [28] as the Patent Office had theretofore permitted.[29]

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[25] Act of May 9, 1938, 52 Stat. 342; now 66 Stat. 796, 35 U. S. C. § 33.

[26] This was the so-called "Cramton bill," H. R. 699, 71st Cong., 2d Sess.; H. R. 5527, 70th Cong., 1st Sess.; H. R. 5811, 69th Cong., 1st Sess.; H. R. 10735, 69th Cong., 1st Sess.; H. R. 5790, 68th Cong., 1st Sess.

[27] *E. g.*, 69 Cong. Rec. 6580; Hearings before Senate Committee on Patents on H. R. 5527, 70th Cong., 1st Sess. 4–7, 51; Hearings before House Committee on Patents on H. R. 699, 71st Cong., 2d Sess. 34, 49.

[28] *E. g.*, 69 Cong. Rec. 6580; S. Rep. No. 628, 71st Cong., 1st Sess. 4; Hearings before Senate Committee on Patents on H. R. 5527, 70th Cong., 1st Sess. 7, 59; Hearings before House Committee on Patents on H. R. 5527, 70th Cong., 1st Sess. 14–25, 28–33, 56–76, 85–100; Hearings before Senate Committee on Patents on H. R. 699, 71st Cong., 2d Sess. 3, 5, 10; Hearings before House Committee on Patents on H. R. 699, 71st Cong., 2d Sess. 2–5, 41.

[29] Prior to 1938, the Patent Office listed both lawyers and nonlawyers on a single register and referred to both as Patent Attorneys. The

The proposed bills would not have affected "any engineers or draftsmen from doing those things which they have always been doing before the Patent Office";[30] the bills sought "to bring about no change in the status of the many men now registered and *entitled to practice before the Patent Office,* regardless of whether they are members of the bar or not . . . ."[31] (Emphasis added.) "[T]here are quite a number of solicitors of patents who are highly qualified and who are not members of the bar, who never graduated at law and were never admitted to the bar. But this bill doesn't disqualify those men. *They can continue to qualify as patent agents.*"[32] (Emphasis added.) When asked "[w]hat is going to be the difference in the legal prerogatives of the agents and the others that come in," the Commissioner of Patents responded that "[*t*]*heir rights in the Patent Office will be exactly the same.* Their rights in the courts will be dif-

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legislation which was proposed would not have prohibited nonlawyers previously registered from continuing to use this appellation. *E. g.*, H. R. Rep. No. 947, 70th Cong., 1st Sess. 4. Although the several bills containing this provision failed to gain approval (though passing the House repeatedly), in 1938, the Commissioner, following suggestions made to him during the course of the Committee hearings, Hearings before House Committee on Patents on H. R. 5811, 69th Cong., 1st Sess. 46; Hearings before House Committee on Patents on H. R. 5527, 70th Cong., 1st Sess. 20, 26–27, established separate registers for lawyers and for nonlawyer agents, 495 O. G. Pat. Off. 715, and has since prohibited agents so registered from representing themselves to be attorneys, solicitors or lawyers. See 37 CFR §§ 1.341, 1.345. The registration of those agents previously enrolled on the single register, of whom petitioner is one, was not changed.

[30] S. Rep. No. 1209, 70th Cong., 1st Sess. 1.

[31] H. R. Rep. No. 947, 70th Cong., 1st Sess. 4; S. Rep. No. 626, 71st Cong., 2d Sess. 4; H. R. Rep. No. 728, 71st Cong., 2d Sess. 3.

[32] Statement of E. W. Bradford, Chairman of the Committee on Ethics of the American Patent Law Association, Hearings before House Committee on Patents on H. R. 699, 71st Cong., 2d Sess. 61.

ferent." [33] (Emphasis added.) The House debates on the bill before Congress in 1930 reveal the same understanding:

> "Mr. STAFFORD. . . . I was under the impression that hereafter a person in order to practice before the Patent Office must be admitted to practice before some bar of a State.
>
> "Mr. LaGUARDIA. That is my understanding.
>
> "Mr. PERKINS. I will correct myself. He may be admitted to act as a patent agent, but after the passage of this act no one who is not admitted to the bar generally can hold himself out to be a patent attorney, patent lawyer, patent solicitor, or patent counselor.
>
> "Mr. STAFFORD. A person without being a member of the bar may be registered as a patent agent to practice before the Commissioner of Patents?
>
> "Mr. PERKINS. He may." [34]

Hence, during the period the 1922 statute was being considered, and prior to its readoption in 1952,[35] we find strong and unchallenged implications that registered agents have a right to practice before the Patent Office. The repeated efforts to assure Congress that no attempt was being made to limit this right are not without significance. Nor is it insignificant that we find no suggestion that the abuses being perpetrated by patent agents could or should be corrected by the States. To the contrary, reform was effected by the Patent Office, which now requires all practitioners to pass a rigorous examination,

[33] Hearings before House Committee on Patents on H. R. 5527, 70th Cong., 1st Sess. 15.

[34] 72 Cong. Rec. 5467.

[35] No changes of substance were intended by the 1952 revision. S. Rep. No. 1979, 82d Cong., 2d Sess. 4; H. R. Rep. No. 1923, 82d Cong., 2d Sess. 6.

37 CFR § 1.341 (c), strictly regulates their advertising, 37 CFR § 1.345, and demands that "[a]ttorneys and agents appearing before the Patent Office . . . conform to the standards of ethical and professional conduct generally applicable to attorneys before the courts of the United States." 37 CFR § 1.344.

Moreover, the extent to which specialized lay practitioners should be allowed to practice before some 40-odd federal administrative agencies, including the Patent Office, received continuing attention both in and out of Congress during the period prior to 1952.[36] The Attorney General's Committee on Administrative Procedure which, in 1941, studied the need for procedural reform in the administrative agencies, reported that "[e]specially among lawyers' organizations there has been manifest a sentiment in recent years that only members of the bar should be admitted to practice before administrative agencies. The Committee doubts that a sweeping interdiction of nonlawyer practitioners would be wise . . . ." [37] Ultimately it was provided in § 6 (a) of the Administrative Procedure Act that "[e]very party shall be accorded the right to appear in person or by or with counsel or other duly qualified representative in any agency proceeding. . . . Nothing herein shall be construed either to grant or to deny to any person who is not a lawyer the

[36] See Committee on Administrative Practice of the Bar Association of the District of Columbia, Report on Admission to and Control Over Practice Before Federal Administrative Agencies (1938); Survey of the Legal Profession, Standards of Admission for Practice Before Federal Administrative Agencies (1953); House Committee on Government Operations, Survey and Study of Administrative Organization, Procedure, and Practice in the Federal Agencies, 85th Cong., 1st Sess. (Comm. Print); Note, Proposed Restriction of Lay Practice Before Federal Administrative Agencies, 48 Col. L. Rev. 120.

[37] Attorney General's Committee on Administrative Procedure, Final Report, 124 (1941). Compare Commission on Organization of the Executive Branch of the Government, Report to the Congress on Legal Services and Procedure, 32–35, 40–44 (1955).

right to appear for or represent others before any agency or in any agency proceeding." 60 Stat. 240, 5 U. S. C. § 1005 (a). Although the act thus disavows any intention to change the existing practice before any of the agencies, so that the right of nonlawyers to practice before each agency must be determined by reference to the statute and regulations applicable to the particular agency, the history of § 6 (a) contains further recognition of the power of agencies to admit nonlawyers, and again we see no suggestion that this power is in any way conditioned on the approval of the State. The Chairman of the American Bar Association's committee on administrative law testified before the House Judiciary Committee:

> "A great deal of complaint has been received from two sources. Number one is the lay practitioners before the various agencies, chiefly the Interstate Commerce Commission, who are afraid something might be said that would oust them from practice. On the other hand, there is a great deal of protest from the committees on unauthorized practice of the law in various State, local, and municipal bar associations who are just as vehement in saying that these measures fail to recognize that legal procedure must be confined to lawyers. But these bills do not eliminate the lay practitioner, if the administrative agency feels they have a function to perform and desires to admit him to practice." [38]

Despite the concern of the bar associations, the Senate Judiciary Committee reported that "nonlawyers, if permitted by the agency to practice before it, are not excluded from representing interested parties in adminis-

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[38] Hearings before House Committee on the Judiciary on Federal Administrative Procedure, 79th Cong., 1st Sess. (Serial No. 19) 33–34, Legislative History of the Administrative Procedure Act, S. Doc. No. 248, 79th Cong., 2d Sess. 79–80 (hereinafter referred to as "Legislative History").

trative matters." [39] And in the House debates on this provision we find the following instructive passage:

> "Mr. AUSTIN. Mr. President, before the Senator leaves that thought, I wish to ask a question. I notice . . . in the section to which the Senator is referring, this language:
>
> " 'Nothing herein shall be construed either to grant or to deny to any person who is not a lawyer the right to appear for or represent others before any agency or in any agency proceeding.'
>
> "Is it not a fact that somewhere in the bill the distinguished Senator has reserved the right to a nonprofessional—that is, a man who is not a lawyer—to appear, if the agency having jurisdiction permits it? That is, there is a discretion permitted, is there not? For example, take a case where a scientific expert would better represent before the Commission the interests involved than would a lawyer. The right to obtain that privilege is granted in the bill somewhere, is it not?
>
> "Mr. McCARRAN. The Senator is correct; and in connection with that I wish to read from the Attorney General's comment, as follows:
>
> " 'This subsection does not deal with, or in any way qualify, the present power of an agency to regulate practice at its bar. It expressly provides, moreover, that nothing in the act shall be construed either to grant or to deny the right of nonlawyers to appear before agencies in a representative capacity. *Control over this matter remains in the respective agencies.*'
>
> "That is the Attorney General's observation." [40] (Emphasis added.)

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[39] S. Comm. Print on S. 7, 79th Cong., 1st Sess. 10 (June 1945), Legislative History 26.

[40] 92 Cong. Rec. 2156, Legislative History 316–317.

It is also instructive to note that shortly after the adoption of the Administrative Procedure Act, the American Bar Association proposed the adoption of an "Administrative Practitioners Act." [41] Though limiting the powers of nonattorneys in respects not here relevant, the bill did provide that "authorized participation in agency proceedings" was permissible, without regard to whether the conduct constituted the practice of law in the State where performed.[42]

Indicative of this same general understanding, we note that every state court considering the problem prior to 1952 agreed that the authority to participate in administrative proceedings conferred by the Patent Office and by

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[41] H. R. 2657, 80th Cong., 1st Sess. See Curry, Bills in Congress Sponsored by American Bar Association Seek to Prevent Nonlawyers From Practicing Before the Interstate Commerce Commission, 14 I. C. C. Pract. J. 491.

[42] "Credentials for Agents

"SEC. 6. If any agency shall find it necessary in the public interest and in the interest of parties to agency proceedings before it to authorize practice by individuals not subject to section 5 and provides by generally applicable rule therefor in any case in which the governing statute does not provide only for appearances in person or by attorney or counsel, any such individual may be admitted hereunder to practice as an agent before such agency except in proceedings pursuant to section 7 or 8 of the Administrative Procedure Act or in connection with any form of compulsory process. . . . On application, individuals subject to this section who have been individually authorized to practice before any agency, have maintained such standing, are actively engaged in practice so permitted, and are so certified by the agency with a specification of the extent to which they have been so qualified to practice and have practiced shall be given credentials enabling them to continue such practice. No agency, and nothing in this Act, shall be deemed to permit any person to practice law in any place or render service save the authorized participation in agency proceedings by holders of credentials; and no person shall hold himself out, impliedly or expressly, as otherwise authorized hereunder."

other federal agencies was either consistent with or preemptive of state law.[43]

Finally, regard to the underlying considerations renders it difficult to conclude that Congress would have per-

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[43] *Chicago Bar Assn.* v. *Kellogg*, 338 Ill. App. 618, 88 N. E. 2d 519 (1949) (Patent Office); *Sharp* v. *Mida's Research Bureau*, 45 N. Y. S. 2d 690 (1943), aff'd, 48 N. Y. S. 2d 799 (1944) (Patent Office); *Schroeder* v. *Wheeler*, 126 Cal. App. 367, 14 P. 2d 903 (1932) (Patent Office); *People ex rel. Colorado Bar Assn.* v. *Erbaugh*, 42 Colo. 480, 94 P. 349 (1908) (Patent Office) (by implication); *In re New York County Lawyers Assn.* (*In re Bercu*), 273 App. Div. 524, 534–535, 78 N. Y. S. 2d 209, 218 (1948), aff'd, 299 N. Y. 728, 87 N. E. 2d 451 (1949) (Treasury and Tax Court) (by implication); *Auerbacher* v. *Wood*, 139 N. J. Eq. 599, 604, 53 A. 2d 800, 803 (1947), aff'd, 142 N. J. Eq. 484, 59 A. 2d 863 (1948) (N. L. R. B.); *De Pass* v. *B. Harris Wool Co.*, 346 Mo. 1038, 144 S. W. 2d 146 (1940) (I. C. C.); *Blair* v. *Motor Carriers Service Bureau, Inc.*, 40 Pa. D. & C. 413, 426 (1939) (I. C. C.); *Bennett* v. *Goldsmith*, 280 N. Y. 529, 19 N. E. 2d 927 (1939) (Immigration Department); *Public Service Traffic Bureau, Inc.*, v. *Haworth Marble Co.*, 40 Ohio App. 255, 178 N. E. 703 (1931) (I. C. C.) (dictum); *In re Gibbs*, 35 Ariz. 346, 355, 278 P. 371, 374 (1929) (Land Office) (dictum); *Mulligan* v. *Smith*, 32 Colo. 404, 76 P. 1063 (1904) (Land Office); see also *In re Lyon*, 301 Mass. 30, 16 N. E. 2d 74 (1938) (bankruptcy); *Brooks* v. *Mandel-Witte Co.*, 54 F. 2d 992 (C. A. 2d Cir.), cert. denied, 286 U. S. 559 (1932) (Customs Court). Compare *Lowell Bar Assn.* v. *Loeb*, 315 Mass. 176, 184–185, 52 N. E. 2d 27, 33–34 (1943) (Treasury and Tax Court).

Normally, the state courts have deemed the authority granted by the federal agency to be closely circumscribed. *E. g., Chicago Bar Assn.* v. *Kellogg, supra; In re Lyon, supra; Public Service Traffic Bureau, Inc.*, v. *Haworth Marble Co., supra.*

In recent years divergence in opinion has developed. Compare *Battelle Memorial Inst.* v. *Green*, 133 U. S. P. Q. 49 (Ohio Ct. App. 1962) (Patent Office), and *Noble* v. *Hunt*, 95 Ga. App. 804, 99 S. E. 2d 345 (1957) (Treasury and Tax Court), with *Agran* v. *Shapiro*, 127 Cal. App. 2d Supp. 807, 273 P. 2d 619 (App. Dept. Super. Ct., 1954) (Treasury); *Wisconsin* v. *Keller*, 16 Wis. 2d 377, 114 N. W. 2d 796, now pending on certiorari as No. 429, 1962 Term (I. C. C.); *Petition of Kearney*, 63 So. 2d 630 (Fla. 1953) (Treasury and Tax

mitted a State to prohibit patent agents from operating within its boundaries had it expressly directed its attention to the problem. The rights conferred by the issuance of letters patent are federal rights. It is upon Congress that the Constitution has bestowed the power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries," Art. I, § 8, cl. 8, and to take all steps necessary and proper to accomplish that end, Art. I, § 8, cl. 18, pursuant to which the Patent Office and its specialized bar have been established. The Government, appearing as *amicus curiae,* informs the Court that of the 7,544 persons registered to practice before the Patent Office in November 1962, 1,801 were not lawyers and 1,687 others were not lawyers admitted to the bar of the State in which they were practicing.[44] Hence, under the respondent's view, one-quarter of the present practitioners would be subject to disqualification or to relocation in the District of Columbia and another one-fourth, unless reciprocity provisions for admission to the bar of the State in which they are practicing are available to them, might be forced to relocate, apply for admission to the State's bar, or discontinue practice. The disruptive effect which

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Court); cf. *Marshall* v. *New Inventor's Club, Inc.,* 69 O. L. Abs. 578, 117 N. E. 2d 737 (C. P. 1953) (Patent Office).

State courts have frequently held practice before state administrative agencies by nonlawyers to constitute the unauthorized practice of law. *E. g., People ex rel. Chicago Bar Assn.* v. *Goodman,* 366 Ill. 346, 8 N. E. 2d 941, 111 A. L. R. 1, cert. denied, 302 U. S. 728; *Clark* v. *Austin,* 340 Mo. 467, 101 S. W. 2d 977. But compare *State ex rel. Reynolds* v. *Dinger,* 14 Wis. 2d 193, 109 N. W. 2d 685; *Realty Appraisals Co.* v. *Astor-Broadway Holding Corp.,* 5 App. Div. 2d 36, 169 N. Y. S. 2d 121.

[44] Of the 73 patent practitioners in Florida, 62 are not members of the Florida Bar.

this could have upon Patent Office proceedings cannot be ignored. On the other hand, the State is primarily concerned with protecting its citizens from unskilled and unethical practitioners,[45] interests which, as we have seen, the Patent Office now safeguards by testing applicants for registration, and by insisting on the maintenance of high standards of integrity. Failure to comply with these standards may result in suspension or disbarment. 35 U. S. C. § 32; 37 CFR § 1.348. So successful have the efforts of the Patent Office been that the Office was able to inform the Hoover Commission that "there is no significant difference between lawyers and nonlawyers either with respect to their ability to handle the work or with respect to their ethical conduct." [46]

Moreover, since patent practitioners are authorized to practice only before the Patent Office, the State maintains control over the practice of law within its borders except to the limited extent necessary for the accomplishment of the federal objectives.[47]

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[45] *Hexter Title & Abstract Co.* v. *Grievance Committee,* 142 Tex. 506, 509, 179 S. W. 2d 946, 948; *Lowell Bar Assn.* v. *Loeb,* 315 Mass. 176, 180, 52 N. E. 2d 27, 31. Commission on Organization of the Executive Branch of the Government, Report of the Task Force on Legal Services and Procedure, Part VI, Appendices and Charts, 169 (1955).

[46] *Id.,* 158. The Patent Office noted the qualification that nonlawyers are able to advertise. Compare Hearings before House Committee on Patents on H. R. 5527, 70th Cong., 1st Sess. 16–19, 71–72, 89, 90.

[47] Because of the breadth of the injunction issued in this case, we are not called upon to determine what functions are reasonably within the scope of the practice authorized by the Patent Office. The Commissioner has issued no regulations touching upon this point. We note, however, that a practitioner authorized to prepare patent applications must of course render opinions as to the patentability of the inventions brought to him, and that it is entirely reasonable for a practitioner to hold himself out as qualified to perform his specialized work, so long as he does not misrepresent the scope of his license.

We have not overlooked respondent's constitutional arguments, but find them singularly without merit. We have already noted the source of Congress' power to grant patent rights. It has never been doubted that the establishment of the Patent Office to process patent applications is appropriate and plainly adapted to the end of securing to inventors the exclusive right to their discoveries, nor can it plausibly be suggested that by taking steps to authorize competent persons to assist in the preparation of patent applications Congress has exceeded the bounds of what is necessary and proper to the accomplishment of this same end. Cf. *Goldsmith* v. *United States Board of Tax Appeals,* 270 U. S. 117; *United States* v. *Duell,* 172 U. S. 576. Congress having acted within the scope of the powers "delegated to the United States by the Constitution," it has not exceeded the limits of the Tenth Amendment despite the concurrent effects of its legislation upon a matter otherwise within the control of the State. "Interference with the power of the States was no constitutional criterion of the power of Congress. If the power was not given, Congress could not exercise it; if given, they might exercise it, although it should interfere with the laws, or even the Constitution of the States." II Annals of Congress 1897 (remarks of Madison). The Tenth Amendment "states but a truism that all is retained which has not been surrendered." *United States* v. *Darby,* 312 U. S. 100, 124; *Case* v. *Bowles,* 327 U. S. 92, 102. Compare *Miller, Inc.,* v. *Arkansas,* 352 U. S. 187. The authority of Congress is no less when the state power which it displaces would otherwise have been exercised by the state judiciary rather than by the state legislature. Cf. *Pennsylvania R. Co.* v. *Public Service Comm'n,* 250 U. S. 566. Finally, § 31 contains sufficient standards to guide the Patent Office in its admissions policy to avoid the criticism that Congress has improperly delegated its powers to the ad-

ministrative agency. *Fahey* v. *Mallonee,* 332 U. S. 245; *Currin* v. *Wallace,* 306 U. S. 1, 16–18.

It follows that the order enjoining petitioner must be vacated since it prohibits him from performing tasks which are incident to the preparation and prosecution of patent applications before the Patent Office. The judgment below is vacated and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

UNITED STATES *v.* BRAVERMAN.

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

No. 506. Argued April 22, 1963.—Decided May 27, 1963.

An indictment under § 1 of the Elkins Act states an offense when it charges that a person has solicited a rebate from a common carrier respecting the transportation in interstate commerce of a shipper's property, even though it is not alleged that the rebate was for the benefit of the shipper. Pp. 405–409.

Reversed and remanded.

Frank I. Goodman argued the cause for the United States by special leave of Court *pro hac vice*. With him on the brief were *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit.*

No appearance for the appellee.

MR. JUSTICE BLACK delivered the opinion of the Court.

Appellee, Jerry Braverman, was transportation manager of the Burbank, California, distribution office of the Andrew Jergens Company, which ships goods in interstate commerce. In June 1962 he was indicted in a United States District Court and charged with having violated § 1 of the Elkins Act [1] by having knowingly solicited from a freight forwarder concessions and rebates respecting interstate motor carrier shipments of Jergens' goods so that, had the rebates been granted, goods would have been shipped at a lower rate than that named in the applicable tariffs filed with the Interstate Commerce Commission. The indictment did not allege, and all parties agreed that the Government did not intend to prove, that the rebate would have been for the benefit of the shipper. The dis-

[1] 49 U. S. C. § 41 (1).

trict judge, believing that the Act applies only where some "advantage or discrimination is practiced in favor of the shipper," ruled that the indictment did not charge an offense under the statute and therefore must be dismissed. The case is properly here on appeal under 18 U. S. C. § 3731.

We have concluded that the Elkins Act outlaws solicitations of rebates by any person whatever, no matter for whose benefit the rebate is sought, and that therefore the District Court erred in dismissing the indictment. Section 1 aims in unmistakable language at preserving published tariffs inviolate. That section, first, makes it a misdemeanor for a carrier to fail "strictly to observe" published tariffs and, second, goes right on to make it unlawful "for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination" as to interstate shipments of property "whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier . . . ." More unequivocal language would be hard to imagine. It strikes at any and every kind of rebate, no matter by whom or to whom given. Nowhere does the section say or imply that rebates are unlawful only if they are given to or are for the benefit of a shipper. It is a rebate, to whomever given, which the statutory language proscribes.

The legislative history of the Elkins Act bears out the conclusion that Congress intended to prevent any kind of departure from the published rates and to that end outlawed all rebates, without requiring a showing of benefit to any shipper. The original Interstate Commerce Act,[2] passed in 1887, made it unlawful for any carrier to charge either more or less than the rate specified in its published

[2] 24 Stat. 379.

schedule of rates.[3] But the Interstate Commerce Commission, after a decade of experience with the Act, recounted in its Annual Reports to Congress between 1897 and 1902 the secrecy with which rebates were cloaked, the impossibility of enforcing tariffs when the Government had to prove not only a departure but also a benefit to one shipper not received by another, and the pressing need to invoke penalties simply upon showing a departure from a published rate.[4]

These urgings led to the passage of the Elkins Act. A Committee of the House of Representatives, in hearings on several bills proposing amendments to the Interstate Commerce Act, was told by the Chairman of the Interstate Commerce Commission that the existing law was "[i]n some important respects . . . practically unworkable." In particular, he reported the virtual impossibility of showing that a rebate had resulted in an "actual discrimination" among shippers and agreed with a member of the Committee that "any departure" from the published rates should be made an offense.[5] In its favorable report on the bill which became the Elkins Act, the Committee observed that it was "practically impossible to show the discrimination" and recommended passage of its proposal making it "a penal offense to make any departure from the published rates whether there be a discrimination or not." [6]

This Court has already held that the sanctions of the Act are not restricted to carriers or shippers and that "any

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[3] 24 Stat. 381.

[4] Annual Reports, Interstate Commerce Commission, Dec. 6, 1897, pp. 46–48, Dec. 24, 1900, p. 10, Jan. 17, 1902, p. 8.

[5] Hearings on H. R. 146, 273, 2040, 5775, 8337, and 10930 before the House Committee on Interstate and Foreign Commerce 197–199 (1902).

[6] H. R. Rep. No. 3765, 57th Cong., 2d Sess. 5 (1903). The bill passed the House by a vote of 250 to 6, 36 Cong. Rec. 2159 (1903), having already passed the Senate, 36 Cong. Rec. 1633–1634 (1903).

person" as used in § 1 means "any person." [7] It was there recognized that, in order to ensure carrier efficiency, rates must be maintained unimpaired and that the Elkins Act no more intended to allow third persons to tamper with the statutory scheme than it intended to allow carriers and shippers themselves to do so. And in an analogous situation, this Court has held that railroad employees who charge passengers more than the established rates are punishable under the Interstate Commerce Act even though they acted for their own gain and even though the railroad was not a party to their conduct.[8]

We have considered the statute before us in light of the salutary rule that criminal statutes should not by interpretation be expanded beyond their plain language.[9] But neither can we interpret a statute so narrowly as to defeat its obvious intent.[10] Congress, the Commission, and the public were concerned to make certain that, once a tariff had been published, no deviations whatever from that tariff would take place. Nowhere can we find support for the suggestion that some departures were to be checked while others were to be allowed. We would ignore the express language of the Elkins Act, the economic ills which gave rise to its passage, the objects which the framers of the statute had in mind, and the subsequent judicial enforcement of the Act if we limited its operation to only some kinds of rebates or to only some people.

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[7] *Union Pac. R. Co.* v. *United States*, 313 U. S. 450, 463 (1941). The lower courts soon after the passage of the Elkins Act rejected the argument that the Act reached only the carrier and the shipper and held that it was immaterial that rebates were paid to someone other than the shipper. *E. g., United States* v. *Milwaukee Refrigerator Transit Co.*, 145 F. 1007, 1012 (C. C. E. D. Wis. 1906); *United States* v. *Delaware, L. & W. R. Co.*, 152 F. 269, 273 (C. C. S. D. N. Y. 1907).

[8] *Howitt* v. *United States*, 328 U. S. 189 (1946).

[9] See *United States* v. *Resnick*, 299 U. S. 207, 209–210 (1936).

[10] See *United States* v. *Raynor*, 302 U. S. 540, 552 (1938).

Congress wanted rates to be published and honored. It wanted rebates stopped. It used fitting language to accomplish that end. We hold that an indictment under § 1 of the Elkins Act states an offense when it charges that a person has solicited a rebate from a common carrier respecting the transportation in interstate commerce of a shipper's property, even though it is not alleged that the rebate was for the benefit of the shipper.

Reversed and remanded.

REED *v.* THE YAKA ET AL.

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

No. 509. Argued April 22, 1963.—Decided May 27, 1963.

Petitioner, a longshoreman, filed a libel *in rem* in a Federal District Court against a ship for injuries sustained while engaged in loading the ship as an employee of a corporation which was operating it under a bareboat charter. The District Judge found that, at the time of the injury, petitioner was aboard the ship, standing on a stack of wooden pallets used in loading the ship, and that the sole cause of the injury was a latent defect in one of the planks of a pallet, which caused it to break. He held that the defective pallet supplied by the chartering corporation rendered the ship unseaworthy and that, therefore, petitioner could recover against the ship. The corporation contended that it could not be held liable in damages to petitioner, because it was petitioner's employer, and the Longshoremen's and Harbor Workers' Compensation Act provides that compensation liability of an employer under that Act is exclusive and in place of any other liability on his part. *Held:* Petitioner was not barred by that Act from relying on the corporation's liability as a shipowner *pro hac vice* for the ship's unseaworthiness in order to support his libel *in rem* against the ship. Pp. 410–416.

307 F. 2d 203, reversed.

Abraham E. Freedman argued the cause and filed a brief for petitioner.

T. E. Byrne, Jr. argued the cause for respondents. With him on the brief for Pan-Atlantic Steamship Corp. was *Mark D. Alspach*. *Thomas F. Mount* filed a brief for The Yaka.

MR. JUSTICE BLACK delivered the opinion of the Court.

Petitioner, a longshoreman, filed a libel *in rem* in a United States District Court against the steamship *Yaka* to recover for injuries he sustained while engaged in loading the vessel. The *Yaka's* owner, Waterman Steamship Corporation, appeared as claimant of the ship but brought in as an additional defendant petitioner's employer, Pan-

Atlantic Steamship Corporation, which at the time of the accident was operating Waterman's ship under a bareboat charter and whose negligence Waterman alleged caused petitioner's injury. The district judge found that at the time of the injury petitioner was in the ship standing on a stack of rectangular, wooden pallets used in loading the vessel and that the sole cause of the injury was a latent defect in one of the planks of a pallet, which caused it to break. The judge held that the defective pallet supplied by Pan-Atlantic rendered Waterman's *Yaka* unseaworthy and that therefore petitioner could recover against the ship. But since the defective pallet was furnished by Pan-Atlantic, the trial judge went on to hold that it must make Waterman whole because of an indemnity clause in the bareboat charter agreement. 183 F. Supp. 69. The Court of Appeals for the Third Circuit reversed the judgment, holding that neither Waterman nor Pan-Atlantic could be held personally liable for the unseaworthiness and that a libel *in rem* against a ship could not be sustained unless there was an underlying personal liability to support the *in rem* action. 307 F. 2d 203. Having previously reserved in *Guzman* v. *Pichirilo,* 369 U. S. 698, 700 n. 3 (1962), the question of whether personal liability is essential to the liability of a ship, we granted certiorari. 371 U. S. 938.

In determining that there was no underlying personal liability for the unseaworthiness of the vessel, the Court of Appeals held that (1) Waterman, the actual owner, could not be made to respond in damages because the unseaworthiness of its ship arose after it had been demised under bareboat charter to Pan-Atlantic,[1] and (2) Pan-

[1] Whether a bareboat charter absolves the owner from liability on its warranty of seaworthiness is a question we also reserved in *Guzman* v. *Pichirilo,* 369 U. S. 698, 700 (1962). We do not reach that question here.

Counsel state that an *in personam* complaint against Waterman was dismissed and no appeal was taken by petitioner. But this has no relevancy here.

Atlantic could not have been held personally liable in damages to petitioner for the unseaworthiness because Pan-Atlantic was petitioner's employer under the Longshoremen's and Harbor Workers' Compensation Act,[2] and, while that Act permits actions for damages against third persons,[3] it provides that compensation liability of an employer under the Act is exclusive and in place of all other liability on his part.[4]

We find it unnecessary to decide whether a ship may ever be held liable for its unseaworthiness where no personal liability could be asserted because, in our view, the Court of Appeals erred in holding that Pan-Atlantic could not be held personally liable for the unseaworthiness of the ship which caused petitioner's injury.

Pan-Atlantic was operating the *Yaka* as demisee or bareboat charterer from Waterman. Under such arrangements full possession and control of the vessel are delivered up to the charterer for a period of time.[5] The ship is then directed by its Master and manned by his crew; it makes his voyages and carries the cargo he chooses. Services performed on board the ship are primarily for his benefit. It has long been recognized in the law of admiralty that for many, if not most, purposes the bareboat charterer is to be treated as the owner,[6] generally called owner *pro hac vice*. We have no doubt, and indeed Pan-Atlantic admits,[7] that, barring explicit statutory exemption, the bareboat charterer is personally liable for

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[2] 44 Stat. 1424 (1927), 33 U. S. C. §§ 901–950.

[3] 33 U. S. C. § 933.

[4] 33 U. S. C. § 905.

[5] See *Guzman* v. *Pichirilo*, 369 U. S. 698, 699–700 (1962), and cases there cited; Gilmore and Black, The Law of Admiralty (1957), 215.

[6] See, *e. g.*, *Leary* v. *United States*, 14 Wall. 607, 610 (1872); *United States* v. *Shea*, 152 U. S. 178 (1894).

[7] Pan-Atlantic states in its brief, "Whether we call him bareboat charterer, owner *pro hac vice*, or demisee, it is he who 'is the warrantor of seaworthiness.'"

the unseaworthiness of a chartered vessel,[8] and that this liability will support a libel *in rem* against the vessel.[9] Since the unseaworthiness of the *Yaka* is no longer in dispute, the only question is whether the Longshoremen's Act prevents recovery by petitioner for Pan-Atlantic's breach of its warranty of seaworthiness.

In *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85 (1946), we held that a shipowner's warranty of seaworthiness extended to a longshoreman injured while loading the ship, even though the longshoreman was employed by an independent contractor. In doing so, we noted particularly the hazards of marine service, the helplessness of the men to ward off the perils of unseaworthiness, the harshness of forcing them to shoulder their losses alone, and the broad range of the "humanitarian policy" of the doctrine of seaworthiness, which we held not to depend upon any kind of contract. 328 U. S., at 93–95. We further held that the Longshoremen's and Harbor Workers' Act was not intended to take away from longshoremen the traditional remedies of the sea, so that recovery for unseaworthiness could be had notwithstanding the availability of compensation. Ten years later, in *Ryan Stevedoring Co.* v. *Pan-Atlantic S. S. Corp.,* 350 U. S. 124 (1956), we were faced with the question of whether a shipowner who was forced to pay damages to a longshoreman injured by the unsafe storage of cargo could recover indemnity from the stevedoring company for whom the longshoreman worked. Even in the absence of an indemnity provision, the Court held that the stevedoring company was liable over to the shipowner because it had promised to store the cargo safely. The Court was not convinced by arguments that its result made the eco-

[8] Cf. *Cannella* v. *Lykes Bros. S. S. Co.,* 174 F. 2d 794 (C. A. 2d Cir. 1949); *Cannella* v. *United States,* 179 F. 2d 491 (C. A. 2d Cir. 1950).

[9] See, *e. g., Crumady* v. *The Joachim Hendrik Fisser,* 358 U. S. 423 (1959).

nomic burden of the longshoreman's recovery fall on the stevedoring employer contrary to the purpose of the Act. Thus, there can be no doubt that, if the petitioner here had been employed to do this particular work by an independent stevedoring company rather than directly by the owner, he could have recovered damages for his injury from the owner who could have then under *Ryan* shifted the burden of the recovery to petitioner's stevedoring employer. Yet the Court of Appeals held, and Pan-Atlantic would have us hold, that petitioner must be completely denied the traditional and basic protection of the warranty of seaworthiness simply because Pan-Atlantic was not only the owner *pro hac vice* of the ship but was also petitioner's employer. In making this argument, Pan-Atlantic has not pointed and could not point to any economic difference between giving relief in this case, where the owner acted as his own stevedore, and in one in which the owner hires an independent company. In either case, under *Ryan,* the burden ultimately falls on the company whose default caused the injury. Pan-Atlantic relies simply on the literal wording of the statute, and it must be admitted that the statute on its face lends support to Pan-Atlantic's construction. But we cannot now consider the wording of the statute alone. We must view it in the light of our prior cases in this area, like *Sieracki, Ryan,* and others, the holdings of which have been left unchanged by Congress. In particular, we pointed out several times in the *Sieracki* case, which has been consistently followed since,[10] that a shipowner's obligation of seaworthiness cannot be shifted about, limited, or escaped by contracts or by the

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[10] See, *e. g., Pope & Talbot, Inc.,* v. *Hawn,* 346 U. S. 406 (1953); *Alaska S. S. Co.* v. *Petterson,* 347 U. S. 396 (1954); *Rogers* v. *United States Lines,* 347 U. S. 984 (1954); *Crumady* v. *The Joachim Hendrik Fisser,* 358 U. S. 423 (1959).

absence of contracts and that the shipowner's obligation is rooted, not in contracts, but in the hazards of the work. And *Ryan's* holding that a negligent stevedoring company must indemnify a shipowner has in later cases been followed and to some degree extended.[11] In the light of this whole body of law, statutory and decisional, only blind adherence to the superficial meaning of a statute could prompt us to ignore the fact that Pan-Atlantic was not only an employer of longshoremen but was also a bareboat charterer and operator of a ship and, as such, was charged with the traditional, absolute, and nondelegable obligation of seaworthiness which it should not be permitted to avoid. We have previously said that the Longshoremen's Act "must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results." [12] We think it would produce a harsh and incongruous result, one out of keeping with the dominant intent of Congress to help longshoremen,[13] to distinguish between liability to longshoremen injured under precisely the same circumstances because some draw their pay directly from a shipowner and others from a stevedoring company doing the ship's service. Petitioner's need for protection from unseaworthiness was neither more nor less than that of a longshoreman working for a stevedoring company. As we said in a slightly different factual context, "All were subjected to the same danger. All were entitled to like treatment under law." [14] We conclude that petitioner was not barred by the Long-

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[11] See, *e. g., Weyerhaeuser S. S. Co.* v. *Nacirema Operating Co.*, 355 U. S. 563 (1958); *Crumady* v. *The Joachim Hendrik Fisser*, 358 U. S. 423 (1959); *Waterman S. S. Corp.* v. *Dugan & McNamara, Inc.*, 364 U. S. 421 (1960).

[12] *Voris* v. *Eikel*, 346 U. S. 328, 333 (1953).

[13] See S. Rep. No. 973, 69th Cong., 1st Sess. (1926); H. R. Rep. No. 1190, 69th Cong., 1st Sess. (1926).

[14] *Pope & Talbot, Inc.*, v. *Hawn*, 346 U. S. 406, 413 (1953).

shoremen's Act from relying on Pan-Atlantic's liability as a shipowner for the *Yaka's* unseaworthiness in order to support his libel *in rem* against the vessel.

Reversed.

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

This decision goes further than anything yet done by the Court in F. E. L. A. and admiralty cases (see, *e. g.*, *Rogers* v. *Missouri Pac. R. Co.*, 352 U. S. 500, and its offspring, and *Gutierrez* v. *Waterman S. S. Corp.*, *ante*, p. 206) to do what it considers "justice" to those who have become the unfortunate victims of industrial accidents. For it is no exaggeration to say that in holding that a longshoreman may recover from his own employer for injuries suffered in the course of employment, the Court has effectively "repealed" a basic aspect of the Longshoremen's and Harbor Workers' Compensation Act.

The violence done to the statutory scheme is most simply shown merely by quoting the relevant portions of the two provisions that govern the question before us. The first is the definition of "employer" as:

> "an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock)." § 2 (4), 44 Stat. 1425, 33 U. S. C. § 902 (4).

The second is § 5, a provision entitled "Exclusiveness of liability," which states:

> "The liability of an employer [for the compensation] prescribed in section 4 shall be exclusive and in place of all other liability of such employer to the employee . . . at law or in admiralty on account of such injury or death . . . ." 44 Stat. 1426, 33 U. S. C. § 905.

There being no doubt that petitioner is an "employee" within the meaning of the Act,[1] there is thus no question that he is excluded from recovering from his employer, Pan-Atlantic, in this action. Under a statute which was specifically written to include shipowners who employed their own dockworkers, and which excluded liability at law *or in admiralty,* there is no room for concluding that an employer shipowner can be held liable to his own longshoreman employee for unseaworthiness. Indeed, the point is so clear that petitioner has had what I would have thought was the good sense not even to argue to the contrary. (He has instead based his argument wholly on the theory that the ship itself may be liable even in the absence of any underlying personal liability on the part of anyone.)

While conceding that the statute "on its face lends support" to the conclusion that neither party has challenged, the Court refuses to give what it describes as "blind adherence to the superficial meaning" of the Act. But if exclusiveness of liability is the "superficial" meaning, then what, may it be asked, is the "true" congressional purpose in enacting this legislation? The statutory design was nowhere more concisely or more accurately summarized than in the dissenting opinion in *Ryan Stevedoring Co.* v. *Pan-Atlantic S. S. Corp.*, 350 U. S. 124, 140, where it was stated:

> "Congress weighed the conflicting interests of employers and employees and struck what was considered to be a fair and constitutional balance. Injured employees thereby lost their chance to get large tort verdicts against their employers, but gained the right to get a sure though frequently a more modest recovery. However, § 33 did leave employees a chance to

[1] The Act in § 2 (3), 44 Stat. 1425, 33 U. S. C. § 902 (3), defines "employee," and excludes only masters and members of a crew and those engaged to load or unload any small vessel under 18 tons net.

> recover extra tort damages from third persons who negligently injured them. And while Congress imposed absolute liability on employers, they were also accorded counterbalancing advantages. They were no longer to be subjected to the hazards of large tort verdicts. Under no circumstances were they to be held liable to their own employees for more than the compensation clearly fixed in the Act. Thus employers were given every reason to believe they could buy their insurance and make other business arrangements on the basis of the limited Compensation Act liability." (Footnote omitted.)

Congress, then, deliberately gave employers certain "counterbalancing advantages" in exchange for imposing on them absolute liability. If these advantages are to be discarded as purely "superficial," then the true purpose of the statute was apparently to give an *additional* remedy to employees while not requiring them to relinquish any existing remedies as part of the bargain. This, of course, is precisely the opposite of what Congress explicitly aimed to do.

The Court is frank to admit that the real reason for its decision is that a contrary result would make little economic sense after the decision in *Ryan, supra,* holding that, on the basis of an implied contract of indemnity, a shipowner is entitled to reimbursement from an independent stevedore of a judgment obtained against the shipowner by the stevedore's employee. Admittedly, the liability imposed in *Ryan* is similar to the liability imposed on Pan-Atlantic in the present case. But what is overlooked is that the *Ryan* result can be squared with the statute, resting as it did on the stevedoring company's voluntarily assumed contractual obligation to indemnify the third-party shipowner, while the present result cannot. Granting that petitioner could have recovered in this case for faulty equipment brought aboard by longshoremen if the ship had been operated by an independ-

ent company, cf. *Alaska S. S. Co.* v. *Petterson,* 347 U. S. 396, I believe that any anomaly between that case and this one should be left to Congress to remedy, for it may be that it would choose means wholly different from those chosen by the Court. There is an outer limit beyond which judicial construction of the language of a statute ought not go, and I respectfully submit that that limit has been exceeded here.

Believing that there is no basis on which recovery by petitioner can be sustained,[2] I would affirm the judgment below.

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[2] The basis of recovery urged by petitioner is that *in rem* liability of the ship can exist even without any underlying personal liability. But I fully agree with the court below (cf. *Guzman* v. *Pichirilo,* 369 U. S. 698, 704 (dissenting opinion)) that such a result would be a gross misapplication of a fiction whose principal modern function is as a procedural device to provide a convenient forum where none would otherwise be available. See *Continental Grain Co.* v. *Barge FBL–585,* 364 U. S. 19, 23–24. The reasons against its application to create substantive liability were eloquently stated by Mr. Justice Bradley, speaking for the Court in *City of Norwich,* 118 U. S. 468, 503: "To say that an owner is not liable, but that his vessel is liable, seems to us like talking in riddles. . . . In the matter of liability, a man and his property cannot be separated . . . ."

The Court also suggests that there may be another basis for recovery that is not reached apparently on the ground that it was not properly preserved: that Waterman, the demisor, was not absolved by the making of a bareboat charter from liability for unseaworthiness arising after the demise. I see no procedural barrier to consideration of this theory as possible support for petitioner's recovery against the ship, but I do not believe it can be sustained on its merits. I agree with the court below, and with the Court of Appeals for the Second Circuit, see *Grillea* v. *United States,* 229 F. 2d 687, 690, that a demisor should not be held liable for unseaworthiness resulting solely from the equipment brought on board by the demisee's employees. An analogy may concededly be drawn to this Court's holding in *Alaska S. S. Co.* v. *Petterson, supra,* relating to the shipowner's liability for equipment brought on board by a stevedore, but I would not extend that one-sentence 6–3 *per curiam* decision beyond its precise facts. Cf. *Gutierrez* v. *Waterman S. S. Corp., supra,* at 216 (dissenting opinion).

NORVELL *v.* ILLINOIS.

CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

No. 513. Argued April 24, 1963.—Decided May 27, 1963.

In applying the doctrine of *Griffin* v. *Illinois*, 351 U. S. 12, to a situation where no transcript of the trial of an indigent defendant is available due to the death of the court reporter, a State may, without violation of the Due Process or Equal Protection Clause of the Fourteenth Amendment, deny relief to an indigent prisoner who had a lawyer at his trial and presumably had the lawyer's continuing services for purposes of appeal and yet failed to pursue an appeal. Pp. 420–424.

25 Ill. 2d 169, 182 N. E. 2d 719, affirmed.

Thomas P. Sullivan argued the cause and filed briefs for petitioner.

William C. Wines, Assistant Attorney General of Illinois, argued the cause for respondent. With him on the brief were *William G. Clark,* Attorney General of Illinois, and *Raymond S. Sarnow, A. Zola Groves* and *Edward A. Berman,* Assistant Attorneys General.

Mr. Justice Douglas delivered the opinion of the Court.

Petitioner was convicted of murder in the Illinois courts in 1941 and sentenced to 199 years in prison. Though indigent, he had a lawyer at the trial.

On the date of the sentence the docket entry reads: "Defendant Willie Norvell's motion for allowance of 90 days' time in which to prepare and file his bill of exceptions allowed." Presumably petitioner's lawyer made that motion, though the record does not indicate one way or the other. Petitioner tried to get a transcript. But again whether he acted on his own or through his lawyer we do not know. We do know, however, that because he

was indigent he was unable to pay the costs of the transcript and therefore did not obtain it; and he did not, moreover, pursue an appeal.

In 1956 we decided *Griffin* v. *Illinois,* 351 U. S. 12, holding on the facts of that case that it was a violation of the Fourteenth Amendment to deprive a person because of his indigency of any rights of appeal afforded all other convicted defendants. And see *Draper* v. *Washington,* 372 U. S. 487; *Eskridge* v. *Washington,* 357 U. S. 214. Cf. *Burns* v. *Ohio,* 360 U. S. 252; *Smith* v. *Bennett,* 365 U. S. 708. Thereupon the Supreme Court of Illinois adopted Rule 65–1 (Smith-Hurd's Ill. Ann. Stat., c. 110, § 101.65–1) by which the State provides a free trial transcript to every indigent person convicted of crime, whether he was convicted prior to the *Griffin* decision or thereafter. An important exception to that rule, applicable here, is the following:

> ". . . In the event the court finds that it is impossible to furnish petitioner a stenographic transcript of the proceedings at his trial because of the unavailability of the court reporter who reported the proceedings and the inability of any other court reporter to transcribe the notes of the court reporter who served at the trial, or for any other reason, the court shall deny the petition." Rule 65–1 (2).

On motion of petitioner in 1956 the trial court was requested to furnish a stenographic transcript of his trial. The trial judge, finding that petitioner had satisfied the conditions prescribed in the Rule, ordered the official shorthand reporter to transcribe his notes and furnish petitioner with a copy of the transcript. It subsequently appeared, however, that the official reporter in question had died some years earlier and that no one could read his shorthand notes. An effort was then made to reconstruct the transcript through the testimony of persons who

attended the trial. Ten witnesses testified, including petitioner, but none could recall much of the evidence introduced at the 1941 trial. Thus in 1956 it was not possible for Illinois to supply petitioner with the adequate appellate review of his 1941 conviction which he failed to pursue at that time. Cf. *Eskridge* v. *Washington, supra.*

The trial judge who heard this motion entered an order denying petitioner a new trial. The Supreme Court of Illinois affirmed. 25 Ill. 2d 169, 182 N. E. 2d 719. The case is here on a petition for a writ of certiorari. 371 U. S. 860.

The issue in the case is whether Illinois has made an "invidious discrimination" against petitioner. *Griffin* v. *Illinois, supra,* p. 18. More precisely, the question is whether when a transcript cannot subsequently be obtained or reconstructed through no fault of the State, may it constitutionally draw the line against indigents who had lawyers at their trial but after conviction did not pursue their remedy? Illinois on the face of its rules draws no such distinction. But Illinois in the application of its rules has denied relief in such a case.[1] And so we have the narrow question—whether a State may avoid the obligation of *Griffin* v. *Illinois,* where, without fault, no transcript can be made available, the indigent having had a lawyer at the trial and no remedy having been sought at the time.

If it appeared that the lawyer who represented petitioner at the trial refused to represent him on the appeal and petitioner's indigency prevented him from retaining another, we would have a different case. Cf. *Douglas* v.

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[1] The case is analogous to those where this Court's review of a state judgment sustaining a state law is directed to the statute "as applied and enforced in respect of the situation presented." *Fiske* v. *Kansas,* 274 U. S. 380, 385. And see *Terminiello* v. *Chicago,* 337 U. S. 1, 4.

California, 372 U. S. 353. Petitioner, who testified at the hearing on the motion, made no such claim. Nor did the lawyer, who testified as follows:

> "I have no independent recollection whether there were motions for a new trial made in the regular course after the trial. All of the constitutional guarantees which were afforded my client, Willie Norvell, were asserted at that time. I have no independent recollection of this case, but I give the defendant every constitutional guarantee that the law affords.
>
> "I have no recollection now on whether or not I was ever called upon for an appeal in this matter. I have no recollection one way or the other whether I was called upon to obtain a transcript of the trial."

We do not say that petitioner, having had a lawyer, could be found to have waived his rights on appeal. We only hold that a State, in applying *Griffin* v. *Illinois* to situations where no transcript of the trial is available due to the death of the court reporter, may without violation of the Due Process or Equal Protection Clause deny relief to those who, at the time of the trial, had a lawyer and who presumably had his continuing services for purposes of appeal [2] and yet failed to pursue an appeal. Exact equality is no prerequisite of equal protection of the laws within the meaning of the Fourteenth Amendment. See *Douglas* v. *California, supra.* As we said in *Tigner* v. *Texas,* 310 U. S. 141, 147:

> ". . . The Fourteenth Amendment enjoins 'the equal protection of the laws,' and laws are not abstract propositions. They do not relate to abstract units A, B and C, but are expressions of policy arising out of specific difficulties, addressed to the attainment of specific ends by the use of specific remedies. The

[2] The record in *Griffin* v. *Illinois, supra,* shows that such was not the case there.

> Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same."

When, through no fault of the State, transcripts of criminal trials are no longer available because of the death of the court reporter, some practical accommodation must be made. We repeat what was said in *Metropolis Theatre Co.* v. *Chicago,* 228 U. S. 61, 69–70:

> "The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific. . . . What is best is not always discernible; the wisdom of any choice may be disputed or condemned."

The "rough accommodations" made by government do not violate the Equal Protection Clause of the Fourteenth Amendment unless the lines drawn are "hostile or invidious." *Welch* v. *Henry,* 305 U. S. 134, 144. We can make no such condemnation here. For, where transcripts are no longer available, Illinois may rest on the presumption that he who had a lawyer at the trial had one who could protect his rights on appeal.

Affirmed.

MR. JUSTICE HARLAN concurs in the result.

MR. JUSTICE GOLDBERG, with whom MR. JUSTICE STEWART joins, dissenting.

I must respectfully dissent because the majority ignores what to me is the key to disposition of this matter. The Illinois Supreme Court decided this case under a misapprehension as to a crucial point of federal constitutional law, but for which it might have resolved the ultimate question in favor of, rather than against, the petitioner.

The Illinois court concluded that the decision of this Court in *Griffin* v. *Illinois,* 351 U. S. 12, operated prospec-

tively, and not retroactively, in the sense that it invalidated only "existing financial barriers" to appeal. Given its view of *Griffin,* it was unnecessary for the state court to consider whether the petitioner, who concededly could not obtain a transcript at the time of his original conviction in 1941 because of his indigency, was *at that time* deprived of his constitutional rights. Enabled by this erroneous interpretation of *Griffin* to put aside this basic constitutional issue, the Illinois Supreme Court held only that its present rule, as applied to deny the petitioner a transcript *now* on his delayed appeal, was not unconstitutional because that denial was based solely upon the present unavailability of the transcript, and not upon anything related to the petitioner's indigency. The majority of this Court seems today to approve at least that holding of the state court, though on grounds different from those relied upon below.

The State Supreme Court was in error in its belief that the principles of *Griffin* have no application to denials of transcripts which occurred before *Griffin* was decided. *Griffin* was a constitutional decision vindicating basic Fourteenth Amendment rights and is no more to be restricted in scope or application in time than other constitutional judgments. This, it seems to me, is the clear import of this Court's decision in *Eskridge* v. *Washington,* 357 U. S. 214.*

*The Illinois court said simply that *Eskridge* "did not hold that the failure to furnish defendant with a free transcript in 1935 denied him a right guaranteed by the fourteenth amendment, but held that the failure in 1956 to furnish him with a free transcript which was still available denied him of such a right." 25 Ill. 2d 169, 173, 182 N. E. 2d 719, 720–721. *Eskridge* was thus read to mean merely "that such financial barriers could no longer be imposed by the State even though the indigent defendant was sentenced prior to the time the restrictions were invalidated." *Ibid.* The issue in *Eskridge,* however, as presented on review of a 1956 state habeas corpus proceeding, was whether the petitioner there had been deprived of a

Of course, we do not know how the Illinois court would have resolved the petitioner's claim that he is entitled either to a transcript or a new trial if it had viewed *Griffin* as having retroactive effect and as controlling with respect to the constitutional deprivation which may have occurred in 1941. Illinois has shown a broad and commendable latitude in implementing the principles enunciated in *Griffin,* and I would not presume to predict what its courts might do under a proper reading of that case. Because Illinois has not passed upon what is perhaps the controlling issue in the case, and because we ought not to anticipate and resolve difficult constitutional questions unless necessary, I would vacate and remand the case to the Supreme Court of Illinois to permit it to decide the question which it treated as foreclosed only because it believed *Griffin's* application not to be fully retroactive.

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constitutional right when first convicted in 1935 because he was *then* denied a transcript with which to prosecute an appeal as an indigent; this Court decided that issue in favor of Eskridge.

LOPEZ *v.* UNITED STATES.

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

No. 236. Argued January 14, 1963.—
Decided May 27, 1963.

In a Federal District Court, petitioner was convicted of attempting to bribe an Internal Revenue Agent in violation of 18 U. S. C. § 201. The Agent was investigating possible evasion of excise taxes on cabarets. On a visit to petitioner's inn, the Agent saw dancing in the bar and lounge, spoke to petitioner about it and suggested that the inn might be liable for a cabaret tax. According to the Agent's testimony, petitioner suggested, after some discussion, that the Agent could drop the case, gave him $420 and promised more in the future. Petitioner also promised to file a return for the current quarter and invited the Agent to return a few days later. When he kept that appointment, the Agent carried with him a pocket wire recorder which recorded his conversation with petitioner. The Agent produced an excise tax return form and started to explain it. Petitioner told the Agent that he wanted the Agent to be on petitioner's side, gave him some money, and promised more. At the trial, the Agent testified concerning his conversations with petitioner, and his testimony was corroborated by the admission in evidence of the recording of the last conversation. Petitioner's counsel did not request acquittal on the ground of entrapment, request any instruction on that subject or object to the instructions actually given. He did object to the admission in evidence of the recording of the Agent's conversation with petitioner, on the ground that it was inadmissible as the fruit of a fraudulent entry into petitioner's private office in violation of the Fourth Amendment. *Held:*

1. On the record in this case, entrapment was not shown as a matter of law; and, if there was any error in the trial court's instructions on this subject, it was not reversible error. Pp. 434–437.

2. Both the Agent's testimony pertaining to his conversation with petitioner and the wire recording of that conversation were properly admitted in evidence. Pp. 437–440.

(a) The Agent was not guilty of an unlawful invasion of petitioner's office in violation of his rights under the Fourth Amendment

simply because his apparent willingness to accept a bribe was not real. Pp. 437–438.

(b) The secret making of the wire recording of the conversation did not violate petitioner's rights under the Fourth Amendment. Pp. 438–439.

(c) This Court should not, in the exercise of its supervisory powers, prevent the introduction of the recording in evidence, since there was no manifestly improper conduct by federal officials. P. 440.

305 F. 2d 825, affirmed.

Edward J. Davis argued the cause for petitioner. With him on the brief was *Gerald F. Muldoon.*

Louis F. Claiborne argued the cause for the United States. With him on the brief were *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit.*

MR. JUSTICE HARLAN delivered the opinion of the Court.

The petitioner, German S. Lopez, was tried in a federal court on a four-count indictment charging him with attempted bribery of an Internal Revenue Agent, Roger S. Davis, in violation of 18 U. S. C. § 201.[1] The questions

[1] 18 U. S. C. § 201 provides:

"Whoever promises, offers, or gives any money or thing of value . . . to any officer or employee or person acting for or on behalf of the United States, or any department or agency thereof, in any official function . . . with intent to influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of such money or value of such thing or imprisoned not more than three years, or both."

before us for review are: (1) whether the trial court's treatment of "entrapment" constituted reversible error; and (2) whether Davis' testimony relating to a conversation with petitioner on October 24, 1961, which formed the basis of the three counts of the indictment on which petitioner was convicted, and a wire recording of that conversation, were properly admitted into evidence.

The evidence at the trial related to three meetings between Lopez and Davis that took place at Clauson's Inn, situated at North Falmouth, Massachusetts, and operated by Lopez under a lease. Davis, who was investigating possible evasion of excise taxes in the area, first visited the Inn on the afternoon of August 31, 1961, when he asked Lopez whether there was any dancing, singing, or other entertainment in the evenings and showed him an advertisement for the Inn which stated that there was. Lopez said there was no entertainment and denied responsibility for the advertisement. Davis returned again that evening and saw dancing in the bar and lounge. He described the Inn in a report to his superior the next day as a "potential delinquent" and said that he would "follow up."

Davis next returned to the Inn on October 21, when he again saw dancing in the bar and lounge, and spoke with Lopez. Davis' testimony about this meeting may be summarized as follows: Early in the discussion, Davis told Lopez that he thought the establishment would be liable for a cabaret tax and asked to see the books, but Lopez resisted and suggested that they continue the conversation in his office. Once there, Lopez suggested that he would like to avoid all "aggravation" and to reach an "agreement." After Davis said he could not drop the matter and would return the following week, Lopez said he didn't wish to "insult" Davis and that he didn't know

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whether to take him into his "confidence." Receiving no reply, Lopez put some money on the desk saying:

> "You can drop this case. Here's $200. Buy your wife a present. And I'll have more money for you at Christmas time. This is all I have now."

Davis balked, and Lopez urged him to take the money and to bring his wife and family for a weekend "as my guest." Following some questioning as to the extent of Lopez' business, during the course of which Davis estimated a year's tax as running to $3,000, Lopez added another $220 to the money on the desk, stating that he did not want to be bothered with returns for past years but would file a return for the current quarter. More importunities on Lopez' part followed and Davis finally took the money. Before Davis left, Lopez again said he would file a return for the current quarter and asked Davis to come back on October 24.

Lopez, in his version of the events of October 21, admitted giving the $420 to Davis but said the money was given in an effort to have Davis prepare his returns and get his books in proper order. According to Lopez' testimony, he told Davis that he would file returns from October 17 on, since on that date the Inn had changed its policy to one of entertainment.

After leaving the Inn, Davis reported the meeting to a fellow agent and to his superior and turned over the $420 to a Regional Inspector. On the morning of October 24, he met with four Internal Revenue Inspectors, who instructed him to keep his appointment with Lopez, to "pretend to play along with the scheme," and to draw the conversation back to the meeting of October 21. Davis was then equipped with two electronic devices, a pocket battery-operated transmitter (which subsequently failed to work) and a pocket wire recorder, which recorded the conversation between Lopez and Davis at their meeting later in the day.

According to the recording of that conversation, Davis suggested they talk in Lopez' office and, once inside the office, Davis started to explain the excise tax form and to discuss the return. Before any computations were made, Lopez said he had never thought he needed to file a cabaret tax return, and the conversation then continued:

> "Lopez: . . . Whatever we decide to do from here on I'd like you to be on my side and visit with me. Deduct anything you think you should and I'll be happy to . . . because you may prevent something coming up in the office. If you think I should be advised about it let me know. Pick up the phone. I can meet you in town or anywhere you want. For your information the other night I have to . . .
>
> "Davis: Well, you know I've got a job to do.
>
> "Lopez: Yes, and Uncle Sam is bigger than you and I are and we pay a lot of taxes, and if we can benefit something by it individually, let's keep it that way and believe me anything that transpires between you and I, not even my wife or my accountant or anybody is aware of it. So I want you to feel that way about it." [2]

The two then discussed receipts and the potential tax liability for 1959–1961, and Lopez protested that Davis' estimates were very high, although he did not deny the fact of liability. After Davis said, "I don't want to get greedy or anything," Lopez gave him $200 and later in the conversation told Davis he could bring his family down for a free weekend and should "[c]ome in every so often and I'll give you a couple of hundred dollars every time you come in." At one point, Lopez said "Now if you should suggest that I should file returns from this point on, I'll do it. If you suggest that I can get by

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[2] There have been no omissions from this passage. The indicated elisions appear in the original record.

without doing it, then just drop in every so often and I'll . . ." Lopez also confirmed that he had given Davis $420 on October 21.

Lopez, in his testimony, did not question the accuracy of the recording and in fact said little more about the meeting of October 24 than that Davis had gone into a lot of figures and that he (Lopez) had become emotionally upset because he felt that Davis "was not there for the purpose that he came in there for on October 21st." He did not suggest that Davis had induced him to offer any bribes.

The first of the four counts in the ensuing indictment charged that at the meeting of October 21, Lopez gave Davis the $420 with intent to induce Davis, among other things, "to refrain from making an examination of the books and records relating to sales and receipts" at the Inn from 1959–1961.[3] The remaining three counts related to the meeting of October 24, and charged three separate acts of attempted bribery, each for the purpose of influencing Davis to aid in concealing sales, receipts, and any cabaret tax due for the years 1959–1961. The acts were the giving of $200 to Davis (Count 2), the promise of an additional $200 the following month (Count 3), and the promise of a free weekend for Davis and his family (Count 4).

Prior to trial, petitioner filed a motion to suppress as evidence the wire recording of the October 24 conversation between Lopez and Davis. After hearing, this motion was denied. At trial, the motion was renewed and again denied, and the recording was received in evidence. Petitioner did not object to the testimony of Agent Davis relating to the October 24 conversation.

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[3] Count 1 also charged that the money was given to induce Davis "to refrain . . . from computing a cabaret tax on . . . [the business of the Inn], and from reporting same to the Internal Revenue Service."

In his charge to the jury, the trial judge emphasized the presumption of innocence and the burden on the Government to establish "every essential element" of the crime beyond a reasonable doubt. He then detailed what these essential elements were and called particular attention to the contrast between the specific intent charged in Count 1—to prevent an examination of books and records—and the more general intent charged in the other three counts—to conceal liability for the tax in question. He strongly suggested that the specific intent alleged in Count 1 had not been established beyond a reasonable doubt.

Although defense counsel had briefly adverted to the possibility of "entrapment" in his summation to the jury, he did not request judgment of acquittal on that ground. Nor did he request any instruction on the point or offer at the trial any evidence particularly aimed at such a defense. Nevertheless, the trial judge did charge on entrapment.[4] Petitioner made no objection to this instruction, or to any other aspect of the charge.

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[4] "Now the law with respect to entrapment is this: if a government agent by improper means or over-bearing persuasion or wrongful conduct induces a person of ordinary firmness to commit a crime which he would not otherwise commit, then under those circumstances the defendant is to be acquitted, not because he did not do something wrongful but because he was induced to do a wrongful act which he would not otherwise have done.

"Now needless to say in all types of law enforcement, particularly with respect to matters involving certain types of regulatory statutes, it is often difficult for the government to get evidence, and government agents may properly, and without violating the law, or their duty, take such steps as make it possible to procure evidence even though such steps involve their own participation, provided that their participation is not a deliberate temptation to men of ordinary firmness, provided that they do not cause a crime to be committed by someone who does not have a criminal disposition to commit that crime.

"The burden of proof with respect to entrapment is on the defendant. And you are to ask yourself whether in fact on the evidence

The jury acquitted on Count 1 and found petitioner guilty on Counts 2, 3 and 4. A motion for judgment notwithstanding the verdict "as a matter of law on the evidence" was denied, and petitioner was sentenced to a term of imprisonment for one year.

Following *per curiam* affirmance of the conviction by the Court of Appeals for the First Circuit, 305 F. 2d 825, we granted certiorari, 371 U. S. 859, to consider the two questions stated at the outset of this opinion. *Supra,* pp. 428–429.

I.

The defense of entrapment, its meaning, purpose, and application, are problems that have sharply divided this Court on past occasions. See *Sorrells* v. *United States,* 287 U. S. 435; *Sherman* v. *United States,* 356 U. S. 369; *Masciale* v. *United States,* 356 U. S. 386. Whether in the absence of a conclusive showing the defense is for the court or the jury, and whether the controlling standard looks only to the conduct of the Government, or also takes into account the predisposition of the defendant, are among the issues that have been mooted. We need not, however, concern ourselves with any of these questions here, for under any approach, petitioner's belated claim of entrapment is insubstantial, and the record fails to show any prejudice that would warrant reversal on this score.

The conduct with which the defense of entrapment is concerned is the *manufacturing* of crime by law enforcement officials and their agents. Such conduct, of course, is far different from the permissible stratagems involved in the detection and prevention of crime. Thus before

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you heard you are persuaded by the preponderance of that evidence that Agent Davis, as it were, created the crime and the temptation, and he, Agent Davis, was the instigator and author of a crime that would never under any circumstances have taken place, had he not used unfair means."

the issue of entrapment can fairly be said to have been presented in a criminal prosecution there must have been at least some showing of the kind of conduct by government agents which may well have induced the accused to commit the crime charged.

In the case before us, we think that such a showing has not been made. It is undisputed that at the meeting of October 21, petitioner made an unsolicited offer of $420 to Agent Davis. The references to the October 21 offer in the recorded conversation scarcely leave room for doubt that this offer was made for the same general purpose as the bribes offered at the October 24 meeting: to obtain Davis' assistance in concealing any cabaret tax liability for past and present periods.[5] As to the meeting of October 24, the recording shows that petitioner's improper overtures began almost at the outset of the discussion, when he stated: "Deduct anything you think you should and I'll be happy to . . . because you may prevent something coming up in the office." This and similar statements preceded Davis' computations,[6] and his comment, "I don't want to get greedy,"

[5] That this was the purpose of the October 21 offer is in no way inconsistent with the verdict of acquittal on Count 1. Count 1, as noted above, charged, among other things, a specific intent to induce the agent not to examine books and records, and the court in its charge attached great emphasis to the language of this count. Thus it may well have been that the acquittal on Count 1 was based solely on the jury's conclusion that the Government had not proved the existence of the specific intent beyond a reasonable doubt.

[6] Petitioner claims that Davis' assertions of the existence of cabaret tax liability, and of the extent of that liability, were so recklessly false as to suggest or require a finding of entrapment. But as noted, petitioner's overtures preceded these assertions, and in any event, Davis had ample basis for believing that taxes were due, and petitioner never undertook to deny his liability during the conversation on October 24. Although Davis conceded that he may have made some errors in computation because of "nervousness," petitioner in his testimony made no claim that these computations led to the bribe offers.

on which petitioner so heavily relies. Moreover, we find nothing in the recording as a whole, or in petitioner's own testimony, to suggest that his conduct on October 24 was instigated by Davis. Upon any reasonable assessment of the record, it seems manifest that all that Davis was doing was to afford an opportunity for the continuation of a course of criminal conduct, upon which the petitioner had earlier voluntarily embarked, under circumstances susceptible of proof.

It is therefore evident that, under any theory, entrapment has not been shown as a matter of law. Indeed, the paucity of the showing might well have justified a refusal to instruct the jury at all on entrapment.[7] But in any event no request for such an instruction was made, and there was no objection to the instruction given. Under these circumstances, petitioner may not now challenge the form of that instruction. See Fed. Rules Crim. Proc., 30;[8] *Moore* v. *United States,* 262 F. 2d 216; *Martinez* v. *United States,* 300 F. 2d 9. Nor was there on this score any such plain error in the charge, affecting substantial rights, as would warrant reversal despite the failure to object. See Fed. Rules Crim. Proc., 52 (b). Since the record does not disclose a sufficient showing that petitioner was induced to offer a bribe, we cannot conclude that he was prejudiced by the charge on burden of proof, even assuming that the burden called for

[7] Petitioner does not claim that the issue of entrapment should always be decided by the court and never submitted to the jury, and we are not now presented with that question. See *Sherman* v. *United States,* 356 U. S. 369; *Masciale* v. *United States,* 356 U. S. 386.

[8] Rule 30 provides in pertinent part:

"No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

was too great. By the same token, we are not persuaded that in this case it is significant to determine whether entrapment should turn on the effect of the Government's conduct on "men of ordinary firmness," as the court charged, or on the effect on the particular defendant. Accordingly, we do not reach the question whether the charge was in every respect a correct statement of the law. It is enough to say that in the circumstances of this case, there was in any event no reversible error.

II.

Petitioner's remaining contentions concern the admissibility of the evidence relating to his conversation with Davis on October 24. His argument is primarily addressed to the recording of the conversation, which he claims was obtained in violation of his rights under the Fourth Amendment.[9] Recognizing the weakness of this position if Davis was properly permitted to testify about the same conversation, petitioner now challenges that testimony as well, although he failed to do so at the trial. His theory is that, in view of Davis' alleged falsification of his mission, he gained access to petitioner's office by misrepresentation and all evidence obtained in the office, *i. e.,* his conversation with petitioner, was illegally "seized." In support of this theory, he relies on *Gouled* v. *United States,* 255 U. S. 298, and *Silverman* v. *United States,* 365 U. S. 505. But under the circumstances of the present case, neither of these decisions lends any comfort to petitioner, and indeed their rationale buttresses

[9] The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

the conclusion that the evidence was properly admitted. See *On Lee* v. *United States,* 343 U. S. 747.[10]

We need not be long detained by the belated claim that Davis should not have been permitted to testify about the conversation of October 24. Davis was not guilty of an unlawful invasion of petitioner's office simply because his apparent willingness to accept a bribe was not real. Compare *Wong Sun* v. *United States,* 371 U. S. 471. He was in the office with petitioner's consent, and while there he did not violate the privacy of the office by seizing something surreptitiously without petitioner's knowledge. Compare *Gouled* v. *United States, supra.* The only evidence obtained consisted of statements made by Lopez to Davis, statements which Lopez knew full well could be used against him by Davis if he wished. We decline to hold that whenever an offer of a bribe is made in private, and the offeree does not intend to accept, that offer is a constitutionally protected communication.

Once it is plain that Davis could properly testify about his conversation with Lopez, the constitutional claim relating to the recording of that conversation emerges in proper perspective. The Court has in the past sustained instances of "electronic eavesdropping" against constitutional challenge, when devices have been used to enable government agents to overhear conversations which would have been beyond the reach of the human ear. See, *e. g., Olmstead* v. *United States,* 277 U. S. 438; *Goldman* v. *United States,* 316 U. S. 129. It has been insisted only that the electronic device not be planted by an unlawful physical invasion of a constitu-

[10] In *On Lee,* the defendant had been induced to make certain statements by an old acquaintance who, without the defendant's knowledge, had turned government informer and was carrying a small concealed microphone which transmitted the conversation to a narcotics agent some distance away. Thus any differences between *On Lee* and this case cut against the petitioner.

tionally protected area. *Silverman* v. *United States, supra.* The validity of these decisions is not in question here. Indeed this case involves no "eavesdropping" whatever in any proper sense of that term. The Government did not use an electronic device to listen in on conversations it could not otherwise have heard. Instead, the device was used only to obtain the most reliable evidence possible of a conversation in which the Government's own agent was a participant and which that agent was fully entitled to disclose. And the device was not planted by means of an unlawful physical invasion of petitioner's premises under circumstances which would violate the Fourth Amendment. It was carried in and out by an agent who was there with petitioner's assent, and it neither saw nor heard more than the agent himself.

The case is thus quite similar to *Rathbun* v. *United States,* 355 U. S. 107, in which we sustained against statutory attack the admission in evidence of the testimony of a policeman as to a conversation he overheard on an extension telephone with the consent of a party to the conversation. The present case, if anything, is even clearer, since in *Rathbun* it was conceded by all concerned "that either party may *record* the conversation and publish it." 355 U. S., at 110. (Emphasis added.)

Stripped to its essentials, petitioner's argument amounts to saying that he has a constitutional right to rely on possible flaws in the agent's memory, or to challenge the agent's credibility without being beset by corroborating evidence that is not susceptible of impeachment. For no other argument can justify excluding an accurate version of a conversation that the agent could testify to from memory.[11] We think the risk that petitioner took in offering a bribe to Davis fairly included the risk that the offer would be accurately reproduced in court, whether by faultless memory or mechanical recording.

[11] The trustworthiness of the recording is not challenged.

It is urged that whether or not the recording violated petitioner's constitutional rights, we should prevent its introduction in evidence in this federal trial in the exercise of our supervisory powers. But the court's inherent power to refuse to receive material evidence is a power that must be sparingly exercised. Its application in the present case, where there has been no manifestly improper conduct by federal officials, would be wholly unwarranted.[12]

The function of a criminal trial is to seek out and determine the truth or falsity of the charges brought against the defendant. Proper fulfillment of this function requires that, constitutional limitations aside, all relevant, competent evidence be admissible, unless the manner in which it has been obtained—for example, by violating some statute or rule of procedure—compels the formulation of a rule excluding its introduction in a federal court. See, *e. g., McNabb* v. *United States,* 318 U. S. 332; *Mallory* v. *United States,* 354 U. S. 449.

When we look for the overriding considerations that might require the exclusion of the highly useful evidence involved here, we find nothing. There has been no invasion of constitutionally protected rights, and no violation of federal law or rules of procedure. Indeed, there has not even been any electronic eavesdropping on a private conversation which government agents could not otherwise have overheard. There has, in short, been no act of any kind which could justify the creation of an exclusionary rule. We therefore conclude that the judgment of the Court of Appeals must be

Affirmed.

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[12] Since Agent Davis himself testified to the conversation with petitioner which was the subject matter of the recording, the question whether there may be circumstances in which the use of such recordings in evidence should be limited to purposes of "corroboration" is not presented by this case.

MR. CHIEF JUSTICE WARREN, concurring in the result.

I concur in the result achieved by the Court but feel compelled to state my views separately. As pointed out in the dissenting opinion of MR. JUSTICE BRENNAN, the majority opinion may be interpreted as reaffirming *sub silentio* the result in *On Lee* v. *United States,* 343 U. S. 747. Since I agree with MR. JUSTICE BRENNAN that *On Lee* was wrongly decided and should not be revitalized, but base my views on grounds different from those stated in the dissent, I have chosen to concur specially. Although the dissent assumes that this case and *On Lee* are in all respects the same, to me they are quite dissimilar constitutionally and from the viewpoint of what this Court should permit under its supervisory powers over the administration of criminal justice in the federal courts.

I also share the opinion of MR. JUSTICE BRENNAN that the fantastic advances in the field of electronic communication constitute a great danger to the privacy of the individual; that indiscriminate use of such devices in law enforcement raises grave constitutional questions under the Fourth and Fifth Amendments; and that these considerations impose a heavier responsibility on this Court in its supervision of the fairness of procedures in the federal court system. However, I do not believe that, as a result, all uses of such devices should be proscribed either as unconstitutional or as unfair law enforcement methods. One of the lines I would draw would be between this case and *On Lee.*

As MR. JUSTICE HARLAN sets out in greater detail, Agent Davis, upon entering the premises of the petitioner, gave full notice of both his authority and purpose—to investigate possible evasion or delinquency in the payment of federal taxes. In the course of this investigation, the petitioner offered Davis a bribe and promised more in the future if Davis would conceal the facts of the petitioner's tax evasion. Davis accepted the money and

promptly reported it to his superiors. On a return visit to the petitioner's place of business to complete the investigation, Davis was outfitted with a concealed recorder to tape his conversation with the petitioner. At trial, Davis testified to both of his conversations with the petitioner, and the tape recording was introduced to corroborate this testimony. The petitioner did not claim he was entrapped into the bribery or that the purpose of the investigation from the start was to induce the bribe. On the contrary, he admitted giving the money to Davis but claimed that it was for the purpose of having the latter prepare his tax return. The only purpose the recording served was to protect the credibility of Davis against that of a man who wished to corrupt a public servant in the performance of his public trust. I find nothing unfair in this procedure. Tax agents like Agent Davis are required to examine the tax returns of suspected tax evaders as a necessary part of our national taxation system. Many of these taxpayers interviewed are integral parts of the underworld. In the performance of their duty, agents are thus often faced with situations where proof of an attempted bribe will be a matter of their word against that of the tax evader and perhaps some of his associates. They should not be defenseless against outright denials or claims of entrapment, claims which, if not open to conclusive refutation, will undermine the reputation of the individual agent for honesty and the public's confidence in his work. Where confronted with such a situation, it is only fair that an agent be permitted to support his credibility with a recording as Agent Davis did in this case.

On Lee, however, is a completely different story. When On Lee was arrested, the only direct evidence that he was engaged in the distribution of opium was the unreliable testimony of an alleged accomplice who handled

the contacts with purchasers and had made the mistake of selling to an undercover narcotics agent. To strengthen its case against On Lee, the Government sent a "special employee," one Chin Poy, into On Lee's laundry armed with a concealed transmitter, On Lee being out on bail pending indictment at the time. Chin Poy had known On Lee for 16 years and had formerly been his employee. His criminal character is exposed by the familiarity with which he and On Lee discussed the narcotics traffic and the agreement of the latter to supply him with narcotics at his request in the future. Thus, Chin Poy, armed with the transmitter, engaged On Lee in conversation for the purpose of eliciting admissions that On Lee was part of an opium syndicate and to encourage him to commit another crime. At trial, instead of calling Chin Poy to testify, the Government put on the narcotics agent who had been at the receiving end of the radio contact with Chin Poy to testify to the admissions made by On Lee, testimony that led directly to conviction.

The use and purpose of the transmitter in *On Lee* was substantially different from the use of the recorder here. Its advantage was not to corroborate the testimony of Chin Poy, but rather, to obviate the need to put him on the stand. The Court in *On Lee* itself stated:

> "We can only speculate on the reasons why Chin Poy was not called. It seems a not unlikely assumption that the very defects of character and blemishes of record which made On Lee trust him with confidences would make a jury distrust his testimony. Chin Poy was close enough to the underworld to serve as bait, near enough the criminal design so that petitioner would embrace him as a confidante, but too close to it for the Government to vouch for him as a witness. Instead, the Government called agent Lee."

However, there were further advantages in not using Chin Poy. Had Chin Poy been available for cross-examination, counsel for On Lee could have explored the nature of Chin Poy's friendship with On Lee, the possibility of other unmonitored conversations and appeals to friendship, the possibility of entrapments, police pressure brought to bear to persuade Chin Poy to turn informer, and Chin Poy's own recollection of the contents of the conversation. His testimony might not only have seriously discredited the prosecution, but might also have raised questions of constitutional proportions. This Court has not yet established the limits within which the police may use an informer to appeal to friendship and camaraderie-in-crime to induce admissions from a suspect, but suffice it to say here, the issue is substantial. We have already struck down the use of psychological pressures and appeals to friendship to induce admissions or confessions under not totally dissimilar circumstances. *Leyra* v. *Denno*, 347 U. S. 556; *Spano* v. *New York*, 360 U. S. 315.[1] Yet the fact remains that without the testimony of Chin Poy, counsel for On Lee could not develop a record sufficient to raise and present the issue for decision, and the courts could not evaluate the full impact of such

[1] The facts in *On Lee* may also have involved a right to counsel issue. The New York Court of Appeals has recently ruled that after a person has been arraigned, any statement obtained outside the presence of his counsel and without advice as to his rights is inadmissible at trial since the petitioner is entitled to the presence of counsel at every stage in the proceedings after arraignment. *People* v. *Meyer*, 11 N. Y. 2d 162, 182 N. E. 2d 103; cf. *Gideon* v. *Wainwright*, 372 U. S. 335; *Spano* v. *New York*, *supra*, p. 324 (DOUGLAS, J., concurring). The statement in *Meyer* was made to a police officer voluntarily and without solicitation while Meyer was on bail awaiting submission of his case to the grand jury. Presumably, any agent of the prosecutor would be circumscribed by this rule whether he be a "special employee" like Chin Poy or a patrolman on the beat.

practices upon the rights of an accused or upon the administration of criminal justice.[2]

It is no answer to say that the defense can call an informer such as Chin Poy as a hostile witness. The prosecution may have an interest in concealing his identity or whereabouts. *Roviaro* v. *United States,* 353 U. S. 53. He may be so undependable and disreputable that no defense counsel would risk putting him on the stand. Moreover, as a defense witness, he would be open to impeachment by the Government, his late employer. The tactical possibilities of this situation would be apparent to a prosecutor bent on obtaining conviction. Through use of a recorder or transmitter, he may place in the case-in-chief evidence of statements supporting conviction which is not open to impeachment. And if not required to call the informer, he may place on the defense the onus of finding and calling a disreputable witness who, if called, may be impeached on all collateral issues favoring the defense. The effect on law enforcement practices need hardly be stated: the more disreputable the informer employed by the Government, the less likely the accused will be able to establish any questionable law enforcement methods used to convict him.

Thus while I join the Court in permitting the use of electronic devices to corroborate an agent under the particular facts of this case, I cannot sanction by implication the use of these same devices to radically shift the

[2] Where the similar defense of entrapment has been involved, cross-examination of the government informer has invariably been critical to the defense. See *Sherman* v. *United States,* 356 U. S. 369, 371–375. Had the Government been able to limit its case in *Sherman* to recordings of the final meetings between the informer and the petitioner wherein the illegal sales were consummated, the record would never have revealed the long series of meetings inducing the petitioner to make these sales. The officers in charge were apparently unaware they had ever taken place. 356 U. S., at 374–375.

pattern of presentation of evidence in the criminal trial, a shift that may be used to conceal substantial factual and legal issues concerning the rights of the accused and the administration of criminal justice.[3] Cf. *On Lee* v. *United States,* 343 U. S. 747, 758 (BLACK, J., dissenting).

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE GOLDBERG join, dissenting.

In *On Lee* v. *United States,* 343 U. S. 747, the Court sustained the admission in evidence of the testimony of a federal agent as to incriminating statements made by the accused, a laundryman, on trial for narcotics offenses. The statements were made by the accused while at large on bail pending trial in a conversation in his shop with an acquaintance and former employee, who, unknown to the accused, was a government informer and carried a radio transmitter concealed on his person. The federal agent,

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[3] If a party were to show that the interests of justice in a particular case so require, the Court should consider limiting the use of evidence obtained by means of a recorder or transmitter to corroboration of a witness who was a party to the conversation in question. To so condition the use of evidence in the federal courts is clearly within the power of this Court. As the Court stated in *McNabb* v. *United States,* 318 U. S. 332, 341:

"In the exercise of its supervisory authority over the administration of criminal justice in the federal courts, see *Nardone* v. *United States,* 308 U. S. 338, 341–42, this Court has, from the very beginning of its history, formulated rules of evidence to be applied in federal criminal prosecutions. . . . [Collecting authority.] And in formulating such rules of evidence for federal criminal trials the Court has been guided by considerations of justice not limited to the strict canons of evidentiary relevance."

See *Upshaw* v. *United States,* 335 U. S. 410, 414–416 (dissenting opinion); Rule 26, Federal Rules of Criminal Procedure. In *McNabb* itself, the purpose of the exclusionary rule adopted was to eliminate all incentive to engage in law enforcement practices universally condemned—use of the "third degree" to obtain confessions immediately after arrest.

equipped with a radio receiver tuned to the transmitter, heard the transmitted conversation while standing on the sidewalk outside the laundry. The Court rejected arguments invoking the Fourth Amendment and our supervisory power against the admissibility of the agent's testimony. I believe that that decision was error, in reason and authority, at the time it was decided; that subsequent decisions and subsequent experience have sapped whatever vitality it may once have had; that it should now be regarded as overruled; that the instant case is rationally indistinguishable; and that, therefore, we should reverse the judgment below.

I.

The United States in its brief and oral argument before this Court in the instant case made little effort to justify the result in *On Lee,* doubtless because it realizes that that decision has lost virtually all its force as authority. Instead, the Government seeks to distinguish the instant case. This strategy has succeeded, it appears, with a majority of my Brethren. The Court's refusal to accord more than passing mention in its opinion to the only decision of this Court—*On Lee*—factually analogous to the case at bar suggests very strongly that some of my colleagues who have joined the Court's opinion today agree with us that *On Lee* should be considered a dead letter. For the Court, rather than follow *On Lee,* has adopted the substance of the Government's attempted distinction between *On Lee* and the instant case.

The Government argues as follows: "Petitioner can hardly complain that his secret thoughts were unfairly extracted from him, for they were, from the beginning, intended to be put into words, and to be communicated to the very auditor who heard them." This argument has two prongs and I take the second first. To be sure, there were two auditors in *On Lee*—the informer

and the federal agent outside. But equally are there two auditors here—the federal agent and the Minifon. In *On Lee,* the informer was the vehicle whereby the accused's statements were transmitted to a third party, whose subsequent testimony was evidence of the statements. So here, the intended auditor, Agent Davis, was the vehicle enabling the Minifon to record petitioner's statements in a form that could be, and was, offered as evidence thereof.

The Government would have it that the "human witness [Davis] actually testifies and the machine merely repeats and corroborates his narrative." But it can make no difference that Davis did, and the informer in *On Lee* did not, himself testify; for the challenged evidence, the Minifon recording, is *independent* evidence of the statements to which Davis also testified. A mechanical recording is not evidence that is merely repetitive or corroborative of human testimony. To be sure, it must be authenticated before it can be introduced. But once it is authenticated, its credibility does not depend upon the credibility of the human witness. Therein does a mechanical recording of a conversation differ fundamentally from, for example, notes that one of the parties to the conversation may have taken. A trier of fact credits the notes only insofar as he credits the notetaker. But he credits the Minifon recording not because he believes Davis accurately testified as to Lopez' statements but because he believes the Minifon accurately transcribed those statements. This distinction is well settled in the law of evidence, and it has been held that Minifon recordings are independent third-party evidence. *Monroe* v. *United States,* 98 U. S. App. D. C. 228, 233–234, 234 F. 2d 49, 54–55.[1]

[1] See *Burgman* v. *United States,* 88 U. S. App. D. C. 184, 188 F. 2d 637; *Belfield* v. *Coop,* 8 Ill. 2d 293, 134 N. E. 2d 249 (1956); *Boyne City, G. & A. R. Co.* v. *Anderson,* 146 Mich. 328, 109 N. W.

The other half of the Government's argument is that Lopez surrendered his right of privacy when he communicated his "secret thoughts" to Agent Davis. The assumption, manifestly untenable, is that the Fourth Amendment is only designed to protect secrecy. If a person commits his secret thoughts to paper, that is no license for the police to seize the paper; if a person communicates his secret thoughts verbally to another, that is no license for the police to record the words. *Silverman* v. *United States,* 365 U. S. 505. *On Lee* certainly rested on no such theory of waiver. The right of privacy would mean little if it were limited to a person's solitary thoughts, and so fostered secretiveness. It must embrace a concept of the liberty of one's communications, and historically it has. "The common law secures to each individual the right of determining, ordinarily, to what extent his thoughts,

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429 (1906); *State* v. *Reyes,* 209 Ore. 595, 636, 308 P. 2d 182, 196 (1957); *Paulson* v. *Scott,* 260 Wis. 141, 50 N. W. 2d 376 (1951). "The ground for receiving the testimony of the phonograph would seem to be stronger [than in the case of the telephone], since in its case there is not only proof by the human witness of the making of the sounds to be reproduced, but a reproduction by the mechanical witness of the sounds themselves." *Boyne City, G. & A. R. Co.* v. *Anderson, supra.* See generally Annotation, Admissibility of Sound Recordings in Evidence, 58 A. L. R. 2d 1024 (1958). This is to be contrasted with documents offered as evidence of past recollection recorded or present recollection revived, which have no status unless verified by a witness from his personal knowledge. "The witness must be able *now* to assert that the record accurately represented his knowledge and recollection at the time. The usual phrase requires the witness to affirm that he 'knew it to be true at the time.'" 3 Wigmore, Evidence (3d ed. 1940), § 747. "It follows from the nature of the purpose [present recollection revived] for which the paper is used . . . that it is in no strict sense *testimony.* In this respect it differs from a record of past recollection, which is adopted by the witness as the embodiment of his testimony and, as thus adopted, becomes his present evidence . . . ." 3 *id.,* § 763. It is to be noted that in both cases the documents come in only on the strength of the witness' testimony.

sentiments, and emotions shall be communicated to others . . . and even if he has chosen to give them expression, he generally retains the power *to fix the limits of the publicity which shall be given them.*" Warren and Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193, 198 (1890). (Emphasis supplied.)

That is not to say that all communications are privileged. On Lee assumed the risk that his acquaintance would divulge their conversation; Lopez assumed the same risk *vis-à-vis* Davis. The risk inheres in all communications which are not in the sight of the law privileged. It is not an undue risk to ask persons to assume, for it does no more than compel them to use discretion in choosing their auditors, to make damaging disclosures only to persons whose character and motives may be trusted. But the risk which both *On Lee* and today's decision impose is of a different order. It is the risk that third parties, whether mechanical auditors like the Minifon or human transcribers of mechanical transmissions as in *On Lee*—third parties who cannot be shut out of a conversation as conventional eavesdroppers can be, merely by a lowering of voices, or withdrawing to a private place—may give independent evidence of any conversation. There is only one way to guard against such a risk, and that is to keep one's mouth shut on all occasions.

It is no answer to say that there is no social interest in encouraging Lopez to offer bribes to federal agents. Neither is there a social interest in allowing a murderer to conceal the murder weapon in his home. But there is a right of liberty of communications as of possessions, and the right can only be secure if its limitations are defined within a framework of principle. The Fourth Amendment does not forbid all searches, but it defines the limits and conditions of permissible searches; the compelled disclosure of private communications by electronic means ought equally to be subject to legal regulation.

And if this principle is granted, I see no reasoned basis for reaching different results depending upon whether the conversation is with a private person, with a federal undercover agent (*On Lee*), or with an avowed federal agent, as here.

THE CHIEF JUSTICE, concurring in the Court's result, suggests two further distinctions between *On Lee* and the instant case: first, that Agent Davis, in carrying a concealed recording device, was legitimately seeking to protect his reputation as an honest public servant; and second, that in the instant case, unlike *On Lee*, electronically obtained evidence was not used so as to circumvent the production of the key government witness. I admit these are differences, but I do not see how they bear upon the problem of the case before us, which is the admissibility in a federal criminal trial of the fruits of surreptitious electronic surveillance. Whether a federal tax agent, in order to convince his superiors that he was indeed offered the bribe and did not solicit it, ought to be permitted to carry a Minifon on his person is a separate question from whether the recording made by the Minifon is constitutionally permissible evidence in a federal criminal trial; I take it Lopez would have no standing to challenge the use of such recordings save in a prosecution or other proceeding against him. And whether it is unfair for the Government to introduce electronic evidence without putting the human agent of transmission on the stand seems to me to implicate considerations which have nothing to do with the principle of individual freedom enshrined in the Fourth Amendment. On Lee's trial may well have been less fair than Lopez' because of the withholding of the government informer as a witness. But the invasion of freedom was in both cases the same: the secret electronic transmission or recording of private communications, Lopez' to Davis and On Lee's to the undercover agent.

II.

If *On Lee* and the instant case are in principle indistinguishable, the question of the continued validity of the Court's position in *On Lee* is inescapably before us. But we cannot approach the question properly without first clearing away another bit of underbrush: the suggestion that the right of privacy is lost not by the speaker's giving verbal form to his secret thoughts, but by the auditor's consenting to an electronic transcription of the speaker's words. The suggestion is an open invitation to law enforcement officers to use cat's-paws and decoys in conjunction with electronic equipment, as in *On Lee*. More important, it invokes a fictive sense of waiver wholly incompatible with any meaningful concept of liberty of communication. If a person must always be on his guard against his auditor's having authorized a secret recording of their conversation, he will be no less reluctant to speak freely than if his risk is that a third party is doing the recording. Surely high government officials are not the only persons who find it essential to be able to say things "off the record." I believe that there is a grave danger of chilling all private, free, and unconstrained communication if secret recordings, turned over to law enforcement officers by one party to a conversation, are competent evidence of any self-incriminating statements the speaker may have made. In a free society, people ought not to have to watch their every word so carefully.

Nothing in *Rathbun* v. *United States,* 355 U. S. 107, is to the contrary. We held in that case that evidence obtained by police officers' listening in to a telephone conversation on an existing extension with the consent of one of the parties, who was also the subscriber to the extension, did not violate the federal wiretapping Act, 47 U. S. C. § 605. The decision was a narrow one. The grant of certiorari was limited to the question of statutory

construction, and neither the majority nor dissenting opinion discusses any other possible basis for excluding the evidence. Furthermore, as the Court was careful to emphasize, extension phones are in common use, so common that it is a normal risk of telephoning that more than one person may be listening in at the receiver's end. The extension telephone by means of which Rathbun's statements were heard had not been specially installed for law enforcement purposes, and no attempt was made to transcribe the phone conversation electronically. Thus in the Court's view wiretapping in the conventional sense was not involved and § 605 had no application. It should also be pointed out that while it is a very serious inconvenience to be inhibited from speaking freely over the telephone, it perhaps is a far graver danger to a free society if a person is inhibited from speaking out in his home or office.[2]

III.

The question before us comes down to whether there is a legal basis, either in the Fourth Amendment or in the supervisory power,[3] for excluding from federal criminal

[2] If anything, *Rathbun* supports the position that the right of privacy is not forfeited merely because the auditor authorizes electronic eavesdropping. The Court might have grounded its decision in the fact that the receiver had consented to the police officers' listening in; since § 605 proscribes only unauthorized interceptions of telephonic communications, the Court could have held that the listening in was authorized, but it did not, turning the case entirely on the absence of interception within the meaning of the statute, and carefully differentiating between use of an existing extension phone and other modes of listening in. Thus the concession in *Rathbun* which the Court today quotes was pure dictum.

[3] The failure of Lopez or his counsel to raise or argue the supervisory-power point does not bar us from considering it. For the interest secured by the exercise of the power is that of the federal courts themselves, not of the parties. "[T]he objection that the plaintiff comes with unclean hands will be taken by the court itself. It will be taken despite the wish to the contrary of all the parties to the

trials the fruits of surreptitious electronic surveillance by federal agents.

History and the text of the Constitution point the true path to the answer. In the celebrated case of *Entick* v. *Carrington,* 19 Howell's State Trials 1029 (C. P. 1765), Lord Camden laid down two distinct principles: that general search warrants are unlawful because of their uncertainty; and that searches for evidence are unlawful because they infringe the privilege against self-incrimination.[4] Lord Camden's double focus was carried over into the structure of the Fourth Amendment. See Lasson, The History and Development of the Fourth Amendment to the United States Constitution (1937), 103; Fraenkel, Concerning Searches and Seizures, 34 Harv. L. Rev. 361, 366 (1921).[5] The two clauses of the Amendment are in the conjunctive, and plainly have distinct functions. The Warrant Clause was aimed specifically at the evil of the general warrant, often regarded as the single immediate cause of the American Revolution.[6] But the first clause

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litigation. The court protects itself." *Olmstead* v. *United States,* 277 U. S. 438, 485 (Brandeis, J., dissenting). (Footnote omitted.)

[4] "It is very certain, that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it should seem, that search for evidence is disallowed upon the same principle." 19 Howell's State Trials, at 1073.

[5] The text of the Fourth Amendment is as follows: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[6] "Historically we are dealing with a provision of the Constitution which sought to guard against an abuse that more than any one single factor gave rise to American independence. John Adams surely is a competent witness on the causes of the American Revolution. And he it was who said of Otis' argument against search by the police . . . , 'American independence was then and there born.' 10

embodies a more encompassing principle. It is, in light of the *Entick* decision, that government ought not to have the untrammeled right to extract evidence from people. Thus viewed, the Fourth Amendment is complementary to the Fifth. *Feldman* v. *United States,* 322 U. S. 487, 489–490. The informing principle of both Amendments is nothing less than a comprehensive right of personal liberty in the face of governmental intrusion.

And so this Court held in *Boyd* v. *United States,* 116 U. S. 616, "a case that will be remembered as long as civil liberty lives in the United States" (Brandeis, J., dissenting in *Olmstead* v. *United States,* 277 U. S. 438, 474):

> "The principles laid down in this opinion [*Entick* v. *Carrington*] affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employés of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence,—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used

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Adams, *Works* 247." *Harris* v. *United States,* 331 U. S. 145, 159 (dissenting opinion).

Of course, the Warrant Clause not only outlaws general warrants, but also establishes the root principle of judicial superintendence of searches and seizures. See p. 464, *infra.*

> as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other." 116 U. S., at 630.

The Court in *Boyd* set its face against a narrowly literal conception of "search and seizure," instead reading the Fourth and Fifth Amendments together as creating a broad right to inviolate personality. *Boyd* itself was not a search and seizure case in the conventional sense, but involved an order to compel production of documents in the nature of a subpoena *duces tecum*. And *Boyd* had been preceded by *Ex parte Jackson*, 96 U. S. 727, 735, in which the Court had clearly intimated that a statute permitting government officials to open letters in the mail would violate the Fourth Amendment. See also *Hoover* v. *McChesney*, 81 F. 472 (Cir. Ct. D. Ky. 1897).

The authority of the *Boyd* decision has never been impeached. Its basic principle, that the Fourth and Fifth Amendments interact to create a comprehensive right of privacy, of individual freedom, has been repeatedly approved in the decisions of this Court.[7] Thus we have held that the gist of the Fourth Amendment is "[t]he security of one's privacy against arbitrary intrusion by the police." *Wolf* v. *Colorado*, 338 U. S. 25, 27; *Stefanelli* v. *Minard*, 342 U. S. 117, 119; *Frank* v. *Maryland*, 359 U. S.

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[7] *E. g.*, *Bram* v. *United States*, 168 U. S. 532, 543–544; *Hale* v. *Henkel*, 201 U. S. 43, 71; *Weeks* v. *United States*, 232 U. S. 383; *Gouled* v. *United States*, 255 U. S. 298, 306; *Amos* v. *United States*, 255 U. S. 313; *Agnello* v. *United States*, 269 U. S. 20, 33–34; *McGuire* v. *United States*, 273 U. S. 95, 99; *United States* v. *Lefkowitz*, 285 U. S. 452, 467; *Feldman* v. *United States*, *supra*, at 489–490; *Davis* v. *United States*, 328 U. S. 582, 587; *Zap* v. *United States*, 328 U. S. 624, 628.

The Court's liberal construction of the Fourth is paralleled by its similarly liberal construction of the Fifth. See, *e. g.*, *Counselman* v. *Hitchcock*, 142 U. S. 547, 562.

360, 362. Only two Terms ago, in reaffirming that the Fourth Amendment's "right to privacy" is a "basic constitutional right," *Mapp* v. *Ohio,* 367 U. S. 643, 656, we remarked the " 'intimate relation' " between the Fourth and Fifth Amendments. *Id.,* at 657. So also, the Court's insistence that the Fourth Amendment is to be liberally construed, *e. g., Byars* v. *United States,* 273 U. S. 28, 32; *United States* v. *Lefkowitz,* 285 U. S. 452, 464; *Grau* v. *United States,* 287 U. S. 124, that searches for and seizures of mere evidence as opposed to the fruits or instrumentalities of crime are impermissible under any circumstances, *e. g., United States* v. *Lefkowitz, supra,* at 464–466; *Harris* v. *United States,* 331 U. S. 145, 154; *Abel* v. *United States,* 362 U. S. 217, 237–238, and that the Fourth Amendment is violated whether the search or seizure is accomplished by force, by subterfuge, *Gouled* v. *United States,* 255 U. S. 298, 306; see, *e. g., Gatewood* v. *United States,* 209 F. 2d 789; *Fraternal Order of Eagles* v. *United States,* 57 F. 2d 93; *United States* v. *General Pharmacal Co.,* 205 F. Supp. 692; *United States* v. *Bush,* 172 F. Supp. 818; *United States* v. *Reckis,* 119 F. Supp. 687; *United States* v. *Mitchneck,* 2 F. Supp. 225; but see *United States* v. *Bush,* 283 F. 2d 51, reversing 172 F. Supp. 818, by an invalid subpoena, see, *e. g. Hale* v. *Henkel,* 201 U. S. 43, 76; *Federal Trade Comm'n* v. *American Tobacco Co.,* 264 U. S. 298; *Brown* v. *United States,* 276 U. S. 134, or otherwise, see *e. g., Wakkuri* v. *United States,* 67 F. 2d 844, is confirmation that the purpose of the Amendment is to protect individual liberty in the broadest sense from governmental intrusion. And see *Poe* v. *Ullman,* 367 U. S. 497, 549–552 (dissenting opinion).

It is against this background that we must appraise *Olmstead* v. *United States, supra,* where the Court, over the dissents of Justices Holmes, Brandeis, Stone, and Butler, held that the fruits of wiretapping by federal officers were admissible as evidence in federal criminal trials. The

Court's holding, which is fully pertinent here,[8] rested on the propositions that there had been no search because no trespass had been committed against the petitioners and no seizure because no physical evidence had been obtained, thus making the Fourth Amendment inapplicable; and that evidence was not inadmissible in federal criminal trials merely because obtained by federal officers by methods violative of state law or otherwise unethical.

When the Court first confronted the problem of electronic surveillance apart from wiretapping, *Olmstead* was deemed to control, five members of the Court declining to reexamine the soundness of that decision. *Goldman* v. *United States,* 316 U. S. 129. In turn, *Olmstead* and *Goldman* were deemed to compel the result in *On Lee.* But cf. note 10, *infra.* The instant case, too, hinges on the soundness and continued authority of the *Olmstead* decision. I think it is demonstrable that *Olmstead* was erroneously decided, that its authority has been steadily

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[8] In part, the Court rested its decision on considerations thought peculiar to wiretapping, *i. e.,* the interception of telephonic communications. "The language of the Amendment can not be extended and expanded to include telephone wires reaching to the whole world from the defendant's house or office. The intervening wires are not part of his house or office any more than are the highways along which they are stretched." 277 U. S., at 465. "The reasonable view is that one who installs in his house a telephone instrument with connecting wires intends to project his voice to those quite outside, and that the wires beyond his house and messages while passing over them are not within the protection of the Fourth Amendment. Here those who intercepted the projected voices were not in the house of either party to the conversation." *Id.,* at 466.

The disingenuous artificiality of this analysis is surely plain. Although, arguably, face-to-face conversations in home or office are more intimately a part of the right to privacy than are telephonic conversations, see pp. 452–453, *supra,* any attempt to draw a constitutional distinction would ignore the plain realities of modern life, in which the telephone has assumed an indispensable role in free human communication.

sapped by subsequent decisions of the Court, and that it and the cases following it are sports in our jurisprudence which ought to be eliminated.

(1) *Olmstead*'s illiberal interpretation of the Fourth Amendment as limited to the tangible fruits of actual trespasses was a departure from the Court's previous decisions, notably *Boyd,* and a misreading of the history and purpose of the Amendment. Such a limitation cannot be squared with a meaningful right to inviolate personal liberty. It cannot even be justified as a "literal" reading of the Fourth Amendment. "In every-day talk, as of 1789 or now, a man 'searches' when he looks or listens. Thus we find references in the Bible to 'searching' the Scriptures (John V, 39); in literature to a man 'searching' his heart or conscience; in the law books to 'searching' a public record. None of these acts requires a manual rummaging for concealed objects. . . . [J]ust as looking around a room is searching, listening to the sounds in a room is searching. Seeing and hearing are both reactions of a human being to the physical environment around him—to light waves in one instance, to sound waves in the other. And, accordingly, using a mechanical aid to either seeing or hearing is also a form of searching. The camera and the dictaphone both do the work of the end-organs of an individual human searcher—more accurately." *United States* v. *On Lee,* 193 F. 2d 306, 313 (Frank, J., dissenting).

(2) As constitutional exposition, moreover, the *Olmstead* decision is insupportable. The Constitution would be an utterly impractical instrument of contemporary government if it were deemed to reach only problems familiar to the technology of the eighteenth century; yet the Court in *Olmstead* refused to apply the Fourth Amendment to wiretapping seemingly because the Framers of the Constitution had not been farsighted enough to foresee the invention of the telephone.

(3) The Court's illiberal approach in *Olmstead* was a deviant in the law of the Fourth Amendment and not a harbinger of decisional revolution. The Court has not only continued to reiterate its adherence to the principles of the *Boyd* decision, see, *e. g., Mapp* v. *Ohio, supra,* but to require that subpoenas *duces tecum* comply with the Fourth Amendment, see *United States* v. *Bausch & Lomb Optical Co.,* 321 U. S. 707, 727–728; *Oklahoma Press Publishing Co.* v. *Walling,* 327 U. S. 186; *McPhaul* v. *United States,* 364 U. S. 372, 382–383—a requirement patently inconsistent with a grudging, narrow conception of "searches and seizures."

(4) Specifically, the Court in the years since *Olmstead* has severed both supports for that decision's interpretation of the Fourth Amendment. We have held that the fruits of electronic surveillance, though intangible, nevertheless are within the reach of the Amendment. *Irvine* v. *California,* 347 U. S. 128; *Silverman* v. *United States,* 365 U. S. 505; [9] *Lanza* v. *New York,* 370 U. S. 139, 142. Indeed, only the other day we reaffirmed that verbal fruits, equally with physical, are within the Fourth. *Wong Sun* v. *United States,* 371 U. S. 471, 485–486. So too, the Court has refused to crowd the Fourth Amendment into the mold of local property law, *Chapman* v. *United States,* 365 U. S. 610, 617; *Jones* v. *United States,* 362 U. S. 257, 266; *United States* v. *Jeffers,* 342 U. S. 48; *McDonald*

[9] In *Irvine* v. *California, supra,* though the conduct of the police was held to violate the Fourth and Fourteenth Amendments, the fruits were deemed admissible under the rule of *Wolf* v. *Colorado, supra,* overruled in *Mapp* v. *Ohio, supra.* It might be noted that the holdings in *Irvine* and *Silverman,* insofar as they brought verbal fruits within the Fourth Amendment, were implicit in *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, 392, where it was held that all fruits of an unconstitutional search must be excluded from the federal courts, so as not to "reduce . . . the Fourth Amendment to a form of words." Cf. *McDonald* v. *United States,* 335 U. S. 451; *Nueslein* v. *District of Columbia,* 73 App. D. C. 85, 115 F. 2d 690.

v. *United States,* 335 U. S. 451, 454, and has expressly held, in a case very close on its facts to that at bar, that an actual trespass need not be shown in order to support a violation of the Fourth Amendment. *Silverman* v. *United States, supra,* at 511.[10]

(5) Insofar as *Olmstead* rests on the notion that the federal courts may not exclude evidence, no matter how

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[10] *Silverman* involved the penetration of a "spike mike" several inches into the party wall of the house occupied by the petitioners. The mike touched a heating duct which acted as a conductor of sounds within the house, thus enabling their transmission by the mike to federal officers on the other side of the wall. On its facts the case was very close to *Goldman,* which had involved a detectaphone placed against and touching (but not penetrating) the outside of a wall. Since the Court in *Silverman* declined to distinguish the cases on the ground that *Silverman* did, and *Goldman* did not, involve an actual trespass, it would seem that the authority of *Goldman* was severely impaired—and so also, it would seem, that of *On Lee* and *Olmstead.*

Actually, the instant case and *On Lee,* compared with *Goldman* and *Silverman,* are *a fortiori* for applying the Fourth Amendment:

"This Court has held generally that, in a federal criminal trial, a federal officer may testify to what he sees or hears take place within a house or room which he has no warrant or permission to enter, provided he sees or hears it outside of those premises. . . . This holds true even where the officer supplements his hearing with a hearing aid, detectaphone or other device outside the premises. . . . He and his hearing aid pick up the sounds outside of, rather than within, the protected premises.

"In the instant case [*On Lee*] . . . Lee's overhearing of petitioner's statements was accomplished through Chin Poy's surreptitious introduction, within petitioner's laundry, of Lee's concealed radio transmitter which, without petitioner's knowledge or consent, *there* picked up petitioner's conversation and transmitted it to Lee outside the premises. The presence of the transmitter, for this purpose, was the presence of Lee's ear. . . . In this case the words were picked up without warrant or consent *within* the constitutionally inviolate 'house' of a person entitled to protection there against unreasonable searches and seizures . . . ." *On Lee* v. *United States,* 343 U. S. 747, 766–767 (Burton, J., dissenting).

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obtained, unless its admission is specifically made illegal by federal statute or by the Constitution, the decision is manifestly inconsistent with what has come to be regarded as the scope of the supervisory power over federal law enforcement. See, *e. g.*, *McNabb* v. *United States,* 318 U. S. 332; *Upshaw* v. *United States,* 335 U. S. 410; *Rea* v. *United States,* 350 U. S. 214; *Mallory* v. *United States,* 354 U. S. 449; Morgan, The Law of Evidence, 1941–1945, 59 Harv. L. Rev. 481, 537 (1946). We are empowered to fashion rules of evidence for federal criminal trials in conformity with "the principles of the common law as they may be interpreted . . . in the light of reason and experience." Rule 26, Federal Rules of Criminal Procedure. Even if electronic surveillance as here involved does not violate the letter of the Fourth Amendment, which I do not concede, it violates its spirit, and we ought to devise an appropriate prophylactic rule. The Court's suggestion that the supervisory power may never be invoked to create an exclusionary rule of evidence unless there has been a violation of a specific federal law or rule of procedure is, to me, a gratuitous attempt to cripple that power. And I do not see how it can be reconciled with our mandate to fashion rules conformable to evolving common law principles.

(6) The *Olmstead* decision caused such widespread dissatisfaction that Congress in effect overruled it by enacting § 605 of the Federal Communications Act, which made wiretapping a federal crime. We have consistently given § 605 a generous construction, see *Nardone* v. *United States,* 302 U. S. 379; *Weiss* v. *United States,* 308 U. S. 321; *Nardone* v. *United States,* 308 U. S. 338; *Benanti* v. *United States,* 355 U. S. 96, recognizing that Congress had been concerned to prevent "resort to methods deemed inconsistent with ethical standards and destructive of personal liberty." *Nardone* (I), *supra,* at 383; see *Goldstein* v. *United States,* 316 U. S. 114, 120. To be sure,

§ 605, being directed to the specific practice sanctioned by *Olmstead,* wiretapping, does not of its own force forbid the admission in evidence of the fruits of other techniques of electronic surveillance. But a congressional enactment is a source of judicial policy as well as a specific mandate to be enforced, and the same "broad considerations of morality and public well-being," *Nardone* (II), at 340, which make wiretap evidence inadmissible in the federal courts equally justify a court-made rule excluding the fruits of such devices as the Minifon. It is anomalous that the federal courts, while enforcing the right to privacy with respect to telephone communications, recognize no such right with respect to communications wholly within the sanctuaries of home and office.

IV.

If we want to understand why the Court, in *Olmstead, Goldman,* and *On Lee,* carved such seemingly anomalous exceptions to the general principles which have guided the Court in enforcing the Fourth Amendment, we must consider two factors not often articulated in the decisions. The first is the pervasive fear that if electronic surveillance were deemed to be within the reach of the Fourth Amendment, a useful technique of law enforcement would be wholly destroyed, because an electronic "search" could never be reasonable within the meaning of the Amendment. See Note, The Supreme Court, 1960 Term, 75 Harv. L. Rev. 40, 187 (1961). For one thing, electronic surveillance is almost inherently indiscriminate, so that compliance with the requirement of particularity in the Fourth Amendment would be difficult; for another, words, which are the objects of an electronic seizure, are ordinarily mere evidence and not the fruits or instrumentalities of crime, and so they are impermissible objects of lawful searches under any circumstances, see pp. 456–457, *supra;* finally, the usefulness of electronic surveillance depends on lack of notice to the suspect.

But the argument is unconvincing. If in fact no warrant could be devised for electronic searches, that would be a compelling reason for forbidding them altogether. The requirements of the Fourth Amendment are not technical or unreasonably stringent; they are the bedrock rules without which there would be no effective protection of the right to personal liberty. A search for mere evidence offends the fundamental principle against self-incrimination, as Lord Camden clearly recognized; a merely exploratory search revives the evils of the general warrant, so bitterly opposed by the American Revolutionaries; and without some form of notice, police searches became intolerable intrusions into the privacy of home or office. Electronic searches cannot be tolerated in the name of law enforcement if they are inherently unconstitutional.

But in any event, it is premature to conclude that no warrant for an electronic search can possibly be devised. The requirements of the Fourth Amendment are not inflexible, or obtusely unyielding to the legitimate needs of law enforcement. It is at least clear that "the procedure of antecedent justification before a magistrate that is central to the Fourth Amendment," *Ohio ex rel. Eaton* v. *Price,* 364 U. S. 263, 272 (separate opinion); see *McDonald* v. *United States,* 335 U. S. 451, 455; *Abel* v. *United States,* 362 U. S. 217, 251–252 (dissenting opinion), could be made a precondition of lawful electronic surveillance. And there have been numerous suggestions of ways in which electronic searches could be made to comply with the other requirements of the Fourth Amendment.[11]

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[11] See, *e. g., Goldman* v. *United States,* 316 U. S. 129, 140, n. 6 (Murphy, J., dissenting); cf. 8 Wigmore, Evidence (McNaughton rev. ed. 1961), § 2184b (3), at 59; Westin, The Wire-Tapping Problem: An Analysis and a Legislative Proposal, 52 Col. L. Rev. 165, 200–208 (1952).

This is not to say that a warrant that will pass muster can actually be devised. It is not the business of this Court to pass upon hypothetical questions, and the question of the constitutionality of warrants for electronic surveillance is at this stage purely hypothetical. But it is important that the question is still an open one. Until the Court holds inadmissible the fruits of an electronic search made, as in the instant case, with no attempt whatever to comply with the requirements of the Fourth Amendment, there will be no incentive to seek an imaginative solution whereby the rights of individual liberty and the needs of law enforcement are fairly accommodated.

The second factor that may be a significant though unarticulated premise of *Olmstead* and the cases following it is well expressed by the Government in the instant case: "if the agent's relatively innocuous conduct here is found offensive, *a fortiori,* the whole gamut of investigatorial techniques involving more serious deception must also be condemned. Police officers could then no longer employ confidential informants, act as undercover agents, or even wear 'plain clothes.'" But this argument misses the point. It is not Agent Davis' deception that offends constitutional principles, but his use of an electronic device to probe and record words spoken in the privacy of a man's office. For there is a qualitative difference between electronic surveillance, whether the agents conceal the devices on their persons or in walls or under beds, and conventional police stratagems such as eavesdropping and disguise. The latter do not so seriously intrude upon the right of privacy. The risk of being overheard by an eavesdropper or betrayed by an informer or deceived as to the identity of one with whom one deals is probably inherent in the conditions of human society. It is the kind of risk we necessarily assume whenever we speak. But as soon as electronic surveillance comes into play, the

risk changes crucially. There is no security from that kind of eavesdropping, no way of mitigating the risk, and so not even a residuum of true privacy. See pp. 449–451, *supra*.[12]

Furthermore, the fact that the police traditionally engage in some rather disreputable practices of law enforcement is no argument for their extension. Eavesdropping was indictable at common law [13] and most of us would still agree that it is an unsavory practice. The limitations of human hearing, however, diminish its potentiality for harm. Electronic aids add a wholly new dimension to eavesdropping. They make it more penetrating, more indiscriminate, more truly obnoxious to a free society. Electronic surveillance, in fact, makes the police omniscient; and police omniscience is one of the most effective tools of tyranny.

V.

The foregoing analysis discloses no adequate justification for excepting electronic searches and seizures from the requirements of the Fourth Amendment. But to state the case thus is to state it too negatively. It is to ignore the positive reasons for bringing electronic surveillance under judicial regulation. Not only has the

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[12] This is not to say that the Fourth Amendment must necessarily embrace every situation involving electronic recording aids to law enforcement. For example, a distinction might be drawn between surveillance of home or office on the one hand, and surveillance of public places, streets, and so forth, on the other hand. Compare *McDonald* v. *United States*, 335 U. S. 451, with *Hester* v. *United States*, 265 U. S. 57.

[13] "*Eaves-droppers*, or such as listen under walls or windows or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales, are a common nusance and presentable at the court-leet: or are indictable at the sessions, and punishable by fine and finding sureties for their good behaviour." 4 Blackstone Commentaries 168. See Ga. Code Ann. § 26–2001; N. D. Cent. Code § 12–42–05; S. C. Code § 16–554.

problem grown enormously in recent years, see, *e. g.*, *Todisco* v. *United States,* 298 F. 2d 208; *United States* v. *Kabot,* 295 F. 2d 848, but its true dimensions have only recently become apparent from empirical studies not available when *Olmstead, Goldman,* and *On Lee* were decided. The comprehensive study by Samuel Dash and his associates as well as a number of legislative inquiries [14] reveals these truly terrifying facts: (1) Electronic eavesdropping by means of concealed microphones and recording devices of various kinds has become as large a problem as wiretapping, and is pervasively employed by private detectives, police, labor spies, employers and others for a variety of purposes, some downright disreputable.[15] (2) These devices go far beyond simple

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[14] Dash, Schwartz, and Knowlton, The Eavesdroppers (1959); Hearings on S. Res. No. 234 before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 85th Cong., 2d Sess. *passim* (1958); Report of the California Senate Judiciary Committee on the Interception of Messages by the Use of Electronic and Other Devices (1957); Report of the New York Joint Legislative Committee to Study Illegal Interception of Communications, N. Y. Sess. Laws (1956).

[15] See Dash, *supra,* note 14, at 76 ("bugging" by police of interrogation rooms, jail cells, and interview rooms in jails), 96 (monitoring of employees' conversations by means of microphones concealed in pen sets), 136 (use of microphones by law enforcement officers termed "universal" in New Orleans and Baton Rouge), 175 (in California, "[b]ugging is much more frequently and openly engaged in by police than wiretapping"), 180 (again in California: "Literally, whenever the police suspected an individual of being connected with the commission of a crime, and the case was worth it, trained police technicians, or private specialists employed by the police, would pry open windows, pick locks, or by some ruse gain entry to the home or business place of the suspected individual and plant a microphone for the purpose of overhearing his conversations. By means of a leased wire from the telephone company, these planted microphones could be connected to telephone lines which would be drawn in to a single listening post where a great number of conversations in different parts of the city could be monitored at one time and in one place"), 190 (use of con-

"bugging," and permit a degree of invasion of privacy that can only be described as frightening.[16] (3) Far from providing unimpeachable evidence, the devices lend themselves to diabolical fakery.[17] (4) A number

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cealed microphone for purposes of blackmail), 196 (bugging conversations between husbands and wives in jails), 212 ("tables have been bugged in a restaurant for the purpose, according to the proprietor, of permitting him to know what his customers actually think of his food and to detect discourtesy among his waitresses"), 229–230 (use of bugging to obtain evidence for divorce proceedings), 269–271 (wiretapping and bugging of labor controversies in Philadelphia), 280–281 (in Las Vegas: "A bug is put in a visiting hoodlum's hotel room as a matter of course, to see what he is up to"). These are, of course, only a few isolated examples of the practice; see, *e. g.*, The Wall Street Journal, April 9, 1963, p. 1, col. 4; p. 22, col. 3.

[16] Dash suggests that a parabolic microphone (which concentrates sound much as a curved mirror focuses light) might pick up a conversation at a distance of 100 feet. P. 350. Such a microphone can be made virtually impossible to detect, p. 353, but even the ordinary concealed microphone in the home may be impossible to detect, at least without a mine detector. P. 342. Dash also suggests that a microwave-beam device may have been developed with a range of 1,000 feet or more and ability to penetrate through virtually any obstacle. Pp. 357–358. Such a device, if it exists, is not readily obtainable; but the parabolic microphone and a variety of other such devices are. Thus a current advertisement in a national magazine for "The Snooper" describes this device as follows: "This is literally an electronic marvel that's a direct result of the space age. Incredible as it may seem, it does amplify sound 1,000,000 times. Sensitive 18″ disk reflector will pick up normal conversations at a distance (500 ft.) where you can't even see lips moving. Just think of the ways you can use this. Portable; complete with tripod and stethescopic earphones. The best part—a regular tape recorder can be plugged into the back to take everything down. Have fun!" The advertised price is $18.95.

[17] "In a carefully controlled experiment, Samuel Dash made a sample political speech on tape. A sound studio specializing in tape editing for one of the large broadcasting studios then took this tape and edited it in such a way as completely to reverse its meaning. Finally, a third recording was made, this time of Mr. Dash reading the new, distorted version of the speech. The three recordings were

of States have been impelled to enact regulatory legislation.[18] (5) The legitimate law enforcement need for such techniques is not clear,[19] and it surely has not been established that a stiff warrant requirement for electronic surveillance would destroy effective law enforcement.

But even without empirical studies, it must be plain that electronic surveillance imports a peculiarly severe danger to the liberties of the person. To be secure against police officers' breaking and entering to search for physical objects is worth very little if there is no security against the officers' using secret recording devices to purloin words spoken in confidence within the four walls of home or office. Our possessions are of little value compared to our personalities. And we must bear in mind that

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compared by ear and by oscilloscope to see whether or not the editing was detectable. By ear it was noticeable only in one place where the editor had been hurried in his work. The oscilloscope could not reveal even this much because of the rapidly changing patterns on the screen. It was decided that the only way to examine the waveforms for purposes of comparison was to record them on motion-picture film; accordingly, equipment was set up for doing this. Although it was expected that the build-up or decay of sounds would be altered by cutting, so skilful had been the editorial manipulation that nothing of the kind was observed. Even after hours of studying the films, no sure clue revealing an editing job could be found." Dash, at 368.

[18] Cal. Penal Code §§ 653h, 653i; Mass. Gen. Laws Ann., c. 272, § 99; Nev. Rev. Stat. § 200.650; N. Y. Penal Law, § 738.

[19] In the nature of things, wiretapping is only useful in the investigation of crimes of a continuing nature, which are typically not major crimes. "[T]he wiretapping done by plainclothesmen is still in large part aimed at bookmakers' operations and prostitution. As a matter of fact, more wiretapping by police is done in gambling cases than in any other kind of case. In gambling and in vice matters generally, there is steady pressure on the plainclothesmen to maintain a certain arrest record. Continuous wiretap surveillance, without court order, enables plainclothesmen to maintain this record." Dash, at 66. The same principles apply to electronic surveillance generally.

historically the search and seizure power was used to suppress freedom of speech and of the press, see Lasson, *supra,* at 33, 37–50; *Marcus* v. *Search Warrant,* 367 U. S. 717, 724–729; *Frank* v. *Maryland,* 359 U. S. 360, 376 (dissenting opinion), and that today, also, the liberties of the person are indivisible. "Under Hitler, when it became known that the secret police planted dictaphones in houses, members of families often gathered in bathrooms to conduct whispered discussions of intimate affairs, hoping thus to escape the reach of the sending apparatus." *United States* v. *On Lee,* 193 F. 2d 306, 317 (dissenting opinion). Electronic surveillance strikes deeper than at the ancient feeling that a man's home is his castle; it strikes at freedom of communication, a postulate of our kind of society. Lopez' words to Agent Davis captured by the Minifon were not constitutionally privileged by force of the First Amendment. But freedom of speech is undermined where people fear to speak unconstrainedly in what they suppose to be the privacy of home and office. King, Wire Tapping and Electronic Surveillance: A Neglected Constitutional Consideration, 66 Dick. L. Rev. 17, 25–30 (1961). If electronic surveillance by government becomes sufficiently widespread, and there is little in prospect for checking it, the hazard that as a people we may become hagridden and furtive is not fantasy.

The right to privacy is the obverse of freedom of speech in another sense. This Court has lately recognized that the First Amendment freedoms may include the right, under certain circumstances, to anonymity. See *NAACP* v. *Alabama ex rel. Patterson,* 357 U. S. 449; *Bates* v. *Little Rock,* 361 U. S. 516; *Talley* v. *California,* 362 U. S. 60; *Louisiana ex rel. Gremillion* v. *NAACP,* 366 U. S. 293; *Gibson* v. *Florida Legislative Investigation Comm.,* 372 U. S. 539. The passive and the quiet, equally with the active and the aggressive, are entitled to protection when engaged in the precious activity of expressing ideas

or beliefs. Electronic surveillance destroys all anonymity and all privacy; it makes government privy to everything that goes on.

In light of these circumstances I think it is an intolerable anomaly that while conventional searches and seizures are regulated by the Fourth and Fourteenth Amendments and wiretapping is prohibited by federal statute, electronic surveillance as involved in the instant case, which poses the greatest danger to the right of private freedom, is wholly beyond the pale of federal law.[20]

This Court has by and large steadfastly enforced the Fourth Amendment against physical intrusions into person, home, and property by law enforcement officers. But our course of decisions, it now seems, has been outflanked by the technological advances of the very recent past. I cannot but believe that if we continue to condone electronic surveillance by federal agents by permitting the fruits to be used in evidence in the federal courts, we shall be contributing to a climate of official lawlessness and conceding the helplessness of the Constitution and this Court to protect rights "fundamental to a free society." *Frank* v. *Maryland, supra,* at 362.[21]

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[20] Senator Hennings has termed electronic eavesdropping more insidious and more prevalent than wiretapping. The Wiretapping-Eavesdropping Problem: A Legislator's View, 44 Minn. L. Rev. 813, 815 (1960). Another observer has called the problem "far graver" than wiretapping. Williams, The Wiretapping-Eavesdropping Problem: A Defense Counsel's View, 44 Minn. L. Rev. 855, 862 (1960).

[21] Viewing the instant case as I do, I find no occasion to consider the petitioner's defense of entrapment.

BOESCHE, ADMINISTRATOR, *v.* UDALL, SECRETARY OF THE INTERIOR.

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

No. 332. Argued February 25, 1963.—
Decided May 27, 1963.

The Secretary of the Interior has authority to cancel in an administrative proceeding a noncompetitive lease of public lands issued under the provisions of the Mineral Leasing Act of 1920 in circumstances where such lease was granted in violation of the Act and the regulations promulgated thereunder—*i. e.*, he has power to correct administrative errors of the sort involved in this case by cancellation of leases in administrative proceedings timely instituted by competing applicants for the same land. Pp. 473–486.

(a) The Secretary, under his general powers of management over the public lands, has authority to cancel such a lease administratively for invalidity at its inception, unless such authority was withdrawn by the Mineral Leasing Act. Pp. 476–478.

(b) Both the language of the statute and its legislative history show that § 31 of the Mineral Leasing Act reaches only cancellations based on *post-lease* events and leaves unaffected the Secretary's traditional administrative authority to cancel on the basis of *pre-lease* factors. Pp. 478–482.

(c) From the beginnings of the Mineral Leasing Act, the Secretary has conceived that he had such power, and Congress has never interfered with its exercise. Pp. 482–483.

(d) This case is a peculiarly appropriate one for administrative determination in the first instance, since the sole issue was whether petitioner's lease offer was defective because it failed to include an adjoining 40-acre tract under application by another party, and this question had already been decided adversely to petitioner's position by the Secretary in a previous case interpreting the governing departmental regulations. Pp. 483–485.

112 U. S. App. D. C. 344, 303 F. 2d 204, affirmed.

Leon BenEzra argued the cause for petitioner. With him on the briefs was *Lewis E. Hoffman.*

Solicitor General Cox argued the cause for respondent. With him on the brief were *Louis F. Claiborne, Roger P. Marquis* and *A. Donald Mileur.*

Scott A. Pfohl, A. G. McClintock, V. P. Cline, Clinton D. Vernon, J. E. Horigan, A. T. Smith, Clair M. Senior and *L. C. White* filed a brief for the Rocky Mountain Oil & Gas Association et al., as *amici curiae,* urging reversal.

MR. JUSTICE HARLAN delivered the opinion of the Court.

The question presented in this case is whether the Secretary of the Interior has authority to cancel in an administrative proceeding a lease of public lands issued under the provisions of the Mineral Leasing Act of 1920, 30 U. S. C. §§ 181 *et seq.,* in circumstances where such lease was granted in violation of the Act and regulations promulgated thereunder. Because of a seeming conflict in principle between the decision of the Court of Appeals in this case, 112 U. S. App. D. C. 344, 303 F. 2d 204, and that of the Court of Appeals for the Tenth Circuit in *Pan American Petroleum Corp.* v. *Pierson,* 284 F. 2d 649, and also because of the importance of the question to the proper administration of the Mineral Leasing Act, we brought the case here. 371 U. S. 886. For reasons stated hereafter we affirm the judgment below.

Section 17 of the Mineral Leasing Act, 30 U. S. C. § 226, authorizes the Secretary of the Interior to grant to the first qualified applicant, without competitive bidding, oil and gas leases of lands in the public domain not within a known geologic structure. These are called "noncompetitive" leases.[1] A departmental regulation provides that "no offer" for a noncompetitive lease "may be made

[1] Competitive bidding is required for leases of lands that are within known geologic structures.

for less than 640 acres except . . . where the land is surrounded by lands not available for leasing under the act." 43 CFR § 192.42 (d). "Not available" has always been administratively construed to mean lands not available for leasing to *anyone*. Hence lands covered only by an outstanding application for a lease are considered available, *Natalie Z. Shell*, 62 I. D. 417 (1955), and therefore subject to the 640-acre requirement.

On September 11, 1956, petitioner [2] applied to the Santa Fe Land Office in New Mexico (whose authority also embraces Oklahoma) for an 80-acre noncompetitive lease of land in Oklahoma. There was already on file an application by one Connell for a noncompetitive lease of an adjoining 40-acre tract, but no lease had issued to Connell at the time of petitioner's application. Immediately following petitioner's application two other persons, Cuccia and Conley, filed for a lease of the entire 120 acres. On December 1, 1956, the 40-acre lease issued to Connell, the validity of which is not questioned here. In November 1957 an 80-acre lease issued to petitioner. Following notification that their 120-acre application had been rejected, Cuccia and Conley pursued a departmental appeal, 43 CFR §§ 221.1–221.2. This ultimately resulted in a cancellation of petitioner's lease on the ground that having failed to include in his application the adjoining 40-acre tract (no lease to Connell having then been issued), his 80-acre application was invalid, thus leaving the Cuccia and Conley application in respect of that tract prior in right. Accordingly a lease to them was directed.[3]

The ensuing litigation instituted by petitioner in the Federal District Court resulted in the judgment of

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[2] Petitioner is actually the administrator of the estate of the original applicant, but for convenience this opinion will disregard the distinction.

[3] Pending the outcome of this litigation, the Land Office Manager has withheld cancellation of petitioner's lease.

the Court of Appeals, now under review, sustaining the administrative cancellation.

Petitioner's claim before this Court [4] rests on § 31 of the Mineral Leasing Act, 30 U. S. C. § 188, as amended, which, in pertinent part, reads as follows:

> "Except as otherwise herein provided, any lease issued under the provisions of . . . [this Act] may be forfeited and canceled by an appropriate proceeding in the United States district court for the district in which the property, or some part thereof, is located whenever the lessee fails to comply with any of the provisions of . . . [the Act], of the lease, or of the general regulations promulgated under . . . [the Act] and in force at the date of the lease . . . .
>
> "Any lease issued after August 21, 1935,[5] under the provisions of . . . [§ 17 of the Act, 30 U. S. C. § 226] shall be subject to cancellation by the Secretary of the Interior after thirty days' notice upon the failure of the lessee to comply with any of the provisions of the lease, unless or until the land covered by any such lease is known to contain valuable deposits of oil or gas."

Petitioner contends: (1) § 31 is the exclusive source of the Secretary's power to forfeit a lease once it has been issued; (2) the section, by its second paragraph, limits administrative cancellation to instances where a lessee has failed to comply with the terms of his lease and then only so long as the land is not known to contain oil or gas; (3) since petitioner failed to comply not with the terms of his lease but with a departmental regulation, cancella-

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[4] We limited the writ of certiorari to the single question of the authority of the Secretary to cancel this lease administratively, 371 U. S. 886, not bringing here for review the validity of the Secretary's interpretation of the minimum-acreage regulation which was sustained by the Court of Appeals.

[5] See note 8, *infra*.

tion of his lease was governed by the first paragraph of § 31, which requires a judicial proceeding.

The Secretary, on the other hand, contends: (1) the provisions of § 31 as a whole apply only to events, whether in violation of lease terms, the Act, or the regulations, occurring *after* a lease has been issued; (2) the Secretary's authority to cancel on the basis of pre-lease events is found not in § 31 but in his general powers of management over lands in the public domain; (3) that authority remained unaffected by the Mineral Leasing Act.

I.

We think that the Secretary, under his general powers of management over the public lands, had authority to cancel this lease administratively for invalidity at its inception, unless such authority was withdrawn by the Mineral Leasing Act. With respect to earlier statutes containing no express administrative cancellation authority, this Court, in *Cameron* v. *United States*, 252 U. S. 450, found such authority to exist. In there sustaining the Secretary's power to cancel administratively an invalid mining claim, the Court said (at p. 461):

> "True, the mineral land law does not in itself confer such authority on the land department. Neither does it place the authority elsewhere. But this does not mean that the authority does not exist anywhere, for, in the absence of some direction to the contrary, the general statutory provisions before mentioned vest it in the land department."

The statutory provisions referred to by the Court are those vesting the Secretary with general managerial powers over the public lands.[6]

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[6] R. S. § 441, 5 U. S. C. § 485, charges the Secretary "with the supervision of public business relating to . . . [p]ublic lands, including mines." He is directed by R. S. § 453, 43 U. S. C. § 2, to "perform all executive duties . . . in anywise respecting . . . public

The Secretary has also long been held to possess the same authority with respect to other kinds of interests in public lands: *Harkness & Wife* v. *Underhill,* 1 Black 316; *Lee* v. *Johnson,* 116 U. S. 48; *Orchard* v. *Alexander,* 157 U. S. 372 (all involving homestead entries); *Brown* v. *Hitchcock,* 173 U. S. 473 (selection list); *Knight* v. *United States Land Assn.,* 142 U. S. 161 (erroneous survey); *Hawley* v. *Diller,* 178 U. S. 476 (timber land entry); *Riverside Oil Co.* v. *Hitchcock,* 190 U. S. 316 (lieu land selection).

The continuing vitality of this general administrative authority was recently confirmed by us in *Best* v. *Humboldt Placer Mining Co.,* 371 U. S. 334.

We are not persuaded by petitioner's argument—based on cases holding that land patents once delivered and accepted could be canceled only in judicial proceedings (*e. g., Johnson* v. *Towsley,* 13 Wall. 72; *Moore* v. *Robbins,* 96 U. S. 530)—that the administrative cancellation power established by *Cameron* and the other cases cited is confined to so-called equitable interests, and that a lease, which is said to resemble more closely the legal interest conveyed by a land patent, is not subject to such power. We think that no matter how the interest conveyed is denominated the true line of demarcation is whether as a result of the transaction "all authority or control" over the lands has passed from "the Executive Department," *Moore* v. *Robbins, supra,* at 533, or whether the Government continues to possess some measure of control over them.

Unlike a land patent, which divests the Government of title, Congress under the Mineral Leasing Act has not only reserved to the United States the fee interest in the leased land, but has also subjected the lease to exacting

lands [of the United States]," and R. S. § 2478, 43 U. S. C. § 1201, authorizes him "to enforce and carry into execution, by appropriate regulations, every part of the provisions of . . . [the Title dealing with public lands] not otherwise specially provided for."

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restrictions and continuing supervision by the Secretary. Thus, assignments and subleases must be approved by the Secretary, 30 U. S. C. § 187; he may direct complete suspension of operations on the land, 30 U. S. C. § 209, or require the lessee to operate under a cooperative or unit plan, 30 U. S. C. (Supp. IV, 1963), § 226 (j); and he may prescribe, as he has, rules and regulations governing in minute detail all facets of the working of the land, 30 U. S. C. § 189; 30 CFR, pt. 221. In short, a mineral lease does not give the lessee anything approaching the full ownership of a fee patentee, nor does it convey an unencumbered estate in the minerals.[7] Since the Secretary's connection with the land continues to subsist, he should have the power, in a proper case, to correct his own errors.

The dispositive question in this case, therefore, is whether this general administrative power of cancellation was withdrawn by § 31 of the Mineral Leasing Act. To that question we now turn.

II.

We believe that both the statute on its face and the legislative history of the enactment show that § 31 reaches only cancellations based on *post-lease* events and

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[7] In contrast, compare the interest of a mining claimant whose location is perfected:

"The rule is established by innumerable decisions of this Court, and of state and lower federal courts, that when the location of a mining claim is perfected under the law, it has the effect of a grant by the United States of the right of present and exclusive possession. The claim is property in the fullest sense of that term; and may be sold, transferred, mortgaged, and inherited without infringing any right or title of the United States. The right of the owner is taxable by the state; and is 'real property' subject to the lien of a judgment . . . . The owner is not required to purchase the claim or secure patent from the United States; but so long as he complies with the provisions of the mining laws, his possessory right, for all practical purposes of ownership, is as good as though secured by patent." *Wilbur* v. *Krushnic*, 280 U. S. 306, 316–317.

leaves unaffected the Secretary's traditional administrative authority to cancel on the basis of pre-lease factors.

1. Were § 31 deemed to be the exclusive source of the power to cancel, the Act, in respect of its "first qualified applicant" requirement relating to noncompetitive leases, would be self-defeating. For in cases where there had been no breach of a lease, statute, or regulations *by the lessee,* the factor which alone brings § 31 into play (p. 475, *supra*), the Secretary would be powerless to cancel the lease even if the lessee had not been the first qualified applicant. Thus, a local land office manager might, without fault on the part of the lessee, inadvertently or purposefully issue a lease to a nonqualified applicant. Yet under petitioner's view of the law the Secretary would be wholly unable, either in administrative or judicial proceedings, to remedy such illegal action.

2. The first paragraph of § 31—the one on which petitioner's case depends—speaks entirely in terms of post-lease occurrences. Thus in providing that a lease may be forfeited in judicial proceedings "*whenever* the *lessee* [not an applicant for a lease] *fails* to comply with any of the provisions of . . . [the Act], of the lease, or of the general regulations promulgated under . . . [the Act] and *in force at the date of the lease* . . ." (emphasis added), the provision clearly assumes the existence of a valid lease. It therefore does not cover a situation where, as here, the lease has not been issued at the time the breach of the Act or regulations occurs, for there is at that time no lease to cancel.

3. The other forfeiture provisions of the Mineral Leasing Act, as originally enacted, are, with one partial exception, also all concerned with post-lease events. Thus cancellation of a lease in judicial proceedings was authorized when the lessee drilled within 200 feet of the lease boundary (§ 16, 41 Stat. 443), or failed to comply with the provision granting rights of way for pipelines through public

lands (§ 28, 41 Stat. 449). And with respect to prospecting permits, administrative cancellation was authorized for the permittee's failure to exercise his prospecting rights with due diligence (§ 26, 41 Stat. 448).[8]

The sole exception to this post-issuance scheme of forfeiture—and only a partial one at that—is found in § 27, 41 Stat. 448, which provides for judicial forfeiture of interests in excess of certain minimum acreage allowances. But even here it is apparent that the statute was less concerned with initially invalid awards of excessive acreage than with the subsequent pooling of the interests of separate grantees, having the effect of avoiding the acreage limitation. Section 27 was in part born of fears that large oil companies might obtain a monopoly of the oil resources in public lands. See H. R. Rep. No. 206, 65th Cong., 2d Sess., p. 5.

4. The background of the Mineral Leasing Act also points against the likelihood that Congress intended to curtail the Secretary's general power respecting administrative cancellation of leases which had been invalidly issued (pp. 476–478, *supra*).

Public lands valuable for their oil deposits had been opened to entry as placer mining claims by the Act of

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[8] The Act originally authorized issuance of a prospecting permit to a qualified applicant for land not within a known geologic structure. § 13, 41 Stat. 441. In 1935 prospecting permits were converted to noncompetitive leases, 49 Stat. 674, 676, and the provision for administrative cancellation for breach of the conditions of the grant before the land was proven was carried over to § 17. 49 Stat. 678. In 1946 this provision was transferred from § 17 to § 31. 60 Stat. 956. As explained in S. Rep. No. 1392, 79th Cong., 2d Sess., p. 3, this transfer effected no substantive change in the Secretary's powers:

"Section 31 of the Mineral Leasing Act is amended to consolidate in that section various provisions of the act relating to termination or forfeiture of leases for default by the lessee, the substance of the existing law being retained in the amended section."

February 11, 1897, 29 Stat. 526. In 1909, confronted with a rapid depletion of petroleum reserves under this system, the President issued a proclamation withdrawing from further entry pending the enactment of conservation legislation upwards of 3,000,000 acres of land in California and Wyoming. In 1914 a mineral leasing bill passed both Houses of Congress but died in conference at the close of the session, see H. R. Rep. No. 668, 63d Cong., 2d Sess., and a mineral leasing program was considered by each subsequent Congress until the Mineral Leasing Act of 1920 was passed.

The committee reports reveal that one of the main congressional concerns was the prevention of an overly rapid consumption of oil resources that the Government, particularly the Navy, might need in the future. See H. R. Rep. No. 206, 65th Cong., 2d Sess. 5. Conservation through control was the dominant theme of the debates. See, *e. g.*, H. R. Rep. No. 398, 66th Cong., 1st Sess. 12–13. The report on an earlier version of the bill that eventually became the Mineral Leasing Act stated:

> "The legislation provided for herein, it is thought, will go a long way toward . . . reserv[ing] to the Government the right to supervise, control, and regulate the . . . [development of natural resources], and prevent monopoly and waste and other lax methods that have grown up in the administration of our public-land laws." H. R. Rep. No. 1138, 65th Cong., 3d Sess. 19.

It would thus be surprising to find in the Act, which was intended to expand, not contract, the Secretary's control over the mineral lands of the United States, a restriction on the Secretary's power to cancel leases issued through administrative error—a power which was then already firmly established. See pp. 476–478, *supra*. More particularly, we can perceive no reason why Congress

should have given the Secretary authority to cancel administratively a prospecting permit (later a noncompetitive lease), § 26, 41 Stat. 448, on the basis of post-issuance events, but implicitly denied him that power in respect of pre-issuance occurrences.

The fragmentary excerpts of legislative history relied on by petitioner do not suggest an opposite conclusion. The comment that "the Secretary of the Interior has no right or authority under the bill to cancel a lease" was made in the course of a discussion on the floor of the Senate about lands on which there were producing wells in existence, and it was assumed that there had been a post-issuance violation of the terms of the lease; [9] the Secretary here claims no authority to cancel a lease in such a situation. The remark in the House debates that "there must be a showing made in court before the forfeiture can be secured" occurred in discussion relating to § 27 of the Act,[10] which is, as we have seen, a partial exception to the general scheme of forfeitures.

III.

From the beginnings of the Mineral Leasing Act the Secretary has conceived that he had the power drawn in question here, and Congress has never interfered with its exercise.

The power was first invoked with respect to prospecting permits, as to which the statute authorized administrative cancellation only on the basis of post-issuance breach (note 8, *supra,* and accompanying text). See, *e. g., Leach* v. *Cornell,* No. A–1687 (unpublished departmental decision, Aug. 13, 1921); *McCarthy* v. *Son,* No. A–2398 (unpublished decision, Mar. 4, 1922); *Murray* v. *McNabb,* No. A–4412 (unpublished decision, Feb. 14,

[9] 58 Cong. Rec. 4168.

[10] 58 Cong. Rec. 7604.

1923); *Moon* v. *Woodrow,* 51 I. D. 118 (1925); *Drake* v. *Simmons,* No. A–16885 (unpublished decision, Oct. 28, 1932). Following the replacement of prospecting permits by noncompetitive leases in 1935 (note 8, *supra*), the same power was exercised with respect to them. See, *e. g., Fenelon Boesche,* No. A–21230 (unpublished decision, Feb. 21, 1938); *Reay* v. *Lackie,* 60 I. D. 29 (1947); *Iola Morrow,* No. A–27177 (unpublished decision, Oct. 10, 1955); *R. S. Prows,* 66 I. D. 19 (1959).[11]

Although the Act, as it relates to oil and gas leases, has been amended a dozen times in the last 40 years,[12] Congress has never interfered with this long-continued administrative practice. The conclusion is plain that Congress, if it did not ratify the Secretary's conduct, at least did not regard it as inconsistent with the Mineral Leasing Act. Cf. *Ivanhoe Irrig. Dist.* v. *McCracken,* 357 U. S. 275, 293; *Fleming* v. *Mohawk Co.,* 331 U. S. 111, 116; *Billings* v. *Truesdell,* 321 U. S. 542, 552–553.

IV.

The present case is a peculiarly appropriate one for administrative determination in the first instance. At issue was simply the question whether petitioner's lease

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[11] In *Melish Consolidated Placer Oil Mining Co.* v. *Testerman,* 53 I. D. 205 (1930), the First Assistant Secretary of the Interior stated that the "lease once granted was beyond recall by the Secretary and is only subject to cancellation in the Federal courts (Sec. 31, act of February 25, 1920)." This dictum, expressed with reference to a *competitive* lease, casts no doubt on the Secretary's uniform course of decision regarding permits and noncompetitive leases.

[12] See Act of April 30, 1926, 44 Stat. 373; Act of July 3, 1930, 46 Stat. 1007; Act of March 4, 1931, 46 Stat. 1523; Act of August 21, 1935, 49 Stat. 674; Act of August 26, 1937, 50 Stat. 842; Act of August 8, 1946, 60 Stat. 950; Act of June 1, 1948, 62 Stat. 285; Act of September 1, 1949, 63 Stat. 682; Act of July 29, 1954, 68 Stat. 583; Act of August 2, 1954, 68 Stat. 648; Act of September 21, 1959, 73 Stat. 571; Act of September 2, 1960, 74 Stat. 781.

offer was defective because it failed to include an adjoining 40-acre tract under application by another party, and this question had already been decided adversely to petitioner's position by the Secretary in a previous case interpreting the governing departmental regulations. *Natalie Z. Shell, supra.* Matters of this nature do not warrant initial submission to the judicial process. Indeed the magnitude and complexity of the leasing program conducted by the Secretary [13] make it likely that a seriously detrimental effect on the prompt and efficient administration of both the public domain and the federal courts might well be the consequence of a shift from the Secretary to the courts of the power to cancel such defective leases.

Recognition of the Secretary's power here serves to protect the public interest in the administration of the public domain. Cancellation of this kind of erroneously issued lease gives effect to regulations designed to check the undue splitting up of tracts, which might facilitate frauds, hinder the development of oil and gas resources, and render supervision very burdensome. See *Annie Dell Wheatley,* 62 I. D. 292, 293–294 (1955). In addition, exercise

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[13] The Secretary, in his brief (pp. 12–13), informs us that on June 30, 1960, there were 139,000 outstanding leases supervised by the Department of the Interior under the Mineral Leasing Act, which covered 113,000,000 acres. The total number of outstanding leases supervised by the Department under all programs—public lands, acquired lands, Indian, Naval Petroleum Reserve and Outer Continental Shelf—was 159,000, covering 125,000,000 acres.

In many instances there are multiple applications for leases of the same land, sometimes hundreds for the same tract. For example, in a one-month period in 1961 there were 10,742 applications filed in the Santa Fe Land Office alone, many of which affected the same acreage. And in the three-year period ending June 30, 1960, there were 1,129 administrative cancellations out of the total of 54,000 leases issued during that period.

of the administrative power in cases of this type safeguards the statutory rights of conflicting claimants.

In the day-to-day operation of the Bureau of Land Management, the managers of the local land offices act on each lease application in chronological sequence. If the land is available, if the applicant is qualified, and if the application appears to conform to the regulations, a lease will issue. In due course the manager will come to conflicting applications for the same land. If a later applicant is not the first qualified, his application will be denied. The notice of denial will probably afford the first occasion for an applicant to investigate whether he was in truth the first qualified applicant, and to appeal on this ground to the Director of the Bureau of Land Management and the Secretary of the Interior. Thus, given the nature of the land office's business, the power of cancellation, at least while conflicting applications are pending, is essential to secure the rights of competing applicants.[14]

We sanction no broader rule than is called for by the exigencies of the general situation and the circumstances of this particular case. We hold only that the Secretary has the power to correct administrative errors of the sort involved here by cancellation of leases in proceedings timely instituted by competing applicants for the same land.

In so holding we do not open the door to administrative abuses. The regulations of the Department of the Inte-

[14] Petitioner contends that if an administrative cancellation proceeding is permitted to the Secretary, it would be imprudent for a lessee, since his interest would thus be precarious, to assume the financial risk of developing his lease, and therefore the effective term of his lease would be curtailed even if he were finally held to be the first qualified applicant. But the same delay—and perhaps even a longer one—would result if the Secretary were remitted to judicial proceedings for cancellation.

rior provide for adversary proceedings on appeals taken within the Department where other private parties will be affected by the decision. See generally 43 CFR, pt. 221. Appeal is of right, 43 CFR §§ 221.1, 221.31, the appellant is required to notify his opponent, 43 CFR §§ 221.4, 221.34, and the latter has full rights of participation, 43 CFR §§ 221.5–221.6, 221.35. And final action by the Secretary, see 43 CFR § 221.37, has always been subject to judicial review. 30 U. S. C. (Supp. IV, 1963), § 226–2; see, *e. g., Noble* v. *Union River Logging R. Co.*, 147 U. S. 165; *Moore* v. *Robbins, supra.*

We conclude that the judgment of the Court of Appeals must be

Affirmed.

CAMPBELL ET AL. *v.* UNITED STATES.

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

No. 631. Argued April 25, 1963.—
Decided May 27, 1963.

After this Court's remand of this case, 365 U. S. 85, for further proceedings to determine whether petitioners' motion under the Jencks Act, 18 U. S. C. § 3500, for production of a pretrial statement of a government witness had been erroneously denied by the Federal District Court in their trial for bank robbery, further hearings were held in the District Court, from which it appeared that, after interviewing the witness and taking longhand notes of his account of the robbery, an F. B. I. Agent had repeated back to the witness this account, referring to his notes; the witness had indicated that the Agent's oral presentation was accurate but had not signed the notes; some hours later the Agent had incorporated the substance of these notes in an interview report; and he had then destroyed the notes. The District Court found specifically that the Agent's oral presentation to the witness had "not merely adhered to the substance [of the notes] but so far as practical to the precise words"; that the witness had adopted this presentation; that the interview report was "almost *in ipsissima verba* the narrative [the Agent] had just checked with" the witness; and that, therefore, the report was producible as "a written statement made by said witness and . . . adopted . . . by him," within the meaning of § 3500 (e) (1). The Court of Appeals reversed. *Held:* The interview report should have been produced under § 3500 (e) (1) at petitioners' trial; the judgment of the Court of Appeals and the judgments of conviction are vacated; and the case is remanded for further proceedings. Pp. 488–497.

(a) On this record, the producibility of the interview report under § 3500 (e) (1) depended upon the answers to two questions: (1) whether the Agent's oral version of the notes may fairly be deemed a reading back of the notes to the witness, and (2) whether the interview report may fairly be deemed a copy of the notes. Pp. 492–493.

(b) These are questions of fact, the determination of which by the District Judge may not be disturbed unless clearly erroneous,

and the District Judge's findings thereon were not clearly erroneous. Pp. 493–495.

(c) There were discrepancies between the testimony of the witness at the trial and his statements in the interview report, and fairness in federal criminal procedure, which the Jencks Act was enacted to secure, demands that this interview report, reasonably found to be an accurate copy of a written statement made by the witness the day after the robbery and adopted by him as his own, be producible for impeachment purposes. Pp. 495–497.

303 F. 2d 747, judgment vacated and case remanded.

Melvin S. Louison and *Lawrence F. O'Donnell* argued the cause for petitioners. With him on the brief was *Leonard Louison.*

Solicitor General Cox argued the cause for the United States. With him on the brief were *Assistant Attorney General Miller, Bruce J. Terris, Beatrice Rosenberg* and *Theodore George Gilinsky.*

Mr. Justice Brennan delivered the opinion of the Court.

This case, involving questions under the so-called Jencks Act, 18 U. S. C. § 3500,[1] is before the Court for the second time. When it was first here, we held inadequate

[1] The Act provides in part:

"(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

. . . . . .

"(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discre-

the procedure employed by the trial court for ascertaining whether notes taken by Federal Agent John F. Toomey, Jr., at his interview with Dominic Staula—a key government witness at petitioners' trial for bank robbery—or the Interview Report compiled by Toomey from his notes, were producible statements within the meaning of § 3500 (e)(1) or (e)(2). 365 U. S. 85.[2] We declined to order petitioners' convictions vacated, but remanded "to the trial court with direction to hold a new inquiry consistent with this opinion . . . [and] supplement the record with new findings . . . ." 365 U. S., at 98–99. On remand the trial judge held a hearing at which Toomey but not Staula testified. Toomey gave the following testimony: On the day following the robbery he interviewed Staula privately. Staula was a depositor of the bank and had been an eyewitness to the crime. Toomey took longhand notes of the interview, which were "complete . . . with respect to the pertinent information" given by Staula, although not a complete, word-for-word transcription of what he had said. Toomey then recited

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tion shall determine that the interests of justice require that a mistrial be declared.

"(e) The term 'statement', as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

"(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

"(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

[2] Specifically, we held that the district judge was required to hold a nonadversary hearing on the producibility of the notes and Interview Report. We also directed that attention be given the question what sanctions, if any, would be appropriate if it developed that the notes were producible but had been destroyed and that no copy had survived. See 365 U. S., at 98, 18 U. S. C. § 3500 (d).

back to Staula the substance of his account, referring to his notes, and Staula said that Toomey had got it straight. Staula did not read or sign the notes. About seven hours later Toomey, after rearranging his notes to accord with the chronology of Staula's account, dictated the Interview Report, relying primarily on his notes but also on memory. After checking the transcribed report against the notes and finding it accurate, he destroyed the notes.[3]

On the basis of this testimony and the record of Staula's testimony at petitioners' trial, the trial judge held that neither the notes nor the Interview Report was producible under the Jencks Act. 206 F. Supp. 213. On appeal, the Court of Appeals expressed dissatisfaction with the judge's conduct of the hearing but accepted his ruling that the Interview Report was not producible. 296 F. 2d 527. However, the court held that the status of the notes could not be adequately determined without fresh testimony from Staula.[4] Accordingly the court, while retaining jurisdiction of the appeal generally, ordered a further hearing before a district judge other than the trial judge, with both Staula and Toomey to testify, for a determination "whether Staula signed or otherwise adopted or approved the notes." *Id.*, at 534.

At this hearing Staula testified that he had not read or signed Toomey's notes but had told Toomey that what the latter had repeated back to him was, to the best of

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[3] The Interview Report was released by the Court of Appeals and was included in the record before this Court in *Campbell* I. The full text of the report is reproduced in 365 U. S., at 90 and 91, n. 3.

[4] Although Toomey testified at the hearing that Staula had not signed or read the notes, Staula had testified at petitioners' trial: "I think they wrote down what I said, and then I think they gave it back to me to read over, to make sure that it was right. And I think I had to sign it. Now, I am not sure. I couldn't remember before." 365 U. S., at 89, n. 2. Staula was referring to his interview with Toomey.

his knowledge, what had happened. Toomey amplified his earlier testimony. On this record the second district judge concluded, 199 F. Supp. 905, that Toomey's oral presentation to Staula had "not merely adhered to the substance [of the notes] but so far as practical to the precise words," *id.*, at 906; that Staula had adopted this presentation; that the Interview Report was "almost *in ipsissima verba* the narrative . . . [Toomey] had just checked with Staula," *id.*, at 907; and that therefore the report was producible as "a written statement made by said witness and . . . adopted . . . by him." 18 U. S. C. § 3500 (e)(1).

The Court of Appeals then filed a supplemental opinion in which it accepted the second district judge's findings but held that the report was neither a written statement approved by Staula nor a copy of such a statement, and hence did not come within § 3500 (e)(1). 303 F. 2d 747. We granted certiorari and leave to proceed *in forma pauperis*. 371 U. S. 919. We reverse. We agree with the second district judge that the Interview Report was producible under § 3500 (e)(1); consequently, we do not reach the other issues tendered by petitioners.[5]

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[5] These issues, basically, are whether the Interview Report is producible under § 3500 (e)(2) of the Jencks Act and whether, if the notes are producible under the Act, their destruction gives rise to sanctions under subsection (d), or permits secondary evidence of their contents to be produced. The second district judge found that the Interview Report was a substantially verbatim recording of Staula's oral statement to Toomey and hence producible under § 3500 (e)(2). The Court of Appeals disagreed. Moreover, in denying rehearing, the Court of Appeals rendered an opinion holding that no sanctions could attach to Toomey's destruction of his notes because such destruction had not been in bad faith. 303 F. 2d, at 751. Our holding that the Interview Report is producible under § 3500 (e)(1) makes it unnecessary for us to consider any of the other issues, and we intimate no view on the correctness of the Court of Appeals' rulings on them.

In *Campbell* I, we posed the following questions to frame the hearing on remand:

> "Did Toomey write down what Staula told him at the interview? If so, did Toomey give Staula the paper 'to read over, to make sure that it was right,' [as Staula had testified at the trial] and did Staula sign it?
>
> "Was the Interview Report the paper Staula described, or a copy of that paper? In either case, as the trial judge ruled, the Interview Report would be a producible 'statement' under subsection (e)(1)." 365 U. S., at 93.

We now know that the "paper Staula described" was Toomey's interview notes, and that Staula adopted Toomey's oral presentation based on the notes. Plainly, if Toomey in making the oral presentation was in fact reading the notes back to Staula, the latter's adoption of the oral presentation would constitute adoption of a written statement made by him, namely, the notes. See *United States* v. *Annunziato,* 293 F. 2d 373, 382 (C. A. 2d Cir. 1961); *United States* v. *Aviles,* 197 F. Supp. 536, 556 (D. C. S. D. N. Y. 1961).[6] The producibility of the Interview Report under § 3500 (e)(1) would therefore seem to depend upon the answers to two questions: whether Toomey's oral version of the notes may fairly

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[6] It is settled, of course, that a written statement, to be producible under § 3500 (e)(1), need not be signed by the witness, *Campbell* I, at 93–94; *Bergman* v. *United States,* 253 F. 2d 933, 935, n. 1 (C. A. 6th Cir. 1958); cf. *United States* v. *Allegrucci,* 299 F. 2d 811, 813 and n. 3 (C. A. 3d Cir. 1962), or written by him, *Campbell* I, at 93; *United States* v. *Thomas,* 282 F. 2d 191, 194 (C. A. 2d Cir. 1960); H. R. Rep. No. 700, 85th Cong., 1st Sess. 5–6 (1957); Note, The Supreme Court, 1960 Term, 75 Harv. L. Rev. 40, 181–182 (1961), or be a substantially verbatim recording of a prior oral statement, see *United States* v. *McCarthy,* 301 F. 2d 796 (C. A. 3d Cir. 1962); *United States* v. *Berry,* 277 F. 2d 826 (C. A. 7th Cir. 1960).

be deemed a reading back of the notes to Staula; and whether the Interview Report may fairly be deemed a copy of the notes.

We think these questions properly are ones of fact, the determination of which by the district judge may not be disturbed unless clearly erroneous. "Final decision as to production must rest, as it does so very often in procedural and evidentiary matters, within the good sense and experience of the district judge guided by the standards we have outlined, and subject to the appropriately limited review of appellate courts." *Palermo* v. *United States,* 360 U. S. 343, 353. Cf. *id.,* at 360 (concurring opinion); *Hance* v. *United States,* 299 F. 2d 389, 397 (C. A. 8th Cir. 1962); *United States* v. *Thomas,* 282 F. 2d 191 (C. A. 2d Cir. 1960). "The inquiry . . . [is] a proceeding necessary to aid the judge to discharge the responsibility laid upon him to enforce the statute. . . . The statute . . . implies the duty in the trial judge affirmatively to administer the statute in such way as can best secure relevant and available evidence . . . ." 365 U. S., at 95. To determine the accuracy with which Toomey's oral presentation and Interview Report reproduced his notes was preeminently a task for a *nisi prius,* not an appellate, court. It required the *ad hoc* appraisal of one of the "myriad" "possible permutations of fact and circumstance," *Palermo* v. *United States, supra,* at 353, present in such cases; it may well have depended upon nuances of testimony and demeanor of witnesses; and it concerned a subject, rulings on evidence, which is peculiarly the province of trial courts.[7]

For the purpose of applying the clearly-erroneous standard in the instant case, we deem controlling the find-

[7] The producibility of statements under the Jencks Act and their admissibility under the rules of evidence are separate questions, *United States* v. *Berry,* 277 F. 2d 826, 830 (C. A. 7th Cir. 1960), but obviously closely related.

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ings of the second district judge. As the Court of Appeals correctly held, the first hearing did not conform to our mandate in *Campbell* I because Staula was not called to testify; and the hearing was unsatisfactory in other respects.[8] Moreover, while Toomey's testimony at the second hearing did not contradict his earlier testimony, it was considerably more detailed. Also, we perceive no basic inconsistency between the fact-findings made at the first hearing and those made at the second, although the later findings were more elaborate.[9] Finally, we read the supplemental opinion of the Court of Appeals as having accepted the later findings as controlling and based its decision upon them.

In so doing, the Court of Appeals implicitly concluded that the later findings were not clearly erroneous. That

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[8] "While technically the court called Toomey itself and permitted the defendants to cross-examine, the restrictions imposed upon counsel were such that it was cross-examination in name only. In spite of the fact that the witness was a special agent of long standing who had discussed his testimony with the Assistant U. S. Attorney immediately before the hearing, the court hovered constantly over him like an over-anxious mother. With respect to correlation between the notes, Staula's statements, and the eventual report, the Supreme Court's directions for a non-adversary proceeding to assist the court in performing its duty, with the defendants permitted to cross-examine, were honored largely in the breach." 296 F. 2d, at 529.

[9] The first district judge's findings, so far as pertinent to the issue of producibility under § 3500 (e)(1), read as follows:

"3. . . . Agent Toomey repeated to Mr. Staula, from memory and using the notes which he had taken only to refresh his recollection, the substance of the story which Mr. Staula had related to him. . . .

"4. Agent Toomey did not transcribe the story related to him by Mr. Staula word for word." 206 F. Supp., at 214. We do not read these as findings that Toomey's oral presentation was not an accurate reproduction of the contents of the notes. Apparently, the judge based his conclusion of nonproducibility under § 3500 (e)(1) on the legally erroneous supposition that adoption of an oral presentation of

conclusion was surely sound. Although there may well be small differences as among the notes, oral presentation, and Interview Report, it is not seriously suggested that there was a material variance or inconsistency among them.[10] And the district judge was entitled to infer that an agent of the Federal Bureau of Investigation of some 15 years' experience would record a potential witness' statement with sufficient accuracy as to obviate any need for the courts to consider whether it would be "grossly unfair to allow the defense to use statements to impeach a witness which could not fairly be said to be the witness' own." *Palermo* v. *United States, supra,* at 350. We cannot say, therefore, that the second district judge's finding that the Interview Report was a copy of a written statement made and adopted by Staula was clearly erroneous.[11]

Our holding today only gives effect to the "command of the statute [which] is . . . designed to further the fair and just administration of criminal justice . . . ."

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a written statement did not constitute a permissible mode of adopting the written statement.

[10] One judge, concurring in the Court of Appeals, questioned the correctness of the Distict Court's finding that the Interview Report recorded Staula's statement "almost *in ipsissima verba.*" 303 F. 2d, at 751. But he did not suggest, nor, we think, could he on this record, that there were material differences between the statement and the report. It is not suggested, for example, that the descriptions of the robbers in the report or the statement in the report that Staula had not observed a third robber—the crucial portions of the report for impeachment purposes—differed in the slightest relevant particular from the notes or oral presentation. The only variances, apparently, are grammatical and syntactical changes, rearrangement into chronological order, and omissions and additions of information immaterial for impeachment purposes.

[11] As a copy, we consider the report admissible as independent evidence for impeachment purposes, and not merely as secondary evidence of the notes which have been destroyed. See generally *United States* v. *Annunziato, supra,* at 382; *United States* v. *Thomas, supra,* at 194–195.

Campbell I, 365 U. S., at 92.[12] Petitioners—Alvin R. Campbell and Arnold S. Campbell, brothers, and Donald Lester—were convicted of a serious crime and sentenced to long prison terms. At their trial, held four months after the bank robbery, Staula testified that there had been three robbers. One, who had worn "a white shirt with short sleeves," Record, *Campbell* I, No. 53, October Term 1960, p. 141, he said resembled Lester. Another, who "had on a blue suit," *id.*, p. 142, he said resembled Arnold Campbell. The third he had glimpsed "[a]t the vault," *id.*, p. 170, but could not describe. The Interview Report, however, states that Staula "did not observe a third man in the bank." Of the two he did observe, one is described as wearing a "[d]ark blue suit" and "[w]hite shirt"; but at the trial, when asked whether he remembered "what kind of a shirt, if any, the man in the blue suit was wearing," Record, *supra,* p. 148, Staula answered: "No, because I saw him from the side. I didn't see the front of him. I didn't see his shirt." *Ibid.* And in the description in the report of the second man Staula observed, there is no mention of his wearing "a white shirt with short sleeves"; he is only described as "wearing gray chino pants," and the report adds that Staula "only observed the man . . . for an instant and could give no further description of him." Surely fairness in federal criminal procedure, which the Jencks Act

[12] "Every experienced trial judge and trial lawyer knows the value for impeaching purposes of statements of the witness recording the events before time dulls treacherous memory. Flat contradiction between the witness' testimony and the version of the events given in his reports is not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony." *Jencks* v. *United States,* 353 U. S. 657, 667. The Jencks Act, of course, "reaffirms" our holding in *Jencks* v. *United States, supra. Campbell* I, at 92.

was enacted to secure, *Campbell* I, 365 U. S., at 92, demands that this Interview Report, reasonably found to be an accurate copy of a written statement made the day after the robbery by Staula and adopted by him as his own, be producible for impeachment purposes.[13]

The judgment of the Court of Appeals and the judgments of conviction are vacated,[14] and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE CLARK, with whom MR. JUSTICE HARLAN and MR. JUSTICE STEWART join, dissenting.

In this case an FBI Agent, John F. Toomey, Jr., conducted a 30-minute interview of Dominic Staula, a witness to the bank robbery involved. The Special Agent asked Staula some questions and while they were being answered jotted down notes. Upon completion of the interview the Special Agent orally recited to Staula the substance of the interview, refreshing his memory from his notes as he did so. He then asked Staula if the recitation was correct and received an affirmative reply. This was at noon. About nine o'clock that night the Special Agent transcribed the report on a dictating machine for subsequent typing, using the notes, as well as his memory, for the dictation. After the report was

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[13] We intimate no view on the probative weight to be accorded the Interview Report as impeaching Staula's trial testimony; that is a matter for the triers of facts. And of course nothing we say is intended to suggest that a showing of inconsistency is a prerequisite to the production of documents under the Jencks Act. *Jencks* v. *United States, supra,* at 667–668; 18 U. S. C. § 3500 (b).

[14] Understandably, no contention has been made that the refusal to produce the Interview Report can be deemed harmless error under the principles laid down in *Rosenberg* v. *United States,* 360 U. S. 367. Cf. *Gordon* v. *United States,* 344 U. S. 414.

typed by a secretary, working entirely from the transcription, he checked its accuracy and then destroyed the notes.

The Court holds the "oral recitation" to be "a written statement made by said witness [Staula] and . . . adopted . . . by him," within the purview of 18 U. S. C. § 3500 (e)(1). It reaches this result via a construction reminiscent of the Rube Goldberg cartoons, basing its holding upon the following conclusions: (1) the Special Agent may be fairly deemed to have read his notes back to Staula, since "it is not seriously suggested that there was a material variance or inconsistency"; (2) Staula approved and thereby adopted this "reading" of the notes; and (3) the Special Agent reduced the notes to narrative in his interview report which, as the trial court found, was "almost *in ipsissima verba* the narrative" the Special Agent had recited to Staula. The Court thus transmutes the interview report into a written statement made by Staula and adopted by him and strikes down the conviction because the interview report was not produced at the trial upon the request of the defense.

This conclusion, however, will not bear analysis. Even though Staula's approval of the oral recitation as correct be deemed *arguendo* an adoption by him, the oral recitation, nevertheless, was not a written statement within the meaning of the Jencks Act, 18 U. S. C. § 3500. The interview report of the Special Agent was written by the agent, not Staula, and was never approved by Staula in its written form. The statute applies to "a written statement made by said witness." At the very least the "written statement" referred to by the Act is one which is, if not written by the witness, adopted by him in its final written form. The notes to which the agent referred in preparing his report do not rise to the dignity of a statement. They were, as the trial court found, "jottings" of the Special Agent in aid of his memory for purposes of

later dictating his formal report. These notes were not in narrative form, they were not read to Staula by the Special Agent, nor did Staula read them himself or initial or sign them. The Special Agent merely recounted to Staula a narrative of the events which the latter had described. It is true that in so doing he referred to his notes from time to time, but the evidence is clear that the notes were not included verbatim in this recitation. Every lawyer—indeed every layman experienced in the taking of interviews—knows full well that it is extremely unlikely that any two narratives, even though prepared from identical notes, will be alike. Likewise the common experience of all of us belies the conclusion that the interview report was "almost *in ipsissima verba* the narrative" recited by the Special Agent to Staula. But even if it were, the statute does not cover a written report such as we have here, prepared from the agent's memory, as well as his notes, some nine hours subsequent to the interview and neither read by or to the witness nor shown to him prior to what the Court terms his "adoption" of it.

The Court reads the trial court's findings as holding that the Special Agent, in presenting the information for Staula's comments after the interview, adhered to the precise words of the notes, so far as practical. But the testimony is to the contrary and is unequivocal.* It then

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*"Q. Did you, Mr. Toomey, write down what Mr. Staula told you at the interview?

"A. I took notes concerning the information that he furnished to me." Cross-examination of Special Agent Toomey, Transcript of Record, p. 4.

. . . . . .

"Q. Mr. Toomey, did you give Mr. Staula the paper that you made your notes on to read over?

"[fol. 12] A. I did not, sir.

"Q. Did you read it back to Mr. Staula?

[*Footnote continued on p. 500*]

holds that this finding is not clearly erroneous. But the simple answer to this is that the finding has no support in the record. In addition, there are three vital flaws in the adoption of this inference—and that is all that it is—that the oral narrative to Staula was identical to that related nine hours later in the interview report. The trial judge stated what was said to be Toomey's testimony that "*anyone* who heard Staula and had Toomey's jottings would have dictated *the same words.*" (Emphasis supplied.) 199 F. Supp. 905, 907. But this overlooks (1) the limitation Toomey put on the word "*anyone,*" *i. e.,* anyone who had "the same knowledge of the case"; (2) that Toomey did not say that the interview report was in "the same words" as the narrative to Staula but twice

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"A. As I previously stated, I took notes and I did not read the notes back to him verbatim." *Ibid.*

. . . . . .

"THE COURT: The witness said he went over his notes.

"Did you mean to infer that you read your notes over [fol. 54] to Mr. Staula?

"THE WITNESS: No, sir, I did not.

"THE COURT: You looked at them and then you repeated what he said—you didn't read them over to him?

"THE WITNESS: No.

"THE COURT: He didn't see them?

"THE WITNESS: No, your Honor.

"THE COURT: They were in your possession so he could not have done that.

"Q. There was the desk in the front of where both of you people were sitting?

"A. Yes.

"Q. Your notes contained the whole story supplied to you by Mr. Staula?

"A. That is correct.

"Q. And it was vital, wasn't it, Mr. Toomey, that what was contained in your notes be Mr. Staula's story?

"A. That is correct.

"Q. The method you employed to double check was to read your notes, of what Mr. Staula had told you aloud and get Mr. Staula to

repeated in his testimony that the language of the interview report was *"substantially the same thing"* he had related to Staula; and (3) the notes made by Toomey had not been "just checked with Staula," *ibid.*, for it had been nine hours since Toomey had even seen him. Hence the findings of the Court of Appeals were entirely correct and those of the trial judge clearly erroneous. This is made as clear as crystal in the concurring opinion of Judge Aldrich. As he said, it would be a "surprising coincidence" that "the checking back with a witness at noontime of a consolidation of jottings and memory, and the dictation of a report in the evening, would result in the

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agree with you that that was accurate—the information that you had for future use, that is so isn't it, Mr. Toomey?

"[fol. 55] A. Not exactly. I did not read them back to the witness. I went over the story again, refreshing my memory by referring to my notes.

"Q. That is right—that is what your memory was, which was on the papers that you had recorded—and whatever you said came from those papers, that is so, isn't it?

"A. No, sir, not everything." *Id.*, at 19–20.

. . . . . .

"Q. Now, of course, Mr. Toomey, with all your experience, investigating this bank robbery, it is so, isn't it, that the most vital part of the entire interview was the question whether or not your notes meant to Mr. Staula the same thing as they meant to you; that is so, isn't it?

"MR. KOEN: I pray your Honor's judgment.

"THE COURT: Well, he may answer that question.

"A. No.

"Q. Now isn't it so, Mr. Toomey, that another vital part of your interview was whether or not the wellspring of all your knowledge regarding Dominic Staula was correct?

"A. Yes.

"Q. As a matter of fact, after you had read back, it is so, isn't it, sir, that the most vital part of your entire effort taking notes, reading them back, was the question [fol. 327] whether or not Dominic Staula agreed with them?

"A. I didn't read the notes back to him, sir." Redirect examination of Special Agent Toomey, *id.*, at 123.

identity inferred by the court." 303 F. 2d 747, 751. Even the expertise of an experienced Special Agent of the FBI does not rescue such a conclusion from beyond credulity.

As we said in *Palermo* v. *United States,* 360 U. S. 343, 350 (1959), the Congress felt that it would "be grossly unfair to allow the defense to use statements to impeach a witness which could not fairly be said to be the witness' own rather than the product of the investigator's selections, interpretations and interpolations." This is exactly what the Court is doing today. Extension of the statute to include such reports can only result in mischief, permitting a skillful defense lawyer to repudiate and destroy a witness and obstruct the administration of justice. I therefore dissent.

HAYNES *v.* WASHINGTON.

CERTIORARI TO THE SUPREME COURT OF WASHINGTON.

No. 147. Argued February 26–27, 1963.—Decided May 27, 1963.

In a Washington State Court, petitioner was tried on a charge of robbery, convicted and sentenced to imprisonment. Over his timely objection, there was admitted in evidence a written confession obtained after he had been held incommunicado for 16 hours and had been told that he could not call his wife until he had signed it. In accordance with local practice, the question as to the voluntariness of the confession was left for determination by the jury, and it brought in a general verdict of guilty. *Held:* On the record in this case, the confession was not voluntary, and its admission in evidence violated the Due Process Clause of the Fourteenth Amendment. Pp. 504–520.

(a) A review of the entire record reveals that petitioner's account of the circumstances in which his written confession was obtained and signed was uncontradicted in its essential elements. Pp. 507–513.

(b) The uncontroverted portions of the record disclose that petitioner's written confession was obtained in, and was the result of, an atmosphere of substantial coercion and inducement created by statements and actions of state authorities, which made its admission in evidence violative of due process. Pp. 513–515.

(c) This Court cannot be precluded by the verdict of a jury from determining whether the circumstances under which a confession was obtained were such that its admission in evidence amounts to a denial of due process. Pp. 515–518.

58 Wash. 2d 716, 364 P. 2d 935, judgment vacated and cause remanded.

Lawrence Speiser argued the cause for petitioner. With him on the briefs were *Francis Hoague* and *William W. Ross.*

George A. Kain argued the cause for respondent. With him on the briefs were *Joseph J. Rekofke* and *John J. Lally.*

Mr. Justice Goldberg delivered the opinion of the Court.

The petitioner, Raymond L. Haynes, was tried in a Superior Court of the State of Washington on a charge of robbery, found guilty by a jury, and sentenced to imprisonment "for a term of not more than 20 years." The Washington Supreme Court affirmed the conviction, with four of nine judges dissenting. 58 Wash. 2d 716, 364 P. 2d 935. Certiorari was granted, 370 U. S. 902, to consider whether the admission of the petitioner's written and signed confession into evidence against him at trial constituted a denial of due process of law.

Haynes contends that the confession was involuntary, and thus constitutionally inadmissible, because induced by police threats and promises. He testified at trial that during the approximately 16-hour period between the time of his arrest and the making and signing of the written confession, he several times asked police to allow him to call an attorney and to call his wife. He said that such requests were uniformly refused and that he was repeatedly told that he would not be allowed to call unless and until he "cooperated" with police and gave them a written and signed confession admitting participation in the robbery. He was not permitted to phone his wife, or for that matter anyone, either on the night of his arrest or the next day. The police persisted in their refusals to allow him contact with the outside world, he said, even after he signed one written confession and after a preliminary hearing before a magistrate, late on the day following his arrest. According to the petitioner, he was, in fact, held incommunicado by the police until some five or seven days after his arrest.[1]

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[1] Haynes makes no claim that he was physically abused, deprived of food or rest, or subjected to uninterrupted questioning for prolonged periods.

The State asserts that the petitioner's version of events is contradicted, that the confession was freely given, and that, in any event, the question of voluntariness was conclusively resolved against the petitioner by the verdict of the jury at trial. We consider each of these contentions in turn.

I.

The petitioner was charged with robbing a gasoline service station in the City of Spokane, Washington, at about 9 p. m. on Thursday, December 19, 1957. He was arrested by Spokane police in the vicinity of the station within approximately one-half hour after the crime.[2] Though he orally admitted the robbery to officers while en route to the police station, he was, on arrival there, not charged with the crime, but instead booked for "investigation," or, as it is locally called, placed on the "small book." Concededly, prisoners held on the "small book" are permitted by police neither to make phone calls nor to have any visitors.[3]

Shortly after arriving at the station at about 10 p. m., the petitioner was questioned for about one-half hour by Lieutenant Wakeley of the Spokane police, during which period he again orally admitted the crime. He was then placed in a line-up and identified by witnesses as one of the robbers. Apparently, nothing else was done that night.

On the following morning, beginning at approximately 9:30 a. m., the petitioner was again questioned for about an hour and a half, this time by Detectives Peck and

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[2] The petitioner's brother, Keith Haynes, had been arrested a few minutes earlier. Though also charged with, and convicted of, participation in the robbery of the service station, he does not seek review of his conviction here.

[3] Apparently recognizing the questionable nature of such a practice, the Spokane police, we are told, have since abandoned use of the "small book" and the attendant restrictive practices.

Cockburn. He once more orally admitted the robbery, and a written confession was transcribed. Shortly thereafter, he was taken to the office of the deputy prosecutor, where still another statement was taken and transcribed. Though Haynes refused to sign this second confession, he then did sign the earlier statement given to Detectives Peck and Cockburn.[4] Later that same afternoon he was taken before a magistrate for a preliminary hearing; this was at about 4 p. m. on December 20, the day after his arrest.

At the conclusion of the hearing, Haynes was transferred to the county jail and on either the following Tuesday or Thursday was returned to the deputy prosecutor's office. He was again asked to sign the second statement which he had given there some four to six days earlier, but again refused to do so.

The written confession taken from Haynes by Detectives Peck and Cockburn on the morning after his arrest and signed by Haynes on the same day in the deputy prosecutor's office was introduced into evidence against the petitioner over proper and timely objection by his counsel that such use would violate due process of law. Under the Washington procedure then in effect,[5] voluntariness of the confession was treated as a question of fact

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[4] The written confession appears to indicate on its face that it was signed shortly before 2 p. m. on December 20, about 16¼ hours after Haynes was arrested. The State asserts in its brief, however, that the total time of detention prior to signing of the confession was "17 to 19" hours. We assume, for purposes here, that the 16-hour period is sufficiently accurate.

[5] Washington has since revised its rules of practice to provide for a preliminary hearing by the trial court, out of the presence of the jury, on the issue of voluntariness of a confession. See 58 Wash. 2d, at 720, 364 P. 2d, at 937, and Rules of Pleading, Practice and Procedure, Wash. Rev. Code, Rule 101.20W, Vol. O, as amended, effective January 2, 1961.

for ultimate determination by the jury. In overruling the petitioner's objection to use of the confession, the trial judge, however, made an apparently preliminary determination that it was voluntary and "conditionally" admissible. See 58 Wash. 2d, at 719–720, 364 P. 2d, at 937. The evidence going to voluntariness was heard before the jury and the issue submitted to it. The jury returned a general verdict of guilty and was not required to, and did not, indicate its view with respect to the voluntariness of the confession.

II.

The State first contends that the petitioner's version of the circumstances surrounding the making and signing of his written confession is evidentially contradicted and thus should be rejected by this Court. We have carefully reviewed the entire record, however, and find that Haynes' account is uncontradicted in its essential elements.

Haynes testified that on the evening of his arrest he made several specific requests of the police that he be permitted to call an attorney and to call his wife. Each such request, he said, was refused. He stated, however, that he was told he might make a call if he confessed:

> "They kept wanting me to own up to robbing a Richfield Service Station and I asked Mr. [Detective] Pike several times if I could call a lawyer and he said if I cooperated and gave him a statement . . . that I would be allowed to call, to make a phone call . . . ."

On cross-examination, Lieutenant Wakeley, the officer who interrogated the petitioner on the night of his arrest, first said that Haynes did not ask him for permission to call his wife, but merely inquired whether his wife would be notified of his arrest. Lieutenant Wakeley said that

he told the petitioner that his wife would be notified.[6] Defense counsel, however, pursued the point and, only a moment later, Wakeley testified that Haynes "may have" asked permission to call his wife himself; Wakeley said he didn't "remember exactly whether he asked or whether we wouldn't notify his wife." Wakeley then testified that he simply didn't "remember" whether Haynes asked to call his wife so that she might secure a lawyer for him; in addition, the lieutenant admitted that the petitioner might have asked to call his wife after the interrogation was completed. Detective Pike, also testifying at trial, said simply that he had not talked to Haynes on the evening of the arrest.

If this were the only evidence of police coercion and inducement in the record, we would face the problem of determining whether, in view of the testimony of Lieutenant Wakeley and Detective Pike, the petitioner's own testimony would be sufficient, on review by this Court, to establish the existence of impermissible police conduct barring use of the written confession ultimately obtained. We need not pursue such an inquiry, however, since the record contains other probative, convincing, and uncontradicted evidence.

The written confession introduced at trial was dictated and transcribed while Haynes was being questioned by Detectives Peck and Cockburn on the morning of December 20, the day after the robbery. Haynes testified:

> "Q. . . . [S]tate whether or not the officers at that time asked you to give them a statement. A. Yes.

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[6] There is no indication that she was actually so notified. In fact, the petitioner's wife telephoned police at about noon on the day following the robbery, but was refused any information beyond the fact that her husband was being held. Though she identified herself and asked specifically why her husband was in jail, she was told simply "to get the morning paper and read it."

"Q. And what was your answer to that? A. I wanted to call my wife.

"Q. And were you allowed to call your wife? A. No.

"Q. . . . This was on Friday? A. Friday.

"Q. December 20th? A. Yes.

"Q. And was anything else said with respect to making a telephone call? A. Mr. Pike [*sic*] and the other officer both told me that when I had made a statement and cooperated with them that they would see to it that as soon as I got booked I could call my wife.

"Q. Well, that was the night before you were told that, wasn't it? A. I was told that the next day too, several times.

"Q. Who were the officers that were with you? A. Oh, not Mr. Pike. Mr. Cockburn and Mr. Peck, I believe.

"Q. In any event, Mr. Haynes, did you soon after that give them a statement? A. Well, not readily.

"Q. Did you give them a statement? A. Yes."

The transcribed statement itself discloses that early in the interrogation Haynes asked whether he might at least talk to the prosecutor before proceeding further. He was told: "We just want to get this down for our records, and then we will go to the prosecutor's office and he will ask the same questions that I am."

Whatever contradiction of Haynes' account of his interrogation on the night of his arrest might be found in the testimony of Lieutenant Wakeley and Detective Pike, his explicit description of the circumstances surrounding his questioning and the taking by Detectives Peck and Cockburn of the challenged confession on the following day remains testimonially undisputed. Though he took the stand at trial, Detective Cockburn did not deny that he or Detective Peck had told the petitioner that he might

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call his wife only if he "cooperated" and gave the police a statement. Cockburn said merely that he could not "remember" whether Haynes had asked to call his wife. He conceded that the petitioner "could have" made such a request. No legal alchemy can transmute such wholly equivocal testimony into a denial or refutation of the petitioner's specific recitation of events. Detective Peck did not testify and no other evidence was presented to contradict the petitioner's testimony, either as part of the prosecution's case in chief or, even more importantly, by way of rebuttal subsequent to the petitioner's testimony. We cannot but attribute significance to the failure of the State, after listening to the petitioner's direct and explicit testimony, to attempt to contradict that crucial evidence; this testimonial void is the more meaningful in light of the availability and willing cooperation of the policemen who, if honestly able to do so, could have readily denied the defendant's claims. Similarly, no evidence was offered to contradict in any way the petitioner's testimony that when first taken to the deputy prosecutor's office to sign the statement he had given to Detectives Peck and Cockburn he again requested permission to call his wife and was again refused.[7]

Though the police were in possession of evidence more than adequate to justify his being charged without delay, it is uncontroverted that Haynes was not taken before a magistrate and granted a preliminary hearing until he had acceded to demands that he give and sign the written statement. Nor is there any indication in the record that prior to signing the written confession, or even thereafter,

[7] The petitioner's incommunicado detention was in contravention of an explicit Washington statute, Wash. Rev. Code, § 9.33.020 (5), which prohibits and makes it a misdemeanor for police to "refuse permission to [an] . . . arrested person to communicate with his friends or with an attorney" when the refusal has as its purpose the obtaining of a confession.

Haynes was advised by authorities of his right to remain silent, warned that his answers might be used against him, or told of his rights respecting consultation with an attorney.

In addition, there is no contradiction of Haynes' testimony that even after he submitted and supplied the written confession used at trial, the police nonetheless continued the incommunicado detention while persisting in efforts to secure still another signature on another statement.[8] Upon being returned to the deputy prosecutor's office during the week following his arrest and while still being held incommunicado, the petitioner was again asked to sign the second statement which he had given there several days earlier. He refused to do so, he said, because, as he then told the deputy prosecutor, "all the promises of all the officers I had talked to had not been fulfilled and I had not been able to call my wife and I would sign nothing under any conditions until I was allowed to call my wife to see about legal counsel." The State offered no evidence to rebut this testimony.[9] Similarly uncontradicted is Haynes' testimony that it was not until

[8] While occurring after completion of the signed confession here challenged, such action not only tends to bear out petitioner's version of what happened earlier but displays and confirms an official disregard by police of state law, see note 7, *supra,* and of the basic rights of the defendant. See *Haley* v. *Ohio,* 332 U. S. 596, 600 (opinion of Mr. Justice Douglas). The police "were rather concerned primarily with securing a statement from defendant on which they could convict him. The undeviating intent of the officers to extract a confession from petitioner is therefore patent. When such an intent is shown, this Court has held that the confession obtained must be examined with the most careful scrutiny . . . ." *Spano* v. *New York,* 360 U. S. 315, 324.

[9] Though the deputy prosecutor himself appeared as a witness for the State at the trial, his testimony was in no way directed to this statement made in his office or the attendant circumstances and he was not recalled to the stand after Haynes testified so that he might controvert the petitioner's version of events.

during or after this second interview with the prosecutor on the Tuesday or Thursday—Haynes could not be quite certain—but, in any event, some five or seven days after his arrest, that he was first allowed to call his wife.

The contested written confession itself contains the following exchange:

> "Q. Have we made you any threats or promises? A. No.
>
> "Q. Has [*sic*] any police officers made you any promises or threats? A. No—except that the Lieutenant promised me that as soon as I was booked that I could call my wife.
>
> "Q. You are being held for investigation—you haven't been booked yet. When you are, you will be able to phone your wife."

The State argues that the quoted answers to the first two of these questions conclusively negative existence of coercion or inducement on the part of the police. The statement bears no such reading, however. The questions on their face disclose that the petitioner was told that "booking" was a prerequisite to calling his wife, and "booking" must mean booking on a charge of robbery. Since the police already had enough evidence to warrant charging the petitioner with the robbery—they had the petitioner's prior oral admissions, the circumstances surrounding his arrest, and his identification by witnesses—the only fair inference to be drawn under all the circumstances is that he would not be booked on the robbery charge until the police had secured the additional evidence they desired, the signed statement for which they were pressing. The quoted portions of the signed confession thus support the petitioner's version of events; under any view, they offer no viable or reliable contradiction.

Even were it otherwise, there would be substantial doubt as to the probative effect to be accorded recita-

tions in the challenged confession that it was not involuntarily induced. Cf. *Haley* v. *Ohio,* 332 U. S. 596, 601 (opinion of Mr. Justice Douglas). It would be anomalous, indeed, if such a statement, contained within the very document asserted to have been obtained by use of impermissible coercive pressures, was itself enough to create an evidentiary conflict precluding this Court's effective review of the constitutional issue. Common sense dictates the conclusion that if the authorities were successful in compelling the totally incriminating confession of guilt, the very issue for determination, they would have little, if any, trouble securing the self-contained concession of voluntariness. Certainly, we cannot accord any conclusive import to such an admission, particularly when, as here, it is immediately followed by recitations supporting the petitioner's version of events.

III.

The uncontroverted portions of the record thus disclose that the petitioner's written confession was obtained in an atmosphere of substantial coercion and inducement created by statements and actions of state authorities. We have only recently held again that a confession obtained by police through the use of threats is violative of due process and that "the question in each case is whether the defendant's will was overborne at the time he confessed," *Lynumn* v. *Illinois,* 372 U. S. 528, 534. "In short, the true test of admissibility is that the confession is made freely, voluntarily and without compulsion or inducement of any sort." *Wilson* v. *United States,* 162 U. S. 613, 623. See also *Bram* v. *United States,* 168 U. S. 532. And, of course, whether the confession was obtained by coercion or improper inducement can be determined only by an examination of all of the attendant circumstances. See, *e. g., Leyra*

v. *Denno,* 347 U. S. 556, 558.[10] Haynes' undisputed testimony as to the making and signing of the challenged confession used against him at trial permits no doubt that it was obtained under a totality of circumstances evidencing an involuntary written admission of guilt.

Here, as in *Lynumn, supra,* the petitioner was alone in the hands of the police, with no one to advise or aid him, and he had "no reason not to believe that the police had ample power to carry out their threats," 372 U. S., at 534, to continue, for a much longer period if need be, the incommunicado detention—as in fact was actually done. Neither the petitioner's prior contacts with the authorities nor the fact that he previously had made incriminating oral admissions negatives the existence and effectiveness of the coercive tactics used in securing the written confession introduced at trial. The petitioner at first resisted making a written statement and gave in only after consistent denials of his requests to call his wife, and the conditioning of such outside contact upon his accession to police demands. Confronted with the express threat of continued incommunicado detention and induced by the promise of communication with and access to family, Haynes understandably chose to make and sign the damning written statement; given the unfair and inherently coercive context in which made, that choice cannot be said to be the voluntary product of a free and unconstrained will, as required by the Fourteenth Amendment.

We cannot blind ourselves to what experience unmistakably teaches: that even apart from the express threat, the basic techniques present here—the secret and incommunicado detention and interrogation—are devices adapted and used to extort confessions from suspects. Of course, detection and solution of crime is, at best, a diffi-

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[10] See also *Fikes* v. *Alabama,* 352 U. S. 191, 197–198; *Gallegos* v. *Nebraska,* 342 U. S. 55, 65 (opinion of Mr. Justice Reed).

cult and arduous task requiring determination and persistence on the part of all responsible officers charged with the duty of law enforcement. And, certainly, we do not mean to suggest that all interrogation of witnesses and suspects is impermissible. Such questioning is undoubtedly an essential tool in effective law enforcement. The line between proper and permissible police conduct and techniques and methods offensive to due process is, at best, a difficult one to draw, particularly in cases such as this where it is necessary to make fine judgments as to the effect of psychologically coercive pressures and inducements on the mind and will of an accused. But we cannot escape the demands of judging or of making the difficult appraisals inherent in determining whether constitutional rights have been violated. We are here impelled to the conclusion, from all of the facts presented, that the bounds of due process have been exceeded.

IV.

Our conclusion is in no way foreclosed, as the State contends, by the fact that the state trial judge or the jury may have reached a different result on this issue.

It is well settled that the duty of constitutional adjudication resting upon this Court requires that the question whether the Due Process Clause of the Fourteenth Amendment has been violated by admission into evidence of a coerced confession be the subject of an *independent* determination here, see, *e. g., Ashcraft* v. *Tennessee,* 322 U. S. 143, 147–148; "we cannot escape the responsibility of making our own examination of the record," *Spano* v. *New York,* 360 U. S. 315, 316. While, for purposes of review in this Court, the determination of the trial judge or of the jury will ordinarily be taken to resolve evidentiary conflicts and may be entitled to some weight even with respect to the ultimate conclusion on the crucial issue of voluntariness, we cannot avoid our re-

sponsibilities by permitting ourselves to be "completely bound by state court determination of any issue essential to decision of a claim of federal right, else federal law could be frustrated by distorted fact finding." *Stein* v. *New York,* 346 U. S. 156, 181. As state courts are, in instances such as this, charged with the primary responsibility of protecting basic and essential rights, we accord an appropriate and substantial effect to their resolutions of conflicts in evidence as to the occurrence or nonoccurrence of factual events and happenings. This is particularly apposite because the trial judge and jury are closest to the trial scene and thus afforded the best opportunity to evaluate contradictory testimony. But, as declared in *Ward* v. *Texas*, 316 U. S. 547, 550, "when, as in this case, the question is properly raised as to whether a defendant has been denied the due process of law . . . we cannot be precluded by the verdict of a jury from determining whether the circumstances under which the confession was made were such that its admission in evidence amounts to a denial of due process." To the same effect, see, *e. g., Spano* v. *New York,* 360 U. S. 315; *Thomas* v. *Arizona,* 356 U. S. 390, 393; *Payne* v. *Arkansas,* 356 U. S. 560, 562, 568; *Ashcraft* v. *Tennessee,* 322 U. S. 143, 147–148; *Lisenba* v. *California,* 314 U. S. 219, 237–238; *Chambers* v. *Florida,* 309 U. S. 227, 228.

Beyond even the compelling nature of our precedents, however, there is here still another reason for refusing to consider the present inquiry foreclosed by the verdict of the jury to which the issue of voluntariness of the confession was submitted. The jury was instructed, in effect, not to consider as relevant on the issue of voluntariness of the confession the fact that a defendant is not reminded that he is under arrest, that he is not cautioned that he may remain silent, that he is not warned that his answers may be used against him, or that he is not advised that

he is entitled to counsel.[11] Whatever independent consequence these factors may otherwise have, they are unquestionably attendant circumstances which the accused is entitled to have appropriately considered in determining voluntariness and admissibility of his confession.[12]

In addition, the trial court instructed in terms of a Washington statute which permits consideration of a corroborated confession "made under inducement" and excepts only confessions "made under the influence of fear produced by threats." [13] It seems reasonably clear from this portion of the instructions that the jury may well have been misled as to the requisite constitutional standard, notwithstanding the apparent propriety of other portions of the instructions. Given the fact that the jury did no more than return a general verdict of guilty, we obviously have no way of knowing whether it found the confession to be voluntary and admissible or not. Be-

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[11] The trial court told the jury:

"And in this connection, I further instruct you that a confession or admission of a defendant is not rendered involuntary because he is not at the time of making the same reminded that he was under arrest, or that he was not obliged to reply, or that his answers would be used against him, or that he was entitled to be represented by counsel."

That the jury was to take this as precluding consideration of the cited factors is evidenced by the immediately succeeding instruction which advised that it *should* consider a denial of communication with friends or an attorney in connection with determining whether the written confession was voluntary or not.

[12] See note 10, *supra*.

[13] The instruction commenced:

"By statute of the State of Washington, it is provided:

" 'The confession of a defendant made under inducement, with all the circumstances, may be given as evidence against him, except when made under the influence of fear produced by threats; but a confession made under inducement is not sufficient to warrant a conviction without corroborating testimony.' "

cause there was sufficient other evidence to sustain the verdict, the jury may have found the defendant guilty even though it rejected the confession as involuntary; alternatively, the jury may have based its finding of guilt on the confession, reasoning, under the questionable instructions and the Washington statute, that the confession was admissible as voluntary, even though improperly induced, because it was corroborated by the other evidence. Although, for the reasons indicated, the Washington statute and the quoted instructions raise a serious and substantial question whether a proper constitutional standard was applied by the jury, we need not rely on the imperfections in the instructions as a separate ground of reversal. We think it clear, however, that these imperfections are entirely sufficient to preclude any dependence we might otherwise place on the jury verdict as settling the issue of voluntariness here.

V.

In reaching the conclusion which we do, we are not unmindful of substantial independent evidence tending to demonstrate the guilt of the petitioner. As was said in *Rogers* v. *Richmond,* 365 U. S. 534, 541:

> "Indeed, in many of the cases in which the command of the Due Process Clause has compelled us to reverse state convictions involving the use of confessions obtained by impermissible methods, independent corroborating evidence left little doubt of the truth of what the defendant had confessed. Despite such verification, confessions were found to be the product of constitutionally impermissible methods in their inducement."

Of course, we neither express nor suggest a view with regard to the ultimate guilt or innocence of the petitioner here; that is for a jury to decide on a new trial free of

constitutional infirmity, which the State is at liberty to order.

This case illustrates a particular facet of police utilization of improper methods. While history amply shows that confessions have often been extorted to save law enforcement officials the trouble and effort of obtaining valid and independent evidence, the coercive devices used here were designed to obtain admissions which would incontrovertibly complete a case in which there had already been obtained, by proper investigative efforts, competent evidence sufficient to sustain a conviction. The procedures here are no less constitutionally impermissible, and perhaps more unwarranted because so unnecessary. There is no reasonable or rational basis for claiming that the oppressive and unfair methods utilized were in any way essential to the detection or solution of the crime or to the protection of the public. The claim, so often made in the context of coerced confession cases, that the devices employed by the authorities were requisite to solution of the crime and successful prosecution of the guilty party cannot here be made.

Official overzealousness of the type which vitiates the petitioner's conviction below has only deleterious effects. Here it has put the State to the substantial additional expense of prosecuting the case through the appellate courts and, now, will require even a greater expenditure in the event of retrial, as is likely. But it is the deprivation of the protected rights themselves which is fundamental and the most regrettable, not only because of the effect on the individual defendant, but because of the effect on our system of law and justice. Whether there is involved the brutal "third degree," or the more subtle, but no less offensive, methods here obtaining, official misconduct cannot but breed disrespect for law, as well as for those charged with its enforcement.

The judgment below is vacated and the case is remanded to the Supreme Court of Washington for further proceedings not inconsistent herewith.

It is so ordered.

MR. JUSTICE CLARK, with whom MR. JUSTICE HARLAN, MR. JUSTICE STEWART and MR. JUSTICE WHITE join, dissenting.

On December 19, 1957, at 9:05 p. m., a report was received by the Spokane Police Station that a filling station robbery was in progress in a certain area of the city. The report was broadcast to police cars working in the area. Twenty-five minutes later uniformed officers riding in a police car near the scene of the reported robbery observed petitioner walking down the street. As they approached him he went into the yard of a home in the vicinity. The police drove up and called to petitioner, who was questioned for a moment by one of the officers. Petitioner indicated that "he lived there" and, after talking with the officers, walked onto the porch of the house and began fumbling with the screen door as if to unlock it. The officer remained at the curb observing petitioner, who in a few moments returned to the car and spontaneously exclaimed to the officers, "You got me, let's go." He was placed in the police car, admitted the robbery to the officers and, as they drove to the filling station, identified it as the place he had robbed. He was taken to the police station where he arrived within 20 minutes of his arrest and made a second oral confession to Lieutenant Wakeley, who was in charge of the detective office on the 4 o'clock to midnight shift. This confession was related by the lieutenant at the trial, without objection, in the following testimony:

> "A. [By Lt. Wakeley.] He said they decided to hold up a place so they drove around to find some

> place that didn't seem to have any customers and they didn't know the streets, didn't know the town very well. They said they were out where they found the car. They drove by and saw a service station which didn't seem to have any business, so they parked the car in the alley and walked into the service station, and Raymond said that he told the man it was a holdup and his brother stood behind the man and he got the money from the service station operator. He didn't think his brother got any of it. After they held up the place they ran out the door and he ran down the side street, not directly toward the car, down around toward the end of the block and come [*sic*] back down the alley and as he was approaching the car he saw a police officer had his brother in custody. So he turned and ran north about two blocks and then turned and went west about three blocks before a prowl car came along and they stopped and talked to him and asked him where he was going. He said he was going home and he turned and walked up onto a porch. He stood on the porch and he said the prowl car sat out there in the street, didn't move, so he thought well, I might as well give up. So he went back and told them he was the man they were looking for."

Thus within an hour and 20 minutes after his surrender petitioner had made two oral confessions—both admitted into evidence without objection—identical in relevant details to the written confession made the following day which the Court finds coerced. In light of the circumstances surrounding petitioner's arrest and confession, I believe the Court's reversal to be an abrupt departure from the rule laid down in the cases of this Court and an enlargement of the requirements heretofore visited upon state courts in confession cases. I therefore dissent.

The petitioner is neither youthful in age (though his exact age is not shown by the record) nor lacking in experience in law breaking. He is married and was a skilled sheet-metal worker temporarily unemployed. Some indication of his approximate age is given by the facts that his wife had been employed for some 14 years by the same employer, and that 11 years prior to the trial he had his first brush with the law, *i. e.*, drunken driving, resisting arrest and being without a driver's license. Further, in 1949 he was convicted of breaking and entering, and in 1950 of robbery. During the same year he pleaded guilty to breaking jail and to "taking a car." He had not only served time but had been on parole for two years, making regular visits to parole officers to whom he was assigned. He cannot, therefore, be placed in the category of those types of people with whom the Court's cases in this area have ordinarily dealt, such as the mentally subnormal accused, *Fikes* v. *Alabama,* 352 U. S. 191 (1957); *Payne* v. *Arkansas,* 356 U. S. 560 (1958), and *Reck* v. *Pate,* 367 U. S. 433 (1961); the youthful offender, such as *Haley* v. *Ohio,* 332 U. S. 596 (1948), and *Gallegos* v. *Colorado,* 370 U. S. 49 (1962); or the naive and impressionable defendant, such as *Lynumn* v. *Illinois,* 372 U. S. 528 (1963). On the contrary, he is a mature adult who appears, from his testimony at the trial, to be of at least average intelligence and who is neither a stranger to police techniques and custodial procedures nor unaware of his rights on arrest. Thus the Court's reliance on *Lynumn* v. *Illinois, supra,*[1] is completely misplaced.

[1] In *Lynumn* v. *Illinois,* 372 U. S. 528 (1963), the petitioner was a woman who "had no previous experience with the criminal law, and had no reason not to believe that the police had ample power to carry out their threats." *Id.,* at 534. She confessed after the police told her that if she did not cooperate she would be imprisoned for 10 years, her children would be taken away and she would be deprived of state aid for them.

I do not say that only the young, the weak and the mentally disturbed are susceptible to coercion, but only that these factors have ordinarily been involved in coerced confession cases and have been consistently regarded by the Court as important circumstances in the determination as to whether a confession was voluntarily made. Along with circumstances related to the petitioner, of course, the determination of coercion requires examination of the conduct of the police and the environment in which interrogation and confession occurred. We have long recognized that coercion need not be based upon the physical torture involved in *Brown* v. *Mississippi,* 297 U. S. 278 (1936). But here there is no contention by the petitioner either of physical abuse or of the more sophisticated techniques associated with police coercive practices. There was no extended or repeated interrogation,[2] no deprivation of sleep or food,[3] no use of psychiatric techniques.[4] Further, there were no external circumstances such as threat of mob violence [5] furnishing an atmosphere tending to subvert petitioner's rationality and free will.

I cannot condone the conduct of the police in holding the petitioner incommunicado, but of course we have no supervisory power over state courts. The question under the Fourteenth Amendment is whether the will of the accused is so overborne at the time of the confession that his statement is not "the product of a rational intellect and a free will," *Reck* v. *Pate, supra,* at 440, and its determination "is one on which we must make an inde-

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[2] See *Spano* v. *New York,* 360 U. S. 315 (1959); *Ward* v. *Texas,* 316 U. S. 547 (1942); *Chambers* v. *Florida,* 309 U. S. 227 (1940).

[3] See *Reck* v. *Pate,* 367 U. S. 433 (1961); *Payne* v. *Arkansas,* 356 U. S. 560 (1958).

[4] See *Leyra* v. *Denno,* 347 U. S. 556 (1954); cf. *Malinski* v. *New York,* 324 U. S. 401 (1945).

[5] See *Payne* v. *Arkansas,* note 3, *supra; Chambers* v. *Florida,* note 2, *supra.*

pendent determination on the undisputed facts." *Malinski* v. *New York,* 324 U. S. 401, 404 (1945), citing *Lisenba* v. *California,* 314 U. S. 219 (1941), and *Ashcraft* v. *Tennessee,* 322 U. S. 143 (1944). We have held that the fact that one has been denied consultation with an attorney, *Cicenia* v. *Lagay,* 357 U. S. 504 (1958), *Crooker* v. *California,* 357 U. S. 433 (1958), was not in itself controlling in such cases. Further, not even the fact that one is "held incommunicado, is subjected to questioning by officers for long periods, and deprived of the advice of counsel," without a showing that he had "so lost his freedom of action" that the confession was not his own, requires a reversal under the Fourteenth Amendment. *Lisenba* v. *California, supra,* at 240–241. Finally, the fact that police officers violated state statutes in their treatment of the petitioner does "not furnish an answer" to the question whether a confession was voluntarily made. *Id.,* at 235; see *Gallegos* v. *Nebraska,* 342 U. S. 55 (1951).

The Court's reversal here must be based upon the fact that, on the day after petitioner's arrest, when he signed the written confession at issue, he was told that after he made a statement and was booked he could call his wife. As to his testimony relating to the evening of his arrest, it is certainly disputed. Petitioner testified that he asked Detective Pike if he could call his wife, but Detective Pike testified that he did not even talk to petitioner. Lieutenant Wakeley testified unequivocally that petitioner made no such requests to him during their conversation, though he could not recall whether such requests were made "at any time that night." [6]

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[6] Lieutenant Wakeley testified as follows:

"Q. Did Raymond Haynes at any time during that conversation [when he was interrogated] ask permission to make a telephone call to his wife? A. Not during the conversation.

"Q. Well, at any time that night? A. He might have asked afterward, after I got through talking to him. He wanted to know if his

The Court concludes, then, that the police, by holding petitioner incommunicado and telling him that he could call his wife after he made a statement and was booked, wrung from him a confession he would not otherwise have made, a confession which was not the product of a free will. In *Crooker* v. *California, supra,* at 436, however, we found no coercion or inducement, despite the fact that the petitioner's repeated requests for an attorney were denied and he "was told that 'after [the] investigation was concluded he could call an attorney.' "

In light of petitioner's age, intelligence and experience with the police, in light of the comparative absence of any coercive circumstances, and in light of the fact that petitioner never, from the time of his arrest, evidenced a will to deny his guilt, I must conclude that his written confession was not involuntary. I find no support in any of the 33 cases decided on the question by this Court for a contrary conclusion. Therefore, I would affirm the judgment before us.

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wife would be notified. I told him we would notify her that he was being held.

"Q. Did he ask permission to make a phone call himself to his wife? A. He may have. I don't remember exactly whether he asked or whether we wouldn't notify his wife.

"Q. Did he say anything to you, Lieutenant Wakeley, if you remember in substance that he wanted to call his wife so that she could get a lawyer? A. No, I don't remember that."

692–438 O–63–37

WATSON ET AL. *v.* CITY OF MEMPHIS ET AL.

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

No. 424. Argued April 17–18, 1963. Decided May 27, 1963.

In 1960, petitioners, Negro residents of Memphis, Tenn., sued in a Federal District Court for declaratory and injunctive relief directing immediate desegregation of public parks and other publicly owned or operated recreational facilities from which Negroes were still excluded. The City denied neither the fact that the majority of the relevant facilities were operated on a segregated basis nor its duty under the Fourteenth Amendment to terminate its policy of conditioning use of such facilities on race. Instead, it pointed to the partial desegregation already effected and attempted to justify its further delay in conforming fully to constitutional mandates by urging the need and wisdom of proceeding slowly and gradually in its desegregation efforts. There was no evidence that there had been any violence or meaningful disturbances when other recreational facilities had been desegregated, and there was evidence that such prior transitions had been peaceful. The District Court denied the relief sought and ordered the City to submit within six months a plan providing additional time for desegregation of the relevant facilities. *Held:* The continued denial to petitioners of the use of city facilities solely because of their race is without warrant, and prompt vindication of their rights is required. Pp. 528–539.

(a) In considering the appropriateness of the equitable decree entered below inviting a plan calling for an even longer delay in effecting desegregation, this Court cannot ignore the passage of a substantial period of time since the original declaration of the manifest unconstitutionality of racial practices such as are here challenged, the repeated and numerous decisions giving notice of such illegality, and the many intervening opportunities heretofore available to attain the equality of treatment which the Fourteenth Amendment commands the States to achieve. Pp. 529–530.

(b) This Court's decision in *Brown* v. *Board of Education,* 349 U. S. 294, never contemplated that the concept of "deliberate speed" would countenance indefinite delay in elimination of racial bar-

riers in public schools, let alone other public facilities not involving the same physical problems or comparable conditions. P. 530.

(c) Desegregation of parks and other recreational facilities does not present the same kinds of cognizable difficulties inhering in elimination of racial classification in schools, at which attendance is compulsory, the adequacy of teachers and facilities crucial, and questions of geographic assignment often of major significance. Pp. 530–532.

(d) Even the delay countenanced by *Brown* was a necessary, albeit significant, adaptation of the usual principle that any deprivation of constitutional rights calls for prompt rectification. The rights here asserted are, like all such rights, *present* rights, and unless there is an overwhelmingly compelling reason, they are to be promptly fulfilled. Pp. 532–533.

(e) The claims of the City to further delay in affording the petitioners that to which they are clearly and unquestionably entitled cannot be upheld except upon the most convincing and impressive demonstration by the City that such delay is manifestly compelled by constitutionally cognizable circumstances warranting the exercise of an appropriate equitable discretion by a court. P. 533.

(f) Constitutional rights may not be denied simply because of hostility to their assertion or exercise. Pp. 535–536.

(g) The City has failed to demonstrate any compelling or convincing reason requiring further delay in implementing the constitutional proscription of segregation of publicly owned or operated recreational facilities. Pp. 534–539.

303 F. 2d 863, reversed.

Constance Baker Motley argued the cause for petitioners. With her on the brief were *Jack Greenberg, Derrick A. Bell, Jr.* and *H. T. Lockard.*

Thomas R. Prewitt argued the cause for respondents. With him on the brief were *J. S. Allen, Walter Chandler* and *Frank B. Gianotti, Jr.*

Solicitor General Cox, Assistant Attorney General Marshall, J. William Doolittle, Harold H. Greene, Isabel L. Blair and *Gerald P. Choppin* filed a brief for the United States, as *amicus curiae,* urging reversal.

MR. JUSTICE GOLDBERG delivered the opinion of the Court.

The issue in this case, simply stated, is whether the City of Memphis may further delay in meeting fully its constitutional obligation under the Fourteenth Amendment to desegregate its public parks and other municipal recreational facilities.

The petitioners, adult Negro residents of Memphis, commenced this action against the city in May 1960 in the United States District Court for the Western District of Tennessee, seeking declaratory and injunctive relief directing immediate desegregation of municipal parks and other city owned or operated recreational facilities from which Negroes were then still excluded. The city denied neither the fact that the majority of the relevant facilities were operated on a segregated basis nor its duty under the Fourteenth Amendment to terminate its policy of conditioning use of such facilities on race. Instead, it pointed to the partial desegregation already effected and attempted to justify its further delay in conforming fully and at once to constitutional mandates by urging the need and wisdom of proceeding slowly and gradually in its desegregation efforts.

The District Court denied the relief sought by the petitioners and ordered the city to submit, within six months, a plan providing additional time for desegregation of the relevant facilities.[1] The Court of Appeals for the Sixth Circuit affirmed. 303 F. 2d 863. We granted certiorari, 371 U. S. 909, to consider the important question presented and the applicability here of the principles enunciated by this Court in the second *Brown* decision, *Brown* v. *Board of Education,* 349 U. S. 294, upon which the

[1] The plan ultimately formulated, though not part of the record here, was described in oral argument before the Court of Appeals. It does not provide for complete desegregation of all facilities until 1971.

courts below relied in further delaying complete vindication of the petitioners' constitutional rights.

We find the second *Brown* decision to be inapplicable here and accordingly reverse the judgment below.

I.

It is important at the outset to note the chronological context in which the city makes its claim to entitlement to additional time within which to work out complete elimination of racial barriers to use of the public facilities here involved. It is now more than nine years since this Court held in the first *Brown* decision, *Brown* v. *Board of Education,* 347 U. S. 483, that racial segregation in state public schools violates the Equal Protection Clause of the Fourteenth Amendment. And it was almost eight years ago—in 1955, the year after the decision on the merits in *Brown*—that the constitutional proscription of state enforced racial segregation was found to apply to public recreational facilities. See *Dawson* v. *Mayor and City Council of Baltimore,* 220 F. 2d 386, aff'd, 350 U. S. 877; see also *Muir* v. *Louisville Park Theatrical Assn.,* 347 U. S. 971.

Thus, the applicability here of the factors and reasoning relied on in framing the 1955 decree in the second *Brown* decision, *supra,* which contemplated the possible need of some limited delay in effecting total desegregation of public schools, must be considered not only in the context of factual similarities, if any, between that case and this one, but also in light of the significant fact that the governing constitutional principles no longer bear the imprint of newly enunciated doctrine. In considering the appropriateness of the equitable decree entered below inviting a plan calling for an even longer delay in effecting desegregation, we cannot ignore the passage of a substantial period of time since the original declaration of the manifest unconstitutionality of racial practices

such as are here challenged, the repeated and numerous decisions giving notice of such illegality,[2] and the many intervening opportunities heretofore available to attain the equality of treatment which the Fourteenth Amendment commands the States to achieve. These factors must inevitably and substantially temper the present import of such broad policy considerations as may have underlain, even in part, the form of decree ultimately framed in the *Brown* case. Given the extended time which has elapsed, it is far from clear that the mandate of the second *Brown* decision requiring that desegregation proceed with "all deliberate speed" would today be fully satisfied by types of plans or programs for desegregation of public educational facilities which eight years ago might have been deemed sufficient. *Brown* never contemplated that the concept of "deliberate speed" would countenance indefinite delay in elimination of racial barriers in schools, let alone other public facilities not involving the same physical problems or comparable conditions.

II.

When, in 1954, in the first *Brown* decision, this Court declared the constitutional impermissibility of racial segregation in public schools, it did not immediately frame

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[2] See, *e. g., Dawson* v. *Mayor and City Council of Baltimore,* 220 F. 2d 386, aff'd, 350 U. S. 877 (beaches and bathhouses); *New Orleans City Park Improvement Assn.* v. *Detiege,* 252 F. 2d 122, aff'd, 358 U. S. 54 (golf courses and other facilities); *City of St. Petersburg* v. *Alsup,* 238 F. 2d 830 (beach and swimming pools); *Tate* v. *Department of Conservation and Development,* 133 F. Supp. 53, aff'd, 231 F. 2d 615, cert. denied, 352 U. S. 838 (parks); *Moorhead* v. *City of Fort Lauderdale,* 152 F. Supp. 131, aff'd, 248 F. 2d 544 (golf course); *Fayson* v. *Beard,* 134 F. Supp. 379 (parks); *Holley* v. *City of Portsmouth,* 150 F. Supp. 6 (golf course); *Ward* v. *City of Miami,* 151 F. Supp. 593 (golf course); *Willie* v. *Harris County,* 202 F. Supp. 549 (park). It is noteworthy that in none of these cases was the possibility of delay in effecting desegregation even considered.

a decree, but instead invited and heard further argument on the question of relief. In its subsequent opinion, the Court noted that "[f]ull implementation of these [applicable] constitutional principles may require solution of varied local school problems" and indicated an appropriate scope for the application of equitable principles consistent with both public and private need and for "exercise of [the] . . . traditional attributes of equity power." 349 U. S., at 299–300. The District Courts to which the cases there under consideration were remanded were invested with a discretion appropriate to ultimate fashioning of detailed relief consonant with properly cognizable local conditions. This did not mean, however, that the discretion was even then unfettered or exercisable without restraint. Basic to the remand was the concept that desegregation must proceed with "all deliberate speed," and the problems which might be considered and which might justify a decree requiring something less than immediate and total desegregation were severely delimited. Hostility to the constitutional precepts underlying the original decision was expressly and firmly pretermitted as such an operative factor. *Id.*, at 300.

The nature of the ultimate resolution effected in the second *Brown* decision largely reflected no more than a recognition of the unusual and particular problems inhering in desegregating large numbers of schools throughout the country. The careful specification of factors relevant to a determination whether any delay in complying fully and completely with the constitutional mandate would be warranted demonstrated a concern that delay not be conditioned upon insufficient reasons or, in any event, tolerated unless it imperatively and compellingly appeared unavoidable.

This case presents no obvious occasion for the application of *Brown*. We are not here confronted with attempted desegregation of a local school system with

any or all of the perhaps uniquely attendant problems, administrative and other, specified in the second *Brown* decision as proper considerations in weighing the need for further delay in vindicating the Fourteenth Amendment rights of petitioners.[3] Desegregation of parks and other recreational facilities does not present the same kinds of cognizable difficulties inhering in elimination of racial classification in schools, at which attendance is compulsory, the adequacy of teachers and facilities crucial, and questions of geographic assignment often of major significance.[4]

Most importantly, of course, it must be recognized that even the delay countenanced by *Brown* was a necessary, albeit significant, adaptation of the usual principle that any deprivation of constitutional rights calls for prompt

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[3] The factors set out by the Court in the second *Brown* decision were "problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems." 349 U. S., at 300–301.

[4] Recognition of the possible need for delay has not even been extended to desegregation of state colleges or universities in which like problems were not presented. See, *e. g., Florida ex rel. Hawkins* v. *Board of Control,* 350 U. S. 413, where, in remanding on the authority of *Brown,* this Court said that "[a]s this case involves the admission of a Negro to a graduate professional school, there is no reason for delay. He is entitled to prompt admission under the rules and regulations applicable to other qualified candidates." 350 U. S., at 414. See also *Lucy* v. *Adams,* 350 U. S. 1. Similarly, both before and after *Brown,* delay has neither been suggested nor countenanced in eliminating operation of racial barriers with respect to transportation, *e. g., Boynton* v. *Virginia,* 364 U. S. 454; *Henderson* v. *United States,* 339 U. S. 816; *Morgan* v. *Virginia,* 328 U. S. 373; *Browder* v. *Gayle,* 142 F. Supp. 707, aff'd, 352 U. S. 903; voting, *e. g., Schnell* v. *Davis,* 336 U. S. 933; *Smith* v. *Allwright,* 321 U. S. 649; racial

rectification. The rights here asserted are, like all such rights, *present* rights; they are not merely hopes to some *future* enjoyment of some formalistic constitutional promise. The basic guarantees of our Constitution are warrants for the here and now and, unless there is an overwhelmingly compelling reason, they are to be promptly fulfilled.[5] The second *Brown* decision is but a narrowly drawn, and carefully limited, qualification upon usual precepts of constitutional adjudication and is not to be unnecessarily expanded in application.

Solely because of their race, the petitioners here have been refused the use of city owned or operated parks and other recreational facilities which the Constitution mandates be open to their enjoyment on equal terms with white persons. The city has effected, continues to effect, and claims the right or need to prolong patently unconstitutional racial discriminations violative of now long-declared and well-established individual rights. The claims of the city to further delay in affording the petitioners that to which they are clearly and unquestionably entitled cannot be upheld except upon the most convincing and impressive demonstration by the city that such delay is manifestly compelled by constitutionally cognizable circumstances warranting the exercise of an appropriate equitable discretion by a court. In short, the city must sustain an extremely heavy burden of proof.

Examination of the facts of this case in light of the foregoing discussion discloses with singular clarity that this burden has not been sustained; indeed, it is patent

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zoning of property, *e. g., City of Richmond* v. *Deans,* 281 U. S. 704; *Buchanan* v. *Warley,* 245 U. S. 60; or employment rights and union representation, *e. g., Brotherhood of Railroad Trainmen* v. *Howard,* 343 U. S. 768.

[5] This principle was well established even under the now discarded "separate but equal" doctrine. See, *e. g., McLaurin* v. *Oklahoma State Regents for Higher Education,* 339 U. S. 637, 642; *Sweatt* v. *Painter,* 339 U. S. 629, 635; *Sipuel* v. *Board of Regents of University*

from the record that the principles enunciated in the second *Brown* decision have absolutely no application here.

III.

The findings of the District Court disclose an unmistakable and pervasive pattern of local segregation, which, in fact, the city makes no attempt to deny, but merely attempts to justify as necessary for the time being. Memphis owns 131 parks, all of which are operated by the Memphis Park Commission. Of these, only 25 were at the time of trial open to use without regard to race; [6] 58 were restricted to use by whites and 25 to use by Negroes; the remaining 23 parks were undeveloped raw land. Subject to exceptions, neighborhood parks were generally segregated according to the racial character of the area in which located. The City Park Commission also operates a number of additional recreational facilities, by far the largest share of which were found to be racially segregated. Though a zoo, an art gallery and certain boating and other facilities are now desegregated, about two-thirds (40) of the 61 city-owned playgrounds were at the time of trial reserved for whites only, and the remainder were set aside for Negro use. Thirty of the 56 playgrounds and other facilities operated by the municipal Park Commission on property owned by churches, private groups, or the School Board were set aside for the exclusive use of whites, while 26 were reserved for Negroes. All 12 of the municipal

of Oklahoma, 332 U. S. 631, 632–633. See also *Florida ex rel. Hawkins* v. *Board of Control,* 350 U. S. 413, 414, and notes 2 and 4, *supra.*

[6] These figures, and others referred to in the text, apparently represent the total extent of progress, as of the time of trial, toward desegregation of recreational facilities since this Court's decision eight years ago outlawing the practices here in question. So far as appears, none of the relevant facilities were open for use without regard to race prior to 1955, and, in fact, several new parks have been opened on a segregated basis since that time.

community centers were segregated, eight being available only to whites and four to Negroes. Only two of the seven city golf courses were open to Negroes; play on the remaining five was limited to whites. While several of these properties have been desegregated since the filing of suit, the general pattern of racial segregation in such public recreational facilities persists.[7]

The city asserted in the court below, and states here, that its good faith in attempting to comply with the requirements of the Constitution is not in issue, and contends that gradual desegregation on a facility-by-facility basis is necessary to prevent interracial disturbances, violence, riots, and community confusion and turmoil. The compelling answer to this contention is that constitutional rights may not be denied simply because of hostility to their assertion or exercise. See *Wright* v. *Georgia, ante,* p. 284; *Brown* v. *Board of Education,* 349 U. S. 294, 300. Cf. *Taylor* v. *Louisiana,* 370 U. S. 154. As declared in *Cooper* v. *Aaron,* 358 U. S. 1, 16, "law and order are not . . . to be preserved by depriving the Negro children of their constitutional rights." This is really no more than an application of a principle enunciated much earlier in *Buchanan* v. *Warley,* 245 U. S. 60, a case dealing with a somewhat different form of state-ordained segregation—enforced separation of Negroes and whites by neighborhood. A unanimous Court, in striking down the officially imposed pattern of racial segregation there in question, declared almost a half century ago:

> "It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the

[7] It is not entirely clear precisely how many properties have since trial actually been desegregated and how many were merely changed from "white-only" to "Negro-only" use in line with changes in neighborhood racial composition.

preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution." 245 U. S., at 81.

Beyond this, however, neither the asserted fears of violence and tumult nor the asserted inability to preserve the peace was demonstrated at trial to be anything more than personal speculations or vague disquietudes of city officials. There is no indication that there had been any violence or meaningful disturbances when other recreational facilities had been desegregated. In fact, the only evidence in the record was that such prior transitions had been peaceful.[8] The Chairman of the Memphis Park Commission indicated that the city had "been singularly blessed by the absence of turmoil up to this time on this race question"; notwithstanding the prior desegregation of numerous recreational facilities, the same witness could point as evidence of the unrest or turmoil which would assertedly occur upon complete desegregation of such facilities only to a number of anonymous letters and phone calls which he had received. The Memphis Chief of Police mentioned without further description some "troubles" at the time bus service was desegregated and referred to threatened violence in connection with a "sit-in" demonstration at a local store, but, beyond making general predictions, gave no concrete indication of any inability of authorities to maintain the peace. The only violence referred to at any park or recreational facility occurred in segregated parks and was not the product of attempts at desegregation. Moreover, there was no factual evidence to support the bare testimonial speculations that authorities would be unable to

[8] Nor, contrary to predictions, does it appear that violence or disruption of any kind ensued upon elimination of racial barriers to use of certain additional facilities subsequent to trial.

cope successfully with any problems which in fact might arise or to meet the need for additional protection should the occasion demand.

The existing and commendable goodwill between the races in Memphis, to which both the District Court and some of the witnesses at trial made express and emphatic reference as in some inexplicable fashion supporting the need for further delay, can best be preserved and extended by the observance and protection, not the denial, of the basic constitutional rights here asserted. The best guarantee of civil peace is adherence to, and respect for, the law.

The other justifications for delay urged by the city or relied upon by the courts below are no more substantial, either legally or practically. It was, for example, asserted that immediate desegregation of playgrounds and parks would deprive a number of children—both Negro and white—of recreational facilities; this contention was apparently based on the premise that a number of such facilities would have to be closed because of the inadequacy of the "present" park budget to provide additional "supervision" assumed to be necessary to operate unsegregated playgrounds. As already noted, however, there is no warrant in this record for assuming that such added supervision would, in fact, be required, much less that police and recreation personnel would be unavailable to meet such needs if they should arise.[9] More significantly, however, it is obvious that vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them. We will not assume that the citizens of Memphis accept the questionable premise implicit in this argument

[9] Except for the mention of some extra policemen assigned to duty at the city zoo, no showing was made even that additional supervision was necessary or provided at facilities which had been desegregated previously.

or that either the resources of the city are inadequate, or its government unresponsive, to the needs of all of its citizens.

In support of its judgment, the District Court also pointed out that the recreational facilities available for Negroes were roughly proportional to their number and therefore presumably adequate to meet their needs.[10] While the record does not clearly support this, no more need be said than that, even if true, it reflects an impermissible obeisance to the now thoroughly discredited doctrine of "separate but equal." The sufficiency of Negro facilities is beside the point; it is the segregation by race that is unconstitutional.

Finally, the District Court deferred ruling as to the propriety of ordering elimination of racial barriers at one facility, an art museum, pending initiation of, and decision in, a state court action to construe a racially restrictive covenant contained in the deed of the property to the city. Of course, the outcome of the state suit is irrelevant to whether the city may constitutionally enforce the segregation, regardless of the effect which desegregation may have on its title. Cf. *Pennsylvania* v. *Board of Trusts,* 353 U. S. 230. In any event, there is no reason to believe that the restrictive provision will be invoked. The museum has already been opened to Negroes one day a week without complaint.[11]

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[10] Approximately 37% of Memphis' 500,000 residents are Negroes; contrary to the apparent assumption of the trial court, the recreational facilities available to Negroes were not at the time of trial all quantitatively proportional to their number and their complete or partial exclusion from certain other facilities evidenced a substantial qualitative difference. Moreover, there was testimony from Negro witnesses that they were excluded from golf courses and playgrounds more convenient to their places of residence than other like facilities open to them.

[11] The city also asserted in the District Court that delay was supported by the fact that desegregation of the Fairgrounds would result in a substantial loss of revenues therefrom and would be unfair to

Since the city has completely failed to demonstrate any compelling or convincing reason requiring further delay in implementing the constitutional proscription of segregation of publicly owned or operated recreational facilities, there is no cause whatsoever to depart from the generally operative and here clearly controlling principle that constitutional rights are to be promptly vindicated. The continued denial to petitioners of the use of city facilities solely because of their race is without warrant. Under the facts in this case, the District Court's undoubted discretion in the fashioning and timing of equitable relief was not called into play; rather, affirmative judicial action was required to vindicate plain and present constitutional rights. Today, no less than 50 years ago, the solution to the problems growing out of race relations "cannot be promoted by depriving citizens of their constitutional rights and privileges," *Buchanan* v. *Warley, supra,* 245 U. S., at 80–81.

The judgment below must be and is reversed and the cause is remanded for further proceedings consistent herewith.

Reversed.

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contract concessionaires. This claim appears to have been mooted by the intervening elimination of racial restrictions at that facility, seemingly without difficulty.

HATHAWAY *v.* TEXAS.

APPEAL FROM THE COUNTY COURT OF COOKE COUNTY, TEXAS.

No. 532. Decided May 27, 1963.

Judgment reversed on representations of counsel for appellee.

David B. Buerger for appellant.

Norman V. Suarez, Assistant Attorney General of Texas, for appellee.

PER CURIAM.

The judgment is reversed on the representations of counsel for the appellee. *West Point Wholesale Grocery Co.* v. *City of Opelika, Alabama,* 354 U. S. 390.

YALE TRANSPORT CORP. *v.* UNITED STATES ET AL.

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

No. 936. Decided May 27, 1963.

210 F. Supp. 862, affirmed.

Herbert Burstein for appellant.

Solicitor General Cox, Assistant Attorney General Loevinger, Robert B. Hummel, Robert W. Ginnane, James Y. Piper and *Fritz R. Kahn* for the United States et al.

PER CURIAM.

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

FOOD FAIR STORES, INC., ET AL. *v.* ZONING BOARD OF APPEALS OF CITY OF POMPANO BEACH, FLORIDA.

APPEAL FROM THE SUPREME COURT OF FLORIDA.

No. 973. Decided May 27, 1963.

Appeal dismissed for want of a substantial federal question.

Harry Shapiro for appellants.

Robert B. Cochran for appellee.

PER CURIAM.

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

MILE ROAD CORP. *v.* CITY OF BOSTON.

APPEAL FROM THE SUPERIOR COURT OF MASSACHUSETTS, SUFFOLK COUNTY.

No. 981. Decided May 27, 1963.

Appeal dismissed for want of a substantial federal question.
Reported below: See 345 Mass. —, 187 N. E. 2d 826.

Edward M. Dangel and *Leo E. Sherry* for appellant.

William H. Kerr for appellee.

PER CURIAM.

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

692-438 O-63-38

GONZALEZ ET AL. *v.* CITY OF CHICAGO.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

No. 984. Decided May 27, 1963.

Appeal dismissed for want of a substantial federal question.
Reported below: 27 Ill. 2d 128, 188 N. E. 2d 489.

Frederic D. Houghteling, George W. Overton, F. Raymond Marks, Jr. and *Donald Page Moore* for appellants.

John C. Melaniphy, Milton P. Webster, Jr. and *Albert E. Jenner, Jr.* for appellee.

PER CURIAM.

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

MILNE *v.* RHODE ISLAND.

APPEAL FROM THE SUPREME COURT OF RHODE ISLAND.

No. 989. Decided May 27, 1963.

Appeal dismissed for want of a substantial federal question.
Reported below: — R. I. —, 187 A. 2d 136.

William M. Kunstler for appellant.

PER CURIAM.

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

BUFFINGTON *v.* WAINWRIGHT, CORRECTIONS DIRECTOR.

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

No. 706, Misc. Decided May 27, 1963.

Certiorari granted; judgment vacated; and case remanded.

Petitioner *pro se.*

Richard W. Ervin, Attorney General of Florida, and *A. G. Spicola, Jr.,* Assistant Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded for further consideration in light of *Gideon* v. *Wainwright,* 372 U. S. 335.

COUNTS *v.* COUNTS.

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

No. 1058, Misc. Decided May 27, 1963.

Appeal dismissed for want of a substantial federal question.
Reported below: 358 S. W. 2d 192.

PER CURIAM.

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

SMITH *v.* KANSAS ET AL.

APPEAL FROM THE SUPREME COURT OF KANSAS.

No. 966, Misc. Decided May 27, 1963.

Appeal dismissed and certiorari denied.
Reported below: 188 Kan. 473, 363 P. 2d 541.

Appellant *pro se.*

William M. Ferguson, Attorney General of Kansas, and *J. Richard Foth* and *Park McGee,* Assistant Attorneys General, for appellees.

PER CURIAM.

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

CEPERO *v.* UNITED STATES.

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

No. 1227, Misc. Decided May 27, 1963.

Appeal dismissed.
Reported below: —— F. Supp. ——.

Appellant *pro se.*

Solicitor General Cox for the United States.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed.

ALABAMA ET AL. *v.* UNITED STATES ET AL.

ON MOTION FOR LEAVE TO FILE BILL OF COMPLAINT.

No. 15, Original. Decided May 27, 1963.

Motion for leave to file proposed bill of complaint, as amended, denied.

J. Kirkman Jackson, John P. Kohn, George Stephen Leonard, Richard L. Hirshberg, John W. Vardaman, John A. Caddell and *Thos. B. Hill, Jr.* for plaintiffs.

Solicitor General Cox, Ralph S. Spritzer and *Louis F. Claiborne* for the United States et al.

PER CURIAM.

The motion for leave to file the proposed bill of complaint, as amended, is denied. In essence the papers show no more than that the President has made ready to exercise the authority conferred upon him by 10 U. S. C. § 333 by alerting and stationing military personnel in the Birmingham area. Such purely preparatory measures and their alleged adverse general effects upon the plaintiffs afford no basis for the granting of any relief.

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

CEPERO *v.* UNITED STATES CONGRESS ET AL.

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

No. 1024, Misc. Decided May 27, 1963.

Appeal dismissed.

Reported below: — F. Supp. —.

PER CURIAM.

The appeal is dismissed.

ARIZONA *v.* CALIFORNIA ET AL.

ON EXCEPTIONS TO SPECIAL MASTER'S REPORT AND RECOMMENDED DECREE.

No. 8, Original. Argued January 8–11, 1962.—Restored to calendar for reargument June 4, 1962.—Reargued November 13–14, 1962.—Decided June 3, 1963.

This original suit was brought in this Court by the State of Arizona against the State of California and seven of its public agencies. Later Nevada, New Mexico, Utah and the United States became parties. The basic controversy is over how much water each State has a legal right to use out of the waters of the Colorado River and its tributaries. A Special Master appointed by the Court conducted a lengthy trial and filed a report containing his findings, conclusions and recommended decree, to which various parties took exceptions. *Held:*

1. In passing the Boulder Canyon Project Act, Congress intended to, and did, create its own comprehensive scheme for the apportionment among California, Arizona and Nevada of the Lower Basin's share of the mainstream waters of the Colorado River, leaving each State her own tributaries. It decided that a fair division of the first 7,500,000 acre-feet of such mainstream waters would give 4,400,000 acre-feet to California, 2,800,000 to Arizona, and 300,000 to Nevada, and that Arizona and California should each get one-half of any surplus. Congress gave the Secretary of the Interior adequate authority to accomplish this division by giving him power to make contracts for the delivery of water and by providing that no person could have water without a contract. Pp. 546–590.

(a) Apportionment among the Lower Basin States of that Basin's Colorado River water is not controlled by the doctrine of equitable apportionment or by the Colorado River Compact. Pp. 565–567.

(b) No matter what waters the Compact apportioned, the Project Act itself dealt only with water of the mainstream and reserved to each State the exclusive use of the waters of her own tributaries. Pp. 567–575.

(c) The legislative history of the Act, its language and the scheme established by it for the storage and delivery of water show that Congress intended to provide its own method for a complete apportionment of the Lower Basin's share of the mainstream water among Arizona, California and Nevada; and Congress intended the Secretary of the Interior, through his contracts under § 5, both to carry out the allocation of the waters of the main Colorado River among the Lower Basin States and to decide which users within each State would get water. Pp. 575–585.

(d) It is the Act and the contracts made by the Secretary of the Interior under § 5, not the law of prior appropriation, that control the apportionment of water among the States; and the Secretary, in choosing between the users within each State and in settling the terms of his contracts, is not required by §§ 14 and 18 of the Act to follow state law. Pp. 585–586.

(e) Section 8 of the Reclamation Act does not require the United States, in the delivery of water, to follow priorities laid down by state law; and the Secretary is not bound by state law in disposing of water under the Project Act. Pp. 586–587.

(f) The general saving language of § 18 of the Project Act does not bind the Secretary by state law or nullify the contract power expressly conferred upon him by § 5. Pp. 587–588.

(g) Congress has put the Secretary of the Interior in charge of a whole network of useful projects constructed by the Federal Government up and down the Colorado River, and it has entrusted him with sufficient power, principally the § 5 contract power, to direct, manage and coordinate their operation. This power must be construed to permit him to allocate and distribute the waters of the mainstream of the Colorado River within the boundaries set down by the Act. Pp. 588–590.

2. Certain provisions in the Secretary's contracts are sustained, with one exception. Pp. 590–592.

(a) The Secretary's contracts with Arizona and Nevada are sustained, insofar as they provide that any waters diverted by those States out of the mainstream above Lake Mead must be charged to their respective Lower Basin apportionments; but he cannot reduce water deliveries to those States by the amount of their uses from tributaries above Lake Mead, since Congress intended to apportion only the mainstream, leaving to each State her own tributaries. Pp. 590–591.

(b) The fact that the Secretary has made a contract directly with the State of Nevada, through her Colorado River Commission, for the delivery of water does not impair the Secretary's power to require Nevada water users, other than the State, to make further contracts. Pp. 591–592.

3. In case of water shortage, the Secretary is not bound to require a pro rata sharing of shortages. He must follow the standards set out in the Act; but he is free to choose among the recognized methods of apportionment or to devise reasonable methods of his own, since Congress has given him full power to control, manage and operate the Government's Colorado River works and to make contracts for the sale and delivery of water on such terms as are not prohibited by the Act. Pp. 592–594.

4. With respect to the conflicting claims of Arizona and New Mexico to water in the Gila River, the compromise settlement agreed upon by those States and incorporated in the Master's recommended decree is accepted by this Court. Pp. 594–595.

5. As to the claims asserted by the United States to waters in the main river and some of its tributaries for use on Indian reservations, national forests, recreational and wildlife areas and other government lands and works, this Court approves the Master's decision as to which claims required adjudication, and it approves the decree he recommended for the government claims he did decide. Pp. 595–601.

(a) This Court sustains the Master's finding that, when the United States created the Chemehuevi, Cocopah, Yuma, Colorado River and Fort Mohave Indian Reservations in Arizona, California and Nevada, or added to them, it reserved not only the land but also the use of enough water from the Colorado River to irrigate the irrigable portions of the reserved lands. Pp. 595–597.

(1) The doctrine of equitable apportionment should not be used to divide the water between the Indians and the other people in the State of Arizona. P. 597.

(2) Under its broad powers to regulate navigable waters under the Commerce Clause and to regulate government lands under Art. IV, § 3, of the Constitution, the United States had power to reserve water rights for its reservations and its property. Pp. 597–598.

(3) The reservations of land and water are not invalid though they were originally set apart by Executive Order. P. 598.

(4) The United States reserved the water rights for the Indians, effective as of the time the Indian reservations were created, and these water rights, having vested before the Act became effective in 1929, are "present perfected rights" and as such are entitled to priority under the Act. Pp. 598–600.

(5) This Court sustains the Master's conclusions that enough water was intended to be reserved to satisfy the future, as well as the present, needs of the Indian reservations and that enough water was reserved to irrigate all the practicably irrigable acreage on the reservations, and also his findings as to the various acreages of irrigable land existing on the different reservations. Pp. 600–601.

(b) This Court disagrees with the Master's decision to determine the disputed boundaries of the Colorado River Indian Reservation and the Fort Mohave Indian Reservation, since it is not necessary to resolve those disputes here. P. 601.

(c) This Court agrees with the Master's conclusions that the United States intended to reserve water sufficient for the future requirements of the Lake Mead National Recreational Area, the Havasu Lake National Wildlife Refuge, the Imperial National Wildlife Refuge and the Gila National Forest. P. 601.

(d) This Court rejects the claim of the United States that it is entitled to the use, without charge against its consumption, of any waters that would have been wasted but for salvage by the Government on its wildlife preserves. P. 601.

(e) This Court agrees with the Master that all uses of mainstream water within a State are to be charged against that State's apportionment, which, of course, includes uses by the United States. P. 601.

Mark Wilmer reargued the cause for complainant. With him on the briefs were *Chas. H. Reed, William R. Meagher, Burr Sutter, John E. Madden, Calvin H. Udall, John Geoffrey Will, W. H. Roberts* and *Theodore Kiendl.*

Northcutt Ely, Special Assistant Attorney General of California, reargued the cause for the State of California et al., defendants. With him on the briefs were *Stanley Mosk,* Attorney General, *Charles E. Corker* and *Gilbert*

F. Nelson, Assistant Attorneys General, *Burton J. Gindler, John R. Alexander* and *Gerald Malkan,* Deputy Attorneys General, *Shirley M. Hufstedler, Howard I. Friedman, C. Emerson Duncan II, Jerome C. Muys, Francis E. Jenney, Stanley C. Lagerlof, Roy H. Mann, Harry W. Horton, R. L. Knox, Jr., Earl Redwine, James H. Howard, Charles C. Cooper, Jr., H. Kenneth Hutchinson, Frank P. Doherty, Roger Arnebergh, Gilmore Tillman, Alan M. Firestone, Jean F. DuPaul* and *Henry A. Dietz.*

Solicitor General Cox reargued the cause for the United States, intervener. With him on the briefs were *John F. Davis, David R. Warner, Walter Kiechel, Jr.* and *Warren R. Wise.*

R. P. Parry reargued the cause for the State of Nevada, intervener. With him on the briefs were *Roger D. Foley,* Attorney General, *W. T. Mathews* and *Clifford E. Fix.*

Walter L. Budge, Attorney General of Utah, and *Dennis McCarthy,* Special Assistant Attorney General, filed a statement on behalf of the State of Utah.

Earl E. Hartley, Attorney General of New Mexico, *Thomas O. Olson,* First Assistant Attorney General, and *Claude S. Mann* and *Dudley Cornell,* Special Assistant Attorneys General, filed a brief for the State of New Mexico.

Mr. Justice Black delivered the opinion of the Court.

In 1952 the State of Arizona invoked the original jurisdiction of this Court [1] by filing a complaint against the

[1] "The judicial Power shall extend . . . to Controversies between two or more States . . . .

"In all Cases . . . in which a State shall be Party, the supreme Court shall have original Jurisdiction." U. S. Const., Art. III, § 2. See also 28 U. S. C. § 1251 (a)(1).

Three times previously Arizona has instituted actions in this Court concerning the Colorado River. *Arizona* v. *California,* 283 U. S. 423

State of California and seven of its public agencies.[2] Later, Nevada, New Mexico, Utah, and the United States were added as parties either voluntarily or on motion.[3] The basic controversy in the case is over how much water each State has a legal right to use out of the waters of the Colorado River and its tributaries. After preliminary pleadings, we referred the case to George I. Haight, Esquire, and upon his death in 1955 to Simon H. Rifkind, Esquire, as Special Master to take evidence, find facts, state conclusions of law, and recommend a decree, all "subject to consideration, revision, or approval by the Court."[4] The Master conducted a trial lasting from June 14, 1956, to August 28, 1958, during which 340 witnesses were heard orally or by deposition, thousands of exhibits were received, and 25,000 pages of transcript were filled. Following many motions, arguments, and briefs, the Master in a 433-page volume reported his findings, conclusions, and recommended decree, received by the Court on January 16, 1961.[5] The case has been extensively briefed here and orally argued twice, the first time about 16 hours, the second, over six. As we see this case, the question of each State's share of the waters of the Colorado and its tributaries turns on the meaning and the scope of the Boulder Canyon Project Act passed by Congress in

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(1931); *Arizona* v. *California*, 292 U. S. 341 (1934); *Arizona* v. *California*, 298 U. S. 558 (1936). See also *United States* v. *Arizona*, 295 U. S. 174 (1935).

[2] Palo Verde Irrigation District, Imperial Irrigation District, Coachella Valley County Water District, Metropolitan Water District of Southern California, City of Los Angeles, City of San Diego, and County of San Diego.

[3] 344 U. S. 919 (1953) (intervention by United States); 347 U. S. 985 (1954) (intervention by Nevada); 350 U. S. 114 (1955) (joinder of Utah and New Mexico).

[4] The two orders are reported at 347 U. S. 986 (1954), and 350 U. S. 812 (1955).

[5] 364 U. S. 940 (1961).

1928.[6] That meaning and scope can be better understood when the Act is set against its background—the gravity of the Southwest's water problems; the inability of local groups or individual States to deal with these enormous problems; the continued failure of the States to agree on how to conserve and divide the waters; and the ultimate action by Congress at the request of the States creating a great system of dams and public works nationally built, controlled, and operated for the purpose of conserving and distributing the water.

The Colorado River itself rises in the mountains of Colorado and flows generally in a southwesterly direction for about 1,300 miles through Colorado, Utah, and Arizona and along the Arizona-Nevada and Arizona-California boundaries, after which it passes into Mexico and empties into the Mexican waters of the Gulf of California. On its way to the sea it receives tributary waters from Wyoming, Colorado, Utah, Nevada, New Mexico, and Arizona. The river and its tributaries flow in a natural basin almost surrounded by large mountain ranges and drain 242,000 square miles, an area about 900 miles long from north to south and 300 to 500 miles wide from east to west—practically one-twelfth the area of the continental United States excluding Alaska. Much of this large basin is so arid that it is, as it always has been, largely dependent upon managed use of the waters of the Colorado River System to make it productive and inhabitable. The Master refers to archaeological evidence that as long as 2,000 years ago the ancient Hohokam tribe built and maintained irrigation canals near what is now Phoenix, Arizona, and that American Indians were practicing irrigation in that region at the time white men first explored it. In the second half of the nineteenth century a group

[6] Boulder Canyon Project Act, 45 Stat. 1057 (1928), 43 U. S. C. §§ 617–617t.

of people interested in California's Imperial Valley conceived plans to divert water from the mainstream of the Colorado to give life and growth to the parched and barren soil of that valley. As the most feasible route was through Mexico, a Mexican corporation was formed and a canal dug partly in Mexico and partly in the United States. Difficulties which arose because the canal was subject to the sovereignty of both countries generated hopes in this country that some day there would be a canal wholly within the United States, an all-American canal.[7]

During the latter part of the nineteenth and the first part of the twentieth centuries, people in the Southwest continued to seek new ways to satisfy their water needs, which by that time were increasing rapidly as new settlers moved into this fast-developing region. But none of the more or less primitive diversions made from the mainstream of the Colorado conserved enough water to meet the growing needs of the basin. The natural flow of the Colorado was too erratic, the river at many places in canyons too deep, and the engineering and economic hurdles too great for small farmers, larger groups, or even States to build storage dams, construct canals, and install the expensive works necessary for a dependable year-round water supply. Nor were droughts the basin's only problem; spring floods due to melting snows and seasonal storms were a recurring menace, especially disastrous in California's Imperial Valley where, even after the Mexican canal provided a more dependable water supply, the threat of flood remained at least as serious as before. Another troublesome problem was the erosion of land and the deposit of silt which fouled waters, choked irrigation works, and damaged good farmland and crops.

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[7] "[The All-American Canal] will end an intolerable situation, under which the Imperial Valley now secures its sole water supply from a canal running for many miles through Mexico . . . ." S. Rep. No. 592, 70th Cong., 1st Sess. 8 (1928).

It is not surprising that the pressing necessity to transform the erratic and often destructive flow of the Colorado River into a controlled and dependable water supply desperately needed in so many States began to be talked about and recognized as far more than a purely local problem which could be solved on a farmer-by-farmer, group-by-group, or even state-by-state basis, desirable as this kind of solution might have been. The inadequacy of a local solution was recognized in the Report of the All-American Canal Board of the United States Department of the Interior on July 22, 1919, which detailed the widespread benefits that could be expected from construction by the United States of a large reservoir on the mainstream of the Colorado and an all-American canal to the Imperial Valley.[8] Some months later, May 18, 1920, Congress passed a bill offered by Congressman Kinkaid of Nebraska directing the Secretary of the Interior to make a study and report of diversions which might be made from the Colorado River for irrigation in the Imperial Valley.[9] The Fall-Davis Report,[10] submitted to Congress in compliance with the Kinkaid Act, began by declaring, "The control of the floods and development of the resources of the Colorado River are peculiarly national problems . . ." [11] and then went on to give reasons why this was so, concluding with the statement that the job was so big that only the Federal Government could do it.[12] Quite naturally, therefore, the

[8] Department of the Interior, Report of the All-American Canal Board (1919), 23–33. The three members of the Board were engineers with long experience in Western water problems.

[9] 41 Stat. 600 (1920).

[10] S. Doc. No. 142, 67th Cong., 2d Sess. (1922).

[11] *Id.*, at 1.

[12] The reasons given were:

"1. The Colorado River is international.

"2. The stream and many of its tributaries are interstate.

[*Footnote 12 continued on p. 555*]

Report recommended that the United States construct as a government project not only an all-American canal from the Colorado River to the Imperial Valley but also a dam and reservoir at or near Boulder Canyon.[13]

The prospect that the United States would undertake to build as a national project the necessary works to control floods and store river waters for irrigation was apparently a welcome one for the basin States. But it brought to life strong fears in the northern basin States that additional waters made available by the storage and canal projects might be gobbled up in perpetuity by faster growing lower basin areas, particularly California, before the upper States could appropriate what they believed to be their fair share. These fears were not without foundation, since the law of prior appropriation prevailed in most of the Western States.[14] Under that law the one who first appropriates water and puts it to beneficial use thereby acquires a vested right to continue to divert and use that quantity of water against all claimants junior to him in point of time.[15] "First in time, first in right" is the shorthand expression of this legal principle. In 1922, only four months after the Fall-Davis Report, this Court in *Wyoming* v. *Colorado,* 259 U. S. 419, held that the

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"3. It is a navigable river.

"4. Its waters may be made to serve large areas of public lands naturally desert in character.

"5. Its problems are of such magnitude as to be beyond the reach of other than national solution." *Ibid.*

[13] *Id.*, at 21.

[14] This law prevails exclusively in all the basin States except California. See I Wiel, Water Rights in the Western States § 66 (3d ed., 1911); Hutchins, Selected Problems in the Law of Water Rights in the West 30–31 (1942) (U. S. Dept. of Agriculture Misc. Pub. No. 418). Even in California it is important. See 51 Cal. Jur. 2d Waters §§ 257–264 (1959).

[15] *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.,* 304 U. S. 92, 98 (1938); *Arizona* v. *California,* 283 U. S. 423, 459 (1931).

doctrine of prior appropriation could be given interstate effect.[16] This decision intensified fears of Upper Basin States that they would not get their fair share of Colorado River water.[17] In view of California's phenomenal growth, the Upper Basin States had particular reason to fear that California, by appropriating and using Colorado River water before the upper States, would, under the interstate application of the prior appropriation doctrine, be "first in time" and therefore "first in right." Nor were such fears limited to the northernmost States. Nevada, Utah, and especially Arizona were all apprehensive that California's rapid declaration of appropriative claims would deprive them of their just share of basin water available after construction of the proposed United States project. It seemed for a time that these fears would keep the States from agreeing on any kind of division of the river waters. Hoping to prevent "conflicts" and "expensive litigation" which would hold up or prevent the tremendous benefits expected from extensive federal development of the river,[18] the basin States requested and Congress passed an Act on August 19, 1921, giving the

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[16] The doctrine continues to be applied interstate. *E. g., Nebraska* v. *Wyoming*, 325 U. S. 589, 617–618 (1945).

[17] "Delph E. Carpenter, Colorado River Commissioner for the State of Colorado, summarized the situation produced by that decision as follows:

" 'The upper state has but one alternative, that of using every means to retard development in the lower state until the uses within the upper state have reached their maximum. The states may avoid this unfortunate situation by determining their respective rights by interstate compact before further development in either state, thus permitting freedom of development in the lower state without injury to future growth in the upper.'

"The final negotiation of the compact took place in the atmosphere produced by that decision." H. R. Doc. No. 717, 80th Cong., 2d Sess. 22 (1948).

[18] H. R. Rep. No. 191, 67th Cong., 1st Sess. (1921).

States consent to negotiate and enter into a compact for the "equitable division and apportionment . . . of the water supply of the Colorado River." [19]

Pursuant to this congressional authority, the seven States appointed Commissioners who, after negotiating for the better part of a year, reached an agreement at Santa Fe, New Mexico, on November 24, 1922. The agreement, known as the Colorado River Compact,[20] failed to fulfill the hope of Congress that the States would themselves agree on each State's share of the water. The most the Commissioners were able to accomplish in the Compact was to adopt a compromise suggestion of Secretary of Commerce Herbert Hoover, specially designated as United States representative.[21] This compromise divides the entire basin into two parts, the Upper Basin and the Lower Basin, separated at a point on the river in northern Arizona known as Lee Ferry. (A map showing the two basins and other points of interest in this controversy is printed as an Appendix facing p. 602.) Article III (a) of the Compact apportions to each basin in perpetuity 7,500,000 acre-feet of water [22] a year from the Colorado River System, defined in Article II (a) as "the Colorado River and its tributaries within the United States of America." In addition, Article III (b) gives the Lower Basin "the right to increase its beneficial consumptive use [23] of such waters by one million acre-feet per annum." Article III (c) provides that future Mex-

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[19] 42 Stat. 171 (1921).

[20] The Compact can be found at 70 Cong. Rec. 324 (1928), and U. S. Dept. of the Interior, Documents on the Use and Control of the Waters of Interstate and International Streams 39 (1956).

[21] H. R. Doc. No. 717, 80th Cong., 2d Sess. 22 (1948).

[22] An acre-foot of water is enough to cover an acre of land with one foot of water.

[23] "Beneficial consumptive use" means consumptive use measured by diversions less return flows, for a beneficial (nonwasteful) purpose.

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ican water rights recognized by the United States shall be supplied first out of surplus over and above the aggregate of the quantities specified in (a) and (b), and if this surplus is not enough the deficiency shall be borne equally by the two basins. Article III (d) requires the Upper Basin not to deplete the Lee Ferry flow below an aggregate of 75,000,000 acre-feet for any 10 consecutive years. Article III (f) and (g) provide a way for further apportionment by a compact of "Colorado River System" waters at any time after October 1, 1963. While these allocations quieted rivalries between the Upper and Lower Basins, major differences between the States in the Lower Basin continued. Failure of the Compact to determine each State's share of the water left Nevada and Arizona with their fears that the law of prior appropriation would be not a protection but a menace because California could use that law to get for herself the lion's share of the waters allotted to the Lower Basin. Moreover, Arizona, because of her particularly strong interest in the Gila, intensely resented the Compact's inclusion of the Colorado River tributaries in its allocation scheme and was bitterly hostile to having Arizona tributaries, again particularly the Gila, forced to contribute to the Mexican burden. Largely for these reasons, Arizona alone, of all the States in both basins, refused to ratify the Compact.[24]

Seeking means which would permit ratification by all seven basin States, the Governors of those States met at Denver in 1925 and again in 1927. As a result of these meetings the Governors of the upper States suggested, as a fair apportionment of water among the Lower Basin States, that out of the average annual delivery of water at

[24] Arizona did ratify the Compact in 1944, after it had already become effective by six-state ratification as permitted by the Boulder Canyon Project Act.

Lee Ferry required by the Compact—7,500,000 acre-feet—Nevada be given 300,000 acre-feet, Arizona 3,000,000, and California 4,200,000, and that unapportioned waters, subject to reapportionment after 1963, be shared equally by Arizona and California. Each Lower Basin State would have "the exclusive beneficial consumptive use of such tributaries within its boundaries before the same empty into the main stream," except that Arizona tributary waters in excess of 1,000,000 acre-feet could under some circumstances be subject to diminution by reason of a United States treaty with Mexico. This proposal foundered because California held out for 4,600,000 acre-feet instead of 4,200,000 [25] and because Arizona held out for complete exemption of its tributaries from any part of the Mexican burden.[26]

Between 1922 and 1927 Congressman Philip Swing and Senator Hiram Johnson, both of California, made three attempts to have Swing-Johnson bills enacted, authorizing construction of a dam in the canyon section of the Colorado River and an all-American canal.[27] These bills would have carried out the original Fall-Davis Report's recommendations that the river problem be recognized and treated as national, not local. Arizona's Senators and Congressmen, still insisting upon a definite guaranty of water from the mainstream, bitterly fought these proposals because they failed to provide for exclusive use of her own tributaries, particularly the Gila, and for exemption of these tributaries from the Mexican burden.

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[25] Hearings on H. R. 5773 before the House Committee on Irrigation and Reclamation, 70th Cong., 1st Sess. 402–405 (1928).

[26] *Id.*, at 30–31. Arizona also objected to the provisions concerning electrical power.

[27] H. R. 11449, 67th Cong., 2d Sess. (1922); H. R. 2903, S. 727, 68th Cong., 1st Sess. (1923); H. R. 9826, S. 3331, 69th Cong., 1st Sess. (1926).

Finally, the fourth Swing-Johnson bill passed both Houses and became the Boulder Canyon Project Act of December 21, 1928, 45 Stat. 1057. The Act authorized the Secretary of the Interior to construct, operate, and maintain a dam and other works in order to control floods, improve navigation, regulate the river's flow, store and distribute waters for reclamation and other beneficial uses, and generate electrical power.[28] The projects authorized by the Act were the same as those provided for in the prior defeated measures, but in other significant respects the Act was strikingly different. The earlier bills had offered no method whatever of apportioning the waters among the States of the Lower Basin. The Act as finally passed did provide such a method, and, as we view it, the method chosen was a complete statutory apportionment intended to put an end to the long-standing dispute over Colorado River waters. To protect the Upper Basin against California should Arizona still refuse to ratify the Compact,[29] § 4 (a) of the Act as finally passed provided that, if fewer than seven States ratified within six months, the Act should not take effect unless six States including California ratified and unless California, by its legislature, agreed "irrevocably and unconditionally . . . as an express covenant" to a limit on its annual consumption of Colorado River water of "four million four hundred thousand acre-feet of the waters apportioned to the lower

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[28] Another purpose of the Act was to approve the Colorado River Compact, which had allocated the water between the two basins.

[29] The Upper Basin States feared that, if Arizona did not ratify the Compact, the division of water between the Upper and Lower Basins agreed on in the Compact would be nullified. The reasoning was that Arizona's uses would not be charged against the Lower Basin's apportionment and that California would therefore be free to exhaust that apportionment herself. Total Lower Basin uses would then be more than permitted in the Compact, leaving less water for the Upper Basin.

basin States by paragraph (a) of Article III of the Colorado River compact, plus not more than one-half of any excess or surplus waters unapportioned by said compact." Congress in the same section showed its continuing desire to have California, Arizona, and Nevada settle their own differences by authorizing them to make an agreement apportioning to Nevada 300,000 acre-feet, and to Arizona 2,800,000 acre-feet plus half of any surplus waters unapportioned by the Compact. The permitted agreement also was to allow Arizona exclusive use of the Gila River, wholly free from any Mexican obligation, a position Arizona had taken from the beginning. Sections 5 and 8 (b) of the Project Act made provisions for the sale of the stored waters. The Secretary of the Interior was authorized by § 5 "under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon, for irrigation and domestic uses . . . ." Section 5 required these contracts to be "for permanent service" and further provided, "No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated." Section 8 (b) provided that the Secretary's contracts would be subject to any compact dividing the benefits of the water between Arizona, California, and Nevada, or any two of them, approved by Congress on or before January 1, 1929, but that any such compact approved after that date should be "subject to all contracts, if any, made by the Secretary of the Interior under section 5 hereof prior to the date of such approval and consent by Congress."

The Project Act became effective on June 25, 1929, by Presidential Proclamation,[30] after six States, including California, had ratified the Colorado River Compact and

[30] 46 Stat. 3000 (1929).

the California legislature had accepted the limitation of 4,400,000 acre-feet [31] as required by the Act. Neither the three States nor any two of them ever entered into any apportionment compact as authorized by §§ 4 (a) and 8 (b). After the construction of Boulder Dam the Secretary of the Interior, purporting to act under the authority of the Project Act, made contracts with various water users in California for 5,362,000 acre-feet, with Nevada for 300,000 acre-feet, and with Arizona for 2,800,000 acre-feet of water from that stored at Lake Mead.

The Special Master appointed by this Court found that the Colorado River Compact, the law of prior appropriation, and the doctrine of equitable apportionment—by which doctrine this Court in the absence of statute resolves interstate claims according to the equities—do not control the issues in this case. The Master concluded that, since the Lower Basin States had failed to make a compact to allocate the waters among themselves as authorized by §§ 4 (a) and 8 (b), the Secretary's contracts with the States had within the statutory scheme of §§ 4 (a), 5, and 8 (b) effected an apportionment of the waters of the mainstream which, according to the Master, were the only waters to be apportioned under the Act. The Master further held that, in the event of a shortage of water making it impossible for the Secretary to supply all the water due California, Arizona, and Nevada under their contracts, the burden of the shortage must be borne by each State in proportion to her share of the first 7,500,000 acre-feet allocated to the Lower Basin, that is, $\frac{4.4}{7.5}$ by California, $\frac{2.8}{7.5}$ by Arizona, and $\frac{.3}{7.5}$ by Nevada, without regard to the law of prior appropriation.

Arizona, Nevada, and the United States support with few exceptions the analysis, conclusions, and recommen-

[31] California Limitation Act, Cal. Stat. 1929, c. 16, at 38.

dations of the Special Master's report. These parties agree that Congress did not leave division of the waters to an equitable apportionment by this Court but instead created a comprehensive statutory scheme for the allocation of mainstream waters. Arizona, however, believes that the allocation formula established by the Secretary's contracts was in fact the formula required by the Act. The United States, along with California, thinks the Master should not have invalidated the provisions of the Arizona and Nevada water contracts requiring those States to deduct from their allocations any diversions of water above Lake Mead which reduce the flow into that lake.

California is in basic disagreement with almost all of the Master's Report. She argues that the Project Act, like the Colorado River Compact, deals with the entire Colorado River System, not just the mainstream. This would mean that diversions within Arizona and Nevada of tributary waters flowing in those States would be charged against their apportionments and that, because tributary water would be added to the mainstream water in computing the first 7,500,000 acre-feet available to the States, there would be a greater likelihood of a surplus, of which California gets one-half. The result of California's argument would be much more water for California and much less for Arizona. California also argues that the Act neither allocates the Colorado River waters nor gives the Secretary authority to make an allocation. Rather she takes the position that the judicial doctrine of equitable apportionment giving full interstate effect to the traditional western water law of prior appropriation should determine the rights of the parties to the water. Finally, California claims that in any event the Act does not control in time of shortage. Under such circumstances, she says, this Court should divide the waters according to the doctrine of equitable apportionment or

the law of prior appropriation, either of which, she argues, should result in protecting her prior uses.

Our jurisdiction to entertain this suit is not challenged and could not well be since Art. III, § 2, of the Constitution gives this Court original jurisdiction of actions in which States are parties. In exercising that jurisdiction, we are mindful of this Court's often expressed preference that, where possible, States settle their controversies by "mutual accommodation and agreement." [32] Those cases and others [33] make it clear, however, that this Court does have a serious responsibility to adjudicate cases where there are actual, existing controversies over how interstate streams should be apportioned among States. This case is the most recent phase of a continuing controversy over the water of the Colorado River, which the States despite repeated efforts have been unable to settle. Resolution of this dispute requires a determination of what apportionment, if any, is made by the Project Act and what powers are conferred by the Act upon the Secretary of the Interior. Unless many of the issues presented here are adjudicated, the conflicting claims of the parties will continue, as they do now, to raise serious doubts as to the extent of each State's right to appropriate water from the Colorado River System for existing or new uses. In this situation we should and do exercise our jurisdiction.

I.

Allocation of Water Among the States and Distribution to Users.

We have concluded, for reasons to be stated, that Congress in passing the Project Act intended to and did

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[32] *Colorado* v. *Kansas,* 320 U. S. 383, 392 (1943); *Nebraska* v. *Wyoming,* 325 U. S. 589, 616 (1945).

[33] *E. g., Kansas* v. *Colorado,* 185 U. S. 125 (1902); *New Jersey* v. *New York,* 283 U. S. 336 (1931).

create its own comprehensive scheme for the apportionment among California, Arizona, and Nevada of the Lower Basin's share of the mainstream waters of the Colorado River, leaving each State its tributaries. Congress decided that a fair division of the first 7,500,000 acre-feet of such mainstream waters would give 4,400,000 acre-feet to California, 2,800,000 to Arizona, and 300,000 to Nevada; Arizona and California would each get one-half of any surplus. Prior approval was therefore given in the Act for a tri-state compact to incorporate these terms. The States, subject to subsequent congressional approval, were also permitted to agree on a compact with different terms. Division of the water did not, however, depend on the States' agreeing to a compact, for Congress gave the Secretary of the Interior adequate authority to accomplish the division. Congress did this by giving the Secretary power to make contracts for the delivery of water and by providing that no person could have water without a contract.

A. *Relevancy of Judicial Apportionment and Colorado River Compact.*—We agree with the Master that apportionment of the Lower Basin waters of the Colorado River is not controlled by the doctrine of equitable apportionment or by the Colorado River Compact. It is true that the Court has used the doctrine of equitable apportionment to decide river controversies between States.[34] But in those cases Congress had not made any statutory apportionment. In this case, we have decided that Congress has provided its own method for allocating among the Lower Basin States the mainstream water to which they are entitled under the Compact. Where Congress has so exercised its constitutional power over waters, courts have no power to substitute their own notions of an "equitable apportionment" for the apportionment chosen by Con-

[34] *E. g., Wyoming* v. *Colorado,* 259 U. S. 419 (1922); *Nebraska* v. *Wyoming,* 325 U. S. 589 (1945).

gress. Nor does the Colorado River Compact control this case. Nothing in that Compact purports to divide water among the Lower Basin States nor in any way to affect or control any future apportionment among those States or any distribution of water within a State. That the Commissioners were able to accomplish even a division of water between the basins is due to what is generally known as the "Hoover Compromise."

> "Participants [in the Compact negotiations] have stated that the negotiations would have broken up but for Mr. Hoover's proposal: that the Commission limit its efforts to a division of water between the upper basin and the lower basin, leaving to each basin the future internal allocation of its share." [35]

And in fact this is all the Compact did. However, the Project Act, by referring to the Compact in several places, does make the Compact relevant to a limited extent. To begin with, the Act explicitly approves the Compact and thereby fixes a division of the waters between the basins which must be respected. Further, in several places the Act refers to terms contained in the Compact. For example, § 12 of the Act adopts the Compact definition of "domestic," [36] and § 6 requires satisfaction of "present perfected rights" as used in the Compact.[37] Obviously, therefore, those particular terms, though originally formulated only for the Compact's allocation of water between basins, are incorporated into the Act and are made applicable to the Project Act's allocation among Lower Basin

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[35] H. R. Doc. No. 717, 80th Cong., 2d Sess. 22 (1948).

[36] " 'Domestic' whenever employed in this Act shall include water uses defined as 'domestic' in said Colorado River compact."

[37] The dam and reservoir shall be used, among other things, for "satisfaction of present perfected rights in pursuance of Article VIII of said Colorado River compact."

States. The Act also declares that the Secretary of the Interior and the United States in the construction, operation, and maintenance of the dam and other works and in the making of contracts shall be subject to and controlled by the Colorado River Compact.[38] These latter references to the Compact are quite different from the Act's adoption of Compact terms. Such references, unlike the explicit adoption of terms, were used only to show that the Act and its provisions were in no way to upset, alter, or affect the Compact's congressionally approved division of water between the basins. They were not intended to make the Compact and its provisions control or affect the Act's allocation among and distribution of water within the States of the Lower Basin. Therefore, we look to the Compact for terms specifically incorporated in the Act, and we would also look to it to resolve disputes between the Upper and Lower Basins, were any involved in this case. But no such questions are here. We must determine what apportionment and delivery scheme in the Lower Basin has been effected through the Secretary's contracts. For that determination, we look to the Project Act alone.

B. *Mainstream Apportionment.*—The congressional scheme of apportionment cannot be understood without knowing what water Congress wanted apportioned. Under California's view, which we reject, the first 7,500,000 acre-feet of Lower Basin water, of which California has agreed to use only 4,400,000, is made up of both mainstream and tributary water, not just mainstream water. Under the view of Arizona, Nevada, and the United States, with which we agree, the tributaries are not included in the waters to be divided but remain for the exclusive use of each State. Assuming 7,500,000 acre-

[38] §§ 1, 8 (a), 13 (b) and (c).

feet or more in the mainstream and 2,000,000 in the tributaries, California would get 1,000,000 acre-feet more if the tributaries are included and Arizona 1,000,000 less.[39]

California's argument that the Project Act, like the Colorado River Compact, deals with the main river and all its tributaries rests on § 4 (a) of the Act, which limits California to 4,400,000 acre-feet "of the waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact, plus not more than one-half of any excess or surplus waters unapportioned by said compact . . . ." And Article III (a), referred to by § 4 (a), apportioned in perpetuity to the Lower Basin the use of 7,500,000 acre-feet of water per annum "from the Colorado River System," which was defined in the Compact as "that portion of the Colorado River and its tributaries within the United States of America."

Arizona argues that the Compact apportions between basins only the waters of the mainstream, not the mainstream and the tributaries. We need not reach that question, however, for we have concluded that whatever waters the Compact apportioned the Project Act itself dealt only with water of the mainstream. In the first place, the Act, in § 4 (a), states that the California limitation, which is in reality her share of the first 7,500,000 acre-feet of Lower Basin water, is on "water of and from the Colorado River," not of and from the "Colorado River System." But more importantly, the negotiations among the States and the congressional debates leading to the passage of the Project Act clearly show that the language used by Congress in the Act was meant to refer to mainstream waters only. Inclusion of the tributaries in the Compact was natural in view of the upper States' strong feeling that the Lower Basin

[39] Also, California would reduce Nevada's share of the mainstream waters from 300,000 acre-feet to 120,500 acre-feet.

tributaries should be made to share the burden of any obligation to deliver water to Mexico which a future treaty might impose. But when it came to an apportionment among the Lower Basin States, the Gila, by far the most important Lower Basin tributary, would not logically be included, since Arizona alone of the States could effectively use that river.[40] Therefore, with minor exceptions, the proposals and counterproposals over the years, culminating in the Project Act, consistently provided for division of the mainstream only, reserving the tributaries to each State's exclusive use.

The most important negotiations among the States, which in fact formed the basis of the debates leading to passage of the Act, took place in 1927 when the Governors of the seven basin States met at Denver in an effort to work out an allocation of the Lower Basin waters acceptable to Arizona, California, and Nevada. Arizona and California made proposals,[41] both of which suggested giving Nevada 300,000 acre-feet out of the mainstream of the Colorado River and reserving to each State the exclusive use of her own tributaries. Arizona proposed that all remaining mainstream water be divided equally between herself and California, which would give each State 3,600,000 acre-feet out of the first 7,500,000 acre-feet of mainstream water. California rejected the proposed equal division of the water, suggesting figures that would result in her getting about 4,600,000 out of the 7,500,000. The Governors of the four Upper Basin States, trying to bring Arizona and California together, asked each State to reduce its demands and suggested this compromise: Nevada 300,000 acre-feet, Arizona 3,000,000, and California

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[40] Not only does the Gila enter the Colorado almost at the Mexican border, but also in dry seasons it virtually evaporates before reaching the Colorado.

[41] See 69 Cong. Rec. 9454 (1928).

4,200,000.[42] These allocations were to come only out of the mainstream, that is, as stated by the Governors, out of "the average annual delivery of water to be provided by the states of the upper division at Lees Ferry, under the terms of the Colorado River Compact." The Governors' suggestions, like those of the States, explicitly reserved to each State as against the other States the exclusive use of her own tributaries. Arizona agreed to the Governors' proposal, but she wanted it made clear that her tributaries were to be exempted from any Mexican obligation.[43] California rejected the whole proposal, insisting that she must have 4,600,000 acre-feet from the mainstream, or, as she put it, "from the waters to be provided by the States of the upper division at Lee Ferry under the Colorado River compact."[44] Neither in the States' original offers, nor in the Governors' suggestions, nor in the States' responses was the "Colorado River System"—mainstream plus tributaries—ever used as the basis for Lower Basin allocations; rather, it was always mainstream water, or the water to be delivered by the upper States at Lee Ferry, that is to say, an annual average of 7,500,000 acre-feet of mainstream water.

With the continued failure of Arizona and California to reach accord, there was mounting impetus for a congressional solution. A Swing-Johnson bill containing no limitation on California's uses finally passed the House in 1928 over objections by Representatives from Arizona and Utah.[45] When the bill reached the Senate, it was amended in committee to provide that the Secretary in his water delivery contracts must limit California to 4,600,000 acre-feet "of the water allocated to the lower basin by

[42] See 70 Cong. Rec. 172 (1928).

[43] Hearings on H. R. 5773, *supra* note 25, at 30–31.

[44] *Id.*, at 402.

[45] H. R. 5773, 70th Cong., 1st Sess.; 69 Cong. Rec. 9989–9990 (1928).

the Colorado River compact . . . and one-half of the unallocated, excess, and/or surplus water . . . ." [46] On the floor, Senator Phipps of Colorado proposed an amendment which would allow the Act to go into effect without any limitation on California if seven States ratified the Compact; if only six States ratified and if the California Legislature accepted the limitation, the Act could still become effective.[47] Arizona's Senator Hayden had already proposed an amendment reducing California's share to 4,200,000 acre-feet (the Governors' proposal), plus half of the surplus, leaving Arizona exclusive use of the Gila free from any Mexican obligation,[48] but this the Senate rejected.[49] Senator Bratton of New Mexico, noting that only 400,000 acre-feet kept Arizona and California apart, immediately suggested an amendment by which they would split the difference, California getting 4,400,000 acre-feet "of the waters apportioned to the lower basin States by the Colorado River compact," plus half of the surplus.[50] It was this Bratton amendment that became part of the Act as passed,[51] which had been amended on the floor so that the limitation referred to waters apportioned to the Lower Basin "by paragraph (a) of Article III of the Colorado River compact," instead of waters apportioned "by the Colorado River compact." [52]

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[46] S. Rep. No. 592, 70th Cong., 1st Sess. 2 (1928).

[47] 70 Cong. Rec. 324 (1928).

[48] *Id.*, at 162.

[49] *Id.*, at 384.

[50] *Id.*, at 385.

[51] 45 Stat. 1057 (1928). Arizona's Senators Ashurst and Hayden voted against the bill, which did not exempt the Gila from the Mexican burden. 70 Cong. Rec. 603 (1928).

[52] 70 Cong. Rec. 459 (1928). That this change was not intended to cause the States to give up their tributaries may reasonably be inferred from the fact that the amendment was agreed to by Senator Hayden, who was a constant opponent of including the tributaries.

Statements made throughout the debates make it quite clear that Congress intended the 7,500,000 acre-feet it was allocating, and out of which California was limited to 4,400,000, to be mainstream water only. In the first place, the basin Senators expressly acknowledged as the starting point for their debate the Denver Governors' proposal that specific allocations be made to Arizona, California, and Nevada from the mainstream, leaving the tributaries to the States. For example, Senator Johnson, leading spokesman for California, and Senator Hayden, leading spokesman for Arizona, agreed that the Governors' recommendations could be used as "a basis for discussion." [53] Hayden went on to observe that the Committee amendment would give California the same 4,600,000 acre-feet she had sought at Denver.[54] Later, Nevada's Senator Pittman stated that the committee "put the amount in there that California demanded before the four governors at Denver," and said that the Bratton amendment would split the 400,000 acre-feet separating the Governors' figure and the Committee's figure.[55] All the leaders in the debate—Johnson, Bratton, King, Hayden, Phipps, and Pittman—expressed a common understanding that the key issue separating Arizona and California was the difference of 400,000 acre-feet,[56] precisely the same 400,000 acre-feet of mainstream water

[53] *Id.*, at 77.

[54] *Ibid.* Later, Senator Hayden said that his amendment incorporated the Governors' proposal. *Id.*, at 172–173.

[55] *Id.*, at 386.

[56] *Id.*, at 164 (King), 165 (Johnson, Bratton), 382 (Hayden, Phipps), 385 (Bratton), 386 (Pittman). Senator Hayden's statement is representative: "I want to state to the Senate that what I am trying to accomplish is to get a vote on the one particular question of whether the quantity of water which the State of California may divert from the Colorado River should be 4,200,000 acre-feet or 4,600,000 acre-feet." *Id.*, at 382.

that had separated the States at Denver. Were we to sustain California's argument here that tributaries must be included, California would actually get more than she was willing to settle for at Denver.

That the apportionment was from the mainstream only is also strongly indicated by an analysis of the second paragraph of § 4 (a) of the Act. There Congress authorized Arizona, Nevada, and California to make a compact allocating to Nevada 300,000 acre-feet and to Arizona 2,800,000 plus one-half of the surplus, which, with California's 4,400,000 and half of the surplus, would under California's interpretation of the Act exhaust the Lower Basin waters, both mainstream and tributaries. But Utah and New Mexico, as Congress knew, had interests in Lower Basin tributaries which Congress surely would have protected in some way had it meant for the tributaries of those two States to be included in the water to be divided among Arizona, Nevada, and California. We cannot believe that Congress would have permitted three States to divide among themselves water belonging to five States. Nor can we believe that the representatives of Utah and New Mexico would have sat quietly by and acquiesced in a congressional attempt to include their tributaries in waters given the other three States.

Finally, in considering California's claim to share in the tributaries of other States, it is important that from the beginning of the discussions and negotiations which led to the Project Act, Arizona consistently claimed that she must have sole use of the Gila, upon which her existing economy depended.[57] Arizona's claim was supported by the fact that only she and New Mexico could effectively use the Gila waters, which not only entered the Colorado

[57] *E. g.*, Report, Colorado River Commission of Arizona (1927), reprinted in Hearings on H. R. 5773, *supra* note 25, at 25–31; 69 Cong. Rec. 9454 (1928) (Arizona's proposal at Denver).

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River too close to Mexico to be of much use to any other State but also was reduced virtually to a trickle in the hot Arizona summers before it could reach the Colorado. In the debates the Senators consistently acknowledged that the tributaries—or at least the waters of the Gila, the only major Arizona tributary—were excluded from the allocation they were making. Senator Hayden, in response to questions by Senator Johnson, said that the California Senator was correct in stating that the Senate had seen fit to give Arizona 2,800,000 acre-feet in addition to all the water in the Gila.[58] Senator Johnson had earlier stated, "[I]t is only the main stream, Senators will recall, that has been discussed," and one of his arguments in favor of California's receiving 4,600,000 acre-feet rather than 4,200,000 was that Arizona was going to keep all her tributaries in addition to whatever portion of the main river was allocated to her.[59] Senator Johnson also argued that Arizona should bear more than half the Lower Basin's Mexican burden because in addition to the 2,800,000 acre-feet allotted her by the Act she would get the Gila, which he erroneously estimated at 3,500,000 acre-feet.[60] Senator Pittman, who had sat in on the Governors' conference, likewise understood that the water was being allocated from "the main Colorado River." [61] And other interested Senators similarly distinguished between the mainstream and the tributaries.[62] While the debates, extending over a long period of years, undoubtedly contain statements which support inferences in conflict with those we have drawn, we are persuaded by the legislative history as a whole that the Act was not intended to give

[58] 70 Cong. Rec. 467–468 (1928). See also *id.*, at 463–464, 465.

[59] *Id.*, at 237.

[60] *Id.*, at 466–467.

[61] *Id.*, at 469. See also *id.*, at 232.

[62] See *id.*, at 463 (Shortridge); *id.*, at 465 (King).

California any claim to share in the tributary waters of the other Lower Basin States.

C. *The Project Act's Apportionment and Distribution Scheme.*—The legislative history, the language of the Act, and the scheme established by the Act for the storage and delivery of water convince us also that Congress intended to provide its own method for a complete apportionment of the mainstream water among Arizona, California, and Nevada.

First, the legislative history. In hearings on the House bill that became the Project Act, Congressman Arentz of Nevada, apparently impatient with the delay of this much needed project, told the committee on January 6, 1928, that if the States could not themselves allocate the water, "there must be some power which will say to California 'You can not take any more than this amount and the balance is allocated to the other States.' " [63] Later, May 25, 1928, the House passed the bill,[64] but it did not contain any allocation scheme. When the Senate took up that bill in December, pressure mounted swiftly for amendments that would provide a workable method for apportioning the waters among the Lower Basin States and distributing them to users in the States. The session convened on December 3, 1928, on the fifth the Senate took up the bill,[65] nine days later the bill with significant amendments passed the Senate,[66] four days after that the House concurred in the Senate's action,[67] and on the twenty-first the President signed the bill.[68] When the bill first reached the Senate floor, it had

[63] Hearings on H. R. 5773, *supra* note 25, at 50.
[64] 69 Cong. Rec. 9990 (1928).
[65] 70 Cong. Rec. 67 (1928).
[66] *Id.*, at 603.
[67] *Id.*, at 837–838.
[68] 45 Stat. 1057.

a provision, added in committee, limiting California to 4,600,000 acre-feet,[69] and Senator Hayden on December 6 proposed reducing that share to 4,200,000.[70] The next day, December 7, Mr. Pittman, senior Senator from Nevada, vigorously argued that Congress should settle the matter without delay. He said,

> "What is the difficulty? We have only minor questions involved here. There is practically nothing involved except a dispute between the States of Arizona and California with regard to the division of the increased water that will be impounded behind the proposed dam; that is all. . . . Of the 7,500,000 acre-feet of water let down that river they have gotten together within 400,000 acre-feet. They have got to get together, and if they do not get together Congress should bring them together." [71]

The day after that, December 8, New Mexico's Senator Bratton suggested an amendment splitting the difference between the demands of Arizona and California by limiting California to 4,400,000 acre-feet.[72] On the tenth, reflecting the prevailing sense of urgency for decisive action, Senator Bratton emphasized that this was not a dispute limited simply to two States:

> "The two States have exchanged views, they have negotiated, they have endeavored to reach an agreement, and until now have been unable to do so. This controversy does not affect those two States alone. It affects other States in the Union and the Government as well.
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> "Without undertaking to express my views either way upon the subject, I do think that if the two

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[69] See S. Rep. No. 592, 70th Cong., 1st Sess. 2 (1928).

[70] 70 Cong. Rec. 162 (1928).

[71] *Id.*, at 232.

[72] *Id.*, at 277, 385.

> States are unable to agree upon a figure then that we, as a disinterested and friendly agency, should pass a bill which, according to our combined judgment, will justly and equitably settle the controversy. I suggested 4,400,000 acre-feet with that in view. I still hold to the belief that somewhere between the two figures we must fix the amount, and that this difference of 400,000 acre-feet should not be allowed to bar and preclude the passage of this important measure dealing with the enormous quantity of 15,000,000 acre-feet of water and involving seven States as well as the Government." [73]

The very next day, December 11, this crucial amendment was adopted,[74] and on the twelfth Senator Hayden pointed out that the bill settled the dispute over Lower Basin waters by giving 4,400,000 acre-feet to California and 2,800,000 to Arizona:

> "One [dispute] is how the seven and a half million acre-feet shall be divided in the lower basin. The Senate has settled that by a vote—that California may have 4,400,000 acre-feet of that water. It follows logically that if that demand is to be conceded, as everybody agrees, the remainder is 2,800,000 acre-feet for Arizona. That settles that part of the controversy." [75]

On the same day, Senator Pittman, intimately familiar with the whole water problem,[76] summed up the feeling

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[73] *Id.*, at 333.

[74] *Id.*, at 387.

[75] *Id.*, at 467. See also *id.*, at 465.

[76] For example, Senator Pittman's active role in resolving the whole Colorado River problem was acknowledged by Senator Hayden on the Senate floor:

"When Congress assembled in December, 1927, no agreement had been made. The senior Senator from Nevada [MR. PITTMAN], in

of the Senate that the bill fixed a limit on California and "practically allocated" to Arizona her share of the water:

> "The Senate has already determined upon the division of water between those States. How? It has determined how much water California may use, and the rest of it is subject to use by Nevada and Arizona. Nevada has already admitted that it can use only an insignificant quantity, 300,000 acre-feet. That leaves the rest of it to Arizona. As the bill now stands it is just as much divided as if they had mentioned Arizona and Nevada and the amounts they are to get . . . .
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> . . . . .
>
> "As I understand this amendment, Arizona to-day has practically allocated to it 2,800,000 acre-feet of water in the main Colorado River." [77]

The Senator went on to explain why the Senate had found it necessary to set up its own plan for allocating the water:

> "Why do we not leave it to California to say how much water she shall take out of the river or leave it to Arizona to say how much water she shall take out of the river? It is because it happens to become a duty of the United States Senate to settle this matter, and that is the reason." [78]

Not only do the closing days of the debate show that Congress intended an apportionment among the States

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continuation of the earnest efforts that he has made all these years to bring about a settlement of the controversy between the States with respect to the Colorado River, invited a number of us to conferences in his office and there we talked over the situation." *Id.*, at 172.

[77] *Id.*, at 468–469.

[78] *Id.*, at 471. The Senator added, "We have already decided as to the division of the water, and we say that if the States wish they can enter into a subsidiary agreement confirming that." *Ibid.*

but also provisions of the Act create machinery plainly adequate to accomplish this purpose, whatever contingencies might occur. As one alternative of the congressional scheme, § 4 (a) of the Act invited Arizona, California, and Nevada to adopt a compact dividing the waters along the identical lines that had formed the basis for the congressional discussions of the Act: 4,400,000 acre-feet to California, 300,000 to Nevada, and 2,800,000 to Arizona. Section 8 (b) gave the States power to agree upon some other division, which would have to be approved by Congress. Congress made sure, however, that if the States did not agree on any compact the objects of the Act would be carried out, for the Secretary would then proceed, by making contracts, to apportion water among the States and to allocate the water among users within each State.

In the first section of the Act, the Secretary was authorized to "construct, operate, and maintain a dam and incidental works . . . adequate to create a storage reservoir of a capacity of not less than twenty million acre-feet of water . . ." for the stated purpose of "controlling the floods, improving navigation and regulating the flow of the Colorado River, providing for storage and for the delivery of the stored waters thereof for reclamation of public lands and other beneficial uses . . . ," and generating electrical power. The whole point of the Act was to replace the erratic, undependable, often destructive natural flow of the Colorado with the regular, dependable release of waters conserved and stored by the project. Having undertaken this beneficial project, Congress, in several provisions of the Act, made it clear that no one should use mainstream waters save in strict compliance with the scheme set up by the Act. Section 5 authorized the Secretary "under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river . . . as may be agreed upon, for irrigation and

domestic uses . . . ." To emphasize that water could be obtained from the Secretary alone, § 5 further declared, "No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated." The supremacy given the Secretary's contracts was made clear in § 8 (b) of the Act, which provided that, while the Lower Basin States were free to negotiate a compact dividing the waters, such a compact if made and approved after January 1, 1929, was to be "subject to all contracts, if any, made by the Secretary of the Interior under section 5" before Congress approved the compact.

These several provisions, even without legislative history, are persuasive that Congress intended the Secretary of the Interior, through his § 5 contracts, both to carry out the allocation of the waters of the main Colorado River among the Lower Basin States and to decide which users within each State would get water. The general authority to make contracts normally includes the power to choose with whom and upon what terms the contracts will be made. When Congress in an Act grants authority to contract, that authority is no less than the general authority, unless Congress has placed some limit on it.[79] In this respect it is of interest that in an earlier version the bill did limit the Secretary's contract power by making the contracts "subject to rights of prior appropriators." [80] But that restriction, which preserved the law of prior appropriation, did not survive. It was

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[79] In the debates leading to the passage of the bill, Senator Walsh observed that "to contract means a liberty of contract" and asked if this did not mean that the Secretary could "give the water to them [appropriators] or withhold it from them as he sees fit," to which Senator Johnson answered "certainly." 70 Cong. Rec. 168 (1928).

[80] See Hearings on H. R. 6251 and 9826 before the Committee on Irrigation and Reclamation, 69th Cong., 1st Sess. 12 (1926).

stricken from the bill when the requirement that every water user have a contract was added to § 5.[81] Significantly, no phrase or provision indicating that the Secretary's contract power was to be controlled by the law of prior appropriation was substituted either then or at any other time before passage of the Act, and we are persuaded that had Congress intended so to fetter the Secretary's discretion, it would have done so in clear and unequivocal terms, as it did in recognizing "present perfected rights" in § 6.

That the bill was giving the Secretary sufficient power to carry out an allocation of the waters among the States and among the users within each State without regard to the law of prior appropriation was brought out in a colloquy between Montana's Senator Walsh and California's Senator Johnson, whose State had at least as much reason as any other State to bind the Secretary by state laws. Senator Walsh, who was thoroughly versed in western water law and also had previously argued before this Court in a leading case involving the doctrine of prior appropriation,[82] made clear what would follow from the Government's impounding of the Colorado River waters when he said, "I always understood that the interest that stores the water has a right superior to prior appropriations that do not store." He sought Senator Johnson's views on what rights the City of Los Angeles, which had filed claims to large quantities of Colorado River water, would have after the Government had built the dam and impounded the waters. In reply to Senator Walsh's specific question whether the Government might "dispose of the stored water as it sees fit," Senator Johnson said,

[81] See *id.*, at 97, 115.

[82] *Bean* v. *Morris*, 221 U. S. 485 (1911). This case was relied on by Mr. Justice Van Devanter in *Wyoming* v. *Colorado*, 259 U. S. 419, 466 (1922).

"Yes; under the terms of this bill." Senator Johnson added that "everything in this scheme, plan, or design" was "dependent upon the Secretary of the Interior contracting with those who desire to obtain the benefit of the construction . . . ." He admitted that it was possible that the Secretary could "utterly ignore" Los Angeles' appropriations.[83]

In this same discussion, Senator Hayden emphasized the Secretary's power to allocate the water by making contracts with users. After Senator Walsh said that he understood Senator Johnson to be arguing that the Secretary must satisfy Los Angeles' appropriations, Senator Hayden corrected him, pointing out that Senator Johnson had qualified his statement by saying that "after all, the Secretary of the Interior could allow the city of Los Angeles to have such quantity of water as might be determined by contract." Senator Hayden went on to say that, where domestic and irrigation needs conflicted, "the Secretary of the Interior will naturally decide as between applicants, one who desires to use the water for potable purposes in the city and another who desires to use it for irrigation, if there is not enough water to go around, that the city shall have the preference." [84] It is also signifi-

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[83] 70 Cong. Rec. 168 (1928). Other statements by Senator Johnson are less damaging to California's claims. For example, the Senator at another point in the colloquy with Senator Walsh said that he doubted if the Secretary either would or could disregard Los Angeles and contract with someone having no appropriation. *Ibid.* It is likely, however, that Senator Johnson was talking about present perfected rights, as a few minutes before he had argued that Los Angeles had taken sufficient steps in perfecting its claims to make them protected. See *id.*, at 167. Present perfected rights, as we have observed in the text, are recognized by the Act. § 6.

[84] 70 Cong. Rec. 169 (1928). At one point Senator Hayden seems to say that the Secretary's contracts are to be governed by state law: "The only thing required in this bill is contained in the amendment

cant that two vigorous opponents of the bill, Arizona's Representative Douglas and Utah's Representative Colton, criticized the bill because it gave the Secretary of the Interior "absolute control" over the disposition of the stored waters.[85]

The argument that Congress would not have delegated to the Secretary so much power to apportion and distribute the water overlooks the ways in which his power is limited and channeled by standards in the Project Act. In particular, the Secretary is bound to observe the Act's limitation of 4,400,000 acre-feet on California's consumptive uses out of the first 7,500,000 acre-feet of mainstream water. This necessarily leaves the remaining 3,100,000 acre-feet for the use of Arizona and Nevada, since they are the only other States with access to the main Colorado River. Nevada consistently took the position, accepted by the other States throughout the debates, that her conceivable needs would not exceed 300,000 acre-feet, which, of course, left 2,800,000 acre-feet for Arizona's use. Moreover, Congress indicated that it thought this a proper division of the waters when in the second paragraph of § 4 (a) it gave advance consent to a tri-state compact adopting

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that I have offered, that there shall be apportioned to each State its share of the water. Then, who shall obtain that water in relative order of priority may be determined by the State courts." *Ibid.* But, in view of the Senator's other statements in the same debate, this remark of a man so knowledgeable in western water law makes sense only if one understands that the "order of priority" being talked about was the order of present perfected rights—rights which Senator Hayden recognized, see *id.*, at 167, and which the Act preserves in § 6.

[85] 69 Cong. Rec. 9623, 9648, 9649 (1928). We recognize, of course, that statements of opponents of a bill may not be authoritative, see *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384, 394–395 (1951), but they are nevertheless relevant and useful, especially where, as here, the proponents of the bill made no response to the opponents' criticisms.

such division. While no such compact was ever entered into, the Secretary by his contracts has apportioned the water in the approved amounts and thereby followed the guidelines set down by Congress. And, as the Master pointed out, Congress set up other standards and placed other significant limitations upon the Secretary's power to distribute the stored waters. It specifically set out in order the purposes for which the Secretary must use the dam and the reservoir:

> "First, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of present perfected rights in pursuance of Article VIII of said Colorado River compact; and third, for power." § 6.

The Act further requires the Secretary to make revenue provisions in his contracts adequate to ensure the recovery of the expenses of construction, operation, and maintenance of the dam and other works within 50 years after their construction. § 4 (b). The Secretary is directed to make water contracts for irrigation and domestic uses only for "permanent service." § 5. He and his permittees, licensees, and contractees are subject to the Colorado River Compact, § 8 (a), and therefore can do nothing to upset or encroach upon the Compact's allocation of Colorado River water between the Upper and Lower Basins. In the construction, operation, and management of the works, the Secretary is subject to the provisions of the reclamation law, except as the Act otherwise provides. § 14. One of the most significant limitations in the Act is that the Secretary is required to satisfy present perfected rights, a matter of intense importance to those who had reduced their water rights to actual beneficial use at the time the Act became effective. § 6. And, of course, all of the powers granted by the Act are exercised by the Secretary and his well-established executive department,

responsible to Congress and the President and subject to judicial review.[86]

Notwithstanding the Government's construction, ownership, operation, and maintenance of the vast Colorado River works that conserve and store the river's waters and the broad power given by Congress to the Secretary of the Interior to make contracts for the distribution of the water, it is argued that Congress in §§ 14 and 18 of the Act took away practically all the Secretary's power by permitting the States to determine with whom and on what terms the Secretary would make water contracts. Section 18 states:

> "Nothing herein shall be construed as interfering with such rights as the States now have either to the waters within their borders or to adopt such policies and enact such laws as they may deem necessary with respect to the appropriation, control, and use of waters within their borders . . . ."

Section 14 provides that the reclamation law, to which the Act is made a supplement, shall govern the management of the works except as otherwise provided, and § 8 of the Reclamation Act, much like § 18 of the Project Act, provides that it is not to be construed as affecting or interfering with state laws "relating to the control, appropriation, use, or distribution of water used in irrigation . . . ."[87] In our view, nothing in any of these pro-

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[86] See, *e. g., Ickes* v. *Fox,* 300 U. S. 82 (1937); cf. *Best* v. *Humboldt Placer Mining Co.,* 371 U. S. 334 (1963); *Boesche* v. *Udall, ante,* p. 472.

[87] "Nothing in . . . [this Act] shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of such sections, shall proceed in conformity with such

visions affects our decision, stated earlier, that it is the Act and the Secretary's contracts, not the law of prior appropriation, that control the apportionment of water among the States. Moreover, contrary to the Master's conclusion, we hold that the Secretary in choosing between users within each State and in settling the terms of his contracts is not bound by these sections to follow state law.

The argument that § 8 of the Reclamation Act requires the United States in the delivery of water to follow priorities laid down by state law has already been disposed of by this Court in *Ivanhoe Irr. Dist.* v. *McCracken,* 357 U. S. 275 (1958), and reaffirmed in *City of Fresno* v. *California,* 372 U. S. 627 (1963). In *Ivanhoe* we held that, even though § 8 of the Reclamation Act preserved state law, that general provision could not override a specific provision of the same Act prohibiting a single landowner from getting water for more than 160 acres. We said:

> "As we read § 8, it merely requires the United States to comply with state law when, in the construction and operation of a reclamation project, it becomes necessary for it to acquire water rights or vested interests therein. But the acquisition of water rights must not be confused with the operation of federal projects. As the Court said in *Nebraska* v. *Wyoming, supra,* at 615: 'We do not suggest that where Congress has provided a system of regulation for federal projects it must give way before an inconsistent state system.' . . . We read nothing in § 8 that compels the United States to deliver water on conditions imposed by the State." *Id.,* at 291–292.

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laws, and nothing . . . [herein] shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof." 43 U. S. C. § 383.

Since § 8 of the Reclamation Act did not subject the Secretary to state law in disposing of water in that case, we cannot, consistently with *Ivanhoe,* hold that the Secretary must be bound by state law in disposing of water under the Project Act.

Nor does § 18 of the Project Act require the Secretary to contract according to state law. That Act was passed in the exercise of congressional power to control navigable water for purposes of flood control, navigation, power generation, and other objects,[88] and is equally sustained by the power of Congress to promote the general welfare through projects for reclamation, irrigation, or other internal improvements.[89] Section 18 merely preserves such rights as the States "now" have, that is, such rights as they had at the time the Act was passed. While the States were generally free to exercise some jurisdiction over these waters before the Act was passed, this right was subject to the Federal Government's right to regulate and develop the river.[90] Where the Government, as here, has exercised this power and undertaken a comprehensive project for the improvement of a great river and for the orderly and beneficial distribution of water, there is no room for inconsistent state laws.[91] As in *Ivanhoe,* where the general provision preserving state law was held not to override a specific provision stating the terms for disposition of the water, here we hold that the general saving

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[88] *Arizona* v. *California,* 283 U. S. 423 (1931).

[89] *United States* v. *Gerlach Live Stock Co.,* 339 U. S. 725, 738 (1950).

[90] *First Iowa Hydro-Elec. Coop.* v. *Federal Power Comm'n,* 328 U. S. 152, 171 (1946). See *United States* v. *Chandler-Dunbar Water Power Co.,* 229 U. S. 53, 62–72 (1913); *United States* v. *Willow River Power Co.,* 324 U. S. 499 (1945).

[91] See *Arizona* v. *California,* 283 U. S. 423 (1931); *Nebraska* v. *Wyoming,* 325 U. S. 589, 615 (1945); *First Iowa Hydro-Elec. Coop.* v. *Federal Power Comm'n,* 328 U. S. 152 (1946).

language of § 18 cannot bind the Secretary by state law and thereby nullify the contract power expressly conferred upon him by § 5.[92] Section 18 plainly allows the States to do things not inconsistent with the Project Act or with federal control of the river, for example, regulation of the use of tributary water and protection of present perfected rights.[93] What other things the States are free to do can be decided when the occasion arises. But where the Secretary's contracts, as here, carry out a congressional plan for the complete distribution of waters to users, state law has no place.[94]

Before the Project Act was passed, the waters of the Colorado River, though numbered by the millions of acre-feet, flowed too haltingly or too freely, resulting in droughts and floods. The problems caused by these conditions proved too immense and the solutions too costly for any one State or all the States together. In addition, the States, despite repeated efforts at a settlement, were unable to agree on how much water each State should get. With the health and growth of the Lower Basin at stake, Congress responded to the pleas of the States to come to their aid. The result was the Project Act and the

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[92] *Nebraska* v. *Wyoming*, 325 U. S. 589 (1945), holds nothing to the contrary. There the Court found it unnecessary to decide what rights the United States had under federal law to the unappropriated water of the North Platte River, since the water rights on which the projects in that case rested had in fact been obtained in compliance with state law.

[93] See *First Iowa Hydro-Elec. Coop.* v. *Federal Power Comm'n*, 328 U. S. 152, 175–176 (1946), where this Court limited the effect of § 27 of the Federal Power Act, which expressly "saved" certain state laws, to vested property rights.

[94] By an Act of September 2, 1958, 72 Stat. 1726, the Secretary must supply water to Boulder City, Nevada. It follows from our conclusions as to the inapplicability of state law that, contrary to the Master's conclusion, Boulder City's priorities are not to be determined by Nevada law.

harnessing of the bountiful waters of the Colorado to sustain growing cities, to support expanding industries, and to transform dry and barren deserts into lands that are livable and productive.

In undertaking this ambitious and expensive project for the welfare of the people of the Lower Basin States and of the Nation, the United States assumed the responsibility for the construction, operation, and supervision of Boulder Dam and a great complex of other dams and works. Behind the dam were stored virtually all the waters of the main river, thus impounding not only the natural flow but also the great quantities of water previously allowed to run waste or to wreak destruction. The impounding of these waters, along with their regulated and systematic release to those with contracts, has promoted the spectacular development of the Lower Basin. Today, the United States operates a whole network of useful projects up and down the river, including the Hoover Dam, Davis Dam, Parker Dam, Headgate Rock Dam, Palo Verde Dam, Imperial Dam, Laguna Dam, Morelos Dam, and the All-American Canal System, and many lesser works. It was only natural that the United States, which was to make the benefits available and which had accepted the responsibility for the project's operation, would want to make certain that the waters were effectively used. All this vast, interlocking machinery—a dozen major works delivering water according to congressionally fixed priorities for home, agricultural, and industrial uses to people spread over thousands of square miles—could function efficiently only under unitary management, able to formulate and supervise a coordinated plan that could take account of the diverse, often conflicting interests of the people and communities of the Lower Basin States. Recognizing this, Congress put the Secretary of the Interior in charge of these works

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and entrusted him with sufficient power, principally the § 5 contract power, to direct, manage, and coordinate their operation. Subjecting the Secretary to the varying, possibly inconsistent, commands of the different state legislatures could frustrate efficient operation of the project and thwart full realization of the benefits Congress intended this national project to bestow. We are satisfied that the Secretary's power must be construed to permit him, within the boundaries set down in the Act, to allocate and distribute the waters of the mainstream of the Colorado River.

II.

Provisions in the Secretary's Contracts.

A. *Diversions above Lake Mead.*—The Secretary's contracts with Arizona and Nevada provide that any waters diverted by those States out of the mainstream or the tributaries above Lake Mead must be charged to their respective Lower Basin apportionments. The Master, however, took the view that the apportionment was to be made out of the waters actually stored at Lake Mead or flowing in the mainstream below Lake Mead. He therefore held that the Secretary was without power to charge Arizona and Nevada for diversions made by them from the 275-mile stretch of river between Lee Ferry and Lake Mead [95] or from the tributaries above Lake Mead. This conclusion was based on the Master's reasoning that the Secretary was given physical control over the waters stored in Lake Mead and not over waters before they reached the lake.

We hold that the Master was correct in deciding that the Secretary cannot reduce water deliveries to Arizona

[95] The location of Hoover Dam is a result of engineering decisions. As Senator Pittman pointed out, "There is no place to impound the flood waters except at the lower end of the canyon." 68 Cong. Rec. 4413 (1927).

and Nevada by the amount of their uses from tributaries above Lake Mead, for, as we have held, Congress in the Project Act intended to apportion only the mainstream, leaving to each State its own tributaries. We disagree, however, with the Master's holding that the Secretary is powerless to charge States for diversions from the mainstream above Lake Mead. What Congress was doing in the Project Act was providing for an apportionment among the Lower Basin States of the water allocated to that basin by the Colorado River Compact. The Lower Basin, with which Congress was dealing, begins at Lee Ferry, and it was all the water in the mainstream below Lee Ferry that Congress intended to divide among the States. Were we to refuse the Secretary the power to charge States for diversions from the mainstream between Lee Ferry and the damsite, we would allow individual States, by making diversions that deplete the Lower Basin's allocation, to upset the whole plan of apportionment arrived at by Congress to settle the long-standing dispute in the Lower Basin. That the congressional apportionment scheme would be upset can easily be demonstrated. California, for example, has been allotted 4,400,000 acre-feet of mainstream water. If Arizona and Nevada can, without being charged for it, divert water from the river above Lake Mead, then California could not get the share Congress intended her to have.

B. *Nevada Contract.*—Nevada has excepted to her inclusion in Paragraph II (B)(7) of the Master's recommended decree, which provides that "mainstream water shall be delivered to users in Arizona, California and Nevada only if contracts have been made by the Secretary of the Interior, pursuant to Section 5 of the Boulder Canyon Project Act, for delivery of such water." While the California contracts are directly with water users and the Arizona contract specifically contemplates further subcontracts with actual users, it is argued that the Nevada con-

tract, made by the Secretary directly with the State of Nevada through her Colorado River Commission, should be construed as a contract to deliver water to the State without the necessity of subcontracts by the Secretary directly with Nevada water users. The United States disagrees, contending that properly construed the Nevada contract, like the Secretary's general contract with Arizona, does not exhaust the Secretary's power to require Nevada water users other than the State to make further contracts. To construe the Nevada contract otherwise, the Government suggests, would bring it in conflict with the provision of § 5 of the Project Act that "No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract [with the Secretary] made as herein stated." Acceptance of Nevada's contention here would not only undermine this plain congressional requirement that water users have contracts with the Secretary but would likewise transfer from the Secretary to Nevada a large part, if not all, of the Secretary's power to determine with whom he will contract and on what terms. We have already held that the contractual power granted the Secretary cannot be diluted in this manner. We therefore reject Nevada's contention.

III.

Apportionment and Contracts in Time of Shortage.

We have agreed with the Master that the Secretary's contracts with Arizona for 2,800,000 acre-feet of water and with Nevada for 300,000, together with the limitation of California to 4,400,000 acre-feet, effect a valid apportionment of the first 7,500,000 acre-feet of mainstream water in the Lower Basin. There remains the question of what shall be done in time of shortage. The Master, while declining to make any findings as to what future

supply might be expected, nevertheless decided that the Project Act and the Secretary's contracts require the Secretary in case of shortage to divide the burden among the three States in this proportion: California $\frac{4.4}{7.5}$; Arizona $\frac{2.8}{7.5}$; Nevada $\frac{.3}{7.5}$. While pro rata sharing of water shortages seems equitable on its face,[96] more considered judgment may demonstrate quite the contrary. Certainly we should not bind the Secretary to this formula. We have held that the Secretary is vested with considerable control over the apportionment of Colorado River waters. And neither the Project Act nor the water contracts require the use of any particular formula for apportioning shortages. While the Secretary must follow the standards set out in the Act, he nevertheless is free to choose among the recognized methods of apportionment or to devise reasonable methods of his own. This choice, as we see it, is primarily his, not the Master's or even ours. And the Secretary may or may not conclude that a pro rata division is the best solution.

It must be remembered that the Secretary's decision may have an effect not only on irrigation uses but also on other important functions for which Congress brought this great project into being—flood control, improvement of navigation, regulation of flow, and generation and distribution of electric power. Requiring the Secretary to prorate shortages would strip him of the very power of choice which we think Congress, for reasons satisfactory to it, vested in him and which we should not impair or take away from him. For the same reasons we cannot accept California's contention that in case of shortage each State's share of water should be determined by the

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[96] Proration of shortage is the method agreed upon by the United States and Mexico to adjust Mexico's share of Colorado River water should there be insufficient water to supply each country's apportionment.

judicial doctrine of equitable apportionment or by the law of prior appropriation. These principles, while they may provide some guidance, are not binding upon the Secretary where, as here, Congress, with full power to do so, has provided that the waters of a navigable stream shall be harnessed, conserved, stored, and distributed through a government agency under a statutory scheme.

None of this is to say that in case of shortage, the Secretary cannot adopt a method of proration or that he may not lay stress upon priority of use, local laws and customs, or any other factors that might be helpful in reaching an informed judgment in harmony with the Act, the best interests of the Basin States, and the welfare of the Nation. It will be time enough for the courts to intervene when and if the Secretary, in making apportionments or contracts, deviates from the standards Congress has set for him to follow, including his obligation to respect "present perfected rights" as of the date the Act was passed. At this time the Secretary has made no decision at all based on an actual or anticipated shortage of water, and so there is no action of his in this respect for us to review. Finally, as the Master pointed out, Congress still has broad powers over this navigable international stream. Congress can undoubtedly reduce or enlarge the Secretary's power if it wishes. Unless and until it does, we leave in the hands of the Secretary, where Congress placed it, full power to control, manage, and operate the Government's Colorado River works and to make contracts for the sale and delivery of water on such terms as are not prohibited by the Project Act.

IV.

Arizona-New Mexico Gila Controversy.

Arizona and New Mexico presented the Master with conflicting claims to water in the Gila River, the tributary

that rises in New Mexico and flows through Arizona. Having determined that tributaries are not within the regulatory provisions of the Project Act the Master held that this interstate dispute should be decided under the principles of equitable apportionment. After hearing evidence on this issue, the Master accepted a compromise settlement agreed upon by these States and incorporated that settlement in his findings and conclusions, and in Part IV (A)(B)(C)(D) of his recommended decree. No exceptions have been filed to these recommendations by any of the parties and they are accordingly accepted by us. Except for those discussed in Part V, we are not required to decide any other disputes between tributary users or between mainstream and tributary users.

V.

Claims of the United States.

In these proceedings, the United States has asserted claims to waters in the main river and in some of the tributaries for use on Indian Reservations, National Forests, Recreational and Wildlife Areas and other government lands and works. While the Master passed upon some of these claims, he declined to reach others, particularly those relating to tributaries. We approve his decision as to which claims required adjudication, and likewise we approve the decree he recommended for the government claims he did decide. We shall discuss only the claims of the United States on behalf of the Indian Reservations.

The Government, on behalf of five Indian Reservations in Arizona, California, and Nevada, asserted rights to water in the mainstream of the Colorado River.[97] The

[97] The Reservations were Chemehuevi, Cocopah, Yuma, Colorado River and Fort Mohave.

Colorado River Reservation, located partly in Arizona and partly in California, is the largest. It was originally created by an Act of Congress in 1865,[98] but its area was later increased by Executive Order.[99] Other reservations were created by Executive Orders and amendments to them, ranging in dates from 1870 to 1907.[100] The Master found both as a matter of fact and law that when the United States created these reservations or added to them, it reserved not only land but also the use of enough water from the Colorado to irrigate the irrigable portions of the reserved lands.. The aggregate quantity of water which the Master held was reserved for all the reservations is about 1,000,000 acre-feet, to be used on around 135,000 irrigable acres of land. Here, as before the Master, Arizona argues that the United States had no power to make a reservation of navigable waters after Arizona became a State; that navigable waters could not be reserved by Executive Orders; that the United States did not intend to reserve water for the Indian Reservations; that the amount of water reserved should be measured by the reasonably foreseeable needs of the Indians living on the reservation rather than by the number of irrigable acres; and, finally, that the judicial doctrine of equitable appor-

[98] Act of March 3, 1865, 13 Stat. 541, 559.

[99] See Executive Orders of November 22, 1873, November 16, 1874, and May 15, 1876. See also Executive Order of November 22, 1915. These orders may be found in 1 U. S. Dept. of the Interior, Executive Orders Relating to Indian Reservations 6–7 (1912); 2 *id.*, at 5–6 (1922).

[100] Executive Orders of January 9, 1884 (Yuma), September 19, 1890 (Fort Mohave), February 2, 1911 (Fort Mohave), September 27, 1917 (Cocopah). For these orders, see 1 *id.*, at 12–13, 63–64 (1912); 2 *id.*, at 5 (1922). The Chemehuevi Reservation was established by the Secretary of the Interior on February 2, 1907, pending congressional approval.

tionment should be used to divide the water between the Indians and the other people in the State of Arizona.

The last argument is easily answered. The doctrine of equitable apportionment is a method of resolving water disputes between States. It was created by this Court in the exercise of its original jurisdiction over controversies in which States are parties. An Indian Reservation is not a State. And while Congress has sometimes left Indian Reservations considerable power to manage their own affairs, we are not convinced by Arizona's argument that each reservation is so much like a State that its rights to water should be determined by the doctrine of equitable apportionment. Moreover, even were we to treat an Indian Reservation like a State, equitable apportionment would still not control since, under our view, the Indian claims here are governed by the statutes and Executive Orders creating the reservations.

Arizona's contention that the Federal Government had no power, after Arizona became a State, to reserve waters for the use and benefit of federally reserved lands rests largely upon statements in *Pollard's Lessee* v. *Hagan*, 3 How. 212 (1845), and *Shively* v. *Bowlby*, 152 U. S. 1 (1894). Those cases and others that followed them [101] gave rise to the doctrine that lands underlying navigable waters within territory acquired by the Government are held in trust for future States and that title to such lands is automatically vested in the States upon admission to the Union. But those cases involved only the shores of and lands beneath navigable waters. They do not determine the problem before us and cannot be accepted as limiting the broad powers of the United States to regulate navigable waters under the Commerce Clause and to regulate

[101] See, *e. g.*, *United States* v. *California*, 332 U. S. 19, 29–30 (1947); *United States* v. *Holt State Bank*, 270 U. S. 49, 54–55 (1926).

government lands under Art. IV, § 3, of the Constitution. We have no doubt about the power of the United States under these clauses to reserve water rights for its reservations and its property.

Arizona also argues that, in any event, water rights cannot be reserved by Executive Order. Some of the reservations of Indian lands here involved were made almost 100 years ago, and all of them were made over 45 years ago. In our view, these reservations, like those created directly by Congress, were not limited to land, but included waters as well. Congress and the Executive have ever since recognized these as Indian Reservations. Numerous appropriations, including appropriations for irrigation projects, have been made by Congress. They have been uniformly and universally treated as reservations by map makers, surveyors, and the public. We can give but short shrift at this late date to the argument that the reservations either of land or water are invalid because they were originally set apart by the Executive.[102]

Arizona also challenges the Master's holding as to the Indian Reservations on two other grounds: first, that there is a lack of evidence showing that the United States in establishing the reservations intended to reserve water for them; second, that even if water was meant to be reserved the Master has awarded too much water. We reject both of these contentions. Most of the land in these reservations is and always has been arid. If the water necessary to sustain life is to be had, it must come from the Colorado River or its tributaries. It can be said without overstatement that when the Indians were put on these reservations they were not considered to be located in the most desirable area of the Nation. It is

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[102] See *United States* v. *Midwest Oil Co.*, 236 U. S. 459, 469–475 (1915); *Winters* v. *United States*, 207 U. S. 564 (1908).

impossible to believe that when Congress created the great Colorado River Indian Reservation and when the Executive Department of this Nation created the other reservations they were unaware that most of the lands were of the desert kind—hot, scorching sands—and that water from the river would be essential to the life of the Indian people and to the animals they hunted and the crops they raised. In the debate leading to approval of the first congressional appropriation for irrigation of the Colorado River Indian Reservation, the delegate from the Territory of Arizona made this statement:

> "Irrigating canals are essential to the prosperity of these Indians. Without water there can be no production, no life; and all they ask of you is to give them a few agricultural implements to enable them to dig an irrigating canal by which their lands may be watered and their fields irrigated, so that they may enjoy the means of existence. You must provide these Indians with the means of subsistence or they will take by robbery from those who have. During the last year I have seen a number of these Indians starved to death for want of food." Cong. Globe, 38th Cong., 2d Sess. 1321 (1865).

The question of the Government's implied reservation of water rights upon the creation of an Indian Reservation was before this Court in *Winters* v. *United States,* 207 U. S. 564, decided in 1908. Much the same argument made to us was made in *Winters* to persuade the Court to hold that Congress had created an Indian Reservation without intending to reserve waters necessary to make the reservation livable. The Court rejected all of the arguments. As to whether water was intended to be reserved, the Court said, at p. 576:

> "The lands were arid and, without irrigation, were practically valueless. And yet, it is contended, the

> means of irrigation were deliberately given up by the Indians and deliberately accepted by the Government. The lands ceded were, it is true, also arid; and some argument may be urged, and is urged, that with their cession there was the cession of the waters, without which they would be valueless, and 'civilized communities could not be established thereon.' And this, it is further contended, the Indians knew, and yet made no reservation of the waters. We realize that there is a conflict of implications, but that which makes for the retention of the waters is of greater force than that which makes for their cession."

The Court in *Winters* concluded that the Government, when it created that Indian Reservation, intended to deal fairly with the Indians by reserving for them the waters without which their lands would have been useless. *Winters* has been followed by this Court as recently as 1939 in *United States* v. *Powers*, 305 U. S. 527. We follow it now and agree that the United States did reserve the water rights for the Indians effective as of the time the Indian Reservations were created. This means, as the Master held, that these water rights, having vested before the Act became effective on June 25, 1929, are "present perfected rights" and as such are entitled to priority under the Act.

We also agree with the Master's conclusion as to the quantity of water intended to be reserved. He found that the water was intended to satisfy the future as well as the present needs of the Indian Reservations and ruled that enough water was reserved to irrigate all the practicably irrigable acreage on the reservations. Arizona, on the other hand, contends that the quantity of water reserved should be measured by the Indians' "reasonably foreseeable needs," which, in fact, means by the number

of Indians. How many Indians there will be and what their future needs will be can only be guessed. We have concluded, as did the Master, that the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage. The various acreages of irrigable land which the Master found to be on the different reservations we find to be reasonable.

We disagree with the Master's decision to determine the disputed boundaries of the Colorado River Indian Reservation and the Fort Mohave Indian Reservation. We hold that it is unnecessary to resolve those disputes here. Should a dispute over title arise because of some future refusal by the Secretary to deliver water to either area, the dispute can be settled at that time.

The Master ruled that the principle underlying the reservation of water rights for Indian Reservations was equally applicable to other federal establishments such as National Recreation Areas and National Forests. We agree with the conclusions of the Master that the United States intended to reserve water sufficient for the future requirements of the Lake Mead National Recreation Area, the Havasu Lake National Wildlife Refuge, the Imperial National Wildlife Refuge and the Gila National Forest.

We reject the claim of the United States that it is entitled to the use, without charge against its consumption, of any waters that would have been wasted but for salvage by the Government on its wildlife preserves. Whatever the intrinsic merits of this claim, it is inconsistent with the Act's command that consumptive use shall be measured by diversions less returns to the river.

Finally, we note our agreement with the Master that all uses of mainstream water within a State are to be charged against that State's apportionment, which of course includes uses by the United States.

VI.

Decree.

While we have in the main agreed with the Master, there are some places we have disagreed and some questions on which we have not ruled. Rather than adopt the Master's decree with amendments or append our own decree to this opinion, we will allow the parties, or any of them, if they wish, to submit before September 16, 1963, the form of decree to carry this opinion into effect, failing which the Court will prepare and enter an appropriate decree at the next Term of Court.

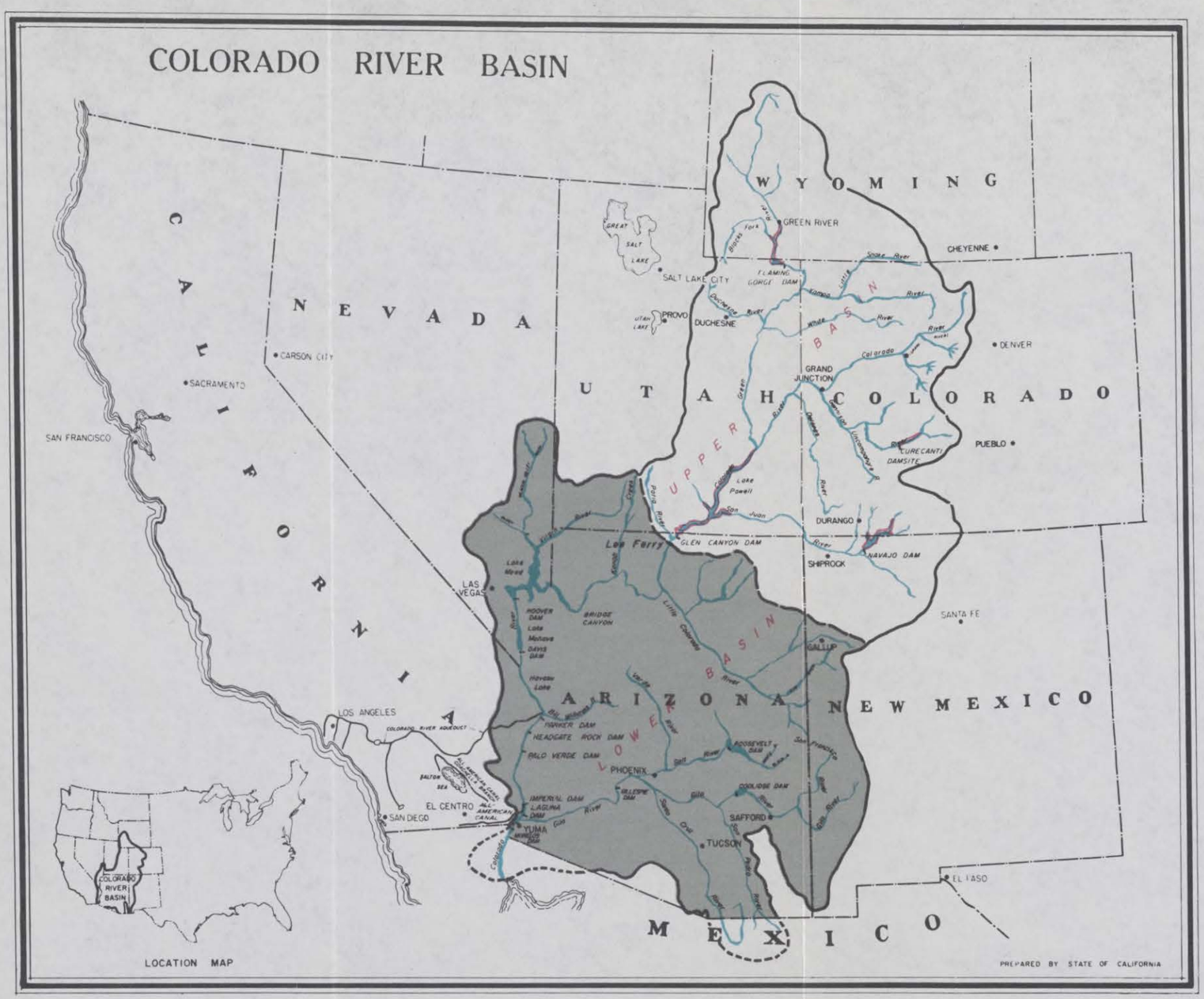
It is so ordered.

The Chief Justice took no part in the consideration or decision of this case.

[For opinion of Mr. Justice Harlan, joined by Mr. Justice Douglas and Mr. Justice Stewart, see *post*, p. 603.]

[For dissenting opinion of Mr. Justice Douglas, see *post*, p. 627.]

COLORADO RIVER BASIN



LOCATION MAP

PREPARED BY STATE OF CALIFORNIA

MR. JUSTICE HARLAN, whom MR. JUSTICE DOUGLAS and MR. JUSTICE STEWART join, dissenting in part.

I dissent from so much of the Court's opinion as holds that the Secretary of the Interior has been given authority by Congress to apportion, among and within the States of California, Arizona, and Nevada, the waters of the mainstream of the Colorado River below Lee Ferry. I also dissent from the holding that in times of shortage the Secretary has discretion to select or devise any "reasonable method" he wishes for determining which users within these States are to bear the burden of that shortage. (In all other respects MR. JUSTICE STEWART and I—but not MR. JUSTICE DOUGLAS—agree with and join in the Court's opinion, though not without some misgivings regarding the amounts of water allocated to the Indian Reservations.)

In my view, it is the equitable principles established by the Court in interstate water-rights cases, as modified by the Colorado River Compact and the California limitation, that were intended by Congress to govern the apportionment of mainstream waters among the Lower Basin States, whether in surplus or in shortage. *A fortiori,* state law was intended to control apportionment among users within a single State.

I.

INTRODUCTION.

The Court's conclusions respecting the Secretary's apportionment powers, particularly those in times of shortage, result in a single appointed federal official being vested with absolute control, unrestrained by adequate standards, over the fate of a substantial segment of the life and economy of three States. Such restraint upon his actions as may follow from judicial review are, as will

be shown, at best illusory. Today's result, I venture to say, would have dumbfounded those responsible for the legislation the Court construes, for nothing could have been farther from their minds or more inconsistent with their deeply felt convictions.

The Court professes to find this extraordinary delegation of power principally in § 5 of the Project Act, the provision authorizing the Secretary to enter into contracts for the storage and delivery of water. But § 5, as is more fully shown below, pp. 615–621, *infra,* had no design resembling that which the Court now extracts from it. Rather, it was intended principally as a revenue measure, and the clause *requiring* a contract as a condition of delivery was inserted at the insistence not of the Lower but of the Upper Basin States in an effort to insure that nothing would disturb that basin's rights under the Colorado River Compact. There was no thought that § 5 would give authority to apportion water among the Lower Basin States. Indeed, during the hearings on the third Swing-Johnson bill when § 5 took its present form, one of its principal proponents, Delph Carpenter of Colorado, specifically stated that the proposed condition of a contract was intended to require

> "that the persons who receive the water shall respect and do so under the compact. *It has nothing to do with the interstate relations between Arizona and California.*" [1] (Emphasis added.)

And Representative Swing, coauthor of the bill, made virtually the same point in explaining the provision before the House Rules Committee:

> "The act says [in § 5] 'The Secretary of the Interior is hereby authorized, under such general regulations

[1] Hearings before House Committee on Irrigation and Reclamation on H. R. 6251 and H. R. 9826, 69th Cong., 1st Sess. 163.

> as he may prescribe, to contract for the storage of water.' Whose water? It does not say. It might be a community like Imperial Valley that has already acquired a water right . . . or it may be someone who hereafter will acquire a water right, but that right will not be acquired under this bill; *not from the United States Government.* He will acquire his water right, if he acquires one, from the State and under the laws of the State, in which he puts the water to a beneficial use. *There is nothing in this bill which puts the Government in conflict with the water laws of Arizona or Utah or any other State.* As a matter of fact, the reclamation law is adopted by section 13 of this bill [now § 14], and section 8 of the reclamation act says that *what the Government does must not be in conflict with the water laws of the States, so there can be no violence done State laws on this score.*" [2] (Emphasis added.)

The Court concedes, as indeed it must in the face of such unequivocal evidence, that this third Swing-Johnson bill, like its predecessors, established "no method whatever of apportioning the waters among the States of the Lower Basin." *Ante,* p. 560. This concession, one would think, would end this aspect of the controversy, since § 5 as ultimately adopted is virtually the same as that proposed in the third bill.[3] Yet a method of federal apportionment is discovered in the fourth Swing-Johnson bill as finally enacted, a method which ends by delegating to the Secre-

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[2] Hearings before House Committee on Rules on H. R. 9826, 69th Cong., 2d Sess. 116. The bill then under consideration, as recommended by the House Committee on Irrigation and Reclamation, appears in H. R. Rep. No. 1657, 69th Cong., 2d Sess. 29–34.

[3] The only change that need be noted for present purposes is the addition of a clause requiring contracts to conform to § 4 (a), discussed below, as well as to the Compact.

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tary of the Interior the awesome power over the "water" destiny of three States. To what provision does the Court attribute this startling metamorphosis? The fundamental change in approach is apparently found in § 4 (a), which as adopted contains provisions (1) conditioning the effectiveness of the Act on seven-state ratification of the Colorado River Compact or alternatively on California's agreement to limit its annual consumption of Colorado River water, together with six-state ratification of the Compact; and (2) giving permission to California, Arizona, and Nevada to enter a further compact apportioning certain waters to the latter two States pursuant to a stated formula.

It is manifest that § 4 (a), on which the Court so heavily relies, neither apportions the waters of the river nor vests power in any official to make such an apportionment. The first paragraph does not *grant* any water to anyone; it merely conditions the Act's effectiveness on seven-state ratification of the Compact or on six-state ratification, plus California's agreement to a limitation, *i. e.*, a *ceiling*, on her appropriations. The source of authority to make such appropriations must be found elsewhere. And the second paragraph of § 4 (a), suggesting a particular interstate agreement, similarly makes no apportionment of water among the States and delegates no power to any official to make such an apportionment. Indeed, it was accepted by the Senator from California (Mr. Johnson) only after the following colloquy with its proponent, Senator Pittman of Nevada:

> "Mr. JOHNSON. . . . [W]hat I want to make clear is that this amendment shall not be construed hereafter by any of the parties to it or any of the States as being the expression of the will or the demand or the request of the Congress of the United States.

"Mr. PITTMAN. Exactly, not.

"Mr. JOHNSON. Very well, then.

"Mr. PITTMAN. It is not the request of Congress.

"Mr. JOHNSON. I accept the amendment, then." 70 Cong. Rec. 472.

Senator Johnson would surely have been surprised to learn that the formula which was not even "the request of Congress" was in truth one which the Secretary was authorized to force down the throats of the States if they did not voluntarily agree to it.

Even this brief summary, I think, casts the gravest doubts upon the Court's construction of the Project Act as abolishing state law and accepted principles of equitable apportionment in effecting allocations of water among the States. A more detailed analysis will, I believe, demonstrate the incorrectness of the Court's conclusions on this score and will reveal the constitutional difficulties inherent in the uncontrolled delegation of power resulting from those conclusions.

II.

THE BACKGROUND OF THE BOULDER CANYON PROJECT ACT.

Judicial apportionment of interstate waters was established long before the Project Act as an effective means of resolving interstate water disputes. *Kansas* v. *Colorado,* 206 U. S. 46. Its acceptability had never been questioned. Priority of appropriation, the basic determinant of judicial apportionment as enunciated in *Wyoming* v. *Colorado,* 259 U. S. 419, was the law in six of the Colorado Basin States,[4] and senior appropriations were

[4] Arizona: *Clough* v. *Wing,* 2 Ariz. 371, 17 P. 453; Colorado: *Coffin* v. *Left Hand Ditch Co.,* 6 Colo. 443; Nevada: *Jones* v. *Adams,*

respected in the seventh.[5] The law of appropriation, which rests on the basic principle that a water right depends on beneficial use and which gives priority of right to the appropriator first in time, had been repeatedly declared to be indispensable to the development of the arid lands of the West.[6]

This backdrop of firm dedication to the principles of appropriation and of judicial apportionment is critical to an understanding of congressional purpose with respect to the Project Act. It is also critical to recognize that congressional compromise with these deeply respected principles was only partial; the problems facing Congress as a result of *Wyoming* v. *Colorado* were narrow. No Senator or Representative ever suggested that judicial apportionment was generally inappropriate; no Senator or Representative ever inveighed against the law of appropriation as such. The first problem was simply this: Interstate application of the doctrine of priority, unlimited by equitable considerations, threatened to deprive the four Upper Basin States of their fair share of the Colorado River because they were not so quick as California in development. The purpose of the Compact was simply to limit traditional doctrines to the extent necessary to

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19 Nev. 78, 6 P. 442; New Mexico: *Albuquerque Land & Irr. Co.* v. *Gutierrez,* 10 N. Mex. 177, 61 P. 357; Utah: *Stowell* v. *Johnson,* 7 Utah 215, 26 P. 290; Wyoming: *Moyer* v. *Preston,* 6 Wyo. 308, 44 P. 845.

[5] California: *Osgood* v. *El Dorado Water & Deep Gravel Mining Co.,* 56 Cal. 571.

[6] *E. g., Coffin* v. *Left Hand Ditch Co.,* 6 Colo. 443, 446–447, 449–450; *Stowell* v. *Johnson,* 7 Utah 215, 225, 26 P. 290, 291; *Willey* v. *Decker,* 11 Wyo. 496, 515–524, 73 P. 210, 215–218. "Irrigation," said the Nevada court, ". . . would be strangled by the enforcement of the riparian principle." *Twaddle* v. *Winters,* 29 Nev. 88, 106, 85 P. 280, 284.

avoid this extreme and harsh result, and to eliminate long and costly litigation.

It was perfectly plain that the Colorado River Compact merely guaranteed to the upper States a specified quantity of water immune from priorities below, subject to stated delivery requirements; it did nothing whatever to interfere with the law of priorities or the principles of equitable apportionment among the States of the Lower Basin.[7] It was precisely because it did not that Arizona refused to approve either the Project Act or the Compact until something was done to safeguard her share of Lower Basin water.[8] Similarly, the upper States feared that in the absence of ratification by Arizona, California would be free to appropriate all the Lower Basin's share under the Compact, and Arizona, not limited by that document, would be free to appropriate, as against the upper States, water the Compact sought to apportion to the Upper Basin.[9]

The remaining problem, therefore, was that California's acquisition of priorities as against Arizona and the upper States had to be further limited. A ceiling had to be put on her interstate appropriative priorities. Solution of this narrow problem likewise did not require complete abrogation of the principles of priority and interstate judicial apportionment.

Still another, and profoundly significant, factor in understanding the effect of the Project Act on the law

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[7] Ward Bannister, Denver attorney and spokesman for the Upper Basin States, said that "[t]he purpose of the compact is to provide the three lower States with a fund of water from which they may appropriate and the four upper States with a fund of water from which they may appropriate." Hearings before House Committee on Irrigation and Reclamation on H. R. 2903, 68th Cong., 1st Sess. 232.

[8] See the remarks of Senator Hayden, 70 Cong. Rec. 388.

[9] See, *e. g.*, H. R. Rep. No. 1657, 69th Cong., 2d Sess., pt. 2, 3–4; Hearings, *supra*, note 2, at 34–37.

of appropriation and judicial apportionment is the pervasive hostility that many westerners had to any form of federal control of water rights. Colorado's Delph Carpenter, who was as much responsible as any man for both the Compact and the contract requirement of § 5 of the Project Act, testified in 1925 to what he termed an insidious and calculated policy of the National Government, fostered particularly by the Departments of Interior and Justice, to encroach upon state prerogatives and supersede state authority with respect to the distribution of water. He made it clear, as did Wyoming's Senator Kendrick, that he deemed this policy oppressive, destructive, and deplorable.[10] Utah's Senator King made the same objection on the floor of the Senate. 69 Cong. Rec. 10262. When it was suggested that Congress might legislate to meet the problem of California's threatened preemption of the river, a storm of doubt arose as to its constitutional power to do so. Upper Basin and Arizona spokesmen—those who were to be benefited by limiting appropriations—repeatedly insisted that the only constitutional ways of apportioning the river were by suit in

[10] Hearings before Senate Committee on Irrigation and Reclamation pursuant to S. Res. No. 320, 68th Cong., 2d Sess. 663–675. "It was the oppression of the National Government strangling development, preventing development in the States. . . . These two experiences and others taught Colorado, Wyoming, and New Mexico the extent to which a department of the United States would go in overriding State authority and oppressing whole communities. . . . Thus it came to the attention of the States, that the United States Government intended to supersede all State law and override State authority on that river. . . . [A]ny desire by a governmental bureau to ultimately, by insiduous [*sic*] or other methods, take over the control and dominion of the streams within the States and to override State authority at once becomes not only abhorrent but gives rise to a feeling of bitter resentment and sounds a call to arms for self-defense. . . ." *Id.*, at 663, 665, 671, 673. See also his remarks at Hearings, *supra,* note 1, at 146–157.

this Court or by interstate compact.[11] And Senator Bratton of New Mexico, hardly an opponent of the Project Act, objected that by merely suggesting in § 4 (a) the terms of a compact which the States were free to modify

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[11] Senator KING: "If the Senator means by his statement that the Federal Government may go into a stream, whether it be the Colorado River, the Sacramento River, or a river in the State of Montana, and put its powerful hands down upon the stream and say, 'This is mine; I can build a dam there and allocate water to whom I please, regardless of other rights, either suspended, inchoate, or perfected,' I deny the position which the Senator takes." 70 Cong. Rec. 169. The Senator in question was Carl Hayden; he denied that his statement, which concerned his authorization for a compact among the three lower States, meant any such thing.

Senator PHIPPS: "I am firmly convinced that there must be voluntary ratification on the part of each interested State in order to make the compact effective. This is the only method of settling possible controversies permanently and of putting the water of the stream to its highest beneficial use. It is the only satisfactory method; it is the only legal method to avoid proceedings in the courts which would prove costly and almost interminable." 68 Cong. Rec. 4515.

Senator HAYDEN: "There are only two ways in which this controversy can be settled. Either the States can agree upon an equitable apportionment of waters of the Colorado River or, in the absence of a compact, the Supreme Court of the United States can determine what the rights of the various States are in on [*sic*] that stream. . . . *Arizona denies that it is within the power of Congress to apportion the waters of an interstate stream among the States.*" Hearings, *supra,* note 2, at 75, 76. (Emphasis added.)

Representative COLTON: "I have been informed that an attorney for the Reclamation Service of the United States claims that Congress has the power to allocate and apportion all of the Colorado River among the States regardless of their wishes in the matter. Such a theory is abhorrent to our whole plan of government and particularly to the theory on which our whole system of water rights has been built up." Hearings before House Committee on Irrigation and Reclamation on H. R. 5773, 70th Cong., 1st Sess. 414.

Representative LEATHERWOOD: "[T]here are only two agencies that can allocate the waters of this great river, the States themselves

or to reject, Congress was infringing upon state sovereignty. 70 Cong. Rec. 470–471.

Congress' entire approach to the problems of prior appropriation was governed by this deep-seated hostility to federal dictation of water rights. When plans for development of the Lower Basin threatened the rights of the upper States, they did not seek the simple (and in my view constitutionally unobjectionable) solution of a legislative apportionment. They employed instead the cumbersome method of interstate compact, which required authorization by Congress and by seven state legislatures prior to negotiation and ratification by the same eight bodies thereafter. When it began to appear that Arizona would not ratify the Compact, Congress still did not legislate a general apportionment. It built the statute around the provisions of the Compact, insisting on ratification by as many States as possible, even at the cost of further delaying the already overdue Project Act. It simply conditioned the use of government property and of water stored behind the dam on compliance with the Compact. Attempts to divide the Lower Basin water by interstate agreement continued through the Denver Conference called by the Upper Basin Governors in the summer of 1927—nearly five years after negotiation of

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by treaty ratified by the Congress of the United States, or by the judicial branch of the Government; for the Congress has no power to allocate any of the waters of this river or any other river where the doctrine of prior appropriation is in force." Hearings, *supra*, note 2, at 31.

WARD BANNISTER: "[T]here is nothing in the Federal Constitution upon which to base the power of the Federal Government to divide this water among the States. . . . [T]he same thing that would invalidate a provision inserted by Congress direct would invalidate any rule promulgated by the Secretary of the Interior under Congressional permission, and the upper States would find themselves utterly helpless." Hearings, *supra*, n. 7, at 195.

the Compact. Yet it was not until 1927 that an amendment was first offered to protect Arizona by a statutory limitation on California's consumption, and it was not until 1928 that the proposal was adopted into the bill.[12]

Finally, when Congress ultimately resigned itself to the necessity of legislating in some way with respect to the division of Lower Basin waters, it used narrow words suitable to its narrow purpose and to its regard both for the system of judicial apportionment and appropriation and for the rights of the States. Even then Congress did not attempt to legislate an apportionment of Lower Basin water; it simply prescribed a ceiling for California. In the words of Senator Johnson, "We write, then, that California shall use perpetually only a specific amount of water, naming the maximum amount which may be used." 69 Cong. Rec. 7250. Even this, Congress was unwilling to do directly. As reported from committee, the bill contained a provision directing the Secretary of the Interior to limit California's consumption in the exercise of his power of contract.[13] But this was replaced by the present provision, which reached the same result not via the Secretary's contract authority but by the awkward device of requiring California's legislature to consent to the limitation as a condition precedent to the effectiveness of the Project Act. And this was not all; to end the tale Congress added to § 4 (a) specific authorization to Arizona, California, and Nevada to enter into an agreement to complete the division of the Lower Basin water—the same cumbersome substitute for direct congressional apportionment that had been abortively mooted for six years.

This history bears recapitulation. *First,* the law of appropriation, basic to western water law, was greatly

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[12] 68 Cong. Rec. 4763; S. Rep. No. 592, 70th Cong., 1st Sess. 2.

[13] S. Rep. No. 592, 70th Cong., 1st Sess. 2.

respected, and the solution of interstate water disputes by judicial apportionment in this Court was well established and accepted. *Second,* the problems created by these doctrines as applied in *Wyoming* v. *Colorado* were narrow ones, not requiring for their solution complete abrogation of well-tried principles; existing law was quite adequate to deal with all questions save those Congress expressly solved by imposing a ceiling on California. *Third,* Congress throughout the dispute exhibited great reluctance to interfere with the division of water by legislation, because of a deep and fundamental mistrust of federal intervention and a profound regard for state sovereignty, shared by many influential members. *Finally,* when Congress was forced to legislate with respect to this problem or face defeat of the entire Project Act, it chose narrow terms appropriate to the narrow problem before it, and even then acted only indirectly to require California's consent to limiting her consumption.

It is inconceivable that such a Congress intended that the sweeping federal power which it declined to exercise—a power even the most avid partisans of national authority might hesitate to grant to a single administrator—be exercised at the unbridled discretion of an administrative officer, especially in the light of complaints registered about "bureaucratic" and "oppressive" interference of the Department which that very officer headed.[14] It is utterly incredible that a Congress unwilling because of concern for States' rights even to limit California's maximum consumption to 4,400,000 acre-feet without the consent of her legislature intended to give the Secretary of the Interior authority without California's consent to reduce her share even below that quantity in a shortage.

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[14] See note 10, *supra,* and accompanying text.

III.

THE AUTHORITY OF THE SECRETARY UNDER SECTION 5 OF THE PROJECT ACT.

The Court holds that § 5 of the Project Act, which empowers the Secretary to contract for water delivery and forbids delivery of stored water without a contract, displaces the law of apportionment among the Lower Basin States, giving the Secretary power to divide the water by contract and to distribute the burden of shortages, without respecting appropriations.

But it does not follow that because no user is entitled to stored water without a contract the Secretary may award or withhold contracts independently of priorities. In fact, § 5 reflects no such intention. The Secretary's power to contract upon appropriate financial charges for water delivery, not included in the early bills, was added during the 1926 hearings in response to a request from Secretary of the Interior Work that users of water, as well as of power, be made to bear the cost of the project.[15] At the same time § 4 (b) for the first time provided that no work under the Act should begin until these revenues were assured by the Secretary's contracts. There was yet no provision prohibiting deliveries without contracts.[16]

Thus originally purely a financial tool, the contract power was later made to serve the additional purpose of enforcing the Compact's provisions against Arizona in the absence of her ratification. At the urging of the upper States § 8 had been amended to subject the United States in operating the dam to the Compact, to condition the enjoyment of the dam's benefits on compliance with the Compact, and to require that contracts from the United

[15] Hearings, *supra*, note 1, at 6, 46.

[16] H. R. 9826, 69th Cong., 1st Sess., § 5.

States should so provide.[17] The upper States then insisted on inserting the requirement in § 5 that no one was to receive stored water without a contract, *expressly and solely for the purpose of tying the Compact's enforcement to the contract power.*[18] There was no intent to confer absolute power to grant or withhold. Indeed, to give effect to priorities in time of shortage, up to the maximum quantities permitted California by § 4 (a), tends to promote the stability of water uses, a policy Congress sought to further in § 5 itself by requiring that contracts be for permanent service. In short, disregard of appropriations in one State in favor of those in another, except as required by the inter-basin apportionment of the Compact or by the California limitation, was no part of the purpose of this section; it was designed to insure revenue and to enforce the Compact and the California limitation.[19]

When the provision for water delivery contracts was first inserted in the Swing bill in 1926, it prescribed that "Contracts respecting water for domestic uses may be for permanent service but subject to rights of prior appropriators." [20] Proponents of the bill later altered this

[17] S. 1868, 69th Cong., 1st Sess.; H. R. 6251, 69th Cong., 1st Sess.; H. R. 9826, 69th Cong., 1st Sess. This amendment, wrote Secretary Work in recommending the bill, "provides for the distribution and use of all water for irrigation, power and otherwise, in accordance with the Colorado River compact." Hearings, *supra*, note 1, at 8.

[18] See notes 1, 2, *supra*, and accompanying text. Contracts were later made subject also to the California limitation in § 4 (a).

[19] It is significant to contrast the language giving the Secretary authority to enter water delivery contracts with that in § 5 (c), relating to the distribution of electrical power. The latter provision explicitly gives the Secretary authority to resolve conflicts in applications, referring him for the governing standards to "the policy expressed in the Federal Water Power Act as to conflicting applications for permits and licenses."

[20] Hearings, *supra*, note 1, at 12.

provision to apply to irrigation contracts as well as to require, rather than simply to permit, that contracts be for permanent service.[21] At the request of the upper States, the phrase "subject to rights of prior appropriators" was deleted.[22] The Court concludes from this bit of history that Congress considered but rejected the suggestion that the law of appropriation govern the distribution of water stored in Lake Mead. But deletion or rejection of a proposed amendment is not strong evidence of legislative intention; the reasons for deletion may be any of a great number, not the least frequent of which is that the suggestion is redundant. Here it seems clear that there was a further reason for the change. The phrase was dropped at the same time the provision *requiring* each user to have a contract was added. Under the bill as it stood prior to this no contract was required, and new contracts were made junior to all prior appropriators, even those initiating or perfecting rights only after the statute became effective. As amended the bill required a contract of every user of stored waters, and the deleted clause was no longer in accord with the contractual plan. It is surely stretching things to suggest that deletion of this no longer accurate language signifies that the Secretary may award contracts on his own authority, without regard for priorities that would obtain under state law.

In support of its construction of § 5 the Court relies in large part upon an exchange between Senator Johnson and Senator Walsh of Montana. 70 Cong. Rec. 168. The only thing this colloquy seems to make clear is that Senator Johnson had not comprehensively analyzed the relationship between § 5 and the law of appropriation. First he thought the Secretary would be required to deliver water to those who had appropriated it; then he said this

[21] *Id.*, at 115.

[22] *Id.*, at 97, 115.

would be required "[i]f they contract"; then he agreed the Secretary might withhold water "as he sees fit"; then he "doubt[ed] very much" whether the Secretary could disregard Los Angeles' appropriations; finally he said "possibly" the Secretary might utterly ignore appropriations. This shifting dialogue can scarcely be deemed an authoritative, or even useful, aid to construction of the statute.

Nor is there warrant for the Court's reliance on the statements of such opponents of the bill as Utah's Representative Colton and Arizona's Representative Douglas. Objections of opponents of a bill are seldom significant guides to its construction. See *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384, 394–395. And in any event in this instance the opponents themselves were far from consistent in their views.[23]

Of far greater significance are the statements of the bill's supporters, which confirm that no power to ignore appropriations was given to the Secretary.[24] Representative Swing, author of the bill, responded to Mr. Hayden's assertion that such a power was given with an emphatic denial: "the distribution will either be by agree-

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[23] Thus, almost in the same breath with which Representative Colton made his then seemingly dire prediction of national control, he declared that "Arizona is not a party at all to this compact. She and her citizens may appropriate water at any time." 69 Cong. Rec. 9648. Arizona, as has already been pointed out, was busily opposing the bill on the specific ground that it left California free to appropriate from the river.

[24] The one apparent exception to the unanimity of view among the bill's supporters is the statement in Representative Smith's report of the third Swing bill to the House: "All rights respecting water or power under the project are, under the terms of the bill, to be disposed of by contract by the Government. It is not reasonable to assume that the Government will do anything of an unfair or prejudicial nature to Arizona." H. R. Rep. No. 1657, 69th Cong., 2d Sess. 11.

ment between the States or under their respective laws." House Hearings, *supra,* note 1, at 32. The following year he explained that the United States would not dispose of water rights under the bill; it would merely store water belonging to persons acquiring their rights under state law. See pp. 604–605, *supra.* In 1928, defending the House bill against an Arizona witness' charge that California might appropriate the entire Lower Basin supply, Mr. Swing did not dispute the statement as to California's rights but reinforced it by declaring that Arizona was free to make appropriations too. Hearings before House Committee on Irrigation and Reclamation on H. R. 5773, 70th Cong., 1st Sess. 57–58. He later assured the House that notwithstanding the bill Arizona "still has the benefit of the law of prior appropriation, and she still has the right to the beneficial use of any of the water she is able to put to use." 69 Cong. Rec. 9781. Delph Carpenter, proponent of the § 5 contract requirement, said that it was designed to burden storage water with the Compact, and thus to protect the Upper Basin, and that "[i]t has nothing to do with the interstate relations between Arizona and California." [25] Senator Johnson, sponsor of the Senate

[25] See note 1, *supra,* and accompanying text. Mr. Carpenter's remarks also included the following: " 'Except by contract made as herein stated' means this: If the flow of the Colorado River is controlled and regulated by the construction of the Black Canyon Dam, and any person in the State of Arizona attempt to take any water out of the stream which has been discharged from the reservoir and is being carried in the stream bed, as a natural conduit, for delivery to lower users, this law would be brought into effect and he would be prevented from using any of that water independent of the Colorado River compact but unincumbered by any other condition for the benefit of California and Nevada. In other words, the compact does not disturb the rights between Arizona, California, and Nevada, *inter sese,* as to their portion of the water." Hearings, *supra,* note 1, at 163.

bill, told the Senate the bill was made a part of the reclamation law, which "specifically protects each State in its water rights and in the rights of the citizens of those States to water." 68 Cong. Rec. 4292. Senator Pittman insisted there was nothing in the bill (prior to the California limitation) to prevent either Arizona or California from appropriating all the water she could use.[26] Senator Phipps, whose amendment became the California limitation, declared that any dispute over the relative rights of Arizona and of Los Angeles would be resolved by the Secretary in accordance with priority of appropriation and the normal preference for domestic over agricultural use.[27]

Of further weight in supporting the view that Congress did not construe § 5 to destroy the law of appropriation and apportionment is the fact that the entire controversy over the California limitation took place *after* § 5 was added to the bill. Utah was so certain that Arizona remained free to appropriate water despite § 5 that she

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[26] "If a dam shall be built at Boulder Canyon it will impound certain waters and equate the flow below. The water below will be subject to appropriation and use by both California and Arizona . . . . In other words, there is nothing in this proposed legislation that could prevent Arizona from appropriating from the Colorado River within her borders all of the water she could use for irrigation." 68 Cong. Rec. 4412.

[27] "It seems to me that in resolving such a difficulty, should it arise, there would be taken into consideration the fact that water for domestic use should take priority over water intended for purposes of irrigation. Aside from that, these filings are first in point as compared with those to which the Senator from Arizona referred. They are for a superior use, and, in addition thereto, the applicant who has made the filing has pursued the proper course in developing the manner of appropriation or the manner of diverting the water and putting it to the highest beneficial use. I do not anticipate any difficulty on that score in resolving the question of priority by the Secretary of the Interior." 70 Cong. Rec. 169.

repealed her ratification of the six-state Compact thereafter.[28] While the original committee amendment to the Act would have required the Secretary to limit California's appropriations, the debates evidence no conviction that the Secretary had even a permissive authority to do so by virtue of the unamended § 5.

IV.

THE BEARING OF OTHER PROVISIONS OF THE PROJECT ACT.

Nothing in the Project Act expressly gives the Secretary power to ignore appropriations so long as financial conditions are met and the Compact and limitations are observed. Senators Hayden and Pittman, as the Court notes, did indicate that § 4 (a) provided for an apportionment of the water, although even they did not suggest that § 4 (a) gave any authority to the Secretary to make an apportionment by his contracts or to allocate the burdens in time of shortage. But in any event, as already noted, pp. 606–607, *supra,* § 4 does not by its terms make an apportionment; rather it simply requires six-state ratification of the Compact and an agreement by California to limit her share as conditions on the effectiveness of the Act, and authorizes an apportionment by the States themselves. In the words of Senator Johnson, the provision

> ". . . does not divide the water between Arizona and California. It fixes a maximum amount beyond which California can not go." 70 Cong. Rec. 385.

Nor does § 6, which requires that the dam be operated for the satisfaction of "present perfected rights" among

[28] See 68 Cong. Rec. 3064–3065; Hearings before House Committee on Irrigation and Reclamation on H. R. 5773, 70th Cong., 1st Sess. 191, 193, 214–215.

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other purposes, indicate by negative implication that the Secretary may ignore all other appropriations. This provision was drafted by the Upper Basin States in order to insure that the condition of the Compact had been met to relieve them from the claims of perfected users below.[29] That condition was the construction of an adequate storage reservoir against which those claims could be asserted; the Compact has nothing to do with whether rights perfected under state law since 1929 may be ignored by the Secretary in awarding contracts. Section 8 (b), which subjects the United States and all users of the Project to any compact allocating among the Lower Basin States "the benefits, including power, arising from the use of water accruing to said States," and which subjects such an agreement, if made after January 1, 1929, to any delivery contracts made prior to its approval, is similarly no authority for the Court's conclusion. Legislative history is virtually silent as to the reason for giving such contracts precedence, but the provision seems simply to have been intended to promote the entering of contracts by insuring their permanence in accordance with the requirement of § 5.[30] There is no indication in § 8 (b) whether or not the Secretary is free in awarding contracts to ignore existing appropriations; it merely evidences a policy that rights so perfected as to have been reduced to a contract for delivery at a consideration, whatever the basis on which they should be awarded, ought not to be destroyed by a subsequent interstate agreement.

If the statute were completely silent as to whether the Secretary may disregard appropriations, the normal inference would be that Congress did not mean to displace

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[29] See Hearings, *supra*, note 1, at 98, 116, 117.

[30] Delph Carpenter said that the Secretary's contracts should be lagged for only a limited period of time in order to give the States complete freedom to agree. *Id.*, at 204.

existing law. Enough has been said of the statute's history to buttress this inference beyond question. Moreover, the statute is by no means silent on this matter. The references in § 8 (a) and (b) to "appropriators" of water stored or delivered by the Project, and in § 4 (a) to the taking of steps "to initiate or perfect any claims to the use of water" made available by the dam, are only the least evidence.[31] Section 14 provides that the Reclamation Act shall govern the operation of Hoover Dam except as the Project Act otherwise provides. Section 8 of the Reclamation Act, 32 Stat. 390, 43 U. S. C. § 383, directs the Secretary of the Interior in carrying out his duties under the Act to proceed in accordance with state and territorial laws and declares that nothing in the federal act "shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof."

Both Representative Swing and Senator Johnson emphasized that this provision was deliberately incorporated into the Project Act to safeguard from federal destruction the rights of the States to their shares of the water.[32] This Court made clear in *Wyoming* v. *Colorado,* 259 U. S. 419, 463, that by thus protecting the rights of any State in an interstate stream Congress intended to leave untouched the law of interstate equitable apportionment. *Ivanhoe Irrig. Dist.* v. *McCracken,* 357 U. S. 275, 291, despite its dictum that § 8 applies only to the acquisition of rights by the United States and not to its operation of

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[31] It should also be noted that, as the Master held, § 18, quoted *ante,* p. 585, clearly leaves each State free to apply its own law in determining rights among users within its borders. The Court's strained reading of this provision emasculates it entirely and sacrifices even matters of solely intrastate concern on the altar of federal supremacy.

[32] See pp. 604–605, 619–620, *supra.*

a dam, holds only that the clear command of § 5 of the Reclamation Act, 32 Stat. 389, 43 U. S. C. § 431—that water deliveries to each user not exceed the quantity required for 160 acres—prevails over state law, not that state law does not generally govern priorities in the use of water from federal reclamation projects under § 8.[33] The Court in *Ivanhoe* expressly stated that it was reaching its narrow conclusion:

> "[w]ithout passing generally on the coverage of § 8 in the delicate area of federal-state relations in the irrigation field . . . ." 357 U. S., at 292.

This general question, with reference to what is undoubtedly the most important single water project in the United States, is precisely the question before us today. In view of the language of the Project Act, as well as its background and legislative history, there can, I think, be no doubt of the answer.

V.

THE LACK OF STANDARDS DEFINING THE LIMITS OF THE SECRETARY'S POWER.

The Secretary, the Court holds, has already apportioned the waters of the mainstream by his contracts with Arizona and Nevada and has done so in accordance with the formula suggested as a basis for an interstate agreement in § 4 (a). This holding may come as a surprise to those

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[33] Nor is anything said in *City of Fresno* v. *California*, 372 U. S. 627, relevant here, since the Court there stated only that if the Government exercises its power of eminent domain, "the effect of § 8 in such a case is to leave to state law the definition of the property interests, if any, for which compensation must be made." 372 U. S., at 630. *Fresno* did not consider the question now presented: the effect of § 8 in the *absence* of any exercise of the federal power of eminent domain.

responsible for a statement such as that in the Arizona contract, which provides that its terms are

> ". . . without prejudice to, any of the respective contentions of said states and water users as to . . . (5) what limitations on use, rights of use, and relative priorities exist as to the waters of the Colorado River system . . . ."

But whether the quantum of the Secretary's apportionment was intentional or inadvertent, the Court holds that such an apportionment has been made, and the relevant question for the future is the one that is perhaps primarily responsible for this litigation: How is the burden of any shortage to be borne by the Lower Basin States? This question is not decided; the Court simply states that the initial determination is for the Secretary to make.

What yardsticks has Congress laid down for him to follow? There is, it is true, a duty imposed on the Secretary under § 6 to satisfy "present perfected rights," and if these rights are defined as those perfected on or before the effective date of the Act, it has been estimated that California's share amounts to approximately 3,000,000 acre-feet annually. This, then, would be the floor provided by the Act for California, assuming enough water is available to satisfy such present perfected rights. And the Act also has provided a ceiling for California: the 4,400,000 acre-feet of water (plus one-half of surplus) described in § 4 (a).

But what of that wide area between these two outer limits? Here, when we look for the standards defining the Secretary's authority, we find nothing.[34] Under the

[34] Nor, I submit, does the Court suggest any standards. Certainly, there is nothing in the enumeration of purposes in § 6 which will be of any assistance in helping the Secretary allocate the burden of shortages among competing irrigation and domestic uses within and among the Lower Basin States.

Court's construction of the Act, in other words, Congress has made a gift to the Secretary of almost 1,500,000 acre-feet of water a year, to allocate virtually as he pleases in the event of any shortage preventing the fulfillment of all of his delivery commitments.

The delegation of such unrestrained authority to an executive official raises, to say the least, the gravest constitutional doubts. See *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495; *Panama Refining Co.* v. *Ryan,* 293 U. S. 388; cf. *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U. S. 579, 587–589. The principle that authority granted by the legislature must be limited by adequate standards serves two primary functions vital to preserving the separation of powers required by the Constitution.[35] *First,* it insures that the fundamental policy decisions in our society will be made not by an appointed official but by the body immediately responsible to the people. *Second,* it prevents judicial review from becoming merely an exercise at large by providing the courts with some measure against which to judge the official action that has been challenged.

The absence of standards under the Court's construction is an instructive illustration of these points. The unrestrained power to determine the burden of shortages is the power to make a political decision of the highest order. Indeed, the political pressures that will doubtless be brought to bear on the Secretary as a result of this decision are disturbing to contemplate. Furthermore, whatever the Secretary decides to do, this Court will surely be unable effectively to review his actions, since it will not know what guides were intended by Congress to govern those actions.

These substantial constitutional doubts do not, of course, lead to the conclusion that the Project Act must

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[35] See the discussion in Comment, 14 Stan. L. Rev. 372.

be held invalid. Rather, they buttress the conviction, already firmly grounded in the Act and its history, that no such authority was vested in the Secretary by Congress. Its purpose instead was to leave these matters to state law, and developed principles of equitable apportionment, subject only to the explicit exceptions provided in the Act.

For these reasons I respectfully dissent from the construction which the Court puts upon this aspect of the Act.

MR. JUSTICE DOUGLAS, dissenting.

I.

This case, I think, has been haunted by several irrelevancies. First, is the fact that the only points from which California can take the water of the Colorado River System are on the mainstream above Laguna Dam, there being no tributaries in that State. This fact, I think, leads the Court to the inference that the tributaries which come in below Laguna Dam contain waters to which California has no rights. The controversy does concern the waters of the lower tributaries, but only indirectly. California does not seek those waters. She merely seeks to have them taken into consideration in the formula that determines the allocation between her and Arizona.

Another irrelevancy is the fact that only 2½% of the Colorado River drainage basin is in California, although 90% of the water which California appropriates leaves the basin never to return. If we were dealing with problems of equitable apportionment, as we were in *Nebraska* v. *Wyoming*, 325 U. S. 589, that factor would be relevant to our problem. And it would be relevant in case we were dealing with litigation concerning waters in excess of the amount granted California under the Project Act. But it is irrelevant here because the only justiciable

question that involves the volume of water is one that concerns the source of supply out of which California's 4,400,000 acre-feet will be satisfied—a matter which I think Congress resolved differently than has the Court.

Third, is a mood about the controversy that suggests that here, as in the cases involving multipurpose federal dams, federal control of navigable streams controls this litigation. The right of the Federal Government to the flow of the stream is not an issue here. We deal with a very unique feature of the irrigation laws of the 17 Western States.

The question is not what Congress has authority to do, but rather the kind of regime under which Congress has built this and other irrigation systems in the West. Heretofore those regimes have been posited on the theory that state law determines the allotment of waters coming through the irrigation canals that are fed by the federal dams.

Much is written these days about judicial lawmaking; and every scholar knows that judges who construe statutes must of necessity legislate interstitially, to paraphrase Mr. Justice Cardozo. Selected Writings (1947 Hall ed.), p. 160. The present case is different. It will, I think, be marked as the baldest attempt by judges in modern times to spin their own philosophy into the fabric of the law, in derogation of the will of the legislature. The present decision, as MR. JUSTICE HARLAN shows, grants the federal bureaucracy a power and command over water rights in the 17 Western States that it never has had, that it always wanted, that it could never persuade Congress to grant, and that this Court up to now has consistently refused to recognize. Our rulings heretofore have been consistent with the principles of reclamation law established by Congress both in nonnavigable streams (*Ickes* v. *Fox,* 300 U. S. 82, 94–96) and in navigable ones. *Nebraska* v. *Wyoming,* 325 U. S. 589, 612. The rights of the United

States as storer of waters in western projects have been distinctly understood to be simply that of "a carrier and distributor of the water." *Ickes* v. *Fox, supra,* p. 95. As we stated in *Nebraska* v. *Wyoming, supra,* p. 614:

> "The property right in the water right is separate and distinct from the property right in the reservoirs, ditches or canals. The water right is appurtenant to the land, the owner of which is the appropriator. The water right is acquired by perfecting an appropriation, i. e., by an actual diversion followed by an application within a reasonable time of the water to a beneficial use."

And that result was reached even though under those other projects, as under the present one, the Secretary had broad powers to make contracts governing the use and disposition of the stored water. See, *e. g.,* 43 U. S. C. §§ 389, 440.

The men who wrote the Project Act were familiar with western water law. *Wyoming* v. *Colorado,* 259 U. S. 419, had recently been decided, holding that priority of appropriation was the determining factor in reaching an equitable apportionment between two Western States. *Id.,* at 470. Yet, S. Rep. No. 654, 69th Cong., 1st Sess. 26–27, contains no suggestion that Congress, by § 5, was displacing a doctrine as important to these Western States as the doctrine of seizin has been to the development of Anglo-American property law. Instead, only 25 lines of that report are devoted to § 5, and those lines clearly support MR. JUSTICE HARLAN'S conclusion that the section was designed primarily as a financial tool.

The principle that water priorities are governed by state law is deep-seated in western reclamation law. In spite of the express command of § 14 of the Project Act, which makes the system of appropriation under state law determine who has the priorities, the Secretary of the

Interior is given the right to determine the priorities by administrative *fiat*. Now one can receive his priority because he is the most worthy Democrat or Republican, as the case may be.

The decision today, resulting in the confusion between the problem of priority of water rights and the public power problem, has made the dream of the federal bureaucracy come true by granting it, for the first time, the life-and-death power of dispensation of water rights long administered according to state law.

II.

At issue on the other main phase of the case is the meaning of the California limitation contained in § 4 (a) of the Project Act. The Court, however, does not use the present litigation as an occasion to determine Arizona's and California's rights under that Act, but as a vehicle for making a wholly new apportionment of the waters in the Lower Basin and turning over all unresolved problems to the Secretary of the Interior. The Court accomplishes this by distorting both the history and language of the Project Act.

The Court relies heavily on the terms and history of a proposed tri-state compact, authorized by § 4 (a) *but never adopted by the States concerned, viz., Arizona, California and Nevada.* The proposed tri-state compact provided for a division of tributary waters identical to that made by the Court, insofar as the Gila is awarded to Arizona. The Court in reality enforces its interpretation of the proposed tri-state compact and imposes its terms upon California.

The Court, however, cannot find in the proposed tri-state compact (the one that was never approved) an allocation of the tributaries other than the Gila; and in order to justify their allocation to Arizona it is forced to turn to the terms of "proposals and counterproposals over the

years," instead of to the language of the Project Act. The result is the Court's, not that of Congress, whose intent we have been called upon to discover and effectuate. The congressional intent is expressed in § 4 (a), which provides that California shall be limited to the use of 4,400,000 acre-feet "of the waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact" (the compact that was approved) and to not more than half of "any excess or surplus waters unapportioned by said compact." [1] These waters are defined in the Colorado River Compact as *system* waters, and not as waters in the mainstream. Yet the Court restricts California to *mainstream waters*. That is the essence of the difference between us.

III.

As I read the Colorado River Compact and § 4 (a) of the Project Act, California is entitled to add all uses of system waters by Lower Basin States in the tributaries to those waters available in the mainstream to determine (1) how much water she can take out of the first 7,500,000 acre-feet apportioned to the Lower Basin States by Article III (a), and (2) whether there are excess or surplus system waters, including Article III (b) waters, of which California has a right to no more than one-half.

I disagree with the Court's conclusion that § 4 (a) of the Project Act refers only to the water flowing in the mainstream below Lee Ferry. The Project Act speaks clearly, and only, in terms of the waters apportioned to the Lower Basin States by Article III (a) of the Compact, *viz.*, California may take no more than 4,400,000 acre-feet "of the waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River

[1] The relevant provisions of the Project Act, the California Limitation Act, and the Colorado River Compact are set forth in the Appendix, *post*, p. 643.

compact." Article III (a) of the Compact apportions "from the Colorado River System in perpetuity to the Upper Basin and to the Lower Basin, respectively, the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum." The term "Colorado River System" is defined in Article II (a) as including the entire mainstream and the tributaries.[2]

There is, moreover, not a word in Senate Report No. 592, 70th Cong., 1st Sess., reporting the Project Act, that indicates, suggests, or implies that the Colorado River is to be divided and California or any other Lower Basin State restricted to mainstream water. The Report indeed speaks of "enthroning the Colorado River compact" (*id.*, p. 16), which embraces the entire river system in the United States, not just the mainstream. See Article II (a). Arizona's fears that California would take 5,400,000 acre-feet from the first 7,500,000 acre-feet, if the entire system were used as the source, are, I think, unfounded. Out of the first 7,500,000 acre-feet of system water, California would be entitled only to 4,400,000 acre-feet. Out of the balance or 3,100,000 acre-feet, California would be excluded.

How much of this 3,100,000 acre-feet should go to Arizona and how much to Nevada, New Mexico, and Utah cannot be determined on this record, the relevant findings not being made in light of the construction which has been given to the Project Act, the Compact, and the Limitation Act. We cannot take as a guide the provisions in the second paragraph of § 4 (a) of the Project Act, *viz.*, the 300,000 acre-feet proposed for Nevada and the 2,800,000 acre-feet proposed for Arizona, *because those provisions come into play only if Arizona, California, and Nevada enter a compact, which to date they have not done.* The division of 3,100,000 acre-feet should, I think, be made

[2] See the Appendix, pp. 645–646, for the relevant portions of Article III.

among Arizona, Nevada, New Mexico, and Utah pursuant to the principles of equitable apportionment. *Nebraska* v. *Wyoming,* 325 U. S. 589.

The evidence is clear that the dependable Lower Basin supply does not exceed 8,000,000 acre-feet if the river system is taken as a whole. By Article III (b) of the Compact the Lower Basin States can increase their beneficial use by 1,000,000 acre-feet, *if additional water is available.* By § 4 (a) of the Project Act California is entitled to not more than one-half of any excess that is "unapportioned by said compact." The amount apportioned to the Lower Basin States by the Compact is 8,500,000 acre-feet, *viz.,* Article III (a) waters in the amount of 7,500,000 "in perpetuity" plus Article III (b) waters, which are highly contingent. After the Upper Basin is given its 7,500,000 acre-feet, the "unapportioned" excess described in Article III (b) would be available. As noted, the present permanent supply for the Lower Basin would not exceed 8,000,000 acre-feet from the mainstream and the tributaries. As I read the Compact and the Project Act, California would get out of the 8,000,000 acre-feet 4,400,000 acre-feet *plus* not more than one-half of Article III (b) waters, which, under the foregoing assumption, would amount to one-half of 500,000 acre-feet. If there is a further surplus (either in the sense of Article III (b) or in the more remote sense in which § 4 (a) of the Project Act uses that word),[3] the division between the Lower Basin

[3] It is said that the § 4 (a) language referring to surplus or excess waters, one-half of which is to go to California, the other to Arizona, is meaningless if read literally. That turns on the meaning of the words "excess or surplus waters unapportioned" by the Compact. They mean, it is said, all waters unapportioned by Article III (a) and (b), because Article III (c) defines or speaks of surplus in such manner as to indicate that surplus is only that water over and above Article III (a) and (b) water. This is true, at least for the limited purpose of Article III (c). From that premise it is reasoned that § 4 (a), literally construed, would allow Arizona and California to split equally all waters over 16,000,000 acre-feet,

States should follow the principles of equitable apportionment which we applied in *Nebraska* v. *Wyoming,* 325 U. S. 589. If § 4 (a) is to be read as referring to system waters, California's total rights in available Lower Basin waters would amount to not more than 4,650,000 acre-feet annually (4,400,000 plus 250,000). She would also have a right, albeit highly contingent, to any additional Article III (b) waters that become available to the Lower Basin and to such share of the waters in both Basins over 16,000,000 acre-feet (7,500,000 to Upper Basin, 7,500,000 to Lower Basin under Article III (a), plus 1,000,000 to Lower Basin under Article III (b)) as is equitable. *Nebraska* v. *Wyoming, supra.*

Under the Court's reading of § 4 (a), however, a far different division is made. The Court says that the

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that is after 7,500,000 acre-feet went to each of the Basins, and after the Lower Basin received an additional 1,000,000 acre-feet under the provisions of Article III (b). If that is true and if California and Arizona were allowed to divide up the rest, the Upper Basin States would forever be limited to their initial 7,500,000 acre-feet, something not contemplated by Article III (f), which specifically provides for apportionment of waters in excess of 16,000,000 between the Upper and Lower Basins. Thus, it is argued that the words "excess or surplus waters" as used in § 4 (a) are meaningless and in hopeless conflict with the terms of the Compact if read literally.

This interpretation is ill-founded. The first paragraph of § 4 (a) contains only a limitation; it apportions no water. The tri-state compact authorized by the second paragraph of § 4 (a) has never been made. But, even if it had been made, it could affect only the rights of its signatories *vis-à-vis* each other. For § 4 (a) explicitly provides "that all of the provisions of said tri-State agreement shall be subject in all particulars to the provisions of the Colorado River compact."

The words "excess or surplus waters unapportioned by said compact" mean, I think, Article III (b) waters plus all waters in the entire System in excess of 16,000,000 acre-feet. Not only does this interpretation allow the Project Act and the Colorado River Compact to be construed as a harmonious whole, but it is also compelled by the legislative history. See 70 Cong. Rec. 459–460.

language of § 4 (a) limiting California to 4,400,000 acre-feet "of the waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact" (7,500,000 acre-feet per annum) is just a "shorthand" way of saying that California is limited to 4,400,000 acre-feet of the water available in the mainstream. According to the Court, California has no rights in system waters, as this would include rights in the tributaries, and the Court has decided that the tributaries belong exclusively to Arizona. Thus, if California is to obtain any "excess or surplus" waters, the surplus must be flowing in the mainstream. That is, California can assert her right to "surplus" waters only when the flow of the mainstream is more than 7,500,000 acre-feet per year. But if, as the evidence shows, the dependable Lower Basin supply of *system* waters is only 8,000,000 acre-feet per annum, 2,000,000 of which are in the tributaries, California can look only to 6,000,000 acre-feet in the mainstream. Thus, California will never be entitled to any of the additional Article III (b) waters (500,000 acre-feet) in the Lower Basin system. Those "surplus" waters would necessarily be in the tributaries, and under the Court's interpretation they belong exclusively to Arizona, § 4 (a) to the contrary notwithstanding.

As a practical matter, the only place California can get system waters is from the mainstream, there being no tributaries of the Colorado River in California. The question to be decided is whether or not under § 4 (a) of the Project Act California can take into consideration Arizona's uses on her tributaries in determining her (California's) right to divert water from the mainstream. The Court says California cannot, because when the Project Act refers to her rights in *system* waters as the measuring rod, it really means her rights in mainstream waters. With due respect, the majority achieves that result by misreading the Colorado River Compact, the

Project Act, and by misreading the legislative history leading up to the California Limitation Act. An analysis of the legislative history will show, as already noted, that the Court's analysis is built mainly upon statements made by the various Senators in arguing the terms of a proposed tri-state compact that was never made.

IV.

The Project Act needs the Compact to achieve a settlement of the issue of the apportionment of water involved in this case. It is argued that an apportionment, constitutionally, can be achieved only in one of two ways—by an interstate compact or by a decree of equitable apportionment. That proposition need not, however, be resolved here, because (apart from a contingency not relevant here) the Project Act by the express terms of § 4 (a) is dependent on the ratification of the Compact.[4] If the Compact is ratified, it and the Project Act are to supply the measure of waters which California may claim.[5]

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[4] Under § 4 (a) of the Project Act it is provided that if all seven States fail to ratify the Compact in six months (which in fact they did fail to do), the Project Act shall not take effect until six of the States, including California, ratify the Compact and waive the provisions of Article XI of the Compact (which required approval of all seven States) and the President has so declared by public proclamation. A further condition was the passage of California's Limitation Act. The Presidential Proclamation is dated June 25, 1929. 46 Stat. 3000; and California's Limitation Act was approved March 4, 1929, and became effective August 14, 1929.

[5] The Colorado River Compact is referred to many times in the Project Act—§ 1, § 4 (a), § 6, § 8, § 12, § 13, § 18, and § 19.

By § 18 the rights of the States to waters within their borders are not interfered with "except as modified by the Colorado River compact or other interstate agreement."

By § 8 (a) "all users and appropriators" of water are "subject to and controlled by said Colorado River compact . . . anything in this Act to the contrary notwithstanding . . . ."

The overall accounting of the waters is provided for in Article III of the Compact. By Article III (a) "the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum" is apportioned "in perpetuity to the Upper Basin and to the Lower Basin, respectively," meaning that each basin gets 7,500,000 acre-feet. By Article III (b) the Lower Basin is given the right to increase its beneficial consumptive use by 1,000,000 acre-feet per annum. By Article III (c) any deficiency owed Mexico "shall be equally borne by the Upper Basin and the Lower Basin." The Lower Basin by definition includes California. Article II (g). Tributary uses in Arizona diminish California's right under Article III (c) to require the Upper Basin States to supply water to satisfy Mexico. California is to be charged with water from the Gila when the accounting is made with Mexico. That is, California is presumed to enjoy the waters from the Lower Basin tributaries for purposes of Article III (c) of the Compact. It is manifestly unfair to charge her with those waters under Article III (c) of the Compact and to say that she is entitled to none of them in computing the 4,400,000 acre-feet which the Limitation Act and the Project Act give her out of the waters of Article III (a) of the Compact.

Section 1 of the Project Act authorizes the Secretary of the Interior to construct and operate the Boulder Dam "subject to the terms of the Colorado River *compact.*" By § 4 (a) the Project Act is not to be operative unless and until the seven States "shall have ratified the Colorado River *compact*"; and if they do not, then "the provisions of the first paragraph of Article XI of said *compact*" must be waived. Moreover, the 4,400,000 acre-feet allotted to California by § 4 (a) are described in terms "of the waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River *compact.*" Section 4 (a) describes the "excess or surplus" waters in

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terms of those "unapportioned by said *compact*"; and it makes all "uses always to be subject to the terms of said *compact*." The *compact* is, indeed, the underpinning of the Project Act.

The Compact apportions the waters "from the Colorado River System," which by definition includes the mainstream and its tributaries in the United States. And California's Limitation Act, containing the precise language of the allocation of waters in § 4 (a) of the Project Act, describes the 4,400,000 acre-feet in terms "of the waters apportioned to the lower basin states by paragraph 'a' of article three of the said Colorado river *compact*." [6]

So it seems that the Compact is the mainspring from which all rights flow. The 7,500,000 acre-feet of water apportioned by Article III (a) of the Compact "from the Colorado River System" to the Lower Basin is the supply out of which California's 4,400,000 acre-feet is to be taken.

To repeat, the words "excess or surplus waters unapportioned by said compact," as used in § 4 (a) of the Project Act, mean, in my view, all waters available in the Lower Basin in excess of the first 7,500,000 acre-feet covered by Article III (a) of the Compact.[7]

The additional 1,000,000 acre-feet described in Article III (b) was added to the Compact "to compensate for the

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[6] It was indicated in *Arizona* v. *California*, 292 U. S. 341, 357, that the Limitation Act incorporates the Compact:

"It may be true that the Boulder Canyon Project Act leaves in doubt the apportionment among the states of the lower basin of the waters to which the lower basin is entitled under Article III (b). But the Act does not purport to apportion among the states of the lower basin the waters to which the lower basin is entitled under the Compact. The Act merely places limits on California's use of waters under Article III (a) and of surplus waters; and it is 'such' uses which are 'subject to the terms of said compact.'"

[7] See note 3, *supra*.

waters of the Gila River and its tributaries being included within the definition of the Colorado River System." *Arizona* v. *California,* 292 U. S. 341, 350–351. And though Arizona has long claimed those 1,000,000 acre-feet as hers, that construction of Article III (b) of the Compact was rejected long ago. *Arizona* v. *California, supra,* p. 358.

V.

While the legislative history of the California limitation contained in § 4 (a) looks several ways, much of it is legislative history made with a view to its favorable use in the future—a situation we have noticed on other occasions. See *Schwegmann Bros.* v. *Calvert Corp.,* 341 U. S. 384. I think an objective reading of that history shows that the tri-state compact authorized by § 4 (a) of the Project Act (a compact never made) was *the one and only way* visualized by that Act through which Arizona could get the *exclusive use* of the waters of the Gila River. For the second paragraph of § 4 (a) of the Project Act states that the tri-state compact, *if made,* shall give Arizona "the exclusive beneficial consumptive use of the Gila River and its tributaries" within the boundaries of Arizona. Fears that this appropriation would injure New Mexico are not relevant to our problem, since the proposed tri-state compact would not hurt New Mexico unless she agreed to it. The legal rights of States not parties to the Compact would be unimpaired, as *Arizona* v. *California,* 283 U. S. 423, 462, holds. The same applies to any concern that Upper Basin rights would be imperiled by the tri-state compact.

After much discussion, the amendment allocating 4,400,000 acre-feet to California by § 4 (a) of the Project Act was finalized by Senator Phipps, Chairman of the Committee on Irrigation and Reclamation, who identified

those 4,400,000 acre-feet as system waters. He made it unmistakably clear by adding to § 4 (a) the words "by paragraph (a) of Article III" of the Compact which in his words "show that that allocation of water refers directly to the seven and one-half million acre-feet of water" described by Article III (a) of the Compact. 70 Cong. Rec. 459. That amendment was agreed to without a roll call. 70 Cong. Rec. 473. Prior to that time Senator Phipps had proposed that California receive 4,600,000 acre-feet. *Id.*, p. 335.

The following colloquy took place:

> "Mr. HAYDEN. Under the circumstances I should like to inquire of the Senator from Colorado how he arrives at the figure 4,600,000 acre-feet of water instead of 4,200,000 acre-feet as proposed in my amendment?
>
> "Mr. PHIPPS. It was just about as difficult for me to arrive at 4,600,000 acre-feet as it would have been to arrive at 4,200,000 acre-feet. The arguments pro and con have been debated in the committee for quite a period of time. The contentions made by the Senators from Arizona have not been conclusive to my mind. For instance, I will refer to the fact that *Arizona desires to eliminate entirely all waters arising in the watershed and flowing out of the Gila River.*
>
> "Mr. HAYDEN. There is nothing of that kind in the Senator's amendment.
>
> "Mr. PHIPPS. There is nothing of that kind in the Senator's amendment, but that has been one of the arguments advanced by California as being an offset to the amount to which Arizona would try to limit California.
>
> "Mr. HAYDEN. If the Senator thought there was force in that argument, I should think that he

would have included in his amendment a provision eliminating the waters of the Gila River and its tributaries, as my amendment does.

"Mr. PHIPPS. I do not consider it necessary because the bill itself, not only the present substitute measure but every other bill on the subject, *ties this question up with the Colorado River compact.*

"Mr. HAYDEN. My amendment does that.

"Mr. PHIPPS. Yes; that is true, but under estimates of engineers—one I happen to recall being made, I think, by Mr. La Rue—notwithstanding all of the purposes to which water of the Gila may be put by the State of Arizona, at least 1,000,000 acre-feet will return to the main stream. Yet Arizona contends that that water is not available to California; whereas to-day and for years past at least some of the waters from the Gila River have come into the canal which is now supplying the Imperial Valley.

"It is not a definite fixed fact that with the enactment of this proposed legislation the all-American canal is going to be built within the period of seven years; as a matter of fact, it may not be built at all; we do not know as to that. *But I do not think that the water from the Gila River, one of the main tributaries of the Colorado, should be eliminated from consideration. I think that California is entitled to have that counted in as being a part of the basic supply of water.*" (Italics added.)

It is plain from this colloquy that Senator Phipps thought that his amendment, limiting the amount California can claim, "ties this question up with the Colorado River compact" and that the Gila River (below Lake Mead) should be "counted in as being a part of the

basic supply of water" which California is entitled to have included in the computations for the Lower Basin States.

The word of Senator Phipps, who was chairman of the committee and who offered the amendment, is to be taken as against those in opposition or those who might be making legislative history to serve their ends. *Schwegmann Bros.* v. *Calvert Corp., supra,* pp. 394–395: "The fears and doubts of the opposition are no authoritative guide to the construction of legislation. It is the sponsors that we look to when the meaning of the statutory words is in doubt."

If California were restricted by the Project Act to the use of 4,400,000 acre-feet out of the mainstream, it is difficult to believe that Senator Ashurst of Arizona would have expressed his bitter minority views in the Report on the Project Act. S. Rep. No. 592, 70th Cong., 1st Sess., pt. 2. He said that the bill "sedulously and intentionally proposes to sever Arizona's jugular vein" (*id.,* p. 3), that "the amount of water apportioned to California . . . is not warranted in equity, law, justice, or morals" (*id.,* p. 4), that the bill is "a reckless and relentless assault upon Arizona." *Id.,* p. 38. He apparently never imagined that the proposed legislation would confine California to mainstream water. He indeed charged that the bill "authorizes California, which comprises only 2½ per cent of the Colorado River Basin and contributes no water, to appropriate . . . over 38 per cent of the estimated constant water supply available in the main Colorado River for all seven States in the basin and for Mexico." *Id.,* p. 5.

Like Senator Ashurst and like the Chairman of the Senate Committee, Senator Phipps, I too read the Project Act to speak in terms of the entire Colorado River System in the United States.

APPENDIX TO OPINION OF MR. JUSTICE DOUGLAS.

Section 4 (a) of the Project Act provides in relevant part:

"This Act shall not take effect and no authority shall be exercised hereunder and no work shall be begun and no moneys expended on or in connection with the works or structures provided for in this Act, and no water rights shall be claimed or initiated hereunder, and no steps shall be taken by the United States or by others to initiate or perfect any claims to the use of water pertinent to such works or structures unless and until (1) the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming shall have ratified the Colorado River compact, mentioned in section 13 hereof, and the President by public proclamation shall have so declared, or (2) if said States fail to ratify the said compact within six months from the date of the passage of this Act then, until six of said States, including the State of California, shall ratify said compact and shall consent to waive the provisions of the first paragraph of Article XI of said compact, which makes the same binding and obligatory only when approved by each of the seven States signatory thereto, and shall have approved said compact without conditions, save that of such six-State approval, and the President by public proclamation shall have so declared, and, further, until the State of California, by act of its legislature, shall agree irrevocably and unconditionally with the United States and for the benefit of the States of Arizona, Colorado, Nevada, New Mexico, Utah, and Wyoming, as an express covenant and in consideration of the passage of this Act, that the aggregate annual consumptive use (diversions less returns to the river) of water of and from

the Colorado River for use in the State of California, including all uses under contracts made under the provisions of this Act and all water necessary for the supply of any rights which may now exist, shall not exceed four million four hundred thousand acre-feet of the waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact, plus not more than one-half of any excess or surplus waters unapportioned by said compact, such uses always to be subject to the terms of said compact.

"The States of Arizona, California, and Nevada are authorized to enter into an agreement which shall provide (1) that of the 7,500,000 acre-feet annually apportioned to the lower basin by paragraph (a) of Article III of the Colorado River compact, there shall be apportioned to the State of Nevada 300,000 acre-feet and to the State of Arizona 2,800,000 acre-feet for exclusive beneficial consumptive use in perpetuity, and (2) that the State of Arizona may annually use one-half of the excess or surplus waters unapportioned by the Colorado River compact, and (3) that the State of Arizona shall have the exclusive beneficial consumptive use of the Gila River and its tributaries within the boundaries of said State, and (4) that the waters of the Gila River and its tributaries, except return flow after the same enters the Colorado River, shall never be subject to any diminution whatever by any allowance of water which may be made by treaty or otherwise to the United States of Mexico but if, as provided in paragraph (c) of Article III of the Colorado River compact, it shall become necessary to supply water to the United States of Mexico from waters over and above the quantities which are surplus as defined by said compact, then the State of California shall and will mutually agree with the State of Arizona to supply, out of the main stream of the Colorado River, one-half of any deficiency which must be supplied to Mexico by the lower basin,

and . . . (6) that all of the provisions of said tri-State agreement shall be subject in all particulars to the provisions of the Colorado River compact . . . ."

By § 1 of the California Limitation Act it was provided that when the seven States approved the Compact and its approval is proclaimed by the President that:

". . . the State of California as of the date of such proclamation agrees irrevocably and unconditionally with the United States and for the benefit of the states of Arizona, Colorado, Nevada, New Mexico, Utah and Wyoming as an express covenant and in consideration of the passage of the said 'Boulder canyon project act' that the aggregate annual consumptive use (diversions less returns to the river) of water of and from the Colorado river for use in the State of California including all uses under contracts made under the provisions of said 'Boulder canyon project act,' and all water necessary for the supply of any rights which may now exist, shall not exceed four million four hundred thousand acre-feet of the waters apportioned to the lower basin states by paragraph 'a' of article three of the said Colorado river compact, plus not more than one-half of any excess or surplus waters unapportioned by said compact, such uses always to be subject to the terms of said compact."

Article III of the Compact provides in relevant part:

"(a) There is hereby apportioned from the Colorado River System in perpetuity to the Upper Basin and to the Lower Basin, respectively, the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist.

"(b) In addition to the apportionment in paragraph (a), the Lower Basin is hereby given the right to increase its beneficial consumptive use of such waters by one million acre-feet per annum.

"(c) If, as a matter of international comity, the United States of America shall hereafter recognize in the United States of Mexico any right to the use of any waters of the Colorado River System, such waters shall be supplied first from the waters which are surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b); and if such surplus shall prove insufficient for this purpose, then, the burden of such deficiency shall be equally borne by the Upper Basin and the Lower Basin, and whenever necessary the States of the Upper Division shall deliver at Lee Ferry water to supply one-half of the deficiency so recognized in addition to that provided in paragraph (d).

"(d) The States of the Upper Division will not cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,000 acre-feet for any period of ten consecutive years reckoned in continuing progressive series beginning with the first day of October next succeeding the ratification of this compact."

WHEELDIN ET AL. *v.* WHEELER.

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

No. 493. - Argued April 23, 1963.—Decided June 3, 1963.

Basing jurisdiction on 28 U. S. C. § 1331 and not alleging diversity of citizenship, petitioner Dawson brought suit in a Federal District Court against respondent, an investigator for the House Committee on Un-American Activities. Petitioner alleged that, without authorization from the Committee but acting under color of his office, respondent had caused a subpoena to appear as a witness before the Committee to be served on petitioner at his place of work and that this caused him to lose his job and otherwise injured him. He sought damages and declaratory and injunctive relief. His reliance was on a claim of violation of the Fourth Amendment and of a statute authorizing issuance of subpoenas; but, so far as the complaint disclosed, he was neither arrested nor detained pursuant to the subpoena, he did not respond to the subpoena, nor was the subpoena used to cite him for contempt. *Held:*

1. On the face of the complaint, the Federal Court had jurisdiction. P. 649.

2. The facts alleged and conceded do not establish a violation of the Fourth Amendment; the provisions of the Civil Rights Act are inapplicable; Congress has not created a cause of action for abuse of the subpoena power by a federal officer, at least where the subpoena was never given effect; and the complaint failed to state a federal cause of action. Pp. 649–652.

302 F. 2d 36, affirmed.

A. L. Wirin argued the cause for petitioners. With him on the briefs were *Fred Okrand* and *Nanette Dembitz.*

Alan S. Rosenthal argued the cause for respondent. With him on the brief were *Solicitor General Cox, Acting Assistant Attorney General Guilfoyle* and *Mark R. Joelson.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioner Dawson [1] was served with a subpoena to appear before the House Un-American Activities Committee. He alleges that the subpoena was signed in blank by the Committee Chairman and that respondent Wheeler, an investigator for the Committee, filled in Dawson's name without authorization of the Committee. We read the complaint, as does the Solicitor General, most favorably to Dawson and conclude that the complaint alleges that no member of the Committee even attempted to delegate the Committee's subpoena power to Wheeler. The complaint also alleges that Wheeler intended to subject petitioner, when he appeared as a witness before the Committee, to public shame, disgrace, ridicule, stigma, scorn and obloquy, and falsely place upon him the stain of disloyalty without any opportunity of fair defense, to petitioner's irreparable injury. The complaint alleges not only the lack of authority of respondent Wheeler to fill in the blank subpoena but also the unconstitutionality of the House Resolution and the Act of Congress, 60 Stat. 828, authorizing the Committe to act and to subpoena witnesses. The complaint alleges that the mere service of the subpoena on Dawson cost him his job and that Wheeler caused service to be made while petitioner was at work knowing that loss of employment would result. It prays that the subpoena be declared void and of no force or effect, and asks for damages and for an injunction.

The District Court denied declaratory and injunctive relief, holding that since Dawson's appearance did not seem imminent the case was not ripe for equitable intervention and that the mere apprehension that a federal

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[1] Petitioner Donald Wheeldin was in the case when we granted certiorari. But since that time Wheeldin has moved for leave to withdraw his petition, which motion we hereby grant.

right might be infringed at some future time did not warrant declaratory or injunctive relief at the present time. The District Court held that no federal cause of action was stated as respects damages and dismissed the complaint for lack of jurisdiction over the subject matter. The Court of Appeals held that declaratory relief, being within the District Court's discretion, was properly denied and that the claim for injunctive relief had become moot. It held, however, that "in the sense of *Bell* v. *Hood,* 327 U. S. 678," there was "jurisdiction to entertain the claim for money damages," and to that extent reversed. 280 F. 2d 293. On remand the District Court dismissed the action without opinion. The Court of Appeals affirmed. 302 F. 2d 36. The case is here on a petition for a writ of certiorari which we granted. 371 U. S. 812. The basic question presented is whether a federal claim for damages is stated.

We agree with the Court of Appeals in its first opinion (280 F. 2d 293) that on the face of the complaint the federal court had jurisdiction. As we stated in *Bell* v. *Hood,* 327 U. S. 678, 685, "the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another. For this reason the District Court has jurisdiction." And see *Bock* v. *Perkins,* 139 U. S. 628, 630.

But on the undisputed facts, as they appear on argument of the case, no federal cause of action can be made out. Dawson's main reliance is on the Fourth Amendment, which protects a person against unreasonable searches and seizures. Its violation, he contends, occurred when an unauthorized subpoena was served on him. But there was neither a search nor a seizure of him. He was neither arrested nor detained pursuant to any subpoena; nor, so far as the complaint discloses, did he

respond to the subpoena and either testify or refuse to testify; nor was the subpoena used to cite him for contempt. Cf. *Williams* v. *United States,* 341 U. S. 97. In short, the facts alleged do not establish a violation of the Fourth Amendment. And the provisions of the Civil Rights Act are clearly inapplicable to this kind of case. See R. S. §§ 1979, 1980, 42 U. S. C. §§ 1983, 1985; [2] *Tenney* v. *Brandhove,* 341 U. S. 367; *Monroe* v. *Pape,* 365 U. S. 167.

Apart from any rights which may arise under the Fourth Amendment, Congress has not created a cause of action for abuse of the subpoena power by a federal officer, at least where the subpoena was never given coercive effect. No claim is made that the Federal Tort Claims Act reaches that far.[3] Cf. *Hatahley* v. *United States,* 351 U. S. 173. There is much discussion in the briefs of *Barr* v. *Matteo,* 360 U. S. 564. But that was a libel action brought against a federal official in the District of Columbia. And the immunity doctrine of that case and *Howard* v. *Lyons,* 360 U. S. 593, upon which the

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[2] By § 1983 Congress made liable in civil suits "every person" who "under color" of any state or territorial law deprives anyone of a right "secured by the Constitution and laws" of the United States. But respondent Wheeler was not acting "under color" (see *Screws* v. *United States,* 325 U. S. 91, 108, 111; *Monroe* v. *Pape,* 365 U. S. 167, 171–187) of state or territorial law. And even if § 1985 applies to federal officers (compare *Screws* v. *United States, supra,* with *Collins* v. *Hardyman,* 341 U. S. 651) who conspire with others to commit acts falling within the narrow confines of that statute, no such conspiracy is here involved. See generally 1 Emerson and Haber, Political and Civil Rights in the United States, 79–100; 1961 United States Commission on Civil Rights Report, Book 5, 71–77.

[3] 28 U. S. C. § 2680 provides: "The provisions of [the Tort Claims Act] . . . shall not apply to—

. . . . . .

"(h) 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."

Court of Appeals rested, is not relevant here, for, as the Solicitor General has conceded, under the allegations of the complaint respondent Wheeler was not acting sufficiently within the scope of his authority to bring the doctrine into play.

It is argued that the statute governing the issuance of subpoenas [4] not having been complied with, a cause of action for damages "arises" under it within the meaning of 28 U. S. C. § 1331. As respects the creation by the federal courts of common-law rights, it is perhaps needless to state that we are not in the free-wheeling days antedating *Erie R. Co.* v. *Tompkins,* 304 U. S. 64. The instances where we have created federal common law are few and restricted. In *Clearfield Trust Co.* v. *United States,* 318 U. S. 363, we created federal common law to govern transactions in the commercial paper of the United States; and we did so in view of the desirability of a uniform rule in that area. *Id.,* p. 367. But even that rule was qualified in *Bank of America* v. *Parnell,* 352 U. S. 29. In *Tunstall* v. *Brotherhood,* 323 U. S. 210, the federal right was derived from the federal duty of the union to act as bargaining representative for all members of the union.[5] But it is difficult for us to see how the present statute, which only grants power to issue subpoenas, implies a cause of action for abuse of that power. Congress

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[4] Legislative Reorganization Act of 1946, P. L. 601, c. 753, House Rule XI (1)(q)(2), 60 Stat. 828: "Subpenas may be issued under the signature of the chairman of the committee [on Un-American Activities] or any subcommittee, or by any member designated by any such chairman . . . ."

[5] The other cases cited are singularly inapposite. *Holmberg* v. *Armbrecht,* 327 U. S. 392, was a suit to enforce a liability created by a federal statute, and the question was what remedies the federal courts should apply. *Howard* v. *Lyons,* 360 U. S. 593, held in a diversity suit for libel against a federal official that, although state law created the right, the defense of privilege is to be formulated by the federal courts. *Id.,* 597.

has not done here what was done in *Textile Workers* v. *Lincoln Mills,* 353 U. S. 448, and left to federal courts the creation of a federal common law for abuse of process.

When it comes to suits for damages for abuse of power, federal officials are usually governed by local law. See, *e. g., Slocum* v. *Mayberry,* 2 Wheat. 1, 10, 12. Federal law, however, supplies the defense, if the conduct complained of was done pursuant to a federally imposed duty (see, *e. g., Mayor* v. *Cooper,* 6 Wall. 247; cf. *Tennessee* v. *Davis,* 100 U. S. 257), or immunity from suit. See *Barr* v. *Matteo, supra; Howard* v. *Lyons, supra.* Congress could, of course, provide otherwise, but it has not done so. Over the years Congress has considered the problem of state civil and criminal actions against federal officials many times. See Hart and Wechsler, The Federal Courts and the Federal System, 1147–1150. But no general statute making federal officers liable for acts committed "under color," but in violation, of their federal authority has been passed. Congress has provided for removal to a federal court of any state action, civil or criminal, against "[a]ny officer of the United States . . . , or person acting under him, for any act under color of such office . . . ." 28 U. S. C. § 1442 (a)(1). That state law governs the cause of action alleged is shown by the fact that removal is possible in a nondiversity case such as this one only because the interpretation of a federal defense makes the case one "arising under" the Constitution or laws of the United States. See *Tennessee* v. *Davis, supra; Gay* v. *Ruff,* 292 U. S. 25, 34. We conclude, therefore, that it is not for us to fill any *hiatus* Congress has left in this area.

No question of pendent jurisdiction as in *Hurn* v. *Oursler,* 289 U. S. 238, is presented, for petitioner has not attempted to state a claim under state law.

We hold on the conceded facts that no federal cause of action was stated and that the judgment must be and is

Affirmed.

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

The Court of Appeals characterized petitioners' suit as follows: "The gravamen of their complaint is that the subpoenas were invalidly, maliciously and mischievously issued and served for the sole purpose of exposing them to public scorn with consequent loss of employment and of esteem. They assert that they have a federal right to protection againt such abuse of federal process; that since the subpoenas were not properly issued appellee in securing their issuance and service has subjected himself to personal liability." 302 F. 2d 36–37. The Court of Appeals did not, however, decide whether such a "federal right" exists and, if so, whether the complaint sufficiently alleged a denial of it. It sustained the District Court's dismissal on the sole ground that the allegedly unlawful acts had been committed by respondent in the line of his duty as a federal officer, and that therefore he was immune from suit by reason of the principles announced in *Barr* v. *Matteo,* 360 U. S. 564. In this Court, the Solicitor General of the United States, appearing as counsel for the respondent, candidly admits that the Court of Appeals misapplied *Barr* v. *Matteo.* In that case we upheld the governmental-officer immunity in respect of "action . . . taken . . . within the outer perimeter of petitioner's line of duty." 360 U. S., at 575. It has never been suggested that the immunity reaches beyond that perimeter, so as to shield a federal officer acting wholly on his own. A federal officer remains liable for acts committed "manifestly or palpably beyond his authority." *Spalding* v. *Vilas,* 161 U. S. 483, 498; see *Colpoys* v. *Gates,* 73 App. D. C. 193, 118 F. 2d 16; *Kozlowski* v. *Ferrara,* 117 F. Supp. 650; Note, Remedies Against the United States and Its Officials, 70 Harv. L. Rev. 827, 835 (1957). Liberally construed, see *Virgin Islands Corp.* v. *W. A. Taylor & Co.,* 202 F. 2d 61; 2 Moore, Federal Practice (2d ed. 1948),

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¶ 12.08, at 2245, petitioner Dawson's complaint alleges no less.[1] He alleges that respondent "secured from the *staff* of said Committee, blank subpoenas in large numbers" (emphasis supplied), and this can be read, the Solicitor General concedes, "to allege that no member of the Committee even attempted to delegate the Committee's subpoena power to Wheeler." Since members of the Committee's *staff* clearly have no power to delegate the issuance of subpoenas, respondent, according to the allegations of the complaint, was acting "manifestly or palpably beyond his authority." [2]

I think the proper disposition of this case would be to vacate the Court of Appeals' judgment, based as it was wholly upon an erroneous ground, and remand the case to the Court of Appeals for consideration of the questions which that court found unnecessary to decide. I recommend this course because the instant case seems to me to raise novel and important questions which have not been adequately briefed or argued by the parties and which this Court consequently, in its opinion today, treats in a most cursory fashion.

The Court states that "Dawson's main reliance is on the Fourth Amendment." I cannot agree with this. As the Court of Appeals correctly apprehended, the gravamen of the complaint is the notion of a tort of malicious abuse of federal process by a federal officer. This to me raises a number of questions. Does the complaint state

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[1] Petitioner Wheeldin has withdrawn from the case in this Court.

[2] It is not contended that respondent was acting under the orders of a superior officer which he reasonably believed to be lawful or authorized. Compare Gray, Private Wrongs of Public Servants, 47 Cal. L. Rev. 303, 317–318 (1959); Comment, 63 Col. L. Rev. 326, 334 (1963). And of course no issue is involved here of the scope of the immunity of Congressmen themselves from private civil suits. Cf. *Tenney* v. *Brandhove*, 341 U. S. 367, 378.

a claim actionable under common-law principles? If so, and if the claim is a creature of state law, may it nevertheless be entertained in the federal courts? Under what theory, if any, can the claim be deemed federal and within the original jurisdiction of the Federal District Courts? As will become apparent, these questions, which I shall discuss in order, do not require reference to the Fourth Amendment.[3]

The Court of Appeals described the instant action as one claiming malicious abuse of process. But, as usually defined, that tort "is committed when the actor employs legal process in a manner technically correct, but for a wrongful and malicious purpose to attain an unjustifiable end . . . ." 1 Harper and James, Torts (1956), § 4.9; see 3 Restatement of Torts § 682; Prosser, Torts (2d ed. 1955), § 100. Put succinctly, the tort is the "perversion" of legal process. *Mayer* v. *Walter,* 64 Pa. 283, 286. In the instant case, the process allegedly abused was not judicial, but legislative. I do not, however, consider the distinction material. But cf. Comment, 63 Col. L. Rev. 326, 327, n. 13 (1963). Abuse of administrative process seems to be a recognized aspect of the tort, see 1 Harper and James, *supra,* § 4.10; 3 Restatement of Torts § 680; *National Surety Co.* v. *Page,* 58 F. 2d 145; but cf. *Petherbridge* v. *Bell,* 146 Va. 822, 132 S. E. 683, and so does abuse of the judicial subpoena power, *Dishaw* v. *Wadleigh,* 15 App. Div. 205, 44 N. Y. Supp. 207. The con-

[3] In so confining my discussion, I mean to intimate no view on the questions whether the complaint states a violation of the Fourth Amendment and whether, if so, a remedy in damages is available. On the latter question, compare *Wiley* v. *Sinkler,* 179 U. S. 58; *Swafford* v. *Templeton,* 185 U. S. 487; and *Bell* v. *Hood,* 327 U. S. 678, 684, with *Bell* v. *Hood,* 71 F. Supp. 813; and *Johnston* v. *Earle,* 245 F. 2d 793. These questions, too, should be determined in the first instance by the courts below. See *Bell* v. *Hood,* 327 U. S. 678.

gressional subpoena is no less mandatory than the judicial, see *Watkins* v. *United States,* 354 U. S. 178, 187–188, no less a placing of governmental compulsion upon the recipient, cf. *Sinclair* v. *United States,* 279 U. S. 263, 292. It may, of course, be the first link in a chain leading to eventual criminal prosecution. See, *e. g.,* R. S. § 102, as amended, 2 U. S. C. § 192.

I should point out that the conventional notion of abuse of process assumes that the wrongdoer is a private person who procures the issuance of valid, authorized legal process, albeit with a wrongful intention and for an unjustifiable end. Comment, 63 Col. L. Rev. 326, 327, n. 13. The tort, thus, does not depend on the validity of the process, which may be "technically correct," yet still abusive. In the instant case, however, liability is sought to be imposed upon the officer who issues the process, and his authority *vel non* is of the essence.[4] Pertinent here is the settled principle of the accountability, in damages, of the individual governmental officer for the consequences of his wrongdoing. See, *e. g., Entick* v. *Carrington,* 19 Howell's State Trials 1029 (C. P. 1765); *Marbury* v. *Madison,* 1 Cranch 137, 163–168; cf. *Wolf* v. *Colorado,* 338 U. S. 25, 30–31, n. 1. With respect to federal officers, see, *e. g., Little* v. *Barreme,* 2 Cranch 169; *Elliott* v. *Swartwout,* 10 Pet. 137; *Mitchell* v. *Harmony,* 13 How. 115; *Buck* v. *Colbath,* 3 Wall. 334; *Bates* v. *Clark,* 95 U. S. 204; *Kilbourn* v. *Thompson,* 103 U. S. 168; *Belknap* v. *Schild,* 161 U. S. 10, 18; *Philadelphia Co.* v.

[4] The question of authority is, of course, distinct from that of immunity from civil suit. Even an unauthorized act may be within the scope of the immunity, so long as it is within the "outer perimeter" of the officer's "line of duty." *Barr* v. *Matteo, supra,* at 575. That, however, is a matter of defense. Whether respondent's issuance of the subpoena to petitioner Dawson was authorized by law would seem to be an element of the tort framed in the complaint.

Stimson, 223 U. S. 605, 619. This principle, in combination with the conventional notion of malicious abuse of process, seems to me ample warrant for concluding that the instant complaint makes out a common-law cause of action. Compare cases in which state judicial officers have been held liable in damages for abuse of process: *Williams* v. *Kozak,* 280 F. 373; *Dean* v. *Kochendorfer,* 237 N. Y. 384, 143 N. E. 229; *Hoppe* v. *Klapperich,* 224 Minn. 224, 28 N. W. 2d 780.

If so, and if we assume that this claim is actionable under California law [5] (postponing, for the moment, the question whether it may also be actionable under federal law), then it seems to me there are two possible theories for sustaining federal court jurisdiction over it. The first relies upon the principle of pendent jurisdiction drawn from *Hurn* v. *Oursler,* 289 U. S. 238. Since the complaint asserts a nonfrivolous claim under the Fourth Amendment, federal court jurisdiction attaches, *Bell* v. *Hood,* 327 U. S. 678, thereby permitting decision of the common-law claim which is based upon the same facts, see *id.,* at 686 (dissenting opinion).[6]

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[5] The acts complained of as establishing the cause of action all took place, apparently, in California, and petitioner and respondent are both residents of California; thus, the tort law of California would seem to be the appropriate referent. Neither the parties nor the courts below have canvassed the possibly relevant California authorities and I have made no independent investigation of the question. But consider § 3281 of the California Civil Code: "Every person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefor in money, which is called damages." Cf. *Bell* v. *Hood,* 71 F. Supp. 813, 817; *Toscano* v. *Olesen,* 189 F. Supp. 118; but cf. Foote, Tort Remedies for Police Violations of Individual Rights, 39 Minn. L. Rev. 493, 502–503 (1955).

[6] The Solicitor General agrees that the Fourth Amendment claim in the complaint conferred federal court jurisdiction to dispose of it

Whether the instant complaint can be read as adequately claiming pendent jurisdiction would seem a matter best determined in the first instance by the courts below. I cannot accept the Court's flat assertion that "petitioner has not attempted to state a claim under state law," in view of the liberality of pleading practice under the Federal Civil Rules. "A motion to dismiss a complaint, without the aid of anything except the complaint itself, is usually a most undesirable way for a defendant to seek a victory. For, on such a motion, the court must construe the complaint's language in a manner most favorable to the plaintiff; and, if that language is at all ambiguous, seldom will it, when thus generously construed,

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on the merits, and the Court of Appeals so held in an earlier phase of the instant litigation. 280 F. 2d 293 (*per curiam*). This result is clearly compelled by *Bell* v. *Hood*, 327 U. S. 678. On the remand in *Bell* v. *Hood*, the District Court held that a state law claim relying on the same facts as the Fourth Amendment claim could not be entertained under the doctrine of pendent jurisdiction because the Fourth Amendment claim did not state a cause of action. 71 F. Supp. 813, 820. This ground has been criticized, with the suggestion however that "the dismissal [might] have been more convincingly supported by saying that the dog would be wagged by his tail if plenary trial of an ancillary claim was compelled by a primary claim which could be disposed of on the pleadings." Hart and Wechsler, The Federal Courts and the Federal System (1953), 808; see Note, 62 Col. L. Rev. 1018, 1025–1026 (1962); *Salganik* v. *Mayor and City Council of Baltimore*, 192 F. Supp. 897. Whether this suggestion has merit or applicability in the instant case I am not prepared to say. I should also point out that if the federal question were deemed completely insubstantial on the merits, dismissal of the pendent claim might be appropriate on that ground. See *Levering & Garrigues Co.* v. *Morrin*, 289 U. S. 103, 105; *Emmons* v. *Smitt*, 149 F. 2d 869. I note finally that the District Court in *Bell* v. *Hood* on remand suggested that the doctrine of pendent jurisdiction pertains only to equitable claims. 71 F. Supp., at 820. This was error. See, *e. g.*, *Manosky* v. *Bethlehem-Hingham Shipyard, Inc.*, 177 F. 2d 529; Note, 62 Col. L. Rev. 1018, 1034–1041 (1962).

fail to show a cause of action." *Virgin Islands Corp.* v. *W. A. Taylor & Co., supra,* at 65. The dismissal of the instant complaint was on motion by defendant.

The second possible theory builds from *Smith* v. *Kansas City Title & Trust Co.,* 255 U. S. 180. A shareholder sued to enjoin the Trust Company, a Missouri corporation, from investing in certain federal bonds, on the ground that the Act of Congress authorizing their issuance was unconstitutional. It was claimed that under Missouri law an investment in securities the issuance of which had not been authorized by a valid law was *ultra vires* and enjoinable. The cause of action, thus, was state-created. Nevertheless this Court held that the action was one arising under federal law within the meaning of the predecessor section to 28 U. S. C. § 1331 (a). See also *Fielding* v. *Allen,* 181 F. 2d 163. It has been suggested that later decisions, *e. g., Puerto Rico* v. *Russell & Co.,* 288 U. S. 476; *Gully* v. *First Nat. Bank,* 299 U. S. 109, repudiated *Smith.* London, "Federal Question" Jurisdiction—A Snare and a Delusion, 57 Mich. L. Rev. 835, 853 (1959). But those decisions are clearly distinguishable as attempts to found federal jurisdiction upon "remote federal premises, or mere federal permission . . . , or other merely possible federal defenses." Hart and Wechsler, The Federal Courts and the Federal System (1953), 769. *Smith* remains firm authority for the principle that "where federal law has inserted itself into the texture of state law, a claim founded on the national legislation could be brought into a federal forum" even if the right of action was state-created. Mishkin, The Federal "Question" in the District Courts, 53 Col. L. Rev. 157, 166 (1953). Stated differently, "in the Smith case the claim under federal law was an essential ingredient of the plaintiff's case, without which he could assert no right to relief." Hart and Wechsler, *supra,* at 766. In

short, there is federal-question jurisdiction if a proposition of federal law is inherent in the plaintiff's claim. Cf. Wechsler, Federal Jurisdiction and the Revision of the Judicial Code, 13 Law and Contemp. Prob. 216, 225 (1948).

How does the instant complaint fare under this standard? The matter is not free from doubt, but it is arguable, at least, that inherent in a claim to abuse of federal process by a federal officer are certain propositions drawn from the network of federal statutory and constitutional provisions governing congressional investigations. In other words, implicit in the notion of abuse of process are the principles controlling the proper use of process. Concretely, the instant complaint asserts that respondent's use of congressional process was unauthorized and was for an "unjustifiable end," p. 655, *supra;* surely the contours of this authority and the classification of justifiable and unjustifiable ends of congressional process are matters of federal law. Thus, just as *Smith* is a case "where state law incorporates federal standards by reference," Wechsler, *supra,* at 225, n. 46, so here a basic element of the common-law tort is the body of federal law authorizing and defining the issuance of federal legislative process. I do not wish, however, to be understood as suggesting that the analogy is perfect.[7]

I come now to the question whether petitioner Dawson's cause of action may be deemed created by federal law apart from the Fourth Amendment. It is not claimed that any federal statute in terms confers a remedy in

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[7] In *Smith,* the investment powers of the Trust Company were subject to federal law governing the issuance of federal securities. Thus, substantially the only question in the case was the validity *vel non* of the issuance under federal law. Here, besides the question of respondent's authority *vel non* to issue the subpoena, there are questions, *e. g.,* malice, which might be thought to be rooted in the common law of abuse of process.

damages for malicious abuse of federal process by a federal officer.[8] But it is argued that such a remedy (1) may be implied from the Act of Congress respecting the issuance of subpoenas by the House Un-American Activities Committee and its subcommittees, and (2) is given by the federal common law.

The Legislative Reorganization Act of 1946, c. 753, § 121 (b), House Rule XI (1)(q)(2), 60 Stat. 828, provides in part: "Subpenas may be issued under the signature of the chairman of the committee [on Un-American Activities] or any subcommittee, or by any member designated by any such chairman . . . ." If this provision be interpreted to prohibit respondent from issuing the Committee's subpoenas on his own,[9] may a right of action in damages be implied in favor of one injured as a direct consequence of respondent's unlawful use of such a subpoena? I see no reason why it may not. "Implied rights of action are not contingent upon statutory language which affirmatively indicates that they are intended. On the contrary, they are implied unless the legislation evidences a contrary intention." *Brown* v.

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[8] No claim here is made of a conspiracy to deny petitioner the equal protection of the laws. R. S. § 1980 Third, 42 U. S. C. § 1985 (3). Nor is this an action for breach of a United States marshal's bond, 28 U. S. C. § 544; in an earlier phase of the instant litigation, the complaint was dismissed as against a United States marshal and a sheriff as frivolous. 280 F. 2d 293 (*per curiam*). The Federal Tort Claims Act, 28 U. S. C. §§ 2671–2680, has nothing to do with the present case, since the Act imposes liability on the United States and does not pertain to the question of individual federal officers' personal tort liability. The Act excludes abuse of process and other intentional torts. See § 2680 (h).

[9] I do not reach the question, which was not decided below or discussed in the opinion of the Court today, whether the Committee may delegate the power to issue subpoenas to members of its staff; petitioner Dawson contends that no such delegation was here attempted, see p. 654, *supra*.

Bullock, 194 F. Supp. 207, 224, aff'd on other grounds, 294 F. 2d 415. Increasingly, the tendency in the federal courts has been to infer private rights of action from federal statutes unless to do so would defeat manifest congressional purpose. See, *e. g., Texas & Pac. R. Co.* v. *Rigsby,* 241 U. S. 33; *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen,* 323 U. S. 210; *Neiswonger* v. *Goodyear Tire & Rubber Co.,* 35 F. 2d 761; *Reitmeister* v. *Reitmeister,* 162 F. 2d 691; *Fitzgerald* v. *Pan American World Airways,* 229 F. 2d 499; *Roosevelt Field, Inc.,* v. *Town of North Hempstead,* 84 F. Supp. 456; *Wills* v. *Trans World Airlines,* 200 F. Supp. 360; 2 Loss, Securities Regulation (2d ed. 1961), 932–956; Note, 48 Col. L. Rev. 1090 (1948). We must presume that Congress, in specifying the conditions for the lawful delegation of the Committee on Un-American Activities' subpoena power, was mindful of the grave injustices which might be done to individuals as a result of the flouting of those conditions. In this sense, Rule XI (1)(q)(2) may be said to have created a protected class of private persons of which petitioner Dawson, if the allegations of his complaint be true, is a member. Moreover, a private damages action affords the only practicable means of redressing the kind of wrong Dawson alleges. Since he was never called to testify he could not use the circumstances surrounding the issuance of the subpoena defensively,[10] and, for the same reason, his prayer for injunctive relief was struck below as moot, 280 F. 2d 293 (*per curiam*). And cf. *Pauling* v. *Eastland,* 109 U. S. App. D. C. 342, 288 F. 2d 126; *Mins* v. *McCarthy,* 93 U. S. App. D. C. 220, 209 F. 2d 307.

[10] Arguably, the validity of the subpoena could not be challenged in a criminal prosecution based on refusal to testify before the Committee, but presumably it could be challenged in a prosecution for willful default of subpoena. See R. S. § 102, as amended, 2 U. S. C. § 192; *McPhaul* v. *United States,* 364 U. S. 372.

Nor is it the case that a congressional rule (in the instant case contained in an Act of Congress) stands on a different footing, as respects judicial enforcement, from a rule respecting administrative, executive, or other conduct. It has long been settled that rules of Congress and its committees are judicially cognizable. *Christoffel* v. *United States,* 338 U. S. 84; *United States* v. *Smith,* 286 U. S. 6; *United States* v. *Ballin,* 144 U. S. 1. I therefore see no objection in principle to grounding a private action in such a rule.

A final approach to the problem of founding federal jurisdiction [11] is by way of the federal common law. Mr. Justice Brandeis' dictum: "There is no federal general common law," *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, 78, cannot, of course, be taken at its full breadth. "[A]lthough federal judicial power to deal with common-law problems was cut down in the realm of liability or its absence governable by state law, that power remained unimpaired for dealing independently, wherever necessary or appropriate, with essentially federal matters, even though Congress has not acted affirmatively about the specific question." *United States* v. *Standard Oil Co.,* 332 U. S. 301, 307. "Were we bereft of the common law, our federal system would be impotent." *D'Oench, Duhme & Co.* v. *F. D. I. C.,* 315 U. S. 447, 470 (concurring opinion). And so in a wide variety of cases the federal courts have assumed to fashion federal common-law

[11] If Rule XI (1) (q) (2) were interpreted to create an implied right of action in favor of petitioner, his claim would be one arising under federal law within the meaning of 28 U. S. C. § 1331 (a), since the rule was enacted as part of an Act of Congress. It seems to me to make no difference that the instant complaint cites not the Legislative Reorganization Act, but rather H. Res. 5, 85th Cong., 1st Sess., wherein the provisions of the Act were adopted *in haec verba* as rules of the 85th Congress. See 103 Cong. Rec. 47 (1957).

rights.[12] Ordinarily, to be sure, such fashioning is done under the aegis of a more specific jurisdictional grant than 28 U. S. C. § 1331 (a). But I agree with the test set forth in *United States* v. *Standard Oil Co., supra,* and would recognize the existence of federal common-law rights of action "wherever necessary or appropriate" for dealing with "essentially federal matters." Plainly, this test supports recognition of a federal cause of action on the facts of the instant complaint. "[A]ctions against federal officials . . . are necessarily of federal concern." Wechsler, *supra,* at 220. This is not to say that federal law is necessarily implicated whenever the defendant is a federal officer. See *Johnston* v. *Earle,* 245 F. 2d 793. But where, as here, it is alleged that a federal officer acting under color of federal law has so abused his federal powers as to cause unjustifiable injury to a private person, I see no warrant for concluding that state law must be looked to as the sole basis for liability. Under such circumstances, no state interest is infringed by a generous construction of federal jurisdiction, and every consideration of practicality and justice argues for such a construction.[13] To be sure, once the federal common-law

[12] *E. g., Southern Express Co.* v. *Byers,* 240 U. S. 612; *Sola Elec. Co.* v. *Jefferson Elec. Co.,* 317 U. S. 173; *Clearfield Trust Co.* v. *United States,* 318 U. S. 363, 367; *United States* v. *County of Allegheny,* 322 U. S. 174, 183; *Holmberg* v. *Armbrecht,* 327 U. S. 392, 395; *United States* v. *Fullard-Leo,* 331 U. S. 256, 269–270; *Rea* v. *United States,* 350 U. S. 214; *Textile Workers* v. *Lincoln Mills,* 353 U. S. 448, 457; *Howard* v. *Lyons,* 360 U. S. 593, 597; *International Assn. of Machinists* v. *Central Airlines,* 372 U. S. 682, 691, 693, n. 17; *O'Brien* v. *Western Union Tel. Co.,* 113 F. 2d 539; *Kaufman* v. *Western Union Tel. Co.,* 224 F. 2d 723, 728; *Kardon* v. *National Gypsum Co.,* 73 F. Supp. 798; see Hart, The Relations Between State and Federal Law, 54 Col. L. Rev. 489, 530–535 (1954); *Bell* v. *Hood,* 327 U. S. 678, 684.

[13] Thus, it is unsettled whether the state courts have jurisdiction to entertain an action to enjoin a federal officer acting under color of federal law, Hart and Wechsler, *supra,* at 388–391, so that denial

cause of action is recognized, the much-mooted problem remains whether such a cause arises under federal law within the meaning of 28 U. S. C. § 1331 (a). This Court has never decided the question.[14] For the position that it does, see my separate opinion in *Romero* v. *International Terminal Operating Co.,* 358 U. S. 354, 389–412, and Kurland, The Romero Case and Some Problems of Federal Jurisdiction, 73 Harv. L. Rev. 817, 831–833 (1960).

Let me make clear that I am not suggesting that this Court enjoys the same freedom to create common-law rights of action as do truly common-law courts. But there is a matrix of federal statutory and constitutional principles governing the rights, duties, and immunities

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of federal court jurisdiction over claims such as petitioner's might leave an injured party totally remediless. To be sure, there is state court jurisdiction of damages actions against federal officers. *Teal* v. *Felton,* 12 How. 284; *Buck* v. *Colbath,* 3 Wall. 334. But damages may not in every case be an adequate remedy. And if the existence of state damages remedies were relied upon to confine federal court jurisdiction to equitable actions against federal officers, a person seeking both equitable and damages relief could only invoke federal court jurisdiction at the cost of splitting his claim. So also, the broad provisions for the removal to federal courts of actions commenced against federal officers, 28 U. S. C. § 1442, unfairly give access to the federal courts to defendants which is denied plaintiffs. See Wechsler, *supra,* at 220–221. And it has been suggested that recognition of a federal cause of action against governmental officers might allow a more effective measure of damages than is presently available under state tort law. Foote, Tort Remedies for Police Violations of Individual Rights, 39 Minn. L. Rev. 493, 512 (1955).

[14] In *Romero* v. *International Terminal Operating Co.,* 358 U. S. 354, a majority of the Court held that claims under the general maritime law, which is a body of federal decisional law, did not arise under federal law for the purposes of § 1331 (a). But the Court based its decision on considerations peculiar to the maritime law and did not purport to resolve the broader question whether claims under federal common law are within § 1331 (a). See 358 U. S., at 395 (separate opinion).

of federal officers acting under color of federal authority. The existence of this matrix makes the matter of private actions against such officers respecting conduct alleged to be in excess of their authority of essentially federal concern, which justifies, in my view, the exercise of the residual common-law power which we unquestionably possess. "At the very least, effective Constitutionalism requires recognition of power in the federal courts to declare, as a matter of common law or 'judicial legislation,' rules which may be necessary to fill in interstitially or otherwise effectuate the statutory patterns enacted in the large by Congress." Mishkin, The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision, 105 U. of Pa. L. Rev. 797, 800 (1957).

Thus the theories of an implied right of action based on Rule XI (1)(q)(2) and a federal common-law right ultimately coalesce. "It seems monstrous to imply that when Congress as a matter of federal law lays the foundation for a right or condemns any conduct as a wrong, nothing can be done about it by courts without clear warrant in statutory language and legislative history." Powell, Use of Common-Law Techniques and Remedies in Statutory Enforcement—A Study in Judicial Behavior, 57 Harv. L. Rev. 900, 902 (1944). Rule XI (1)(q)(2) at least provides the foundation; the superstructure may be derived from the various sources I have canvassed. I should not like to believe that this Court is helpless to inaugurate in the federal courts the salutary "[r]estoration of the doctrine that a government officer is civilly responsible in damages for an exercise of official discretion which is motivated by personal vindictiveness or desire for personal gain." Hart and Wechsler, *supra,* at 1230. I do not believe that the matter can properly be remitted entirely to the state courts. See Foote, *supra,* note 13, for a trenchant criticism of existing state remedies

for the wrongful acts of public officers. Cf. *Mapp* v. *Ohio*, 367 U. S. 643, 651–652.

I have dealt with the foregoing problems in a deliberately tentative manner. My discussion is intended to be only suggestive, not exhaustive; I am not prepared to offer definitive solutions. But it seems to me that these novel and difficult problems permeate the case and justify our adoption here of the disposition we made in *Bell* v. *Hood* of remanding the case for a consideration of them by the courts below in the first instance.

McNEESE ET AL. *v.* BOARD OF EDUCATION FOR COMMUNITY UNIT SCHOOL DISTRICT 187, CAHOKIA, ILLINOIS, ET AL.

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

No. 480. Argued April 23, 1963.—Decided June 3, 1963.

Petitioners, Negro students in an Illinois public school, brought suit in a Federal District Court under the Civil Rights Act, 42 U. S. C. § 1983, to vindicate their rights under the Fourteenth Amendment. They alleged that the enrollment at the school consisted of 251 Negroes and 254 whites and that, with a few exceptions, the Negro students attended classes in one part of the school, separate and apart from the whites, and were compelled to use entrances and exits separate from the whites. They prayed for equitable relief, including their registration in racially integrated schools. The District Court dismissed the complaint on the ground that petitioners had not exhausted their administrative remedies under Illinois law, which forbids racial segregation in public schools and prescribes administrative procedures for enforcement of the prohibition. The Court of Appeals affirmed. *Held:* The judgment is reversed. Pp. 669–676.

(a) Relief under the Civil Rights Act may not be defeated though relief was not first sought under a state law which provided a remedy. *Monroe* v. *Pape*, 365 U. S. 167. P. 671.

(b) The purposes of 42 U. S. C. § 1983 were to override certain kinds of state laws, to provide a remedy where a state law is inadequate, to provide a federal remedy where the state remedy, though adequate in theory, is not available in practice, and to provide a remedy in the federal courts supplementary to any remedy any State might provide; and those purposes would be defeated if it were held that assertion of a federal claim in a federal court must await an attempt to vindicate the same claim in a state court. Pp. 671–673.

(c) In this case, the right alleged is plainly federal in origin and nature; there is no underlying issue of state law controlling this litigation; nor is the federal right in any way entangled in a skein of state law that must be untangled before the federal case can proceed. P. 674.

(d) It is by no means clear that Illinois law provides petitioners with an administrative remedy sufficiently adequate to preclude prior resort to a federal court for protection of their federal rights. Pp. 674–676.

305 F. 2d 783, reversed.

Raymond E. Harth argued the cause for petitioners. With him on the brief were *John W. Rogers, Earl E. Strayhorn, Jack Greenberg, Constance Baker Motley* and *James M. Nabrit III.*

Howard Boman and *Robert H. Reiter* argued the cause and filed a brief for respondents.

Alex Elson filed a brief for the American Civil Liberties Union, as *amicus curiae,* urging reversal.

Mr. Justice Douglas delivered the opinion of the Court.

This suit, which invokes the jurisdiction of the District Court under the Civil Rights Act, is brought to vindicate the rights of plaintiffs who are Negro students in the Illinois public school system. The complaint alleges that Chenot School, St. Clair County, was built and its attendance area boundaries drawn in 1957 so as to make it exclusively a Negro school. It alleges that due to overcrowded conditions in an adjacent school, Centreville, which is in the same school district, all fifth and sixth grade classes in that school (containing 97% white students) were transferred to Chenot and kept segregated there. It alleges that enrollment at Chenot consists of 251 Negroes and 254 whites, all of the whites being in the group transferred from Centreville. It alleges that Negro students, with the exception of the eight transferred from Centreville, attend classes in one part of the school, separate and apart from the whites, and are compelled to use entrances and exits separate from the whites'. It alleges that Chenot school is a segregated

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school in conflict with the Constitution of the United States; and it prays for equitable relief, including registration of plaintiffs in racially integrated schools pursuant to a plan approved by the District Court.

Respondents moved to dismiss the complaint on the ground, *inter alia,* that the plaintiffs had not exhausted the administrative remedies provided by Illinois law. The District Court granted the motion. 199 F. Supp. 403. The Court of Appeals affirmed. 305 F. 2d 783. The case is here on a petition for a writ of certiorari which we granted. 371 U. S. 933.

The administrative remedy, which the lower courts held plaintiffs must first exhaust, is contained in the Illinois School Code. Ill. Rev. Stat. 1961, c. 122, § 22–19. By that Code, 50 residents of a school district or 10%, whichever is lesser, can file a complaint with the Superintendent of Public Instruction alleging that a pupil has been segregated in a school on account of race. The Superintendent, on notice to the school board, puts the complaint down for hearing within a prescribed time. After hearing, the Superintendent notifies the parties of his decision and, if he decides that the allegations in the complaint are "substantially correct," requests the Attorney General to bring suit to rectify the practice. Any final decision of the Superintendent may be reviewed by the courts. Moreover, under the School Code a school district may not file a claim for state aid unless it files with the Superintendent a sworn statement that the school district has complied with the constitutional and statutory provisions outlawing segregation in the public schools. See Ill. Const., Art. VIII, § 1; School Code §§ 10–22.5, 22–11, 22–12.

Respondents, while saying that Illinois law does not require the Superintendent to refuse to certify claims for state aid if he finds the particular school board practices segregation, contends that the Superintendent would have

the power to withhold his certificate and as a practical matter would do so.

We have previously indicated that relief under the Civil Rights Act may not be defeated because relief was not first sought under state law which provided a remedy. We stated in *Monroe* v. *Pape,* 365 U. S. 167, 183:

> "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."

The cause of action alleged here [1] is pleaded in terms of R. S. § 1979, 42 U. S. C. § 1983, which reads:

> "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."

That is the statute that was involved in *Monroe* v. *Pape, supra;* and we reviewed its history at length in that case. 365 U. S., at 171 *et seq.* The purposes were several-

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[1] Federal jurisdiction is asserted under 28 U. S. C. § 1343, which in material part reads as follows:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

. . . . . .

"(3) To 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 or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

fold—to override certain kinds of state laws, to provide a remedy where state law was inadequate, "to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice" (*id.*, 174), and to provide a remedy in the federal courts supplementary to any remedy any State might have. *Id.*, 180–183.

We would defeat those purposes if we held that assertion of a federal claim in a federal court must await an attempt to vindicate the same claim in a state court. The First Congress created federal courts as the chief—though not always the exclusive—tribunals for enforcement of federal rights. The heads of jurisdiction of the District Court, at the start limited,[2] are now numerous. In the beginning the main concern was the security of commercial intercourse, which "parochial prejudice" might endanger.[3]

> "Maritime commerce was then the jugular vein of the Thirteen States. The need for a body of law applicable throughout the nation was recognized by every shade of opinion in the Constitutional Convention. From this recognition it was an easy step to entrust the development of such law to a distinctive system of courts, administering the same doctrines, following the same procedure, and subject to the same nationalist influences." [4]

As the beneficiaries of the Fourteenth and Fifteenth Amendments became articulate and the nationalist needs multiplied, the heads of jurisdiction of the District Courts

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[2] General "arising under" jurisdiction was not conferred on federal courts of first instance until passage of the Judiciary Act of 1875, 18 Stat. 470. See Hart and Wechsler, The Federal Courts and the Federal System, 727–733.

[3] Frankfurter and Landis, The Business of the Supreme Court (1928), pp. 8–9.

[4] *Id.*, p. 7.

increased, and that increase was a measure of the broadening federal domain in the area of individual rights.

Where strands of local law are woven into the case that is before the federal court, we have directed a District Court to refrain temporarily from exercising its jurisdiction until a suit could be brought in the state court. See *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496; *Thompson* v. *Magnolia Co.*, 309 U. S. 478; *Harrison* v. *NAACP*, 360 U. S. 167. Thus we have stayed the hands of a Federal District Court when it sought to enjoin enforcement of a state administrative order enforcing state law, since any federal question could be reviewed when the case came here through the hierarchy of state courts. *Burford* v. *Sun Oil Co.*, 319 U. S. 315. The variations on the theme have been numerous.[5]

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[5] See Note, 59 Col. L. Rev. 749. Yet where Congress creates a head of federal jurisdiction which entails a responsibility to adjudicate the claim on the basis of state law, *viz.*, diversity of citizenship, as was true in *Meredith* v. *Winter Haven*, 320 U. S. 228, we hold that difficulties and perplexities of state law are no reason for referral of the problem to the state court:

"We are pointed to no public policy or interest which would be served by withholding from petitioners the benefit of the jurisdiction which Congress has created with the purpose that it should be availed of and exercised subject only to such limitations as traditionally justify courts in declining to exercise the jurisdiction which they possess. To remit the parties to the state courts is to delay further the disposition of the litigation which has been pending for more than two years and which is now ready for decision. It is to penalize petitioners for resorting to a jurisdiction which they were entitled to invoke, in the absence of any special circumstances which would warrant a refusal to exercise it." *Id.*, p. 237.

And we held in *Kline* v. *Burke Construction Co.*, 260 U. S. 226, that, apart from contests over a *res* (*Pennsylvania* v. *Williams*, 294 U. S. 176), a suit *in personam* based on diversity of citizenship could continue in the federal court even though a suit on the same cause of action had been started in the state court:

"Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court. Whenever

We have, however, in the present case no underlying issue of state law controlling this litigation. The right alleged is as plainly federal in origin and nature as those vindicated in *Brown* v. *Board of Education,* 347 U. S. 483. Nor is the federal right in any way entangled in a skein of state law that must be untangled before the federal case can proceed. For petitioners assert that respondents have been and are depriving them of rights protected by the Fourteenth Amendment. It is immaterial whether respondents' conduct is legal or illegal as a matter of state law. *Monroe* v. *Pape, supra,* at 171–187. Such claims are entitled to be adjudicated in the federal courts.[6] *Monroe* v. *Pape, supra,* at 183; *Gayle* v. *Browder,* 352 U. S. 903, affirming 142 F. Supp. 707; *Borders* v. *Rippy,* 247 F. 2d 268, 271. Cf., *e. g., Lane* v. *Wilson,* 307 U. S. 268; *Smith* v. *Allwright,* 321 U. S. 649; *Schnell* v. *Davis,* 336 U. S. 933, affirming 81 F. Supp. 872; *Turner* v. *Memphis,* 369 U. S. 350.

Moreover, it is by no means clear that Illinois law provides petitioners with an administrative remedy sufficiently adequate to preclude prior resort to a federal court

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a judgment is rendered in one of the courts and pleaded in the other, the effect of that judgment is to be determined by the application of the principles of *res adjudicata* by the court in which the action is still pending in the orderly exercise of its jurisdiction, as it would determine any other question of fact or law arising in the progress of the case. The rule, therefore, has become generally established that where the action first brought is *in personam* and seeks only a personal judgment, another action for the same cause in another jurisdiction is not precluded." *Id.,* p. 230.

[6] As well stated by Judge Murrah in *Stapleton* v. *Mitchell,* 60 F. Supp. 51, 55, appeal dismissed pursuant to stipulation, 326 U. S. 690: "We yet like to believe that wherever the Federal courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum."

for protection of their federal rights. Under § 22–19 of the Illinois School Code petitioners could file a complaint alleging discrimination *if* they could obtain the subscription of the lesser of 50 residents or 10% of the school district. The Superintendent would then be required to hold a hearing on the matter. And,

> "If he so determines [that the allegations of the complaint are substantially correct], he shall *request* the Attorney General to apply to the appropriate circuit court for such injunctive or other relief as may be necessary to rectify the practice complained of." (Emphasis added.)

The Superintendent himself apparently has no power to order corrective action. In other words, his "only function . . . is to investigate, recommend and report. . . . [He] can give no remedy. . . . [He] can make no controlling finding of law or fact. . . . [His] recommendation need not be followed by any court . . . or executive officer." *United States Alkali Export Assn.* v. *United States,* 325 U. S. 196, 210. It would be anomalous to conclude that such a remedy forecloses suit in the federal courts when the most it could produce is a state court action that would have no such effect. See *Lane* v. *Wilson, supra,* at 274–275; *Monroe* v. *Pape, supra.*

Respondents urge, however, that prior resort to the Superintendent is necessary because by § 2–3.25 he can revoke recognition of a school district guilty of violating pupils' Fourteenth Amendment rights, and recognition is a necessary condition to state financial aid. Furthermore, state aid cannot be received by a district unless it submits a sworn statement that it does not discriminate between students "on account of color, creed, race or nationality." §§ 10–22.5, 18–12. Respondents say that the Superintendent would not certify a district for state aid if he determined that its sworn statement was false.

Apparently no Illinois cases have held that the Superintendent has authority to withhold funds once he has received an affidavit from the district, even if he determines that the affidavit is false. In any event, the withholding of state aid is at best only an indirect sanction of Fourteenth Amendment rights. When federal rights are subject to such tenuous protection, prior resort to a state proceeding is not necessary. See *Hillsborough* v. *Cromwell*, 326 U. S. 620, 625–626.

Reversed.

MR. JUSTICE HARLAN, dissenting.

In *Burford* v. *Sun Oil Co.*, 319 U. S. 315, 317–318, this Court said:

> "Although a federal equity court does have jurisdiction of a particular proceeding, it may, in its sound discretion, whether its jurisdiction is invoked on the ground of diversity of citizenship or otherwise, 'refuse to enforce or protect legal rights, the exercise of which may be prejudicial to the public interest'; [citing *United States* v. *Dern*, 289 U. S. 352, 360] for it 'is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy.' . . . [Citing *Pennsylvania* v. *Williams*, 294 U. S. 176, 185.] Assuming that the federal district court had jurisdiction, should it, as a matter of sound equitable discretion, have declined to exercise that jurisdiction here?"

This wise approach has been followed by the lower federal courts in "school segregation" cases (see, *e.g.*, *Carson* v. *Board of Education*, 227 F. 2d 789; *Carson* v. *Warlick*, 238 F. 2d 724; *Covington* v. *Edwards*, 264 F. 2d 780; *Holt* v. *Raleigh City Board of Education*, 265 F. 2d 95; *Parham*

v. *Dove,* 271 F. 2d 132; *Shepard* v. *Board of Education,* 207 F. Supp. 341), and more than once this Court has refused to interfere (see *Carson* v. *Warlick, supra,* cert. denied, 353 U. S. 910; *Holt* v. *Raleigh City Board of Education, supra,* cert. denied, 361 U. S. 818).[1] For several reasons I think the present case is peculiarly one where, as was said in *Burford* (at p. 334), "a sound respect for the independence of state action requires the federal equity court to stay its hand."

1. It is apparent on the face of the complaint that this case is quite atypical of others that have come before this Court, in that the Chenot School's student body includes both white and Negro students—in almost equal numbers—and in that none of the petitioners (or others whom they purport to represent) has been refused enrollment in the school. The alleged discriminatory practices relate, rather, to the manner in which this particular school district was formed and to the way in which the internal affairs of the school are administered. These are matters in which the federal courts should not initially become embroiled. Their exploration and correction, if need be, are much better left to local authority in the first instance.

2. There is nothing that leaves room for serious doubt as to the efficacy of the administrative remedy which Illinois has provided. (The text of the statute is set forth in the Appendix to this opinion.) The fact that the Superintendent of Public Instruction himself possesses no corrective power and that he can only "request" the Attor-

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[1] Cases such as *Mannings* v. *Board of Public Instruction,* 277 F. 2d 370, and *Borders* v. *Rippy,* 247 F. 2d 268 (where the school boards had taken no affirmative steps whatever to desegregate the schools), and *Orleans Parish School Board* v. *Bush,* 242 F. 2d 156, and *Gibson* v. *Board of Public Instruction,* 246 F. 2d 913 (arising in States having school segregation statutes on their books), are wide of the mark in the circumstances of this case.

ney General to enforce his findings by appropriate court proceedings does not, in my opinion, leave the administrative proceeding sanctionless (compare *United States Alkali Export Assn.* v. *United States,* 325 U. S. 196), or, as in *Lane* v. *Wilson,* 307 U. S. 268, serve to remove this case from the "exhaustion" requirements of *Burford.* If the Superintendent refuses to activate the Attorney General, his decision (as with a contrary one) is subject to judicial review. It is not suggested that the Attorney General could not also be compelled to act if he improperly refused to do so. And it must of course be assumed that these two responsible public officials will fully perform their sworn duty. Moreover, the terms of the statute itself which, among other things, provides for the use of compulsory process, strongly attest to the fact that the administrative remedy was intended as serious business and not as an exercise that might abort before fulfillment.

Nor can this administrative remedy otherwise be regarded as deficient. The fact that it takes a minimal number of school district residents to initiate a complaint before the Superintendent can hardly be deemed an untoward or unduly burdensome requirement. And the proceeding surely finds a strong practical even though "indirect sanction" (*ante,* p. 676) in the power of the Superintendent at least to make it more difficult for a school, guilty of racial discrimination, to obtain state financial aid—either by revoking "recognition" of the school district (*ante,* p. 675) or, as suggested to us by respondents' attorneys, by refusing to certify such a school for state aid.[2]

[2] Section 18–12 of the School Code of Illinois provides in part:

"No State aid claim may be filed for any district unless the clerk or secretary of the school board executes and files with the Superintendent of Public Instruction, on forms prescribed by him, a sworn

3. Finally, we should be slow to hold unavailing an administrative remedy afforded by a State which long before *Brown* v. *Board of Education,* 347 U. S. 483, had outlawed both by its constitution and statutes racial discrimination in its public schools,[3] and which since *Brown* has passed the further implementing legislation drawn in question in this litigation (Appendix). For myself I am

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statement that the district has complied with the requirements of Section 10–22.5 in regard to the non-segregation of pupils on account of color, creed, race or nationality."

[3] As early as 1901 the Supreme Court of Illinois in *People* v. *Mayor of Alton,* 193 Ill. 309, 312, 61 N. E. 1077, 1078, construing Art. VIII, § 1, of the Illinois Constitution, held:

"The complaint of the relator is that his children have been excluded, on account of their color, from the public school of said city located near his residence and been required to attend a school located a mile and a half distant from his residence, established exclusively for colored children. Such complaint is not met by showing that the schools established for colored children in said city equal or surpass in educational facilities the schools established in said city for white children. Under the law the common council of said city had no right to establish different schools for the white children and colored children of said city and to exclude the colored children from the schools established for white children, even though the schools established for colored children furnished educational facilities equal or superior to those of the schools established for white children."

Section 10–22.5 of the School Code of Illinois has provided since 1945 that:

". . . no pupil shall be excluded from or segregated in any such school on account of his color, race or nationality."

Sections 22–11 and 22–12 of the School Code, enacted in 1909, provide:

"Any school officer or other person who excludes or aids in excluding from the public schools, on account of color, any child who is entitled to the benefits of such school shall be fined not less than $5 nor more than $100."

"Whoever by threat, menace or intimidation prevents any colored child entitled to attend a public school in this State from attending such school shall be fined not exceeding $25."

unwilling to assume that these solemn constitutional and legislative pronouncements of Illinois mean anything less than what they say or that the rights assured by them and by the Fourteenth Amendment will not be fully and promptly vindicated by the State if petitioners can make good their grievances.

I would affirm.

APPENDIX TO OPINION OF MR. JUSTICE HARLAN.

Section 22–19 of the School Code of Illinois provides:

Upon the filing of a complaint with the Superintendent of Public Instruction, executed in duplicate and subscribed with the names and addresses of at least 50 residents of a school district or 10%, whichever is lesser, alleging that any pupil has been excluded from or segregated in any school on account of his color, race, nationality, religion or religious affiliation, or that any employee of or applicant for employment or assignment with any such school district has been questioned concerning his color, race, nationality, religion or religious affiliation or subjected to discrimination by reason thereof, by or on behalf of the school board of such district, the Superintendent of Public Instruction shall promptly mail a copy of such complaint to the secretary or clerk of such school board.

The Superintendent of Public Instruction shall fix a date, not less than 20 nor more than 30 days from the date of the filing of such complaint, for a hearing upon the allegations therein. He may also fix a date for a hearing whenever he has reason to believe that such discrimination may exist in any school district. Reasonable notice of the time and place of such hearing shall be mailed to the secretary or clerk of the school board and to the first subscriber to such complaint.

The Superintendent of Public Instruction may designate an assistant to conduct such hearing and receive testimony concerning the situation complained of. The complainants may be represented at such hearing by one of their number or by counsel. Each party shall have the privilege of cross examining witnesses. The Superintendent of Public Instruction or the hearing officer appointed by him shall have the power to subpoena witnesses, compel their attendance, and require the production of evidence relating to any relevant matter under this Act. Any Circuit or Superior Court of this State, or any judge thereof, either in term time or vacation, upon the application of the Superintendent of Public Instruction or the hearing officer appointed by him, may, in its or his discretion, compel the attendance of witnesses, the production of books, papers, records or memoranda and the giving of testimony before the Superintendent of Public Instruction or the hearing officer appointed by him conducting an investigation or holding a hearing authorized by this Act, by an attachment for contempt, or otherwise, in the same manner as production of evidence may be compelled before said court. The Superintendent of Public Instruction or the hearing officer appointed by him may cause the depositions of witnesses within the State to be taken in the manner prescribed by law for like depositions in civil actions in courts of this State, and to that end compel the attendance of witnesses and the production of books, papers, records or memoranda. All testimony shall be taken under oath administered by the hearing officer, but the formal rules pertaining to evidence in judicial proceedings shall not apply. The Superintendent of Public Instruction shall provide a competent reporter to take notes of all testimony. Either party desiring a transcript of the hearing shall pay for the cost of such transcript. The hearing officer shall report a summary of the testimony to the Superintendent

of Public Instruction who shall determine whether the allegations of the complaint are substantially correct. The Superintendent of Public Instruction shall notify both parties of his decision. If he so determines, he shall request the Attorney General to apply to the appropriate circuit court for such injunctive or other relief as may be necessary to rectify the practice complained of.

The provisions of the "Administrative Review Act", approved May 8, 1945, and all amendments and modifications thereof and the rules adopted pursuant thereto shall apply to and govern all proceedings for the judicial review of any final decision rendered by the Superintendent of Public Instruction pursuant to this Section.

GOSS ET AL. *v.* BOARD OF EDUCATION OF KNOXVILLE, TENNESSEE, ET AL.

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

No. 217. Argued March 20–21, 1963.—Decided June 3, 1963.

Negro pupils and their parents sued in two Federal District Courts in Tennessee to desegregate racially segregated public schools. In each case, a desegregation plan submitted to the District Court by the school board provided for the rezoning of school districts without reference to race; but each plan contained a transfer provision under which any student, upon request, would be permitted, solely on the basis of his own race and the racial composition of the school to which he was assigned by virtue of rezoning, to transfer from such school, where he would be in the racial minority, back to his former segregated school, where his race would be in the majority. These plans were approved by the respective District Courts and the Court of Appeals. *Held:* Insofar as they approve such transfer provisions, the judgments of the Court of Appeals are reversed, since such transfer plans are based on racial factors which inevitably would lead toward segregation of students by race, contrary to this Court's admonition in *Brown* v. *Board of Education*, 349 U. S. 294. Pp. 684–689.

301 F. 2d 164, 828, reversed in part and causes remanded.

Jack Greenberg argued the cause for petitioners. With him on the briefs were *Constance Baker Motley, James M. Nabrit III, Carl A. Cowan, Z. Alexander Looby* and *Avon N. Williams.*

K. Harlan Dodson, Jr. and *S. Frank Fowler* argued the cause and filed briefs for respondents.

Assistant Attorney General Marshall argued the cause for the United States, as *amicus curiae,* urging reversal. With him on the brief were *Solicitor General Cox, Bruce J. Terris, Harold H. Greene* and *Howard A. Glickstein.*

Jack Petree argued the cause for the Board of Education of the Memphis City Schools, as *amicus curiae,* urging affirmance. With him on the brief was *Harry C. Pierotti.*

Raymond B. Witt, Jr. filed a brief for the Chattanooga Board of Education, as *amicus curiae,* urging affirmance.

Mr. Justice Clark delivered the opinion of the Court.

We granted certiorari (371 U. S. 811) limited to the question whether petitioners, Negro school children seeking desegregation of the public school systems of Knoxville, Tennessee (the *Goss* case), and Davidson County, Tennessee, an area adjacent to Nashville (the *Maxwell* case), are deprived of rights under the Fourteenth Amendment. The question centers around substantially similar transfer provisions incorporated in formal desegregation plans adopted by the respective local school boards pursuant to court orders. The claim is that the transfer programs are invalid because they are based solely on race and tend to perpetuate the pre-existing racially segregated school system. Under the over-all desegregation plans presented to the trial courts, school districts would be rezoned without reference to race. However, by the terms of the transfer provisions, a student, upon request, would be permitted, solely on the basis of his own race and the racial composition of the school to which he has been assigned by virtue of rezoning, to transfer from such school, where he would be in the racial minority, back to his former segregated school where his race would be in the majority. The appropriate District Courts and the Court of Appeals approved the transfer plans. 301 F. 2d 164, 301 F. 2d 828. The transfer plans being based solely on racial factors which, under their terms, inevitably lead toward segregation of the students by race, we conclude that they run counter

to the admonition of *Brown* v. *Board of Education,* 349 U. S. 294, 301 (1955), wherein the District Courts were directed to "consider the adequacy of any plans" proposed by school authorities "to effectuate a . . . racially nondiscriminatory school system." Our conclusion here leads to a reversal of the judgments of the Court of Appeals to the extent they approve the transfer provisions of respondent boards in each of the cases. The only question with which we are here concerned relates solely to the transfer provisions, and we are not called upon either to discuss or to pass on the other provisions of the desegregation plans.[1]

I.

These cases were brought by Negro public school pupils and their parents as class actions against the respective school authorities. They challenged, among other points in the desegregation plans not here relevant, the transfer provisions which permitted a pupil to transfer, upon request, from the zone of his residence to another school. The transfer plans are essentially the same, each containing, in addition to the provisions at issue here, general provisions providing for transfers on a showing of "good cause."[2] The crucial provision, however, present in

[1] A full discussion of the Knoxville plans may be found in the opinion of the Court of Appeals, 301 F. 2d 164, which affirmed, with modifications not relevant here, the over-all plan, including the transfer provisions. Likewise the opinion of the Court of Appeals in *Maxwell* v. *County Board of Education of Davidson County,* 301 F. 2d 828, affirmed the action of the District Court in approving the Davidson County plan, including the transfer provisions which are set out in detail in that opinion.

[2] The Knoxville Plan provides (R. 31):

"5. Requests for transfer of students in desegregated grades from the school of their Zone to another school will be given full consideration and will be granted when made in writing by parents or guardians or those acting in the position of parents, when good cause

somewhat the same form in each plan, is exemplified by § 6 of the Knoxville plan:

> "6. The following will be regarded as some of the valid conditions to support requests for transfer:
>
> "a. When a white student would otherwise be required to attend a school previously serving colored students only;
>
> "b. When a colored student would otherwise be required to attend a school previously serving white students only;
>
> "c. When a student would otherwise be required to attend a school where the majority of students of that school or in his or her grade are of a different race."

This provision is attacked as providing racial factors as valid conditions to support transfers which by design and operation would perpetuate racial segregation. It is also said that no showing is made that the transfer provisions are essential to effectuation of desegregation and that other procedures are available.

II.

It is readily apparent that the transfer system proposed lends itself to perpetuation of segregation. Indeed, the provisions can work only toward that end. While transfers are available to those who choose to attend

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therefor is shown and when transfer is practicable, consistent with sound school administration."

The Davidson County Plan provides (R. 214):

"4. Application for transfer of first grade students, and subsequent grades according to the gradual plan, from the school of their zone to another school will be given careful consideration and will be granted when made in writing by parents, guardians, or those acting in the position of parents, when good cause therefor is shown and when transfer is practicable and consistent with sound school administration."

school where their race is in the majority, there is no provision whereby a student might transfer upon request to a school in which his race is in a minority, unless he qualifies for a "good cause" transfer. As the Superintendent of Davidson County's schools agreed, the effect of the racial transfer plan was "to permit a child [or his parents] to choose segregation outside of his zone but not to choose integration outside of his zone." Here the right of transfer, which operates solely on the basis of a racial classification, is a one-way ticket leading to but one destination, *i. e.*, the majority race of the transferee and continued segregation. This Court has decided that state-imposed separation in public schools is inherently unequal and results in discrimination in violation of the Fourteenth Amendment. *Brown* v. *Board of Education,* 347 U. S. 483 (1954). Our task then is to decide whether these transfer provisions are likewise unconstitutional. In doing so, we note that if the transfer provisions were made available to all students regardless of their race and regardless as well of the racial composition of the school to which he requested transfer we would have an entirely different case. Pupils could then at their option (or that of their parents) choose, entirely free of any imposed racial considerations, to remain in the school of their zone or to transfer to another.

III.

Classifications based on race for purposes of transfers between public schools, as here, violate the Equal Protection Clause of the Fourteenth Amendment. As the Court said in *Steele* v. *Louisville & Nashville R. Co.,* 323 U. S. 192, 203 (1944), racial classifications are "obviously irrelevant and invidious." The cases of this Court reflect a variety of instances in which racial classifications have been held to be invalid, *e. g.,* public parks and playgrounds, *Watson* v. *City of Memphis, ante,* p. 526 (1963); tres-

pass convictions, where local segregation ordinances preempt private choice, *Peterson* v. *City of Greenville, ante,* p. 244 (1963); seating in courtrooms, *Johnson* v. *Virginia, ante,* p. 61 (1963); restaurants in public buildings, *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715 (1961); bus terminals, *Boynton* v. *Virginia,* 364 U. S. 454 (1960); public schools, *Brown* v. *Board of Education, supra;* railroad dining-car facilities, *Henderson* v. *United States,* 339 U. S. 816 (1950); state enforcement of restrictive covenants based on race, *Shelley* v. *Kraemer,* 334 U. S. 1 (1948); labor unions acting as statutory representatives of a craft, *Steele* v. *Louisville & Nashville R. Co., supra;* voting, *Smith* v. *Allwright,* 321 U. S. 649 (1944); and juries, *Strauder* v. *West Virginia,* 100 U. S. 303 (1879). The recognition of race as an absolute criterion for granting transfers which operate only in the direction of schools in which the transferee's race is in the majority is no less unconstitutional than its use for original admission or subsequent assignment to public schools. See *Boson* v. *Rippy,* 285 F. 2d 43 (C. A. 5th Cir.).

The alleged equality—which we view as only superficial—of enabling each race to transfer from a desegregated to a segregated school does not save the plans. Like arguments were made without success in *Brown, supra,* in support of the separate but equal educational program. Not only is race the factor upon which the transfer plans operate, but also the plans lack a provision whereby a student might with equal facility transfer from a segregated to a desegregated school. The obvious one-way operation of these two factors in combination underscores the purely racial character and purpose of the transfer provisions. We hold that the transfer plans promote discrimination and are therefore invalid.

This is not to say that appropriate transfer provisions, upon the parents' request, consistent with sound school administration and not based upon any state-imposed

racial conditions, would fall. Likewise, we would have a different case here if the transfer provisions were unrestricted, allowing transfers to or from any school regardless of the race of the majority therein. But no official transfer plan or provision of which racial segregation is the inevitable consequence may stand under the Fourteenth Amendment.

In reaching this result we are not unmindful of the deep-rooted problems involved. Indeed, it was consideration for the multifarious local difficulties and "variety of obstacles" which might arise in this transition that led this Court eight years ago to frame its mandate in *Brown* in such language as "good faith compliance at the earliest practicable date" and "all deliberate speed." *Brown* v. *Board of Education,* 349 U. S., at 300, 301. Now, however, eight years after this decree was rendered and over nine years after the first *Brown* decision, the context in which we must interpret and apply this language to plans for desegregation has been significantly altered. Compare *Watson* v. *City of Memphis, supra.* The transfer provisions here cannot be deemed to be reasonably designed to meet legitimate local problems, and therefore do not meet the requirements of *Brown.* Accordingly, the decisions of the Court of Appeals, insofar as they approve the transfer provisions submitted by the boards of education of Knoxville, Tennessee, and Davidson County, Tennessee, are reversed and the cases are remanded to the Court of Appeals with directions to remand to the District Courts for further proceedings in accordance with this opinion.

Reversed and remanded.

LOCAL 100, UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES, *v.* BORDEN.

CERTIORARI TO THE COURT OF CIVIL APPEALS OF TEXAS, FIFTH SUPREME JUDICIAL DISTRICT.

No. 541. Argued April 24, 1963.—Decided June 3, 1963.

Respondent, a member of a local plumbers' union in Shreveport, La., arrived in Dallas, Tex., looking for a job with a construction company on a particular bank construction project there. Although the foreman of the construction company wanted him, he was unable to get the job, because the company's hiring was done through union referral, and the business agent of petitioner, the local plumbers' union in Dallas, refused to refer respondent. Respondent sued petitioner in a Texas State Court, seeking damages for such refusal and alleging that petitioner's actions constituted a willful, malicious and discriminatory interference with his right to contract and to pursue a lawful occupation; that petitioner had breached a promise, implicit in the union membership arrangement, not to discriminate unfairly or to deny any member the right to work; and that it had violated certain state statutes. Petitioner challenged the State Court's jurisdiction. *Held:* The conduct of petitioner that was the subject matter of the suit was arguably protected by § 7 or prohibited by § 8 of the National Labor Relations Act, and the State Court was precluded from exercising jurisdiction. *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236, followed. *International Assn. of Machinists* v. *Gonzales,* 356 U. S. 617, distinguished. Pp. 691–698.

355 S. W. 2d 729, reversed.

L. N. D. Wells, Jr. argued the cause for petitioner. With him on the briefs was *Charles J. Morris.*

Robert Weldon Smith argued the cause for respondent. With him on the brief was *Ewell Lee Smith, Jr.*

J. Albert Woll, Robert C. Mayer, Theodore J. St. Antoine and *Thomas E. Harris* filed a brief for the American Federation of Labor and Congress of Industrial Organizations, as *amicus curiae,* urging reversal.

MR. JUSTICE HARLAN delivered the opinion of the Court.

This case presents one facet of the recurrent problem of defining the permissible scope of state jurisdiction in the field of labor relations. The particular question before us involves consideration and application, in this suit by a union member against a local union, of the principles declared in *International Assn. of Machinists* v. *Gonzales,* 356 U. S. 617, and *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236.

I.

The respondent, H. N. Borden, who was then a member of the Shreveport, Louisiana, local of the plumbers union, arrived in Dallas, Texas, in September 1953, looking for a job with the Farwell Construction Company on a particular bank construction project. Farwell's hiring on this project was done through union referral, although there was no written agreement to this effect. Borden was unable to obtain such a referral from the business agent of the Dallas local of the plumbers union, even after the agent had accepted Borden's clearance card from the Shreveport local and after the Farwell foreman on the construction project had called the business agent and asked to have Borden sent over. According to Borden's testimony, the business agent told him:

> "You are not going to work down there on the bank job or for Farwell, you have come in here wrong, you have come in here with a job in your pocket."

And according to the Farwell foreman, the business agent answered his request by saying:

> "I am not about to send that old ——— down there, he shoved his card down our throat and I am not about to send him to the bank."

Borden never did get the job with Farwell, although he was referred to and accepted several other jobs during the period before the bank construction project was completed.

Subsequently, he brought the present suit against the Dallas local, petitioner here, and the parent International,[1] seeking damages under state law for the refusal to refer him to Farwell. He alleged that the actions of the defendants constituted a willful, malicious, and discriminatory interference with his right to contract and to pursue a lawful occupation; that the defendants had breached a promise, implicit in the membership arrangement, not to discriminate unfairly or to deny any member the right to work; and that the defendants had violated certain state statutory provisions.[2]

Petitioner challenged the state court's jurisdiction, asserting that the subject matter of the suit was within the exclusive jurisdiction of the National Labor Relations Board. The trial court upheld the challenge and dismissed the suit, but on appeal the Texas Court of Civil Appeals, relying on this Court's decision in *International Assn. of Machinists* v. *Gonzales, supra,* reversed and remanded for trial. 316 S. W. 2d 458. The Texas Supreme Court granted a writ of error on another point in the case and affirmed the remand. 160 Tex. 203, 328 S. W. 2d 739.

At trial, the case was submitted to the jury on special issues and the jury's answers included findings that Borden had been promised a job by a Farwell representa-

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[1] The trial court granted a directed verdict in favor of the parent International, and the parent organization is therefore no longer in the case.

[2] Tex. Civ. Stat. Ann., 1962, Art. 5207a—"Right to bargain freely . . ."—was cited by Borden in his complaint. This statute, however, was not relied upon by the courts below as supporting recovery, and its effect need not be considered here.

tive; that the Farwell foreman asked the union business agent to refer Borden; that the business agent "wilfully" refused to let Borden work on the bank project, knowing that Borden was entitled to work on that project under union rules; and that the conduct of the business agent was approved by the officers and members of petitioner. Actual loss of earnings resulting from the refusal to refer Borden to the Farwell job was found to be $1,916; compensation for mental suffering, $1,500; and punitive damages, $5,000. The trial court disallowed recovery for mental anguish and ordered a remittitur of the punitive damages in excess of the amount of actual damages, thus awarding total damages of $3,832. The Court of Civil Appeals affirmed, 355 S. W. 2d 729, again rejecting petitioner's preemption argument. Following denial of a writ of error by the Supreme Court of Texas, we granted certiorari, 371 U. S. 939, to consider the question whether federal labor law precludes the exercise of state jurisdiction over this dispute.

II.

This Court held in *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236, that in the absence of an overriding state interest such as that involved in the maintenance of domestic peace, state courts must defer to the exclusive competence of the National Labor Relations Board in cases in which the activity that is the subject matter of the litigation is arguably subject to the protections of § 7 or the prohibitions of § 8 of the National Labor Relations Act.[3] This relinquishment of state jurisdic-

[3] 49 Stat. 452, as amended, 29 U. S. C. §§ 157, 158. We do not deal here with suits brought in state courts under § 301 or § 303 of the Labor Management Relations Act, 61 Stat. 156, 158, 29 U. S. C. §§ 185, 187, which are governed by federal law and to which different principles are applicable. See, *e. g., Smith* v. *Evening News Assn.,* 371 U. S. 195.

tion, the Court stated, is essential "if the danger of state interference with national policy is to be averted," 359 U. S., at 245, and is as necessary in a suit for damages as in a suit seeking equitable relief. Thus the first inquiry, in any case in which a claim of federal preemption is raised, must be whether the conduct called into question may reasonably be asserted to be subject to Labor Board cognizance.

In the present case, respondent contends that no such assertion can be made, but we disagree.[4] The facts as alleged in the complaint, and as found by the jury, are that the Dallas union business agent, with the ultimate approval of the local union itself, refused to refer the respondent to a particular job for which he had been sought, and that this refusal resulted in an inability to obtain the employment. Notwithstanding the state court's contrary view, if it is assumed that the refusal *and the resulting inability to obtain employment* were in some way based on respondent's actual or believed failure to comply with internal union rules, it is certainly "arguable" that the union's conduct violated § 8 (b) (1) (A), by restraining or coercing Borden in the exercise of his protected right to refrain from observing those rules, and § 8 (b)(2), by causing an employer to discriminate against Borden in violation of § 8 (a)(3).[5] See, *e. g.*,

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[4] Respondent does not challenge the existence of the requisite effect on commerce to bring the matter within the scope of the Board's jurisdiction.

[5] Section 8 (a) of the Act provides that it shall be an unfair labor practice for an employer "(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ."

Section 8 (b) of the Act provides that it shall be an unfair labor practice for a labor organization or its agents "(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 . . . ," or "(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) . . . ."

Radio Officers v. *Labor Board,* 347 U. S. 17; *Local 568, Hotel Employees,* 141 N. L. R. B. No. 29; *International Union of Operating Engineers, Local 524 A–B,* 141 N. L. R. B. No. 57. As established in the *Radio Officers* case, the "membership" referred to in § 8 (a)(3) and thus incorporated in § 8 (b) (2) is broad enough to embrace participation in union activities and maintenance of good standing as well as mere adhesion to a labor organization. 347 U. S., at 39–42. And there is a substantial possibility in this case that Borden's failure to live up to the internal rule prohibiting the solicitation of work from any contractor [6] was precisely the reason why clearance was denied. Indeed this may well have been the meaning of the business agent's remark, testified to by Borden himself, that "you have come in here wrong, you have come in here with a job in your pocket."

It may also be reasonably contended that after inquiry into the facts, the Board might have found that the union conduct in question was not an unfair labor practice but rather was protected concerted activity within the meaning of § 7. This Court has held that hiring-hall practices do not necessarily violate the provisions of federal law, *Teamsters Local* v. *Labor Board,* 365 U. S. 667, and the Board's appraisal of the conflicting testimony might have led it to conclude that the refusal to refer was due only to the respondent's efforts to circumvent a lawful hiring-hall arrangement rather than to *his* engaging in protected activities. The problems inherent in the operation of union hiring halls are difficult and complex, see Rothman, The Development and Current Status of the Law Pertaining to Hiring Hall Arrangements, 48 Va. L. Rev. 871, and point up the importance of limiting initial competence

[6] Section 30 of Article I of the bylaws of petitioner provides in pertinent part that "Members shall not solicit work from any contractor or their representative. All employment must be procured through Business Office of Local Union No. 100."

to adjudicate such matters to a single expert federal agency.

We need not and should not now consider whether the petitioner's activity in this case was federally protected or prohibited, on any of the theories suggested above or on some different basis.[7] It is sufficient for present purposes to find, as we do, that it is reasonably "arguable" that the matter comes within the Board's jurisdiction.

III.

Respondent urges that even if the union's interference with his employment is a matter that the Board could have dealt with, the state courts are still not deprived of jurisdiction in this case under the principles declared in *International Assn. of Machinists* v. *Gonzales,* 356 U. S. 617. *Gonzales* was a suit against a labor union by an individual who claimed that he had been expelled in violation of his contractual rights and who was seeking restoration of membership. He also sought consequential damages flowing from the expulsion, including loss of wages resulting from loss of employment and compensation for physical and mental suffering. It was recognized in that case that restoration of union membership was a remedy that the Board could not afford and indeed that the *internal* affairs of unions were not in themselves a matter within

[7] As one possible additional basis on which the conduct in question might have been held to be prohibited, for example, petitioner refers us to the Board's recent decision in *Miranda Fuel Co.,* 140 N. L. R. B. No. 7, in which the majority held that a statutory bargaining representative violates § 8 (b) (2) "when, for arbitrary or irrelevant reasons or upon the basis of an unfair classification, the union attempts to cause or does cause an employer to derogate the employment status of an employee." Again, we need not and do not pass upon the correctness of that decision or its applicability in the circumstances of this case.

the Board's competence.[8] The Court then went on to hold that, in the presence of admitted state jurisdiction to order restoration of membership, the State was not without power "to fill out this remedy" by an award of consequential damages, even though these damages might be for conduct that constituted an unfair labor practice under federal law. The Taft-Hartley Act, the Court stated, did not require mutilation of "the comprehensive relief of equity." 356 U. S., at 621.

The *Gonzales* decision, it is evident, turned on the Court's conclusion that the lawsuit was focused on purely internal union matters, *i. e.*, on relations between the individual plaintiff and the union not having to do directly with matters of employment, and that the principal relief sought was restoration of union membership rights. In this posture, collateral relief in the form of consequential damages for loss of employment was not to be denied.

We need not now determine the extent to which the holding in *Garmon, supra,* qualified the principles declared in *Gonzales* with respect to jurisdiction to award consequential damages, for it is clear in any event that the present case does not come within the *Gonzales* rationale. The suit involved here was focused principally, if not entirely, on the union's actions with respect to Borden's efforts to obtain employment. No specific equitable relief was sought directed to Borden's status in the union, and thus there was no state remedy to "fill out" by permitting the award of consequential damages. The "crux" of the action (*Gonzales,* 356 U. S., at 618) concerned Borden's employment relations and involved conduct arguably subject to the Board's jurisdiction.

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[8] Section 8 (b) (1) (A), it should be noted, contains a proviso to the effect that "this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein."

Nor do we regard it as significant that Borden's complaint against the union sounded in contract as well as in tort. It is not the label affixed to the cause of action under state law that controls the determination of the relationship between state and federal jurisdiction. Rather, as stated in *Garmon, supra,* at 246,

> "[o]ur concern is with delimiting *areas of conduct* which must be free from state regulation if national policy is to be left unhampered." (Emphasis added.)

In the present case the *conduct* on which the suit is centered, whether described in terms of tort or contract, is conduct whose lawfulness could initially be judged only by the federal agency vested with exclusive primary jurisdiction to apply federal standards.

Accordingly, we conclude that the judgment of the court below must be

Reversed.

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

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

While I dissented in *International Association* v. *Gonzales,* 356 U. S. 617, I fail to see how that case can fairly be distinguished from this one. Both *Gonzales* and *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236, were written by the same author, who had no difficulty in reconciling them. And they were decided before Congress reentered the labor relations field with the Landrum-Griffin Act of 1959. 73 Stat. 519. Yet, the Court points to no indication that Congress thought *Gonzales* had incorrectly interpreted the balance it had struck between state and federal jurisdiction over these matters.

The distinction the Court draws between this case and *Gonzales*—that in *Gonzales* the lawsuit focused on purely

internal union matters—is not one that a court can intelligently apply in the myriad of cases in the field. This lawsuit started with a quarrel between respondent and his union, concerning the scope of membership rights in the union, as did *Gonzales;* and it is with those rights that this litigation is concerned, as was *Gonzales.* And, as here, it was conceded in *Gonzales* that the conduct complained of might well amount to an unfair labor practice within the Labor Board's jurisdiction. Because of these similarities, and because the Court is clearly right in saying "[i]t is not the label affixed to the cause of action under state law that controls the determination of the relationship between state and federal jurisdiction," I am able to find no support for the Court's distinction of *Gonzales* in the fact that it was primarily an "equitable" case where damages were allowed only to "fill out" the union member's remedy. Cf. Federal Rules of Civil Procedure, Rules 1, 2, and 54 (c).

San Diego Building Trades Council v. *Garmon, supra,* involved a controversy between union and employer in the classical case for National Labor Board jurisdiction. Suits for damages by individual employees against the union or the employer fall in the category of *Moore* v. *Illinois Central R. Co.,* 312 U. S. 630. As a matter of policy, there is much to be said for allowing the individual employee recourse to conventional litigation in his hometown tribunal for redress of grievances. Washington, D. C., and its administrative agencies—and even regional offices—are often distant and remote and expensive to reach. Under today's holding the member who has a real dispute with his union may go without a remedy.*

*It is by no means clear that the General Counsel, who by § 3 (d) has "final authority" to investigate charges and to issue complaints, can be made to file a charge on behalf of this individual claimant. See *Hourihan* v. *Labor Board,* 91 U. S. App. D. C. 316, 201 F. 2d 187; *Dunn* v. *Retail Clerks,* 299 F. 2d 873; 307 F. 2d 285.

See, *e. g.*, *San Diego Building Trades Council* v. *Garmon, supra; Guss* v. *Utah Labor Board*, 353 U. S. 1. When the basic dispute is between a union and an employer, any *hiatus* that might exist in the jurisdictional balance that has been struck can be filled by resort to economic power. But when the union member has a dispute with his union, he has no power on which to rely. If *Gonzales*—written in the spirit of *Moore*—is to survive, this judgment should be affirmed.

Syllabus.

LOCAL NO. 207, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS UNION, ET AL. *v.* PERKO.

CERTIORARI TO THE SUPREME COURT OF OHIO.

No. 482. Argued April 23–24, 1963.—Decided June 3, 1963.

Respondent, a union member, brought suit in an Ohio State Court against petitioners, his ironworkers local union and certain of its officers, seeking damages under state common law. He alleged that for several years he had been a member in good standing of the ironworkers local union and had been employed "as a foreman" by a certain company; that petitioners, without justification, had conspired to deprive him of the right to continue to work "as a foreman"; that, pursuant to this conspiracy, they had demanded that the company discharge him from his duties "as superintendent and foreman"; that, as a result, he had been discharged; and that petitioners had since prevented him from obtaining work "as a foreman" by representing that his foreman's rights had been suspended. *Held:* The case arguably involved an unfair labor practice over which the National Labor Relations Board would have exclusive jurisdiction, and the State Court was precluded from exercising jurisdiction. *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236, followed. *International Assn. of Machinists* v. *Gonzales,* 356 U. S. 617, distinguished. Pp. 702–708.

(a) The exercise of state jurisdiction cannot be sustained on the ground that respondent was a "supervisor," within the meaning of the National Labor Relations Act, since it appeared that he worked sometimes as a regular ironworker, sometimes as a foreman, and sometimes as a superintendent, and it is entirely possible that the Board might conclude that a foreman, under the facts of this case, is an employee and that a man whose status fluctuates, as respondent's did, is entitled to claim the protection afforded employees under the Act. Pp. 706–707.

(b) Even if it be assumed that respondent was not an employee but was solely a supervisor, there is a sufficient probability that the matter would still have been cognizable by the Board so as to compel the relinquishment of state jurisdiction, since it may well

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be that a union's insistence on discharge of a supervisor for failure to comply with union rules would violate § 8 (b) (1) (A) by tending to coerce nonsupervisory employees into observing those rules, and, if a union forces an employer to discharge a supervisor, such conduct might well violate § 8 (b) (1) (B), because it coerces the "employer in the selection of his representatives for the purpose of collective bargaining or the adjustment of grievances." Pp. 707–708.

173 Ohio St. 576, 184 N. E. 2d 100, reversed.

David E. Feller argued the cause for petitioners. With him on the briefs were *Jerry D. Anker* and *Joseph Schiavoni.*

Martin S. Goldberg argued the cause and filed a brief for respondent.

J. Albert Woll, Robert C. Mayer, Theodore J. St. Antoine and *Thomas E. Harris* filed a brief for the American Federation of Labor and Congress of Industrial Organizations, as *amicus curiae,* urging reversal.

Mr. Justice Harlan delivered the opinion of the Court.

This case, involving a suit by a union member against a local union, raises issues of federal preemption similar to those considered in *Local 100, United Assn. of Journeymen* v. *Borden, ante,* p. 690, also decided today.

In the present case the respondent, Jacob Perko, filed a complaint in a state court against Local 207 of the International Association of Bridge, Structural and Ornamental Iron Workers Union and certain of its officers, petitioners here, seeking damages under state common law. He alleged that for several years he had been a member in good standing of the iron workers local and had been employed "as a foreman" by the William B. Pollock Company; that the defendants without justification had conspired to deprive him of the right to continue

to work "as a foreman"; that pursuant to this conspiracy they had demanded that the company discharge him from his duties "as superintendent and foreman"; that as a result he had been discharged, and defendants had since prevented him from obtaining work "as a foreman in ironwork by representing that plaintiff's foreman's rights had been suspended"; and that he was entitled to damages for past and future loss of earnings in the amount of $75,000.

An order of the trial court that the complaint be dismissed was reversed by the Supreme Court of Ohio and the case remanded for trial, 168 Ohio St. 161, 151 N. E. 2d 742. The court disposed of the union's argument that Perko had failed to exhaust internal union remedies by noting that:

> "Plaintiff is not attempting to secure any redress for loss of rights as a member of the union. . . . He is alleging that the union to which he belonged and certain named officials thereof committed a common-law tort against him by conspiring to deprive him of his right to earn a living and interfering with his contract of employment . . . ." 168 Ohio St., at 162, 151 N. E. 2d, at 744.

In answer to the union's argument that federal law precluded the exercise of state jurisdiction, the court stated that there was no federal preemption with regard to a state action "to recover damages for a common-law tort, which is also an unfair labor practice," citing *International Assn. of Machinists* v. *Gonzales*, 356 U. S. 617.

At trial, a verdict was directed for petitioners, but this ruling was reversed on appeal, and a second trial was held. The evidence at this trial showed that Perko had generally worked for the company as a "foreman" or "superintendent"; [1] that in December 1953 he was working as

[1] The record indicates that as used in this case a "superintendent" is the supervisor of an entire construction project, who has working

a superintendent on a particular project; that in that capacity he gave instructions to boilermakers with respect to performance of certain phases of the work that the iron workers claimed; and that following this incident Perko was charged by members of petitioner local with assisting boilermakers in violation of the union's rule [2] and was found guilty, fined and suspended from membership. The fine, however, was later suspended and Perko was placed on probation, being permitted to resume payment of dues.

According to the evidence introduced by Perko, the iron workers informed the company, after settlement of the jurisdictional dispute with the boilermakers, that they would no longer take orders from Perko because he had been "educating the boilermakers in their particular work." Some weeks after completion of the project, the company laid him off "due to his dispute with the union," and Perko did not thereafter obtain employment with Pollock, or with any other company either as a superintendent or as a foreman.

The jury brought in a verdict of $25,000 for Perko, and the judgment was affirmed by the Court of Appeals. 90 Ohio L. Abs. 65, 187 N. E. 2d 407. That court rejected again the contention that the State was without jurisdiction, and held on the merits that although "there is very little that supports the cause sued on here," the evidence was sufficient to sustain the verdict. The Supreme Court of Ohio dismissed an appeal "for the reason that no debatable constitutional question is involved." 173 Ohio St. 576, 184 N. E. 2d 100. We granted certiorari, 371

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under him groups of employees of various crafts. One member of each such craft group is designated as its "foreman" and has the responsibility of receiving orders from the superintendent and transmitting them to his particular crew.

[2] The rule provided that "any member that leaves the iron workers to go in as a boilermaker *or assist them in any way* will be fined $500." (Emphasis added.)

U. S. 939, to consider the petitioner's claim that the State lacked jurisdiction over this dispute by virtue of the National Labor Relations Act, 49 Stat. 449, as amended, 29 U. S. C. §§ 151–168.

At the outset we note that for the reasons set forth in *Borden, ante,* p. 690, the rationale of the *Gonzales* case does not support state jurisdiction here, and we need not now consider the present vitality of that rationale in the light of more recent decisions. As in *Borden,* the crux of the action here concerned alleged interference with the plaintiff's existing or prospective employment relations and was not directed to internal union matters. Indeed the state court itself observed that "Plaintiff is not attempting to secure any redress for loss of rights as a member of the union." *Supra,* p. 703. Thus there was no permissible state remedy to which the award of consequential damages for loss of earnings might be subordinated.

Respondent contends, however, that in any event the exercise of state jurisdiction is not precluded because the matter is clearly not subject to the Labor Board's cognizance.[3] The basis of this contention is respondent's claim that he was a job superintendent, and thus a "supervisor" within the meaning of the Act,[4] at the time of the alleged tort and that he was thus excluded from the scope, operation, and protection of federal law. There are, we

[3] Respondent does not challenge the existence of the requisite effect on commerce to bring the matter within the scope of the Board's jurisdiction.

[4] Section 2 (3) of the Act defines "employee" as not including "any individual employed as a supervisor." Section 2 (11) defines "supervisor" as meaning "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

believe, two independent and conclusive answers to this argument, both of which establish that this matter falls squarely within the preemption principles declared in *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236.

First, even if it is conceded that a job superintendent is a supervisor, it is at least reasonably arguable that a foreman, as that term has been used in this case, is an "employee" within the meaning of the Act, since his function is apparently to transmit instructions, not to originate them. See, *e. g., New York Shipping Assn.,* 116 N. L. R. B. 1183. Perko in his complaint alleged that he had worked for many years "as a foreman," that the actions of the defendant were designed to cause his discharge "as superintendent and foreman," and that he was subsequently prevented from obtaining employment "as a foreman." The evidence indicated that Perko sometimes worked for Pollock as a regular iron worker in a gang, sometimes as a foreman, and sometimes as a superintendent.

It is evident that this case presents difficult problems of definition of status, problems which we have held are precisely "of a kind most wisely entrusted initially to the agency charged with the day-to-day administration of the Act as a whole." *Marine Engineers Beneficial Assn.* v. *Interlake Steamship Co.,* 370 U. S. 173, 180. It is entirely possible that the Board might conclude that a foreman under the facts of this case is an employee and that a man whose status fluctuates, as Perko's seemingly did, is entitled to claim the protection afforded employees under the Act. Given such a conclusion, Perko's complaint—that the petitioners caused his discharge and prevented his subsequent employment as a foreman as well as a superintendent—falls within the ambit of the unfair labor practices prohibited by §§ 8 (b)(1)(A) and 8 (b)(2)

of the Act.[5] And since petitioners' actions apparently resulted from Perko's violation of a union rule, there is a reasonable likelihood that on these premises the Board would have found such unfair labor practices to have been committed. See the discussion in the *Borden* case, *ante*, pp. 694–695.

Second, even if it be assumed that Perko was not an employee but was solely a supervisor, there is a sufficient probability that the matter would still have been cognizable by the Board so as to compel the relinquishment of state jurisdiction. It has been held that discharge of a supervisor for failure effectively to coerce employees into renouncing their union affiliation constitutes a violation of § 8 (a)(1) because such a discharge would reasonably cause nonsupervisory employees to fear that they might meet the same fate if they adhered to the union; and in such instances the Board has been sustained in ordering reinstatement of the supervisor with back pay. *Labor Board* v. *Talladega Cotton Factory, Inc.*, 213 F. 2d 209; cf. *Labor Board* v. *Better Monkey Grip Co.*, 243 F. 2d 836. So here, it may well be that a union's insistence on discharge of a supervisor for failure to comply with union rules would violate § 8 (b)(1)(A) because it would inevitably tend to coerce nonsupervisory employees into observing those rules. If so, it would surely be within the Board's power under § 10 (c) to order the union to reimburse the supervisor for lost wages.

[5] Section 8 (b) of the Act provides that it shall be an unfair labor practice for a labor organization or its agents "(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 . . . ," or "(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) . . . ." Section 8 (a) provides that it shall be an unfair labor practice for an employer "(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ."

Moreover, if a union forces an employer to discharge a supervisor, such conduct may well violate § 8 (b)(1)(B) because it coerces the "employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." Cf. *International Typographical Union* v. *Labor Board,* 278 F. 2d 6, aff'd in part by an equally divided Court, 365 U. S. 705; *Labor Board* v. *Local 294, International Brotherhood of Teamsters,* 284 F. 2d 893. Whether a "job superintendent" like Perko has sufficient responsibilities with regard to grievances to bring this section into play cannot be ascertained on this record, and in any event would be a question for initial determination by the Board. But the probability that such a violation of § 8 (b)(1)(B) might have occurred, especially in view of Perko's role in the interunion dispute that gave rise to the present controversy, is certainly not insignificant.

We do not of course intimate any view on the merits of any of the underlying substantive questions, that is, whether the union was guilty of a violation of the Act. It is enough to hold, as we do, that it is plain on a number of scores that the subject matter of this lawsuit "arguably" comes within the Board's jurisdiction to deal with unfair labor practices. We therefore conclude that the State must yield jurisdiction and the judgment below must be

Reversed.

Mr. Justice Douglas and Mr. Justice Clark dissent for the reasons stated in their dissent in No. 541, *Local 100, United Assn. of Journeymen* v. *Borden, ante,* p. 698.

Mr. Justice Goldberg took no part in the consideration or decision of this case.

UNITED STATES *v.* CARLO BIANCHI & CO., INC.

CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

No. 529. Argued April 29, 1963.—Decided June 3, 1963.

The so-called "Wunderlich Act" of May 11, 1954, 68 Stat. 81, provides, in substance, that a departmental decision on a question of fact pursuant to a "disputes" clause in a government contract shall be final and conclusive in accordance with the provisions of the contract, "unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence." *Held:* In a suit on a government contract, apart from questions of fraud, determination of the finality to be attached to a departmental decision on a question arising under a "disputes" clause must rest solely on consideration of the record before the department, and no new evidence may be received or considered. Pp. 709–718.

157 Ct. Cl. —, judgment vacated and cause remanded.

David L. Rose argued the cause for the United States. With him on the brief were *Solicitor General Cox, Acting Assistant Attorney General Douglas, Bruce J. Terris* and *Morton Hollander.*

William H. Matthews argued the cause and filed a brief for respondent.

Glen A. Wilkinson, Jesse E. Baskette and *Paul M. Rhodes* filed a brief for the Bar Association of the District of Columbia, as *amicus curiae,* urging affirmance.

MR. JUSTICE HARLAN delivered the opinion of the Court.

This case involves the interpretation and application of the "Wunderlich Act," 68 Stat. 81, 41 U. S. C. §§ 321–322,[1]

[1] 41 U. S. C. § 321 provides: "No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is

an Act designed to permit judicial review of decisions made by federal departments and agencies under standard "disputes" clauses [2] in government contracts. The issue before us is whether, in a suit governed by this statute, the court is restricted to a review of the administrative record on issues of fact submitted to administrative determination or is free to receive new evidence on such issues.

In 1946, the respondent, Carlo Bianchi and Company, entered into a contract with the Army Corps of Engineers for the construction of a flood-control dam. Included in the work to be performed was the construction of a 710-foot tunnel, designed for the diversion of water, to be lined with concrete and to have permanent steel supports as protection for a 50-foot section at either end. The specifications did not call for such permanent supports throughout the remainder of the tunnel but only for "[t]emporary tunnel protection . . . where required for safety of the workmen." The contract contained a standard "changed conditions" clause, authorizing the contracting officer to provide for an increase in cost if the contractor encountered subsurface conditions materially different from those indicated in the contract or to be rea-

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alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence."

41 U. S. C. § 322 provides: "No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board."

[2] The standard "disputes" clause, as included in the contract involved in this case, provides: "Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed."

sonably anticipated, and also contained the standard "disputes" clause quoted, *supra,* note 2.

After the tunnel had been drilled by a subcontractor, but before it was lined with concrete, the respondent took the position that unforeseen conditions created extreme hazards for workmen, requiring permanent protection throughout the tunnel, and that it should be compensated for installing such protection. The contracting officer decided that compensation would not be made, and pursuant to the "disputes" clause a timely appeal from his decision was taken to the Board of Claims and Appeals of the Corps of Engineers. While the appeal was pending, respondent installed the tunnel supports and completed work on the tunnel.

An adversary hearing was held before the Board, at which a record was made and each side offered its evidence and had an opportunity for cross-examination. In December 1948, the Board issued a decision against the contractor, resolving certain conflicts in the evidence in favor of the Government and holding in substance that there were no unanticipated or unforeseen conditions requiring the use of permanent steel protection throughout the tunnel.

Almost six years later, in December 1954, respondent brought the present action for breach of contract in the Court of Claims, seeking substantial damages and alleging that the decisions of the contracting officer and the Board were "capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or were not supported by substantial evidence." At a hearing before a Commissioner in 1956, the Government took the position that on the question whether the Board's decision was entitled to be considered final, no evidence was admissible except the record before the Board. But the Commissioner received evidence *de novo,* including, over government objection, a substantial amount of evidence that had not

been before the Board. He subsequently made extensive findings of fact and concluded that the respondent was entitled to recover.

In an opinion issued in January 1959, the Court of Claims accepted the Commissioner's findings and conclusions, ruling that "on consideration of all the evidence, the contracting officer's decision [as affirmed by the Board] cannot be said to have substantial support," and thus "does not have finality." 144 Ct. Cl. 500, 506, 169 F. Supp. 514, 517. On the question whether it was limited in its consideration to the evidence before the Board, the court stated:

> "In our opinion in *Volentine and Littleton* v. *United States,* 136 C. Cls. 638, holding that the trial in this court should not be limited to the record made before the contracting agency, but should be *de novo,* we recognized that there were logical weaknesses in our position. We concluded, however, that the intent of Congress in enacting the Wunderlich Act was in accord with our conclusion, and we adhere to that conclusion in this case." *Ibid.*

After receiving additional evidence on damages, the court entered judgment for respondent in the amount of $149,617.36. 157 Ct. Cl. ——. We granted certiorari, 371 U. S. 939, to resolve a conflict among the lower courts [3] on the important question of the kind of judicial proceeding to be afforded in cases governed by the Wunderlich Act.

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[3] With the decision below, compare, *e. g., Allied Paint & Color Works, Inc.,* v. *United States,* 309 F. 2d 133 (C. A. 2d Cir.); *Wells & Wells, Inc.,* v. *United States,* 269 F. 2d 412 (C. A. 8th Cir.). See also *Mann Chemical Laboratories, Inc.,* v. *United States,* 174 F. Supp. 563 (D. C. D. Mass.). In suits involving less than $10,000, the District Courts have concurrent jurisdiction with the Court of Claims over claims arising under government contracts, 28 U. S. C. § 1346 (a)(2), and in suits by the Government under such contracts have exclusive jurisdiction, see 28 U. S. C. § 1345.

I.

The jurisdiction of the Court of Claims in the present case is conferred by 28 U. S. C. § 1491, since this is a suit for judgment against the United States "founded" upon an "express or implied contract with the United States." Ordinarily, when questions of fact arise in such suits, the function of the court is to receive evidence and to make appropriate findings as to the facts in dispute. But this Court long ago upheld the validity of clauses in government contracts delegating to a government employee the authority to make determinations of disputed questions of fact, and required such determinations to be given conclusive effect in any subsequent suit in the absence of fraud or gross mistake implying fraud or bad faith. See *Kihlberg* v. *United States,* 97 U. S. 398; *Ripley* v. *United States,* 223 U. S. 695. Thus the function of the Court of Claims in matters governed by "disputes" clauses was in effect to give an extremely limited review of the administrative decision, and although the scope of review was somewhat expanded by that court over the years,[4] it was expressly restricted in *United States* v. *Wunderlich,* 342 U. S. 98, 100, to determining whether or not the departmental decision had been founded on *fraud, i. e.,* "conscious wrongdoing, an intention to cheat or be dishonest."

The *Wunderlich* decision, rendered over strong dissents, evoked considerable effort to obtain legislation expanding the scope of review beyond questions of fraud. A number of bills were introduced in the Eighty-second and Eighty-third Congresses; hearings were held in the Senate [5] and House of Representatives; [6] and the result-

[4] See, *e. g., Southern Shipyard Corp.* v. *United States,* 76 Ct. Cl. 468; *Needles* v. *United States,* 101 Ct. Cl. 535.

[5] Hearings before a Subcommittee of the Senate Judiciary Committee on S. 2487, 82d Cong., 2d Sess.

[6] Hearings before the House Judiciary Committee on H. R. 1839 *et al.,* 83d Cong., 1st Sess.

ing statute known as the "Wunderlich Act" was ultimately approved by both Houses in 1954. This statute, quoted in full in note 1, *supra,* is entitled an Act "To permit review of decisions of the heads of departments . . . involving questions arising under Government contracts," and provides in substance that a departmental decision on a question of fact rendered pursuant to a "disputes" clause shall be final and conclusive in accordance with the provisions of the contract

> "unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence."

Respondent has not argued in this Court that the underlying controversy in the present suit is beyond the scope of the "disputes" clause in the contract or that it is not governed by the quoted language in the Wunderlich Act. Thus the sole issue, as stated *supra,* p. 710, is whether the Court of Claims is limited to the administrative record with respect to that controversy or is free to take new evidence. In considering this issue, we put to one side questions of fraud, which are not involved in this case, which normally require the receipt of evidence outside the administrative record for their resolution, and which could be considered in judicial proceedings even prior to the enactment of the statute.

It is our conclusion that, apart from questions of fraud, determination of the finality to be attached to a departmental decision on a question arising under a "disputes" clause must rest solely on consideration of the record before the department. This conclusion is based both on the language of the statute and on its legislative history.

1. With respect to the language used, we note that the statute is designated as an Act "To permit review" and that the reviewing function is one ordinarily limited to consideration of the decision of the agency or court below

and of the evidence on which it was based. Indeed, in cases where Congress has simply provided for review, without setting forth the standards to be used or the procedures to be followed, this Court has held that consideration is to be confined to the administrative record and that no *de novo* proceeding may be held. *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420; *National Broadcasting Co.* v. *United States,* 319 U. S. 190, 227. And of course, as shown by the *Tagg Bros.* and *NBC* cases themselves, the function of reviewing an administrative decision can be and frequently is performed by a court of original jurisdiction as well as by an appellate tribunal.

Moreover, the standards of review adopted in the Wunderlich Act—"arbitrary," "capricious," and "not supported by substantial evidence"—have frequently been used by Congress and have consistently been associated with a review limited to the administrative record.[7] The term "substantial evidence" in particular has become a term of art to describe the basis on which an administrative record is to be judged by a reviewing court. This standard goes to the reasonableness of what the agency did *on the basis of the evidence before it,* for a decision may be supported by substantial evidence even though it could be refuted by other evidence that was not presented to the decision-making body.

2. The legislative history supports our conclusion that the language used in the Act should be given its customary meaning. It is true that several witnesses representing contractors explained the purpose of the proposed legislation as restoring rights the contractors had before *Wunderlich,*[8] and that it had apparently been the prac-

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[7] See, *e. g.,* § 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. § 1009; § 10 of the Fair Labor Standards Act, 52 Stat. 1065, as amended, 29 U. S. C. § 210; § 10 of the National Labor Relations Act, 49 Stat. 453, as amended, 29 U. S. C. § 160.

[8] See, *e. g.,* Senate Hearings, *supra,* note 5, at 32–35, 57–58.

tice of the Court of Claims to receive evidence on matters covered by "disputes" clauses.[9] But it seems clear in context that these witnesses meant only that the *standards* of review should cover more than conscious fraud, as the Court of Claims had assumed prior to *Wunderlich*. Indeed with respect to the *procedural* significance of the substantial evidence test, a leading contractor's representative stated that it would

> "result in these various departments and agencies feeling that they will have to produce their witnesses at these hearings and permit the contractor to examine them, in order to have in the record some substantial evidence to support their decisions when they go up on appeal to the court." [10]

The House Report recommending the bill ultimately enacted leaves little doubt that the review intended was one confined to the administrative record. H. R. Rep. No. 1380, 83d Cong., 2d Sess. The explicit references to the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. § 1009, and to this Court's discussion of the standards of review in *Consolidated Edison Co.* v. *Labor Board,* 305 U. S. 197, 229, are only the least indications. Even more significant is the Committee's view, echoing that of the witness quoted above, that the standards proposed would remedy the practice in many departments of failing to acquaint the contractor with the evidence in support of the Government's position:

> "It is believed that if the standard of substantial evidence is adopted this condition will be corrected and

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[9] The Government, citing *Needles* v. *United States,* 101 Ct. Cl. 535, 606–607, suggests that although the Court of Claims did receive "live" evidence on such matters, it may not have "consciously considered evidence not presented and not available to the administrative officers making the final administrative decision."

[10] House Hearings, *supra,* note 6, at 79–80.

> that the records of hearing officers will hereafter contain all of the testimony and evidence upon which they have relied in making their decisions. It would not be possible to justify the retention of the finality clauses in Government contracts unless the hearing procedures were conducted in such a way as to require each party to present openly its side of the controversy and afford an opportunity of rebuttal." H. R. Rep. No. 1380, 83d Cong., 2d Sess. 5.

This sound and clearly expressed purpose would be frustrated if either side were free to withhold evidence at the administrative level and then to introduce it in a judicial proceeding. Moreover, the consequence of such a procedure would in many instances be a needless duplication of evidentiary hearings and a heavy additional burden in the time and expense required to bring litigation to an end. Thus in the present case judicial proceedings began in 1954, almost six years after completion of the departmental proceedings, and a final decision on the issue of liability was not rendered until 1959. This is surely delay at its worst, and we would be loath to condone any procedure under which the need for expeditious resolution would be so ill-served. Here the procedure is clearly inconsistent with the legislative directive.

It is contended that the Court of Claims has no power to remand a case such as this to the department concerned, cf. *United States* v. *Jones,* 336 U. S. 641, 670–671, and thus if the administrative record is defective or inadequate, or reveals the commission of some prejudicial error, the court can only hold an evidentiary hearing and proceed to judgment. There are, we believe, two answers to this contention. *First,* there would undoubtedly be situations in which the court would be warranted, on the basis of the administrative record, in granting judgment for the contractor without the need for further administrative action. *Second,* in situations where the court

believed that the existing record did not warrant such a course, but that the departmental determination could not be sustained under the standards laid down by Congress, we see no reason why the court could not stay its own proceedings pending some further action before the agency involved. Cf. *Pennsylvania R. Co.* v. *United States,* 363 U. S. 202. Such a stay would certainly be justified where the department had failed to make adequate provision for a record that could be subjected to judicial scrutiny, for it was clearly part of the legislative purpose to achieve uniformity in this respect. And in any case in which the department failed to remedy the particular substantive or procedural defect or inadequacy, the sanction of judgment for the contractor would always be available to the court.

II.

In its argument here, the Government has urged that if judicial review is confined to the administrative record, it must be concluded that the Board's determination is supported by substantial evidence and thus is entitled to finality under the Wunderlich Act. The respondent, on the other hand, contends that there were several irregularities in the Board's procedures that preclude giving its determination conclusive effect.

Neither of these matters is properly embraced within our grant of certiorari, and we are therefore not called upon to pass on them. We hold only that in its consideration of matters within the scope of the "disputes" clause in the present case, the Court of Claims is confined to review of the administrative record under the standards in the Wunderlich Act and may not receive new evidence. We therefore vacate the judgment below and remand the case for further proceedings in conformity with this opinion.

It is so ordered.

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

The petition to the Court of Claims alleged that changed subsurface conditions required respondent to install permanent tunnel protection by the use of steel arch ribs and steel liner plates, that that work delayed completion of the project and increased its cost, for which respondent should be reimbursed, and that the decision of the Corps of Engineers in rejecting the claim was "capricious" or "arbitrary."

The Wunderlich Act, 41 U. S. C. § 321, makes "final and conclusive" any decision by a federal agency under customary disputes clauses in government contracts with several exceptions—"unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence."

I think the decision was "capricious or arbitrary" because evidence was considered by the Appeals Board in making its decision which the claimant did not see and which he had no opportunity to refute. I therefore think that a *de novo* hearing was permissible before the Court of Claims.

The Board found that respondent at the start should have used temporary protection against fall-ins and that, had it done so, permanent tunnel protection would not have been required. In February 1948, before the hearing, a letter from the Acting District Engineer to the Chief of Engineers reported a conversation the Corps' resident engineer for this project had had with an expert from New York's Bureau of Mines. The only inference that could be drawn from that report was that the expert believed that the tunnel was in safe condition shortly after it was bored and that its later unsafe condition was caused by the fact that respondent "had not had the fore-

sight to gunite the exposed tunnel roof with cement as the excavation progressed to seal it against air slacking [*sic*] . . . ." Somehow, in a manner not disclosed by the record, this letter came into the hands of the Appeal Board and was considered by it before a decision was rendered on the appeal.*

After the decision respondent learned of this expert's alleged statements and called him as a witness at the hearing before the Court of Claims, where he testified on the basis of his inspection that permanent, not temporary, protection against fall-ins was necessary from the beginning. As respects the guniting of the tunnel, one of the Government's own witnesses testified at the hearing before the Court of Claims that it would have served no useful purpose.

This issue—whether only temporary protection was needed—was one of the main issues in the case. When the agency making the decision relies on evidence that the claimant has no chance to refute, the hearing becomes infected with a procedure that lacks that fundamental fairness the citizen expects from his Government. Cf. *Willner* v. *Committee on Character & Fitness, ante,* p. 96; *Gonzales* v. *United States,* 348 U. S. 407; *Morgan* v. *United States,* 304 U. S. 1.

This irregularity points up what Judge Madden, writing for the Court of Claims, said in *Volentine & Littleton* v. *United States,* 136 Ct. Cl. 638, 641–642, 145 F. Supp. 952, 954:

> ". . . the so-called 'administrative record' is in many cases a mythical entity. There is no statutory provision for these administrative decisions or for

*The letter also contained a statement to the effect that only $9,000 was involved in the appeal. This figure was used in the Board's opinion, but it was nowhere mentioned in the hearing or record before the Board. In fact the figure was grossly inaccurate.

> any procedure in making them. The head of the department may make the decision on appeal personally or may entrust anyone else to make it for him. Whoever makes it has no power to put witnesses under oath or to compel the attendance of witnesses or the production of documents. There may or may not be a transcript of the oral testimony. The deciding officer may, and even in the departments maintaining the most formal procedures, does, search out and consult other documents which, it occurs to him, would be enlightening, and without regard to the presence or absence of the claimant."

We are dealing, in other words, with subnormal administrative procedures. While the regulations governing hearings before the Corps of Engineers are published and provide many protective features (33 CFR § 210.4), they lack some of the safeguards normally accorded claimants in administrative proceedings. Thus they are specifically exempt from § 5 and from § 7 of the Administrative Procedure Act. 5 U. S. C. §§ 1004, 1006. The exemption from § 7 is highlighted in this case. That section provides in part:

> "Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and *to conduct such cross-examination as may be required for a full and true disclosure of the facts.*" (Emphasis supplied.)

That provision, if applicable, would have made reliance by the Board on the *ex parte* hearsay statement of this outside expert reversible error. Lax procedural standards may at times do no harm. But where, as here, opinion evidence on the vital issue in the case was obtained *ex parte* and where that evidence is shown to have been false, the conclusion that the decision was "capricious" or "arbitrary" seems to me unavoidable.

A remand to the agency to determine whether the agency's decision is "capricious" or "arbitrary" seems obviously inappropriate, since it is the court, not the agency, that should determine that question. Since these administrative proceedings are exempt from the protective provisions of § 7 of the Administrative Procedure Act, there is no procedure whereby a contractor can determine whether the agency's decision rested on the testimony of "faceless" or secret witnesses, as in this case. Like the case where a contractor seeks reformation of his contract (cf. *Blake Constr. Co.* v. *United States,* 111 U. S. App. D. C. 271, 296 F. 2d 393), the only place he can get the hearing Congress intended him to have on whether the decision was "capricious" or "arbitrary" is in the courts.

RIDEAU *v.* LOUISIANA.

CERTIORARI TO THE SUPREME COURT OF LOUISIANA.

No. 630. Argued April 29, 1963.—Decided June 3, 1963.

A few hours after a man robbed a bank in Lake Charles, La., kidnapped three of the bank's employees and killed one of them, petitioner was arrested and lodged in the Parish Jail. The next morning a motion picture film with a sound track was made of an "interview" in the Jail between petitioner and the Sheriff of the Parish. This "interview" lasted approximately 20 minutes and consisted of interrogation by the Sheriff and admissions by petitioner that he had perpetrated the bank robbery, kidnapping, and murder. Later the same day and on the succeeding two days, the filmed "interview" was broadcast over the local television station and was seen and heard by many people in the Parish. Subsequently, petitioner was arraigned on charges of armed robbery, kidnapping, and murder, and two lawyers were appointed to represent him. They promptly filed a motion for change of venue; but this was denied and petitioner was convicted in the trial court of the Parish and sentenced to death on the murder charge. *Held:* It was a denial of due process of law to refuse the request for a change of venue after the people of the Parish had been exposed repeatedly and in depth to the spectacle of the petitioner personally confessing in detail to the crimes with which he was later to be charged. Pp. 723–727.

242 La. 431, 137 So. 2d 283, reversed.

Fred H. Sievert, Jr. argued the cause and filed a brief for petitioner.

Frank Salter argued the cause for respondent. With him on the brief were *Jack P. F. Gremillion,* Attorney General of Louisiana, and *Robert S. Link, Jr., John E. Jackson, Jr.* and *M. E. Culligan,* Assistant Attorneys General.

Mr. Justice Stewart delivered the opinion of the Court.

On the evening of February 16, 1961, a man robbed a bank in Lake Charles, Louisiana, kidnapped three of the

bank's employees, and killed one of them. A few hours later the petitioner, Wilbert Rideau, was apprehended by the police and lodged in the Calcasieu Parish jail in Lake Charles. The next morning a moving picture film with a sound track was made of an "interview" in the jail between Rideau and the Sheriff of Calcasieu Parish. This "interview" lasted approximately 20 minutes. It consisted of interrogation by the sheriff and admissions by Rideau that he had perpetrated the bank robbery, kidnapping, and murder. Later the same day the filmed "interview" was broadcast over a television station in Lake Charles, and some 24,000 people in the community saw and heard it on television. The sound film was again shown on television the next day to an estimated audience of 53,000 people. The following day the film was again broadcast by the same television station, and this time approximately 29,000 people saw and heard the "interview" on their television sets. Calcasieu Parish has a population of approximately 150,000 people.

Some two weeks later, Rideau was arraigned on charges of armed robbery, kidnapping, and murder, and two lawyers were appointed to represent him. His lawyers promptly filed a motion for a change of venue, on the ground that it would deprive Rideau of rights guaranteed to him by the United States Constitution to force him to trial in Calcasieu Parish after the three television broadcasts there of his "interview" with the sheriff.[1] After a hearing, the motion for change of venue was denied, and

[1] The motion stated: "That to require the Defendant to be tried on the charges which have been preferred against him in the Parish of Calcasieu, would be a travesty of justice and would be a violation to the Defendant's rights for a fair and impartial trial, which is guaranteed to every person accused of having committed a crime by the Constitution of the State of Louisiana and by the Constitution of the United States."

Rideau was accordingly convicted and sentenced to death on the murder charge in the Calcasieu Parish trial court.

Three members of the jury which convicted him had stated on *voir dire* that they had seen and heard Rideau's televised "interview" with the sheriff on at least one occasion. Two members of the jury were deputy sheriffs of Calcasieu Parish. Rideau's counsel had requested that these jurors be excused for cause, having exhausted all of their peremptory challenges, but these challenges for cause had been denied by the trial judge. The judgment of conviction was affirmed by the Supreme Court of Louisiana, 242 La. 431, 137 So. 2d 283, and the case is here on a writ of certiorari, 371 U. S. 919.

The record in this case contains as an exhibit the sound film which was broadcast. What the people of Calcasieu Parish saw on their television sets was Rideau, in jail, flanked by the sheriff and two state troopers, admitting in detail the commission of the robbery, kidnapping, and murder, in response to leading questions by the sheriff.[2] The record fails to show whose idea it was to make the sound film, and broadcast it over the local television station, but we know from the conceded circumstances that the plan was carried out with the active cooperation and participation of the local law enforcement officers. And certainly no one has suggested that it was Rideau's idea, or even that he was aware of what was going on when the sound film was being made.

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[2] The Supreme Court of Louisiana summarized the event as follows: "[O]n the morning of February 17, 1961, the defendant was interviewed by the sheriff, and the entire interview was filmed (with a sound track) and shown to the audience of television station KPLC–TV on three occasions. The showings occurred prior to the arraignment of defendant on the murder charge. In this interview the accused admitted his part in the crime for which he was later indicted." 242 La., at 447, 137 So. 2d, at 289.

In the view we take of this case, the question of who originally initiated the idea of the televised interview is, in any event, a basically irrelevant detail. For we hold that it was a denial of due process of law to refuse the request for a change of venue, after the people of Calcasieu Parish had been exposed repeatedly and in depth to the spectacle of Rideau personally confessing in detail to the crimes with which he was later to be charged. For anyone who has ever watched television the conclusion cannot be avoided that this spectacle, to the tens of thousands of people who saw and heard it, in a very real sense *was* Rideau's trial—at which he pleaded guilty to murder. Any subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality.

In *Brown* v. *Mississippi,* 297 U. S. 278, this Court set aside murder convictions secured in a state trial with all the formalities of fair procedures, based upon "free and voluntary confessions" which in fact had been preceded by grossly brutal kangaroo court proceedings while the defendants were held in jail without counsel. As Chief Justice Hughes wrote in that case, "The State is free to regulate the procedure of its courts in accordance with its own conceptions of policy . . . . [But] it does not follow that it may substitute trial by ordeal." 297 U. S., at 285. Cf. *White* v. *Texas,* 310 U. S. 530. That was almost a generation ago, in an era before the onrush of an electronic age.

The case now before us does not involve physical brutality. The kangaroo court proceedings in this case involved a more subtle but no less real deprivation of due process of law. Under our Constitution's guarantee of due process, a person accused of committing a crime is vouchsafed basic minimal rights. Among these are the right to counsel,[3] the right to plead not guilty, and the

[3] *Gideon* v. *Wainwright,* 372 U. S. 335.

right to be tried in a courtroom presided over by a judge. Yet in this case the people of Calcasieu Parish saw and heard, not once but three times, a "trial" of Rideau in a jail, presided over by a sheriff, where there was no lawyer to advise Rideau of his right to stand mute.

The record shows that such a thing as this never took place before in Calcasieu Parish, Louisiana.[4] Whether it has occurred elsewhere, we do not know. But we do not hesitate to hold, without pausing to examine a particularized transcript of the *voir dire* examination of the members of the jury, that due process of law in this case required a trial before a jury drawn from a community of people who had not seen and heard Rideau's televised "interview." "Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death." *Chambers* v. *Florida,* 309 U. S. 227, 241.

Reversed.

MR. JUSTICE CLARK, with whom MR. JUSTICE HARLAN joins, dissenting.

On the evening of February 16, 1961, the petitioner, Wilbert Rideau, was arrested and confined in the Calcasieu Parish jail in Lake Charles, Louisiana. The arrest

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[4] "Q. Mr. Mazilly, you have been in police work roughly 21 years?

"A. Yes, sir.

"Q. Were you in court yesterday at the time a sound on film picture was shown to the court which had been shown on KPLC–TV encompassing an interview between Sheriff Reid and Rideau?

"A. I was.

"Q. In all of your 21 years, do you know of any similar case in this parish or Southwest Louisiana where a man charged with a capital crime was allowed—that pictures were made of him and the general public was shown the pictures and a sound track in which he confessed to a capital crime?

. . . . .

"A. No, sir."

arose out of a bank robbery and a subsequent kidnapping and homicide. On the night of his arrest petitioner made detailed oral and written confessions to the crimes, and on the following morning a sound film was made of an interview between the sheriff and petitioner in which he again admitted commission of the crimes. The film was broadcast on a local television station on February 17, 18, and 19, 1961.

On March 3, 1961, petitioner was arraigned on charges of armed robbery, kidnapping and murder. As required under the law of Louisiana, he pleaded not guilty to the two capital crimes, but he entered a plea of guilty to the charge of armed robbery. Counsel were appointed immediately, and they requested permission to withdraw the plea of guilty to armed robbery, which motion was granted. They then filed a motion to quash, and the State was required to elect under which count it wished to proceed. The State elected the murder count, and the trial was set for April 10, 1961.

The defense moved for a change of venue, which was denied after hearing. Thereupon a jury was empaneled and petitioner was tried and convicted of murder. The Louisiana Supreme Court affirmed and this Court now reverses that judgment, holding that the denial of petitioner's motion for change of venue was a deprivation of due process of law. Having searched the Court's opinion and the record, I am unable to find any deprivation of due process under the Fourteenth Amendment and I therefore dissent.

At the outset, two matters should be clearly established. First, I do not believe it within the province of law enforcement officers actively to cooperate in activities which tend to make more difficult the achievement of impartial justice. Therefore, if this case arose in a federal court, over which we exercise supervisory powers, I would vote to reverse the judgment before us. Cf. *Marshall* v.

United States, 360 U. S. 310 (1959). It goes without saying, however, that there is a very significant difference between matters within the scope of our supervisory power and matters which reach the level of constitutional dimension. See, *e. g., Stein* v. *New York,* 346 U. S. 156, 187 (1953); *Brown* v. *Allen,* 344 U. S. 443, 476 (1953).

Second, I agree fully with the Court that one is deprived of due process of law when he is tried in an environment so permeated with hostility that judicial proceedings can be "but a hollow formality." This proposition, and my position with regard thereto, are established in *Irvin* v. *Dowd,* 366 U. S. 717 (1961). At this point I must part company with the Court, however, not so much because it deviates from the principles established in *Irvin* but because it applies no principles at all. It simply stops at this point, without establishing any substantial nexus between the televised "interview" and petitioner's trial, which occurred almost two months later. Unless the adverse publicity is shown by the record to have fatally infected the trial, there is simply no basis for the Court's inference that the publicity, epitomized by the televised interview, called up some informal and illicit analogy to *res judicata,* making petitioner's trial a meaningless formality. See *Beck* v. *Washington,* 369 U. S. 541 (1962).

That the Court apparently does not realize the necessity of establishing this nexus is illustrated by its reliance on *Brown* v. *Mississippi,* 297 U. S. 278 (1936). That case and its progeny * stand for the proposition that one may not constitutionally be convicted of a crime upon evidence including a confession involuntarily made. There can be no more clear nexus between the action of state officials before trial and the trial itself than when the results of that action are admitted in evidence at the

*See Ritz, Twenty-five Years of State Criminal Confession Cases in the U. S. Supreme Court, 19 Wash. & Lee L. Rev. 35 (1962).

trial. Here, of course, neither the filmed interview nor any transcript of it was shown or read to the jury. While the oral and written confessions made on the night of the arrest were admitted in evidence, the only argument for their exclusion made by the petitioner is that they were obtained at an interrogation when he had not been advised of his right to counsel and did not have counsel present. That argument is clearly answered by our decisions in *Cicenia* v. *Lagay,* 357 U. S. 504 (1958), and *Crooker* v. *California,* 357 U. S. 433 (1958).

The fact that the adverse publicity was not evidence in the case is not controlling, however, for we have recognized that such matter may, in unusual circumstances, fatally infect a trial when it enters the courtroom indelibly imbedded in the minds of the jurors. We found such a situation in *Irvin* v. *Dowd, supra,* where the continuous wave of publicity concerning the offense and the past record of the petitioner so permeated the area where he was tried that

> "[a]n examination of the 2,783-page *voir dire* record shows that 370 prospective jurors or almost 90% of those examined on the point . . . entertained some opinion as to guilt—ranging in intensity from mere suspicion to absolute certainty. A number admitted that, if they were in the accused's place in the dock and he in theirs on the jury with their opinions, they would not want him on a jury." 366 U. S., at 727.

More important, of the 12 jurors finally placed in the jury box eight thought petitioner Irvin to be guilty. In view of those circumstances we unanimously reversed the judgment in that case, with the caveat that

> "It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected

> to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. 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." *Id.*, at 722–723.

Thus, in *Irvin,* because of the complete permeation, imbedding opinions of guilt in the minds of 90% of the veniremen and two-thirds of the actual jury, we held that petitioner had been deprived of his constitutional right to an impartial tribunal. Compare *Beck* v. *Washington, supra.* We now face the question whether this is such a situation and, for that determination, we must examine the publicity involved, the hearing on the motion for change of venue and the record of the *voir dire* examination.

Initially, we face an obstacle in determining the pervasiveness of the televised interview, since the circulation of a television program is less susceptible of determination than that of a newspaper. The figures quoted by the Court as representing the number of people who "saw and heard" the interview were given by the Program Director of the television station and represented the typical number of viewers at the times when the interview was broadcast, as determined by a rating service which had conducted a sampling some months previous to the broadcasts. The Director testified that those figures represented "an approximate number and, as I say, there is no way you can prove this because communications is an intangible business . . . ." Of course, assuming *arguendo* the accuracy of the figures given, there is no way of deter-

mining whether those figures are mutually inclusive or whether they represent different viewers on the different occasions. The record does give a more tangible indication of the effect of the publicity, however, in the hearing on the motion for change of venue. At that hearing five witnesses testified that, in their opinions, petitioner could not get a fair trial in the parish. Twenty-four witnesses testified that, in their opinions, petitioner could get a fair trial and a stipulation was entered that five more witnesses would testify that he could get a fair trial in the parish.

The most crucial evidence relates to the composition of the 12-man jury. Of the 12 members of the panel only three had seen the televised interview which had been shown almost two months before the trial. The petitioner does not assert, and the record does not show, that these three testified to holding opinions of petitioner's guilt. They did testify, however, that they

> "could lay aside any opinion, give the defendant the presumption of innocence as provided by law, base their decision solely upon the evidence, and apply the law as given by the court. As the judge stated in his per curiam: 'They testified they could do so notwithstanding anything they may have heard, seen or read of the case.'" 242 La. 431, 462, 137 So. 2d 283, 295.

Further, two members of the jury held honorary Deputy Sheriff's commissions from the Sheriff's department. Neither of these men was in any way connected with the department as a deputy, neither had ever made any arrests and neither had ever received any pay from the department. They both testified that they used the honorary commissions only for their convenience. They testified that these honorary commissions would not affect their ability to serve as jurors in any way, and the trial

judge concluded that this tenuous relationship with the State did not destroy their qualifications to serve. Cf. *Frazier* v. *United States,* 335 U. S. 497 (1948); *United States* v. *Wood,* 299 U. S. 123 (1936).

The right to a trial before a fair and impartial tribunal "is a basic requirement of due process," *In re Murchison,* 349 U. S. 133, 136 (1955), and must be safeguarded with vigilance. As we recognized in *Irvin,* however, it is an impossible standard to require that tribunal to be a laboratory, completely sterilized and freed from any external factors. The determination of impartiality, in which demeanor plays such an important part, is particularly within the province of the trial judge. And when the jurors testify that they can discount the influence of external factors and meet the standard imposed by the Fourteenth Amendment, that assurance is not lightly to be discarded. When the circumstances are unusually compelling, as in *Irvin,* the assurances may be discarded, but "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 . . . ." *Adams* v. *United States ex rel. McCann,* 317 U. S. 269, 281 (1942). Since the petitioner clearly has not met that burden, I would affirm the judgment before us.

692-438 O-63-50

NATIONAL LABOR RELATIONS BOARD *v.* GENERAL MOTORS CORP.

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

No. 404. Argued April 18, 1963.—Decided June 3, 1963.

An "agency shop" arrangement, which leaves union membership optional with the employees but requires that, as a condition of continued employment, nonunion employees pay to the union sums equal to the initiation fees and periodic dues paid by union members, does not in itself constitute an unfair labor practice under § 8 (a) (3) of the National Labor Relations Act and is not prohibited by § 7 or § 8. In a State which does not prohibit such an arrangement, therefore, an employer commits an unfair labor practice, within the meaning of § 8 (a) (5), when it unconditionally refuses to bargain with a certified union of its employees over the union's proposal for the adoption of such an arrangement. Pp. 734–745.

303 F. 2d 428, reversed.

Solicitor General Cox argued the cause for petitioner. With him on the brief were *Stuart Rothman, Dominick L. Manoli* and *Norton J. Come.*

Harry S. Benjamin, Jr. argued the cause for respondent. With him on the brief was *Aloysius F. Power.*

J. Albert Woll, Robert C. Mayer, Theodore J. St. Antoine, Thomas E. Harris, Joseph L. Rauh, Jr., John Silard and *Harold A. Cranefield* filed a brief for the American Federation of Labor and Congress of Industrial Organizations et al., as *amici curiae,* urging reversal.

Owen J. Neighbours filed a brief for Raymond E. Lewis et al., as *amici curiae,* urging affirmance.

MR. JUSTICE WHITE delivered the opinion of the Court.

The issue here is whether an employer commits an unfair labor practice, National Labor Relations Act

§ 8 (a)(5),[1] when it refuses to bargain with a certified union over the union's proposal for the adoption of the "agency shop." More narrowly, since the employer is not obliged to bargain over a proposal that he commit an unfair labor practice, the question is whether the agency shop is an unfair labor practice under § 8 (a)(3) of the Act or else is exempted from the prohibitions of that section by the proviso thereto.[2] We have concluded that this type of arrangement does not constitute an unfair labor practice and that it is not prohibited by § 8.

Respondent's employees are represented by the United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, in a single, multiplant, company-wide unit. The 1958 agreement between union and company provides for maintenance of membership and the union shop.[3] These provisions were not operative,

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[1] "SEC. 8. (a) It shall be an unfair labor practice for an employer—

. . . . . .

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a)."

[2] "SEC. 8. (a) It shall be an unfair labor practice for an employer—

. . . . . .

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later . . . ."

[3] "Union Security and Check-Off of Union Membership Dues

"(4) An employe who is a member of the Union at the time this Agreement becomes effective shall continue membership in the Union for the duration of this Agreement to the extent of paying an initiation fee and the membership dues uniformly required as a condition of acquiring or retaining membership in the Union.

"(4a) An employe who is not a member of the Union at the time this Agreement becomes effective shall become a member of the Union within 60 days after the thirtieth (30th) day following the

however, in such States as Indiana where state law prohibited making union membership a condition of employment.

In June 1959, the Indiana intermediate appellate court held that an agency shop arrangement would not violate the state right-to-work law. *Meade Elec. Co.* v. *Hagberg,* 129 Ind. App. 631, 159 N. E. 2d 408. As defined in that opinion, the term "agency shop" applies to an arrangement under which all employees are required as a condition of employment to pay dues to the union and pay the union's initiation fee, but they need not actually become union members. The union thereafter sent respondent a letter proposing the negotiation of a contractual provision covering Indiana plants "generally similar to that set forth" in the *Meade* case. Continued employment in the Indiana plants would be conditioned upon the payment of sums equal to the initiation fee and regular monthly dues paid by the union members. The intent of the proposal, the National Labor Relations

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effective date of this Agreement or within 60 days after the thirtieth (30th) day following employment, whichever is later, and shall remain a member of Union, to the extent of paying an initiation fee and the membership dues uniformly required as a condition of acquiring or retaining membership in the Union, whenever employed under, and for the duration of, this Agreement.

"(4b) Anything herein to the contrary notwithstanding, an employe shall not be required to become a member of, or continue membership in, the Union, as a condition of employment, if employed in any state which prohibits, or otherwise makes unlawful, membership in a labor organization as a condition of employment.

"(4c) The Union shall accept into membership each employe covered by this Agreement who tenders to the Union the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership in the Union.

. . . . . .

"(4f) 'Member of the Union' as used in paragraphs (4) and (4a) above means any employe who is a member of the Union and is not more than sixty (60) days in arrears in the payment of membership dues."

Board concluded, was not to require membership but to make membership available at the employees' option and on nondiscriminatory terms. Employees choosing not to join would make the required payments and, in accordance with union custom, would share in union expenditures for strike benefits, educational and retired member benefits, and union publications and promotional activities, but they would not be entitled to attend union meetings, vote upon ratification of agreements negotiated by the union, or have a voice in the internal affairs of the union.[4] The respondent made no counterproposal, but replied to the union's letter that the proposed agreement would violate the National Labor Relations Act and that respondent must therefore "respectfully decline to comply with your request for a meeting" to bargain over the proposal.

The union thereupon filed a complaint with the National Labor Relations Board against respondent for its alleged refusal to bargain in good faith. In the Board's view of the record, "the Union was not seeking to bargain over a clause requiring nonmember employees to pay sums equal to dues and fees as a condition of employment while at the same time maintaining a closed-union policy with respect to applicants for membership," since the proposal contemplated an arrangement in which "all employees are *given the option* of becoming, or refraining from becoming, members of the Union." Proceeding on this basis and putting aside the consequences of a closed-union policy upon the legality of the agency shop, the Board assessed the union's proposal as comporting fully with the congressional declaration of policy in favor of union-security contracts and therefore a mandatory subject as to which the Act obliged respondent to

[4] The union's vice-president so explained the union proposal, and the Board seems to have accepted this view. 133 N. L. R. B. 451, at 456, n. 12.

bargain in good faith. At the same time, it stated that it had "no doubt that an agency-shop agreement is a permissible form of union-security within the meaning of Sections 7 and 8 (a)(3) of the Act." Accordingly, the Board ruled that respondent had committed an unfair labor practice by refusing to bargain in good faith with the certified bargaining representative of its employees,[5] and it ordered respondent to bargain with the union over the proposed arrangement; no back-pay award is involved in this case. 133 N. L. R. B. 451, 456, 457.

Respondent petitioned for review in the Court of Appeals, and the Board cross-petitioned for enforcement. The Court of Appeals set the order aside on the grounds that the Act tolerates only "an agreement requiring membership in a labor organization as a condition of employment" when such agreements do not violate state right-to-work laws, and that the Act does not authorize agreements requiring payment of membership dues to a union, in lieu of membership, as a condition of employment. It held that the proposed agency shop agreement would violate §§ 7, 8 (a)(1), and 8 (a)(3) of the Act and that the employer was therefore not obliged to bargain over it. 303 F. 2d 428 (C. A. 6th Cir.). We granted certiorari, 371 U. S. 908, and now reverse the decision of the Court of Appeals.

Section 8 (3) under the Wagner Act was the predecessor to § 8 (a)(3) of the present law. Like § 8 (a)(3), § 8 (3) forbade employers to discriminate against employees to compel them to join a union. Because it was feared that § 8 (3) and § 7, if nothing were added to qualify them, might be held to outlaw union-security arrangements such as the closed shop, see 79 Cong. Rec.

[5] The Board also held that respondent's refusal to bargain interfered with, restrained, and coerced its employees in the exercise of their National Labor Relations Act § 7 rights, contrary to National Labor Relations Act § 8 (a)(1).

7570 (statement of Senator Wagner), 7674 (statement of Senator Walsh); H. R. Rep. No. 972, 74th Cong., 1st Sess. 17; H. R. Rep. No. 1147, 74th Cong., 1st Sess. 19, the proviso to § 8 (3) was added expressly declaring:

> "*Provided,* That nothing in this Act . . . or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a) . . . ."

The prevailing administrative and judicial view under the Wagner Act was or came to be that the proviso to § 8 (3) covered both the closed and union shop, as well as less onerous union-security arrangements, if they were otherwise legal. The National Labor Relations Board construed the proviso as shielding from an unfair labor practice charge less severe forms of union-security arrangements than the closed or the union shop,[6] including an arrangement in *Public Service Co. of Colorado,* 89 N. L. R. B. 418,[7] requiring nonunion members to pay to

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[6] See, *e. g., M. & J. Tracy, Inc.,* 12 N. L. R. B. 916, 931–934; *J. E. Pearce Contracting & Stevedoring Co., Inc.,* 20 N. L. R. B. 1061, 1070–1073. And see the memorandum printed by the Senate committee, commenting upon the final bill, which indicated that the exemption of the proviso was not limited to the closed or union shop:

"Unless this change is made as provided in S, 1958, most strikes for a closed shop or even for a preferential shop would by this act be declared to be for an illegal purpose . . . .

"As the legislative history of [N. I. R. A. §] 7 (a) demonstrates, nothing in that section was intended to deprive labor of its existing rights in many States to contract or strike for a closed or preferential shop . . . . No reason appears for a contrary view here." 1 Leg. Hist. N. L. R. A. 1354–1355.

[7] This case was decided in 1950, but it was governed by the Wagner Act because the agreement was covered by the saving clause in the Labor Management Relations Act, § 102, 89 N. L. R. B., at 419–420.

the union $2 a month "for the support of the bargaining unit." And in *Algoma Plywood Co.* v. *Wisconsin Board,* 336 U. S. 301, 307, which involved a maintenance of membership agreement, the Court, in commenting on petitioner's contention that the proviso of § 8 (3) affirmatively protected arrangements within its scope, cf. *Garner* v. *Teamsters Union,* 346 U. S. 485, said of its purpose: "The short answer is that § 8 (3) merely disclaims a national policy hostile to the closed shop *or other forms of union-security agreement.*" (Emphasis added.)

When Congress enacted the Taft-Hartley Act, it added the following to the language of the original proviso to § 8 (3):

> "on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later . . . *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership." 29 U. S. C. § 158 (a)(3).

These additions were intended to accomplish twin purposes. On the one hand, the most serious abuses of compulsory unionism were eliminated by abolishing the closed shop. On the other hand, Congress recognized that in the absence of a union-security provision "many employees sharing the benefits of what unions are able to accomplish by collective bargaining will refuse to pay their share

of the cost." S. Rep. No. 105, 80th Cong., 1st Sess., p. 6, 1 Leg. Hist. L. M. R. A. 412. Consequently, under the new law "employers would still be permitted to enter into agreements requiring all the employees in a given bargaining unit to become members 30 days after being hired," but "expulsion from a union cannot be a ground of compulsory discharge if the worker is not delinquent in paying his initiation fee or dues." S. Rep. No. 105, p. 7, 1 Leg. Hist. L. M. R. A. 413. The amendments were intended only to "remedy the most serious abuses of compulsory union membership and yet give employers and unions who feel that such agreements promoted stability by eliminating 'free riders' the right to continue such arrangements." *Ibid.* As far as the federal law was concerned, all employees could be required to pay their way. The bill "abolishes the closed shop but permits voluntary agreements for requiring such forms of compulsory membership as the union shop or maintenance of membership . . . ." S. Rep. No. 105, p. 3, 1 Leg. Hist. L. M. R. A. 409.

We find nothing in the legislative history of the Act indicating that Congress intended the amended proviso to § 8 (a)(3) to validate only the union shop and simultaneously to abolish, in addition to the closed shop, all other union-security arrangements permissible under state law. There is much to be said for the Board's view that, if Congress desired in the Wagner Act to permit a closed or union shop and in the Taft-Hartley Act the union shop, then it also intended to preserve the status of less vigorous, less compulsory contracts which demanded less adherence to the union.

Respondent, however, relies upon the express words of the proviso which allow employment to be conditioned upon "membership": since the union's proposal here does not require actual membership but demands only initiation fees and monthly dues, it is not saved by the proviso.

This position, of course, would reject administrative decisions concerning the scope of § 8 (3) of the Wagner Act, *e. g., Public Service Co. of Colorado, supra,* reaffirmed by the Board under the Taft-Hartley amendments, *American Seating Co.,* 98 N. L. R. B. 800.[8] Moreover, the 1947 amendments not only abolished the closed shop but also made significant alterations in the meaning of "membership" for the purposes of union-security contracts. Under the second proviso to § 8 (a)(3), the burdens of membership upon which employment may be conditioned are expressly limited to the payment of initiation fees and monthly dues. It is permissible to condition employment upon membership, but membership, insofar as it has significance to employment rights, may in turn be conditioned only upon payment of fees and dues. "Membership" as a condition of employment is whittled down to its financial core. This Court has said as much before in *Radio Officers' Union* v. *Labor Board,* 347 U. S. 17, 41:

> "This legislative history clearly indicates that Congress intended to prevent utilization of union security agreements for any purpose other than to compel payment of union dues and fees. Thus Congress recognized the validity of unions' concern about 'free

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[8] In that case, the Board stated:

"As to the requirement in paragraph 4 that religious objectors who do not become members pay to the Intervenor sums equivalent to dues, the Board has ruled that closed-shop agreements providing for 'support money' payments did not violate the proviso to Section 8 (3) of the Wagner Act. As the precise language of the 8 (3) proviso in the Wagner Act was continued in the amended Act with certain added qualifications not pertinent here, and because the legislative history of the amended Act indicates that Congress intended not to illegalize the practice of obtaining support payments from nonunion members who would otherwise be 'free riders,' we find that the provision for support payments in the instant contract does not exceed the union-security agreements authorized by the Act." 98 N. L. R. B., at 802.

> riders,' *i. e.*, employees who receive the benefits of union representation but are unwilling to contribute their fair share of financial support to such union, and gave unions the power to contract to meet that problem while withholding from unions the power to cause the discharge of employees for any other reason. . . ."

We are therefore confident that the proposal made by the union here conditioned employment upon the practical equivalent of union "membership," as Congress used that term in the proviso to § 8 (a)(3).[9] The proposal for requiring the payment of dues and fees imposes no burdens not imposed by a permissible union shop contract and compels the performance of only those duties of membership which are enforceable by discharge under a union shop arrangement. If an employee in a union shop unit refuses to respect any union-imposed obligations other than the duty to pay dues and fees, and membership in the union is therefore denied or terminated, the condition of "membership" for § 8 (a)(3) purposes is nevertheless satisfied and the employee may not be discharged for nonmembership even though he is not a formal member.[10] Of course, if the union chooses to extend member-

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[9] Referring to the Canadian practice, Senator Taft stated that the rule adopted by the Conference Committee "is substantially the rule now in effect in Canada" which is that "the employee must, nevertheless, pay dues, even though he does not join the union" and that if he pays the dues without joining he has the right to be employed. 93 Cong. Rec. 4887, 2 Leg. Hist. L. R. M. A. 1422.

[10] *Union Starch & Ref. Co.* v. *Labor Board,* 186 F. 2d 1008 (C. A. 7th Cir.). See also *Labor Board* v. *Food Fair Stores,* 307 F. 2d 3 (C. A. 3d Cir.); *Labor Board* v. *Local 815, International Brotherhood of Teamsters,* 290 F. 2d 99 (C. A. 2d Cir.); *Labor Board* v. *Local 450, International Union of Operating Engineers,* 281 F. 2d 313, 316–317 (C. A. 5th Cir.); *Labor Board* v. *National Automotive Fibres, Inc.,* 277 F. 2d 779 (C. A. 9th Cir.); *Labor Board* v. *Die &*

ship even though the employee will meet only the minimum financial burden, and refuses to support or "join" the union in any other affirmative way, the employee may have to become a "member" under a union shop contract, in the sense that the union may be able to place him on its rolls.[11] The agency shop arrangement proposed here removes that choice from the union and places the option of membership in the employee while still requiring the same monetary support as does the union shop. Such a difference between the union and agency shop may be of great importance in some contexts, but for present purposes it is more formal than real. To the extent that it has any significance at all it serves, rather than violates, the desire of Congress to reduce the evils of compulsory unionism while allowing financial support for the bargaining agent.[12]

In short, the employer categorically refused to bargain with the union over a proposal for an agreement within the proviso to § 8 (a)(3) and as such lawful for the pur-

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Tool Makers Lodge, 231 F. 2d 298 (C. A. 7th Cir.); *Labor Board* v. *Mechanics Educational Society of America,* 222 F. 2d 429 (C. A. 6th Cir.); *Labor Board* v. *Pape Broadcasting Co.,* 217 F. 2d 197 (C. A. 5th Cir.); *Labor Board* v. *Philadelphia Iron Works,* 211 F. 2d 937 (C. A. 3d Cir.); *Labor Board* v. *Eclipse Lumber Co.,* 199 F. 2d 684 (C. A. 9th Cir.); *Utley Company,* 108 N. L. R. B. 295, enforced, 217 F. 2d 885 (C. A. 6th Cir.); *Washington Waterfront Employers,* 98 N. L. R. B. 284, enforced, 211 F. 2d 946 (C. A. 9th Cir.); *Electric Auto-Lite Co.,* 92 N. L. R. B. 1073, enforced, 196 F. 2d 500 (C. A. 6th Cir.).

[11] Cf. *American Seating Co.,* 98 N. L. R. B. 800, 802, quoted *supra,* note 8, approving a provision protecting those who object on conscientious grounds from being required to become "members" in the conventional sense of that term.

[12] Also wide of the mark is respondent's further suggestion that Congress contemplated the obligation to pay fees and dues to be imposed only in connection with actual membership in the union, so as to insure the enjoyment of all union benefits and rights by those

poses of this case. By the same token, § 7, and derivatively § 8 (a)(1), cannot be deemed to forbid the employer to enter such agreements, since it too is expressly limited by the § 8 (a)(3) proviso. We hold that the employer was not excused from his duty to bargain over the proposal on the theory that his acceding to it would necessarily involve him in an unfair labor practice. Whether a different result obtains in States which have declared such arrangements unlawful is an issue still to be resolved in *Retail Clerks Assn.* v. *Schermerhorn, post,* p. 746, and one which is of no relevance here because Indiana law does not forbid the present contract proposal. In the context of this case, then, the employer cannot justify his refusal to bargain. He violated § 8 (a)(5), and the Board properly ordered him to return to the bargaining table.

Reversed and remanded.

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

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from whom money is extracted. Congress, it is said, had no desire to open the door to compulsory contracts which extract money but exclude the contributing employees from union membership. But, as analyzed by the Board and as the case comes to us, there is no closed-union aspect to the present proposal by the union. Membership remains optional with the employee and the significance of desired, but unavailable, union membership, or the benefits of membership, in terms of permissible § 8 (a)(3) security contracts, we leave for another case. In view of the legislative history of the Taft-Hartley amendments to § 8 (a)(3) and of their purposes, we cannot say that optional membership, which is neither compulsory nor unavailable membership, vitiates an otherwise valid union-security arrangement.

RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL 1625, AFL–CIO, ET AL. *v.* SCHERMERHORN ET AL.

CERTIORARI TO THE SUPREME COURT OF FLORIDA.

No. 368. Argued April 18, 1963.—Decided June 3, 1963.

Petitioner union and an employer in Florida entered into a collective bargaining agreement containing an "agency shop" clause, which left union membership optional with the employees but required that, as a condition of continued employment, nonunion employees pay to the union sums equal to the initiation fees and periodic dues paid by union members. Nonunion employees of the employer sued in a Florida State Court for a declaratory judgment that this provision was "null and void" and unenforceable under the Florida right-to-work law and for an injunction against petitioner union and the employer to prevent them from requiring nonunion employees to contribute money to the union. The Florida Supreme Court held that Florida law forbids such an "agency shop" arrangement and that Florida courts could deal with the "agency shop" clause involved here. *Held:*

1. The "agency shop" clause here involved is within the scope of § 14 (b) of the National Labor Relations Act, as amended, and therefore is congressionally made subject to prohibition by Florida law, and its legality is governed by the decision of the Florida Supreme Court under review here. Pp. 747, 750–754, 757.

2. The issue as to whether Florida courts have jurisdiction to enforce the State's prohibition against such an arrangement or whether the National Labor Relations Board has exclusive jurisdiction to afford such a remedy is left undecided, and the case is retained on the calendar for reargument on that issue. Pp. 747, 754–757.

Reported below: 141 So. 2d 269.

S. G. Lippman argued the cause for petitioners. With him on the briefs were *Tim L. Bornstein, Russell Specter* and *Claude Pepper.*

Bernard B. Weksler argued the cause for respondents. With him on the brief was *John L. Kilcullen.*

J. Albert Woll, Robert C. Mayer, Theodore J. St. Antoine, Thomas E. Harris, Joseph L. Rauh, Jr., John Silard and *Harold A. Cranefield* filed a brief for the American Federation of Labor and Congress of Industrial Organizations et al., as *amici curiae,* urging reversal.

Briefs of *amici curiae,* urging affirmance, were filed by *Richard W. Ervin,* Attorney General of Florida, *Richmond M. Flowers,* Attorney General of Alabama, *Robert Pickrell,* Attorney General of Arizona, *Evan L. Hultman,* Attorney General of Iowa, *William M. Ferguson,* Attorney General of Kansas, *Joe T. Patterson,* Attorney General of Mississippi, *Clarence A. H. Meyer,* Attorney General of Nebraska, *T. Wade Bruton,* Attorney General of North Carolina, *Daniel R. McLeod,* Attorney General of South Carolina, *Frank Farrar,* Attorney General of South Dakota, *George F. McCanless,* Attorney General of Tennessee, *Waggoner Carr,* Attorney General of Texas, and *A. Pratt Kesler,* Attorney General of Utah, for their respective States; by *Robert Y. Button,* Attorney General of Virginia, *D. Gardiner Tyler,* Assistant Attorney General, and *Frederick T. Gray,* Special Assistant Attorney General, for the Commonwealth of Virginia; and by *William B. Barton* and *Harry J. Lambeth* for the Chamber of Commerce of the United States.

Mr. Justice White delivered the opinion of the Court.

Like *Labor Board* v. *General Motors Corp., ante,* p. 734, decided today, this case involves the status of an "agency shop" arrrangement. We have concluded that the contract involved here is within the scope of § 14 (b) of the National Labor Relations Act and therefore is congressionally made subject to prohibition by Florida law. We have not determined, however, whether the Florida courts, rather than solely the National Labor Relations Board, are tribunals with jurisdiction to enforce

the State's prohibition against such arrangements. Accordingly, the case is retained on the calendar for reargument on the undecided issue.

Retail Clerks Local 1625 is the certified bargaining agent for the Food Fair Stores supermarket chain in five South Florida counties. In October 1960 the union and the employer negotiated a collective bargaining agreement effective until April 1963.[1] The contract provided for various terms and conditions of employment, such as protection against discharge except for just cause, paid vacations and holidays, pregnancy leaves of absence, life and hospitalization insurance, paid time off to vote, to serve on juries, and to attend funerals, as well as for wage-and-hour terms; a grievance and arbitration clause was inserted for enforcement of these terms, under which the union and employer agree to divide between them the cost of the grievance-arbitration machinery. The contract also contained Article 19, which is the subject of the present lawsuit:

> "Employees shall have the right to voluntarily join or refrain from joining the Union. Employees who choose not to join the Union, however, and who are covered by the terms of this contract, shall be required to pay as a condition of employment, an initial service fee and monthly service fees to the Union for the purpose of aiding the Union in defraying costs in connection with its legal obligations and responsibilities as the exclusive bargaining agent of the employees in the appropriate bargaining unit.

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[1] Article 45 provides:

"This Agreement shall continue in effect from April 18, 1960 to April 15, 1963, and continue in effect from year to year thereafter unless either party notifies the other party sixty (60) days prior to expiration date, or any anniversary date thereafter, of their desire to terminate or open the agreement for the purpose of amendments and/or changes."

> The aforesaid fees shall be payable on or before the first day of each month, and such sums shall in no case exceed the initiation fees and the membership dues paid by those who voluntarily choose to join the Union. Other than the payment of these service fees, those employees who do not choose to join the Union shall be under no further financial obligations or requirements of any kind to the Union. It shall also be a condition of employment that all employees covered by this Agreement shall on the 30th day following the beginning of such employment or the effective date of this agreement, whichever is later, pay established initial and monthly service fees as shown above."

The union and the employer jointly posted a notice to employees, immediately after execution of the collective agreement, explaining the new contract with particular reference to the agency shop clause:

> "The Agency Shop recognizes that union membership in the State of Florida is a voluntary act of the employee. On the other hand, under an Agency Shop Agreement, those Employees who do not become members of the Union nevertheless are required to pay the necessary service fees to the Local Union in order to aid the Union in meeting its authorized expenses as the exclusive bargaining agent.
>
> "Therefore, the Company and the Union have agreed that even though you may not have joined the Union, you are obligated, under the provisions of the Agency Shop, to pay an initial service fee which is the equal of the initiation fee for Union members and a monthly service fee which is the equal of the monthly dues for those who voluntarily become Union members. Note: An Employee who pays the

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> regular initial fee and regular monthly service fee but does not voluntarily join the Union, does not participate in the internal union affairs even though said Employee receives equal treatment under the contract."

The present class action was then instituted by respondents, four nonunion employees of Food Fair, who sought a declaration that Article 19 was "null and void and unenforceable," a temporary and permanent injunction against petitioner and Food Fair to prevent them from requiring respondents or members of the class on behalf of which they sued (all Food Fair employees covered by the collective agreement) to contribute money to the union under Article 19, and an accounting. The trial court granted a motion to dismiss on the ground that Article 19 did not violate the Florida right-to-work law, Fla. Const. § 12.[2] 47 L. R. R. M. 2300. The Florida Supreme Court reversed, holding that state law forbade and that its courts could deal with the agency shop clause involved here, and remanded the case for further proceedings in the trial court. 141 So. 2d 269, cert. granted, 371 U. S. 909.

I.

The case to a great extent turns upon the scope and effect of § 14 (b) of the National Labor Relations Act, added to the Act in 1947, 29 U. S. C. § 164 (b):

> "Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a

[2] "The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union, or labor organization; provided, that this clause shall not be construed to deny or abridge the right of employees by and through a labor organization or labor union to bargain collectively with their employer."

> condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

As is immediately apparent from its language, § 14 (b) was designed to prevent other sections of the Act from completely extinguishing state power over certain union-security arrangements. And it was the proviso to § 8 (a)(3),[3] expressly permitting agreements conditioning employment upon membership in a labor union, which Congress feared might have this result. It was desired to "make certain" that § 8 (a)(3) could not "be said to authorize arrangements of this sort in States where such arrangements were contrary to the State policy." H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 60, 1 Leg. Hist. L. M. R. A. 564.

The connection between the § 8 (a)(3) proviso and § 14 (b) is clear. Whether they are perfectly coincident, we need not now decide, but unquestionably they overlap to some extent. At the very least, the agreements requiring "membership" in a labor union which are expressly permitted by the proviso are the same "membership" agreements expressly placed within the reach of state law by § 14 (b). It follows that the *General Motors* case rules this one, for we there held that the "agency shop" arrangement involved here—which imposes on employees the only membership obligation enforceable under § 8 (a)(3) by discharge, namely, the obligation to pay initiation fees and regular dues—is the "practical equivalent" of an "agreement requiring membership in a labor organization as a condition of employment." Whatever

[3] "*Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later . . . ."

may be the status of less stringent union-security arrangements, the agency shop is within § 14 (b). At least to that extent did Congress intend § 8(a)(3) and § 14 (b) to coincide.

Petitioners, belatedly,[4] would now distinguish the contract involved here from the agency shop contract dealt with in the *General Motors* case on the basis of allegedly distinctive features which are said to require a different result. Article 19 provides for nonmember payments to the union "for the purpose of aiding the Union in defraying costs in connection with its legal obligations and responsibilities as the exclusive bargaining agent of the employees in the appropriate bargaining unit," a provision which petitioners say confines the use of nonmember payments to collective bargaining purposes alone and forbids their use by the union for institutional purposes unrelated to its exclusive agency functions, all in sharp contrast, it is argued, to the *General Motors* situation where the nonmember contributions are available to the union without restriction.

We are wholly unpersuaded. There is before us little more than a complaint with its exhibits. The agency shop clause of the contract is, at best, ambiguous on its face and it should not, in the present posture of the case, be construed against respondent to raise a substantial difference between this and the *General Motors* case. There is no ironclad restriction imposed upon the use of nonmember fees, for the clause merely describes the pay-

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[4] The petition for certiorari posed the question for review as whether § 14 (b) "authorizes the states both to prohibit and to regulate an 'agency shop' clause." The present clause was likened to, rather than distinguished from, the *General Motors* arrangement. It was only upon briefing and argument that petitioners sought to place this alleged "service fee" contract in a different category from the agency shop. Cf. *National Licorice Co.* v. *Labor Board*, 309 U. S. 350, 357, n. 2.

ments as being for "the purpose of aiding the Union" in meeting collective bargaining expenses. The alleged restriction would not be breached if the service fee was used for both collective bargaining and other expenses, for the union would be "aided" in meeting its agency obligations, not only by the part spent for bargaining purposes but also by the part spent for institutional items, since an equivalent amount of other union income would thereby be freed to pay the costs of bargaining agency functions.

But even if all collections from nonmembers must be directly committed to paying bargaining costs, this fact is of bookkeeping significance only rather than a matter of real substance. It must be remembered that the service fee is admittedly the exact equal of membership initiation fees and monthly dues, see p. 749, *supra,*[5] and that, as the union says in its brief,[6] dues collected from members

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[5] This is the factual posture in which the case comes to us, on motion to dismiss. The evidence on this point, if any favorable to petitioners was adduced at the hearing for preliminary injunction, was not made part of the record.

[6] "Rather typically, unions use their members' dues to promote legislation which they regard as desirable and to defeat legislation which they regard as undesirable, to publish newspapers and magazines, to promote free labor institutions in other nations, to finance low cost housing, to aid victims of natural disaster, to support charities, to finance litigation, to provide scholarships, and to do those things which the members authorize the union to do in their interest and on their behalf."

We cannot take seriously petitioners' unsupported suggestion at the oral argument that we must assume that the union spends all of its income on collective bargaining expenses. The record is entirely silent on this matter one way or the other and it would be unique indeed if the union expended no funds for noncollective bargaining purposes. See Brief for N. L. R. B., *Labor Board* v. *General Motors Corp.*, No. 404, p. 38. As indicated in the text, petitioners' brief seems to concede as much and petitioners later appeared to modify or withdraw the suggestion at the oral argument. In any event, we have only the pleadings and we are bound to give the

may be used for a "variety of purposes, in addition to meeting the union's costs of collective bargaining." Unions "rather typically" use their membership dues "to do those things which the members authorize the union to do in their interest and on their behalf." If the union's total budget is divided between collective bargaining and institutional expenses and if nonmember payments, equal to those of a member, go entirely for collective bargaining costs, the nonmember will pay more of these expenses than his pro rata share. The member will pay less and to that extent a portion of his fees and dues is available to pay institutional expenses. The union's budget is balanced. By paying a larger share of collective bargaining costs the nonmember subsidizes the union's institutional activities. In over-all effect, economically, and we think for the purposes of § 14 (b), the contract here is the same as the *General Motors* agency shop arrangement. Petitioners' argument, if accepted, would lead to the anomalous result of permitting Florida to invalidate the agency shop but forbidding it to ban the present service fee arrangement under which collective bargaining services cost the nonmember more than the member.

II.

The more difficult phases of this case remain. In petitioners' motion to dismiss filed in the trial court the contract at issue was said to be an arguable unfair labor practice and the subject matter of the action therefore within the exclusive jurisdiction of the National Labor Relations Board and beyond the power of the state courts to prohibit. The motion was granted, but on another ground, and the preemption argument was renewed but

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respondents the benefit of every reasonable inference from well-pleaded facts. *Wheeldin* v. *Wheeler*, 373 U. S. 647, 648; *Kendall* v. *United States*, 7 Wall. 113, 116; *Rhode Island* v. *Massachusetts*, 15 Pet. 233, 272.

rejected in the Florida Supreme Court. It is now pressed here and has at least two related but distinctive aspects.

It is first urged that whether or not a particular union-security contract is within the category subjected to state law by § 14 (b) is a matter for the Board and no business of the state courts, at least in the doubtful cases where the coverage of § 14 (b) is not a clearly settled matter. If a contract is not within § 14 (b), the argument goes, it is protected by federal law. If within § 14 (b), the arrangement is an unfair practice, at least arguably so. Therefore, where the status of a contract for the purposes of § 14 (b) is at all doubtful, the Board is assertedly the tribunal to deal with the question. Although we were asked in the petition for certiorari, and again in petitioners' brief for oral argument, to resolve the § 14 (b) issue in this agency shop case, the clear thrust of this phase of petitioners' preemption argument is that neither the Florida courts nor this Court should purport in the first instance to determine the status of an agency shop contract under § 14 (b).

There is much force in the argument that the assessment of any union-security arrangement for the purposes of §§ 7, 8 and 14 (b), when there is significant doubt about the matter, is initially a task for the Board, so that it may finally come to this Court with the benefit of the affected agency's views, and in all probability the pre-emption issue was entitled to different treatment than it received in the Florida courts at the time this case was decided. But what was then an arguable matter under § 14 (b) is not necessarily arguable now. In the first place, as we have held in the *General Motors* case, an agency shop arrangement is the equivalent of a permitted § 8 (a)(3) membership agreement, a result which rules this case since, as we have indicated, § 14 (b) subjects to state law the membership agreements, or their equivalent, which are permitted by § 8 (a)(3). Secondly, the Board's

brief in the *General Motors* case contained the Board's own view of the status of the agency shop agreement under § 14 (b): the provision conditioning employment upon the payment of sums equal to initiation fees and monthly dues is within the § 8 (a)(3) proviso, within the scope of § 14 (b), and hence subject to invalidation by state law. What was an arguable question of § 8 (a)(3) and § 14 (b) coverage has been settled, not only in the light of, but consistently with, the views of the Board. We see no reason to hold our hand at this juncture in order that the Board may arrive again at what is now a foregone conclusion. Cf. *Maritime Board* v. *Isbrandtsen Co.*, 356 U. S. 481.

The second question implicit in petitioners' preemption argument is whether a state court may enjoin the operation of an agency shop arrangement which the State has declared to be unlawful as it may do under § 14 (b). Without the proviso to § 8 (a)(3) and a similar saving clause in § 7, conditioning employment upon union membership would be an obvious unfair labor practice, under §§ 8 (a)(1), 8 (a)(3), and 8 (b)(2), as Congress recognized in adding the proviso to original § 8 (3). With the proviso, however, such arrangements, if they comply with the terms of the proviso, are not unfair practices. Section 14 (b), with obvious reference to § 8 (a) (3), declares that "nothing in this Act" is to authorize "the execution or application" of membership agreements in States in which such execution or operation is prohibited by state law. It is one thing if § 14 (b) and a state law prohibiting the union or the agency shop have no impact on §§ 7 and 8 at all, and the union and agency shops are therefore not unfair practices under federal law even in those States which prohibit them. It is quite another matter, however, if § 14 (b) removes the protection of the § 8 (a)(3) proviso and the union and agency shops become unfair labor practices in States where state law

forbids them, for then the obvious question is precipitated as to whether a State as well as the Board may enjoin such union-security arrangements. The scope and vitality of the Court's decision in *Algoma Plywood Co.* v. *Wisconsin Board,* 336 U. S. 301, are involved, as is the applicability of the preemption doctrine, subsequently developed in many cases in this Court, such as *Garner* v. *Teamsters Union,* 346 U. S. 485; *San Diego Council* v. *Garmon,* 359 U. S. 236, to situations where state law invalidates union-security contracts placed within their reach by § 14 (b).

We hold that § 14 (b) of the Act subjects this arrangement to state substantive law, and that the legality of Article 19 is governed by the decision of the Florida Supreme Court under review here. As to the unresolved issue of whether the Florida courts have jurisdiction to afford a remedy for violation of the state law, we prefer not to dispose of the matter without full argument next Term. Moreover, since we have not had the benefit of the views of the National Labor Relations Board, the Solicitor General is invited to file a brief expressing the views of the Government. The case is retained on the calendar and set for reargument during the forthcoming Term on the remaining issue.

It is so ordered.

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

JONES, CHAIRMAN OF NAVAJO TRIBAL COUNCIL OF NAVAJO INDIAN TRIBE, *v.* HEALING, CHAIRMAN OF HOPI COUNCIL OF HOPI INDIAN TRIBE, ET AL.

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

No. 985. Decided June 3, 1963.*

210 F. Supp. 125, affirmed.

Norman M. Littell and *Frederick Bernays Wiener* for appellant in No. 985 and for appellee Jones in No. 1050.

John S. Boyden, Allen H. Tibbals and *Bryant H. Croft* for appellants in No. 1050 and for appellee Healing in No. 985.

PER CURIAM.

The motion to substitute Raymond Nakai in the place of Paul Jones as the party appellant in No. 985 and as a party appellee in No. 1050 is granted. The motion to substitute Abbott Sekaquaptewa in the place of Dewey Healing as a party appellee in No. 985 and as a party appellant in No. 1050 is granted. The motion to affirm in No. 985 is granted and the judgment which is common to both cases is affirmed.

MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted and would decide the cases only after argument.

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*Together with No. 1050, *Healing, Chairman of Hopi Tribal Council of Hopi Indian Tribe, et al.* v. *Jones, Chairman of Navajo Tribal Council of Navajo Indian Tribe, et al.*, on appeal from the same Court.

REPORTER'S NOTE.

The next page is purposely numbered 901. The numbers between 758 and 901 were purposely omitted, in order to make it possible to publish the *per curiam* decisions and 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 APRIL 29 THROUGH JUNE 3, 1963.

April 29, 1963.

Miscellaneous Order.

No. 164. Jacobellis *v.* Ohio. Appeal from the Supreme Court of Ohio. (Probable jurisdiction noted, 371 U. S. 808.) Argued March 26, 1963. This case is restored to the calendar for reargument. *Ephraim London* argued the cause for appellant. With him on the briefs were *Martin Garbus* and *Bennet Kleinman*. *John T. Corrigan* argued the cause and filed a brief for appellee. *Bernard A. Berkman, Jack G. Day* and *Melvin L. Wulf* filed a brief for the American Civil Liberties Union et al., as *amici curiae,* urging reversal. Reported below: 173 Ohio St. 22, 179 N. E. 2d 777.

Certiorari Granted. (*See also No. 715, ante, p. 61.*)

No. 907. Simpson *v.* Union Oil Co. of California. C. A. 9th Cir. Certiorari granted. *Maxwell Keith* for petitioner. *Moses Lasky* for respondent. Reported below: 311 F. 2d 764.

No. 812. Smith *v.* California. Appellate Department, Superior Court of California, County of Los Angeles. Certiorari granted. *Stanley Fleishman* and *Sam Rosenwein* for petitioner. *Roger Arnebergh, Philip E. Grey* and *Wm. E. Doran* for respondent. *Nathan L. Schoichet, A. L. Wirin* and *Fred Okrand* for the American Civil Liberties Union of Southern California, as *amicus curiae,* in support of the petition. *Edward de Grazia* for Allen et al., as *amici curiae,* in support of the petition.

No. 903. UNITED STATES *v.* BEHRENS. C. A. 7th Cir. Certiorari granted. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 312 F. 2d 223.

No. 783, Misc. HARDY *v.* UNITED STATES. Motions for leave to proceed *in forma pauperis* and to supplement the petition granted. 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. *Mozart G. Ratner* for petitioner. *Solicitor General Cox* for the United States.

Certiorari Denied. (*See also No. 878, ante, p. 63.*)

No. 821. BADGER METER MANUFACTURING CO. *v.* BRENNAN, U. S. ATTORNEY, ET AL. C. A. 7th Cir. Certiorari denied. *Jesse Climenko* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Joseph M. Howard* for respondents.

No. 863. MAGNUS, MABEE & REYNARD, INC., ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Boris Kostelanetz* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Joseph M. Howard* and *John M. Brant* for the United States. Reported below: 311 F. 2d 12.

No. 900. HENSLEE, PENITENTIARY SUPERINTENDENT, *v.* STEWART. C. A. 8th Cir. Certiorari denied. *Bruce Bennett,* Attorney General of Arkansas, and *Jack L. Lessenberry,* Assistant Attorney General, for petitioner. Reported below: 311 F. 2d 691.

No. 901. VACHIER *v.* MCCORMICK, ALCAIDE & CO. Supreme Court of Puerto Rico. Certiorari denied. *Carlos D. Vazquez* for petitioner. *Felix Ochoteco, Jr.* for respondent. Reported below: —— P. R. ——.

No. 902. HEYMAN MANUFACTURING CO. *v.* HAP CORPORATION. C. A. 1st Cir. Certiorari denied. *James W. Dent* for petitioner. *Robert I. Dennison, Walter Adler* and *Max Schwartz* for respondent. Reported below: 311 F. 2d 839.

No. 911. MILLPAX, INC., ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Charles Orlando Pratt* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *William W. Goodrich* for the United States. Reported below: 313 F. 2d 152.

No. 914. VIALE ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Peter L. Parrino* for petitioners. *Solicitor General Cox* for the United States. Reported below: 312 F. 2d 595.

No. 915. HARRIS ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Albert M. Goldberg* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Joseph Kovner* for the United States. Reported below: 310 F. 2d 846.

No. 917. STRANGWAY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Oberdorfer, Joseph M. Howard* and *Norman Sepenuk* for the United States. Reported below: 312 F. 2d 283.

No. 916. WATKINS PRODUCTS, INC., FORMERLY KNOWN AS J. R. WATKINS CO., *v.* SUNWAY FRUIT PRODUCTS, INC. C. A. 7th Cir. Certiorari denied. *Theodore W. Miller* for petitioner. Reported below: 311 F. 2d 496.

No. 918. PARTENWEEDEREI ET AL. *v.* BRADY-HAMILTON STEVEDORE CO. C. A. 9th Cir. Certiorari denied. *Erskine B. Wood* and *Graydon S. Staring* for petitioners. *Alfred A. Hampson* for respondent. Reported below: 299 F. 2d 897; 302 F. 2d 730; 313 F. 2d 423.

No. 919. PURNELL *v.* MISSOURI PACIFIC RAILROAD CO. Supreme Court of Arkansas. Certiorari denied. *Griffin Smith* for petitioner. Reported below: 235 Ark. 957, 362 S. W. 2d 674.

No. 832. BEATRICE FOODS CO. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. MR. JUSTICE WHITE took no part in the consideration or decision of this petition. *George B. Christensen* for petitioner. *Solicitor General Cox, Assistant Attorney General Loevinger* and *Robert B. Hummel* for the United States. Reported below: 312 F. 2d 29.

No. 906. ATLAS *v.* EASTERN AIRLINES, INC., ET AL. C. A. 1st Cir. Certiorari denied. MR. JUSTICE BLACK is of the opinion that certiorari should be granted because of the denial of a jury trial. *Joseph Zallen* for petitioner. *Robert B. Russell* for respondents. Reported below: 311 F. 2d 156.

No. 631, Misc. WEINSTEIN *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se*. *Edward S. Silver* and *Aaron Nussbaum* for respondent. Reported below: 11 N. Y. 2d 1098, 184 N. E. 2d 312; 12 N. Y. 2d 673, 185 N. E. 2d 905.

No. 531, Misc. SHANNON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *J. F. Bishop* for the United States.

No. 666, Misc. HAMRICK *v.* CUNNINGHAM, PENITENTIARY SUPERINTENDENT. Supreme Court of Appeals of Virginia. Certiorari denied. Petitioner *pro se*. *Reno S. Harp III,* Assistant Attorney General of Virginia, for respondent.

No. 695, Misc. TRUMBLAY *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. 980, Misc. EGITTO *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se*. *Louis J. Lefkowitz,* Attorney General of New York, *Paxton Blair,* Solicitor General, and *Winifred C. Stanley,* Assistant Attorney General, for respondent.

No. 849, Misc. SCRIBNER *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition.

Rehearing Denied.

No. 34. DOUGLAS ET AL. *v.* CALIFORNIA, 372 U. S. 353; and

No. 774, Misc. COTHRAN *v.* SAN JOSE WATER WORKS, 372 U. S. 938. Petitions for rehearing denied.

No. 533. DYER *v.* MURRAY, TRUSTEE, ET AL., 371 U. S. 949. Motion for leave to file petition for rehearing denied.

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No. 563. CHANDLER, U. S. DISTRICT JUDGE, *v.* OCCIDENTAL PETROLEUM CORP., 372 U. S. 915, 928. Motion of Earl A. Brown et al. for leave to file brief, as *amici curiae,* in support of petition for rehearing granted. Petition for rehearing denied. MR. JUSTICE BRENNAN and MR. JUSTICE WHITE took no part in the consideration or decision of this motion and petition.

No. 817. WARRINER *v.* FINK ET AL., 372 U. S. 943. Motion to dispense with printing the petition for rehearing granted. Petition for rehearing denied.

APRIL 30, 1963.

Dismissal Under Rule 60.

No. 990. W. S. DICKEY CLAY MANUFACTURING CO. *v.* CORDER, DOING BUSINESS AS W. H. C. TRUCKING CO. On petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit. Petition dismissed pursuant to Rule 60 of the Rules of this Court. *Carl L. Phinney* and *Frank A. Leffingwell* for petitioner. *James F. Gardner* and *James P. Hart* for respondent. Reported below: 310 F. 2d 764.

MAY 1, 1963.

Dismissal Under Rule 60.

No. 1115, Misc. CASANOVA *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK. Motion for leave to file petition for writ of prohibition and/or mandamus dismissed pursuant to Rule 60 of the Rules of this Court. *Leonard B. Boudin* and *Victor Rabinowitz* for petitioner. *Solicitor General Cox, Assistant Attorney General Yeagley, George B. Searls* and *Robert S. Brady* for respondent.

MAY 13, 1963.

Miscellaneous Orders.

No. 606. NEW YORK TIMES CO. *v.* SULLIVAN. Certiorari, 371 U. S. 946, to the Supreme Court of Alabama. The motion of Tribune Company for leave to file a brief, as *amicus curiae,* is granted. *Howard Ellis* and *Don H. Reuben* on the motion.

No. 948. WILLIAMSON *v.* CALIFORNIA. On petition for writ of certiorari to the District Court of Appeal of California, Second Appellate District. The motion of the American Civil Liberties Union of Southern California for leave to file a brief, as *amicus curiae,* is granted. *A. L. Wirin* and *Fred Okrand* on the motion.

No. 1153, Misc. BEARD *v.* DUNBAR, CORRECTIONS DIRECTOR, ET AL. Motion for leave to file petition for writ of habeas corpus denied.

No. 1158, Misc. PAGE *v.* GREEN, CORRECTIONAL SUPERINTENDENT, ET AL. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for writ of certiorari, certiorari is denied.

No. 1235, Misc. KEENE *v.* SUPREME COURT OF ALABAMA. Motion for leave to file petition for writ of mandamus denied.

Probable Jurisdiction Noted.

No. 823. SOUTHERN RAILWAY CO. *v.* NORTH CAROLINA ET AL.; and

No. 943. UNITED STATES ET AL. *v.* NORTH CAROLINA ET AL. Appeals from the United States District Court for the Middle District of North Carolina. Probable

jurisdiction noted. The cases are consolidated and a total of two hours is allotted for oral argument. *William T. Joyner* and *Earl E. Eisenhart, Jr.* for appellant in No. 823. *Solicitor General Cox, Assistant Attorney General Loevinger, Robert B. Hummel, Robert W. Ginnane* and *H. Neil Garson* for the United States et al. in No. 943. Reported below: 210 F. Supp. 675.

Certiorari Granted. (*See also No. 975, ante, p. 241; No. 59, Misc., ante, p. 242; and No. 494, Misc., ante, p. 243.*)

No. 925. UNITED STEELWORKERS OF AMERICA, AFL–CIO, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 2d Cir. Certiorari granted. MR. JUSTICE GOLDBERG took no part in the consideration or decision of this petition. *David E. Feller, Elliot Bredhoff* and *Jerry D. Anker* for petitioners. *Solicitor General Cox, Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* for the National Labor Relations Board, and *Theophil C. Kammholz* and *Kenneth C. McGuiness* for Carrier Corporation, respondents. Reported below: 311 F. 2d 135.

No. 934. JOHN WILEY & SONS, INC., *v.* LIVINGSTON. C. A. 2d Cir. Certiorari granted. MR. JUSTICE GOLDBERG took no part in the consideration or decision of this petition. *Charles H. Lieb* for petitioner. *Milton C. Weisman* for respondent. Reported below: 313 F. 2d 52.

Certiorari Denied. (*See also No. 877, ante, p. 240; No. 689, Misc., ante, p. 243; No. 928, Misc., ante, p. 242; and No. 1158, Misc., supra.*)

No. 896. PATZKE *v.* CHESAPEAKE & OHIO RAILWAY CO. Supreme Court of Michigan. Certiorari denied. *Peter E. Bradt* for petitioner. *Robert A. Straub* and *Chase S. Osborn* for respondent. Reported below: 368 Mich. 190, 118 N. W. 2d 286.

No. 828. KUCKENBERG ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. *Kenneth E. Roberts* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Norman H. Wolfe* for respondent. Reported below: 309 F. 2d 202.

No. 890. WILLIAMS ET AL. *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied. *Albert A. Goldfarb* for petitioners. *Frank J. Kelley*, Attorney General of Michigan, *Robert A. Derengoski*, Solicitor General, and *Donald T. Kane*, Assistant Attorney General, for respondent. Reported below: 368 Mich. 494, 118 N. W. 2d 391.

No. 912. GENERAL ELECTRIC CO. ET AL. *v.* ATLANTIC CITY ELECTRIC CO. ET AL. C. A. 2d Cir. Certiorari denied. *J. Courtney Ivey, Francis C. Reed, S. Hazard Gillespie, Jr., Harold F. McGuire, Porter R. Chandler, Robert W. Murray, Edgar E. Barton, Edward E. Rigney, William J. Junkerman, Joseph W. Burns, J. Francis Hayden, Robert C. Barnard, Ernest S. Meyers, William C. Blind, Albert R. Connelly* and *Jesse Climenko* for petitioners. *Louis J. Lefkowitz*, Attorney General of New York, *Milton Handler, James B. Henry, Jr., Bethuel M. Webster, David G. Bress, Merrell E. Clark, Jr., Ralph Warren Sullivan, Robert W. Gelfman, Harold E. Kohn, Sidney Goldstein, Nathaniel Fensterstock, Leo Larkin, Randall J. LeBoeuf, Jr., Horace R. Lamb, Mathias L. Spiegel* and *Clifford D. Root* for respondents. Reported below: 312 F. 2d 236.

No. 927. HEARN ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. *Reginald G. Hearn* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Gilbert E. Andrews* for respondent. Reported below: 309 F. 2d 431.

No. 874. FAMILY RECORD PLAN, INC. (DISSOLVED), ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. *Thomas A. Baird, Alva C. Baird* and *Harold Easton* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Norman H. Wolfe* for respondent. Reported below: 309 F. 2d 208.

No. 923. SAGER GLOVE CORP. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. *Llewellyn A. Luce* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Morton K. Rothschild* for respondent. Reported below: 311 F. 2d 210.

No. 928. STRAUSS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Thomas B. Dewolf* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 311 F. 2d 926.

No. 929. G. LEBLANC CORP. *v.* H. & A. SELMER, INC. C. A. 7th Cir. Certiorari denied. *Edward A. Haight, Roy H. Olson* and *Robert M. Wolters* for petitioner. *Benjamin H. Sherman* for respondent. Reported below: 310 F. 2d 449.

No. 930. KURCK *v.* ARKANSAS. Supreme Court of Arkansas. Certiorari denied. *Jack Holt, Sr.* for petitioner. Reported below: 235 Ark. 688, 362 S. W. 2d 713.

No. 933. JOHNSTON *v.* EARLE ET AL. C. A. 9th Cir. Certiorari denied. *Warde H. Erwin* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Joseph Kovner* for respondents. Reported below: 313 F. 2d 686.

No. 932. DURGIN ET UX. *v.* FLORIDA. Supreme Court of Florida. Certiorari denied.

No. 938. PATTNO, ADMINISTRATOR, *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Teno Roncalio* for petitioner. *Solicitor General Cox, Assistant Attorney General Douglas, Morton Hollander* and *Kathryn H. Baldwin* for the United States. Reported below: 311 F. 2d 604.

No. 939. FERBER COMPANY ET AL. *v.* ONDRICK ET AL. C. A. 1st Cir. Certiorari denied. *Gerson Askinas* for petitioners. Respondent Ondrick *pro se*. Reported below: 310 F. 2d 462.

No. 940. CROSBY *v.* BRADSTREET COMPANY ET AL. C. A. 2d Cir. Certiorari denied. *Jay Leo Rothschild* for petitioner. *Chester Bordeau* for Bradstreet Company, and *Copal Mintz* for Crosby, respondents. Reported below: 312 F. 2d 483.

No. 947. BURTON *v.* TAYLOR, SHERIFF. Supreme Court of Florida. Certiorari denied. *Hilton R. Carr, Jr.* and *Herbert A. Warren, Jr.* for petitioner. Reported below: 148 So. 2d 11.

No. 951. UNGO *v.* BEECHIE, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. *Gordon G. Dale* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *J. F. Bishop* for respondent. Reported below: 311 F. 2d 905.

No. 952. OHIO EX REL. SHEPPARD *v.* KOBLENTZ, CORRECTION COMMISSIONER. Supreme Court of Ohio. Certiorari denied. *Peter W. Princi* for petitioner. Reported below: 174 Ohio St. 120, 187 N. E. 2d 40.

No. 953. YELOUSHAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *James B. McDonough, Jr.* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 313 F. 2d 303.

No. 956. MACMULLEN *v.* SOUTH CAROLINA ELECTRIC & GAS CO. C. A. 4th Cir. Certiorari denied. *James P. Mozingo III* for petitioner. *Arthur M. Williams, Jr.* and *Frank B. Gary* for respondent. Reported below: 312 F. 2d 662.

No. 957. FRENCH LINE *v.* NEW ZEALAND INSURANCE CO., LTD. District Court of Appeal of California, First Appellate District. Certiorari denied. *Francis L. Tetreault* for petitioner.

No. 959. PIERCE ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. *W. Lee McLane, Jr.* and *Nola McLane* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Gilbert E. Andrews* for respondent. Reported below: 311 F. 2d 894.

No. 962. THOMPSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Charles S. Scott* and *Elisha Scott* for petitioner. *Solicitor General Cox* for the United States. Reported below: 312 F. 2d 516.

No. 963. PEKAR ET AL. *v.* LOCAL UNION NO. 181 OF THE INTERNATIONAL UNION OF UNITED BREWERY, FLOUR, CEREAL, SOFT DRINK & DISTILLERY WORKERS OF AMERICA, AFL–CIO, ET AL. C. A. 6th Cir. Certiorari denied. *Dee Edwards* for petitioners. *Thomas E. Harris* for respondents. Reported below: 311 F. 2d 628.

No. 961. FISHER *v.* NORTH BRANCH PRODUCTS, INC. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Robert G. Mentag* and *Albert W. Rinehart* for petitioner. Reported below: —— U. S. App. D. C. ——, 312 F. 2d 880.

No. 964. LAWRENCE CAPITOL, INC., *v.* STANLEY-WARNER CORP. ET AL. C. A. 1st Cir. Certiorari denied. *Russell Hardy, Sr.* for petitioner. *Robert W. Meserve, John R. Hally* and *Edward C. Park* for respondents.

No. 965. HOLAHAN, TRUSTEE IN BANKRUPTCY, *v.* FORD, BACON & DAVIS, INC. C. A. 5th Cir. Certiorari denied. *John W. Bryan* for petitioner. *Harry McCall* for respondent. Reported below: 311 F. 2d 901.

No. 968. MILTON BRADLEY CO. ET AL. *v.* GELLES-WIDMER CO. C. A. 7th Cir. Certiorari denied. *Sidney Neuman* for petitioners. *Edward A. Haight* for respondent. Reported below: 313 F. 2d 143.

No. 971. WOODRING *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Fred Berthold* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 311 F. 2d 417.

No. 998. PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA ET AL. *v.* BEBCHICK ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Chester H. Gray, George F. Donnella, Andrew G. Conlyn, Edmund L. Jones* and *Harvey M. Spear* for petitioners. *Leonard N. Bebchick, pro se,* and *Harold Leventhal* for respondents. Reported below: —— U. S. App. D. C. ——, 318 F. 2d 187.

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No. 861. HARRISON-HALSTED COMMUNITY GROUP, INC., ET AL. *v.* HOUSING & HOME FINANCE AGENCY ET AL. Motion for leave to file a supplement to the petition for certiorari granted. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied. *George W. Overton, Frederic D. Houghteling, F. Raymond Marks, Jr.* and *Donald Page Moore* for petitioners. *Solicitor General Cox, Assistant Attorney General Douglas, Louis F. Claiborne* and *Alan S. Rosenthal* for Housing & Home Finance Agency et al., and *William G. Clark,* Attorney General of Illinois, *William C. Wines,* Assistant Attorney General, *James J. Costello, Albert E. Jenner, Jr., John C. Melaniphy* and *Milton P. Webster, Jr.* for Board of Trustees of the University of Illinois et al., respondents. Reported below: 310 F. 2d 99.

No. 881. FEDERAL PACIFIC ELECTRIC CO. ET AL. *v.* CITY OF KANSAS CITY, MISSOURI. Motion of Union Electric Co. for leave to file a brief, as *amicus curiae,* granted. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied. *Ralph M. Jones, Charles B. Blackmar, James C. Wilson* and *Sheridan Morgan* for petitioners. *Keith Wilson, Jr.* for respondent. *Richard C. Coburn* and *Alan C. Kohn* for Union Electric Co., as *amicus curiae,* in opposition. Reported below: 310 F. 2d 271.

No. 958. JIMENEZ *v.* HIXON, U. S. MARSHAL, ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE WHITE took no part in the consideration or decision of this petition. *David W. Walters* and *Eugene Gressman* for petitioner. *Solicitor General Cox, Louis F. Claiborne* and *Irving Jaffe* for Hixon, and *Howard C. Westwood, William H. Allen, W. L. Craig* and *William G. Ward* for Aristeguieta, respondents. Reported below: 311 F. 2d 547.

No. 922. STADIN *v.* UNION ELECTRIC CO. Motion to dispense with printing appendix to the petition for certiorari granted. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied. *J. Raymond Dyer* for petitioner. *Richmond C. Coburn* and *Alan C. Kohn* for respondent. Reported below: 309 F. 2d 912.

No. 955. FELICE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE WHITE took no part in the consideration or decision of this petition. *P. D. Maktos, John Maktos* and *Moses Krislov* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 311 F. 2d 934.

No. 65, Misc. CAPLAN *v.* KORTH, SECRETARY OF THE NAVY, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Charles A. Docter* for petitioner. *Solicitor General Cox, Acting Assistant Attorney General Guilfoyle, Alan S. Rosenthal* and *Sherman L. Cohn* for respondents. Reported below: 112 U. S. App. D. C. 42, 299 F. 2d 126.

No. 286, Misc. IN RE PATE. Court of Criminal Appeals of Oklahoma. Certiorari denied. *Melvin L. Wulf* for petitioner. *Charles Nesbitt,* Attorney General of Oklahoma, and *Hugh H. Collum,* Assistant Attorney General, for the State of Oklahoma. Reported below: 361 P. 2d 1086.

No. 644, Misc. HAMLETT *v.* WAINWRIGHT, 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.

No. 674, Misc. McCree *v.* Michigan. Supreme Court of Michigan. Certiorari denied. Petitioner *pro se.* *Frank J. Kelley,* Attorney General of Michigan, *Robert A. Derengoski,* Solicitor General, and *Donald T. Kane,* Assistant Attorney General, for respondent.

No. 677, Misc. Joseph *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.

Nos. 692, Misc., and 693, Misc. Hawkins *v.* United States. C. A. 5th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 303 F. 2d 536.

No. 707, Misc. Smith *v.* New York. Court of Appeals of New York. Certiorari denied. Petitioner *pro se.* *Frank S. Hogan* for respondent.

No. 752, Misc. Williams *v.* Texas et al. Court of Criminal Appeals of Texas. Certiorari denied. Petitioner *pro se.* *Waggoner Carr,* Attorney General of Texas, and *Sam R. Wilson, Gilbert J. Pena* and *Allo B. Crow, Jr.,* Assistant Attorneys General, for respondents.

No. 777, Misc. Sorrenti *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: 306 F. 2d 236.

No. 855, Misc. Mault *v.* New York. Court of Appeals of New York. Certiorari denied.

No. 720, Misc. MORGAN *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Monroe H. Freedman* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: —— U. S. App. D. C. ——, 309 F. 2d 234.

No. 838, Misc. MACK ET AL. *v.* LOUISIANA. Supreme Court of Louisiana. Certiorari denied. *James Domengeaux* for petitioners. *Jack P. F. Gremillion,* Attorney General of Louisiana, and *M. E. Culligan,* Assistant Attorney General, for respondent. Reported below: 243 La. 369, 144 So. 2d 363.

No. 844, Misc. BENT *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: 308 F. 2d 585.

No. 944, Misc. KEENE *v.* HOLMAN, WARDEN. Supreme Court of Alabama. Certiorari denied. Petitioner *pro se. Richmond M. Flowers,* Attorney General of Alabama, and *John C. Tyson III,* Assistant Attorney General, for respondent. Reported below: 274 Ala. 219, 147 So. 2d 817.

No. 958, Misc. HOLLAND *v.* STRAWN, SHERIFF. Supreme Court of Oregon. Certiorari denied. Reported below: 233 Ore. 64, 377 P. 2d 1.

No. 1052, Misc. TOM *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox* for the United States.

No. 997, Misc. STEIN *v.* UNITED STATES. C. A. 9th 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: 313 F. 2d 518.

No. 1056, Misc. MCGREGOR *v.* LAVALLEE, WARDEN. Court of Appeals of New York. Certiorari denied.

No. 1073, Misc. MARCHESE *v.* MURPHY, WARDEN. Court of Appeals of New York. Certiorari denied. Petitioner *pro se*. *Louis J. Lefkowitz,* Attorney General of New York, *Paxton Blair,* Solicitor General, and *Anthony J. Lokot,* Assistant Attorney General, for respondent.

No. 1098, Misc. MARKS *v.* WARDEN, MARYLAND PENITENTIARY. Court of Appeals of Maryland. Certiorari denied. Reported below: 230 Md. 108, 185 A. 2d 909.

No. 1105, Misc. AIKEN *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 1106, Misc. JOBE *v.* COLORADO. Supreme Court of Colorado. Certiorari denied. Petitioner *pro se*. *Duke W. Dunbar,* Attorney General of Colorado, *Frank E. Hickey,* Deputy Attorney General, and *John E. Bush,* Assistant Attorney General, for respondent.

No. 1110, Misc. LOTT *v.* FIRST JUDICIAL DISTRICT COURT, SANTA FE, NEW MEXICO, ET AL. Supreme Court of New Mexico. Certiorari denied.

No. 1112, Misc. WRIGHT *v.* RHAY, PENITENTIARY SUPERINTENDENT, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 310 F. 2d 687.

No. 1124, Misc. KING *v.* BETO, CORRECTIONS DIRECTOR, ET AL. Court of Criminal Appeals of Texas. Certiorari denied.

No. 1126, Misc. AARON *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied.

No. 1172, Misc. COLEMAN *v.* DENNO, WARDEN. C. A. 2d Cir. Certiorari denied. *Norman Redlich* for petitioner. Reported below: 313 F. 2d 457.

No. 1190, Misc. LATHAM ET AL. *v.* KANSAS. Supreme Court of Kansas. Certiorari denied. *Lawrence Speiser* and *Bernard Roazen* for petitioners. *William M. Ferguson,* Attorney General of Kansas, and *J. Richard Foth* and *Park McGee,* Assistant Attorneys General, for respondent. Reported below: 190 Kan. 411, 375 P. 2d 788.

No. 1193, Misc. FREEMAN *v.* OREGON. Supreme Court of Oregon. Certiorari denied. *Eugene Gressman* for petitioner. Reported below: 232 Ore. 267, 374 P. 2d 453.

Rehearing Denied.

No. 894. TOFFENETTI RESTAURANT CO., INC., *v.* NATIONAL LABOR RELATIONS BOARD, 372 U. S. 977. Petition for rehearing denied.

No. 557. FLORA CONSTRUCTION CO. *v.* FIREMAN'S FUND INSURANCE CO. ET AL., 371 U. S. 950. Motion to dispense with printing petition for rehearing granted. Petition for rehearing denied.

No. 685, Misc. WALKER *v.* INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA ET AL., 372 U. S. 922, 961. Motion for leave to file a second petition for rehearing denied.

MAY 20, 1963.

Miscellaneous Orders.

No. 26. GRIFFIN ET AL. *v.* MARYLAND. Certiorari, 370 U. S. 935, to the Court of Appeals of Maryland. Argued November 5 and 7, 1962. This case is restored to the calendar for reargument. *Joseph L. Rauh, Jr.* argued the cause for petitioners. With him on the brief were *John Silard, Joseph H. Sharlitt, Jack Greenberg* and *James M. Nabrit III*. *Robert C. Murphy*, Assistant Attorney General of Maryland, and *Joseph S. Kaufman*, Deputy Attorney General, argued the cause for respondent. With them on the brief was *Thomas B. Finan*, Attorney General. *Solicitor General Cox*, by special leave of Court, argued the cause for the United States, as *amicus curiae*, urging reversal. With him on the brief were *Assistant Attorney General Marshall, Louis F. Claiborne* and *Harold H. Greene*. Reported below: 225 Md. 422, 171 A. 2d 717.

No. 1011. UNITED STATES *v.* BARNETT ET AL. On certificate from the United States Court of Appeals for the Fifth Circuit. The motion of Barnett et al. to advance is denied. *Joe T. Patterson*, Attorney General of Mississippi, *Dugas Shands*, Assistant Attorney General, and *Malcolm B. Montgomery, Garner W. Green, M. M. Roberts, Fred B. Smith* and *Charles Clark*, Special Assistant Attorneys General, on the motion. *Solicitor General Cox* for the United States.

No. 1044, Misc. LION MANUFACTURING CORP. ET AL. *v.* MCGUIRE, CHIEF JUDGE, U. S. DISTRICT COURT. Motion for leave to file petition for writ of mandamus denied. MR. JUSTICE WHITE took no part in the consideration or decision of this motion. *Paul R. Connolly, E. Barrett*

Prettyman, Jr. and *Martin M. Nelson* for petitioners. *Solicitor General Cox, Acting Assistant Attorney General Douglas* and *Morton Hollander* for respondent.

Probable Jurisdiction Noted.

No. 942. UNITED STATES *v.* WIESENFELD WAREHOUSE CO. Appeal from the United States District Court for the Middle District of Florida. Probable jurisdiction noted. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. *Clarence G. Ashby* for appellee. Reported below: 217 F. Supp. 638.

Certiorari Granted.

No. 1024. WILBUR-ELLIS CO. ET AL. *v.* KUTHER. C. A. 9th Cir. Certiorari granted. *Frank A. Neal* and *James M. Naylor* for petitioners. *Oscar A. Mellin* and *Carlisle M. Moore* for respondent. Reported below: 314 F. 2d 71.

Certiorari Denied. (*See also No. 887, Misc., ante, p. 376.*)

No. 970. BRUNENKANT *v.* CELEBREZZE, SECRETARY OF HEALTH, EDUCATION AND WELFARE. C. A. 7th Cir. Certiorari denied. *Edward J. Brunenkant,* petitioner, *pro se. Solicitor General Cox, Assistant Attorney General Douglas* and *Morton Hollander* for respondent. Reported below: 310 F. 2d 355.

No. 991. CLIFTON INVESTMENT CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. *Charles F. Hartsock* and *Irving Harris* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Robert N. Anderson* for respondent. Reported below: 312 F. 2d 719.

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No. 967. SING ET AL. *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Supreme Court of Florida. Certiorari denied. *A. K. Black* for petitioners. Reported below: 148 So. 2d 19.

No. 972. BURKE *v.* ARKANSAS. Supreme Court of Arkansas. Certiorari denied. *John W. Goodson* for petitioner. Reported below: 235 Ark. 882, 362 S. W. 2d 695.

No. 976. WEEKS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *George H. Searle* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome Nelson* for the United States. Reported below: 313 F. 2d 688.

No. 977. MITSUBISHI INTERNATIONAL CORP. *v.* THE PALMETTO STATE ET AL. C. A. 2d Cir. Certiorari denied. *F. Herbert Prem* for petitioner. *Richard H. Sommer* and *L. de Grove Potter* for respondents. Reported below: 311 F. 2d 382.

No. 995. WILSON ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. *Benedict . Krieger* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Meyer Rothwacks* and *Carolyn R. Just* for respondent. Reported below: 311 F. 2d 228.

No. 960. LUCAS *v.* STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. ET AL. Supreme Court of Wisconsin. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition. *Charles Saggio* for petitioner. *Charles C. Collins* for respondents. Reported below: 17 Wis. 2d 568, 117 N. W. 2d 660.

No. 974. MITTELMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *O. John Rogge* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: —— F. 2d ——.

No. 982. HERSLOFF ET AL., TRUSTEES, *v.* UNITED STATES. Court of Claims. Certiorari denied. *Charles E. Scribner, Herbert Plaut* and *David C. Bastian* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Melva M. Graney* for the United States. Reported below: —— Ct. Cl. ——, 310 F. 2d 947.

No. 994. GARFIELD TRUST CO. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Llewellyn A. Luce* for petitioner. *Solicitor General Cox, Assistant Attorney General Douglas* and *Sherman L. Cohn* for the United States. Reported below: —— Ct. Cl. ——, 312 F. 2d 751.

No. 1001. NATIONAL STARCH PRODUCTS, INC., *v.* UNITED STATES (INDEX INDUSTRIAL CORP., PARTY IN INTEREST). Court of Customs and Patent Appeals. Certiorari denied. *Charles M. Price* for petitioner. *Solicitor General Cox, Assistant Attorney General Douglas* and *Alan S. Rosenthal* for the United States. *Bruce E. Clubb* for Index Industrial Corp., party in interest. Reported below: 50 C. C. P. A. (Cust.) ——, 318 F. 2d 737.

No. 1036. NEALEY ET AL. *v.* CALIFORNIA. Appellate Department, Superior Court of California, County of Los Angeles. Certiorari denied. *Russell E. Parsons* for petitioners. *Byron B. Gentry* for respondent.

No. 997. Atlantic & Gulf Stevedores, Inc., *v.* American Export Lines, Inc. C. A. 4th Cir. Certiorari denied. *William B. Eley* for petitioner. *John W. Winston* for respondent. Reported below: 313 F. 2d 414.

No. 1007. Luomola *v.* United States. C. A. 9th Cir. Certiorari denied. *Morris J. Kaplan* for petitioner. *Solicitor General Cox* for the United States. Reported below: 301 F. 2d 138.

No. 980. Flight Engineers' International Association, EAL Chapter, AFL–CIO, *v.* Eastern Air Lines, Inc., et al. C. A. 2d Cir. Certiorari denied. Mr. Justice Goldberg took no part in the consideration or decision of this petition. *I. J. Gromfine* and *Herman Sternstein* for petitioner. *Burton A. Zorn, George G. Gallantz, William Roth* and *W. Glen Harlan* for Eastern Air Lines, Inc., and *Samuel J. Cohen* for Air Line Pilots Assn., respondents. Reported below: 311 F. 2d 745.

No. 986. Zambito *v.* United States. C. A. 4th Cir. Certiorari denied. Mr. Justice White took no part in the consideration or decision of this petition. *Gilbert S. Bachmann* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 315 F. 2d 266.

No. 144, Misc. Jackson *v.* Michigan. Supreme Court of Michigan. Certiorari denied. Petitioner *pro se. Frank J. Kelley,* Attorney General of Michigan, *Eugene Krasicky,* former Solicitor General, *Robert A. Derengoski,* Solicitor General, and *George Mason* and *Donald T. Kane,* Assistant Attorneys General, for respondent.

No. 671, Misc. KESSLER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States.

No. 770, Misc. FORTE *v.* WALKER, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Jack P. F. Gremillion,* Attorney General of Louisiana, and *Scallan E. Walsh,* Assistant Attorney General, for respondents.

No. 860, Misc. GILES *v.* MAXWELL, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *William B. Saxbe,* Attorney General of Ohio, and *William C. Baird,* Assistant Attorney General, for respondents. Reported below: —— F. 2d ——.

No. 882, Misc. WELLS *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: 311 F. 2d 409.

No. 907, Misc. STOKES *v.* OKLAHOMA. Court of Criminal Appeals of Oklahoma. Certiorari denied. Reported below: —— P. 2d ——.

No. 912, Misc. DUNN *v.* DUNBAR, CORRECTIONS DIRECTOR, ET AL. Supreme Court of California. Certiorari denied.

No. 957, Misc. WILLIAMS *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. *George L. Russell, Jr.* and *Robert B. Watts* for petitioner. Reported below: 229 Md. 329, 182 A. 2d 783.

No. 959, Misc. TRANOWSKI *v.* PATE, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 960, Misc. REAHM *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 961, Misc. GARCIA *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied.

No. 972, Misc. GOODMAN *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 973, Misc. LEVY *v.* NEW YORK. Appellate Division, Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 976, Misc. WILKERSON *v.* TENNESSEE. Supreme Court of Tennessee. Certiorari denied. *Samuel M. Chambliss* for petitioner. *George F. McCanless,* Attorney General of Tennessee, and *Thomas E. Fox,* Assistant Attorney General, for respondent. Reported below: 211 Tenn. ——, 362 S. W. 2d 253.

No. 977, Misc. STURGES *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied.

No. 987, Misc. ZOCHOWSKI *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 991, Misc. GAINEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *Isabel L. Blair* for the United States.

No. 988, Misc. BEAUCHAMP *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied.

No. 999, Misc. PRAYLOW *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: 309 F. 2d 750.

No. 1006, Misc. GRIFFITH *v.* HARRIS ET AL. Supreme Court of Wisconsin. Certiorari denied. *Hugh M. Matchett, David F. Matchett, Jr.* and *Victor M. Theis* for petitioner. *Alfred E. La France* for respondents. Reported below: 17 Wis. 2d 255, 116 N. W. 2d 133.

No. 1014, Misc. JOHNSON *v.* PATE, WARDEN, ET AL. Circuit Court of Rock Island County, Illinois. Certiorari denied.

No. 1049, Misc. HOLLIS *v.* BETO, CORRECTIONS DIRECTOR, ET AL. Court of Criminal Appeals of Texas. Certiorari denied.

No. 1054, Misc. GLAZEWSKI *v.* NEW JERSEY ET AL. Supreme Court of New Jersey. Certiorari denied.

No. 1060, Misc. LEEPER *v.* RUSSELL, CORRECTIONAL SUPERINTENDENT. Supreme Court of Pennsylvania. Certiorari denied.

No. 1078, Misc. BUONPANE *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 1079, Misc. ANDREWS *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 1082, Misc. STEPHENS *v.* LABURT, STATE HOSPITAL DIRECTOR. C. A. 2d Cir. Certiorari denied. *Morton Birnbaum* for petitioner. *Louis J. Lefkowitz,* Attorney General of New York, *Paxton Blair,* Solicitor General, and *Winifred C. Stanley,* Assistant Attorney General, for respondent.

No. 1096, Misc. ALEXANDER *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied.

No. 1102, Misc. HARRISON *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 26 Ill. 2d 377, 186 N. E. 2d 657.

No. 1109, Misc. BOWEN *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 1242, Misc. GAINES *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. *William O. Weissich* for petitioner. Reported below: 58 Cal. 2d 630, 375 P. 2d 296.

No. 1035, Misc. STEWART *v.* MICHIGAN ET AL. Petition for writ of certiorari to the Supreme Court of Michigan and for other relief denied.

Rehearing Denied.

No. 70. WOLF ET AL. *v.* WEINSTEIN ET AL., 372 U. S. 633. Petitions for rehearing of respondents Fried and Weinstein denied.

No. 892, Misc. WILLIAMS *v.* NASH, WARDEN, 372 U. S. 971; and

No. 896, Misc. PATTERSON ET AL. *v.* NEWPORT NEWS REDEVELOPMENT & HOUSING AUTHORITY, 372 U. S. 770. Petitions for rehearing denied.

May 27, 1963.

Miscellaneous Orders.

No. 45. Florida Lime & Avocado Growers, Inc., et al. *v.* Paul, Director of the Department of Agriculture of California, et al.; and

No. 49. Paul, Director of the Department of Agriculture of California, et al. *v.* Florida Lime & Avocado Growers, Inc., et al., *ante*, p. 132. It is ordered that the opinion of this Court in these cases be amended by adding to footnote 18, the following paragraph:*

"Nor have we any occasion to consider the possible applicability to the Supremacy Clause issue of the provisions of 21 U. S. C. § 341, since neither party has made any reference to that statute either before the District Court or in this Court."

No. 403. Banco Nacional de Cuba *v.* Sabbatino, Receiver, et al. Certiorari, 372 U. S. 905, to the United States Court of Appeals for the Second Circuit. Further consideration of the motion for leave to substitute Compania Azucarera Vertientes-Camaguey de Cuba in place of Peter L. F. Sabbatino as a party respondent is postponed pending a hearing on the merits of the case. *John A. Wilson* for movant Compania Azucarera Vertientes-Camaguey de Cuba. *Victor Rabinowitz* and *Leonard B. Boudin* for petitioner. *Joseph Slavin* for Sabbatino, and *C. Dickerman Williams* for Farr et al., respondents.

No. ——. In re Zavin. The motion to amend the attorneys' roll to show the change of name of Louis B. Zavin to Louis Brooks Gavin is granted.

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*[This opinion is reported, *ante*, p. 132, as amended.]

No. 1065, Misc. WELLER *v.* CALIFORNIA ET AL.;

No. 1117, Misc. ADAMS *v.* MYERS, CORRECTIONAL SUPERINTENDENT;

No. 1154, Misc. EX PARTE SCHLETTE;

No. 1169, Misc. HANOVICH *v.* MAXWELL, WARDEN, ET AL.;

No. 1188, Misc. KILLGORE *v.* WILLINGHAM, WARDEN, ET AL.;

No. 1248, Misc. PRATT *v.* MISSOURI; and

No. 1277, Misc. MCCAFFREY *v.* HERITAGE, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 1223, Misc. GRUETZMACHER *v.* BURKE, WARDEN;

No. 1239, Misc. WALKER *v.* PATE, WARDEN, ET AL.; and

No. 1279, Misc. HARPER *v.* CALIFORNIA. Motions for leave to file petitions for writs of habeas corpus denied. Treating the papers submitted as petitions for writs of certiorari, certiorari is denied.

No. 1042, Misc. RICE *v.* PALMORE, CHIEF JUSTICE, ET AL. Motion for leave to file petition for writ of mandamus denied.

Probable Jurisdiction Noted.

No. 944. UNITED STATES *v.* EL PASO NATURAL GAS CO. ET AL. Appeal from the United States District Court for the District of Utah. Motion of the State of California for leave to file a brief, as *amicus curiae*, granted. Probable jurisdiction noted. MR. JUSTICE WHITE took no part in the consideration or decision of this case. *Solicitor General Cox, Assistant Attorney General Loevinger* and *Robert B. Hummel* for the United States. *Gregory A. Harrison, Arthur H. Dean, Charles V. Shannon, Atherton Phleger, Roy H. Steyer, Stephen Rackow Kaye, Leon*

M. Payne and *Dennis McCarthy* for appellee El Paso Natural Gas Co. *William M. Bennett* for the State of California, as *amicus curiae,* in support of the United States.

Certiorari Granted. (*See also No. 706, Misc., ante, p. 543.*)

No. 537. NATIONAL LABOR RELATIONS BOARD *v.* EXCHANGE PARTS CO. C. A. 5th Cir. Certiorari granted. *Solicitor General Cox, Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* for petitioner. Reported below: 304 F. 2d 368.

No. 979. DIAMOND *v.* LOUISIANA. Supreme Court of Louisiana. Certiorari granted. *Jack Greenberg, James M. Nabrit III* and *Johnnie A. Jones* for petitioner. *Jack P. F. Gremillion,* Attorney General of Louisiana, for respondent.

No. 722, Misc. PRESTON *v.* UNITED STATES. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit granted. Case transferred to the appellate docket. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 305 F. 2d 172.

Certiorari Denied. (*See also No. 966, Misc., ante, p. 544; and Misc. Nos. 1223, 1239 and 1279, supra.*)

No. 335. SWARCO, INC., *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. *M. Victor Leventritt* and *Aaron Lewittes* for petitioner. *Solicitor General Cox, Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 303 F. 2d 668.

No. 742. KEELER ET UX. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *DeWitt Williams* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Joseph Kovner* for the United States. Reported below: 308 F. 2d 424.

No. 779. BOSTIC *v.* OHIO. Supreme Court of Ohio. Certiorari denied. *James C. Britt* for petitioner. *Earl W. Allison* for respondent.

No. 842. SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC, GULF, LAKES & INLAND WATER DISTRICT, PUERTO RICO DIVISION, AFL–CIO, *v.* VALENCIA BAXT EXPRESS, INC., ET AL. Supreme Court of Puerto Rico. Certiorari denied. *Richard P. Long* for petitioner. *Herbert Burstein* for respondent Valencia Baxt Express, Inc. Reported below: —— P. R. ——.

No. 983. WILLCOXSON *v.* UNITED STATES ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *John H. Pickering* and *John D. Robb* for petitioner. *Solicitor General Cox, Roger P. Marquis* and *S. Billingsley Hill* for the United States et al., and *Jack T. Conn, William Amory Underhill* and *Lynn Adams* for Kerr-McGee Oil Industries, Inc., respondents. Reported below: —— U. S. App. D. C. ——, 313 F. 2d 884.

No. 1012. LIPP ET AL. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Guy Emery* for petitioners. *Solicitor General Cox, Assistant Attorney General Douglas* and *Alan S. Rosenthal* for the United States. Reported below: —— Ct. Cl. ——, 301 F. 2d 674; —— Ct. Cl. ——, 310 F. 2d 381.

No. 867. HOLLMAN *v.* ARKANSAS. Supreme Court of Arkansas. Certiorari denied. *Jack Holt, Sr.* for petitioner. *Bruce Bennett,* Attorney General of Arkansas, and *Jack L. Lessenberry,* Assistant Attorney General, for respondent. Reported below: 235 Ark. 662, 361 S. W. 2d 633.

No. 941. WHEELER *v.* LOUISIANA STATE BAR ASSOCIATION. Supreme Court of Louisiana. Certiorari denied. *Russell Morton Brown* and *Maurice C. Goodpasture* for petitioner. *John Pat. Little* and *A. Leon Hebert* for respondent. Reported below: 243 La. 618, 145 So. 2d 774.

No. 987. BOARD OF TRUSTEES OF SCHOOL DISTRICT NO. 1 OF CLARENDON COUNTY, SOUTH CAROLINA, ET AL. *v.* BRUNSON ET AL. C. A. 4th Cir. Certiorari denied. *David W. Robinson* for petitioners. Reported below: 311 F. 2d 107.

No. 1000. SHAFER ET UX. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Charles P. Taft* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Meyer Rothwacks* for the United States. Reported below: 312 F. 2d 747.

No. 931. MARCELLO *v.* KENNEDY, ATTORNEY GENERAL, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE WHITE took no part in the consideration or decision of this petition. *Jack Wasserman* and *David Carliner* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, L. Paul Winings* and *Charles Gordon* for respondents. Reported below: —— U. S. App. D. C. ——, 312 F. 2d 874.

No. 824. WILLARD DAIRY CORP. *v.* NATIONAL DAIRY PRODUCTS CORP. C. A. 6th Cir. Certiorari denied. *Kenneth Thornton* for petitioner. *Richard F. Stevens* for respondent. Reported below: 309 F. 2d 943.

MR. JUSTICE BLACK, dissenting from the denial of certiorari.

Ordinarily I do not file dissents from denials of certiorari. But this is far from an ordinary case. The action of the Court in denying certiorari is almost as shocking to me as the arbitrary manner in which the trial judge shut off every effort of petitioner to amend its complaint so as to invoke a right granted by a federal statute and to have its case fully tried on sworn evidence rather than summarily disposed of on affidavits and preliminary papers.

Petitioner, a local dairy having a single plant in Ohio, filed this action against respondent, a large national company operating in interstate commerce, seeking treble damages under the Robinson-Patman Act, which outlaws discriminations in price between purchasers of commodities of like grade and quality where any of the purchases involved are in interstate commerce. The complaint charged that respondent, selling from a plant at Shelby, Ohio, had damaged petitioner by cutting milk prices where it competed with petitioner but not cutting prices elsewhere in Ohio. The complaint did not, however, allege any price discrimination which involved sales across state lines. Petitioner then asked the court to allow it to amend its complaint to show that, although respondent cut prices for intrastate sales where it competed with petitioner, it did not cut prices for sales made in interstate commerce. It seems clear to me that this amendment would have brought petitioner's case within the protective provisions of the statute. Nevertheless the trial judge twice rejected petitioner's efforts to add this simple

but necessary factual allegation. His right of recovery being thus threatened with permanent destruction by the judge, petitioner moved to dismiss his case without prejudice in order that he would be able to file a new suit upon payment of the costs of the first. The trial judge, however, refused even to allow petitioner orally to argue the merits of his motion and rendered summary judgment, dismissing the case so as to bar petitioner from ever bringing another suit. The trial judge saw fit to ignore Rule 15 (a), which says that leave to amend "shall be freely given when justice so requires." This and the other Federal Rules "reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Conley* v. *Gibson,* 355 U. S. 41, 48 (1957). The Federal Rules were meant to prevent just the sort of technical and arbitrary action that took place below. The frustration of statutory rights by harsh and unjustifiable procedural rulings is wholly out of place in an enlightened system of jurisprudence.

Moreover, I think the result below is irreconcilable with this Court's decision in *Moore* v. *Mead's Fine Bread Co.,* 348 U. S. 115 (1954), in which we said that the Robinson-Patman Act condemns the monopolistic practice under which profits made in nondiscriminatory interstate transactions are used to offset losses arising from discriminatory price cutting at the local level. I believe that the Court of Appeals in the present case misconstrued both the statute and *Moore* when it held that respondent's interstate shipments "from other than its Shelby, Ohio, plant" were wholly "immaterial" to this case. Refusing to grant certiorari here means that this Court is allowing the economic resources and staying power of an interstate company to be used with impunity to destroy local competition, precisely the sort of thing the Robinson-Patman

Act aimed to prevent. The present case presents an important question of price cutting by interstate business with local plants, each of which services largely a local area but all of which draw on the economic power of the national operation. Judgments like the one left standing here make it difficult indeed for small, independent, local companies to survive against the predatory assaults of their larger and more powerful interstate competitors. I would grant certiorari.

No. 1003. JEFFERSON CITY CABINET CO. *v.* INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL–CIO, ET AL. C. A. 6th Cir. Certiorari denied. *H. R. Silvers* and *G. Maynard Smith* for petitioner. *Benjamin C. Sigal* and *David S. Davidson* for respondents. Reported below: 313 F. 2d 231.

No. 1005. SHUBIN ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. *William Douglas Sellers* for petitioners. *William K. Rieber, Robert W. Fulwider* and *Frederick E. Mueller* for respondent S. Vincen Bowles, Inc. Reported below: 313 F. 2d 250.

No. 988. PETZELT *v.* MAYER. Upon consideration of the suggestion of death, motion to substitute Joseph T. Lochen, as Administrator, in the place of Theodore J. Mayer granted. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied. *L. H. Vogel* for petitioner. *William C. Wines* for respondent. Reported below: 311 F. 2d 601.

No. 376, Misc. DE LUCIA *v.* YEAGER, WARDEN. C. A. 3d Cir. Certiorari denied. Petitioner *pro se*. *Stanley E. Rutkowski* and *Edward J. Phelan* for respondent.

No. 999. LEIGHTON *v.* ONE WILLIAM STREET FUND, INC., ET AL. Motion to dispense with printing the petition for writ of certiorari granted. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied. Petitioner *pro se.* *Donald Marks, Benjamin C. Milner III* and *Harold L. Smith* for respondents.

No. 642, Misc. GARNER *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. 663, Misc. BOYLE *v.* MURPHY, WARDEN. Court of Appeals of New York. Certiorari denied. Petitioner *pro se.* *Louis J. Lefkowitz,* Attorney General of New York, *Paxton Blair,* Solicitor General, and *Winifred C. Stanley,* Assistant Attorney General, for respondent.

No. 668, Misc. HERRING *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Petitioner *pro se.* *Waggoner Carr,* Attorney General of Texas, and *Sam R. Wilson, Gilbert J. Pena* and *Allo B. Crow, Jr.,* Assistant Attorneys General, for respondent.

No. 792, Misc. LIPSCOMB *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. 827, Misc. OUGHTON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *Joseph A. Barry* for the United States. Reported below: 310 F. 2d 803.

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No. 833, Misc. LAWRENSON *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *David Rubin* for the United States et al.

No. 843, Misc. FRISON *v.* DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se.* *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Felicia Dubrovsky* for respondents.

No. 864, Misc. DUNCAN *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. Reported below: 310 F. 2d 367.

No. 874, Misc. CASADOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 300 F. 2d 845.

No. 889, Misc. MCAULAY *v.* UNITED STATES. Court of Claims. Certiorari denied. *Maurice C. Pincoffs, Jr.* for petitioner. *Solicitor General Cox, Acting Assistant Attorney General Douglas* and *Alan S. Rosenthal* for the United States. Reported below: —— Ct. Cl. ——, 305 F. 2d 836.

No. 897, Misc. ELCHUK *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: 310 F. 2d 717.

No. 918, Misc. RAKES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 309 F. 2d 686.

No. 941, Misc. BLYTHER *v.* DYSON ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Acting Assistant Attorney General Douglas, Alan S. Rosenthal* and *Mark R. Joelson* for respondents.

No. 942, Misc. O'NEILL *v.* NORTH DAKOTA. Supreme Court of North Dakota. Certiorari denied. Reported below: 117 N. W. 2d 857.

No. 946, Misc. HARRIS *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *Frances Kahn* for petitioner.

No. 949, Misc. HOVNANIAN *v.* NEW YORK. Appellate Division, Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 954, Misc. KLEIN *v.* KEATING, MEDICAL FACILITY SUPERINTENDENT, ET AL. Supreme Court of California. Certiorari denied.

No. 964, Misc. SHAFFER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Joseph A. Calamia* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 308 F. 2d 654.

No. 989, Misc. LONG *v.* RUNDLE, CORRECTIONAL SUPERINTENDENT, ET AL. Supreme Court of Pennsylvania. Certiorari denied.

No. 981, Misc. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States. Reported below: 309 F. 2d 890.

No. 985, Misc. FRANANO *v.* UNITED STATES. C. A. 8th 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: 310 F. 2d 533.

No. 990, Misc. MCCLEARY *v.* CALIFORNIA. District Court of Appeal of California, Second Appellate District. Certiorari denied. Reported below: 205 Cal. App. 2d 432, 23 Cal. Rptr. 173.

No. 1008, Misc. SCASSERRA *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied. *Louis C. Glasso* for petitioner.

No. 1009, Misc. STEVENS *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 230 Md. 47, 185 A. 2d 194.

No. 1012, Misc. MCLAURIN *v.* CUNNINGHAM, PENITENTIARY SUPERINTENDENT. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 1013, Misc. CUOMO *v.* WILKINS, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1016, Misc. RAMSEY *v.* HAND, WARDEN. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *William M. Ferguson,* Attorney General of Kansas, and *J. Richard Foth* and *Park McGee,* Assistant Attorneys General, for respondent. Reported below: 309 F. 2d 947.

No. 1021, Misc. CHRISTIAN *v.* BETO, CORRECTIONS DIRECTOR. Court of Criminal Appeals of Texas. Certiorari denied.

No. 1025, Misc. TAYLOR *v.* HEARD, ASSISTANT CORRECTIONS DIRECTOR, ET AL. C. A. 5th Cir. Certiorari denied.

No. 1029, Misc. GANT *v.* UNITED STATES. C. A. 6th 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: 303 F. 2d 49.

No. 1034, Misc. BIEU *v.* WARDEN, CONNECTICUT PRISON. Supreme Court of Errors of Connecticut. Certiorari denied.

No. 1037, Misc. PRIORE *v.* FAY, WARDEN. Court of Appeals of New York. Certiorari denied.

No. 1038, Misc. MARSHALL *v.* MARONEY, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 1048, Misc. YOUNG *v.* KROPP, WARDEN. Supreme Court of Michigan. Certiorari denied.

No. 1050, Misc. MEHOLCHICK *v.* MARONEY, CORRECTIONAL SUPERINTENDENT. Supreme Court of Pennsylvania. Certiorari denied.

No. 1051, Misc. MANGUAL *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se. Louis J. Lefkowitz,* Attorney General of New York, *Paxton Blair,* Solicitor General, and *Anthony J. Lokot,* Assistant Attorney General, for respondent.

No. 1053, Misc. MILLER *v.* GLADDEN, WARDEN. Supreme Court of Oregon. Certiorari denied.

No. 1055, Misc. HEAD *v.* EYMAN, WARDEN. Supreme Court of Arizona. Certiorari denied. Reported below: 91 Ariz. 246, 371 P. 2d 599.

No. 1057, Misc. SPEESE *v.* WOLFE, WORKHOUSE SUPERINTENDENT. Supreme Court of Pennsylvania. Certiorari denied.

No. 1059, Misc. PEPPENTENZZA *v.* RHAY, PENITENTIARY SUPERINTENDENT. Supreme Court of Washington. Certiorari denied.

No. 1062, Misc. BOSLER *v.* DALTON, JUDGE, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: —— F. 2d ——.

No. 1063, Misc. CLOUTHIER *v.* MARONEY, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 1067, Misc. CHRISTOPH *v.* MOORE, WARDEN. Court of Criminal Appeals of Texas. Certiorari denied.

No. 1075, Misc. COLLINS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 25 Ill. 2d 605, 186 N. E. 2d 30.

No. 1086, Misc. SYKES ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *David M. Grant* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 312 F. 2d 232.

No. 1088, Misc. BALTHAZAR *v.* HEINZE, WARDEN, ET AL. Supreme Court of California. Certiorari denied.

No. 1090, Misc. MCCLINDON *v.* KEATING ET AL. Supreme Court of California. Certiorari denied.

No. 1091, Misc. MORGAN *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 1094, Misc. HOWE *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied. Reported below: 364 S. W. 2d 546.

No. 1097, Misc. DOSTER *v.* KROPP, WARDEN. Supreme Court of Michigan. Certiorari denied.

No. 1107, Misc. ABRAHAM *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 1118, Misc. ROBINSON *v.* PATE, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 312 F. 2d 161.

No. 1122, Misc. ELLINGTON *v.* NEW YORK. Appellate Division, Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 1130, Misc. WADE *v.* CUNNINGHAM, PENITENTIARY SUPERINTENDENT. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 1132, Misc. ALIRE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 313 F. 2d 31.

No. 1103, Misc. BURKS *v.* ILLINOIS. C. A. 7th Cir. Certiorari denied. Reported below: —— F. 2d ——.

No. 1128, Misc. JORDAN *v.* COLORADO. Supreme Court of Colorado. Certiorari denied. Petitioner *pro se*. *Duke W. Dunbar,* Attorney General of Colorado, *Frank E. Hickey,* Deputy Attorney General, and *John E. Bush,* Assistant Attorney General, for respondent. Reported below: 151 Colo. ——, 376 P. 2d 699.

No. 1129, Misc. STERLING *v.* COLORADO. Supreme Court of Colorado. Certiorari denied. Petitioner *pro se*. *Duke W. Dunbar,* Attorney General of Colorado, *Frank E. Hickey,* Deputy Attorney General, and *John E. Bush,* Assistant Attorney General, for respondent. Reported below: 151 Colo. ——, 376 P. 2d 676.

No. 1133, Misc. GILL *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. 1143, Misc. CHURCH *v.* GLADDEN. Supreme Court of Oregon. Certiorari denied.

No. 1145, Misc. GALASCEWSKI *v.* MYERS, CORRECTIONAL SUPERINTENDENT. Supreme Court of Pennsylvania. Certiorari denied.

No. 1209, Misc. MCINTOSH *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. Reported below: —— U. S. App. D. C. ——, 309 F. 2d 222.

No. 1147, Misc. Woods *v.* Illinois. Supreme Court of Illinois. Certiorari denied. Reported below: 26 Ill. 2d 557, 188 N. E. 2d 1.

No. 1148, Misc. Fox *v.* Maroney, Correctional Superintendent. Supreme Court of Pennsylvania. Certiorari denied.

No. 1160, Misc. Reed *v.* United States et al. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States et al.

No. 1161, Misc. Leigh *v.* Anderson, Jail Superintendent. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Chester H. Gray, Milton D. Korman, Hubert B. Pair* and *John R. Hess* for respondent.

No. 1197, Misc. Smith *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. 1222, Misc. Egitto *v.* Fay, Warden. Court of Appeals of New York. Certiorari denied. Petitioner *pro se*. *Louis J. Lefkowitz,* Attorney General of New York, *Ruth Kessler Toch,* Assistant Solicitor General, and *Winifred C. Stanley,* Assistant Attorney General, for respondent.

No. 596, Misc. Raymond *v.* Indiana. Petition for writ of certiorari to the Supreme Court of Indiana denied in light of the representation made by counsel for the respondent. Petitioner *pro se*. *Edwin K. Steers,* Attorney General of Indiana, for respondent.

No. 1180, Misc. GILMORE *v.* NEW YORK. Appellate Division, Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 1224, Misc. LUDWIG *v.* NEW YORK. Appellate Division, Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 1251, Misc. STORY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox* for the United States. Reported below: 309 F. 2d 483.

No. 1266, Misc. OSBORNE *v.* NEW YORK. Appellate Division, Supreme Court of New York, Fourth Judicial Department. Certiorari denied. Petitioner *pro se. Louis J. Lefkowitz,* Attorney General of New York, *Paxton Blair,* Solicitor General, and *Winifred C. Stanley,* Assistant Attorney General, for respondent.

No. 1297, Misc. LEIBOWITZ *v.* LAVALLEE, WARDEN. Court of Appeals of New York. Certiorari denied. *Joseph Aronstein* for petitioner. *Louis J. Lefkowitz,* Attorney General of New York, *Ruth Kessler Toch,* Assistant Solicitor General, and *Anthony J. Lokot,* Assistant Attorney General, for respondent.

No. 824, Misc. COPPEDGE *v.* UNITED STATES. Motion for leave to use the record in No. 157, October Term, 1961, granted. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit denied. *Bennett Boskey* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: —— U. S. App. D. C. ——, 311 F. 2d 128.

Rehearing Denied.

No. 61. INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL–CIO, ET AL. *v.* CENTRAL AIRLINES, INC., 372 U. S. 682;

No. 720. REES *v.* VIRGINIA, 372 U. S. 964;

No. 854. FUQUA *v.* MISSISSIPPI, 372 U. S. 709;

No. 858. YACIMIENTOS PETROLIFEROS FISCALES *v.* PARAGON OIL CO., INC., ET AL., 372 U. S. 967;

No. 859. GREENHILL ET AL. *v.* UNITED STATES, 372 U. S. 968;

No. 1100, Misc. GREENHILL ET AL. *v.* RIVES ET AL., U. S. CIRCUIT JUDGES, 372 U. S. 962;

No. 853, Misc. THOMSON *v.* TUNKS, JUDGE, ET AL., 372 U. S. 971; and

No. 983, Misc. PATTERSON *v.* CITY OF NEWPORT NEWS, 372 U. S. 771. Petitions for rehearing denied.

MAY 29, 1963.

Dismissal Under Rule 60.

No. 1429, Misc. DINGESS *v.* UNITED STATES. On petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit. Petition dismissed pursuant to Rule 60 of the Rules of this Court. Reported below: 315 F. 2d 238.

JUNE 3, 1963.

Miscellaneous Orders.

No. ——. DRUMM *v.* CALIFORNIA;

No. ——. MOONEY *v.* NEW YORK;

No. ——. WOMACK *v.* OREGON;

No. ——. IN RE JACOBS;

No. ——. IN RE DIAZ; and

No. ——. IN RE TURNER. The motions for the appointment of counsel are denied.

No. 13, Original. TEXAS *v.* NEW JERSEY ET AL. The report of the Special Master is received and ordered filed. The motion of the State of Florida for leave to intervene is granted. *Richard W. Ervin,* Attorney General of Florida, and *Fred M. Burns,* Assistant Attorney General, on the motion. [For earlier orders herein, see 369 U. S. 869; 370 U. S. 929; 371 U. S. 873; 372 U. S. 926, 973.]

Certiorari Granted.

No. 1031. MALLOY *v.* HOGAN, SHERIFF. Supreme Court of Errors of Connecticut. Certiorari granted. *Harold Strauch* for petitioner. *John D. LaBelle* and *Harry W. Hultgren, Jr.* for respondent. Reported below: 150 Conn. 220, 187 A. 2d 744.

Certiorari Denied.

No. 946. RYAN ET AL. *v.* ABATA ET AL. C. A. 7th Cir. Certiorari denied. *Jacques M. Schiffer* and *Howard W. Minn* for petitioners. *Harold A. Katz* and *Irving M. Friedman* for respondents. Reported below: —— F. 2d ——.

No. 1013. SHAFFER *v.* JOSEPH E. SEAGRAM & SONS, INC. C. A. 10th Cir. Certiorari denied. *Arthur John Keeffe, James Reeves Kelley* and *Houston Bus Hill* for petitioner. *T. Murray Robinson, Mathias F. Correa* and *John W. Nields* for respondent. Reported below: 310 F. 2d 668.

No. 1015. SINCLAIR REFINING CO. *v.* VILLAIN & FASSIO E COMPAGNIA, INTERNATIONALE DI GENOVA SOCIETA, RIUNITE DI NAVIGAZIONE, S. p. A. C. A. 2d Cir. Certiorari denied. *Eugene Underwood* for petitioner. *Robert J. Nicol* for respondent. Reported below: 313 F. 2d 722.

No. 1006. Roofire Alarm Co. *v.* Royal Indemnity Co. C. A. 6th Cir. Certiorari denied. *Sizer Chambliss* for petitioner. *Jere T. Tipton* for respondent. Reported below: 313 F. 2d 635.

No. 1018. Sanchez *v.* United States. C. A. 9th Cir. Certiorari denied. *Sol A. Abrams* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 311 F. 2d 327.

No. 1019. Sarelas *v.* Rocanas. C. A. 7th Cir. Certiorari denied. *Peter S. Sarelas,* petitioner, *pro se.* Reported below: 311 F. 2d 36.

No. 1021. Lake et vir *v.* Sawyers. Circuit Court of Hardy County, West Virginia. Certiorari denied. *Lewis W. Lake, pro se,* for petitioners.

No. 1022. Eastern States Petroleum Corp. of Panama, S. A., *v.* Orion Shipping & Trading Co., Inc. C. A. 2d Cir. Certiorari denied. *J. Joseph Noble* and *Roy Leifflen* for petitioner. *Raymond J. Burke* for respondent. Reported below: 312 F. 2d 299.

No. 1023. City National Bank & Trust Co. of Columbus, Administrator, *v.* United States. C. A. 6th Cir. Certiorari denied. *J. Ralston Werum* for petitioner. *Solicitor General Cox* and *Assistant Attorney General Oberdorfer* for the United States. Reported below: 312 F. 2d 118.

No. 1027. Otis Elevator Co. *v.* Local 453, International Union of Electrical, Radio & Machine Workers, AFL–CIO. C. A. 2d Cir. Certiorari denied. *Abraham Shamos* for petitioner. *Irving Abramson* for respondent. Reported below: 314 F. 2d 25.

No. 1025. DIXIE MACHINE WELDING & METAL WORKS, INC., *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Eberhard P. Deutsch* and *René H. Himel, Jr.* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Meyer Rothwacks* for the United States. Reported below: 315 F. 2d 439.

No. 1028. BRUZGO ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Charles Bidelspacher* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Joseph M. Howard* and *John M. Brant* for the United States. Reported below: —— F. 2d ——; —— F. 2d ——.

No. 1029. MAJOR OIL DEVELOPMENT CO. ET AL. *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied. *Claire D. Wallace* for petitioners. *Solicitor General Cox* and *Peter A. Dammann* for the United States et al. Reported below: 320 F. 2d 914.

No. 1030. GREAT EASTERN COLOR LITHOGRAPHIC CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. *James E. Birdsall* for petitioner. *Solicitor General Cox, Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 309 F. 2d 352.

No. 1034. COLEMAN, CIRCUIT CLERK AND REGISTRAR OF LAUDERDALE COUNTY, MISSISSIPPI, ET AL. *v.* KENNEDY, ATTORNEY GENERAL. C. A. 5th Cir. Certiorari denied. *Joe T. Patterson,* Attorney General of Mississippi, *Guy N. Rogers,* Assistant Attorney General, *Peter M. Stockett, Jr.,* Special Assistant Attorney General, *J. A. Covington* and *G. B. Herring* for petitioners. *Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *Howard A. Glickstein* for respondent. Reported below: 313 F. 2d 867.

No. 1035. THOR-WESTCLIFFE DEVELOPMENT, INC., *v.* UDALL, SECRETARY OF THE INTERIOR, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Thomas F. McKenna, James T. McNelis* and *Joseph A. Sommer* for petitioner. *Solicitor General Cox, Roger P. Marquis* and *A. Donald Mileur* for Udall et al., and *Lewis E. Hoffman* and *Leon BenEzra* for Boyle, respondents. Reported below: —— U. S. App. D. C. ——, 314 F. 2d 257.

No. 1037. FINGERS, ALIAS PALMER, ALIAS CLINTON, *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. *Howard T. Savage* for petitioner. Reported below: 26 Ill. 2d 464, 187 N. E. 2d 236.

No. 1038. SPACH, TRUSTEE IN BANKRUPTCY, *v.* FISHER ET AL. C. A. 5th Cir. Certiorari denied. *Robert R. Frank* for petitioner. *Joseph Gassen* and *Shepard Broad* for respondent Drake Operating Co. Reported below: 310 F. 2d 328.

No. 1039. W. J. DILLNER TRANSFER CO. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Ernie Adamson* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 315 F. 2d 107.

No. 1026. BLUMENTHAL ET AL. *v.* UNITED STATES ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, and MR. JUSTICE BRENNAN are of the opinion that certiorari should be granted. *Victor Rabinowitz* and *Leonard B. Boudin* for petitioners. *Solicitor General Cox, Assistant Attorney General Loevinger, Lionel Kestenbaum, Max D. Paglin, Daniel R. Ohlbaum* and *Ruth V. Reel* for the United States et al. Reported below: —— U. S. App. D. C. ——, 318 F. 2d 276.

No. 1042. LOUISIANA POWER & LIGHT CO. *v.* SOUTHERN BELL TELEPHONE & TELEGRAPH CO. C. A. 5th Cir. Certiorari denied. *Thomas B. Lemann* and *Andrew P. Carter* for petitioner. *J. C. Henriques, Jr., Jefferson Davis* and *John A. Boykin, Jr.* for respondent. Reported below: 309 F. 2d 181.

No. 1045. VANCE ET AL. *v.* MIDLAND ENTERPRISES, INC., ET AL. Court of Appeals of Ohio, Hamilton County. Certiorari denied. *Sol Goodman* and *Stanley Goodman* for petitioners. *Robert P. Goldman* for respondents.

No. 916, Misc. BACA *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: 312 F. 2d 510.

No. 953, Misc. FULFORD *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Supreme Court of Florida. Certiorari denied.

No. 978, Misc. ROMEO *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *Nathan Kestnbaum* for petitioner. *Frank S. Hogan* and *H. Richard Uviller* for respondent. Reported below: 12 N. Y. 2d 751, 186 N. E. 2d 420.

No. 1004, Misc. RAYBORN *v.* UNITED STATES. C. A. 6th 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: 310 F. 2d 339.

No. 1031, Misc. ROBISON *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied.

No. 1005, Misc. HODGE *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Clement Theodore Cooper* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

No. 1064, Misc. SALDIVAR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 310 F. 2d 739.

No. 1080, Misc. SUMPTER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Rudolph Lion Zalowitz* and *Frederic A. Johnson* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Richard W. Schmude* for the United States. Reported below: 309 F. 2d 536.

No. 1168, Misc. THOMPSON *v.* GRAY ET AL. C. A. 3d Cir. Certiorari denied. *Arlen Specter* for petitioner.

No. 1194, Misc. HUJAR *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 1199, Misc. BOULDIN *v.* WARDEN, MARYLAND PENITENTIARY. Court of Appeals of Maryland. Certiorari denied.

No. 1240, Misc. RAMBERT *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 1253, Misc. MASON *v.* NEW YORK. Appellate Division, Supreme Court of New York, Second Judicial Department. Certiorari denied.

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No. 1257, Misc. HIGGINS *v.* WILKINS, WARDEN. Court of Appeals of New York. Certiorari denied.

Rehearing Denied.

No. 795. AMERICAN INSTITUTE FOR ECONOMIC RESEARCH, INC., *v.* UNITED STATES, 372 U. S. 976;

No. 911. MILLPAX, INC., ET AL. *v.* UNITED STATES, *ante*, p. 903; and

No. 809, Misc. BENTLEY *v.* UNITED STATES, 372 U. S. 946. Petitions for rehearing denied.

No. 815. EUGE *v.* MISSOURI, 372 U. S. 960. Motion for leave to file petition for rehearing denied.

No. 955. FELICE *v.* UNITED STATES, *ante*, p. 915. Petition for rehearing denied. MR. JUSTICE WHITE took no part in the consideration or decision of this petition.

AMENDMENT OF RULES OF THIS COURT.

ORDER.

IT IS ORDERED that the Rules of this Court be amended by inserting the following section after Rule 61:

"PART XII. APPLICATION OF TERMS.

"62

"TERM 'STATE COURT' INCLUDES SUPREME COURT OF PUERTO RICO.

"The term 'state court' when used in these rules includes the Supreme Court of the Commonwealth of Puerto Rico, and references in these rules to the law and statutes of a state include the law and statutes of the Commonwealth of Puerto Rico."

MAY 20, 1963.

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2. *State criminal trials—Coerced confessions.*—Written confession obtained after defendant had been held incommunicado for 16 hours and told that he could not call his wife until he had signed it was coerced, and its admission in evidence violated Due Process Clause of Fourteenth Amendment, notwithstanding jury's verdict of guilty after question whether confession was voluntary had been left to its determination. Haynes v. Washington, p. 503.

3. *State criminal trials—Suppression of evidence favorable to accused.*—Suppression by prosecution of evidence favorable to an accused who has requested it violates due process where evidence is material either to guilt or to punishment, irrespective of good faith of prosecution. Brady v. Maryland, p. 83.

4. *State criminal trials—Change of venue.*—It was denial of due process for state court to deny change of venue for criminal trial when local people had been exposed repeatedly and in depth to television broadcasting of defendant confessing to sheriff that he had committed the crime. Rideau v. Louisiana, p. 723.

5. *State criminal proceedings—Grant of new trial as to punishment but not guilt.*—In state-court post-conviction proceedings, grant of new trial as to punishment but not guilt did not deny due process where highest state court found that evidence suppressed by prosecution at trial could not have affected question of guilt but may have influenced jury's verdict as to punishment. Brady v. Maryland, p. 83.

6. *State criminal trials—Breach of peace—Conviction of Negroes for refusal to leave public park.*—Conviction of Negroes for breach of peace solely because they refused to leave public park customarily used only by white people violated their rights under Fourteenth Amendment. Wright v. Georgia, p. 284.

7. *State criminal cases—Indigents—No transcript available.*—When no transcript of trial is available due to death of court reporter, State may, without violating Due Process Clause of Fourteenth Amendment, deny relief to indigent prisoner who had lawyer at his trial and presumably had the lawyer's continuing services for purposes of appeal but failed to pursue an appeal. Norvell v. Illinois, p. 420.

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3. *Negroes—Breach of peace—Convictions for refusal to leave public park.* Conviction of Negroes for breach of peace solely because they refused to leave public park customarily used only by white people violated Fourteenth Amendment. Wright v. Georgia, p. 284.

4. *Racial desegregation of public schools—Transfer plans.*—Plans for racial desegregation of public schools under which any student, solely on basis of his race and racial composition of school, would be permitted to transfer from school where he would be in racial minority to school where his race would be in majority, fail to satisfy requirements of Fourteenth Amendment. Goss v. Board of Education, p. 683.

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7. *State criminal proceedings—Grant of new trial as to punishment but not guilt.*—In state-court post-conviction proceedings, grant of new trial as to punishment but not guilt did not deny equal protection of laws where highest state court found that evidence suppressed by prosecution at trial could not have affected question of guilt but may have influenced jury's verdict as to punishment. Brady v. Maryland, p. 83.

8. *State criminal cases—Indigents—No transcript available.*—When no transcript of trial is available due to death of court reporter, State may, without violating Equal Protection Clause of Fourteenth Amendment, deny relief to indigent prisoner who had lawyer at his trial and presumably had the lawyer's continuing services for purposes of appeal but failed to pursue an appeal. Norvell v. Illinois, p. 420.

9. *State regulation of transportation and sale of avocados.*—California statute regulating transportation and sale of avocados does not violate Equal Protection Clause of Fourteenth Amendment. Florida Avocado Growers v. Paul, p. 132.

IV. Search and Seizure.

Secret wire recording of bribe offer—Admissibility in evidence.—Secret wire recording of bribe offer to federal agent on premises of defendant at latter's invitation did not violate his rights under Fourth Amendment and was admissible in evidence in trial for attempting to bribe agent in violation of 18 U. S. C. § 201; no entrapment shown. Lopez v. United States, p. 427.

V. Supremacy Clause.

1. *State regulation of transportation and sale of avocados—Federal Agricultural Marketing Agreement Act.*—California statute regulating transportation and sale of avocados not invalid under Supremacy Clause, because there is not such conflict between state and federal schemes of regulation that both cannot stand in same area, and there is no evidence of congressional design to preempt the field in Agricultural Marketing Agreement Act. Florida Avocado Growers v. Paul, p. 132.

2. *State laws regulating practice of law—Applicability to federally licensed patent practitioner.*—Nonlawyers licensed to practice before Patent Office may not be prevented by State from performing within its borders tasks incident to preparation and prosecution of patent applications. Sperry v. Florida Bar, p. 379.

CONTEMPT. See **Constitutional Law**, III, 5.

CONTRACTS. See **Government Contracts.**

COUNSEL. See **Constitutional Law**, II, 1, 7–8; III, 8; V, 2.

COURTS OF APPEALS. See **Jurisdiction**, 2.

CRIMINAL LAW. See **Constitutional Law**, II, 1–7; III, 1–3, 7–8; IV; **Jurisdiction**, 2; **Procedure**, 1–2; **Transportation**; **Trial**, 1–2.

DEALERS. See **Antitrust Acts.**

DESEGREGATION. See **Civil Rights Act**; **Constitutional Law**, III, 4–6.

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DISPUTES CLAUSE. See **Government Contracts.**

DUE PROCESS. See **Constitutional Law**, II.

ELKINS ACT. See **Transportation.**

ENTRAPMENT. See **Constitutional Law**, IV.

EQUAL PROTECTION OF LAWS. See **Civil Rights Act**; **Constitutional Law**, III.

EVIDENCE. See **Constitutional Law**, II, 2–3; IV; **Government Contracts**; **Trial**, 1.

EXTENSION OF ADMIRALTY JURISDICTION ACT. See **Admiralty**, 1.

FEDERAL AGRICULTURAL MARKETING AGREEMENT ACT. See **Constitutional Law**, I; V, 1.

FEDERAL BUREAU OF INVESTIGATION. See **Trial**, 1.

FEDERAL POWER COMMISSION. See **Natural Gas Act.**

FEDERAL RULES OF CRIMINAL PROCEDURE. See **Jurisdiction**, 2.

FEDERAL-STATE RELATIONS. See **Civil Rights Act**; **Constitutional Law**, I; II, 1–8; III, 1–9; V, 1–2; **Jurisdiction**, 1; **Labor**, 2–5; **Procedure**, 1; **Taxation**, 3; **Waters.**

FLORIDA. See **Constitutional Law**, I; III, 9; V, 1–2; **Labor**, 3.

FOREMEN. See **Labor**, 5.

FOURTEENTH AMENDMENT. See **Civil Rights Act**; **Constitutional Law**, II, 1–8; III, 1–9; **Procedure**, 1.

FOURTH AMENDMENT. See **Constitutional Law**, IV; **Jurisdiction**, 3.

FREEDOM OF SPEECH AND PRESS. See **Labor**, 7.

FREIGHT FORWARDERS. See **Transportation.**

GAS. See **Natural Gas Act.**

GEORGIA. See **Constitutional Law,** II, 6; III, 3.

GILA RIVER. See **Waters.**

GOVERNMENT CONTRACTS.

Suits on contract—Disputes clause—Wunderlich Act.—In a suit on a government contract, apart from questions of fraud, determination of finality to be attached to departmental decision on a question arising under a "disputes" clause must rest solely on consideration of record before the department, and no new evidence may be received or considered. United States v. Bianchi & Co., p. 709.

HABEAS CORPUS. See **Procedure,** 1.

HARMLESS ERROR. See **Trial,** 2.

HAWAII. See **Jurisdiction,** 1.

ILLINOIS. See **Civil Rights Act; Constitutional Law,** II, 7; III, 8.

INCOME TAX. See **Taxation,** 1–2.

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INTERNAL REVENUE. See **Constitutional Law,** IV; **Taxation,** 1.

INTERSTATE COMMERCE. See **Antitrust Acts; Constitutional Law,** I; **Labor,** 1–7; **Taxation,** 3; **Transportation; Waters.**

INTERVIEW REPORTS. See **Trial,** 1.

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JURIES. See **Constitutional Law,** II, 2; III, 7; **Trial,** 2.

JURISDICTION. See also **Admiralty,** 1; **Labor,** 3–6; **Procedure,** 1–2.

1. *Supreme Court—Original action—Hawaii against Budget Director.*—State of Hawaii could not maintain original action in Supreme

JURISDICTION—Continued.

Court against Budget Director to obtain, under § 5 (e) of Hawaii Statehood Act, lands acquired by United States through condemnation, because suit was against United States, which had not consented to it. Hawaii v. Gordon, p. 57.

2. *Courts of Appeals—Order of District Court vacating sentences and ordering prisoners returned to it for resentencing.*—Motion of prisoners for vacation of their sentences and that they be resentenced, because of failure to comply with Federal Rule of Criminal Procedure 32 (a), should be considered as having been made in collateral proceedings under 28 U. S. C. § 2255; District Court's order granting motion was interlocutory, not final; and Court of Appeals did not have jurisdiction of appeal therefrom before resentencing. Andrews v. United States, p. 334.

3. *District Courts—Federal question—Cause of action—Wrongful issuance of subpoena.*—On face of complaint, District Court had jurisdiction where right of plaintiff to recover depended on construction of Federal Constitution or laws; but allegation that defendant wrongfully caused plaintiff to be subpoenaed to appear as witness before Un-American Activities Committee and that this caused plaintiff to lose his job failed to state federal cause of action where there was no allegation that plaintiff was arrested, detained pursuant to subpoena or cited for contempt for failure to respond. Wheeldin v. Wheeler, p. 647.

LABOR. See also **Admiralty**, 1–2.

1. *National Labor Relations Act—Unfair labor practice—Awarding superseniority to strikebreakers.*—Labor Board was justified in finding that it was violation of § 8 (a) for employer to award 20-year seniority credit to replacements for strikers and to strikers who returned to work during strike. Labor Board v. Erie Resistor Corp., p. 221.

2. *National Labor Relations Act—Unfair labor practice—Refusal to bargain about "agency shop."*—In a State which does not prohibit an "agency shop" arrangement, an employer commits an unfair labor practice when it unconditionally refuses to bargain with a certified union of its employees over the union's proposal for adoption of such an arrangement. Labor Board v. General Motors Corp., p. 734.

3. *National Labor Relations Act—"Agency shop" clause—Right of State to prohibit.*—"Agency shop" clause of collective bargaining agreement held to be within scope of § 14 (b) and, therefore, subject to prohibition by state law; legality governed by decision of State Supreme Court; decision as to jurisdiction of state court to enforce such prohibition deferred. Retail Clerks v. Schermerhorn, p. 746.

LABOR—Continued.

4. *National Labor Relations Act—Possible violation—Suit in state court for damages.*—State court precluded from exercising jurisdiction over suit by union member against union's business agent for damages for wrongful refusal to refer plaintiff to employer who wanted to employ him, since such refusal might arguably violate § 7 or § 8 of Act and be within exclusive jurisdiction of Board. Plumbers' Union v. Borden, p. 690.

5. *National Labor Relations Act—Possible violation—Suit in state court for damages.*—State court precluded from exercising jurisdiction over suit by union member against union and its officers for damages for causing plaintiff to lose right to work "as a foreman," since such action might arguably be unfair labor practice within exclusive jurisdiction of Board. Iron Workers v. Perko, p. 701.

6. *Railway Labor Act—Minor dispute—Enforcement of money award.*—Under Railway Labor Act, union could not legally strike to enforce Adjustment Board's money award in "minor dispute" but must use judicial enforcement procedure under § 3 First (p); and District Court properly enjoined threatened strike. Locomotive Engineers v. L. & N. R. Co., p. 33.

7. *Railway Labor Act—Union-shop agreement—Use of dues for political purposes.*—Section 2 Eleventh of Railway Labor Act does not permit a union having a union-shop agreement to use a member's dues over his protest for political causes which he opposes, if he notifies union of his opposition; but injunction against collecting any dues from such members is too broad, and other remedies must be devised. Railway Clerks v. Allen, p. 113.

LAWYERS. See **Constitutional Law**, II, 1, 7–8; III, 8; V, 2.

LONGSHOREMEN. See **Admiralty**, 1–2.

LOUISIANA. See **Constitutional Law**, II, 4; III, 1; **Taxation**, 3.

LUNCH COUNTERS. See **Constitutional Law**, III, 1–2.

MARYLAND. See **Constitutional Law**, II, 1, 3, 5; III, 7.

MINERAL LEASING ACT. See **Public Lands.**

MOTOR CARRIERS. See **Transportation.**

NATIONAL FORESTS. See **Waters.**

NATIONAL LABOR RELATIONS ACT. See **Labor**, 1–5.

NATURAL GAS ACT.

Independent producers—Method of fixing rates—Termination of pending proceedings.—When Federal Power Commission determined that individual company cost-of-service method of fixing rates for

NATURAL GAS ACT—Continued.

independent producers was unworkable, that rates should be established on area basis, and that rate increases filed under § 4 (d) would not bring revenues up to cost of service, it did not abuse discretion in terminating investigation under § 5 (a) of lawfulness of current rates and dismissing ten proceedings under § 4 (e) re legality of rate increases. Wisconsin v. Federal Power Commission, p. 294.

NAVIGABLE WATERS. See **Waters.**

NEGLIGENCE. See **Admiralty,** 1–2.

NEGROES. See **Civil Rights Act; Constitutional Law,** II, 6; III, 1–6.

NEVADA. See **Waters.**

NEW MEXICO. See **Waters.**

NEW TRIAL. See **Constitutional Law,** II, 5; III, 7.

NEW YORK. See **Constitutional Law,** II, 8.

NORTH CAROLINA. See **Constitutional Law,** III, 1; **Labor,** 7.

OHIO. See **Labor,** 5.

PARKS. See **Constitutional Law,** II, 6; III, 3, 6; **Waters.**

PATENTS. See **Constitutional Law,** V, 2.

PAUPERS. See **Constitutional Law,** II, 7; III, 8.

PERSONAL INJURIES. See **Admiralty,** 1–2.

POLITICAL ACTIVITIES. See **Labor,** 7.

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PRACTICE OF LAW. See **Constitutional Law,** II, 8; V, 2.

PREJUDICIAL ERRORS. See **Trial,** 2.

PRISONERS. See **Constitutional Law,** II, 1–7; **Jurisdiction,** 2; **Procedure,** 1–2; **Trial,** 1–2.

PROCEDURE. See also **Constitutional Law,** II, 1–8; III, 7; **Government Contracts; Jurisdiction,** 2; **Labor,** 2–7; **Natural Gas Act; Trial,** 1–2.

1. *Supreme Court — Certiorari — Dismissal when record insufficient.*—When it appeared after oral argument that record was insufficient to permit petitioner's claims that, in his trial and conviction in a state court, he was denied rights under Fourteenth Amendment, writ of certiorari was dismissed without prejudice to application for federal habeas corpus after exhaustion of any state remedies still open to him. Smith v. Mississippi, p. 238.

PROCEDURE—Continued.

2. *District Courts—Relief from sentence—Effect of denial of prior applications.*—No matter how many prior applications for relief a prisoner has made under 28 U. S. C. § 2255, controlling weight may not be given to their denial, in considering new application, if they were not adjudicated on merits or if different ground for relief is presented by new application; court's discretion as to hearing on new application. Sanders v. United States, p. 1.

PUBLIC LANDS. See also **Jurisdiction**, 1; **Waters.**

Mineral Leasing Act—Noncompetitive lease—Cancellation in administrative proceedings.—Secretary of the Interior has authority to cancel in administrative proceedings noncompetitive lease of public lands issued under Mineral Leasing Act of 1920 through administrative error. Boesche v. Udall, p. 472.

PUBLIC SCHOOLS. See **Civil Rights Act; Constitutional Law**, III, 4.

RACIAL DISCRIMINATION. See **Civil Rights Act; Constitutional Law**, II, 6; III, 1–6.

RAILWAY LABOR ACT. See **Labor**, 6–7.

REBATES. See **Transportation.**

RECLAMATION. See **Waters.**

RECREATIONAL FACILITIES. See **Constitutional Law**, II, 6; III, 3, 6; **Waters.**

REMEDIES. See **Civil Rights Act; Jurisdiction**, 1–3; **Labor**, 3–7; **Natural Gas Act; Procedure**, 1–2; **Public Lands; Waters.**

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RIGHT-TO-WORK LAWS. See **Labor**, 3.

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RULES OF SUPREME COURT.

Amendment of Rules of Supreme Court, p. 955.

SALES TAXES. See **Taxation**, 3.

SCHOOLS. See **Civil Rights Act; Constitutional Law**, III, 4.

SEARCH AND SEIZURE. See **Constitutional Law**, IV.

SEAWORTHINESS. See **Admiralty**, 1–2.

SECRETARY OF THE INTERIOR. See **Public Lands; Waters.**

SECURITIES EXCHANGE ACT OF 1934. See **Antitrust Acts.**

SEGREGATION. See **Constitutional Law**, II, 6; III, 1–6.

SELF-INCRIMINATION. See **Constitutional Law**, II, 2, 4; **Trial**, 2.

SENIORITY. See **Labor**, 1.

SENTENCING. See **Jurisdiction**, 2.

SHERMAN ACT. See **Antitrust Acts.**

SHIPOWNERS. See **Admiralty**, 1–2.

SIT-IN DEMONSTRATIONS. See **Constitutional Law**, III, 1–2.

SOUTH CAROLINA. See **Constitutional Law**, III, 1.

STOCK EXCHANGES. See **Antitrust Acts.**

STRIKES. See **Labor**, 1, 6.

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SUPREMACY CLAUSE. See **Constitutional Law**, V, 1–2.

SUPREME COURT. See also **Jurisdiction**, 1; **Procedure**, 1.

Amendment of Rules, p. 955.

TAXATION.

1. *Income tax—Bad debts—Business or nonbusiness.*—Whether bad debt owed by corporation to individual taxpayer who owned controlling interest in it, managed it, sold equipment to it, leased bottling plant to it, and lent it money to pay other creditors, was business or nonbusiness debt, under § 23 (k) (4) of Internal Revenue Code of 1939, depended upon whether it was attributable to taxpayer's position as owner and lessor of real estate and bottling plant in which corporation did business. Whipple v. Commissioner, p. 193.

2. *Income tax—Exemption of capital gains of British subject—American trust.*—American trust, created and administered in United States by American trustee for beneficiaries who are British subjects and residents, which retains capital gains income realized in United States, is not exempt from income tax on such gains under provision of Income Tax Convention with United Kingdom exempting capital gains of "resident of the United Kingdom." Maximov v. United States, p. 49.

3. *State use taxes—Validity—Discrimination against interstate commerce.*—Though State taxed sales within State at same rate that it taxed use within State of articles imported from other States, its use tax was invalid when applied in such manner that it resulted in actual discrimination against owners of goods imported from other States. Halliburton Oil Well Co. v. Reily, p. 64.

TELEVISION. See **Constitutional Law**, II, 4.

TENNESSEE. See **Constitutional Law**, III, 4, 6.

TEXAS. See **Labor**, 4.

TRANSCRIPTS. See **Constitutional Law**, II, 7; III, 8.

TRANSFER PLANS. See **Constitutional Law**, III, 4.

TRANSPORTATION. See also **Admiralty**, 1–2; **Labor**, 6–7.

Elkins Act—Solicitation of rebates—Beneficiary.—An indictment under the Elkins Act stated an offense when it charged that a shipper's agent solicited rebates from a freight forwarder in connection with interstate motor carrier shipments, even though it did not allege that the rebate was for the benefit of the shipper. United States v. Braverman, p. 405.

TREATIES. See **Taxation**, 2.

TRESPASS. See **Constitutional Law**, III, 1–2.

TRIAL. See also **Constitutional Law**, II, 1–7; III, 7; IV; **Procedure**, 1–2.

1. *Criminal cases—Jencks Act—Interview report of F. B. I. agent.*—In trial in Federal District Court for bank robbery, an interview report written by an F. B. I. agent and found by the District Court to incorporate the substance, and so far as practicable the language, of notes taken by the agent during the interview, read back to the witness and acknowledged by him to be accurate, but not signed by him, should have been produced under 18 U. S. C. § 3500, when there were discrepancies between such report and the testimony of the witness. Campbell v. United States, p. 487.

2. *Criminal cases—Asking witnesses self-incriminating questions—Instructions to jury.*—In light of entire record of federal criminal trial, no prejudicial error was committed when prosecutor asked witnesses questions as to which their plea of privilege against self-incrimination was sustained; nor did judge's instructions to jury constitute prejudicial error, even if erroneous. Namet v. United States, p. 179.

TRUSTS. See **Taxation**, 2.

UN-AMERICAN ACTIVITIES COMMITTEE. See **Jurisdiction**, 3.

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WATERS.

Colorado River—Apportionment among States—Boulder Canyon Project Act.—Boulder Canyon Project Act created comprehensive scheme for apportionment of Lower Basin's share of Colorado River water among Arizona, California and Nevada and gave Secretary of the Interior adequate authority to carry out scheme; Colorado River Compact and doctrines of equitable apportionment and prior appropriation not controlling; most provisions of Secretary's contracts sustained; certain claims of United States to waters for Indian reservations, national forests, recreational and wildlife areas, etc., sustained. Arizona v. California, p. 546.

WILDLIFE. See **Waters.**

WIRE RECORDINGS. See **Constitutional Law,** IV.

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1. *"Affecting substantial rights."*—Federal Rule of Criminal Procedure 52 (b). Namet v. United States, p. 179.

2. *"Resident of the United Kingdom."*—Income Tax Convention between United States and United Kingdom. Maximov v. United States, p. 49.

3. *"Trade or business."*—Internal Revenue Code of 1939, § 23 (k) (4). Whipple v. Commissioner, p. 193.

4. *"Written statement made by said witness and . . . adopted . . . by him."*—18 U. S. C. § 3500 (e) (1). Campbell v. United States, p. 487.

WORKMEN'S COMPENSATION. See **Admiralty,** 1–2.

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